Oral Argument Not Yet Scheduled

NO. 10-1092 AND CONSOLIDATED CASES (COMPLEX)

United States Court of Appeals
For the District of Columbia Circuit

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

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Environmental Protection Agency Order

BRIEF OF STATE PETITIONERS AND SUPPORTING INTERVENOR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:

09-1092 (Lead), 10-1094, 10-1134, 10-1143, 10-1144, 10-1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10-1162, 10-1163, 10-1164, 10-1166, 10-1172, 10-1182

(A) Parties, Intervenors, and Amici

Petitioners

Alpha Natural Resources, Inc.
American Farm Bureau Federation
American Forest & Paper Association, Inc.
American Frozen Food Institute
American and Iron Steel Intstitute
American Petroleum Institute
Attorney General Greg Abbott
Brick Industry Association
Chamber of Commerce of the United States of America
Coalition for Responsible Regulation, Inc.
Collins Industries, Inc.
Collins Ready-Mix Concrete, Inc.
Collins Trucking Company, Inc.
Commonwealth of Virginia
Competitive Enterprise Institute
Corn Refiners Association
Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation
Freedomworks
Georgia Agribusiness Council, Inc.
Georgia Motor Trucking Association, Inc.
Gerdau Ameristeel US Inc.
Aglass Packaging Institute
Great Northern Project Development, L.P.
Haley Barbour, Governor of Mississippi
Horizon Freight System, Inc.
Industrial Minerals Association – North America

J&M Tank Lines, Inc.
Kennesaw Transportation, Inc.
Landmark Legal Foundation
Langdale Forest Products Company
Langdale Timber Company
Michigan Manufacturers Association
Mississippi Mnaufacturrers Association
National Association of Home Builders
National Association of Manufacturers
National Cattlemen's Beef Association
National Federation of Independent Business
National Mining Association
National Oilseed Processors Association
National Petrochemical & Refiners Association
Ohio Coal Association
Peabody Energy Company
Portland Cement Association
Rick Perry, Governor of Texas
Rosebud Mining Company
Science and Environmental Policy Project
Southeast Trailer Mart, Inc.
Southeastern Legal Foundation, Inc.
Specialty Steel Industry of North America
State of Alabama
State of South Carolina
State of South Dakota
State of Nebraska
State of North Dakota
State of Texas
Tennessee Chamber of Commerce and Industry
Texas Agriculture Commission
Texas Commission on Environmental Quality
Texas General Land Office
Texas Public Utilities Commission
Texas Railroad Commission
The Langdale Company
Utility Air Regulatory Group
West Virginia Manufacturers Association
Wisconsin Manufacturers and Commerce

Respondents

Environmental Protection Agency
National Highway Traffic Safety Administration
Lisa Perez Jackson

Intervenors for Petitioners

State of Georgia
Langdale Farms, LLC
Langdale Forest Products Company
Langdale Fuel Compnay
Langdale Chevrolet-Pontiac, Inc.
Langdale Ford Company
Langdale Timber Company
Langboard, Inc. – MDF
Langboard, Inc. – OSB

Intervenors for Respondents

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Association of International Automobile Manufacturers, Inc.
City of New York
Commonwealth of Massachusetts
Commonwealth of Pennsylvania
Department of Environmental Protection
Environmental Defense Fund
Global Automakers
Natural Resources Defense Council
Sierra Club
State of California
State of Delaware
State of Illinois
State of Iowa
State of Maine
State of Maryland
State of New Mexico
State of New York
State of Oregon

State of Rhode Island
State of Vermont
State of Washington

Amicus Curiae for Petitioners

American Chemistry Council

Amici Curiae for Respondents

Great Waters Coalition
Honeywell International, Inc.
Union of Concerned Scientists
Institute for Policy Integrity at New York University School of Law

(B) Rulings Under Review

These consolidated cases challenge:

> *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010)

(C) Related Cases

The consolidated cases on review have not previously been reviewed by this Court or any other court. The following groups of consolidated cases are related to the consolidated cases under review:

(1) Twenty-six petitions for review consolidated under lead case **No. 09-1322**, challenge EPA's "Endangerment Finding," 74 Fed. Reg. 66,496 (Dec. 15, 2009).

