ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

Nos. 18-1114(L), 18-1118(Con.), 18-1139(Con.), 18-1162(Con.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF CALIFORNIA, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents,

ALLIANCE OF AUTOMOBILE MANUFACTURERS; ASSOCIATION OF GLOBAL AUTOMAKERS, INC.,

Movant-Intervenors.

On Petition for Review of Agency Action by the
United States Environmental Protection Agency
No. EPA-83FR16077

MOVANT- INTERVENORS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authority

GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
CARB	California Air Resources Board
EPA	Environmental Protection Agency
GHG	Greenhouse gas
MTE	Mid-term evaluation
MY	Model year
NHTSA	National Highway Traffic Safety Administration

INTRODUCTION

The petitions for review in these consolidated proceedings ask this Court to review an agency notice that does nothing more than announce the agency's intention to initiate a proposed rulemaking. As well-settled Supreme Court and Circuit precedent confirms, those requests are premature and must be dismissed for lack of jurisdiction.

In October 2012, the Environmental Protection Agency ("EPA") adopted greenhouse gas ("GHG") emissions standards for cars and light trucks to be sold in the United States in model years ("MYs") 2017-2025. When it did so, the Agency made provisions to reconsider and, if necessary, revise those standards for MYs 2022-2025 vehicles. After receiving hundreds of thousands of comments and conducting a public hearing in 2017, EPA published a notice in the Federal Register on April 13, 2018 ("the April 13 notice"), stating that it had decided that the available data and analysis no longer supported the MYs 2022-2025 standards adopted in 2012. The notice thus stated that EPA would initiate a notice-and-comment rulemaking to reconsider and revise those standards as necessary. The April 13 notice did not amend, defer, or vacate any of the October 2012 standards; to the contrary, it expressly states that the existing standards remain in effect unless and until they are altered through the upcoming rulemaking.

In their comments to EPA before the April 13 Federal Register notice, petitioners advocated in favor of maintaining the GHG standards adopted in 2012. Instead of waiting to see whether and, if so, how EPA chooses to alter those standards in the upcoming proceedings, however, petitioners initiated this litigation. Settled rules of finality and ripeness compel the conclusion that their petitions are premature and must be dismissed.

First, section 307 of the Clean Air Act authorizes review only of *final* agency action. Final agency action has two prerequisites (consummation of the agency process and creation of legal consequences), neither of which is met here. EPA's April 13 notice announced only an interim step in the process of reconsidering and potentially amending the MYs 2022-2025 GHG standards, and thus plainly did not mark the consummation of the Agency's decisionmaking regarding those standards. In addition, the April 13 notice neither creates new legal rights or obligations nor has legal consequences, as it leaves the standards adopted in 2012 intact unless and until a new rule replaces them. The April 13 notice is plainly not final agency action.

Second, petitioners' challenge is unripe. No purpose would be served by forcing EPA now to explain, and requiring the Court now to decide, whether the new data and analysis cited in the April 13 Federal Register notice warranted reconsideration of the MYs 2022-2025 GHG standards adopted in 2012. Any asserted substantive or procedural flaws in the interim decision announced in the

April 13 notice will be fair game for petitioners to try to challenge if and when a final rule issues. And the mere fact that petitioners must participate in a rulemaking that they oppose if they want to challenge the final rule is not the kind of "hardship" that allows them to obtain premature judicial review.

FACTUAL AND PROCEDURAL BACKGROUND

For more than 40 years, the National Highway Traffic Safety Administration ("NHTSA") has regulated the fuel economy of cars and trucks sold in the United States. In 2007, the Supreme Court directed EPA to decide whether to regulate motor vehicle GHG emissions. *Massachusetts v. EPA*, 549 U.S. 497 (2007). EPA began to regulate automotive GHG emissions two years later.[1] The principal GHG emission from vehicles powered with carbon-based fuels like gasoline is carbon dioxide. The only effective way to reduce those carbon dioxide emissions is to increase a vehicle's fuel economy. For that reason, since 2009, EPA and NHTSA have conducted joint rulemakings to set GHG and fuel economy standards. The federal agencies also have attempted to coordinate their programs with the California Air Resources Board ("CARB"), which has adopted GHG standards for vehicles sold in California that also apply in 12 other States and the District of Columbia.

