State of West Virginia
Office of the Attorney General
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December 1, 2025

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

Submitted Electronically via Regulations.gov

Re: Comments on Proposed Rulemaking Titled "Visibility Protection: Regional Haze State Plan Requirements Rule Revision" by the Attorneys General of the States of West Virginia, Alabama, Arkansas, Georgia, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Tennessee, and Wyoming (Docket No. [EPA-HQ-OAR-2025-1477; FRL-6714-04-OAR])

Dear Administrator Zeldin:

We appreciate the opportunity to comment in support of EPA's potential revisions to the Regional Haze Rule. *See Visibility Protection: Regional Haze State Plan Requirements Rule Revision*, 90 Fed. Reg. 47,677 (Oct. 2, 2025). The Clean Air Act's visibility-improvement requirements greatly affect our States, so we are glad that EPA takes seriously our role in this process. Revisions would be especially welcome given that previous administrations ignored the great economic and administrative costs state implementation plans carry. The Notice presents an opportunity to achieve significant national visibility progress and account for surging economic costs, while also realigning federal regulations with the Act's requirements.

The Notice already suggests a vast improvement over the status quo, but we offer some suggestions for still further improvement here. For instance, we urge EPA to expressly recognize that the States alone have discretion to determine what is "necessary" to make "reasonable progress" toward achieving the "national goal" of improving air visibility impairment under the Act. The States further propose that EPA restructure the Regional Haze Rule to remove all provisions that do not align with the Act's text. Finally, if EPA feels it should impose additional

guidelines, we propose several considerations that properly balance economic growth and environmental concerns.

BACKGROUND

I. The Clean Air Act.

In the Clean Air Act, Congress declared a "national goal" to improve visibility impairment in certain federal areas. 42 U.S.C. § 7491(a)(1). To achieve its goal, Congress chose to "experiment" in "federal-state collaboration." *Ohio v. EPA*, 603 U.S. 279, 283 (2024) (cleaned up); *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). Indeed, the Act's "core principle" is "cooperative federalism." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511 n.14 (2014).

Reflecting the Act's cooperative federalism, Congress left States with the "primary responsibility" to determine how to address visibility impairment by creating and enforcing state implementation plans. *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (cleaned up); *see also St. Marys Cement Inc. v. EPA*, 782 F.3d 280, 283 (6th Cir. 2015) (noting that the States determine how to "enforce" visibility standards); 42 U.S.C. §§ 7410, 7491-92. Congress left much to the States, saying only that SIPs must "contain such emissions limits, schedules of compliance[,] and other measur[able criteria] as may be necessary to make reasonable progress toward meeting the national goal." 42 U.S.C. §§ 7491(b)(2), 7492(e)(1). Among other things, sources must acquire and operate the "best available retrofit technology" (BART) and maintain "a long-term (ten to fifteen years) strategy." *Id.* § 7491(b)(2)(A)-(B).

On the other hand, Congress only authorized EPA to study air visibility and make rules with "guidelines" for the States. 42 U.S.C. § 7491(b)(1). Specifically, EPA must (1) identify visibility-important Class I Federal areas, *id.* § 7491(a)(2); (2) provide "guidelines to the States" on potential methods and techniques to address visibility impairment, *id.* § 7491(b)(1); (3) review SIPs for compliance with the Act, *id.* § 7491(b)(2); and (4) conduct 5-year progress assessments, *id.* § 7492(b).

Throughout this process, Congress required EPA follow the States' lead. After the States determine how best to reduce visibility impairment, they submit their SIPs for EPA's review. 42 U.S.C. § 7410(a)(1)-(2). If the SIP complies with the Act, EPA must approve it. *Id.* § 7410(a)(2)(j); *St. Marys Cement Inc.*, 782 F.3d at 283 ("If a plan satisfies the applicable requirements … EPA will approve it." (cleaned up)). If the SIP does not comply with the Act, the State may revise it after consulting with a federal land manager. 42 U.S.C. §§ 7410(a)(2)(H), (c)(1), (k)(3)-(4), 7491(d). EPA may promulgate a federal implementation plan only if a State refuses to revise a noncompliant SIP. *Id.* § 7410(c)(1).

II. The Regional Haze Rule.

In 1999, EPA abandoned its limited statutory role and promulgated the Regional Haze Rule, imposing procedures and rules with no grounding in the Clean Air Act. 64 Fed. Reg. 35,714 (July

1, 1999). The Haze Rule conjured up a host of "core requirements" for SIPs, including "[c]alculations of baseline and natural visibility conditions," "[m]onitoring strategy," "statewide inventory of emissions," "future projected emissions," "other elements, including reporting, recordkeeping, and other measures." *Id.* at 35,766-67. Continuing its excursion beyond the Act's text, the Haze Rule compelled States to identify a "uniform rate of progress" (URP) that would be needed to "attain natural conditions by the year 2064." *Id.* at 35,746. It also commanded States to conduct "comprehensive periodic" SIP revisions every ten years, submit "periodic reports" every five years, and participate in State and federal land manager coordination. *Id.* at 35,768.

Because of the Haze Rule's onerous requirements, decades of litigation between EPA and the States followed the rule's promulgation. *See, e.g.*, *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). EPA has also revised the Haze Rule four times. *See* 70 Fed. Reg. 39,104 (July 6, 2005); 71 Fed. Reg. 60,612 (Oct. 13, 2006); 77 Fed. Reg. 33,656 (June 7, 2012); 82 Fed. Reg. 3,078 (Jan. 10, 2017). Yet the Haze Rule still contains unauthorized, unjustified, and unlawful extra-statutory requirements. *See* 40 C.F.R. § 51.308.

Fortunately, EPA recently asked for "comment[s] and input" on "restructuring [the Haze Rule] in a manner consistent with [the Act's] applicable requirements." 90 Fed. Reg. at 47,678. EPA is interested in finding "ways to streamline and clarify certain requirements governing the Regional Haze program" as it seeks to "fundamentally revis[e] the Regional Haze program" and return it to its statutory roots. *Id.* EPA would be wise to revise the Haze Rule.

DISCUSSION

The Act entrusts the States with implementing the Act's provisions and working towards a national visibility goal. To help the States in this endeavor, the Act commits EPA to offering guidelines and reviewing SIPs for statutory compliance. But the Haze Rule tramples on that statutorily struck balance by reaching beyond the Act's text. In doing so, it arbitrarily and capriciously ignores the monumental costs it takes as tribute. EPA must revise this rule, and we propose several ways to do so.

I. The Clean Air Act Affords States Wide Discretion.

To understand how and why the Haze Rule must be revised, EPA need only turn to the Act's text and structure.

As always, "statutory interpretation must begin with, and ultimately heed, what a statute actually says." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (cleaned up). The terms of a statute "will be interpreted as taking their ordinary, contemporary, common meaning," "unless [they are] otherwise defined." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 433-34 (2019). Statutes are also to be read as a whole and harmoniously with other provisions. Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* §§ 24, 27, at 167, 180 (2012). As applied, these canons reveal Congress's intent in the Act to confer upon States wide discretion in determining what is "necessary" for "reasonable progress."

Start with Congress's declaration of the Act's purpose: "Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Congress chose to use the term "national goal" to describe the Act's overarching aim. *Id.* That choice is critical.

"National" means "of or relating to a nation." *National*, MERRIAM WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1963). And a "goal" is an "end toward which effort is directed." *Goal*, MERRIAM WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1963). Thus, the Act's "national goal" is not a "mandatory standard which must be achieved by a particular date" and in a particular place, but rather a target for the country. 64 Fed. Reg. at 35,733. This aspirational language demonstrates that Congress wanted the Act to promote better visibility overall. *See* 42 U.S.C. § 7491(a)(1).

To work toward this goal, Congress left States "wide discretion" in defining what progress is required. *See Texas*, 829 F.3d at 411 (citing *Union Elec. Co.*, 427 U.S. at 250). Reflecting the issue's fact-intensive nature, Congress required that States make only "reasonable progress" toward the national goal. 42 U.S.C. § 7491(a)(4), (b)(2). "Reasonable" is "not extreme or excessive" but is context specific and depends on what is "agreeable" for the State's needs in the State's "sound judgment." *See Reasonable*, MERRIAM WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1963). The common understanding of "progress" at the time was akin to "effort" and is defined as a "gradual betterment." *See Progress*, *id.* Taken together, the Act's idea of "reasonable progress" is thus a context-dependent level of improvement. It does not require States to eliminate visibility impairments outright by an arbitrarily determined deadline.

