ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 18-1114(L), 18-1118(Con.), 18-1139(Con.), 18-1162(Con.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ALLIANCE OF AUTOMOBILE MANUFACTURERS; ASSOCIATION OF GLOBAL AUTOMAKERS, INC.,
Intervenors for Respondent

On Petition for Review of Agency Action by the
United States Environmental Protection Agency
No. EPA-83FR16077

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

All parties, intervenors, and amici appearing in this Court are listed in the Brief for State Petitioners, except for amici curiae the State of Colorado and Lyft, Inc.

B. Ruling Under Review.

The reference to the nonfinal agency action at issue appears in the Brief for State Petitioners.

C. Related Cases.

The cases on review were not previously before this Court or any other court. This Court ordered the cases filed in case numbers 18-1114, 18-1118, 18-1139, and 18-1162 consolidated. Intervenors are not aware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Alliance of Automobile Manufacturers certifies that it is an I.R.C. Section 501(c)(6) not-for-profit trade association of car and light truck manufacturers whose members include the BMW Group, FCA US, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America and Volvo Car USA. The Alliance operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. The Alliance does not have any outstanding shares or debt securities in the hands of the public, nor does it have a parent company. No publicly held company has a 10% or greater ownership interest in the Alliance.

The Association of Global Automakers, Inc., a Virginia not-for-profit corporation, states pursuant to Federal Rule of Appellate Procedure 26.1 that it has no parent company and that no publicly held corporation has a 10% or greater ownership interest in Global Automakers.

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
EPA	Environmental Protection Agency
APA	Administrative Procedure Act
NHTSA	National Highway Traffic Safety Administration
CAFE	Corporate Average Fuel Economy

INTRODUCTION

Petitioners ask this Court to review an agency notice that does nothing more than announce the agency's intention to initiate a proposed rulemaking. Settled Supreme Court and Circuit precedent confirms that petitioners' requests are premature and must be dismissed for lack of jurisdiction. In all events, petitioners' complaints are meritless.

In October 2012, the Environmental Protection Agency ("EPA") adopted greenhouse gas emissions standards for cars and light trucks to be sold in the United States in model years 2017-2025. Given that long timeframe and the corresponding risk that its analysis would be overtaken by subsequent events, EPA bound itself to conduct a Mid-Term Evaluation by April 2018 to assess whether the standards for model years 2022-2025 continued to be justified. After receiving hundreds of thousands of comments and conducting a public hearing in 2017, EPA published a notice in the Federal Register on April 13, 2018, concluding that the information before it no longer supported the model year 2022-2025 standards. The April 13 notice announced EPA's intention to initiate a notice-and-comment rulemaking to gather new information, update its analysis, and revise the standards as appropriate. The notice did not amend, defer, or vacate any of the existing standards; to the contrary, it expressly states that the existing standards remain in effect unless and

until they are altered through the upcoming rulemaking. That rulemaking commenced in August 2018 and remains ongoing.

Petitioners have consistently urged EPA to maintain for upcoming model years the standards that were adopted in 2012. But rather than waiting to see whether—and, if so, how—EPA chooses to alter those standards, petitioners initiated this premature and meritless litigation. The petitions' jurisdictional defects are glaring and insurmountable. The Clean Air Act grants this Court jurisdiction to review only *final* agency action. To be final, agency action must mark the consummation of the agency's decisionmaking, and it must create cognizable legal consequences. The April 13 notice meets neither requirement. It was only an interim step in the process of reconsidering and potentially amending the model year 2022-2025 standards and thus had no effect on any party's rights or obligations. For similar reasons, the petitions are plainly unripe, as nothing would be gained from reviewing the agency's decisional process before a final decision has even been made.

Because this Court lacks jurisdiction, the analysis must end there. But even a glance at the merits confirms that petitioners' complaints are baseless. Petitioners insist that EPA violated the regulation that governs the Mid-Term Evaluation, 40 C.F.R. §86.1818-12(h), and the Administrative Procedure Act ("APA"). In fact, EPA fully complied with both. Neither §12(h) nor the APA requires an exhaustive agency

undertaking to justify a decision to initiate a new rulemaking—which is unsurprising given that neither statutory regime contemplates judicial review of that interstitial step. As such, the petitions are meritless as well as jurisdictionally barred.

BACKGROUND

A. The One National Program

For decades, motor vehicle fuel economy was regulated solely by the National Highway Traffic Safety Administration ("NHTSA") through the Corporate Average Fuel Economy ("CAFE") program. In 2004, the California Air Resources Board began rulemaking to regulate greenhouse gas emissions from automobiles, which is essentially equivalent to regulating fuel economy. Twelve states adopted California's regulations pursuant to §177 of the Clean Air Act. 42 U.S.C. §7507. Then, following *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA moved to regulate greenhouse gas emissions from vehicles as well. Automakers thus were left facing the potential for three different regulatory programs and 15 separate compliance requirements throughout the country.

This competing patchwork of regulation was bound to waste resources, cause friction, discourage innovation, and frustrate the purposes of the standards. As one Obama Administration representative reflected:

> [T]here was a significant likelihood that the regulators, acting independently, would produce inconsistent standards with different levels of stringency, along with duplicative or confusing compliance programs and incompatible enforcement policies, which could raise the

> costs to industry, and compromise the potential benefits of the new standards for consumers and the public.

Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal"*, 35 Harv. Envtl. L. Rev. 343, 358 (2011). Vehicle manufacturers, regulators, and other stakeholders worked together to avoid that outcome. The result of their efforts was the "One National Program." Adopted in 2009, the program committed EPA and NHTSA to issuing their emissions regulations jointly, to ensure as much alignment between the agencies' programs as possible. The California Air Resources Board also agreed to help facilitate the program by deeming automakers who complied with federal regulations to comply with state regulations as well.

