ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1114 (and consolidated cases)

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

State of California, et al.,

Petitioners,

v.

United States Environmental Protection Agency, et al.,

Respondents,

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

Intervenors.

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

REPLY BRIEF FOR STATE PETITIONERS

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

Additional parties and counsel listed on signature pages

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GLOSSARY OF ABBREVIATIONS

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

INTRODUCTION

Section 12(h) of the regulation establishing greenhouse gas emission standards for model year 2017-2025 vehicles required EPA to complete a Mid-Term Evaluation of the model year 2022-2025 standards by April 1, 2018. Section 12(h) imposed important procedural and substantive requirements to ensure that any determination that the standards were not appropriate and should be revised would be based on a robust, transparent, and well-grounded technical analysis. As Petitioners' opening briefs showed, EPA breached these requirements when it issued its Revised Determination. EPA ignored the Technical Assessment Report mandated by Section 12(h), instead basing its about-face on a smattering of information that had never been publicly vetted. Moreover, EPA impermissibly deferred the detailed assessment required by Section 12(h) and promised to make up that work later. The resulting determination violates Section 12(h) and is arbitrary and capricious.

EPA's response seeks to sidestep Section 12(h)'s requirements by recasting the Revised Determination as an unreviewable "initial step" in a future rulemaking. EPA Br. 2. EPA cannot shrug off these requirements so easily. The Revised Determination was not merely a decision to initiate a new rulemaking. It consummated EPA's mandated Mid-Term Evaluation

process, which EPA itself characterizes as an informal adjudication, and unequivocally concluded that the model year 2022-2025 standards, a core part of the National Program, were "not appropriate and, therefore, should be revised as appropriate." 83 Fed. Reg. 16,077, 16,087 (Apr. 13, 2018). This action, by itself, created direct legal consequences for the States. EPA also reversed position and withdrew its 2017 Determination affirming those standards, which EPA concedes was a final action. The Revised Determination therefore is a final action subject to judicial review, and Petitioners' challenge readily overcomes EPA's other threshold objections.

EPA's attempts to downplay the significance of its action and the entire Mid-Term Evaluation process cannot cure the glaring defects in the Revised Determination. The Court should vacate the Revised Determination and reinstate the 2017 Determination.

ARGUMENT

I. PETITIONERS' CHALLENGE IS JUSTICIABLE

A. The Mid-Term Evaluation Determination Was an Important and Consequential Action

Throughout its brief, EPA repeatedly attempts to recast the Revised Determination as an inconsequential, non-final action insulated from judicial review. *See, e.g.*, EPA Br. 22, 30-31. EPA's characterization of the Revised Determination is irreconcilable with the text of Section 12(h) and the Mid-

Term Evaluation's history and intended purpose, and the Court should reject EPA's attempt to rewrite this history and read Section 12(h)'s requirements out of the Code of Federal Regulations.

In negotiating the 2012 extension of the National Program, industry stakeholders demanded that EPA establish the Mid-Term Evaluation as a potential off-ramp in case technology did not progress as anticipated. Indeed, "[m]any industry commenters *expressly predicated* their support of the 2017-2025 National Program on the existence of this evaluation." 77 Fed. Reg. 62,624, 62,636 (Oct. 15, 2012) (emphasis added). To allay competing stakeholder concerns that the process would be just "an opportunity to weaken standards," *id.*, EPA designed the Mid-Term Evaluation to be far more than a cursory, check-the-box exercise. EPA mandated that its determination be based on a transparent, technically sound, and evidence-based analysis, and a detailed assessment of certain enumerated factors, and it codified these requirements in Section 12(h). EPA cannot use its mischaracterizations of the Revised Determination and the Mid-Term Evaluation process to evade judicial scrutiny of its violations of those requirements.

