Oral Argument Not Yet Set

No. 09-1322 (Complex)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Environmental Protection Agency Final Orders

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Consolidated with 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) All parties, intervenors, and amici appearing in this Court are listed in the Joint Brief for the Non-State Petitioners and Supporting Intervenors and the Brief of Texas for State Petitioners and Supporting Intervenors.

(B) References to the rulings at issue appear in the Joint Brief for the Non-State Petitioners and Supporting Intervenors and the Brief of Texas for State Petitioners and Supporting Intervenors.

(C) Related cases are identified in Joint Brief for the Non-State Petitioners and Supporting Intervenors and the Brief of Texas for State Petitioners and Supporting Intervenors.

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GLOSSARY OF ABBREVIATIONS

CAA – Clean Air Act

CBA – cost-benefit analysis

EIA – Economic Impact Assessment

EPA – Environmental Protection Agency

GHG – greenhouse gas

OMB – Office of Management and Budget

PSD – Prevention of Significant Deterioration

RIA – Regulatory Impact Analysis

RFA – Regulatory Flexibility Act

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

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NFIB represents over 300,000 member businesses nationwide, and its membership reflects the entire spectrum of American small business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will affect small businesses.

This Court granted the *amici* leave to participate in orders dated February 24, April 9, April 14, and April 22, 2010. No party's counsel authored this brief in any part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amici*, their members, and their counsel—contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(c)(5).

INTRODUCTION

In promulgating the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act (the "Endangerment Finding")—a regulatory action that will have sweeping (and perhaps crippling) economic effects— the Environmental Protection Agency ("EPA") did not conduct any substantive cost-benefit analysis. The Agency had ample tools had it wanted to use them, among them as undertaking an Economic Impact Assessment (EIA) or Regulatory Impact Analysis (RIA).

EPA should have recognized that the statutory command to give "appropriate consideration to the cost of compliance" in Clean Air Act (CAA) section 202(a) required it to do what any rational administrative agency would do when proposing to brand as a danger to human health a ubiquitous naturally occurring compound and byproduct of almost all energy generation (not to mention human and animal respiration): The Agency should have rigorously assessed whether any reasonably expected benefit outweighed the potentially gargantuan costs of exposing such commonplace substances to CAA regulation.

Because it provided no meaningful analysis of the costs and benefits of its rule, however, EPA failed to engage in reasoned decision-making. As a consequence, the Endangerment Finding should be vacated and remanded.

EPA's evasion of its responsibility was intertwined with its decision to isolate its finding of endangerment from any specific, substantive regulatory action, notwithstanding the contrary direction in the text of Section 202(a). That improper separation between the Finding and the series of proposed regulations that quickly followed allowed EPA to proclaim the benefits of its chosen course in a vacuum, without reference to its costs. Yet, once made, the Finding as to six greenhouse gases (GHGs) inevitably required regulations that extend beyond mobile sources (as the Agency's subsequent regulatory course has made clear).

By treating the Endangerment Finding separately, however, EPA has sidestepped consideration of the costs of the regulations that logically follow. Instead it treats the need for stringent regulations as largely incontestable in the wake of the Finding, with consideration of costs to proceed as a matter of *ex post* agency discretion rather than reasoned *ex ante* analysis.

The implementation of the Finding and the inevitable follow-on rules demonstrates that EPA acted unreasonably in promulgating a free-standing endangerment finding untethered to a substantive rule. EPA shut its eyes to the predictable regulatory consequences of adopting the Finding. Yet EPA's conclusion just a few months later that the Finding compelled substantial additional regulation, regardless of cost, illustrates why it was unreasonable to separate the assessment of endangerment from consideration of the costs of

compliance. EPA cannot rely on the purported precautionary language of Section 202(a) as a substitute for its obligation to perform meaningful cost-benefit analysis.

A reasonable economic analysis would have determined that implementation of the GHG regulatory framework (as a seemingly inevitable sequel to the Endangerment Finding) will impose widespread and substantial costs on broad segments of the economy, including those most responsible for job creation and innovation, constraining economic growth in the short and long term. In making the Finding, the Agency overlooked numerous and significant direct and indirect costs that will significantly burden small and medium-sized businesses which lack administrative infrastructure and cannot amortize the costs of compliance over their modest volumes of sales. The additional costs associated with compliance with GHG regulations alone will have severe adverse consequences for these entities, and raise significant barriers to entry for new enterprises.

Yet the Finding also appears to reflect a predetermined conclusion that pervasive regulation in the name of preventing climate change is an end that justifies the means regardless of cost. Any constraints on the cost of compliance may arise only as a matter of administrative grace.

