No. 12-1253

IN THE

Supreme Court of the United States

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

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS IN OPPOSITION

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QUESTION PRESENTED

Section 202(a) of the Clean Air Act commands that EPA "shall by regulation prescribe … standards applicable to the emission of any air pollutant" from new motor vehicles if the Agency finds that those emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Given that statutory mandate, the question presented is whether EPA has the discretion to decline to promulgate motor-vehicle emission standards under Section 202(a) once EPA has made an "endangerment finding."

RULE 29.6 STATEMENT

Petitioners the Association of Global Automakers and the Alliance of Automobile Manufacturers are not-for-profit corporations which have no parent companies, and in which no publicly held corporation has a 10% or greater ownership interest.

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BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS IN OPPOSITION

The Association of Global Automakers ("Global Automakers") and the Alliance of Automobile Manufacturers (the "Alliance") respectfully submit that the petition for writ of certiorari in No. 12-1253 should be denied.[1]

OPINIONS BELOW

The opinion of the D.C. Circuit Court of Appeals (App. 5a-83a) is reported at 684 F.3d 102. The D.C. Circuit's orders denying petitions for rehearing and rehearing en banc (App. 84a-139a) are unreported, but are available at 2012 WL 6621785 and 6681996. The final rule by EPA promulgating GHG emission

[1] Nine separate petitions for writ of certiorari have been filed challenging four EPA actions concerning greenhouse gas "GHG") regulations under the Clean Air Act—the "Endangerment Finding," the "Tailpipe Rule," the "Timing Rule" and the "Tailoring Rule"—and the D.C. Circuit's decision upholding those actions. Only one of those petitions presents a question for review directed at the merits of EPA's Tailpipe Rule—that which was filed by the Coalition for Responsible Regulation *et al.* in No. 12-1253. The other eight petitions address EPA's regulation of GHG emissions from stationary sources and either remain silent concerning the Tailpipe Rule or explicitly disavow any challenge to that Rule. *See, e.g.,* Petition in 12-1254 at page 12 ("The second proceeding, known as the 'Tailpipe Rule,' established greenhouse-gas emission standards for light-duty vehicles, which we likewise do not challenge.") Consequently, this opposition is directed at only the petition filed in No. 12-1253. Global Automakers and the Alliance take no position concerning the petitions challenging the other aspects of EPA's GHG rulemaking.

standards applicable to light duty motor vehicles is published at 75 Fed. Reg. 25,324.

JURISDICTION

The judgment of the D.C. Circuit was entered on June 26, 2012. The petitions for rehearing or rehearing en banc were denied on December 20, 2012. On March 11, 2013, the time to petition for a writ of certiorari was extended to and including April 19, 2013. Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a), provides, in relevant part:

> Except as otherwise provided in subsection (b) of this section—
>
> (1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor-vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.
>
> (2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary

> to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

STATEMENT OF THE CASE

1.a. Carbon dioxide ("CO_2") emissions are an unavoidable byproduct of combustion, and any motor vehicle powered by an internal combustion engine will thus emit a certain amount of CO_2. Unlike other emissions from motor vehicles traditionally regulated under the Clean Air Act like carbon monoxide and hydrocarbons, there is no "bolt on" after-treatment device such as a catalytic converter that can capture or chemically alter CO_2 emissions. As a result, the amount of CO_2 emitted by a motor vehicle depends entirely on the type of fuel used to power the vehicle (*i.e.*, the carbon content of the fuel) and the amount of fuel burned.

Given this inextricable relationship between a motor vehicle's fuel consumption and CO_2 emissions, the emission of that substance from motor vehicles has historically been regulated at the federal level under the Corporate Average Fuel Economy ("CAFE") standards established by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the Energy Policy and Conservation Act of 1975 ("EPCA"), 49 U.S.C. § 32901 et seq. Under EPCA, NHTSA sets fuel economy standards that apply to a manufacturer's nationwide fleet of light duty vehicles. This means that an automobile manufacturer can sell any combination of vehicles it chooses without penalty, so long as the average fuel economies of its nationwide car and truck fleets meet the applicable CAFE standards. This nationwide fleet average approach was adopted by Congress in EPCA to "ensure wide consumer choice" by leaving "maximum flexibility to the manufacturer" to

produce a "diverse product mix" while meeting the applicable nationwide CAFE standards. S. Rep. No. 94-179, at 6 (1975).

b. The fuel-economy performance (and the resulting CO_2 emissions) of a motor vehicle goes to the heart of its design and manufacture. Improving a motor vehicle's fuel economy therefore requires a holistic evaluation of virtually all aspects of the vehicle. As EPA correctly concluded in the Tailpipe Rule, redesigns aimed at improving fuel economy "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; *see also id.* at 25,373-75 (describing the advanced technologies required to meet standards established in the Tailpipe Rule).

