State of West Virginia
Office of the Attorney General
John B. McCuskey
Attorney General

State of Indiana
Office of the Attorney General
Todd Rokita
Attorney General

Commonwealth of Kentucky
Office of the Attorney General
Russell Coleman
Attorney General

August 7, 2025

The Honorable Lee M. Zeldin
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, Suite 1101A
Washington, DC 20460

Submitted Electronically via Regulations.gov

Re: Comments on the Repeal of Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units by the Attorneys General of the States of West Virginia, Indiana, Kentucky, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming (Docket No. EPA-HQ-OAR-2025-0124)

Dear Administrator Zeldin:

We appreciate the opportunity to comment on EPA's proposed Section 111 rule for coal-, natural-gas-, and oil-fired power plants. *See Repeal of Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units*, 90 Fed. Reg. 25,752 (June 17, 2025).

As States, we take seriously both our traditional authority in energy regulation and our statutory role within the cooperative federalism framework of the Clean Air Act (CAA). But under the past administration, that authority was thwarted. The Proposed Rule will restore the Clean Air Act to its proper meaning and help States secure affordable, reliable, and environmentally responsible energy for everyone.

The Proposed Rule appropriately requires a separate, significant contribution finding specific to greenhouse gas (GHG) before regulating electric generating units' (EGU) GHG emissions. The Proposed Rule also rightly recognizes that the CAA provides the Administrator discretion when determining significant contribution, and that analysis must consider EGU emissions in context with global GHG emissions. Finally, the Proposed Rule recognizes what the States have been saying all along: EPA's previous rule finding that carbon capture and sequestration/storage (CCS) and co-firing are best system of emission reductions (BSER) for

EGUs is unlawful. Among other problems, CCS has not been adequately demonstrated yet, and the cost is unreasonable. Co-firing at this scale also cannot be a BSER because it constitutes the sort of impermissible generation shifting invalidated in *West Virginia v. EPA*, 597 U.S. 697 (2022). Beyond that, it would have a significant adverse effect on the national energy grid.

We applaud EPA for its strong Proposed Rule, which will keep our environment clean while still providing reliable energy nationwide. We urge the agency to adopt it as soon as possible.[1]

BACKGROUND

Section 111 of the CAA directs EPA to identify source categories that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b). After making that list, the Administrator must determine the BSER available to address air pollutants from both new and existing stationary sources. *See* 42 U.S.C. § 7411(a)(1), (b)(1).

A BSER must be "adequately demonstrated" at the time it is promulgated. 42 U.S.C. § 7411(a)(1), (b)(1). That requirement means the system must be applicable "under [a] range of … conditions," *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 n.46, 433 (D.C. Cir. 1980), and is not "purely theoretical or experimental." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 434 (D.C. Cir. 1973). Once EPA determines the BSER, it "impose[s] an emissions limit on new stationary sources" reflecting "the degree of emission limitation achievable" through applying those "adequately demonstrated" BSERs. *West Virginia*, 597 U.S. at 709. In determining a BSER, the Administrator accounts for cost and energy requirements. 42 U.S.C. § 7411(a)(1), (b)(1).

In addition to setting standards for new and modified sources under Section 111(b), Section 111 directs the Administrator to establish a procedure under which States are to submit plans for regulating existing sources that are not already regulated under Sections 110 or 112. *See* 42 U.S.C. § 7411(d); *West Virginia*, 597 U.S. at 710. Section 111(d) allows EPA to identify the underlying BSER, but it leaves States with discretion to implement standards to reach the degree of emission limitation achievable through the application of that BSER. *See* 42 U.S.C. § 7411(d)(1). In this

[1] We do not agree with suggestions from some—including other States—that EPA has provided insufficient time for comment or inadequate opportunities for public comment on the Proposed Rule. The issues implicated by the Proposed Rule have been commented on and litigated by relevant stakeholders for more than a decade. The legal and factual questions presented here are well understood, and a fulsome record already exists to address them. States and other relevant stakeholders have been forced to operate in a state of uncertainty for far too long; the timeline EPA has adopted recognizes that delaying additional corrective action for months on end will only continue that uncertainty and further undermine the American energy market. And to the best of our knowledge, those seeking more time have not identified any specific information or analysis that will not be available before the end of the 30-day comment period—the very comment period contemplated by the CAA. *See* 42 U.S.C. § 7607(h).

cooperative setup, States and the federal government work together to protect air quality while balancing competing considerations, such as cost, achievability, and energy usage.

For the first several decades of Section 111's existence, EPA declined to regulate GHG emissions from power plants. Then, for the first time in 2015, EPA sought to curtail GHG emissions from power plants by issuing standards of performance for those emissions in the Clean Power Plan (CPP). 80 Fed. Reg. 64,510, 64,662 (Oct. 23, 2015). In issuing the plan, EPA claimed that it did not need to make a pollutant-specific finding that GHG emissions from EGUs contribute significantly to dangerous air pollution before regulating those GHGs. 80 Fed. Reg. at 64,529-31. EPA argued that it could regulate any pollutant emitted by sources in an already-regulated source category. *See* 80 Fed. Reg. at 64,529-31. EPA also asserted that, in the alternative, it had a rational basis for determining that GHG emissions from fossil-fuel-fired EGUs endanger public health and welfare. *See* 80 Fed. Reg. at 64,530-31.

To reduce GHG emissions, EPA settled on "emissions ceilings so strict that no existing coal plant would have been able to achieve them" without generation shifting. *West Virginia*, 597 U.S. at 714. Owners of coal power plants would have had to reduce their output, generate power using different energy sources, or buy emissions allowances. *Id.* at 713. Altogether, the standards were designed to "implement a sector-wide shift in electricity production from coal to natural gas and renewables." *Id.*

But the CPP never went into effect because the Supreme Court granted a stay pending review. *West Virginia v. EPA*, 577 U.S. 1126 (2016). EPA eventually repealed the CPP, concluding that the rule had "significantly exceeded" the Agency's statutory authority. 84 Fed. Reg. 32,520, 32,523 (July 8, 2019). Specifically, EPA agreed that it never should have considered generation shifting as part of the BSER. Both Section 111's plain text and the major-questions doctrine supported its revised determination, it explained, because the "generation-shifting scheme was projected to have billions of dollars of impact," and "no section 111 rule of the scores issued ha[d] ever been based on generation shifting." 84 Fed. Reg. at 32,529. EPA thus concluded that it had lacked the authority to implement the CPP because Congress did not provide a clear statement showing "[c]ongressional intent to endow the Agency with discretion of this breadth." *Id.* EPA then replaced the CPP with a different Section 111(d) rule. 84 Fed Reg. at 32,532. That rule confirmed that a BSER should apply to specific facilities rather than at a regional or grid-wide level.

The second rule didn't remain effect because many States and private parties filed petitions for review in the D.C. Circuit. And that Court ultimately held in a 2-1 decision that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021). The majority read Section 111 broadly— finding that EPA "tied its own hands" by focusing on only source-specific BSERs, *id.* at 962 n.9, and that "Congress imposed no limits on the types of measures the EPA may consider," *id.* at 946.

Ultimately, the Supreme Court reversed the D.C. Circuit, holding that EPA had been right—the second time, that is—to reject the CPP because EPA lacked authority to require "generation shifts." *See Id.* at 735. The Court emphasized that nothing in Section 111 allowed EPA to decide how much coal-generation there should be. *Id.* at 729, 732, 734-35.

Despite the Supreme Court's admonishment, EPA decided to try generation-shifting and other adventuresome methods all over again. In 2023, EPA unveiled the Clean Power Plan 2.0. *See New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 88 Fed. Reg. 33,240 (May 23, 2023). The new rule did not explicitly mandate generation shifting; instead, it implicitly did so by adopting a BSER that no coal-fired plant has ever achieved. State of West Virginia, et al., Comment Letter on Proposed Section 111 Rule for Existing Coal-, Natural-gas-, and Oil-fired Power Plants 49 (Aug. 8, 2023), https://tinyurl.com/4ht9usa4 (States Comment). Multiple States challenged this rule, and the case is currently in abeyance in the D.C. Circuit. *West Virginia v. EPA*, No. 24-1120 (D.C. Cir.).

Both the original CPP and CPP 2.0 tried to impose a BSER that would have come at significant cost. "EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs"—costs that would be borne by consumers "in the form of higher energy prices." *West Virginia*, 597 U.S. at 714 (citing EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 3-22, 3-30, 3-33, 6-24, 6-25 (2015)). The closure of dozens of coal-fired power plants, in addition to other compliance costs, would "eliminate tens of thousands of jobs across various sectors." *Id.* And States most dependent on fossil-fuel energy sources would have borne the brunt of those job losses and compliance costs. *See, e.g.*, John Deskins, et al., *The Economic Impact of Coal and Coal-Fired Power Generation in West Virginia*, BUREAU BUS. & ECON. RSCH. 15 (Winter 2021), https://tinyurl.com/5n7ruv9h.

In addition to imposing substantial costs on consumers, these rules would have destabilized—not shored up—the grid reliability of the electricity-generating market. For example, Southwest Power Pool, which operates across the Midwest and West, said that EPA's 2023 rule would have "deleterious impacts" on grid reliability because the plants could not comply with the rule and would have to retire early. Statement, SPP, Statement on the Recent EPA Greenhouse Gas Emissions Rule 2 (May 20, 2024), https://tinyurl.com/dpduafbu. Even if those plants were replaced as EPA had envisioned under those rules, it would destabilize the grid. That's because EPA aimed to replace "dispatchable generation" that can be "turned on and off and adjusted as needed" with "weather-dependent resources such as wind and solar"—resources lacking "key reliability attributes that are needed to keep the grid reliable every hour of the year." MISO, RESPONSE TO THE RELIABILITY IMPERATIVE 1 (Feb. 2024), https://tinyurl.com/ya7tz7y9; *see also* NERC, 2023 LONG-TERM RELIABILITY ASSESSMENT 6-9 (Dec. 2023), https://tinyurl.com/bdm36c27.

Grid reliability is essential now more than ever. Electricity consumption has increased about 2% every year. *See* EIA, *After more than a decade of little change, U.S. electricity consumption is rising again* (May 13, 2025), https://tinyurl.com/ypjdn2aa. But new investments in areas like data centers and artificial intelligence demand even more electricity—moving from 4.4% of total U.S. electricity consumption in 2023 to an estimated 6.7-12% of total U.S. electricity consumption by 2028. *See DOE Releases New Report Evaluating Increase in Electricity Demand from Data Centers*, U.S. DEP'T OF ENERGY (Dec. 20, 2024),

https://tinyurl.com/5x577ve2. This exponential growth will require more electricity than ever, as shown here:

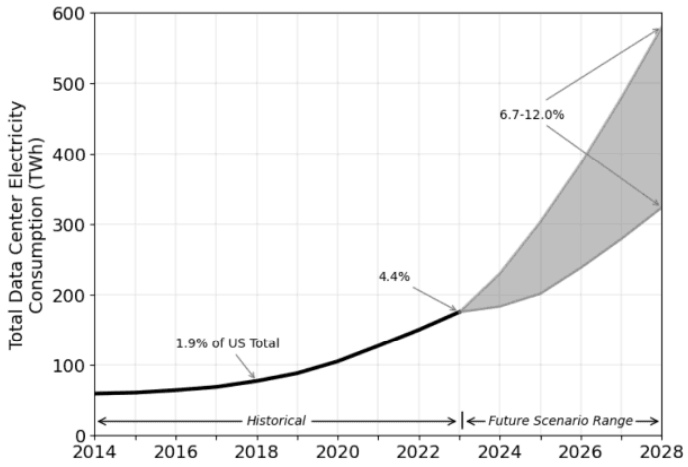


Figure ES-1. Total U.S. data center electricity use from 2014 through 2028.

ARMAN SHEHABI ET AL., 2024 UNITED STATES DATA CENTER ENERGY USAGE REPORT 52 (Dec. 2024), https://tinyurl.com/yr7xpwmj.

Technological advances in artificial intelligence are one part of these increases. Some estimate that data centers for AI products could double their electricity consumption between 2024 and 2028, as reflected below:

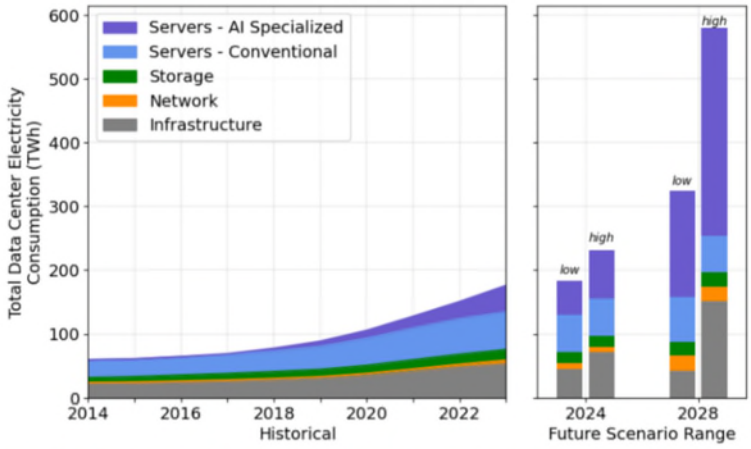


Figure 5.6. Total data center electricity use from 2014 through 2028 by equipment type.

