No.

In the Supreme Court of the United States

COALITION FOR RESPONSIBLE REGULATION, INC., ALPHA NATURAL RESOURCES, INC., GREAT NORTHERN PROJECT DEVELOPMENT, L.P., AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Clean Air Act ("Act") and this Court's decision in *Massachusetts* v. *EPA* prohibit the Environmental Protection Agency from considering whether regulations addressing greenhouse gases under Section 202 of the Act would meaningfully mitigate the risks identified as the basis for their adoption.

PARTIES TO THE PROCEEDINGS

Challenges to 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding") and 75 Fed. Reg. 49,556 (Aug. 13, 2010) (Denial of Reconsideration)

1. Petitioners in No. 09-1322 and 10-1234 below were Alpha Natural Resources, Inc., Coalition for Responsible Regulation, Inc., Great Northern Project Development, L.P., Industrial Minerals Association–North America, Massey Energy Company, National Cattlemen's Beef Association and Rosebud Mining Company.

2. Additional petitioners below were: National Mining Association; Peabody Energy Company; the American Farm Bureau Federation; the Chamber of Commerce of the United States of America; Southeastern Legal Foundation, Inc., The Langdale Company, Langdale Forest Products Company, Langdale Farms, LLC, Langdale Fuel Company, Langdale Chevrolet-Pontiac, Inc., Langdale Ford Company, Langboard, Inc.-MDF, Langboard, Inc.-OSB, Georgia Motor Trucking Association, Inc., Collins Industries, Inc., Collins Trucking Company, Inc., Kennesaw Transportation, Inc., J&M Tank Lines, Inc., Southeast Trailer Mart, Inc., Georgia Agribusiness Council, Inc., John Linder, Dana Rohrabacher, John Shimkus, Phil Gingrey, Lynn Westmoreland, Tom Price, Paul Broun, Steve King, Nathan Deal, Jack Kingston, Michele Bachmann, and Kevin Brady; the Commonwealth of Virginia; Gerdau Ameristeel Corp.; American Iron and Steel Institute; the State of Alabama; the Ohio Coal Association; the State of Texas, Attorney General Gregory Wayne Abbott, Texas Commis-

sion on Environmental Quality, Texas Agriculture Commission, Barry Smitherman, Chairman of Texas Public Utility Commission, and Governor Rick Perry; Utility Air Regulatory Group; National Association of Manufacturers, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, National Association of Home Builders, National Oilseed Processors Association, National Petrochemical & Refiners Association, and Western States Petroleum Association; Competitive Enterprise Institute, FreedomWorks Foundation, Science and Environmental Policy Project; Portland Cement Association; John Shadegg, Dan Burton, and Marsha Blackburn; the Pacific Legal Foundation.

3. Respondents below were the United States Environmental Protection Agency and Lisa P. Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

4. Petitioner-intervenors below were the State of Michigan, Haley Barbour, Governor of the State of Mississippi, State of Louisiana, State of South Carolina, State of Oklahoma, State of Kentucky, State of Indiana, State of Utah, State of Florida, State of Nebraska, State of North Dakota, State of South Dakota, Arkansas State Chamber of Commerce, Associated Industries of Arkansas, Colorado Association of Commerce & Industry, Glass Packaging Institute, Idaho Association of Commerce and Industry, Independent Petroleum Association of America, Indiana

Cast Metals Association, Louisiana Oil and Gas Association, Michigan Manufacturers Association, Mississippi Manufacturers Association, National Electrical Manufacturers Association, Nebraska Chamber of Commerce and Industry, North American Die Casting Association, Pennsylvania Manufacturers Association, Tennessee Chamber of Commerce and Industry, West Virginia Manufacturers Association, Wisconsin Manufacturers and Commerce, Steel Manufacturers Association, the Kansas Chamber of Commerce and Industry, The Ohio Manufacturers Association, Virginia Manufacturers Association, Portland Cement Association.

5. Respondent-intervenors below were Commonwealth of Massachusetts; State of Alaska; State of Arizona; State of California; State of Connecticut; State of Delaware; State of Iowa; State of Illinois; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; City of New York; Natural Resources Defense Council; Environmental Defense Fund; Sierra Club; National Wildlife Federation; Conservation Law Foundation, Inc.; Commonwealth of Pennsylvania, Department of Environmental Protection; State of Minnesota; and Wetlands Watch.

Challenges to 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule")

1. Petitioners in No. 10-1092 below were Alpha Natural Resources, Inc., Coalition for Responsible Regulation, Inc., Great Northern Project Development, L.P., Industrial Minerals Association–North America, Massey Energy Company, National Cattle-

men's Beef Association and Rosebud Mining Company.

2. Respondents below were the United States Environmental Protection Agency and Lisa P. Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

3. Additional petitioners below were Southeastern Legal Foundation, Inc., Michele Bachmann, Kevin Brady, Paul Broun, Phil Gingrey, Steve King, Jack Kingston, Tom Price, John Linder, Nathan Deal, John Shadegg, Dan Burton, Dana Rohrabacher, John Shimkus, Lynn Westmoreland, The Langdale Company, Langdale Forest Products Company, Georgia Motor Trucking Association, Inc., Collins Industries, Inc., Collins Trucking Company, Inc., Kennesaw Transportation, Inc., J&M Tank Lines, Inc., Southeast Trailer Mart, Inc., Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute, FreedomWorks, the Science and Environmental Policy Project; American Iron and Steel Institute; Ohio Coal Association; Mark R. Levin, Landmark Legal Foundation; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Portland Cement Association; Chamber of Commerce of the United States of America, Utility Air Regulatory Group; National Mining Association; Peabody Energy Company; American Farm Bureau Federation; National Association of Manufacturers; American Frozen Food Institute; American Petrole-

um Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical and Refiners Association; American Fuel & Petrochemical Manufacturers; Specialty Steel Industry of North America, Tennessee Chamber of Commerce and Industry; Wisconsin Manufacturers & Commerce; State of Texas; Rick Perry, Governor of Texas, Attorney General Gregory Wayne Abbott; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; and Haley Barbour, Governor of the State of Mississippi.

4. Petitioner-intervenors below were State of Georgia; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevorlet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc – MDF and Langboard, Inc. - OSB.

5. Respondent-intervenors below were Association of International Automobile Manufacturers; State California; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Commonwealth of Pennsylvania; Department of Environmental Protection; City of New York; Environmental Defense Fund; Natural Resources Defense

Council; Sierra Club; Global Automakers; and Alliance of Automobile Manufacturers.

Challenges to 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Rule")

1. Petitioners in No. 10-1073 below were Alpha Natural Resources, Inc., Coalition for Responsible Regulation, Inc., Great Northern Project Development, L.P., Industrial Minerals Association–North America, Massey Energy Company, National Cattlemen's Beef Association and Rosebud Mining Company.

2. Respondents below were the United States Environmental Protection Agency and Lisa P. Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

3. Additional petitioners below were Southeastern Legal Foundation, Inc., Michele Bachmann, Marsha Blackburn, Kevin Brady, Dan Burton, Paul Broun, Nathan Deal, Phil Gingrey, Steve King, Jack Kingston, John Linder, Tom Price, Dana Rohrabacher, John Shadegg, John Shimkus, Lynn Westmoreland, The Langdale Company, Langdale Forest Products Company, Langdale Farms, LLC, Langdale Fuel Company, Langdale Chevrolet-Pontiac, Inc., Langdale Ford Company, Langboard, Inc. – MDF, Langboard, Inc. – OSB, Georgia Motor Trucking Association, Inc., Collins Industries, Inc., Collins Trucking Company, Inc., Kennesaw Transportation, Inc., J&M

Tank Lines, Southeast Trailer Mart, Inc., Georgia Agribusiness Council, Inc.; Clean Air Implementation Project; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Utility Air Regulatory Group; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio Coal Association; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; State of Louisiana; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the

State of Mississippi; and Portland Cement Association.