Indeed, Congress recognized that progress must be gradual and account for state-specific circumstances. It directed that "reasonable progress" be weighed against the "costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." 42 U.S.C. § 7491(g)(1). The States are best positioned to answer these real-world-facing questions. That's why Congress gave States the discretion to "determine[]" things such as the "best available retrofit technology." *Id.* § 7491(b)(2)(A), (g)(2).

Congress could have assigned this role to EPA as it has elsewhere in the Act. For instance, where the Act details new source performance standards, it authorizes EPA to "determine[]" whether States "adequately demonstrate[]" the "best system of emission reduction." *Id.* § 7411. Likewise, for nonroad engines and vehicles, Congress charged EPA with determining what "technology … [is] available" to achieve emissions standards. *Id.* § 7547(a)(3). But here, Congress instead gave the role of determining "best available retrofit technology" to the States. Likewise, Congress refused to set a specific date for States to achieve the national goal. *See id.* § 7491(f).

Congress also declined to arbitrarily impose on the States EPA's findings of specific techniques and methods available to implement visibility standards. For example, Congress

directed EPA to provide "guidelines" to the States on appropriate techniques and methods for implementation. *Id.* § 7491(b)(1). But Congress made certain that only large "fossil-fuel fired generating powerplant[s] ... generating [more than] 750 megawatts" had to conform to these "guidelines." *Id.* § 7491(b)(2)(B). For every other aspect of implementation, the guidelines are just that: guidelines and no more. *See, e.g.*, *Wyoming v. EPA*, 78 F.4th 1171, 1175 (10th Cir. 2023) ("the guidelines are *not mandatory*." (cleaned up)).

Even beyond the plain text, the Act's structure points to wide state discretion. Congress gave States the "primary responsibility" to address visibility impairment by creating and enforcing their SIPs. *Texas*, 829 F.3d at 411 (cleaned up); *St. Marys Cement Inc.*, 782 F.3d at 283; 42 U.S.C. §§ 7410, 7491-92. And States comply with the Act by "tak[ing] into consideration" what is "necessary" to make "reasonable progress" toward the "national goal." *See id.* §§ 7491(b)(2), (g)(1). Determining what is necessary in this context includes weighing such factors as the costs of compliance, time necessary for compliance, energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to the requirements. *Id.* § 7491(g)(1). As this extensive list demonstrates, "States have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements." *Wyoming*, 78 F.4th at 1178 (cleaned up).

Contrasted with the States' active role, Congress assigned EPA the more "ministerial function" of identifying protected areas, conducting visibility research, and providing "guidelines" and measurable "criteria." *See Luminant Gen. Co., LLC*, 675 F.3d at 921 (cleaned up); 42 U.S.C. §§ 7491(a)(3), (b)(1), 7492(e)(1). Once that's done, it's the States who choose what measures are "necessary" to make "reasonable progress" toward the "national goal." *See id.* § 7491(b)(2); *see also id.* § 7491(g)(1) (four factors "shall be taken into consideration" to determine "reasonable progress."). EPA plays no part in making those determinations. Instead, EPA only checks to make sure the minimum statutory requirements are met before approving the SIP. *See id.* §§ 7491(b)(2), 7410(k)(3).

And courts read the Act the same way. "Under the [Act's] structure of cooperative federalism, [States are] the entit[ies] considering 'relevant factors,' and the EPA's role is confined to ensuring that [those] determinations compl[y] with the [Act]." *Sierra Club v. EPA*, 939 F.3d 649, 664 (5th Cir. 2019). Indeed, "[t]he [Act] gives the [S]tates broad authority: no matter how a [S]tate designs its SIP, if it meets the statutory criteria of the [Act], then the EPA must approve it." *Texas v. EPA*, 132 F.4th 808, 836 (5th Cir. 2025) (cleaned up). EPA thus has "no authority to question the wisdom of a State's choices." *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

Altogether, under this cooperative federalism scheme, States naturally exercise wide discretion in determining what is "necessary" for "reasonable progress" toward the "national goal." The Haze Rule should be revised to reflect that.

II. Searching Judicial Review Will Reveal The Haze Rule's Unauthorized Requirements.

EPA hid behind misguided legal doctrines to stretch the limits of its congressional authorizations in the past. No more. Following the reversal of *Chevron*, federal judges will apply higher judicial review to the Haze Rule than they have in the past. The rule cannot stand such scrutiny.

a. EPA No Longer Gets Statutory Deference On Rules Like The Haze Rule.

The Supreme Court's recent decision to rein in agency power in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024), calls into question how the Haze Rule will fare under judicial review in the future. After all, federal courts are supposed to "reverse any action" that is outside EPA's "statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. § 7607(d)(9)(C); *see also* 5 U.S.C. § 706(2)(C) (same standard under the APA). Yet EPA promulgated the Haze Rule at a time when courts misguidedly deferred to agency statutory interpretation. *See Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). With the Haze Rule, EPA undoubtedly benefited from that deferential review.

For example, *Chevron* deference saved the Haze Rule's interpretation of "reasonable progress" because it was not defined by the Act. *Util. Air Reg. Grp. v. EPA*, 471 F.3d 1333, 1340 (D.C. Cir. 2006). The D.C. Circuit denied petitions for review because EPA's interpretation was "reasonable." *Id.* at 1341. Another court sided with EPA again where its "reasonable" interpretation led to limiting emission source exemptions and subjecting them to permitting. *Phoenix Cement Co. v. EPA*, 647 F. App'x 702, 705 (9th Cir. 2016). A third court upheld "EPA's interpretation of its authority" to determine such things as "reasonably attributable" sources and "reasonable progress" requirements. *Cent. Az. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1539-41 (9th Cir. 1993). Even the Supreme Court held that EPA could decide what constitutes "best available control technology" only because EPA "rationally construed the Act's text." *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 485 (2004). But those courts' "reasoning conflicts with the express language of the Clean Air Act … with sound rules of administrative law, and with principles that preserve the integrity of States in our federal system." *See id.* at 502 (Kennedy, J., dissenting).

Chevron's blind deference no longer exists to save the Haze Rule. Last year, the Supreme Court overruled *Chevron* in *Loper Bright*, 603 U.S. at 412. Federal courts now "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* In other words, the courts, not agencies, will "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

This change will certainly affect courts' interpretations of the Haze Rule. The Fifth Circuit already warned there may be tension concerning the allocation of interpretive authority between States and EPA under the Act's Good Neighbor Provision. *See Texas v. EPA*, 132 F.4th 808, 831 (5th Cir. 2025). Similarly, another court suggested EPA's "guidelines" "might somehow conflict with the [Act]." *Oklahoma v. EPA*, 723 F.3d 1201, 1210 (10th Cir. 2013).

This loss of deference should especially alarm EPA here where the Haze Rule historically withers under more searching judicial review—that is, without the benefit of *Chevron*. Indeed,

where the D.C. Circuit disagreed with EPA's characterization of the way BART factors should be applied, the court sided against the agency. *Am. Corn Growers Ass'n*, 291 F.3d at 6. This loss led EPA to its first Haze Rule revision. 70 Fed. Reg. at 39,104 ("Today's rule addresses the court's ruling in that case."). And that judicially instigated revision wasn't the only time. The D.C. Circuit later granted a petition of review when EPA "limit[ed] [States] to a [Haze Rule] alternative defined by an unlawful methodology[]." *Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 660 (D.C. Cir. 2005). This decision prompted yet another Haze Rule revision. 71 Fed. Reg. at 60,612 (referencing *Center for Energy & Economic Development* and adopting revisions to the Haze Rule).

These cases and *Chevron*'s reversal portend that courts will soon recognize what the States are cautioning now: the Haze Rule goes beyond EPA's congressional authorizations and must be revised.

b. The Haze Rule's Requirements Exceed Congressional Authorization.