Integrating technologies that improve fuel economy across multiple product lines requires several years 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. 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.

2. Motor-vehicle fuel economy and CO_2 emissions have been historically regulated by NHTSA under the CAFE program. In *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), this Court held that EPA has concurrent authority under the Clean Air Act to regulate in this area. Specifically, this Court held that CO_2 is an "air pollutant" under the Act, and that Section 202(a)(1) authorizes EPA to regulate CO_2 emissions from new motor vehicles if EPA makes an "endangerment finding" – *i.e.*, a finding that air pollution resulting from such emissions "'may reasonably be anticipated to endanger public health or welfare.'" 549 U.S. at 528-29. This Court further held that EPA had abused its discretion in relying on non-statutory policy concerns in declining to inquire whether such an endangerment finding should be made; EPA's decision "rest[ed] on reasoning divorced from the statutory text," *id*. at 532, and EPA offered "no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change," *id*. at 534.

This Court therefore remanded the matter to EPA for reconsideration in light of the requirements of the Clean Air Act. In doing so, the Court recognized the statutory limits on EPA's discretion in the event EPA were to make an endangerment finding: "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." 549 U.S. at 533. Put another way, "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.*

This Court further observed that in the event that EPA makes an endangerment finding and therefore promulgates motor-vehicle emission standards under Section 202(a), EPA nonetheless possesses broad discretion in its standard-setting. That discretion includes "significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." *Id.* 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 CO_2 emissions and fuel economy, and that "coordination" between the two agencies would allow "both [to] administer their obligations and yet avoid inconsistency." 549 U.S. at 532-33.

3. Although motor-vehicle fuel economy and CO_2 emissions are addressed in two separate federal statutes (EPCA and the Clean Air Act), the State of California embarked on its own separate program to reduce motor-vehicle GHG emissions. In 2002 the California legislature enacted Assembly Bill 1493, see Cal. Health & Safety Code § 43018.5, directing the California Air Resources Board ("CARB") to adopt regulations aimed at reducing GHG emissions from new passenger cars and light trucks. Pursuant to this mandate, CARB promulgated regulations in 2004 requiring that each manufacturer's fleet of cars and light trucks sold in California meet increasingly stringent GHG emission standards that phase in

between the 2009 and 2016 model years, see Cal. Code Regs. tit. 13, § 1961.1. California subsequently sought a waiver of Clean Air Act preemption from EPA under 42 U.S.C. § 7543(b), as it (alone among the states) is entitled to do for vehicle emissions standards. California's standards for the 2012 through 2016 model years were significantly more stringent than the then-applicable CAFE standards, and effectively required manufacturers to produce a separate fleet of high fuel economy vehicles just for the California market.

Thirteen other states and the District of Columbia subsequently adopted the California regulations under Section 177 of the Clean Air Act, 42 U.S.C. § 7507, which allows other states to adopt California's vehicle tailpipe emissions regulations that receive a waiver from EPA. Once put into effect, these regulations would have required each manufacturer's motor-vehicle fleet sold in those jurisdictions—some with an exceptionally small number of vehicles—also to meet these new stringent California standards. Consequently, for the first time, manufacturers were faced with having to balance not only their national fleets of vehicles for CAFE compliance, but also 14 separate state fleets—one each in California and the 13 Section 177 States—to comply with fuel economy and GHG regulations.

This result would have been untenable for the automobile industry; NHTSA has described it as a "patchwork of state and federal rules governing fuel economy and GHG emissions that were inadequate, uncertain, potentially conflicting, and in a constant state of flux."[2] In addition to imposing much more

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[2] See Letter from O. Kevin Vincent to Office of Senator Diane Feinstein (Feb. 19, 2010) (available at

stringent standards and a compliance framework that is entirely different from federal regulations, implementing the California GHG regulations would have deprived manufacturers of the flexibility of nationwide fleet-averaging provided under the CAFE program. Balancing the smaller and more homogeneous fleets found in each of California and the Section 177 States is inherently more difficult and costly than it is to balance a fleet across the entire nation.[3]

[Footnote continued from previous page]

http://media.washingtonpost.com/wp-srv/special/climate-change/documents/post-carbon/NelsonLetter022510.pdf) (last accessed July 8, 2013).

