ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1092 and consolidated cases (Complex)

COALITION FOR RESPONSIBLE REGULATION, *et al.*,

***Petitioners*,**

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

***Respondents*.**

ON CONSOLIDATED PETITIONS FOR REVIEW OF FINAL ACTIONS
OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit R. 28(a)(1), Intervenors in Support of Respondents submit this certificate as to parties, rulings and related cases.

(A) Parties and amici: The parties and amici to this action are those set forth in the certificates filed with the Joint Opening Brief of Non-State Petitioners and Supporting Intervenors (hereinafter "Industry Brief" or "Ind. Br."), the Brief of Texas for State Petitioners and Supporting Intervenors, with the exception noted in the Rule 28(a)(1) Certificate preceding the Brief for Respondents ("EPA Br.").

(B) Rulings under review: This case is a set of consolidated petitions for review of a final rule of the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA), "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 75 Fed. Reg. 25,324 (May 7, 2010).

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

DATED: September 30, 2011

/s/ *Sean H. Donahue*
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GLOSSARY OF ABBREVIATIONS

Act	Clean Air Act
CO_2	carbon dioxide
EPA	United States Environmental Protection Agency
EPA Br.	Brief of Respondents United States Environmental Protection Agency *et al.*
Ind. Br.	Joint Opening Brief of Non-State Petitioners and Supporting Intervenors
JA	Joint Appendix
MY	model year
NHTSA	National Highway Traffic Safety Administration
PSD	Prevention of Significant Deterioration

The State and Environmental Intervenors respectfully submit this brief in support of Respondents Environmental Protection Agency ("EPA"), *et al*.

STATEMENT OF JURISDICTION

Petitioners invoke the Court's jurisdiction under 42 U.S.C. § 7607(b).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum to EPA's brief.

STATEMENT OF THE CASE

A. Statutory Background. Section 202(a)(1) of the Clean Air Act requires the EPA Administrator to determine whether, "in [her] judgment," "the emission of any air pollutant" from new motor vehicles "cause[s], or contribute[s] to, air pollution" that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). If the Administrator answers these questions affirmatively, then she "shall" promulgate vehicle emission standards "in accordance with the provisions of" Section 202. *Id*. Thus, "[i]f EPA makes a finding of endangerment, the Clean Air Act *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (emphasis added). Light duty vehicle emission standards are governed by Section 202(a)(2),which provides that the standards "shall take effect after such period as the Administrator finds necessary to permit

the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7521(a)(2).

B. Statement of Facts. On December 15, 2009, EPA issued its finding that vehicular greenhouse gas emissions "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) ("Endangerment Finding").

EPA promulgated the standards currently before the Court on May 7, 2010, explaining that, once an endangerment finding is made, "section 202(a) requires EPA to issue standards." 75 Fed. Reg. 25,324, 25,398. In developing the standards, EPA "carefully evaluated the effectiveness of individual technologies as well as the interactions when technologies are combined," and also "the cost to manufacturers of meeting the standards." *Id.* at 25,403-04. The agency determined that manufacturers would "employ[] a wide variety of technologies that are already commercially available," and that manufacturers had enough lead time to incorporate the emissions control technologies. *Id.* at 25,403-04; *see also id.* at 25,373-77.

In this Vehicle Rule, EPA set carbon dioxide (CO_2) emission standards for vehicles with model years 2012 through 2016. 75 Fed. Reg. at 25,405. The

standards gradually become more stringent from model year 2012 to model year 2016, *see id.* at 25,406-07 (tables), and "are projected to achieve a national fleet-wide average, covering both light cars and trucks, of 250 grams/mile of CO_2 in model year (MY) 2016," *Id.* at 25,405. EPA also set limits on emissions of methane and nitrous oxide. *Id.* EPA's standards provide manufacturers with credits for reducing emissions of hydrofluorocarbons from air conditioners. *See id.* at 25,424-32.

EPA found that the "average cost of technology to meet the final 2016 standards … is $948 per vehicle." 75 Fed. Reg. at 25,463. It further found that manufacturer compliance costs, reflected in vehicle prices to the consumer, will be more than offset by consumer savings due to decreased fuel costs. *Id.* at 25,519. The rule saves consumers more than $400 per year in fuel costs, offsetting any increased vehicle price within the first three years, and yielding immediate savings for vehicles purchased with credit. *See id.* at 25,519-20 (Tables III.H.5-3, 5-4). Over the lifetime of the vehicle, the net savings for the average consumer is well over $3,000. *Id.* at 25,520 (Table III.H.5-5). Thus, consumers – including fleet purchasers – will realize a net savings.