Even if it had deference, EPA would still need to revise the Haze Rule because the rule exceeds the agency's statutory bounds outright. For visibility impairment reduction purposes, Congress authorized EPA to (1) provide States with "guidelines" on methods and techniques they may choose to use in addressing visibility impairment; and (2) approve SIPs that contain emission limits, schedules of compliance, and other measurable criteria that States deem necessary to make reasonable progress toward the national goal. *See* 42 U.S.C. §§ 7491(b)(1)-(2), 7492(e)(1). That's all. Yet the Haze Rule requires much more.

For example, when States revise their SIPs, EPA imposes "additional factors" in developing their long-term strategies. 40 C.F.R. § 51.308(f)(2)(iv) ("(A) Emission reductions due to ongoing air pollution control programs, including measures to address reasonably attributable visibility impairment; (B) Measures to mitigate the impacts of construction activities; (C) Source retirement and replacement schedules; (D) Basic smoke management practices for prescribed fire used for agricultural and wildland vegetation management purposes and smoke management programs; and (E) The anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the long-term strategy."). These additional factors are contemplated nowhere in the statutory scheme.

Indeed, the Haze Rule is replete with additional burdens on States that have no grounding in the Act's text. *See, e.g.*, 40 C.F.R. § 51.304(c) (requiring States to list "integral vista[s]" in their SIPs); *id.* §§ 51.305, 51.308(d)(4), (f) (requiring States to monitor "reasonably attributable" visibility impairment "in addition to" current monitoring, and include the results in their revised SIPs); *id.* § 51.308(d)(1)(i)(B) (setting a date of 2064 to achieve "natural visibility conditions"); *id.* § 51.308(d)(1)(ii) (shifting the burden of proving that the 2064 date is unreasonable to the States when a SIP includes a rate of progress that does not achieve natural visibility by 2064); *id.* § 51.308(d)(1)(iv) (requiring States to consult with each other); *id.* § 51.308(d)(2)(i) (measuring baseline visibility by the most and least impaired days); *id.* § 51.308(g) (requiring States to submit periodic progress reports). These additional requirements unduly burden the States to perform according to regulatory mandates that are not supported by the Act's text. Thus, the Haze Rule

regulates "without regard for the thresholds prescribed by Congress." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (*UARG*).

III. The Haze Rule's Enormous Unconsidered Costs And Diminishing Benefits Render It Arbitrary And Capricious

Unauthorized requirements are bad enough. But the Haze Rule pours gas on the bonfire by arbitrarily and capriciously failing to consider the colossal expenses it extracts from States and industry.

a. The Haze Rule's Costs Surge As Benefits Dwindle.

From the beginning, the Haze Rule represented an expensive endeavor. The Act's "goals and standards are purely aesthetic rather than directly related to health and safety." *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1198-99 (10th Cir. 2014). And it often costs more "to maintain and preserve air for aesthetic purposes than for health purposes." John Copeland Nagle, *The Scenic Protections of the Clean Air Act*, 87 N.D. L. REV. 571, 599 (2011). Material visibility improvement has become especially hard to come by (and thus expensive) given that we no longer have visibility problems anything like existed at the Haze Rule's inception. *See, e.g.*, CLEAN AIR ACT ADVISORY COMMITTEE, *The 50th Anniversary of the Clean Air Act* (2019), https://tinyurl.com/45mmydhj ("Across all 183 visibility monitoring stations … the vast majority have seen significant improvement." (cleaned up)). And air can only get so clear (imperceptible impairment after all means there is no visible impairment). So as beneficial progress becomes more and more unavailable, what began as an expensive endeavor will soon become an impossible demand

EPA initially estimated that the Haze Rule would cost a total of 1 to 4 billion dollars annually. *See* Michael T. Palmer, *The Regional Haze Rule: EPA's Next Phase in Protecting Visibility Under the Clean Air Act*, 7 ENV'T L. 555, 621 (2001) (citing EPA estimates). But that "estimate" turned out to be wishful thinking. In 2011, a single source in states like Oklahoma might calculate implementation costs at about $95 million over five years. Oklahoma Gas & Electric Co., *U.S. SEC Form 10-K*, at 17 (2013). When EPA imposed its own federal implementation plan on Oklahoma, that cost jumped to over $282 million annually—over $1.8 billion total. U.S. CHAMBER OF COMMERCE, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* 25 (2012) (New Regulatory Front); *see also Oklahoma*, 723 F.3d at 1226 (Kelly, J., concurring in part and dissenting in part) ("EPA's rule here requires [the Oklahoma Gas & Electric Company] to make a $1.2 billion dollar investment over the next five years.").

Yet Oklahoma's costs pale in comparison to other States, like Texas. That State figured it would pay $2 billion for "additional measures" and later found that it would expend annualized costs of about $200 million. *Tex. v. EPA*, 829 F.3d 405, 416 (5th Cir. 2016); TEX. COMM'N ON ENV'T QUALITY, *Interoffice Mem.* 1 (June 11, 2021), https://tinyurl.com/4pajn4ef. These costs are aside from the billions of dollars that industry partners incur through consent agreements to invest exorbitant sums in pollution control technologies. W. VA. DEP'T OF ENV'T PROT., *West Virginia Regional Haze Second Period (2028) State Implementation Plan to Preserve, Protect, and Improve Visibility in Class I Federal Areas* 242 (2021) (WV SIP) (over $5 billion in consent agreements).

This capital contribution may have been worth the initial squeeze. But "[v]isibility has improved dramatically in the US." IMPROVE, *Interagency Monitoring of Protected Visual Environments*, https://tinyurl.com/yvmuawrw (last visited Nov. 14, 2025). Since 2000, States like West Virginia have reduced their deciview count—the Haze Rule's measure of visibility impairment calculated based on haze light extinction—significantly. *See, e.g.*, STATE OF WEST VIRGINIA, *Comment Letter on Air Plan Approval; West Virginia; Regional Haze State Implementation Plan for the Second Implementation Period*, at 4, (May 19, 2025), https://tinyurl.com/2mtkex5e (WV Comment Letter) (moving from ~26 deciviews to ~15 deciviews); Angela R. Morrison & Mary Ellen Ternes, eds., *The Regional Haze Program*, 2 L. OF ENVT'L. PROT. § 12:78 (Oct. 2025 update) (showing dutiful progress in nearly every Class I federal area).

But what began as a need to increase visibility has become a hazy witch hunt. The Haze Rule's benefits have always been suspect as "there is no easy way to quantify the benefits of visibility." Steven H. Bergman, *To See or Not to See: The Viability of Visibility at the Grand Canyon*, 13 UCLA J. ENV'T L. & POLI. 127, 130 (1999). Even more so on a granular level. *See Am. Corn Growers Ass'n*, 291 F.3d at 16 (Garland, J., concurring in part and dissenting in part) ("it is not possible to trace emissions from an individual source directly to such a downwind area without great time and expense—and even then, the results would be of uncertain reliability."). Even a decade and a half ago, there was "no perceptible visibility benefit" from the Haze Rule. *See* TEX. COMM'N ON ENV'T. QUALITY, *Revisions to the State Implementation Plan (SIP) Concerning Regional Haze* 10-7 (2009) ("At a total estimated cost exceeding $300 million and no perceptible visibility benefit, Texas has determined that it is not reasonable to implement additional controls at this time."); *see also Oklahoma*, 723 F.3d at 1226 (EPA requiring a $1.2 billion investment "that w[ould], even under EPA's estimate, result in no appreciable change in visibility"). Indeed, the difference between deciviews may be "imperceptible" to the human eye, and available modeling may not account for improvements. Douglas K. Miller, *Visibility Issues in Rural Arizona & Indian Country*, 43 AZ. STATE L. J. 861, 876 (2011); *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1146-47 (9th Cir. 2015).

