No. _____

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Did Virginia and other Petitioners below demonstrate that there was evidence of central relevance to the EPA's Endangerment Finding not available during the comment period such that the Administrator was obligated to convene a proceeding for reconsideration with procedural rights of notice and comment?

2) Did the EPA correctly apply the standard for demonstrating central relevance?

3) Did the EPA err when it found the objections material enough to require resort to extensive new evidence outside of the record while denying the rights of notice and comment on that evidence?

4) Did the EPA err initially and on Petition for Reconsideration by delegating its Statutory Authority to outside entities?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

The United States Court of Appeals for the District of Columbia Circuit consolidated the following cases for review:

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

Parties, Intervenors, and Amici

Petitioners

Alliance for Natural Climate Change Science and William Orr (10-1049)
Alpha Natural Resources, Inc. (09-1322)
American Farm Bureau Federation (10-1026)
American Iron and Steel Institute (10-1038)
American Petroleum Institute (10-1044)
Attorney General Greg Abbott (10-1041)
Barry Smitherman, Chairman of the Texas Public Utility Commission (10-1041)
Brick Industry Association (10-1044)
Chamber of Commerce of the United States of America (10-1030)
Coalition for Responsible Regulation, Inc. (09-1322)
Collins Industries, Inc. (10-1035)
Collins Trucking Company, Inc. (10-1035)
Commonwealth of Virginia *ex rel.* Attorney General Kenneth T. Cuccinelli (10-1036)
Competitive Enterprise Institute (10-1045)
Corn Refiners Association (10-1044)

PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Freedomworks (10-1045)
Georgia Agribusiness Council, Inc. &
Georgia Motor Trucking Association, Inc. (10-1035)
Gerdau Ameristeel Corporation (10-1037)
Great Northern Project Development, L.P. (09-1322)
Industrial Minerals Association –
North America (09-1322)
J&M Tank Lines, Inc. (10-1035)
Kennesaw Transportation, Inc. (10-1035)
Langdale Company (10-1035)
Langdale Forest Products Company (10-1035)
Langdale Farms, LLC (10-1035)
Langdale Fuel Company (10-1035)
Langdale Chevrolet-Pontiac, Inc. (10-1035)
Langdale Ford Company (10-1035)
Langboard, Inc.-MDF (10-1035)
Langboard, Inc.-OSB (10-1035)
Massey Energy Company (09-1322)
National Association of Manufacturers (10-1044)
National Association of Home Builders (10-1044)
National Cattlemen's Beef Association (09-1322)
National Mining Association (10-1024)
National Oilseed Processors Association (10-1044)
National Petrochemical and
Refiners Association (10-1044)
Ohio Coal Association (10-1040)
Peabody Energy Company (10-1025)
Portland Cement Association (10-1046)
Rosebud Mining Company (09-1322)
Science and Environmental Policy Project (10-1045)
Southeast Trailer Mart Inc. (10-1035)
Southeastern Legal Foundation, Inc. (10-1035)

PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

State of Alabama (10-1039)
State of Texas (10-1041)
Rick Perry, Governor of Texas (10-1041)
Texas Commission on Environmental Quality (10-1041)
Texas Agriculture Commission (10-1041)
U.S. Representative Dana Rohrabacher (10-1035)
U.S. Representative Jack Kingston (10-1035)
U.S. Representative John Linder (10-1035)
U.S. Representative John Shimkus (10-1035)
U.S. Representative Kevin Brady (10-1035)
U.S. Representative Lynn Westmoreland (10-1035)
U.S. Representative Michele Bachmann (10-1035)
U.S. Representative Nathan Deal (10-1035)
U.S. Representative Paul Broun (10-1035)
U.S. Representative Phil Gingrey (10-1035)
U.S. Representative Steve King (10-1035)
U.S. Representative Tom Price (10-1035)
Utility Air Regulatory Group (10-1042)
Western States Petroleum Association (10-1044)

Respondents

Environmental Protection Agency (Respondent IN ALL CONSOLIDATED CASES)

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

Intervenors for Petitioners

Associated Industries of Arkansas
Arkansas State Chamber of Commerce

PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

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

PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

West Virginia Manufacturers Association
Wisconsin Manufacturers and Commerce

Intervenors for Respondents

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

PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Amici Curiae for Petitioners

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

Amici Curiae for Respondents

Great Waters Coalition
Union of Concerned Scientists

Virginia, Kentucky, and Utah are States of the Union with no interests required to be disclosed.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The panel opinion affirming the rulemaking of the EPA is reported as *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency*, 684 F.3d 102 (D.C. Cir. 2012). Both the order and opinions relating to denial of rehearing are unpublished, but are available at 2012 U.S. App. LEXIS 25997, 2012 WL 6621785, and, through PACER, as U.S.C.A.

Case No. 09-1322, Doc. 1411145 (Dec. 20, 2012).[1] *See* SUP. CT. R. 12(7). And both are reprinted in the Appendix ("App.") at App. 1-103, 104-63.

