ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 10-1092 (Lead) and Consolidated Cases (Complex)

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

COALITION FOR RESPONSIBLE REGULATION, INC., *ET AL.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LISA P. JACKSON, ADMINISTRATOR, AND THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondents.

On Petitions for Review of *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010)

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Statutes

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GLOSSARY OF TERMS

ANPRM	Advance Notice of Proposed Rulemaking, *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008) (JA __)
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy program or standards
CH_4	Methane
CO_2	Carbon Dioxide
Doc No.	Refers to the serial number assigned by the electronic CM/ECF system to documents and orders filed in this Court
DOE	U.S. Department of Energy
DOT	U.S. Department of Transportation
EISA	Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (Dec. 19, 2007)
Endangerment Joint Br.	Joint Opening Brief of Non-State Petitioners and Supporting Intervenors, filed May 20, 2011 in *Coalition for Responsible Regulation v. EPA*, No. 09-1322
Endangerment TSD	*Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (Dec. 7, 2009), Dkt. EPA-HQ-OAR-2009-171-11645
EPA	U.S. Environmental Protection Agency
EPA RIA	EPA, *Final Regulatory Impact Analysis: Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, April 2010, Dkt. EPA-HQ-OAR-2009-0472-11578 (JA __)

EPCA	Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871
GHG(s)	Greenhouse gas(es)
HFCs	Hydrofluorocarbons
LDV	Light-Duty Vehicles
LDVR	Final Rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (JA __)
NAAQS	National Ambient Air Quality Standards
NHTSA	National Highway Traffic Safety Administration
NHTSA RIA	NHTSA, *Final Regulatory Impact Analysis: Corporate Average Fuel Economy for MY2012-MY2016 Passenger Cars and Light Trucks* (March 2010) (JA __)
N_2O	Nitrous Oxide
NPRM	Notice of Proposed Rulemaking
OMB	Office of Management and Budget
Paperwork Reduction Act	44 U.S.C. §§ 3501-3520
PFCs	Perfluorocarbons
ppm	Parts per million
Proposed LDVR	Proposed Rule, *Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49,454 (Sept. 28, 2009) (JA __)
PSD	Prevention of Significant Deterioration

Regulatory Flexibility Act	5 U.S.C. §§ 601-612
RTC	EPA, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards: EPA Response to Comments Document for Joint Rulemaking*, Doc. No. EPA-HQ-OAR-2009-472-11581 (JA __)
SF_6	Sulfur hexafluoride
Tailoring Rule	Proposed Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009) Final Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010)
Tailoring RIA	EPA, *Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, Final Report (May 2010), Dkt EPA-HQ-OAR-2009-0517-19161
Title V	Clean Air Act §§ 501-507, 42 U.S.C. §§ 7661-7661f
Timing Rule	Final Rule, *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010)
tpy	Tons per year
Unfunded Mandates Reform Act (UMRA)	Pub. L. No. 104-4, 109 Stat. 48, Title II codified at 2 U.S.C. §§ 1531-1538

SUMMARY OF ARGUMENT

EPA does not dispute that it has interpreted its final rule regulating light-duty vehicle greenhouse gas emissions (the "LDVR") as triggering consequences that are "absurd" and not what Congress intended. It also does not dispute that it attempted to address this conceded absurdity by adopting another rule that impermissibly rewrites numerical thresholds fixed by Congress. It failed to demonstrate that the LDVR will serve the intended purpose of meaningfully ameliorating any climate-related endangerment. And it rejected alternative approaches without making any attempt to show that they are inconsistent with the Clean Air Act ("CAA").

EPA has fundamentally misinterpreted the CAA's statutory requirements and violated basic principles of reasoned decision-making. *See* CAA § 307(d)(9). Before finalizing its LDVR, EPA had an obligation to construe the relevant statutory provisions in harmony with the overall statutory scheme. EPA also had an obligation to articulate a rational connection between the policy choices embodied in its final rule and the risks it attributed to light-duty vehicle emissions; to identify and consider what EPA maintained would be the *inevitable* far-reaching consequences of promulgating its LDVR; and to address reasonable and available alternatives that would achieve essentially the same effects on public health and welfare.