That EPA has independent authority under Section 202(a) of the Clean Air Act to reconsider its standards does not, as EPA contends, render

the Mid-Term Evaluation a nullity. *See* EPA Br. 30-31. To the contrary, a proper Section 12(h) determination grounded in the Technical Assessment Report and justified by EPA's detailed assessment would have established a starting point for any future action on the standards. Particularly given the serious reliance interests in the existing federal standards, and the lead-time and planning needs of industry and regulators, any revision of those standards would have to contend with a valid Section 12(h) determination and its underlying technical record. *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016). EPA's and Intervenors' own conduct demonstrates this. EPA did not immediately launch a Section 202(a) rulemaking when it decided in 2017 to reconsider the existing standards. Instead, it first reconsidered, and then *withdrew*, the 2017 Determination and replaced it with the Revised Determination before beginning its current rulemaking. And EPA took those actions in response to Intervenors' petitions to reconsider the 2017 Determination. EPA Br. 15-16. Neither EPA nor Intervenors can now pretend that the Revised Determination is of no consequence.

B. EPA's Revised Determination Is a Final Action

1. The Revised Determination Consummated the Mid-Term Evaluation Process

As the States have shown, the Revised Determination readily meets the first condition for finality because it "'mark[s] the consummation' of the Mid-Term Evaluation." State Pet'rs Br. 30 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Indeed, the Revised Determination acknowledged this fact, stating that "[t]his notice *concludes*" the Mid-Term Evaluation. 83 Fed. Reg. at 16,087 (emphasis added). EPA does not dispute this, but asserts that the Revised Determination merely "marked the end of one stage" of EPA's ongoing deliberative process that now includes a rulemaking to revise the standards. EPA Br. 23.

The Court should reject EPA's attempt to subvert finality by seeking to walk back the importance of the Revised Determination. As explained above, EPA designed its Mid-Term Evaluation to be consequential and mandated that a decision to revise the standards not be arrived at casually. EPA described the Mid-Term Evaluation process as one of "decision making" (*see* 77 Fed. Reg. at 62,784), terming its conclusion a "determination" the Administrator "shall" make by "[n]o later than April 1, 2018." 40 C.F.R. § 86.1818-12(h). EPA codified important requirements: it had to prepare a Technical Assessment Report, put the Report out for

public comment, base its determination on the Report and the comments received, and "set forth in detail the bases for the determination." *Id.* § 86.1818-12(h)(2), (4). Such a "considered determination," *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016), based on "extensive factfinding," carries the hallmarks of finality, *U.S. Army Corps of Engs. v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1813 (2016).

That EPA is currently engaged in a rulemaking under Section 202(a) does not alter the fact that the Revised Determination—the EPA action at issue here—marked the conclusion of the Mid-Term Evaluation process. As the States explained, State Pet'rs Br. 29-30, this Court has recognized that, to be final for purposes of judicial review, an action "need not be the last administrative action contemplated by the statutory [or regulatory] scheme." *Role Models America, Inc. v. White*, 317 F.3d 327, 331 (D.C. Cir. 2003) (quotation marks and brackets omitted). Neither EPA nor Intervenors dispute this point.

Instead, they cite cases involving inapposite agency decisions *to begin* a rulemaking process, *see In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015), and *to initiate* agency adjudications, *see FTC v. Standard Oil Co.*, 449 U.S. 232 (1980); *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018). None of these cases involved the culmination of a process similar to

that required by Section 12(h). Nor did these cases involve any determination that a prior standard is not appropriate and should be revised. Consequently, they provide no support for EPA's attempt to dismiss its Revised Determination—and the entire Mid-Term Evaluation process—as only a step in a deliberative process, and one that merely determined "*something*." EPA Br. 26 (italics in original). Notably, EPA itself characterizes the Mid-Term Evaluation as an informal adjudicatory process (EPA Br. 44-45), which is wholly inconsistent with it being an inconsequential, non-final step in some larger deliberative process.

Portland Cement Association v. EPA, 665 F.3d 177 (D.C. Cir. 2011), is similarly inapposite. There, EPA *declined* to make a determination so that it could collect information. *Id.* at 193. Here, EPA made a determination that the model year 2022-2025 standards "are not appropriate." 83 Fed. Reg. at 16,077. If EPA now takes the position that it has done nothing more than decide it needs more information, it has conceded that it violated Section 12(h)'s core requirement that EPA *determine* by no later than April 1, 2018 *whether* the standards are appropriate.

