ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1114 (and consolidated cases)

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

State of California, et al.,

Petitioners,

v.

United States Environmental Protection Agency, et al.,

Respondents,

Association of Global Automakers, Alliance of Automobile Manufacturers, Inc.,

Intervenors.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

BRIEF FOR STATE PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), the undersigned counsel provides the following information on behalf of the petitioners in case number 18-1114.

A. Parties and Amici

Petitioners: In case number 18-1114, the petitioners are the States of California (by and through its Governor Gavin Newsom, Attorney General Xavier Becerra and California Air Resources Board), Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota (by and through its Minnesota Pollution Control Agency and Minnesota Department of Transportation), New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts, Pennsylvania (by and through its Department of Environmental Protection and Attorney General Josh Shapiro), and Virginia, and the District of Columbia.

In case number 18-1118, the petitioner is National Coalition for Advanced Transportation.

In case number 18-1139, the petitioners are Center for Biological Diversity, Conservation Law Foundation, Environmental Defense Fund,

Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, and the Union of Concerned Scientists.

In case number 18-1162, the petitioners are Consolidated Edison Company of New York, Inc., National Grid USA, New York Power Authority, and the City of Seattle, by and through its City Light Department.

Respondents: Respondents are the United States Environmental Protection Agency and, in case number 18-1114, Andrew Wheeler, as Acting Administrator of the United States Environmental Protection Agency.

Intervenors: Respondent-Intervenors are the Alliance of Automobile Manufacturers and the Association of Global Automakers, Inc.

Amici Curiae: South Coast Air Quality Management District, National League of Cities, U.S. Conference of Mayors, City of New York, NY, Los Angeles, CA, Chicago, IL, King County, WA, County of Santa Clara, CA, San Francisco, CA, Mayor and City Council of Baltimore, MD, Oakland, CA, Minneapolis, MN, Board of County Commissioners of Boulder County, CO, Pittsburgh, PA, Ann Arbor, MI, West Palm Beach, FL, Santa Monica, CA, Coral Gables, FL, Clarkston, GA, Consumer Federation of America, and Advanced Energy Economy.

B. Ruling Under Review

These consolidated cases involve challenges to a final action by the United States Environmental Protection Agency entitled, "Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles," published in the Federal Register at 83 Fed. Reg. 16,077 on April 13, 2018.

C. Related Cases

The Court ordered the cases filed by petitioners in case numbers 18-1114, 18-1118, 18-1139, and 18-1162 consolidated. The undersigned counsel is not aware of other related cases.

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GLOSSARY OF ABBREVIATIONS

CARB	California Air Resources Board
EPA	Environmental Protection Agency
NCAT	National Coalition for Advanced Transportation
NHTSA	National Highway Traffic Safety Administration
Section 12(h)	40 C.F.R. § 86.1818-12(h)
Section 177 States	The State Petitioners that have adopted California's emission standards pursuant to 42 U.S.C. § 7507
States or State Petitioners	The States of California (by and through Governor Gavin Newsom, Attorney General Xavier Becerra and the California Air Resources Board), Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency and Minnesota Department of Transportation), New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts, Pennsylvania (by and through the Department of Environmental Protection and Attorney General Josh Shapiro), and Virginia, and the District of Columbia
TAR	Draft Technical Assessment Report

INTRODUCTION

The Environmental Protection Agency ("EPA") violated its own regulation and the Administrative Procedure Act when it determined that its greenhouse gas emission standards for model year 2022-2025 vehicles are no longer appropriate and must be revised. 83 Fed. Reg. 16,077 (Apr. 13, 2018) ("Revised Determination") (JA__-__).[1] EPA's regulation governing this determination imposed special procedural and substantive requirements designed to ensure that any decision to revise the standards would be based on a robust, publicly-vetted technical record and a detailed assessment of enumerated factors. *See* 40 C.F.R. § 86.1818-12(h) ("Section 12(h)").[2] Because the Revised Determination flouts these requirements, is untethered to the record before EPA, and fails to explain its reversal of EPA's previous determination that the standards remain appropriate, the Revised Determination is arbitrary and capricious and should be vacated.

In 2012, EPA, invoking its authority under Section 202(a) of the Clean Air Act, established greenhouse gas emission standards for model year 2017-2025 vehicles. In light of the long timeframe for the standards, EPA

[1] As used herein, "vehicles" refers to passenger vehicles and light-duty trucks.

[2] Statutes and regulations relevant to the Court's consideration of this petition are set forth in the States' Addendum.

committed to reassess the model year 2022-2025 standards by no later than April 1, 2018, to determine whether they remained appropriate ("Mid-Term Evaluation"). EPA established several requirements for the Mid-Term Evaluation to ensure that any decision to revise the existing standards would be based on rigorous, up-to-date technical analyses and public input, and would clear a high hurdle before EPA disturbed the duly-adopted standards on which automakers, the States, and other stakeholders rely. These requirements were especially important to California, which had already adopted its own greenhouse gas emission standards, but which agreed as part of the National Program of vehicle standards to deem compliance with EPA's standards as compliance with its own, as well as to the States that have adopted and enforce California's standards.

In January 2017, EPA determined, based on hundreds of studies and nearly two-thousand pages of its own technical assessments, that its emission standards remain achievable, cost-effective, and appropriate under the Clean Air Act ("2017 Determination"). JA__-__. EPA estimated that the standards would reduce greenhouse gas emissions by 540 million metric tons, while saving consumers an average of $1,650 over the lifetime of their new vehicles. *Id.* at 6-7 (JA__-__).

Shortly after taking office, however, President Trump announced his plan to cancel the 2017 Determination. On April 13, 2018, EPA withdrew its 2017 Determination and replaced it with the Revised Determination that concluded the standards "are not appropriate" and "should be revised." 83 Fed. Reg. at 16,077 (JA__-__).

EPA's Revised Determination violates Section 12(h)'s procedural and substantive requirements. EPA did not identify or make available for public comment the record on which the Revised Determination is based. And in contrast to the 2017 Determination, which was firmly grounded in the extensive technical record, the Revised Determination cites a handful of cherry-picked data and industry comments that were either outdated or did not support EPA's reversal. Far from making the detailed assessment required by Section 12(h), EPA asserted that alleged "uncertainty" supported its determination. Because this flawed and erroneous Revised Determination violates multiple regulatory requirements and bedrock principles of administrative law, the Court should vacate the Revised Determination and reinstate the 2017 Determination.

JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review EPA's Revised Determination, which is a final action concerning "nationally applicable"

standards. 42 U.S.C. § 7607(b)(1). EPA published its Revised Determination on April 13, 2018, and the States' May 1, 2018 petition for review is timely. *See id.*

QUESTIONS PRESENTED

The issues raised in the States' petition for review are:

1. Whether the Revised Determination is arbitrary and capricious or otherwise not in accordance with the law because EPA violated the governing regulation, Section 12(h), by failing to: (a) identify and allow public comment on the record on which it purportedly based its determination; (b) base the Revised Determination on the Technical Assessment Report and rest of the record; and (c) set forth in detail its assessment of each of the enumerated factors.

2. Whether the Revised Determination is also arbitrary and capricious under the Administrative Procedure Act because it is contradicted by the record, lacks reasoned analysis, and fails to offer a reasoned explanation for reversing the 2017 Determination.

STATEMENT OF THE CASE

I. STATE REGULATION OF GREENHOUSE GAS EMISSIONS FROM VEHICLES

According to the federal government's Fourth National Climate Assessment, the period we are living through "is now the warmest in the

history of modern civilization."[3] The harms associated with the changing climate, which the Supreme Court has described as "serious and well recognized," *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007), are already harming the States' resources and their residents' health and welfare. States face eroding coastlines, rising sea levels, more intense forest fires, and threats to freshwater supplies.[4] How much worse these dangers become "will depend primarily on the amount of greenhouse gases (especially carbon dioxide) emitted globally."[5]

Concerned by this growing threat to their residents and natural resources, many States have enacted laws and established programs to reduce greenhouse gas emissions. A key focus of these efforts is the transportation sector, the nation's largest source of greenhouse gas

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[3] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* (2017) ("Fourth Nat'l Climate Assessment Vol. I"), Exec. Summ., https://science2017.globalchange.gov/chapter/executive-summary/.

