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.,

Respondent.

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

Opposition by the State Petitioners to Respondents' and Movant-Intervenors' Motions to Dismiss

---

XAVIER BECERRA
Attorney General of California
GARY E. TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JULIA K. FORGIE
DAVID ZAFT
Deputy Attorneys General
300 South Spring Street
Los Angeles, California 90013
Tel: (213) 269-6372
Attorneys for the State of California, by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Xavier Becerra

Additional parties and counsel listed on signature pages

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
CARB	California Air Resources Board
EPA	Environmental Protection Agency
MTE Regulation	Mid-Term Evaluation Regulation
NHTSA	National Highway Traffic Safety Administration
Section 177	42 U.S.C. § 7507
Section 177 States	The States that have adopted California's emission standards pursuant to 42 U.S.C. § 7507
TAR	Draft Technical Assessment Report

INTRODUCTION

In 2012, the Environmental Protection Agency (together, with Acting Administrator Andrew Wheeler, "EPA") adopted greenhouse gas emission standards for model year 2017–2025 passenger vehicles and light-duty trucks. In its rulemaking, EPA committed to further evaluate the model year 2022–2025 standards utilizing a comprehensive and transparent process. After completing that review, EPA announced its final determination that the emission standards remained achievable, cost-effective and appropriate. Sixteen months later, however, EPA withdrew its determination and replaced it with a new determination that the standards "are not appropriate" and "should be revised." 83 Fed. Reg. 16,077 (Apr. 13, 2018) (the "Revised Determination"). Because EPA's action violates several important requirements in its own regulations and the Administrative Procedure Act (APA), the State Petitioners petitioned this Court for review.[1]

[1] The eighteen State Petitioners ("States") are the States of California (by and through its Governor Edmund G. Brown Jr., 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.

The justiciability issues raised in EPA and Movant-Intervenors' motions to dismiss mischaracterize the Revised Determination as nothing more than a "decision to engage in further rulemaking" (EPA Mot. 1), a "tentative" step (*id*. at 9) that determines no "rights or obligations" (*id.* at 7). In fact, it is a definitive decision that purports to conclude a decision-making process designed by EPA, codified in its regulations, and subject to specified requirements to ensure its soundness and transparency. It also has altered the legal regime and caused legal consequences for the States. As such, the Revised Determination constitutes a final action.

For the same reasons, the States' claims are ripe. They raise purely legal questions and are based on a closed administrative record. No amount of delay will make the States' claims more concrete or fit for review.

As to standing, EPA's Revised Determination has injured the States in several ways that would be redressed by a favorable ruling here.

In sum, EPA and Movant-Intervenors' threshold arguments miss their mark. The motions to dismiss should be denied.

I. BACKGROUND

A. 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."[2] Recent years have been the hottest on record and have brought "record-breaking, climate-related weather extremes."[3] The harms associated with the warming climate, which the Supreme Court has described as "serious and well recognized," *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007), are already impacting the States' resources and their residents' health and welfare. How much worse these impacts become "will depend primarily on the amount of greenhouse gases (especially carbon dioxide) emitted globally."[4]

Accordingly, numerous states have enacted laws and implemented programs to reduce their greenhouse gas emissions.[5] Addressing emissions from the transportation sector is particularly important: as of 2016, it is the nation's largest source of greenhouse gas emissions.[6] California recognized

---

[2] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment* (Wash., DC 2017), Vol. 1, Exec. Summ., https://science2017.globalchange.gov/chapter/executive-summary/

[3] *Id.*

[4] *Id.*

[5] Exhibit M (APP186-187) provides a partial list of such laws. The exhibits and declarations cited herein can be found in the accompanying Appendix. Citations to pages in the Appendix follow the format "APP."

[6] EPA, "Sources of Greenhouse Gas Emissions" in Inventory of U.S. Greenhouse Gas Emissions and Sinks, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last accessed Aug. 28, 2018).

the transportation sector's significance as early as 2002, when it enacted the nation's first law requiring limits on greenhouse gas emissions from vehicles.[7] Cal. Health & Safety Code § 43018.5. Thereafter, the California Air Resources Board ("CARB") 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 vehicle emission standards pursuant to the Clean Air Act, 42 U.S.C. § 7507 ("Section 177").