Natural Resources Defense Council v. EPA, 706 F.3d 428 (D.C. Cir. 2013), is even further afield. There, this Court found no final action in EPA's interpretive "snippets … buried in the preamble" of a rule because

they were not subjected to a process "comparable" to that ordinarily used by agencies to pronounce final statutory interpretations. *Id.* at 431-32, 434. Here, by contrast, EPA claims it fully complied with the extensive process required by Section 12(h) when it issued the Revised Determination.

EPA's reliance on *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017), is also misplaced. While *Clean Air Council* recognized that a decision to reconsider a rule is not a final action, Petitioners have not challenged EPA's March 2017 decision to reconsider the 2017 Determination; rather, Petitioners challenge the *outcome* of that reconsideration and the agency's failure to follow the legally prescribed process in reaching that outcome. Moreover, the Revised Determination withdrew the 2017 Determination, which EPA does not dispute was a final action. EPA Br. 30. EPA glosses over this fact and provides no support for the proposition that where a court indisputably has jurisdiction to review an agency action (here the 2017 Determination), it lacks jurisdiction to review the withdrawal of that same action.[1]

[1] Intervenors object that the 2017 Determination was rushed and represented an "about-face" by EPA. *See* Intervenors Br. 7-11. But the 2017 Determination is not at issue here, and Intervenors' criticisms of the procedures followed in the 2017 Determination cannot justify EPA's failure to observe Section 12(h)'s requirements in making the Revised Determination. In any event, the 2017 Determination was not a reversal, but

Finally, Intervenors point to EPA's statement in the Revised Determination that the determination was not a final action. Intervenors Br. 21. It is well settled, however, that an agency cannot curtail review of its actions simply by deeming them non-final. *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942) (substance of agency's action is material, not the "particular label" it assigns the action); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (refusing to give weight to EPA's assertion that policies "do not represent final Agency action").

2. The Revised Determination Created Legal Consequences

According to EPA, because the Revised Determination does not, by itself, change the emission standards or "dictat[e] any particular rulemaking outcome," EPA Br. 28, it does not satisfy the requirement that a final action determine rights or obligations or create legal consequences.[2] That is wrong. First, the Revised Determination withdrew the 2017 Determination, an action that EPA and Intervenors agree was final. Neither EPA nor

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was entirely consistent with, and based on, the Technical Assessment Report.

[2] Yet EPA concedes that a determination that the standards remain appropriate *would be* final and reviewable even though such a determination would also leave the standards untouched. EPA Br. 29-30. Certainly, if a decision to maintain the status quo is final and reviewable, then EPA's decision to upend that status quo and rescind the 2017 Determination is also reviewable.

Intervenors attempt to explain how the withdrawal of a final action has no legal consequences or import. If indeed the Revised Determination *were* non-final, the withdrawal of the 2017 Determination could not be effective. Moreover, as explained above, if the 2017 Determination were not withdrawn, EPA would have a fulsome legal obligation to justify any departure from that final action, and the underlying technical analysis, when taking future actions concerning the standards. *See Encino Motorcars*, 136 S.Ct. at 2126.

In addition, EPA's determination that the federal standards "are not appropriate" and "should be revised," 83 Fed. Reg. at 16,077, imposed direct legal consequences on State Petitioners. As the States showed, to comply with Section 177's two-year lead-time requirement, States wishing to ensure they could apply California's comparably robust standards on model year 2022 vehicles had to immediately commence steps to adopt those standards. State Pet'rs Br. 31-32.

