ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 10-1092 (Lead) and Consolidated Cases (Complex)

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

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LISA P. JACKSON, ADMINISTRATOR, AND THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondents.

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

JOINT OPENING BRIEF OF NON-STATE PETITIONERS AND SUPPORTING INTERVENORS

John P. Elwood
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW
Washington, D.C. 20037
(202) 639-6500

Counsel for Coalition for Responsible Regulation, Inc., et al.

Eric Groten
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746-7568
(512) 542-8709

Counsel for Coalition for Responsible Regulation, Inc., et al.

DATED: June 3, 2011

Additional counsel listed beginning on inside front cover

Patrick R. Day, P.C.
HOLLAND & HART LLP
2515 Warren Ave., Suite 450
Cheyenne, WY 82001
(307) 778-4209

Counsel for Coalition for Responsible Regulation, Inc., et al.

John A. Bryson
HOLLAND & HART, LLP
975 F Street NW
Washington, D.C. 20004
(202) 393-6500

Counsel for Coalition for Responsible Regulation, Inc., et al.

Shannon L. Goessling
SOUTHEASTERN LEGAL FOUNDATION, INC.
2255 Sewell Mill Road, Suite 320
Marietta, GA 30062
(770) 977-2131

Counsel for Southeastern Legal Foundation, Inc., et al., and Intervenors Langdale Farms, LLC, et al..

Harry W. MacDougald
CALDWELL & WATSON LLP
Two Ravinia Drive, Suite 1600
Atlanta, GA 30346
(404) 843-1956

Counsel for Southeastern Legal Foundation, Inc., et al., and Intervenors Langdale Farms, LLC, et al..

Paul D. Phillips
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202-3979
(303) 295-8131

Counsel for Coalition for Responsible Regulation, Inc., et al.

James A. Holtkamp
HOLLAND & HART LLP
60 E. South Temple, Suite 2000
Salt Lake City, UT 84111
(801) 799-5800

Counsel for Coalition for Responsible Regulation, Inc., et al.

Edward A. Kazmarek
KAZMAREK GEIGER & LASETER LLP
One Securities Center
3490 Piedmont Road NE, Suite 350
Atlanta, GA 30305
(404) 812-0840

Counsel for Southeastern Legal Foundation, Inc., et al., and Intervenors Langdale Farms, LLC, et al..

Chet M. Thompson
CROWELL & MORING LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
(202) 624-2500

Counsel for American Iron and Steel Institute and Gerdau Ameristeel US Inc.

Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE INSTITUTE
1899 L Street NW, 12th Floor
Washington, D.C. 20036
(202) 331-2265

Counsel for Competitive Enterprise Institute, FreedomWorks, and Science and Environmental Policy Project

Neal J. Cabral
McGUIREWOODS LLP
Washington Square
1050 Connecticut Ave. NW, Suite 1200
Washington, D.C. 20036
(202) 857-1700

Counsel for Ohio Coal Association

Gordon R. Alphonso
McGUIREWOODS LLP
The Proscenium
1170 Peachtree St. NW, Suite 2100
Atlanta, GA 30309
(404) 443-5500

Counsel for Ohio Coal Association

Scott C. Oostdyk
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-1000

Counsel for Ohio Coal Association

Richard P. Hutchison
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 1210
Kansas City, MO 64111
(816) 931-5559

Counsel for Mark Levin and Landmark Legal Foundation

Ronald J. Tenpas
Michael W. Steinberg
Levi McAllister
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 739-5145

Counsel for Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

John J. McMackin, Jr.
WILLIAMS & JENSEN, PLLC
701 8th Street, NW, Suite 500
Washington, D.C. 20001
(202) 659-8201

Counsel for Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

F. William Brownell
Norman W. Fichthorn
Henry V. Nickel
Allison D. Wood
HUNTON & WILLIAMS LLP
1900 K Street NW
Washington, D.C. 20006
(202) 955-1500

Counsel for Utility Air Regulatory Group

Robin S. Conrad
Sheldon Gilbert
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street NW
Washington, D.C. 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

Ashley C. Parrish
Cynthia A.M. Stroman
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 737-0500

Counsel for Portland Cement Association and Chamber of Commerce of the United States of America

Katie Sweeney
NATIONAL MINING ASSOCIATION
101 Constitution Ave. NW
Suite 500 East
Washington, D.C. 20001

Counsel for National Mining Association

Peter Glaser
Mark E. Nagle
TROUTMAN SANDERS LLP
401 9th Street NW, Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for National Mining Association

Alexander C. Schoch
Mary L. Frontczak
PEABODY ENERGY COMPANY
701 Market Street, 6th Floor
St. Louis, MO 63101

Counsel for Peabody Energy Company

Peter Glaser
Mark E. Nagle
TROUTMAN SANDERS LLP
401 9th Street NW, Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for Peabody Energy Company

Ellen Steen
Danielle Quist
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave. SW, Suite 1000
Washington, D.C. 22024

Counsel for American Farm Bureau Federation

Peter Glaser
Mark E. Nagle
TROUTMAN SANDERS LLP
401 9th Street NW, Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for American Farm Bureau Federation

Timothy K. Webster
Roger R. Martella
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, D.C. 20005
(202) 736-8000

Counsel for the National Association of Manufacturers, et al.

Charles H. Knauss
Shannon S. Broome
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, D.C. 20006
(202) 373-6000

Counsel for the National Association of Manufacturers, et al.

Matthew G. Paulson
BAKER BOTTS LLP
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500

Counsel for the National Association of Manufacturers, et al.

Of Counsel:

Quentin Riegel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave. NW, Suite 600
Washington, D.C. 20004-1790
(202) 637-3000

Counsel for the
National Association of Manufacturers

Elizabeth Gaudio
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
1201 F Street NW, Suite 200
Washington, D.C. 20004
(202) 406-4443

Counsel for the
National Federation of Independent Business

Thomas J. Ward
Amy C. Chai
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15th Street NW
Washington, D.C. 20005
(202) 266-8200

Counsel for
National Association of Home Builders

Harry Moy Ng
Michele Marie Schoeppe
AMERICAN
PETROLEUM INSTITUTE
1220 L Street NW
Washington, D.C. 20005-4070
(202) 682-8251

Counsel for American Petroleum Institute

Gregory M. Scott
NATIONAL PETROCHEMICAL
AND REFINERS ASSOCIATION
1667 K Street NW, Suite 700
Washington, D.C. 20006
(202) 457-0480

Counsel for National Petrochemical
and Refiners Association

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Non-State Petitioners and Supporting Intervenors state as follows:

The Court's Order of March 22, 2011 (Doc. No. 1299440) rejected petitioners' briefing proposal and required these 67 parties, representing a variety of interests, to file joint briefing subject to a combined word limit, and does not otherwise provide for separate argument where those interests may diverge. Any given argument presented or incorporated in this brief should not be construed as necessarily representing the views of each of these parties.

A. Parties and *Amici*

PETITIONERS:

Case No. 10-1092: Coalition for Responsible Regulation, Inc.; Industrial Minerals Association–North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Company; Alpha Natural Resources, Inc.

Case No. 10-1094: Southeastern Legal Foundation, Inc.; John Linder (U.S. Representative) (GA-7th); Dana Rohrabacher (U.S. Representative) (CA-46th); John Shimkus (U.S. Representative) (IL-19th); Phil Gingrey (U.S. Representative) (GA-11th); Lynn Westmoreland (U.S. Representative) (GA-3rd); Tom Price (U.S. Representative) (GA-6th); Paul Broun (U.S. Representative) (GA-10th); Steve King (U.S. Representative) (IA-5th); Nathan Deal (U.S. Representative) (GA-9th); Jack Kingston (U.S. Representative) (GA-1st); Michele Bachmann (U.S. Representative) (MN-6th); Kevin Brady (U.S. Representative) (TX-8th); John Shadegg (U.S. Representative) (AZ-3rd); Dan Burton (U.S. Representative) (IN-5th); The Langdale Company; Langdale Forest Products Company; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.

Case No. 10-1134: American Iron & Steel Institute

Case No. 10-1143: Competitive Enterprise Institute; FreedomWorks; The Science and Environmental Policy Project

Case No. 10-1144: Ohio Coal Association

Case No. 10-1152: Mark Levin and Landmark Legal Foundation

Case No. 10-1156: Gerdau Ameristeel US Inc.

Case No. 10-1158: Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

Case No. 10-1159: Portland Cement Association

Case No. 10-1160: Chamber of Commerce of the United States of America

Case No. 10-1161: Utility Air Regulatory Group

Case No. 10-1162: National Mining Association

Case No. 10-1163: Peabody Energy Company

Case No. 10-1164: American Farm Bureau Federation

Case No. 10-1166: National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical and Refiners Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce & Industry; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce

Case No. 10-1182: State of Texas; Governor Rick Perry (TX); Attorney General Greg Abbott (TX); Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Haley Barbour, Governor of the State of Mississippi

RESPONDENTS: United States Environmental Protection Agency (Respondent in all consolidated cases); National Highway Traffic Safety Administration (Respondent in Nos. 10-1094 and 10-1143); and Lisa P. Jackson, Administrator, United States Environmental Protection Agency (Respondent in Nos. 10-1160 and 10-1166)

PETITIONERS' INTERVENORS: State of Georgia; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc; Langdale Ford Company; Langboard, Inc.–MDF; Langboard, Inc–OSB

RESPONDENTS' INTERVENORS: Global Automakers (f/k/a Association of International Automobile Manufacturers, *see* Doc. No. 1310060); Alliance of Automobile Manufacturers; Natural Resource Defense Council, Environmental Defense Fund, Sierra Club; Commonwealth of Massachusetts; States of California, Delaware, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; Pennsylvania Department of Environmental Protection; City of New York

AMICUS CURIAE FOR PETITIONERS: American Chemistry Council

AMICI CURIAE FOR RESPONDENTS: Institute for Policy Integrity at New York University School of Law; Honeywell International, Inc.

B. Ruling Under Review

These petitions challenge EPA's and NHTSA's final rule entitled *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) ("LDVR").

C. Related Cases

There are numerous cases related to the cases relevant to this case that have been consolidated into three separate groupings, as follows:

(1) Twenty-six cases consolidated under lead case **No. 09-1322:** sixteen cases challenging EPA's "Endangerment Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Rule"); and ten cases challenging

EPA's denial of petitions for reconsideration of that rule, 75 Fed. Reg. 49,556 (Aug. 13, 2010) ("Reconsideration Denial")

(2) Forty-one cases consolidated under lead case **No. 10-1073**: seventeen petitions challenging EPA's "Timing Rule," 75 Fed. Reg. 17,004 (April 2, 2010), and twenty-four petitions challenging EPA's "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010)

(3) Twelve cases consolidated under lead case **No. 10-1167**: three petitions challenging each of the following four EPA Rules: (a) *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) *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) *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980); and (d) *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), Petitioners and Petitioner-Intervenors state that Case No. 10-1172, *American Forest & Paper Association, Inc. v. EPA*, challenges the LDVR, 75 Fed. Reg. 25,324. That case has been severed from these consolidated cases and placed in abeyance. *See* Doc. Nos. 1307858 (motion to sever), 1310090 (stipulation), 1310387 (order placing case in abeyance).