B. The 2012 Rule

In 2010, EPA and NHTSA finalized the first set of joint greenhouse gas and CAFE standards, covering model years 2011-2016. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010). The agencies renewed their commitment to the One National Program in 2011, when they proposed standards covering model years 2017-2025. While those proposed standards were finalized in 2012, the 2012 Rule required EPA to conduct a Mid-Term Evaluation by April 2018 to reassess the model year 2022-2025 standards to determine whether they remained appropriate in light of the most up-to-date data. *See* 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel

Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012). This evaluation was necessary both because the long time horizon of the 2012 Rule made it difficult to predict whether the standards would remain advisable for model years 2022-2025, and because NHTSA is prohibited by statute from promulgating more than five years of fuel economy standards at a time, *see* 49 U.S.C. §32902(b)(3)(B).

The procedural and substantive requirements governing the Mid-Term Evaluation are set forth in 40 C.F.R. §86.1818-12(h). In essence, §12(h) required EPA to determine whether the information currently in its possession on a variety of non-exclusive specified factors was sufficiently robust to justify leaving the existing standards in place. *Id.* §86.1818-12(h)(1). Among other things, the record on which EPA based its findings was required to include a draft Technical Assessment Report ("TAR") addressing relevant issues and to reflect public comments on both the TAR and the model year 2022-2025 standards. *Id.* §86.1818-12(h). If EPA were to conclude the information before it no longer justified keeping the existing standards in place for model years 2022-2025, then "the Administrator shall initiate a rulemaking to revise the standards, to be either more or less stringent as appropriate." *Id.* Underscoring that a decision to initiate a new rulemaking would represent *only* a decision to gather more information, EPA explained that such a decision would represent nothing more than a "determination ... that standards *may* change." 77 Fed. Reg. at 62,652 (emphasis added); *see id.* at 62,628, 62,633. And EPA repeatedly

emphasized that any decision to initiate a new rulemaking would not limit the agency's options when determining appropriate standards based on the additional information it would gather. *See, e.g.*, *id.* at 62,786 ("EPA will determine the appropriate course to follow based on all of the information, evidence, and views in front of it, including those provided during public notice and comment.").

In committing to the Mid-Term Evaluation, EPA and NHTSA made two core commitments to stakeholders. First, the agencies promised "to align the agencies[']proceedings for [model years] 2022-2025 and to maintain a joint national program." 77 Fed. Reg. at 62,633. Thus, EPA assured stakeholders that if the Mid-Term Evaluation led it to conclude "that its standards will not change, *NHTSA will issue its final rule concurrently with the EPA determination*"; conversely, "[i]f the EPA determination is that standards may change, the agencies will issue a *joint* [notice of proposed rulemaking] and *joint* final rule." *Id.* (emphasis added). That rulemaking step was essential because, as noted, NHTSA lacks authority to promulgate CAFE standards for more than five years at a time, and thus would need to issue a new rule to maintain the existing standards for model years 2022-2025.

Second, in the preamble to the 2012 Rule and in public statements by key personnel, EPA committed to the following timeline: In the summer of 2017, EPA would issue a proposed determination setting forth tentative conclusions on its Mid-Term Evaluation, and at the same time NHTSA would issue a proposed rule detailing

complementary CAFE standards. By April 1, 2018, EPA would issue a final determination concluding the Mid-Term Evaluation, and NHTSA would issue a final rule putting CAFE standards into effect. *See id.* at 62,784; Christopher Grundler, *Light-Duty Vehicle Greenhouse Gas Standards: 2025 and Beyond* 24 (Sept. 17, 2015), https://bit.ly/2FYcjcr. This timeline was critical to ensuring the agencies would be able to incorporate the most up-to-date information on the costs and effectiveness of the technologies needed to meet their standards. Interested parties relied on this schedule and these repeated representations, both in developing information to assist the agencies in making their determinations, and in allocating their own fiscal and automotive engineering resources.

C. EPA's About-Face

Notwithstanding its public commitments to a joint process that would allow for robust input from all interested parties, EPA abruptly reversed course 22 days after the 2016 presidential election. On November 30, 2016, after giving industry representatives a mere two hours' notice by telephone, EPA unilaterally issued a Proposed Determination—more than six months ahead of schedule and without any input or coordination from NHTSA—proposing to keep the existing standards in place for model years 2022-2025.

The Proposed Determination and its accompanying Technical Support Document ran almost 1,000 pages and cited almost 1,100 references, many of which

were new and/or significantly different from anything stakeholders had seen before. Nonetheless, when EPA published its Notice of Availability on the Proposed Determination on December 6, 2016, it gave interested parties until only December 30, 2016, to submit comments—a period of just over three weeks, including the winter holidays and many scheduled automotive office and plant shutdowns. *See* Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation, 81 Fed. Reg. 87,927 (Dec. 6, 2016).

In its evident haste to lock in the existing standards before the impending change in administrations, EPA denied stakeholders' pleas to withdraw the Proposed Determination or, at a minimum, to at least extend the comment period. Instead, the EPA Administrator issued a "final determination" on January 12, 2017—just 13 days after the comment period closed, and eight days before the new administration would take office—concluding that the model year 2022-2025 greenhouse gas standards should not be revised. *See* EPA, *Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation* (Jan. 12, 2017) (the "January 2017 Determination"). In those 13 days, EPA purported to have reviewed more than 100,000 comments, *id.* at 1, calling into serious question the thoroughness of its review. The January 2017 Determination was not published or reported in the Federal Register.

D. The April 2018 Determination

Myriad industry stakeholders immediately urged EPA to reconsider the January 2017 Determination, and to put the Mid-Term Evaluation process back on the track to which EPA had committed in 2012. As they explained, the January 2017 Determination broke both of the core commitments undergirding the Mid-Term Evaluation. First, EPA's decision to push ahead without any input from NHTSA directly contradicted the agencies' commitments to undertake a joint rulemaking. Indeed, NHTSA had not even *proposed* CAFE standards, let alone finalized any, by the time of the January 2017 Determination. EPA's haste thereby threatened to create exactly the patchwork regulatory framework that the One National Program was designed to avoid. Moreover, by accelerating the timetable for the Mid-Term Evaluation by more than a year, EPA deprived itself of the most up-to-date data available concerning fuel economy, emissions-reduction technology, and market trends.

