

Oral Argument Not Yet Set

No. 09-1322 (Complex)

**United States Court of Appeals
For the District of Columbia Circuit**

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

v.

**ENVIRONMENTAL PROTECTION AGENCY,
Respondent.**

Petition for Review of Environmental Protection Agency Final Orders

Consolidated with 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

**BRIEF OF TEXAS FOR STATE PETITIONERS
AND SUPPORTING INTERVENORS**

GREG ABBOTT
Attorney General of Texas

JONATHAN F. MITCHELL
Solicitor General

DANIEL T. HODGE
First Assistant Attorney General

MICHAEL P. MURPHY
Assistant Solicitor General

BILL COBB
Deputy Attorney General for
Civil Litigation

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1695

DAVID C. MATTAX
Deputy of Defense Litigation

Fax: (512) 474-2697
jonathan.mitchell@oag.state.tx.us

J. REED CLAY, JR.
Special Assistant and Senior
Counsel to the Attorney General

**COUNSEL FOR STATE PETITIONERS
AND SUPPORTING INTERVENORS**

[Additional Counsel Listed On Inside
Cover]

ADDITIONAL COUNSEL

Luther Strange
Attorney General
State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 242-7445

Pamela Jo Bondi
Attorney General of Florida
The Capitol, L-01
Tallahassee, FL 32399-1050
Tel: (850) 414-3684
Fax: (850) 410-2672

Gregory F. Zoeller
Attorney General of Indiana
302 W. Washington St.
IGC-South, Fifth Floor
Indianapolis, IN 46204
Tel: (317) 232-6255
Fax: (317) 232-7979

Jack Conway
Attorney General
Commonwealth of Kentucky
Capitol Suite 118
700 Capitol Avenue
Frankfort, KY 40601-3449
Tel: (502) 696-5300
Fax: (502) 564-2894

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6705
Fax: (225) 326-6793

Neil D. Gordon
Michigan Dept. of
Attorney General
Environment, Natural
Resources, and Agriculture
Division
P.O. Box 30755
Lansing, MI 48909
Tel: (517) 373-7540
Fax: (517) 373-1610

Governor Haley Barbour
State of Mississippi
P.O. Box 139
Jackson, MS 39205-0139
Tel: (601) 359-3150
Fax: (601) 359-3741

Jon Bruning
Attorney General of Nebraska
Katherine J. Spohn
Special Counsel to Attorney
General
2115 State Capitol Building
P.O. Box 98920
Lincoln, NE 68509-8920
Tel: (402) 471-2682
Fax: (402) 471-3297

Marty Jackley
Attorney General
State of South Dakota
Roxanne Giedd
Chief, Civil Litigation Division
Attorney General's Office
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel: (605) 773-3215
Fax: (605) 773-4106

Wayne Stenehjem
Attorney General
State of North Dakota
Margaret Olson
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Tel: (701) 328-3640
Fax: (701) 328-4300

Mark L. Shurtleff
Attorney General
State of Utah
PO Box 142320
Salt Lake City, UT 84114
Tel: (801) 538-9600
Fax: (801) 538-1121

Scott Pruitt
Attorney General
State of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-3921
Fax: (405) 522-0669

Kenneth T. Cuccinelli, II
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219
Tel: (804) 786-2436
Fax: (804) 786-1991

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:

09-1322 (Lead), 10-1024, 10-1025, 10-1026, 10-1030, 10-1035,
10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042,
10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245,
10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

(A) Parties, Intervenors, and Amici

Petitioners

Alliance for Natural Climate Change Science and William Orr (10-1049)
Alpha Natural Resources, Inc. (09-1322)
American Farm Bureau Federation (10-1026)
American Iron and Steel Institute (10-1038)
American Petroleum Institute, (10-1044)
Attorney General Greg Abbott (10-1041)
Barry Smitherman,
Chairman of the Texas Public Utility Commission (10-1041)
Brick Industry Association(10-1044)
Chamber of Commerce of the United States of America (01-1030)
Coalition for Responsible Regulation, Inc. (09-1322)
Collins Industries, Inc. (10-1035)
Collins Trucking Company, Inc. (10-1035)
Commonwealth of Virginia ex rel.
Attorney General Kenneth T. Cuccinelli (10-1036)
Competitive Enterprise Institute(10-1045)
Corn Refiners Associaton(10-1044)
Freedomworks (10-1045)
Georgia Agribusiness Council, Inc.
Georgia Motor Trucking Association, Inc. (10-1035)
Gerdau Ameristeel Corporation (10-1037)
Great Northern Project Development, L.P. (09-1322)
Industrial Minerals Association – North America (09-1322)
J&M Tank Lines, Inc. (10-1035)
Kennesaw Transportation, Inc. (10-1035)