JURISDICTION

Section 307 of the Clean Air Act (CAA) grants exclusive jurisdiction to the United States Court of Appeals for the District of Columbia Circuit over petitions for review that challenge nationally applicable final actions of the Administrator of the EPA. 42 U.S.C. § 7607(b)(1) ("A petition for review of . . . final action taken[ ] by the Administrator under [the CAA] may be filed only in the United States Court of

[1] All references to "Doc." are to the appellate record in case number 09-1322, and collected cases, from the United States Court of Appeals for the District of Columbia Circuit and are available via that Court's PACER system.

Appeals for the District of Columbia"). With regard to the Endangerment Finding and follow-on rulemaking, the D.C. Circuit received a number of timely petitions, and interventions, including those of the Commonwealth of Kentucky and the State of Utah, consolidated them, and, on June 26, 2012, issued an opinion denying the petitions and affirming the EPA's rulemaking. *Responsible Regulation*, 684 F.3d at 102, 149. Timely petitions for rehearing *en banc* were received, circulated to the circuit court, voted on, and denied on a 6 to 2 vote on December 20, 2012. *See Coalition for Responsible Regulation, Inc. v. Envtl. Protection Agency (Responsible Regulation II)*, No. 09-1322, 2012 U.S. App. LEXIS 25997, 2012 WL 6621785 (D.C. Cir. Dec. 2012) (unpublished); Doc. 1411145; App. at 104-63. This petition for certiorari has been timely filed within 90 days of the denial of rehearing, *see* SUP. CT. R. 13(1) & (3), and so is now properly within this Court's jurisdiction. *See* 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The statutes and regulations involved in this case are 42 U.S.C. §§ 7521 and 7607; 74 Fed. Reg. 66,496 (Dec. 15, 2009), 75 Fed. Reg. 49,556 (Aug. 13, 2010). Because they are lengthy, the relevant statutory provisions are reprinted in the Appendix and the Federal Register provisions are cited from the Joint Appendix below. *See* SUP. CT. R. 14(f).

STATEMENT OF THE CASE

This Court found in *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007), that the EPA had both the jurisdiction and the obligation to decide "whether sufficient information exists to make an endangerment finding" with respect to CO_2. The EPA published its Endangerment Finding on December 15, 2009. *Endangerment and Cause or Contribute Findings (Endangerment Finding)*, 74 Fed. Reg. at 66,496; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 29 of 695. Petitions for review of that finding were permitted "within sixty days from the date notice" was published in the Federal Register. 42 U.S.C. § 7607(b)(1). Virginia, Texas, and others filed timely petitions for review, invoking the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. *See id.*

By statute, the EPA Administrator must "convene a proceeding for reconsideration also of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed" if a person raising an objection to agency action can demonstrate that "the grounds for . . . objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." *Id.* § 7607(d)(7)(B). The comment period for the Endangerment Finding closed on June 23, 2009. *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under*

Section 202(a) of the Clean Air Act (RTP), 75 Fed. Reg. at 49,556, 49,560 (Aug. 13, 2010); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 82, 86 of 695. On November 17, 2009, internal emails and documents from the Climate Research Unit (CRU) at the University of East Anglia (UEA) became available to the public. These documents were sufficiently damaging to the data upon which the EPA relied in making its Endangerment Finding that the release is now commonly known as "climategate." *See* John M. Broder, *Scientists Taking Steps to Defend Work on Climate*, N.Y. Times, Mar. 2, 2012, at A11, http://www.nytimes.com/2010/03/03/science/earth/03climate.html. In the wake of these revelations, ten petitions for reconsideration also were timely filed within the period for appeal of the Endangerment Finding, including those of Virginia and Texas. The EPA refused to convene the statutory proceeding and flatly denied the petitions. *See RTP*, 75 Fed. Reg. at 49,557; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 83 of 695.

The Clean Air Act requires that information relied upon for rulemaking be in the administrative record, subject to public comment, and also provides for rehearing in the event additional information comes to light after the comment period has closed. With respect to the rulemaking record, Section 307(d)(4)(B) requires that "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." 42 U.S.C. § 7607(d)(4)(B)(i). Once this

process is complete, Section 307(d)(6)(C) states that the "promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation." 42 U.S.C. § 7607(d)(6)(C). As for rehearing, Section 307(d)(7)(B) of the Act provides *inter alia*:

> If the person raising an objection can demonstrate to the Administrator that . . . the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

42 U.S.C. § 7607(d)(7)(B).

Ever since 1980, the EPA has consistently interpreted this rehearing standard, CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), as a heightened relevancy standard. That is, the EPA grants reconsideration when new evidence would "provide substantial support *for the argument* that the regulation should be revised." *Denial of Petition to Revise NSPS for Stationary Gas Turbines*, 45 Fed. Reg. at 81,653 n.3 (Dec. 11, 1980) (emphasis added); *see Prevention of Significant Deterioration and Non-Attainment New Source Review: Reconsideration*, 68 Fed. Reg. 63,021 (Nov. 7, 2003) (codified at 40 CFR pts. 51, 52); *Denial of Petition for Reconsideration of National Ambient Air*

Quality Standards for Particulate Matter, 53 Fed. Reg. 52,698 (Dec. 29, 1988). Consistent with its past practice, the EPA announced that it would apply its usual standard to the petitions for reconsideration of the endangerment finding. *RTP*, 75 Fed. Reg. at 49,561.