EPA also evaluated the reductions in greenhouse gas emissions and oil usage associated with the standards, quantifying "important and significant reductions" at approximately 960 million metric tons of CO_2 equivalent and 1.8 *billion* barrels of

oil. 75 Fed. Reg. at 25,404. These reductions will provide an array of environmental and public benefits above and beyond the substantial financial savings from lower fuel use. *Id.* at 25,520-31.

In developing the standards, EPA also evaluated alternative standards that were more and less stringent than those finally adopted, and provided detailed rationales for rejecting such alternatives based on technology, cost, and lead time considerations. *See* 75 Fed. Reg. at 25,463-68.

EPA's greenhouse gas standards are projected to achieve significantly greater emission reductions than the companion fuel economy standards of the National Highway Traffic Safety Administration ("NHTSA"): 960 million metric tons of CO_2 equivalent emissions as compared to 655 million metric tons of CO_2 from NHTSA's standards, or 47% more than the NHTSA standards alone. *Compare* 75 Fed. Reg. at 25,490 & Table III.F.1-2 *with id.* at 25,636 & Table IV.G.1-4. EPA's Vehicle Rule will, over time, reduce greenhouse gas emissions from new cars and light trucks by more than 20%. *Id.* at 25,489 (Table III.F.1-1).

EPA's standards enable the establishment of a coordinated National Program for light duty vehicles, harmonizing the standard-setting efforts of EPA, NHTSA, and California. 75 Fed. Reg. at 25,327-28; *see* EPA Br. 14-15, 18-19. This would not have been possible had EPA not set standards. 75 Fed. Reg. at 25,466. In addition to producing significantly more emission reductions than California or

NHTSA acting alone, the National Program gave vehicle manufacturers added flexibility, *id.*, and allowed the federal government, California and other States, and the manufacturers to avoid protracted litigation. 75 Fed. Reg. at 25,328. *See, e.g.*, *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (appeals subsequently dismissed); *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (same); *see also Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192 (D.C. Cir. 2011) (dismissing, for lack of standing, challenges by *non*-auto manufacturers to EPA's approval of California's standards).

Following the National Program approach, EPA recently issued greenhouse gas emission standards for heavy duty vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011), and proposed standards for post-model-year-2016 light duty vehicles, 76 Fed. Reg. 48,758 (Aug. 9, 2011).

STANDARD OF REVIEW

EPA (Br. 23-25) sets forth the applicable standard of review.

SUMMARY OF ARGUMENT

Petitioners' challenges to EPA's Vehicle Rule are meritless. Having found that motor vehicle emissions contribute to air pollution that endangers public health and welfare, the agency was under an express statutory obligation to issue the standards, *see* 42 U.S.C. § 7521(a)(1) ("shall"), one pointedly confirmed by *Massachusetts*, 549 U.S. at 533.

Petitioners have no quarrel with the Rule's specific content – only with EPA's compliance with its statutory obligation to set standards. But Petitioners turn administrative law on its head by trying to block EPA from fulfilling an express statutory duty based on factors nowhere mentioned in Section 202(a), the statutory section that establishes the agency's duty and governs its performance of that duty. Petitioners erroneously suggest that in determining whether to promulgate vehicle standards, EPA must consider costs that may be imposed indirectly on stationary sources when the vehicle standards trigger other regulatory actions affecting those stationary sources. To the contrary, Section 202(a)(2) requires EPA to consider only vehicle manufacturers' costs of complying with the standards. Thus, EPA properly followed *Massachusetts*' central teaching that the agency must base its choices on the factors set forth in the statute. 549 U.S. at 532-35.

Petitioners likewise err in suggesting that EPA may decline to establish motor vehicle emission standards based upon claims that the vehicle standards will not go *far enough* toward eliminating the hazards of climate change. Petitioners' arguments contrast with their overall effort to block all regulation of greenhouse gases. Moreover, these arguments ignore the very substantial reductions this Rule alone will bring about, and are unmoored to the criteria Congress prescribed to guide EPA's decision.

Finally, EPA properly rejected claims that it should delay compliance with its duty to promulgate the standards.