Langdale Company (10-1035)
Langdale Forest Products Company (10-1035)
Langdale Farms, LLC (10-1035)
Langdale Fuel Company (10-1035)
Langdale Chevrolet-Pontiac, Inc. (10-1035)
Langdale Ford Company (10-1035)
Langboard, Inc.-MDF (10-1035)
Langboard, Inc.-OSB (10-1035)
Massey Energy Company (09-1322)
National Association of Manufacturers (10-1044)
National Association of Home Builders (10-1044)
National Cattlemen's Beef Association (09-1322)
National Mining Association (10-1024)
National Oilseed Processors Association (10-1044)
National Petrochemical and Refiners Association (10-1044)
Ohio Coal Association (10-1040)
Peabody Energy Company (10-1025)
Portland Cement Association (10-1046)
Rosebud Mining Company (09-1322)
Science and Environmental Policy Project (10-1045)
Southeast Trailer Mart Inc. (10-1035)
Southeastern Legal Foundation, Inc. (10-1035)
State of Alabama (10-1039)
State of Texas (10-1041)
Rick Perry, Governor of Texas(10-1041)
Texas Commission on Environmental Quality (10-1041)
Texas Agriculture Commission (10-1041)
U.S. Representative Dana Rohrabacher (10-1035)
U.S. Representative Jack Kingston (10-1035)
U.S. Representative John Linder (10-1035)
U.S. Representative John Shimkus (10-1035)
U.S. Representative Kevin Brady (10-1035)
U.S. Representative Lynn Westmoreland (10-1035)
U.S. Representative Michele Bachmann (10-1035)
U.S. Representative Nathan Deal (10-1035)
U.S. Representative Paul Broun (10-1035)
U.S. Representative Phil Gingrey (10-1035)
U.S. Representative Steve King (10-1035)

U.S. Representative Tom Price (10-1035)
Utility Air Regulatory Group (10-1042)
Western States Petroleum Association (10-1044)

Respondents

Environmental Protection Agency (RESPONDENT IN ALL
CONSOLIDATED CASES)
Lisa P. Jackson, Administrator, United States Environmental
Protection Agency (Respondent in Nos. 10-1030, 10-1044, 10-1049,
and 10-1235)

Intervenors for Petitioners

Associated Industries of Arkansas
Arkansas State Chamber of Commerce
Colorado Association of Commerce & Industry
Glass Packaging Institute
Haley Barbour, Governor for the State of Mississippi
Idaho Association of Commerce and Industry
Independent Petroleum Association of America
Indiana Cast Metals Association
Kansas Chamber of Commerce and Industry
Louisiana Oil and Gas Association
Michigan Manufacturers Association
Mississippi Manufacturers Association
National Electrical Manufacturers Association
Nebraska Chamber of Commerce and Industry
North American Die Casting Association
Ohio Manufacturers Association
Pennsylvania Manufacturers Association
Portland Cement Association
State of Alaska
State of Florida
State of Indiana
State of Kentucky
State of Louisiana
State of Michigan

State of Nebraska
State of North Dakota
State of Oklahoma
State of South Carolina
State of South Dakota
State of Utah
Steel Manufacturers Association
Tennessee Chamber of Commerce and Industry
Virginia Manufacturers Association
West Virginia Manufacturers Association
Wisconsin Manufacturers and Commerce

Intervenors for Respondents

City of New York
Commonwealth of Massachusetts
Commonwealth of Pennsylvania
Conservation Law Foundation
Department of Environmental Protection
Environmental Defense Fund
Natural Resources Defense Council
National Wildlife Federation
Sierra Club
State of Arizona
State of California
State of Connecticut
State of Delaware
State of Illinois
State of Iowa
State of Maine
State of Maryland
State of Minnesota
State of New Hampshire
State of New Mexico
State of New York
State of Oregon
State of Rhode Island
State of Vermont

State of Washington
Wetlands Watch

Amici Curiae for Petitioners

Atlantic Legal Foundation
Landmark Legal Foundation
Mountain States Legal Foundation
National Federation of Independent Business Small Business Legal
Center

Amici Curiae for Respondents

Great Waters Coalition
Union of Concerned Scientists

(B) Rulings Under Review

These consolidated cases challenge:

- (1) *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009); and
- (2) *EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 75 Fed. Reg. 49,556 (Aug. 13, 2010).