EPA and its supporting intervenors offer no meaningful response to these points. Because the record establishes beyond doubt that EPA did not undertake the careful weighing of options that the CAA and other laws require, EPA attempts to

defend its LDVR principally with the claim that it had no choice but to promulgate emission standards that, in EPA's view, unleash absurd consequences and require the agency to rewrite statutory thresholds. EPA also takes the position that CAA Section 202(a) in effect exempts it from the requirements of reasoned decision-making. In EPA's view, because it has broken its suite of GHG regulations into *ad hoc* pieces, it has no obligation to draw any rational connection between the scope and effect of its regulations and the endangerment it identified. In particular, EPA maintains that, once it determined that GHGs endanger public health and welfare, it was required to adopt technology-forcing regulations on automobile emissions without any obligation to specify an acceptable level of atmospheric concentrations or to demonstrate that its regulations would actually ameliorate any "endangerment" posed by those gases.

For reasons explained below and in non-state petitioners' opening brief, EPA's approach is impermissible and unreasonable. Both on its face, and when interpreted in context and consistent with the overall statutory scheme, Section 202(a) does not require EPA to adopt rules that trigger absurd consequences, strip EPA of discretion over the timing and content of its rules, or exempt EPA from the requirements of reasoned decision-making. The Court should grant the petitions.

ARGUMENT[1]

I. EPA HAS MISINTERPRETED THE CLEAN AIR ACT AND *MASSACHUSETTS V. EPA*.

EPA asserts that once it made an endangerment determination, Section 202(a) imposed a non-discretionary obligation to promulgate emission standards that, in EPA's view, automatically trigger "absurd" stationary source permitting requirements. EPA's interpretation violates basic principles of statutory construction and is inconsistent with *Massachusetts v. EPA*, 549 U.S. 497 (2007).

EPA puts all of its interpretive weight on the word "shall," construing Section 202(a) as mandating promulgation of the LDVR without considering its consequences and without considering whether the rule will meaningfully ameliorate the endangerment EPA has identified. EPA.Br.27-31. To be sure, "shall" is "usually interpreted as 'the language of command,'" but that does not mean that Congress intended to strip EPA of discretion, or that the statute dictates the scope and nature of the discretion EPA must exercise. *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (statutory requirement that EPA "shall … take such measures … as necessary" does not impose a non-discretionary duty); *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33, n.9 (1995) ("shall" can sometimes mean "should," "will," or "may"). Nor does that language exempt EPA's emissions standards from

[1] *See* NSPet.Br. i, ¶ 2 (noting that any given argument should not be construed as necessarily representing the views of each petitioner).

basic requirements of reasoned decision-making. *See, e.g., Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (mandatory statutory language does not exempt agency from reasoned decision-making); *cf. Lockhart v. United States*, 546 U.S. 142, 148-49 (2005) (Scalia, J., concurring) (exemptions from reasoned decision-making requirements are "not lightly to be presumed"). The CAA requires just the opposite, for it directs courts to strike down any EPA action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA § 307(d)(9)(A).

Section 202(a)'s language, like that of any other statutory provision, must be interpreted in "context and with a view to [its] place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989); *Sierra Club*, 648 F.3d at 856 (statute's words should not be considered "in isolation"). The flaw with EPA's approach is that it fails to conform to, or even acknowledge, the overall statutory scheme. Nothing in the CAA suggests that Congress intended Section 202(a) to compel regulations that have not been shown to accomplish the purposes for which they were authorized. Nor does Section 202(a) compel regulations that, in EPA's view, trigger absurd consequences and require rewriting unambiguous numeric statutory thresholds. To the contrary, traditional principles of statutory construction require that Section 202(a) be interpreted to avoid absurd results to the maximum extent possible, and to require emission standards that rationally respond to EPA's identified endangerment and otherwise satisfy reasoned decision-making requirements. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1067-68 (D.C. Cir.