Petitioners also state that Case Nos. 10-1165 and 10-1171, both filed July 6, 2010, challenged the LDVR as a constructive denial of then-pending petitions for reconsideration of the Endangerment Rule, 74 Fed. Reg. 66,496. After EPA formally denied the petitions for reconsideration of the Endangerment Rule on July 29, 2010,

75 Fed. Reg. 49,556, petitioners in Nos. 10-1165 and 10-1171 voluntarily moved to dismiss those cases. *See* Doc No. 1262187, in No. 10-1165; Doc. No. 1260748 in No. 10-1171 (orders dismissing cases).

Prior Procedural Rulings: On November 16, 2010, this Court ordered that these consolidated cases be designated as complex. *See* Order in *Coalition for Responsible Regulation v. EPA*, No. 10-1092, Doc. No. 1277651 (Nov. 16, 2010). Through orders issued December 10, 2010 [Doc. No. 1282576] and March 18, 2011 [Doc. No. 1299003 in Case No. 10-1167], this Court ordered that these consolidated cases, as well as the three groupings of cases listed above, be scheduled for oral argument before the same panel.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Non-State Petitioners and Petitioners-Intervenors provide the following corporate disclosures:

Alpha Natural Resources, Inc. is a Delaware corporation engaged in the business of coal mining and gas production. Alpha Natural Resources, Inc. has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Alpha Natural Resources, Inc.

American Farm Bureau Federation ("AFBF") is a non-profit voluntary general farm organization founded in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents more than 6 million member families through membership organizations in all fifty states and Puerto Rico. AFBF has no member companies, and no publicly held companies have an ownership interest in AFBF.

The American Frozen Food Institute ("AFFI") is a trade association that serves the frozen food industry by advocating its interests in Washington, D.C., and communicating the value of frozen food products to the public. The AFFI is comprised of 500 members including manufacturers, growers, shippers and warehouses, and represents every segment of the $70 billion frozen food industry. As a member-driven association, AFFI exists to advance the frozen food industry's agenda in the 21st century. The AFFI has no parent company, and no publicly held company has a 10% or greater ownership interest in the AFFI.

American Iron & Steel Institute ("AISI") is a non-profit, national trade association headquartered in the District of Columbia. AISI has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in AISI. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 24 member companies, including integrated and electric furnace steelmakers, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. AISI's member companies represent approximately 75 percent of both U.S. and North American steel capacity.

American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. API has

approximately 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

The Brick Industry Association ("BIA") is a national trade association representing small and large brick manufacturers and associated services. Founded in 1934, the BIA is the recognized national authority on clay brick construction, representing approximately 270 manufacturers, distributors, and suppliers that generate approximately $9 billion annually in revenue and provide employment for more than 200,000 Americans. BIA has no parent company, and no publicly held company has a 10% or greater ownership interest in BIA.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is a non-profit corporation organized under the laws of the District of Columbia. It has no parent company and does not issue stock. It is a trade association within the meaning of Circuit Rule 26.1 (b). The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3,000,000 businesses and professional organizations of every size and in every economic sector and geographic region of the country. A central function of the U.S. Chamber is to advocate for the interests of its members in important matters before courts, Congress, and the Executive Branch.

Coalition for Responsible Regulation, Inc. is a non-profit membership corporation organized under the laws of the State of Texas for the purpose of promoting social welfare, particularly to ensure that the Clean Air Act is properly applied with respect to greenhouse gases, and its members include businesses and trade associations of businesses engaged in activities that would likely be subject to regulation under the Clean Air Act for greenhouse gas emissions. Coalition for Responsible Regulation, Inc. has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Coalition for Responsible Regulation, Inc.

Collins Industries, Inc. is a Georgia corporation in the business of transporting building products. Collins Industries, Inc. has no parent corporation. No publicly held corporation has 10% or greater ownership interest in Collins Industries, Inc.

Collins Trucking Company, Inc. is a Georgia corporation in the business of transporting pine and hardwood logs in the state of Georgia. Collins Trucking

Company, Inc. is a subsidiary of Collins Industries, Inc. No publicly held corporation has 10% or greater ownership interest in Collins Trucking Company, Inc.

Competitive Enterprise Institute is a non-profit 501(c)(3) corporation organized under the laws of the District of Columbia for the purpose of defending free enterprise, limited government, and the rule of law. It has no parent companies. No publicly held corporation has a 10% or greater ownership interest in it.

The Corn Refiners Association ("CRA") is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture starches, sweeteners, corn oil, bioproducts (including ethanol), and animal feed ingredients. CRA has no parent company, and no publicly held company has a 10% or greater ownership interest in CRA.

The Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation ("Energy-Intensive Manufacturers' Group") is a trade association formed for the purpose of promoting the general policy interests of its members. The Energy-Intensive Manufacturers' Group represents companies from a broad swath of United States manufacturing, including the ferrous and non-ferrous metal, cement, glass, ceramic, chemical, paper, and nitrogen fertilizer industries. The Energy-Intensive Manufacturers' Group has no parent company, and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public. As such, no publicly held company has a 10% or greater ownership interest in the Energy-Intensive Manufacturers' Group.

FreedomWorks is a non-profit 501(c)(4) corporation organized under the laws of the District of Columbia for the purpose of promoting individual liberty, consumer choice and competition, and has over 870,000 members nationwide. It has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in it.

Georgia Agribusiness Council, Inc. is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship to enhance the quality of life for all Georgians. The Georgia Agribusiness Council, Inc. has no parent company. No publicly held company as a 10% or greater ownership in the Georgia Agribusiness Council, Inc.

Georgia Motor Trucking Association, Inc. is a Georgia corporation that serves as the "voice" of the trucking industry in Georgia, representing more than 400 for-hire carriers, 400 private carriers, and 300 associate members. The mission of the

Georgia Motor Trucking Association is to promote: reasonable laws; even-handed, common-sense administration; equitable and competitive fees and taxes; a market, political and social environment favorable to the trucking industry; and good citizenship among the people and companies of Georgia's trucking industry. Georgia Motor Trucking Association, Inc. has no parent corporation. No publicly held corporation has 10% or greater ownership interest in the Georgia Motor Trucking Association.

Gerdau Ameristeel Corporation ("Gerdau Long Steel North America" or "GLN"), headquartered in Tampa, Florida, manufactures steel at facilities located throughout the United States and Canada. Gerdau S.A., which is approximately 47% owned by Metalurgica Gerdau S.A., has a 10% or greater indirect ownership interest in GLN.

The Glass Packaging Institute ("GPI") represents the interests of the glass container industry. GPI's 45 member and associate member companies bring a diverse array of products to consumers, producing glass containers for food, beer, soft drinks, wine, liquor, cosmetics, toiletries, medicine and more. GPI members either manufacture glass containers or provide essential supplies to those operations, such as machinery, raw materials, recyclable materials, inspection equipment, energy, transportation and other services. GPI has no parent company, and no publicly held company has a 10% or greater ownership interest in GPI.

Great Northern Project Development, L.P. is a Delaware limited partnership engaged in the business of developing, constructing, and operating coal gasification projects. Great Northern Project Development, L.P. has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Great Northern Project Development, L.P.

Industrial Minerals Association–North America ("IMA-NA") is a trade association representing the interests of producer member companies that extract and process industrial minerals, and associate member companies that provide goods and services to the industrial minerals industry. IMA-NA has no parent companies. No publicly held corporation has a 10% or greater ownership interest in IMA-NA.

J&M Tank Lines, Inc. is a Georgia corporation in the business of transporting industrial grade products, such as lime, calcium carbonate, cement, and sand, as well as food grade products such as flour, and agricultural grade products such as salt. J&M Tank Lines, Inc. operates a fleet of 265 tractors and 414 tanks, with 9 terminals located in Georgia, Alabama, and Texas. J&M Tank Lines, Inc. has no

parent company. No publicly held corporation has a 10% or greater ownership in J&M Tank Lines, Inc.

Kennesaw Transportation, Inc. is a Georgia corporation in the business of truckload long-haul transportation of goods, serving an area from Georgia south to Florida, north to Illinois, and west to Washington, Oregon, California, Nevada and Arizona. Kennesaw Transportation, Inc. has no parent company. No publicly held corporation has a 10% or greater ownership interest in Kennesaw Transportation, Inc.

Landmark Legal Foundation is a public interest law firm committed to preserving the principles of limited government, separation of powers, free enterprise, federalism, strict construction of the Constitution and individual rights. Specializing in Constitutional litigation, Landmark maintains offices in Kansas City, Missouri and Leesburg, Virginia. Landmark Legal Foundation is a non-profit, public interest law firm organized under the laws of the State of Missouri. Landmark has no parent companies, subsidiaries or affiliates that have issued shares to the public.

Langboard, Inc.–MDF is a Georgia corporation in the business of producing Medium Density Fiberboard (MDF). MDF is used in various applications including molding, flooring and furniture. Langboard, Inc.—MDF is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langboard, Inc.—MDF

Langboard, Inc.–OSB is a Georgia corporation in the business of producing Oriented Strand Board (OSB). OSB is used in the home construction industry as a panel in flooring, roofing and siding.

Langdale Chevrolet-Pontiac, Inc. is a Georgia corporation in the business of selling and servicing Chevrolet and Pontiac automobiles. Langdale Chevrolet-Pontiac, Inc. is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Chevrolet - Pontiac, Inc.

The Langdale Company is a Georgia corporation and is the parent company for a diverse group of businesses, some of which are described elsewhere in this Certificate. The Langdale Company has no parent companies. No publicly held corporation has 10% or greater ownership in the Langdale Company.

Langdale Farms, LLC is a Georgia Corporation in the business of producing soybeans, peanuts, cotton, pecans, tomatoes, hay, cattle, and fish. Langdale Farms,

LLC is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Farms, LLC.

Langdale Ford Company is a Georgia corporation in the business of selling and servicing Ford automobiles and trucks with one of the largest new car and truck dealerships in the area with sales, service, parts, body repair and commercial/fleet departments. Langdale Ford Company is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Ford Company.

Langdale Forest Products Company is a Georgia corporation and is a leading producer of lumber, utility poles, marine piling and fence posts. Langdale Forest Products Company is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Forest Products Company.

Langdale Fuel Company is a Georgia corporation in the business of providing fuel for The Langdale Company's needs. It is comprised of two divisions which provide wholesale Fuel and Lubricants. Langdale Fuel Company is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Fuel Company.

The Michigan Manufacturers Association ("Michigan MA") is a private nonprofit organization and is the state of Michigan's leading advocate exclusively devoted to promoting and maintaining a business climate favorable to industry. Michigan MA represents the interests and needs of over 2,500 members, ranging from small manufacturing companies to some of the world's largest corporations. Michigan MA's members operate in the full spectrum of manufacturing industries, which account for 90% of Michigan's industrial workforce and employ over 500,000 Michigan citizens. Michigan MA has no parent company, and no publicly held company has a 10% or greater ownership interest in Michigan MA.