4. Petitioner-intervenors below were Independent Petroleum Association of America, Indiana Cast Metals Association, Michigan Manufacturers Association, Tennessee Chamber of Commerce and Industry, West Virginia Manufacturers Association, Wisconsin Manufacturers and Commerce, Glass Association of North America, State of Louisiana, National Association of Manufacturers, American Petroleum Institute, Corn Refiners Association, National Association of Home Builders, National Oilseed Processors Association, Western States Petroleum Association, American Frozen Food Institute, and American Fuel & Petrochemical Manufacturers.

5. Respondent-intervenors below were Commonwealth of Massachusetts, Conservation Law Foundation, Natural Resources Council of Maine, Indiana Wildlife Federation, Michigan Environmental Council, Ohio Environmental Council, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, State of California, State of Illinois, State of Iowa, State of Maine, State of Maryland, State of New Hampshire, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, Georgia ForestWatch, Wild Virginia, Center for Biological Diversity, National Mining Association, American Farm Bureau Federation, National Environmental Development Association's Clean Air Project, Utility Air Regulatory Group, Brick Industry Association, South Coast Air Quality Management District, State of North Carolina.

Challenges to 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule")

1. Petitioners in No. 10-1132 below were Alpha Natural Resources, Inc., Coalition for Responsible Regulation, Inc., Great Northern Project Development, L.P., Industrial Minerals Association–North America, Massey Energy Company, National Cattlemen's Beef Association and Rosebud Mining Company.

2. Respondents below were the United States Environmental Protection Agency and Lisa P. Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

3. Additional petitioners below were Southeastern Legal Foundation, Inc., Michele Bachmann, Marsha Blackburn, Kevin Brady, Paul Broun, Dan Burton, Phil Gingrey, Steve King, Jack Kingston, John Linder, Tom Price, Dana Rohrabacher, John Shadegg, John Shimkus, Lynn Westmoreland, The Langdale Company, Langdale Forest Products Company, Langdale Farms, LLC, Langdale Fuel Company, Langdale Chevrolet-Pontiac, Inc., Langdale Ford Company, Langboard, Inc. – MDF, Langboard, Inc. – OSB, Georgia Motor Trucking Association, Inc., Collins Industries, Inc., Collins Trucking Company, Inc., Kennesaw Transportation, Inc., J&M Tank Lines, Inc., Southeast Trailer Mart, Inc., Georgia Agribusiness Council, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US

Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Alliance of Forest Owners; American Forest & Paper Association; National Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of the State of Mississippi; State of South Carolina; State of Nebraska; Utility Air Regulatory Group; Missouri Joint Municipal Electric Utility Commission; Sierra Club; Clean Air Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Depart-

ment of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; and State of Texas.

4. Petitioner-intervenors below were National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; American Fuel & Petrochemical Manufacturers; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

5. Respondent-intervenors below were Natural Resources Defense Council; Environmental Defense Fund; Sierra Club; Conservation Law Foundation, Inc.; Georgia Forest Watch; Natural Resources Council of Maine; Wild Virginia; State of New York; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania Department of Environmental Protection; State of Rhode Island; South Coast Air Quality Management District; Center for Biological Diversity; National Mining Association; Brick Industry Association; Peabody Energy Company; American Farm Bureau Federation; National Environmental Development Association's Clean Air Project; Utility Air Regulatory Group.

RULE 29.6 STATEMENT

Petitioners Coalition for Responsible Regulation, Inc., Alpha Natural Resources, Inc., Great Northern Project Development, L.P., and National Cattlemen's Beef Association have no parent companies, and no publicly-held corporation owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Coalition for Responsible Regulation, Inc., Alpha Natural Resources, Inc., Great Northern Project Development, L.P., and National Cattlemen's Beef Association (collectively "Coalition") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 5a-83a) is reported at 684 F.3d 102. The orders of the court of appeals denying petitions for rehearing en banc (App. 84a-139a) are unreported, but are available at 2012 WL 6621785 and 6681996.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. App. 1a-4a. That court denied petitions for rehearing en banc on December 20, 2012. App. 84a-139a. On March 11, 2013, the Chief Justice extended the time to petition for a writ of certiorari to and including April 19, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 202 of the Clean Air Act, 42 U.S.C. § 7521, provides:

(a) Authority of Administrator to prescribe by regulation

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.

Other relevant provisions of the Clean Air Act are reproduced at App. 144a-153a.

INTRODUCTION

This petition arises from challenges to a suite of regulations the U.S. Environmental Protection Agency ("EPA") promulgated on remand from *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), that apply the Clean Air Act's broad array of regulatory programs to six "well-mixed greenhouse gases" ("GHG"), 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009), emitted from vir-

tually every human activity and each sector of the U.S. economy. The trigger for EPA's "cascading series of [GHG]-related rules and regulations," App. 10a, was its December 2009 Endangerment Finding, 74 Fed. Reg. at 66,496, which included pronouncements that GHG "may reasonably be anticipated both to endanger public health [and] * * * welfare," and that U.S. automobiles contribute to GHG "air pollution." *Id.* at 66,497-66,499. In a second action, EPA promulgated "tailpipe" emission standards for automobiles under Section 202 of the Clean Air Act ("Act"), which essentially duplicated fuel economy standards from the National Highway Transportation Safety Administration ("NHTSA"). 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule").

Rulemakings under other provisions of the Act followed in rapid succession—each predicated on the Endangerment Finding and Tailpipe Rule—addressing other sectors, not only power plants and factories, but eventually also everything from trucks and airplanes to dairies, hospitals, schools, and perhaps even homes. 75 Fed. Reg. 17,004 (Apr. 2, 2010); 75 Fed. Reg. 31,514, 31,550, 31,573 (June 3, 2010); 73 Fed. Reg. 44,354, 44,355 (July 30, 2008).[1] These ac-

[1] Further final actions are based on the same 2009 Endangerment Finding, including tailpipe standards for heavy-duty vehicles. 76 Fed. Reg. 57,106 (Sept. 15, 2011). And EPA has proposed to establish New Source Performance Standards for power plants in reliance on the Section 202 *mobile source* Endangerment Finding. 77 Fed. Reg. 22,392, 22,413 (Apr. 13, 2012). Many petitions for additional rulemakings remain pending, demanding GHG limits on aircraft engines, nonroad engines, ships, petroleum refineries and cement kilns, all predicated on the Endangerment Finding for automobiles. 73 Fed. Reg. at 44,399, 44,459-44,461. At least one petition seeks a National

tions reflect "epic overreach," App. 105a (Brown, J., dissenting from denial of rehearing en banc), vindicating EPA Administrator Stephen Johnson's 2008 warning that "regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land." 73 Fed. Reg. at 44,355.

By EPA's own estimate, the Tailpipe Rule will, over a century of regulation, avoid a total of 0.6-1.4 *millimeters* of sea level rise—roughly the same dimension as the period that ends this sentence**.** 75 Fed. Reg. at 25,495. And, EPA concedes, nearly all of that imperceptible effect will be achieved anyway by fuel economy standards NHTSA promulgated under independent statutory authority. EPA does not attempt to demonstrate health or welfare benefits from this tiny effect. Instead, EPA asserts—and the Panel agreed—that concerns about the rules' (in)efficacy are wholly "irrelevant" to the Section 202 emission standards and Endangerment Finding. See 74 Fed. Reg. at 66,507-66,508 ("[t]he effectiveness of a potential future control strategy is not relevant [to the En-

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Ambient Air Quality Standard for GHGs. The Endangerment Finding has also prompted regulatory proceedings under other federal laws, such as the National Environmental Policy Act, State and regional rulemakings, and private tort litigation. See, *e.g.*, *WildEarth Guardians* v. *Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012) (challenge to coal development leases in Powder River Basin based on alleged global warming effects) (appeal pending, D.C. Cir. No. 12-5300); *American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2540 (2011) (leaving open state-law nuisance claims for carbon-dioxide emissions).

dangerment Finding]"); App. 38a (rejecting proposition that "EPA's authority to regulate [is] conditioned on evidence of a particular level of mitigation"). In the Panel and Agency's view, *Massachusetts* and the statute *compel* EPA to regulate a constituent of clean air, *without regard to* whether the adopted regulations ameliorate the risks identified as the basis for regulating.