[4] *See generally* Intergovernmental Panel on Climate Change, *Global Warming of 1.5 °C* (2018), http://www.ipcc.ch/report/sr15/; U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* (2018), Summary Findings and Overview at 24-68, available at https://nca2018.globalchange.gov/

[5] Fourth Nat'l Climate Assessment, Vol. 1, Exec. Summ.

emissions.[6] Nearly two decades ago, California—which has regulated vehicle emissions since the 1960s—enacted the nation's first law requiring limits on vehicle greenhouse gas emissions. Cal. Health & Safety Code § 43018.5. The California Air Resources Board ("CARB") then adopted regulations establishing such limits. 13 Cal. Code Regs. §§ 1961.1, 1961.3. Between 2004 and 2010, twelve States—Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington (the "Section 177 States")—adopted California's greenhouse gas standards pursuant to Section 177 of the Clean Air Act, 42 U.S.C. § 7507.[7]

II. THE NATIONAL PROGRAM

Section 202(a) of the Clean Air Act requires EPA to establish standards "applicable to the emission of any air pollutant from … new motor vehicles or new motor vehicle engines," which "may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7521(a). Shortly after issuing a finding that emissions of greenhouse gases from new motor vehicles contribute to the harms to public health and welfare caused by

[6] EPA, *Sources of Greenhouse Gas Emissions*, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last accessed Feb. 6, 2019).

[7] Colorado recently adopted California's standards. The District of Columbia has also taken steps to do so.

climate change, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (JA__), EPA promulgated the first federal greenhouse gas emission standards, which it modeled on California's standards, 75 Fed. Reg. 25,324 (May 7, 2010). EPA did this in a joint rulemaking with the National Highway Traffic Safety Administration ("NHTSA"), which has separate authority to set fuel economy standards. *See* 49 U.S.C. § 32902.

In light of the comparable, but distinct, federal and California vehicle standards, EPA, NHTSA, and CARB—with automaker support—developed a single, coordinated "National Program" of vehicle emission and fuel economy standards for model years 2012-2016. As this Court has explained, the National Program is "[t]he product of an agreement between the federal government, California, and the major automobile manufacturers" that "make[s] it possible for automobile manufacturers to sell a 'single light-duty national fleet' that satisfies the standards of the EPA, NHTSA, California, and the Section 177 states." *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 198 (D.C. Cir. 2011). "Pursuant to that agreement, California amended its regulations to deem compliance with the national standards [adopted in 2010 as] compliance with its own," *id.*, and EPA and NHTSA harmonized their emission and fuel economy standards, 75 Fed. Reg. at

25,328. The Section 177 States took steps as necessary to incorporate California's "deem-to-comply" modification into their regulatory programs.

In 2012, EPA promulgated greenhouse gas emission standards to govern model year 2017-2025 vehicles. 77 Fed. Reg. 62,624 (Oct. 15, 2012). EPA estimated that these standards would reduce annual fleet-wide average greenhouse gas emissions by one-third. 77 Fed. Reg. at 62,641-42. Together, EPA, NHTSA, and CARB extended the National Program agreement to cover the model year 2017-2025 vehicle standards. *Id.* at 62,638. California again agreed to deem compliance with EPA's emission standards as compliance with its own, provided that the reductions EPA projected for those model years "are maintained." *Id.*

III. THE MID-TERM EVALUATION

Recognizing the long timeframe for these standards, EPA established the Mid-Term Evaluation as an *ex ante* review of the model-year 2022-2025 standards based on up-to-date information and "a collaborative, robust and transparent process, including public notice and comment." 77 Fed. Reg. at 62,784. EPA committed to completing the Mid-Term Evaluation by "[n]o later than April 1, 2018," 40 C.F.R. § 86.1818-12(h), a timeframe supported by several automakers, 77 Fed. Reg. at 62,787. If, after completing its review, EPA determined that the standards continued to be "appropriate

under Section 202(a) of the Clean Air Act," *id.* at 62,784, they would remain binding. Otherwise, and only if EPA determined that the standards were no longer appropriate "in light of the record then before" EPA, the regulation required the Administrator to "initiate a rulemaking to revise the standards." 40 C.F.R. § 86.1818-12(h).

To ensure that this process would have a sound technical and scientific basis, and recognizing the importance of California's agreement to accept compliance with the federal standards, EPA gave the Mid-Term Evaluation certain important features.

First, EPA obligated itself to making the Mid-Term Evaluation a "collaborative … and transparent" process, 77 Fed. Reg. at 62,964, that would be "as robust and comprehensive as that in the original setting of the [model year] 2017-2025 standards," *id.* at 62,784. To this end, EPA mandated that its determination had to satisfy important procedural and substantive requirements. The Mid-Term Evaluation was required to be based on a draft Technical Assessment Report ("TAR") to be prepared jointly by EPA, NHTSA, and CARB. *Id.* In this document, EPA would "examine afresh the issues and, in doing so, conduct similar analyses and projections as those considered in the … rulemaking" that originally established the standards. *Id.* at 62,965. The result would be "a

comprehensive, integrated assessment of all of the results of the review." *Id.* at 62,784.

EPA established the following procedural requirements for the Mid-Term Evaluation: EPA had to make its assumptions and modeling "available to the public to the extent consistent with law," "arrange for appropriate peer review of [the TAR's] underlying analyses," and, most importantly, provide opportunity for public comment on the TAR and "carefully consider" and "respond to comments." *Id.* at 62,965, 62,784; *see also* 40 C.F.R. § 86.1818-12(h)(2).

The Mid-Term Evaluation also had to satisfy important substantive requirements. EPA bound itself to base its determination on the TAR and public comments thereon. 40 C.F.R. § 86.1818-12(h)(2). It further agreed to "set forth in detail the bases for [its appropriateness] determination … including [EPA's] assessment of each of [eight enumerated] factors." *Id.* § 86.1818-12(h)(4). These factors address:

(i) the availability and efficacy of new technology, and appropriate lead time for its introduction;

(ii) the costs of new vehicles to producers or consumers;

(iii) the standards' feasibility and practicability;

(iv) the standards' impact on emission reductions, oil conservation, energy security, and consumer fuel savings;

(v) the standards' impacts on the auto industry;

(vi) the standards' impacts on auto safety;

(vii) the standards' impact on NHTSA's fuel economy standards and the harmonized National Program; and,

(viii) the standards' impact on any other relevant factors.

Id. § 86.1818-12(h)(1)(i)-(viii). This assessment would be "holistic" and would not "place[] decisive weight on any particular factor or projection." 77 Fed. Reg. at 62,784.

Second, EPA and NHTSA gave CARB a critical role in the Mid-Term Evaluation, in recognition of California's expertise and its important role in the National Program. EPA and NHTSA agreed "to conduct the mid-term evaluation in close coordination with [CARB]." 77 Fed. Reg. at 62,784. They pledged that "any adjustments to the standards will be made with the participation of CARB and in a manner that ensures continued harmonization of state and Federal vehicle standards." *Id.*; *see also id.* at 62,785, 62,786 (stressing the importance of CARB's role). And as noted above, EPA agreed that the TAR—the document that would "inform EPA's

determination on the appropriateness of the [greenhouse gas] standards"—would be jointly prepared "by EPA, NHTSA and CARB." *Id.* at 62,784.