(2) Forty-two petitions for review consolidated under lead case **No. 10-1073**:

a. Seventeen petitions challenge EPA's "Triggering Rule," 75 Fed. Reg. 17,004 (April 2, 2010);

b. Twenty-five petitions challenge EPA's "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010).

(3) Twelve petitions for review consolidated under lead case **No. 10-1167**:

a. Three petitions challenge the EPA rule entitled *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978);

b. Three petitions challenge the EPA rule entitled *Part 52 – Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978);

c. Three petitions challenge the EPA rule entitled *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980);

d. Three petitions challenge the EPA rule entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Baseline Emissions Determination; Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186 (Dec. 31, 2002)

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GLOSSARY OF ABBREVIATIONS

APA – Administrative Procedures Act

CAA – Clean Air Act

CAFE – Combined Average Fuel Economy

EPA – United States Environmental Protection Agency

GHG – Greenhouse gas

NHTSA – National Highway Traffic Safety Administration

PSD – Prevention of Significant Deterioration

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BRIEF OF STATE PETITIONERS AND SUPPORTING INTERVENOR

The Clean Air Act (CAA) directs the Administrator of Environmental Protection Agency (EPA) to regulate air-pollutant emissions from new motor vehicles that "in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (CAA § 202(a)(1)). But these regulations cannot take effect until after a time period "necessary to permit the development and application of the

requisite technology," and the statute requires the Administrator to give "appropriate consideration to the cost of compliance within such period." *Id.* § 7521(a)(2) (CAA § 202(a)(2)). EPA's "Tailpipe Rule" fails to fully consider these costs of compliance, and in all events rests on a legally flawed "Endangerment Finding." Each of these shortcomings independently warrants a ruling from this Court vacating and remanding the Tailpipe Rule.

Following the Supreme Court's decision *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA concluded that manmade greenhouse-gas (GHG) emissions contribute to the perceived but undefined danger variously referred to as "climate change" or "global warming," and found that GHGs such as carbon dioxide therefore qualify as "air pollutants" from new motor vehicles that "may reasonably be anticipated both to endanger public health and to endanger public welfare." *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,496-97 (Dec. 15, 2009) (Endangerment Finding). Based on that Endangerment Finding, EPA and the National Highway Traffic Safety Administration (NHTSA) jointly issued a separate rule limiting GHG emissions from mobile

sources. *See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (Tailpipe Rule). But EPA did not stop there. Not content to regulate GHGs only from mobile sources under section 202(a)(1), EPA concluded that its Tailpipe Rule meant that GHGs were now "subject to regulation under the [Clean Air] Act," a finding that empowered EPA to regulate GHGs from *stationary* sources under the Prevention of Significant Deterioration (PSD) permitting program. *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004, 17,019 (April 2, 2010) (Triggering Rule). The Tailpipe Rule thus became the *sine qua non* of one of the most expansive and onerous regulatory programs ever promulgated in the United States—yet EPA never considered the full scope of compliance costs that the Tailpipe Rule spawned.

Courts must set aside agency action under the arbitrary-and-capricious test if the agency "entirely fail[s] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Here, the very language

of the CAA requires EPA to consider the costs of compliance in deciding when its Tailpipe Rule should take effect, and EPA not only ignored but expressly refused to consider the costs of complying with the stationary source regulations that sprung into being on account of the Tailpipe Rule. EPA's willingness to consider only those costs of complying with the *provisions in* the Tailpipe Rule represents nothing less than willful blindness to the full consequences of this regulatory decision, a posture that the arbitrary-and-capricious doctrine forbids.