The Endangerment Finding should be vacated and remanded as arbitrary, capricious, and unreasonable.

ARGUMENT

I. EPA IMPROPERLY CIRCUMVENTED THE REQUIREMENT TO EVALUATE COSTS.

A. EPA Shirked Numerous Legal Obligations To Analyze (and Take Into Account) The Costs Of The Endangerment Finding.

EPA had no sustainable basis for its decision to insulate the Finding from any meaningful analysis of its costs. To the contrary, several provisions of law require EPA to analyze the costs associated with final promulgation of the Finding. Under CAA section 202(a)(2), "EPA must assess the 'economic costs'" of any proposed rule. *Am. Trucking Ass'ns v. EPA*, 600 F.3d 624, 629 (D.C. Cir. 2010) (quoting *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979) (emphasis omitted)). The CAA requires EPA to perform an EIA, 42 U.S.C. § 7617, and to evaluate the potential loss or shifts of employment that may result from the rule's implementation, *id.* § 7621. The Regulatory Flexibility Act (RFA) requires EPA to describe the steps taken to minimize the rule's impact on small entities (whom the Finding places in the cross-hairs). 5 U.S.C. §§ 601-612. If the statutory obligations were not sufficiently clear, Executive Order 12,866 removes all doubt by explicitly requiring EPA (and other agencies) to assess the costs and benefits of each proposed regulation and its alternatives. *See Regulatory Planning & Review*, Exec. Order 12,866, 58 Fed. Reg. 51,735 (1993). EPA has failed to satisfy these mandates.

This Court has repeatedly instructed administrative agencies that reasoned decision-making necessarily encompasses meaningful consideration of the costs as well as the purported benefits of their rules. *See Competitive Enterprise Institute v. NHTSA*, 956 F.2d 321, 324-327 (D.C. Cir. 1992), *UAW v. OSHA*, 938 F.2d 1310, 1318 (D.C. Cir. 1991). Similar principles apply to EPA. *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991). But EPA did not performed these analyses in promulgating the Finding.

It appears that EPA believes that the issuance of a stand-alone finding of endangerment exempts it from conducting the requisite cost-benefit analyses. Yet under Section 202(a), once the Endangerment Finding is made, revised emissions standards for motor vehicles inevitably must follow, as must revised standards and rules under other parts of the CAA that address stationary sources of emissions (as the Tailoring Rule recognizes, *see Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (2009). By making a Finding that serves as a blanket determination of unquantified benefit to inure from future regulations, EPA makes the *existence* of additional regulation virtually a foregone conclusion—without undertaking any cost-benefit analysis. The expedient of fragmenting a single sentence in Section 202(a) allowed EPA to short-circuit the cost-benefit analysis that is required by statute, executive order,

and settled principles of administrative law. Because the Finding reflects the opposite of reasoned decision-making, it should be vacated.

1. *CAA Section 317 Obligates EPA To Perform An Economic Impact Assessment.*

CAA Section 317 requires EPA to "prepare an economic impact assessment" before issuing the notice of proposed rulemaking for "*any* … regulation" under Section 202, not merely regulations that "establish[] emission standards." 42 U.S.C. §§ 7617(b), 7617(a)(5) (emphasis added). To comply with Section 317, an EIA must analyze the proposed regulation's (1) costs of compliance; (2) potential inflationary or recessionary effects; (3) effects on the competitive position of small businesses; (4) effects on consumer costs; and (5) effects on energy use. 42 U.S.C. § 7617(c)(1)-(5).

The Finding indisputably is a rulemaking under Section 202(a). EPA explicitly rests its authority to issue the Finding on that provision: "Pursuant to CAA section 202(a), the Administrator finds that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." 74 Fed. Reg. at 66,497. In addition, in the Proposed Endangerment Finding, EPA applied "the rulemaking provisions of CAA section 307(d) to this action." 74 Fed. Reg. at 18,889. The result, EPA acknowledged, is that the Finding "*will be subject to the same rulemaking requirements that would*

apply if the proposed findings were part of the standard-setting rulemaking." *Id.* (emphasis added). But EPA did not comply with those requirements.

As with any other rule under Section 202, EPA had a clear obligation to engage in a substantive, meaningful cost-benefit analysis before promulgating the Finding. But no such analysis appears in the Federal Register.

2. *CAA Section 321 Requires An Analysis of Employment Effects.*

The Finding also triggered EPA's separate obligation under CAA Section 321 to conduct "continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provisions of the [CAA]." 42 U.S.C. § 7621(a). Given the sweeping potential effects of the Finding, Section 321 required EPA to investigate "threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." *Id.* Yet no analysis of potential shifts or loss in employment as a result of the Finding and its implementation has appeared.