ARGUMENT

None of the Petitioners argues that the Vehicle Rule is inconsistent with the criteria for vehicle standards set forth in Section 202(a)(2), or that the rulemaking record fails to support EPA's judgments concerning the availability and cost of emissions control technologies, or that there is inadequate lead time for vehicle manufacturers to install them. Rather, Petitioners argue that EPA should have defied an unambiguous statutory command and declined to issue *any* motor vehicle standards because those standards trigger certain obligations for stationary sources, and because they will not effectively abate greenhouse gas emissions. The Court should reject Petitioners' argument that EPA was required for these or any other reasons to defy an unambiguous statutory command.

A. When the Administrator Makes an Endangerment Finding, Section 202(a)(1) Creates a Mandatory Duty to Promulgate Regulations.

Section 202(a)(1) provides that "[t]he Administrator *shall* by regulation prescribe … standards" applicable to motor vehicle emissions that the Administrator finds contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. *See* 42 U.S.C. § 7521(a)(1) (emphasis added). This provision creates a mandatory duty to promulgate standards once, as here, the Administrator has made the threshold findings of "contribution" and "endangerment." "Shall" is the "language of command," and creates a mandatory duty to promulgate regulations. *See, e.g.*, *Ass'n of Am. R.R.s v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977).

The mandatory character of EPA's duty is underlined by the statutory context. Elsewhere in the same subsection, Congress conferred discretion on EPA through uses of the permissive "may." *See, e.g.*, 42 U.S.C. § 7521(a)(3)(A)(ii) (criteria for establishing categories of motor vehicles), (a)(3)(B)(i) (revisions to pre-1990 heavy-duty vehicle standards); *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 20 n.37 (D.C. Cir. 1976) ("§ 211 is permissive; the Administrator 'may' regulate if emissions 'will endanger' the public health"). Congress knew how to leave EPA discretion, and chose not to leave the agency discretion to refuse promulgation of vehicle emission standards following an endangerment finding. *See Jama v.*

Immigration & Customs Enforcement, 543 U.S. 335, 346 (2005) (juxtaposing the permissive "may" with the mandatory "shall").

Indeed, the Supreme Court has already ruled that Section 202(a)(1) prescribes a "clear statutory command." *Massachusetts*, 549 U.S. at 533. First, EPA must form a "judgment" about "whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Id.* at 532-33 (quoting § 202(a)(1)). Second, "[i]f EPA makes a finding of endangerment, the Clean Air Act *requires* the agency to regulate emissions of the deleterious pollutant from new motor vehicles." *Id.* at 533 (citing § 202(a)(1)) (emphasis added); *see also Ethyl Corp.*, 541 F.2d at 20 n.37 (§ 202 is "mandatory").

B. Petitioners' Proffered Grounds for Avoiding EPA's Mandatory Duty Are Irrelevant and Improper Under the Statute.

Petitioners would alter *Massachusetts*' reading of the Act and amend Section 202(a)(1) by adding a proviso to EPA's duty: in their view, EPA is "require[d]" to promulgate regulations and "shall" promulgate them, *unless the agency declines to do so based on stationary source impacts or concerns that the regulations will not eliminate the endangerment.*

This Court should reject Petitioners' invitation to ignore a Supreme Court decision. *See Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) ("Vertical stare decisis – both in letter and in spirit – is a critical aspect of our hierarchical

Judiciary headed by 'one supreme Court.'") (quoting U.S. CONST. art. III, § 1).[1] And it should reject Petitioners' effort to engraft a new proviso onto Section 202(a)(1). As this Court held in construing another portion of Section 202:

> Where the authors of the CAA intended to create a conditional duty, they used the familiar words of condition. No such words of condition are found in the consultation requirement of section 202(a)(6) that derogate from EPA's duty to promulgate ORVR standards.

Natural Resources Defense Council v. Reilly, 983 F.2d 259, 266-67 (D.C. Cir. 1993) (citations and footnotes omitted). Here too, Congress imposed no condition of the kind urged by Petitioners. Instead, the *only* condition Section 202(a)(1) places on EPA's duty to regulate is that there must be an endangerment finding.[2]

Petitioners' arguments fail because they attempt to import statutorily irrelevant considerations. The factors that are relevant to an agency's decision must be found in the statute at issue, and consideration of factors beyond those intended by Congress renders an agency rule arbitrary and unlawful. *See Motor*

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[1] Petitioners go so far as to argue that EPA should be "forced" to "decline to establish motor vehicle GHG rules under CAA § 202(a)." Ind. Br. 17. Their alternative claim that EPA should have "exclude[d] CO_2" from the Vehicle Rule (*id.*) is contrary to both *Massachusetts*, *see* 549 U.S. at 533 (once it finds endangerment, EPA must "regulate emissions of the deleterious pollutant"), and Section 202(a)(1), which requires that EPA issue standards "applicable" to the air pollutant EPA has found to "endanger" public health or welfare.