Once again, EPA's and Intervenors' authorities are inapposite. The Revised Determination, signed by the EPA Administrator and concluding (per EPA) an informal adjudicatory process mandated by Section 12(h), is manifestly unlike the nonbinding staff letter at issue in *Soundboard Association v. FTC*, 888 F.3d 1261 (D.C. Cir. 2018), the "workaday advice

letter" restating longstanding policy "for the umteenth time" in *Independent Equipment Dealers Association v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004), and the letter from officials at the Consumer Product Safety Commission stating their intent *to initiate* an adjudication, *Reliable Automatic Sprinkler Company, Inc. v. CPSC*, 324 F.3d 726, 731-32 (D.C. Cir. 2003). None of those letters withdrew and replaced a previous final action, concluded an agency process, or committed the agency to a regulatory path with legal consequences for the affected parties.

In sum, the Revised Determination "is final agency action, reflecting a settled agency position which has legal consequences" for Petitioners. *Appalachian Power*, 208 F.3d at 1023.

C. Petitioners Have Standing

EPA's standing arguments are based on the same mischaracterization as its finality arguments: that the Revised Determination is inconsequential. As discussed above, that characterization is at odds with Section 12(h) and the importance of the Mid-Term Evaluation.

EPA disputes that California has a special interest in the National Program, arguing that Section 12(h) does not "codify" any commitment made to CARB concerning its special role. EPA Br. 35-36. However, the States showed that EPA made an explicit and public commitment in its

rulemaking establishing the Mid-Term Evaluation that "EPA, NHTSA *and CARB* will jointly prepare a draft Technical Assessment Report (TAR) to inform EPA's determination on the appropriateness of the [greenhouse gas] standards …." 77 Fed. Reg. at 62,784 (emphasis added); *see also* State Pet'rs Br. 11-12, 25-26. Section 12(h) required EPA's determination to be based, among other things, on that "draft Technical Assessment Report addressing issues relevant to the standard for the 2022 through 2025 model years." 40 C.F.R. § 86.1818-12(h)(2). California agreed to participate in the extended National Program and devoted thousands of hours over nearly four years to the Report in light of this *codified* commitment by EPA. State Pet'rs Br. 25-26. By tossing aside the Report, and instead relying on an entirely different body of previously unidentified and unexamined information, the Revised Determination injured California in ways fully redressable by a favorable decision here.

EPA's disregard for the Report also caused the State Petitioners' informational and procedural injuries. State Pet'rs Br. 26-27. Although EPA denies that Petitioners suffered such harms, EPA Br. 36-38, it offers no explanation why its failure to satisfy the requirements of Section 12(h) does not create a cognizable injury. This omission is especially notable given stakeholders' concerns during the Section 12(h) rulemaking "that the mid-

term evaluation might be used as an opportunity to weaken standards," 77 Fed. Reg. at 62,636—concerns which EPA assuaged by including requirements in Section 12(h) to ensure that its determination would be based upon a body of publicly vetted information. *See* Ctr. for Biological Diversity, et al., Reply Br. 2-4.

Intervenors concede that the District of Columbia's injury "may suffice to satisfy Article III," Intervenors Br. 31, but EPA denies this. According to EPA, the actions that the District has taken to ensure that it may enforce California's standards in response to the Revised Determination are "self-inflicted" injuries. EPA Br. 36 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)). This argument implicitly assumes that the District's need to adopt California's standard was merely "hypothetical" or "manufacture[d]." *Clapper*, 568 U.S. at 402, 409. That is incorrect: EPA decided in the Revised Determination that the model year 2022-2025 standards are inappropriate and should be revised. Accordingly, to ensure that it could enforce California's comparably robust standards, the District had to take action rather than bide its time in the hope that EPA might reevaluate its decision later. Declaration of Marc A. Nielsen, ¶ 13 (State Petitioners' Addendum (ECF# 1772468) at ADD68).

EPA also argues that the District of Columbia's injury is not redressable. EPA Br. 36. But a favorable decision here would reinstate the technically supported 2017 Determination, establishing unequivocally the baseline against which any EPA decision to revise the standards must be judged. This is sufficient to demonstrate redressability. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (recognizing that "considerably eas[ing]" the path to desired result suffices to show redressability).