Mississippi Manufacturers Association ("Mississippi MA") has served as the voice of industry in the State of Mississippi since 1951. Mississippi MA diligently works to maintain a strong manufacturing environment in the State and is the voice of approximately 2,200 member companies in Mississippi. Mississippi MA addresses the needs of today's manufacturer through active involvement in federal and state legislative and regulatory issues, as well as educational and training opportunities. Mississippi MA represents their interests in the areas of the environment, industrial and employee relations, taxation, energy, workforce development and transportation.

Mississippi MA has no parent company, and no publicly held company has a 10% or greater ownership interest in Mississippi MA.

National Association of Home Builders ("NAHB") is a not-for- profit trade association organized for the purposes of promoting the general commercial, professional, and legislative interests of its approximately 160,000 builder and associate members throughout the United States. NAHB's membership includes entities that construct and supply single family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB does not have any parent companies that have a 10% or greater ownership interest in NAHB, and no publicly held company has a 10% or greater ownership interest in NAHB.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in the NAM.

National Cattlemen's Beef Association ("NCBA") is a trade association representing more than 140,000 cattle breeders, producers, and feeders in the United States. NCBA has no parent companies. No publicly held corporation has a 10% or greater ownership interest in NCBA.

National Federation of Independent Business ("NFIB") is the nation's leading association of small businesses and has a presence in all 50 States and the District of Columbia. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB has no parent company, and no publicly held company has a 10% or greater interest in NFIB.

The National Mining Association ("NMA") is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

The National Oilseed Processors Association ("NOPA") is a national trade association that represents 16 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 66 plants located throughout the country, including 61 plants that process soybeans. NOPA has no parent company, and no publicly held company has a 10% or greater ownership interest in NOPA.

The National Petrochemical and Refiners Association ("NPRA") is a national trade association whose members comprise more than 450 companies, including virtually all United States refiners and petrochemical manufacturers. NPRA's members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel fuel, home-heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in making plastics, clothing, medicine, and computers. NPRA has no parent company, and no publicly held company has a 10% or greater ownership interest in NPRA.

The Ohio Coal Association ("the Association") is an unincorporated trade association dedicated to representing Ohio's coal industry. The Association has not issued shares or debt securities to the public and has no parent companies, subsidiaries, or affiliates that have any outstanding shares or debt securities issued to the public.

Peabody Energy Company ("Peabody") is a publicly-traded company and, and to its knowledge, has no shareholder owning ten percent or more of its common stock with the exception of BlackRock, Inc., which reported that at December 31, 2009, it owned approximately 10.96% of Peabody's outstanding common stock. Peabody's principal business is the mining and sale of coal.

The Portland Cement Association is a non-for-profit trade association that represents more than thirty companies in the United States and Canada engaged in the manufacture of portland cement. The Portland Cement Association conducts market development, engineering, research, education, technical assistance and public affairs programs on behalf of its member companies. Its mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment. The Portland Cement Association is a "trade association" within the meaning of Circuit Rule 26.1 (b). It has no parent corporation, and no publicly held company owns a 10 percent or greater interest in the Portland Cement Association.

Rosebud Mining Co. is a Pennsylvania corporation engaged in the business of bituminous coal mining primarily in Ohio and Pennsylvania. Rosebud Mining Company has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Rosebud Mining Company.

The Science and Environmental Policy Project is a non-profit 501(c)(3) corporation organized under the laws of the State of Virginia for the purpose of promoting sound and credible science as the basis for regulatory decisions. It has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in it.

Southeast Trailer Mart, Inc. is a Georgia corporation in the business of selling new and used semi-trailers, along with providing related parts and services. Southeast Trailer Mart, Inc. has no parent company. No publicly held company has a 10% or greater ownership in Southeast Trailer Mart, Inc.

Southeastern Legal Foundation, Inc. ("SLF") is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies. No publicly held corporation has 10% or greater ownership interest in SLF.

The Specialty Steel Industry of North America ("SSINA") is a national trade association comprised of 17 producers of specialty steel products, including stainless, electric, tool, magnetic, and other alloy steels. SSINA members produce steel by melting scrap metal in electric arc furnaces and account for over 90 percent of the specialty steel manufactured in the United States. The SSINA has no parent company, and no publicly held company has a 10% or greater ownership interest in the SSINA.

The Tennessee Chamber of Commerce and Industry ("the Tennessee Chamber") is Tennessee's largest statewide, broad-based business and industry trade association. It is a private, not-for-profit trade association that serves as the primary voice of diverse business interests on major employment and economic issues facing public policy decision-makers in Tennessee. It fosters harmonious relationships between the various elements of the Tennessee business community and serves as an umbrella organization for companies, trade associations and chambers of commerce to work together for the economic health of the state. The Tennessee Chamber has no parent company, and no publicly held company has a 10% or greater ownership interest in the Tennessee Chamber.

Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

West Virginia Manufacturers Association ("WVMA") represents the interests of manufacturers across the State of West Virginia to state and federal agencies, legislators, regulators and policy-makers. WVMA has no parent company, and no publicly held company has a 10% or greater ownership interest in WVMA.

The Wisconsin Manufacturers and Commerce ("WMC") is a business trade association with nearly 4,000 members, and is dedicated to making Wisconsin the most competitive State in the nation to do business through public policy that supports a healthy business climate. Its members are Wisconsin businesses that operate throughout the State in the manufacturing, energy, commercial, health care, insurance, banking, and service industry sectors of the economy. Roughly one-fourth of Wisconsin's workforce is employed by a WMC member company. WMC has no parent company, and no publicly held company has a 10% or greater ownership interest in WMC.

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TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with asterisks

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GLOSSARY OF TERMS

ANPRM	Advance Notice of Proposed Rulemaking, *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008) (JA __)
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy program or standards
CH_4	Methane
CO_2	Carbon Dioxide
Doc No.	Refers to the serial number assigned by the electronic CM/ECF system to documents and orders filed in this Court
DOE	U.S. Department of Energy
DOT	U.S. Department of Transportation
EISA	Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (Dec. 19, 2007)
Endangerment Joint Br.	Joint Opening Brief of Non-State Petitioners and Supporting Intervenors, filed May 20, 2011 in *Coalition for Responsible Regulation v. EPA*, No. 09-1322
Endangerment TSD	*Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (Dec. 7, 2009), Dkt. EPA-HQ-OAR-2009-171-11645
EPA	U.S. Environmental Protection Agency
EPA RIA	EPA, *Final Regulatory Impact Analysis: Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, April 2010, Dkt. EPA-HQ-OAR-2009-0472-11578 (JA __)

EPCA	Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871
GHG(s)	Greenhouse gas(es)
HFCs	Hydrofluorocarbons
LDV	Light-Duty Vehicles
LDVR	Final Rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (JA __)
NAAQS	National Ambient Air Quality Standards
NHTSA	National Highway Traffic Safety Administration
NHTSA RIA	NHTSA, *Final Regulatory Impact Analysis: Corporate Average Fuel Economy for MY2012-MY2016 Passenger Cars and Light Trucks* (March 2010) (JA __)
N_2O	Nitrous Oxide
NPRM	Notice of Proposed Rulemaking
OMB	Office of Management and Budget
Paperwork Reduction Act	44 U.S.C. §§ 3501-3520
PFCs	Perfluorocarbons
ppm	Parts per million
Proposed LDVR	Proposed Rule, *Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49,454 (Sept. 28, 2009) (JA __)
PSD	Prevention of Significant Deterioration

Regulatory Flexibility Act	5 U.S.C. §§ 601-612
RTC	EPA, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards: EPA Response to Comments Document for Joint Rulemaking*, Doc. No. EPA-HQ-OAR-2009-472-11581 (JA __)
SF_6	Sulfur hexafluoride
Tailoring Rule	Proposed Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009) Final Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010)
Tailoring RIA	EPA, *Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, Final Report (May 2010), Dkt EPA-HQ-OAR-2009-0517-19161
Title V	Clean Air Act §§ 501-507, 42 U.S.C. §§ 7661-7661f
Timing Rule	Final Rule, *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010).
tpy	Tons per year
Unfunded Mandates Reform Act (UMRA)	Pub. L. No. 104-4, 109 Stat. 48, Title II codified at 2 U.S.C. §§ 1531-1538

JURISDICTIONAL STATEMENT

Petitioners seek review of EPA's final rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*; 75 Fed. Reg. 25,324 (May 7, 2010) ("LDVR"). Multiple timely petitions for review were filed challenging this final agency action, which were consolidated. The Court has jurisdiction under Clean Air Act ("CAA") § 307(b)(1).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are reproduced in the addendum. Throughout this brief, citations are provided to sections in the CAA, rather than the U.S. Code sections into which the CAA provisions are codified. Appendix B provides a cross-reference table.

STATEMENT OF ISSUES

1. Whether EPA violated the CAA's requirements, misinterpreted *Massachusetts v. EPA*, and improperly deemed itself lacking in discretion by: **(a)** failing to perform the risk assessment required under CAA § 202(a), **(b)** failing to consider the consequences of its LDVR under its statutory interpretation, and **(c)** imposing GHG regulation for reasons that are not "grounded in the statute."

2. Whether EPA's LDVR violates the CAA and is arbitrary, capricious, and otherwise contrary to law because: **(a)** EPA failed to address the concededly "absurd" consequences produced by its view that the LDVR automatically triggers regulation of stationary source GHG emissions; **(b)** EPA unlawfully failed to analyze the

substantial costs and burdens imposed by the stationary source regulation that, in EPA's view, was automatically triggered by its promulgation of the LDVR; **(c)** notwithstanding EPA's conclusion to the contrary, its decision to regulate automobile GHG emissions under the CAA's Title II cannot automatically trigger regulation of stationary source GHG emissions under CAA Title I; and **(d)** EPA reopened its interpretation of the Act's PSD permitting triggers but failed to recognize the illegality of that interpretation and the consequences of that illegality for GHG emissions controls.

3. Whether EPA's LDVR violates the CAA and is arbitrary, capricious, and otherwise contrary to law because it functionally duplicates NHTSA's fuel-economy standards and will not meaningfully avert any climate-related endangerment.

STATEMENT OF CASE AND FACTS

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court directed EPA to reconsider a 1999 rulemaking petition filed under CAA § 202(a) seeking to impose controls on GHG emissions from new motor vehicles. On remand, EPA initially opened a single regulatory docket and issued an Advance Notice of Proposed Rulemaking ("ANPRM") to deal comprehensively with the questions posed by the prospect of imposing GHG emissions controls on the Nation's economy. *See* 73 Fed. Reg. 44,354 (July 30, 2008) (JA __). These questions include EPA's authority to impose GHG emissions controls on new motor vehicles and on stationary and agricultural emission sources; the necessary prerequisites for invoking that authority; and whether EPA's rulemaking record would provide an adequate basis for regulation.