(C) Related Cases

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

- (1) Seventeen petitions for review consolidated under lead case **No. 10-1092**, challenge EPA's and NHTSA's joint "Tailpipe Rule," 75 Fed. Reg. 25,324 (May 7, 2010).

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

- a. Seventeen petitions challenge EPA's "Triggering Rule," 75 Fed. Reg. 17,004 (April 2, 2010);
- b. Twenty-five petitions challenge EPA's "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010).

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

- a. Three petitions challenge the EPA rule entitled *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978);
- b. Three petitions challenge the EPA rule entitled *Part 52 – Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978);
- c. Three petitions challenge the EPA rule entitled *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980);
- d. Three petitions challenge the EPA rule entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Baseline Emissions Determination; Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186 (Dec. 31, 2002)

Pursuant to Rule 28(a)(1)(C) of the Rules of this Court, Petitioners and Petitioner-Intervenors state that Case No. 10-1049, *Orr v. EPA*,

challenges EPA's Endangerment Rule, 74 Fed. Reg. 66,496. The Court severed that case and dismissed it for lack of prosecution on September 9, 2010, reopened it on January 12, 2011, and that case continues to proceed separately from these consolidated cases. On March 14, 2011, the Court ordered the petitioner in that case to show cause why his petition should not be dismissed. Petitioner's response to that show-cause order is due on July 13, 2011.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be granted because it would assist the Court in resolving the numerous, complex issues presented in this set of consolidated cases. The EPA orders challenged in this proceeding serve as the genesis for one of the most expansive regulatory programs ever enacted, and the issues presented here are intertwined with other, pending proceedings. Specifically, the Court's decisions regarding the issues in these consolidated cases will implicate the Court's resolution of two closely related proceedings—Tailpipe (No. 10-1092), and Triggering and Tailoring (No. 10-1073)—that draw from and depend on the EPA action challenged in this proceeding. Given the numerous,

complex issues that span multiple proceedings, oral argument would likely provide a valuable aid to the Court in deciding these cases.

TABLE OF CONTENTS

Certificate as to Parties, Rulings, and Related Cases.....	i
Statement Regarding Oral Argument	vii
Table of Contents	ix
Table of Authorities.....	xi
Glossary of Abbreviations	xiii
Statement of Jurisdiction.....	3
Statement of the Issues.....	4
Statutes and Regulations.....	4
Statement of Facts	5
A. EPA Initially Concludes That Scientific Uncertainty Precludes It From Issuing an Endangerment Finding and Regulating GHG Emissions.....	5
B. The Supreme Court Rejects the EPA’s Conclusion That It Categorically Lacks Authority to Regulate GHGs Under Section 202.....	6
C. Without Identifying or Applying Any Measures or Thresholds for Endangerment, EPA Makes an Endangerment Finding.....	7
Summary of the Argument	12
Standing	13
Argument.....	15
I. Standard of Review	15

II. The Endangerment Finding is Arbitrary and Capricious Because EPA Refused to Define or Measure Endangerment.....	17
III. EPA’s Refusal to Consider Adaptation and Mitigation Was Arbitrary and Capricious.....	21
Conclusion	22
Certificate of Compliance.....	24
Certificate of Service	25

TABLE OF AUTHORITIES

Cases

Ethyl Corp. v. EPA,
 541 F.2d 1 (D.C. Cir. 1976) 16, 17

Lujan v. Defenders of Wildlife,
 504 U.S. 555 (1992) 13, 15

**Massachusetts v. EPA*,
 549 U.S. 497 (2007) 6, 16, 17, 20, 21, 22

**Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut.
 Auto. Ins.*, 463 U.S. 29 (1983) 2, 4, 12, 16, 19, 21

Statutes

5 U.S.C. § 706 3

5 U.S.C. § 706(2)(A) 16

42 U.S.C. § 7521(a)(1) (CAA § 202(a)(1)) 1, 4, 11, 14

42 U.S.C. § 7607(b)(1) 3

42 U.S.C. § 7607(d)(9) 16

Regulations and Rules

Control of Emissions From New Highway Vehicles and
 Engines: Notice of Denial of Petition for Rulemaking,
 68 Fed. Reg. 52,922 (Sept. 8, 2003) (GHG Rulemaking
 Denial) 5, 6, 11

* Authorities chiefly relied upon are marked with an asterisk (*).

Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556 (Aug. 13, 2010) (Reconsideration Denial)..... v, 11

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment Finding)v, 2, 3, 7, 8, 9, 10, 11, 18, 19, 20, 21

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (Tailpipe Rule)..... 11, 12, 14

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule)..... 12, 13, 15

Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (Triggering Rule)..... 12

GLOSSARY OF ABBREVIATIONS

APA – Administrative Procedures Act

CAA – Clean Air Act

EPA – United States Environmental Protection Agency

GHG – Greenhouse gas

No. 09-1322 and Consolidated Cases (Complex)

United States Court of Appeals
For the District of Columbia Circuit

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

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**BRIEF OF TEXAS FOR STATE PETITIONERS
AND SUPPORTING INTERVENORS**

The Clean Air Act (CAA) directs the EPA Administrator to regulate air-pollutant emissions from new motor vehicles that “in [her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1) (CAA § 202(a)(1)). From this mandate, EPA issued an “endangerment” finding after concluding that greenhouse gas (GHG) emissions contribute to a perceived but undefined danger: anthropogenic global warming. *See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the*

Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment Finding). This Endangerment Finding serves as a springboard for an EPA regulatory regime that unilaterally rewrites key provisions of the Clean Air Act and imposes some of the most expansive and onerous regulatory burdens in U.S. history.

The arbitrary-and-capricious test requires courts to set aside an agency action whenever the agency fails to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (citation omitted). EPA’s Endangerment Finding fails this test because it never determines, or even considers, the point at which climate conditions, changes in climate, or atmospheric concentrations of GHGs endanger human health or welfare.

An agency action will also be deemed arbitrary and capricious if an agency “entirely fail[s] to consider an important aspect of the problem.” *Id.* Here, too, EPA’s Endangerment Finding falls short because it refuses to consider adaptation and mitigation factors in weighing endangerment—even though EPA admits those factors will

likely reduce any endangerment from climate change. The CAA vests the EPA Administrator not with an unbridled “judgment” over these endangerment issues, but with an obligation to provide reasoned explanations in accordance with the APA, 5 U.S.C. § 706, and the courts’ arbitrary-and-capricious tests. The Administrator’s Endangerment Finding fails to satisfy these requirements, and this Court should vacate and remand her decision.

STATEMENT OF JURISDICTION

Section 307 of the CAA grants this Court exclusive jurisdiction over petitions for review that challenge nationally applicable final actions of the EPA Administrator, *see* 42 U.S.C. § 7607(b)(1) (explaining that a “petition for review of . . . final action taken[] by the Administrator under [the CAA] may be filed only in the United States Court of Appeals for the District of Columbia”), and the EPA’s Endangerment Finding qualifies as such a final action. Texas filed its petition for review on February 16, 2010, within the 60-day deadline for challenging the Endangerment Finding. *See* 74 Fed. Reg. 66,496 (appearing in the Federal Register on December 15, 2009).

STATEMENT OF THE ISSUES

The arbitrary-and-capricious test requires an agency to “articulate a satisfactory explanation for its action” and forbids it to “entirely fail[] to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43 (citation omitted). Is EPA’s Endangerment Finding arbitrary and capricious because it: (1) fails to identify any criteria by which to judge endangerment, nor does it consider the levels at which GHG emissions, climate change, or climate temperature endanger public health or welfare, and (2) refuses to consider both adaptation to and mitigation of climate change, even though EPA concedes that both factors will affect climate-change risks?

STATUTES AND REGULATIONS

The following statutory provision is pertinent to this case:

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

STATEMENT OF FACTS

A. EPA Initially Concludes That Scientific Uncertainty Precludes It From Issuing an Endangerment Finding and Regulating GHG Emissions.

For the second time in six years, EPA has considered whether to regulate man-made GHG emissions under Section 202 of the CAA. In 2003, EPA concluded that it lacked statutory authority under the Clean Air Act to regulate GHG emissions from motor vehicles. *Control of Emissions From New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking*, 68 Fed. Reg. 52,922, 52,924 (Sept. 8, 2003) (GHG Rulemaking Denial). EPA further determined that it would be inappropriate to issue an endangerment finding and regulate GHG emissions until “more is understood about the causes, extent and significance of climate change and the potential options for addressing it.” *Id.* at 52,929-31. EPA explained that “[t]he science of climate change is extraordinarily complex and still evolving,” and that “important uncertainties” remain regarding “the factors that may affect future climate change and how it should be addressed.” *Id.* at 52,930. Because of these “[s]ubstantial scientific uncertainties,” EPA deemed

itself unable to assess the relevant factors necessary to predict how future climate change might affect public health and welfare. *Id.*

B. The Supreme Court Rejects the EPA's Conclusion That It Categorically Lacks Authority to Regulate GHGs Under Section 202.

