

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 ----- X  
4 STATE OF CALIFORNIA, BY AND :  
5 THROUGH ITS GOVERNOR EDMUND G.:  
6 BROWN, JR., ATTORNEY GENERAL :  
7 XAVIER BECERRA AND CALIFORNIA :  
8 AIR RESOURCES BOARD, ET AL., :  
9 :  
10 Petitioners, : No. 18-1114  
11 :  
12 v. :  
13 :  
14 ENVIRONMENTAL PROTECTION :  
15 AGENCY, ET AL., :  
16 :  
17 Respondents. :  
18 :  
19 ----- X

Friday, September 6, 2019  
Washington, D.C.

20 The above-entitled matter came on for oral  
21 argument pursuant to notice.

22 BEFORE:

23 CIRCUIT JUDGES ROGERS, SRINIVASAN, AND PILLARD

24 APPEARANCES:

25 ON BEHALF OF THE PETITIONERS:

DAVID ZAFT, ESQ.  
SEAN H. DONAHUE, ESQ.

ON BEHALF OF THE RESPONDENT:

ERIC G. HOSTETLER (DOJ), ESQ.

ON BEHALF OF THE INTERVENORS:

ERIN E. MURPHY, ESQ.

**Deposition Services, Inc.**  
12321 Middlebrook Road, Suite 210  
Germantown, MD 20874  
Tel: (301) 881-3344 Fax: (301) 881-3338  
info@DepositionServices.com www.DepositionServices.com

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
David Zaft, Esq. On Behalf of the State Petitioners	3; 67
Sean H. Donahue, Esq. On Behalf of the PIO Petitioners	25; 74
Eric G. Hostetler (DOJ), Esq. On Behalf of the Respondent	35
Erin E. Murphy, Esq. On Behalf of the Intervenors	55

P R O C E E D I N G S

1  
2 THE CLERK: Case number 18-1114, State of  
3 California, by and through its Governor Edmund G. Brown,  
4 Jr., Attorney General Xavier Becerra and California Air  
5 Resources Board, et al., Petitioners v. Environmental  
6 Protection Agency, et al. Mr. Zaft for State Petitioners;  
7 Mr. Donahue for PIO Petitioners; Mr. Hostetler for the  
8 Respondent; and Ms. Murphy for the Intervenors.

9 ORAL ARGUMENT OF DAVID ZAFT, ESQ.

10 ON BEHALF OF THE STATE PETITIONERS

11 MR. ZAFT: Good morning.

12 JUDGE ROGERS: Good morning.

13 MR. ZAFT: May it please the Court, I am David  
14 Zaft representing the State Petitioners in these matters. I  
15 wanted to call out two people with me at Counsel table, Sean  
16 Donahue, who is representing the Public Interest  
17 Organization Petitioners, with whom I will be splitting the  
18 Petitioners' time. I also wanted to introduce Robert Wyman,  
19 who is one of the attorneys representing the Industry  
20 Petitioners in these cases. The Industry Petitioners are  
21 wholly aligned in these cases with the State Petitioners and  
22 the Public Interest Organization Petitioners. Mr. Wyman has  
23 not asked for any time this morning, but I wanted to make  
24 his presence known to the Court, and he is fully prepared  
25 and available should the Court wish to ask any questions

1 specific to the Industry Petitioners' briefs.

2 JUDGE ROGERS: And how are you and Mr. Donahue  
3 going to divide the issues?

4 MR. ZAFT: We --

5 JUDGE ROGERS: Or are you?

6 MR. ZAFT: -- haven't divided the issues, Your  
7 Honor --

8 JUDGE ROGERS: Okay.

9 MR. ZAFT: -- although there is -- I can explain  
10 when we get into it, but there's one area where I think Mr.  
11 Donahue especially wants to focus, which has to do with the  
12 withdrawal of the final determination.

13 So, and I'd like to reserve four minutes for  
14 rebuttal.

15 EPA's revised final determination was blatantly  
16 unlawful, and causes serious harms that can only be  
17 redressed by vacatur, based wholly on a threadbare record  
18 that had never been publicly disclosed EPA withdrew its  
19 original 2017 final determination and put in its place the  
20 Agency's formal affirmative determination that the standards  
21 for model years 2022 to 2025 are not appropriate under the  
22 Clean Air Act based on EPA's conclusions that they were too  
23 stringent and too costly. EPA did this while ignoring  
24 thousands of pages of its own records in its prior detailed  
25 findings and analysis that rested on a careful synthesis of

1 years of peer reviewed science, original research conducted  
2 by the Agency, contributions from the experts at the  
3 California Air Resources Board, input from every major auto  
4 maker, and multiple rounds of public comment. That action  
5 defied the core universally agreed to function for the  
6 midterm evaluation process that whatever may happen EPA's  
7 determination whether to maintain or to change the emission  
8 standards would be based upon a single, rigorous, and  
9 publicly shared body of technical evidence, and public  
10 comment on that record from all of the stakeholders. Those  
11 commitments were codified at Section 12(h), the requirements  
12 contained in that regulation were a critical pre-condition  
13 for the stakeholders, including the State of California, to  
14 sign onto the agreement to extend the national program. The  
15 revised determination does not come anywhere close to  
16 satisfying EPA's commitments, or the important procedural  
17 and substantive requirements that EPA adopted in Section  
18 12(h), it also has caused real harms. The revised  
19 determination --

20 JUDGE SRINIVASAN: Excuse me. You might be going  
21 there at some point, but can you start with the question of  
22 finality?

23 MR. ZAFT: Yes, Your Honor, I'd be happy to. And  
24 starting with the first prong, I think it's indisputable  
25 that the revised final determination marks the consummation

1 of the midterm evaluation, and EPA stated as much when it  
2 issued the determination and said that this notice concludes  
3 the midterm evaluation under Section 12(h).

4 JUDGE SRINIVASAN: So, I guess we can assume,  
5 let's just assume that the denominator is just the  
6 determination part of it, and so, you get past the first  
7 prong.

8 MR. ZAFT: Okay.

9 JUDGE SRINIVASAN: Just assume.

10 MR. ZAFT: Okay.

11 JUDGE SRINIVASAN: Then for purposes of the second  
12 prong I guess my first question is how does the legal  
13 consequence that ensues from the undoing of the  
14 determination and the institution of a new determination  
15 differ from what happens in the context of a notice of  
16 proposed rule-making? Because we know that an NPRM under  
17 our decisions doesn't count as final agency action.

18 MR. ZAFT: Well, here what is very different is  
19 that the Agency has announced its policy, it's made a formal  
20 finding that the standards are not appropriate, and under  
21 the Clean Air Act, and under the endangerment finding, and  
22 under Section 12(h) the Agency now is required to take  
23 action to put in place appropriate standards or standards it  
24 believes are appropriate. So, it necessarily now following  
25 from the revised determination has to take action to change

1 the standards. Of course, it still retains --

2 JUDGE SRINIVASAN: But the standards, it doesn't  
3 have to take, it doesn't necessarily have to take action to  
4 change the standards, right, it could take an action under  
5 which the existing standards remain in effect, and they are  
6 in effect. If nothing happens from now on those standards  
7 continue to govern, as I --

8 MR. ZAFT: Well, I --

9 JUDGE SRINIVASAN: -- understand it, or is that --

10 MR. ZAFT: Well, I think the Agency would be in  
11 quite an awkward and untenable position if it took no action  
12 at this point. It has come out in, following this, this  
13 extensive review process it's issued a formal finding that  
14 the standards that it's required to promulgate under Section  
15 202 of the Clean Air Act, it's required to prescribe these  
16 standards, it's required to enforcement them now, and it  
17 said those standards are not appropriate under the Clean Air  
18 Act. And I think it would be untenable for the Agency to  
19 just allow the standards to remain given that finding. Now,  
20 it's --

21 JUDGE ROGERS: Actually, in the notice of proposed  
22 rule-making they said they were inappropriate and  
23 unreasonable.

24 MR. ZAFT: Yes.

25 JUDGE ROGERS: So --

1 MR. ZAFT: Right.

2 JUDGE ROGERS: -- that's EPA's position --

3 MR. ZAFT: That's --

4 JUDGE ROGERS: -- going into the rule-making.

5 MR. ZAFT: That's their policy.

6 JUDGE ROGERS: And the only question is, I know  
7 there are cases out there that you cite that say when an  
8 agency reaches a determination its follow through in a  
9 regulatory fashion has to be consistent with its  
10 determination. The Government argues well, this is a 202(a)  
11 rehearing, as it were, and the Agency has retained total  
12 discretion.

13 MR. ZAFT: I think the Agency's actions have to  
14 comply with the law, and part of that body of law right now  
15 is Section 12(h), which the Agency has never repealed. The  
16 Agency in their papers I think are artfully suggesting that  
17 they have total discretion to do anything, and to take any  
18 action, but they must be consistent with Section 12(h), they  
19 can always change their mind, agencies always have the  
20 ability --

21 JUDGE SRINIVASAN: Right.

22 MR. ZAFT: -- to do that, but that does not, the  
23 cases are, you know, well established that does not destroy  
24 finality in this case.

25 JUDGE SRINIVASAN: I mean, what happens, for



1 example, you could have an NPRM where the Agency says  
2 suppose there's an existing fabric of regulations on the  
3 books, and then the Agency says we're noticing a proposed  
4 rule-making, and the reason we're noticing a proposed rule-  
5 making is because we have serious reservations about whether  
6 continuation of the existing regulations is appropriate, and  
7 it's just some other agency, they don't have this special  
8 12(h) procedure. And in connection with an announcement of  
9 the NPRM that's the way they describe why they're issuing  
10 the NPRM, and they're asking all stakeholders to chime in to  
11 determine whether continuation is appropriate. I mean, it  
12 seems to me in that situation a lot of the same things  
13 you've said are true, which is that the Agency will have  
14 been on record as saying boy, we've got some serious  
15 questions about this, we're issuing a notice of proposed  
16 rule-making with an eye towards presumably changing these,  
17 but our cases say that in that context there's no finality.

18 MR. ZAFT: I think the Agency has taken a much  
19 more definitive stances, it's issued a formal finding that  
20 is now on its books that followed an extensive, you know,  
21 procedurally detailed and highly substantive process that  
22 was set up to accomplish this by a date certain, it's  
23 announced that finding, it's much different than saying we  
24 have reservations, and we're interested in stakeholder  
25 input. Of course, in the rule-making process it will get

1 additional information, but if it is going to change course  
2 it will have to explain itself and presumably issue a new  
3 determination saying that look, we've looked at all this,  
4 and here are all the reasons why we've changed our mind  
5 again. So, I think it's very different than a notice of  
6 proposed rule-making, here we have what EPA characterized as  
7 an adjudicatory process that it has now completed, and it's  
8 issued a formal finding, it has I think fundamentally  
9 changed the legal environment.

10 JUDGE PILLARD: Can you specify how it's changed  
11 the legal environment? In the briefing on behalf of the  
12 Government and the Intervenors is actually we're open to  
13 keeping the old rule, and if, and they also are somewhat  
14 candid about the not thorough character of the revised  
15 determination, we need to look further into some of these  
16 things. So, what is the legal effect of the determination  
17 as distinct from the coming, the pending rule-making?