B. The National Program

In 2010, EPA established the first federal greenhouse gas emission standards for vehicles. In 2012, it set standards for model years 2017–2025. 40 C.F.R. § 86.1818-12. EPA's actions were part of the establishment and continuation of the National Program of vehicle emission standards. As this Court 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

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

sell a 'single light-duty national fleet' that satisfies the standards of EPA, [the National Highway Traffic Safety Administration (NHTSA)], California, and the Section 177 states." *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 198 (D.C. Cir. 2011); *see also* Declaration of Michael McCarthy ("McCarthy Decl.") ¶¶ 6-7 and attachment (APP78-79, APP88-91). "Pursuant to that agreement, California amended its regulations to deem compliance with the national standards [then proposed by EPA as] compliance with its own." *Chamber of Commerce*, 642 F.3d at 198; *see also* Declaration of Joshua Cunningham ("Cunningham Decl.") ¶ 10 (APP51).

C. The Mid-Term Evaluation

Recognizing the long timeframe for the later model-year standards, EPA committed to a mid-term review of those standards (the "Mid-Term Evaluation"). 77 Fed. Reg. 62,624, 62,784 (Oct. 15, 2012) (the "2012 Rule"). The regulation codifying this commitment required that, "[b]y no later than April 1, 2018, the Administrator shall determine whether the standards … for the 2022 through 2025 model years are appropriate under section 202(a) of the Clean Air Act …" 40 C.F.R. § 86.1818-12(h) (the "MTE Regulation"). If, after completing its review, EPA determined that the standards continued to be appropriate, they would remain binding. Otherwise, if EPA determined that the standards were no longer appropriate,

the regulation provided that the Administrator "shall initiate a rulemaking to revise the standards." *Id.* EPA intended this process to be "collaborative … and transparent," 77 Fed. Reg. at 62,964, and "as robust and comprehensive as that in the original setting of the [model year] 2017–2025 standards," *id.* at 62,784. The agency pledged "to conduct the mid-term evaluation in close coordination with [CARB]." *Id.*; *see also id.* at 62,785 (stressing importance of CARB's role).

The foundation of the Mid-Term Evaluation was a draft Technical Assessment Report ("TAR") to be prepared jointly by EPA, NHTSA and CARB. 77 Fed. Reg. at 62,784. This document would allow EPA "to examine afresh the issues and, in doing so, conduct similar analyses and projections as those considered in the … rulemaking" originally establishing the standards. *Id.* at 62,965. EPA agreed to make its assumptions and modeling "available to the public to the extent consistent with law," *id.* at 62,964, and release the TAR for public comment *before* issuing its determination. 40 C.F.R. § 86.1818-12(h)(2). The MTE Regulation mandated that EPA base its determination upon the TAR and the public comment it received. *Id.*

EPA, NHTSA and CARB began work on the TAR in December 2012. McCarthy Decl. ¶ 12 (APP81). The agencies held over 100 interagency

meetings and met with vehicle manufacturers, parts suppliers, and other stakeholders. *Id.* ¶¶ 13, 14 (APP81-82). Agency staff traveled extensively, gathering information about emission-reducing technologies and manufacturer design plans. *Id.* ¶ 14 (APP81-82). CARB staff participated at every step, spending thousands of hours in meetings, conducting research, and drafting sections of the TAR. *Id.* ¶ 13, 15 (APP81-83).

In July 2016, the agencies issued the TAR.[8] This 1,217-page document assembled data and analysis 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," including a National Academy of Sciences study "purposely timed to inform the Mid-Term evaluation."[9] Based on this body of research, the TAR 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" in 2012.[10]

---

[8] The TAR is available at https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas#TAR

[9] TAR at 2-2, 2-4.

[10] TAR at ES-2.

After receiving public comment on the TAR, EPA issued a 268-page Proposed Determination supported by a 719-page Technical Support Document.[11] EPA preliminarily determined that the standards remained appropriate.

Following a second round of comment, EPA issued its final determination on January 12, 2017 ("2017 Determination").[12] EPA considered the TAR's findings and analysis in detail, and found that "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 that will achieve the significant [greenhouse gas] emissions reduction goals of the program." Ex. A at 29 (APP33). Accordingly, EPA determined that the standards remain "appropriate under section 202(a)(1) of the Clean Air Act." *Id.* at 1 (APP5). As both EPA and Movant-Intervenors acknowledge, the 2017 Determination constituted a final action. *Id.*; Movant-Intervenors Mot. 6 n.7.

[11] These documents are available at https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100Q3DO.pdf and https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100Q3L4.pdf.