[3] For this reason, EPCA contains an express preemption provision—states "may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards," 49 U.S.C. § 32919, and there is no exception for the State of California. NHTSA has therefore concluded that "[s]tate regulation of motor vehicle tailpipe emissions of CO2 is both expressly and impliedly preempted" by EPCA. Average Fuel Economy Standards For Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17,566, 17654 (Apr. 6, 2006). Consequently, the automobile industry challenged the California GHG regulations on federal preemption grounds. *See Green Mountain Chrysler Plymouth Dodge v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007), *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2008). Relying in part on this Court's holding in *Massachusetts v. EPA,* however, the district courts held that EPCA preemption does not apply to a California emissions regulation that receives a waiver from EPA. *See Central Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1174 ("The court concludes that, just as the *Massachusetts* Court held EPA's duty to regulate greenhouse gas emissions under the Clean Air Act overlaps but does not conflict with DOT's duty to set fuel efficiency standards under EPCA, so too California's effort to regulate greenhouse gas emissions through the waiver of preemption provisions of the Clean Air Act overlaps, but does not conflict with DOT's activities under

4.a. The EPA "Tailpipe Rule" challenged in this action addresses this impractical situation, and provides for a single program for regulating motor-vehicle fuel economy and CO_2 emissions coordinated at the national level. That rule also represents the culmination of EPA's regulatory activities after the remand from *Massachusetts v. EPA*. In December 2009, EPA made an Endangerment Finding, concluding that "elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and … welfare," and that "emissions of … greenhouses gasses from new motor vehicles contribute to th[at] air pollution." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516, 66,537 (Dec. 15 2009).

In light of that Endangerment Finding, EPA subsequently issued the Tailpipe Rule establishing jointly with NHTSA coordinated fuel economy and GHG emission standards for light duty vehicles. 75 Fed. Reg. 25,324. Although there are minor substantive differences between the regulations promulgated by each agency as required under their respective governing statutes, their core requirements concerning motor-vehicle fuel economy and resulting CO_2 emissions have been harmonized sufficiently to allow manufacturers to comply with both by producing a single fleet of vehicles. For their part, California and the Section 177 States modified their regulations to provide that, starting with the 2012 model year, compliance with the EPA standards is deemed to satisfy compliance with the state

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[Footnote continued from previous page]

EPCA."). The industry dismissed their appeals to these decisions after the promulgation of the Tailpipe Rule.

standards. The Tailpipe Rule thus 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." 75 Fed. Reg. at 25,326.

b. Section 202(a)(2) of the Clean Air Act, 42 U.S.C. § 7521(a)(2), sets forth the standard by which EPA must evaluate the stringency of motor-vehicle emission standards set by the Agency. Any regulation promulgated under Section 202(a)(1) "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." *Id.* "The emission standards set by the EPA under its general regulatory power … are 'technology-based;' the levels chosen must be premised on a finding of technological feasibility." *NRDC* v. *EPA,* 655 F. 2d 318, 322 (D.C. Cir. 1981). Applying this standard, EPA's Tailpipe Rule requires each manufacturer's combined fleets of cars and light trucks to achieve increasingly stringent CO_2-equivalent emission rates which reach 250 grams per mile (or 34.1 miles per gallon fuel economy) by the 2016 model year.

5. EPA's promulgation of the Tailpipe Rule raises the question whether stationary sources would also be subject to GHG emission regulations under the Clean Air Act. Addressing this question, EPA issued the "Timing Rule" in October 2009 in which it determined that regulating vehicular GHG emissions under Section 202 triggers two stationary-source permit programs under the Act—Prevention of Significant Deterioration ("PSD"), 42 U.S.C. § 7470 *et seq.*, and Title V permitting, *id.* § 7661 *et seq*. The

Clean Air Act's PSD provisions apply to any "major emitting facility," which is defined in the statute as a facility that emits (or has the potential to emit) at least 250 tons per year ("tpy") of "any air pollutant," or at least 100 tpy of "any air pollutant" if the facility is within certain, statutorily enumerated industrial source categories. 42 U.S.C. § 7479(1). Title V applies to any "major stationary source," that has the potential to emit at least 100 tpy of "any air pollutant." *Id.* §§ 7602(j), 7661a(a). EPA found that applying these statutory thresholds to CO_2, however, would sweep tens of thousands of sources into the PSD and Title V permitting programs for the first time and at a cost of billions of dollars. In order to avoid this result, EPA issued the separate "Tailoring Rule" revising upwards the statute's numerical permitting thresholds for stationary-source GHG emissions.