IV. EPA'S 2017 DETERMINATION

EPA, NHTSA, and CARB began work on the TAR in December 2012. Declaration of Michael McCarthy ("McCarthy Decl.") ¶ 12 (ADD50).[8] During the next three-and-a-half years, the three agencies held over 100 meetings and met with vehicle manufacturers, parts suppliers, and other stakeholders. TAR at 2-6 to 2-8 (JA__-__); McCarthy Decl. ¶¶ 13, 14 (ADD50-51). Agency staff traveled throughout the country and abroad, gathering information about emission-reducing technologies and manufacturer design plans. McCarthy Decl. ¶ 14 (ADD50-51). CARB staff participated at every step, spending thousands of hours in meetings, conducting research, and drafting sections of the TAR. *Id.* ¶¶ 13, 15 (ADD50-52).

In July 2016, EPA, NHTSA, and CARB jointly published the 1,217-page TAR.[9] Employing "a collaborative, data-driven, and transparent

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[8] Citations to pages in the Addendum filed with this brief follow the format "ADD__."

[9] Cited excerpts from the TAR will be included in the deferred Joint Appendix. The entire TAR is available at https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas#TAR.

process," the three agencies assembled data and analyses from a "wide range of sources," including "research projects initiated by the agencies, input from stakeholders, and information from technical conferences, published literature, and studies published by various organizations." TAR at 2-2 (JA__). The body of literature the agencies reviewed was extensive: EPA's Certified Index lists over 750 technical studies, academic articles, and other materials EPA placed in the public docket between May 2, 2016 and July 21, 2016, when the TAR was published. Doc. #1736370 at 5-50. EPA contributed "a major research benchmarking program for advanced engine and transmission technologies," and studies employing EPA's vehicle emissions model, both of which generated multiple peer-reviewed research papers. TAR at 2-2 to 2-3 (JA__-__). Among the many contributions made by CARB was a study analyzing the latest technologies that increase aerodynamics and reduce road friction and vehicle mass. *Id.* at 2-6 (JA__). NHTSA also contributed its own research. *Id.* at 2-3 to 2-5 (JA__-__). "[W]here possible, each agency … made the results of a variety of projects available to the public." *Id.* at 2-2 (JA__). The TAR also incorporated the results of a National Academy of Sciences study on fuel economy technologies "purposely timed to inform the mid-term evaluation." *Id.* at 2-4 (JA__).

Based on this voluminous, in-depth technical record, the agencies concluded that "a wider range of technologies exist[s] for manufacturers to use to meet the [model year] 2022-2025 standards, and at costs that are similar or lower than those projected" at the time the standards were established. TAR at ES-2 (JA__).

In November 2016, after considering 200,000 public comments on the TAR, EPA issued a 268-page "Proposed Determination" and 719-page "Technical Support Document."[10] In its Proposed Determination, EPA preliminarily concluded that the model year 2022-2025 standards remained appropriate. Proposed Determination at ES-3 (JA__).

Following a second round of public comment, EPA issued its 2017 Determination and a separate document in which it responded to the public comments it had received. In the 2017 Determination, EPA discussed the record in detail. The agency noted that the auto industry was "thriving," having experienced seven uninterrupted years of growth, including "record high" sales in 2016. 2017 Determination at 7-8 (JA__-__). EPA explained that the costs of emission-reducing technologies were "less than projected in

[10] The Proposed Determination and Technical Support Document are available at https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas#proposed=determination.

the 2012 rulemaking." *Id.* at 13 (JA__). Moreover, "technology adoption rates and the pace of innovation have accelerated even beyond what EPA expected." *Id.* at 23 (JA__). EPA found that automakers would be able to meet the model year 2022-2025 standards "through a number of technology pathways reflecting predominantly the application of technologies already in commercial production." *Id.* at 4 (JA__).

EPA concluded, "the record clearly establishes that, in light of technologies available today and [projected] improvements, … it will be practical and feasible for automakers to meet the [model year] 2022-2025 standards at reasonable cost." *Id.* at 29 (JA__). Accordingly, EPA determined that the standards remain "appropriate" under Section 202(a) of the Clean Air Act. *Id.* EPA stated that its determination constituted a final agency action. *Id.* at 1 (JA__).

V. EPA'S REVISED DETERMINATION

Following the change in federal administrations, EPA reversed course. On March 17, 2017, President Trump told an audience, "we are going to cancel" the 2017 Determination.[11] Days later, EPA announced that it would reconsider the 2017 Determination. 82 Fed. Reg. 14,671 (Mar. 22, 2017)

[11] Remarks by President Trump at American Center for Mobility, Detroit Michigan, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-center-mobility-detroit-mi/.

(JA__). EPA later stated that the reconsideration would be "conducted in accordance with the regulations EPA established for the Mid-term Evaluation." 82 Fed. Reg. 39,551, 39,553 (Aug. 21, 2017) (JA__). EPA solicited public comment on the reconsideration, but refused to reopen the TAR or allow additional comment on it. *Id.* EPA's notice contained no new substantive information or analysis regarding the standards. *Id.*

CARB, joined by the Attorney General of California, submitted a detailed comment letter strongly opposing the reconsideration, supported by an extensive appendix of technical literature including recent studies further demonstrating that the standards remain technologically feasible and cost-effective. CARB Comment Letter (JA__-__). In particular, CARB cited its own robust mid-term review of the standards, which concluded that EPA's existing standards remained feasible and should be maintained. *Id.* at 17 n.60 (JA__). CARB requested that a "proposed new Final Determination should make available for comment [EPA's] assessment of the factors and evidence it considered." *Id.* at 33 (JA__). The Attorneys General of New York, Connecticut, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, North Carolina, Oregon, Pennsylvania, Vermont, and Washington also submitted a comment letter supporting the 2017 Determination. JA__-__.

Heralding the Revised Determination, then-Administrator Scott Pruitt tweeted on April 2, 2018, that EPA "plans to roll back Obama Admin fuel standards," which he claimed were "too high."[12] On April 13, 2018, EPA published its Revised Determination, withdrawing the 2017 Determination and instead "conclud[ing] that the standards are not appropriate" and "should be revised." 83 Fed. Reg. at 16,077 (JA__). The 11-page document did not include a new technical report or other supporting analysis. Despite EPA's regulatory mandate to base its determination on the TAR, 40 C.F.R. § 86.1818-12(h)(2), the Revised Determination ignored the TAR's analyses and the extensive record EPA had assembled between 2012 and 2016. Instead, alluding to a "significant record … developed since the January 2017 Determination"—a record EPA did not identify, publish in a new TAR, or make available for public comment—EPA asserted that "many of the key assumptions EPA relied upon" in the 2017 Determination were "optimistic or have significantly changed." 83 Fed. Reg. at 16,078 (JA__). EPA claimed that the existing standards "present[] challenges for auto

[12] EPA Administrator Scott Pruitt (@EPAScottPruitt), Twitter (Apr. 2, 2018, 12:05 PM), *archived at* https://web.archive.org/web/20180407164951/https:/twitter.com/epascottpruitt/status/980883819468386304; *id.* (Apr. 3, 2018, 11:39 AM), *archived at* https://web.archive.org/web/20180608153304/https:/twitter.com/epascottpruitt/status/981239876971565056.

manufacturers due to feasibility and practicability," raise "potential concerns" about safety, and would increase consumer costs. *Id.* EPA failed to respond to the vast majority of comments it received or meaningfully address the new technical information CARB provided.

Rather than conducting the assessments of factors required by Section 12(h), EPA postponed those assessments to a future rulemaking. For instance, Section 12(h) required EPA to "set forth in detail the bases for [its appropriateness] determination … including [EPA's] assessment of" the standards' impact on safety. 40 C.F.R. § 86.1818-12(h)(4); *id.* § 86.1818-12(h)(1)(vi). The TAR devoted 62 pages of detailed technical analysis to safety. TAR at 8-1 to 8-62 (JA__-__). The Revised Determination did not discuss that analysis or provide a new analysis, but merely stated that EPA "considers safety to be an important factor in the reconsideration" and would "further assess" the scope of the safety analysis "in the upcoming rulemaking." 83 Fed. Reg. at 16,086 (JA__). The Revised Determination's treatment of the seven other factors was similarly deficient.