[12] A copy of the 2017 Determination is included as Exhibit A in the States' Appendix.

D. EPA's Revised Determination

Months later, EPA reversed course. After announcing it would reconsider the 2017 Determination, and receiving public comment, EPA published its 11-page Revised Determination on April 13, 2018.[13] In it, EPA summarily withdrew the 2017 Determination and replaced it with a determination "conclud[ing] that the standards are not appropriate" and "should be revised." 83 Fed. Reg. at 16,077 (APP36).

Despite EPA's regulatory mandate to base the determination upon the TAR, and its promise to conduct the reconsideration "in accordance with the regulations EPA established for the Mid-Term Evaluation," 82 Fed. Reg. 39,551, 39,553 (Aug. 21, 2017), the Revised Determination largely ignored the TAR. McCarthy Decl. ¶ 22 (APP86). Instead, citing a "significant record … developed since the January Final Determination"—a record it had not previously disclosed to the public—EPA declared that the existing standards "present challenges for auto manufacturers due to feasibility and practicability," raise "potential concerns" about safety, and would increase consumer costs. 83 Fed. Reg. at 16,078 (APP37). Despite the requirement that EPA set forth in detail its assessment of specific factors, the agency

[13] A copy of the Revised Determination is included as Exhibit B in the States' Appendix.

instead stated it would defer several such assessments to a future rulemaking.

EPA's Revised Determination violates several important requirements in the MTE Regulation and lacks the "reasoned explanation" required under the APA "in light of the [agency's] change in position and significant reliance interests involved." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016). Based on these and other deficiencies, California, the Section 177 States, and five States that follow the federal standards timely filed a Petition for Review.

II. ARGUMENT

The States' Petition satisfies the threshold requirements for judicial review. EPA's Revised Determination is a final action, and the States and their claims meet the tests for ripeness and standing. Moreover, in seeking to foreclose judicial review, EPA is asking the Court to overlook "the type of administrative evasiveness" that transforms government into "a matter of the whim and caprice of the bureaucracy." *S.C. Coastal Conservation League v. Pruitt*, No. 18-CV-330-DCN, 2018 WL 3933811, at *6 (D.S.C. Aug. 16, 2018), quoting *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). By issuing a Revised Determination that abandons the existing record and

reverses its prior action, EPA wishes to wipe the administrative slate clean and move on to the next rulemaking. Well-grounded precepts of administrative law forbid this. *N. Carolina Growers' Ass'n*, 702 F.3d at 772 ("the pivot from one administration's priorities to those of the next [must] be accomplished with at least some fidelity to law and legal process") (Wilkinson, J., concurring).

A. EPA's Action Is a Final Action

EPA and Movant-Intervenors first contend that the Revised Determination is not a final action under 42 U.S.C. § 7607(b)(1). An action is final if it marks the "consummation of the agency's decisionmaking process" and 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). Courts apply a "pragmatic" and "flexible" approach when assessing finality. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149–50 (1967).

1. The Revised Determination Satisfies the First *Bennett* Prong

a. It Purports to Conclude the Mid-Term Evaluation

EPA has already conceded that the Revised Determination purports to "mark the consummation" of the Mid-Term Evaluation. *See* 83 Fed. Reg. at 16,087 ("This notice *concludes* EPA's [Mid-Term Evaluation] under 40

CFR 86.1818-12(h).") (emphasis added). This concession reflects the governing structure codified in the MTE Regulation, which mandated that the Administrator "*shall determine* whether the standards" remained appropriate "[b]y no later than April 1, 2018." 40 C.F.R. § 86.1818-12(h) (emphasis added). When EPA withdrew the 2017 Determination and issued a new determination reaching the opposite conclusion—*i.e.*, that the standards "are not appropriate" and "should be revised"—it purported to conclude this review and provided its "definitive" and "unequivocal" position regarding the appropriateness of the standards.[14] *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (1986). Thus, EPA's action readily meets the first *Bennett* condition.

Additionally, the MTE Regulation required EPA, before making a determination, to develop a comprehensive record, and then base its determination thereon, and "set forth in detail the bases for the determination." 40 C.F.R. § 86.1818-12(h)(2), (4). Such "extensive factfinding" requirements further demonstrate finality here. *U.S. Army Corps of Engs. v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1813 (2016); *see also Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016). In

[14] Of course, EPA concluded the Mid-Term Evaluation for the first time with its 2017 Determination.

developing the 2017 Determination, EPA undertook a multi-year review that included more than 100 meetings, research projects, two rounds of public comment, and the preparation of the TAR. Although EPA's Revised Determination ignores this record and fails to make several requisite findings, those defects do not change the fact that it purports to conclude the Mid-Term Evaluation and provides EPA's definitive position.