EPA ultimately agreed. In March 2017, the agency published a Federal Register notice stating its intent to reconsider the January 2017 Determination. *See* Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (Mar. 22, 2017). EPA subsequently opened a 45-day comment period and scheduled a public hearing to help it decide

whether—notwithstanding its rush to judgment in January 2017—current information actually justified leaving the existing standards in place. *See* Public Hearing for Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 39,976 (Aug. 23, 2017). EPA's reengagement with the general public produced more than 290,000 comments, including comments from Intervenors the Alliance of Automobile Manufacturers and the Association of Global Automakers. *See* Letter from Chris Nevers, Vice President, Alliance of Automobile Manufacturers, to Christopher Lieske, EPA, and Rebecca Schade, NHTSA (Oct. 5, 2017), https://bit.ly/2CTBn2l ("Alliance Cmt."); Letter from Julia Rege, Director, Association of Global Automakers, to Christopher Lieske, EPA, and Rebecca Schade, NHTSA (Oct. 5, 2017), https://bit.ly/2uGaASA ("Global Cmt."). As the comments from Intervenors (and many others) explained, in addition to flouting the procedures to which EPA had committed itself, the January 2017 Determination was pervaded by deep substantive flaws. Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077, 16,078 (Apr. 13, 2018) ("April 2018 Determination" or "Determination").

For one, EPA's methodology was highly problematic. EPA ignored key business and market constraints and made technically unsound assumptions—with ripple effects throughout the agency's analysis. *See* Alliance Cmt. 4, 30-35; Global

Cmt. 15-28. Making matters worse, EPA's rushed, unilateral effort meant that its modeling tools were often completely different from NHTSA's, leading the two agencies to reach divergent—and sometimes contradictory—answers to the same questions. *See* Alliance Cmt. 4; Global Cmt. 14-15. For instance, the agencies' cost-of-compliance projections differed by more than a factor of two for some manufacturers. Alliance Cmt. 28. More broadly, NHTSA's projected per-vehicle cost of compliance for 2015 relative to 2021 was 42% higher than EPA's projection. *Id.* at 63. These modeling problems undermined EPA's bottom-line conclusion in the January 2017 Determination that the existing standards remained appropriate.

Commenters also pointed out that the existing standards depended on assumptions about the pace of technology improvement that could not be justified in light of current and historic trends. For example, for manufacturers to meet those standards, powertrain fuel conversion technology would need to become 2.8% more efficient year-over-year, every year through 2025. *Id.* at 23. That rate of improvement is *nine times higher* than the rate manufacturers were able to achieve from 2005-2015. *Id.* Moreover, even the best non-electrified vehicles would need to reduce their emissions anywhere from 20-40% to meet the 2025 targets, which is well outside the historical norm and unrealistic in light of market trends and technological realities revealed since 2012. *See id.* at 17. Indeed, EPA's analysis assumed that every vehicle in a U.S. fleet could undergo a major redesign between

2021 and 2025, even though powertrain technology typically turns over only once every *ten* years or more. *Id.* at 50. The record before EPA confirmed that these assumptions were not merely optimistic but totally impracticable.

On April 13, 2018, EPA published its findings, concluding that the record before it raised serious questions about whether the existing standards remained appropriate. *See* 83 Fed. Reg. at 16,077. As EPA explained, "the significant record that has been developed since the January 2017 Determination" revealed that "[m]any of the key assumptions EPA relied upon ... were optimistic or have significantly changed and thus no longer represent realistic assumptions." *Id.* at 16,078. Indeed, EPA's up-to-date information demonstrated that the agency had been downright mistaken—or at least, could no longer claim a sound empirical basis—with respect to critically important variables like gas prices, consumer acceptance of low-emission vehicles, the pace and feasibility of improvements in emission-reduction technology, the cost of new technology, the economic impact of the existing standards, and other relevant factors.

To take just a few examples:

- In 2012, the agencies predicted that gas prices in 2025 would be $3.86 per gallon (in 2010 dollars). In 2017, that projected price was revised down to $2.92 per gallon (in 2016 dollars), a real decrease of more than 30%. *See id.* at 16,084.

- In 2012, the agencies projected that the share of light-duty trucks in the new-vehicle market would decline to 33% by 2025. *See* Draft TAR, p.ES-8. By 2015, however, trucks occupied 45% of the new-vehicle market, making EPA's earlier projection untenable. 83 Fed. Reg. at 16,083.
- Consumer demand for vehicles with the most advanced and costly powertrains was far less than EPA anticipated. For instance, sales of battery-electric vehicles and plug-in hybrid-electric vehicles accounted for just over 1% of the market in the first half of 2017. Additionally, sales of traditional hybrid vehicles had decreased from a peak of 3.1% of the new-vehicle market in 2013 down to just 2% in 2016. *Id.* at 16,083.

In the April 2018 Determination, EPA discussed the factors set forth in §12(h) in detail and explained why each one counseled in favor of initiating a new rulemaking. With respect to the first and third factors—which focus on the availability, feasibility, and effectiveness of low-emission technology—EPA explained that it could no longer rely on its prior conclusions given that gas prices and consumer demand for low-emission vehicles had both turned out to be significantly lower than EPA had expected. *Id.* at 16,079-83. In addition, the technological landscape had evolved in many ways EPA had not foreseen, and many such developments suggested that the existing standards were much less feasible than the January 2017 Determination assumed. *Id.* at 16,082.

With respect to the second factor, which focuses on the costs the existing standards would inflict on consumers and producers of new automobiles, EPA highlighted concerns that the January 2017 Determination had consistently underestimated the cost of developing new emission-control technologies, and had failed to "give appropriate consideration to the effect [the standards would have] on low-income consumers." *Id.* at 16,084.

The fourth factor focuses on whether the existing standards are actually likely to reduce emissions and to promote oil conservation, energy security, and fuel savings. Here again EPA's previous analysis no longer had a sound empirical basis, as the agency had significantly overestimated both future fuel prices and consumers' willingness to buy new low-emission vehicles—developments that together threatened to stymie both emissions reduction and oil conservation. *Id.* In addition, EPA realized that its modeling had understated the so-called "rebound effect," a well-recognized concept that refers to the likelihood that consumers will drive *more* in response to greater fuel efficiency, an unintended consequence that could erase many of the expected benefits the agency had taken for granted. *Id.* at 16,085.

