ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

No. 15-1363 and Consolidated Cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Agency Action of the
United States Environmental Protection Agency
80 Fed. Reg. 64,662 (Oct. 23, 2015)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenor Environmental and Public Health Organizations state as follows:

All parties and amici, rulings under review, and related cases are set forth in the Brief for Respondents Environmental Protection Agency.

/s/ Benjamin Longstreth

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Intervenors American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Coal River Mountain Watch, Conservation Law Foundation, Environmental Defense Fund, Kanawha Forest Coalition, Keepers of the Mountains Foundation, Mon Valley Clean Air Coalition, Natural Resources Defense Council, The Ohio Environmental Council, Ohio Valley Environmental Coalition, Sierra Club, and West Virginia Highlands Conservancy state that they are not-for-profit non-governmental organizations whose missions include protection of public health and the environment and conservation of natural resources. None of the organizations has any outstanding shares or debt securities in the hands of the public, or any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

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GLOSSARY

CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
HAP	Hazardous Air Pollutant
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
UARG	Utility Air Regulatory Group

INTRODUCTION AND SUMMARY OF ARGUMENT

Fossil fuel-fired power plants are the country's largest sources of carbon dioxide (CO_2) pollution, exceeding even the "enormous quantity" emitted by the transportation sector. *Massachusetts v. EPA*, 549 U.S. 497, 524-25 (2007). That pollution is destabilizing the climate that supports human civilization and all life, posing a dire threat to public health and welfare. Higher temperatures worsen deadly heatwaves, promote the spread of insect-borne diseases, intensify storms and flooding that cause death and injury and enormous property damage, and deepen droughts that threaten crops and water supplies. These harmful impacts are already occurring in the United States, and they disproportionately affect children, the elderly, low-income populations, communities of color, and indigenous populations worldwide.

The Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (JA__) ("Rule"), is a reasonable exercise of the Environmental Protection Agency's mandate to reduce that threat under §111(d) of the Clean Air Act, which "'speaks directly'" to CO_2 emissions from existing power plants, and "delegate[s] to EPA the decision whether and how to regulate" those emissions. *Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 131 S. Ct. 2527, 2530, 2538 (2011). The Rule is highly cost-effective, well-suited to the regulated industry, and accommodating of industry and state requests for compliance flexibility.

This brief addresses Petitioners' broad statutory challenges to the Rule. Petitioners base those challenges on misrepresentations of the Rule's mechanics and

erroneous claims that it requires a radical transformation of the power sector, employs an unprecedented standard-setting approach, and encroaches on state authority. These claims have no merit.

In fact, the Rule reflects the predominant approach to reducing power plant CO_2 emissions employed by companies and states across the country. The record shows that industry trends predating the Rule are driving cleaner electricity generation, moderating electricity demand, and reducing use of old, uneconomical coal plants. *See*, *e.g.*, 80 Fed. Reg. 64,694-96. The Rule provides six years' lead time before emission reduction requirements begin gradually phasing in, and the pace of CO_2 reductions the Rule requires by 2030 is in line with the pace actually achieved by the industry in recent years. These readily achievable reductions are not too much to ask of an industry that contributes disproportionately to a grave public hazard.

The Rule is in keeping with a long line of power sector regulations that take account of the unique characteristics of the industry and its pollution. *See EPA v. EME Homer City Generation*, 134 S. Ct. 1584, 1594 (2014) (regulators "must account" for the characteristics of the pollution problem they face). The Rule achieves its pollution-reducing objectives at reasonable cost using flexible measures that are already widely used in the power industry. EPA has employed such measures in many regulations both to set emission targets and to ease compliance. Informed by how power plant operators serving an interconnected power grid actually reduce their CO_2 emissions, the Rule straightforwardly applies the statutory factors—the "degree of

emission limitation achievable" through the "best system of emission reduction which (taking into account the cost…and energy requirements) the Administrator determines has been adequately demonstrated," 42 U.S.C. §7411(a)(1), to arrive at an emission guideline in the familiar form of numerical emission performance rates.

Because the Rule implements a statute that "speaks directly" to power plant emissions, *AEP*, 131 S. Ct. at 2530, and involves only "moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation," *Util. Air Regulatory Grp. v. EPA* ("*UARG*"), 134 S. Ct. 2427, 2448 (2014), the extraordinary "clear statement" rules and faux constitutional objections with which Petitioners attempt to bolster their weak statutory case do not apply. Instead, normal administrative law principles govern, including customary respect for the administering agency's expert judgment.

Petitioners' alternative contention—that EPA lacks authority to regulate CO_2 emissions from power plants under §111(d) because the agency has regulated power plants' emissions of hazardous air pollutants such as mercury under §112—conflicts with the statute's text and design.