3. *The Regulatory Flexibility Act Requires Specific and Searching Analyses of the Effects On Small Business.*

Similarly, the RFA requires the Agency to perform, "regulatory flexibility analyses" at specified stages throughout the rulemaking process. These analyses require, among other things, a "description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." 5 U.S.C. § 604(a)(5). This Court has paid

particular attention to the "contents of the preliminary or final regulatory flexibility analysis, along with the rest of the record, in assessing not only the agency's RFA compliance, but the validity of the rule under other provisions of law." *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984).

Nothing in the administrative record for the Finding reflects any concern with the impact on small businesses. EPA made a conclusory statement that the Finding had no significant economic effect on small businesses because the Finding did not include any implementing emissions "requirement" (74 Fed. Reg. at 66,545), but the necessary implication of the Finding is that both mobile and stationary source regulation will drive up costs of energy, transportation, and regulatory compliance. Indeed, the Small Business Administration noted that, "whether viewed separately or together, EPA's RFA certifications for the three GHG rule proposals lack a factual basis and are improper" because "[th]e GHG rules are likely to have a significant economic impact on a large number of small entities." Comments of the Small Business Administration on EPA's Tailoring Rule (Dec. 23, 2009), http://www.sba.gov/advo/laws/comments/epa09_1223.html.

4. *Executive Order 12866 Specifically Requires Cost-Benefit Analysis.*

Executive Order 12,866 obligates each agency to "assess both the costs and the benefits of [an] intended regulation." 58 Fed. Reg. 51,735, 51,736 (1993). Noting that "some costs and benefits are difficult to quantify," the EO permits an

agency to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." *Id.* Again, the rulemaking record does not reflect any effort to undertake such a determination. Indeed, EPA disregarded guidance from the Office of Management and Budget ("OMB")—the agency charged with reviewing proposed regulations under EO 12,866, *see* 58 Fed. Reg. at 51,737—that identified deficiencies in the proposed endangerment finding. OMB observed that "the finding could be strengthened by including additional information on benefits, costs, and risks (where this information exists)… ." First Round of OMB Comments to USEPA on Proposed Findings, Dkt. No. EPA-HQ-OAR-2009-0171-0124, at 1 (April 22, 2009). OMB also noted that "[t]he Finding should also acknowledge that EPA has not undertaken a systematic risk analysis or cost-benefit analysis." *Id.* at 2.[1]

5. *This Court Has Recognized That Reasoned Decision-making Requires Cost-Benefit Analysis for a Rule of Such Significant Impact.*

In issuing EO 12,866, President Clinton directed the executive branch to comply in all cases with principles of reasoned decision-making that this Court had then-recently enunciated. In several decisions, the Court had recognized that

[1] EPA cannot fulfill this obligation by tying some sort of cost-benefit analysis to the Tailpipe Rule. Any such analysis integrated into that rule would be inherently limited to the effects of the regulation of tailpipe GHG emissions. The effects of the Endangerment Finding are far more widespread, and are not limited to vehicle emissions. A cost-benefit analysis incorporated into the Endangerment Finding is the only means of assessing **all** the effects of GHG regulation.

reasoned decision-making generally requires some analysis of costs and benefits for a rule of substantial adverse economic impact. For example, in *Competitive Enterprise Institute v. NHTSA*, 956 F.2d 321, 327 (D.C. Cir. 1992), this Court held that NHTSA had not "coherently" addressed the safety effects of higher fuel economy standards that would "price[] many … citizens out of access to large-car safety." The Court held that the government's duty of "reasonable candor" required it to acknowledge and account for the costs of a regulatory choice. *Id.* Only an analysis of the full and true costs of a regulation lets "affected citizens … know that the government has faced up to the meaning of its choice." *Id.* "The requirement of reasoned decision-making ensures this result and prevents officials from cowering behind bureaucratic mumbo-jumbo." *Id.*

Similarly, in *UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), this Court identified cost-benefit analysis as a needed brake on agency discretion in an otherwise sweeping (and potentially unconstitutional) grant of regulatory authority. In an analysis fully appropriate to the agency claim of authority here, this Court quoted a Supreme Court plurality opinion: "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view," which posited completely untrammeled power to pursue safety goals. 938 F.2d at 1318 (quoting *Industrial Union Dept., AFL-CIO v.*

American Petroleum Institute, 448 U.S. 607, 645 (1980) (*Benzene*) (plurality opinion).