That EPA's action begets another rulemaking process to revise the standards does not make the Revised Determination any less final. "To be final, an action need not be the last administrative action contemplated by the statutory scheme." *Role Models America v. White*, 317 F.3d 327, 331 (D.C. Cir. 2003) (quotation marks and brackets omitted).

b. EPA's Attempt to Paint Its Action as "Tentative" and "Interlocutory" Fails

To avoid this result, EPA seeks to recast its action as "tentative" and "interlocutory," merely an interim step akin to an advance notice of proposed rulemaking. EPA Mot. 9. EPA further claims that it has not yet decided whether the current standards "should be retained, be made more stringent, or be made less stringent." *Id.* at 10. EPA's attempt to characterize its action this way runs afoul of the facts. Statements throughout the Revised Determination—although unsupported—demonstrate its definitive nature. *See, e.g.*, 83 Fed. Reg. at 16,078 ("the

Administrator believes that the current [greenhouse gas] emission standards for model year 2022–2025 light-duty vehicles presents [sic] challenges for auto manufacturers due to feasibility and practicability, raises potential concerns related to automobile safety, and results in significant additional costs on consumers"); *id.* at 16,081 ("Based on consideration of the information provided, the Administrator believes that it would not be practicable to meet the model year 2022–2025 emission standards without significant electrification and other advanced vehicle technologies that lack a requisite level of consumer acceptance.").

Occasional statements that EPA intends to further analyze certain factors manifest either EPA's failure to complete the determination (thus violating its regulation), or its intent, having determined the standards are "not appropriate," to take steps to decide the extent of the revisions. *See* 83 Fed. Reg. at 16,087 ("EPA … will further explore *the appropriate degree and form* of changes to the program") (emphasis added). In either case, such statements do not alter the definitive nature of EPA's determination.[15]

[15] That EPA retains authority to reconsider its determination does not make an otherwise final action non-final. *Safari Club Int'l*, 842 F.3d at 1289. Moreover, the Notice of Proposed Rulemaking issued by EPA and NHTSA does not include any alternative that would strengthen the standards, and the agencies' "preferred alternative" would jettison all improvements currently required. 83 Fed. Reg. 42,986, 42,988–90 (Aug. 24, 2018).

Indeed, if EPA's characterization of its action were true, it would be conceding that it violated the mandate that it consider specific factors and make a definitive determination regarding the appropriateness of the standards. 40 C.F.R. § 86.1818-12(h)(1), (2), (4).

Finally, contrary to EPA's claim, EPA Mot. 4, the 2012 Rule does not preclude review here, but merely confirms that a determination that the standards are appropriate "will be a final agency action … subject to judicial review on its merits" as will any rule revising the standards. 77 Fed. Reg. at 62,784–85. The 2012 Rule does not state that a determination that the standards are not appropriate—no matter how arbitrary or unlawful—would not be a final action. Indeed, EPA lacks the authority to curtail the reviewability of its actions in this way. *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942) (substance of agency's action is material, not the "particular label" it assigns the action).

c. EPA and Movant-Intervenors' Authorities Are Distinguishable

The definitive nature of EPA's action makes it substantially unlike the grant of reconsideration in *Clean Air Council v. Pruitt*, 862 F.3d 1 (2017), and the proposed rule in *In re Murray Energy Corp.*, 788 F.3d 330 (2015). Those actions are not analogous to EPA's action here, which concluded a decision-making process, withdrew a previous final action, and announced

EPA's determination that the standards are "not appropriate." Having thus "publicly articulate[d] an unequivocal position," EPA has "relinquished the benefit of postponed judicial review." *Ciba-Geigy Corp.*, 801 F.2d at 436.

Movant-Intervenors' cases are also inapplicable. This Court previously held that an agency's decision to collect information to develop emission standards for cement facilities, *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011), a guidance letter that preceded an administrative proceeding, *Southwest Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270 (D.C. Cir. 2016), and a decision to initiate a quasi-adjudicatory proceeding to determine a company's liability, *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018), were all non-final. These cases are distinguishable because they did not involve an agency re-opening and then reversing its prior final action while disregarding the extensive record on which the agency relied for its original action. Finally, *American Portland Cement Alliance v. EPA*, 101 F.3d 772 (D.C. Cir. 1996), involved a different, and comparatively narrow, judicial review provision not relevant here. *Id.* at 775.

