Oral Argument Not Yet 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.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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)

BRIEF FOR INTERVENORS ALLIANCE OF AUTOMOBILE MANUFACTURERS AND ASSOCIATION OF GLOBAL AUTOMAKERS

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Dated: September 30, 2011

CERTIFICATE OF PARTIES, RULING AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Intervenors (in support of Respondent EPA) Alliance of Automobile Manufacturers and Association of Global Automakers respectfully certify:

(A) Parties, intervenors, and *amici curiae*: With one exception, the parties, intervenors, and *amici curiae* to this action are set forth in the Joint Opening Brief Of Non-State Petitioners And Supporting Intervenors. The exception is that, on August 5, 2011, the Court granted the Commonwealth of Pennsylvania's motion to withdraw as an Intervenor.

Intervenor Alliance of Automobile Manufacturers (the "Alliance") is an I.R.C. Section 501(c)(6) not-for-profit trade association of car and light truck manufacturers, and its members include: BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motors North America, Inc., Volkswagen Group of America, and Volvo Cars North America. The Alliance operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. The Alliance does not have any outstanding shares or debt securities in the hands of the public, nor does it have a parent company. No publicly held company has a 10% or greater ownership interest in the Alliance.

Intervenor the Association of Global Automakers ("Global Automakers") is an I.R.C. Section 501(c)(6) not-for-profit trade association comprised primarily of manufacturers, manufacturer-authorized importers, and distributors of motor vehicles manufactured both in and outside of the United States. Its members include: American Honda Motor Company, Inc.; American Suzuki Motor Corporation; Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu Motors America, LLC; Kia Motors America, Inc.; Mahindra & Mahindra Ltd.,; Maserati North America, Inc.; McLaren Automotive, Ltd.; Mitsubishi Motors North America, Inc.; Nissan North America, Inc.; Peugeot Motors of America, Inc.; Subaru of America, Inc.; and Toyota Motor North America, Inc. Global Automakers does not have any outstanding shares or debt securities in the hands of the public, nor does it have a parent company. No publicly held company has a 10% or greater ownership interest in Global Automakers.

(B) Ruling under review: References to the rules at issue appear in the Brief For Respondents.

(C) Related cases: Each of the petitions for review consolidated under No. 10-1092 is related. In addition, pursuant to this Court's prior orders, the petitions under No. 10-1092 will be argued before the same panel as the consolidated petitions in Nos. 09-1322, 10-1167, and 10-1073.

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* Authorities upon which we chiefly rely are marked with asterisks.

Intervenors (in support of Respondents) the Association of Global Automakers and the Alliance of Automobile Manufacturers (collectively, "Automobile Intervenors") respectfully submit this brief in support of EPA's Vehicle Rule, 75 Fed. Reg. 25,324 (May 7, 2010) [JA-XX].[1]

INTRODUCTION

Automobile Intervenors agree with Respondents that the Vehicle Rule was adopted in accordance with the requirements of the CAA and other statutes, and is not arbitrary and capricious. Automobile Intervenors further agree with Respondents' observation that petitioners in the Vehicle Rule cases do not complain about any regulatory burdens imposed by the Vehicle Rule itself; rather, they complain about the *consequences* of the Vehicle Rule for regulation of greenhouse gas emissions from *stationary sources* under the CAA.

Automobile Intervenors use this brief to supplement Respondents' explanation why the Vehicle Rule was validly adopted and should not be vacated as an inadvertent side effect of Petitioners' effort to vacate stationary-source regulation. Even if EPA failed adequately to consider stationary-source "implications" (Ind. Br. 12) of the Vehicle Rule, vacatur of the Vehicle Rule would

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[1] Automobile Intervenors employ the same abbreviations and terminology as do Respondents. Automobile Intervenors have intervened only in the cases consolidated under No. 10-1092 challenging the Vehicle Rule, and address only issues raised by the petitions in those cases.

not be the proper remedy. Rather, the Vehicle Rule should be kept intact, and this Court should at most vacate the separate rules—the Timing Decision, 75 Fed. Reg. 17,004 (Apr. 2, 2010) [JA-XX], and/or the Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) [JA-XX]—that led to regulation of stationary sources. Automobile Intervenors also provide background on the importance of the Vehicle Rule and the negative impacts that would follow from vacating it. Automobile Intervenors fully support the Vehicle Rule because it provides for a single federal regulatory program covering both fuel economy and greenhouse gas emissions and relieves the industry from having to comply with a state patchwork quilt of differing and inconsistent regulations.