[1] Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

A. The October 2012 Final Rule

Shortly after concluding its first joint GHG-fuel economy rulemaking, which established standards for cars and light trucks for MYs 2012-2016, EPA and NHTSA turned their attention to later model years. On October 15, 2012, the two agencies published GHG and fuel economy standards for MYs 2017-2025.[2] Because the statute governing NHTSA's authority to set fuel economy standards precludes NHTSA from setting such standards for more than five model years at a time,[3] the rule set forth what it called "augural" NHTSA standards for MYs 2022-2025, and explained "that the augural standards are not final, and that a future full rulemaking … will be necessary in order for NHTSA to establish final CAFE standards for MYs 2022-2025 passenger cars and light trucks."[4]

The Clean Air Act does not impose a comparable constraint on EPA, so the October 2012 Final Rule established EPA standards for MYs 2022-2025. But EPA received comments from the auto industry explaining that facts bearing on the appropriateness of the standards for MYs 2022-2025 may well change, and urging EPA to reexamine those standards in conjunction with NHTSA's future rulemaking.

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[2] 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

[3] 49 U.S.C. §32902(b)(3)(B).

[4] 77 Fed. Reg. at 62,961.

EPA agreed, and the rule committed both agencies to a reevaluation of the MYs 2022-2025 GHG standards:

> The agencies will conduct a comprehensive mid-term evaluation and agency decision-making process for the MYs 2022-2025 standards as described in the proposal. The mid-term evaluation reflects the rules' long time frame and, for NHTSA, the agency's statutory obligation to conduct a de novo rulemaking in order to establish final standards for MYs 2022-2025. In order to align the agencies' proceedings for MYs 2022-2025 and to maintain a joint national program, EPA and NHTSA will finalize their actions related to MYs 2022-2025 standards concurrently. If the EPA determination is that standards may change, the agencies will issue a joint [notice of proposed rulemaking] and joint final rules.

77 Fed. Reg. at 62,628. The October 2012 Final Rule set April 1, 2018 as the deadline for completion of the mid-term evaluation ("the MTE"), and published factors that EPA would consider in determining whether the MYs 2022-2025 standards remained appropriate. *Id.* at 62,784; *see* 40 C.F.R. §86.1818-12(h). If EPA determined in the MTE that the 2022-2025 standards remained appropriate, that decision would be "final agency action" and "subject to judicial review." 77 Fed. Reg. at 62,784. By contrast, if EPA concluded in the MTE that the standards did not remain appropriate, that would not be the end of its rulemaking process; instead, EPA would "initiate a rulemaking" to determine what the standards should be, "which could result in standards that are either more or less stringent." *Id.* Judicial review would then be available only for "[a]ny final action taken by EPA at the end of that rulemaking." *Id.* at 62,785.

B. The Mid-Term Evaluation

EPA commenced work on the MTE, in collaboration with NHTSA, in 2016. On December 6, 2016—before NHTSA initiated the necessary rulemaking to review its "augural" standards—EPA published a "proposed determination" that the MYs 2022-2025 GHG standards set in 2012 should remain in place. EPA provided an abbreviated 24-day period (including major holidays) for public comment.[5] Despite the truncated notice period, the Agency received more than 100,000 comments, including detailed comments from some 60 different interested organizations. Less than two weeks after the comment period ended, and eight days before the new Administration took office, EPA Administrator Gina McCarthy issued a "final determination" that the MYs 2022-2025 GHG standards remained appropriate and should not be revised.[6] Administrator McCarthy's decision was not published or reported in the Federal Register.[7]

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[5] *See* Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation, 81 Fed. Reg. 87,927 (Dec. 6, 2016).

[6] EPA, Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation (Jan. 12, 2017), *available at* https://bit.ly/2GD934g.

[7] Given that the January 2017 Final Determination was a final agency action (in contrast to the agency action under review here), Movant-Intervenor Alliance of Automobile Manufacturers filed a petition for review of Administrator McCarthy's decision on March 13, 2018, which it later voluntarily dismissed.