SHEHABI, *supra*, at 53.

Instead of hamstringing the industry so it cannot generate the electricity necessary to meet these new challenges, the Proposed Rule correctly reads the Clean Air Act to require a

determination of significant contribution to dangerous air pollution for emissions from each source category. 90 Fed. Reg. at 25,763-65. In the past, EPA disclaimed the need to make such a finding. Even when it claimed it *had* made such a finding, the Agency looked at the overall global impact of GHGs. EPA, REGULATORY IMPACT ANALYSIS 3-28 (2024), https://tinyurl.com/4sc9w2v2. The Proposed Rule reconsiders whether GHG emissions from the EGU source category actually "contribute significantly" to dangerous air pollution, as GHG air pollution involves many independent actors unrelated to electricity generation. 90 Fed. Reg. at 25,768.

At bottom, the Proposed Rule gives electricity generators and States the flexibility to protect air quality while also unleashing electricity generation that will help provide low-cost energy and grid reliability. The States are therefore pleased that EPA has proposed to finalize it near the end of this year.

DISCUSSION

I. Greenhouse Gases from Domestic EGUs Do Not Significantly Contribute to Dangerous Air Pollution.

The Proposed Rule correctly recognizes that EPA must prove that EGU GHG emissions significantly contribute to air pollution that endangers the public health before regulating those emissions under Section 111.

EPA's course correction is a welcome one. As a matter of statutory interpretation, a pollutant-specific significant contribution finding is the only interpretation that advances the statute's textually and structurally derived purpose. In fact, a contrary interpretation would lead to absurd results that Congress could not have intended. Other provisions of the CAA and regulations implementing Section 111 support an interpretation of Section 111 that requires a pollutant-specific significant contribution finding, too. Finally, a more limited reading of Section 111 complies with well-established rules of statutory interpretation: ambiguous statutory text cannot support the grant of sweeping and unfettered regulatory authority, and statutes should be interpreted to avoid such constitutional problems.

The Proposed Rule further recognizes (correctly) that a significant contribution finding must account for certain policy considerations. The EPA Administrator has discretion in determining whether a source category causes or significantly contributes to air pollution by considering whether regulating EGU emissions would have "little effect on dangerous air pollution" or "would not be useful" given the Administration's policies. EGU emissions do not significantly contribute to air pollution because EGUs are insignificant compared to global GHGs. No matter how little or much EPA regulates domestic GHGs, there would not be a change in global air pollution. What's more, choosing not to regulate domestic EGU GHG emissions reflects the science today, which shows that GHGs generally do not significantly contribute to endangering air pollution.

A. Section 111 Requires A Pollutant-Specific Assessment of Significant Contribution.

1. To establish new source emission limits, EPA must list the category of stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). So EPA must make two separate findings: (1) that a given form of air pollution "may reasonably be anticipated to endanger the public health or welfare," and (2) that a given category of stationary sources "causes, or contributes significantly to" that air pollution. *Id.*

A pollutant-specific reading flows naturally from the statutory text and structure. As a textual matter, the endangerment aspect ("endanger public health or welfare") modifies and relates back to "air pollution," not "sources." 42 U.S.C § 7411(b)(1)(A). The provision requires EPA to determine whether a source causes or contributes significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* And the only way to determine that is by evaluating the specific emissions from that source. Only after the endangerment determination of a particular air pollutant may EPA look at whether the category of sources "contributes significantly" to that pollution—the two are inextricably linked. *Id.*

Conversely, the text doesn't support EPA's past practice of relying on a single endangerment finding at the source level to justify regulating any emission the source may produce. *See* 80 Fed. Reg. at 54,529-31. Section 111(b)(1)(B) says EPA may issue performance standards after it lists a source category under Section 111(b)(1)(A). 42 U.S.C. § 7411(b)(1)(B). Yet the definition of "standard of performance" is tied to the specific pollutants EPA concludes endanger health and welfare, not a generic cap on all potential emissions. *Id.* § 7411(a)(1) (defining a "standard of performance" as "a standard for emissions of air pollutants"). Similarly, Section 111(b)(3) requires the Administrator to "issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section." *Id.* § 7411(b)(3). So the statute contemplates that the processes for adding new source categories and new air pollutants are the same: EPA must make the required findings to tie specific sources to specific pollutants.

If Section 111 did not require a pollutant-specific significant contribution finding, it would create an inconsistency in how new source categories and new pollutants are added to the stationary source program. While new source categories must be added through the traditional (and statutorily required) way of making a two-part endangerment finding, EPA could bootstrap jurisdiction over any new pollutants it chooses provided they are emitted from existing source categories. The text does not support treating source categories and pollutants differently. Nor does the text support the notion that Congress would have empowered EPA to regulate harmless and insignificant emissions.

Section 111's structure also supports a pollutant-specific significant contribution finding. Congress required EPA to make a pollutant-specific finding before regulating that pollutant because it wanted EPA "to promote the public health and welfare"—the statute's textually declared purpose. *Id.* § 7401(b)(1). EPA accomplishes that purpose by regulating significant emissions of pollutants that "may reasonably be anticipated to endanger public health or welfare" but not others.

Id. § 7411(b)(1)(A). Here again, a contrary reading would instead license EPA to regulate even beneficial aspects of plant operations, so long as it happened to fall within a category that emits a single dangerous pollutant. *Contra* § 7401(b)(1) (explaining that the CAA is intended to "protect and enhance the quality of the Nation's air resources *so [far] as to promote the public health and welfare*" (emphasis added).

Elsewhere, in subsection (f), the CAA provides criteria for EPA to consider when "determining priorities for promulgating standards [of performance] for categories of major stationary sources." 42 U.S.C. § 7411(f)(2). Those criteria include both "the quantity of air pollutant emissions which each such category will emit" and "the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare." *Id.* EPA must consider "the extent to which" a pollutant endangers public health or welfare, not "whether" a pollutant endangers public health or welfare. So Section 111(f) assumes that for each pollutant, EPA issues a standard of performance only for those pollutants from a source that EPA anticipates "may reasonably be anticipated to endanger public health or welfare." *Id.*

Analogous provisions of the CAA confirm this reading. In Section 202 of the Act, Congress directed EPA to issue "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Without a pollutant-specific significant-contribution finding, EPA could regulate any emissions from a class of new motor vehicles if the class posed a danger. But that approach would contradict *Massachusetts v. EPA*, which held that EPA's "judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" 549 U.S. 497, 532-33 (2007).

Finally, historical practice supports EPA's Proposed Rule requiring a pollutant-specific finding. Under Section 111(d), EPA publishes "guideline documents" to guide States issuing performance standards for existing sources. Those documents must include "[i]nformation concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant." 40 C.F.R. § 60.22(b). And "designated pollutants" are subject to not only existing source performance under Section 111(d) but also new source performance standards under Section 111(b). *Id.* § 60.21(a). So Section 60.22(b) assumes a pollutant-specific finding for all standards of performance.

2. A pollutant-specific significant contribution finding is also consistent with the values of cooperative federalism embedded in the CAA.

Congress intended the Act to address air pollution while also maintaining the traditional division of authority between federal and state regulators. When Congress delegated authority to EPA to enact clean air rules, it also emphasized that "air pollution prevention … is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Other parts of the statute reflect this respect for state sovereignty, too. Congress assigned the critical ability to develop implementation plans for existing sources to the States—plans "which, after EPA approval, are published as regulations in the Federal Register." *California ex rel. State Air Res. Bd. v. Dep't of*

Navy, 431 F. Supp. 1271, 1274 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980). The CAA repeatedly calls out the supremacy of States and local communities in controlling pollution. *See*, *e.g.*, 42 U.S.C. § 7416 ("[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."); *Id* § 7431 ("Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use.").

Requiring EPA to make and justify a significant contribution finding for pollutants from a source category provides meaningful guidelines, preserving the States' roles while keeping the Agency within its own. Otherwise, EPA would be permitted to seize control of broad swathes of American industry, in direct contravention of the States' traditional supreme role. *Nat'l Audubon Soc. v. Dep't of Water*, 869 F.2d 1196, 1214 (9th Cir. 1988) (Reinhardt, J., dissenting) ("[T]he Clean Air Act itself is not 'all-encompassing.'").

3. The major questions doctrine also forecloses EPA's prior interpretation that it could promulgate regulations for particular pollutants "as long as it has a rational basis for doing so." 86 Fed. Reg. at 63,150. Nothing in the CAA says that the Agency needs only a rational basis to regulate a new pollutant from an existing source category. And EPA's sole justification for its past practice was a nonbinding House Report, a source that does not describe the actual legal standard nor have any power to change it. 86 Fed. Reg. at 63,150.

This low bar would allow EPA to bypass the significant contribution finding (and ultimately, endangerment finding) altogether and ignore the reason Congress required it—confirming that a particular pollutant causes significant harm to health or welfare before greenlighting costly regulation. *See Coal. For Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 117-18 (D.C. Cir. 2012) (per curiam), *rev'd in part on other grounds sub. nom., Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014). The "upshot of inserting the adjective 'significant' was a consideration of which risks are worth the cost of elimination." *Michigan v. EPA*, 213 F.3d 663, 677 (D.C. Cir. 2000) (per curiam).

EPA cannot infer this far-reaching grant of power to regulate harmless or insignificant emissions. "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *UARG*, 573 U.S. at 324.

In a similar case, the Supreme Court rejected the Occupational Safety and Health Administration's (OSHA) assertion of power to regulate toxic substances without making a threshold finding "that the toxic substance in question poses a significant health risk in the workplace." *Indus. Union Dep't v. Am. Petrol. Inst.*, 448 U.S. 607, 614-15 (1980) (plurality). Although OSHA claimed that the statute imposed only a "minimal requirement of rationality," *id.* at 641, the plurality opinion characterized OSHA's assertion of authority as "unprecedented." *Id.* at 645. "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [OSHA] the unprecedented power over American industry that would result" if OSHA did not have to first identify a significant health risk. *Id.* at 645

Congress also designed the pollutant-specific significant contribution and endangerment findings to make sure affected parties could hold EPA accountable for its decisions. By contrast, a rational-basis classification is almost impossible to challenge successfully in court. In the constitutional realm, for instance, a rational-basis classification will be upheld if there "is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Congress has deliberately chosen language that does not fit a standard where the actual costs of regulation are such weak backstops to new-claimed agency powers.

And a rational-basis standard would reduce Section 111's significant contribution finding requirement to an arbitrary regulatory hurdle rather than a sensible check on EPA's discretion. It is undisputed that EPA cannot regulate any emissions from a source category until after it concludes that the source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). If Congress wanted EPA to have discretion to regulate harmless or insignificant emissions while ignoring dangerous and significant ones, Congress would have had no reason to limit EPA to source categories that emit dangerous pollutants. If EPA's mandate were to regulate whatever emissions it wants, including those that cannot support an endangerment finding, then Congress would have empowered EPA to regulate all sources, not just sources that emit significant amounts of dangerous pollutants. But Congress did not give EPA that power, and even EPA has never claimed that authority.

Indeed, interpreting the CAA to give EPA open-ended discretion would be problematic for another reason: it creates constitutional concerns. "All legislative Power[]" granted by the Constitution is "vested in a Congress of the United States," not the executive branch. U.S. CONST. art. I § 1. On EPA's previous reading, Section 111 "establishes no criteria to govern [the Agency's] course" and grants "an unlimited authority" to promulgate a standard of performance or not, "as [EPA] may see fit." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935). If EPA were correct that "Congress has declared no policy, has established no standard, has laid down no rule" regarding which emissions to regulate, then Section 111 would violate "the constitutional processes of legislation which are an essential part of our system of government." *Id.* at 430; *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (disapproving "virtually unfettered" executive discretion as "an unconstitutional delegation of legislative power").

Again, in the OSHA context, the Supreme Court rejected the argument that "significant" should be read out of the statute, finding that OSHA's interpretation would "make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the" nondelegation doctrine. *Indus. Union Dep't*, 448 U.S. at 646; *see also id.* at 672 (Rehnquist, J., concurring in the judgment) (finding that the statute violated the nondelegation doctrine). We see little distinction to be made here.