These principles fully apply to the EPA rulemaking at issue here. Not long after the CAA went into effect, this Court remanded a rule pertaining to new stationary source standards for new or modified cement plants because EPA had not adequately considered certain economic costs. *Portland Cement Co. v. Ruckelshaus*, 486 F.2d 375, 388 (D.C. Cir. 1973). Later, the Fifth Circuit remanded an asbestos prohibition because EPA glossed over the costs of the regulation by failing to consider to toxicity of potential asbestos substitutes. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991). These decisions accord with the "proportionality norm" that "understands statutes to impose benefits roughly commensurate with their costs, unless there is a clear legislative statement to the contrary," Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L.Rev. 405, 487 (1989), *cited in Michigan v. EPA*, 213 F.3d 663, 678-79 (D.C. Cir. 2000). EPA's avoidance of cost-benefit analysis in making the Endangerment Finding means that it did not "examine[] the relevant data," or examine each "important aspect of the problem"; EPA thus failed to engage in reasoned decision-making. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. EPA's Adherence To An Exaggerated, Sliding-Scale Precautionary Principle Does Not Excuse Its Failure To Conduct Any Cost-Benefit Analysis.

EPA maintains that, rather than weighing the balance of costs and benefits to determine whether an air pollutant endangers public health, it may use a sliding-scale version of the precautionary principle (74 Fed. Reg. at 66,505):

> [In] exercising her judgment the Administrator balances the likelihood and severity of effects. This balance involves a sliding scale; on one end the severity of the effects may be of great concern, but the likelihood low, while on the other end the severity may be less, but the likelihood high. Under either scenario, the Administrator is permitted to find endangerment.

That is, EPA concludes that it has the authority to find endangerment whenever it concludes that the harm to be avoided is sufficiently "catastrophic," even if the likelihood of actual endangerment is remote. *Id*. But all the benefits of CAA regulation flow from mitigating or averting endangerment. Costly regulations that address an overstated endangerment finding based on a remote and uncertain harm should never see the light of day, no matter how catastrophic the improbable harm might be. Under EPA's theory, a safety agency could order that all houses, office buildings, and power plants be moved deep underground, lest a neighboring planet leave its orbit and crash into Earth—surely a catastrophic event should it occur, but one so remote as be to meaningless.

1. *Ethyl Corp. Does Not Justify EPA's Avoidance of Cost-Benefit Analysis Here.*

EPA finds authority to rely on a nearly standardless sliding scale on this Court's decision in *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). In *Ethyl*, the Court upheld EPA's authority to promulgate a regulation without having established actual harm. But the rule upheld in *Ethyl* regulated lead levels in gasoline. By contrast with carbon dioxide and other GHGs, the toxicity of lead at low levels was well known—and was conceded by the *Ethyl* petitioners. *See* 541 F.2d at 8. Carbon dioxide is a natural and plentiful component of clean air than humans and other animals emit when they exhale, and plants absorb in photosynthesis. Carbon dioxide has always been present in the atmosphere, albeit at varying concentrations.

This Court in *Ethyl* confined the application of the precautionary principle within "reasonable limits." 541 F.2d at 18 n.32. But the application of the precautionary principle here goes far beyond reasonable limits. Rather than addressing an uncertain aspect of a known poison, EPA here speculates about indirect effects of changing concentrations of common constituents of the atmosphere that are not directly harmful to humans. EPA takes the precautionary principle too far; its "sliding scale" has no limits.

2. *The Precautionary Principle Replaces Rigorous Cost-Benefit Analysis With A Premise That Renders Any Regulation Sustainable.*

As reflected in the Endangerment Finding, the precautionary principle requires regulation whenever the possibility of a grave risk to health, safety or the environment cannot be excluded—even if the supporting evidence is speculative and the economic costs of regulation are high. *See generally* CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005).

Proponents cast the principle as a "better safe than sorry" proposition – a "plea for a kind of regulatory insurance." Cass Sunstein, *The Paralyzing Principle*, Regulation 32 (Winter 2002-2003). But the principle's more forthright advocates recognize it as "a radical challenge to business as usual in a modern capitalist, technological civilization." Michael Pollan, "The Precautionary Principle," N.Y. Times, Dec. 9, 2001 (available at http://www.nytimes.com/2001/12/09/magazine/09PRINCIPLE.html). "Scientific uncertainty would no longer argue for freedom of action but for precaution and alternatives." *Id.* That is, the presumptive freedom that built the United States economy would be replaced with government-mandated stasis whenever productive activity threatened to clash with a regulator's remote and unproven fear.