EPA's Revised Determination violates multiple important requirements in Section 12(h), is contradicted by the record evidence, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and lacks the "reasoned explanation" required under the Administrative Procedure Act

for an agency's "change in position," *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Based on these and other deficiencies, the States filed a petition for review.

On August 24, 2018, EPA announced its proposal to roll back the model year 2022-2025 standards. 83 Fed. Reg. 42,986.

STANDARD OF REVIEW

Under the Administrative Procedure Act, a reviewing court must set aside an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[13] This standard requires the agency to examine all relevant factors and record evidence, and articulate a reasoned explanation for its decision that demonstrates "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. In addition, "[a]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (internal quotation marks and citation omitted); *see also Am. Wild*

[13] EPA's action is subject to the Administrative Procedure Act's review standard rather than that specified at 42 U.S.C. § 7607(d)(9)(A). In any event, the two standards are equivalent. *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2000).

Horse Pres. Campaign v. Perdue, 873 F.3d 914, 927 (D.C. Cir. 2017) (agency reversing direction is not permitted "to whistle past [the] factual graveyard" and disregard previous policy and underlying record).

Also, "[a]n agency is bound by its own regulations…. Thus an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations." *Nat'l Envtl. Dev. Assocs. Clean Air Proj. v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (*NEDACAP*) (internal quotation marks and citation omitted), *limited on other grounds*, 891 F.3d 1041, 1052 (D.C. Cir. 2018).

SUMMARY OF ARGUMENT

1. The States' petition satisfies all of the threshold requirements for review.

a. The States have standing to challenge the Revised Determination. *First*, the Revised Determination has injured California by depriving it of the benefit of the bargain it was promised when it agreed to extend the National Program to model year 2017-2025 vehicles and participate in the Mid-Term Evaluation. Honoring that agreement, California invested thousands of hours and considerable costs in preparation of the TAR. By contrast, EPA failed to comply with the rigorous requirements it promised to observe for the Mid-Term Evaluation and

excluded CARB from the reconsideration process in violation of the agreement underlying the National Program.

Second, EPA failed to make the technical information on which it based its Revised Determination available for public comment, as required by Section 12(h), thereby injuring the procedural and informational interests of all the States.

Third, EPA's erroneous determination that the standards must be revised has forced the District of Columbia to expend resources to take administrative and regulatory actions to ensure its ability to apply California's comparable emission standards to model year 2022-2025 vehicles, and the expenditure of these resources represents an injury to its proprietary interests.

Finally, EPA's Revised Determination set in motion a rulemaking that will result in weakened standards, thereby increasing the severity of climate-related impacts to the States' sovereign and quasi-sovereign interests in their natural resources and their residents' health and safety.

b. The Revised Determination is a final action. As EPA itself has recognized, it "marks the consummation" of the extensive, multi-year, multi-agency Mid-Term Evaluation process. EPA's withdrawal of the 2017 Determination, which affirmed the existing standards, altered the legal

regime and created legal consequences both for EPA, which is now required to initiate a rulemaking to revise the standards, and for the States, which have been forced to act to avoid the harm that EPA's weakened standards will cause.

c. The issues raised in the States' petition are ripe. The States' claims present purely legal issues regarding a final agency action and are based on a closed administrative record.

2. On the merits, the Revised Determination is arbitrary and capricious and should be vacated because it violates the special procedural and substantive requirements imposed by Section 12(h).

a. EPA violated Section 12(h)'s procedural requirement that EPA disclose the technical bases for its determination and allow public comment *before* making its appropriateness determination. 40 C.F.R. § 86.1818-12(h)(2); *see also* 77 Fed. Reg. at 62,965. Although EPA purported to base its Revised Determination on a "significant record … developed since the January 2017 Determination," 83 Fed. Reg. at 16,078 (JA__), it did not identify that record or make it available for public comment. EPA also ignored its commitment to work closely with CARB on the technical analyses, shutting CARB out of the reconsideration process.

b. The Revised Determination also violated Section 12(h)'s substantive requirements.

First, Section 12(h) mandated that EPA base its determination on the TAR and the rest of the technical record EPA had developed with CARB and NHTSA. 40 C.F.R. § 86.1818-12(h)(2). The Revised Determination turned this requirement on its head. EPA abandoned the existing record and instead pointed to a handful of cherry-picked data that were either outdated, already had been considered by EPA when it issued its 2017 Determination, or did not support EPA's conclusion. Nowhere did EPA attempt to analyze or weigh the few items of purportedly "new" information against the existing record, or use such an analysis to justify reversing the conclusion it reached in 2017.

Second, EPA failed to "set forth in detail" its assessment of the eight factors enumerated in Section 12(h). 40 C.F.R. § 86.1818-12(h)(4); *see also id.* § 86.1818-12(h)(1). The 11-page Revised Determination fails to provide a reasoned assessment of any of the factors. Instead, EPA generally recited a few comments relevant to the factors, and summarily concluded—without substantive analysis—that the existing standards were no longer appropriate. For most factors, EPA postponed the assessment to the later rulemaking triggered by its new determination, thus inverting the order mandated by

Section 12(h) and putting the cart before the horse. EPA also cited alleged "uncertainty" as a basis for revising the standards, but the entire purpose of the Mid-Term Evaluation was to address any such uncertainty by requiring EPA to develop an updated technical record and analyze that record *before* making a decision to upend the standards. EPA cannot satisfy this requirement by shrugging its shoulders, ignoring the in-depth technical record, and declaring the standards inappropriate.

3. Finally, the Revised Determination is arbitrary and capricious because it fails to articulate a rational connection between the facts found and the choices made. Indeed, the Revised Determination pays little attention to the facts as manifested in the extensive technical record EPA had gathered. Although EPA attempted to justify its reversal with a few pieces of "new" information (which, as noted above, either were outdated or did not provide a logical basis for changing course), it otherwise unlawfully postponed its analyses to a later date.

ARGUMENT

I. THE COURT MAY REVIEW THE REVISED DETERMINATION

A. The States Have Standing

To establish Article III standing, a petitioner must demonstrate: (1) an injury-in-fact, *i.e.*, an "actual or imminent," "concrete and particularized" harm to a "legally protected interest"; (2) that the injury is "fairly traceable"

to the respondent's conduct; and (3) that a favorable decision will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). "States are not normal litigants" and are entitled to "special solicitude" for purposes of standing. *Massachusetts*, 549 U.S. at 518, 520.

1. California Has Standing to Protect Its Interests under the National Program Agreement

The injury-in-fact requirement is meant to "ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014) (internal quotation marks and citation omitted). California meets this test. California agreed to continue the National Program, accept compliance with the federal standards provided that the resulting emission reductions "are maintained," 77 Fed. Reg. at 62,638, and collaborate on the TAR. Declaration of Joshua Cunningham ("Cunningham Decl.") ¶¶ 11-14 (ADD20-22). California honored the agreement. CARB invested thousands of hours and substantial costs in developing the TAR, all with the expectation that EPA—as it bound itself to do—would base its determination regarding the model year 2022-2025 standards on the full technical record. McCarthy Decl. ¶¶ 13-15 (ADD50-52). However, by issuing a determination uninformed by the TAR, and instead purportedly based on a new record developed without CARB's

participation, EPA breached the commitment it made to California and codified in EPA's own regulation. This injury to California is concrete, is clearly traceable to EPA's action, and would be fully redressed by vacatur of the Revised Determination and reinstatement of the 2017 Determination. Thus, California has standing to challenge the Revised Determination. California's standing is sufficient to satisfy Article III's case-or-controversy requirement for all the States. *Massachusetts*, 549 U.S. at 518.