[2] Petitioners' arguments that EPA erred in not considering certain factors are disconnected from their substantive aim, to prohibit EPA from promulgating *any* greenhouse gas emission standard and thereby prevent greenhouse gases from being "subject to regulation" under the Act. *See* Ind. Br. 17, 36.

Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). As this Court has explained:

> [T]here is no such thing as a "general duty" on an administrative agency to make decisions based on factors other than those Congress expressly or impliedly intended the agency to consider. The general principles of administrative law and procedure call upon an agency to give reasoned consideration to all facts and issues relevant to the matter at hand, but the determination of what is relevant turns in the first instance on analysis of the express language of the statute involved and the content given that language by implication from the structure of the statute, its legislative history, and the general course of administrative practice since its enactment. An administrative agency has no charter apart from the framework constructed by that analysis to enforce or otherwise consider whatever suits its or someone else's fancy.

Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1116 (D.C. Cir. 1979) ("*MEMA*").

1. Stationary Source Costs. Petitioners argue (Ind. Br. 19-24) that EPA erred by failing to consider the costs and consequences of the stationary source permitting obligations that are triggered under the provisions for "Prevention of Significant Deterioration" ("PSD") that apply to any pollutant "subject to regulation" under the Act. But EPA precisely followed the statutory mandate to consider only the costs that motor vehicle manufacturers would incur in implementing various pollution control technologies. *See* EPA Br. 34. EPA properly declined to consider *stationary sources'* costs associated with the triggering of PSD requirements. As EPA explains (Br. 31-33), this Court has held

that "cost" in Section 202(a)(2) "refers to the economic costs of *motor vehicle* emission standards and accompanying enforcement procedures." *MEMA*, 627 F.2d at 1118 (emphasis added).[3]

As a matter of plain meaning, when Section 202(a)(2) directs EPA to consider "requisite technology" and "cost of compliance," those terms refer to the technology and cost of the "regulation prescribed under paragraph (1) of this subsection," that is, to the cost of compliance with the standards applicable to motor vehicle emissions. 42 U.S.C. § 7521(a)(2). As this Court explained in *MEMA*, Section 202(a)(2) "requires that emission regulations be technologically feasible within economic parameters. Therein lies the intent of the 'cost of compliance' requirement." 627 F.2d at 1118. The "cost of compliance" refers solely to vehicle manufacturers' costs of meeting the Section 202(a)(2) vehicle emission standards. As the Supreme Court has emphasized, the Congresses that enacted and amended the Clean Air Act were careful and deliberate in their judgments as to whether, when, where, and how costs are to be considered in

[3] In *Michigan v. EPA*, 213 F.3d 663, 678-79 (D.C. Cir. 2000) (cited in Ind. Br. 20), the Court held that EPA could consider the costs of pollution control in defining a "significant" state contribution to interstate pollution. In contrast to Section 202(a), the statutory provision there (42 U.S.C. § 7410(a)(2)(D)) did not contain any direction as to what costs are to be considered. Further, the Court did not suggest, as Petitioners urge here, that an agency may (let alone must) rely upon cost considerations unmentioned in the statute as the basis for avoiding an express, unconditional statutory duty.

connection with initiating and shaping pollution control measures under the Act. *See Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 466-68 (2001).[4]

Moreover, even the stationary source permitting program that Petitioners highlight does not authorize EPA to assess compliance costs as a prerequisite to applicability of its permitting obligations. Instead, under the PSD program, costs are considered only on a case-by-case basis – mostly by state permitting authorities – in determining the appropriate emission limitations in stationary sources' permits. *See* 42 U.S.C. § 7479(3). Those costs vary in light of various source- and locality-specific factors, and evolve case by case over time as new and modified sources seek permits. *See id.* §§ 7475(a)(2)-(7), 7479(3). While cost considerations thus inform the permit requirements for particular facilities, they do not determine the reach of the program, which applies to sources that emit "any air pollutant," *id.* § 7479(1), and requires controls for "each pollutant subject to regulation under the Act," *id.* § 7475(a)(4). The drafters of these provisions expressly declined to impose on EPA an obligation to estimate overall costs prior to the case-by-case permit review: because these decisions would be made by

