No. 12-1253

In the Supreme Court of the United States

COALITION FOR RESPONSIBLE REGULATION, INC., ALPHA NATURAL RESOURCES, INC., GREAT NORTHERN PROJECT DEVELOPMENT, L.P., AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A. The Issue Is Critically Important

EPA contends, and the panel below held, that Section 202 of the Clean Air Act ("Act") and *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), *prohibit* the Environmental Protection Agency from considering whether rules adopted to protect public health and welfare actually will protect public health or welfare. EPA Br. 28; Pet. App. 38a.

That remarkable conclusion warrants review for at least two reasons:

First, it strains against the ancient principle that "the law will not enforce any one to do a thing which will be vain and fruitless," *Sir Anthony Main's Case*, (1596) 77 Eng. Rep. 80, 81 (K.B.) (5 Coke 21a), which finds expression in modern administrative law as the prohibition against construing a statute to require regulation "when the burdens of regulation yield a gain of trivial or no value." *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 360-361 (D.C. Cir. 1979); accord Pet. 24-29 (citing cases).

Second, the decision below authorizes EPA to promulgate emission standards as stringent or permissive as EPA chooses. Pet. 32-34. Respondents aver that "[n]one of the parties seeking to overturn EPA's rulemaking * * * argu[e] that those standards are either too lenient or too strict." Automakers' Br. 11. But that is exactly the Coalition's argument: Absent findings that link the standards to their environmental effects, EPA could have adopted standards twice or half as strict. See *Natural Res. Def. Council* v. *EPA*, 824 F.2d 1146, 1164 (D.C. Cir. 1987) (en banc) (vacating where agency failed to explain "why

[its rule] was 'safe' and the other was not"). The panel's position also frustrates judicial review by depriving courts of findings necessary to assess the rationality of the agency's decision. As our petition explains, Pet. 35-36, "[a] simpleminded argument that '[a pollutant] is bad and our rule reduces [that pollutant]' does not satisfy th[e] [agency's] duty" to "explai[n] why it chose the level it did." *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 525 (D.C. Cir. 1983).[1]

Unable to address these points on their own terms, respondents reframe them. But the Coalition does not argue that EPA must set a "precise" safe level of greenhouse gases ("GHG"), EPA Br. 14 (characterizing panel's description of Coalition argument), *id.* 21 n.8; or that EPA must make a "rigorous" showing of the rules' efficacy at avoiding climate changes, Envtl Br. 18; or that EPA must show the problem is "due *solely*" to cars or can be "*entirely* resolved" by the Tailpipe Rule, Envtl Br. at 19, 20, 22. The Coalition's argument is more modest: EPA must show that the Tailpipe Rule would "meaningfully mitigate" (Pet. I) the risks asserted as the basis for regulation. *Accord*

[1] The panel and EPA err in characterizing the Coalition's argument about regulatory purpose or thresholds of endangerment as a "'specialized version of [the] claim that the scientific record contains too much uncertainty.'" EPA Br. 21 n.8 (quoting Pet. App. 28a). EPA violated basic principles of administrative law by failing to demonstrate a rational connection between facts found and regulatory choices made. As the en banc D.C. Circuit noted in *Natural Resources Defense Council* v. *EPA*, scientific uncertainty does not relieve an agency of its duty to engage in reasoned decisionmaking. 824 F.2d at 1165.

Pet. 18 ("meaningfully address"); *id.* 5 ("appreciable effect on the risk identified").

The related effort (Envtl Br. 22) to distinguish *Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), also fails. The Coalition's concern is not that EPA has regulated "incrementally," Envtl Br. 22, but that EPA has not demonstrated that its regulations would "fruitfully * * * attack" the problem by meaningfully reducing the risks identified, as the D.C. Circuit required with respect to the lead regulations at issue there. Pet. 18-19.

Contrary to the States' suggestion (States' Br. 24), the opinion below does not involve "misapplication of a properly stated rule of law." Rather, the panel endorsed EPA's misunderstanding of Section 202's legal requirements, Pet. 17-23, and departed from long-settled legal principles governing health and welfare regulation. *Id.* at 24-29. The Petition presents basic and recurring issues of administrative law in the context of rules that are "undoubtedly matters of exceptional importance." Envtl Br. 42 (quoting Pet. App. 91a).