Petitioners' various legal arguments ultimately have one goal: hobbling EPA's ability under the Clean Air Act to reduce CO_2 emissions from even the largest sources. Despite years of industry demands for flexible implementation measures, they attack a Rule that achieves emission reductions at lower cost than would less flexible alternatives. Just as in *EME Homer City*, the challengers here rely on strained

arguments not grounded in statutory text that would, perversely, force EPA toward a less workable, more costly regulatory approach. 134 S. Ct. at 1606-07.

STATEMENT OF THE CASE

We adopt EPA's Statement of the Case. EPA Br. 6-21.

STANDARD OF REVIEW

In adopting the Rule, EPA has adhered to terms of the Clean Air Act that are clear and has reasonably interpreted ambiguous terms. *See Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). EPA's factual and technical determinations are neither arbitrary nor capricious, 42 U.S.C. §7607(d)(9)(A), and indeed such determinations merit "special deference" when based on evaluation of complex data within the agency's expertise. *Nat'l Ass'n for Surface Finishing v. EPA*, 795 F.3d 1, 7 (D.C. Cir. 2015).

Petitioners' claims that this familiar deferential framework does not apply are meritless, *see* EPA Br. 40-44, and foreclosed by *AEP*, 131 S. Ct. at 2538-39 (noting that the "complex balancing" Congress "entrusts" to EPA includes consideration of "the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption"). Congress has "designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions" under §111(d). *Id.* at 2539-40 (citing *Chevron*, 467 U.S. at 865-66).

ARGUMENT

I. EPA'S EMISSION GUIDELINES ARE LAWFUL AND REASONABLE

In developing the Rule, EPA carried out its core Clean Air Act role to limit dangerous air pollution, using cost-effective tools employed in prior power sector regulations and relying on emissions-reducing measures already widely used in the industry. Far from Petitioners' grim portrayal, the Rule's eminently achievable targets reinforce existing market trends and give the industry extensive lead time. The Rule provides each plant an array of compliance options that industry and states advocated during the rulemaking, gives states wide implementation flexibility (as well as the option to stand aside), and achieves more pollution reduction at lower cost than the restrictive approach Petitioners now advocate. Petitioners' briefs distort the statute, the Rule, and the history of power sector regulation, and their arguments have no merit.

A. The Statute Authorizes EPA to Determine the Degree of Emission Limitation Required From Existing Sources

Section 111 "delegate[s] *to EPA* the decision whether and how to regulate" power plant CO_2 emissions. *AEP*, 131 S. Ct. at 2538 (emphasis added). Section 111 and its longstanding implementing regulations provide for EPA to issue emission guidelines reflecting the degree of emission reduction achievable by existing power plants through application of the best system of emission reduction that the Administrator determines is adequately demonstrated, considering costs, energy

requirements, and other enumerated factors. 42 U.S.C. §§7411(a)(1), 7411(d)(1); 40 C.F.R. §60.22(b)(5); EPA Br. 7-8.[1] As under §110 of the Act, states then may adopt plans that set standards of performance for existing power plants consistent with the emission guidelines. EPA must approve state plans that are "satisfactory" and issue federal plans for states that choose not to submit plans. 42 U.S.C. §7411(d)(2). The emission guidelines provide the substantive criterion for determining whether a state plan is satisfactory. 40 Fed. Reg. 53,342/3; 80 Fed. Reg. 64,759/1. As shown below, the Rule gives both states and sources great flexibility in determining how to achieve the pollution reductions the emission guidelines specify. *See also* EPA Br. 16-19, 58-59, 74-76.

B. EPA Reasonably Applied the Statutory Factors to Determine the Degree of Emission Limitation Required from Existing Power Plants

The Rule reflects a reasonable application of §111's terms. In defining the "best system of emission reduction," EPA took account of the unique characteristics of CO_2 pollution and the electric power industry. 80 Fed. Reg. 64,723-24, 64,733-35. Because CO_2 mixes evenly in the atmosphere, a ton of emission reductions from any

[1] *See* 40 Fed. Reg. 53,340, 53,342-43 (Nov. 17, 1975) (JA__). Congress approved of EPA's emission guideline regulations in the 1977 legislative history and the 1990 amendments. *See* H.R. Rep. No. 95-294, 195 (May 12, 1977) (JA__); 42 U.S.C. §7429(a)(1)(A) (requiring EPA to establish guidelines for incinerators under §§111(d) and 129).

plant provides equal climate benefit. *Id.* 64,725-26. Power plants—both those that emit CO_2 and those that do not—are part of an interconnected electric grid and are jointly operated to supply exactly the amount of electricity demanded at any given time. *Id.* 64,691-93. Increased generation by one plant necessarily causes decreased generation by other plants. Power companies and grid operators routinely shift generation among facilities to meet demand subject to economic and environmental constraints. *Id.* 64,728-29. *See also Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n* ("*EPSA*"), 136 S. Ct. 760, 768 (2016) ("[E]lectricity flows…through an interconnected grid of near nationwide scope.").