2. EPA's Action Satisfies the Second *Bennett* Prong

a. The Revised Determination Has Altered the Applicable Legal Regime and Created Legal Consequences

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 the MTE Regulation, 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)(1). The Revised Determination therefore carries legal consequences for the agency, which must now carry out that regulatory directive. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (action is final if it has "binding effects on … the agency"); *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d 999, 1007 (D.C. Cir. 2014) (action creating "legal consequences" for agency staff is final). This alone is sufficient to satisfy the second *Bennett* prong.

EPA's action has caused legal consequences for the States as well. The non-Section 177 States rely upon the current federal standards to satisfy a critical part of their own greenhouse gas reduction mandates. After affirming that the standards would remain legally binding in its 2017 Determination, EPA withdrew that determination and proclaimed the

standards "not appropriate." Thus, EPA has wiped away its previous assurance, and these States must now anticipate fewer emission reduction benefits from the National Program.

For instance, the District of Columbia, which currently follows the federal standards, has determined that it can no longer rely on the future emission reduction benefits that the existing federal standards once promised. It therefore has committed staff time and resources to preparing and implementing 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 (APP97-99). Contrary to EPA's suggestion, 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). Because commencement of a model year is based on its "annual production period," model year 2022 will "commence" sometime in 2021 when production of those vehicles begins. *Id.* §§ 7507(2), 7521(b)(3)(A)(i); *see also* Nielsen Decl. ¶ 13 (APP99). The District therefore must act now to be able to apply California's standards to model year 2022 vehicles.

Other states are also taking action in response to EPA's Revised Determination. In California, CARB has prepared proposed amendments to

its regulations clarifying that its agreement to accept compliance with the federal standards will be available to manufacturers only if the current federal standards remain intact. Cunningham Decl. ¶¶ 36-39 (APP60). As CARB staff explained:

> The proposed amendments will ensure that appropriate and necessary greenhouse gas emission reductions and public health protections are achieved by California's standards. They are also important for maintaining the pace of greenhouse gas emission reductions that are necessary to achieve [California's] statutory targets.

Id. attachment at 5 (APP69).

Several Section 177 States are likewise taking, or planning to take, administrative and regulatory action. Declaration of Christine Kirby ("Kirby Decl.") ¶¶ 28-41 (APP134-139), Declaration of Steven E. Flint ("Flint Decl.") ¶¶ 8-15 (APP145-148), Declaration of Ali Mirzakhalili ("Mirzakhalili Decl.") ¶¶ 8-18 (APP166-168), Declaration of Heidi Hales ("Hales Decl.") ¶¶ 3-7 (APP170-171), and Declaration of Stuart Clark ("Clark Decl.") ¶¶ 4-5 (APP181-182). Because it is unknown when EPA's revisions to the federal standards will be final, and manufacturers are already planning model year 2022 vehicles, Cunningham Decl. ¶¶ 34-35 (APP59-60), these States are dedicating staff time and resources in direct response to

EPA's action. All of these State actions demonstrate the "direct and appreciable legal consequences" of EPA's action. *Bennett*, 520 U.S. at 178.

b. Movant-Intervenors' Cases Are Again Inapplicable

Again, Movant-Intervenors' cases have no weight here. *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003), and *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), stand for the unexceptional proposition that the initiation of a quasi-adjudicatory proceeding is not reviewable. The decisions in *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014), and *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004), which involved agency guidance letters, are also distinguishable. *See, e.g.*, *Indep. Equip. Dealers*, 372 F.3d at 427 ("workaday advice letter" reiterating agency's position "for the umteenth time" not reviewable). None concerned an agency concluding its decision-making process, withdrawing a prior final action, and announcing a definitive decision.

B. The States' Claims Are Ripe

EPA and Movant-Intervenors next argue that the States' claims are not ripe. In fact, EPA suggests they will *never* be ripe, and seeks to relegate them to the public comment phase of its ongoing rulemaking. EPA Mot. 13. This is backwards. The Mid-Term Evaluation was designed to determine in

the first place whether such a rulemaking is even warranted, and then, if so, to inform that rulemaking. Thus, any deficiencies in the Revised Determination must be resolved *now*, and not after EPA's rulemaking is completed.