Relatedly, a "well-established principle" of statutory construction says that Congress must provide a "clear statement" if it wants to alter the "usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (citations omitted). And regulating

utilities, including electricity generation, is "one of the most important … functions traditionally associated with the police power of the States." *Ark. Elec. Co-op Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 568-69 (1980). Neutering the significant contribution language of the statute would threaten to give EPA undue authority over energy production, allowing it to regulate electricity production that has no material effect on the dangerous interstate pollution Congress sought to address. Certainly, no clear statement from Congress endorsing the displacement of state power can be found here. So EPA must tread carefully in overreading its powers in this space.

These constitutional objections are reason enough to reject EPA's previous interpretation of the statute and limit EPA's regulatory authority to pollutants that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). EPA's previous interpretation would lead to constitutional invalidity, and "[a]n interpretation that validates outweighs one that invalidates." ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 66 (2012). In any event, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." *Id.* at 247.

4. Finally, reading the CAA to require a pollutant-specific significant contribution finding is the best reading of the statute under *Loper Bright*. Previously, *Chevron* deference applied when a statute "[was] silent or ambiguous with respect to the specific issue." *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). But to find that ambiguity, an agency must use the "traditional tools of statutory construction." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 521 (2018) (quotation omitted). And as explained above, the traditional tools point toward an unambiguous, more rigorous standard—one that requires a significant contribution finding for specific air pollutants before justifying nationwide regulation.

Since *Loper Bright*, however, courts review an agency's interpretation de novo when the agency interprets a statute. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 391-92 (2024). Agencies receive judicial deference under the APA only when they exercise discretion granted by a statute. *Id.*

Here, the CAA requires EPA to list and regulate a category of major emission sources. 42 U.S.C. § 4211(b)(1). And the CAA gives the Administrator discretion—"in his judgment"—to establish standards for air pollutants that he finds "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* So the CAA delegates to the Administrator discretion to identify which air pollutants must be regulated. But the CAA does *not* delegate to the Administrator the discretion to skip the statutorily required step of making a significant contribution finding (and endangerment finding) for a pollutant before doing so.

Under *Loper Bright*, then, EPA's interpretations would receive de novo review. And all the traditional methods of statutory interpretation favor the Proposed Rule's finding that requires a significant contribution finding. Prudential reasons support the Agency's finding, too. It makes

little sense for EPA to regulate any pollutant it wants, even if there's no evidence that it "contributes significantly" to that pollution.

B. U.S. Power Sector GHGs Do Not Significantly Contribute To Global GHGs.

EPA also rightly finds that "contributes significantly" is a holistic inquiry. *See* 90 Fed. Reg. at 25,764. Section 111 requires the Administrator to list a source category "if in his *judgment* it causes, or contributes significantly to, [dangerous] air pollution." 42 U.S.C. § 7411(b)(1) (emphasis added). The explicit grant of authority to the Administrator means that he can consider issues beyond just a quantitative number. *See Coal. for Responsible Regul.*, 684 F.3d at 123 ("EPA need not establish a minimum threshold of risk or harm before determining whether an air pollutant endangers.").

The Proposed Rule recognizes that a significant contribution must be based on the "influence, effect, or usefulness of finding such contribution," accounting for policy considerations. 90 Fed. Reg. at 25,765. It makes little sense to regulate emissions if it would have little effect on dangerous air pollution. And when looking at global GHG emissions, the U.S. power sector contributes only a minor amount of GHGs in the atmosphere—so it is by no means is that significant. What's more, the growing foreign GHG emissions means that any domestic regulation of GHGs is futile and contributes to higher net emissions.

1. EPA proposes that "significantly contributes" in the CAA must be read in the context of global GHG emissions because "GHGs are global pollutants." 90 Fed. Reg. at 25,767. EPA is right.

This global-oriented view isn't new—EPA has long recognized that GHGs, "once emitted, become well mixed in the atmosphere, meaning U.S. emissions can affect not only the U.S. population and environment, but other regions of the world as well." 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009). So greenhouse gas emissions from any "region of the world" are equally relevant to climate change. 74 Fed. Reg. at 66,517. From farm animals to agriculture to transportation, *all* greenhouse gas emissions matter and must be considered when determining whether EGUs contribute significantly to air pollution. And EPA has previously recognized that "[f]rom a percentage perspective, there are no dominating sources and fewer sources that would even be considered to be close to dominating." 74 Fed. Reg. at 66,543.

The share of GHG emissions from the U.S. power sector has been declining. A decade ago, the U.S. electric power sector's GHG emissions constituted only about five percent of greenhouse gas emissions. *Compare* 80 Fed. Reg. at 64,523 (showing greenhouse gas emissions for "Fossil Fuel-Fired EGUs" in 2013 as 2,039.8 MMT), *and* 74 Fed. Reg. at 66,539 (showing "All global GHG emissions" in 2005 as 38,726 MMT). Today, it is three percent. 90 Fed. Reg. at 25,768. Three percent is not a significant contribution for purposes of Section 111. And as other commenters have explained, these figures are only projected to decline in the coming years (without regulatory intervention), falling well below 1%. *See* State of North Dakota, Comment Letter on Repeal of Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units 9-11 (Aug. 7, 2025).

EPA's projections for its past approaches to reduce emissions of GHGs from fossil fuel-fired EGUs show the insignificant contribution EGUs make to global greenhouse gases. Consider EPA's generation-shifting approach. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015). Despite the Agency's attempt to "force a nationwide transition away from the use of coal to generate electricity," *West Virginia*, 597 U.S. at 735, EPA admitted that "the emission reductions achieved by the rule [were] projected to be minor." 80 Fed. Reg. at 64,641. That's true for the environmental effects, too. A study of the proposed rule revealed that the rule would reduce concentrations of carbon dioxide by only 0.2 percent, avert an increase in temperature of only 0.01 degrees Fahrenheit, and prevent sea level rise by only 0.2 millimeters. *See* AM. COAL. FOR CLEAN COAL ELEC., "CLIMATE EFFECTS" OF EPA'S FINAL CLEAN POWER PLAN 1, 2, https://tinyurl.com/3j6k72pt. (We often speak of concentrations because "what affects worldwide temperature is not greenhouse gas emissions but the concentration[s] of greenhouse gases in the atmosphere." BRENT BENNETT, THE MATERIALITY OF U.S. CO_2 EMISSIONS ON GLOBAL CLIMATE 2 (June 2025), https://tinyurl.com/3mumspe6.)

Or consider EPA's recent proposal to use carbon capture and storage/sequestration and hydrogen co-firing. 88 Fed. Reg. 33,240 (May 23, 2023). As we explained when EPA proposed the rule, not only was the proposal impossible to meet—which would force fossil-fuel-fired EGUs to close—but the rule would also have little effect on regulating greenhouse gas emissions. *See* States Comment. EPA's own modeling showed that the proposed rule would minimally reduce CO_2 compared to a baseline with no rule. *See* EPA, INTEGRATED PROPOSAL MODELING AND UPDATED BASELINE ANALYSIS MEMO (July 7, 2023), https://tinyurl.com/2wc3mtt3. These de minimis benefits of regulating greenhouse gas emissions from EGUs undermine any claim that EGUs contribute significantly to climate change.

EPA recognizes this. "[M]any (if not all) individual greenhouse gas source categories could appear small in comparison to the total" global greenhouse gas emissions. 74 Fed. Reg. at 66,543. EPA justified addressing these small contributions under Section 202 because "contributors must do their part even if their contributions to the global problem, measured in terms of percentage, are smaller than typically encountered when tackling solely regional or local environmental issues." 74 Fed. Reg. at 66,543. But Section 202 requires the Administrator to regulate air pollutants from vehicles that may "contribute to" air pollution. 42 U.S.C. § 7521. So, even if EPA can regulate GHGs under Section 202's contribution requirement, it cannot justify a *significant* contribution finding under Section 111. We note, however, EPA has also now announced its proposal to repeal the 2009 Endangerment and Cause and Contribute Findings under Section 202.

The significance requirement reflects Congress's decision to prohibit EPA from regulating small contributions, even if much of the relevant pollution is emitted by small contributors. And Congress knows how to authorize EPA to regulate small contributors, as it did elsewhere in the CAA. In Section 213, for example, the Act creates a two-part framework for regulating numerous small contributors. *See* 42 U.S.C. § 7547(a). "Under § 213's multi-step scheme, EPA must first complete a study to determine whether emissions from nonroad engines 'cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Bluewater Network v. EPA*, 370 F.3d 1, 7 (D.C. Cir. 2004). "If EPA makes a finding

of significant contribution for nonroad engines," then it must "promulgate standards for those individual 'classes or categories' of new nonroad engines whose emissions, in EPA's judgment, 'cause, or contribute to'" the relevant pollution. *Id.* at 8. Congress thus limited the significance requirement to the "threshold determination that the overall regulatory program is justified" and then allowed regulation of individual categories based on smaller contributions. *Id.* at 14. But Section 111 is different. It prohibits EPA from regulating any source category that does not itself "contribute[] significantly."

In sum, EPA is correct that "significantly contributes" must be measured against global GHG air pollution. In finalizing the Proposed Rule, EPA should explain why it shifted from its prior domestic approach, *see* 86 Fed. Reg. 2542 (Jan. 13, 2021), to a global approach. EPA also needs to address why the first Trump administration found that "GHG emissions from the EGU[s] … contribute significantly to dangerous air pollution"—which we think can be done by reference to better scientific understanding and changed conditions. 86 Fed. Reg. at 2543.

Finally, EPA needs to address the perceived tension between Supreme Court case law and EPA's reasoning. *See* Carrie Jenks & Sara Dewey, *EPA Proposes to Eliminate Power Sector Greenhouse Gas Emissions Regulations*, ENV'T & ENERGY L. PROGRAM HARVARD LAW SCHOOL 7 (June 23, 2025). In *Massachusetts v. EPA*, the Supreme Court explained that "it [is not] dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." *Massachusetts v. E.P.A.*, 549 U.S. 497, 525-26 (2007). But *Massachusetts* looked at Section 202 of the CAA, which (again) uses the language "contribute." 42 U.S.C. § 7521(a)(1). No significance was required. So *Massachusetts* has no answer on what a "significant contribution" is when viewed from global emissions.

2. EPA's also right that regulating domestic GHG emissions would also be futile because "[l]imiting the use of coal and other fossil fuels in U.S. EGUs does not significantly impact global GHG concentrations when other countries continue to increase their use of fossil fuels." 90 Fed. Reg. at 25,768. Any emission reductions from either CPP 2.0 or any other BSER would be dwarfed by the increased emissions from China, India, and the rest of the world. From 2000 to 2023, the United States reduced its CO_2 emissions by some 1,101 million tons. Meanwhile, in that same period, China increased its CO_2 emissions by 7,890 million tons, while India increased emissions by 1,855 million tons. Robert Bryce, *Coal Coal Baby*, ROBERT BRYCE (Mar. 24, 2025), https://tinyurl.com/yc49aw8f (citing 2024 Statistical Review of World Energy). China "consumes nearly 40% more coal than the rest of the world combined, largely for power generation … [and] [o]ver one-third of all the coal consumed globally is burned by power plants in China." IEA, GLOBAL ENERGY REVIEW 2025 19 (Mar. 2025), https://tinyurl.com/ar365utk.

And it will only get worse. Despite China's professed commitment to reducing CO_2 emissions no later than 2030, *see* Hongqiao Liu, et al., *The Carbon Brief Profile: China*, CARBON BRIEF (Nov. 29, 2023), https://tinyurl.com/yrwsfkwn, it has recently doubled-down on its commitment to coal-fired electricity generation. "Coal power plant permitting, construction starts and new project announcements accelerated dramatically in China in 2022, with new permits

reaching the highest level since 2015. The coal power capacity starting construction in China was *six times as large* as that in all of the rest of the world combined." LAURI MYLLYVIRTA ET AL., CHINA PERMITS TWO NEW COAL POWER PLANTS PER WEEK IN 2022 2 (Feb. 2023), https://tinyurl.com/ycx55esu (emphasis added).

Ironically, China's ever-increasing demand for coal-fired electricity is fueled by its manufacturing of "green energy" products for the net-zero focused European and North American markets. "The manufacturing of PV modules, batteries, and EVs excluding the processing of associated materials are estimated to have consumed around 320 TWh of electricity in 2024 – as much electricity as Italy uses in a year. The increase in consumption of these sectors has been remarkable in recent years, which rose by more than 230 TWh over 2022-2024." IEA, ELECTRICITY 2025: ANALYSIS AND FORECAST TO 2027 18 (Feb. 2025), https://tinyurl.com/43fk4kke. EPA's misguided current rule governing CO_2 by U.S. fossil fuel-fired generation units is only driving global CO_2 emissions. So imposing crippling costs on American utilities and the American people to reach "net-zero" CO_2 emissions worldwide is a fool's errand.