In denying rehearing, the EPA relied in part on "a 3-volume, roughly 360-page Response to Petitions document," which included both new information (developed after close of the comment period) and additional information not otherwise in the record and thus not subject to notice or comment. *RTP*, 75 Fed. Reg. at 49,556. The agency also relied upon investigations conducted by third parties:

> Inquiries from the UK House of Commons, Science and Technology Committee, the University of East Anglia, Oxburgh Panel, the Pennsylvania State University, and the University of East Anglia, Russell Panel, all entirely independent from EPA, have examined the issues and many of the same allegations brought forward by the petitioners as a result of the disclosure of the private CRU e-mails. These inquiries are now complete. Their conclusions are in line with EPA's review and analysis of these same CRU e-mails.

RTP, 75 Fed. Reg. at 49,557; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 83 of 695. However, none of these reports dealt with the central question raised by the reconsideration petitions: whether climategate undercut the reliability of the science upon which the EPA relied. *See* Pet'rs' Opening Br. at 5-9; U.S.C.A.

Case 09-1322 Doc. 1309185, pp. 23-27 of 90. And obviously none of them addressed whether the information uncovered was of "central relevance" for purposes of 42 U.S.C. § 7607(d)(4)(B)(i) or (7)(B).

In support of rehearing, Petitioners argued that there were copious quantities of new information that had become public after the Endangerment Finding's publication; that climategate emails suggested that the IPCC data and conclusion upon which the EPA relied were manipulated; that critical IPCC records were lost or destroyed; that the peer review process was corrupted and dissent suppressed; that IPCC personnel had conflicts of interest; and that the EPA's reliance on IPCC data ensured that the process underlying the Endangerment Finding lacked transparency. The Rehearing Petitions also pointed out mistakes reflecting on the reliability of the underlying data, such as the EPA's reliance on an IPCC report that purported to "distill[IPCC's] most important science into a form accessible to politicians and policy makers." FoxNews.com, Africa-Gate? U.N. fears of food shortages questioned (Feb. 8, 2010), http://www.foxnews.com/scitech/2010/02/08/british-scientist-says-panel-losing-credibility; *see* IPCC, Climate Change 2007: Synthesis Report, http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf. In it, IPCC claimed that anthropogenic GHGs could cut many African countries' yields from rain-fed agriculture in half. *IPCC Synthesis Report* § 3.3.2 at 50. The source of this alarmist conclusion was a 2003 policy paper from a Canadian think tank. J.A. Vol. IX, Doc.

1339079 (Oct. 31, 2011), pp. 451-53 of 649. *See* Int'l Inst. for Sustainable Dev., Vulnerability of North African Countries to Climate Change: Adaptation and Implementation Strategies for Climate Change (2003) at 5, http://www.iisd.org/cckn/pdf/north_africa.pdf. Petitioners argued that climategate revealed other significant errors and misstatements that the EPA failed to detect and on which the public could not comment before the finding's publication, including the percentage of the Netherlands lying below sea level, J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), p. 456 of 649, errors in the projection of glacier melt in the Himalayas, J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), pp. 448-51 of 649; *see* IPCC, Statement on the melting of Himalayan Glaciers (Jan. 20, 2010), http://www.ipcc.ch/pdf/presentations/himalaya-statement-20january2010.pdf, projected Amazon rainforest die-off, J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), pp. 453-54 of 649, and projections of more violent storms. J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), pp. 459-61 of 649; *see* Pet'rs' Opening Br. at 12-13 n.14; Doc. 1341062 (Nov. 10, 2011), pp. 30-31 n.14 of 90.

Finally, the Petitioners argued that, in adopting the Endangerment Finding, the Administrator viewed the IPCC, the National Research Council (NRC), and the U.S. Global Change Research Program (USGCRP) as representing independent, mutually reinforcing data, rather than data sets heavily dependent on the IPCC, which derives from a small number of collaborative "climate scientists." In the 360-page RTP – which consisted of new material that

had never been commented upon by the public, that was added to the docket by the agency for the first time after the comment period, and that was created, in some instances, after the Endangerment Finding was finalized – the EPA rejected Petitioners' objections raised in the rehearing petitions, without notice and comment, on the ground that the objections did not change the EPA's own conclusions. 75 Fed. Reg. at 49,558 ("The petitioners do not provide any substantial support for the argument that the Endangerment Finding should be revised."), 49,569; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 84, 95 of 695. After the close of the comment period, the EPA also added more than four hundred documents to the record, and cited more than fifty of these documents in its RTP. *RTP* Vols. I through III; J.A. Vol. X, Doc. 1339079 (Oct. 31, 2011), pp. 29 through 401 of 403. For example, the EPA in the RTP cited a newly published NRC study entitled "Advancing the Science of Climate Change" to reinforce the now questioned IPCC study, noting that it was "not aware of any published criticisms" of the study. *RTP* Vol. I at 50; J.A. Vol. X, Doc. 1339079 (Oct. 31, 2011), p. 85 of 403.