In 2007, the Supreme Court held that the CAA permits EPA to regulate GHG emissions from new motor vehicles, and rejected EPA's earlier conclusion that it lacked statutory authority to do so. *See Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). The Court's ruling does not obligate EPA to regulate GHG emissions. The Court recognized that uncertainty can justify a decision from EPA that refuses to issue an endangerment finding, but only if the uncertainty leaves the EPA unable make a determination under § 202(a)(1). *Id.* at 533-34 ("The statutory question is whether sufficient information exists to make an endangerment finding."); *id.* at 534 ("If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.").

C. Without Identifying or Applying Any Measures or Thresholds for Endangerment, EPA Makes an Endangerment Finding.

Following the *Massachusetts* decision, EPA issued an endangerment finding in December 2009. *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009). The Endangerment Finding concludes that “six greenhouse gases taken together”—carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆)—“endanger both the public health and the public welfare of current and future generations” by causing or contributing to climate change. *Id.* at 66,496-97. EPA defines “climate change” as “the global warming effect plus other associated changes (e.g., precipitation effects, sea level rise, changes in the frequency and severity of extreme weather events) being induced by human activities, including activities that emit greenhouse gases.” *Id.* at 66,499.

The Endangerment Finding notes that temperatures in the United States have risen 1.3 degrees Fahrenheit between 1900 and 2008, and asserts that “more than half” of the warming that occurred

between 1951 and 2006 “is likely the result of human-caused greenhouse gas forcing of climate change.” *Id.* at 66,518 (quotation marks omitted). By EPA’s estimate, GHG emissions from human sources have caused temperatures in the United States to rise less than one degree Fahrenheit in a little more than one hundred years. EPA also found that § 202(a) sources—new motor vehicles—“are responsible for about 4 percent of total global greenhouse gas emissions, and for just over 23 percent of total U.S. greenhouse gas emissions.” *Id.* at 66,537.

Looking ahead, EPA admits that the forecasts for GHG emissions, atmospheric GHG concentrations, and global warming are highly uncertain. Assuming no mitigation of GHG emissions, EPA explains that emissions of GHGs may increase between 25 and 90 percent by 2030, compared to 2000 emissions. *Id.* at 66,519. It also notes that projections for global-warming effects by the end of the 21st century vary widely, “ranging from 1.8 to 4.0 °C (3.2 to 7.2 °F), with an uncertainty range of 1.1 to 6.4 °C (2.0 to 11.5 °F).” *Id.* at 66,519.

In addition to acknowledging the great uncertainties in forecasting global warming, EPA recognizes that the time horizon for assessing endangerment ranges from decades to centuries. *Id.* at

66,514. Despite this lengthy timeframe, EPA's Endangerment Finding declines to consider any potential global-warming adaptation or mitigation. EPA acknowledges that "autonomous" or voluntary adaptation to and mitigation of climate change will likely occur and reduce the harmful impact on the public health and welfare. *Id.* at 66,512. Nevertheless, EPA refused to consider adaptation or mitigation in its endangerment determination because it would "dramtically increase the complexity of the issues before EPA." *Id.* at 66,513-514. EPA instead opted to "focus[] on just the air pollution and its impacts" while assuming zero adaptation or mitigation over the century-long endangerment timeframe. *Id.* at 66,513.

The Endangerment Finding also acknowledges that natural causes contribute to climate change—both warming and cooling—and that the Earth's climate has changed throughout history. *Id.* at 66,499. But EPA concludes that "changes taking place in our atmosphere as a result of the well-documented buildup of greenhouse gases due to human activities are changing the climate at a pace and in a way that threatens human health, society, and the natural environment." *Id.* at 66,499. EPA did not, however, explain or attempt to set criteria for

determining the amount or pace of climate change that “threatens” public health and welfare.

Moreover, when identifying and weighing potential global warming risks, EPA declined to establish “a specific threshold metric for each category of risk and impacts.” *Id.* at 66,524. Rather, the Administrator used her “judgment” to issue an endangerment finding under § 202(a), and concluded that this absolves EPA of any need to set a “quantitative threshold above which a positive endangerment finding can be made.” *Id.* at 66,523. EPA described its judgment as “largely qualitative in nature, and [as] not reducible to precise metrics or quantification.” *Id.* at 66,524.