D. Petitioners' Claims Are Ripe

Turning to ripeness, EPA first repeats its erroneous contention that the Revised Determination is not a final action and then wrongly asserts that Petitioners' claims implicate "highly technical and fact-intensive analyses" concerning whether the model year 2022-2025 standards should be revised. EPA Br. 39, 41. In fact, Petitioners' claims concern whether EPA performed those analyses at all in the Revised Determination, whether it followed Section 12(h)'s procedural and substantive requirements, and whether its withdrawal of the 2017 Determination and issuance of an opposite determination was arbitrary and capricious. It is well settled that such questions are purely legal. *Nat'l Envtl. Dev. Assocs. Clean Air Proj. v. EPA*, 752 F.3d 999, 1008 (D.C. Cir. 2014), *limited on other grounds*, 891

F.3d 1041, 1052 (D.C. Cir. 2018); *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003). Moreover, EPA does not attempt to explain how these challenges would "benefit from a more concrete setting." *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007) (quotation marks and citation omitted).[3]

EPA also asks the Court to defer review because "Petitioners were free to bring their concerns regarding potential revision of the standards to EPA's attention during the pending rulemaking." EPA Br. 40. But this conflates the Revised Determination with EPA's separate rulemaking. Petitioners are challenging EPA's violations, committed in issuing the Revised Determination, of Section 12(h) and the Administrative Procedure Act—and EPA has made clear that it does not plan to address, much less correct, those violations in its final rule. *See* EPA Br. 39-40 (final rule will render Revised Determination "irrelevant").

Finally, the Court should reject EPA's contention that the issuance of a final rule will moot Petitioners' challenge. EPA Br. 39-40. The Revised

[3] As the State Petitioners explained (State Pet'rs Br. 33), where administrative review claims present purely legal issues, "there is no need to consider the hardship." *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C. Cir. 1995) (internal quotation marks and citation omitted); *see also General Elec. v. EPA*, 290 F.3d 377, 381 (D.C. Cir. 2002). EPA and Intervenors do not contest this point. But to the extent hardship is relevant, the States have met that showing. *See supra* Sections I.B.2 and I.C.

Determination will continue to have legal relevance after EPA concludes its current rulemaking. It will cast a cloud of regulatory uncertainty over the automakers' obligation to comply with the existing standards should the revised standards be successfully challenged. State Pet'rs Br. 30. Moreover, if the Revised Determination is vacated and the 2017 Determination reinstated, EPA will have an undeniable legal obligation to contend with its prior analysis and conclusions and justify any departure therefrom in its rulemaking. The lasting significance of the Revised Determination, therefore, demands that its defects be resolved now.

II. EPA VIOLATED ITS OWN REGULATION AND THE ADMINISTRATIVE PROCEDURE ACT

As with EPA's flawed justiciability arguments, its attempt to recast the Revised Determination as merely an initial step in a longer deliberative process cannot obscure the weakness of its merits arguments. EPA offers no persuasive argument that it complied with Section 12(h) or the Administrative Procedure Act.

A. EPA Violated Section 12(h)'s Procedural Requirements

EPA does not dispute or rebut the States' demonstrations that EPA violated the procedural requirements of Section 12(h) by failing to identify in advance the technical information that informed its Revised Determination and by shutting CARB out of the reconsideration process.

State Pet'rs Br. 35-38. And contrary to EPA's contention, EPA committed—but failed—to respond to comments on the reconsideration.

First, EPA does not dispute that it failed to identify in advance the technical information that informed its Revised Determination, or that this failure insulated its cursory analysis from public review and comment. Instead, EPA argues that it already had satisfied the disclosure requirements of Section 12(h) when it issued and sought comment on the Technical Assessment Report in 2016 and then requested comment on reconsideration in 2017 (without reopening the Report). EPA Br. 43-44; *see also* Intervenors Br. 32-33.

EPA misses the point. Section 12(h) required EPA either to rely on the existing Report and public comment thereon or to disclose any new technical analysis and allow public comment on that new analysis. *See* 77 Fed. Reg. at 62,784; 40 C.F.R. § 86.1818-12(h)(2)(i)-(ii). EPA did neither, thereby denying the public an opportunity to consider and comment on the technical bases for EPA's assessment *before* the agency issued the Revised Determination. EPA offers no authority that would support its decision to abandon Section 12(h), and the Report mandated by that regulation, and instead make its determination based on previously unidentified and unvetted technical information.