That interpretation is neither compelled by the statutory text as interpreted in *Massachusetts*, nor reconcilable with fundamental principles of administrative law and statutory construction.

This Court has long required that an agency justify its regulatory choices based on facts found. That principle aligns with the basic premise of health and welfare regulation, reflected in the text of Section 202, that the process of identifying and defining risk must inform, and be informed by, the choice of an appropriate regulatory response. But the Panel authorizes EPA to set emissions limits at whatever level it chooses, based on an abstract finding of "endanger[ment]." Absent some requirement to justify regulation in terms of the risk identified, the Agency's discretion in establishing "standards applicable to the emission of any air pollutant" under 42 U.S.C. § 7521(a) would be unbounded, allowing the Agency to regulate as much or as little as it wishes. That interpretation of the Act is unsustainable. And by concluding that EPA *must* regulate without showing that its rules will have any appreciable effect on the risk identified, the Panel imputes to Congress the implausible intent of compelling futile regulation. The Panel decision also serves as precedent for unbounded discretion and futile action in other regulatory con-

texts. Contra *Industrial Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion) (rejecting interpretation vesting agency with "power to impose enormous costs that might produce little, if any, discernible benefit").

The Panel's approach also frustrates meaningful judicial review. Here, EPA found "endangerment" based on generalized reference to climate, global temperatures, and atmospheric CO_2 levels, without defining what conditions, temperatures, or levels constitute "danger." And EPA regulated emissions from new automobiles without deciding whether new automobiles meaningfully contribute to that danger.[2] EPA did so disclaiming any obligation to consider—indeed, claiming the statute *prohibited it* from considering—whether the resulting emission controls meaningfully mitigate the risks.

Put differently: Averting one-thousandth of a degree of temperature increase (see 75 Fed. Reg. at 25,495 (forecasting difference of .006-.015 ^{o}C)) may be rational if it represents a meaningful contribution to the difference between a safe and unsafe temperature, but because EPA has declined to identify the *goal* of its rules (*e.g.*, what temperature or GHG concentration is safe), it is impossible to ascribe any rationality to avoiding a temperature change too small to measure.

Such gaps in the administrative record make it impossible for a court to determine whether the Agency has articulated a rational connection between

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[2] EPA could not have made that finding, because the emissions in question will not occur: they will be avoided anyway through compliance with NHTSA's fuel-economy regulations.

facts found and choices made. Here, the gaps also expose a deeper flaw: EPA declined to quantify risk or estimate efficacy because it *cannot*. The physical characteristics of GHG, and profound uncertainties in climate science, prevent EPA from demonstrating whether or how regulation of GHGs from U.S. automobiles will tangibly protect health or welfare.

Given the "massive real-world consequences" of EPA's GHG regulatory regime, App. 116a (Kavanaugh, J., dissenting from denial of rehearing en banc), and the Panel's misreading of the Act and *Massachusetts* to compel a departure from fundamental principles of reasoned decisionmaking, this Court's review is warranted.

STATEMENT OF THE CASE

1. Regulation of domestic GHG emissions for the purpose of affecting the Earth's climate presents challenges unprecedented under the Act. Unlike traditional air pollutants, GHGs are well-mixed in the global atmosphere, such that their long-term concentrations depend not on local or even U.S.-based emissions, but sources worldwide. 73 Fed. Reg. at 44,401. Carbon dioxide is a trace constituent of clean air. Regulators face a host of uncertainties with GHGs not present for traditional air pollutants: numerous, poorly understood factors that affect the Earth's climate; the rate and magnitude of climate change; the benefits and detriments associated with any change (which vary geographically); and the countless number of natural and anthropogenic sources of GHGs worldwide. *Id.*

EPA, courts, and commentators recognize the magnitude of these challenges. See, *e.g.*, 68 Fed. Reg.

52,922, 52,930 (Sept. 8, 2003) (noting "complex web of economic and physical factors"); *American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2533 n.2 (2011) ("*AEP*") ("endors[ing] no particular view of the complicated issues related to carbon-dioxide emissions and climate change"); App. 101a-102a (Brown, J., dissenting from denial of rehearing en banc) (noting uncertainties). Even the UN Intergovernmental Panel on Climate Change ("IPCC")—whose assessments the EPA Administrator adopted as her own in the Endangerment Finding—has acknowledged the low level of scientific understanding of the principal factors affecting the Earth's climate: the sun, reflective effects (including effects from clouds), feedback effects triggered by atmospheric GHGs, and "external forcings" such as volcanos and aerosols. See IPCC, Fourth Assessment Report: Climate Change 2007: Working Group I, 201-202, 945 (Cambridge Univ. Press 2007).

2. In *Massachusetts*, this Court reviewed EPA's denial of a petition to regulate GHGs under Section 202 of the Act. EPA had concluded that it lacked authority to regulate GHGs as an "air pollutant," and that it would in any event decline to exercise such authority for reasons related to the President's climate change policies. 68 Fed. Reg. at 52,925-53,931.

This Court held narrowly that carbon dioxide and other GHGs fall within the Act's definition of "air pollutant." *Massachusetts*, 549 U.S. at 532; *AEP*, 131 S. Ct. at 2532-2533. The Court rejected EPA's "stated reasons" for declining to regulate as "divorced from the statutory text." *Massachusetts*, 549 U.S. at 505, 528, 532; see also *id.* at 533 ("[EPA's] reasons for action or inaction must conform to the authorizing

statute"). EPA could not decline to regulate, the Court held, based on "voluntary Executive Branch programs [that] already provide an effective response to the threat of global warming," interference with "the President's ability to negotiate with 'key developing nations,'" or because regulating GHG emissions under the Act would be "an inefficient, piecemeal approach." *Id.* at 533 (quoting 68 Fed. Reg. at 52,932).

Nonetheless, acknowledging the "unusual importance" of the issues and to ensure that its interpretation would not lead to "extreme measures" (549 U.S. at 506, 531), the Court emphasized the narrowness of its holding: "We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 534-535. EPA retained "significant latitude as to the manner, timing, content, and coordination of [any] regulations" that might follow such a finding. *Id.* at 533.

3. *Endangerment Finding*

a. In December 2009, EPA issued 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 * * * [GHGs] from new motor vehicles contribute to th[is] air pollution." 74 Fed. Reg. at 66,516, 66,537.

The Administrator asserted that GHGs generally are the "primary driver of current and projected climate change," adopting the IPCC's conclusion that an observed increase in global average temperatures "very likely" (*i.e.*, 90 percent probability) resulted

from increases in anthropogenic GHG concentrations. 74 Fed. Reg. at 66,517-66,518. EPA declined, however, to identify "a bright line, quantitative threshold above which a positive endangerment finding can be made, what atmospheric level of greenhouse gas endangers or is safe, or what environmental conditions (*e.g.*, temperature) it seeks to achieve. *Id.* at 66,523.