<u>REGULATORY BACKGROUND</u>

A. Motor Vehicle Greenhouse Gas Emissions Have Historically Been Controlled Through A Single Federal Fuel Economy Program, Thus Easing The Automobile Industry's Compliance Burden

Historically, motor vehicle fuel economy was regulated solely at the federal level under the CAFE standards established by NHTSA pursuant to EPCA, 49 U.S.C. § 32901 *et seq.* Under EPCA, NHTSA sets fuel economy standards that apply to a manufacturer's nationwide fleet, meaning that an automobile manufacturer can sell any combination of vehicles it chooses without penalty, so long as the average fuel economy of its nationwide fleet meets the applicable CAFE standard. As Respondents correctly point out, NHTSA's fuel economy

regulations also had the effect of limiting motor vehicle greenhouse gas ("GHG") emissions, because "[t]he amount of carbon dioxide tailpipe emissions is generally constant per gallon combusted of a given type of fuel." Resps. Br. 14-15.

Regulations governing motor vehicle fuel economy and carbon dioxide emissions are inherently burdensome on manufacturers because there is no simple "bolt-on" device that can cause a car to be more fuel efficient and reduce carbon dioxide emissions. Rather, making substantial improvements to a motor vehicle's fuel economy requires a holistic re-evaluation of virtually all aspects of the vehicle. These redesigns "can involve major changes to the vehicle, such as changes to the engine block and cylinder heads, redesign of the transmission and its packaging in the vehicle, changes in vehicle shape to improve aerodynamic efficiency and the application of aluminum (and other lightweight materials) in body panels to reduce mass." 75 Fed. Reg. at 25,445 [JA-XX]; *see also id.* at 25,373-75 [JA-XX-XX] (describing the advanced technologies required to meet standards established in the Vehicle Rule).

Integrating these technologies across multiple product lines requires several years' worth of lead time and a substantial investment of capital and engineering resources. "Given the very large investment put into designing and producing each vehicle model, manufacturers typically plan on a major redesign for the

models approximately every 5 years." *Id.* at 25,445 [JA-XX]. As EPA further explained:

> This redesign often involves a package of changes designed to work together to meet the various requirements and plans for the model for several model years after the redesign. This often involves significant engineering, development, manufacturing, and marketing resources to create a new product with multiple new features. In order to leverage this significant upfront investment, manufacturers plan vehicle redesigns with several model years' of production in mind.

Id. Once a vehicle redesign incorporating a new vehicle technology is planned, "[i]t takes a significant amount of time to retool a factory and smoothly validate the tooling and processes to mass produce a replacement technology." *Id.* at 25,468 [JA-XX].

When it comes to regulations concerning fuel economy and GHG emissions, manufacturers need regulatory certainty and nationwide uniformity. Regulatory certainty allows a manufacturer to plan many model years ahead knowing that the vehicles it is designing today will meet the regulatory requirements applicable five years from now. Nationwide uniformity allows the manufacturer to spread the compliance costs over its entire nationwide fleet instead of having to comply with multiple sets of standards that may be incompatible with each other, and/or to design and distribute different vehicles for different states or regions of the country. It is therefore very important to the automobile industry that fuel

economy and GHG emissions regulations be governed at the federal level by agencies that are in coordination with each other.