Further, it is "an unreasonable belief" to think that "additional visibility improvement can continue indefinitely," 90 Fed. Reg. 16,478, 16,483 (Apr. 18, 2025), without greater investment. According to North Dakota, improvement of one deciview can cost over $2 billion at a single protected area. *See North Dakota v. EPA*, 730 F.3d 750, 765 (8th Cir. 2013) ("[T]he State found that the cost effectiveness of additional controls would be … 2.3 billion dollars-per-deciview of improvement at Theodore Roosevelt National Park."). The Haze Rule implicates over 150 of these areas. *See* 40 C.F.R. §§ 81.401-37. Even placing this number at a conservative $1 billion dollars means reducing all protected areas by a single deciview could cost $150 billion – a figure higher than most countries' gross domestic product. *See* WORLD BANK GRP., *Data: GDP (current US$)*, https://tinyurl.com/3jka92xn (last visited Nov. 17, 2025). This figure suggests it could cost $8 billion additional dollars for States like West Virginia, where the Haze Rule requires it to decrease about eight more deciviews. But just because deciviews decreased at this cost in the past does not mean that they will hold for the future.

Increasing costs and nearing-natural visibility conditions make current progress rates impossible in the coming decades as States and industry partners succumb to the economic law of diminishing returns. States have several deciviews to descend until they hit the Haze Rule-imposed "natural condition." *See, e.g.*, WV Comment Letter, at 4. As States approach that line, the "quantity" of economic investment required "increase[]" as progress toward the natural condition "gradual[ly] decrease[s]."; in other words, the costs will rise as the benefits diminish. W.J. Spillman & Emil Lang, *The Law of Diminishing Returns* vii (1924). Never mind that these costs will "render[]" "targeted power plants" "uneconomical and forc[e] the[m] to close." *Texas*, 829 F.3d at 416.

b. The Haze Rule Arbitrarily And Capriciously Fails To Consider Economic Costs.

Even if the Haze Rule's unnecessary costs and requirements weren't *practically* enough to justify a full revision, those problems would still *legally* require EPA to revise the rule. As it stands now, the Haze Rule likely arbitrarily and capriciously requires far more than the agency can reasonably justify.

Courts will reverse EPA actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *see also* 5 U.S.C. § 706(2) (same standard under the APA). There are "numerous ways in which an agency may act arbitrarily and capriciously." *FDA v. Wages & White Lion Investments, LLC*, 604 U.S. 542, 567 (2025). For instance, "[a]n agency action [is] arbitrary or capricious if it is not reasonable and reasonably explained." *Ohio*, 603 U.S. at 292 (cleaned up). This result happens where the agency "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Haze Rule does just that.

The Haze Rule arbitrarily and capriciously fails to consider the costs compared to the benefits of its imposed requirements. As detailed before, States spend billions of dollars to comply with the Haze Rule, *see supra*, Part III.a. But it is arbitrary and capricious "to impose billions of dollars in economic costs in return for a few dollars in … environmental benefits." *Michigan v. EPA*, 576 U.S. 743, 752 (2015). Indeed, EPA cannot force States "to spend millions[, forget billions,] of dollars for new [requirements] that will have no appreciable effect on the haze in any Class I area." *Am. Corn Growers Ass'n*, 291 F.3d at 7. And no matter the cost, EPA must "justify[]" its determination that requirements are "ultimately cost-effective." *Nat'l Parks Cons. Ass'n v. EPA*, 788 F.3d 1134, 1144-45 (9th Cir. 2015). Yet the Haze Rule offers little in exchange for its staggering price tag.

"Whether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 225-26 (2009) (cleaned up). With visibility levels in Class I Federal areas better now than ever, *see* EPA, *Our Nation's Air Trends Through 2020*, https://tinyurl.com/y35efwnf (last visited Nov. 11, 2025), any benefit achieved from this point forward will necessarily require expending more resources than the perceptible difference in air visibility can reasonably justify. *See supra*, Part III.a.

Another major cost of the Haze Rule is compliance with a host of procedural hoops and all the "disadvantage[s]" that come with that compliance. *Michigan*, 576 U.S. at 752. Such disadvantages can include administrative costs like "auditing, insurance, financial, personnel, and other management systems associated with" compliance, *Becerra v. San Carlos Apache Tribe*, 602 U.S. 222, 228 (2024), in addition to "learning about rights, rules, and demands," Aske Halling & Martin Baekgaard, *Administrative Burden in Citizen-State Interactions: A Systematic Literature Review*, 34 J. PUB. ADMIN. RESEARCH & THEORY 180, 181 (2024).

Regulatory barriers that are so high they keep potential electric producers out of the market directly contravenes the Act's design. Congress did not want to sacrifice the economy for amorphous environmental progress, and it recognized that visibility progress should be focused on reality, not fantasy. That's why it strictly cabined the Act's oversight to Class I Federal areas. *See*, *e.g.*, H.R. Rep. 95-294, at 205 (May 12, 1977) ("It would be impracticable to require a major city such as New York or Los Angeles to meet the same visibility standards as [Class I Federal areas].").

Thus, States and industries suffer from both compliance costs and the economic opportunity costs that result from companies choosing not to operate due to high barriers to entry and unduly burdensome regulations.

Congress further feared EPA would impose "no-growth" buffer zones to restrict economic expansion in areas around Class I Federal areas for the sake of the rule. *See*, *e.g.*, Cong. Rec. H.R. 10498, at 4067-68 (Sept. 15, 1976) (Rep. Rousselot) ("If the buffer strips turn out to be 50 or 100 miles wide, there would be only nooks and crannies left in the country for major economic expansion."); Cong. Rec. S. 8920, at 1054 (June 6, 1977) (Sen. Muskie) (responding to allegations that a no-growth buffer zone would be required to prevent pollution of the Federal parks); H.R. 95-294, at 157-58 (May 12, 1977) (same). To prevent that scenario, the Act prohibits EPA from "requir[ing] the use of any automatic or uniform buffer zone or zones." 42 U.S.C. § 7491(e).

Congress wasn't alone in its fears. President Jimmy Carter also hoped the Act would "permit[] economic growth" when he signed amendments to the Act into law. *See* Presidential Statement on Signing H.R. 6161 into Law, Clean Air Act Amendments of 1977, 2 Pub. Papers 1460-61 (Aug. 8, 1977). So the Act strikes a balancing act as "maintaining pristine visibility effectively limits economic development." Arnold W. Reitze, Jr., *Visibility Protection Under the Clean Air Act*, 9 GEORGE WASH. J. OF ENERGY & ENV'T L. 127, 161 (2019).

Unfortunately, these fears have come to fruition. EPA requires States and others to notify federal land managers in certain areas "not only [of new] facilities that will be located within 100 km of a Class I [Federal] area, but also large sources located at distances greater than 100 km if there is reason to believe that such sources could affect the air quality in the Class I [Federal] area." EPA, *Federal Land Manager Notification of New Source Review Permit Applications in EPA's Pacific Southwest (Region 9)*, https://tinyurl.com/bdf27zwn (last visited Nov. 14, 2025). Power plant owners have thus moved their operations far from Class I Federal areas. Indeed, by 1990, only 31% of coal-fired boilers were within a 100-mile radius of these areas because of regulatory burdens. NAT'L RESEARCH COUNCIL, *Protecting Visibility in National Parks and Wilderness Areas* 408 (1993); *see* John Morehouse & Edward Rubin, *Downwind and Out: The Strategic Dispersion*

of Power Plants and their Pollution 1-2 (2021) (power plants locate strategically to reduce regulatory burdens), https://tinyurl.com/d9jw28t8. And the coal- and gas-power-producing sectors have dropped precipitously in twenty years following the Haze Rule's promulgation. EPA, *Power Sector Evolution*, https://tinyurl.com/4evuzt9c (last visited Nov. 17, 2025). "[I]n March 2010" alone, "351 proposed new power plant projects were unable to secure permits" which would have resulted in "$577 billion" invested in our economy, creating "1.9 million jobs per year." New Regulatory Front, at 2.

Thus, the Act as enforced through provisions like the Haze Rule has created de facto buffer zones for economic development and detrimentally affected the nation's most reliable energy sources.