1998) ("statutes are to be read to avoid absurd results"; agency does not have "a license to rewrite the statute"); *Continental Air Lines, Inc. v. DOT*, 843 F.2d 1444, 1452 (D.C. Cir. 1988) (*Chevron* requires agency to explain why regulations serve statutory objectives).

In any event, EPA's view that Section 202(a) strips it of all discretion is inconsistent with the provision's plain language and the Supreme Court's recognition that EPA has "significant latitude as to the manner, timing, [and] content" of its regulations. *Massachusetts*, 549 U.S. at 533. Unlike other CAA provisions, Section 202(a) imposes neither a deadline for EPA action nor an instruction to act as soon as practicable. *See, e.g.*, CAA § 202(b)(2) (requiring certain tailpipe standards to be promulgated by a date certain); *id.* § 107(d)(1)(B)(i) (requiring EPA to designate areas with respect to national ambient air quality standards "as expeditiously as practicable"). Nor does it prescribe any specific or mandatory content for any emission standard. *See id.* § 202(b)(1)(A) (specifying minimum numeric standards for certain tailpipe standards). Because Congress granted the agency broad latitude over the manner, timing, and content of its regulations under Section 202(a), EPA could and should have evaluated its options for determining whether, when, and in what form to promulgate emissions standards so as to avoid triggering absurd results.

EPA seeks to downplay its discretion, citing *Massachusetts*' statement that "[i]f EPA makes a finding of endangerment," the statute "requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." 549 U.S. at 533.

But that dictum does not mean the Supreme Court definitively interpreted Section 202(a) as compelling EPA to promulgate emission standards that trigger absurd consequences and have not been demonstrated by the agency to make atmospheric levels of that "pollutant" meaningfully less "deleterious." *Massachusetts*' holding is expressly limited to whether GHGs "fit" within the statute's "capacious" definition of "air pollutant" under Section 302(g). NSPet.Br.11-13; *Massachusetts*, 549 U.S. at 32, 534-35. The Court was not asked to and did not decide what actions EPA could take under Section 202(a) if and when the agency made an endangerment determination. *Id.* at 534-35 (declining to resolve whether "policy concerns can inform EPA's actions in the event that it makes" an endangerment determination).

In fact, *Massachusetts* confirms that EPA has discretion to avoid absurd regulation as long as the agency's "reasons for action or inaction … conform to the authorizing statute." *Id.* at 533. That makes sense of the Court's conclusion that Congress drafted Section 202(a) to ensure that EPA would have "flexibility" to address new "air pollutants" identified as a result of "changing circumstances and scientific developments." *Id.* at 532. The statute cannot be interpreted to grant EPA flexibility to regulate new pollutants without also being interpreted to provide EPA flexibility to ensure that there is a rational connection between its emissions standards and whatever endangerment the new pollutants are determined to pose. Although *Massachusetts* held that CO_2 and other GHGs are "pollutants" under the CAA, it did not require EPA to find endangerment or address whether the statute requires any

specific form of regulation if and when an endangerment determination is made. It certainly did not reach a *sub silentio* conclusion that the statute exempts EPA from reasoned decision-making requirements or compels it to adopt regulations that yield absurd results.

Because the statute does not strip EPA of discretion to consider regulatory options that avoid consequences that EPA concedes are absurd, EPA's LDVR is based on an erroneous view of the law. Accordingly, EPA misapprehended the nature and scope of its discretion under Section 202(a), and its LDVR "cannot be sustained." *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

II. EPA HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF REASONED DECISION-MAKING.

As non-state petitioners' opening brief explains, the LDVR is arbitrary, capricious, and otherwise not in accordance with law because EPA: (1) failed to address the absurd consequences that in EPA's view automatically result from that rule; (2) refused to analyze the extraordinary burdens imposed by that rule; (3) failed to give meaningful consideration to the option of deferring regulation; and (4) failed to justify its rule by articulating any rational connection between the alleged endangerment and EPA's selected standards. NSPet.Br.15-25, 33-36. EPA and its intervenors have no convincing responses.