6. EPA's GHG rulemaking was challenged by several coalitions of states, industry trade associations and public interest groups. Trade associations representing the automobile industry—the Association of Global Automakers and the Alliance of Automobile Manufacturers—intervened on the side of EPA in support of the Tailpipe Rule. None of the parties seeking to overturn EPA's rulemaking challenged the stringency of the numeric standards established by EPA in the Tailpipe Rule under Section 202(a)(2) by arguing that those standards are either too lenient or too strict. Rather, the petitioners' objections centered around the scientific basis for the Endangerment Finding, the legal bases for the Timing Rule and the Tailoring Rule, and EPA's decision to promulgate motor-vehicle emission standards under Section 202(a) despite the Agency's conclusion that doing so would trigger costly stationary-source regulation.

The D.C. Circuit (Sentelle, C.J., Rogers, Tatel, JJ.) rejected the petitioners' challenges and upheld all aspects of EPA's GHG rulemaking. Referring specifically to the Tailpipe Rule and relying on *Massachusetts v. EPA*, the court held that once EPA made an endangerment finding, the Agency had a "non-discretionary duty" to promulgate emission standards. Pet. App. at 35a. The D.C. Circuit further held that EPA was not required to show the extent to which the motor-vehicle standards it promulgated under Section 202(a) would actually mitigate climate change. Rather, it was sufficient for EPA to establish that "vehicle emissions are a significant contributor to domestic greenhouse gas emissions." *Id.* at 38a. Finally, the D.C. Circuit rejected the contention that Section 202(a)(2) required EPA to consider the cost of compliance to stationary sources in addition to motor-vehicle manufacturers. "[T]he Section 202(a)(2) reference to compliance costs encompasses only the cost to the motor-vehicle industry to come into compliance with the new emission standards, and does not mandate consideration of costs to other entities not directly subject to the proposed standards." *Id.* at 39a (citing *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C.Cir.1979).

After the D.C. Circuit denied rehearing *en banc*, nine separate petitions for writ of certiorari were filed in this Court seeking review of various aspects of EPA's GHG rulemaking and the D.C. Circuit's decision. Only the petition filed in No. 12-1253 specifically addresses the Tailpipe Rule, and this opposition is directed at that petition.

REASONS FOR DENYING THE PETITION

EPA's promulgation of the Tailpipe Rule was the direct result of the statutory command found in Section 202(a) of the Clean Air Act and this Court's

decision in *Massachusetts v. EPA*. As directed by this Court, EPA was required "to exercise discretion within [the] defined statutory limits" set forth in Section 202(a) and determine whether GHG emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Massachusetts*, 549 U.S. at 532-33. In the event of such a finding, EPA was required to "by regulation prescribe … standards applicable to the emission of" GHGs from new motor vehicles. 42 U.S.C. § 7521(a)(1). EPA made such an endangerment finding, and the subsequent promulgation of the Tailpipe Rule challenged in No. 12-1253 merely satisfied the obligations set forth in the statute and in *Massachusetts v. EPA*. Accordingly, this Court's review of EPA's Tailpipe Rule is not warranted. In the event that this Court accepts review with respect to other stationary-source aspects of EPA's GHG rulemaking—such as its Timing Rule or the Tailoring Rule—such review should leave intact the Tailpipe Rule and the D.C. Circuit's opinion upholding that rule.

I. The Clean Air Act Unambiguously Provides That EPA "Shall" Promulgate Motor-Vehicle Emission Standards If The Agency Makes A Valid Endangerment Finding

The D.C. Circuit was entirely correct when it concluded that 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).

The plain language of Section 202(a)(1) establishes a three-step process under which EPA

must promulgate a motor-vehicle emission standard. First, the Agency must determine whether the "air pollution" in question—here, GHGs—"may reasonably be anticipated to endanger public health or welfare." This results from the fact that the endangerment clause modifies the term "air pollution," *i.e.*, "air pollution *which* may reasonably be anticipated to endanger public health or welfare." If so, then EPA must determine whether "the emission of [such] air pollutant" from motor vehicles "cause or contribute to" that air pollution. (Moreover, because the statute says "cause or contribute to" without specifying any amount of such causation or contribution, the D.C. Circuit correctly rejected the contention that "EPA's authority to regulate was conditioned on evidence of a particular level of mitigation." Pet. App. at 38a.) If EPA determines that a pollutant causes or contributes to the air pollution, then it "shall by regulation prescribe … standards applicable to the emission" of that pollutant from new motor vehicles. 42 U.S.C. § 7521(a)(1).