EPA relied instead on a generalized "weighing" of whether "risks and benefits, when viewed in total," support a judgment of endangerment. 74 Fed. Reg. at 66,524; see also *ibid.* (EPA "[did] not establis[h] a specific threshold metric for each category of risk and impacts"). The Administrator relied on general public health risks arising from increases in average temperature, extreme weather events, and ambient ozone, and public welfare risks relating to water resources, sea level rise, infrastructure and settlements, ecosystems and wildlife. *Id.* at 66,526, 66,534. Without meaningful discussion, proof or quantification, EPA concluded that documented benefits from warming (such as increased crop production, forest growth and productivity) were outweighed by generalized harms. *Id.* at 66,529, 66,531-66,532, 66,535.

b. EPA treated as "irrelevant" whether emission limits under Section 202 would meaningfully address the risks identified as the reason for regulating. 74 Fed. Reg. at 66,507. EPA interpreted Section 202 "as not requiring any * * * finding or showing" that the limits would "fruitfully" or "meaningfully" address any danger. *Id.* at 66,507-66,508; see also *id.* at 66,516 (concluding that the Act "[does] not requir[e] the consideration of the impacts of implementing the statute"). EPA declined to determine whether emissions from new motor vehicles cause or contribute to

the dangers invoked as the basis for regulating, or whether such emissions even contribute to concentrations of atmospheric GHGs. *Id.* at 66,507, 66,542.

The Administrator then concluded that emissions of aggregate GHGs from new motor vehicles "contribute to the air pollution that may reasonably be anticipated to endanger public health and welfare," on the ground that all U.S. mobile source categories collectively comprise 4 percent of global, and 23 percent of U.S., GHG emissions. 74 Fed. Reg. at 66,537.

4. *Tailpipe Rule*

Five months later, and on a separate administrative record, EPA issued Section 202 automobile emissions standards in a joint rulemaking with NHTSA. NHTSA's rule revised corporate average fuel economy standards for new automobiles and light-duty vehicles under the Energy Independence and Security Act of 2007. EPA's rule essentially converted NHTSA's fuel economy standards into "harmonized" limits on GHG tailpipe emissions. 75 Fed. Reg. at 25,371.[3]

EPA did not try to show that its tailpipe controls would have any meaningful effect on the identified climate "risks," or would generate any health or welfare benefits. To the contrary, EPA conceded that its rule would have an infinitesimal effect: By EPA's own calculations, in 90 years the Tailpipe Rule would avoid only 2.7-3.1 parts per million ("ppm") in atmospheric CO_2 concentrations, 0.006-0.015 ^{o}C global

[3] EPA's GHG emission limits correspond almost exactly to the NHTSA fuel economy standards, emissions being "essentially constant per gallon combusted," 75 Fed. Reg. at 25,327, with a slight variation because EPA's rule credits reduced emissions from air conditioners.

mean surface temperature increase, and 0.6-1.4 mm global mean sea level rise. 75 Fed. Reg. at 25,495-25,496. With telling understatement, EPA acknowledged that "the magnitude of the avoided climate change projected here is small"—indeed, "too small to address quantitatively in terms of their impacts on resources." 74 Fed. Reg. 49,454, 49,744 (Sept. 28, 2009); 75 Fed. Reg. at 25,496. (Even these estimates greatly over-credit the Tailpipe Rule, because it mostly replicates the GHG emission reductions occurring anyway under the NHTSA fuel economy standards. Compare 75 Fed. Reg. at 25,637, Table IV.G.2-2, with *id.* at 25,496, Table III.F.3-1.)

5. *Timing and Tailoring Rules*

In another rulemaking, EPA concluded that regulating vehicular GHG emissions under Section 202 triggers stationary-source regulation under the Clean Air Act's permit programs. See 74 Fed. Reg. 55,292, 55,294 (Oct. 28, 2009); 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Rule").

EPA acknowledged that stationary-source regulation of GHGs would generate "absurd" results Congress could not have intended, subjecting thousands of sources, including small, non-industrial sources, to reviews, and imposing (by EPA's estimates) $22.5 billion in paperwork costs alone. 75 Fed. Reg. 31,514, 31,517, 31,540 (June 3, 2010) (Table V-1). To cure this self-made absurdity, EPA sought to reduce the number of permits by revising upward ("tailoring") the statutory thresholds for regulation by several orders of magnitude. *Id.* at 31,514 ("Tailoring Rule").

6. Dozens of states and regulated parties sought review pursuant to 42 U.S.C. § 7607(b), challenging

EPA's interpretation of the Act, the adequacy of its record, and the Agency's reasoning and result as arbitrary and capricious. The Panel upheld the rules in their entirety. App. 8a.

The Panel interpreted *Massachusetts* to hold that EPA has a "'statutory obligation' to regulate harmful [GHGs]" following any endangerment finding. App. 9a. The Panel rejected the contention that EPA erred by divorcing its risk assessment (the Endangerment Finding) from its regulatory response (the Tailpipe Rule), construing Section 202 of the Act and *Massachusetts* to "foreclos[e]" the Agency from considering "the effectiveness of [its] emissions regulation." App. 15a-17a. In the Panel's view, Section 202 "requires EPA to answer only two questions: whether [GHGs] * * * 'may reasonably be anticipated to endanger public health or welfare,' and whether motor vehicle emissions 'cause, or contribute to' that endangerment." *Id.* at 16a. The Panel relieved EPA of any obligation to show that its adopted regulations limiting GHG emissions from motor vehicles would do anything to address any identified dangers. *Id.* at 16a-17a.

While recognizing that *Massachusetts* involved a specific "list of reasons" EPA had advanced in declining to regulate, the Panel read the opinion broadly to reject the possibility that *any* "considerations of policy" inform a Section 202 endangerment judgment. App. 16a-17a; cf. 549 U.S. at 534-535. The Panel considered "the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases" as "not part of the § 202(a)(1) endangerment inquiry." App. 17a-18a.

The Panel was unconcerned that EPA's failure to establish or even discuss a "quantitative threshold at which [GHG] or climate change will endanger or cause certain impacts to public health or welfare," App. 27a, would authorize regulation based on the Agency's mere "subjective conviction." Section 202, the Panel concluded, "necessarily" relieves EPA of "establish[ing] a minimum threshold of risk or harm before determining whether an air pollutant endangers." *Ibid.*

Finally, the Panel rejected claims that the regulation was arbitrary and capricious because EPA failed to "justify the Tailpipe Rule in terms of the risk identified in the Endangerment Finding" or to show that the emission standards would "meaningfully mitigate the alleged endangerment." App. 37a. In the Panel's view, nothing in the Act or case law requires the Agency to show a rational connection between risks and regulation, or to show "evidence of a[ny] particular level of mitigation." *Id.* at 38a. All that was required to justify EPA's chosen tailpipe limits was "a showing [that automobile emissions make a] significant contribution" to "domestic greenhouse gas *emissions*." *Ibid.* (emphasis added). The Panel concluded that standard was satisfied by EPA's estimate of the anticipated reduction in tons of CO_2 emitted, even though the record showed those reductions would not meaningfully ameliorate the identified risks, and would largely occur anyway as a result of the NHTSA fuel economy standards. *Ibid.*

7. The court of appeals denied petitions for rehearing en banc over two substantial dissents. App. 87a. Judge Kavanaugh dissented on the ground that EPA had "exceeded its statutory authority" because

GHGs are not an air pollutant for purposes of stationary-source regulation. *Id.* at 116a-117a. Judge Brown also dissented, explaining her broader concern that regulation of GHGs under any provision of the Act "rest[s] on the shakiest of foundations." *Id.* at 93a. "Ambient air quality," she reasoned, "was the point, purpose, and focus of the [Act]"—"[t]he [Act] was drafted not to combat the threat of flooding or the menace of heat waves, but the choking, stifling, and degenerative effect of airborne pollutants on human beings and their affected localities." *Id.* at 94a, 98a.