C. U.S. Power Sector GHGs Do Not Significantly Contribute To <u>Endangering Air Pollution</u>.

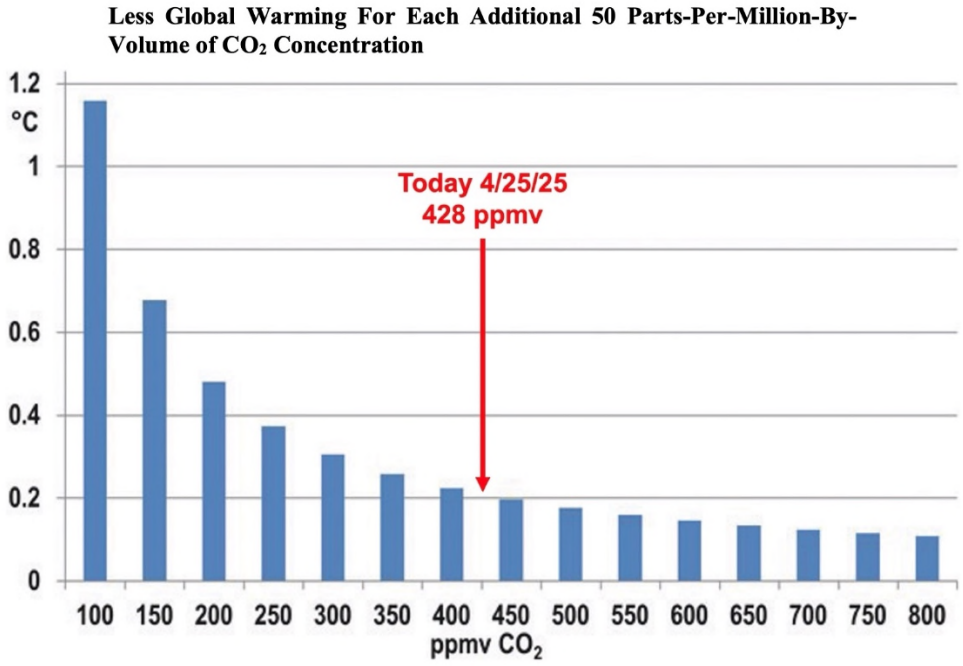
Because the U.S. power plant sector does not significantly contribute to global GHG emissions, EPA need go no further under Section 111(b)(1)(A). Nonetheless, EPA's "no significant contribution" finding is further buttressed by evidence that rebuts the alleged consensus correlating CO_2 emissions to anthropogenic climate change, and which shows that GHGs do not significantly contribute to endangering air pollution. A significant body of science previously ignored by EPA shows that, as a matter of physics, CO_2 is not "the most important species" of greenhouse gas, *see Massachusetts*, 549 U.S. at 505. Fears that GHG emitted from EGUs will cause catastrophic results rely on faulty models and implausible scenarios. *Accord* Climate Working Group, A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate (July 23, 2025), https://tinyurl.com/yc3jxp72; *see also, e.g.*, Benjamin Zycher, Comment to U.S. EPA, Docket EPA-HQ-OAR-2025-0124 (July 29, 2025).

1. Setting aside foreign GHG emissions, retiring every coal-fired plant in the United States and moving the entire U.S. economy to "net-zero" emissions would have only a trivial effect on global average temperatures. Using the MAGICC model employed by EPA, *see* https://magicc.org/, Benjamin Zycher demonstrated that "Net-zero U.S. GHG emissions effective immediately would yield a reduction in global temperatures of 0.173°C by 2100. That effect would be barely detectable given the standard deviation (about 0.11°C) of the surface temperature record." *Left Holding the Bag: The Cost of Oil Dependence in a Low-Carbon World: Hearing Before the S. Comm. on the Budget*, 118th Cong. 1 (2023) (statement of Benjamin Zycher, Senior Fellow, Am. Enter. Inst.) 36, https://tinyurl.com/4vsy7df6. So eliminating U.S. CO_2 emissions will have almost no effect on temperatures.

Increasing CO_2 concentration would similarly have only a trivial effect on global temperature. Dr. Steven E. Koonin, former Obama Administration Undersecretary for Science for

the Department of Energy, notes that while greenhouse gases certainly impede the radiation of heat to space, "water vapor is the most important of the greenhouse gases," accounting for "more than 90 percent of the atmosphere's ability to intercept heat." STEVEN E. KOONIN, UNSETTLED: WHAT CLIMATE SCIENCE TELLS US, WHAT IT DOESN'T, AND WHY IT MATTERS 50-51 (Updated and Expanded Edition, 2021). CO_2, on the other hand, "accounts for about 7% of the atmosphere's ability to intercept heat." *Id.* And while CO_2 at current concentration levels impedes the transfer of heat to space, the heat-trapping effect of adding more CO_2 diminishes as concentrations increase. Compared to an atmosphere with no CO_2, "when CO_2 is present at 400 ppm (about today's concentration)" the CO_2 reduces the radiation of heat into space by 7.6%. But "when the CO_2 concentration is raised to 800 ppm, roughly twice what it is today" only "[a]n additional 0.8% loss of cooling power" follows. This change is "barely visible" in the graph representing it. *Id.* at 53. In other words, "although the effect of CO_2 at today's concentration is significant, doubling it doesn't change things much," *id.* at 54, in the same way that adding a second coat of black paint to an already black window will not block much more sunlight.

Similarly, Dr. William Happer and Dr. Richard Lindzen explained that "CO_2 becomes a less effective greenhouse gas at higher concentrations because of … 'saturation.'" William Happer & Richard Linzen, Comment Letter on Proposed Rule Establishing New Source Performance Standards for Greenhouse Gas Emissions (July 26, 2023), https://tinyurl.com/bdhptawj. "Each additional 50 ppm increase of CO_2 in the atmosphere causes a smaller and smaller change in … temperature." *Id.* Their graph shows that doubling CO_2 from current levels would increase temperatures by about 0.1 degree Centigrade.



Richard Lindzen & William Happer, *Physics Demonstrates that Increasing Greenhouse Gases Cannot Cause Dangerous Warming, Extreme Weather or Any Harm*, CO2 COAL. 9 (June 7, 2025), https://tinyurl.com/37t6svj6.

Other scientists have reached the same conclusion. *See*, *e.g.*, Dieter Schildknecht, *Saturation of the Infrared Absorption by Carbon Dioxide in the Atmosphere*, 34 INT'L J. OF MOD. PHYSICS 30 (2020) https://doi.org/10.1142/S0217979220502938 (finding that doubling the CO_2 content in air "confirms that the effect of an anthropogenic CO_2 increase on the climate on earth is fairly negligible"). And with the One Big Beautiful Bill's passage, climate scientists will likely be unable to continue to "duck" the possible diminishing effects of additional CO2. Holman W. Jenkins, Jr., *Green Elites, Trumped*, WALL ST. J.: OPINION (July 8, 2025, 4:34 PM), https://tinyurl.com/4rv8aycr. Of course, EPA is obliged not to ignore this "important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

So, with or without CPP 2.0, CO_2 levels will continue to rise, but increasing CO_2 levels themselves will not harm people, both because CO_2 itself is harmless and because temperatures will barely move even if concentrations double from current levels.

2. Much of the alarm over GHGs is premised on flawed climate models. CPP 2.0 depends on climate models, including those used by the Intergovernmental Panel on Climate Change (IPCC). The IPCC assessments are informed by the Coupled Model Intercomparison Project Version 6 (CMIP6). These models, first developed decades ago, have gone through multiple iterations leading up to the most recent IPCC Sixth Assessment released in 2023. But the models don't work.

First, not only do the dozens of models used by the IPCC not agree, their "results differ dramatically both from each other and from observations." KOONIN, *supra*, at 86. So the IPCC simply averages the results. *Id.* If the models were just applying physics, their results would agree. But the "simulated global average surface temperature (not the anomaly) varies among models by about 3 degrees C (5.6 degrees F), three times greater than the observed value of the twentieth-century warming they're purporting to describe and explain." *Id.* at 87.

Second, the more sophisticated the models become, the less accurate they are. "[T]he later generation of models is actually *more* uncertain than the earlier one." KOONIN, *supra*, at 87. Even worse, the IPCC models uniformly are unable to compute, or "hindcast," the temperature records for the last 125 years, particularly the relative warm period from 1910 to 1940. "On average, the models give a warming rate over that period of about half what was actually observed." *Id.* at 88. The IPCC conceded that "it remains difficult to quantify the contribution to this warming from internal variability, natural forcing and anthropogenic forcing." NATHANIEL L. BINDOFF ET AL., 2013: DETECTION AND ATTRIBUTION OF CLIMATE CHANGE: FROM GLOBAL TO REGIONAL. IN: CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 887. Or as Dr. Koonin put it, they "have no idea what causes this failure of the models." KOONIN, *supra*, at 89.

Over a broader period, the models not only fail to hindcast the observed temperatures, but they also all err on the side of greater warming. All 38 models "overpredict warming in every target observational analog, in most cases significantly so, and the average differences between

models and observations are statistically significant." Ross McKitrick & John Christy, *Pervasive Warming Bias in CMIP6 Tropospheric Layers*, 7 EARTH & SPACE SCI. 9, 1 (2020) https://tinyurl.com/3x2dn8sn. "The upshot is that the models on average overstate the observations by a factor of over 2.3." Zycher, *supra*, at 33. So the models "predicte[] mid-troposphere temperature increases of 0.44°C per decade, while the actual measurements were 0.16°C per decade." *Id.*

Dr. John Christy explained that the climate models "fail[] the test to match the real-world observations by a significant margin." So "the average of the models is considered to be untruthful in representing the recent decades of climate variation and change, and thus would be inappropriate for use in predicting future changes in the climate or related policy decisions." *Climate Science: Assumptions, Policy Implications, and the Scientific Method: Hearing Before the House Comm. Sci., Space & Tech.*, 115th Cong. 1 (2017) (statement of John R. Christy, Professor of Atmospheric Science) 13, https://tinyurl.com/Christy-testimony. Or as Drs. Lindzen and Happer put it: "101 of the 102 predictions by the models … fail miserably to predict reality." Happer & Linzen, *supra*, at 19. The one model that didn't "fail miserably" was excluded by the IPCC. *Id.* at n.48.

A separate and as equally fundamental problem with the IPCC models is that they depend on hypothetical "climate scenarios" that are now plainly implausible. The direst predictions of global warming and climate catastrophe depend on the RCP 8.5 scenario that assumes that additional CO_2 increases the radiative forcing by 8.5 watts per square meter by 2100, compared to the current approximately 274 watts per square meter. "The emissions scenarios the climate community is now using as baselines for climate models depend on portrayals of the present that are no longer true. And once the scenarios lost touch with reality, so did the climate, impact, and economic models that depend on them for their projections of the future." Roger Pielke, Jr. & Justin Richie, *How Climate Scenarios Lost Touch with Reality*, 38 ISSUES IN SCI. & TECH. 4, 77-78 (Summer 2021), https://tinyurl.com/ev8357xw. Remarkably, while the IPCC has used the RCP 8.5 scenario as its baseline or "business as usual" approach for its assessments, by 2021 that scenario had come to represent not just "an implausible future in 2100, but a present that already deviate[d] significantly from reality." *Id.* at 80. As important, "it is not just RCP8.5 that is implausible, but the entire set of baseline scenarios used by the IPCC," a situation that "amounts to a stubborn commitment to error" on the part of the IPCC, *Id.* at 80-81, and, by extension, the entire climate science establishment. But EPA need not stay committed to that same error.

3. Extreme weather events cannot be linked to GHGs. The Biden rule justifies its draconian approach by linking CO_2 emissions to recent extreme weather events: "Climate change is also expected to cause more intense hurricanes and more frequent and intense storms of other types and heavy precipitation, with impacts on other areas of public health, such as the potential for increased deaths, injuries, infectious and waterborne diseases, and stress-related disorders." 89 Fed. Reg. 39,798, 39,807 (May 9, 2024). Essentially, CPP 2.0 reasoned that CO_2 and other GHG emissions lead to anthropogenic global warming (AGW), which leads to more frequent and extreme weather events.

But not even the IPCC claims a link between AGW and the frequency or intensity of weather events. Take hurricanes: "There is *low confidence* in most reported long-term (multi-

decadal to centennial) trends in [tropical cyclone] frequency- or intensity-based metrics … either the quality or the temporal length of the data is not adequate to provide robust trend detection statements, particularly in the presence of multi-decadal variability." Sonia Seneviratne et al., *Weather and Climate Extreme Events in a Changing Climate*, SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1585 (2021). The IPCC can't say that hurricanes are getting larger: "No detectable anthropogenic influences on TC (tropical cyclone) size have been identified to date, because TCs in observations vary in size substantially and there is no definite theory on what controls TC size." *Id.* at 1591. In short, "trends in hurricane activity outside the range of documented variability have not been detected, nor is there high confidence in connections of hurricane behavior to greenhouse gas emissions." Roger Pielke Jr., *2023 Edition: What the media won't tell you about … hurricanes*, HONEST BROKER (June 1, 2023), https://tinyurl.com/bdf73xdk.