By procedural order, the D.C. Circuit identified denial of reconsideration as one of the issues to be briefed and argued. D.C. Cir. Order, Doc. 1357330 (Feb. 8, 2012), 4 of 5. On the merits, the panel decision minimized the significance of identified errors in light of the size of the record without discussing the overarching reliability issues arising from the politicized, agenda-driven science disclosed by climategate

and without considering whether the EPA applied the wrong standard. *Responsible Regulation*, 684 F.3d at 125. The panel also rejected the claim that the EPA had necessarily revised its Endangerment Finding by supplementing it, and the record. The D.C. Circuit rejected this argument on a mere ipse dixit basis without analysis or citation to authority. *Id.* at 126.

The court of appeals, by procedural order, also identified delegation issues arising from the Endangerment Finding as matters to be briefed and argued. D.C. Cir. Order, Doc. 1357330 (Feb. 8, 2012). However, the panel in its opinion expressed dislike of the word "delegate," branding it as "little more than a semantic trick." *Responsible Regulation*, 684 F.3d at 124. In any case, that court rejected the delegation claim based upon the "extreme degree of deference" afforded factual and scientific decisions by agencies, *id.* at 120, and the precautionary principle, which operates to increase deference as evidence becomes "'more difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge.'" *Responsible Regulation*, 684 F.3d at 121 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976)).

The D.C. Circuit permitted two days for oral argument on the numerous petitions challenging the Endangerment Finding and follow-on regulations. *See* D.C. Cir. Order, Doc. 1357330 (Feb. 8, 2012). However, this petition addresses only those reconsideration and delegation issues on which Virginia was lead on briefing and which Virginia argued. Other petitioners intend to present other issues by separate petitions for writs of certiorari in the coming weeks. *See*

Chamber of Commerce v. EPA, No. 12A871 (Mar. 5, 2013); *Am. Chemistry Council v. EPA*, No. 12A876 (Mar. 8, 2013); *Coalition for Responsible Regulation, Inc. v. EPA*, No. 12A877 (Mar. 8, 2013); *Energy-Intensive Mfrs. Working Grp. on Greenhouse Gas Regulation v. EPA*, No. 12A879 (Mar. 8, 2013); *Southeastern Legal Found. v. EPA*, No. 12A881 (Mar. 7, 2013); *Texas v. EPA*, No. 12A884 (Mar. 8, 2013). And, of course, parties below may advance only one petition each. Sup. Ct. R. 12(4). The parties to this brief pray the Court to grant petitions on all issues so that the decision of the D.C. Circuit may be comprehensively reviewed.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 contains illustrative bases for granting certiorari. Rule 10(a)-(b) deals with issues of uniformity of Federal law. Because the D.C. Circuit had exclusive jurisdiction over this appeal, considerations of uniformity could never arise. Rule 10(c) states that certiorari is appropriate where "a United States court of appeals has decided an important question of Federal law that has not been, but should be, settled by this Court." An example of an exercise of jurisdiction predicated on unusual public importance is provided by the predecessor case of *Massachusetts v. EPA*, 549 U.S. at 505-06, which cited "the unusual importance of the underlying issue," authority to regulate greenhouse gases, as justification for granting a writ despite no conflict between the lower courts on the issue.

It would be difficult to overstate the importance of the decision below. The judges concurring in denial of rehearing were agreed on this:

> To be sure, the stakes here are high. The underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance.

Responsible Regulation II, No. 09-1322, 2012 U.S. App. LEXIS 25997 at 28, 62, 2012 WL 6621785 at 3, 14; App. at 111, 139; Doc. 1411145, pp. 8 & 32 of 52. The significant regulatory and economic burden of greenhouse gas regulation has been the subject of testimony before both Houses of Congress on multiple occasions prior to and after the EPA issued the Endangerment Finding. *See* Testimony of Dr. Margo Thorning on The Impact of EPA Regulation of GHGs under the Clean Air Act on U.S. Investment and Job Growth before H. Subcomm. on Energy & Power (Feb. 9, 2011), American Council for Capital Formation, Publications, http://accf.org/news/publication/the-impact-of-epa-regulation-of-ghgs-under-the-clean-air-act-on-u-s-investment-and-job-growth (explaining the macroeconomic effect of the Endangerment Finding); Testimony of William L. Kovacs on Regulation of Greenhouse Gases under The Clean Air Act before the S. Comm. on Envt. & Public Works (Sept. 23, 2008), U.S. Chamber of Commerce, http://www.uschamber.com/issues/testimony/2008/testimony-regulation-greenhouse-gases-under-clean-air-act (explaining the wide range of activities that would be made subject to EPA permitting once an Endangerment Finding had been

reached); *see generally* Congressional Budget Office, The Economic Effects of Legislation to Reduce Greenhouse-Gas Emissions Report (Sept. 17, 2009), http://www.cbo.gov/publication/41266. It has been estimated that the EPA's regulation of greenhouse gases could decrease U.S. investment by between five to fifteen percent over the three-year period ending in 2014, with a potential reduction in employment from between one-half to 1.5 million jobs and with compliance costs ranging in the tens of billions "annually, a figure that does not include the costs of actually acquiring and implementing the Best Available Control Technology, as required under the PSD program." *See* Thorning Testimony at 4-5, 9.