Moreover, the States' claims are fit for review. "In determining the fitness of an issue for judicial review we look 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." *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1008 (quotation marks and citation omitted). All these factors support ripeness here. The States' claims raise questions about whether EPA's action comports with the governing regulations and the APA. Such administrative law claims "present purely legal issues." *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003). Moreover, these claims are based on a closed administrative record. (Contrary to EPA's assertions, the States are *not* challenging EPA's ongoing rulemaking here.) Thus, the setting is sufficiently concrete for review. And, as demonstrated above, EPA's action is "sufficiently final."

As to hardship, when "an issue is clearly fit for review," as is the case here, "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 showing required under the Clean Air Act is minimal: "Such statutes … permit judicial review directly, even before the concrete effects normally required for APA review are felt." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 479–80 (2001) (quotation marks and citation omitted). Here, the detrimental impact of EPA's action on the States has been substantial. *See* Sections II.A.2.a. and II.C.1. By contrast, EPA has identified no hardship it would suffer from judicial review.

C. The States Have Standing

EPA's standing argument fails because, like its other arguments, it mischaracterizes EPA's action as a mere notice of a contingent future action. Again, this is not the case.

Standing requires (1) an injury-in-fact (2) fairly traceable to the respondent's conduct and (3) likely to be redressed by a favorable decision. *Massachusetts*, 549 U.S. at 517. "States are not normal litigants" and are entitled to "special solicitude" for purposes of standing. *Id.* at 518, 520.

1. The States Have Been Injured

EPA's action injures the States in several ways. *First*, it inflicts a particular injury on California, which, pursuant to an "agreement between

the federal government … and the major automobile manufacturers," amended its regulations to accept compliance with the proposed federal standards. *Chamber of Commerce*, 642 F.3d at 198. This agreement also required that EPA base its determination on a robust factual record that included the TAR. 40 C.F.R. § 86.1818-12(h)(1), (2)(i). And it expressly provided CARB an important role in the Mid-Term Evaluation and the preparation of the TAR. 77 Fed. Reg. at 62,784-85. On these bases, California agreed to participate in the National Program, accept compliance with the federal standards, and collaborate on the TAR. Cunningham Decl. ¶¶ 13-15 (APP52-54). CARB invested thousands of hours of work and substantial costs in the development of the TAR, all with the expectation that EPA—as it had agreed and obligated itself to do—would base its determination on the TAR. McCarthy Decl. ¶¶ 13-15 (APP81-83). California honored its commitments under the agreement. However, by issuing a determination uninformed by the analysis and findings in the TAR, EPA breached a commitment it had made to California and codified in its regulations. This injury establishes California's standing, and only one petitioner's standing is required to satisfy Article III's case-or-controversy requirement. *Massachusetts*, 549 U.S. at 518.

Second, by failing to disclose in advance the information on which EPA based its Revised Determination, EPA has caused informational injury to the States. The governing regulations explicitly required EPA to make the analyses, projections, assumptions and modeling it used to arrive at its determination available for public review and comment. 40 C.F.R. § 86.1818-12(h)(2)(ii); 77 Fed. Reg. at 62,965. Prior to issuing its 2017 Determination, EPA did this: it published the TAR, invited public comment, issued its Proposed Determination and Technical Support Document, and held a second round of public comment, all before issuing its final determination. *See* Section I.C., *supra*. In stark contrast, and in violation of its regulatory precepts, EPA issued its Revised Determination without disclosing the "significant record" of new information on which it based its decision. 83 Fed. Reg. at 16,078. By depriving the States of this information, EPA substantially impaired their ability to fully participate in the Mid-Term Evaluation. *See* McCarthy Decl. ¶¶ 19-21 (APP84-85). This is an independent basis for their standing. *Federal Election Com'n v. Akins*, 524 U.S. 11, 24–25 (1998).

Third, EPA's Revised Determination, coupled with the regulatory mandate that it initiate a rulemaking to revise the standards, has set in motion a process that will result in increased greenhouse gases and

exacerbate climate harms to the States. *See, e.g.*, Declaration of Bruce Carlisle, ¶¶ 8-27 (APP106-119), Declaration of Julia Moore ¶¶ 10-20 (APP175-179), Flint Decl. ¶¶ 24-44 (APP151-163), Clark Decl. ¶¶ 6-9 (APP182-183). Thus, EPA's action harms the States' sovereign and quasi-sovereign interests in preserving their territories and natural resources. *Massachusetts*, 549 U.S. at 521. Although the precise extent of this harm is not yet known, such precision is not required. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992).