In the midst of continuing concerns over affordability, it's an especially inopportune time to ignore costs, especially when it comes to the energy industry. Electric-generating facilities make up thirty-nine of the top fifty sources that may be affecting Class I areas. *See* NAT'L PARKS CONSERVATION ASS'N, *Top 50 Worst Regional Haze Polluters*, (Jan. 23, 2025), https://tinyurl.com/3bsuyjmz. Electricity generation is always critical, but even more so when the demand for electricity is projected to rise "17% in the next decade while … enough [electricity] to power about 100 million homes [] is expected to retire." Molly Christian, *Electric Co-ops Welcome New Agency Efforts to Support Crucial Generation*, NRECA (Sept. 30, 2025), https://tinyurl.com/yc478ba4. And the advent of artificial intelligence promises to consume between "6.7% [and] 12%" of the U.S. electrical grid system by 2028. Arman Shehabi, et al., *2024 United States Data Center Energy Usage Report*, LAWRENCE BERKELEY NAT'L LAB., at 5-6 (Dec. 20, 2024), https://tinyurl.com/b6fzmwxc. These new electricity needs marshal in a "unique period of electricity growth" compared to historic electricity demands. Hannah Ritchie, *How unprecedented is power demand growth in the United States?*, https://tinyurl.com/3z4v76rn (last visited Nov. 12, 2025). Without new electric power sources, average residents can expect electric costs to rise up to "$37 monthly" by 2040. *See, e.g.*, COMMONWEALTH OF VIRGINIA, *Data Centers in Virginia* (2024), https://tinyurl.com/yuwjjp4u. "[C]learly, a requirement to invest as much as $1 billion to achieve [minimal visibility improvement] cannot be justified under any rational cost-benefit analysis, particularly when one considers the potential adverse impacts of such a requirement on [vulnerable producers and consumers]." Miller, at 876.

But by largely abandoning economic considerations in favor of imperceivable visibility "improvements," the Haze Rule goes too far and arbitrarily and capriciously upsets Congress's delicately struck balance.

IV. The Regional Haze Rule Is Illegal.

If unduly burdensome economic considerations weren't enough, the Haze Rule is unlawful in other ways, too. The Haze Rule attempts to answer a major question without clear congressional authorization, while the Act itself (at least as applied by the Haze Rule) could well violate the nondelegation doctrine. Each of these concerns renders the Haze Rule illegal.

a. Major Questions Doctrine.

"Major questions" are issues where "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (cleaned up). The Haze Rule attempts to answer a major question without clear congressional authorization. At least five aspects of the Haze Rule confirm this.

First, the Haze Rule asserts "extravagant statutory power over the national economy." *UARG*, 573 U.S. at 324. The rule "set[s] air standards that affect the entire national economy." *Whitman v. Am. Trucking, Ass'ns*, 531 U.S. 457, 475 (2001). These standards require States to expend billions of dollars to remedy and prevent even imperceptible visibility impairment. *See supra*, Part III.a. These costs include both direct costs of compliance and attendant administrative costs. *Id.*

States aren't the only ones to bear these massive costs. States contract with industry partners to secure "billions of dollars" in consent agreements. *King v. Burwell*, 576 U.S. 473, 485 (2015); *see supra*, Part III.a. These consent agreements require companies like the Tampa Electric Company, American Electric Power, and Virginia Electric and Power Company to invest billions of dollars in "stringent pollution limits." WV SIP, at 242. And as industry faces increased electricity costs, so too do consumers continue to use more electricity. *See, e.g.*, EIA, *After more than a decade of little change, U.S. electricity consumption is rising again*, https://tinyurl.com/snzyffem (last visited Nov. 12, 2025) (rising electricity demand); EIA, *U.S. electricity prices continue steady increase*, https://tinyurl.com/39cbr259 (last visited Nov. 12, 2025) (increasing electricity costs). If the Haze Rule stays as is, ultimately, consumers will bear the brunt of its unwarranted costs. *See supra*, Part III.a. By passing these costs to everyday people, the Haze Rule thus affects virtually every sector of the economy. *West Virginia*, 597 U.S. at 716, 722 (regulating a "significant portion of the American economy" indicates a major question); *UARG*, 573 U.S. at 324 (cleaned up).

Second, the Haze Rule is a "fundamental revision of the statute, changing it from [one] scheme of … regulation" into another. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Congress set the relevant relationship between the States and EPA with States as the primary SIP creator and implementor. *See supra*, Part I. But the Haze Rule disturbs that deliberate experiment in federalism. The rule dictates to States specific requirements on how they should implement the Act through "adequacy" measures. *See supra*, Part II.b., IV.a. This revised approach transforms the statutory scheme from one focused on "federal-state collaboration," *Ohio*, 603 U.S. at 283, to one of state subjugation to EPA's apparently now mandatory "guidelines." These radical new requirements "reveal[]" the "breadth of [EPA's] claimed authority" in the Haze Rule. *West Virginia*, 597 U.S. at 729.

Third, "[t]here is little reason to think Congress assigned" this kind of power to EPA. *West Virginia*, 597 U.S. at 729. EPA does not implement SIPs, but instead only gives "guidelines" in pursuit of an overarching "national goal" of reducing air visibility impairment. The Haze Rule's

mandatory-means application of the Act is not only inconsistent with Congress's intent, *see supra*, Part II.b., but the plain text and structure of its authorizations as well, *id.* at Part I.a.

Fourth, the Haze Rule "discover[ed] in a long-extant statute an unheralded power representing a transformative expansion [of] its regulatory authority." *West Virginia*, 597 U.S. at 724. Congress passed its initial visibility provisions in 1977. *See* 42 U.S.C. § 7491. But EPA didn't publish the Haze Rule until almost a quarter-century later. *See* 40 C.F.R. §§ 51.300-09. And now, over a quarter-century after that—almost 50 years since the first visibility protection provisions were passed—the Haze Rule exercises seemingly unchecked power. Yet West Virginia is not the only one to recognize that the Haze Rule regulates beyond EPA's authority. The Haze Rule itself admits that it *indirectly* regulates things like reasonable progress goals that are not "directly enforceable." 40 C.F.R. § 51.308(f)(3)(iii) (regulating instead through "adequacy" measures). In doing so, it captures wide swaths of previously unregulated State, industry, and end-consumer behaviors. *See supra*, Part III.a. "Given these circumstances, there is every reason to hesitate before concluding that Congress meant to confer on EPA the authority it claims." *West Virginia*, 597 U.S. at 725 (cleaned up).

Fifth, the Haze Rule makes decisions of "vast … political significance." *West Virginia*, 597 U.S. at 716. It regulates air visibility purely for "aesthetic" purposes. *WildEarth Guardians*, 759 F.3d at 1198-99. It is therefore based on "protection of important ecosystems rather than being based on protection of public health." Reitze, at 161. "This makes the program more vulnerable to political pressure." *Id.* And the exact nature of how far aesthetic regulations should go is one for Congress, not EPA.

Indeed, many of the Act's requirements have proven especially contentious. Take, for example, the Haze Rule's imposition of specific BART requirements. These requirements have not only pitted States and industry against EPA, but environmental groups as well. *See* Brian H. Potts, *The Dirty Climate Debate*, 120 YALE L. J. ONLINE 1, 6-15 (2010). They have thus proven particularly susceptible to policy shifts with changing administrations. *See id.* at 8 ("many in the industry believe[d] [an exemption] w[ould] not survive [if] President Obama's EPA issue[d] a CAIR replacement."); Reitze, at 161 ("the Trump Administration is committed to ending Obama Era emission controls on [various industries]."). Congress would not have relinquished the reins of such a contentious debate without clearly saying as much.

Together, these factors "mak[e] this a relatively easy case" to apply the major-questions doctrine. *West Virginia*, 597 U.S. at 744-45. EPA must find a clear statement to justify the power it claims in the Haze Rule. It cannot.

Here, Congress's authorizations are at-best ambiguous. For example, what are the "necessary" emission limits, schedules of compliance, or other measures to make "reasonable progress" toward the "national goal?" Does "best available" retrofit technology refer to economically feasible technology or technology that is technically possible? What is required for a State's long-term strategy?