In March 2017, EPA published a Federal Register notice stating that it intended to reconsider the January 2017 determination that the MYs 2022-2025 GHG standards remained appropriate.[8] The Agency later opened a 45-day comment period regarding that determination, which received more than 290,000 public comments, and held a public hearing.[9] Movant-Intervenors submitted comments including expert reports explaining why important assumptions made in the January 2017 determination were no longer supported by conditions in the new-vehicle marketplace or developments in the technology to control GHG emissions.[10]

On April 13, 2018, EPA published a notice in the Federal Register withdrawing the January 2017 determination and finding that the MYs 2022-2025 GHG standards were not appropriate in light of the record then before the Agency.[11] EPA based that decision on the "significant record" indicating that "[m]any of the key assumptions EPA relied upon … were optimistic or have significantly changed

[8] Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (Mar. 22, 2017).

[9] Public Hearing for Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 39,976 (Aug. 23, 2017).

[10] *See* https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0827-9194; https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0827-9728.

[11] Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077 (Apr. 13, 2018).

and thus no longer represent realistic assumptions." 83 Fed. Reg. at 16,077-78. EPA announced that it would issue a notice of proposed rulemaking to establish revised GHG standards for MYs 2022-2025. Consistent with the October 2012 Final Rule, EPA explicitly explained that the April 13 notice did not constitute final agency action:

> This Determination is not a final agency action. As EPA explained in the 2012 final rule establishing the MTE process, a determination to maintain the current standards would be a final agency action, but a determination that the standards are not appropriate would lead to the initiation of a rulemaking to adopt new standards, and it is the conclusion of that rulemaking that would constitute a final agency action and be judicially reviewable as such.

Id. at 16,078; *see* 77 Fed. Reg. at 62,784-85. EPA likewise stated that until its new rulemaking process is completed, "the current standards remain in effect and there is no change in the legal rights and obligations of any stakeholders." 83 Fed. Reg. at 16,087; *see* 77 Fed. Reg. at 62,785.

Notwithstanding those express and clear statements, petitioners have filed four petitions for review of the April 13 notice, invoking section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1). Those petitions have been consolidated in the above-captioned proceedings. Movant-Intervenors now move to dismiss the petitions for lack of jurisdiction.

ARGUMENT

I. The Decision To Initiate A Rulemaking To Revise The MYs 2022-2025 GHG Standards Is Not Final Agency Action.

Section 307(b)(1) of the Clean Air Act authorizes this Court to review any nationally applicable "final action" taken by EPA under the Act. 42 U.S.C. §7607(b)(1). The "bite in the phrase," of course, is the word "final." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). To be "final," an agency action must meet two conditions: first, it must "mark the consummation of the agency's decisionmaking process," and second, it must be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).[12] Neither of those two necessary conditions is satisfied here.

A. The Challenged Notice Is Not the End of EPA's Decisionmaking Process.

First, the action that petitioners challenge is plainly not the "consummation of the agency's decisionmaking process." *Clean Air Council*, 862 F.3d at 6 (quoting *Bennett*, 520 U.S. at 178). On the contrary, by withdrawing the January 2017 determination and determining that the MYs 2022-2025 standards are not

[12] The test for final action under section 307(b)(1) is the same as under the Administrative Procedure Act. *Whitman*, 531 U.S. at 478.

appropriate on the current record, the April 13 notice *restarts* the Agency's decisionmaking process. As the notice explains, in light of that determination, EPA and NHTSA will now "initiate a notice and comment rulemaking in a forthcoming Federal Register notice to further consider appropriate standards for MY 2022-2025." 83 Fed. Reg. at 16,077; *see id.* at 16,078 ("EPA, in partnership with NHTSA, will further explore the appropriate degree and form of changes to the program through a notice and comment rulemaking process."); *id.* at 16,087 (same). Because "[t]he effect of this action is … to *initiate* a rulemaking process," not to conclude that process, the April 13 notice is not a final action. *Id.* at 16,087 (emphasis added); *see Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 502-03 (D.C. Cir. 2018) (action that "initiate[s] the process" of determining regulatory obligations is not final action); *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 194 (D.C. Cir. 2011) ("This court has never considered an agency decision to continue the rulemaking process to be a 'final agency action' ….").