Fourth, EPA's action has already caused the States concrete injury, as demonstrated above in Section II.A.2.a. As a direct result of the Revised Determination, and in light of statutory and industry lead-times, several States have determined that they must now divert staff time and other resources to take administrative and regulatory actions. The impact on State resources provides another basis for establishing standing. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015).

2. The States' Injuries Are Directly Traceable to EPA's Action and Would Be Redressed by a Favorable Ruling

All of the above injuries are directly traceable to EPA's Revised Determination and would be redressed by a favorable ruling. An order vacating EPA's Revised Determination and restoring the 2017

Determination would cure the immediate harms from EPA's breach of its commitment to California and the States' informational harm.[16] EPA also would be forced to confront its 2017 Determination and the underlying record, thus ensuring that any further consideration of the model year 2022–2025 standards in its rulemaking would be informed by the findings and analysis from the Mid-Term Evaluation. That the States might need to take further actions in light of EPA's separate proposal to revise the standards does not undermine the States' standing here. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (recognizing that "considerably eas[ing]" of path to desired result suffices for redressablity).

CONCLUSION

For the reasons stated above, the States respectfully request that the Court deny the motions to dismiss.

[16] Although the States' informational injury satisfies the redressability element, this showing is not required. *See Massachusetts*, 549 U.S. at 517–18 (party alleging deprivation of a procedural protection need not demonstrate redressability and immediacy).

Dated: August 29, 2018

Respectfully Submitted,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General
ROBERT W. BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
GARY E. TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JULIA K. FORGIE
Deputy Attorney General

/s/ David Zaft
DAVID ZAFT
Deputy Attorney General
Office of the Attorney General
300 South Spring Street
Los Angeles, California 90013
Tel: (213) 269-6372
Email: david.zaft@doj.ca.gov

Attorneys for Petitioner State of California, by and through its Governor Edmund G. Brown Jr., Attorney General Xavier Becerra and California Air Resources Board

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN
Attorney General

/s/ Scott N. Koschwitz
MATTHEW I. LEVINE
SCOTT N. KOSCHWITZ
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, Connecticut 06141
Tel: (860) 808-5250
Email: scott.koschwitz@ct.gov

Attorneys for Petitioner State of Connecticut

FOR THE STATE OF DELAWARE

MATTHEW DENN
Attorney General

/s/ Aaron R. Goldstein
AARON R. GOLDSTEIN
Chief Deputy Attorney General
Department of Justice
820 North French Street, 6th Floor
Wilmington, Delaware 19801
Tel: (302) 577-8400
Email: aaron.goldstein@state.de.us

Attorneys for Petitioner State of Delaware

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General

/s/ Loren L. AliKhan
LOREN L. ALIKHAN
Solicitor General
Office of the Attorney General for the District of Columbia
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
Tel: (202) 727-6287
Email: loren.alikhan@dc.gov

Attorneys for Petitioner District of Columbia

FOR THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General
MATTHEW J. DUNN
Chief, Environmental Enforcement/ Asbestos Litigation Division
GERALD T. KARR
Supervising Attorney
Assistant Attorneys General

/s/ Daniel I. Rottenberg
DANIEL I. ROTTENBERG
Assistant Attorney General
Office of the Attorney General
69 W. Washington Street
18th Floor
Chicago, Illinois 60602
Tel: (312) 814-3816
Email: drottenberg@atg.state.il.us
Attorneys for Petitioner State of Illinois

FOR THE STATE OF IOWA
THOMAS J. MILLER

Attorney General

/s/ Jacob Larson
JACOB LARSON
Assistant Attorney General
Office of Iowa Attorney General
Hoover State Office Building
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
Tel: (515) 281-5341
Email: jacob.larson@ag.iowa.gov

Attorneys for Petitioner State of Iowa

FOR THE STATE OF MAINE

JANET T. MILLS
Attorney General

/s/ Gerald D. Reid
GERALD D. REID
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, Maine 04333
Tel: (207) 626-8800
Email: jerry.reid@maine.gov