2. The States Have Standing to Protect Their Procedural and Informational Interests

EPA has also injured the States by depriving them of "a procedural right to protect [their] concrete interests." *Lujan*, 504 U.S. at 572 n.7. "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518.

Section 12(h) explicitly required EPA to make the analyses, projections, assumptions, and modeling it used to arrive at its determination available for public comment. 40 C.F.R. § 86.1818-12(h)(2)(ii); *see also* 77 Fed. Reg. at 62,965. When EPA announced its Revised Determination, however, it cast aside the TAR and the rest of the record it had developed and based its reversal exclusively on a purportedly brand new record, one it

did not identify or make available for public comment. 83 Fed. Reg. at 16,078 (JA__). By depriving the States of the chance to comment on the information on which EPA based its determination—as EPA was required to do—EPA injured the States' procedural interests.

This omission also prevented the States from fully participating in the Mid-Term Evaluation. *See* McCarthy Decl. ¶¶ 19-21 (ADD53-54). Such informational harm is an additional, independent injury to the States that is clearly traceable to EPA's action, and would be fully redressed by a favorable decision here. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998).

3. The District of Columbia Has Standing to Protect Its Proprietary Interests

EPA's action has also caused concrete injury to the District of Columbia's proprietary interests. As a direct result of the Revised Determination, and in light of the lead time afforded manufacturers under Section 177 of the Clean Air Act, *see* 42 U.S.C. § 7507, the District has diverted staff time and other resources to take administrative and regulatory actions to ensure it can enforce California's standards.

Due to EPA's Revised Determination, the District determined that it can no longer rely on the future emission reductions that the federal standards once promised. It therefore has committed staff time and

resources to prepare and implement regulations to adopt California's standards as part of meeting the District's greenhouse gas reduction goals. Declaration of Marc A. Nielsen ("Nielsen Decl.") ¶¶ 10-12 (ADD66-68). The District cannot wait to act: a state adopting California's standards for a particular model year must do so "at least two years before commencement of such model year." 42 U.S.C. § 7507(2); *see* Nielsen Decl. ¶ 13 (ADD68). This impact on the District's resources provides another basis for standing. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015).

4. The States Have Standing to Protect Their Sovereign and Quasi-Sovereign Interests

Finally, EPA's Revised Determination, coupled with Section 12(h)'s mandate to initiate a rulemaking to revise the standards, has triggered a process that likely will result in weakened emission standards, thus increasing greenhouse gases and smog-forming pollutants and exacerbating associated harms to the States. *See, e.g.*, Declaration of Bruce Carlisle, ¶¶ 8-27 (ADD75-88); Declaration of Julia Moore ¶¶ 10-20 (ADD145-149); Declaration of Steven E. Flint ("Flint Decl.") ¶¶ 22-45 (ADD119-132); Declaration of Stuart Clark ("Clark Decl.") ¶¶ 6-9 (ADD152-153). EPA's action threatens the States' sovereign and quasi-sovereign interests in preserving their territories and natural resources and protecting their residents. *Massachusetts*, 549 U.S. at 519-21. Although the precise extent

of this harm is not yet known, such precision is not required to demonstrate standing. *Lujan*, 504 U.S. at 565 n.2; *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (an injury "need not be actualized" to satisfy standing). This harm is traceable to EPA's Revised Determination and would be at least partly redressed by a favorable decision here. That the States might need to take additional actions in light of EPA's separate proposal to revise the standards does not undermine the States' standing in this case. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (recognizing that "considerably eas[ing]" the path to the desired result suffices for redressability).

B. The Revised Determination is a Final Action

An action is final if it (1) marks the "consummation of the agency's decisionmaking process," and (2) is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks and citations omitted). When assessing finality, courts apply a "pragmatic" and "flexible" approach. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967).

Although EPA claims that the Revised Determination is not a final action because it has triggered a rulemaking to revise the standards, "an action need not be the last administrative action contemplated by the

statutory scheme" to be final. *Role Models America v. White*, 317 F.3d 327, 331 (D.C. Cir. 2003) (quotation marks and brackets omitted). Moreover, should EPA's forthcoming rule weakening the standards be set aside, the Revised Determination, coupled with Section 12(h)'s requirement that EPA initiate a rulemaking to revise the standards, would continue to generate regulatory uncertainty regarding the existing standards.

EPA's action readily meets the first *Bennett* prong. EPA stated that the Revised Determination "mark[s] the consummation" of the Mid-Term Evaluation. *See* 83 Fed. Reg. at 16,087 (JA__) ("This notice *concludes* EPA's [Mid-Term Evaluation] under 40 CFR 86.1818-12(h)." (emphasis added)). This reflects Section 12(h), which mandated that EPA "shall *determine* whether the standards" remain appropriate by "[n]o later than April 1, 2018." 40 C.F.R. § 86.1818-12(h) (emphasis added). The Revised Determination withdrew the 2017 Determination and put in its place a determination that the existing standards are not appropriate. Having thus "publicly articulate[d] an unequivocal position," EPA has "relinquished the benefit of postponed judicial review." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986).

EPA's action likewise satisfies the second prong of the *Bennett* standard: it "alter[ed] the legal regime" and created "direct and appreciable

legal consequences." *Bennett*, 520 U.S. at 178. Under Section 12(h), EPA's action has triggered a binding requirement that it "shall" initiate a rulemaking to revise the standards. 40 C.F.R. § 86.1818-12(h). The Revised Determination therefore created direct legal consequences for the agency. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806-07 (D.C. Cir. 2006) (action is final if it has "binding effects on … the agency"); *NEDACAP*, 752 F.3d at 1006 (action creating "legal consequences" for agency staff is final).

EPA's action also created legal consequences for the States, which relied on the current federal standards to satisfy a critical part of their own greenhouse gas reduction mandates and protect their residents and natural resources. The Revised Determination wiped away EPA's previous assurance that the existing standards would remain legally binding. As a result, several of the States have been forced to act to ensure that they will be able to enforce California's comparably robust standards. *See* Cunningham Decl. ¶¶ 36-42 (ADD29-31); Declaration of Christine Kirby ¶¶ 28-43 (ADD103-109); Flint Decl. ¶¶ 8-16 (ADD114-117); Declaration of Ali Mirzakhalili ¶¶ 8-18 (ADD136-38); Declaration of Heidi Hales ¶¶ 3-7 (ADD140-141); Clark Decl. ¶¶ 4-5 (ADD151-52).

Finally, EPA's Revised Determination expressly set aside its 2017 Determination, a previous final agency action that concluded the Mid-Term Evaluation and created legal consequences by affirming the model year 2022-2025 standards. By reversing what the agency considered the "consummation of the agency's decisionmaking process," EPA has replaced one final agency action with another.

C. The Issues Are Ripe

Ripeness requires a court "to see whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *NEDACAP*, 752 F.3d at 1008 (quotation marks and citation omitted). All three factors support ripeness here. Just as in *NEDACAP*, the States' challenge "presents a purely legal question of whether EPA's final action … violates the strictures of the … EPA regulations." *Id.*; *see also Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) ("[c]laims that an agency's action is arbitrary and capricious … present purely legal issues"). This challenge is based on a closed administrative record, and no additional factual development is necessary to permit the Court's review. Thus, the setting is sufficiently concrete for review. And, as demonstrated above, EPA's action is sufficiently final.

Where, as here, "an issue is clearly fit for review," "there is no need to consider the hardship to the parties of withholding court consideration." *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C. Cir. 1995) (quotation marks and citation omitted). Even if hardship were relevant, the Clean Air Act requires a minimal showing. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 479-80 (2001) ("Such statutes … permit judicial review directly, even before the concrete effects normally required for APA review are felt." (quotation marks and citation omitted)). As discussed in Section I.A., *supra*, the detrimental impact of EPA's action on the States has been and continues to be substantial. By contrast, EPA has identified no hardship it would suffer from judicial review.