The same is true for other weather events. "[T]here is *low confidence* in projections of small-scale phenomena such as tornadoes and hail storms." EXTREME EVENTS, *supra*, at 1585. There's also "*low confidence* in past-century trends in the number and intensity of the strongest [extratropical storms] due to the large interannual and decadal variability." *Id.* at 1592. And IPCC determined that for each of these events (and more, including coastal flooding and erosion, fire weather, drought, and river flooding), no signal of a change in climate from AGW has yet emerged, or is expected to emerge by 2100, even under the IPCC's most extreme scenario of RCP 8.5. *See* Roshanka Ranasinghe et al., 2021: *Climate Change Information for Regional Impact and for Risk Assessment*. IN CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1856 (2021).

So the bottom line is that "[u]biquitous claims that hurricanes, floods, and drought (and various other extremes) have become more intense or frequent (regardless of cause) in the context of documented variability are simply wrong." Roger Pielke Jr., *We Don't Need No Stinking Science*, HONEST BROKER (July 22, 2024), https://tinyurl.com/y6c8b8p7.

Another common claim supporting "net-zero" CO_2 policies is that AGW has caused more loss of life and in particular more property damage than storms in the past. But again, it's false.

Deaths due to natural disasters have plummeted since 1900. *Decadal average: Death rates from natural disasters, World*, OUR WORLD IN DATA, https://tinyurl.com/5n85jx95 (last visited July 19, 2025). Even with the rise of climate doomerism due to increasing GHGs, the death rate has continued to fall. *Id.* In 1920, the death rate due to storms was 0.62 per 100,000. By 2020, the rate was only 0.05 per 100,000. *Id.*

As for property damage, "[t]he overwhelming majority of the literature … reports normalization results that indicate no detectable trends in normalized losses on climate time scales." Roger Pielke Jr., *Climate Change and Disaster Loss*, HONEST BROKER (May 18, 2023), https://tinyurl.com/bdfxcp7v. The storm causing the most property damage in real dollars occurred 99 years ago in Miami. Roger Pielke Jr., *SERIES: Making Sense of Trends in Disaster Losses*, HONEST BROKER (Sept. 27, 2022), https://tinyurl.com/t6286fe5. "Just as with overall and

major hurricane landfalls, there is no trend in normalized losses for the continental United States." *Id.* So "there is little evidence to support claims that changes in climate resulting from the emissions of greenhouse gases (or other causes) have resulted in detectable or attributable trends in disaster losses." *Climate Change and Disaster Loss*, *supra*. Of the "62 relevant studies of various phenomena in regions around the world," "61 of them make no claims of attribution." The IPCC "cherrypicked the one study that claimed … detection and attribution." *Id.*

But EPA should "follow the science." Whether because CPP 2.0 will have no meaningful effect on global CO_2 concentrations, because additional radiative forcing from even a doubling of CO_2 will cause little additional warming, or because extreme weather and resulting damage to public health or property has not been and cannot be linked to increased CO_2 concentrations, EPA is right to determine that continued regulation of GHG emissions from fossil fuel-fired EGUs under Section 111 will not have a significant effect on air pollution that would endanger the public health or welfare.

II. CCS and Co-Firing Are Not Adequately Demonstrated BSERs That Produce Achievable Emission Limitations.

The States also agree with EPA's alternative plan to repeal the "emission guidelines for existing fossil fuel-fired steam generating units," including "the requirements for coal-fired steam generating units undertaking a large modification and the phase 2 CCS-based requirements for new base load combustion turbine EGUs." 90 Fed. Reg. at 25,768. Indeed, EPA's rationale for repealing those misguided regulations closely tracks the legal arguments that we have presented in ongoing challenges to those rules (alongside other stakeholders). *See* Pets.' Br., *West Virginia v. EPA*, No. 24-1120 (D.C. Cir. Sept. 6, 2024), ECF No. 2073644 ("State and Industry Opening Brief"). We thus incorporate those arguments here and briefly survey them again below.

As a preliminary matter, however, we ask that EPA finalize *both* proposals while emphasizing that this alternative proposal is just that—an alternative, severable proposal. "[R]egulations—like statutes—are presumptively severable: If parts of a regulation are invalid and other parts are not, [courts] set aside only the invalid parts unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together." *Bd. of Cnty. Commissioners of Weld Cnty. v. EPA*, 72 F.4th 284, 296 (D.C. Cir. 2023). That idea "is true … for EPA rules in particular." *Id.* So courts will sever offending provisions from non-offending ones so long as it's clear "the agency would have adopted the same disposition … [even] if the challenged portion were subtracted" and "the parts of the regulation that remain [can] function sensibly without the stricken provision." *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019).

Here, of course, the validity of the alternative proposal says nothing about the significant contribution finding; indeed, the validity of the alternative proposal is moot so long as the significant-contribution finding holds. Conversely, the alternative proposal can stand even if EGUs significantly contribute to GHGs producing dangerous air pollution, and EPA's description of this aspect of the rule as an "alternative" makes the agency's intent clear. So they are severable. Whether they are issued in the same or difference notices of final rulemaking makes no legal

difference. *See, e.g., Oklahoma v. EPA*, 145 S. Ct. 1720, 1731 (2025) (recognizing multiple, independent "actions" in a single "omnibus" notice).

With those concepts in mind, we move on to explaining why no part of the affected BSER determinations should be permitted to stand.

A. Steam-Generating Units

1. Long-Term (or Large Modification) Coal-Fired Steam-Generating Units

EPA correctly proposes repealing 90% CCS requirements for coal-fired steam-generating units both operating long-term and undertaking large modifications. 90 Fed. Reg. at 25,775. That BSER meets none of the relevant statutory standards.

Adequately Demonstrated. EPA notes that the CAA's text and structure and interpreting case law all show that "a 'purely theoretical or experimental' system" cannot be "adequately demonstrated." 90 Fed. Reg. at 25,758. The CAA gives EPA only limited discretion to "project technological development into the future." 90 Fed. Reg. at 25,758. EPA has long said a system "must be available to the sources in time to achieve the standards," so a system that will become technologically available several years from now has not been "adequately demonstrated." 90 Fed. Reg. at 25,758. For example, EPA says, the CAA requires it to "'review and, if appropriate, revise' new source standards for a listed category at least every eight years." 90 Fed. Reg. at 25,769 (quoting 42 U.S.C. § 7411(b)(1)(B)). So no technological development can take longer than that.

The States are grateful that EPA is now recognizing *some* limits on Section 111's ability to force technological advancements. But even this limited discretion likely goes too far.

Start with the statutory text. The CAA doesn't ask what might happen in the future but what "has been adequately demonstrated" *today*. 42 U.S.C. § 7411(a)(1). Congress's use of "the present perfect tense" strongly indicates "an act that has been completed." *Carr v. United States*, 560 U.S. 438, 448 (2010) (quoting *Barrett v. United States*, 423 U.S. 212, 216 (1976)). The standard definitions of "demonstrate"—to "show clearly" using "evidence" and "examples"—and "adequate"—"sufficient for a specific requirement"—similarly require the EPA to be able to show 90% CCS is the BSER *today*. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 11, 220 (1970). Or, as Justice Kagan put it, the BSER must have "a proven track record." *West Virginia*, 597 U.S. at 759 (Kagan, J., dissenting). Congress elsewhere in this same section juxtaposed an "adequately demonstrated" system with an "innovative technological system," 42 U.S.C. § 7411(j)(1)(A)—strong proof that Section 7411(a)(1) doesn't allow EPA to drive technological innovation. *Cf. Id.* § 7521(a)(3)(A)(i) (explicitly allowing EPA to consider future technological innovations); 42 U.S.C. § 15962(a) (allowing funding for projects "well beyond" current technologies).

Further, if EPA proclaims a new BSER based on projections that never materialize, the States will be stuck forcing their sources to comply with unachievable emission limitations while

simultaneously unable to challenge the BSER. *See* 42 U.S.C. § 7607(b)(1). In short, forcing emerging technologies and "adequately demonstrated" are concepts in "inherent tension" with one another. *Sierra Club v. Costle*, 657 F.2d 298, 341 n.157 (D.C. Cir. 1981). That's why early Section 7411(d) rules always pointed to *some* technology then in commercial use that could achieve the proposed emission reductions. So while the States appreciate the more limited definition of "adequately demonstrated" the EPA offers here, the best read of the CAA is that it doesn't allow technology forcing of any kind—and definitely nowhere near the eight-year outer limits EPA identifies.

Regardless, EPA is correct that the evidence doesn't show that CCS technology will develop so much in the next several years that 90% capture would be achievable—and especially not within the next eight years. 90 Fed. Reg. at 25,769. Although EPA tried to justify its GHG rule with various examples, all of them were inadequate.

EPA originally offered the Canadian Boundary Dam plant as its best example of 90% CCS, but it has now correctly rethought that position for several reasons. Once, early on, Boundary Dam achieved 89.7% capture over a three-day period; but its "longer-term capture levels have been lower" ever since. 90 Fed. Reg. at 25,769. In fact, from 2015 to 2022, Boundary Dam's capture unit never captured over 63%. 90 Fed. Reg. at 25,769-70. Perhaps most importantly, EPA originally ignored that Boundary Dam captured from a 75% slipstream—not a whole flue. 90 Fed. Reg. at 25,770. The slipstream matters because significant "differences [exist] in performance when a system is processing less than all of the flue gas." 90 Fed. Reg. at 25,770. As EPA summarized it, quoting the States: "processing a portion of the flue gas 'functions reliably because gas pressures and volumes are static and controllable,' whereas a capture system processing all of the flue gas 'would need to contend with dynamic pressure and volume, shifting as the facility responds to electricity demand.'" 90 Fed. Reg. at 25,770 (quoting State and Industry Opening Brief at 46-47). And as the States explained in their D.C. Circuit Reply: "These systems are designed to capture a limited, consistent stream of CO_2 emissions from a fraction of a facility's total emissions. They are a far cry from the technology needed to capture the dynamic emission streams that an entire facility emits." Pets.' Reply Br. at 9, *West Virginia v. EPA*, No. 24-1120 (D.C. Cir. Sept. 6, 2024), ECF No. 2073644 ("State and Industry Reply Brief"); *see id.* at 10-13.

At the end of the day, Boundary Dam left far too many question marks to be the flagship example of 90% CCS. For example, sometimes its operators would process less flue gas. 90 Fed. Reg. at 25,770. But it's unclear whether that reduction coincided with corresponding reductions in EGU load and, if so, how much Boundary Dam's production numbers suffered. 90 Fed. Reg. at 25,770. American operators wouldn't have the luxury of that choice. The 90% CCS requirement means that a reduction in flue gas processing equates to a corresponding production in EGU load—with unknown consequences for both sources' relationships with RTOs and grid reliability if they failed. Boundary Dam's capture unit fluctuated wildly over time: "Between 2015 and 2022, annual availability of the capture plant relative to the EGU varied between 58 and 94%." 90 Fed. Reg. at 25,770. And last year it was about 85%. 90 Fed. Reg. at 25,770. Or take its more recent eye-catching numbers reported in 2024: 87% capture from 95% of flue gas, which equaled 83% total capture. 90 Fed. Reg. at 25,770. Of course, that's still not the 90% capture EPA required. But even if it were, Boundary Dam didn't say how long it captured at that rate—a week?

a month? several hours? Nothing indicates Boundary Dam was capturing at this rate over the long term. 90 Fed. Reg. at 25,770. Indeed, Boundary Dam's operator SaskPower commented on the GHG rule, clarifying that, contrary to EPA's claims, it is not capturing at 90%. Instead, because it's been plagued with a slew of technical issues, it targets 65%-70% capture. All this shows that EPA's claim in the GHG rule that Boundary Dam's early issues have been fixed is wrong. 90 Fed. Reg. at 25,769.

As EPA notes, its other examples were just as inapposite. Most of them weren't remotely commercial scale (e.g., Argus Cogeneration, Warrior Run, and Shady Point). 90 Fed. Reg. at 25,770.