In Judge Brown's view, GHGs did not inflict harm "of the sort" that may "reasonably [be] anticipated to endanger" public health or welfare for purposes of regulation under Section 202. App. 99a. To satisfy Section 202, EPA "would have to"—but did not—"conclude that pollution created by [GHGs] * * * is a *reasonably direct* cause of the damage to public health and welfare." *Id.* at 101a (emphasis added). Harms like sea level rise, Judge Brown explained, "tel[l] us nothing about whether [GHG] concentrations in the ambient air harm public health and welfare." *Ibid*. Judge Brown emphasized the "long speculative chain" required to link GHGs to health and welfare effects, including uncertainties about the magnitude of future emissions, the fate of GHGs in the atmosphere, and climate feedbacks such as cloud cover and ocean circulation. *Id.* at 101a-102a. "If there can be this much logical daylight between the pollutant and the anticipated harm," Judge Brown explained, "there is nothing EPA is not authorized to do." *Ibid.*

REASONS FOR GRANTING THE WRIT

This case is "plainly one of exceptional importance" in both practical and legal terms. App. 116a (Kavanaugh, J., dissenting from denial of rehearing en banc); accord *id.* at 91a (Sentelle, C.J., concurring in the denial of rehearing en banc); *Massachusetts*, 549 U.S. at 506 (recognizing "unusual importance" of issues). EPA's regulations have "massive real-world consequences," App. 116a (Kavanaugh, J., dissenting from denial of rehearing en banc), burdening "virtually every sector of the economy and touch[ing] every household in the land." 73 Fed. Reg. at 44,355; accord *AEP*, 131 S. Ct. at 2539 (noting that "our Nation's energy needs and the possibility of economic disruption * * * weigh in the balance," and citing certiorari review as check on arbitrary EPA action).

This far-reaching, ever-expanding regime rests on a misapprehension of *Massachusetts* and an interpretation of the Act inconsistent with basic principles of administrative law and statutory construction, warranting certiorari. See, *e.g.*, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 109 (1958) (granting certiorari where Panel "misinterpreted [a] recent decision [of this Court]"); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 926 (1982) (inconsistency with prior decisions of this Court); *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 340 (2005) (Panel's views "differ from those of other Circuits"). The Panel's conclusion that the statute *requires* EPA to disregard the (in)efficacy of its regulatory response insulates the current GHG regime from reconsideration, preventing the Agency from ever revisiting its current policy and thus freezing in place a regulatory

regime embodying "epic overreach," App. 105a (Brown, J., dissenting from denial of rehearing en banc). Certiorari is warranted. Cf. *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("enormous potential liability * * * is a strong factor in deciding whether to grant certiorari"); E. Gressman et al., Supreme Court Practice 268-269 (9th ed. 2007) ("novel application of a broad statute" supports certiorari).

I. The Panel Opinion Conflicts With Fundamental Principles Of Administrative Law And Statutory Construction That Prohibit Reading A Statute To Authorize—Much Less To Compel—Futile Regulation

Plenary review is appropriate because EPA's regulatory regime rests on a misreading of this Court's decision in *Massachusetts*, and a novel legal interpretation that is irreconcilable with the administrative-law decisions of this Court or any other.

A. The Panel Opinion Conflicts With The Requirement That An Agency Articulate A Rational Connection Between The Risks Found And The Regulatory Choices Made

Few principles of administrative law are more fundamental than the requirement that an agency "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington*

Truck Lines, Inc. v. *United States*, 371 U.S. 156, 168 (1962)). Grounded in the statutory prohibition on arbitrary and capricious agency action, 42 U.S.C. § 7607(b)(9), 5 U.S.C. § 706(2)(A), this rule requires courts to set aside administrative action where an agency's "explanation * * * is not sufficient to enable [the court] to conclude that the [action] was the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 52.

An agency cannot show a "rational connection" between facts found and choices made when it declines to address whether its chosen regulatory measures will meaningfully address the problem the agency seeks to ameliorate, or even to define the level of risk to be achieved through regulation. This deficiency is most easily illustrated by contrast to how EPA previously understood and applied its obligations under Section 202, in regulating lead in gasoline. See *Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir. 1976) *(en banc)*. There, EPA treated the endangerment finding as the means to determine whether dangers from lead could be meaningfully reduced by regulating lead in gasoline under the Act. In particular, EPA identified a specific risk to public health (impaired brain function) and a measure to evaluate the risk (blood lead levels). *Id.* at 38-39. EPA selected a blood lead level correlated with an acceptable degree of brain function impairment, and explained why it was sufficient to avoid "endangerment," as compared to higher and lower alternatives. *Id.* at 38-40. The Agency analyzed the various pathways for human lead exposure, and concluded that airborne exposure (the pathway related to automobile emissions) was significant, such that regulating lead in gasoline in the manner chosen

would meaningfully reduce airborne exposure and "fruitfully * * * attac[k]" the problem of impaired brain function. *Id.* at 31 n.62, 42-47, 55-65. The D.C. Circuit upheld the rulemaking only after carefully assessing each step in the Agency's reasoning.

Here, by contrast, EPA identified only generalized risks such as "climate change," 74 Fed. Reg. at 66,497—risks that exist independent of human activities, 73 Fed. Reg. at 44,380-44,381—that EPA believes will result from increased GHG concentrations in the global atmosphere. 74 Fed. Reg. at 66,523-66,536. And EPA concluded that automobiles contribute to emissions of GHGs. *Id.* at 66,537. But EPA declined to find that automobiles contribute to the danger, or to establish any GHG thresholds or levels for "endangerment." *Id.* at 66,541. Then, in a separate, later action under Section 202, EPA declined to show how its chosen emissions controls—or indeed, *any* controls under Section 202—would meaningfully address the climate-related effects it invoked as the basis for regulating. *Id.* at 66,507; 75 Fed. Reg. at 25,495. EPA acted as though it would have sufficed to say in the leaded gasoline rulemaking that "there is too much lead in the atmosphere. Cars emit lead. We will require refiners to stop using lead in gasoline."

Given the analytical and record gaps in the Endangerment Finding and Tailpipe Rule, "'[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which [EPA] exercised its expert discretion.'" *State Farm*, 463 U.S. at 48 (quoting *Burlington Truck Lines*, 371 U.S. at 167). The Panel nonetheless denied review, freeing EPA of

any obligation to show that its rules "would meaningfully mitigate the alleged endangerment." App. 37a.

In so doing, the Panel failed to hold EPA even to the Panel's own expressed understanding of Section 202—as "requir[ing] EPA to [decide] * * * whether motor-vehicle emissions 'cause, or contribute to' th[e] *endangerment*" of health or welfare, App. 16a (emphasis added)—and instead asked whether cars contribute to *emissions*, *id.* at 38a. EPA's rulemaking could not survive scrutiny under the first interpretation, as EPA expressly declined to find "endanger[ment]" from the sources subject to Section 202 regulation. 74 Fed. Reg. at 66,542.

Only an interpretation that requires a contribution to "endanger[ment]" is faithful to the Act's text and structure. Section 202 instructs EPA to regulate emissions from mobile sources "which contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." Requiring EPA to determine whether mobile-source emissions "may reasonably be anticipated to endanger public health or welfare" accords with background principles of administrative law. And it avoids the "absurd" consequences that EPA concedes follow from its alternate interpretation, in which the Agency improperly divorces the finding of endangerment from the regulations the finding is intended to inform. 75 Fed. Reg. at 31,517.

Petitioners' interpretation of Section 202 also avoids the prospect—realized here—of arbitrary and capricious agency action, whereby a regulation does nothing to "accomplish its intended purpose." *State Farm*, 463 U.S. at 51. In *State Farm*, NHTSA had rescinded a rule requiring automatic passenger re-

straints in new motor vehicles because the agency could not "reliably predic[t] that the [rule] would lead to any significant increased usage of restraints at all." *Id.* at 39. The agency concluded its rule was not "reasonable or practicable" because vehicle occupants might simply detach automatic seatbelts, rendering them no safer than manual seatbelts and yielding only "minimal safety benefits." *Ibid.* Although this Court identified deficiencies in the administrative record, it expressly *affirmed* the underlying legal proposition: "[w]e agree * * * an agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy." *Id.* at 51-52.