18 MR. ZAFT: Well, first --

19 JUDGE PILLARD: You say it takes --

20 MR. ZAFT: -- I want to --

21 JUDGE PILLARD: -- off, it takes --

22 MR. ZAFT: Yes.

23 JUDGE PILLARD: -- off of the, the table keeping  
24 the rule as it is.

25 MR. ZAFT: Yes, or the Agency would have to do

1 some work to explain a new position that it adopts. As  
2 far -- first of all, I want to say, and I will -- EPA has  
3 been I think quite artful in their brief saying they have  
4 all options open here, and that this whole process and the  
5 result are, really mean nothing, and I just want to say  
6 that's fundamentally at odds with the fact that well, they  
7 had all, all of this claimed uncertainty, they nevertheless  
8 took this step which is a legal step in the process, it  
9 concluded the determination. So, I just wanted to --

10 JUDGE ROGERS: Let me be clear on your argument.  
11 You're saying that the Agency notwithstanding its 2018  
12 determination in the rule-making can completely reverse that  
13 determination?

14 MR. ZAFT: I think it would take a lot of work, I  
15 think --

16 JUDGE ROGERS: But you are saying it could do it?  
17 In other words, if it explained itself, you know, and dealt  
18 with everything that was in 2017, and the record, and all  
19 that sort of --

20 MR. ZAFT: I could imagine, Your Honor,  
21 hypotheticals where unforeseen developments would lead the  
22 Agency to change course, or to alter its course, and --

23 JUDGE ROGERS: But at least in the proposed rule-  
24 making, and the documents that it has put forward it hasn't  
25 given any hint of that?

1 MR. ZAFT: No, Your Honor.

2 JUDGE ROGERS: Or that it would possibly --

3 MR. ZAFT: Yes.

4 JUDGE ROGERS: -- lead the 2012 standards in  
5 effect. So, we don't have that yet.

6 MR. ZAFT: That's right, Your Honor.

7 JUDGE ROGERS: But the Government's argument is  
8 legally since it's a 202(a) proceeding, the Agency returns  
9 discretion, and therefore there is no final agency action.

10 MR. ZAFT: We disagree with that.

11 JUDGE ROGERS: Right. And I want to pin down  
12 specifically what the legal consequences are of what the  
13 Agency did in the 2018 determination.

14 MR. ZAFT: Yes. So, first of all, it affects the  
15 Petitioners in numerous ways, and I'll give a few examples.  
16 Many of the States have legal mandates, or policy goals  
17 regarding the amount of greenhouse gas reduction that they  
18 must achieve by a certain date.

19 JUDGE ROGERS: So, I want to pin that --

20 MR. ZAFT: Yes.

21 JUDGE ROGERS: -- down. As I understand from  
22 reading some of the declarations, the States are concerned  
23 about the commitments that are in their state implementation  
24 plans where in order to attain certain national air quality  
25 standards they must reduce certain types of hazardous

1 emissions to a certain extent by a certain date, that's  
2 number one. Number two, they're concerned that given  
3 Section 177 and the two-year lead time that must be  
4 provided, at least for the vehicle year 2022, as soon as EPA  
5 issued its 2018 determination the States had to act, I get  
6 those two reasons, is there something more the States had to  
7 do?

8 MR. ZAFT: Well, the States also -- so, the States  
9 also have their own requirements, some of them are mandated  
10 within the state, for instance the State of California, to  
11 achieve certain greenhouse gas reductions by a certain date,  
12 and the national program standards provided a certain amount  
13 of those reductions of greenhouse gas emissions, and changes  
14 to the standards that we believe are now going to come as a  
15 result of the revised determination.

16 JUDGE ROGERS: I'm trying to address --

17 MR. ZAFT: Yes.

18 JUDGE ROGERS: -- sort of the Clapper point that  
19 these weren't just voluntary actions by the States --

20 MR. ZAFT: Well, I --

21 JUDGE ROGERS: -- and it wasn't simply a matter of  
22 state law, but --

23 MR. ZAFT: Well, first of all, you mentioned the  
24 SIPs, but I do want to take issue with the Clapper point  
25 because one could see, you know, for instance, under Bennett

1 v. Spear the biological opinion that was issued by the Fish  
2 and Wildlife Service it didn't require the Petitioners who  
3 were water purchasers to do anything, but nevertheless, it  
4 affected in practical and legal ways by directing another  
5 agency to maintain minimum water levels, at some point in  
6 the future those water purchasers were going to be affected,  
7 and the States are similarly situated because we have to  
8 achieve certain greenhouse gas reductions by a certain date,  
9 we were receiving those reductions through the national  
10 program, and now we will be receiving fewer of those  
11 reductions in the future. So, I think --

12 JUDGE SRINIVASAN: Well, you don't --

13 MR. ZAFT: -- that's a similar --

14 JUDGE SRINIVASAN: -- know that.

15 MR. ZAFT: I'm sorry?

16 JUDGE SRINIVASAN: That assumes that things will  
17 change, right? Because as it stands now, and correct me if  
18 this is wrong, as it stands now notwithstanding the  
19 determination that said that the standards are no longer  
20 appropriate, and I take your point that that's what the  
21 determination says, the underlying emission standards are on  
22 the books, and they remain on the books. And it's going to  
23 take a conclusion of the ongoing rule-making that undoes  
24 those in order for those to no longer be on the books. Now,  
25 I also take your point that things are headed in that

1 direction, and as a practical matter everybody has to adjust  
2 to that reality, I take that point, but that's also true in  
3 an NPRM context, you could have that kind of practical  
4 prediction that something's going to happen, and then we're  
5 talking about percentage of likelihood, but --

6 MR. ZAFT: But the difference, Your Honor --

7 JUDGE SRINIVASAN: -- I'm just saying that is it  
8 not true that the emission standards that were announced in  
9 2012 are on the books, and they will remain on the books  
10 unless and until the ongoing rule-making results in a final  
11 rule-making that undoes them?

12 MR. ZAFT: To your specific question, yes --

13 JUDGE SRINIVASAN: Okay.

14 MR. ZAFT: -- but let me explain why this is  
15 different than --

16 JUDGE SRINIVASAN: Sure.

17 MR. ZAFT: -- the NPRM context. So, everybody in  
18 2012, EPA brought everybody to the table and said we're  
19 going to have this review process, we're going to set this  
20 up, you know, we want you all to join in, we're going to,  
21 you know, there shall be no fighting about the standards  
22 that we're going to establish. And everybody signed on to  
23 that, and they signed on to this midterm evaluation process  
24 which was a critical component for the auto makers to have  
25 this guaranteed review that would be put in place with a

1 determination by a certain date. And EPA also made sure  
2 that that process would follow certain requirements, and  
3 that was very important to I believe all of the  
4 stakeholders --

5 JUDGE SRINIVASAN: Yes.

6 MR. ZAFT: -- that EPA follow this rigorous,  
7 technically bounded transparent process. Okay. And the  
8 whole goal of that was to create a record and a  
9 determination that were consistent, and that would point EPA  
10 into a particular direction, but not only that, it would,  
11 once the determination was issued, which I think is what  
12 makes this fundamentally different from say the NPRM  
13 context, EPA now, there's, just like the Bureau of  
14 Reclamation was in some way compelled by the biological  
15 opinion to maintain minimum water levels, EPA has now bound  
16 itself to a certain course that if it, sure, it could change  
17 its mind, but that doesn't destroy finality, if it wants to  
18 change course it's going to have to withdraw this existing  
19 determination or issue some sort of new determination.

20 JUDGE PILLARD: So, is it -- in terms of the  
21 relief that you're seeking from this Court it's limited to  
22 reviewing the determination itself, so in your view the  
23 legal difference between the determination being in place,  
24 the revised determination being in place, and the revised  
25 determination being reviewed and potentially invalidated,



1 assume on merits you win and it's invalidated as we must for  
2 looking at the threshold questions, with a revised  
3 determination in place the Agency is bound to reduce the  
4 stringency of the standards, by the terms of the  
5 determination they must be either more or less stringent as  
6 appropriate here, less given the determination, the existing  
7 rules have been determined to be not appropriate. And so,  
8 your view is if you prevail on this petition that, you know,  
9 I mean, it's a limited victory because they're still going  
10 forward, they still have rule-making authority to go  
11 forward, but among the array of options is a non-arbitrary  
12 choice to stick with the existing standard.

13 MR. ZAFT: That's exactly right, Your Honor. We  
14 think a decision here that a favorable decision from this  
15 Court would give the Agency the opportunity to correct  
16 course, and we're not saying what that might mean, but it  
17 would have to, it would have -- the action that it would  
18 take regarding its standards it would have the opportunity  
19 to ensure that that was not arbitrary and capricious and  
20 unlawful, and takes into account the record that it  
21 assembled over three and a half years, and that it put out  
22 for public comment, and, you know, pursue a path that  
23 complies with Section 12(h). And so, you're right, we're  
24 not, we're asking for the Court only to review the revised  
25 determination in this case for its compliance with Section

1 12(h) and whether it's otherwise arbitrary and capricious.

2 JUDGE ROGERS: Well, one of the interesting  
3 questions in this case to me is do we have to look at 12(h)  
4 and what it requires in terms of deciding some of these  
5 threshold issues, peeking at the merits, as it were?  
6 Because the way EPA wrote its 2018 determination, it sort of  
7 tried to have it both ways, in saying that it concluded that  
8 the 2012 standards were inappropriate, and now we know from  
9 the notice of proposed rule-making also unreasonable; but it  
10 said these are, the record as it is currently before us  
11 raises concerns that we agree should be addressed, and we're  
12 going to do that in our rule-making. So, part of your  
13 argument is, on the merits is that's not a 12(h)  
14 determination because EPA has moved the consideration to the  
15 rule-making, what, put the cart before the horse, or  
16 something like that. I get my metaphors wrong, but you get  
17 my point that 12(h) says all of these decisions are supposed  
18 to be made before EPA reaches the conclusion whether the  
19 2012 standards are inappropriate, do you get what I'm --

20 MR. ZAFT: Yes. Yes.

21 JUDGE ROGERS: So, that whether there's --

22 MR. ZAFT: Absolutely, Your Honor.

23 JUDGE ROGERS: -- final agency action or not --

24 MR. ZAFT: Yes, they --

25 JUDGE ROGERS: -- the Agency says it has taken

1 final action to the extent it has opened up this 12(h)  
2 proceeding, reached a conclusion in the 12(h) proceeding,  
3 and as 12(h) says if the Agency finds the current standards  
4 are inappropriate it should proceed to a rule-making.

5 MR. ZAFT: Yes. Exactly. They have --

6 JUDGE ROGERS: So, we do peek at the merits in  
7 looking at these threshold issues?

8 MR. ZAFT: Well, I think this is an unusual case.

9 JUDGE ROGERS: Yes, no question.

10 MR. ZAFT: It's a very unusual case. And I think  
11 that's right because when EPA, when you look at the context  
12 of this case, brought all the stakeholders together and said  
13 this is what we are going to do, and then it later abandons  
14 Section 12(h), I think that in and of itself satisfies the  
15 second prong of Bennett because it's basically deprived the  
16 Petitioners, and also I'll just say the State of California  
17 which signed on to this, of the right that the Petitioners  
18 have that EPA would fulfill in a way what it said it would  
19 do.

20 JUDGE SRINIVASAN: I'm not sure about that,  
21 because I guess you may have a strong argument that what was  
22 laid out in 12(h) wasn't complied with, and in some ways I  
23 think their finality argument doesn't take issue with that,  
24 they're willing to stipulate to the fact that 12(a) was just  
25 honored in the breach, 12(h), I'm sorry, was just honored in

1 the breach, but their argument is it's still not a final  
2 determination, final agency action for purposes of  
3 jurisdiction. And on that there's one thing you said that I  
4 just wanted to clarify to make sure I understand your  
5 argument. Were you saying that if the pending rule-making  
6 goes through, and against predictions the pending rule-  
7 making doesn't result in a change of the standards that  
8 still the determination, the latest determination, the rise  
9 of determination would have to be undone?