Like other examples, Plant Barry is far from commercial scale—capturing only 5% of plant-wide emissions—so it isn't a serious data point. Warrior Run and Shady Point are poor examples for the same reasons. Petra Nova, however, is much larger and was, perhaps, EPA's second most significant example. 90 Fed. Reg. at 25,770. But just as with Boundary Dam, this reliance is misplaced. Petra Nova opened in 2017, idled in 2020, and restarted in 2023. 90 Fed. Reg. at 25,770-25771. Petra Nova's capture plant processed a 240 MW slip stream from a 610 MW unit (37% of the flue gas). 90 Fed. Reg. at 25,771. It was immediately plagued by a host of issues, including "leaks from heat exchangers, build-up of slurry and solids on the flue gas blower, … build-up of scale on various components," and chronic outages of its auxiliary EGU powering the CO_2 processing equipment. 90 Fed. Reg. at 25,771. All of this led to unit outages often—between 10% and 33% of the time. 90 Fed. Reg. at 25,771; State and Industry Opening Brief at 50. Further, Petra Nova's capture process isn't powered by the unit whose gas its processing, but by an entirely separate turbine—and the CO_2 emissions from that auxiliary unit are not processed. 90 Fed. Reg. at 25,771. So even though the Petra Nova CCS plant captured 92.4% of CO_2 when it was working, its total capture rate was well below 90%—and closer to 30% or below relative to the entire unit plus the auxiliary unit's emissions. 90 Fed. Reg. at 25,771.

As the States and industry said time and again, this dearth of examples meant EPA was not promulgating an emissions limit that could be achieved "under most adverse conditions which can reasonably be expected to recur." *Nat'l Lime*, 627 F.2d at 431 n.46.

As EPA rightly notes, a mistaken assumption that undergirded much of its initial guesswork was that CCS equipment would be available every hour the EGU operates *and* perform at design capture efficiency. 90 Fed. Reg. at 25,771. But those assumptions are wrong. Many variables don't affect the EGU itself even while knocking out the capture equipment. For example, hotter-than-usual weather conditions hurt capture rates at both Boundary Dam and Petra Nova. 90 Fed. Reg. at 25,771. Solvent degradation and component fouling between maintenance cycles far exceeded expectations. 90 Fed. Reg. at 25,771. And EPA didn't consider capture system startup times. This matters because most capture systems run on the power generated by the same EGU whose gas they are processing—meaning that all of the flue gas created to build up the steam and electricity needed to run the capture plant goes untreated. 90 Fed. Reg. at 25,771. That means to hit 90% capture the capture plant would have to *overperform* once it got up and running. 90 Fed. Reg. at 25,771-72. And this need to overperform means that even if the nearly 90% capture rates

EPA originally touted *were* legitimate and trustworthy, they still wouldn't cut it. 90 Fed. Reg. at 25,771-72.

One of the most troubling aspects of EPA's examples was that nearly every one was funded by the Energy Policy Act of 2005, sometimes called EPAct05. By law, EPA must show CAA achievability without relying only on EPAct05-funded facilities: "[n]o technology or level of emission reduction" "shall be considered … adequately demonstrated" under Section 7411 "solely" because that technology was used or emission-reduction achieved "by [one] or more facilities receiving assistance under th[e] Act." 42 U.S.C. § 15962(i)(1). But Petra Nova and nearly every other CCS project or demonstration (except for three tiny ones) is EPAct05-funded. EPA understands that this reliance on publicly funded projects isn't enough to justify the GHG rule, which is why it relied so heavily on Boundary Dam. That reliance was always questionable as well, though, because Boundary Dam received $240 million under the Canadian government's version of EPAct05. *Boundary Dam Integrated Carbon Capture and Storage Demonstration Project*, GOV'T OF CANADA (Jan. 5, 2016), https://tinyurl.com/sshb9y7j. And it makes sense that these projects can't be rightfully considered. After all, the point of Section 15962(i)(1) is to keep cutting edge publicly funded R&D from becoming the national power-sector standard. Yet putting Boundary Dam and its nearly quarter billion dollars of EPAct05-equivalent money on the scale would have done exactly that, allowing the EPA to hold businesses to an unachievable standard based on examples Congress explicitly forbade "adequately demonstrated." Respect for legislative intent demands that the Court assign Boundary Dam the same strictly limited evidentiary value it does Petra Nova.

Finally, no new technological or other developments would change this analysis. 90 Fed. Reg. at 25,772. If anything, the CCS industry has recently suffered some major setbacks. For example, Project Diamond Vault was supposed to capture 95% from a 600 MW unit, but it was shuttered in 2024. 90 Fed. Reg. at 25,772. And Project Tundra was going to capture flue gas from a 455 MW and additional gas from a 250 MW unit (530 MW equivalent), but a major partner has now withdrawn from the project, jeopardizing its viability. 90 Fed. Reg. at 25,772. Project Tundra would have been the largest capture system in the world—a total capture rate of 70%; but even with the best advantages, like substantial state and federal funding and exceptional geology for storage, it wouldn't have complied with the GHG rule. State and Industry Opening Brief at 52. EPA's other examples, like the Dry Fork Power Plant, were even less developed and convincing. *Id.* at 52-53 (noting that Dry Fork's capture equipment would cost more than the plant itself). And while some vendors have made highly speculative statements about potentially promising technology, even if these panaceas could lawfully be relied on, they have yet to materialize. 90 Fed. Reg. at 25,772 (noting that while some vendors have claimed certain solvents achieve an extremely high capture rate under very specific conditions, nothing has come close to the efficiency and workability of the standard amine solutions).

A BSER need not be in widespread or routine use, but it must be adequately demonstrated and actually achieve the standard of performance *somewhere* before it can be required *everywhere*. Because EPA didn't do that in the GHG rule, it wasn't adequately demonstrated, and EPA is right to propose repealing the GHG rule.

Cost. EPA is right that, while it has some "discretion in considering cost," "both in determining the appropriate level of costs and in balancing costs with other BSER factors," these costs can never be "'excessive' or 'unreasonable.'" 90 Fed. Reg. at 25,758 (quoting *Sierra Club*, 657 F.2d at 343); *see also West Virginia*, 597 U.S. at 729 (discussing EPA's understanding that it cannot require "exorbitantly costly" steps); *accord Portland Cement Ass'n v. Train*, 513 F.2d 506, 508 (D.C. Cir. 1975). Before the GHG rule, EPA had twice rejected CCS as the BSER in part because of the prohibitive costs. 80 Fed. Reg. 64,769 (Clean Power Plan); 84 Fed. Reg. 32,548 (ACE Rule). EPA has rightly returned to that consensus and has correctly identified the costs of 90% CCS as unreasonable. 90 Fed. Reg. at 25,772.

As with much of the GHG rule, EPA's analysis relied on best-case-scenario assumptions—like hour-to-hour capture-to-generation (the above examples show it's less), 80% annual capacity factors (the real number is 42%), and the closure of significant coal-fired generation relatively soon (these units will actually "operate longer" than EPA assumed). 90 Fed. Reg. at 25,772. And it assumed extremely high take rates for Section 45Q tax credits. These assumptions are the *only* way it could calculate the cost numbers as low as it did: $18.50/MWh. 90 Fed. Reg. at 25,772; *see also* 90 Fed. Reg. at 25,773 (admitting 90% CCS's costs "are not reasonable without taking into account the tax credit"). But, as noted above, capture equipment operates far less than EPA thinks—especially relevant to EGU runtime; and far less capture means far less 45Q money going around. 90 Fed. Reg. at 25,772. EPA's more sober assessment of 45Q credit availability and capacity factors here puts 90% CCS costs substantially higher: $53.7/MWh. 90 Fed. Reg. at 25,772. That's nearly three times higher than costs EPA previously "determined to be reasonable." 90 Fed. Reg. at 25,772. EPA also originally ignored other variables—like shifting loan interest rates and potential Congressional repeal. 90 Fed. Reg. at 25,772. And its analysis refused to grapple with how these tax credits expire after 12 years, an expiration that would have significantly warped all of EPA's cost and generation projections. State and Industry Opening Brief at 85.

Finally, EPA summarizes the States' argument from the GHG rule litigation that it shouldn't be considering tax credits at all in its costs analysis because credits don't alleviate a cost—they just shift it to the taxpayer. 90 Fed. Reg. at 25,772. As the States explained, "as a matter of basic economics, these billions of dollars in tax credits do not *cut* the costs of EPA's carbon-capture mandate; they *transfer them*—from power plant owners to taxpayers." State and Industry Opening Brief at 81. After all, tax credits are just another way to force citizens to become "indirect and vicarious 'donors'" of those receiving the credit. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). Tax credits thus count as "tax-expenditures"—costs the President must include in his annual budget to Congress—because they "reduce amounts available to the treasury." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343 (2006); *see* 2 U.S.C. § 632(e)(2)(E); 31 U.S.C. § 1105(a)(16). The Congressional Budget office estimated that these tax credits would total "well over $100 billion … by the early 2030s." CBO, CARBON CAPTURE AND STORAGE IN THE UNITED STATES 17 (Dec. 13, 2023), https://www.cbo.gov/publication/59832. The States argued that ignoring these massive costs could not possibly be "taking into account the cost of achieving [an emission] reduction" as § 7411(a)(1) requires. State and Industry Opening Brief at 81. EPA now agrees, saying that it "should not be considering tax credits when determining the cost of the control." 90 Fed. Reg. at 25,772.

EPA has also abandoned its argument that under § 7411(a)(1) it need consider only costs to sources, not taxpayers. *See* State and Industry Opening Brief at 82-88 (listing many reasons this argument fails). Indeed, EPA went so far in the GHG rule as to claim that tax credits weren't costs because they were financed by government borrowing. State and Industry Opening Brief at 88. It has wisely abandoned this argument, too.

Unachievable Infrastructure. The States agree with EPA's framing of the "achievable" standard. A standard of performance is ''achievable," EPA says, when "a technology can reasonably be projected to be available to an individual source at the time it is constructed" so the source can meet the standard. 90 Fed. Reg. at 25,759 (citing *Sierra Club*, 657 F.2d at 364, n.276). Put differently, a standard is "achievable" when the BSER can be applied "under the range of relevant conditions which may affect the emissions to be regulated," including under "most adverse conditions which can reasonably be expected to recur." *Nat'l Lime*, 627 F.2d at 431 n.46. Thus, an achievable standard cannot be "purely theoretical or experimental." *Ruckelshaus*, 486 F.2d at 391. So in addition to showing that a BSER is "adequately demonstrated," the EPA must show that its BSER can in fact achieve the mandated standard of performance in all applicable operating conditions at the time of the rule's promulgation.

EPA also correctly reverses course on its assessment of capture, pipeline, and sequestration infrastructure challenges with 90% CCS. EPA doesn't mention the infrastructure challenges with capturing CO_2—but they are significant. It's incredibly difficult to retrofit old units given space, technical, and sourcing and vendor constraints; there was no evidence these older units could physically scale at the level or pace the GHG rule required. State and Industry Opening Brief at 60-61.

EPA did, however, flag transportation challenges. Regarding CO_2 pipelines, EPA now admits that the few thousand miles of pipelines are not where they need to be—e.g., by coal-fired sources. 90 Fed. Reg. at 25,773. But the number of pipeline miles would have to increase by several orders of magnitude to meaningfully facilitate 90% CCS. State and Industry Opening Brief at 63-64. And planned pipeline buildouts face myriad challenges ranging from tough eminent domain fights to intractable and complex state permitting issues to business-related cancelations. *Id.* at 64-66; 90 Fed. Reg. at 25,773. The States are grateful that EPA is now recognizing what short shrift it initially gave these concerns and is correcting course.

Finally, carbon storage is highly uncertain. The handful of "potential" sites EPA originally flagged aren't sure enough to rely on because they're untried and undeveloped. 90 Fed. Reg. at 25,773. Indeed, the United States has only 14 commercial CO_2 storage facilities, which did not come close to providing sufficient storage under the GHG rule. State and Industry Opening Brief at 66-67. And they face many of the same development roadblocks pipelines do. 90 Fed. Reg. at 25,773. Some of these problems lie at the feet of EPA itself, which for years had only ever issued *eight* Class VI well permits, despite over 100 applications under review. State and Industry Opening Brief at 67-68. And even if permitting did pick up the pace, EPA never explained how the storage industry could possibly expand enough to handle nationwide 90% CCS. *Id.* at 69.

Even if industry could *build* the capture, storage, and sequestration infrastructure, EPA never had a good explanation for how industry would do so by its aggressive compliance deadline. Indeed, for all three of these infrastructure pieces, EPA's original timeline justification was remarkably thin. EPA now admits that in the GHG rule it relied chiefly on a single Sargent & Lundy report regarding project schedules that analyzed a single hypothetical source, assumed the best case result in every scenario, and ignored evidence indicating that infrastructure wouldn't be ready by the January 1, 2032, compliance date. 90 Fed. Reg. at 25,773; State and Industry Opening Brief at 73 (noting that EPA assumed, among other things, that pipelines would never cross federal land or state lines in order to minimize permitting timetables). But EPA's original assumptions about project completion timelines simply did not "reflect what is achievable for the average source"—let alone the edge cases. 90 Fed. Reg. at 25,773. For example, Project Tundra took ten years just to be ready to *begin* construction; Minnkota Power Cooperative took four years just to obtain permits and hold hearings—despite Montana having Class VI permitting primacy. State and Industry Opening Brief at 71. Project Tundra explicitly told EPA in its comment that unless an operator began the CCS process long ago, the EPA's 2030 deadline was utterly impossible. *Id.* at 72. Nor did EPA account for National Environmental Policy Act review and its average timelines, which stretch on for years. *Id.* at 73-74.