EPA also refused to consider whether any later decision to regulate GHG emissions would affect global warming because (in its view) the “effectiveness of the resulting regulatory controls is not a relevant factor to determining endangerment.”¹ *Id.* at 66,521. EPA’s

¹ EPA estimated in the Tailpipe Rule—its regulatory response to the Endangerment Finding—that its regulation of new motor vehicle emissions will reduce global mean temperature by only “0.006–0.015°C” by the year 2100, less than one tenth of one degree over the course of approximately ninety years. *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324, 25,495 (May 7, 2010) (the Tailpipe

decision to divorce its consideration of endangerment from a regulatory response reflects an unprecedented application of § 202(a). *See id.* at 66,501-02 (admitting that EPA typically made endangerment findings concurrent with proposed regulatory standards); *see also* GHG Rulemaking Denial, 68 Fed. Reg. at 52,924-25 (considering whether EPA could and should make an endangerment finding and regulate GHG emissions under § 202(a)).

After issuing its Endangerment Finding, EPA denied State Petitioners' petition to reconsider the decision; the State Petitioners presented newly discovered evidence that EPA had relied upon biased and unreliable third-party climate-change assessment reports to support its scientific conclusions. *Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 75 Fed. Reg. 49,556 (Aug. 13, 2010) (Reconsideration Denial). EPA also rolled out GHG emission regulations for vehicles and stationary sources in three closely linked regulations. *See Light-Duty Vehicle Greenhouse Gas Emission*

Rule). It also estimated that the regulations will reduce the rise of sea levels by only "0.06–0.14 cm" by the year 2100. *Id.*

Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (Tailpipe Rule); *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (Triggering Rule); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule).

SUMMARY OF THE ARGUMENT

EPA's Endangerment Finding suffers from numerous flaws, but State Petitioners will address only two of the most significant problems. First, the arbitrary-and-capricious standard requires an agency to "articulate a satisfactory explanation for its action," *see State Farm*, 463 U.S. at 43, and the Endangerment Finding fails this test because EPA never bothered to define or apply standards or criteria for assessing when GHG emissions or climate change harm public health or welfare. In addition, the arbitrary-and-capricious test precludes agency actions that "entirely fail[] to consider an important aspect of the problem," *id.*, and EPA's Endangerment Finding refuses to consider voluntary (non-regulatory) adaptation to and mitigation of climate change, even as

EPA acknowledges that these factors will reduce the negative impact of climate change. Each of these grounds warrants vacatur and remand.

STANDING

State Petitioners satisfy the three elements needed for Article III standing—injury, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (setting out and explaining the elements of standing). EPA’s Endangerment Finding harms State Petitioners and their citizens by imposing arbitrary and onerous regulations that directly apply to State Petitioners. And a decision from this Court to vacate and remand the EPA’s action will redress these injuries.

Injury. The Endangerment Finding does not itself regulate, but it is an essential component of EPA’s GHG regulations. *See, e.g., Tailoring Rule*, 75 Fed. Reg. at 31,519 (explaining how both mobile and stationary-source regulations flow from the Endangerment Finding). EPA’s GHG regulations harm the State Petitioners in at least two ways. First, they impose a duty on the State Petitioners to spend resources implementing and enforcing GHG regulations. *See* Declarations of Steve Hagle and Elizabeth Sifuentez Supporting Texas’s Motion for

Stay (explaining the various financial and resources burdens the GHG regulations impose on Texas to administer the regulations) (Attachments to Doc. No. 1266089, case 10-1041).

Second, the State Petitioners purchase, own, and operate vehicles and facilities that are subject to the GHG regulations. Even under the relaxed standards of EPA's Tailoring Rule, stationary sources owned by State Petitioners will be subject to GHG permitting. State Petitioners also regularly purchase vehicles that are governed by EPA's Tailpipe rule. *See* Texas Office of Fleet Management, Biennial State of the Fleet Report (2009), *available at* <http://www.window.state.tx.us/supportserv/prog/vfleet/2009StateoftheFleetReport.pdf> (noting that Texas spent \$27 million purchasing light-duty vehicles in 2008). And as EPA acknowledges, the Tailpipe Rule will increase the cost of vehicles, thereby harming State Petitioners. *See* 75 Fed. Reg. at 25,348 (estimating that the GHG regulations will increase the purchase price of vehicles by an average of nearly \$1,000 each by 2016).

Causation. The Endangerment Finding is a necessary and indispensable component of the GHG regulations that directly harm the State Petitioners. *See* 42 U.S.C. § 7521(a)(1) (predicating regulation of

air pollutants on a finding of endangerment). When the plaintiff is an object of the government action at issue, “there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Lujan*, 504 U.S. at 561-562.

Redressability. There is no dispute that EPA’s GHG regulations hinge on the validity of the Endangerment Finding. *See, e.g.*, Tailoring Rule, 75 Fed. Reg. at 31,519 (explaining the necessary link from the Endangerment Finding to mobile and stationary-source GHG regulation). Thus, if this Court sets aside the Endangerment Finding, as it should, the remaining GHG regulations will be rendered invalid, thereby redressing the harm to the State Petitioners.