B. California's And Other States' Adoption Of Motor Vehicle Greenhouse Gas Emissions Standards Created A Patchwork Of Regulation, Imposing Significant Compliance Burdens On The Automobile Industry

Despite the fact that the federal CAFE program already regulated motor vehicle fuel economy (and therefore GHG emissions), the State of California enacted its own motor vehicle GHG emissions program in 2004. Under the auspices of Assembly Bill 1493, *see* Cal. Health & Safety Code § 43018.5, the California Air Resources Board ("CARB") promulgated regulations requiring that each manufacturer's fleet of cars and light trucks sold in California meet increasingly stringent GHG emission standards that phase in between 2009 and 2016, *see* Cal. Code Regs. tit. 13, § 1961.1. As these standards phased in, they would have become significantly more stringent than the then-applicable federal CAFE standards, and would have effectively required manufacturers to produce a separate fleet of high fuel economy vehicles just for the California market. These regulations were subsequently adopted by 13 other states and the District of Columbia under CAA § 177. *See* 42 U.S.C. § 7507.

When layered on top of the existing CAFE standards, these state GHG emissions standards created what the Obama Administration referred to as a "costly patchwork of differing rules and regulations" concerning motor vehicle

fuel economy and GHG emissions.[2] For the first time, manufacturers were required to simultaneously comply with one set of federal fuel economy standards and a completely separate set of requirements in each of the 15 jurisdictions adopting the California program. These new state regulations threatened to impose tremendous costs and compliance obligations on manufacturers. In addition to having to design and produce high fuel economy vehicles specifically for these markets, manufacturers would have to balance their fleets in each market to ensure the state-wide fleet-average requirements were met. Balancing the smaller and more homogeneous fleets found in each of California and the CAA § 177 states is inherently more difficult and costly than it is to balance a fleet across the entire nation. Consequently, the automobile industry vigorously opposed the imposition of these state regulations.

C. The Vehicle Rule Solved The Patchwork Regulation Problem By Again Providing The Automobile Industry With A Single Federal Greenhouse Gas Emissions Standard

The Vehicle Rule provided the relief sought by the automobile industry. Responding to the Supreme Court's mandate in *Massachusetts v. EPA*, EPA promulgated the Vehicle Rule in "coordination" with fuel economy standards separately established by NHTSA. 549 U.S. 497, 532-33 (2007). Although there

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[2] Office of the Press Secretary, President Obama Announces National Fuel Efficiency Policy, http://www.whitehouse.gov/the_press_ office/President-Obama-Announces-National-Fuel-Efficiency-Policy/ (quotation mark omitted).

are substantive differences between the regulations promulgated by each agency as required under their respective organic statutes,[3] they have been harmonized sufficiently to allow manufacturers to comply with both by producing a single fleet of vehicles.

Relying on the added environmental benefit anticipated to be achieved under the Vehicle Rule, California amended its state regulations in 2010 such that it would deem compliance with the Vehicle Rule to satisfy its state standards. Specifically, the amended California regulations provide that, "[f]or the 2012 through 2016 model years, a manufacturer may elect to demonstrate compliance with [the state GHG regulations] by demonstrating compliance with the National greenhouse gas program . . . ." Cal. Code Regs. tit. 13, § 1961.1(a)(1)(A)(ii). "National greenhouse gas program" is defined as "the national program that applies to new 2012 through 2016 model year passenger cars, light-duty trucks, and medium-duty passenger vehicles as proposed by the U.S. Environmental Protection Agency at 74 Fed. Reg. 49,454 (September 28, 2009) and adopted by EPA on April 1, 2010 ….'" *Id.* § 1961.1(e)(7). This national compliance option is then carried to the other state GHG emission programs through CAA § 177.

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[3] For a discussion of the differences between the NHTSA fuel economy regulations and the EPA GHG standards, *see* Resps. Br. 58-60.