Conclusion. For all these reasons, EPA is right to now say that 90% CCS is not adequately demonstrated, that its costs are unreasonable, and that its infrastructure challenges mean the corresponding degree of emission limitation isn't achievable. 90 Fed. Reg. at 25,773. Importantly, EPA is explicitly *not* considering "[w]hether CCS with other, lower rates of capture could be the BSER." 90 Fed. Reg. at 25,773. And it applies the same analysis to coal-fired steam generating units undertaking a large modification and for new combustion turbines in phase 2. 90 Fed. Reg. at 25,775. The States agree with these decisions, too.

2. Medium-Term Coal-Fired Steam-Generating Units

EPA also correctly reassessed its BSER for medium-term coal-fired steam-generating units. In the GHG rule, EPA said that the BSER for those units was co-firing natural gas at 40%. 90 Fed. Reg. at 25,774. But as EPA had previously determined in the ACE Rule, significant co-firing "is an inefficient use of natural gas." 90 Fed. Reg. at 25,774. In particular, 40% co-firing would decrease boiler efficiency across the board by 2%. 90 Fed. Reg. at 25,774 (noting this is because of natural gas's higher hydrogen content). And while EPA originally claimed in the GHG Rule that so much coal-fired capacity and generation will be retiring that this impact would be minimal, subsequent evidence shows that many coal-fired units are delaying or canceling the retirement dates EPA originally relied on because "of increasing electricity demand." 90 Fed. Reg. at 25,774.

Further, everyone estimates that America's demand for natural gas will continue to grow significantly every year for the foreseeable future. 90 Fed. Reg. at 25,774. So it's unreasonable to assume industry will be able to find the natural gas to co-fire at 40% or that diverting natural gas from the many other uses the market has already determined are more efficient wouldn't hurt the energy industry. 90 Fed. Reg. at 25,774. And everyone agrees that combined cycle natural gas turbines are far more efficient than co-firing in steam-generating units—so if the industry is

going to burn natural gas to create energy, it should do so in the former, not the latter. 90 Fed. Reg. at 25,774 (noting that heat rates are twice as bad in natural gas-fired steam EGUs).

EPA also rightly identified 40% co-firing as illegal generation shifting under *West Virginia*. Co-firing would require an operator "to use a completely different fuel type that in many cases requires significant new infrastructure to be added to supply the facility, and can require modification/addition of burners to the boiler, is impermissible generation shifting." 90 Fed. Reg. at 25,774. As the Supreme Court said in *West Virginia*, 597 U.S. at 728 n.3, it "doubt[ed]" the EPA could "requir[e] coal plants to become natural gas plants" or otherwise "direct existing sources to effectively cease to exist." As the States showed before the D.C. Circuit, that prohibition isn't limited to an EPA rule ordering a coal plant to transform to a 100% natural gas plant. State and Industry Opening Brief at 112. As EPA now admits, a crucial difference exists between switching to a cleaner or more efficient version of the same fuel and switching between *kinds* of fuel. *Id.* at 112-13; 90 Fed. Reg. at 25,774. Indeed, the only examples of EPA ordering fuel switching involved the former, not the latter. State and Industry Opening Brief at 112-14. And EPA is also admitting that this would be a transparent attempt to "dictate the market share." 90 Fed. Reg. at 25,774.

EPA further concedes that 40% co-firing wouldn't really be "achievable" because no evidence shows that the natural-gas pipeline infrastructure will be deployed in time. 90 Fed. Reg. at 25,774. This recognition makes sense because two-thirds of the nation's coal plants have zero access to natural gas; and of the third that does have access, very few plants have "firm access" or access to a big enough pipeline. State and Industry Opening Brief at 116-18. That's why only 4% of coal plants co-fire with natural gas at any significant level. *Id.* at 118. EPA tried to wriggle out of these firm-access issues by saying operators could just buy gas on the spot market—but that wouldn't have provided the sort of stability needed. *Id.* at 119-20.

EPA's original rosy prediction was that the industry could pull all of the permits necessary to build the 3,500 new miles of natural gas pipeline necessary to make 40% co-firing work within a single year. 90 Fed. Reg. at 25,774. And then, it assumed, industry would build those 3,500 miles of pipeline the next year. 90 Fed. Reg. at 25,774. But a two-year timeline for these steps was always unrealistically optimistic—especially given the crushing demand for additional natural gas, 90 Fed. Reg. at 25,774, and EPA's lengthy timeline for the approval of state plans, State and Industry Opening Brief at 123-24. Further, many of these pipelines wouldn't have been lateral, as EPA assumes. *Id.* at 124. EPA is now taking into account reasonably foreseeable hurdles, which push that timeline back at least five years—well past the January 2030 compliance deadline. 90 Fed. Reg. at 25,774; State and Industry Opening Brief at 122 (noting that the study EPA originally relied on agreed with that five-year estimate). EPA also failed to justify the extra $11.5 billion in infrastructure costs. *Id.* at 127; State and Industry Reply Brief at 56-57.

Ultimately, this pipeline infrastructure argument shouldn't matter, because § 7411(a)(1) doesn't include any language authorizing EPA to address these problems by ordering the construction of thousands of miles of natural gas pipelines. State and Industry Opening Brief at 116.

The States agree: any other decision would run afoul of the requirement that a standard is achievable only when it can be "met under most adverse conditions which can reasonably be expected to recur." *Nat'l Lime*, 627 F.2d at 431 n.46.

3. Direct-Fired Natural Gas Units

The EPA is properly proposing to repeal its 90% CCS BSER for new combustion turbines—and for all the same reasons 90% CCS won't work for coal-fired sources: it hasn't been adequately demonstrated, it costs too much, and building out the necessary infrastructure by January 2032 isn't achievable.

Adequately demonstrated. 90% CCS is not adequately demonstrated for new combustion turbines for many of the same reasons given for coal-fired sources in Section II.A. In fact, 90% CCS appears even less adequately demonstrated for combustion turbines. For one thing, natural gas-fired sources' exhaust gas is different in ways that make capturing its carbon harder. 90 Fed. Reg. at 25,776 (noting that CO_2 is less concentrated and oxygen is more concentrated). For another, combustion turbines can and do start and stop more than coal-fired units. 90 Fed. Reg. at 25,776. Remember that because a capture unit runs on electricity generated by the main EGU, its capturing will always somewhat lag CO_2 production. 90 Fed. Reg. at 25,776. Because combustion turbines spend more of their "on" time starting up than their coal-fired counterparts, their corresponding capture units will spend less time capturing, too. 90 Fed. Reg. at 25,776. For these reasons and others, EPA is rightly admitting that coal-fired EGU experiences don't necessarily translate to natural gas EGUs.

Indeed, as EPA now acknowledges, it offered no examples of 90% CCS used on combustion turbines at scale. 90 Fed. Reg. at 25,776. The Bellingham turbine's capture plant, for example, was tiny—installed on a 40 MWe slipstream. 90 Fed. Reg. at 25,776. So even though its capture rate on that slipstream was good, it ultimately captured less than 10% of the station's total emissions. State and Industry Opening Brief at 54. That Bellingham processed such a small percentage of the total flue gas means it's not helpful to understanding how capture equipment will affect sources without the flexibility to radically limit the amount of processed gas. 90 Fed. Reg. at 25,776. And Bellingham neither transported nor stored the CO_2, and it closed in 2005. State and Industry Opening Brief at 54.

The other solutions EPA offered in the GHG rule were speculative. EPA has rightly dropped references to plants and projects without clear capture rates—all of which appear to operate far below 90% CCS. State and Industry Opening Brief at 55-58. Evidence shows that large scale deployments of CO_2 capture solvent may underperform; and nothing suggests the NET Power Cycle or other development projects are promising enough to substitute for hard evidence of success. 90 Fed. Reg. at 25,776.

Cost. EPA's initial cost estimates were flawed, too. They didn't include the smallest turbine models, which matters because costs "increase on a $/ton basis for smaller base load combustion turbines." 90 Fed. Reg. at 25,776. So EPA initially claimed costs for this entire source category would be about $19/MWh. 90 Fed. Reg. at 25,776. But EPA now correctly recognizes

the error in artificially limiting its cost data set to larger turbines. 90 Fed. Reg. at 25,776. And those small-turbine costs radically change the picture: compliance costs for the 490 and 1,000 MMBtu/h models are $73/MWh and $55/MWh, respectively—far above EPA's too-good-to-be-true $19/MWh number. 90 Fed. Reg. at 25,776. EPA has also adjusted another cost factor: capture-equipment availability. Originally, it estimated that capture equipment would be available 90% of the time; now, it more realistically estimates 75% availability. 90 Fed. Reg. at 25,776. That adjustment alone increases costs by $2/MWh—exceeding the thresholds EPA said was reasonable in prior rulemakings. 90 Fed. Reg. at 25,776.

EPA now spots other issues, too. For one thing, its original capacity factor estimations were too high given recent capacity factor numbers for nuclear EGUs and non-CCS coal EGUs. 90 Fed. Reg. at 25,777. That alternative energy sources like coal and nuclear will be much more broadly available than previously thought means that the relative or comparative cost of energy produced by combustion turbines burdened with CCS is higher than EPA originally thought. 90 Fed. Reg. at 25,777. Further, its numbers now show that combined cycle generation with CCS is more expensive than simple cycle generation. 90 Fed. Reg. at 25,777. Finally, EPA again acknowledges that it can't make costs disappear just by shifting them to the public via Section 45Q tax credits. 90 Fed. Reg. at 25,777. And even if it could, it's relying far too heavily on them for all the reasons explained in Section II.A. 90 Fed. Reg. at 25,777.

Infrastructure. EPA says the GHG rule's infrastructure analysis was wrong for all of the reasons articulated above. 90 Fed. Reg. at 25,777. Not least, it confesses, because that analysis was filled with unjustified best-case scenario assumptions. 90 Fed. Reg. at 25,777. For example, its assumption that new combustion turbines could be placed near good storage locations ignores whether natural gas pipelines and transmission capacity can be found nearby. 90 Fed. Reg. at 25,777. And EPA sees now that it ignored line loss. 90 Fed. Reg. at 25,777.[2]

[2] EPA is also rightly proposing to repeal the requirements for natural gas- and oil-fired steam-generating units. EPA's BSER for these units was "routine methods of operation and maintenance," which is what the vast majority of these sources are already doing. 90 Fed. Reg. at 25,775. In other words, EPA's BSER was for these sources to conduct business as usual. EPA now says these units count for only 1.2% of all electric generation and 3.5% of all emissions—shares only projected to decrease going forward. 90 Fed. Reg. at 25,775. It also notes that developing SIP "involves a meaningful expenditure of resources by States and regulated entities, including time and money for development of engineering analyses, for conducting public hearings and meaningful engagement, for drafting permits or other legal instruments, and for getting necessary legislative or other approvals." 90 Fed. Reg. at 25,775. This is exactly correct. So EPA is right to say that, while telling these sources to carry on as they were isn't necessarily unreasonable, requiring States to spend millions of dollars to send that message and industry millions to receive it seems "imprudent"—especially given the vanishingly small gains it expects. 90 Fed. Reg. at 25,775. Routine methods of operation and maintenance appears to be a fine BSER for this category, but EPA is right to save States millions of dollars' worth of trouble to tell a shrinking handful of units that.

4. Additional Reasons to Repeal the Rule

The reasons given in the Proposed Rule are more than enough to repeal the GHG rule. But several other reasons do, too, which were thoroughly fleshed out in litigation before the D.C. Circuit and Supreme Court.

1. Grid Reliability

The "arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). And the CAA requires EPA to "tak[e] into account … energy requirements" when identifying a BSER. § 7411(a)(1). EPA must weigh the "impacts in the broadest sense at the national and regional levels and over time" to find "the best balance of economic, environmental, and energy considerations" on a "grand scale." *Sierra Club*, 657 F.2d at 330. So whether GHG rule-forced retirements will threaten reliability of the grid is a relevant fact EPA must consider under § 7411. *See Michigan v. EPA*, 576 U.S. 743, 753 (2015) (requiring consideration of all "the advantages and the disadvantages"); *State Farm*, 463 U.S. at 43 (saying EPA may not ignore an "important aspect of the problem … before [it]").