10 MR. ZAFT: I think as part of that, or separately  
11 the Agency would have to issue a new determination, or  
12 withdraw its existing determination. Also, here's --

13 JUDGE SRINIVASAN: I wasn't aware of that. I  
14 thought why couldn't the Agency just explain in the final  
15 rule-making what it's doing? I didn't realize that the,  
16 after the midterm evaluation period is done, and the other  
17 rule, and the pending rule-making is going on that the  
18 determination still has some ongoing legal effect, such  
19 that --

20 MR. ZAFT: Well, it does, and --

21 JUDGE SRINIVASAN: It does?

22 MR. ZAFT: -- let me, let me give one example, and  
23 I also --

24 JUDGE SRINIVASAN: Yes.

25 MR. ZAFT: -- want to mention Mr. Donahue I think

1 is prepared to address some of these questions that you're  
2 raising about the ongoing legal effect. But for instance,  
3 the revised, you know, they issued the revised  
4 determination, they said the standards are not appropriate  
5 under the Clean Air Act.

6 JUDGE SRINIVASAN: Yes.

7 MR. ZAFT: Had they taken no action I think  
8 Intervenors, or their constituent members, would be on, you  
9 know, somewhat, I don't want to concede anything, but they  
10 would have a very good argument that EPA, you can't say your  
11 standards are not appropriate and then tell us we have to  
12 comply with them. And so, they could bring some sort of  
13 challenge demanding that EPA take action consistent with  
14 this final determination. And similarly, if EPA ultimately,  
15 and there's no indication that they're going to do this,  
16 ultimately were to find that the existing standards remain  
17 appropriate despite their determination, I think the course  
18 of explaining themselves they would also have to, as they  
19 did previously, withdraw the determination that they believe  
20 it was no longer the appropriate determination.

21 JUDGE SRINIVASAN: But I'm not quite sure I  
22 follow. Let's just take that hypothetical --

23 MR. ZAFT: Okay.

24 JUDGE SRINIVASAN: -- and then assume it's within  
25 the field of vision, even though I take your point that you

1 think it's realistically not. But on that, why did they  
2 have to withdraw the determination? Wouldn't they just  
3 explain that the existing standards are the right standards  
4 and we're going to institute them for all kinds of reasons?  
5 And then I don't, I didn't, I wasn't aware that there's a  
6 separate legal step that says and therefore, we need to  
7 withdraw the revised determination.

8 MR. ZAFT: Well, I think then that you would have  
9 a finding from the Agency that's fundamentally inconsistent  
10 with the action the Agency takes. Now, maybe --

11 JUDGE SRINIVASAN: That would be true.

12 MR. ZAFT: -- the action at that point if they  
13 adequately explained themselves, maybe --

14 JUDGE SRINIVASAN: Correct.

15 MR. ZAFT: -- it would --

16 JUDGE PILLARD: Right.

17 MR. ZAFT: -- supersede --

18 JUDGE SRINIVASAN: Right.

19 JUDGE PILLARD: So, why is it not --

20 MR. ZAFT: -- the existing determination.

21 JUDGE PILLARD: I'm sorry.

22 MR. ZAFT: Yes.

23 JUDGE PILLARD: Why is it not just a box burden --

24 JUDGE SRINIVASAN: Right.

25 JUDGE PILLARD: -- you know, Encino Motor's burden

1 that they have to, you know, I mean if it was a notice and  
2 comment rule that said those standards are not appropriate,  
3 all they would need to do to supervene that is to say oh,  
4 actually, on further consideration under the current notice  
5 and comment rule we were wrong.

6 MR. ZAFT: Right.

7 JUDGE PILLARD: And I gather that your position is  
8 that there is something stickier about this set of  
9 regulations, and this one time very robust midterm  
10 evaluation, and the determination flowing from it that  
11 somehow is different, and I think that's what we're having  
12 trouble appreciating --

13 MR. ZAFT: Well, first of all --

14 JUDGE PILLARD: -- why is that if the Agency has,  
15 you know, the authority to make rules, including rules that  
16 are very different from its prior rule.

17 MR. ZAFT: Well, first of all, I do think it does  
18 create a consequence as a result of the burden under Fox TV  
19 because the Agency has reversed its policy, and in effect I  
20 think what the Agency is trying to do is to put a wall  
21 between the Agency, the three and a half years of work they  
22 did, and all their findings and analysis, and the step they  
23 want to take. So, if the Agency, for instance, had just  
24 left the original final determination in place it would have  
25 to meet I think a higher burden under Fox TV to explain if

1 it wanted to change the standards why it was, you know, it  
2 would have to confront and grapple with all of the work that  
3 it had done, and I think --

4 JUDGE PILLARD: Well, doesn't it still, because in  
5 fact, I mean, I know you characterized this differently, but  
6 in fact, the Government didn't say it was setting aside the  
7 tar and the whole record, they said they were acting on it  
8 and then some.

9 MR. ZAFT: Well, Your Honor, first of all, the  
10 record from the midterm evaluation is not in the docket for  
11 the rule-making, currently. And the, you know, the docket  
12 is, it is what it is, and they're working on their final  
13 rule, that record is not in there at all.

14 Secondly, I think what EPA said was well, you  
15 know, Petitioners, you can comment, and you can bring these  
16 materials as if they were, you know, materials in a library  
17 somewhere, to our attention, these were the Agency's own  
18 analysis and findings from merely 18 months ago, detailed  
19 findings that were based on an extensive technical record,  
20 and I think we submitted a Rule 28(j) letter showing what  
21 one of the other co-authors of the Technical Assessment  
22 Report how it has treated those findings and analysis, and  
23 it basically said well, we don't have to consider those in  
24 the separate rule-making dealing with the CAFE penalty, we  
25 don't have to consider those, because EPA has issued this



1 revised final determination.

2           The other thing I want to stress here is we also  
3 think the Agency has a chance to still act in a lawful  
4 manner, and do something that's not arbitrary and  
5 capricious, and we think relief here would cause the Agency  
6 to modified its course somehow, we're not pre-determining  
7 how that might happen, but we'll get to a better regulatory  
8 result because the Agency will have to do what it has not  
9 done at all and confront its own analysis.

10           JUDGE ROGERS: All right. Why don't we hear from  
11 Counsel, Mr. Donahue.

12           ORAL ARGUMENT OF SEAN H. DONAHUE, ESQ.

13           ON BEHALF OF THE PIO PETITIONERS

14           MR. DONAHUE: May it please the Court, Sean  
15 Donahue for the Public Interest Organization Petitioners.  
16 I'd like to reserve two minutes for rebuttal.

17           So, we submit that the withdrawal of the 2017  
18 final determination was clearly final, the 2018 revised  
19 determination states even in the caption, and then three  
20 times within we are withdrawing that 2017 determination, so  
21 it's not as if they say we want to add to it, it remains our  
22 findings, but maybe we'll make some other findings, formally  
23 withdrawn. EPA's briefing, however, totally avoids that,  
24 the word withdrawal, although repeated in the notice and the  
25 legal effect of the notice one of the two big things the

1 notice does, it withdraws this massive determination and  
2 findings, and then --

3 JUDGE ROGERS: So --

4 MR. DONAHUE: -- it replaces it, but it's  
5 unmentioned at any point in any of their briefing or motions  
6 in the case, and that's not surprising because they have no  
7 good answer for how the original determination could be  
8 final and have legal consequences, but its rescission in  
9 2018 not have legal consequences for purposes of Bennett  
10 prong two. It also explains --

11 JUDGE PILLARD: Well, to be fair they do have an  
12 answer, which is if there's no change that's the end of that  
13 midterm evaluation, if there's a change they're saying it  
14 just opens a process that ends with the completion of the  
15 rule-making.

16 MR. DONAHUE: Well, I mean, what they purport to  
17 have done is removed as Agency policy the determination and  
18 everything supporting it, and that's, you know, why they're  
19 fighting this, because if this was a two -- if they want to  
20 do a cert they have sort of independent authority under  
21 Section 202 to do a rule-making. Say they said the last  
22 administration did this determination, we want to do  
23 something different, they could have done that, it would  
24 have raised a serious question why they're ignoring this  
25 process that was set up for the very purpose of making these

1 highly detailed technical findings about economics and  
2 vehicle technology and pollution control technology. But  
3 they could have tried, but if they had done that they would  
4 have had to confront the heightened burden under Fox  
5 Television and many other cases to explain departures where  
6 the prior Agency policy was based on detailed factual  
7 findings, that's what this is about at its core.

8 JUDGE PILLARD: But don't they have to because  
9 that is still the rule on the books, determination or not?

10 MR. DONAHUE: That's the -- there is a 2012 Rule  
11 with a preamble, and they have to explain changes from that.  
12 What they're trying to do is erase the update, which  
13 everybody agreed was critical given the rapidly evolving  
14 technology and all that that occurred in 2017. They want to  
15 just compare their roll back to 2012, and they're  
16 withdrawing this massive factual inquiry, and we think that  
17 is clearly final, and --

18 JUDGE SRINIVASAN: And what do you think happens,  
19 so, in the ongoing rule-making process if the, if the  
20 constituents who are unsatisfied with where the NPRM exists  
21 brings into play the 2012 underbrush, and then also brings  
22 into play the determination that's now been revised, and  
23 then you have all that information before you --

24 MR. DONAHUE: Right.

25 JUDGE SRINIVASAN: -- and that was information

1 that is in your arsenal.

2 MR. DONAHUE: Right. And that's -- I'm sorry,  
3 Your Honor.

4 JUDGE SRINIVASAN: Well, I think you know where  
5 I'm going.

6 MR. DONAHUE: Why isn't that enough? Why isn't  
7 it --

8 JUDGE SRINIVASAN: Yes. Yes.

9 MR. DONAHUE: I mean, we could cite, we could  
10 bring in the entire revised determination and submit it, and  
11 that's sort of what learned Counsel on the other side says,  
12 you can always make this an appendix to your rule-making  
13 comments, and my response is that's a very different thing,  
14 as Mr. Zaft noted, from the Agency having to explain its  
15 own, and the Court has said this, like, you can deny a rule-  
16 making petition, I have been reminded of the Radio and  
17 Television Broadcasters case from some time ago that when  
18 the Agency commits itself, and this was a major commitment,  
19 the Fox obligation here, this was very unusual, this was one  
20 of the biggest, the midterm evaluation is one of the biggest  
21 sort of undertakings EPA as an agency has made in a long  
22 time, it was four years, it was original research, it was  
23 reviewing hundreds of peer reviewed studies, there was a  
24 National Academies of Science report that EPA analyzed and  
25 ultimately agreed with and incorporated in its findings.