Petitioners cannot get around that straightforward conclusion by trying to artificially separate the MTE from the broader process of setting the MYs 2022-2025 standards. To be sure, the MTE reaches a "final" decision on the question of whether a new rulemaking should be commenced to reevaluate what standards are appropriate for MYs 2022-2025. But the finality inquiry asks whether the challenged agency action marks the end of an agency's decisionmaking process *as*

a whole, not whether it is the end of one step in that process. *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (final action must be "the culmination of that agency's consideration of an issue"). It is therefore well settled that issuing a notice of proposed rulemaking is not final agency action, even if it could artfully be described as an agency's final word on whether to conduct a rulemaking. *See, e.g.*, *In re Murray Energy Corp.*, 788 F.3d 330, 333-34 (D.C. Cir. 2015); *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996). *A fortiori*, simply issuing a notice of intent to issue a notice of a proposed rulemaking is not final action either. This principle is obvious when an agency initiates rulemaking on an entirely novel subject, but is no less true when the agency announces an intent to initiate rulemaking on a subject addressed by existing rules.

This Court's precedent on reconsideration of agency action provides a useful analogy. As this Court recently made clear, "an agency's decision to grant a petition to reconsider a regulation is not reviewable final agency action." *Clean Air Council*, 862 F.3d at 6. Granting a petition for reconsideration (and so initiating a new notice-and-comment rulemaking to revise an existing rule) does not end an agency's decisionmaking process; instead, it "merely begins [the] process" of agency review and revision. *Id.* So too here: The April 13 determination that the MYs 2022-2025 standards are not appropriate on the current record merely begins the process of review and revision for the MYs 2022-2025 standards—a process that could result

in a wide variety of outcomes, including no change at all. Because EPA has not "rendered its last word on the matter" of what the MYs 2022-2025 standards should be, the April 13 notice is not final agency action. *Whitman*, 531 U.S. at 478 (quoting *Harrison v. PPG Indus.*, 446 U.S. 578, 586 (1980)).

That the now-withdrawn January 2017 determination to *retain* the existing MYs 2022-2025 standards could qualify as final action does not change that conclusion. As EPA explained in the April 13 notice, "a determination to maintain the current standards would be a final agency action" because no further agency decisionmaking would be required after that point; the existing standards would simply remain in place. 83 Fed. Reg. at 16,078. By contrast, "a determination that the standards are not appropriate would lead to the initiation of a rulemaking to adopt new standards," meaning the Agency would not conclude its decisionmaking process until "the conclusion of that rulemaking." *Id.*; *see Murray Energy*, 788 F.3d at 336 ("Put simply, the consummation of the agency's decisionmaking process with respect to a rule occurs when the agency issues the rule."). There is nothing novel about that asymmetry. Again, the same pattern holds true for petitions for agency reconsideration: A decision denying reconsideration (and so maintaining an existing rule) may be a reviewable final action, but a decision granting reconsideration (and so initiating a new rulemaking process) is not. *Clean Air Council*, 862 F.3d at 6 (citing *Portland Cement*, 665 F.3d at 185).

The ongoing regulatory process confirms that the April 13 notice is not final agency action. In determining whether an agency action is final, "this court and the Supreme Court have looked to the way in which the agency subsequently treats the challenged action." *Sw. Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016). Here, the April 13 notice "makes clear that the Agency did not consummate its decisionmaking process"; instead, EPA made plain its intention to "invest[] time and resources in undertaking … a final resolution" by initiating a proposed rulemaking on the MYs 2022-2025 standards. *Id.* at 276; *cf. Whitman*, 531 U.S. at 479 (finding EPA action final when EPA had declared that "its earlier decision was conclusive"). The Agency's own treatment of its April 13 notice as announcing an interim step in the decisionmaking process, rather than a final action ending that process, confirms that the challenged action is not final or reviewable.