EPA's reliance on Section 12(h)(2)(iv) is misplaced. *See* EPA Br. 47. Although that subsection permitted EPA to consider "other material" the agency deemed relevant, it does not swallow the detailed disclosure and public comment procedures in Section 12(h)(2)(i) and (ii) or allow EPA to ignore the Report. Such an interpretation would impermissibly render those subsections meaningless or superfluous. *Corley v. United States*, 556 U.S. 303, 314 (2009).

Second, EPA does not dispute that it excluded CARB from the process leading to the Revised Determination. It merely notes that "CARB had at least the same ability as other stakeholders to submit comments during the reconsideration process." EPA Br. 60-61. However, the National Program was designed so that EPA, NHTSA, and CARB would "jointly prepare [the Report]" that would "inform EPA's determination on the appropriateness of the ... standards." 77 Fed. Reg. at 62,784. Section 12(h) did not permit EPA to conduct an alternative, dispositive technical assessment without input from CARB, or to issue a Revised Determination entirely untethered from the Report it had jointly prepared with CARB.

Intervenors argue that EPA did not bind itself when it stated that it "fully expect[ed]" to conduct the Mid-Term Evaluation in close coordination with CARB. Intervenors Br. 34-35. Setting aside that EPA itself has not

made this argument, the 2012 Rule stated also that EPA, NHTSA, and CARB "*will* jointly prepare" the Report. 77 Fed. Reg. at 62,784 (emphasis added). This is hardly the "tentative language" that was not binding in *Natural Resources Defense Council*, 706 F.3d at 432. Moreover, EPA initially fulfilled that commitment when it jointly prepared the Report with CARB, but subsequently rendered the entire effort meaningless by issuing a Revised Determination that disregarded the Report and its analyses, in violation of Section 12(h).

Third, EPA is wrong to deny that it committed to respond to comments prior to completing the Mid-Term Evaluation. EPA Br. 46. As noted in the States' opening brief (at 10, 18), the 2012 Rule states that the "agencies will ... respond to comments in their respective subsequent final actions." 77 Fed. Reg. at 62,784. EPA argues that this requirement does not apply here because the Revised Determination is not a final action. EPA Br. 46. That is unavailing, as shown above, *supra* 5-11. EPA defied its commitment to respond to comments in its final action: the Revised Determination. EPA's failure also violated its obligation to engage in reasoned decisionmaking. *See* Ctr. for Biological Diversity, et al., Reply Br. 9. And EPA's characterization of the Revised Determination as an informal adjudication,

EPA Br. 44-45, has no bearing on this violation of Section 12(h)'s requirements.

B. EPA Violated Section 12(h)'s Substantive Requirements

EPA also has not shown that it complied with Section 12(h)'s substantive requirements.

1. EPA Failed to Base its Determination on the Record, Including the Report

Section 12(h) established the Report as the core technical assessment on which EPA must base its appropriateness determination. 40 C.F.R. § 86.1818-12(h)(2), (3). Instead, the Revised Determination only referred to the Report in passing or conclusory fashion. *See* State Pet'rs Br. 39-41 & n.14. EPA's unsupported assertions that it "did not ignore" the Report and "considered [it] as part of the record," EPA Br. 60, ring hollow and do not change that fact or satisfy Section 12(h).[4]

2. EPA Failed to Conduct the Detailed Assessment Required by Section 12(h)

EPA does not seriously dispute that the Revised Determination lacked the detailed factor-by-factor assessment required by Section 12(h). Rather, EPA points to "significant considerations" that it claims justified its decision

[4] Similarly, EPA fails to even address the Revised Determination's disregard for the Technical Support Document that updated the Report. *See* State Pet'rs Br. 39-40.

to put off this assessment. *See* EPA Br. 52-54. But these amount to nothing more than alleged, but unexamined, uncertainties. Indeed, EPA expressly concedes that the Revised Determination omitted the required analysis: "EPA's decision to undertake further rulemaking *did not rest upon 'factual findings that contradict those which underlay its prior policy,'* inasmuch as the Agency made clear that *all factual matters remain under deliberation*." *Id.* 58 (emphasis added & internal citations omitted).