B. The Decision Below Is Wrong

For decades, EPA correctly understood the Section 202(a) "endangerment finding" as integral to setting limits on car emissions: The findings of endangerment inform the setting of standards. See, *e.g.*, *Ethyl*, 541 F.2d at 32. Now, breaking from its longstanding approach, see 74 Fed. Reg. 66,496, 66,501 (Dec. 15, 2009), and claiming *Massachusetts* requires it to do so, EPA divorces the endangerment finding from the substantive standards. In so doing, EPA separates its determination of whether the atmosphere contains

too much GHG (while disclaiming any obligation to discuss how much is too much), from its regulation of GHG emissions. The panel accepted this bifurcation of Section 202, where one determination may not inform the other.

1. This misconstruction of Section 202 ignores longstanding background principles of administrative law against which Congress is presumed to legislate. Those principles require an agency to articulate a "rational connection between the facts found and choices made," *Motor Vehicle Mfrs. Ass'n of the United States* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and prohibit agency action that fails to explain how chosen regulations would have appreciable benefits. Pet. 22-23. Respondents fail to engage that analysis, instead asserting that the text of Section 202 creates a "non-discretionary duty" to regulate. Automakers' Br. 13. But as demonstrated in the petition, Pet. 26, Congress must use "extraordinarily rigid" language to overcome the presumption that regulation is not required where it would "yield a gain of trivial or no value." *Alabama Power*, 636 F.2d at 360-361. In 139 pages of opposition briefs and 57 footnotes, respondents have no answer to the numerous cited authorities that reject fruitless agency action and apply a "significan[ce]" threshold to avoid excessive burdens for trivial gains. Pet. 18, 24-29.

EPA offers *Ethyl* to defend its failure even to discuss, much less determine, safe levels of GHG or climactic conditions, but that case excused only the need "to identify the precise amount of airborne lead that will endanger public health." EPA Br. 21 n.8. *Ethyl* did not call for precision because Section 202

does not require it: EPA was authorized to regulate only because the Administrator "determine[d] * * * that lead automobile emissions *significantly* increase the total human exposure to lead *so as to cause* a significant risk of harm to the public health." *Ethyl*, 541 F.2d at 32 (emphases added). These limiting principles avoid interpreting the Act to "allow for baseless or purposeless regulation." *Ibid.* Indeed, the D.C. Circuit in *Ethyl* predicated its analysis on "accept[ing] the Administrator's determination that the contribution" to "total [lead] exposure" of lead additives in gasoline "must be 'significant' before regulation is proper." *Id.* at 31 n.62. While respondents observe that Section 202's plain language does not "specify[]" any particular "amount of such causation" (or mitigation), Automakers' Br. 14, background principles of administrative law foreclose EPA's choice to close its eyes to these issues altogether.

2. Section 202 authorizes EPA to prescribe emissions regulations for "any air pollutant from any * * * new motor vehicles * * * which in [its] 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). One need only read the statute, not "rewrite" it (Envtl Br. 21), to conclude that Congress intended a finding that the regulated car population contributes endangerment, not just emissions. Indeed, the Automakers, perhaps inadvertently, get the law right and expose the panel's error by saying that Section 202(a) triggers regulation by "a finding that air pollution *resulting from* [new vehicle] emissions 'may reasonably be anticipated to endanger public health or welfare.'" Automakers' Br. 13 (emphasis added); see also *id.* at 13 (mischaracter-

izing panel as holding that regulation is triggered "once [EPA] made a finding that motor-vehicle emissions of GHGs 'contribute' to air pollution that may 'reasonably be anticipated to endanger public health or welfare'").

The environmental organizations are more candid still, acknowledging Congress's intent that rules adopted under Section 202 must "reduce the danger" EPA has identified. See Envtl Br. 20 (Section 202 rests on the "congressional premise that reducing emissions that 'contribute' to dangerous air pollution will reduce the danger") (emphasis omitted). But with a trace constituent of clean air emitted or absorbed by all living things and many other natural processes, it hardly follows that greater or lesser emissions from U.S. automobiles will have a proportional effect on ambient concentrations, much less on the effects of those concentrations. Without an explanation of what concentrations "endanger" and what do not, Pet. 35-36, evaluating contributions from automobiles is a meaningless exercise. The panel disclaimed any obligation to determine whether EPA's rules comported with Congress's intent (Envtl Br. 20) that any rules adopted under Section 202 "reduce the danger."[2]

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[2] The natural assumption of proportionality between emissions and effects—however erroneous—may account not only for the panel's error but for language in this Court's discussion of standing in *Massachusetts*, made on the (then) limited record of standing affidavits. As the government asserts, "EPA noted [in defending the Tailpipe Rule], and agreed with, this Court's observation that, '[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations.'" EPA Br. 29 (quoting *Massachusetts*, 549 U.S.