EPA seems to have relied on ambiguous provisions like these in the past to impermissibly find "elephants" in the Act's "mousehole" authorizations. *Whitman*, 531 U.S. at 468; *see also Sackett v. EPA*, 598 U.S. 651, 677 (2023) ("Congress does not hide elephants in mouseholes by altering the fundamental details of a regulatory scheme in vague terms or ancillary provisions." (cleaned up)). But courts have roundly rebuked the agency for doing so in this context. *See, e.g.*, *Am. Corn Growers Ass'n*, 291 F.3d at 6 ("The [Regional] Haze Rule's splitting of the statutory factors is consistent with neither the text nor the structure of the statute[;] … the factors were meant to be considered together by the [S]tates."); *Ctr. for Energy & Econ. Dev.*, 398 F.3d at 660 ("EPA cannot … require [S]tates to exceed invalid emission reductions (or, to put it more exactly, limit them to a[n] … alternative defined by an unlawful methodology).").

In the past, EPA didn't point to clear authorization for the Haze Rule's requirements, instead hiding behind *Chevron* deference. But without that deference, the Haze Rule now rests on shifting sands. So instead of stretching perceived ambiguity, EPA should "occupy the most defensible terrain." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 19 (2008). And the most secure foundation lies in the Act's plain text as "that approach respects the words of Congress." *Laramie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). The Act's plain text demands that that *States*—not EPA—describe and enforce their own SIPs, *see* 42 U.S.C. § 7491(b)(1), (b)(2)(A), (g)(1)-(2) (providing guidelines, elements, and factors the States may and must consider when creating their SIPs); *id.* § 7410 (describing SIP requirements), while EPA pursues its "ministerial function" of approving SIPs that have considered the requisite factors. *See Luminant Gen. Co., LLC*, 675 F.3d at 921. The Act "can be read in no other way." *Am. Corn Growers Ass'n*, 291 F.3d at 6.

In the end, EPA simply doesn't have clear authority supporting the Haze Rule. And in fact, the Act's text militates against it. Thus, EPA should rescind the rule for unlawfully attempting to answer a major question.

b. The Nondelegation Doctrine.

And if the Haze Rule-era EPA were somehow right about its authority under the Act, that would mean the Act itself violates the nondelegation doctrine by giving essentially legislative power to EPA. The Constitution "vest[s]" "[a]ll legislative Powers" in the "Congress of the United States." U.S. CONST. art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 588 U.S. 128, 135 (2019). Thus, the nondelegation doctrine says that Congress "can[not] delegate" those "powers which are ... exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42 (1825). The Haze Rule's reading of the Act would do just that.

To avoid nondelegation concerns, when assigning a task to an agency, Congress must set out an "intelligible principle" to guide the agency, laying out the general policy and ascertainable boundaries of its delegated authority. *FCC v. Consumers' Research*, 145 S. Ct. 2482, 2497 (2025) (cleaned up). "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. Here, visibility standards "affect the entire the national economy," so Congress "must provide substantial guidance." *Id.*

Starting with the plain text, we believe Congress's delegations in the Act are constitutional. Congress provided an "intelligible principle" and "general policy" where it declared its "national goal" to remedy and prevent visibility impairment. 42 U.S.C. § 7491(a)(2). It separated the States and EPA's roles, giving States "wide discretion" to plan and implement SIPs while authorizing EPA to pursue its "ministerial function." Congress also set clear boundaries on EPA's authority. The Act authorizes EPA to (1) identify visibility-important Class I Federal areas, *id.* § 7491(a)(2); (2) provide guidelines to the States on potential methods and techniques to address visibility impairment, *id.* § 7491(b)(1); (3) review SIPs for compliance with the Act, *id.* § 7491(b)(2); and (4) conduct 5-year progress assessments, *id.* § 7492(b). That's it. Within these bounds, the Act is comfortably insulated from nondelegation problems.

The problem is that as EPA apparently understood the Act, the boundaries of its delegated authority extended far beyond these delineated administrative tasks. The Haze Rule not only identifies Class I Federal areas but establishes "integral vistas" that receive the same protection as Class I Federal areas. 40 C.F.R. § 51.304. Further, in reviewing SIPs for "compliance" with the Act, the Haze Rule saddles States with a host of onerous, arbitrary, and capricious requirements. *See supra*, Parts II-III. Finally, the Haze Rule passed on the 5-year progress assessment requirement from EPA to the States, 42 U.S.C. § 7492(b), 40 C.F.R. § 51.308(g), despite state progress reports being contemplated nowhere in the Act.

If EPA's interpretation of the Act were somehow correct, no standards would exist against which courts or the public measure EPA's possible actions. It could continue to expand its authority to require States to do anything it wanted to combat any level of visibility impairment. The Haze Rule would thus render the Act's authorizations a "tyrann[ical]" delegation offending state "liberty" interests. *See*, *e.g.*, THE FEDERALIST NO. 47 (J. Madison); Baron de Montesquieu, *The Spirit of Laws*, Book 11 Chap. 6, at 185 (The Legal Classics Library 1984) (1748). It is far more likely that the Act's plain text means what it says: the Act assigns EPA a ministerial task that EPA has now extended beyond its statutory authorizations.

In sum, the Haze Rule is illegal because it attempts to answer a major question without clear congressional authorization and it interprets the Act in a way that violates the nondelegation doctrine.

V. In Its Revision, EPA Should Cleave To The Statutory Text.

When EPA revises the Haze Rule, it should expressly recognize that the Act gives States alone the discretion to determine what measures are "necessary" to make "reasonable progress" to achieve the "national goal." Any additional requirements outside this, like progress metrics, percentage requirements, etc. are arbitrary and capricious. EPA should thus restructure the Haze Rule to remove all arbitrary and capricious requirements that the statutory text does not plainly authorize. *See supra*, Parts II-III; *see also infra*, Part V.

If EPA wants to make further specific recommendations to the States, the agency should do so in a section entitled "guidelines"—reflecting the Act's advisory language. These guidelines

should explicitly acknowledge (1) the States' primary role of creating and implementing the SIP; (2) deference to state judgment; (3) the significant progress already made by States; and (4) the economic costs that will make exponential progress impossible in coming years.

The following suggestions align with those principles.

a. Topic 1: Development and Implementation of a Reasonable Progress Metric and Consideration of the Four Statutory Factors.

i. Question 1: Are there alternative approaches through which EPA and/or States can meet the CAA section 169A(g)(1) requirement to consider the four factors in determining reasonable progress?

While we appreciate EPA's attempt at increasing flexibility under the Act, we believe States, not EPA, should consider the Act's four reasonable progress factors. *See supra*, Part I. Still, if EPA decides it must include reasonable progress factors in developing a FIP, it should do so only after consulting with and adopting a State's analysis of the reasonable progress factors. This approach is most consistent with the Act generally, which gives States the "primary burden" of creating and executing SIPs. *Texas*, 829 F.3d at 411.

ii. Question 2: What form could a reasonable progress metric take? Should EPA revise the end date to a year other than 2064?

Again, we have an underlying concern with the question presented: as a threshold matter, EPA should not set any definitive deadline given that the Act pursues a "national goal" with no "mandatory standard which must be achieved by a particular date." 64 Fed. Reg. at 35,733. Assuming EPA revises technical considerations that formed the basis of the current URP framework, EPA should recognize the significant progress made and increasing cost constraints that States and industries will inevitably incur in the coming years due to the law of diminishing returns. *See* Lang, at vii; *see also supra*, Part II. So if EPA believes a deadline is necessary despite the lack of statutory support, the agency should thus change the date to one that honors the increasing cost constraints on States.

iii. Questions 3: Should EPA revise the rule to include a concept akin to a "safe harbor," and what methods should EPA use to track visibility conditions and determine reasonable progress?

In that same vein, we don't believe EPA can force States to conform to *any* particular standard, even if that standard means they enter a "safe harbor" because each State has unique needs given the Class I Federal areas, industries, and citizens within its borders. *See supra*, Parts II.a., IV.c.