Here again, EPA relies on its erroneous characterization of the Revised Determination as "preliminary" in nature—in effect, claiming that analysis leading to a "not appropriate" determination need not be as rigorous as that leading to an "appropriate" determination. EPA Br. 57; *see also* Intervenors Br. 36. This distinction appears nowhere in Section 12(h) or the 2012 rulemaking and is irreconcilable with the plain language of Section 12(h) and principles of administrative law. Indeed, Section 12(h) prescribed only one set of requirements that EPA had to follow to determine whether the model year 2022-2025 standards were appropriate or not appropriate, including that it consider eight factors and "set forth in detail the bases for the determination ... including the Administrator's assessment of each of the [enumerated] factors." 40 C.F.R. § 86.1818-12(h), (h)(1), (h)(4). EPA's

assertion that it can postpone this detailed assessment until completing a rulemaking plainly defies this mandate.[5]

EPA's response also fails to dispute the many specific flaws and omissions in its factor-by-factor assessment, such as: EPA's misrepresentation of data on vehicle electrification (*see* State Pet'rs Br. 42-44); its failure to review material already in the record (*see id.* 45); its failure to consider or even acknowledge the 2017 Determination's robust analysis of affordability (*id.* 45-46); its failure to examine the fuel price analyses in the 2017 Determination (*id.* 47-48); its misleading treatment of an employment study it had previously rejected as significantly flawed (*id.* 48-49); and its failure to acknowledge its robust safety analysis in the Report (*id.* 49-50).

Even the few factor-specific arguments EPA attempts are unavailing. For instance, EPA argues that it was proper to "accord great weight to vehicle manufacturers' comments" in identifying uncertainty that warrants revision of the standards. EPA Br. 60 (regarding Factors 1 and

[5] EPA contends that it is "not required to go through the [Section 12(h)] process at all prior to revising the standards." EPA Br. 56. But whether and how EPA could later revise the standards is irrelevant here. What matters now is that Section 12(h) compelled EPA to follow specific rules in completing the Mid-Term Evaluation, and EPA completed that process without doing so. *See* 82 Fed. Reg. 39,551, 39,553 (Aug. 21, 2017) (EPA binding its reconsideration process to Section 12(h)).

3). But EPA never analyzed those comments in relation to the existing technical record or justified its dispositive reliance on them. Similarly, for Factor 5, EPA points to a single study submitted by one of the Intervenors to support the Revised Determination's observation that the standards "could potentially result in decreased vehicle sales." EPA Br. 62. But again, the Revised Determination lacks any assessment *by EPA* of the study, the weight it warranted in light of EPA's contrary analysis on the topic, and its impact on the appropriateness of the standards.

3. The Revised Determination Does Not Warrant "Especially Deferential Review"

Relying on its erroneous characterization of the Revised Determination as "preliminary," EPA urges this Court to apply a newly minted (and undefined) "especially deferential review standard." EPA Br. 49-52. But EPA does not explain why a special standard of review should be applied to the question of whether EPA complied with Section 12(h), much less how such a standard would allow it to ignore the plain language of the regulation.[6]

[6] Certainly, no special deference is warranted here, where EPA has merely asserted uncertainty in place of the requisite analysis. *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions." (citation and quotation marks omitted)).

EPA grounds its argument in Section 202 of the Clean Air Act (which EPA refers to as Section 7521). EPA Br. 49-50. But Petitioners have not challenged standards set under Section 202, and EPA's characterizations of the review applicable to such standards (on which State Petitioners take no position) are irrelevant here.

Accordingly, this Court should apply the traditional arbitrary and capricious standard and set aside EPA's Revised Determination because the agency "fail[ed] to comply with its own regulations." *Nat'l Envtl. Dev. Assocs. Clean Air Proj.*, 752 F.3d at 1009 (internal quotation marks omitted).