1 So, that burden to explain why are you changing your  
2 position is what's at stake here, that's what they're trying  
3 to, learned Counsel, you know, I think there's lots of ways  
4 in which one needs to look at what they actually said in the  
5 final determination, I think my friend on the other side has  
6 made this look into almost a creditable, we're, you know,  
7 curious about potential changes in the world, and there's  
8 always uncertainties, and an agency can always do better at  
9 resolving those. But that's really not what this is about,  
10 this is, if that had been what it was about you'd see  
11 something very different than a blanket withdrawal, and we  
12 think that withdrawal is the clearest and easiest  
13 identifiable, you know, legal consequence, because if that  
14 has been effectively withdrawn the legal standard going  
15 forward, the legal consequences that will flow from that  
16 action are very large because the Agency's burden will be  
17 different, and all these sort of technical findings from  
18 2017 will have no status other than --

19 JUDGE SRINIVASAN: And just to be clear, the  
20 legal --

21 MR. DONAHUE: Sure.

22 JUDGE SRINIVASAN: -- consequence you see that  
23 ensues from the withdrawal is that now Fox operates against  
24 the underlying emission standards, which remain the same  
25 as --

1 MR. DONAHUE: 2012 Rule, right.

2 JUDGE SRINIVASAN: -- what -- which are the same.

3 MR. DONAHUE: Right. I mean, they --

4 JUDGE SRINIVASAN: And those are still there. And  
5 you have to justify --

6 MR. DONAHUE: Yes.

7 JUDGE SRINIVASAN: -- moving from those --

8 MR. DONAHUE: Yes.

9 JUDGE SRINIVASAN: -- but you don't, the EPA  
10 wouldn't have to justify moving from the re-validation of  
11 those --

12 MR. DONAHUE: Right.

13 JUDGE SRINIVASAN: -- with the additional  
14 information that attended --

15 MR. DONAHUE: Right.

16 JUDGE SRINIVASAN: -- the determination --

17 MR. DONAHUE: The 2017 --

18 JUDGE SRINIVASAN: -- that's been revised.

19 MR. DONAHUE: -- determination has been rescinded,  
20 it has been withdrawn, very clear in the order. I think  
21 this is a case where precisely because my friend is so  
22 artful and expert it's important to apply Chenery, and look  
23 at what they actually said. And I think this is the one,  
24 these petitions for review are our opportunity to challenge  
25 that effort to rescind the 2017 --

1 JUDGE SRINIVASAN: But it's the baseline against  
2 which Fox operates, in other words?

3 MR. DONAHUE: Yes. Yes.

4 JUDGE SRINIVASAN: You're saying it's a different  
5 baseline when you're looking at --

6 MR. DONAHUE: No.

7 JUDGE SRINIVASAN: -- what happened in 2017, as  
8 opposed to what happened in 2012?

9 MR. DONAHUE: That's right.

10 JUDGE SRINIVASAN: That's the --

11 MR. DONAHUE: And that might sound ephemeral, it's  
12 in the context, in, I think in any context, of course.  
13 appellate courts reverse lower courts all the time because  
14 they applied the wrong legal standard, it's too high a  
15 burden, too little, so maybe it doesn't sound ephemeral, but  
16 in the context it's so important because there's all this  
17 technical work that needs to be contended with that EPA,  
18 that's laid out, a fraction of it is laid out in the Joint  
19 Appendix.

20 And I want to also emphasize that the status of  
21 the 2017 final determination that has been withdrawn will  
22 remain important no matter what happens with the rule-making  
23 because that question of is this EPA's determination will  
24 matter if they, for example, do nothing, they would I think  
25 at some point face legitimate claims from those seeking

1 weakening of the standards that say you found these  
2 standards are too stringent, you've got to do something.  
3 And, you know, in, if they finalize the rule with a roll  
4 back this question of whether the 2017 determination was  
5 validly withdrawn is absolutely critical, and again, under  
6 307(b) of the Clean Air Act we had to challenge this within  
7 60 days of April 13th, 2018 when it was issued. So, this  
8 Court is the proper place to be challenging this withdrawal.

9           And the relief we're seeking is limited to  
10 vacating the 2018 revised determination, which would have  
11 the effect because that is the notice that withdraw of the  
12 2018 determination of reviving the 2017 determining, and EPA  
13 would then face choices, it could return and reconsider the  
14 midterm evaluation, or they could try to proceed under 202,  
15 but if they did that they would have to --

16           JUDGE PILLARD: Right.

17           MR. DONAHUE: -- confront their own record.

18           JUDGE PILLARD: They could only proceed under 202,  
19 at least, I mean, they have said that they are complying  
20 with the midterm evaluation --

21           MR. DONAHUE: Right.

22           JUDGE PILLARD: -- rule, or that they were, and  
23 that's why they sought to meet the April, 2018 deadline, but  
24 they couldn't now because that deadline has passed.

25           MR. DONAHUE: That's right.



1 JUDGE PILLARD: Unless they --

2 MR. DONAHUE: Right.

3 JUDGE PILLARD: -- created, amended somehow, or --

4 MR. DONAHUE: Right.

5 JUDGE PILLARD: -- re-promulgated 12(h).

6 MR. DONAHUE: It's not unheard of for EPA to have  
7 to do something after a deadline, after getting instructions  
8 from a court. But no matter what they do this question will  
9 be critical of whether they've validly withdrawn their 2017  
10 determination.

11 Can I quickly jump to something that's slightly  
12 unrelated that I think may be helpful on the NPRM  
13 comparison, and that is first of all, most NPRM cases the  
14 first prong of Bennett provides a very easy answer, that an  
15 NPRM is not a consummation, it's nothing like this midterm  
16 evaluation that was four years with a final determination by  
17 the Agency Head, it's --

18 JUDGE SRINIVASAN: Yes, as you said --

19 MR. DONAHUE: -- inherently --

20 JUDGE SRINIVASAN: -- I'm not sure I completely --  
21 I know our cases say that, but then --

22 MR. DONAHUE: Right.

23 JUDGE SRINIVASAN: -- our cases also go on to say  
24 that it doesn't meet prong two either.

25 MR. DONAHUE: Right.

1 JUDGE SRINIVASAN: But even as to prong one you  
2 could conceive of the NPRM as the consummation of the NPRM  
3 process, so it's not entirely --

4 MR. DONAHUE: Right.

5 JUDGE SRINIVASAN: -- clear to me, it becomes a  
6 little --

7 MR. DONAHUE: Right.

8 JUDGE SRINIVASAN: -- tautological at some point,  
9 but --

10 MR. DONAHUE: Right, I mean --

11 JUDGE SRINIVASAN: -- there's still --

12 MR. DONAHUE: -- this process --

13 JUDGE SRINIVASAN: -- the prong two --

14 MR. DONAHUE: Right. I mean, this --

15 JUDGE PILLARD: But you were going to address  
16 prong one?

17 MR. DONAHUE: In this case I think --

18 JUDGE ROGERS: No.

19 MR. DONAHUE: -- I respectfully submit prong  
20 one --

21 JUDGE ROGERS: Yes.

22 MR. DONAHUE: -- should not be that difficult  
23 because it's a four-year process that leads to a final  
24 determination that, you know, EPA characterized as such,  
25 they, you know, closed the record, they've started a new

1 proceeding, but that doesn't make the first one -- I think  
2 it's conceivable that an NPRM could meet Bennett prong two  
3 if the Agency, you know, said something, some ad homonym  
4 characterization of a private individual in an NPRM that  
5 caused them all kinds of grief and was, you know,  
6 problematic, and caused legal consequences, but it wouldn't  
7 be final. I don't think there's anything inherent in the  
8 idea of an NPRM that it couldn't meet prong two, but that's  
9 not, you know, that's not what we have here, and because of  
10 this formal withdrawal of a detailed finding that EPA  
11 concedes was itself final, we think that's, you know, it's  
12 quite different.

13 JUDGE ROGERS: All right.

14 MR. DONAHUE: If there are no more questions I'll  
15 like to --

16 JUDGE ROGERS: All right.

17 MR. DONAHUE: -- reserve the time --

18 JUDGE ROGERS: Thank you.

19 MR. DONAHUE: -- that I've already burned through.

20 Thank you.

21 JUDGE ROGERS: Good. Thank you. All right,  
22 Counsel for Respondent.

23 ORAL ARGUMENT OF ERIC G. HOSTETLER, ESQ.

24 ON BEHALF OF THE RESPONDENT

25 MR. HOSTETLER: Good morning, may it --

1 JUDGE ROGERS: Good morning.

2 MR. HOSTETLER: -- please the Court, my name is  
3 Eric Hostetler from the Department of Justice, and with me  
4 at Counsel table today is Mark Kataoka from EPA's Office of  
5 General Counsel, and Erin Murphy representing the  
6 Intervenors.

7 Your Honors, I would like to pick up on this  
8 discussion of finality and focus on that. Our position is  
9 that these petitions are premature and should be dismissed  
10 because this was not a final action, and met neither of the  
11 two Bennett prongs, and candidly, we don't think it's even a  
12 particularly close call on the Bennett analysis, and as I'd  
13 like to --

14 JUDGE ROGERS: But you write your brief as though  
15 the Agency -- you write your brief as though the Agency was  
16 proceeding in 2018 in making its determination pursuant to  
17 202(a), when in fact the 2018 determination says it's  
18 pursuing, it's addressing this pursuant to 12(h).

19 MR. HOSTETLER: That's correct, the Agency --

20 JUDGE ROGERS: So, we have to take the Agency at  
21 what it's saying it's doing.

22 MR. HOSTETLER: To be sure the Agency was applying  
23 its evaluation rule, Section 12(h), the point we're making  
24 fundamentally is that the plain text of the evaluation rule  
25 dictates that a decision to initiate rule-making is not a

1 final action, I mean, the only thing EPA --

2 JUDGE ROGERS: It doesn't actually say that in the  
3 2012 Rule, but I get your point, but I just want to be clear  
4 because you know as well as I do that there are numerous  
5 cases in the Supreme Court, our Court, other Circuits, that  
6 to be final a matter doesn't have to be the final step in  
7 reaching the ultimate goal, and so, here as you heard me  
8 say, I thought the Agency was trying to have it both ways by  
9 saying we have done the 12(h) process, and we have reached  
10 these conclusions, but it included in its discussion these  
11 statements about we have some concerns and we want to  
12 address those in the future in our rule-making.

13 MR. HOSTETLER: Right. And the point I'm trying  
14 to make, Your Honor, is that the 12(h) process was always  
15 intended to be structured so that a decision to initiate  
16 rule-making would not be a final conclusion. I mean, let's  
17 look at the first Bennett prong, the consummation prong, the  
18 only thing that is at issue in Rule 12(h) is should EPA  
19 revise the emission standards for model years '22 to 2025 or  
20 not? And EPA hasn't concluded its deliberations on that  
21 issue.

22 JUDGE PILLARD: Right, although it has, it has  
23 determined that the extent rule is not appropriate, the 2012  
24 Rule is not appropriate for the back half of the time, and  
25 that it therefore will be revised to make it less stringent,

1 it has made that determination, and I'm -- do you disagree?

2 MR. HOSTETLER: I do, Your Honor, because the  
3 determination doesn't dictate what happens in the rule-  
4 making, the question --

5 JUDGE PILLARD: That's not -- well --

6 MR. HOSTETLER: -- the question assumes that EPA  
7 is bound to reach the same result in the determination at  
8 the end of rule-making, it's not, all of the options are on  
9 the table, EPA can retain the standards, make them more  
10 stringent, make them less stringent, the determination  
11 dictates nothing, and to say the --

12 JUDGE PILLARD: But I'm curious, I mean, you heard  
13 the discussion with your Opposing Counsel who says well, one  
14 thing that's at stake is the standard against which the new  
15 rule will be judged, and, I mean, another way of putting it  
16 is well, why did EPA go to the trouble of going through, you  
17 know, putting itself in the traces of the 12(h) process, and  
18 re-determining the result of the midterm evaluation rather  
19 than just initiate as is its prerogative a new rule-making,  
20 why would the Agency do that if it didn't have any effect?

21 MR. HOSTETLER: You're correct, Your Honor, that  
22 the Agency could have just launched into a rule-making, I  
23 think the Agency did this as a matter of good government and  
24 transparency to signal to the public what its current  
25 thinking was, and entertain another round of comment on it.