In its ANPRM, EPA asserted that the rulemaking petition, although limited to seeking GHG emissions controls on motor vehicles, could not be granted without triggering a cascade of burdensome and potentially unintended regulatory consequences. EPA explained that, in its view, the CAA's provisions "are interconnected in multiple ways such that a decision to regulate one source" of GHG emissions could potentially "lead to regulation of other source categories of GHGs." *Id.* at 44,418. EPA also asserted that "CAA standards applicable to GHGs for one category of sources could trigger" CAA Prevention of Significant Deterioration ("PSD") requirements "for other categories of sources that emit GHGs." *Id.*

Numerous commenters explained that the CAA does not provide a workable platform for regulating stationary source GHG emissions. The Department of Energy ("DOE"), for example, cautioned that EPA's response to the rulemaking petition should be carefully considered given its potential to trigger onerous and costly stationary source regulation under the PSD program. *See id.* at 44,367. Under that program, certain new and modified stationary sources are required to obtain PSD permits that reflect the "best available control technology" ("BACT"), which in the context of CO_2 emissions effectively means controls on the use of fossil fuels or energy consumption. *Id.* at 44,371. According to DOE, EPA staff failed to "explain in clear, understandable terms the extraordinary costs, burdens and other adverse consequences, and the potentially limited benefits, of the United States unilaterally using the [CAA] to regulate GHG emissions." *Id.*

In January 2009, a change in Presidential administrations brought a new agenda to EPA. That changeover could not, however, alter the fundamental tensions between regulating GHG emissions and the legal framework of the CAA's stationary source emissions programs. Nor could EPA free itself of its obligation to consider whether there were alternatives that would not affect stationary sources. As EPA later asserted, absent such alternatives, "[a]pplying the PSD thresholds to sources of GHG emissions literally results in a PSD program that is so contrary to what Congress had in mind — and that in fact so undermines what Congress attempted to

accomplish with the PSD requirements — that it should be avoided under the 'absurd results' doctrine." 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009).

Nonetheless, the new EPA Administration arrived in 2009 with a pre-formed conviction that EPA must regulate GHG emissions. *See* Endangerment Joint Br. 5-6. Accordingly, although EPA had previously acknowledged the fundamental mismatch between its CAA legal authority and regulating GHG emissions from stationary sources, it ultimately decided to impose controls on such emissions. EPA also decided to proceed in piecemeal fashion, spreading its reasoning across four separate rules. In the process, EPA never fully addressed the fundamental contradictions between the text and structure of the CAA and EPA's attempts to regulate stationary source GHG emissions under the PSD program. Nor did it consider the heavy burdens that would be imposed on stationary sources. Instead, EPA asserted that, once it determined that worldwide GHG levels may reasonably be anticipated to endanger public health and welfare, it was compelled to promulgate automobile GHG emission regulations and that, in turn, doing so automatically triggers stationary source regulation under the CAA's PSD and Title V permitting programs.

As a preliminary step, EPA finalized its Endangerment Rule, concluding that a mix of six GHGs — CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6 — together constitute a single "air pollutant" emitted by new automobiles that contributes to harmful "air pollution," even though automobiles do *not* emit two of the substances (PFCs and SF_6) and emit two others (CH_4 and N_2O) in relatively minute amounts. EPA then

concluded that, because of its Endangerment Rule, it was legally obligated to promulgate a separate rule under CAA § 202(a) to restrict GHG emissions from new motor vehicles. *See* 75 Fed. Reg. at 25,398-99. This was the first time EPA had ever separated an endangerment determination from its resulting emissions standard rulemaking.

EPA's automobile emissions rule, the focus of these consolidated petitions, was finalized as a joint rule together with a companion rule of the National Highway Traffic Safety Administration ("NHTSA") on April 1, 2010. *See* 75 Fed. Reg. at 25,324 (JA __). By promulgating its rule, NHTSA fulfilled its obligations under the Energy Independence and Security Act of 2007 ("EISA") to adopt a new round of corporate average fuel economy ("CAFE") standards. For its part, EPA effectively converted those CAFE standards into GHG limits on tailpipe emissions. *See id.* at 25,371 (JA __). But it identified nothing meaningful that EPA-promulgated automobile-emissions rules would add to NHTSA's fuel-economy standards. Nor did EPA undertake a risk assessment of endangerment specific to its consideration of the LDVR; instead, it adopted "assessment reports" prepared by other entities to announce that GHG emissions generally "endanger" public health and welfare. *See id.* at 25,398-99 (JA __) ("relied heavily upon" assessment reports), *id.* at 25,491 (JA __) ("key findings … primarily drawn from assessment reports"). According to EPA's interpretation of model results reported by the Intergovernmental Panel on Climate Change ("IPCC"), its final rule would have *no* perceptible effect on climate. *See* EPA

RIA 7-124 (JA __) (by 2100, LDVR could reduce global mean temperature by approximately 0.006–0.015°C and reduce global mean sea level rise by approximately 0.06–0.14 centimeters). Moreover, EPA and NHTSA each examined the effect of its own rule on climate (assuming the other agency's rule was not adopted) and each found its rule would achieve essentially the same results as the other agency's. *Compare* 75 Fed. Reg. at 25,637, Table IV.G.2-2 *with id.* at 25,496, Table III.F.301. EPA nonetheless concluded that the extent to which projected climate effects might be addressed or mitigated by its standards was irrelevant and that EPA had neither the obligation nor the discretion to consider NHTSA's standards when framing its regulatory decisions. *See, e.g.*, RTC 7-78 to -79 (JA __) (noting comments that the proposed LDVR was duplicative of NHTSA's standards and directing reader to Endangerment Rule for response); *see also* 74 Fed. Reg. at 66,507-08 (portion of the Endangerment Rule cited by EPA in the RTC on the LDVR as responding to this issue and noting that "[t]he effectiveness of a potential future control strategy is not relevant").

EPA also concluded that its decision to regulate new automobile GHG emissions automatically triggered, beginning January 2, 2011, regulation of stationary source GHG emissions under the CAA's PSD and Title V programs. *See*, *e.g.*, 74 Fed. Reg. at 55,294 (when the LDVR "is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD program").

In EPA's view, once it promulgated its LDVR, the PSD and Title V requirements for GHGs would apply to stationary sources without further action.

EPA recognized, however, that its interpretation of the statute causes "absurd results" never intended by Congress. In particular, EPA recognized that its interpretation subjects thousands of stationary sources, including small, non-industrial sources, to PSD and Title V regulation, and creates (by EPA estimates) $22.5 billion in permitting paperwork costs alone. 75 Fed. Reg. at 31,540 (Table V-I). These absurd consequences are contrary to Congress's intent and exceed available administrative capabilities. To cure the absurdity its interpretation created, EPA then sought to reduce the number of permits its LDVR would require by rewriting ("tailoring") the statutory PSD thresholds for stationary source emissions, raising them, for GHGs, several orders of magnitude higher. Although EPA solicited comments on all aspects of this proposed statutory rewrite, announcing that all alternatives would be considered, *see* 74 Fed. Reg. at 55,317, 55,320, 55,327, it ultimately rejected interpretations of the CAA that would have avoided absurd results and, instead, chose to adopt an interpretation that required rewriting the statutory text to try to avoid the absurdity created by that very interpretation. *See* 75 Fed. Reg. 31,514 (June 3, 2010).

SUMMARY OF ARGUMENT

EPA's LDVR violates the CAA and is inconsistent with the requirements of non-arbitrary, reasoned decision-making for three fundamental reasons. ***First***, EPA

relied on an impermissible interpretation of the CAA and the Supreme Court's decision in *Massachusetts*, and failed to justify its LDVR in light of any defined endangerment risk to public health or welfare. (*See* Section I.). ***Second***, EPA failed to take into consideration the substantial burdens resulting from its regulatory approach, and impermissibly interpreted its LDVR as automatically triggering stationary source regulation under the CAA's PSD and Title V programs, even while acknowledging that its interpretation produces profound and absurd consequences for stationary source owners and states that Congress did not intend. (*See* Section II.) ***Third***, EPA failed to demonstrate that the LDVR will meaningfully avert any claimed endangerment to public health or welfare. EPA's own projections show that the LDVR will have essentially no effect on any public health or welfare endangerment beyond the concededly negligible effects already produced by NHTSA's standards. (*See* Section III.)

STANDING

Petitioners' standing to bring these challenges is self-evident because they are companies and associations representing members that face substantial additional and costly regulatory burdens as a result of EPA's final regulatory action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-63 (1992) (when parties are "object[s]" of governmental action, "there is ordinarily little question that the action … has caused [them] injury"); *National Coal Ass'n v. Lujan*, 979 F.2d 1548, 1551-52 (D.C. Cir. 1992). There is "little question" that, as the object of regulation that EPA asserts is triggered

by EPA's rule, petitioners and their members suffer concrete, particularized injury, and that "a judgment preventing … the action will redress" that injury. *Sierra Club v. EPA*, 292 F.3d 895, 900–01 (D.C. Cir. 2002); *see also SCAQMD v. EPA*, 472 F.3d 882, 895-96 (D.C. Cir. 2006). Moreover, given petitioners' strong interests in ensuring that EPA adopts rational regulatory policies, and because the questions presented concern EPA's failure to comply with legal requirements, association petitioners have standing to represent their members' interests. *See Sierra Club*, 292 F.3d at 898.

The significant harms faced by petitioners and their members are addressed in declarations previously submitted to the Court. As the declarations explain, petitioners and their members will face increased costs for purchasing or leasing new vehicles. *See* Bidet Decl. (Ex. A). In addition, because EPA's imposition of restrictions on vehicles' GHG emissions operates, in EPA's view, as an automatic trigger of regulation of thousands of additional stationary sources not currently covered under the PSD program, petitioners and their members face increased costs for complying with stationary source requirements. Several will, as a direct result of the LDVR and EPA's statutory interpretation, become subject to PSD permitting requirements. *See* Friedman Decl. (Ex. B); Ailor Decl. (Ex. C); Ward Decl. (Ex. D); Manning Decl. (Ex. E); Putman Decl. (Ex. F); McCracken Decl. (Ex. G). Others will be subject to increased regulation, higher operational costs, and related commercial burdens. *See* Kerr Decl. (Ex. H); Peelish Decl. (Ex. I); Barker Decl. (Ex. J); *see also* Frontczak Decl. (Ex. K); Sweeney Decl. (Ex. L); Ellis Decl. (Ex. M).

ARGUMENT

The LDVR is invalid because it violates applicable statutory requirements and is not the product of reasoned decision-making.

I. EPA'S RULE RELIES ON AN IMPROPER INTERPRETATION OF THE STATUTE AND *MASSACHUSETTS V. EPA*.

Section 202(a)(1) requires EPA's Administrator to "prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles … which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." EPA's Administrator must therefore determine: **(1)** whether a substance is an air pollutant emitted by new motor vehicles; **(2)** whether "in [her] judgment" emissions of that pollutant from motor vehicles "cause or contribute to air pollution"; **(3)** whether the resulting air pollution "may reasonably be anticipated to endanger public health or welfare"; **(4)** the content of the standards applicable to such emissions; and **(5)** the class of vehicles to which the standards would apply.