Courts may also set aside agency action "in excess of statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9). The Tailpipe Rule fails this test because section 202(a)(1) authorizes the Administrator to regulate pollutants from motor-vehicle emissions only if the Administrator finds that those pollutants endanger human health and welfare, 42 U.S.C. § 7521(a)(1), and the Tailpipe Rule rests upon a legally flawed endangerment finding. *See* Brief of Texas for State Petitioners and Supporting Intervenors, No. 09-1322, at 17-21 (Brief of Texas). As we maintained in our earlier brief, the Endangerment Finding violates the CAA because EPA "refused to determine what 'atmospheric concentrations' of GHGs" endanger humans, made no

"attempt to determine whether reducing GHG emissions will have any impact on climate change," and refused to consider adaptation and mitigation factors. *Id*. at 2, 18-19, 21-22.

For either of these reasons, this Court should vacate and remand EPA's decision.

STATEMENT OF JURISDICTION

Section 307 of the CAA grants this Court exclusive jurisdiction over petitions for review that challenge the nationally applicable final actions of the EPA Administrator. *See* 42 U.S.C. § 7607(b)(1) (explaining that a "petition for review of . . . final action taken[] by the Administrator under [the CAA] may be filed only in the United States Court of Appeals for the District of Columbia"). EPA's Tailpipe Rule qualifies as a nationally applicable final action. Texas timely filed its petition for review on July 7, 2010. *See* 75 Fed. Reg. 25,324 (appearing in the Federal Register on May 7, 2010).

STATEMENT OF THE ISSUES

1. The arbitrary-and-capricious test requires courts to vacate and remand agency actions that "entirely fail[] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and section 202(a)(2)

of the CAA requires the EPA Administrator to "giv[e] appropriate consideration to the cost of compliance" in deciding when a new regulation of motor vehicles should take effect. Does the Tailpipe Rule violate the arbitrary-and-capricious doctrine by considering only the costs of compliance imposed directly by the Tailpipe Rule, and refusing to consider the costs of complying with the stationary-source regulations triggered by the Tailpipe Rule?

2. Section 202(a)(1) of the CAA requires the EPA Administrator to find that a motor-vehicle pollutant may "endanger human health or welfare" before regulating those mobile-source pollutants. Does the Tailpipe Rule rest on a legally flawed and invalid Endangerment Finding?

STATUTES AND REGULATIONS

The following statutory provisions are pertinent to this case:

42 U.S.C. § 7521(a)(1) [CAA § 202(a)(1)]: "The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution."

42 U.S.C. § 7521(a)(2) [CAA § 202(a)(2)]: "Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period."

STATEMENT OF FACTS

After the Supreme Court concluded that GHGs such as carbon dioxide fall within the CAA's definition of "air pollutant," *Massachusetts*, 549 U.S. 497, then-EPA Administrator Stephen Johnson warned that "regulation of greenhouse gases under any portion of the CAA could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land." *Regulating Greenhouse Gas Emissions Under the Clearn Air Act; Advanced Notice of Proposed Rulemaking,* 73 Fed. Reg. 44,354, 44,355 (July 30, 2008). The hastily enacted, cascading regulations at issue in this litigation have proven Administrator Johnson's words prophetic. This case presents a challenge to the rule that provides the springboard for EPA's "unprecedented expansion" of authority over the economy.

A. EPA's Effort to Regulate GHGs.

Following the Court's decision in *Massachusetts*, EPA determined that "six greenhouse gases taken in combination"—carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)—"endanger both the public health and the public welfare of current and future generations" by causing or contributing to climate change. Endangerment Finding, 74 Fed. Reg. at 66,496. This Endangerment Finding did not, however, explain or attempt to set criteria for determining the amount or pace of climate change that "threatens" public health and welfare. Nor did EPA consider the effects of current adaptation and mitigation when assessing the danger to the public health and welfare. Endangerment Finding, 74 Fed. Reg. at 66,514. And by issuing its Endangerment Finding separately from its statutorily mandated regulatory response (an unprecedented application of § 202(a)), EPA was able to discuss the endangerment issues without considering the effectiveness of its regulatory response.