1           JUDGE ROGERS: Well, but it could have done that  
2 easily in a notice in the Federal Register, agencies do that  
3 all the time.

4           MR. HOSTETLER: But let me address the standard of  
5 review issue because I think this is important. The only  
6 thing EPA has --

7           JUDGE SRINIVASAN: Before we go to standard can I  
8 just say --

9           MR. HOSTETLER: Yes.

10          JUDGE SRINIVASAN: -- why is it so obvious you  
11 could have done that, because what's the point of having  
12 12(h) on the books if it, you can just circumvent it by  
13 doing something else?

14          MR. HOSTETLER: Right. Nothing in Section 12(h)  
15 compels, takes away EPA's rule-making authority under  
16 Section 202, so EPA has always retained rule-making  
17 authority to at any time propose the revision of standards,  
18 number one. But getting back to the issue of standard of  
19 review, the only thing that EPA has withdrawn here --

20          JUDGE ROGERS: So, is your point it can just  
21 ignore its own regulation --

22          MR. HOSTETLER: The point --

23          JUDGE ROGERS: -- because 202(a) is there?

24          MR. HOSTETLER: The point is that the  
25 determination to initiate a rule-making is not a final

1 agency action, that's the point, because EPA has not  
2 consummated its deliberative process --

3 JUDGE ROGERS: But that's not how EPA --

4 MR. HOSTETLER: -- nor has it changed rights or --

5 JUDGE ROGERS: -- itself phrased its  
6 determination. I know Intervenors argue that all this was  
7 sort of an invitation to a rule-making, that's not the way  
8 EPA phrased what it was doing in 2018 in the determination.

9 MR. HOSTETLER: It was the determination, but that  
10 begs the question of whether the determination --

11 JUDGE ROGERS: Right.

12 MR. HOSTETLER: -- has legal consequences and is  
13 final. So, that's what I'm trying to say, yes. I mean, EPA  
14 in a proposed rule often makes very categorical statements  
15 of fact, and assertions, but that doesn't mean they are  
16 final.

17 JUDGE ROGERS: What about the withdrawal of the  
18 2017 determination?

19 MR. HOSTETLER: Right. That's what I was trying  
20 to get at. The only thing that's been withdrawn is a  
21 decision not to initiate rule-making. Now, EPA has decided  
22 to initiate rule-making, but EPA hasn't withdrawn prior  
23 technical analysis for the record.

24 JUDGE ROGERS: But it says it did.

25 MR. HOSTETLER: It withdrew the prior



1 determination not to initiate rule-making, that's what's  
2 been withdrawn.

3 JUDGE ROGERS: But let me say it didn't say that,  
4 it said we, one, find the 2012 standards are inappropriate;  
5 and two, we're also vacating, withdrawing the 2017  
6 determination --

7 MR. HOSTETLER: Right.

8 JUDGE ROGERS: -- period.

9 MR. HOSTETLER: But that determination is still  
10 there, it's a matter of public record, EPA hasn't withdrawn  
11 any technical analysis, so in other word, this Court --

12 JUDGE ROGERS: What did it mean when it said it  
13 withdrew the 2017?

14 MR. HOSTETLER: It means it reached a new  
15 determination.

16 JUDGE ROGERS: And what is that?

17 MR. HOSTETLER: That previously it determined it  
18 was not going to initiate a rule-making, and now it's  
19 determined that it will.

20 JUDGE ROGERS: You don't think the Agency was  
21 trying to avoid its burden?

22 MR. HOSTETLER: Yes, I'm trying to address that.  
23 I've been trying to get to that point. It was not trying to  
24 remove any kind of burden, that January, 2017 determination  
25 still stands as a prior final action, just as the 2012 rule-

1 making was a final action. Stakeholders are perfectly free  
2 when and if there's a final rule on judicial review to point  
3 to the 2012 Rule, to point to the 2017 findings, and make  
4 the case that EPA hasn't reasonably articulated --

5 JUDGE SRINIVASAN: So, you don't think of the,  
6 what Fox operates against changes as a result of the  
7 withdrawal of the 2017 --

8 MR. HOSTETLER: No, I don't think --

9 JUDGE SRINIVASAN: -- determination?

10 MR. HOSTETLER: -- this Court needs to review a  
11 non-final action in order to preserve its --

12 JUDGE SRINIVASAN: No, that's a different  
13 question.

14 JUDGE ROGERS: Yes.

15 JUDGE SRINIVASAN: So, I --

16 MR. HOSTETLER: -- ability to, to --

17 JUDGE SRINIVASAN: That's your finality argument.  
18 I'm just saying that when there's review at the end of the  
19 day of what EPA does, does the withdrawal of the 2017  
20 determination affect the way Fox operates?

21 MR. HOSTETLER: No.

22 JUDGE SRINIVASAN: Not all, you don't think? It  
23 just operates --

24 MR. HOSTETLER: No, I mean, I mean, because --

25 JUDGE SRINIVASAN: As if -- so, for Fox

1 purposes --

2 MR. HOSTETLER: If you're getting --

3 JUDGE SRINIVASAN: -- your view is -- can I just  
4 finish?

5 MR. HOSTETLER: Yes.

6 JUDGE SRINIVASAN: For Fox purposes your view is  
7 the world remains exactly the same as if the 2017  
8 determination were never withdrawn?

9 MR. HOSTETLER: In the sense that you're generally  
10 comparing final actions to previous final actions. So, in  
11 this case, you know, the previous final action you would  
12 have would be the 2017 determination when the 2012 Rule, and  
13 the Court would be free to look to those and apply Fox.

14 JUDGE SRINIVASAN: No, but the 2017 determination,  
15 the thing is the 2017 determination was a final action.

16 MR. HOSTETLER: Right.

17 JUDGE SRINIVASAN: Right? And so, but then once  
18 it's withdrawn that, I think the point is being --

19 MR. HOSTETLER: But not withdrawn in a final way  
20 in the sense that EPA hasn't taken a final action yet. EPA  
21 may retain the standards in this rule-making, in which case  
22 presumably all of the Petitioners will be happy there will  
23 be nothing --

24 JUDGE ROGERS: No, but it's whole --

25 JUDGE PILLARD: Finish your sentence.

1           JUDGE ROGERS: -- analysis says in part we think  
2 that the 2017 determination understated the costs, and it  
3 talks about some other things it thought were wrong with the  
4 2017 determination. So, when it gets to the final paragraph  
5 it says we're withdrawing it.

6           MR. HOSTETLER: Right. It is making a new  
7 determination, and all of those findings remain preliminary  
8 in the sense that EPA hasn't made a final decision as to  
9 whether to amend standards or not.

10          JUDGE PILLARD: But the way that -- I'd be really  
11 curious as to your response to the Petitioners' argument,  
12 the way that the midterm evaluation rule is written it says  
13 that the determination is whether the standards are  
14 appropriate or not appropriate, and if they're not  
15 appropriate the regulation at least pursuant to that scheme  
16 is that they shall be made more or less stringent as  
17 appropriate.

18          MR. HOSTETLER: As appropriate.

19          JUDGE PILLARD: So, they shall be made less  
20 stringent. Well, as appropriate meaning if the reason that  
21 they were held to not be appropriate was that they weren't  
22 stringent enough, you're going to have to take it out. If  
23 the reason that they were held to be not appropriate is  
24 because they were too demanding, you're going to have to  
25 take it down. And I think, you know, there's a, there was a

1 point made by Environmental Petitioners that this is a, it's  
2 not a tentative proposal, it's a big deal that was heavily  
3 negotiated in the rule that we're going to have one midterm  
4 evaluation, that its rigor is going to be at least as robust  
5 as the underlying rule, and so, it makes sense to think that  
6 the determination has bite in terms of which direction the  
7 ensuring rule-making is going to go.

8 MR. HOSTETLER: I'd like to address that question  
9 of what the purpose of this rule was, because I think it's  
10 been somewhat mischaracterized by --

11 JUDGE PILLARD: The purpose of the determination  
12 you mean?

13 MR. HOSTETLER: -- my friends on the other side.  
14 The purpose of the evaluation rule. Stepping back, you  
15 know, in 2012 EPA was setting standards 10 to 13 years in  
16 advance, and it understood two things, one, that its  
17 technology and cost projections might be off given that long  
18 lead time; and two, that its sister agency, NHTSA, hadn't  
19 begun promulgating the parallel closely related fuel economy  
20 standards for those latter model years because its authority  
21 was limited as to how many years it could set. So, EPA made  
22 a commitment to stakeholders, especially the automobile  
23 industry which requested this, that it would take at least  
24 one look by 2018 as whether to initiate a rule-making to  
25 consider new information. And that was the purpose of the

1 midterm evaluation, to take that look --

2 JUDGE ROGERS: But Counsel, you say --

3 MR. HOSTETLER: -- but it --

4 JUDGE ROGERS: -- especially, and I understand  
5 your point, and that's in the record that the auto industry  
6 wanted this midterm evaluation, but there were others who  
7 wanted to be sure that this wasn't just going to be an  
8 excuse to lower the standards, and therefore, 12(h) --

9 MR. HOSTETLER: Right.

10 JUDGE ROGERS: -- was adopted by the Agency.

11 MR. HOSTETLER: But that's what I'm trying to get  
12 at, Your Honor, it was never intended as an impediment to  
13 the exercise of rule-making authority, it was always  
14 intended to be a one-way off ramp where, you know, EPA  
15 could, it would be a tripwire where someone who wanted a  
16 rule-making might be able to compel EPA to look at new  
17 information and commence a rule-making, it was never  
18 intended as a mechanism whereby EPA would have to like do a  
19 rule-making in advance of a rule-making.

20 JUDGE ROGERS: No. But I think that's why you  
21 wrote your brief the way you did, all right? To say this is  
22 just a 202(a) case, and there's no final rule yet, and so  
23 there's no final agency action, and Intervenors write their  
24 briefs the same way, as though what was negotiated as part  
25 of the 2012 rule-making now has an impediment to a new rule-

1 making, but that before you cast aside decisions that were  
2 reached, and you're free to do that, no one wasn't saying,  
3 no one was saying the Agency couldn't do it, but you have to  
4 go through a process.

5 MR. HOSTETLER: If you look at the preamble to the  
6 2012 Rule it's very clear that EPA envisioned a decision to  
7 initiate rule-making as not being a final agency action, and  
8 not reviewable, that in that circumstance it would be the  
9 final action at the end of rule-making that would be  
10 judicially reviewable, that was always the intent from the  
11 get-go. It was never intended as a means by which before  
12 EPA could even launch into a rule-making it would have to  
13 make a determination and defend it in this Court.

14 JUDGE SRINIVASAN: Can I ask you about what was  
15 intended, just on what Rule 12(h) and what it was supposed  
16 to do? Because it seems to me that 12(h) contemplates  
17 either a determination that the standards are appropriate,  
18 the 2012 standards are appropriate, or that they're not.  
19 And just as a matter of ordinary English suppose I say the  
20 following, I've now taken a look at the 2012 standards, you  
21 know what, they might be appropriate, they might not be  
22 appropriate, and therefore they're not appropriate. Does  
23 that make sense?

24 MR. HOSTETLER: Yes, it makes sense if you --

25 JUDGE SRINIVASAN: That makes sense. If I --

1 MR. HOSTETLER: -- if you --

2 JUDGE SRINIVASAN: -- say, I literally say those  
3 standards might be appropriate, they might not be  
4 appropriate, and therefore they're not appropriate.