Based on these characteristics, EPA concluded that the CO_2-emitting electric generating units covered by the Rule can achieve meaningful and cost-effective emission reductions through a combination of measures (called "building blocks") already in widespread use in the power sector: improving coal unit efficiency (heat rate) (building block 1); increasing generation by existing lower-emitting units (natural gas combined cycle plants) (building block 2); and increasing generation by new zero-emitting units (e.g., wind turbines and solar plants) (building block 3). 80 Fed. Reg. 64,745/1. Because power plants are interconnected and the amount of electricity needed is fixed by market demand, expanding generation by lower- or zero-emitting facilities cuts emissions from higher-emitting regulated units by reducing their

generation. *Id.* 64,677-78. Numerous states[2] and power companies[3]—including many Petitioners here—filed comments acknowledging the efficacy of the building block measures and supporting their use to comply with the Rule.

EPA then applied this best system of emission reduction to derive the Rule's "chief regulatory requirement": two national emission performance rates—one for fossil steam plants (primarily coal units) and one for combined cycle natural gas plants—expressed in pounds of CO_2 emissions per megawatt-hour of generation, and phased in gradually between 2022 and 2030. 80 Fed. Reg. 64,811-12. EPA determined that affected coal- and gas-fired units could achieve the applicable performance rate by improving thermal efficiency (building block 1) and using "emission rate credits" from expanded lower-emitting or new zero-emitting generation (building blocks 2 and 3) to reduce their "adjusted CO_2 emission rate" to the limit. *Id.*; 40 C.F.R. §60.5790(c). EPA explained that each unit has multiple ways to acquire emission rate credits: by shifting generation within a company's portfolio,

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[2] *See* 80 Fed. Reg. 64,733, n.380 (collecting comments from many states, including multiple petitioners, supporting emissions trading as means of compliance); *see, e.g.*, Georgia Comments 21, Doc. No. EPA-HQ-OAR-2013-0602-23715 (Dec. 1, 2014) (JA__) (requesting compliance credit for out-of-state renewable energy programs); Louisiana Comments 2, Doc. No. EPA-HQ-OAR-2013-0602-24279 (Apr. 9, 2014) (JA__) (requesting compliance credit for renewable generation and regional approaches). *See also* EPA Br. 47-48.

[3] EPA, *Legal Memorandum Accompanying Clean Power Plan for Certain Issues*, 14-18 (2015) (JA__) (hereinafter "Legal Memo") (power industry comments encouraging EPA to consider "the role of fuel-switching to natural gas, plant retirements, and growing renewable energy" to reduce CO_2 emissions from the source category).

building eligible facilities, contracting for credits from another company, or purchasing credits in a trading market. 80 Fed. Reg. 64,752; Legal Memo 137-48.

EPA supported the achievability of these regulatory requirements with exhaustive technical analyses. *See* EPA Br. 12-15, 117-40. For example, the agency carefully assessed how much existing coal units can reduce emissions through heat-rate improvements, how much existing natural gas units can increase generation, and how rapidly technologies like wind and solar generation can expand. EPA's assessment considered a wide range of technical, cost, environmental, and energy implications, as required by §111, and carefully considered electric service reliability, infrastructure needs, resource availability, and many other factors. 80 Fed. Reg. 64,787, 64,795, 64,800-03, 64,806-11.

The Rule reflects demonstrated trends and practices. As EPA learned through extensive outreach and fact-gathering, the power industry is already achieving reductions at a pace in line with EPA's targets. *See* EPA Br. 18-19. The agency found that "lower-emitting [natural gas combined cycle] generation and renewable generation have increased, and projected future trends are for continued increases." 80 Fed. Reg. 64,725/2. From 2005 to 2014, "coal-fired generation declined at a rate that was greater than the rate of reduced coal-fired generation…expect[ed] from this rulemaking from 2015 to 2030." *Id.* 64,785/1. EPA also found that zero-emitting generation is expanding rapidly as costs are declining. *Id.* 64,803-04. State- and company-based CO_2 reduction initiatives are reinforcing these market trends. *Id.*

64,725/1 (citing exhaustive review of utility resource plans). The agency reasonably and appropriately accounted for projected market trends, practical industry realities, and "market-generated innovation[s]," *EPSA*, 136 S. Ct. at 779, in determining the best system of emission reduction.[4] Considering all the relevant factors, EPA reasonably determined that the two national emission performance rates are achievable through adequately demonstrated measures.

Contrary to Petitioners' claim that the Rule's rates are unachievable, EPA assessed the building block measures conservatively—a level it considered "a reasonable degree of stringency," not "the maximum possible degree." 80 Fed. Reg. 64,718/1. For example, EPA assessed achievable emission reductions separately for three United States regions (the Eastern, Western, and Texas interconnections) and then based the national performance rates on the least stringent of these regional analyses. *Id.* 64,738/3. Further, many additional emission-cutting measures were not reflected in the "best system" but are available for compliance, such as demand-side energy efficiency programs, gas co-firing at coal plants, carbon capture and sequestration, and electricity transmission improvements. *Id.* 64,755-58.