[4] It is particularly implausible that Congress would have implicitly permitted a standard-setting process focused on vehicle manufacturers' "cost of compliance" to be dominated by an entirely unguided inquiry into stationary sources' costs under separate programs. That would turn a clear statutory command into a conditional, permissive authorization. As the Supreme Court has recognized, in the Clean Air Act, Congress did not "hide elephants in mouseholes." *Am. Trucking Associations*, 531 U.S. at 468.

numerous state officials over time, "any attempt to determine uniform national costs and benefits [of the PSD program] obviously would be meaningless." H.R. Rep. No. 95-294 at 177 (1977). Since the Act does not provide that costs will be considered in determining whether a pollutant is subject to PSD requirements, it clearly does not provide for EPA to consider those costs in determining whether to issue the Vehicle Rule.

Petitioners also argue that EPA should have revisited here its decades-old view that (as the Act's plain language provides) stationary source PSD requirements are triggered when "any" air pollutant becomes subject to regulation under the Act. *See* Ind. Br. 25-32. These challenges are time-barred, 42 U.S.C. § 7607(b), and in any event are foreclosed both by unambiguous statutory text, *see*, *e.g.*, *id*. §§ 7475(a)(4) & 7479(3) (requiring best available control technology for "each pollutant subject to regulation under [the Act]"), 7479(1) (PSD applies to specified levels of emissions of "any air pollutant") and circuit precedent, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). At no point in this Section 202 rulemaking did EPA revisit or alter that decades-old interpretation concerning the applicability of the PSD program to newly regulated pollutants, and Petitioners' argument is not properly presented in this review proceeding. In any event, these arguments are irrelevant to EPA's statutory obligation under Section

202(a), which is to develop and promulgate standards for categories of *motor vehicles* that EPA has found contribute to endangering air pollution.

Petitioners also erroneously claim that EPA has elsewhere conceded that Section 202 leads to "absurd" results for stationary sources by triggering PSD and Title V permitting requirements. From this, they reason that EPA was obligated (or at least authorized) to refrain from setting any vehicle standards under Section 202. *See*, *e.g*., Ind. Br. 15-17. First, as discussed above, stationary source considerations have nothing to do with the factors that Section 202(a) directs EPA to consider in promulgating vehicle regulations. Second, EPA did not, as Petitioners suggest, make a broad finding that application of the PSD Program or Title V to greenhouse gas sources was unworkable, let alone absurd. Rather, the agency found that immediate application of PSD permitting requirements to smaller stationary sources was unworkable for administrative reasons, and thus chose to implement those requirements in phases, beginning with larger sources. 75 Fed. Reg. 31,514, 31,535-40, 31,577 (June 3, 2010). The administrative inconvenience that would result from immediately applying PSD and Title V requirements to all sources of greenhouse gases does not warrant the wholesale statutory rewrite that Petitioners seek here. *See Mova Pharm. Co. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("When the agency concludes that a literal

reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.”).

2. Alleged Ineffectiveness of Standards. Equally meritless are Petitioners’ arguments that EPA was required to establish that these vehicle standards, standing alone, would effectively abate the endangerment caused by greenhouse gas emissions. *See* Ind. Br. 33-39. These arguments are incongruous, since Petitioners’ central enterprise in the coordinated cases before this Court is to defeat *all* regulation of greenhouse gases. Moreover, there is no basis for the suggestion that the vehicle standards must completely solve the pollution problem they target.

Indeed, the statute imposes no requirement to demonstrate any specific reduction in the endangerment. Section 202(a)(2) requires EPA to set standards based on technological, cost, and other specified factors. *See* 42 U.S.C. § 7521(a)(2), (a)(3)(1)(A), (b)(1)(A), (h). Like other technology-based standard-setting directives, *e.g.*, *id.* § 7411 (new source performance standards), Section 202(a)(2) aims to develop and apply technology to reduce emissions, *see Husqvarna AB v. EPA*, 254 F.3d 195, 201 (D.C. Cir. 2001), and expressly provides for those standards to be updated over time, *see* 42 U.S.C. § 7521(a)(1) (Administrator shall “from time to time revise” vehicle standards), but it does not require the standards to achieve particular air quality goals.