And the CBO, in modeling various legislative programs deemed by some to be more efficient than the EPA approach, estimated that such regulation will reduce the annual rate of GDP growth by less than 1 percent of GDP this decade, but would rise sharply over time as the loss in wealth "multiplies." CBO Report at 12-13 (Table 1). Obviously, even a small reduction of GDP growth results in a large loss in societal wealth, jobs, and other measures of human flourishing. U.S. Dep't of Commerce, Bureau of Economic Analysis, "National Income and Product Accounts: Gross Domestic Product, 4th Quarter and Annual 2012 (second estimate)," (Feb. 28, 2013), http://www.bea.gov/newsreleases/national/gdp/2013/gdp4q12_2nd.htm. In sum, this Petition, challenging the EPA's adoption of regulations aimed at limiting the previous conduct of citizens in order to reduce CO_2

and other greenhouse gas emissions, presents a matter of utmost importance to the vitality of our Nation. *See Responsible Regulation II*, No. 09-1322, 2012 U.S. App. LEXIS 12980 at 63; 2012 WL 6621785 at 14 (Kavanaugh, J., dissenting from denial of reh'g en banc) ("Put simply, the economic and environmental policy stakes are very high."); App. at 139.

With respect to whether this is a case that "has not been, but should be, settled by this Court," the judges of the panel thought that the outcome was predetermined by this Court in *Massachusetts v. EPA*. *See Responsible Regulation*, 684 F.3d at 120. But only this Court can definitely say that. Furthermore, the rehearing and delegation issues raised in this petition, and essential to public participation in the administrative process and informed agency decisionmaking, have never been decided by this Court.

Not only does this Petition raise matters of first impression, but the arguments against the EPA's actions are weighty and substantial.

A. The Administrator Was Obligated to Grant Reconsideration Because Petitioners Demonstrated that their Timely Objections Were Based on Evidence of Central Relevance to the Outcome of the Endangerment Finding.

For over thirty years, the EPA has consistently held that a timely motion for reconsideration is due to be granted where new evidence would "provide

substantial support for the argument that the regulation should be revised." *See* 45 Fed. Reg. at 81,653; 53 Fed. Reg. at 52,698; 68 Fed. Reg. at 63,021. Reversing the old saw "let's not and say we did," the EPA, in response, produced a 360-page, three-volume supplement to the Endangerment Finding and added numerous documents to shore up its scientific bases, but maintained that it had not reconsidered its original decision. Having supplemented its findings, the agency's claim that the new information was unlikely to cause it to revise its action rang hollow. *See West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004). The EPA, for foreign diplomatic reasons, had issued the Endangerment Finding as a free-standing document unassociated with any implementing rule. *See* John M. Broder, *Greenhouse Gases Imperil Health, E.P.A. Announces*, N.Y. Times, Dec. 7, 2009, at A18, http://www.nytimes.com/2009/12/08/science/earth/08epa.html?_r=1& ("The announcement was timed to coincide with the opening of the United Nations conference on climate change in Copenhagen, strengthening President Obama's hand as more than 190 nations struggle to reach a global accord."). Having done so, any objection cogent enough to require a response relying on extensive new extra-record evidence plainly provided substantial support for an argument that the Finding needed reworking. Indeed, the rehearing petitions were not merely likely to lead to a revision, they in fact led to a *de facto* revision. Put another way, an Endangerment Finding whose supporting bases have to be materially supplemented and reweighed to adequately respond

to objections triggers reconsideration under notice and comment standards. This is the plain meaning of 42 U.S.C. § 7607(d)(7)(B), and the court of appeals erred in holding otherwise. *See Responsible Regulation*, 684 F.3d at 125-26.

B. The Administrator Misapplied the Central Relevance Standard.

The EPA departed from its clear and consistent use of its heightened relevance standard without adequate explanation when it found that the data supplied by Petitioners did not change its mind on the Endangerment Finding. The Endangerment Finding was promulgated as the first step in rulemaking under Section 202(a) of the Clean Air Act, codified at 42 U.S.C. § 7521. *See Endangerment Finding*, 74 Fed. Reg. at 66,496; J.A. Vol. I, Doc. 1339709 (Oct. 31, 2011), p. 30 of 695. As a consequence, the associated rulemaking was required to be accompanied by "a statement of basis and purpose," as well as "a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." 42 U.S.C. § 7607(d)(6)(A)(i) & (d)(6)(B). In no event could the Endangerment Finding "be based (in part or whole) on any information or data which ha[d] not been placed in the docket as of the date of such promulgation." 42 U.S.C § 7607(d)(6)(C). Thus, after promulgation on December 15, 2009, any revision to the statement of basis and purpose or to the response to comments was a revision requiring the same

process as that required in the initial promulgation. 42 U.S.C. § 7607(d)(1)(K). *See Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295 (W.D.N.Y. 1979) (EPA enforcement officials cannot circumvent rule-making requirements of 42 U.S.C. § 7607 by making substantial changes in testing methods without notice and hearing).