The sixth factor, which addresses the impact the standards will have on auto safety, presented a similar problem. As EPA explained, safety improvements depend on fleet turnover (because newer cars tend to be safer); but because the record now indicated that the existing standards would *impede* fleet turnover, by making new

cars more expensive and otherwise less attractive to consumers, EPA's prior safety analysis was thrown into doubt. *Id.* at 16,086.

The fifth, seventh, and eighth factors all unequivocally favored initiating a new rulemaking. As to the fifth—the impact the standards will have on the automobile industry—the preliminary analysis showed that the existing standards would likely "impose unreasonable per vehicle costs," with consequences including 1.3 million lost vehicle sales between 2022 and 2025 and as many as 1.13 million lost jobs in the auto sector alone. *Id.* at 16,085-86. The seventh and eighth factors, which focus on whether the standards will promote a harmonious One National Program and overall "regulatory certainty," likewise both militated strongly in favor of initiating a new rulemaking in coordination with NHTSA. Only then could EPA "ensure that [greenhouse gas] emission standards and CAFE standards are as aligned as much as possible," and only then could industry "effectively plan for compliance." *Id.* at 16,086-87.

In short, as promised, the April 2018 Determination offered a substantial analysis of "the information available on the factors relevant to setting greenhouse gas emission standards." 40 C.F.R. §86.1818-12(h)(1). With respect to each factor, EPA identified areas in which the updated record contradicted key conclusions it had previously reached, as well as areas in which the updated record left critical questions unresolved. The agency therefore announced that "EPA, in partnership

with NHTSA, will initiate a notice and comment rulemaking in a forthcoming Federal Register notice to further consider appropriate standards for [model years] 2022-2025 light-duty vehicles." 83 Fed. Reg. 16,087. And to eliminate any potential confusion about the status of the April 2018 Determination or the state of the law going forward, EPA reiterated that "this revised determination is not a final agency action, as explained in the 2012 final rule. The effect of this action is rather to initiate a rulemaking process whose outcome will be a final agency action. Until that rulemaking has been completed, the current standards remain in effect and there is no change in the legal rights and obligations of any stakeholders." *Id.*

Nevertheless, these petitions followed.

SUMMARY OF ARGUMENT

The jurisdictional defects with these proceedings leap off the page. Indeed, multiple Supreme Court and Circuit decisions confirm what is obvious at first glance: The April 2018 Determination is not final agency action. The Determination is one step removed even from a (non-final) notice of proposed rulemaking, as it does nothing more than announce EPA's intention to *issue* a notice of proposed rulemaking to revise greenhouse gas standards that will not take force for three more years, with the results of that still-yet-to-be-completed rulemaking yet to be determined. In the meantime, the 2012 standards remain in place, as do all the legal

rights and obligations that they create. The Determination is thus classic non-final agency action.

It should come as little surprise, then, that petitioners' efforts to challenge that non-final agency action are plainly not ripe for review. Petitioners cannot invoke this Court's judicial power until EPA actually decides whether and in what way to revise the model year 2022-2025 standards. Until then, they must address their concerns to the agency and its rulemaking process, not the courts.

At any rate, petitioners' complaints are entirely meritless, as petitioners both misconstrue what EPA did and misconceive the procedural and substantive burdens EPA faced. Indeed, petitioners repeatedly fault EPA for failing to follow procedures that the law does not prescribe, and for failing to make determinations that the law does not require, all while distorting the analysis EPA actually provided. In reality, EPA's analysis was more than sufficient to justify its determination that a full round of notice and comment should be conducted before settling on standards that will have an enormous impact on both the public and a critical sector of the nation's economy. Petitioners' contrary arguments ultimately reduce to efforts to fault EPA for failing to justify a final decision that the agency has not yet made. That not only confirms that their complaints are meritless, but underscores that their premature efforts to challenge final agency action that does not yet exist must be dismissed for lack of jurisdiction.

ARGUMENT

I. The Petitions Must Be Dismissed For Lack Of Jurisdiction.

Once again, this Court is confronted with petitioners who are "champing at the bit to challenge EPA's anticipated rule." *In re Murray Energy Corp.*, 788 F.3d 330, 333 (D.C. Cir. 2015) (Kavanaugh, J.). Once again, those challenges must be rebuffed as manifestly premature. The agency action that petitioners ask this Court to review does nothing more than announce EPA's intention to issue a notice of proposed rulemaking of unspecified content at some future date, which may or may not lead EPA to revise an existing regulation. In the meantime, the legal landscape remains entirely unchanged, with every existing regulation in full force and effect, and every legal right and obligation just as it was before. Because the April 2018 Determination is not final agency action, and the petitions are not ripe for review, the petitions must be dismissed for lack of jurisdiction.

A. The April 2018 Determination Is Not Final Agency Action.

The Clean Air Act grants this Court jurisdiction to review only "final action" taken by EPA. 42 U.S.C. §7607(b)(1); *NRDC v. EPA*, 559 F.3d 561, 564 (D.C. Cir. 2009). "The bite in the phrase 'final action,'" of course, is "in the word 'final.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). To be "final," agency action must satisfy both parts of the two-part test the Supreme Court articulated in *Bennett v. Spear*, 520 U.S. 154 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely

tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177-78 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)); *see Whitman*, 531 U.S. at 478 (applying *Bennett* to the Clean Air Act); *Murray Energy*, 788 F.3d at 334.

The April 2018 Determination fails on both scores. Far from marking the "consummation" of EPA's decisionmaking process, the Determination *restarts* that process. And it neither creates any rights or obligations nor triggers any "legal consequences" that count for finality purposes. It therefore cannot constitute final and reviewable agency action.

1. The April 2018 Determination does not mark the consummation of EPA's decisionmaking process.

Agency action is nonfinal under *Bennett*'s first prong if it "merely instructs [the agency] to ... initiate the process by which [regulated parties'] obligations ... eventually will be determined." *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 502-03 (D.C. Cir. 2018). That rule follows from the Supreme Court's holding that agency action is not final if it "determin[es] only that [further] proceedings will commence" and "[s]erv[es] only to initiate the proceedings." *FTC v. Standard Oil Co.*, 449 U.S. 232, 241-42 (1980). Such action is not final because it does no more than announce the agency's "threshold determination that further inquiry is warranted and that [the

agency] should initiate proceedings." *Id.* at 241. Simply put, "[a]n announcement of an agency's intent to establish law and policy in future is not the equivalent of the actual promulgation of a final regulation." *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996).