C. EPA's Failure to Explain and Justify its Revised Determination is Arbitrary and Capricious

Finally, EPA failed to articulate any reasoned explanation for its Revised Determination or to provide justification to support reversal of its 2017 Determination. *See* State Pet'rs Br. 51-53. EPA asserts only that all factual matters "remain under deliberation." *See* EPA Br. 58-59. But the Mid-Term Evaluation required that EPA announce its determination by April 1, 2018, and include a detailed assessment justifying that determination. EPA imposed this deadline in light of the lead times required by automakers and regulators to respond to changes in the standards. EPA should not be permitted to evade the Administrative Procedure Act's

requirements or the carefully calibrated process EPA itself designed and adopted as part of the agreement underlying the National Program simply by asserting that it has not made the findings that Section 12(h) required it to make. *See* Ctr. for Biological Diversity, et al., Reply Br. 8-9.

CONCLUSION

This Court should vacate EPA's Revised Determination and reinstate the 2017 Determination.

Dated: May 6, 2019

Respectfully Submitted,

FOR THE STATE OF CALIFORNIA

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

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

Attorneys for Petitioner State of California, by and through its Governor Gavin Newsom, Attorney General Xavier Becerra and California Air Resources Board

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General

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

Attorneys for Petitioner State of Connecticut

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General

/s/ Valerie Edge
VALERIE EDGE
Deputy Attorney General
Department of Justice
102 W. Water Street
Dover, Delaware 19904
Tel: (302) 739-4636
Email: valerie.edge@delaware.gov

Attorneys for Petitioner State of Delaware

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General

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

Attorneys for Petitioner District of Columbia

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General
MATTHEW J. DUNN
Chief, Environmental Enforcement/ Asbestos Litigation Division

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

FOR THE STATE OF IOWA

THOMAS J. MILLER
Attorney General

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

Attorneys for Petitioner State of Iowa

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General

/s/ Mary M. Sauer
MARY M. SAUER
Assistant Attorney General
Laura E. Jensen
Assistant Attorney General
Maine Office of Attorney General
6 State House Station
Augusta, Maine 04333
Tel: (207) 626-8579 / 8868
Email: mary.sauer@maine.gov

Attorneys for Petitioner State of Maine

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

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

Attorneys for Petitioner State of Maryland

FOR THE COMMONWEALTH OF MASSACHUSETTS

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

/s/ Matthew Ireland

MATTHEW IRELAND
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
Tel: (617) 727-2200
Email: matthew.ireland@mass.gov

Attorneys for Petitioner the Commonwealth of Massachusetts

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

KEITH ELLISON
Attorney General

/s/ Max Kieley

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

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

FOR THE STATE OF NEW JERSEY

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

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

Attorneys for Petitioner State of New Jersey

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General
YUEH-RU CHU
Chief, Affirmative Litigation Section
Environmental Protection Bureau
AUSTIN THOMPSON
Assistant Attorney General

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

Attorneys for Petitioner State of New York

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

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

Attorneys for Petitioner State of Oregon

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General

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

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

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

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General

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

Attorneys for Petitioner State of Rhode Island

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

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

Attorneys for Petitioner State of Vermont

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General
DONALD D. ANDERSON
Deputy Attorney General
PAUL KUGELMAN, JR.
Sr. Asst. Attorney General and Chief

/s/ Matthew R. McGuire
MATTHEW R. MCGUIRE
Principal Deputy Solicitor General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Tel: (804) 786-3811
Email: pkugelman@oag.state.va.us

Attorneys for Petitioner Commonwealth of Virginia

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

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

Attorneys for Petitioner State of Washington

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief for State Petitioners, dated May 6, 2019, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's order of January 11, 2019 (ECF# 1768141). I certify that this brief contains 5,084 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ David Zaft
DAVID ZAFT

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Reply Brief for State Petitioners to be filed on May 6, 2019 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ David Zaft
DAVID ZAFT