[4] *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 339 (D.C. Cir. 1981) (upholding standards reflecting fuel market trends); *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 190 (D.C. Cir. 2011) (upholding standards based on trend of newer units replacing older ones); *see also* 80 Fed. Reg. 64,784/2 (discussing §111 precedent).

C. Petitioners Rely on Invented Restrictions with No Basis in Statutory Text

Petitioners assert that §111(d) "unambiguously forecloses" EPA, when determining the best system, from considering emission reductions achieved by shifting electricity generation from high-emitting to lower- and zero-emitting plants. They claim the only measures EPA may consider when determining the best system are those that occur at the "individual coal or gas-fired generating unit" using "control technologies and operating practices at the plants themselves." Core Br. 41-42, 48. The statutory text does not support the restrictions that Petitioners seek.

Congress intended §111 to cover a wide range of pollutants and source categories, and drafted it in broad terms so that EPA could most effectively reduce pollution using the "best" measures, so long as they are "achievable" and "adequately demonstrated," accounting for "cost" and "energy requirements." These are "the kinds of words that suggest a congressional intent to leave unanswered questions to an agency's discretion and expertise." *Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009). Given the interconnected grid and global nature of CO_2 pollution, EPA appropriately answered these questions here.

Tellingly, Petitioners say nearly nothing about the central terms, "best system of emission reduction." The ordinary meaning of these words easily encompasses the measures the Rule identified for the power industry. Their breadth contrasts with other Clean Air Act provisions that expressly limit EPA to technologies installed at

the source. *See, e.g.,* 42 U.S.C. §7491(b)(2)(A) (standards based on "the best available *retrofit* technology…for controlling emissions *from such source*") (emphasis added); *see also* EPA Br. 50 & n.35 (citing additional examples).

Notably, §111(d) expressly references §110, another section authorizing use of state implementation plans to meet federal emission goals. Congress there specified that "economic incentives" such as "marketable permits" and "auctions" are available "control measures, means, or techniques." 42 U.S.C. §7410(a)(2)(A). Further, §111(a)(7) provides that a system of emission reduction may include "precombustion cleaning or treatment of fuels," measures that Congress recognized would take place outside the source. *See* 123 Cong. Rec. 26,846/2 (1977) (JA__) (statement of Sen. Muskie) (EPA should credit precombustion fuel treatment processes, "whether or not undertaken by the source itself"). The legislative history underscores §111(d)'s breadth by emphasizing that standards for existing sources need "not necessarily [be] technological." H.R. Rep. No. 95-294 at 195 (1977); *see* 80 Fed. Reg. 64,702/1; *see also* 80 Fed. Reg. 64,764 (discussing Senate 1970 version of §111(d), which prevailed over House Bill that would have restricted performance standards to technical controls).

Petitioners' lead textual argument is that standards of performance must be "for" and "applicable…to" sources. Core Br. 41. But these terms indicate only that state plans must establish standards of performance for each affected source (as the Rule requires). *See* 40 C.F.R. §60.5775 (state plans must include emission standards

"with respect to each affected EGU"). That a standard allows a source to use emission credits does not make the standard "inapplicable" to that source.

Likewise, EPA has not redefined "stationary source." Core Br. 42. Section 111(a)(3) defines a source as a "building, structure, facility, or installation," indicating the types of pollution-emitting *entities* subject to performance standards. 42 U.S.C. §7411(a)(3). This definition does not limit the *measures* that EPA may consider in setting emission guidelines for such entities.

Similarly weak is Petitioners' claim that EPA has conflated "owners and operators" with the source itself. Core Br. 43-45. The Rule plainly regulates the emissions of power plants. A power plant, however, is an inanimate object that cannot operate, let alone comply with a standard, absent action by its owner/operator. *See* 80 Fed. Reg. 64,767/3. The owner/operator always "controls" the source, 42 U.S.C. §7411(a)(5), routinely enters into arrangements with third parties to purchase on- or off-site emission control technologies (*e.g.*, scrubbers or fuel cleaning), and is legally responsible for compliance. For decades, EPA has held owner/operators responsible for acquiring emission credits, allowances, or other market-based instruments under rules that allow their use. 80 Fed. Reg. 64,772-73; *see also* 42 U.S.C. §7413.

Petitioners sophistically claim EPA is establishing invalid standards of "non-performance" because they contemplate reduced utilization of some high-emitting sources. Core Br. 52. Under §111(a)(1), however, "'standard of performance' means

a standard *for emissions of air pollutants* which reflects the degree of *emission limitation*…" (emphasis added). An "emission limitation" limits "the quantity, rate, or concentration of emissions." 42 U.S.C. §7602(k). Thus, a "standard of performance" governs a source's *emissions*—and consistent with this requirement, the emission performance rates in the EPA guidelines are denominated in pounds of CO_2 per megawatt-hour.