But assuming EPA can create such standards, any "safe harbor," the agency promulgates should ensure that States alone analyze the reasonable progress factors consistent with their primary role under the Act. *Sierra Club*, 939 F.3d at 664. States that enter the "safe harbor" should

be allowed to forego further consideration of the reasonableness factors because the Act only commands that the reasonable progress factors be "taken into consideration." 42 U.S.C. § 7491(g)(1). So long as States have done this in their previous SIPs, and progress continues below the national glidepath, there is no reason to "compel[]" them to "enforce the steep-slope standards" and further "expend any state funds." *New York v. United States*, 505 U.S. 144, 161 (1992) (cleaned up).

iv. Question 4: Are there any recommended alternative metrics to the 20% clearest days and 20% most impaired days to track visibility impairment?

Congress intended to remedy and prevent visibility impairment in Class I Federal areas. 42 U.S.C. § 7491(a). Reasonable spectators understand that visibility may be impaired on many days of the year for a variety of reasons, including cloud cover, morning fog, dust storms, wildfires, and other visibility impediments. Tracking visibility impairment based on an annual average of visibility impairment thus most aligns with Congress's intent that those visiting Class I Federal areas can see them clearly. *See supra*, Parts I, III.b.

It's unthinkable that Congress intended for States to incur massive economic losses for visibility to be "pristine" every day. *See* 42 U.S.C. § 7491(e) (prohibiting economic buffer zones); Reitze, at 161; Miller, at 876 (high economic costs cannot justify minimal visibility improvement). Circumstances beyond States' control add to visibility impairment with wildfires, international pollution, volcanic activity, and other factors. Park et al., *Natural and Transboundary Pollution Influences on Sulfate-Nitrate-Ammonium Aerosols in the United States: Implications for Policy*, 109 J. GEOPHYSICAL RSCH: ATMOSPHERES 15 (2004), https://tinyurl.com/2mb2pupx. It follows then that Congress must have meant that visibility be increased gradually on average over time, not just for the best and worst of days. *See supra*, Part I (definition of reasonable progress).

v. Question 5: Should EPA continue to track visibility impairment using IMPROVE ambient data in deciviews?

In 1999, as part of the Haze Rule, EPA chose to use an interagency monitoring method to track visibility impairment – the IMPROVE Network. GAO, *Air Pollution: EPA's Actions to Resolve Concerns with the Fine Particulate Monitoring Program* 4 (1999), https://tinyurl.com/55mxc8pb. The IMPROVE Network predominantly tracks visibility impairment using devices with filters that require sample collection, lab analysis, and data verification. *See* INTERAGENCY MONITORING OF PROTECTED VISUAL ENVIRONMENTS (IMPROVE) NETWORK, *Quality Management Plan* 12 (Updated Jan. 6, 2025), https://tinyurl.com/ww62hbrd (QMP).

We see at least three problems with this approach.

First, the IMPROVE Network "is 40 years old" and "requires significant funding." *Id.* at 42. Even when EPA proposed using it for Haze Rule purposes, EPA estimated the IMPROVE Network required capital costs of $23,000 per device, for at least 100 devices, and annual operation

and maintenance costs of $30,200. GAO, *Air Pollution: EPA's Actions to Resolve Concerns with the Fine Particulate Monitoring Program* 4 (1999), https://tinyurl.com/55mxc8pb (GAO Report). The network was among the most expensive options available to EPA at the time. *See id.* (continuous monitoring having an initial capital cost of $20,000 per device and maintenance costs between $6,000-8,000 annually thereafter). Now after four decades, maintaining the "aging" IMPROVE Network costs around $4 million each year. *See* EPA, *FY2025 and 2026 National Program Manager Guidance Monitoring Appendix*, at 2, 24 (2025).

Second, "IMPROVE samples are collected once every 3 days." Paul A. Solomon, et al, *U.S. National PM2.5 Chemical Speciation Monitoring Networks – CSN and IMPROVE: Description of Networks*, 64 J. OF THE AIR & WASTE MGMT. ASS'N 1410, 1418 (2014). So data collected is not measured in real-time to provide true visibility levels. Thus, the data is problematic to use in SIPs, which should reflect the average daily conditions.

Third, publishing IMPROVE Network data analyses also takes too long to be useful for SIPs. For example, publicly available data hasn't been updated in over *two years*. *See* J.L. Hand, *IMPROVE Data User Guide 2023 (Version 2)* (Oct. 24, 2023), https://tinyurl.com/yc5jvwx7. And available data can lag collection by a magnitude of years. EPA, *Overview of Elements for the Regional Haze Second Planning Period State Implementation Plan Progress Reports Due in 2025* 14 (2024), https://tinyurl.com/47jjfnpm. This time delay places States at a sore disadvantage in developing their SIPs because they are forced to rely on outdated data. *See id.*

So the IMPROVE Network must go. In its stead, EPA should use monitoring sources that allow instant data collection and analysis. For example, EPA can expand its continuous monitoring systems "[i]n lieu of filters" "to instantaneously analyze the particles passing through the sampler." GAO Report, at 4. At the very least, to align with Congress's intent that air visibility be improved, EPA could continue using IMPROVE's "digital camera systems to document the appearance of a scene viewed through the atmosphere." QMP at 12. Such changes would emphasize cost-effective, instantaneous, and congressionally authorized methods.

Should EPA continue to track the visibility conditions through the IMPROVE Network—despite its shortcomings—the agency should favor the States' position when ambient data lags SIP revision development. It may do so by continuing to allow States to account for wildfires and international sources of visibility impairment. *See, e.g.*, EPA, *Guidance on Regional Haze State Implementation Plans for the Second Implementation Period* (2019), https://tinyurl.com/u9r5jspd. EPA should make certain that these calculation adjustments are simple and clearly communicated in its guidelines. Such adjustments will help account for circumstances outside States' control which heavily impact economic realities as States strive to achieve the "national goal."

b. Topic 2: Development of Criteria Used to Determine When a SIP Revision is Necessary.

i. Question 6: Does the national visibility goal articulated under CAA section 169A(a)(1) require Class I areas to be at natural visibility conditions (i.e., elimination of all US anthropogenic visibility

impairment) or does the goal refer to something less stringent than natural visibility conditions (e.g., achieving a level of impairment that is consistent with no perceptible US anthropogenic impairment)?

Nowhere in the Act does Congress refer to "natural visibility" as being the goal. The Act therefore does not define the term, and it lacks any meaningful characteristics. Does "natural" encompass cloud cover, fog, wildfire, volcanic, and other impairment? Similarly, is "visibility" measured based on the average person's perception of impairment? What about people with higher or lower vision capabilities? "Natural visibility," then, is not functionally different from "imperceptible impairment." After all, "imperceptible impairment" is definitionally "impairment" that cannot be seen. *See Imperceptible*, MERRIAM WEBSTER'S DICTIONARY, https://tinyurl.com/yn6fyeuw (last visited Nov. 17, 2025) ("not perceptible by a sense or by the mind: extremely slight, gradual, or subtle."). Yet the Haze Rule measures and defines visibility impairment in exactly that way– in deciviews, where impairment may be "imperceptible." Miller, at 876.

"Natural visibility" also contravenes the Act's purpose. Congress did not intend "to impose billions of dollars in economic costs in return for" *Michigan*, 576 U.S. at 752, "no appreciable effect on the haze in any Class I area." *Am. Corn Growers Ass'n*, 291 F.3d at 7. But striving for a goalpost that can constantly change with the definition of the words "natural visibility" does just that. Therefore, "natural visibility" is not the goal articulated under the Act, and EPA should make that clear in its revisions.

ii. Question 8: Should EPA develop a numerical threshold to identify when Class I areas have achieved the national visibility goal?

EPA should not develop a numerical threshold identifying when Class I Federal areas have achieved the national visibility goal because there may be no perceptible difference between the Haze Rule's natural visibility condition and some amount of deciviews above it. In such a case, a numerical threshold would result in some situations of imperceptible impairment being deemed sufficient while others are not. So the latter group would have to work toward becoming "more imperceptible." This makes little sense, and EPA should decline to impose such a scheme.