Whatever the 360-page tome "appears to be," *Responsible Regulation*, 684 F.3d at 126, the EPA misapplied the central relevance and likelihood of revision test because, in purporting to deny reconsideration, the EPA did, in fact, revise the statement of basis and purpose and its response to comments. This is not only an arbitrary and capricious violation of the EPA's own standard, but is also a facial violation of the Clean Air Act, or of the APA if the Endangerment Finding is not considered a rule for purposes of 42 U.S.C. § 7607(d)(8).

C. The EPA Administrator Erred by Making Determinations without Notice or Comment.

42 U.S.C. § 7607(d)(3) forbids the revision of any rule without notice and comment and limits the basis for such revision to data, information, and documents contained in the docket when the revision is published. 42 U.S.C. § 7607(d)(7)(B) requires any reconsideration to be conducted with rights of notice and comment. Moreover, 42 U.S.C. § 7607(h) declares, with exceptions not here relevant, a congressional

intent, "consistent with the policy of the Administrative Procedures Act," that the Administrator "ensure a reasonable period for public participation of at least 30 days." Finally, 42 U.S.C. § 7607(d)(6)(A) provides that any promulgated rule "shall be accompanied by (i) a statement of basis and purpose," among other things. A revision of the statement of basis and purpose is, therefore, a revision requiring notice and comment. The Endangerment Finding itself is nothing more than an overarching statement of basis and purpose intended to support all subsequent rulemaking on the subject.

This is well-established:

> To have any reasonable prospect of obtaining judicial affirmance of a major rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effects of the rule, relates the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the plausible alternatives to the rule it has adopted.

1 Richard J. Pierce, Jr., *Administrative Law Treatise* 593 (5th ed. 2010). "Failure to fulfill one of these

judicially prescribed requirements of a 'concise general statement of basis and purpose' has become the most frequent basis for judicial reversal of agency rules." *Id.* Supplementing the statement of basis and purpose with a 360-page response to objections, which includes data not included in the Endangerment Finding and, in some cases, not even compiled prior to its publication, is a revision that violates this scheme when conducted without rights of notice and comment. In fact, procedurally and institutionally, an agency in the present context is incapable of knowing and deciding scientific matters in the absence of notice and comment, and simply permitting reconsideration petitions affords no substitute. *See Kennecott Corp. v. EPA*, 684 F.2d 1007, 1018-19 (D.C. Cir. 1982).

D. The EPA's Reasons for Relying on the IPCC Were Undermined by the Climategate Data Provided in the Reconsideration Petitions which Data Compel the Conclusion that the Endangerment Finding Fails to meet essential Information Quality Standards such that Reconsideration Is Required.

The EPA Administrator sought to justify her reliance on the "assessment literature" by claiming that the agency carefully reviewed the processes by which this literature was prepared, confirming thereby that these processes met the standards to which the EPA is subject in preparing scientific findings. *Endangerment Finding*, 74 Fed. Reg. at 66,511-13; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 45-47 of

695. *EPA Response to Public Comments (RTC)* at 1-2 (based on its review of IPCC procedures, "EPA has determined that the approach taken provided the high level of transparency and consistency outlined by EPA's" information quality requirements); J.A. Vol. VII, Doc. 1339079 (Oct. 31, 2011), at 253 of 395. Based on this review, the Administrator concluded that her reliance on this literature "is entirely reasonable and allows EPA to rely on the best available science." *Endangerment Finding*, 74 Fed. Reg. at 66,511 (footnote omitted); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Of course, as the EPA Inspector General found, not only was this not so, but the Administrator, in making the Endangerment Finding, lacked access to the information necessary to evaluate the quality of the IPCC's scientific conclusions, violated the agency's own peer-review standards, and, by having no procedure for evaluating the circumstances in which it is appropriate to rely on outside data, comprehensively delegated her statutory duties to the IPCC and other outside groups. *See* Report of the EPA Inspector General, Data Quality Processes, Report 11-P-0702 (Sept. 26, 2011), http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf) ("Inspector General Report").

As discussed in the previous section, even if IPCC's scientific procedures had been of sterling quality, the Administrator still would have been required to exercise her own judgment on climate science, and this she did not do. In issuing the Endangerment Finding, the EPA failed to comply even with its own standards for evaluating externally

generated information, insufficient as the EPA Inspector General subsequently found them to be. Accordingly, it should come as no surprise that climategate revealed that the quality of IPCC's science was anything but sterling, and that there is a yawning gap between the way IPCC operated in reality compared with the way the EPA says it did based on its review of IPCC's written procedures. Indeed, by relying so heavily on the IPCC, the agency failed to observe basic information quality standards to which it is subject.

1. The EPA failed to ensure that Endangerment Finding's information was "accurate, reliable and unbiased."

The EPA is subject to rigorous data quality obligations under the Information Quality Act (IQA), Pub. L. No. 106-554, 114 Stat. 2763 (2000), and the EPA's IQA Guidelines, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (IQA Guidelines)* (Oct. 2002), http://www.epa.gov/QUALITY/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf. Because the Endangerment Finding meets the EPA's definition of "influential information," information having "a clear and substantial impact (i.e., potential change or effect) on important public policies or private sector decisions," *id.* at 19, the Endangerment Finding is "subject to a higher degree of quality (for example, transparency about data and methods) than

[other] information." *Id*. at 20. The substance of the information underlying the Endangerment Finding must be "accurate, reliable and unbiased," requiring use of "the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including, when available, peer reviewed science and supporting studies; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data)." *Id.* at 22.