II. EPA VIOLATED ITS OWN REGULATION

In establishing the Mid-Term Evaluation, EPA did not simply require that it evaluate whether the standards adopted for those years remained appropriate. Instead, it included special procedural and substantive requirements designed to ensure that the evaluation would be based on publicly vetted, up-to-date technical analyses developed in partnership with CARB. EPA stated that this review would be transparent and "as robust and comprehensive as that in the original setting of the [model year] 2017-2025 standards." 77 Fed. Reg. at 62,784.

First, Section 12(h) specifies that EPA must consider eight enumerated factors. *See* 40 C.F.R. § 86.1818-12(h)(1). *Second*, Section 12(h) requires that EPA's assessment of these factors be based on a record that includes "[a] draft Technical Assessment Report addressing issues relevant to the standard for the 2022 through 2025 model years," which must be disclosed to the public, and "[p]ublic comment on the draft Technical Assessment Report." *Id*. § 86.1818-12(h)(2), (h)(3). *Third*, Section 12(h) also requires EPA to "set forth *in detail*" the bases for its determination, including its "*assessment* of each of the [eight] factors" relevant to setting the standards. *Id.*, (h)(4) (emphases added). And EPA pledged to "conduct the mid-term evaluation in close coordination with" CARB and that "any adjustments to the standards will be made with the participation of CARB and in a manner that ensures continued harmonization of state and Federal vehicle standards." 77 Fed. Reg. at 62,784.

EPA followed these requirements in its 2017 Determination. Its Revised Determination, however, flouts both the procedural and substantive requirements specified by Section 12(h), thereby rendering EPA's determination both erroneous and legally deficient. *See, e.g.*, *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (agencies may not "play fast and loose" with their own regulations).

A. EPA Violated the Procedural Requirements of Section 12(h) by Failing to Allow Notice and Comment on Its Purported "New" Information

Section 12(h) required EPA to conduct a technical assessment in the form of the TAR and publicly disclose the TAR and allow "[p]ublic comment on" it before making its determination. 40 C.F.R. § 86.1818-12(h)(2), (h)(3). These requirements were intended to ensure that the public would have the opportunity to vet the technical bases underlying EPA's assessment of the the standards *before* EPA issued its determination.

EPA followed these requirements in developing its 2017 Determination: EPA invited public comment on the TAR and received over 200,000 comments. Proposed Determination at ES-1 (JA__). Then, EPA invited public comment on its Proposed Determination, which incorporated comments on the TAR and updated certain analyses. *Id.* at i (JA__).

EPA did not follow these requirements in its Revised Determination. It did not issue a new TAR in connection with the Revised Determination or even issue a supplement to the previously issued TAR. Instead, EPA based the Revised Determination on an alleged "significant record that has been developed since the January 2017 Determination," 83 Fed. Reg. at 16,078 (JA__), but it did not identify this "significant record" in advance, much less make EPA's technical evaluation of that record available for public

comment. Had it done so, the States and other stakeholders would have informed EPA of the problems with this new record and EPA's evaluation of it, which would have forced the agency to confront those problems *before* reaching a decision on whether the standards remain appropriate. By relying on evidence never made available for comment, EPA turned the procedures adopted in Section 12(h) on their head, transforming an open and transparent public vetting of technical information into an impenetrable black box, which, as shown below, produced an arbitrary and erroneous result.

EPA's failure was exacerbated by its decision to shut CARB out of the reconsideration process notwithstanding its pledge in the 2012 rulemaking to "conduct the mid-term evaluation in close coordination with" CARB. 77 Fed. Reg. at 62,784. Leading up to the 2017 Determination, EPA worked closely with CARB in recognition of California's unique Clean Air Act authority to regulate vehicle emissions and CARB's status as a co-regulator in the National Program. In particular, CARB played a critical role in developing the TAR. CARB analyzed and verified EPA and NHTSA model inputs in the TAR. *See* TAR at ES-6 (JA__) (CARB was "integrally involved in analyzing the underlying technology cost and effectiveness inputs to the EPA and NHTSA modeling"). CARB also conducted analyses of technology costs to support the TAR. *See id.* at 5-132 (JA__) ("CARB

performed a study of [fuel cell electric vehicle] system costs"); *id.* at 5-136 (JA__) ("CARB then performed a parametric analysis for [fuel cell electric vehicle] costs"); *id.* at 5-137 (JA__) ("CARB performed a secondary analysis with a narrowed system design space"). CARB commissioned a study on technology improvements to further the TAR analysis. *See id.* at 2-5 to 2-6 (JA__-__). CARB also funded and managed a critical study in support of the TAR's safety analysis. *See id.* at 8-55 (JA__) ("CARB-sponsored Lotus 'Phase 2' study provides the updated design, crash simulation results, detailed costing, and analysis of the manufacturing feasibility"); Technical Support Document at 2-157 to 2-164 (JA__-__). Finally, CARB data on zero emission vehicle sales contributed to the 2016 Proposed Determination's Technical Support Document. *See* Technical Support Document at 2-3 (JA__).

EPA tossed all of CARB's work aside in the Revised Determination. EPA never consulted CARB on any of the allegedly "new" technical data or studies that EPA cites in its Revised Determination, CARB Comment Letter at 4 (JA__), and it failed to consider the new studies and the results of CARB's independent midterm review, which CARB submitted with its October 5, 2017 comment letter. Most troubling, by wholly ignoring the TAR's analysis (as discussed below), EPA completely blocked any input or

analysis from CARB and effectively threw out its expert contributions. In effect, EPA decided to unilaterally alter the terms of the longstanding and effective National Program. These actions are contrary to EPA's stated intent and the obligations set forth in its 2012 rulemaking, and undermine the purpose of the Clean Air Act, which the 2012 rulemaking was intended to implement.

EPA's failure to follow these procedural requirements in developing the Revised Determination is arbitrary and capricious.

B. EPA Violated the Substantive Requirements of Section 12(h)

The Revised Determination also should be set aside because EPA arbitrarily and capriciously ignored the substantive requirements of Section 12(h). Section 12(h) required EPA to base its determination on a comprehensive, *ex ante* assessment so that a decision to initiate a rulemaking to revise the standards would *itself* be technically supported. 40 C.F.R. § 86.1818-12(h), (h)(2); *see also* 77 Fed. Reg. at 62,784. Likewise, Section 12(h) required EPA to "set forth in detail" its "assessments of each of the factors" specified by the regulation. 40 C.F.R. § 86.1818-12(h)(4). The Revised Determination violated both requirements.

1. EPA Failed to Base Its Determination on the Record

Section 12(h) demanded that the Mid-Term Evaluation be based upon a complete record including a TAR. Although EPA asserts in the Revised Determination that it considered the complete record, 83 Fed. Reg. at 16,079 (JA__), that claim is belied by the superficiality of the Revised Determination's analysis. The Revised Determination in fact disregards the extensive technical record compiled for the 2017 Determination.

The TAR issued by EPA, NHTSA, and CARB, and the Technical Support Document issued with EPA's 2016 Proposed Determination together present nearly 2,000 pages of detailed analysis addressing the eight factors specified in Section 12(h). Although the 2017 Determination relied extensively on this record, *see, e.g.*, 2017 Determination at 3, 17-28 (JA__, __-__), the Revised Determination hardly mentions it. For example, the Revised Determination makes no mention of the 2016 Technical Support Document or the comments previously submitted by CARB and the States during the Mid-Term Evaluation. And, aside from a description of the background, the Revised Determination refers to the Proposed Determination's analysis only once, and then only in passing. 83 Fed. Reg. at 16,084 (JA__) (discussing impact of gas prices on fuel savings).