Courts have interpreted these requirements as obligating EPA to justify its regulation in light of the identified endangerment risk. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 525 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc). Instead, EPA separated these two integral steps. EPA concluded that it had no obligation to show — and even that it lacked discretion to consider whether –- "the resulting emissions control strategy or strategies will have

some significant degree of harm reduction or effectiveness in addressing the endangerment." 74 Fed. Reg. at 66,508. This conclusion violates the statute and the principle, recognized in *Small Refiner* and *Ethyl*, that the emissions control must be justified in light of the identified endangerment risk. In neither the LDVR nor any of its related rules did EPA ever articulate a legal and logical connection between the alleged endangerment risk and the emissions standards it selected. *See* Endangerment Joint Br. 23-29. EPA also failed to justify its interpretation that the LDVR automatically triggers stationary source regulation, and failed to address the enormous burdens and costs imposed on stationary sources as a result of its LDVR.

EPA's errors stem in large part from its misinterpretation of *Massachusetts*. EPA appears to believe that, once it promulgated its Endangerment Rule, it was required to promulgate automobile emissions standards without regard to whether those standards would mitigate any defined endangerment, and without considering whether they would trigger absurd regulatory consequences for other emissions sources under other CAA programs. That view misunderstands *Massachusetts* and ignores fundamental objections to EPA's approach. Just as *Massachusetts* held that EPA may not reject a rulemaking petition based on considerations untethered to the statutory text, EPA cannot engage in regulating GHG emissions without undertaking a well-reasoned evaluation of mandatory statutory factors and considering the implications of its action throughout the relevant statutory framework.

Massachusetts held that EPA's initial decision to deny rulemaking could not be sustained because "EPA ha[d] offered no *reasoned explanation* for its refusal to decide whether greenhouse gases cause or contribute to climate change." 549 U.S. at 534 (emphasis added). The Court rejected the "policy considerations" EPA invoked in denying the rulemaking petition and emphasized that EPA may not rest its decision whether to regulate on "reasoning divorced from the statutory text." *Id.* at 532. *Massachusetts* did *not* hold that GHG regulation is required by the CAA: The Court expressly declined to address "whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 534-35. Instead, the Court held that "EPA must ground its reasons for action *or inaction* in the statute." *Id.* at 535 (emphasis added); *id.* at 533 (EPA's "reasons for action or inaction must conform to the authorizing statute"); *id.* (EPA must "exercise discretion within defined statutory limits").

Massachusetts held, of course, that GHGs are "air pollutants" within the scope of CAA § 302(g). *Id.* at 528-29. But, as Section 202(a) makes clear, that is merely a necessary, not a sufficient, pre-condition for regulation. Were it otherwise, *Massachusetts* would have ordered outright reversal of EPA's decision instead of remanding to EPA. Indeed, *Massachusetts* expressly left open the possibility that EPA would not promulgate motor vehicle standards for reasons "ground[ed] … in the statute." *Id.* at 535. And it specifically left open the possibility that EPA could

determine that scientific uncertainties preclude reasoned decision-making on that issue. *Id.* at 534-35.

The limited nature of the Court's holding follows from the narrow relief the *Massachusetts* petitioners sought. In particular, they sought only a remand that would ensure that "the question whether to regulate these pollutants is evaluated according to the legal standard set forth in the Clean Air Act." Petitioners' Br., *Massachusetts v. EPA*, No. 05-1120 at 3, *available at* 2006 WL 2563378. "A judgment in favor of petitioners," they explained, "will not mandate regulation of air pollutants associated with climate change, nor will it dictate a particular answer to the question whether such pollutants are endangering public health or welfare." *Id.* Indeed, the petitioners took pains to emphasize that a remand for consideration under the appropriate standard was the only relief they sought. *Id.* ("that is all").

The LDVR is invalid because it relies on a profoundly mistaken view of EPA's authority under the statute. EPA wrongly believes it had no choice but to promulgate an emission-limiting rule that does not specifically address or meaningfully mitigate the endangerment identified in its risk assessment and that does not take into consideration (indeed, deliberately ignores) the stationary source regulatory consequences EPA concludes flow from promulgating the LDVR. This alone means that EPA's action cannot be sustained. *See Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985) ("agency decision cannot be sustained … where it is based not on the agency's own judgment but on an erroneous view of the law"). In addition, for reasons

explained below, the conclusion that EPA's legal premise for its regulatory action is fatally flawed is reinforced by EPA's departure in other respects from statutory requirements and its failure to conduct reasoned decision-making.

II. EPA FAILED TO JUSTIFY ITS CONCLUSION THAT THE LDVR TRIGGERS STATIONARY SOURCE REGULATION AND ERRED IN FAILING TO CONSIDER THE LDVR'S ASSERTED STATIONARY SOURCE IMPACTS.

Although EPA views its LDVR as an automatic trigger for PSD and Title V requirements for stationary sources, it acknowledges that triggering those requirements produces profound and absurd consequences for stationary source owners and states. EPA nonetheless refused to consider the asserted stationary source impacts of its LDVR and to adapt its regulatory action accordingly. Moreover, EPA failed to interpret the relevant statutes in light of the CAA's localized PSD permitting requirements, even though that failure produced the absurd results EPA identified.

A. EPA Unlawfully Failed To Analyze The Consequences Of Its Chosen Action.

EPA has been unequivocal that, in its view, the LDVR triggers stationary source permitting requirements that would result in "absurd" consequences by imposing enormous costs and burdens on the private and public sectors. *See* 74 Fed. Reg. at 55,294. According to EPA, "the January 2, 2011 trigger date for GHG PSD applicability will subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold." 75 Fed. Reg. at 31,554. As EPA

acknowledged, "[m]ost industry stakeholders who commented on the ANPR[M] believe that triggering Title V and PSD [requirements] … would be disastrous and that a regulatory gridlock would ensue." 74 Fed. Reg. at 55,303. A study that "most of the industry" believed "underestimated the impacts" documented that "regulating GHGs under the CAA would cause 1,000,000 commercial buildings, nearly 200,000 manufacturing operations, and about 20,000 large farms to become CAA-regulated stationary sources." *Id.* As EPA acknowledged, the new requirements would increase the volume of permit applications by "orders of magnitude" and would "immediately and completely overwhelm the [state] permitting authorities." *Id.* at 55,295.

In considering the LDVR, EPA had available options that would have avoided or at least deferred the "absurd" stationary source burdens. EPA nonetheless deemed the burdens imposed on stationary sources irrelevant in its LDVR rulemaking. EPA's approach violates the statutory requirements and does not satisfy the basic requirements of reasoned decision-making.

1. EPA Failed To Address The "Absurd Consequences" For Stationary Source Regulation.

EPA concluded that, under its reading of the statute, regulating motor vehicle GHG emissions under CAA § 202(a) *necessarily* results in subjecting stationary sources of GHG emissions to regulation under the PSD and Title V provisions — and that, in turn, such regulation contradicts congressional intent by producing "absurd consequences." 74 Fed. Reg. at 55,294-300. In its Section 202(a) rulemaking action,

EPA should have taken into account the "absurd consequences" it believed would stem from regulating GHG emissions under the PSD and Title V programs. EPA indisputably failed to do so. EPA's statement of basis and purpose for the LDVR, and the record supporting the rule, are devoid of any discussion of the absurd consequences that (in EPA's view) automatically flow from acting under the Title II motor vehicle provisions to subject GHG emissions to regulation.

Had EPA taken into account the absurd consequences it identified, it would have been forced, as a matter of statutory construction, to exclude CO_2 from the set of GHGs regulated by the LDVR, to decline to establish motor vehicle GHG rules under CAA § 202(a), or otherwise to interpret the statute so as not to automatically trigger stationary source regulation. EPA instead took the position that the absurd consequences of stationary source regulation need not be addressed in its LDVR because they "were not contained in the proposed rule, but instead flow from the operation of other provisions of the CAA." RTC 5-454 n.63 (JA __). Even accepting EPA's premise, that position lacks any basis in law or logic. Nearly every agency action has consequences that result from the application of statutory provisions; if agencies could avoid consideration of an action's consequences on the grounds that those consequences result from operation of the statute in conjunction with the agency action, the requirement for reasoned agency decision-making would be a nullity. Indeed, the premise of EPA's Tailoring Rule is that, given the "absurd" consequences of stationary source GHG regulation, "Congress did not intend for

[EPA] to follow [a] literal reading" of the Act. 75 Fed. Reg. at 31,541. According to EPA, the "most important reason" justifying its departure from the express statutory text is the practical consequence of regulating stationary sources. *Id.* at 31,563. But that is precisely the sort of "policy concern[]" that should have "informed" EPA's action in deciding whether (and, if so, when) to promulgate the LDVR. *See Massachusetts*, 549 U.S. at 534-35 (expressly declining to decide, and leaving EPA to address, "whether policy concerns can inform EPA's actions in the event that it makes … [an endangerment] finding" for motor vehicle GHG emissions). Indeed, it is a "policy concern" that provides EPA with a compelling reason –- one that is precisely "ground[ed] ... in the statute," *id.* at 535 –- *not* to regulate motor vehicle GHG emissions.

The Department of Transportation ("DOT"), through NHTSA, also failed to explain its about-face in acceding to CAA joint regulation in tandem with DOT-led EISA regulation. At the ANPRM stage, DOT observed that "using the [CAA] as a means for regulating [GHG] emissions presents *insurmountable* obstacles," given the localized-pollutant design of stationary source CAA programs. 73 Fed. Reg. at 44,362 (JA __) (emphasis added). Nowhere in the joint proposed or final LDVR and EISA rules or in NHTSA's regulatory impact analysis did DOT explain why it was changing course. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (agencies may not change positions *sub silentio*). Like EPA, DOT failed to address the strong

policy concerns "ground[ed] … in the statute" for *not* having EPA regulate motor vehicle GHG emissions under the CAA.

2. EPA Failed To Consider The Burdens Resulting From Its Interpretation Of The LDVR.

Even though the LDVR and the stationary source regulations EPA believes were triggered constitute one of the most expensive and burdensome sets of administrative regulations ever promulgated by an environmental agency, EPA refused to consider the costs and other burdens of these regulations in its LDVR rulemaking. According to EPA, it need not consider the LDVR's effects on stationary source requirements because those effects were purportedly only "indirect" and the "analysis of such impacts would not aid EPA in determining what GHG standards to adopt." RTC 5-456 (JA __). EPA is wrong. It should have considered the stationary source impacts to determine whether the LDVR added enough to NHTSA's fuel-economy regulations to justify the burdens it imposes on stationary sources. EPA's rationale that no matter how heavy, the burdens imposed would not have influenced its decision to promulgate the LDVR — and, in its view, pull the GHG permitting trigger — is arbitrary and capricious. EPA was obligated at least to examine the question.