As demonstrated in detail in the petitions for reconsideration, however, the IPCC reports frequently relied on unscientific "studies" that were prepared by advocacy groups such as the World Wildlife Fund (WWF), Greenpeace, and other similar organizations. This led, among other numerous examples, to the IPPC having to retract its embarrassing assertion, which was relied on in the *Endangerment Finding*, 74 Fed. Reg. at 66,523; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 57 of 695. *TSD*, J.A. Vol. VII, Doc. 1339079 (Oct. 31, 2011), p. 202 of 395; *RTC*, J.A. Vol. X, Doc. 1339079 (Oct. 31, 2011), p. 210 of 403, that Himalyan glaciers would melt by 2035, which turned out to be based on faulty information from an unpublished, unpeered review study by an advocacy organization. J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), p. 448-51 of 649. The IPCC had been aware of the data problems in the study but had decided to rely on it anyway for public relations impact. The coordinating Lead Author of that section of the IPCC report, Dr. Murai Lai, has stated:

> It related to several countries in this region and their water sources. *We thought that if we can highlight it, it will impact policy-makers and politicians and encourage them to take some concrete action.* It had importance for the region, so we thought we should put it in.

David Rose, "Glacier Scientist: I knew data hadn't been verified," UK Daily Mail (Jan. 24, 2010), http://www.dailymail.co.uk/news/article-1245636/Glacier-scientists-says-knew-data-verified.html.

This degree of goal-oriented "science" ought not, but can be expected to, inform decisions of momentous public policy import where an agency fails to follow its procedures, as the EPA did prior to the release of the Endangerment Finding TSD. *See* EPA Inspector General's Report, *supra* at 28-29; *see also id.* at Executive Summary (reporting that the agency "did not meet all OMB requirements for peer review of a highly influential scientific assessment primarily because the review results and the EPA's response were not publicly reported, and because 1 of the 12 reviewers was an EPA employee."). What is more, while the EPA told the Inspector General that it engaged in ex post review in response to the petitions for reconsideration, *id*. at 29, the Inspector General found the agency's procedures for reliance on outside entities to be inadequate and recommended that it "establish minimum review and documentation requirements for assessing and accepting data from other organizations." *Id*.

2. The EPA's reliance on IPCC reports undermined the Public's right to comment.

The EPA's reliance on the "assessment literature" rendered the public's right to comment meaningless. But ex ante the agency did not think that much of a public comment period was necessary at all. While recognizing the enormous complexity of climate science: "very wide range of risks and harms that need to be considered," *Endangerment Finding*, 74 Fed. Reg. at 66,509; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 43 of 695, the EPA limited the comment period to a mere 60 days based in part on the agency's (mistaken and irrelevant) view that the public had had an opportunity to comment previously. *Id.* at 66,503; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 37 of 695.

There was another defect with the comment process. The EPA time and again responded to public comments on a particular scientific point by saying that the "assessment literature" had reached a different conclusion. The fundamental purpose of the comment process, however, is to ensure that a "genuine interchange" is carried on between the agency and the public, where the agency makes available all the underlying studies and data and the public is able to provide "meaningful commentary." *Conn. Light & Power v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). No such interchange occurs when the Administrator dismisses public comments on the ground that a third party disagrees with them. Furthermore the EPA's reflexive citation to the "assessment literature," some of which was not part of the TSD, undermined the

substantive credibility of the agency's findings. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("By requiring the 'most critical factual material' used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment . . . ").

Finally, in the Endangerment Finding, the EPA justified its use of third-party synthesis and assessment reports as "allow[ing] EPA to rely on the best available science." 74 Fed. Reg. at 66,511; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Now, however, the EPA argues that it was entitled to deny reconsideration in part because other institutions found "no evidence of scientific misconduct or intentional data manipulation" by the climate researchers on whom the IPCC had so extensively relied. *RTP*, 75 Fed. Reg. at 49,558; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 84 of 695. Informal reconsideration without notice or comment based on a "no evidence of scientific misconduct or intentional data manipulation" standard is nowhere authorized by the Clean Air Act.