The end result of the Vehicle Rule, therefore, was to provide the automobile industry with a regulatory environment that would not impose unnecessarily high compliance costs on manufacturers. Manufacturers have the ability to comply with their motor vehicle fuel economy and GHG emissions obligations by meeting a single set of coordinated standards established at the federal level. In the absence of the Vehicle Rule, "California and the States that adopted the California standards could move forward to enforce standards that are inconsistent with the Federal standards, thus creating confusion, encouraging renewed litigation, and driving up the cost of compliance to automobile manufacturers and consumers alike." Letter from O. Kevin Vincent to Office of Senator Diane Feinstein 2 (Feb. 19, 2010), *available at* http://media.washingtonpost.com/wp-srv/special/climate-change/documents/post-carbon/NelsonLetter022510.pdf).

SUMMARY OF ARGUMENT

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that carbon dioxide and other GHGs are "air pollutant[s]" subject to regulation under the CAA, and that EPA must promulgate motor vehicle emission standards under CAA § 202(a) if the agency makes an "endangerment finding." In so holding, the Court recognized that EPA's regulation of GHG emissions would "overlap" with fuel economy regulations promulgated by NHTSA because of the direct mathematical relationship between GHG emissions and carbon dioxide, and that

"coordination" between the two agencies would allow "both [to] administer their obligations and yet avoid inconsistency." 549 U.S. at 532-33.

The Vehicle Rule challenged here was the result of the coordination contemplated by the Supreme Court. Rather than subjecting the automobile industry to different and potentially conflicting standards, EPA and NHTSA jointly promulgated a single set of coordinated motor vehicle fuel economy and GHG emission standards. The promulgation of the EPA standards had the additional benefit of relieving manufacturers from having to comply with a patchwork of state standards that had previously been enacted by California and adopted by 14 other jurisdictions. The Vehicle Rule therefore represents an important step forward with respect to the public policy of GHG regulation, and it has been widely praised as such.[4] The Vehicle Rule alleviates huge burdens on the automobile industry by "allow[ing] automakers to produce and sell a single fleet nationally, mitigating the additional costs that manufacturers would otherwise face in having to comply with multiple sets of Federal and State standards." Vehicle Rule, 75 Fed. Reg. at 25,326 [JA-XX]. It also benefits consumers by eliminating

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[4] *See, e.g.*, John M. Broder, *Obama to Toughen Rules on Emissions and Mileage*, N.Y. Times, May 18, 2009, *available at* http://www.nytimes.com/2009/05/19/business/19emissions.html (quoting environmental advocates praising the Vehicle Rule as "the single biggest step the American government has ever taken to cut greenhouse gas emissions").

the potential for state or regional product restrictions and helping to ensure the availability of a wide selection of vehicles nationwide.

Automobile Intervenors agree with Respondents' defense of the Vehicle Rule as a rule that was required under the CAA once EPA made its Endangerment Finding, even aside from any implications the promulgation of the Vehicle Rule may have on regulation of stationary sources of GHGs. Automobile Intervenors expand upon EPA's brief by explaining that any deficiency in EPA's consideration of stationary-source regulation does not warrant vacating the Vehicle Rule and depriving the automobile industry and the public of its substantial benefits.

First, if this Court accepts Petitioners' argument that EPA incorrectly interpreted the CAA to provide that regulation of motor vehicle GHG emissions under § 202(a) automatically triggers regulation of stationary-source GHG emissions, there will be no link between the Vehicle Rule and stationary-source regulation, thereby making the rules easily severable. Accordingly, if EPA's decision regarding the triggering of stationary-source regulation was incorrect, this Court can sever, remand, and/or vacate the stationary-source regulation while leaving the Vehicle Rule intact.

Second, if EPA's triggering interpretation is correct but this Court finds that EPA's approach to stationary-source regulation was somehow deficient, this Court should still sever, remand, and/or vacate only the stationary-source regulation

while leaving the Vehicle Rule intact because the Vehicle Rule's operation does not depend on stationary-source regulation. Assuming the Endangerment Finding is upheld, EPA is under a statutory obligation to regulate GHGs from motor vehicles. It would make no sense for this Court to vacate a set of regulations that is valid, mandated by law, and non-controversial, in order to correct a problem that may exist with a different set of regulations. There is no basis to conclude that EPA cannot devise a permissible regulation of stationary-source GHG emissions. Accordingly, EPA should be allowed to redress any defects in its stationary-source regulations, and while that re-examination is underway, the Vehicle Rule should be preserved intact.