Those descriptions fit the April 2018 Determination to a T. As explained, the Determination does nothing more than announce EPA's intention to commence a rulemaking in which the agency's standards will "be revised as appropriate." 83 Fed. Reg. at 16,077; *id.* at 16,087. And just in case the interlocutory nature of the Determination were not already clear, EPA made explicit that it does not settle anything about what result the forthcoming rulemaking will reach, 77 Fed. Reg. at 62,652, and that, "[u]ntil that rulemaking has been completed, the current standards remain in effect and there is no change in the legal rights and obligations of any stakeholders," 83 Fed. Reg. at 16,087.

It is therefore plain that the action petitioners seek to challenge marks the *first step*, rather than the *consummation*, of EPA's ongoing decisionmaking process. As this Court has said before, "there was nothing 'final' in EPA's decision to collect additional information before proposing greenhouse emissions standards." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 193 (D.C. Cir. 2011) (per curiam). In fact, in words that apply here almost to the letter, the Court has said that "[w]e fail to understand how explicitly tentative and conditional statements—which expressed

certainty *only as to EPA's decision to continue the process of studying greenhouse gases*—could possibly be considered 'final.' Indeed, as the final rule states, '[t]his is not the end of the matter.'" *Id.* (emphasis added).

That should resolve the finality question here. But EPA's own view makes that conclusion doubly assured. "*Bennett* directs courts to look at finality from the agency's perspective" when assessing "whether the action represents the culmination of the agency's decisionmaking." *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1271 (D.C. Cir. 2018). Here, EPA has been clear and consistent. From 2012 to the present, EPA has uniformly maintained that a decision to reconsider the 2022-2025 standards would *not* be final agency action. *See* 77 Fed. Reg. at 62,784-85; 83 Fed. Reg. at 16,078; *id.* at 16,087.

Petitioners cannot escape this straightforward analysis. In the single paragraph (across all three briefs) that they devote to *Bennett*'s first prong, petitioners assert that "the Revised Determination 'marks the consummation' of the Mid-Term Evaluation." State Pet.Br.30 ("Pet.Br."). Petitioners are hardly the first litigants to try to end-run *Bennett* by recharacterizing an agency's determination of a threshold issue as "final action" with respect to that threshold issue. That familiar tactic should fail here, as it has in the past.

Indeed, the Supreme Court made short work of a comparable argument in *Standard Oil*. "To be sure," the Court acknowledged, the FTC action challenged

there (the issuance of an administrative complaint) was "definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the [Federal Trade Commission] Act." 449 U.S. at 241. But that did not make the action "a definitive statement of position" for purposes of finality, because it merely "represent[ed] a threshold determination that further inquiry is warranted and that [the agency] should initiate proceedings." *Id.*

So too here. At bottom, petitioners' arguments fail because they ignore "that agency rulemaking can occur in stages, and that review of initial steps should generally be deferred until the regulatory process is complete." *Am. Portland Cement All.*, 101 F.3d at 776. Indeed, their arguments contradict two well-settled lines of precedent: first, that an agency's decision to issue a notice of proposed rulemaking fails *Bennett*'s first prong, *Murray Energy*, 788 F.3d at 334; and second, that an agency's decision to reconsider an existing regulation *also* fails *Bennett*'s first prong, *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017). It follows *a fortiori* that an agency's decision to issue a notice of proposed rulemaking to reconsider an existing regulation likewise fails *Bennett*'s first prong. And the April 2018 Determination is one step preliminary even to *that* manifestly non-final action, for it merely announces EPA's *intention* to issue a notice of proposed rulemaking to reconsider the existing greenhouse gas standards.

That likewise dispels petitioners' suggestion that the Determination is final agency action because it "expressly set aside [EPA's] 2017 Determination, a previous final agency action." Pet.Br.32. First, the Determination does not set aside any existing *regulations*; as EPA explained, "the current standards remain in effect." 83 Fed. Reg. at 16,087. More to the point, the Determination is no different in that respect from an agency decision to reconsider a final rule. Neither agency action is "final" because neither marks the consummation of the relevant decisionmaking process. "Put simply, the consummation of the agency's decisionmaking process with respect to a rule occurs when the agency issues the rule." *Murray Energy*, 788 F.3d at 336.

2. The April 2018 Determination neither determines rights or obligations nor has relevant legal consequences.

Because the April 2018 Determination fails the first *Bennett* prong, it cannot be final. But even if this Court were to reach the second prong, it would fail there as well. Under *Bennett*'s second prong, "[a]gency action is considered final to the extent that it imposes an obligation, denies a right, or fixes some legal relationship." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003). The Determination "generates no such consequences." *Action on Smoking & Health v. Dep't of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994).

As discussed, the Determination is clear and unequivocal: It does not have any effect whatsoever on the rights or obligations of any regulated parties, and it

changes nothing about their legal relationship to one another or to EPA. 83 Fed. Reg. at 16,087. This Court has "held often enough that when an 'agency has not yet made any determination or issued any order imposing any obligation ..., denying any right ..., or fixing any legal relationship,' the agency action was not reviewable." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427-28 (D.C. Cir. 2004) (Roberts, J.) (quoting *Reliable Automatic Sprinkler*, 324 F.3d at 732). Such is the case here.

Indeed, just as notices of proposed rulemaking fail *Bennett*'s first prong, they also fail *Bennett*'s second prong. *Murray Energy*, 788 F.3d at 334. The same is true of the Determination *a fortiori*, because the Determination is not even a proposed rule, but merely announces EPA's intention to *issue* a proposed rule at some future date. Moreover, EPA's view is relevant at *Bennett*'s second prong just as it is at *Bennett*'s first prong. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.). And here too, EPA's clear and consistent position compels the conclusion that the Determination has no relevant consequences for finality purposes.