Moreover, it is common for pollution limits to result in lowered use of some sources, particularly in this industry. Emission limits internalize the costs of harmful pollution and can raise the operating costs of higher-emitting power plants, causing them to move down the dispatch order. *See* 80 Fed. Reg. 64,693, 64,734. Shifting generation toward lower-emitting electricity production has been the regular effect—and often deliberate objective—of numerous Clean Air Act programs. *See*, *e.g.*, *id.* 64,772, 64,780-81; Legal Memo 62-82; *infra*, pp. 17 (discussing Cross-State Air Pollution Rule). Petitioners acknowledge, Core Br. 53, that the Rule allows a unit to operate at any level, so long as it meets the required standard of performance through on-site emission-reduction measures or emission rate credits. But the statute does not guarantee that sources subject to pollution standards will operate as much as in the past.

Petitioners wrongly claim the emission guidelines fail to require "continuous" emission reductions. Core Br. 52. A standard applies "continuous[ly]" as long as it applies to a source at all times. *See Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir.

2008). The Rule requires state plans to include standards of performance that apply to each megawatt-hour of electricity production by a regulated unit during the entire compliance period.[5]

Petitioners claim the Rule is invalid because the numerical emission rates for existing sources under the guidelines are lower than rates for new power plants under §111(b). Core Br. 56-61. The relative stringency of the emission rates for new and existing sources cannot be compared, however, because the regulations apply at different times and are structured differently. The new source standards apply to sources built today and must be met by each new unit immediately. 42 U.S.C. §§7411(a)(2), 7411(b)(1)(B). The existing source performance rates will not take effect until 2022-2030 and reflect a wider array of compliance options that will then be available to existing sources through building block measures. *See* EPA Br. at 70-73.

Petitioners seek to restrict the emission guideline to heat-rate improvements, even though EPA found that relying on that measure in isolation could perversely *increase* net emissions. 80 Fed. Reg. 64,727 n.370. It was reasonable for EPA to interpret the "*best* system of emission *reduction*" in a manner that cost-effectively achieves greater emission reductions than the alternative Petitioners urge. *Sierra Club*,

[5] Petitioners (Core Br. 52) misstate the reason for requiring "continuous" reductions, which was to ban "intermittent" controls—"temporary reductions in emissions when weather conditions were poor." *See Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 434 n.54 (D.C. Cir. 1981); *see also* EPA Br. 67-68.

657 F.2d at 326 (quantity of emission reductions is an important factor in determining "best" system).[6]

Petitioners' statutory constructions also would bar the very compliance flexibility that many states and companies advocated during the rulemaking. *See supra* p. 8. For example, if the requirements that reductions be "continuous" or that standards be "for" a source compelled on-site approaches only, a coal-fired plant could not comply by using credits from expanding generation at lower- or zero-emitting facilities. *See* Core Br. 53 (arguing that a standard that incorporates crediting is not "continuous"). EPA properly concluded that when determining the best system of emission reductions for this industry and pollutant, it should consider the cost-effective emission-reducing techniques already in use and that sources will be able to use for compliance. Nothing in the Act restricts EPA to Petitioners' one-sided proposition that such techniques should be considered only at the compliance stage.

[6] If the agency *were* restricted to on-site-only measures, the minimal heat-rate improvement Petitioners favor would not end EPA's inquiry. Rather, the agency would have to consider *other* on-site measures, such as gas co-firing and carbon capture and sequestration, that EPA found can cut power plant CO_2 emissions effectively, but at greater cost than the building block measures EPA identified as the "best system." As EPA found, source owners would likely respond to such standards not by installing those controls, but by shifting generation to cleaner facilities. 80 Fed. Reg. 64,746-51, 64,785.

D. The Rule Has Ample Precedent in Clean Air Act Regulations for the Power Sector and Other Industries

Contrary to Petitioners' assertions, the Rule is in line with effective and lower-cost regulatory approaches EPA has employed for decades in the power industry and other sectors.[7] For example, EPA has repeatedly used such programs to curb power plants' interstate pollution that worsens downwind violations of public health standards. The Cross-State Air Pollution Rule established state-wide budgets for power plants' sulfur dioxide and nitrogen oxides emissions, based in part on "increased dispatch of lower-emitting generation." 76 Fed. Reg. 48,208, 48,252/3 (Aug. 8, 2011). The Supreme Court found this a "permissible, workable, and equitable interpretation" of §110(a)(2)(D)(i). *EME Homer City*, 134 S. Ct. at 1610. Likewise, EPA established limitations for power plant nitrogen oxides emissions based on a region-wide emissions trading program, and accounted for changes in dispatch. *See* Legal Memo 96, 106-08; 63 Fed. Reg. 57,356, 57,362 (Oct. 27, 1998). Similarly, EPA's Regional Haze Rule allowed states to replace source-specific emission standards with trading programs, "[i]n recognition of the control and cost efficiencies that can be achieved through trading programs," 64 Fed. Reg. 35,714, 35,739/2 (July 1, 1999); *see also Util. Air Regulatory Grp. v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (noting this Court's affirmation of this approach). Petitioners now

[7] *See generally* Richard L. Revesz, *et al.*, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 ENVTL. L. REP. 10,190 (2016).

malign compliance options and voluntary trading strategies as forced subsidization. Core Br. 33-34.