The Revised Determination's treatment of the TAR is nearly as cursory. The Revised Determination asserts that a handful of industry comments and a few "new" pieces of data constitute a "substantial record" that justifies abandoning the 2017 Determination. But in only once instance does EPA compare or weigh this purportedly new information against the evidence it had assembled in the TAR, and even then EPA neither explains nor supports its position.[14] Specifically, in discussing energy security, EPA asserts that "the situation of the United States is … significantly different from its situation in 2016 when the draft TAR was developed." 83 Fed. Reg. at 16,085. But EPA does not explain *how* the situation is different, much less why that difference justifies its reversal. This single—and conclusory—discussion of the TAR cannot satisfy Section 12(h)'s mandate that EPA *base* its determination on the TAR. 40 C.F.R. § 86.1818-12(h).

2. EPA Failed to Set Out Reasoned Bases for Its Determination, including Any Assessment of the Section 12(h) Factors

Section 12(h) also required EPA to provide the bases for its determination *in detail*, including an assessment of each of eight enumerated factors. 40 C.F.R. § 86.1818-12(h)(1), (h)(4). The Revised Determination

[14] The remaining seven references to the TAR in the Revised Determination are made in passing either as part of EPA's description of its Mid-Term Evaluation process or in recitations of comments.

fails to provide this detailed assessment. Although the 2017 Determination adopted a 268-page Proposed Determination, which itself was based on nearly 2,000 pages of assessment, the Revised Determination devotes only 11 pages to its assessment and gives scant consideration to many factors. Moreover, for the few it discusses at any length, it fails to provide any real assessment of those factors. And even where EPA references purportedly new information, it does not analyze how that information justifies EPA's assessment of each factor or reconcile it with EPA's prior analysis.

Availability and Effectiveness of Technology (Factor 1) & Feasibility and Practicability (Factor 3): EPA devotes most of the Revised Determination to a combined discussion of Factors 1 and 3, but this effort is plainly inadequate. For instance, in the 2017 Determination, EPA considered and directly rebutted comments suggesting certain advanced technologies may not be available in 2025, finding instead that "the range of technology development has been more extensive and effective than anticipated [in 2012]." 2017 Determination at 19, 29 (JA__, __). In the Revised Determination, EPA cites new industry comments on technology and summarily concludes that some technologies may be more available, and others less available, than anticipated in 2012. 83 Fed. Reg. at 16,091-82 (JA__-__). But EPA never analyzes the relative merits of these

comments in relation to the full technical record, nor explains how the purported changes regarding some technologies impact the overall appropriateness of the standards or render them unattainable. Instead, EPA simply concludes that "uncertainty" about technology development requires it to revise the standards. That is hardly the detailed assessment of the record that Section 12(h) required.

The Revised Determination's discussion of electric vehicles is similarly deficient: it mischaracterizes data and ignores the analysis and conclusion underpinning the 2017 Determination. The Revised Determination relies on a figure provided by an auto industry trade group showing electric vehicle sales from 1999 to early 2016, and claims the figure "calls into question EPA assumptions for the 2012 rulemaking and the January 2017 Determination that sales of electrified [vehicles] will be sufficient to support compliance with the [model year] 2022-2025 standards." *Id.* at 16,079 (JA__); *see id.* at 16,080, 16,083 (JA__, __). However, this figure omitted the upswing in electric vehicle sales that occurred in 2016 and 2017. *See, e.g.*, National Coalition for Advanced Technology (NCAT), et al. Br. at 15-16. Indeed, NCAT *provided* updated data from 2016 and 2017 to EPA showing that electric vehicle sales had recovered and were increasing substantially in late 2016 and early 2017 (JA

__), but EPA ignored this information and relied only on the trade group's misleading snapshot to conclude that electric vehicle sales will be lower than anticipated.

Moreover, had EPA made the trade group's data available for comment in a TAR, the States would have pointed out that EPA already had concluded that only modest levels of electrification will be needed to meet the model year 2025 standards. As EPA stated in the 2017 Determination:

> Our analysis … indicates that there are multiple compliance pathways which would need [by model year 2025] only minimal (less than 3 percent) of strong hybrids and electric vehicles, and that the great bulk of technologies used would be based on improvements to gasoline internal combustion engines. This is true not only in the agency's primary analysis, but also in a series of sensitivity analyses.

2017 Determination at 25 (JA__). Thus, in addition to relying on incomplete and misleading information, EPA failed to explain how such information outweighs its prior analysis. These failures render its new conclusion technically unsound and legally invalid.

Also, although the 2017 Determination cited data showing that automakers had over-complied with the model year 2012-2015 standards and therefore accrued credits, the Revised Determination cites data showing that some companies used these credits to meet the 2016 standards. 83 Fed. Reg. at 16,079. But EPA stops there and provides no analysis or explanation

of how this undercuts the broader data and projections supporting the 2017 Determination that the existing standards remain feasible and appropriate.[15]

Another, even more fundamental flaw in EPA's treatment of the first and third factors also renders its assessment inadequate: its invocation of "uncertainty." As noted above, EPA asserts that some comments suggest "uncertainty" about advanced technologies, which, according to EPA, "further supports [EPA's] determination to reconsider the current standards through a subsequent rulemaking." *Id.* at 16,082 (JA__). Indeed, EPA uses this artifice throughout the Revised Determination. *See id.* at 16,083 (JA__) (stating EPA's intention to "more fully consider" the impact of consumer preference on vehicle sales in the rulemaking). And at times EPA does so even while acknowledging that it has failed to review material already in the record. *Id.* at 16,083 n.21 (JA__) (noting "there are numerous peer-reviewed studies related to this subject *and many of them are available in the docket associated with this action*. EPA intends to summarize and assess the studies on this topic as part of the forthcoming rulemaking" (emphasis added)).

[15] EPA's regulations allow automakers to earn credits that can be used to minimize compliance costs. When it is cheaper to apply credits rather than deploy emission reduction technologies, an automaker may choose to use its credits to minimize its compliance costs.

But the entire purpose of the Mid-Term Evaluation was for EPA to address any such "uncertainty" by developing an updated technical record and analyzing that record *before* making a decision to upend the standards and the National Program. Section 12(h) requires that EPA "shall determine" whether the standards are appropriate and "will set forth in detail" its assessment of the factors. 40 C.F.R. § 86.1818-12(h), (h)(4). EPA cannot satisfy these requirements simply by asserting some uncertainty and declaring its intention to make a detailed assessment in the future.

Cost on Producers/Purchasers (Factor 2): The Revised Determination devotes less than a page to assessing the cost of new vehicles to producers and consumers. *See* 83 Fed. Reg. at 16,083-84 (JA__). EPA expresses concern that the "2017 Final Determination did not give appropriate consideration to the effect on low-income consumers." *Id.* at 16,084. In fact, EPA's earlier consideration of this was robust. *See* Technical Support Document at 4-38 to 4-56 (JA__-__); Proposed Determination at A-66 to A-79 (JA__-__); TAR at 6-16 to 6-23 (JA__-__). But rather than replace that ostensibly insufficient consideration with an adequate one, EPA instead treats its dissatisfaction, together with its stated intent to assess this factor in the future, as a sufficient basis for its determination of inappropriateness. 83 Fed. Reg. at 16,084 ("[i]n its new

rulemaking, EPA plans to thoroughly assess the impacts of the standards on affordability"); *id.* ("affordability concerns and their impact on new vehicle sales should be more thoroughly assessed, further supporting [EPA's] determination to initiate a new rulemaking"). As explained above, this violates Section 12(h)'s requirement that EPA complete its assessment and only then, based on that assessment, make its determination.

Impact on emission reductions, oil conservation, energy security, and consumer fuel savings (Factor 4): EPA devotes less than a page to Factor 4, *see id.* at 16,084-85, and again notes its intent to consider most of the relevant issues in a future rulemaking rather than completing the technical assessment required to underpin EPA's determination. *See id.* at 16,085 (asserting that "it is important to fully consider" the effects of improved fuel efficiency on miles driven (the so-called "rebound effect"), that EPA "received a range of views and assessments in the recent public comments," and that "EPA intends to [fully consider the effects] in its new rulemaking"); *cf.* 40 C.F.R. § 86.1818-12(h)(4) (requiring that EPA support its determination with a detailed assessment of the factors).