5 MR. HOSTETLER: I think the, the point is that  
6 Section --

7 JUDGE SRINIVASAN: If somebody just said that to  
8 you as a matter of ordinary English what would your response  
9 be? Would you say oh, yes, totally get it, or would you say  
10 I'm completely befuddled, you've told me they might be  
11 appropriate, they might not be appropriate, and therefore,  
12 they're not appropriate.

13 MR. HOSTETLER: If you don't know they're  
14 appropriate then it would make sense to do a rule-making to  
15 examine the issue further.

16 JUDGE SRINIVASAN: But then you wouldn't say  
17 therefore they're not appropriate, you'd say I don't know  
18 whether they're appropriate. And it just seems to me what's  
19 happening here over and over in the 11-page document is  
20 we're supposed to determine, we're going to start by saying  
21 they're not appropriate, and then we're going to end by  
22 saying we're not appropriate, and what we've done in the  
23 middle is basically say we don't know whether they're  
24 appropriate.

25 MR. HOSTETLER: But that's -- all right. EPA did



1 conclude they were not appropriate, but that's --

2 JUDGE SRINIVASAN: Right.

3 MR. HOSTETLER: -- a snapshot in time --

4 JUDGE SRINIVASAN: And you had to.

5 MR. HOSTETLER: -- it's a snapshot in time, and  
6 it's not a final determination, it just flows into a further  
7 deliberative process.

8 JUDGE PILLARD: But that's just ipse dixit, you're  
9 just asserting that it's not a final determination. I mean,  
10 that, if that determination is to be reviewed ever it's now,  
11 right? I mean, when else can it be reviewed?

12 MR. HOSTETLER: Yes. No. A determination to  
13 initiate rule-making under this, under this --

14 JUDGE PILLARD: But that's the notice and comment,  
15 that's the notice of proposed rule-making, that's the  
16 determination to initiate.

17 MR. HOSTETLER: This determination, you're  
18 correct, is not reviewable because it's not --

19 JUDGE PILLARD: Ever.

20 MR. HOSTETLER: -- a final agency action. Yes,  
21 absolutely. It's not like Petitioners won't have their day  
22 in court to challenge any revision to emission standards,  
23 they will, it's just --

24 JUDGE PILLARD: They appreciate that.

25 MR. HOSTETLER: -- that that day hasn't arrived

1 yet, but there's no legal consequence from this  
2 determination that's reviewable, and so, that, it's not a  
3 final action, it's not reviewable, it will be moot when  
4 there's a rule-making determination. And indeed, subsequent  
5 administrative events have already largely rendered this  
6 determination obsolete, I mean, after this determination  
7 there was a proposed rule, which was based on an involved  
8 administrative record, we've now had thousands and thousands  
9 of comments submitted, so already the record is way past  
10 where EPA was when it made this determination, it's largely  
11 obsolete, and it'll be moot completely when there's a final  
12 rule-making action.

13 JUDGE PILLARD: And when is that --

14 JUDGE ROGERS: What about the States' --

15 JUDGE PILLARD: -- anticipated?

16 JUDGE ROGERS: -- reaction, though?

17 JUDGE PILLARD: I'm sorry, when is the, the final  
18 rule anticipated?

19 MR. HOSTETLER: My understanding, Your Honor, is  
20 that it's still anticipated later this calendar year. It  
21 was submitted for interagency review last month. Yes, Your  
22 Honor, did you have a question?

23 JUDGE ROGERS: Yes.

24 JUDGE PILLARD: I'm sorry, you were asking about  
25 the states.

1 JUDGE ROGERS: Yes, I did.

2 JUDGE PILLARD: You were asking about the states.

3 MR. HOSTETLER: If I may, I did want to just make  
4 an important point --

5 JUDGE ROGERS: Do you want to answer the question?

6 MR. HOSTETLER: What was, I'm sorry, what was the  
7 question?

8 JUDGE ROGERS: The States' reaction to the 2018  
9 revised determination given Section 177, and given their  
10 commitments in their SIPs.

11 MR. HOSTETLER: Right. Well, the standards  
12 haven't been revised yet, so what they are doing is  
13 anticipating a potential action that EPA may take in the  
14 future.

15 JUDGE ROGERS: Based on EPA's signaling where it's  
16 headed.

17 MR. HOSTETLER: Right. In that sense it would be  
18 no different as if EPA had just directly proposed a rule to  
19 amend the standards, that also would have --

20 JUDGE ROGERS: Actually, no, because we have  
21 cases, and even the Supreme Court, saying, you know, where  
22 the Agency has reached a conclusion, it's supposed to  
23 proceed to address the problem it's identified in the  
24 conclusion.

25 MR. HOSTETLER: Right, but it hasn't reached a

1 final conclusion, but --

2 JUDGE ROGERS: But it doesn't have to be --

3 MR. HOSTETLER: But --

4 JUDGE ROGERS: -- to be final it doesn't have to  
5 be the final --

6 MR. HOSTETLER: If I can get to --

7 JUDGE ROGERS: -- point, that's what I'm trying to  
8 get you -- I mean, the Supreme Court has said this, it's not  
9 just the lower court.

10 MR. HOSTETLER: The possibility that EPA might  
11 amend the standards has always been present, I mean, even in  
12 the January, 2000 --

13 JUDGE ROGERS: No question about it, it could --

14 MR. HOSTETLER: Right.

15 JUDGE ROGERS: -- have done that, and indeed it  
16 had before it not only petitions to reconsider the 2017  
17 determination, but it had petitions for a rule-making, and  
18 it chose to do, to proceed on the former basis.

19 MR. HOSTETLER: In the interest of good government  
20 and transparency advise the public through this revised  
21 midterm evaluation that it intended to change course, yes.

22 JUDGE ROGERS: Okay.

23 MR. HOSTETLER: But that did not change the  
24 emission standards, it did not have any legal consequences  
25 for any stakeholders.

1           JUDGE SRINIVASAN: Can I ask just one concrete  
2 question about the way review will come about after, in the  
3 event that there's a rule that's adopted, ultimately that  
4 changes things from what 2012 instituted, and what 2017  
5 reiterated? So, suppose that the pending rule-making  
6 results in a final rule that changes the status quo, and  
7 then parties seek judicial review of that, and then part of  
8 their argument is EPA didn't explain why in the new rule it  
9 deviated from all the things that were said in 2017 as to  
10 why the 2012 Rule, 2012 standards were appropriate. And  
11 then would your answer be we don't have to actually explain  
12 that at all, because the thing that happened in 2017 no  
13 longer exists, or would your answer to be yes, we have to  
14 explain why things change from 2017, and here's our  
15 explanation?

16           MR. HOSTETLER: The latter, Your Honor. I mean,  
17 I'm assuming that they're preserved this issue in their  
18 rule-making comments as they have to do under Section 307,  
19 but EPA would have to explain the departure.

20           JUDGE SRINIVASAN: From 2017.

21           MR. HOSTETLER: Yes. And I did want to address  
22 redressability here because this is I think an important  
23 point. I think it's important to make crystal clear that  
24 regardless of, again, what EPA had done in this  
25 determination it would have retained its Section 202 rule-

1 making authority. So, the rule-making that is now very far  
2 along, and advanced, and nearing conclusion is not dependent  
3 in any respect upon this determination, and essentially what  
4 Petitioners are asking for is an advisory opinion because it  
5 would have no effect on EPA's rule-making authority in terms  
6 of, you know, what's going on with that rule-making.

7 Are there further questions I could address  
8 regarding any of these issues? I think --

9 JUDGE ROGERS: No, I think we have your position.

10 MR. HOSTETLER: One, just one other point. I did  
11 want to --

12 JUDGE ROGERS: All right.

13 MR. HOSTETLER: -- call attention to that Clean  
14 Air Council case, because I do think this is remarkably  
15 similar to this situation where EPA is acting on a petition  
16 for reconsideration, or for petition for rule-making, and  
17 it's, you know, grants the petition and initiates rule-  
18 making. It's quite clear that there are often situations  
19 where a denial of a petition for rule-making would occur,  
20 and that would be considered reviewable because it's the end  
21 of the decision-making process, but like Clean Air Council  
22 suggests where EPA initiates rule-making, and makes  
23 determinations that rule-making is required that's not  
24 final, and that's basically what we have here.

25 JUDGE ROGERS: Okay. Thank you.

1 MR. HOSTETLER: Thank you, Your Honors.

2 JUDGE ROGERS: We'll hear Counsel for Intervenors.

3 Good morning.

4 ORAL ARGUMENT OF ERIN E. MURPHY, ESQ.

5 ON BEHALF OF THE INTERVENOR

6 MS. MURPHY: Good morning, Your Honors, and may it  
7 please the Court, Erin Murphy on behalf of the Intervenors.

8 The 2018 determination was not final agency  
9 action, it didn't satisfy either of the Bennett prongs  
10 because it was the initiation, not the consummation of a  
11 decision-making process, and because it didn't change rights  
12 and obligations on the ground. If I can start with those in  
13 reverse order, I think that the second factor here is  
14 particularly clear cut, and I pick up right where Counsel  
15 just left off, which is with the Clean Air Council case. As  
16 this Court made clear in that case, and has made clear in  
17 many cases, when an agency decides to grant a petition to  
18 reconsider a rule that is not reviewable final agency  
19 action. The only context in which this Court will review  
20 those kinds of decisions is if the agency takes the  
21 additional step of actually changing the law on the ground,  
22 holding the rule, you know, in abeyance, staying the rule,  
23 delaying its effective date, vacating the rule, here the  
24 Agency did precisely the opposite, the 2018 determination  
25 explicitly says as had been promised in 2012 that the

1 existing standards remain on the books unless and until  
2 there is a new rule that changes them.

3 JUDGE SRINIVASAN: So, typically when an agency  
4 grants reconsideration it doesn't also do something else  
5 like withdraw something, it just grants reconsideration.

6 MS. MURPHY: Well --

7 JUDGE SRINIVASAN: It doesn't vacate, it's not  
8 like an en banc, as I understand it's not like an --

9 MS. MURPHY: Sure.

10 JUDGE SRINIVASAN: -- en banc order from a court  
11 of appeals where then the decision is vacated while the en  
12 banc proceeding is pending, and so here the argument that's  
13 being made on the other side is this is different because  
14 yes, there's a grant of reconsideration in some sense, but  
15 there's also withdrawal of the determination.

16 MS. MURPHY: Yes, and, you know, it's a bit of an  
17 unusual fact pattern, but I don't think it changes the  
18 analysis at all. I mean, I think what it's equivalent to is  
19 if a petition for reconsideration were filed and the Agency  
20 denied it, and then a month or so later said you know what,  
21 we've changed our minds and we're going to grant it. Now,  
22 that denial while it was on the books would have been final  
23 agency action that was reviewable, but the fact that the  
24 Agency then changes its mind and says actually, we're going  
25 to grant it, and we're going to have a rule-making, I don't



1 think that somehow then, you know, renders what otherwise  
2 would clearly be non-final, non-reviewable agency action  
3 reviewable, it's still just a decision to engage in a rule-  
4 making, it's the initiation of a rule-making and decision-  
5 making process, and at the conclusion of that whoever wants  
6 to challenge the rule will be free to make whatever  
7 arguments they want to make consistent with their  
8 participation in the process about the steps along the way,  
9 and if they think that the Agency, you know, acted  
10 arbitrarily and capriciously in the process, or in the way  
11 it made different determinations as it got to the ultimate  
12 conclusion to issue a rule, but all of that gets it view in  
13 the context of a rule-making those arguments get raised when  
14 you have a rule, they don't get --

15 JUDGE ROGERS: So, do you agree --

16 MS. MURPHY: -- raised along the way.

17 JUDGE ROGERS: -- do you agree that the withdrawal  
18 of the 2017 determination in no way affects the burden that  
19 the Agency has to explain its action if it decides that it  
20 wants to promulgate a final rule changing the 2012  
21 standards?