A. EPA Failed To Address The LDVR's "Absurd Consequences."

EPA does not address non-state petitioners' critical point that the agency could and should have avoided promulgating any rule that, in EPA's view, would automatically result in absurd consequences. Under EPA's analysis, the LDVR *is* the rule that automatically triggers absurd stationary source regulation and EPA has authority to avoid absurd consequences by invoking the absurd-results doctrine. *See, e.g.*, 75 Fed. Reg. 31,514 at 31,554 (June 3, 2010)); 74 Fed. Reg. 55,292 at 55,294-300 (Oct. 27, 2009). Given EPA's own analysis, the agency at a minimum should have exercised its "significant latitude as to the manner, timing, [and] content" of regulatory action, *Massachusetts*, 549 U.S. at 533, to avoid absurdity in the first instance.

Non-state petitioners have identified several (non-exclusive) alternatives that were available to EPA and would have allowed the agency to materially achieve its goals for regulating light-duty vehicle emissions while avoiding the LDVR's alleged triggering effect. For example, EPA could have: (1) relied on NHTSA's fuel-economy standards to accomplish the same (trivial) projected avoidance of climate impacts as attributed to its LDVR, *see* NSPet.Br.24-25, 35-36; (2) interpreted Section 202 as not rendering GHGs "subject to regulation" under the PSD and Title V programs, *see* NSPet.Br.25-30; (3) reconsidered EPA's interpretation of the *situs* requirement for PSD permitting; *see* NSPet.Br.31-32; or (4) exercised its statutorily-conferred discretion to defer regulating, *see* NSPet.Br.24-25. Still more alternatives are discussed below. Accordingly, even if EPA believed it was compelled to regulate light-duty

vehicle GHG emissions at this juncture, it had an obligation to select an option that would have achieved its goals *without* triggering absurd consequences.

More fundamentally, having identified absurd results that under EPA's view are automatically triggered by its LDVR, EPA was obligated to find a solution that avoids the absurdity without requiring it to rewrite statutory thresholds. EPA argues that its decision to rewrite the statute should be considered independent of its LDVR, but that directly conflicts with the settled principle that statutes must be interpreted as a whole and that the "structure of a statute … is important in the sensitive task of divining Congress' meaning." *American Mining Congress v. EPA*, 824 F.2d 1177, 1187 (D.C. Cir. 1987). No accepted canon of construction allows EPA to arrogate authority to rewrite statutory thresholds where none has been delegated by Congress. *See Landstar Exp. Am., Inc. v. Federal Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("neither courts nor federal agencies can rewrite a statute's plain text"). Indeed, EPA's purported need to rewrite statutory thresholds to avoid absurd results that, in its view, are automatically triggered by the LDVR is conclusive proof that EPA did not properly interpret the CAA in the first instance.

B. EPA Employed A Shell Game To Avoid Considering The Burdens Resulting From Its Interpretation Of The Effect of Issuing The LDVR.

Although EPA interpreted its LDVR as automatically triggering enormous economic and regulatory consequences for stationary sources, EPA refused to consider or address these consequences in any meaningful fashion. NSPet.Br.1-8.

EPA's arguments in response all boil down to its assertions that the LDVR's burdens on stationary sources are "indirect," too attenuated, and in any event compelled by the statute and beyond EPA's control. EPA.Br.31. But that is not true. The economic and regulatory stationary source burdens imposed by EPA's LDVR, as construed by the agency, are *not* "indirect," attenuated, or beyond EPA's control. EPA asserts that the LDVR is the "but for" cause of the stationary source impacts, and it cannot ignore these impacts merely because it does not want to consider their consequences. Nor are these effects the type of general social costs that go beyond EPA's authority to consider. Instead, the burdens are the direct, plainly understood, and *intended* consequence of EPA's decision to construe Section 202(a) and the LDVR as automatically triggering stationary source permitting requirements. NSPet.Br.15-16 (citing 74 Fed. Reg. at 55,294).