B. The Challenged Notice Neither Determines Legal Rights and Obligations Nor Causes Legal Consequences.

The petitions for review likewise fail the second part of the finality test because the action they challenge neither determines legal rights and obligations nor causes legal consequences. *See Bennett*, 520 U.S. at 178. As EPA made clear in the April 13 notice, the decision to withdraw the January 2017 determination and initiate a rulemaking to revise the MYs 2022-2025 standards does not alter any existing regulatory requirements. Until the expected rulemaking is completed, "the current standards remain in effect and there is no change in the legal rights and obligations

of any stakeholders." 83 Fed. Reg. at 16,087. As such, the April 13 notice is not final agency action.

Once again, that conclusion flows directly from settled precedent. It is well recognized that *proposed* rules do not determine rights or obligations or impose cognizable legal consequences. *See, e.g.*, *Murray Energy*, 788 F.3d at 334-35; *Action on Smoking & Health v. Dep't of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994) ("[A] proposed rulemaking generates no such consequences."). The April 13 notice is not even a proposed rule; it is merely a notice that EPA intends to issue a proposed rule in the future. Because that notice "neither announced a new interpretation of the [existing] regulations nor effected a change in the regulations themselves," and indeed "had no binding effect whatsoever" on the Agency or on any regulated party, it cannot constitute final action under section 307(b)(1). *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004); *accord Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (finding agency action not final where "there has been no order compelling [regulated parties] to do anything").

To the extent the April 13 notice might have any practical consequences based on public expectations about the likely results of the upcoming rulemaking, those consequences do not satisfy the second part of the finality test. *See Reliable Automatic Sprinkler*, 324 F.3d at 732 ("practical consequences" do not create finality

when agency action "has no legally binding effect"). The fact that petitioners and other stakeholders "may alter their behavior (and thereby incur costs) based on what they think is likely to come in the form of new regulations" is not a "legal consequence" that can permit immediate review. *Murray Energy*, 788 F.3d at 335. If it were, the second part of the finality test would be rendered virtually meaningless. Every government agency rulemaking has potential outcomes that are the subject of speculation, and stakeholders can always alter their behavior ahead of a final rule if they anticipate (rightly or wrongly) a particular outcome.

The April 13 notice does not create any cognizable legal obligations or consequences. To be sure, the determination that the MYs 2022-2025 standards are not appropriate on the current record means that the Agency will now have to commence a rulemaking to determine whether and, if so, how those standards should be changed. But that alone cannot be a cognizable "legal consequence" for finality purposes; otherwise, every agency decision to reconsider a rule or announce a new rulemaking would satisfy the second part of the *Bennett* inquiry. *Cf. Arch Coal*, 888 F.3d at 503 ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding.") (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 30 (D.C. Cir. 2014)).

Even if granting a petition for reconsideration or announcing a proposed rule might in some sense create an "obligation" for an agency to take further steps—such

as accepting and considering public comments—that is not the kind of "obligation" or "consequence" that the finality inquiry recognizes. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980) (mere "threshold determination that further inquiry is warranted" is not final agency action); *Arch Coal*, 888 F.3d at 503 (same). Whatever effect such actions may have in advancing the regulatory process, they create no "substantive change" in the existing legal regime, and so do not establish finality. *Mendoza v. Perez*, 754 F.3d 1002, 1018-19 (D.C. Cir. 2014); *see NRDC v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011) (final action must "announce[] a binding change in the law"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006) (final action must "determine[] … substantive rights or obligations"). So too for the April 13 notice: Whatever role that notice may play in leading EPA to revise the MYs 2022-2025 GHG standards in the future, it does not alter the presently governing legal regime. 83 Fed. Reg. at 16,087 ("[T]he current standards remain in effect and there is no change in the legal rights and obligations of any stakeholders."). It therefore is not final agency action.

Last but not least, "the agency's characterization of the [action]" is relevant to determining whether it creates legal rights, obligations, or consequences and reinforces the lack of finality here. *Nat'l Mining Ass'n*, 758 F.3d at 252; *see Sw. Airlines*, 832 F.3d at 275. In *National Mining Association*, for instance, EPA issued a guidance document that "repeatedly state[d] that it does not impose legally binding

requirements," and "disclaim[ed] any intent to require anyone to do anything or to prohibit anyone from doing anything." 758 F.3d at 252. Relying on that characterization, this Court held that the guidance was not a final action. *Id.* at 253. That same reasoning applies equally here: The April 13 notice makes crystal clear that EPA believes its action does nothing but "initiate a rulemaking process," and makes "no change" in any existing legal rights and obligations. 83 Fed. Reg. at 16,087. That positive declaration weighs heavily against finding that the action at issue nevertheless had the substantive impact necessary for finality.