Moreover, EPA instructed commenters to "direct any comments relating to potential adverse economic impacts on small entities from PSD requirements for GHG emissions to the docket for the PSD tailoring rule." 74 Fed. Reg. 49,454,

49,629 (Sept. 28, 2009) (JA __). The LDVR thus stated that EPA's Tailoring Rule would address stationary source impacts. 75 Fed. Reg. at 25,401-02 (JA __). But, then, in its Tailoring Rule, EPA *refused* to address those impacts on grounds that the Tailoring Rule provided only relief, and did not impose costs, because any costs were imposed by the LDVR. 75 Fed. Reg. at 31,597 (permitting requirements "are already mandated by the Act and by existing rules and are not imposed as a result of the Tailoring Rule"); *see also id.* at 31,554 (stating that its LDVR "will trigger the applicability of PSD for GHG sources").

This attempted "Catch-22" — evading comments and refusing to address the core issue of stationary source regulation in any of EPA's related rulemakings –- is plainly improper. *See Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293-94 (D.C. Cir. 2000) (agency may not "use shell games to elude review"). More fundamentally, EPA's failure to consider the stationary source impacts violates Section 202 and is inconsistent with its statutory obligation to respond to "significant comments." CAA § 307(d)(3), (5), (6); *see id.* § 307(d)(1)(J), (K) (applying CAA § 307(d) requirements to EPA's PSD and Section 202 rulemakings). Unlike some other sections of the CAA, nothing in Section 202 prohibits EPA from taking costs into account. *See Michigan v. EPA*, 213 F.3d 663, 678-79 (D.C. Cir. 2000) (showing of "clear congressional intent" in the form of the "text, structure, or history" of the applicable CAA section is required to bar EPA from considering costs). Section 202 even mandates consideration of certain costs and, although it does not go so far as to

require an analysis of the "social costs" of the rule, *see Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979), Congress intended that EPA consider at least industry compliance costs as a critical factor. Considering stationary source impact is thus plainly consistent with Section 202.

EPA's failure to consider the burdens imposed on stationary sources is flatly contrary to multiple mandates from Congress and the President:

- ***CAA Section 317***, which expressly applies to Section 202 rulemaking, *see* CAA § 317(a)(5), requires EPA to perform an economic impact assessment, which must contain an analysis of a proposed rule's compliance costs, inflationary or recessionary effects, competitive effects, effect on consumers, and impact on energy use.
- ***The Regulatory Flexibility Act*** requires EPA to prepare an analysis that describes the effects of a proposed rule on small businesses, or certify that there are no such effects. 5 U.S.C. §§ 603(a), 605(b).
- ***The Unfunded Mandates Reform Act*** requires EPA to assess its rules' impact on state, local, and tribal governments and the private sector, and prepare a written statement, including a cost-benefit analysis, for proposed rules with "federal mandates" that

may result in expenditures of $100 million or more in any single year. 2 U.S.C. § 1532(a).

- ***The Paperwork Reduction Act*** requires EPA to seek approval from the Office of Management and Budget before creating a rule that will impose significant information-collection obligations. 44 U.S.C. § 3507; *see also Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 28-29 (D.C. Cir. 1998).
- ***Executive Order 12898*** requires an agency to identify and address disproportionate effects of its actions on minority and low-income populations in the United States. 59 Fed. Reg. 7,629 (Feb. 11, 1994)
- ***Executive Order 13211*** requires an agency to conduct an analysis of its rule's impact on energy supply, distribution, and use. 66 Fed. Reg. 28,355 (May 18, 2001).

In defiance of these requirements, EPA refused to estimate or even consider the costs of the LDVR for stationary sources. EPA did not give meaningful consideration to less costly regulatory alternatives that could have achieved the statutory objectives. 2 U.S.C. § 1535. EPA never submitted a request to the Office of Management and Budget for approval of the massive stationary source information collection requirements compelled by its promulgation of the LDVR in conjunction

with its statutory interpretation. 75 Fed. Reg. at 31,603. Its summary certification that the LDVR will "not have a significant economic impact on a substantial number of small entities," 75 Fed. Reg. at 25,541 (JA __), is contradicted by EPA's own repeated statements that the LDVR will "trigger the applicability of PSD for GHG sources at the 100/250 tpy [tons per year] threshold levels as of January 2, 2011." 75 Fed. Reg. at 31,554. Indeed, as the Small Business Administration noted, "whether viewed separately or together, EPA's RFA certifications for the three GHG rule proposals lack a factual basis and are improper" because the "GHG rules are likely to have a significant economic impact on a large number of small entities." Comments of the Small Business Administration on EPA's Tailoring Rule (Dec. 23, 2009), Dkt. EPA-HQ-OAR-2009-0517-4867.1, *available at* http://www.archive.sba.gov/advo/laws/comments/epa09_1223.html. And, although EPA's GHG requirements will place disproportionate burdens on low-income populations because of the regressive impact of increasing energy costs, *see* 73 Fed. Reg. at 44,410 n.58 (JA __), EPA failed to perform even a cursory analysis of these burdens or the rule's impact on energy supply, distribution, and use. 75 Fed. Reg. at 31,603, 31,605.

When an agency fails to consider factors identified as relevant by Congress and the President, as EPA has failed to do here, it has not "examined the relevant data," or examined each "important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) ("the reviewing court will consider the contents of the

preliminary or final regulatory flexibility analysis, along with the rest of the record, in assessing not only the agency's compliance with the Regulatory Flexibility Act, but the validity of the rule under other provisions of law"). Indeed, the requirement of reasoned rulemaking is heightened under the CAA. *Small Refiner*, 705 F.2d at 518-19 (agency must set forth, *inter alia*, "the major legal interpretations and policy considerations underlying the proposed rule"); *see also* CAA § 307(d)(3)(C). EPA's failure to estimate or consider the costs of the LDVR for stationary sources is therefore unlawful, arbitrary, and capricious.

3. EPA Improperly Failed To Give Meaningful Consideration To The Option Of Deferring Regulation.

Section 202(a) imposes on EPA no deadline for promulgating regulations. In fact, *Massachusetts* expressly recognized that, with respect to any decisions on when and how to set automobile emissions standards, EPA has "significant latitude as to the manner, timing, [and] content" of its regulations and "coordination of its regulations with those of other agencies." 549 U.S. at 533.

In light of its discretion under the statute, EPA should have seriously considered comments objecting to EPA's approach and recommending that EPA at least defer establishing regulations under CAA § 202(a) while (1) NHTSA's new fuel economy standards reduced vehicle GHG emissions; (2) States increased their administrative resources as necessary to address PSD and Title V permit applications; and (3) EPA and States developed appropriate streamlining techniques for permits

and permit proceedings. Doing so would have obviated (or, at a minimum, deferred) any perceived need by EPA to rewrite the CAA's plain language (in its Tailoring Rule). It also would have allowed EPA to avoid taking any action that, in the Agency's view, would trigger PSD and Title V requirements for GHG emissions from stationary sources, large or small. In light of EPA's own interpretation of the statute, its discretion as to the timing of any GHG motor vehicle standards, and the vanishingly small benefits that EPA projected its regulation would produce, *see infra*, EPA's decision not to defer regulation was arbitrary and capricious.

EPA asserted that the benefits of delay would be outweighed by the LDVR's "important GHG reductions as well as benefits to the automakers and to consumers." RTC 7-68 (JA __). But, for reasons discussed below, EPA admitted the LDVR will yield no significant benefits that would not be achieved by NHTSA's statutorily mandated fuel-economy standards. And, in any event, EPA could not rationally consider the costs or benefits of its LDVR without considering the substantial burdens that, in EPA's view, promulgating the LDVR imposed on stationary sources.

B. Because Title II Rulemaking Does Not Govern Title I Regulation, EPA Should Have Made An Interpretive Inquiry Focused On Its Lack Of Statutory Authority To Promulgate Title I, Part C PSD Controls On Non–Localized Pollutants.

As noted above, EPA maintained that its decision to promulgate automobile emissions regulations under CAA Title II automatically triggers regulation of stationary source GHG emissions under the CAA's PSD program. According to

EPA, "[w]hatever the pollutant is that is regulated elsewhere" under the CAA, "it is that pollutant to which PSD ... applies," and the Agency "do[es] not have discretion to interpret the GHG 'air pollutant' differently for purposes of PSD or [T]itle V." 75 Fed. Reg. at 31,528. In EPA's view, PSD program requirements must "apply to GHGs upon the date that the ... tailpipe standards for light-duty vehicles ... take effect." 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010). It is thus EPA's position that "GHGs become subject to regulation" under the CAA on January 2, 2011, the date on which EPA deemed the LDVR requirements to take effect, and that the PSD "program requirements" also "begin to apply upon that date." 75 Fed. Reg. at 31,522.

EPA misconstrues the scope of its discretion and authority to implement the CAA's PSD provisions. EPA is wrong that regulating motor vehicle GHG emissions under CAA § 202(a) requires that GHGs become air pollutants "subject to regulation" under the PSD program. On the contrary, EPA not only has discretion to determine that the Title II LDVR does not automatically inject GHGs into the Title I PSD program, EPA also had the obligation to consider the structural fit, or lack thereof, between GHGs and the PSD program and the statutory consequences of injecting GHGs into that program.

The CAA includes a spectrum of statutory programs, each addressing different pollutants, different sources of pollution, and different pollution problems, and each using different regulatory mechanisms of different geographical focus. *See, e.g.*, CAA Title I (stationary source emissions); CAA Title II (mobile source emissions); CAA

Title IV (acid rain); CAA Title VI (stratospheric ozone protection). These statutory programs are not self-executing. Instead, rulemaking is required under each program to address, in light of the elements and contours of each program, the specific air pollutant, pollution sources, and pollution problems the program is designed to address. *See*, *e.g.*, CAA §§ 109(a), 111(b), 112(d)(1), 120(a)(1)(A), 123(c), 161, 169A(a)(4).

These differences come into stark relief when comparing the Title II provisions at issue in the LDVR with the PSD provisions of Title I, Part C. Title II addresses emissions from new motor vehicles found by EPA to constitute an endangerment to public health or welfare. *See id.* § 202(a)(1). In marked contrast, the PSD program addresses regulation of a defined class of stationary sources that emit, in amounts exceeding 100 or 250 tpy (depending on source category), air pollutants that deteriorate air quality in defined geographical regions within a State. *See id.* §§ 107, 161, 165(a). Regardless of EPA's views about the suitability of GHG emissions for regulation under Title II, GHGs are quite different from the conventional "air pollutants" that regulation under the PSD program addresses. The concern with GHG emissions, as EPA recognizes, stems not from their local effects but from their indirect, global effects –- *i.e.*, the "additional heating effect caused by the buildup of anthropogenic GHGs in the [global] atmosphere" and the associated potential effects on global climate. 73 Fed. Reg. at 44,423 (JA __). Regulation of GHG emissions is thus in no fashion driven by any health or environmental concern with local emissions

in defined geographical areas causing elevated ground-level exposures to a pollutant in the air that people breathe –- *i.e.*, the sort of emissions that result in the "deterioration" of localized "air quality" to which, as the plain language of the CAA makes clear, the PSD program is directed. CAA § 161.