EPA's approach is also consistent with Title IV of the Act, which establishes an emission trading program for sulfur dioxide emissions from existing power plants. *See* 80 Fed. Reg. 64,696/1. Title IV reflected Congress's recognition that plant owners would meet emission reduction obligations via measures such as emissions trading among sources and "least-emissions dispatching." *Id.* 64,771/1 (citing S. Rep. No. 101-228, 316 (Dec. 20, 1989)). In exercising its mandate to identify "the best system of emission reduction…adequately demonstrated," EPA properly considered approaches "already endorsed by Congress in a related context." *Van Hollen v. FEC*, 811 F.3d 486, 493 (D.C. Cir 2016).

Other §111(d) regulations also provide precedent for EPA's approach. Emission guidelines for waste combustors, issued jointly under §111(d) and §129, allow affected sources to average their nitrogen oxides emissions, requiring additional reductions from combustors that engage in averaging. 60 Fed. Reg. 65,387, 65,402/2 (Dec. 19, 1995).

As this Court's precedents demonstrate, there is no basis for Petitioners' suggestion (Core Br. 54-55) that crediting is allowed only under parts of the Act they

classify as "air quality" programs, and not others they call "control" programs.[8] This Court upheld EPA's lead phase-down standards, whose stringency was premised on the ability of refiners to acquire lead reduction credits from other refineries. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535-36 (D.C. Cir. 1983). Likewise, the Court upheld vehicle emission standards whose levels were premised, in part, on emissions averaging and credit trading. *See* 50 Fed. Reg. 10,606, 10,635/1 (Mar. 15, 1985) (averaging reduces "technological risk" of standards), *upheld, Nat. Res. Def. Council v. Thomas*, 805 F.2d 410, 425 (D.C. Cir. 1986) (absent "any clear congressional prohibition of averaging," EPA's approach "makes sense").

E. The Wide Array of Flexible Compliance Options for Sources and States Undermines Petitioners' Claims

Consistent with cooperative federalism, the Rule provides states with many implementation options. *See* EPA Br.16-19; State Intervenors Br. 17-24. States may adopt EPA's national performance rates for each affected unit or elect a "blended" rate reflecting their balance of coal and gas generation in the baseline year. Alternatively, states may adopt "mass-based" plans that limit the total CO_2 tonnage that covered units may emit per year, and let them comply using "emission allowances." 80 Fed. Reg. 64,832-33; see also 40 C.F.R. §60.24(c). All of these options allow a state to set more lenient emission rates for some plants (to account

[8] Under the Clean Air Act, trading is impermissible in various circumstances, such as for pollutants that, unlike CO_2, have localized toxic health effects. *See*, *e.g.*, 42 U.S.C. §§7412(d)(2), 7412(f)(2)(A).

for remaining useful lives or other factors) so long as the plan achieves equivalent overall reductions.

These many degrees of freedom afford states broad flexibility to continue to choose their preferred electricity generation mix, provided they also meet overall federal pollution limits. Accordingly, there is no truth to Petitioners' assertion, Core Br. 33, that EPA is acting as a "central planning authority for the power sector" and depriving states of their role in managing the electric system.

Petitioners' most sweeping assertion is that federal air pollution limits are invalid if they have indirect effects on energy markets that states also regulate. This would effectively nullify *any* federal regulation of power sector air pollution. *See* State Intervenors Br. 14-17.

II. STANDARDS FOR POWER PLANTS' HAZARDOUS EMISSIONS UNDER SECTION 112 DO NOT BAR EPA FROM LIMITING THEIR CARBON DIOXIDE EMISSIONS UNDER SECTION 111(d)

After lengthy attacks on how EPA applied §111(d), Petitioners contend the agency may not use that section *at all*, because EPA previously regulated different pollutants—mercury and other hazardous air pollutants ("HAPs")—under a different section of the Act. Core Br. 61-74. This bizarre proposition is like exempting restaurants from food handling requirements because they are subject to the fire code. The Clean Air Act does not work that way.[9]

[9] The theory is a recent contrivance. In 2011, *after* EPA proposed HAP standards for power plants, power sector petitioners nonetheless insisted in *AEP* that §111(d)

Indeed, Petitioners' theory would "overthrow" the Clean Air Act's "structure and design," *UARG*, 134 S. Ct. at 2442, and obstruct §111(d)'s core function. Since its enactment in 1970, §111(d) has served to protect the public from dangerous air pollutants not covered by other provisions of the Act—specifically, pollutants not regulated by National Ambient Air Quality Standards ("NAAQS") under §§108-110, or by the HAP regime of §112. *See* S. Rep. No. 91-1196, at 20 (1970) (JA__) ("[T]here should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.").