ARGUMENT

I. RESPONDENTS ARE CORRECT THAT THE VEHICLE RULE COMPLIES WITH THE CAA AND OTHER STATUTES AND IS NEITHER ARBITRARY NOR CAPRICIOUS

Automobile Intervenors support Respondents' arguments that the promulgation of the Vehicle Rule was not arbitrary or capricious. None of the Petitioners raises any issues concerning the burdens imposed directly by the motor vehicle standards that were adopted by EPA, or any specific regulatory provision of the Vehicle Rule. Rather, their objections stem entirely from the fact that EPA adopted *any* standards at all because of EPA's separate determination that the Vehicle Rule adoption triggers GHG regulations on stationary sources under the

Prevention of Significant Deterioration program found in CAA Title I, 42 U.S.C. §§ 7470-92, and the permitting requirements found in CAA Title V, 42 U.S.C. §§ 7661-61f.

Petitioners' collateral attacks on the Vehicle Rule lack merit. As Respondents correctly point out, EPA was under a non-discretionary duty to promulgate standards once it made a finding that motor vehicle emissions of GHGs "contribute" to air pollution that may "reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1); *see Massachusetts v. EPA*, 549 U.S. at 533 ("If EPA makes a finding of endangerment, the Clean Air Act *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." (emphasis added)). This duty stems from the mandatory word "shall" in the statute. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily the language of command." (quotation marks omitted)); *Ass'n of Am. Railroads v. Costle,* 562 F.2d 1310, 1312 (D.C. Cir. 1977) (same). Consequently, once EPA made its Endangerment Finding, adoption of the Vehicle Rule was not only a valid exercise of EPA's discretion, but was mandated under the Act—without regard to any "implications" (Ind. Br. 12) of the Vehicle Rule for regulation of GHG emissions from stationary sources.

II. IF EPA ACTED ARBITRARILY OR CAPRICIOUSLY AS TO STATIONARY-SOURCE REGULATION, THAT WOULD NOT WARRANT VACATING THE VEHICLE RULE

As just explained, in light of the CAA's unambiguous language, EPA was required to regulate motor vehicle GHG emissions upon making its Endangerment Finding, and any indirect consequences of the Vehicle Rule for regulation of stationary sources did not alter the CAA's command for EPA to issue the Vehicle Rule. That alone warrants rejecting Petitioners' challenge to the Vehicle Rule. But even if the Court were to do so, and even if the Court found problems with EPA's approach to regulation of stationary sources—an issue on which Automobile Intervenors take no position—the Vehicle Rule should be left intact rather than deprive the public and the automobile industry of its substantial benefits.[5]

First, if EPA erred in construing the CAA as requiring that stationary-source regulation of GHG emissions is automatically triggered by regulation of GHG emissions from motor vehicles, then EPA's triggering interpretation (found at 75

[5] As noted *supra* at 1, 11-12, petitioners do not challenge the Vehicle Rule because of any regulatory burdens imposed on them by the four corners of that rule; rather, they challenge the Vehicle Rule only because it was a step in EPA's path to the stationary-source regulation about which petitioners do complain. *See also* Resps. Br. 5-6 ("The petitioners do not contest the content of the vehicle emissions standards in any respect, but instead seek to topple the Vehicle Rule solely to prevent regulation of stationary sources of greenhouse gases pursuant to separate CAA programs ….").

Fed. Reg. 17,004 (Apr. 2, 2010) [JA-XX]) and the ensuing stationary-source regulations may be severed and then remanded and/or vacated, relieving petitioners of the burden of any stationary-source regulation, with no impact upon the Vehicle Rule.

Second, if EPA's triggering interpretation is correct but EPA somehow failed adequately to study regulation of stationary sources or to make the regulation sufficiently lenient, these defects may be redressed by remanding the stationary-source regulation for further consideration by EPA, while leaving the Vehicle Rule intact.