Here, EPA and the Panel interpreted the Act in a contrary fashion, as a mandate to regulate without regard for whether regulation is effective. The Panel read Section 202 and *Massachusetts* to impose a "nondiscretionary duty [on] EPA" to regulate mobile-source emissions, and found irrelevant Section 202(a)(2)'s references to costs and other policy concerns. App. 35a-37a (latter provision provides only "limited flexibility"). Indeed, the Panel's decision went beyond rejecting *State Farm* (which affirmed an agency's ability to decline to regulate based on uncertainty about efficacy, 463 U.S. at 51-52) to conclude that efficacy is irrelevant to the inquiry. That an agency must regulate in the face of evidence that its actions would be ineffective finds no basis in *State Farm* or this Court's other precedents. See, *e.g.*, *Industrial Union*, 448 U.S. at 663-664 (Burger, C.J., concurring) (agency appropriately declined to regulate where "administrative record reveal[ed] only scant or minimal risk of material health impairment"); Lester M. Salamon, Economic Regulation, *in*

The Tools of Government 126 (Lester M. Salamon ed., 2002) (prohibition on arbitrary or capricious action requires agency to demonstrate "that a connection exists between the regulation and the problem it is intended to solve").

The Panel's interpretation of Section 202 also relieved EPA from an essential constraint on agency discretion, which this Court endorsed in *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001). *Whitman* interpreted a related provision of the Act to require EPA to show that its chosen level of regulation is the least restrictive means to achieve the agency's stated public health goals—i.e., regulation that is "sufficient, but not more than necessary" to "protect public health from the adverse effects of the pollutant in the ambient air." *Id.* at 473.

EPA itself has acknowledged that regulation "would not be appropriate" if "limitations in relevant data" and "uncertainties" "are of such a significant nature and degree as to prevent [EPA] from reaching a reasoned decision as to what * * * [emission] standard would provide any particular intended degree of protection of public welfare." 77 Fed. Reg. 20,218, 20,255-20,256 (Apr. 3, 2012). But EPA and the Panel here disclaim the obligation to show *any* such connection between regulation and risk—indeed, both claim they are *prohibited* from even considering it. 74 Fed. Reg. at 66,507; App. 16a, 37a-39a. That is far from the searching inquiry required by *Whitman*.

The D.C. Circuit has previously acknowledged the irrationality of agency action that fails to explain how the chosen regulatory standard would produce benefits. *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) *(en banc)*, addressed an

endangerment finding and emission limitation under Section 112 of the Act. Similar to Section 202, Section 112 directs EPA to regulate hazardous air pollutants which in EPA's judgment "caus[e], or contribut[e] to, air pollution which may reasonably be anticipated to result in an increase in mortality [or other serious illness]." 824 F.2d at 1148 (citing 42 U.S.C. § 7412(a)(1) (1982)). The court criticized EPA for failing to compare the levels of risk present under baseline conditions with risks remaining after its regulation—i.e., to address the rule's expected efficacy—or to explain "why [its rule] was 'safe' and the other was not." *Id.* at 1148, 1164. See also *American Corn Growers Ass'n*. v. *EPA*, 291 F.3d 1, 7 (D.C. Cir. 2002) (criticizing "EPA's take on the statute," under which it was "entirely possible that a source may be forced to spend millions of dollars for new technology that will have no appreciable effect").

Other courts have adopted a similar view. See, *e.g.*, *Ober* v. *Whitman*, 243 F.3d 1190, 1193-1194 (9th Cir. 2001) (upholding EPA's judgment that it "would be unreasonable" to impose emission controls on sources that "contribute only negligibly to ambient [pollutant] concentrations"); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (statute does not compel agency to engage in "meaningless exercise").

In short, as *Massachusetts* held that EPA erred by categorically refusing to consider evidence of risk based on certain policy considerations, this case involves the converse question: whether EPA erred by considering risk while categorically excluding practical and policy implications. Review by this Court is needed to ensure fidelity to core principles of administrative law.

B. The Panel's Interpretation Conflicts With The Canon That Statutes Should Not Be Construed To Impose Meaningless Requirements

This Court will not interpret a statute in a manner that deprives it of real or substantial effect. See, *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687, 701 (1995) (courts "presume" that Congress enacts legislation with the expectation that the enactment will "have real and substantial effect" (quoting *Stone* v. *INS*, 514 U.S. 386, 397 (1995)). For instance, *Pierce County, Washington* v. *Guillen*, 537 U.S. 129, 145 (2003), rejected an interpretation that would have rendered a statutory provision an "exercise in futility"—in the sense of "protect[ing]" certain interests "already protected" in the absence of that provision.

This general canon of construction aligns with this Court's longstanding view that, absent a contrary statutory command, agencies are not compelled to apply their regulatory authority woodenly, to burden *de minimis* contributors to a problem being regulated. See, *e.g.*, *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 399 (1974); *Volkswagenwerk, A.G.* v. *FMC*, 390 U.S. 261, 276-277 (1968).

Accordingly, courts of appeals have declined to interpret the Clean Air Act to compel regulation in circumstances involving minimal environmental impacts. *Connecticut* v. *EPA*, 696 F.2d 147, 163-165 (2d Cir. 1982), involved challenges to EPA approval of New York's State Implementation Plan, which allowed power plants to burn fuel with a particular sulfur content. The challengers asserted that the in-

creased sulfur emissions would "'prevent the attainment'" of air quality standards in Connecticut. *Id.* at 162 (citing 42 U.S.C. § 7410(a)(2)(E) (Supp. IV 1980)). The court rejected the challenges, noting EPA's conclusion that the "impact" of the emissions "would be minimal"—i.e., an increase of less than 1.5% of the ambient standard. 696 F.2d at 163-165. The court declined to interpret the Act to compel EPA to regulate "even minimal [environmental] impacts." To the contrary, EPA had no obligation to regulate environmental "impact[s] * * * so insignificant as to be fairly described as minimal." *Id.* at 165. The court so held even though the statute did not specify what level of pollution would "prevent" attainment, or contain any express limitation to "significant" contributions. *Id.* at 164.

The Sixth Circuit took a similar approach in *Air Pollution Control District* v. *EPA*, 739 F.2d 1071, 1092-1093 (1984). Interpreting the same statute, the court recognized that Congress had provided no explicit "threshold for Agency intervention." The court nonetheless held that the Act was best read to contemplate EPA action only where emissions "significantly contribut[e]" to another State's violations. The court specifically rejected the suggestion that "Congress intended to prohibit even *de minimis* contributions by one state to [air quality] violations in another state." *Id.* at 1093. Applying that standard, the court upheld EPA's conclusion that it had no obligation to regulate sources contributing 3% of the downwind state's pollution.

The Seventh Circuit has explicitly declined to interpret Section 114 of the Act to "impos[e] on the EPA an arbitrary and meaningless requirement." *Ced's*

Inc. v. *EPA*, 745 F.2d 1092, 1100 (7th Cir. 1984); see also *American Dental Ass'n* v. *Martin*, 984 F.2d 823, 827 (7th Cir. 1993) ("irrational" for agency to "impose onerous requirements on an industry that does not pose substantial hazards * * * merely because the industry is a part of some large sector or grouping and the agency has decided to regulate at wholesale"). Other circuits agree. See *Sierra Club* v. *EPA*, 314 F.3d 735, 744 (5th Cir. 2002) (courts reluctant to require "pointless expenditure of effort"); *Connecticut Fund for the Environment, Inc.* v. *EPA*, 696 F.2d 179, 183 (2d Cir. 1982) (same); *Ober*, 243 F.3d at 1193-1194 (9th Cir.) (similar).