ARGUMENT

I. STANDARD OF REVIEW

The CAA authorizes the Court to set aside any EPA action subject to judicial review that is found to be, among other things, “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or

short of statutory right.” 42 U.S.C. § 7607(d)(9); *see also* 5 U.S.C. § 706(2)(A) (requiring courts to set aside an administrative action, decision, or finding that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

In making an endangerment determination, EPA’s judgment is bound by “reasonable limits.” *Ethyl Corp. v. EPA*, 541 F.2d 1, 18 & n.32 (D.C. Cir. 1976) (en banc). As the Supreme Court recently admonished, § 202(a)’s call for EPA to exercise its “judgment” “is not a roving license to ignore the statutory text.” *Massachusetts v. EPA*, 549 U.S. at 532-33. Rather, EPA must provide a “reasonable explanation” for its endangerment decision. *Id.*

The arbitrary-and-capricious test requires an agency to “articulate a satisfactory explanation for its action” and forbids it to “entirely fail[] to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43 (citation omitted). EPA’s Endangerment Finding fails this standard for two reasons. First, EPA never provides criteria for determining when GHG emissions or climate change endanger public health or welfare. Second, EPA declines to consider adaptation to and

mitigation of climate change in the course of making its endangerment determination.

II. THE ENDANGERMENT FINDING IS ARBITRARY AND CAPRICIOUS BECAUSE EPA REFUSED TO DEFINE OR MEASURE ENDANGERMENT.

EPA's Endangerment Finding fails the arbitrary-and-capricious test because it provides no criteria by which to assess endangerment. Section 202(a) requires EPA to exercise its "judgment" about reasonably likely dangers to public health and welfare, but that is not a license for advancing standardless policy preferences. *Massachusetts v. EPA*, 549 U.S. at 532-33. In *Ethyl*, for example, EPA concluded that lead emissions from gasoline "will endanger" public health or welfare, but it reached this decision only after identifying a level of lead in blood levels that endangers. 541 F.2d at 38-39. Here, by contrast, EPA offers no criteria for determining a harmful, as opposed to a safe, climate. This is especially problematic given that EPA admits that man-made global warming will likely benefit certain parts of the United States by expanding farmable land and improving their economies. Some theory of optimal—or at least non-dangerous—climate is needed before EPA

can declare GHG emissions an “endangerment” to human health or welfare.

In its finding that “elevated atmospheric concentrations of the well-mixed greenhouse gases may be reasonably anticipated to endanger the public health and welfare,” EPA specifically refused to determine what “atmospheric concentrations” of GHGs endanger public health or welfare, claiming that it is not required to “identify a bright line, quantitative threshold above which a positive endangerment finding can be made.” 74 Fed. Reg. at 66,523. EPA did not even attempt to quantify the risks or potential impacts of global warming. *Id.* at 66,524 (explaining that EPA “has not established a specific threshold metric for each category of risk and impacts”). Instead, it justified its finding with generalities supported by highly uncertain climate forecasts. *See id.* at 66,499 (explaining that “changes taking place in our atmosphere as a result of the well-documented buildup of greenhouse gases due to human activities are changing the climate at a pace and in a way that threatens human health, society, and the natural environment”); *id.* at 66,519 (conceding that projections for

global warming by the end of the century range “from 1.8 to 4.0 °C (3.2 to 7.2 °F), with an uncertainty range of 1.1 to 6.4 °C (2.0 to 11.5 °F”).

EPA also justified its Endangerment Finding on the threat of increasing rates of climate change, but here, too, it refused to identify the rate or type of climate change that will endanger public health or welfare. *See id.* at 66,518 (asserting that absent “substantial and near-term efforts to significantly reduce emissions, atmospheric levels of greenhouse gases will . . . continue to climb, and thus lead to ever greater rates of climate change”). Nor did EPA even attempt to determine whether reducing GHG emissions will have any impact on climate change. *Id.* at 66,515 (explaining that “this action does not attempt to assess the impacts of any future regulation”). Without standards, EPA’s Endangerment Finding represents little more than a subjective conviction, and falls short of its obligation to “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (citation omitted). For example, EPA estimates climate temperatures will rise between 3.2 to 7.2 degrees Fahrenheit by the end of the century, 74 Fed. Reg. at 66,519, but without determining the

temperatures or warming rates that harm rather than benefit human health and welfare, EPA lacks any basis for determining that such an increase endangers.