EPA's use of the precautionary principle guarantees a positive finding of endangerment. Because the most alarming straight-line projections of global

warming suggest dire human consequences of climate change within several decades, a low probability that such straight-line projections are accurate (or doubts about human causation and regulatory redressability) would not alter the conclusion of endangerment. Thus, once the Agency decided to rely on the precautionary principle in determining whether certain GHGs "endanger[ed] public health or welfare," the results were predetermined. Although the statute requires endangerment to be "reasonably anticipated," 42 U.S.C. § 7521(a), EPA's sliding-scale variation on the precautionary principle allows the "reasonably anticipated" standard to be satisfied by almost any probability numerator greater than zero so long as the imagined dire effects are sufficiently large.

The results of the precautionary principle's adoption may actually harm public health and welfare. In the case of GHGs "[a] great deal of evidence suggests the possibility that an expansive regulation can have adverse effects on life and health simply by reducing income. Richer societies are healthier societies; richer individuals tend to be healthier too. If regulatory policies are expensive and lead to higher costs, less employment, and more poverty, the net effect may be to harm individual health." Cass Sunstein, *The Paralyzing Principle*, Regulation 34 (Winter, 2002-2003). That is why "it is a mistake to rely on any version of a precautionary principle that attaches enormous weight to errors that allow dangerous activities to go forward while slighting the losses associated with the

beneficial activities that turn out to be thwarted." Richard A. Epstein, *In Defense of the "Old" Public Health*, 69 Brook. L. Rev. 1421, 1458 (2004).

The current Administration's own OMB has recognized that EPA appears to have jettisoned traditional cost-benefit analysis in favor of a "dramatically expanded precautionary principle." First Comment of OMB, *supra*, at 2. Indeed, OMB, observed, EPA's "relaxed and expansive new standard for endangerment" invites petitions to "regulate many other 'pollutants' for the sake of the precautionary principle (e.g. electromagnetic fields, perchlorates, endocrine disruptors, and noise)." *Id.* OMB's concerns illustrate why EPA's use of a sliding-scale precautionary principle in lieu of traditional cost-benefit analysis is arbitrary and capricious.

C. EPA Improperly Attempted to Insulate the Endangerment Finding from Cost-Benefit Scrutiny by Characterizing The Finding As "Stand-Alone" and Isolating It From Its Necessary (And Cost-Laden) Regulatory Implications.

Declaring that the Finding does not specifically regulate any pollutant, EPA excused itself from performing an RIA, EIA, RFA analysis, or any other cost-benefit analysis. EPA characterized the Finding as "stand-alone" and noted that it "does not contain any regulatory requirements." 74 Fed. Reg. at 66,515. According to EPA, this precluded any duty to "assess the impacts of any future regulation." *Id.*

In particular, EPA maintained, "[b]ecause these Findings do not impose any requirements, the Administrator certifies that this action will not have a significant economic impact on a substantial number of small entities. This action does not impose any requirements on small entities." *Id.* at 66,545. So long the "endangerment and cause or contribute findings do not in-and-of themselves impose any new requirements," EPA believed it need not analyze the obvious regulatory consequences of its "determination on whether [GHGs] in the atmosphere may reasonably be anticipated to endanger public health or welfare." *Id.*

In responding to comments, EPA distinguished authorities requiring it to perform meaningful cost-benefit analysis as addressing only concrete or quantitative standards or regulations, not the isolated "initial question of whether a statutory precondition to setting standards has been met, such as determining whether the air pollution (not the ensuing regulations) endanger public health." EPA's Response to Public Comments, Response to Comment 11–8 (available at http://www.epa.gov/climatechange/endangerment/comments/volume11.html11-8). Revealing its reason for separating the Finding from all subsequent regulation, EPA asserted that none of the authorities required the Agency to "consider the full range of possible impacts of future regulation" that would follow upon a finding of endangerment that was issued separately from any mitigating regulation. *Id.*

Indeed, EPA stated that the Finding is "not the appropriate place to consider the economic impacts of mitigation measures that may follow a positive endangerment finding." *Id.*, Response to Comment 11–10. Rather, EPA insisted that, with a sweeping and unexamined Endangerment Finding in place and not subject to repetitive judicial review, EPA could simply "provide[] an analysis of costs, economic impacts, and benefits in conjunction with proposed regulatory standards under the CAA." *Id.*

Thus, EPA believes, it can make a Finding that necessarily serves as a premise for intensive regulation without considering the costs of those inevitable regulations. But EPA cannot artificially sever the Finding from the entire body of GHG regulations that inevitably follow.

To the contrary, the plain language of the CAA section 202(a) shows that a finding of endangerment should be integrated into the substantive rule, rather than standing apart:

> 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.

42 U.S.C. § 7521(a)(1). This language indicates that a positive finding of endangerment should be made *within* an action regulating emissions from motor

vehicles. Nothing in this authorizing provision contemplates issuing a separate finding of endangerment.