EPA's review of this factor also overlooks, without justification or explanation, EPA's prior analyses supporting its 2017 Determination. The Revised Determination posits that the fuel cost savings it projected in 2012

"may have been optimistic" because more recent Energy Information Agency fuel price projections are significantly lower. 83 Fed. Reg. at 16,084. But this comparison is a red herring. EPA's 2017 Determination included an updated Energy Information Agency projection that assumed future fuel prices would be *lower* than anticipated in 2012. The 2017 Determination incorporated this updated projection throughout its analysis and concluded that the standards are "working even at low fuel prices" and would continue to yield net benefits *even under substantially lower fuel price scenarios*. 2017 Determination at 4-6, 8, 21 (JA__-__, __, __); Technical Support Document at 3-4 to 3-5 (JA__-__). Although the Revised Determination implicitly acknowledges that the 2017 Determination's fuel price projections were *lower* than the Revised Determination's projections, *id.* at 16,085, Fig. 3 (JA__), it otherwise ignores the fuel price analysis in the 2017 Determination.

Impact on Auto Industry (Factor 5): The Revised Determination devotes less than a page to Factor 5. *See* 83 Fed. Reg. at 16,085-86. As with the other factors, EPA asserts that "a more rigorous analysis of job gains and losses is needed" and states that it "intends to include such an analysis as part of the basis for the new rule." *Id.* at 16,086 (JA__).

In connection with this factor, the Revised Determination also points to "significant unresolved concerns regarding" the standards' impact on jobs and cites a cost-benefit study that estimated "employment losses up to 1.13 million due to the standards *if* the standards increased prices by $6,000 per vehicle." *Id.* at 16,085-86 (JA__-__) (emphasis added). But EPA previously considered this study and rejected it as "significantly flawed" based on its "questionable assumptions," including cost estimates that were speculative and contrary to numerous other studies. Technical Support Document at 4-17 to 4-20 (JA__-__). But nowhere does EPA suggest that prices are reasonably likely to rise by that amount or cite any supporting evidence. Thus, this hypothetical provides no credible support for an assessment on the impact to industry jobs or EPA's overall determination, much less any reason to reverse the 2017 Determination's finding that the standards will have little, if any, effect on jobs. Technical Support Document at 4-13 to 4-16 (JA__-__).

Impact on Auto Safety (Factor 6): In a particularly glaring shortcoming, EPA devotes *four sentences* to Factor 6, 83 Fed. Reg. at 16,086, and, unsurprisingly, fails to offer any reason to depart from the 2017 Determination's safety assessment. The 2017 Determination's analysis summarized the extensive safety assessment provided in the TAR and

Proposed Determination. 2017 Determination at 26-27 (JA__-__). EPA and NHTSA had reviewed the relationship between mass, size, and fatality risk based on historical crash data, and then calculated the estimated safety impacts of modeled mass reductions over the lifetimes of new vehicles. *Id.* at 26 (JA__); *see* TAR at 8-1 to 8-62 (JA__); Proposed Determination at A-95-98 (JA__). Based on this analysis, the 2017 Determination found that the existing standards would have "no adverse impact on vehicle safety." 2017 Determination at 27 (JA__).

The Revised Determination offers no alternative analysis, makes no finding about the impact of the standards on vehicle safety, and never even acknowledges that it had published a full *chapter* of safety analysis in the TAR and also addressed it in the Proposed Determination. 83 Fed. Reg. at 16,086 (JA__). Ignoring this record, EPA states that it will "further assess" the scope of its safety analysis *in the future* and, on this basis, summarily concludes that the standards are inappropriate and must be revised. *Id*. This failure to acknowledge—much less grapple with—the substantial existing record directly violates the requirement that EPA make a determination based on the record before it. *See* 40 C.F.R. § 86.1818-12(h).

Impact on NHTSA's fuel economy standards and the harmonized National Program (Factor 7): Factor 7 required EPA to consider the impact of the standards on NHTSA's fuel economy standards and on the harmonized National Program. *Id.* § 86.1818-12(h)(1)(vii). The Revised Determination simply notes that harmonization is "very important" and that EPA will continue to work toward it. 83 Fed. Reg. at 16,086. EPA fails to consider the impact that its Revised Determination would have—and has had—on the National Program, as well as the cost to automakers, consumers, and other stakeholders from EPA's decision to disrupt this program.

The standards' impact on any other relevant factors (Factor 8): With respect to the final, catch-all factor, the Revised Determination affirms the 2017 Determination's emphasis on the importance of regulatory certainty, but then reaches the illogical conclusion that "maintaining the current standards" may not be "the best way to provide such certainty." *Id.* at 16,087. EPA did not weigh the impacts that a lengthy rulemaking process would have on stakeholders against the regulatory certainty that simply affirming the existing standards would provide.

In sum, the Revised Determination ignores the vast record EPA previously created and omits any real assessment of the factors specified in

Section 12(h), thus transforming the rigorous, data-driven analysis contemplated by the regulation into an administrative bagatelle. EPA's failure to follow the procedures mandated by Section 12(h) and conduct the requisite analysis renders the Revised Determination erroneous and legally inadequate.

III. EPA'S FAILURE TO EXPLAIN ITS REVISED DETERMINATION AND ITS SHIFT FROM ITS 2017 DETERMINATION IS ARBITRARY AND CAPRICIOUS

As articulated above in Section II, EPA failed to base its Revised Determination on the full record, and provided no analysis or explanation to support its conclusion. Standing alone, EPA's Revised Determination is arbitrary and capricious because EPA failed to articulate a reasoned explanation for its decision that demonstrates "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43; *see also U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 629 (D.C. Cir. 2016) ("we cannot uphold an agency decision that … fails to establish a reasonable connection to the facts in the record").

In addition, because EPA's Revised Determination reverses its 2017 Determination, EPA was required to reconcile its new position with its prior factual findings, something it wholly failed to do. *See Encino Motorcars*, 136 S. Ct. at 2126 (agencies changing policy must provide "a reasoned

explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009))); *see also* Ctr. for Biological Diversity, et al. Br. at 12-18.

The above discussion, in Section II.B, of how EPA violated its regulation also demonstrates EPA's failure to explain its change of course:

- EPA provided no adequate explanation for its departure from the 2017 Determination's findings or underlying factual record, including the TAR and Technical Support Document.
- Where EPA did mention assumptions or analyses supporting the 2017 Determination, it mischaracterized them. This cannot serve as a viable basis for reversing course.
- In the few instances where EPA pointed to ostensibly new information that allegedly raises "uncertainty" about the 2017 Determination, it failed to explain how the new information justifies reversing EPA's conclusion.
- EPA's unsupported claims that the 2017 Determination inadequately analyzed an issue or that "uncertainty" exists regarding a factor, without more, do not constitute a reasoned explanation for reversing course.

- EPA's mere recitation of industry comments without weighing them against the full record does not amount to a reasoned explanation for rejecting a determination built on an extensive and robust technical assessment.

The Revised Determination's shortcomings are particularly troubling in light of the significant reliance interests at stake. *See Encino Motorcars*, 136 S. Ct. at 2126 ("the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position" particularly because of "reliance on the Department's prior policy"). CARB, the States, and industry have acted in reliance on the existing model year 2022-2025 standards. *See supra*, Argument Section I.B; *see also* NCAT, et al. Br. at 5-11. In these circumstances, EPA's failure to provide any reasoned explanation demands vacatur of the Revised Determination.

CONCLUSION

For the reasons stated above, the States respectfully request that the Court vacate EPA's Revised Determination and reinstate the 2017 Determination.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the State Petitioners' Opening Brief, dated February 7, 2019, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure and this Court's Circuit Rules. I certify that this brief contains 10,664 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing State Petitioners' Opening Brief to be filed on February 7, 2019 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

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