Indeed, although for purposes of judicial review EPA seeks to separate the LDVR from the consequences EPA intended to flow from the rule, linking the two is essential to EPA's broader, coordinated program for imposing economy-wide regulations on GHG emissions. For example, the six-gas-amalgam that comprises GHGs as defined in EPA's rules includes gases that are *not* emitted by motor vehicles (SF_6 and PFCs) or are emitted only in comparatively minute quantities (CH_4). *See* No. 09-1322, NSPet.Br.30-33. The only apparent purpose of including these gases in EPA's six-gas-amalgam is to subject stationary-source emissions of those gases to regulation. Similarly, in its brief, EPA seeks to defend the LDVR on the basis of

presumed *indirect* benefits — namely, that the rule purportedly will yield reductions of "other air pollutants, due largely to refiners operating less due to reductions in gasoline demand." EPA.Br.49. EPA should not be permitted to tout indirect benefits as a justification for its LDVR, without addressing the *direct* burdens it contends are automatically triggered. In fact, EPA has stated in other briefing before this Court that its four GHG rules "represent, *as a whole*, a regulatory response to climate change that is fair, feasible, and faithful to the Agency's duties under" the CAA. No. 09-1322, EPA.Br.4 (emphasis added). Because EPA plainly intended its four-rule suite of GHG regulations to work together "as a whole," it was incumbent on the agency to justify the means taken to achieve its desired ends by considering (among other things) the direct burdens on stationary sources that, in EPA's view, are a result of the LDVR.

EPA cites *Motor & Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA*"), and argues that the agency could not consider the LDVR's burdens because Section 202(a)(2) permits it to consider only "economic disruption to the automotive manufacturing industry." EPA.Br.31-33. That misreads *MEMA*. The Court there addressed whether Section 202(a)(2)'s "cost of compliance" provision required EPA to consider "general claims" of anti-competitiveness and broader "social costs" of pollution control when determining whether to grant California a waiver under Section 209(b). 627 F.2d at 1116, 1118. Recognizing that "[e]very effort at pollution control exacts social costs," the Court noted that Section

202(a)(2) addresses only the "*timing* of a particular emission control regulation," and held that Congress did not intend to burden EPA with a broader obligation in that context. *Id.* at 1118 (emphasis added). But *MEMA* also took care to confirm that an agency must give "reasoned consideration to all facts and issues relevant to the matter at hand" and that what is relevant depends on "the structure of the statute" as a whole. *Id.* at 1116.

In citing *MEMA* and Section 202(a)(2), EPA argues against a straw man. Non-state petitioners do not maintain that Section 202(a)(2) is the basis for EPA's duty to consider the stationary source burdens caused by the LDVR, do not challenge EPA's "cost of compliance" determination for the LDVR under Section 202(a)(2), and do not ask EPA to consider general "social costs" of pollution control. Instead, non-state petitioners are making a straightforward point of administrate law: Because the stationary source impacts that EPA maintains are triggered by the LDVR are the acknowledged and intended result of EPA's rule, EPA must consider the direct consequences of its chosen regulatory action and reconcile those consequences with the statutory requirements. *See Chemical Mfrs.*, 217 F.3d at 866-67.

Contrary to EPA's position, nothing in Section 202(a) exempts EPA from its obligations under Section 307(d)(9) to engage in reasoned, non-arbitrary decision-making. EPA is required to consider "the salient problems before it," *Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435, 439 (D.C. Cir. 1989), and to address serious objections to its approach. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*

Co., 463 U.S. 29, 43 (1983). Moreover, it is appropriate for EPA to consider potential costs and burdens of a proposed rule whenever, as here, there is no express statutory command not to do so. *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000).

These obligations are buttressed by the independent statutory and Executive Order requirements described in petitioners' opening brief. NSPet.Br.21-22. EPA notes that several of these requirements provide no independent basis for judicial review, EPA.Br.40, but that does not mean they are not properly considered by the Court. Even when direct judicial review under a statute is unavailable, an agency's failure to satisfy statutory requirements may deprive a "rule of its required rational support" and cause it to violate "the general legal requirement of reasoned, nonarbitrary decisionmaking." *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984). EPA also asserts that it complied with these laws and orders, EPA.Br.40-46, but the analyses it recites are beside the point because *none address* the far broader stationary source consequences EPA concluded are triggered by the LDVR.