Massachusetts held that the definition of "air pollutant" in CAA § 302(g) is "capacious" and that GHGs do not fall outside that definition's scope, thereby authorizing EPA to consider, under CAA § 202(a)(1), whether "to regulate the emission of such gases *from new motor vehicles*." 549 U.S. at 532 (emphasis added). But that conclusion does not speak to, much less resolve, questions concerning EPA's authority to regulate GHG emissions from stationary sources under the Title I, Part C, PSD program. In this regard, an analogue is found in CAA § 169A(g)(7), which defines "major stationary source[s]" for purposes of the CAA's visibility-protection program as "stationary sources with the potential to emit 250 tons or more of *any pollutant*" (emphasis added). Consistent with the statutory scheme, EPA's visibility regulations reasonably apply this statutory phrase and the visibility program only to those air pollutants that impair visibility. *See* 40 C.F.R. pt. 51, App. Y, § III.A.2.

So too here. EPA should have conducted, but failed to conduct, an interpretive inquiry considering the definition of "major emitting facility" in the PSD provisions. CAA § 169(1). This definitional inquiry should in turn have recognized the localized structure of the PSD program of which the definitional question forms a central part, and the statutory consequences of regulating GHGs in that program.

EPA has never interpreted "major emitting facility" literally to make stationary sources with major emissions of "any air pollutant" a "major emitting facility." Instead, EPA has limited the regulatory definition of "major emitting facilities" to include only those sources with major emissions of pollutants that are "regulated [new source review] pollutant[s]" under the PSD program. 40 C.F.R. § 51.166(b)(1)(i)(*a*), (*b*); *id.* § 52.21(b)(1)(i)*(a), (b)*.

Accordingly, EPA had a statutory obligation to inquire into the PSD program's structure. Specifically, rather than reject any analysis of structural fit or statutory consequences on the grounds that the statute mandates an automatic PSD trigger based on Title II regulation, EPA was obligated to inquire into whether the overall statutory scheme contemplates regulation of GHGs as pollutants "subject to regulation" under the PSD program. Had EPA undertaken this inquiry — as it was required to do — it would have found that PSD regulation of GHGs produces a complete regulatory mismatch. Indeed, EPA's conclusion that treating GHGs as pollutants subject to PSD regulation would produce absurd results contrary to congressional intent alone requires excluding GHGs from the PSD program as a matter of statutory construction under *Chevron* step one. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

Even if the Court disagrees, however, and decides the statute does not speak directly to this matter, it is indisputable that EPA at least enjoyed interpretive discretion that it failed to appreciate or acknowledge in the proceedings below. In

particular, EPA had interpretive discretion to adopt a construction of the PSD triggering provisions based on, and informed by, the function and regulatory contours of the PSD program. By analogy, even though the CAA specifies for purposes of visibility protection that a major stationary source is one "with the potential to emit 250 tons or more of *any pollutant*," CAA § 169A(g)(7) (emphasis added), EPA had the discretion to limit the visibility program's applicability to a small category of pollutants — those that impair visibility –- and not to every substance that falls within the Act's broad definition of air pollutant. *See* 40 C.F.R. pt. 51, App. Y, § III.A.2. Because EPA had — and exercised — discretion to limit the scope of the pollutants subject to the Title I, Part C, visibility program, it necessarily likewise had discretion to limit the scope of the pollutants subject to the Title I, Part C, PSD program under section 169(1)'s reference to "any air pollutant." EPA's refusal to acknowledge its statutory discretion, and to reasonably exercise that discretion, requires reversal. *Prill*, 755 F.2d at 947-48.

Regulation of GHGs as an "air pollutant" under Title II does not, and cannot, have automatic consequences that trigger application of the PSD program under Title I, Part C — as EPA should have recognized when it acknowledged that PSD regulation of GHG emissions would inevitably produce "absurd" consequences. EPA's contrary conclusion that it lacks any discretion to exclude GHGs from regulation under the PSD program is reversible error.

C. The LDVR Reopened EPA's Interpretation Of The PSD Permitting Triggers, But EPA Failed To Address The Legality Of That Interpretation.

The LDVR is also invalid because EPA should have recognized that, by promulgating the LDVR, it reopened its interpretation of the *situs* requirement for PSD permitting and that its interpretation is contrary to the statute.

As explained in the briefing submitted in Case No. 10-1167, the Title I, Part C, PSD provisions of the CAA require PSD permits only for major emitting facilities located "in any area to which this part applies." CAA § 165(a). Part C applies only to areas designated attainment or unclassifiable for a national ambient air quality standard ("NAAQS"); it does not apply to nonattainment areas. *See id.* § 161. EPA has for 30 years interpreted these provisions to establish a pollutant-indifferent *situs* requirement, concluding that a major source of any pollutant must obtain a PSD permit so long as it is located in an area designated attainment or unclassifiable for *any pollutant*, including pollutants the source does not emit in major amounts. *See* 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980). The error in that interpretation has become glaring in light of EPA's LDVR. Under EPA's interpretation, because of its LDVR, all sources that are "major emitting facilities" solely because of their GHG emissions must obtain PSD permits, even though there are no NAAQS for GHGs, because every area of the country is in attainment with, or unclassifiable for, at least one NAAQS. *See* 75 Fed. Reg. at 31,561.

EPA reopened its interpretation of the PSD program's *situs* requirement when it promulgated the LDVR. *See Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008). Because of the LDVR, the PSD program applies not only to a vast new quantity of sources (tens of thousands, up from only a few hundred each year), but also to whole new types of sources (commercial and residential facilities, not just large industrial facilities). And to accommodate the influx of stationary sources precipitated by its LDVR, EPA fundamentally revised its PSD program.

Had EPA properly reconsidered its pollutant-indifferent interpretation of the PSD *situs* requirement, however, it would have recognized that its interpretation is not permissible. The Act's text, structure, and purpose compel a pollutant-specific interpretation, one that requires PSD permits only if the pollutant whose emissions qualify a source as a "major emitting facility" is the pollutant for whose NAAQS the source area in question is designated attainment or unclassifiable. NAAQS do not exist for GHGs. Under the statute, then, no source that is a "major emitting facility" solely because of its GHG emissions would have to obtain a PSD permit, as no area of the country is in attainment with, or unclassifiable for, the *nonexistent* NAAQS for GHGs. Accordingly, no new PSD permits would be required as a result of the LDVR.

III. EPA FAILED TO DEMONSTRATE THAT ITS RULE WILL MEANINGFULLY AVERT ANY CLAIMED ENDANGERMENT OF PUBLIC HEALTH OF WELFARE.

EPA concedes that its LDVR essentially duplicates NHTSA's fuel-economy standards and that the only difference between its regulatory authority and NHTSA's is EPA's ability to consider GHGs emitted from automobiles because of operation of their air conditioning systems. 75 Fed. Reg. at 25,327 (JA __). According to EPA and NHTSA's own projections in the record, the LDVR will have essentially no effect on any public health or welfare endangerment beyond the concededly negligible effects already produced by the NHTSA standards. The LDVR is thus contrary to the CAA's requirements, as explained in *Ethyl*.

A. The LDVR Does Not Meaningfully Avert Any Predicted Danger Not Already Averted By NHTSA's Fuel Standards.

EPA cannot justify the LDVR because EPA failed to explain how the LDVR significantly and meaningfully averts any predicted danger. The CAA's legislative history indicates the purpose of the CAA's endangerment criterion is "[t]o emphasize the preventive or precautionary nature of the [A]ct, *i.e.*, to assure that regulatory action can effectively prevent harm before it occurs." H.R. Rep. No. 95-294, at 49 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1127. The fundamental purpose of CAA provisions, like section 202(a)(1), that incorporate the endangerment criterion is to regulate emissions when such regulation is determined by the agency to be effective in meaningfully addressing the cause of endangerment –- not "regulation for regulation's

sake." As EPA has acknowledged, the *Ethyl* decision provides the conceptual foundation for the 1977 amendments to the CAA endangerment provisions, including section 202(a)(1), that succeeded, and codified, that decision. 74 Fed. Reg. 18,886, 18,891-92 (Apr. 24, 2009). *Ethyl* is thus particularly relevant to a proper, statutorily grounded conception of the prerequisites to regulations issued by EPA under section 202(a)(1).

In *Ethyl*, which affirmed EPA's regulation of lead in fuels under CAA Title II, EPA carefully justified its decision to regulate fuels' lead content at specified levels with evidence showing that the levels it selected would prevent at least a considerable part of the public health danger posed by exposure to lead. EPA established that "lead automobile emissions were, far and away, the most readily reduced significant source of environmental lead," and that regulating gasoline lead at the levels it proposed would avert much of the underlying danger. *See* 541 F.2d at 31 & n.62, 55-65. In *Ethyl*, the Court determined that an affirmative endangerment finding was warranted, at least in part, because "the lead exposure problem can fruitfully be attacked through control of lead additives" in vehicle fuels. *Id.* at 31 n.62.

Ethyl makes clear that EPA need not remove entirely a particular health or welfare danger. EPA must, however, be able to conclude that the resulting regulation is capable of meaningfully and substantially reducing the extent of that danger. *See id.*; *see also Small Refiner*, 705 F.2d at 525 (EPA explained its decision to regulate lead emissions at specified levels). Accordingly, before adopting any LDVR, EPA must be

able to show that any such EPA-established automobile-emissions standards would meaningfully mitigate the alleged endangerment, a burden EPA failed to satisfy here (even apart from its disregard of any mitigation of climate-change effects resulting from the NHTSA standards).

The LDVR does not add anything meaningful to NHTSA's standards. According to both EPA's and NHTSA's projections in the record, the (imperceptible) benefits from the LDVR will be fully achieved by NHTSA's rules alone. The LDVR reports projected modifications in global climate change effects that will result by the year 2100 from the NHTSA standards and from the EPA standards in terms of decreases in atmospheric CO_2 concentration, reduction in global mean surface temperature, and reduction in global mean sea level rise. According to NHTSA, its standards will result in the following by 2100:

- A 2.7 parts per million ("ppm") decrease in atmospheric CO_2 concentration;
- A 0.011 degree Celsius reduction in global mean surface temperature; and
- A 0.09 centimeter reduction in global mean sea level rise.

75 Fed. Reg. at 25,637, Table IV.G.2.-3 (JA __). EPA's estimates of projected impacts of its LDVR over the same nine-decade period are essentially identical to NHTSA's estimates of the impacts of NHTSA's standards:

- A 2.7-3.1 ppm decrease in atmospheric CO_2 concentration;

- A 0.006 to 0.015 degree Celsius reduction in global mean surface temperature; and
- A 0.06 to 0.14 centimeter reduction in global mean sea level rise.

Id. at 25,495, Table III.F.3-1 (JA __).