But if EPA decides that a numerical threshold is necessary, that level should be something above the "natural visibility" condition the Haze Rule imposes for each Class I Federal area. This would help account for the high economic costs necessary to attain even 1 deciview of visibility. *See*, *e.g.*, *North Dakota*, 730 F.3d at 765 ("[T]he State found that the cost effectiveness of additional controls would be 618 million dollars-per-deciview of improvement at Lostwood Wilderness Area and 2.3 billion dollars-per-deciview of improvement at Theodore Roosevelt National Park.").

iii. Question 9: What types of criteria could EPA describe to identify Class I areas where sufficient visibility progress is being made during a planning period such that states contributing to those areas would not have any SIP revision, or substantive SIP revision obligations related to

those Class I areas (i.e., not account for those areas in their SIP demonstration for that specific point in time)?

EPA should set a program floor, which the Proposal calls a "preservation category." 90 Fed. Reg. at 47,683. The preservation category could be defined by EPA as whatever number of deciviews amounts to imperceptible impairment. After a Class I Federal area's visibility impairment falls below the preservation category line as measured by the average day, an area has met the "national goal." *See* 42 U.S.C. § 7491(a). States need not continue analyzing the four reasonable progress factors because progress cannot be made toward a destination already reached. Consistent with the States' role of implementing the Act, *Luminant Gen. Co., LLC*, 675 F.3d at 921, States should track and monitor sources that fall below the preservation category.

EPA should further permit States to attain a *de minimis* contribution threshold. In recognizing state discretion to consider what is necessary and reasonable progress, *see* 42 U.S.C. § 7491(g)(1), States would determine what that *de minimis* contribution threshold would be. This approach thus accounts for differing state needs.

Similarly, because the Act requires SIP revisions only when a Haze Rule revision affects a SIP, or when a SIP does not comply with the Act, *see* 42 U.S.C. §§ 7491 (b), 7492(e)(2), EPA need not require States to submit revised SIPs reflecting their long-term strategies on a periodic basis. If States meet the *de minimis* contribution threshold, fall below the URP, or achieve the preservation category, States should not need to reevaluate "reasonable progress" on a periodic basis when—under their previous evaluations—they continue to make progress. Thus, long-term strategies will not change significantly so States need not submit periodic revisions of their SIPs.

iv. Question 11: Given the significant difference in visibility conditions and progress across Class I areas (e.g., East versus West), how can EPA ensure reasonable progress is being made at all Class I areas?

EPA can ensure reasonable progress across Class I areas by deferring to States' judgment on what reasonable progress is and how it can be accomplished in their area. *See supra*, Part I.

c. Topic 3: Determining SIP Content Requirements.

i. Question 12: Should EPA maintain the current approach under 40 CFR 51.308(f) to have "planning periods every 10 years? Should this be extended to 15-year planning periods? Should SIP revisions be on an "as needed" basis?

EPA should do away with the term "planning period" and its associated approach because it finds no textual support in the Act. Instead, EPA should require that States have a 15-year long-term strategy to be made available for review at EPA's request. That approach would fulfill the Act's requirement that States have a long-term strategy and give "considerable latitude" to States in creating and keeping their SIPs current. *Train*, 421 U.S. at 87; *see also* 42 U.S.C.

§ 7491(b)(2)(B). Thus, SIP revisions would only happen on an "as needed" basis, assuming a Haze Rule revision does not affect a State.

ii. Question 14: To what extent should states be required to incorporate sources' current emissions measures into their Regional Haze SIP revisions consistent with the requirements of CAA section 169A(b)(2), to obtain "credit" for such reductions as part of their Regional Haze SIP and reasonable progress requirements? What are potential pathways for making existing measures (e.g., permit limitations, statewide emissions management strategies, source-specific consent agreements) federally enforceable in a SIP such that they can be relied upon for the reasonable progress determination under the Regional Haze program?

The Act's plain text does not require that States incorporate sources' current emissions measures into any SIP revisions or weigh "visibility" as a reasonable progress factor. Such suggestions are therefore beyond the authorizations that Congress has allotted EPA. *See supra*, Parts I-II. EPA should not include them.

iii. Question 15: How should visibility be considered as a regulatory factor to ensure Regional Haze SIP revisions are evaluated based on visibility improvement at Class I areas?

Again, the Act does not require States to weigh "visibility" as a reasonable progress factor or otherwise. EPA therefore should not include it in its forthcoming revision.

iv. Question 16: What would be the benefits or drawbacks from removing States' requirements under the 2017 RHR to submit a 5-year progress report between SIP revision submittals under 40 CFR 51.308(g)?

State "progress reports" similarly have no basis in the Act. Such reports are costly, burdensome, and wasteful. The only drawback from removing these arbitrary and capricious requirements is that Congress tasked EPA with assessing actual visibility impairment progress every five years. 42 U.S.C. § 7492(b). But because Congress assigned EPA that role, the agency should bear the costs of its statutorily imposed burden and assess actual progress every five years at its own expense.

v. Question 17: In what way should EPA consider revising the Reasonably Attributable Visibility Impairment (RAVI) provisions under 40 CFR 51.302 to ensure CAA objectives are met?

EPA should remove the Reasonably Attributable Visibility Impairment (RAVI) provisions entirely from the Haze Rule. These provisions are not supported by the Act's text. Nowhere in the Act does Congress give federal land managers the ability to identify sources of reasonably attributable visibility impairment. Congress gives federal land managers very little role in the

Act's scheme, certainly none of the power as presently constituted under the RAVI provisions. *See* 42 U.S.C. §§ 7491(d), 7492(e)(2). Indeed, the only role federal land managers play is to consult with States when EPA's rules affect a State. *Id.* §§ 7491(d), 7492(e)(2).

vi. Question 18: Revisions to 40 CFR 51.308(i) consistent with the CAA, that ensures adequate FLM consultation but does not unnecessarily delay or cause undue burden on states and others engaged in the Regional Haze process?

The Act does not dictate specific procedures for consulting with federal land managers aside from holding an "in person" meeting "[b]efore holding the public hearing on the proposed revision of an applicable implementation plan." 42 U.S.C. § 7491(d). EPA should defer to the States' judgments in determining how and when to meet with federal land managers as specific requirements may pose a burden on States. This permissive approach squares with Congress's intent that States have "wide discretion" to implement the Act. *Union Elec. Co.*, 427 U.S. at 250 (1976).

vii. Question 19: How should the interstate consultation process be revised? What role should the regional planning organizations play in interstate consultation and overall SIP development?

Nowhere in the Act does Congress mandate that States participate in regional planning organizations. Thus, EPA should not impose hard and fast requirements on this score. Instead, States should use regional planning organizations as resources to assess overall regional efforts to address visibility impairment and take into consideration their colleagues' input akin to "guidelines" under the Act. *See* 42 U.S.C. § 7491(b)(1).

d. Additional Recommendation.

In 2018, the Trump Administration directed EPA to consider how the Haze Rule might be revised to allow States greater discretion in addressing visibility impairment. *See* 83 Fed. Reg. 16,761 (Apr. 12, 2018). Accordingly, in any new rule, EPA should provide a mechanism that allows States to revise their SIPs within two years of a failed SIP submission or EPA disapproval. 42 U.S.C. § 7410(c)(1) (requiring that EPA promulgate an FIP within two years of a failed submission or disapproved SIP "unless the State corrects the deficiency"). This approach would give the States both more discretion and more incentive to figure out how best to deal with visibility impairment in their regions.

CONCLUSION

The Haze Rule was flawed at inception and has only worsened with age. We are glad EPA plans to correct the rule and hope it does so with our recommendations in mind. In particular, EPA should be mindful of the Act's cooperative federalism scheme. The Act leaves the States with wide discretion, and any new rule must do the same. We look forward to working with EPA on its proposal and appreciate the long runway and thoughtful consideration of this issue.

Sincerely,

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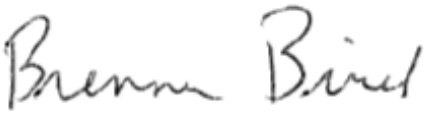

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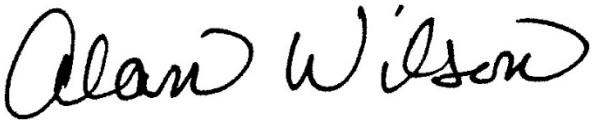

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