Prior to this case, the D.C. Circuit had long recognized a similar principle. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979), admonished that "[c]ourts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort." Except where a statute is phrased in "extraordinarily rigid" language, the court explained, Congress must not be presumed to require regulation "when the burdens of regulation yield a gain of trivial or no value." *Id.* at 360-361; *Association of Admin. Law Judges* v. *FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) ("Congress is always presumed to intend that pointless expenditures of effort be avoided"). No such extraordinary mandate is present here. Cf. *Sierra Club* v. *EPA*, 705 F.3d 458, 467-69 (D.C. Cir. 2013).

Nor does EPA's reading of Section 202 align with congressional intent. As EPA itself has acknowledged, Congress codified *Ethyl* when it amended Section 202. 74 Fed. Reg. 18,886, 18,891-18,892 (Apr. 24, 2009); 74 Fed. Reg. at 66,506; H.R. Rep. 95-294, at

43-51 (1977).[4] In *Ethyl*, EPA had carefully justified its decision to regulate lead in gasoline at a particular level by showing that it would prevent a considerable part of the public health danger posed by exposure to lead. The D.C. Circuit upheld EPA's action at least in part on the ground that "the lead exposure problem can fruitfully be attacked through control of lead additives" in vehicle fuels. 541 F.2d at 31 n.62; accord *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 525 (D.C. Cir. 1983) (EPA must explain why regulation of emissions at specific level "rather than some other [level]" is "appropriate").

EPA's interpretation of the Section 202 "endanger[ment]" inquiry, affirmed by the Panel below, conflicts with these cases, and with the requirement that regulations meaningfully address the problem an agency is seeking to regulate. EPA's *own predictions* about the Tailpipe Rule's (in)efficacy illustrate how far its actions here diverge from precedent. The Tailpipe Rule will not have any measurable effects, especially beyond what the NHTSA fuel-economy standards will accomplish: According to both agencies' predictions, the Tailpipe Rule's (imperceptible) benefits will be fully achieved by NHTSA's fuel economy rules alone.[5] Put differently, EPA has found "endan-

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[4] The Act's legislative history explains that the statutory endangerment requirement was included "[t]o emphasize the preventive or precautionary nature of the [A]ct, i.e., to assure that regulatory action can effectively prevent harm before it occurs." H.R. Rep. 95-294, at 49.

[5] NHTSA estimates its standards will prevent a 2.7 ppm increase in atmospheric CO_2 concentration, a 0.011 ^{o}C increase of mean surface temperature, and a 0.09 cm increase in global mean sea level rise. 75 Fed. Reg. at 25,637, Table IV.G.2.-3. EPA estimates the Tailpipe Rule's projected effects to be essen-

ger[ment]" (and justified its extensive regulation of GHG) from emissions that EPA knows will not actually occur, including from two pollutants no car emits. 75 Fed. Reg. at 25,399.

Even if the Tailpipe Rule will achieve some theoretical benefits beyond NHTSA's standards (i.e., due to regulation of emissions from air conditioning), EPA failed to explain why those infinitesimal marginal benefits justify this regulatory "cascade." And even (counterfactually) ascribing to the Tailpipe Rule all of the joint rulemaking's expected benefits, EPA's expected effects are so small as to be imperceptible, both in absolute terms and in relation to the risks identified as the basis for regulating.[6] EPA concedes "the magnitude of the avoided climate change projected here is small." 74 Fed. Reg. at 49,589. Indeed, as a fraction of the climate effects the IPCC expects to occur by 2100, the Tailpipe Rule would avoid 0.15% of projected temperature rise and as little as 0.10% of sea-level rise. Such projected changes—mere hundredths of one percent—are "too small to address

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tially identical: 2.7-3.1 ppm in atmospheric CO_2 concentration, 0.006-0.015 °C in mean surface temperature, and 0.06-0.14 cm in global mean sea level. *Id.* at 25,496, Table III.F.3-1. These changes are imperceptible to human beings, particularly when spread over the 90-year period in which the regulations are projected to have that effect.

[6] EPA estimates the baseline atmospheric concentration of CO_2 in 2100 to range between 535 and 983 ppm. See EPA, Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act 195 (Dec. 7, 2009). Even assuming the Tailpipe Rule achieves EPA's maximum estimated reduction of 3.1 ppm by 2100 (see 75 Fed. Reg. at 25,496, Table III.F.3-1), the projected atmospheric concentration would remain essentially unchanged at a range of 531.9-979.9 ppm.

quantitatively in terms of their impacts on resources." *Id.* at 49,744.

By any reasonable measure, the negligible mitigation expected to occur nine decades hence falls short of the contributions this Court and others have found sufficient to trigger an agency's regulatory obligations. See *State Farm*, 463 U.S. at 39; *Connecticut*, 696 F.2d at 163-165; *Air Pollution Control Dist.*, 739 F.2d at 1092-1093. Nor do these contributions justify distorting the Act so severely as to require "tailoring" its unambiguous text to avoid absurd results.

C. The Panel And EPA Misread *Massachusetts* v. *EPA*

This extraordinary regulatory regime rests on EPA's and the Panel's mistaken view that *Massachusetts* compels it. But this Court's holding in *Massachusetts* was self-consciously narrow: CO_2 and other GHGs fall within the Act's statutory definition of "air pollutant." 549 U.S. at 528-529. Because EPA had initially declined to regulate based on its contrary conclusion, *Massachusetts* authorized the Agency on remand to form a judgment about whether GHGs "endanger" public health and welfare. *Id.* at 532-533. This Court explicitly left open, however, the possibility that EPA could give "some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether [GHGs endanger]." And the Court declined to address "whether policy concerns can inform EPA's actions in the event that it makes [an endangerment] finding." *Id.* at 533-535.

EPA now reads *Massachusetts* to "ma[k]e clear" that its "judgment in making the endangerment and contribution findings" must be "based solely on the

scientific and other evidence relevant to that decision." 74 Fed. Reg. at 66,507. On the basis of that reading, EPA concluded the "effectiveness of a potential future control strategy" is categorically "irrelevant." *Id.* at 66,507-66,508; see also *id.* at 66,508 ("EPA has no discretion").

The Panel took EPA's flawed analysis further, concluding that *Massachusetts* "foreclosed" EPA's discretion to consider "the effectiveness of emissions regulation triggered by the Endangerment Finding." App. 15a. In the Panel's view, *Massachusetts* prohibited EPA from including *any* "considerations of policy" in its endangerment analysis. *Id.* The Panel also read *Massachusetts* to deprive EPA of discretion to defer or decline to regulate mobile-source emissions. *Id.* at 36a (EPA "was in no position to 'avoid taking further action'").

EPA and the Panel overread *Massachusetts*. This Court emphasized EPA's "significant latitude as to the manner, timing, content, and coordination" of any regulations, leaving open the possibility that EPA would provide a "reasonable explanation as to why it cannot or will not exercise its discretion." 549 U.S. at 533. And this Court carefully addressed the particular policy-related reasons advanced by EPA as a basis for declining to regulate, concluding that those reasons were "divorced from the statutory text." *Id.* at 532.

The Court did not address the universe of considerations that might arise on remand; to the contrary, the Court suggested approval of reasons grounded in the statute's text. 549 U.S. at 535. *Massachusetts* did not discuss, for instance, whether EPA would have discretion to define "endanger[ment]" in Section

202 by reference to other parts of the statute that indicate the Act's intended scope and application, such as the stationary-source permitting requirements whose application to GHG would lead to "absurd" consequences, 74 Fed. Reg. at 55,294; 42 U.S.C. §§ 7475, 7661-7661f.