Attorneys for Petitioner State of Maine

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

/s/ Steven M. Sullivan
STEVEN M. SULLIVAN
Solicitor General
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
Tel: (410) 576-6427
Email: ssullivan@oag.state.md.us

Attorneys for Petitioner State of Maryland

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General
CHRISTOPHE COURCHESNE
Assistant Attorney General
Chief, Environmental Protection Division
MATTHEW IRELAND
Assistant Attorney General
MEGAN M. HERZOG
Special Assistant Attorney General

/s/ Carol Iancu

CAROL IANCU
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
Tel: (617) 727-2200
Email: carol.iancu@state.ma.us

Attorneys for Petitioner the Commonwealth of Massachusetts

FOR THE STATE OF MINNESOTA, BY AND THROUGH ITS MINNESOTA POLLUTION CONTROL AGENCY AND MINNESOTA DEPARTMENT OF TRANSPORTATION

OFFICE OF THE ATTORNEY GENERAL

STATE OF MINNESOTA

/s/ Max Kieley

MAX KIELEY
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101
Tel: (651) 757-1244
Email: max.kieley@ag.state.mn.us

Attorney for Petitioner the State of Minnesota, by and through its Minnesota Pollution Control Agency and Minnesota Department of Transportation

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General
DAVID C. APY
Assistant Attorney General

/s/ Robert J. Kinney
ROBERT J. KINNEY
Deputy Attorney General
R.J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, New Jersey 08625
Tel: (609) 376-2789
Email: robert.kinney@law.njoag.gov

Attorneys for Petitioner State of New Jersey

FOR THE STATE OF NEW YORK

BARBARA D. UNDERWOOD
Attorney General
YUEH-RU CHU
Chief, Affirmative Litigation Section
Environmental Protection Bureau
AUSTIN THOMPSON
Assistant Attorney General

/s/ Gavin G. McCabe
GAVIN G. MCCABE
Special Assistant Attorney General
28 Liberty Street, 19th Floor
New York, New York 10005
Tel: (212) 416-8469
Email: gavin.mccabe@ag.ny.gov

Attorneys for Petitioner State of New York

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

/s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street, N.E.
Salem, Oregon 97301
Tel: (503) 947-4593
Email:
paul.garrahan@doj.state.or.us

Attorneys for Petitioner State of Oregon

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General

/s/ Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
KRISTEN M. FURLAN
Assistant Director,
Bureau of Regulatory Counsel
Pennsylvania Department of
Environmental Protection

Pennsylvania Office of Attorney
General
Strawberry Square
Harrisburg, Pennsylvania 17120
Tel: (215) 560-2171
Email:mfischer@attorneygeneral.gov
kfurlan@pa.gov

Attorneys for Petitioner Commonwealth of Pennsylvania, by and through its Department of Environmental Protection and Attorney General Josh Shapiro

FOR THE STATE OF RHODE ISLAND
PETER F. KILMARTIN
Attorney General

/s/ Gregory S. Schultz
GREGORY S. SCHULTZ
Application Pending
Special Assistant Attorney General
Rhode Island Department of the Attorney General
150 South Main Street
Providence, Rhode Island 02903
Tel: (401) 274-4400
Email: gschultz@riag.ri.gov

Attorneys for Petitioner State of Rhode Island

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

/s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
Tel: (802) 828-3186
Email:nick.persampieri@vermont.gov

Attorneys for Petitioner State of Vermont

FOR THE COMMONWEALTH OF VIRGINIA
MARK R. HERRING
Attorney General
STEPHEN A. COBB
Deputy Attorney General
DONALD D. ANDERSON
Sr. Asst. Attorney General and Chief

/s/ Matthew L. Gooch
MATTHEW L. GOOCH
Assistant Attorney General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Tel: (804) 225-3193
Email: mgooch@oag.state.va.us

Attorneys for Petitioner Commonwealth of Virginia

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

/s/ Katharine G. Shirey
KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, Washington 98504
Tel: (360) 586-6769
Email: kays1@atg.wa.gov

Attorneys for Petitioner State of Washington

CERTIFICATE OF COMPLIANCE

I hereby certify that the Opposition by the State Petitioners to Respondents' and Movant-Intervenors' Motions to Dismiss, dated August 29, 2018, 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 5,189 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).

/s/ David Zaft
DAVID ZAFT

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposition by the State Petitioners to Respondents' and Movant-Intervenors' Motions to Dismiss to be filed on August 29, 2018 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ David Zaft
DAVID ZAFT