* * *

As this Court has explained, judicial review of nonfinal agency action "improperly intrudes into the agency's decisionmaking process." *Reliable Automatic Sprinkler*, 324 F.3d at 732 (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986)). Where (as here) the challenged action merely announces a new regulatory proceeding, in which the challengers will have every opportunity to present their views to the agency, "it makes no sense for a court to intervene." *Id.* at 733. Instead, postponing review until an agency has reached its final determination "conserves both judicial and administrative resources" by "allow[ing] the required agency deliberative process to take place before judicial review is undertaken." *Id.*

II. The Petitions Are Unripe.

Just as the April 13 notice does not constitute final agency action, the petitions challenging that notice are unripe. *See NRDC v. EPA*, 643 F.3d at 319 (finality and ripeness "turn on the same question"). To determine whether a case is ripe for review, courts must evaluate "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Both of those factors foreclose review of the agency action at issue here.

First, whatever issues petitioners seek to present (which remain opaque) are not fit for judicial review. As this Court has recognized, an issue "is not fit [for review] if it does not involve final agency action." *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 n.4 (D.C. Cir. 2012); *see NRDC v. EPA*, 643 F.3d at 319 (finality is "a necessary feature of fitness for review") (citing *Abbott Labs.*, 387 U.S. at 149). Because the Agency has not yet taken any final action, the petitions challenging that action are necessarily unripe.

Indeed, the "basic rationale" of the ripeness doctrine is to prevent courts from "entangling themselves in abstract disagreements over administrative policies … and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way."

Abbott Labs., 387 U.S. at 148-49. Allowing judicial review here would undermine *Abbott Laboratories*' basic rationale, forcing EPA to put forth an abstract defense of its decision to revisit the MYs 2022-2025 standards before the Agency has even definitively decided whether to alter the standards, let alone concluded what any new standards should be. Because any attempt at review of EPA's current thinking would "inappropriately interfere with further administrative action," as EPA has not yet "concluded its consideration of the [relevant] issue," the petitions must be dismissed as unripe. *Whitman*, 531 U.S. at 479; *see Murray Energy*, 788 F.3d at 334 (declining to "review the legality of a proposed EPA rule so as to prevent EPA from issuing a final rule").

Put differently, petitioners' challenges to the decision to initiate a rulemaking to potentially revise the MYs 2022-2025 standards should not be decided in a vacuum. Judicial appraisal of those challenges "is likely to stand on a much surer footing" in reviewing a specific determination by EPA on what those standards should be, rather than in "the generalized challenge made here." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967); *cf. Nat'l Park Hosp.*, 538 U.S. at 812 (case is not fit for review when "further factual development would significantly advance our ability to deal with the legal issues presented"). The first factor in the ripeness inquiry thus tips sharply against immediate review.

So does the second factor. There is no plausible hardship to petitioners from withholding judicial review until EPA has taken final action. Indeed, even under the "lower standard" that applies to the hardship inquiry in the Clean Air Act context, *see Whitman*, 531 U.S. at 479-80, petitioners cannot carry their burden. To begin with, petitioners themselves are not regulated by the MYs 2022-2025 standards, making any claim of hardship from future changes to those standards tenuous at best. In any event, as explained above, neither petitioners nor anyone else faces any immediate legal effect from the April 13 notice. The existing MYs 2022-2025 standards remain just as much the law today as they were before that notice issued, and will continue to remain the law unless and until EPA completes its expected rulemaking. Thus, just as in *Toilet Goods*, this "is not a situation in which primary conduct is affected" by the challenged action. 387 U.S. at 164. Because the April 13 notice has not changed the existing regulations, there are "no irremediable adverse consequences … from requiring a later challenge," and so petitioners cannot show hardship. *Id.*; *see Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (finding no hardship where agency action created no "adverse effects of a strictly legal kind").