Nor did this Court consider the textual reasons to believe an endangerment determination under Section 202 must be related to the decision to regulate under that section, especially given numerous other sections that require *separate* endangerment findings in connection with a decision to regulate other sources. See, *e.g.*, 42 U.S.C. § 7411(b)(1)(A) (new source performance standards); *id.* § 7415(a) (international air pollution); *id.* § 7545(c)(1) (fuel additives); *id.* § 7547(a)(4) (nonroad engines); *id.* § 7571(a)(2) (aircraft engines). *Massachusetts* did not address, much less reject, the argument that "endanger[ment]" must be determined for each specific source type for which a statutory provision authorizes regulation, rather than a single, abstract determination that "GHG endanger." Nothing in the Act authorizes such a finding, instead contemplating a source- and context-specific analysis for each potential source of endangerment—i.e., a record of risks developed to inform rational regulation of those risks.

EPA's misreading of *Massachusetts* pretermitted the Agency's endangerment analysis, generating a suite of rules promulgated without regard to whether they bear a rational relationship to the stated reasons for regulating. The Panel endorsed EPA's flawed interpretation that these actions are *compelled* by statute and *Massachusetts*. That error not only mistakenly upholds EPA's current regime, but entrenches it

against future change. If, for instance, implementation of EPA's current rules convinces the Agency its current policy is misguided, the Panel's interpretation of what the Act requires may prevent EPA from taking a different approach. *Cf. National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 979 (2005) (granting certiorari where Panel decision improperly constrained agency discretion). Plenary review by this Court is needed to avoid that result.

II. The Panel Authorizes EPA To Regulate As Much Or As Little As It Likes, And Frustrates Meaningful Judicial Review

The Panel and EPA's departure from traditional administrative-law principles dramatically expands EPA's regulatory authority and allows for agency action unconstrained by meaningful judicial review.

A. The Panel's Interpretation Of The Act Authorizes EPA To Promulgate Regulations Of Arbitrary Stringency

The Panel held that Section 202 requires EPA to limit mobile-source emissions based on an abstract showing that motor vehicles contribute to GHG emissions, without considering whether the limits would meaningfully mitigate the risks EPA invoked as the purpose of regulation. App 39a.

By eliminating any requirement to show a rational connection between the Agency's chosen means and its stated environmental purpose, the Panel authorizes EPA to promulgate emission standards as arbitrarily stringent or permissive as EPA chooses.

As Judge Brown observed, given the characteristics of climate change and the abstract nature of the "endangerment," there is "[so] much logical daylight between the pollutant and the anticipated harm [that] there is nothing EPA is not authorized to do."[7] App. 102a.

The D.C. Circuit previously reached a similar conclusion in *Small Refiner*. EPA had sought to justify its numerical standard for a particular fuel additive by "only show[ing] that [the pollutant] threatens human health and that [EPA's] regulation will reduce [that pollutant]" in gasoline. The court rejected that reasoning as fundamentally "incomplete." 705 F.3d at 525. By the Agency's logic, the existence of some generalized "adverse health effects would permit [EPA] to justify any [pollutant] standard at all, without explaining why it chose the level it did." *Ibid.* So too here.

It is implausible to conclude that Congress delegated unbounded authority to EPA given the widespread consequences of regulating GHGs under the Act. See *Whitman*, 531 U.S. at 475 (Congress "must provide substantial guidance on setting air standards that affect the entire national economy"). The Court's holding in *Massachusetts* was based on the under-

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[7] The Panel noted EPA's estimate that the Tailpipe Rule would reduce GHG *emissions* from mobile sources by a certain number of tons over the lifetime of regulated vehicles. App. 38a. But the Panel's discussion underscores its failure to consider that reduction's infinitesimal effect on GHG concentrations, asserting without analysis or point of reference that the figure constituted "meaningful mitigation of [GHG] emissions." *Ibid.* Like EPA, the Panel drew no connection between that reduction and the underlying risks or effects on climate or temperature.

standing that its interpretation of "air pollutant" would not lead to "extreme measures." 549 U.S. at 531-532. EPA's actions on remand contradict that expectation, both by removing constraints on Section 202 emission standards and triggering far-reaching stationary-source regulation that even the Agency concedes is beyond Congress's contemplation. 75 Fed. Reg. at 31,555.

B. The Panel's Interpretation Of The Act Frustrates Meaningful Judicial Review

The Panel's decision also frustrates effective judicial review, because it upholds EPA's regulations despite the absence of key findings necessary to evaluate whether the rules are arbitrary or capricious.

If "adequate judicial review is to be obtained, the agency must provide a written decision that clearly sets out the grounds which form the basis of its action." *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994, 1004 (7th Cir. 1980) (citations omitted). Where Congress has delegated to an agency "the power to make decisions of national import," the agency "has the heaviest of obligations to explain and expose every step of its reasoning." *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998).

As discussed above, the Panel upheld EPA's suite of regulations despite significant gaps in the administrative record. Unlike EPA's careful chain of reasoning in *Ethyl*, the Endangerment Finding here jumps from the non-falsifiable assertion that greenhouse gases cause a greenhouse effect of uncertain magnitude directly to the conclusion that GHGs sufficiently endanger public health and welfare to warrant the

Tailpipe Rule's specific level of GHG reductions (which happened to be the same levels independently imposed by NHTSA). EPA here failed to "estimate the [effects on endangerment risks] it expected" to result from a particular emission limit or "any other standard," and to explain "what [level of risks] it wanted to reach"—the same shortcomings the D.C. Circuit identified in *Small Refiner*. 705 F.2d at 531.[8] See also *Lead Indus. Ass'n, Inc.* v. *EPA*, 647 F.2d 1130, 1162 (D.C. Cir. 1980) (choice between two policy approaches must be explained).

EPA also declined to identify any "bright line, quantitative threshold above which a positive endangerment finding can be made." 74 Fed. Reg. at 66,523. The Agency failed to make findings about a safe atmospheric level of GHGs, or the environmental conditions (e.g., temperature) its regulations are intended to achieve. And EPA relied on generalized and unexplained "weighing" of whether "risks and benefits, when viewed in total," yield endangerment. *Id.* at 66,524.

As in *Small Refiner*, it is not enough for EPA to conclude that a pollutant "endangers," and that the Tailpipe Rule will reduce levels of that pollutant. "A simpleminded argument that '[a pollutant] is bad and our rule reduces [that pollutant]' does not satisfy

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[8] The Panel's only basis for distinguishing *Small Refiner* was that the case addressed "guidelines for assessing EPA's discretion to set numerical standards," and petitioners purportedly "do not challenge the substance of the [GHG] emission standards," App. 38a. That distinction ignores *Small Refiner*'s extensive discussion of "[w]hat [c]onstitutes [a]dequate [a]gency [r]easoning," and that failure to justify specific levels was "incomplete reasoning" warranting vacatur. 705 F.2d at 525.

th[e] [agency's] duty" to "explain[n] why it chose the level it did." 705 F.2d at 525. That concern is particularly apt when the "pollutant" (unlike lead) is not inherently harmful, but (like CO_2) a natural constituent of clean air, necessary for life on Earth; where the object of regulation (climate) is constantly changing independent of human activity; and where climate effects such as warmer temperatures benefit some and harm others. See 74 Fed. Reg. at 66,499; *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027, 1051-1052 (D.C. Cir. 1999) (rejecting EPA's refusal to consider beneficial effects of regulated substance), rev'd on other grounds sub nom, *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001). By refusing to conduct a complete analysis or make relevant findings, EPA deprives courts of the record necessary to evaluate whether emission standards are a rational tool for mitigating identified health and welfare risks. See *Northwest Coalition for Alternatives to Pesticides* v. *EPA*, 544 F.3d 1043, 1052 (9th Cir. 2008) (vacating EPA rule that "d[id] not explain the connection between the [risk] data and the [standard selected]," leaving court "entirely unclear" whether EPA "chose th[e] * * * safety levels arbitrarily").

This case raises the specter of unconstrained agency action that this Court long ago sought to prevent through "hard look" judicial review and regular administrative procedures: "unless [courts] make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *State Farm*, 463 U.S. at 48 (internal quotation marks omitted, emphasis omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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