Finally, EPA disclaims any responsibility for analyzing the LDVR's alleged triggering effect by suggesting it did, in fact, consider comments about stationary source impacts. EPA.Br.34-37. It also complains that petitioners' challenges should be raised in one or more of the other coordinated cases addressing EPA's four-rule suite of GHG regulations. EPA.Br.62-64. But these arguments only underscore the shell game that EPA is playing to avoid confronting the "absurd consequences" of its arbitrary regulatory choices.

EPA points to a single paragraph in its Response to Comments ("RTC") on the LDVR, and to an inapposite section of its Tailoring Rule, as proof it considered the LDVR's consequences. EPA.Br.34-37 (citing RTC 7-66 (JA __); 75 Fed. Reg. at 31,533-41, 31,595-602). Although the RTC paragraph purports to address the "various comments on consideration of economic impacts" of the LDVR's supposed triggering effect, EPA's "response" merely states that "[i]mpacts on stationary source [sic] are not related to any of the issues EPA needs to consider" and pledges that "the final Tailoring Rule" will "address[] the applicability of" the stationary source permitting requirements that, according to EPA, are triggered by the LDVR. RTC 7-66 (JA __). But EPA *did not consider* the full burdens of the LDVR's supposed triggering effect in the Tailoring Rule. Instead, it concluded that the Tailoring Rule did "not impose economic burdens or costs" *at all* because the rule merely provided "regulatory relief" — *i.e.*, relief from the full impact of the LDVR's alleged triggering effect and EPA's suite of GHG regulations. 75 Fed. Reg. at 31,599. In other words, the "elephant in the room" — the enormous burdens triggered in EPA's view by the LDVR and imposed by EPA's regulatory program — has never been weighed or assessed.[2]

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[2] EPA's Tailoring Rule discussion is in any event insufficient because, according to EPA, the LDVR triggers stationary source GHG regulation at the *statutory* thresholds, not the more lenient thresholds conjured by EPA in the Tailoring Rule. 75 Fed. Reg. at 31,516. Moreover, EPA contends that it is free — and indeed has announced plans — to consider amending and reducing the Tailoring Rule thresholds. *Id.* at 31,607

This shell game is improper and inconsistent with EPA's obligations to consider every "important aspect" of the LDVR. *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293 (D.C. Cir. 2000) (agencies "may not use shell games to elude review"); *see also State Farm*, 463 U.S. at 43. The point should be beyond dispute: Before unleashing the most significant, far-reaching, and burdensome regulatory program ever devised by an agency, EPA was required to take account of these burdens and to explain why they are appropriate and justified under the statute.

C. EPA Failed To Consider The Option Of Deferring Regulation.

EPA also offers no meaningful explanation for failing to consider the option of deferring regulation. NSPet.Br.24-25; *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984) (agency must "consider responsible alternatives to its chosen policy" and "give a reasoned explanation" for rejecting "such alternatives").

EPA contends that "three years had already passed since" *Massachusetts* determined that CO_2 is an air pollutant. EPA.Br.37-39. But the amount of time that has passed is beside the point given that the LDVR is not projected to yield any material climate-related benefits *in toto* taken together with NHTSA's standards or beyond what is already attributed to NHTSA's standards. NSPet.Br.35-36. EPA had an obligation to explain why the LDVR was needed immediately and why the costs, if any, of deferring regulation under the CAA would justify the adverse impacts of

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(making "[e]nforceable commitments" by EPA to conduct rulemaking on promulgating lower thresholds by July 1, 2012).

immediate regulation. The passage of time cannot justify regulation for regulation's sake.

Nor can EPA's professed desire to maintain a single, nationally applicable emissions standard justify its failure to consider deferring regulation. EPA and its intervenors suggest that the LDVR was urgently needed because California would not accept compliance with the federal fuel-economy standards absent the LDVR. EPA.Br.38; Auto.Mfrs.Br.5-8. But California has no authority to adopt its own standards without a waiver from EPA, *see* CAA § 209(b); if EPA sought to avoid inconsistent obligations not justified by compelling state needs, it should not have granted California a waiver. Even accepting that California is entitled to set its own GHG vehicle emission standards, California's threats cannot authorize EPA to violate the law and ignore requirements for reasoned decision-making. When a waiver is appropriate, Congress expressly contemplated different sets of tailpipe standards. CAA § 209(b); *see also id.* § 177; *cf. id.* § 116. And, in any event, EPA's and its intervenors' arguments miss the point: EPA's policy preference for a consistent national standard cannot justify its failure to consider other relevant factors, including the benefits of deferring regulation.