A few months later, EPA issued another rule relating to air pollution from *stationary* sources—sources that fall outside the scope of section 202(a). This "Triggering Rule" concluded that PSD and Title V permitting requirements for stationary sources will apply to a "newly regulated pollutant" once "a regulatory requirement to control emissions of that pollutant 'takes effect.'" 75 Fed. Reg. at 17,006. This rule, enacted *before* the Tailpipe Rule at issue in this case, ensured that EPA's soon-to-be-enacted rule regulating GHG emissions from motor vehicles would make GHGs "subject to regulation under the [Clean Air] Act," an event that would automatically extend the CAA's PSD and Title V permitting requirements to stationary sources that emit more than 100 or 250 tons per year of any greenhouse gas. *Id*. at 17,019.

About a month after announcing its Triggering Rule, and nearly five months after issuing its Endangerment Finding under section 202(a)(1), EPA issued a rule regulating GHG emissions from motor vehicle tailpipes. The rule, issued jointly with the NHTSA, requires motor-vehicle manufacturers to meet a combined average fuel economy (CAFE) standard. Tailpipe Rule, 75 Fed. Reg. at 25,330. By issuing this Tailpipe Rule, EPA's action automatically brought stationary

sources that emit GHGs under the PSD and Title V permitting programs, effective January 2, 2011, the same day the Tailpipe Rule became effective. Triggering Rule, 75 Fed. Reg. at 17,004.

The CAA's PSD and Title V permitting requirements apply to all stationary sources that emit more than 100 or 250 tons per year of *any* air pollutant, an extremely low threshold for a gas as common as carbon dioxide. Faced with the admittedly "absurd result" of extending the CAA's onerous permitting scheme beyond large industrial facilities to reach entities such as churches and schools, EPA announced a prerogative to unilaterally amend these statutory thresholds (though only as applied to GHGs). *Prevention of Significant Deterioration and Title V Greenhouse Gase Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule).

B. EPA Avoids Considering the Costs of Stationary-Source Compliance Resulting from Its Tailpipe Rule.

Section 202(a)(2) requires EPA to delay implementing newly announced motor-vehicle regulations for a time "necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." In considering the costs of compliance resulting from its Tailpipe Rule,

EPA avoided consideration of any costs associated with stationary-source regulation when it enacted the Tailpipe Rule, though it was aware that the Tailpipe Rule would "trigger" the new stationary-source regulations. Triggering Rule, 75 Fed. Reg. at 17,006. Even so, EPA asked commentators to withhold comment on such matters, urging them to save comments "relating to potential adverse economic impacts on small entities from PSD requirements for GHG emissions to the docket for the PSD tailoring rule." *Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Proposed Rule*, 74 Fed. Reg. 49,454, 49,629 (Sept. 28, 2009). Yet in the Tailoring Rule, EPA avoided considering stationary-source costs from its Tailpipe Rule, reasoning that the Tailoring Rule "provides regulatory relief rather than regulatory requirements." 75 Fed. Reg. at 31,595. Notably, EPA's Endangerment Finding also avoided any consideration of costs because EPA announced it as a "stand-alone" set of findings that "does not contain any regulatory requirements."[1] Endangerment Finding, 74 Fed.

1. Indeed, EPA's decision to divorce its Endangerment Finding from its regulatory response—and attendant consideration of regulatory impact—is unprecedented. *See* 74 Fed. Reg. at 66,501-02 (admitting that EPA typically

Reg. at 66,515. EPA has yet to account for the financial impact on stationary-sources from the Tailpipe Rule.

SUMMARY OF THE ARGUMENT

The Court should set aside the Tailpipe Rule because it is arbitrary and capricious and it also exceeds EPA's statutory authority. The Tailpipe Rule is arbitrary and capricious because EPA failed to consider the costs of compliance for stationary-source GHG emitters that, by EPA's interpretation of the CAA, are necessarily regulated as a result of the Tailpipe Rule. EPA also exceeded its authority under the CAA to issue the Tailpipe Rule because the Rule rests on an invalid endangerment determination.

STANDING

State Petitioners and Supporting Intervenor (the State Petitioners) satisfy the three elements of Article III standing—injury, causation, and redressability.