3. Respondents err in suggesting that *Massachusetts* compels EPA to promulgate emission standards. EPA Br. 27; Automakers' Br. 15; Envtl Br. 1. As even the Automakers concede (Br. 15), this Court explicitly avoided prejudging the outcome of remand, acknowledging that "EPA can avoid taking further action * * * if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether [greenhouse gases contribute to climate change]." 549 U.S. at 533; accord *id.* at 534-535.

Nor does *Massachusetts* render irrelevant the fact that nearly all of the Tailpipe Rule's effects will be achieved anyway by fuel economy standards from the National Highway Transportation Safety Administration ("NHTSA"). EPA Br. 31 n.13; Envtl Br. 20-21 n.9; States' Br. 25. In *Massachusetts*, this Court rejected EPA's distinct argument that it lacked authority to regulate GHG "because doing so would require it to tighten mileage standards," on the grounds that EPA and NHTSA could administer their statutory obligations in a way that "avoid[s] inconsistency." 549 U.S. at 531-532. That EPA can avoid conflict with NHTSA's fuel-economy standards does not mean that EPA is *compelled* to promulgate tailpipe regulations despite the fact that most of the purported benefits of EPA's regulation are already achieved by NHTSA fuel-economy standards.

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at 525). But EPA had not made then and still has not made now any showing of contributions to global atmospheric *concentrations*, only to emissions.

C. EPA Failed To Show That Its Actions Would Achieve Any Measurable Benefit

Although claiming that the efficacy of regulation "has no legal or logical connection" to the decision to regulate, EPA Br. 22, EPA still tries to show its regulations *are* effective, implicitly conceding that expensive regulation must accomplish something. It recites impressive-sounding absolute tonnage figures, see, *e.g.,* EPA Br. 29 ("960 million metric tons" of CO_2 equivalent); *id.* ("about 4 percent of total of total global greenhouse gas emissions, and * * * 23 percent of total U.S. greenhouse gas emissions"); see also States' Br. 25; Envtl Br. 19, but no impressive-sounding environmental benefits:[3] No respondent denies that EPA's *own estimates* indicate the Tailpipe Rule will, over a century of regulation, avoid 0.6-1.4 *millimeters* of sea-level rise and about *one-thousandth* of a degree of temperature rise. Pet. 4, 6. How these unnoticeable effects 90 years from now will address actual endangerment is left to conjecture.

EPA and the Environmental Organizations try to augment that meager showing, claiming that the Tailpipe Rule meaningfully affects climate-related risks in conjunction with other mobile-source standards not at issue here. EPA Br. 29-30; Envtl Br. 19. But neither cites any authority for the proposition that "subsequent rulemaking[s]" (EPA Br. 29) not currently under this Court's jurisdiction, involving a different and non-overlapping set of vehicles and

[3] EPA's conspicuous failure to identify benefits suggests that millions of tons comprise a small share of global emissions.

model years, have anything to do with the lawfulness of the regulations currently under review. EPA says that "each of [its] vehicle rules * * * 'makes a significant contribution toward'" GHG reductions, EPA Br. 30, and cites a 2013 White House "action plan" (*ibid.*) that is both outside the record and not part of the agency's rationale, but cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). EPA gives no reason to believe that the absolute CO_2 tonnage figures it cites (EPA Br. 30) will yield anything but the sort of infinitesimal contribution it is able to attribute to the Tailpipe Rule, such that the end result of trillions of dollars of regulation will not even be perceptible to humans.

D. Under The Panel's (And EPA's) Flawed Analysis, Section 202(a)'s Authority Is Unconstrained

Respondents claim that EPA's chosen standards are not arbitrary because Section 202(a)(2) provides that such regulations "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology." See Automakers' Br. 16; Envtl Br. 19-20. But "requisite" to what? Neither the panel opinion nor respondents offer any answer, or even discuss the question.