D. EPA Failed To Demonstrate That Its Rule Will Meaningfully Avert Or Ameliorate The Identified Endangerment.

As non-state petitioners' opening brief explains, EPA's LDVR is arbitrary and capricious and otherwise not in accordance with law not only because EPA failed to

consider the LDVR's enormous burdens but also because EPA failed to articulate any basis for concluding that meaningful climate-related benefits will result from it. NSPet.Br.33-36. The CAA is properly interpreted — consistent with principles of reasoned decision-making — as requiring EPA to justify its emissions standards by articulating a rational connection between the alleged risk and the selected standards. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 525 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976); *see also* CAA § 307(d)(9).[3] To avoid irrational regulation for regulation's sake, EPA had to explain how its emissions standards will meaningfully ameliorate the endangerment risk it has identified. *See Chemical Mfrs.*, 217 F.3d at 865-67 (although statute mandated regulation, EPA still must show that regulations served statutory objectives); *Alabama Power Co. v. Costle*, 636 F.3d 323, 360 (D.C. Cir. 1979) (interpretations that "mandate pointless expenditures of effort" should be avoided). EPA has not satisfied that basic requirement.

EPA first contends that its LDVR will "achieve large … reductions in greenhouse gases" and other air pollutants. EPA.Br.47-52. EPA focuses on the amount of projected emission reductions, *see* EPA.Br.47-49, and cites estimates that

[3] EPA criticizes non-state petitioners' reliance on *Small Refiners* and *Ethyl* because those cases dealt with an earlier CAA provision that stated that EPA "may" regulate fuel additives. EPA.Br.53-56. But that is irrelevant: Regardless of whether EPA initially has discretion or an obligation to regulate, both cases affirm that if EPA does regulate, it must explain how its regulation meaningfully addresses the EPA-identified endangerment.

are based not on the LDVR alone but on an assumption that the LDVR's emission standards "continue through later model years." EPA.Br.48. But this dodges the real question: whether any emission reductions attributable to the LDVR will actually ameliorate the dangers to public health and welfare identified in EPA's endangerment determination. EPA has good reason to avoid that question, because its own data show that the LDVR has *no significant effect* on the climate-related endangerment to public health and welfare it identified. 75 Fed. Reg. 25,324 at 25,496 (May 7, 2010) (showing vanishingly small impacts on atmospheric CO_2 concentrations, global mean surface temperature, sea levels, and ocean acidity); *see also* NSPet.Br.37-39.

Even that overstates the LDVR's benefits. Whatever the amount of claimed total GHG reductions, the record shows that an overwhelming amount of those reductions are already and independently achieved by NHTSA's fuel-economy standards. NSPet.Br.35-36. Although EPA points to different "compliance flexibilities" and enforcement regimes, EPA.Br.59-60, the agency made no effort in its LDVR to demonstrate that any of these differences will have any effect on the EPA-identified endangerment.

In fact, EPA and its supporters acknowledge that any arguable marginal environmental benefit produced by the LDVR beyond the NHTSA standards is due in substantial part to reductions in non-CO_2 GHG emissions related to air-conditioning systems. EPA.Br.58-59; Honeywell.Br.5-8; NYU.Br.2. That only confirms that EPA could and should have considered options for avoiding the

massive stationary source burdens it concluded were triggered by the LDVR. For example, EPA could have regulated only those non-CO_2 GHG emissions related to air-conditioning systems while NHTSA pursued fuel-economy standards that reduce CO_2. Because EPA takes the position that a pollutant is "subject to regulation" — thus triggering PSD and Title V requirements — only if the pollutant is subject to a regulation that "requires actual control," 40 C.F.R. § 52.21(b)(49), EPA could have addressed the air-conditioning issue without triggering stationary source CO_2 regulation and without sacrificing any of the LDVR's purported independent benefits. It is indisputable that nothing in the CAA *required* EPA to regulate all six GHGs in the LDVR — including two that vehicles do not even emit — as one amalgamated pollutant.