These two sets of estimates are, for all practical purposes, the same. Because NHTSA had no option after EISA's enactment but to issue new fuel-economy standards, *see*, *e.g.*, EISA § 102, 49 U.S.C. § 32902, EPA had to take that into account and show how its emission standards *are necessary* to achieve any projected health or welfare benefits. In other words, EPA should have treated NHTSA's regulation as establishing a baseline for automobile GHG emissions when it was considering whether to issue the Endangerment Rule and its LDVR. Indeed, this was DOT's original position, now abandoned without explanation. See 73 Fed. Reg. at 44,363 (JA __). Moreover, to the extent (if any) the LDVR will achieve benefits over and above benefits from NHTSA's standards, the LDVR is still not adequately reasoned because EPA failed to identify the LDVR's specific marginal benefits. In particular, EPA failed to explain why any such marginal benefit was worth the "absurd results" EPA asserts the LDVR triggers for stationary sources.

B. The LDVR Is Unsupportable On The Basis Of EPA's Rulemaking Record Because, According To EPA, Any Benefits Of That Rule In Addressing Global Climate Change Effects Are Vanishingly Small.

Even if EPA's emission standards did not duplicate NHTSA's fuel economy standards, the LDVR still could not satisfy the CAA and *Ethyl* because, according to EPA's projections, the LDVR results in benefits so small as to be imperceptible.

EPA acknowledges that "the magnitude of the avoided climate change projected here is small." 75 Fed. Reg. at 25,496 (JA __). EPA characterizes the projected changes in temperature and sea level rise resulting from the LDVR as "small relative to the IPCC's 2100 'best estimates' for global mean temperature increases (1.8-4.0 °C) and sea level rise (0.20-0.59 m [20 to 59 centimeters]) for all global GHG emissions sources for a range of emissions scenarios." *Id.* at 25,495 (JA __). Indeed, when one converts EPA's projections to percentages of the IPCC's 2100 estimates, the LDVR will avoid as little as 0.15% of the IPCC-projected temperature rise by 2100 and as little as 0.10% of the IPCC-projected sea-level rise by that year. *See* Endangerment Joint Br. 7, 9-10. Such minuscule changes –- projected to occur nine decades from now –- cannot be said to mitigate meaningfully the EPA-posited endangerment to public health and welfare, especially given that those same reductions are projected to result from NHTSA's rules.

The projected estimates with regard to atmospheric CO_2 concentration are similarly negligible. EPA estimates the atmospheric concentration of CO_2 will range

between 535 and 983 ppm in 2100. *See* Endangerment TSD 195. Even assuming the LDVR achieves the maximum EPA-estimated reduction of 3.1 ppm by 2100, *see* 75 Fed. Reg. at 25,496, Table III.F.3-1 (JA __), the projected concentration of atmospheric CO_2 in that year would remain virtually unchanged –- ranging from between 531.9 and 979.9 ppm.

In short, according to EPA's own estimates, the projected changes in global atmospheric CO_2 concentration, temperature, and sea level that EPA attributes to the LDVR are vanishingly small, to the point of being all but unquantifiable, especially on any scale perceptible to humans. Indeed, by EPA's admission, such projected changes are simply "*too small to address quantitatively in terms of their impacts on resources*." 74 Fed. Reg. at 49,744 (emphasis added). Where, as here, the agency-projected benefits of regulation are negligible, the CAA is not properly implemented by imposing massive regulatory burdens. *Cf. Connecticut v. EPA*, 696 F.2d 147, 163-65 (2d Cir. 1982) (where air-quality impact of state's revision to a NAAQS implementation plan is "minimal," EPA "may approve that revision" even if the affected state is not in compliance with NAAQS); *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1092-93 (6th Cir. 1984) (insignificant contributions to NAAQS violations not covered by CAA).

Indeed, the contrast between the situation posed by the LDVR and that addressed by this Court in *Ethyl* –- where the regulation at issue was found to be capable of addressing to a very considerable extent the endangerment associated with the targeted pollution –- could not be more sharply drawn. EPA cannot justify the

LDVR given the exceedingly small magnitude of the effects that it projects, particularly in light of the fact that all of those small effects will be achieved by the unchallenged NHTSA standards, promulgation of which –- unlike EPA's standards under EPA's view of the CAA –- created no "absurd results" at odds with Congress's intent.

CONCLUSION

The Court should vacate or vacate and remand the LDVR in whole or in part.

Respectfully submitted,

/s/ Eric Groten

Eric Groten
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746-7568
(512) 542-8709

Counsel for Coalition for Responsible Regulation, Inc., et al.

John P. Elwood
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW
Washington, D.C. 20037
(202) 639-6500

Counsel for Coalition for Responsible Regulation, Inc., et al.

Patrick R. Day, P.C.
HOLLAND & HART LLP
2515 Warren Ave., Suite 450
Cheyenne, WY 82001
(307) 778-4209

Counsel for Coalition for Responsible Regulation, Inc., et al.

Paul D. Phillips
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202-3979
(303) 295-8131

Counsel for Coalition for Responsible Regulation, Inc., et al.

John A. Bryson
HOLLAND & HART, LLP
975 F Street NW
Washington, D.C. 20004
(202) 393-6500

Counsel for Coalition for Responsible Regulation, Inc., et al.

James A. Holtkamp
HOLLAND & HART LLP
60 E. South Temple, Suite 2000
Salt Lake City, UT 84111
(801) 799-5800

Counsel for Coalition for Responsible Regulation, Inc., et al.

Shannon L. Goessling
SOUTHEASTERN LEGAL
FOUNDATION, INC.
2255 Sewell Mill Road, Suite 320
Marietta, GA 30062
(770) 977-2131

Counsel for Southeastern Legal Foundation, Inc., et al., and Intervenors Langdale Farms, LLC, et al..

/s/ Edward A. Kazmarek
Edward A. Kazmarek
KAZMAREK GEIGER
& LASETER LLP
One Securities Center
3490 Piedmont Road NE, Suite 350
Atlanta, GA 30305
(404) 812-0840

Counsel for Southeastern Legal Foundation, Inc., et al., and Intervenors Langdale Farms, LLC, et al..

Harry W. MacDougald
CALDWELL & WATSON LLP
Two Ravinia Drive, Suite 1600
Atlanta, GA 30346
(404) 843-1956

Counsel for Southeastern Legal Foundation, Inc., et al., and Intervenors Langdale Farms, LLC, et al..

/s/ Chet M. Thompson
Chet M. Thompson
CROWELL & MORING LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
(202) 624-2500

Counsel for American Iron and Steel Institute and Gerdau Ameristeel US Inc.

/s/ Sam Kazman
Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE
INSTITUTE
1899 L Street NW, 12th Floor
Washington, D.C. 20036
(202) 331-2265

Counsel for Competitive Enterprise Institute, FreedomWorks, and Science and Environmental Policy Project

/s/ Neal J. Cabral
Neal J. Cabral
McGUIREWOODS LLP
Washington Square
1050 Connecticut Ave. NW, Suite 1200
Washington, D.C. 20036
(202) 857-1700

Counsel for Ohio Coal Association

Gordon R. Alphonso
McGUIREWOODS LLP
The Proscenium
1170 Peachtree St. NW, Suite 2100
Atlanta, GA 30309
(404) 443-5500

Counsel for Ohio Coal Association

/s/ Richard P. Hutchison
Richard P. Hutchison
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 1210
Kansas City, MO 64111
(816) 931-5559

Counsel for Mark Levin and Landmark Legal Foundation

John J. McMackin, Jr.
WILLIAMS & JENSEN, PLLC
701 8th Street, NW, Suite 500
Washington, D.C. 20001
(202) 659-8201

Counsel for Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

Scott C. Oostdyk
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-1000

Counsel for Ohio Coal Association

/s/ Ronald J. Tenpas
Ronald J. Tenpas
Michael W. Steinberg
Levi McAllister
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 739-5145

Counsel for Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

/s/ F. William Brownell
F. William Brownell
Norman W. Fichthorn
Henry V. Nickel
Allison D. Wood
HUNTON & WILLIAMS LLP
1900 K Street NW
Washington, D.C. 20006
(202) 955-1500

Counsel for Utility Air Regulatory Group

Robin S. Conrad
Sheldon Gilbert
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street NW
Washington, D.C. 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

Katie Sweeney
NATIONAL MINING ASSOCIATION
101 Constitution Ave. NW
Suite 500 East
Washington, D.C. 20001

Counsel for National Mining Association

Alexander C. Schoch
Mary L. Frontczak
PEABODY ENERGY COMPANY
701 Market Street, 6th Floor
St. Louis, MO 63101

Counsel for Peabody Energy Company

/s/ Ashley C. Parrish
Ashley C. Parrish
Cynthia A.M. Stroman
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 737-0500

Counsel for Portland Cement Association and Chamber of Commerce of the United States of America

/s/ Peter Glaser
Peter Glaser
Mark E. Nagle
TROUTMAN SANDERS LLP
401 9th Street NW, Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for National Mining Association

/s/ Peter Glaser
Peter Glaser
Mark E. Nagle
TROUTMAN SANDERS LLP
401 9th Street NW, Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for Peabody Energy Company

Ellen Steen
Danielle Quist
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave. SW, Suite 1000
Washington, D.C. 22024

Counsel for American Farm Bureau Federation

Timothy K. Webster
Roger R. Martella
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, D.C. 20005
(202) 736-8000

Counsel for the National Association of Manufacturers, et al.

Matthew G. Paulson
BAKER BOTTS LLP
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500

Counsel for the National Association of Manufacturers, et al.

/s/ Peter Glaser
Peter Glaser
Mark E. Nagle
TROUTMAN SANDERS LLP
401 9th Street NW, Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for American Farm Bureau Federation

/s/ Charles H. Knauss
Charles H. Knauss
Shannon S. Broome
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, D.C. 20006
(202) 373-6000

Counsel for the National Association of Manufacturers, et al.

Of Counsel:

Quentin Riegel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave. NW, Suite 600
Washington, D.C. 20004-1790
(202) 637-3000

Counsel for the
National Association of Manufacturers

Elizabeth Gaudio
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
1201 F Street NW, Suite 200
Washington, D.C. 20004
(202) 406-4443

Counsel for the
National Federation of Independent Business

Thomas J. Ward
Amy C. Chai
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15th Street NW
Washington, D.C. 20005
(202) 266-8200

Counsel for
National Association of Home Builders

Harry Moy Ng
Michele Marie Schoeppe
AMERICAN
PETROLEUM INSTITUTE
1220 L Street NW
Washington, D.C. 20005-4070
(202) 682-8251

Counsel for American Petroleum Institute

Gregory M. Scott
NATIONAL PETROCHEMICAL
AND REFINERS ASSOCIATION
1667 K Street NW, Suite 700
Washington, D.C. 20006
(202) 457-0480

Counsel for National Petrochemical
and Refiners Association

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FINAL BRIEF:

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure And Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 9,149 words as determined by the word-counting feature of Microsoft Word 2000.

/s/ Ashley C. Parrish
Ashley C. Parrish

Dated: June 3, 2011

APPENDICES

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 3rd day of June 2011, served a copy of the foregoing documents electronically through the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ashley C. Parrish
Ashley C. Parrish