A. If EPA's Triggering Interpretation Is Incorrect, Then There Is No Link Between The Vehicle Rule And Stationary-Source Regulation And This Court Should Limit Any Relief Solely To Stationary-Source Regulation

Although EPA's triggering interpretation is directly at issue in No. 10-1167, Petitioners in this case also prominently argue that the triggering interpretation is erroneous. *See* Ind. Br. 26 ("EPA is wrong that regulating motor vehicle GHG emissions under CAA § 202(a) requires that GHGs become air pollutants 'subject to regulation' under the PSD program."); Amicus Br. Of American Chemistry Council In Support of Petitioners 24 (same); *compare* Final Brief For Respondents in *American Chemistry Council v. U.S. EPA*, No. 10-1167 (D.C. Cir. Aug. 3, 2011), ECF No. 1322352 (EPA's defense of its triggering interpretation).

Automobile Intervenors do not contest EPA's triggering interpretation, but instead wish to clarify the consequences that would follow *if* this Court accepts petitioners' argument that the triggering interpretation is incorrect. In that event, there would no longer be any Vehicle Rule "step" in EPA's path to regulating stationary sources, and no longer any need for petitioners—who, it will be recalled, complain only of the burdens of stationary-source regulation, not of the burdens of the Vehicle Rule *per se*—to challenge the Vehicle Rule or to insist on its vacatur. Under this scenario, this Court would be able to address the merits of petitioners' challenge to stationary-source regulation in the separate actions challenging those EPA actions, and to restrict any relief (in the event EPA acted arbitrarily or capriciously vis-à-vis stationary-source regulation) to vacating the triggering interpretation and the stationary-source rules (the Timing Decision and Tailoring Rule).

The instant situation (of separate yet related rules) is analogous to this Court's case law regarding severability of parts of a *single* rule. When examining whether parts of a single rule are severable, this Court looks for "'substantial doubt' that the agency would have adopted the severed portion on its own" by asking whether the rules are "intertwined." *Davis Cnty. Solid Waste Mgmt. v. U.S. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). Here, there is no "substantial doubt" because, in the absence of a triggering link between the Vehicle Rule and the

stationary-source rules—the Timing Decision and Tailoring Rule—the rules are not "intertwined," but rather are entirely independent. Accordingly, any deficiency either in EPA's Timing Decision or Tailoring Rule "will not impair the function of [the Vehicle Rule]," and the standards are easily severable. *Davis*, 108 F.3d at 1460 (quotation marks omitted) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 2984 (1988)); *see also Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (citing *Davis* and concluding that two portions of a regulation were severable because the provisions "operate independently of one another; the functionality of [one] does not depend on enforcement of the [other].").

B. If EPA Is Correct That The Vehicle Rule Automatically Triggers Stationary-Source Regulation, And If EPA's Consideration Of Stationary-Source Regulation Was Deficient In Some Way, There Is Still No Need To Vacate The Vehicle Rule

If EPA's triggering interpretation is correct, there is likewise no need to vacate the Vehicle Rule. As explained in Point I, *supra*, Respondents are correct that EPA's decision to regulate motor vehicle emissions of GHGs was required—without regard to any regulatory implications for stationary sources—once EPA found under CAA § 202(a)(1) that emissions of GHGs from motor vehicles contributes to air pollution that may "reasonably be anticipated to endanger public health or welfare." Resps. Br. 27-31. As a result, the fact that Congress also drafted the CAA to provide that stationary-source regulation is "triggered" once

motor-vehicle emissions regulations become effective offers no basis for this Court to ignore the statutory mandate in CAA § 202(a) and vacate the Vehicle Rule.

Even if EPA was somehow required to take into account stationary-source implications before adopting the Vehicle Rule (despite the absence of any requirement in CAA § 202(a) that EPA do so), any deficiency in EPA's stationary-source approach—whether it be a failure to study stationary-source issues, a failure to make the stationary-source regulations more lenient, or a failure to give stationary-source emitters more lead time—still does not warrant vacating the Vehicle Rule. The rules would still be severable because while the Tailoring Rule may depend on the Vehicle Rule, the converse is not true: the Vehicle Rule's operation, which focuses solely on motor-vehicle sources, does not depend on the Tailoring Rule's regulation of stationary sources. *See Ariz. Pub. Serv. Co.*, 562 F.3d at 1122.