EPA contends that *Massachusetts* recognized that EPA has a statutory obligation "wholly independent" from NHTSA. EPA.Br.57 (quoting *Massachusetts*, 549 U.S. at 532). But the Supreme Court was only recognizing that EPA had an obligation to examine the issue of GHG regulation and could not side-step that obligation merely because NHTSA has authority to regulate fuel economy. Nothing in the decision suggests that EPA should ignore NHTSA's specific fuel-economy regulations or that EPA may refuse to consider whether those regulations are sufficient to realize its own GHG reduction goals. Indeed, *Massachusetts* made clear that "there is no reason" NHTSA and EPA could not "administer their obligations" in a way that "avoid[s] inconsistency." 549 U.S. at 532. There is accordingly no reason EPA should not take

into account GHG reductions achieved by NHTSA's rules, especially because Congress has given NHTSA (unlike EPA) a mandatory, specific instruction to promulgate fuel-economy standards. 75 Fed. Reg. at 25,331; *see also* Auto.Mfrs.Br.2-3, 8-9 (acknowledging direct relationship between GHG emissions and fuel-economy standards); *cf.* NYU.Br.3-6 (arguing incorrectly that there is no reason NHTSA's standards should serve as a baseline for EPA regulation).[4]

In the end, EPA retreats to its misguided view that it had to follow "a clear obligation under Section 202 to promulgate emission standards." EPA.Br.52. But, as explained above, that obligation is far from "clear." In fact, this Court rejected a similar argument in *Chemical Manufacturers Ass'n v. EPA*.

In that case, parties challenged EPA's rule establishing a bifurcated deadline for solid waste incinerators either to meet new hazardous emissions standards (three years) or to cease operations (two years). 217 F.3d at 861-62. Although EPA had not demonstrated that its rule would reduce health and welfare risks, EPA argued this was irrelevant because Section 112(i)(3)(A) imposed a mandatory duty on EPA to enforce its emissions standards "as expeditiously as practicable." *Id.* at 866. The Court rejected that argument. Because there was no evidence the rule would ameliorate the danger it was supposed to address, the Court held that EPA had engaged in "a classic

[4] The Automobile Manufacturers argue that the Court could sever the LDVR and set aside only EPA's decision to interpret the LDVR as triggering stationary source regulation. Auto.Mfrs.Br.13-14. The Court may wish to entertain further briefing on remedy issues.

case of arbitrary and capricious rulemaking." *Id.* at 865. Although EPA's rule imposed "costly obligations on regulated entities," EPA had "abandoned any attempt to reconcile its reading" of the statutory provision with the statute as a whole, and had not "determine[d] through reasoned decisionmaking" that its rule would "produce environmental or health benefits." *Id.* at 865-67.

So too here. There is no dispute that *Massachusetts* recognizes EPA's authority to determine whether GHGs endanger public health or welfare (provided that any determination is consistent with the statute), and to take appropriate steps to address any health or welfare endangerment if the agency "determines through reasoned decisionmaking" that its regulatory program will "produce environmental or health benefits" that will meaningfully ameliorate the identified endangerment. Petitioners do not argue that EPA should have just "thrown up its hands." EPA.Br.53. But what EPA cannot do is to interpret the statute as unleashing unprecedented, ineffective, and concededly absurd regulation on multiple sectors of the economy without considering other available options and with no more satisfying rationale than "the statute made me do it."

CONCLUSION

The Court should vacate or vacate and remand the LDVR in whole or in part.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure And Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 5,127 words as determined by the word-counting feature of Microsoft Word 2000.

/s/ Ashley C. Parrish
Ashley C. Parrish

Dated: October 31, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 31st day of October 2011, served a copy of the foregoing documents electronically through the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ashley C. Parrish
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