Section 202(a)(2) does nothing to guide the Administrator's choice among technologically feasible options. If, as the panel held, EPA need not identify the goal of its regulations, it is impossible to determine from technological feasibility alone whether the chosen emission standard is a rational means of achieving that end. For instance, if "safe" levels of greenhouse gases will result from controls that are only a

tenth as stringent as what is "technologically feasib[le]" (Automakers' Br. 16), it would be arbitrary and capricious for EPA to impose standards (even if feasible) that are ten times more stringent than necessary.

Unlike other provisions of the Act, Section 202(a) is not a technology-for-technology's-sake program: It does not, for example, mandate "the best available control technology" (42 U.S.C. § 7475(a)(4)) or "the lowest achievable emission rate" (42 U.S.C. § 7503(a)(2)), defined terms under the Act. Rather, Section 202(a) authorizes regulation to ameliorate endangerment, and it must be "requisite" to do so: If car emissions were largely responsible for the effects on public health and welfare outlined in EPA's endangerment finding, then stringent controls might be "requisite"; on the other hand, if (as appears), their emissions have little meaningful effect, then the "requisite" standards might be none. Here, the Tailpipe Rule standards appear "requisite" only to a political bargain with the major car companies.

E. The Tailpipe Rule Is Central To Any Consideration Of EPA's Rulemaking

The Automakers urge that further review of the Tailpipe Rule will create "uncertainty for the automobile industry." Automakers' Br. 19. That concern seems misplaced in light of the acknowledgement that the EPA and NHTSA standards—the latter of which would be untouched by the review sought here—"have been harmonized sufficiently to allow manufacturers to comply with both by producing a single fleet of vehicles" because there are only "minor substantive differences" between them. Automakers'

Br. 9.[4] The Automakers' policy concerns provide no basis for disregarding the core legal error in EPA and the panel's analysis. And in any event, the auto industry represents just a portion of the economic activity affected by EPA's sweeping regulatory regime.

The Tailpipe Rule must be central to this Court's review of that regime. Section 202(a), which in EPA's view triggered the entire regulatory cascade, authorizes only one action—the adoption of tailpipe limits informed by an endangerment finding. Even the Automakers concede that vacatur of the Endangerment Finding (relief the Coalition seeks, see Pet. 4-5, 19) would remove the Tailpipe Rule's "antecedent basis." Automakers' Br. 18 n.5. The Tailpipe Rule thus has a place in any consideration of the Endangerment Finding. And given the stationary source regime's unquestioned dependence on EPA's actions to regulate cars, the Tailpipe Rule also should be considered if this Court grants any petition addressing the Timing or Tailoring Rules—or, at a minimum, held pending a merits disposition.

In sum, the Coalition's petition offers the Court an attractive vehicle to address the central concern implicitly or explicitly animating *all* the petitions for

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[4] This observation by the affected industry belies claims by EPA (Br. 31 n.13) and the Environmental Organizations (Br. 20-21 n.9) that the Tailpipe Rule will reduce GHG emissions significantly more than NHTSA's fuel economy standards alone. But regardless, neither brief demonstrates that any asserted emissions difference would meaningfully affect atmospheric GHG concentrations or climate or temperature risks. See Pet. 33 n.7. And so the Court can dispose of EPA's rules without affecting the one set of emission limits (on cars) that Congress actually directed (by NHTSA).

review: EPA's sprawling suite of regulations, and the myriad and troubling legal issues it has spawned, demonstrate that the Clean Air Act is not an appropriate tool to regulate greenhouse gases. The Coalition's petition identifies flaws in Endangerment Finding and Tailpipe Rule, the legal predicates for stationary-source and an array of other regulations under the Act.

CONCLUSION

The panel ratified EPA's interpretation that *Massachusetts* compels adoption of an extensive suite of regulations without regard to whether they will mitigate the risks the Agency has identified. But if Congress adopted Section 202(a)(1) to authorize "precautionary action to prevent harm before it occurs, on the basis of probative but still uncertain scientific evidence," Envtl Br. 16, that is all the more reason why EPA must demonstrate that its regulations prevent harm. This Petition offers the Court its last opportunity to ensure that *Massachusetts* does not become a license for arbitrary and unreviewable rulemaking.

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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