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made endangerment findings concurrent with proposed regulatory standards); *see also Control of Emissions From New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking*, 68 Fed. Reg. 59,922 (Sept. 8, 2003) (considering whether EPA could and should make an endangerment finding and regulate GHG emissions under § 202(a)).

Injury. The Tailpipe Rule harms State Petitioners in at least two ways. First, as the springboard for EPA's regulation of stationary-source GHG emissions, the Tailpipe Rule causes State Petitioners to spend resources implementing and enforcing these stationary-source GHG regulations. *See* Declarations of Steve Hagle and Elizabeth Sifuentz Supporting Texas's Motion for Stay (explaining the various financial and resources burdens the GHG regulations impose on Texas to administer the regulations) (Attachments to Doc. No. 1266089, case 10-1041).

Second, the State Petitioners purchase, own, and operate vehicles and facilities subject to the GHG regulations. Even under the relaxed standards of EPA's Tailoring Rule, stationary sources owned by State Petitioners will be subject to GHG permitting. State Petitioners also regularly purchase vehicles governed by EPA's Tailpipe rule. *See* Texas Office of Fleet Management, Biennial State of the Fleet Report (2009), *available at* http://www.window.state.tx.us/supportserv/prog/vfleet /2009StateoftheFleetReport.pdf (noting that Texas spent $27 million purchasing light-duty vehicles in 2008). And as EPA acknowledges, the Tailpipe Rule will increase the cost of vehicles, thereby harming State

Petitioners. *See* 75 Fed. Reg. at 25,348 (estimating that the GHG regulations will increase the purchase price of vehicles by an average of nearly $1,000 each by 2016).

Causation. As already explained, the Tailpipe Rule is a necessary and indispensable component of the GHG regulations that directly harm the State Petitioners. *See also* Tailoring Rule, 75 Fed. Reg. at 31,519-22 (explaining the necessary link between the Tailpipe Rule and stationary-source regulations). When the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

Redressability. As noted above, the Tailpipe Rule both increases the cost of vehicles purchased by the State Petitioners and increases its regulatory burden in administering the stationary source regulation triggered by the rule. Thus, if this Court sets aside the Tailpipe Rule, as it should, both injuries to the State Petitioners would be redressed.

ARGUMENT

I. STANDARD OF REVIEW

The CAA authorizes this Court to set aside any EPA action subject to judicial review that is found to be, among other things, "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. § 7607(d)(9). The Administrative Procedure Act similarly requires this Court to set aside an administrative action, decision, or finding that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

II. THE TAILPIPE RULE FAILS THE ARBITRARY-AND-CAPRICIOUS TEST BECAUSE IT REFUSES TO CONSIDER THE FULL COST OF COMPLIANCE WITH THE RULE.

Section 202(a)(2) precludes EPA from implementing new regulations of motor vehicles until after it provides a time period for "the development and application of the requisite technology." In determining the length of this grace period, EPA must "[g]ive appropriate consideration to the cost of compliance within such period."

But EPA has considered only a subset of the costs of compliance spawned by the Tailpipe Rule, by looking at the regulatory burdens imposed by the Tailpipe Rule in isolation. In our view, the proper framework for considering costs of compliance should recognize the role of the Tailpipe Rule in triggering the PSD and Title V permitting requirements for *stationary* sources that emit greenhouse gases, and include the costs imposed on stationary sources as a direct and immediate result of the Tailpipe Rule. EPA's refusal to acknowledge the breadth of compliance costs caused by its decision to adopt the Tailpipe Rule violates the arbitrary-and-capricious doctrine by "fail[ing] to consider an important aspect of the problem." *State Farm,* 463 U.S. at 43.

The Tailpipe Rule asserts that it "will not have a significant economic impact on a substantial number of small entities," and that it "will not have substantial direct effects on the States." 75 Fed. Reg. at 25,541. But EPA reaches this conclusion by considering only the compliance costs imposed by the provisions in the Tailpipe Rule itself, deliberately excluding the compliance costs imposed on stationary sources that are automatically triggered by EPA's decision to adopt the

Tailpipe Rule. We believe that EPA is mistaken to insist on this formalistic notion of compliance costs that deliberately overlooks the real-world effects of its decision.