Petitioners claim this alleged loophole sprang from the 1990 Clean Air Act Amendments. But as shown below, their reading conflicts with language enacted by those very amendments. Moreover, there is no evidence that Congress intended to abandon the long-established "gap-filling" role of §111(d). On the contrary, the text and history of those amendments show that Congress did *not* intend its revisions to §112 to limit §111. And EPA has consistently read §111(d) to authorize regulation of non-HAPs for sources regulated under §112. EPA Br. 96-97.

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directly addresses power plant CO_2 emissions and thus displaces federal common law liability. Legal Memo 13 (JA__). And in 2015, counsel for petitioner UARG acknowledged that §111(d) "governs the regulation of emissions from existing sources of air pollutants that are not listed as criteria air pollutants pursuant to section 108 of the Act or listed as hazardous air pollutants under section 112"; noted that this is "how the statute has traditionally been interpreted by EPA"; and downplayed Petitioners' current interpretation, describing it as "[a] legal argument" that "exists." Brownell, *et al.*, CLEAN AIR HANDBOOK 211 & n.230 (2015).

A. Petitioners' Interpretation Conflicts with Other Clean Air Act Language

Petitioners' reading is foreclosed by §112(d)(7). Added in the 1990 Amendments and entitled "Other requirements preserved," §112(d)(7) provides that §112 standards "shall not be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation pursuant to section 111" or "other authority of [the Clean Air Act]." 42 U.S.C. §7412(d)(7). This clear directive demonstrates that Congress did not intend standards under §112 to weaken §111(d) requirements, let alone prohibit them. *See* 80 Fed. Reg. 64,714. Thus, even if §111(d)(1) were unclear in isolation, its meaning is "clarified by the remainder of the statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

Moreover, Petitioners' reading introduces a striking anomaly. As Petitioners' amicus acknowledges, *see* Pac. Legal Found. Br. 17, even under the most grudging reading of §112(d)(7), regulation of a source category under both §111(d) and §112 is permissible, so long as the §111(d) regulation occurs *first*. An interpretation that makes EPA's obligation contingent on nothing but the sequence of adopting the standards is senseless. 80 Fed. Reg. 64,714/1-2 n.292; *see also Greenlaw v. United States*, 554 U.S. 237, 251 (2008) (rejecting interpretation that would draw "a puzzling distinction").

B. Petitioners Misinterpret the 1990 Cross-References

Petitioners misinterpret §111(d)'s two differently worded cross-references to §112, both signed into law in the 1990 Amendments. *See* EPA Br. 77-78 (describing House and Senate amendments). Petitioners claim that: (1) the House cross-reference unambiguously bars EPA's reading, (2) Congress replaced the gap-*filling* policy with a gap-*creating* policy, and (3) the duly enacted Senate cross-reference should be disregarded. Core Br. 62-74. No part of this story withstands examination.

1. Petitioners' Interpretation of the House Amendment is Manifestly Unreasonable

Petitioners' theory rests entirely on reading the House-originated cross-reference to §112 as an oblique repeal of EPA's longstanding authority under §111(d) to regulate dangerous pollutants that are *not* HAPs. But, as EPA reasonably concluded, the phrase "regulated under section [1]12" embraces only pollutants that can be regulated under §112—*i.e.*, HAPs, but not CO_2. The cross-reference thus exempts from §111(d) a source category's HAPs that are regulated under §112. *See* 80 Fed Reg. 64,714-15; *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365-66 (2002) ("[D]eciding whether a law 'regulates insurance' under" the Employee Retirement Income Security Act entails "parsing the 'who' and the 'what': [whether] insurers are regulated *with respect to* their insurance practices.") (emphasis added).

This pollutant-specific reading accords with the obvious intent of the other parts of the sentence to which the House clause belongs. The phrase modifies "any

air pollutant"—not the language identifying the sources covered by §111(d)—and the adjacent clauses similarly exclude air pollutants, not sources, from regulation under §111(d). The natural inference is that the House language also excludes a set of air pollutants, not a set of sources. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (interpretation should reflect "the specific context in which that language is used").