Agency practice has aligned with the statutory structure: a*mici* have not found a single instance in which EPA separated a finding of endangerment from a proposed regulation. Nor did EPA identify any in defending its approach. The procedural device EPA chose here represents an unexplained departure from consistent prior practice, itself a tell-tale sign of arbitrary and capricious decision-making. *State Farm*, 463 U.S. at 43.

1. *EPA's Characterization of The Endangerment Finding as "Stand-Alone" Is Arbitrary and Capricious.*

EPA is correct that the Endangerment Finding does not by itself impose any emissions limitations or other requirements on the conduct of outside entities. But that is so only because EPA sliced one part of Section 202(a) apart from the rest—and from the rest of the CAA regulatory structure that the Finding puts in motion. Indeed, EPA made clear that it knew what it was doing; it was well aware that "the Prevention of Significant Deterioration (PSD) permitting program for major stationary sources … is triggered by a CAA section 202(a) standard" 74 Fed. Reg. at 66,515. In responding to comments observing that the extreme "costs associated with using the inflexible structure of the CAA will harm public health and welfare"—because "once EPA makes an endangerment finding under CAA section 202(a), it will be forced to regulate greenhouse gases under a number of other

sections of the CAA, resulting in regulatory chaos" (*id.*)—EPA did not deny that the "inflexible regulatory structure of the CAA" in fact would result in a proliferation of GHG regulations that would have significant adverse economic effects. EPA insisted, "[w]hat these comments object to is that Congress has already made some decisions about next steps after a finding of endangerment." *Id.*

That is, for its own self-authorization of regulatory excesses EPA blamed a 1970 Congress that had no idea that it was authorizing an agency to regulate the products of human respiration and "*everything* [else] airborne, from Frisbees to flatulence." *Massachusetts v. EPA*, 549 U.S. 497, 558 n.2 (2007) (Scalia, J., dissenting) (emphasis retained). It is EPA's procedural separation of the Finding from its regulatory consequences, not the design of the CAA, that set the regulatory process in motion without seriously inquiring whether the greater threat to human health and welfare came from GHGs or from the adverse economic consequences of command-and-control regulation of carbon dioxide and methane.

The public record shows that EPA promulgated the Finding in conjunction with interrelated GHG regulations as part of a calculated scheme. One need look no further than the accelerated time period in which EPA proposed and completed the entire GHG regulatory framework to recognize that the substantive regulation (the Tailpipe Rule) was contemplated and developed in conjunction with the

Endangerment Finding. The Finding and substantive regulations function as one, massive regulatory scheme. Indeed, this appears to be the first time that EPA has promulgated a finding under Section 202 in a proceeding separate from the promulgation of the substantive emissions standard, rather than using a singe integrated inquiry to assess the costs and benefits of the proposed finding and its proposed remediation.

2. *The Overlapping Promulgation of the GHG Rules Underscores Their Interdependence.*

The Finding was originally proposed on April 24, 2009. See Proposed Rule, 74 Fed. Reg. 18,996. Shortly thereafter, on September 28, 2009, EPA proposed its "Tailpipe Rule." 74 Fed. Reg. 49,454. On October 27, 2009, six weeks before issuing a final endangerment finding, EPA proposed its "Timing" (or "Triggering") Rule and its Tailoring Rule. *See Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, 74 Fed. Reg. 51,535; 74 Fed. Reg. 55,292 (2010). EPA promulgated its final Endangerment Finding on December 15, 2009 (74 Fed. Reg. 66,496), while the other three proposed rules were pending. EPA then promulgated a final "Timing Rule" on April 2, 2010 (75 Fed. Reg. 17,004); a final, substantive "Tailpipe Rule" on May 7, 2010 (75 Fed. Reg. 25,324); and a final "Tailoring Rule" on June 3, 2010 (75 Fed. Reg. 31,514)

These rules were proposed and finalized in little over a year. Each of the three later rules is predicated on the Endangerment Finding.

3. *The Function and Application of the GHG Rules Belies EPA's Assertion That theFinding Is "Stand-Alone."*

The function and operation of all of these rules demonstrates their interdependence. The entire GHG regulatory scheme is mutually dependent upon each individual regulation. Combined, they operate at one massive regulation.