3. The EPA's reliance on IPCC reports prevented public transparency.

Under § 6.3 of the EPA's IQA Guidelines, the Endangerment Finding, as "Influential Information," was required to have "a higher degree of transparency regarding (1) the source of the data used, (2) the various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures

employed." *IQA Guidelines* at 21. Climategate revealed the hollowness of the EPA's claim that IPCC met this same level of transparency, as key IPCC authors routinely relied on their own studies while simultaneously refusing to disclose to other scientists the data underlying those studies. The United Kingdom House of Commons Science and Technology report cited by the EPA in denying reconsideration found an "unacceptable" "culture of withholding information – from those perceived by CRU to be hostile to global warming." Parliament of the United Kingdom – Science & Technology Comm., The Disclosure of climate data from the Climatic Research Unit at the University of East Anglia: Conclusions & Recommendations ¶13 (Mar. 31, 2010), http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/38709.htm. Another review panel report cited by the EPA found "a consistent pattern of failing to display the proper degree of openness." The Independent Climate Change E-mails Review: Findings § 1.3(15) (July 2010), http://www.cce-review.org/pdf/FINAL%20REPORT.pdf. As stated by the President of the National Academy of Sciences in commenting on climategate, "'[f]ailure to make research data and related information accessible not only impedes science, it also breeds conflicts.'" Ralph J. Cicerone, Editorial: Ensuring Integrity in Science, 327 Science 624 (2010), http://www.nasonline.org/about-nas/leadership/president/cicerone-editorial-science.pdf. It is also completely at odds with the "high" level of transparency demanded by the IQA Guidelines in order to ensure the high quality of the EPA's science.

E. In Issuing the Endangerment Finding and in Denying Rehearing, the EPA Impermissibly Delegated its Statutory Authority to Outside Entities.

The EPA violated the CAA when it delegated its judgment to outside groups. Congress empowered the EPA Administrator to decide whether, "*in his judgment*," pollutants emitted from motor vehicles endanger public health and welfare. 42 U.S.C. § 7521(a)(1) (emphasis added). But rather than independently assessing the data as required by the CAA, the EPA impermissibly delegated that responsibility to outside organizations.

By its own admission, the EPA placed "primary and significant weight on the[ ] assessment reports" of the IPCC, the NRC, and the USGCRP in making the endangerment finding. *Endangerment Finding*, 74 Fed. Reg. at 66,511; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. And rather than assessing the actual scientific data, these reports served as the EPA's "primary scientific and technical basis" for its endangerment decision. *Id.* at 66,510; *see also* J.A. Vol. VII, TSD Executive Summary, Doc. 1339079 (Oct. 31, 2011), p. 34 of 395 (explaining that the document's data and conclusions "are primarily drawn from the assessment reports of the Intergovernmental Panel on Climate Change (IPCC), the U.S. Climate Change Science Program (CCSP), the U.S. Global Change Research Program (USGCRP), and the National Research Council (NRC)"); *RTC* at Resp. 1-5 ("We did not develop new science to support the finding, but rather relied primarily on the conclusions of the

major assessment reports of USGCRP/CCSP, IPCC, and NRC and the evaluation of the public comments received."); J.A. Vol. VII, Doc. 1339079 (Oct. 31, 2011), p. 256 of 394. However, to avoid an arbitrary decision, "*the agency* must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see* 42 U.S.C. § 7521(a)(1). The EPA failed to do so here.

Federal administrative agencies generally may not delegate their authority to outside parties. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 556 (D.C. Cir. 2004). An agency may look to outside groups for advice and policy recommendations, as the EPA did in proposed rulemakings, *e.g.*, *Advance Notice of Proposed Rulemaking for Endangerment Finding*, 73 Fed. Reg. at 44,354 (July 30, 2008); J.A. Vol. I, Doc. 1339709 (Oct. 31, 2011), p. 122 of 695, but delegation is improper because "lines of accountability may blur, undermining an important democratic check on government decision-making." *U.S. Telecom Ass'n*, 359 F.3d at 565-66, 568. Because outside sources do not necessarily "share the agency's 'national vision and perspective,'" the goals of the outside parties may be "inconsistent with those of the agency and the underlying statutory scheme." *Id.* at 566 (quoting *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)).

The EPA's wrongful delegation in this case powerfully illustrates those dangers. The agency relied on the judgment of a number of outside groups, but the IPCC's Fourth Assessment Report was accorded special weight. *See* J.A. Vol. XI, Doc. 1339079 (Oct. 31, 2011), pp. 29 through 184 of 355. Not only did the EPA cite it more often than the others, but the USGCRP – another of EPA's major sources – also relied heavily on the IPCC Report for its "own" findings. *See Endangerment Finding*, 74 Fed. Reg. at 66,511 (noting that the "USGCRP incorporates a number of key findings from the [IPCC Report]" including "the attribution of observed climate change to human emissions of greenhouse gases, and the future projected scenarios of climate change for the global and regional scales"); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Despite the serious deficiencies of the IPCC process demonstrated in the reconsideration petitions and the fact that scientific data underlying the assessments is not in the administrative record, in violation of the CAA, s*ee* 42 U.S.C. § 7607(d)(3) ("All data, information, and documents . . . on which the proposed rule relies shall be included" in the rulemaking docket "on the date of publication of the proposed rule"), the EPA used the same assessments again to unilaterally reject reconsideration without notice or comment. 75 Fed. Reg. at 49,565-66; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 91-92 of 695; *see Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976) (explaining that "judicial review is meaningless where the administrative record is insufficient to determine

whether the action is arbitrary and capricious"). In sum, the EPA's delegation of its statutory duties was unreasonable and illegal.

CONCLUSION

Wherefore the petition should be granted and the Endangerment Finding reversed and remanded for further proceeding in accordance with law, including rehearing with rights of notice and comment.

Respectfully submitted,

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