The language of Section 202(a)(1) does not allow for any other reading. The statute commands that EPA "shall" promulgate motor-vehicle emission standards once it makes an endangerment finding. "The word 'shall' is ordinarily 'the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson v. Yungkau,* 329 U.S. 482, 485 (1947)). The D.C. Circuit therefore correctly held that the "plain text of Section 202(a)(1) thus refutes Industry Petitioners' contention that EPA had discretion to defer issuance of motor-vehicle emission standards on the basis of stationary-source costs" once the Agency made an endangerment finding. Pet. App. at 35a.

If the words of Section 202(a)(1) were not enough to compel EPA's interpretation and the Panel's decision, this Court's holding in *Massachusetts* removes all doubt. There, the Court held that "[i]f EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." 549 U.S. at 533. The only path by which EPA could have avoided adopting any motor-vehicle GHG emission standards would have been if the Agency were to have determined "that greenhouse gases do not contribute to climate change or if it provide[d] some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Massachusetts*, 549 U.S. at 533. But once EPA made its Endangerment Finding, the Agency was compelled to promulgate motor-vehicle emission standards. The fact that EPA acted on the clear command found in both the Clean Air Act and in this Court's prior holding hardly warrants this Court's review.

II. EPA Properly Applied Clean Air Act Section 202(a)(2) In Setting The Emission Standards In The Tailpipe Rule

While Section 202(a)(1) of the Clean Air Act sets forth the standard by which EPA must determine whether or not to prescribe motor-vehicle emission standards in the first place, the stringency of such standards is guided by Section 202(a)(2).

> Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

42 U.S.C. § 7521(a)(2). The plain language of the Clean Air Act thus divorces the numeric stringency of the emission limits adopted by EPA from the endangerment finding, and there is no requirement in the statute that the regulations "mitigate" the endangerment identified under Section 202(a)(1).

That does not mean, however, that the D.C. Circuit's decision "authorizes EPA to promulgate emission standards as arbitrarily stringent or permissive as EPA chooses." Petition at 32. Quite the contrary, EPA's standard-setting is guided by Section 202(a)(2) and "must be premised on a finding of technological feasibility" taking into account the costs of compliance. *NRDC* v. *EPA,* 655 F. 2d 318, 322 (D.C. Cir. 1981); 42 U.S.C. § 7521(a)(2).

Emission standards must therefore provide "sufficient lead time to permit manufacturers to develop and apply the necessary technology." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998). *See also Green Mountain Chrysler Plymouth Dodge v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (holding that Section 202(a)(2) requires EPA to assess "technological feasibility (adequate time to permit development and application of requisite technology) and economic practicability (cost of compliance within that lead-time)" of California emission standards in determining whether they are "consistent with" Section 202(a).) Additionally, Section 202(a)(4) of the Clean Air Act, 42 U.S.C. § 7521(a)(4), expressly requires EPA to consider the safety impacts of any emission control device, system or element of design that may be required in order to comply with its standards.

After an analysis of technologies available to reduce motor-vehicle CO_2 emissions as well as the costs and safety implications of such technologies, EPA determined that the emission limits

promulgated in the Tailpipe Rule were appropriate. *See, e.g.,* 75 Fed. Reg. at 25,555 ("the decision on what standard to set is largely based on the effectiveness of the emissions control technology, the cost and other impacts of implementing the technology, and the lead time needed for manufacturers to employ the control technology"); *id.* at 25,382 (in promulgating the joint fuel economy and GHG emission standards, EPA and NHTSA "must consider the potential of the standards to affect vehicle safety, which the agencies have assessed in evaluating the appropriate levels at which to set the final standards"). No party has challenged the Tailpipe Rule on the basis of EPA's construction and application of Sections 202(a)(2) and (a)(4) in setting the stringency of the emission limits required under the Rule. And the industry that would stand to be most concerned about such compliance costs—the automobile industry, represented here by Global Automakers and the Alliance—supports EPA's Tailpipe Rule.

III. Even If Certiorari Is Warranted With Respect To EPA's Timing Rule And Tailoring Rule This Court Need Not Review EPA's Tailpipe Rule

In light of the clear language of Section 202(a) of the Clean Air Act and this Court's holding in *Massachusetts v. EPA*, and given EPA's antecedent Endangerment Finding, EPA's promulgation of the Tailpipe Rule was entirely proper. There is therefore no basis for this Court to accept review of that portion of the D.C. Circuit's decision upholding the Tailpipe Rule, and the petition in No. 12-1253 should be denied.