Under CAA section 202(a), the Administrator cannot regulate GHGs emitted from automobiles without a finding of endangerment. The "Timing Rule" established EPA's position that, once GHGs became "subject to control" through the Endangerment Finding, EPA had no choice but to regulate under the CAA's various other permit programs. Finally, the "Tailoring Rule" attempts to modify EPA's obligations under the CAA to regulate entities whose emissions exceed the threshold levels under Title V and the Prevention of Significant Deterioration ("PSD") permit procedure

Thus, the Finding has already triggered a cascade of rules and obligations under various sections of the CAA. EPA's statements add further confirmation. EPA concluded that the Finding legally obligated promulgation of a rule restricting GHG emissions from new motor vehicles. *Tailpipe Rule*, 75 Fed. Reg. 25,237. EPA then determined that regulation of motor vehicle GHG emissions

automatically triggered regulation of GHG emissions from stationary ources under the PSD and Title V programs. *Tailoring Rule*, 75 Fed. Reg. 31,514.

The CAA prescribes specific threshold levels for regulating pollutants under the PSD and Title V programs: 100- and 250- ton-per-year thresholds for PSD sources, and a 100 ton-per-year threshold for Title V sources. 42 U.S.C. §§ 7475, 7479(1)-(2). There is no ambiguity in the meaning of these statutes: sources emitting (or potentially emitting) pollutants in excess of the threshold levels are subject to these permitting processes.

EPA itself recognized that applying these programs to GHG sources would produce "absurd results." 75 Fed. Reg. at 31,541. Applying the statutory thresholds to GHG would subject hundreds of thousands of small emission sources—for the most part small businesses—to the burdensome, costly permitting processes. Under the CAA, these processes were originally intended only to apply to "major emitting facilities." 42 U.S.C. §§ 7475(a)(1), 7479(1)-(2). EPA tries to remedy this "absurd" and administratively burdensome result by crafting a "Tailoring Rule" that modifies the thresholds that the statute specifically prescribes, but only as applied to GHGs. Rather than make an endangerment (or no-endangerment) finding that made sense in the context of the statute, EPA instead issued a Finding that gave it the greatest possible authority, and then

ignored the clear language of other parts of the statute to mitigate the Finding's absurd effects.

D. Because It Failed To Engage in Cost-Benefit Analysis, EPA Overlooked the Substantial Costs that Flow from the Endangerment Finding.

Once EPA made a positive finding of endangerment, it had to regulate not only GHG emissions from new motor vehicles (75 Fed. Reg. at 25,398), automobile emissions, but emissions from stationary GHG sources under the PSD and Title V permitting programs as well (75 Fed. Reg. at 31,519-22). Yet EPA omitted any cost-benefit analysis that accounted for logical effects of the interaction of the Finding and the regulatory superstructure of the CAA.

The costs that result from the Endangerment Finding are significant. The U.S. Chamber of Commerce estimates that at least one million mid- to large-sized commercial buildings emit enough CO_2 each year to qualify as "major emitting" facilities under the current threshold levels established by the CAA. Almost 200,000 manufacturing operations will become regulated CO_2 sources and 20,000 large farms emit enough $CO_2$to become regulated.[2] U.S. Chamber of Commerce, *A Regulatory Burden: The Compliance Dimension of Regulating CO_2 as a Pollutant*, at 3 ("*Regulatory Burden*").

[2] The Chamber of Commerce estimates that a business emits over 250 tons per year of CO_2 if it consumes approximately $70,000 of oil or natural gas per year in "stationary" equipment (*i.e.*, excluding vehicle). This accounts for the large number of entities who are subject to GHG regulation. *Regulatory Burden*," at 3.

The cost of compliance with new GHG regulations will be particularly burdensome for small and medium-sized businesses. By contrast with larger entities with compliance staff, small businesses do not already accommodate costs and risks of federal regulatory compliance. As the U.S. Chamber of Commerce notes, "establishing operations and procedures to comply with federal Clean Air Act regulations would be a new experience for most small and mid-sized businesses, especially those that do not have infrastructure for such regulatory regimes, the staff time, consulting support and legal services." *Regulatory Burden*, at 3. Indeed, "for many to-be-regulated businesses, it is possible that compliance costs could exceed the direct fuel price increase… ." *Id.*

Complying with the CAA's permitting programs requires time, money and expertise. Small business lacks all three. It would be nearly impossible for a business operating a small facility to absorb the costs associated with the PSD permit program. Because many small sources have not needed air permits in the past, they would need to expend additional resources to acquire basic knowledge of the regulations and how to comply with them. As the Small Business Administration noted: "[a] small business or small community is more likely to have to hire an outside consultant or other professional to ensure that they are properly following EPA's . . . rules." Small Bus. Admin., Office of Advocacy,

Comments on EPA's Proposed Rule, "Mandatory Reporting of Greenhouse Gases," 74 Fed. Reg. 16448 (2009).