Resisting that straightforward application of settled precedent, petitioners argue that the Determination has a "legal consequence" for the agency itself because it creates "a binding requirement that [EPA] 'shall' initiate a rulemaking to revise the standards." Pet.Br.31. But that argument is foreclosed by this Court's repeated holdings that notices of proposed rulemaking do not have cognizable legal

consequences for finality purposes. *See supra* p.24. The purported "legal consequences" here are identical, and hence identically inadequate.

Indeed, petitioners' argument would eviscerate *Bennett*'s second prong, because *any* agency decision to initiate or continue a proceeding has the same "legal consequences" petitioners describe. Not surprisingly, the Supreme Court and this Court have consistently rejected that exception, which plainly would swallow the rule. For example, in *Standard Oil*, the agency action being challenged had the consequence of requiring the agency "to initiate ... proceedings," and "impose[d] upon [Standard Oil] the burden of responding to the charges made against it." 449 U.S. at 242. Those consequences, the Supreme Court held, do not create the "legal or practical effect" necessary for finality purposes. *Id.* Likewise, as this Court has explained, "[o]rders setting cases for hearings despite objections to the agency's jurisdiction have long been considered nonfinal. Such an order is like a district court's denial of a motion to dismiss, which—unlike a final order ending the case—assures its continuation." *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1215 (D.C. Cir. 1996) (citation omitted). Here too, the Determination does no more than help "initiate" a rulemaking proceeding and "assure[] its continuation."

Petitioners insist that agency action can satisfy *Bennett*'s second prong if it has "binding effects on ... the agency" or creates "'legal consequences' for agency

staff." Pet.Br.31 (citing *NEDACAP v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014); *Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 806-07 (D.C. Cir. 2006)). But petitioners misunderstand the meaning of that proposition. That principle does *not* refer to agency action that merely "initiate[s]" or "assures [the] continuation" of agency proceedings—which is all that the April 2018 Determination does. *Standard Oil*, 449 U.S. at 242; *DRG Funding Corp.*, 76 F.3d at 1215. Instead, that principle refers to agency action that affects the rights and obligations of regulated parties by binding the agency to treat those parties differently than before. As *NEDACAP* explained, "[i]f an agency action announces a binding change in its enforcement policy which immediately affects the rights and obligations of regulated parties, then the action is likely final and subject to review." 752 F.3d at 1007. Applying that principle, *NEDACAP* held the EPA action at issue reviewable "because it *compel*[*led*] agency officials to apply different permitting standards in different regions of the country." *Id.*; *see also, e.g.*, *NRDC v. EPA*, 643 F.3d 311, 319-20 (D.C. Cir. 2011) (holding that EPA guidance document satisfied *Bennett*'s second prong because it "binds EPA regional directors" to approve state ozone regulations that they previously had "discretion ... to reject"). The Determination is categorically different, as it does not change the relationship between EPA and petitioners (or, for that matter, anyone else), and it leaves every party's rights and obligations untouched.

Finally, petitioners contend that the Determination "created legal consequences for the States" because it "wiped away EPA's previous assurance that the existing standards would remain legally binding," forcing several States "to act to ensure that they will be able to enforce California's comparably robust standards." Pet.Br.31. That argument fails for at least two reasons. First, EPA made no such assurance; indeed, the entire premise of having a Mid-Term Evaluation was that the existing standards might be revised. Moreover, the Clean Air Act itself grants EPA the authority to "revise" existing standards as it deems appropriate, so interested parties must always be prepared for that possibility. 42 U.S.C. §7521(a)(1).

More fundamentally, "[t]he flaw in [petitioners'] argument is that the 'consequences' to which they allude are practical, not legal." *Ctr. for Auto Safety*, 452 F.3d at 811. As this Court has consistently held, practical consequences that flow from voluntary action are not cognizable under *Bennett*'s second prong. "[P]rudent organizations and individuals may alter their behavior (and thereby incur costs) based on what they think is likely to come in the form of new regulations. But that reality has never been a justification for allowing courts to review proposed agency rules." *Murray Energy*, 788 F.3d at 335; *see, e.g.*, *Soundboard Ass'n*, 888 F.3d at 1273; *Indep. Equip. Dealers*, 372 F.3d at 428; *Nat'l Mining Ass'n*, 758 F.3d at 253; *Reliable Automatic Sprinkler*, 324 F.3d at 732.

B. The Petitions Are Not Ripe for Review.

In addition to challenging agency action that is not final, the petitions are not ripe for review. As this Court and the Supreme Court have explained, "[t]he ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). These petitions present all the dangers the ripeness doctrine is designed to avert.

To determine "whether administrative action is ripe for judicial review," courts must "evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Both considerations confirm that these petitions are not ripe.

1. The issues petitioners raise are not fit for judicial decision.

An issue is not "fit" for judicial review if the agency action being challenged is not final. *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 943 n.4

(D.C. Cir. 2012); *Abbot Labs.*, 387 U.S. at 149. That alone dooms the petitions because the April 2018 Determination is not final agency action.

Moreover, "judicial intervention would inappropriately interfere with further administrative action." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). EPA is in the midst of a substantial rulemaking that will resolve the ultimate issue in a way that petitioners might—or might not—find objectionable. While that process is ongoing, there can be little doubt that "immediate judicial review ... could hinder agency efforts to refine its policies." *Id.* at 735. Simply put, immediate judicial review would threaten EPA's "interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985).

2. Petitioners would not suffer hardship if review were deferred until EPA completes the ongoing rulemaking.

The second part of the ripeness test asks whether "a delay in judgment will cause ... hardship" to petitioners. *AT&T Corp. v. FCC*, 349 F.3d 692, 699 (D.C. Cir. 2003). Here, petitioners cannot show cognizable hardship because they are "not required to engage in, or to refrain from, any conduct" as a result of the Determination. *Texas v. United States*, 523 U.S. 296, 301 (1998). Absent such a requirement, a litigant "will suffer no legally cognizable hardship." *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 396 (D.C. Cir. 2013).

Indeed, "hardship cannot be established when an agency's [challenged action] does not have 'adverse effects of a strictly legal kind.'" *Id.* (quoting *Nat'l Park Hospitality Ass'n*, 538 U.S. at 809); *see* Harry T. Edwards & Linda A. Elliot, *Federal Standards of Review* 177 (3d ed. 2018) ("Critically, hardship will not be found when a complaining party 'is not required to engage in, or to refrain from, any conduct.'" (quoting *Texas*, 523 U.S. at 301)).