Petitioners also cannot show any cognizable hardship from the mere fact that the proposed rulemaking will go forward. Just as "requiring a party to participate in an agency proceeding" does not make agency action final, *Arch Coal*, 888 F.3d at

503, it also does not make a challenge to such agency action ripe. *See, e.g.*, *AT&T Corp. v. FCC*, 349 F.3d 692, 702 (D.C. Cir. 2003) ("[T]he burden of participating in further administrative and judicial proceedings does not constitute sufficient hardship to [show] ripeness."); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (same); *see also Cohen v. United States*, 650 F.3d 717, 743 (D.C. Cir. 2011) (en banc) (Kavanaugh, J., joined by Sentelle, C.J. and Henderson, J., dissenting). And to the extent that the pending rulemaking creates any uncertainty about the MYs 2022-2025 standards, "mere uncertainty as to the validity of a legal rule" likewise cannot constitute a hardship for purposes of the ripeness analysis. *Nat'l Park Hospitality*, 538 U.S. at 811. After all, if mere uncertainty about a legal question could qualify as a hardship warranting immediate review, "courts would soon be overwhelmed with requests for what essentially would be advisory opinions." *Id.*

In sum, petitioners "will have ample opportunity later to bring [their] legal challenge" if and when EPA completes its intended rulemaking and adopts new MYs 2022-2025 GHG standards (or affirms the existing standards). *Ohio Forestry Ass'n*, 523 U.S. at 734. In the meantime, however, petitioners "fail[] to demonstrate that deferring judicial review will result in real hardship." *Nat'l Park Hospitality*, 538 U.S. at 811-12. Thus, not only is the agency action not final, but the petitions are unripe, and so must be dismissed.

CONCLUSION

For the reasons set forth above, this Court should dismiss the petitions for lack of jurisdiction.

Respectfully submitted,

s/Paul D. Clement

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July 10, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Alliance of Automobile Manufacturers certifies that it is an I.R.C. Section 501(c)(6) not-for-profit trade association of car and light truck manufacturers whose members include the BMW Group, Fiat Chrysler Automobiles, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America and Volvo Car USA. The Alliance operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. The Alliance does not have any outstanding shares or debt securities in the hands of the public, nor does it have a parent company. No publicly held company has a 10% or greater ownership interest in the Alliance.

The Association of Global Automakers, Inc., a Virginia not-for-profit corporation, states pursuant to Federal Rule of Appellate Procedure 26.1 that it has no parent company and that no publicly held corporation has a 10% or greater ownership interest in Global Automakers.

CERTIFICATE AS TO PARTIES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), the Alliance submits this certificate of persons who are currently parties, movant-intervenors, or amici:

Petitioners in No. 18-1114: State of California, by and through its Governor Edmund G. Brown Jr., Attorney General Xavier Becerra and California Air Resources Board; State of Connecticut; State of Delaware; District of Columbia; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of Minnesota, by and through its Minnesota Pollution Control Agency and Minnesota Department of Transportation; State of New Jersey; State of New York; State of Oregon; Commonwealth of Pennsylvania, by and through its Department of Environmental Protection and Attorney General Josh Shapiro; State of Rhode Island; State of Vermont; Commonwealth of Virginia; State of Washington.

Petitioner in No. 18-1118: National Coalition for Advanced Transportation.

Petitioners in No. 18-1139: Center for Biological Diversity; Conservation Law Foundation; Environmental Defense Fund; Natural Resources Defense Council; Public Citizen, Inc.; Sierra Club; Union of Concerned Scientists.

Petitioners in No. 18-1162: Consolidated Edison Company of New York, Inc.; National Grid USA; New York Power Authority; City of Seattle, by and through its City Light Department.

Respondent in Nos. 18-1114, 18-1118, 18-1139, and 18-1162: Environmental Protection Agency.

Respondent in No. 18-1114: E. Scott Pruitt, as Administrator of the Environmental Protection Agency.

Movant-Intervenors in Nos. 18-1114, 18-1118, 18-1139, and 18-1162: Alliance of Automobile Manufacturers; Association of Global Automakers, Inc.

Amici Curiae in Nos. 18-1114, 18-1118, 18-1139, and 18-1162: None.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,119 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

July 10, 2018

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
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