22 MS. MURPHY: Yes, but, you know, as a legal matter  
23 the Agency has the same Fox v. FCC burden no matter what has  
24 happened along the way. As a practical matter --

25 JUDGE ROGERS: So, you agree? I just want to be

1 clear about that.

2 MS. MURPHY: Yes. I mean, the same standard  
3 applies, and what the --

4 JUDGE ROGERS: So, there would be no burden on the  
5 Petitioners to introduce the 2017 determination underlying  
6 documents on which the Agency relied?

7 MS. MURPHY: Well, I think that what, that folks  
8 participating in this process would have to call to the  
9 Agency's attention hey, you've done all these other things,  
10 and we think you need to explain yourself in light of them.

11 JUDGE ROGERS: But that's my point, the  
12 Government --

13 MS. MURPHY: Well, I mean --

14 JUDGE ROGERS: -- Attorney did not take that  
15 position, so you're not exactly agreeing with the  
16 Government.

17 MS. MURPHY: I actually don't -- maybe we  
18 misunderstood the Government's position differently, but I  
19 don't think we have any different view here. I mean, you  
20 know, I can't tell you kind of in the abstract without  
21 seeing what the Agency's going to say as an explanation, and  
22 without, you know, looking at a whole record of what people  
23 brought to its attention and asked the Agency to do whether  
24 they will meet a Fox v. FCC burden, but --

25 JUDGE ROGERS: No, we're talking about the

1 baseline that the Agency has to work from.

2 MS. MURPHY: I don't think that there really kind  
3 of is in the Fox sense some, you know, one and only one  
4 baseline that you operate on, what you look at is the  
5 Agency's position in its rule, you know, is it a departure  
6 from past things the Agency has said or done, and if it is  
7 the Agency --

8 JUDGE ROGERS: So, you're finessing the question.

9 MS. MURPHY: I'm sorry?

10 JUDGE ROGERS: You're finessing the question.

11 MS. MURPHY: Well, I mean, I'm trying to give an  
12 answer that I think is consistent with the way this plays  
13 out in the real world, and the fact is, you know --

14 JUDGE ROGERS: No, the question was do you agree  
15 with the Government's position?

16 MS. MURPHY: Well, and I'm not sure you and I  
17 agree on the Government's position, which makes it a little  
18 hard for me to answer that.

19 JUDGE ROGERS: I get it.

20 MS. MURPHY: But what I would say is, you know,  
21 look, right now there are rules in place, there are existing  
22 standards in place on the ground, and, you know, EPA  
23 acknowledges that if it issues a rule that changes those  
24 standards, you know, it's going to have to explain that  
25 there were standards, and it acknowledges that, and it

1 can't, you know, pretend that there never was anything else  
2 on the books, but, you know, this notion that EPA kind of  
3 did all of this to white wash the earlier process and  
4 eliminate the 2017 determination so that it would change its  
5 Fox burden, I mean, I think that's just radically  
6 inconsistent with what actually happened here. What  
7 happened if you take a step back is, I mean, there had been  
8 a commitment that this midterm evaluation process was going  
9 to play out over another year and a half during which  
10 stakeholders would be able to bring to the Agency's  
11 attention studies that we had been conducting for quite some  
12 time to explain what we thought were flaws in the technical  
13 analysis that the Agency had done, what we thought were  
14 deficiencies in the record, and they short circuited that by  
15 issuing a rule, you know, more than a year, or issuing a  
16 final determination in 2017 more than a year in advance, so  
17 they reopened that process.

18 JUDGE PILLARD: And did you challenge that?  
19 Because that was final.

20 MS. MURPHY: We did have, we initially, we had a,  
21 you know, we filed a challenge to it, we didn't need to  
22 proceed with that because once the Agency withdrew it there  
23 was, you know, it had the effect of not requiring us all to  
24 go litigate about a determination that was not anymore going  
25 to be the determination that was on the books, so, you know,

1 the notion that the 2017 determination was, you know,  
2 clearly and always lawful, I mean, it never got to the point  
3 of judicial review because --

4 JUDGE PILLARD: But doesn't that -- I'm sorry, go  
5 ahead, finish your sentence.

6 MS. MURPHY: Well, because they decided that they  
7 were going to reopen the rule-making process, and at the end  
8 of that process everybody's free to say they think that, you  
9 know, it was arbitrary and capricious to change the  
10 standards if the EPA changes the standards. But, you know,  
11 we didn't, once the determination was being taken off the  
12 books, I mean, we recognized that it would not be a good use  
13 of everybody's time and resources to come and litigate about  
14 whether EPA complied with its obligations substantively and  
15 procedurally in issuing a determination that was, you know,  
16 not the final law on the books anymore, the 2012 standards  
17 remain in place, but, you know, we decided let's wait for a  
18 rule, and if we have problems with the rule we'll challenge  
19 the rule, just as Petitioners can challenge the rule if they  
20 have problems with the rule. But that's the right step at  
21 which to kind of air all of the grievances with the process  
22 along the way.

23 JUDGE SRINIVASAN: Can I ask one follow up  
24 question? So, with your hypo of the denial of  
25 reconsideration followed by the grant of reconsideration,

1 so, let's just take that one out.

2 MS. MURPHY: Yes.

3 JUDGE SRINIVASAN: So, an agency denies  
4 reconsideration, and in the course of denying  
5 reconsideration is has a bunch of explanations as to why  
6 it's denying reconsideration.

7 MS. MURPHY: Yes.

8 JUDGE SRINIVASAN: New substantive stuff that  
9 wasn't in the original thing --

10 MS. MURPHY: Sure.

11 JUDGE SRINIVASAN: -- as, that's the subject of  
12 the motion for reconsideration, so it fortifies the record  
13 and it says here's some other stuff that explains to you why  
14 we're denying reconsideration. And then later on it grants  
15 reconsideration --

16 MS. MURPHY: Right.

17 JUDGE SRINIVASAN: -- and after granting  
18 reconsideration it changes the rule.

19 MS. MURPHY: Yes.

20 JUDGE SRINIVASAN: And is your view that when that  
21 ultimate thing is challenged, and there's a Fox claim that's  
22 made, that there's no different than what happened here,  
23 that it's going to play out exactly the same way?

24 MS. MURPHY: Yes, I think so. I mean --

25 JUDGE SRINIVASAN: Okay.

1           MS. MURPHY: -- I think basically what happens is,  
2 you know, if the parties that are unhappy with the rule want  
3 to say as part of their efforts to challenge it as arbitrary  
4 and capricious, which Fox is just, you know, part of the  
5 arbitrary and capricious standard, it's not kind of its own  
6 separate distinct claim, but if they wanted to say part of  
7 what makes this arbitrary and capricious is that you  
8 previously said all of these things on the record, and now  
9 you're saying something else, you know, the Agency is going  
10 to need to respond to that and confront that if that's  
11 comments that are brought to the Agency's attention during  
12 the process. And here, you know, I'm fairly confident that  
13 they're, in the more than I think 100,000 comments on this  
14 are comments that have been made to EPA that say why people  
15 think they should keep the existing standards, why people  
16 think the 2017 determinations, right, there's comments that  
17 actually ask EPA to make the standards more stringent, you  
18 know, there's all sorts of comments here, everybody has the  
19 ability to bring those things to the attention of the  
20 Agency, and the right time to determine whether the Agency  
21 has adequately addressed what people bring to its attention  
22 is when we see what the Agency has done, and what it has  
23 offered as an explanation for what it does in the final rule  
24 that it issues.

25           JUDGE ROGERS: Thank you.

1 JUDGE PILLARD: Why is it that --

2 JUDGE ROGERS: Sorry.

3 JUDGE PILLARD: -- that your clients have  
4 standing, but Tesla doesn't? Or do you, do you not dispute  
5 the standing of the --

6 MS. MURPHY: So --

7 JUDGE PILLARD: -- Industry actors on the other  
8 side?

9 MS. MURPHY: So, you know, we haven't challenged  
10 standing, and part of the reason we didn't, I mean, I think  
11 that there are Petitioners here that have alleged what we  
12 consider to be adequate Article III injuries. I will say as  
13 this has, litigation has played out, and it's been clear now  
14 what everybody's positions are, it's very hard for me to  
15 understand how anyone has identified an injury that would  
16 actually be remedied by the remedy they seek, because all of  
17 the injuries they've identified seem to require a remedy  
18 that would actually create certainty as to what the  
19 standards are going to be. And, you know, so I don't really  
20 think anybody has, you know, the remedy they've sought here  
21 is not going to do that, they're not binding the Agency --

22 JUDGE PILLARD: As I heard them today what they  
23 were saying is putting back on the table the option of  
24 retaining the existing standards was what they're fighting  
25 for, and that as they read the Rule 12(h) record the, the,



1 it really does say you, you know, if it's not appropriate  
2 then the Agency's committing, to the extent that it's within  
3 that process committing to lowering the standards.

4 MS. MURPHY: Yes. And I think the problem with  
5 that is it's just not correct, I mean, what happened in the  
6 12(h) determination is the Agency determined as 12(h)  
7 requires by its actual terms that on the record before the  
8 Agency at that time it could not determine that the  
9 standards were appropriate, they were not appropriate on  
10 that record, okay. It then said in light of that we're  
11 going to have a rule-making, in that rule-making the Agency  
12 has said what its preferred position is, but it has sought  
13 comment on numerous options, one of which is keeping the  
14 existing standards, I mean, that's actually an option that  
15 they put on the table. Now, I want to be very clear, you  
16 know, I mean, I'm not trying to advocate for that, that's  
17 not what my clients think would be a reasonable approach  
18 here in light of the record, but as a legal matter the  
19 Agency has that authority to consider that option, and so, I  
20 don't really see how, you know, the remedy that they're  
21 seeking would have any legal effect, it just, you know,  
22 seems to they think kind of make it seem more  
23 atmospherically like the Agency has a different legal burden  
24 or a slightly more of an explanation it needs to provide, or  
25 something like that, it's not going to change any rights or

1 obligations on the ground, and it's not going to change the  
2 fact that, which is the basis for their Article III injury  
3 allegations, that they don't still, you know, they still  
4 face uncertainty as to what the rule will be because --

5 JUDGE PILLARD: But by the same token it's really  
6 no skin off your client's nose either because it doesn't  
7 change anything.

8 MS. MURPHY: I mean, you know, I think the problem  
9 is it kind of does create this very odd dynamic in which  
10 basically they're trying to, like, bring back to life  
11 something that itself never, you know, it was final agency  
12 action, and never was litigated because it didn't need to be  
13 because the Agency promptly decided we're going to have a  
14 rule-making. And so, you know, they kind of proceed in  
15 their arguments on the assumption that everybody already  
16 decided that the 2017 determination not only was final  
17 agency action, but was lawful agency action, and that  
18 determination never happened, and that's why I think--

19 JUDGE PILLARD: But that was your choice.

20 JUDGE ROGERS: Yes.

21 MS. MURPHY: Well, it was actually the Agency's  
22 choice in taking it off, in re-announcing --

23 JUDGE ROGERS: But protective --

24 MS. MURPHY: -- that it was going to reconsider.

25 JUDGE ROGERS: -- protective appeals have often --

1 MS. MURPHY: We did file a protective appeal.

2 JUDGE PILLARD: Yes.

3 JUDGE ROGERS: Yes, but you didn't pursue it.

4 MS. MURPHY: I mean, that's why --

5 JUDGE ROGERS: All right.

6 MS. MURPHY: -- you know, we --

7 JUDGE ROGERS: So, and you haven't --

8 JUDGE PILLARD: And is that still pending?

9 JUDGE ROGERS: -- you haven't challenged standing.

10 MS. MURPHY: It's not, it's not still pending

11 because --

12 JUDGE ROGERS: Right.

13 MS. MURPHY: -- once this played out it didn't  
14 really need to be pending anymore, but, you know, but I do  
15 think it's worth kind of recognizing in the context of this  
16 that the timeline and how it played out is sort of relevant,  
17 so.