Such is the case here: The Determination "do[es] not create adverse effects of a strictly legal kind" because it "do[es] not command anyone to do anything or to refrain from doing anything; [it] do[es] not grant, withhold, or modify any formal legal license, power, or authority; [it] do[es] not subject anyone to any civil or criminal liability; [it] create[s] no legal rights or obligations." *Ohio Forestry Ass'n*, 523 U.S. at 733. It makes no difference that the Clean Air Act sometimes recognizes a "lower standard" for hardship than the APA, because that lower standard still requires threatened adverse effects of a strictly legal kind. *See Whitman*, 531 U.S. at 479-80 (explaining that Clean Air Act's "lower standard" applies only when party seeks "'*preenforcement*' review" (quoting *Ohio Forestry Ass'n*, 523 U.S. at 737) (emphasis added)).

Petitioners' inability to show adverse effects of a strictly legal kind is dispositive under well-settled Supreme Court and Circuit precedent. But even if it were not, petitioners' attempt to demonstrate hardship would still come up short.

Petitioners' entire hardship theory refers back to the four injuries-in-fact they alleged as part of their basis for standing. *See* Pet.Br.33. But of those alleged injuries, only one could even arguably be mitigated by allowing judicial review now as opposed to later: the District of Columbia's alleged injury in having to "commit[] staff time and resources to prepare" in case EPA weakens the existing standards. Pet.Br.27-28. While that harm may suffice to satisfy Article III, it is manifestly insufficient to satisfy ripeness doctrine, as "mere uncertainty as to the validity of a legal rule" does not give rise to "hardship for purposes of the ripeness analysis." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 811. The alleged injury-in-fact suffered by electric-vehicle manufacturers cannot give rise to cognizable hardship for the same reason: The existence and extent of their hardship depends completely on uncertainty about whether, and if so, how, EPA will revise the existing standards. *See* Nat'l Coal. for Advanced Tech. Br.8-10. Petitioners' hardship arguments thus fail even on their own terms.

II. Petitioners' Arguments Are Meritless.

Jurisdictional defects aside, petitioners' arguments are meritless. Petitioners contend that the April 2018 Determination is procedurally and substantively infirm and insist that EPA violated both the regulation governing the Mid-Term Evaluation and the APA. Petitioners are wrong at every turn.

A. The April 2018 Determination Is Procedurally Sound.

"Time and again," the Supreme Court has "reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'" *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)). Of course, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion," *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), and when they do, "it is incumbent upon agencies to follow [them]," *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). But "[b]eyond the APA's minimum requirements"—and any others Congress or the agency has seen fit to prescribe—"courts lack authority 'to impose upon an agency [their] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'" *Perez*, 135 S. Ct. at 1207 (quoting *Vt. Yankee*, 435 U.S. at 549). Accordingly, a procedural objection to agency action fails unless it is firmly anchored in the APA, a governing statute, or an applicable regulation. *Vt. Yankee*, 435 U.S. at 544; *Perez*, 135 S. Ct. at 1207. That principle dooms each of petitioners' arguments because *none* identifies a binding rule EPA contravened.

Petitioners first suggest that EPA should have supplemented the TAR or supplanted it with a new one. Pet.Br.35. But nothing in §12(h) obligated EPA to do so. Section 12(h)(2) simply requires the Mid-Term Evaluation to be based on a

record that includes, among other things, "[a] draft [TAR]" and public comments on "the draft [TAR]." 40 C.F.R. §86.1818-12(h)(2)(i)-(ii). Those conditions indisputably were satisfied here.

Petitioners next argue that EPA should have "identif[ied]" new record materials underlying the April 2018 Determination "in advance," and should have "ma[de] EPA's evaluation of that record available for comment." Pet.Br.35-36. Petitioners do not appear to be suggesting that EPA failed to make the comments submitted during the comment period publicly available, as EPA committed to do, *see* 82 Fed. Reg. at 39,552. Rather, their complaint seems to be that EPA did not explain which comments it found helpful, and why, before issuing the Determination.

Petitioners cite nothing in support of that complaint, because no support exists. Section 12(h) is quite specific about which materials EPA must make available for comment before concluding the Mid-Term Evaluation: a draft TAR and the standards themselves. 40 C.F.R. §86.1818-12(h)(2)(ii)-(iii). Beyond that, §12(h) leaves EPA free to consider any "other materials the Administrator deems appropriate"—but it nowhere obligates EPA to flag which of those materials it considers most helpful, much less to permit interested parties to comment on EPA's own evaluation of the record. *Id.* §86.1818-12(h)(2)(iv). Nor does the APA impose anything approaching the requirement petitioners seem to envision. Indeed, the APA

does not require an agency to identify probative record material "in advance" even when, unlike here, the agency is using that record to produce a final rule. *See* 5 U.S.C. §553(b)-(c). This Court may not impose procedural obligations beyond those in the APA and §12(h). *Perez*, 135 S. Ct. at 1207.

Finally, petitioners complain that EPA should have conducted the Mid-Term Evaluation in closer consultation with the California Air Resources Board. Pet.Br.34, 36-38. But EPA was under no obligation to so. Petitioners' contrary argument hinges entirely on a statement from §12(h)'s preamble that EPA and NHTSA "*fully expect* to conduct the mid-term evaluation in close coordination with [California]." 77 Fed. Reg. at 62,784 (emphasis added). Petitioners never mention the italicized words—presumably because those words confirm that the language on which their argument depends does not impose any binding requirement.

Indeed, when, as here, language appears in a preamble to a regulation, rather than in the text of the regulation itself, it has no legal effect absent unusual circumstances confirming "the agency's intention to bind either itself or regulated parties." *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996). Here, EPA's deliberate use of the equivocal and aspirational verb "expect" makes plain that it did not intend to *bind* itself to coordinate the Mid-Term Evaluation with the California Air Resources Board. *See, e.g.*, *NRDC v. EPA*, 706 F.3d 428, 432 (D.C. Cir. 2013) (holding that EPA's use of "plainly tentative

language" in preamble—namely "believes" and "should"—rendered preamble non-binding (emphasis omitted)); *NRDC v. EPA*, 559 F.3d at 565 ("'Giving decisive weight to the agency's choice between "may" and "will," we have held that similar statements are nonbinding and unreviewable.'"). Because the preamble language on which petitioners rely has no binding force, petitioners' complaints about EPA's level of coordination with California do not come close to establishing procedural error.