None of the other consolidated petitions for writ of certiorari raises any question concerning the underlying merits of the Tailpipe Rule. Those

petitions focus predominantly on EPA's regulation of GHG emissions from stationary sources via the Timing Rule and the Tailoring Rule.[4] In the event that this Court were to grant any of the other consolidated petitions for writ of certiorari concerning EPA's Timing Rule and/or Tailoring Rule, it should make clear that it is not granting the petition filed in No. 12-1253 and that the D.C. Circuit's decision upholding the Tailpipe Rule remains intact.[5] Such instruction is warranted not just by the legal analysis set forth above, but also by the reality that any deficiency in EPA's stationary-source approach does not warrant vacating the Tailpipe Rule. The rules would still be severable because it is beyond cavil that EPA would have promulgated the Tailpipe Rule independently of the other rules, as it did here. *Cf. Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) ("[T]he touchstone for any decision about remedy is legislative intent," such that courts must ask "[w]ould the legislature have preferred what is left of its statute to not statute at all?"). There is

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[4] *See, e.g.,* Petition in No. 12-1268 at page 27 ("The ultimate impact on stationary sources arose not directly from the Endangerment Finding or the Tailpipe Rule's regulation of mobile sources, but from the follow-on effects of the Timing Rule (which supposedly triggered the regulation of emissions from stationary sources) and the Tailoring Rule (which used the 'absurdity' rationale to permit the exercise of regulatory jurisdiction far beyond congressional authorization).")

[5] Global Automakers and the Alliance recognize that if this Court were to accept review of EPA's Endangerment Finding and overturn the D.C. Circuit's opinion upholding that finding, the antecedent basis for the Tailpipe Rule would no longer exist. That question, however, is not presented in No. 12-1253, and the impact of any decision by this Court concerning the Endangerment Finding could be addressed by the D.C. Circuit on remand.

thus no reason to include the Tailpipe Rule within the scope of this Court's review, if any.

Moreover, the potential invalidation of the Tailpipe Rule would create substantial uncertainty for the automobile industry concerning the types of vehicles it must plan to produce. As EPA noted when it promulgated the Tailpipe Rule in 2010, the automobile industry typically redesigns its models every five years, and requires regulatory stability in order to justify the "significant upfront investment" that comes with a major vehicle redesign. 75 Fed. Reg. at 25,445. In the three years that have passed since EPA's promulgation of the Tailpipe Rule, the automobile industry has relied on this rule in implementing its redesigns of its vehicles; any risk to the implementation of the Tailpipe Rule would raise the specter that the automobile industry would need to return to the "patchwork of state and federal rules" that the Tailpipe Rule was designed to prevent. See *supra* n.2. Such a risk would undermine the significant investments the automobile industry has made in reliance on a national, uniform standard.

Should the Court grant review of any of the petitions, it should do so in a way that does not implicate the Tailpipe Rule. For example, to the extent that the petitioners in the other consolidated petitions are correct that EPA and the D.C. Circuit have erred with respect to the Timing Rule—*i.e.*, correct that stationary-source regulation of GHG emissions is *not* automatically triggered by regulation of such emissions from motor vehicles under Section 202(a)—then that rulemaking may be severed and reviewed with no impact upon the

Tailpipe Rule.[6] In that event, there would no longer be any link between EPA's promulgation of emission standards under Section 202(a) and the regulation of stationary sources under the PSD and Title V permitting programs. Under this scenario, this Court would be able to accept review of the consolidated petitioners' challenges to the merits of the Timing Rule and to restrict any relief to that portion of the D.C. Circuit's opinion upholding that rule.

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[6] The petitioners in No. 12-1248, for example, argue that EPA has incorrectly concluded that the PSD provisions of the Clean Air Act apply not only to air pollutants for which the Agency has promulgated a National Ambient Air Quality Standard ("NAAQS") but rather to any air pollutant regulated under any part of the Act, and further argue that the "absurd results" identified by EPA could be avoided by interpreting the PSD provisions as applying to only NAAQS pollutants. Should this Court accept review on that question, it could do so while declining to review the entirely separate question presented in No. 12-1253 concerning EPA's adoption of the Tailpipe Rule.

CONCLUSION

The petition for writ of certiorari in No. 12-1253 should be denied. In the event this Court grants any of the other petitions, it should make clear that such grant does not implicate the Tailpipe Rule.

Respectfully submitted.

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