Even if the rules are not severable, the Vehicle Rule should still be left intact while EPA gives further consideration to the level of stationary-source regulation.[6] The only basis to vacate the Vehicle Rule would be if there exists no theoretical non-arbitrary/non-capricious regulation of stationary sources, such that the

[6] Automobile Intervenors take no position on whether, in this scenario, regulation of stationary sources should be vacated (as opposed to merely remanded) pending EPA's further consideration.

automatic trigger (*i.e.*, the Vehicle Rule) to *any* regulation of stationary sources must be vacated forever—Petitioners have not made such a showing. If, on the other hand, there is *some* possible regulation of stationary sources that would pass muster, then the Vehicle Rule should be left intact while EPA undertakes its re-examination of stationary-source regulation.

This last approach is also fully supported by this Court's precedents. "Under the APA, reviewing courts generally limit themselves to remanding for further consideration," rather than vacating, even where the "agency acts arbitrarily and capriciously in promulgating a rule." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047-48 (D.C. Cir. 2002). An agency rule will be vacated only where (1) the rule's deficiencies are quite serious, and (2) the consequences of vacatur will not be disruptive. *See Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150 (D.C. Cir. 1993). Such a situation occurs only where it is not "conceivable" that the agency cannot provide an adequate basis for the regulation, *id.* at 151, or where "there are no defensible grounds for [the agency's] conclusions," *U.S. Telecom Ass'n v. FBI*, 276 F.3d 620, 627 (D.C. Cir. 2002).

Neither of these factors is present here. *First*, EPA considered the language of CAA § 202 and the contribution of motor vehicles (not stationary sources) to emission of GHGs in adopting the Vehicle Rule, *see* 75 Fed. Reg. at 25,346-48 [JA-XX]; any failure to consider or properly to address the regulatory implications

for stationary sources does not make EPA's analysis of motor vehicles deficient, much less seriously deficient. *See La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (refusing to vacate an agency's regulation when the agency's "error was its failure to explain what seems to be a policy difference with the plaintiffs"). *Second*, as explained in the Regulatory Background section, *supra*, the costs of vacating the Vehicle Rule would be substantial: As EPA recognized in its analysis of the Vehicle Rule, "delaying the rule would impose significant burdens and uncertainty on automakers, who are already well into planning for production of MY 2012 vehicles, [and are] relying on the ability to produce a single national fleet." 75 Fed. Reg. at 25,402 [JA-XX]; *see also* Regulatory Background, *supra*; Resps. Br. 37-40; *La. Fed. Land Bank Ass'n*, 336 F.3d at 1085 (refusing to vacate an agency's regulation as it would be "'disruptive' because it would preclude a set of voluntary transactions that [the regulated entities] find advantageous"). At this point in time, most manufacturers have 2012 models in production and available for sale. Thus, remanding and/or vacating the stationary-source regulations while leaving the Vehicle Rule intact is the proper course of action should the Court find any aspect of EPA's stationary-source regulation arbitrary or capricious.

CONCLUSION

The petitions for review should be denied.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure, counsel for Intervenors the Alliance of Automobile Manufacturers and the Association of Global Automakers, certify that the foregoing brief is set in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type and contains 4,259 words as determined by the word count function of Microsoft Word 2003 (excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32).

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CERTIFICATE OF SERVICE

I hereby certify that, on September 30, 2011, the foregoing Brief For Intervenors Alliance Of Automobile Manafacturers And Association Of Global Automakers was electronically filed with the United States Court of Appeals for the Fifth Circuit via the Court's Electronic Case Filing System. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Participants in the case who are not registered CM/ECF users will be served via Federal Express, standard overnight delivery.

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