First, the very reason that EPA joined NHSTA in promulgating the Tailpipe Rule was to trigger its authority to regulate stationary sources that emit greenhouse gases under the PSD and Title V permitting regimes. NHSTA already had freestanding regulatory authority to impose CAFE standards on motor vehicles; EPA's "me too" posture served only to provide a platform from which it could pronounce greenhouse gases "subject to regulation under the [Clean Air] Act," and empower itself to regulate stationary-source GHG emissions. To exclude those regulatory burdens from the "costs of compliance" denies that EPA's participation in the Tailpipe Rule served any substantive function.

Second, the compliance costs imposed on stationary sources are a but-for cause of the Tailpipe Rule and flow automatically from EPA's decision to adopt it. EPA announced its Triggering Rule *before* the Tailpipe Rule; it knew full well that the Tailpipe Rule would provide the indispensable linchpin for EPA's stationary-source GHG regulations.

What's more, no further action by EPA is necessary to impose permitting requirements on stationary sources that emit GHGs, once the Tailpipe Rule took effect. The Tailpipe Rule is both a necessary and sufficient cause of the compliance costs imposed on stationary sources.

Finally, it does not seem plausible to think that section 202(a)(2) would require a buffer period that considers only a subset of the regulatory burdens spawned by a new motor-vehicle regulation. The provision is designed to give industry and regulated entities a reasonable time to adopt the technology they need to comply with the new regime without exposing themselves to punishment. Basing this window of time on only the costs of compliance associated with motor-vehicles, and ignoring the regulatory burdens imposed on stationary sources as an automatic result of the Tailpipe Rule, establishes an arbitrary distinction among those burdened by the enactment of the Tailpipe Rule.

Congress could have written section 202(a)(2) in a manner that requires EPA to consider only the costs of complying with the *provisions in* its motor-vehicle regulations. But the statutory language does not limit costs of compliance in this manner, and EPA should have

considered the costs of complying with *all* the regulatory burdens triggered by the Tailpipe Rule. EPA's refusal to consider these costs warrants a remand under the arbitrary-and-capricious test.

III. EPA EXCEEDED ITS STATUTORY AUTHORITY BY ENACTING THE TAILPIPE RULE BECAUSE EPA DID NOT MAKE A LEGAL ENDANGERMENT FINDING.

Section 202(a) grants EPA authority to regulate only air pollutants that the Administrator has determined endanger the public health and welfare. As we have maintained in our earlier briefing, EPA's endangerment finding with respect to GHGs is legally flawed in at least two ways. First, the arbitrary-and-capricious standard requires an agency to "articulate a satisfactory explanation for its action," *see State Farm*, 463 U.S. at 43, and the Endangerment Finding fails this test because EPA never bothered to define or apply standards or criteria for assessing when GHG emissions or climate change harm public health or welfare. *See* Brief of Texas, No. 09-1322, at 17-21. In addition, the arbitrary-and-capricious test precludes agency actions that "entirely fail[] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and EPA's Endangerment Finding refuses to consider voluntary (non-regulatory) adaptation to and mitigation of

climate change, even as EPA acknowledges that these factors will reduce the negative impact of climate change. *See* Brief of Texas, No. 09-1322, at 21-22. The illegality of EPA's Endangerment Finding leaves EPA without the statutory authority to enact regulations limiting the emissions of GHGs from motor vehicles.

CONCLUSION

The Court should vacate and remand EPA's Tailpipe Rule because the rule violates the arbitrary-and-capricious test and because EPA lacked statutory authority to enact it.

Respectfully submitted.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing **Brief of State Petitioners and Supporting Intervenor** was filed electronically with the Court by using the CM/ECF system on this 3rd day of June 2011. Parties, intervenors, and amici that are registered CM/ECF users will be served by the appellate CM/ECF system. The counsel that are not CM/ECF users will be served via Federal Express, standard overnight delivery.

/s/ Jonathan F. Mitchell
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CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 3,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL

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Dated: June 3, 2011