18 JUDGE ROGERS: Right. Thank you very much. All  
19 right, Counsel for Petitioner States.

20 ORAL REBUTTAL OF DAVID ZAFT, ESQ.

21 ON BEHALF OF THE STATE PETITIONERS

22 MR. ZAFT: Your Honor, a few points, and where I'd  
23 like to begin is there's a real fundamental inconsistency  
24 between I think what my esteemed colleagues on the other  
25 side are saying, and actually the actions they've taken.

1 And so, Ms. Murphy just said that the withdrawal did not  
2 affect anyone's rights or obligations, and yet, when the  
3 final determination was issued in 2017 what the Alliance put  
4 in their petition for reconsideration is, quote, for the  
5 auto industry the final determination may be the single most  
6 important decision EPA has made in recent history. So, if  
7 they concede that the final determination, the 2017 final  
8 determination was a final action that had legal  
9 consequences, and that's certainly consistent with that  
10 statement, then I don't see how it could be that the  
11 withdrawal of that, if the final determination created legal  
12 consequences I don't see how the withdrawal could not also  
13 create legal consequences, especially in the context of this  
14 case.

15 JUDGE SRINIVASAN: But that seems like that's  
16 equally true of denial or reconsideration followed by grant  
17 of reconsideration, because what a party would say is this  
18 is a huge deal if this stays on the books, and then  
19 reconsideration is denied, it's a really huge deal. And  
20 then it's followed by a grant of reconsideration, and you  
21 could make the same argument, which is to say it's just a  
22 grant of reconsideration, and a reverse of something that  
23 everybody agrees was a big deal, and therefore, this must be  
24 a big deal, too, but the grant of reconsideration isn't  
25 final agency action.

1           MR. ZAFT: But the 2017 final determination did  
2 not alter anyone's rights or obligations in any way. I  
3 mean, I think it does have legal consequences, and it's a  
4 final action. Let me withdraw what I just said, and phrase  
5 it a little bit differently. It did not change the  
6 standards, so it had legal consequences, but the idea that  
7 in order to have legal consequences EPA's action has to have  
8 changed the standards, I think, is at odds with the  
9 Intervenors' position that the determination in 2017 was the  
10 most important decision EPA had taken.

11           JUDGE PILLARD: Well, right, and the difficulty is  
12 that if you take the framework of the 2012 Rule, including  
13 the midterm evaluation process, as the universe, then it's  
14 momentous what happens at the midterm evaluation. And when  
15 everybody's at the table and playing that game, you know,  
16 all the stakeholders they're like --

17           MR. ZAFT: Yes.

18           JUDGE PILLARD: -- you know, we had a midterm  
19 evaluation, we had our say, and whether the rules were, you  
20 know, more demanding, less demanding, everyone's at the  
21 table, then it seems hugely consequential. And, but once  
22 they say we are the Agency and we have the ability to play a  
23 totally different game, and we're going to do that now, if  
24 they're willing to take that hit as a matter of public  
25 relations and politics, they can do that, no? There's just

1 sort of --

2 MR. ZAFT: They have codified their commitments in  
3 a --

4 JUDGE PILLARD: True.

5 MR. ZAFT: -- regulation --

6 JUDGE PILLARD: True.

7 MR. ZAFT: -- that they're bound to follow.

8 JUDGE PILLARD: So, in setting up the new game  
9 they have to do some new codification, and they're willing  
10 to live with that.

11 MR. ZAFT: Well, and they could have, they could  
12 have repealed or amended Section 12(h), but they did not do  
13 that, they have to live within the requirements that they  
14 put into law in the regulation. And --

15 JUDGE PILLARD: Aren't they in effect doing that  
16 in their new rule?

17 MR. ZAFT: Amending Section 12(h)?

18 JUDGE PILLARD: Or --

19 MR. ZAFT: That's wasn't in the NPRM.

20 JUDGE PILLARD: -- kicking it to the curb?

21 MR. ZAFT: Well, and that's why we're here, Your  
22 Honor, because they're kicking it to the curb. And, you  
23 know, that is a, that change itself I would say is also  
24 something that has legal consequences for everyone,  
25 including stakeholders, including the auto makers who signed

1 up for this regulatory regime, and this is, again, I think  
2 an unusual case, and we have to consider the entire context,  
3 and understand that EPA bound itself, and it wouldn't make  
4 sense to say that EPA could then walk away from those  
5 requirements that it put in writing in a regulation, and  
6 that we could never, as Mr. Hostetler said, we can't  
7 challenge it now, we can never challenge it, they committed  
8 all of these procedural violations, and substantive  
9 violations, and he's saying there's just no relief.

10           The other thing I want to mention along those  
11 lines is this was a, as you said, like, a momentous effort,  
12 and an effort that I think we want agencies to be able to  
13 do, to have this kind of tool in their toolbox, but if  
14 agencies can simply abandon their existing regulations and  
15 requirements, and change course, I think it's going to be  
16 hard to get, you know, a whole host of stakeholders,  
17 including, you know, one of the largest national industries,  
18 you know, several of the states, industry actors on both  
19 sides of the standards together to agree to this sort of  
20 procedure, agencies have to be held to what they're  
21 committed to.

22           JUDGE PILLARD: But both Mr. Hostetler and Ms.  
23 Murphy have said oh, we do have to live with that, that is a  
24 big elephant in the room in which we operate in the new  
25 rule-making. They both said that, doesn't change the -- I

1 mean, they disagree with your position, they say it doesn't  
2 change the Fox burden, it doesn't affect the ability --

3 MR. ZAFT: Well --

4 JUDGE PILLARD: -- to deploy all that information  
5 in challenging --

6 MR. ZAFT: Well, I think --

7 JUDGE PILLARD: -- in the process of the new rule-  
8 making, and challenging the new rule-making.

9 MR. ZAFT: Well, but then why didn't they do that  
10 in the revised determination? They acted as if --

11 JUDGE PILLARD: Time. They wanted to put people  
12 on notice early because lead time is really important.

13 MR. ZAFT: Okay. Your Honor, I'd like to address  
14 a couple of things there. One, they had 13 months, and they  
15 issued a total of something like 16 Federal Register pages,  
16 they had lots of time to do this work, and this is one of  
17 the administration's highest priorities when it comes to the  
18 environment. They could have put out additional evidence  
19 that they wanted to include in the TAR, put it up for public  
20 comment; they could have complied with Section 12(h), and I  
21 submit, Your Honor, that would have been good government.  
22 The other thing, and I lost my train of thought for a  
23 second, but I'm going to -- hopefully I'll remember it.

24 There was one other, there are a couple of other  
25 things that I wanted to mention. Mr. Hostetler has propose



1 don behalf of EPA that this was always supposed to be some  
2 sort of bifurcated standard that would apply one way if  
3 there was one determination, and another way if there was  
4 another, there's nothing like that in Section 12(h), nor in  
5 the preamble, there is one set of requirements that applies  
6 to any determination it makes. And I just want to submit it  
7 would make no sense to set that up because a different  
8 administration could have just said well, we're not going to  
9 release the TAR for public comment, and we're going to  
10 embark on a rule-making to strengthen the standards, and I  
11 submit that Intervenors would be up here claiming hey, we  
12 have rights under Section 12(h), you can't just do that,  
13 moreover, the entire process was put in place to have some  
14 sort of stability for all of the actors that they could  
15 count on that there would be this process that everybody  
16 would follow, there would be this record that would be a  
17 common record that everybody would be able to comment on and  
18 contribute to.

19           The other issue I want to raise is, you know, that  
20 there were procedural injuries here that, that cannot be  
21 addressed in a, you know, in a subsequent case down the  
22 road, they need to be addressed now, and in fact, all of our  
23 injuries really need to be addressed now. We submitted our  
24 petitions within the time provided for, and the idea that we  
25 should have just waited and brought these things up in a

1 future proceeding just doesn't make sense.

2 JUDGE ROGERS: All right. Thank you. All right,  
3 Counsel for the Public Interest Organizations.

4 ORAL REBUTTAL OF SEAN H. DONAHUE, ESQ.

5 ON BEHALF OF THE PIO PETITIONERS

6 MR. DONAHUE: I would just suggest that Counsel  
7 for Respondents have suggested that the withdrawal of the  
8 2017 determination was effectively meaningless for purposes  
9 of standard of review, and I would suggest that that, if  
10 that's true, if that's now their position they shouldn't  
11 object to the vacatur of the rescission in 2018. I think it  
12 would be appropriate to take the 2018 Federal Register  
13 notice at its word. I think a heavy dose of Chenery and the  
14 bar on sort of post hoc massaging of agency actions is  
15 really warranted here. The suggestion that the revised  
16 final determination was in some sense agnostic about where  
17 the standard should go, I don't even that's, it's necessary  
18 to view that determination as committing the Agency to a  
19 particular reduction in standards, but the suggestion that  
20 that's what was going on. I will just note that the day, at  
21 the same time the revised final determination came out the  
22 Administrator of the Agency on his official Twitter account  
23 said that they were taking this action because the standards  
24 were too high and needed to be rolled back. I know that  
25 reliance on Twitter is controversial and problematic, and

1 I've been castigated by my learned friend for bringing in  
2 something, it is in the record of this case, but it wasn't  
3 in the administrative record, but I think there's a certain  
4 dose of realism is fair when the Agency Head is actually  
5 reaching out to the public and explaining the Agency's  
6 actions.

7 I think the theory spun out today that, that Fox  
8 will come into play in undiminished form is problematic, I  
9 mean, Fox operates on policies that are in effect, and yes,  
10 I think even the concessions that have been made today which  
11 seem very significant I think they don't distinguish between  
12 the Agency's reversing its pending policy position, and the  
13 underlying findings, and simply the obligation to explain  
14 someone's comment who said back in the past you did  
15 something else, there is a duty to respond to comments and  
16 to not be arbitrary and capricious, but as Fox and many  
17 other cases make clear, it's a very different thing when  
18 you're reversing your existing policy.

19 And finally, I would just suggest that, I would  
20 note that when questioned about what standard would apply to  
21 the review of a final rule, and whether the 2017 findings  
22 would be something the Agency had to respond to in full,  
23 with the full Fox burden, I think Mr. Hostetler said  
24 something like it's hard to answer that in the abstract. We  
25 submit that the right thing to do here is vacate this very

1 flawed and final action, but if there were anything to that  
2 idea the proper action would be to hold this case in  
3 abeyance until the question is not abstract.

4           If there are any further questions I will --

5           JUDGE ROGERS: Thank you.

6           MR. DONAHUE: -- otherwise I'll step down. Thank  
7 you very much, Your Honors.

8           JUDGE ROGERS: All right. Thank you very much.  
9 We'll take the case under advisement.

10           (Whereupon, at 12:09 p.m., the proceedings were  
11 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

*Paula Underwood*

\_\_\_\_\_  
Paula Underwood

September 23, 2019  
Date

DEPOSITION SERVICES, INC.