The money spent on compliance is a deadweight loss. The burdens associated with the permitting process will prevent small firms from expanding and investing in new facilities or increases in productive staff, significantly impairing economic development. And small businesses—the engines of job growth and innovation in the United States economy—are especially sensitive to the increased transportation costs that result from the Tailpipe Rule, and the increased energy costs that result from the PSD/Title V Rule. Small businesses often operate on the edge, particularly in the incubation period. The imposition of massive and systemic costs inevitably will end some potentially successful enterprises prematurely. That is yet another reason why the Finding should be vacated.

There are more reasons. In order to avoid the admittedly "absurd" effects of applying to GHG emissions the statutory emissions volume thresholds for the PSD and Title V stationary source programs, EPA issued the "Tailoring Rule." 75 Fed. Reg. 31,514. As noted above, the "Tailoring Rule" modifies the applicable thresholds when GHGs are at issue, but proposes to phase in the "absurd" thresholds over time. Yet EPA cannot, by regulation, amend the clear language of the CAA.

Having failed to consider costs and benefits of the Endangerment Finding, EPA put itself in an impossible position. EPA recognized that, if the Endangerment Finding were correct, it would bring "tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the Title V program. " 74 Fed. Reg. at 55,295. The Agency attempts to justify its alteration of the statutory standards by relying on the doctrine of "absurd results." 75 Fed. Reg. at 31,516-17, 31,541-43.

But the "absurd results" at issue here are not the product of the interaction of statutory terms with empirical phenomena, nor are the "absurd results" in evidence when the PSD and Title V programs are applied to the pollutants that Congress actually contemplated. Rather, EPA's inappropriate Finding created the "absurd results." The Finding mandated promulgation of the Tailpipe Rule, which in turn triggered the Tailoring Rule to prevent the enormous costs imposed on small businesses and the enormous enforcement burden imposed on EPA and state environmental enforcement agencies. *See* 74 Fed. Reg. at 55,295.

By trying to isolate the Endangerment Finding, EPA sought to avoid conducting any type of cost-benefit analysis that would encompass the full economic effects of its GHG regime. Having avoided assessing the proliferating costs of the Endangerment Finding, EPA proclaims that it can limit any cost-benefit analysis of the Tailpipe Rule to the impacts directly associated with that

specific rule. 75 Fed. Reg. at 25,324. And EPA turns the logic of cost-benefit analysis on its head when it contends that the Tailoring Rule "provides regulatory relief rather than regulatory requirements for these smaller GHG sources," because "[s]tatutory requirements to obtain a Title V operating permit or to adhere to PSD requirements are already mandated by the CAA and by existing rules [i.e., the Endangerment Finding], not by this rule." *Id*. at 31,595. What EPA leaves unsaid is that the costs associated with promulgation of the Endangerment Rule are immense and should have been considered in the rulemaking, where the costs and benefits would have been laid out for examination by the public and this Court as well as EPA.

E. The Concededly "Absurd" Interaction of the Endangerment Finding With The Explicit Statutory Thresholds for the PSD and Title V Programs Provides Textual Confirmation That Congress Did Not Intend The CAA To Regulate Common GHGs.

The perceived need to fashion a "Tailoring Rule" that varied explicit and unambiguous statutory terms demonstrates that the CAA provides an inappropriate tool for regulating GHGs. The CAA was never intended to regulate substances as pervasive and relatively harmless as carbon dioxide and methane. Although *Massachusetts v. EPA*, 549 U.S. 497 (2007), stands for the proposition that EPA ***may*** classify GHGs under an expansive application of the term "pollutant," EPA was under no obligation to adopt, let alone expedite, GHG regulation. The Court observed that "EPA no doubt has significant latitude as to the manner, timing,

content, and coordination of its regulations… .” *Id.* at 533-34. While the Court criticized EPA for its reliance on “reasoning divorced from the statutory text” (*id.* at 533), the statutory text drives an interpretation that recognizes that the explicit statutory thresholds in the PSD and Title V provisions cannot reasonably apply to GHGs like carbon dioxide and methane—common byproducts of energy use, respiration, and bovine flatulence. As a consequence, those common gases cannot meet endangerment standards within the statutory schema, and no endangerment finding should have issued.

CONCLUSION

The Endangerment Finding should be vacated and remanded.

Respectfully Submitted,

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Dated: May 27, 2011

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I hereby certify that the foregoing **BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS** has been filed with the Clerk of the Court this 27th day of May, 2011 by using the appellate CM/ECF system.

In addition, I hereby certify that the foregoing has been served by United States first-class mail this 27th day of May, 2011 upon each of the following participants in the case who are not registered CM/ECF users:

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