This interpretation also accords with the Supreme Court's pollutant-specific reading in *AEP*: "EPA may not employ §[1]11(d) if existing stationary sources of *the pollutant in question* are regulated under the [NAAQS] program…or the [HAP] program." 131 S. Ct. at 2538 n.7 (emphasis added). The Court equated the HAP cross-reference and the preceding NAAQS cross-reference, which exempts only NAAQS pollutants, not every pollutant emitted by a source that emits a NAAQS pollutant. The Court understood that each operates as a pollutant-specific exception, applying only when "the pollutant in question" (here, CO_2) is regulated under one of the cited programs. Indeed, any other reading would undo *AEP*'s holding. The basis for displacing federal common law remedies would be flimsy indeed if §112 regulation of HAPs—already proposed by EPA at the time—eliminated EPA's §111(d) authority over CO_2. *See* EPA Br. 92-95.

Petitioners' reading would render §111(d) an empty vessel. Nearly all categories of major industrial sources are regulated under §112. *See* 80 Fed. Reg. 64,714/2 (noting over 140 categories of sources). Under Petitioners' reading, the dangerous non-HAP emissions from all of them would be indiscriminately exempt

from §111(d) and left uncontrolled. *See* EPA Br.83 (noting that construction would "practically nullify" §111(d)).

2. Petitioners' Account of the 1990 Congress's Purpose is Unsupported

Petitioners provide no support for their idea that Congressional concern over "double regulation" drove the 1990 amendments to the §111(d) cross-reference. Core Br. 68, 71. It is not "double regulation" to control different pollutants posing different hazards under different programs. The legislative history includes no evidence for Petitioners' theory, and the text and structure of the Act flatly contradict it. As already shown, §112(d)(7) expressly allows for a source to be regulated simultaneously under §112, §111, and other Clean Air Act programs. Moreover, it is common for different pollutants from a given source to be controlled under different provisions of the Act addressing distinct health and environmental hazards, and power plants are no exception.[10]

Petitioners speculate that the House provision reflected a legislative bargain—exempting sources' non-HAP pollutants from §111(d) regulation in exchange for tighter regulation of HAPs under §112. But there is no evidence for such a "pick your poison" bargain. *See* EPA Br. 83 n.62.

[10] Fossil fuel-fired power plants are regulated under at least six different provisions. *See* 42 U.S.C. §§ 7410, 7411(b), 7412, 7470, *et seq.*; 7491, *et seq.*; 7501a, *et seq.*; 7651a, *et seq.*

In fact, the legislative history shows that the House language was intended to *expand* coverage of §111(d). As originally introduced, the House bill would have given EPA discretion not to regulate HAPs from certain source categories if the agency determined such regulation was not "warrant[ed]." H.R. 3030, 101st Cong. §301 (1989), *reprinted in Leg. Hist. of the Clean Air Act Amendments of 1990*, at 3937 (JA__).[11] This suggests that when it revised the §111(d) cross-reference, the House intended to give EPA the *added authority* necessary to maintain §111(d)'s gap-filling role. In other words, the House intended that §111(d) would apply not only to non-HAPs, but also to the HAP emissions of any source categories that EPA chose not to regulate under §112.

Petitioners cannot use language added in order to preserve the gap-filling role of §111(d) to allow harmful non-hazardous pollutants to escape regulation. Rather, it must be interpreted in accordance with its purpose of ensuring protection under §111(d) from dangerous pollutants not covered by the NAAQS and HAP regimes.

3. Petitioners Have No Valid Answer for the Senate-Originated Amendment

Petitioners have no viable explanation for the Senate version of the §111(d) cross-reference, which unambiguously provides EPA authority to set standards for

[11] This discretionary language was replaced in Committee with language making §112 regulation mandatory in most circumstances, *see* Leg. Hist. at 2561, but the §111(d) cross-reference remained in the House bill.

CO_2 pollution from power plants. As EPA has explained, the Senate version was duly enacted and signed into law and Petitioners' efforts to nullify it fail. EPA Br. 87-90.

Intervenors (Br. 14) are wrong in contending that applying *both* provisions would foreclose the Rule. Section 111(d) is phrased as an affirmative, "shall"-driven *mandate* to regulate pollutants not exempted by the cross-references. Thus, even if the two cross-references had different meanings, applying them together would exempt only those pollutants exempted by *both* amendments—that is, pollutants that are *both* (a) HAPs and (b) emitted by source categories covered under §112. Sources' emissions of *non-HAPs* would not be excluded. 80 Fed. Reg. 64714 n.294.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

Dated: March 29, 2016

/s/ Benjamin Longstreth

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Intervenor Environmental and Public Health Organizations in Support of Respondents complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court. I further certify that this brief contains 6,195 words as counted by the Microsoft Word software used to prepare this brief, and that the combined words of this brief and those filed by the other Intervenor-Respondents do not exceed the 20,000 word limit set by this Court's briefing order issued on January 28, 2016.

/s/ Benjamin Longstreth

Dated: March 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2016, the foregoing Brief of Intervenor Environmental and Public Health Organizations in Support of Respondents was served upon all registered counsel via the Court's CM/ECF system.

/s/ Benjamin Longstreth

Dated: March 29, 2016