EPA believes that it can justify its Endangerment Finding by its conclusion that the potential symptoms of global warming are bad, but it admits that climate change occurs naturally, and estimates that some of the warming in the last century was not human-induced. *Id.* at 66,518. By EPA's own admission, then, the identified symptoms that justify an endangerment finding might occur due to natural changes in the climate. Yet the statutory standard directs EPA to determine whether "air pollution" endangers, so without criteria or standards for defining endangerment thresholds, it is impossible (and arbitrary) for EPA to ascribe endangerment to human-caused air pollution.

Judgment without standards is no more than arbitrary preference, and that is precisely the approach the Supreme Court rejected in *Massachusetts v. EPA*. The Court explained that EPA's preferences regarding GHGs are "irrelevant" because the "statutory question is whether sufficient information exists to make an endangerment finding." *Massachusetts v. EPA*, 549 U.S. at 534. EPA's

failure to define standards or thresholds by which to judge whether man-made GHG emissions or climate change endanger public health or welfare reduces EPA's judgment on endangerment to a mere preference. Once again, EPA has not answered the statutory question: Whether sufficient information—in this case, specific thresholds of GHG emissions and/or climate change above which health or welfare are endangered—exists to make an endangerment finding. EPA's finding of endangerment is therefore arbitrary and capricious. *See id.*; *see also State Farm*, 463 U.S. at 43 (explaining that an agency decision is arbitrary when it “entirely failed to consider an important aspect of the problem”).

III. EPA'S REFUSAL TO CONSIDER ADAPTATION AND MITIGATION WAS ARBITRARY AND CAPRICIOUS.

EPA claims that the task of determining whether air pollution endangers public health or welfare requires it to “exercise judgment by weighing risks, assessing potential harms, and making reasonable projections of future trends and possibilities.” 74 Fed. Reg. at 66,505. Yet EPA failed to exercise this judgment in a reasonable, non-arbitrary manner. Its refusal to consider adaptation and mitigation to climate change, while simultaneously creating a multi-century time frame for

assessing endangerment and assuming that technology, science, and natural climate changes would remain fixed and GHG emissions would increase, is both arbitrary and implausible.

EPA concludes that industrial advancements have led to ever-increasing climate change in the last century, but it also refuses to consider current and future adaptation and mitigation when assessing the danger to public health and welfare. These projections may be complex, given the uncertainty of future scientific discoveries, technological developments, and the natural dynamism of the earth's climate and the solar system. But if these fundamental considerations are too complex or impossible to forecast, EPA's duty is not simply to jettison them from consideration but to acknowledge that uncertainty prevents an accurate assessment of endangerment. *See Massachusetts v. EPA*, 549 U.S. at 534 (explaining that the "statutory question is whether sufficient information exists to make an endangerment finding").

CONCLUSION

The Court should vacate and remand EPA's Endangerment Finding as arbitrary and capricious and a violation of the Clean Air Act.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for
Civil Litigation

DAVID C. MATTAX
Director of Defense Litigation

J. REED CLAY, JR.
Special Assistant and Senior Counsel
to the Attorney General

 /s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Solicitor General

MICHAEL P. MURPHY
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1695
Fax: (512) 474-2697
jonathan.mitchell@oag.state.tx.us

COUNSEL FOR STATE PETITIONERS AND
SUPPORTING INTERVENORS

CERTIFICATE OF COMPLIANCE

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

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

this brief contains 3,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Century Schoolbook 14-point type face, or

this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell

COUNSEL FOR STATE PETITIONERS AND
SUPPORTING INTERVENORS

Dated: May 20, 2011

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing **Brief of Texas for State Petitioners and Supporting Intervenors** was filed electronically with the Court by using the CM/ECF system on this 20th day of May 2011. Parties, intervenors, and amici that are registered CM/ECF users will be served by the appellate CM/ECF system. The following counsel that are not CM/ECF users will be served via U.S. mail, first-class, return-receipt requested:

Michael R. Barr
Pillsbury Winthrop Shaw
Pittman, LLP
50 Freemont Street
San Francisco, CA 94105-2228

Sam Kazman
Competitive Enterprise
Institute
1899 L Street, NW, 12th Floor
Washington, DC 20036

Kelvin A. Brooks
Attorney General's Office
State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Luther Strange
Attorney General
State of Alabama
500 Dexter Avenue
Montgomery, AL 36130

Jon Bruning
Attorney General's Office
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

Kimberly P. Massicotte
Attorney General's Office
State of Connecticut
55 Elm Street
Hartford, CT 06106

Charles E. James, Jr.
Attorney General's Office
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
COUNSEL FOR STATE PETITIONERS
AND SUPPORTING INTERVENORS