B. The April 2018 Determination Is Substantively Sound.

The Determination provides straightforward, and more than adequate, support for EPA's conclusion that the information available to it in April 2018 did not justify retaining the 2012 standards. EPA thus acted well within its discretion in concluding that a new rulemaking was warranted, with the existing standards to be revised (or not) as appropriate in light of what that effort revealed. Petitioners' insistence that §12(h) demanded more once again finds no support in law or fact.

1. EPA based its determination on the record.

Petitioners first contend that EPA failed to base its decision on the record. Pet.Br.39-40. This argument essentially boils down to a complaint that the Determination did not spend enough time talking about the TAR. *Id*. But §12(h)'s requirement that EPA base its decision "upon a record that includes" the TAR, 40 C.F.R. §86.1818-12(h)(2), certainly does not obligate the agency to discuss the TAR

in any particular depth. Indeed, even when *Congress* requires agency action to be "based on consideration of the relevant factors" specified in a statute, courts must "'uphold [the agency's] decision'" even if it is "'of less than ideal clarity,'" so long as "'the agency's path may reasonably be discerned.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)). EPA's analysis certainly exceeded that minimal standard.

Petitioners' contrary argument hinges largely on a comparison between the January 2017 Determination and the April 2018 Determination. Pet.Br.39. But that is an apples-to-oranges comparison, as EPA made clear from the outset that it would face a lower burden to justify a decision to initiate a new rulemaking than to justify a decision leave the existing standards in place. *See* 77 Fed. Reg. at 62,784. That makes ample sense given that a decision to leave the existing standards in place would be final agency action subject to judicial review, while a decision to initiate a rulemaking instead would *restart* the process of gathering information, determining the appropriate standards, and then providing a full justification for whatever standards the agency eventually selects. Put simply, an agency need not provide the same level of analysis to justify a decision to *begin* a decisionmaking process as to justify its actual decision.

2. EPA's assessment of the §12(h) factors was more than adequate.

Petitioners argue at length that the Determination is substantively inadequate because its analysis of the §12(h) factors was insufficiently detailed. Pet.Br.40-51. In fact, EPA's step-by-step discussion of each and every §12(h) factor was more than sufficiently robust to justify the modest step of initiating a new proceeding to determine whether to revise the existing standards. *See supra* pp.13-16. Once again, petitioners' contrary argument stems largely from their complaint that the analysis in the April 2018 Determination is less exhaustive than the analysis in the January 2017 Determination. *See* Pet.Br.41, 46-47. But as explained, the January 2017 Determination was a final action subject to judicial review, and was therefore required to set forth a sufficient basis to facilitate such review; the April 2018 Determination was not, and so did not need to lay out the agency's analysis in the same level of detail. At any rate, the April 2018 Determination improved on the reasoning of the January 2017 Determination in several key respects, including by identifying critical flaws in EPA's rushed 2017 analysis and by recognizing the importance of coordinating a rulemaking with NHTSA (a promise that the January 2017 Determination cast aside without any justification).

Petitioners fault EPA for focusing on identifying gaps or uncertainties that the more complete record disclosed as to the §12(h) factors, rather than definitively resolving disagreements that the competing data revealed. *See* Pet.Br.42, 44-49.

That criticism is hard to fathom. The whole point of the Mid-Term Evaluation was for EPA to evaluate whether the available evidence justified leaving the existing standards in place without further inquiry—an interim evaluation necessitated in part by the fact that, in the statute that actually squarely addresses automotive fuel efficiency, Congress precluded NHTSA from issuing efficiency standards for more than five years at a time. *See* 49 U.S.C. §32902(b)(3)(B). If the answer was no, then, unsurprisingly, the next step was further inquiry: EPA "shall initiate a rulemaking to revise the standards, to be either more or less stringent as appropriate." 40 C.F.R. §86.1818-12(h). EPA's findings that the updated record failed to substantiate—or, worse yet, contradicted—key assumptions underlying the existing standards are thus exactly the kind of findings that EPA was supposed to make to justify initiating a new rulemaking. Petitioners cannot fault EPA for failing to make the kind of definitive determinations during the Mid-Term Evaluation that the very regulation on which they rely confirms were outside the scope of that interim step.

C. The April 2018 Determination Is Not Arbitrary and Capricious.

Finally, petitioners argue that the April 2018 Determination is arbitrary and capricious because EPA failed to provide a reasoned explanation and failed to justify its change in position from the January 2017 Determination. Pet.Br.51-53. As to the former, that is just a rehash of petitioners' argument that the April 2018 Determination is substantively unsound. In reality, EPA's explanations were more

than sufficient to satisfy the low bar of arbitrary and capricious review. Petitioners' mere disagreement with the agency's analysis of the evidence is not nearly enough to dislodge EPA's considered conclusions that the record was insufficient to justify preserving the existing standards. *See, e.g.*, *NRDC v. EPA*, 194 F.3d 130, 136 (D.C. Cir. 1999); *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

As to the latter, even assuming an agency faces the same APA obligations to explain a change made within a single decisionmaking process as it does when changing a final rule, the April 2018 Determination readily clears that bar too. When changing final agency action, an agency need only "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Fox Television Stations*, 556 U.S. at 515 (emphasis omitted). The April 2018 Determination unquestionably explains both *that* EPA is withdrawing the January 2017 Determination and *why* it is doing so, which is all the APA could require at this preliminary stage. To the extent petitioners demand more, their arguments only reinforce the prematurity of their lawsuit, as they are effectively attacking EPA for failing to justify a rule that it has yet to promulgate.

CONCLUSION

The petitions for review should be dismissed for lack of jurisdiction. In the alternative, they should be denied.

Respectfully submitted,

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I hereby certify that:

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

April 15, 2019

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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