Moreover, Petitioners ignore that EPA's regulations will produce large reductions in greenhouse gas emissions from one of the largest and fastest-growing source categories. *See* EPA Br. 48; *see also* 75 Fed. Reg. at 25,326 ("Mobile sources emitted 31 percent of all U.S. GHGs in 2007 … and have been the fastest-growing source of U.S. GHGs since 1990."). Petitioners deride the standards as inadequate to significantly reduce climate change-related harms (Ind. Br. 37), but *Massachusetts* rejected similar contentions, emphasizing that "reducing domestic automobile emissions is hardly a tentative step," 549 U.S. at 524, and rejecting, as irrelevant under the statute, arguments that regulating vehicular emissions under Section 202(a) would be inefficient or ineffective, *id.* at 533-34.[5]

In *Ethyl*, this Court ruled that EPA had properly regulated lead in fuel additives even though lead enters the body from "multiple sources," and airborne lead emitted from automobiles "in and of itself, may not be a threat." 541 F.2d at 30. The Court noted that "no regulation could ever be justified" if the agency could not attack cumulative harms incrementally, criticizing as "tunnel-like reasoning" the petitioner's contrary view. *Id; see also id*. at 40 n.88. The 1977 Amendments specifically endorsed *Ethyl*'s approach. *See* H.R. Rep. No. 95-294 at 49-50, 51 (1977).

[5] Moreover, reductions from EPA's Rule far exceed those from NHTSA's companion rule, and EPA was under an independent statutory duty to promulgate standards. EPA Br. 47-61. *See also* Inst. for Policy Integ. Amicus Br. 3-6.

The wording of Section 202(a) – instructing EPA to regulate based upon a finding that mobile sources "contribute" to dangerous air pollution, allowing the agency to develop distinct standards for different classes of mobile sources, and requiring the agency to update the standards "from time to time" – demonstrates that Congress well understood the need to proceed against parts of a pollution problem, even if it cannot be wholly resolved in one step. As this Court has explained in construing an analogous mobile source provision of the Act:

> As used in this context, "contribute" means simply "to have a share in any act or effect," or "to have a part or share in producing." Standing alone, the term has no inherent connotation as to the magnitude or importance of the relevant "share" in the effect; certainly it does not incorporate any "significance" requirement.

Bluewater Network v. EPA, 370 F.3d 1, 13 (D.C. Cir. 2004) (citations omitted).

Greenhouse gas pollution, like many other air pollution problems, stems from multiple types of sources that cannot feasibly or lawfully be addressed through a single regulatory device. Any effort to address the problem necessarily involves reducing emissions incrementally from a wide variety of sources.[6] These regulations are but one phase of the use of Section 202(a) itself to address greenhouse gas emissions; they have been – and will continue to be – followed by

[6] For example, an influential article by Professors Pacala and Socolow provides an analytical framework for addressing global warming by combining "wedges" of gradually increasing reductions from multiple sectors, including vehicles. *See* Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies, 305 Science 968 (2004).

standards addressing other vehicle categories and later model years. The amount of pollution prevented by the Vehicle Rule alone is very substantial. *See* pp. 4-5, *supra*; EPA Br. 48-50.

C. EPA Was Not Required to Further Delay Promulgation of Standards.

In addition to arguing that EPA should have declined to promulgate Section 202 greenhouse gas standards at all, Petitioners repackage their arguments as a claim (Ind. Br. 24-25) that the agency should have *delayed* issuing such standards. As explained above, however, under Section 202(a)(1) and *Massachusetts*, EPA had a nondiscretionary duty to issue the standards. Petitioners cite no authority for the startling proposition that an agency can be required, on pain of reversal, to delay performing a nondiscretionary duty. As EPA correctly notes, there had been “considerable delay already” in the promulgation of these standards. EPA Br. 37-38.[7] Delaying the Rule further would have meant forestalling significant public benefits, including major reductions in emissions, savings for consumers, and implementation of feasible new technologies.

[7] Petitioners do not challenge EPA’s determination that the standards will provide vehicle manufacturers with the lead time “necessary to permit the development and application of the requisite technology.” 42 U.S.C. § 7521(a)(2). *See*, *e.g.*, 75 Fed. Reg. at 25,404.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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STATE AND ENVIRONMENTAL INTERVENORS' CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION AND TYPEFACE REQUIREMENTS

State and Environmental Intervenors hereby represent that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the briefing format adopted by the Court for this case because it contains 4341 words, as counted by Microsoft Word, excluding the signature block and the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

DATED: September 30, 2011

/s/ Sean H. Donahue
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for State and Environmental Intervenors have been served through the Court's CM/ECF system on all registered counsel this 30th day of September, 2011.

DATED: September 30, 2011

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