But EPA unreasonably failed to adequately consider grid reliability in the GHG rule—yet another reason that rule is arbitrary and capricious. Grid reliability considerations strongly support EPA's repeal of the GHG rule here.

EPA designed the GHG rule to force the retirement of certain fossil fuel coal plants and limit their replacements to preferred generation source categories—like renewables. State and Industry Opening Brief at 90. Its own modeling and USEIA's predictions confirm that. *Id.* at 94 (noting that the GHG rule would have "force[d] 155,000 MW of coal-fired retirements by 2032"). But, as EPA was told in a blizzard of comment letters, this massive blow to production would significantly exacerbate grid reliability issues. If each MW of power lost to retirements isn't made up for elsewhere, the grid will collapse. *Id.* at 92-93. The States in particular warned "that grid reliability is especially fragile due to increasing demands from a growing population, an increasingly electrified society, and new heavy-load electricity consumers like data centers or cryptocurrency mining." *Id.* at 91 (cleaned up). Many grid operators like PJM and Southwest Power Pool—alongside other experts like a FERC panel on the GHG rule—said the same. *Id.* at 91-92. Because fossil-fuel-fired EGUs aren't weather-dependent, they are crucial to maintaining grid reliability. *Id.* at 93. Indeed, losing our most reliable and dispatchable sources would mean vulnerability and potentially blackouts during the worst times—severe weather events. *Id.* at 93.

Unfortunately, EPA didn't meaningfully address grid reliability. It paid lip service to its importance, but ultimately made no substantive changes to the GHG rule to help the problem. State and Industry Opening Brief at 95. Its proposed fixes—like installing CCS and "compliance flexibilities"—were inadequate band-aids, falling far short of fixing the problem. *Id.* at 96-97.

EPA's reliability modeling, too, was woefully inadequate.

For example, its grid reliability analysis considered only resource adequacy, despite admitting that grid reliability includes operational reliability and other aspects, too, and receiving comments highlighting this difference. State and Industry Opening Brief at 99; *see id* at 100-01 (noting additional examples of EPA conflating resource adequacy and grid reliability); *see also* State and Industry Reply Brief at 37-42 (discussing in detail EPA's failure to grapple with operational reliability). Even so, its resource adequacy model was deeply flawed because it was set to automatically assume the construction of new resources to close an adequacy gap; in other words, the model parameters guaranteed that EPA would never face a resource adequacy problem. State and Industry Opening Brief at 102. And EPA made several baseless assumptions about how often certain sources would run—e.g., it predicted that solar panels would produce electricity 100% of the year, when the average number is closer to 55%. *Id.* at 103.

All the other models, including DOE's, predicted as part of their baseline far more coal usage than EPA did—to the tune of 30%. *Id.* at 104. And these other models also project that renewables will replace coal at far higher rates than EPA assumes. *Id.* For example, DOE's models correctly assume that renewables will replace coal-fired generation at ratios from 15:1 to 20:1; but EPA's highest ratio was a miniscule 4.2:1. *Id.* at 105. Further, EPA erroneously declared that several specific coal-fired units were going to retire by 2028 even though commenters had pointed out that these plants had *no* plans to cease operation. *Id.* at 106-07; State and Industry Reply Brief at 42 (noting that fully 40% of the units EPA predicted would retire had no such plans).

EPA's refusal to squarely confront these dispatchability, erroneous retirement, and other issues meant, by extension, that its grid reliability analysis was deficient. So EPA failed to properly consider "energy requirements" as Congress directed in § 7411(a)(1) and to properly analyze an "important aspect of the problem." *State Farm*, 463 U.S. at 43. And these failures highlight again that state regulators continue to have "the greatest knowledge regarding questions of grid reliability"—an area that remains firmly outside EPA's expertise. *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016).

2. Major Questions Doctrine

Before an agency promulgates a rule that addresses a major question, it needs to identify a clear statement from Congress authorizing it to tackle such an issue. *West Virginia*, 597 U.S. at 722-23. EPA didn't do that in the GHG rule. That's because Section 7411 lacks a clear statement. Rather, as *West Virginia* explained, EPA must regulate the industry as it finds it—not remake it by "direct[ing] existing sources to effectively cease to exist." 597 U.S. at 728 n.3. Congress kept the question of "how much coal-based generation" should exist for itself, *id.* at 729, and EPA may not "restructur[e] the Nation's overall mix of electricity generation." *Id.* at 720. So EPA cannot force coal plants to "reduce their own production of electricity, or subsidize increased generation by natural gas." *Id.* at 706. It could only make "plants operate more cleanly." *Id.*

The GHG rule triggered the major-questions doctrine. Like the Clean Power Plan, it involved issues of national "political significance." *UARG*, 573 U.S. at 324 (cleaned up). And its compliance costs and economic impact are enormous, confirming that the doctrine applies. *See Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021); *King v. Burwell*, 576 U.S. 473, 485

(2015). Further, EPA has no expertise in energy regulation, and Congress has repeatedly and explicitly refused to legislate on these issues. State and Industry Opening Brief at 130. Congress did not give EPA this power to transform our energy grid through speculation. *Id.* at 130-31. EPA insisted that the GHG rule survived because its BSERs were merely technological systems applied at individual plants. State and Industry Reply Brief at 58-59. But this description was a blinkered refusal to acknowledge the transformative *effects* of its mandates. *Id.* at 59-60; State and Industry Opening Brief at 132. And much of the GHG rule required infrastructure changes (like new pipelines) that were in no way traditional "add-on controls" normally greenlit under Section 7411. *West Virginia*, 597 U.S. at 727 (cleaned up). True, EPA took a different route to generation shifting in the GHG rule, but the results were the same: a massive and intentional reduction in fossil-fuel-fired generation and massive and intentional increase in renewable generation. State and Industry Opening Brief at 133. In particular, the GHG rule would have eliminated "all non-CCS coal by 2035 and produce a net loss of 32 coal GW by that same year." *Id.* at 134.

The GHG rule triggered all the factors the Supreme Court uses to identify a major question: cost, political salience, and transformative scope. State and Industry Reply Brief at 58-67. Because EPA crossed the major-questions line, the States agree that the repeal of the GHG rule was appropriate.

3. State Discretion

Remember that while EPA sets Section 7411 standards, "States set the actual rules" for sources. *West Virginia*, 597 U.S. at 710. Those rules "reflect[]," but need not mirror, EPA's proposed BSER. 42 U.S.C. § 7411(a)(1). And EPA must allow States to tailor its rules for each source it's regulating. *Id.* § 7411(d)(1). EPA "shall permit the State in applying a standard of performance to any particular source … to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." *Id.* § 7411(d)(1)(B). Notably, the CAA didn't originally include this language—Congress added it later explicitly to address cases where applying the default standard could be unreasonable. State and Industry Opening Brief at 138. This discretion makes sense because state agencies know their unique geographical, socioeconomic, infrastructural, and other challenges better than their federal counterparts and are no less committed, skilled, and trustworthy. All this means Section 7411(d) "gives substantial latitude to the states in setting emission standards." *Nat'l-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 838 (6th Cir. 1988); *see also Env't Comm. of Fla. Elec. Power Coordinating Grp. v. EPA*, 94 F.4th 77, 93 (D.C. Cir. 2024) (noting § 7411 is "an exercise in cooperative federalism").

The GHG rule trampled on this discretion by mandating that States adopt EPA's "presumptive standards." State and Industry Opening Brief at 141. EPA said it would approve SIPs only if they achieved "at least the level of emission reduction" as its "presumptive standards." *Id.* But EPA isn't supposed to force States into choosing one particular option or treat them as underlings—it's supposed to guide them. *Id.* at 142; *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 485, 487, 490 (2004). The GHG rule also functionally erased discretion to consider the remaining useful life of facilities and other factors (RULOF): EPA said States could deviate from federal standards only if they showed some factor EPA missed, but EPA considered RULOF

as part of the GHG rule, meaning no RULOF considerations could ever justify a deviation. State and Industry Opening Brief at 143. Yet EPA may not "simply throw[] the burden of persuasion onto the states" and disapprove State plans when they do not meet it. *Michigan*, 213 F.3d at 683. It must allow States to tailor regulations, not "run roughshod over the procedural prerogatives that the Act has reserved to the States." *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). And for the same reason, the GHG rule's forcing of States to accept EPA's preferred "factors and evaluation metrics" violates the States' right to consider "other factors" under Section 7411(d)(1). State and Industry Opening Brief at 145. As the States explained, making States "provide exceedingly persuasive reasons—and limiting the scope of those reasons to only those EPA has preselected—before allowing States to exercise discretion Congress has already said EPA must allow and did not restrict is wrong." *Id.* at 147. And here again, it violates the federalism canon, too. *Id.* at 148-49.

4. Subcategorization and Other Coal-Plant-Related CAA Violations

In comment letters and litigation, various parties raised issues like inappropriate subcategorization, EPA's inability to regulate coal plants under Section 7411(d) given its existing regulations under Section 7412, and EPA's choice to ignore comments about coal refuse plants. Because EPA failed to sufficiently address any of these challenges, either, the GHG rule was arbitrary and capricious for those reasons, too.

***

With the Proposed Rule, EPA recognizes the limits of Section 111. EPA can act only as far as Congress has allowed it, so EPA must hew closely to the Clean Air Act. The Proposed Rule properly reverses course on past EPA attempts to reshape the nation's electricity-generating sector. It acknowledges that prior BSERs are inconsistent with a reasonable interpretation of "adequately demonstrated." And the Proposed Rule balances environmental protection with our nation's energy reliability and affordability. At bottom, the Proposed Rule respects the separation of powers by ensuring that climate policy remains firmly within the bounds of what Congress has authorized. And it proves to be consistent with President Trump's mission of "energy dominance and independence." We thus urge EPA to finalize the Proposed Rule.[3]

[3] We also urge the EPA to act quickly to reevaluate related regulatory impediments to a healthy energy sector. For instance, in the Proposed Rule, EPA notes that it is "not reopening the BSER determinations or standards of performance and related requirements for new and reconstructed intermediate load and low load fossil fuel-fired stationary combustion turbines or for phase 1 for new and reconstructed base load fossil fuel-fired stationary combustion turbines." 90 Fed. Reg. at 25768. Nor is it "reopening the 2015 NSPS or substantive elements of 40 CFR part 60, subpart TTTT." *Id.* We also see no mention of the past administration's revisions to CAA Section 111(d)'s implementing regulations. *See* 90 Fed. Reg. at 25759 (noting the rule of the implementing regulations). Many of us have challenged these various regulations, which have seriously hampered energy development (especially when it comes to new coal-fired facilities) and stripped States of their discretion to make air-pollution-related decisions within the CAA framework. And these related regulatory efforts fail for some of the same reasons laid out in the Proposed Rule; for

Sincerely,

John B. McCuskey
West Virginia Attorney General

Todd Rokita
Indiana Attorney General

Russell Coleman
Kentucky Attorney General

Steve Marshall
Alabama Attorney General

Treg Taylor
Alaska Attorney General

Tim Griffin
Arkansas Attorney General

James Uthmeier
Florida Attorney General

Christopher M. Carr
Georgia Attorney General

instance, the 2015 NSPS adopted a flawed conception of CCS technology much like that later embraced by the Biden Administration. *See generally* Comments of West Virginia, Nebraska, et al. on Proposed Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units (May 9, 2014), https://tinyurl.com/yc6733es. Thus, complete relief for America's energy producers and consumers will only come through comprehensive action that embraces all those misguided regulations, too.

Raúl Labrador
Idaho Attorney General

Brenna Bird
Iowa Attorney General

Kris W. Kobach
Kansas Attorney General

Liz Murrill
Louisiana Attorney General

Lynn Fitch
Mississippi Attorney General

Andrew Bailey
Missouri Attorney General

Austin Knudsen
Montana Attorney General

Mike Hilgers
Nebraska Attorney General

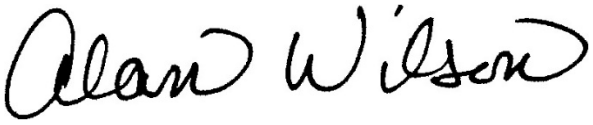
John M. Formella
New Hampshire Attorney General

Drew Wrigley
North Dakota Attorney General

Dave Yost
Ohio Attorney General

Gentner Drummond
Oklahoma Attorney General

Dave Sunday
Pennsylvania Attorney General



Alan Wilson
South Carolina Attorney General

Marty J. Jackley
South Dakota Attorney General

Jonathan Skrmetti
Tennessee Attorney General and Reporter

Ken Paxton
Texas Attorney General

Derek Brown
Utah Attorney General

Jason S. Miyares
Virginia Attorney General

Keith Kautz
Wyoming Attorney General