No. 19-3220

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA and SIERRA CLUB,
Plaintiffs-Appellees,

v.

AMEREN MISSOURI,
Defendant-Appellant.

Appeal from the U.S. District Court for the Eastern District of Missouri, Eastern Division Case No. 4:11-cv-00077-RWS, The Honorable Rodney W. Sippel

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN CHEMISTRY COUNCIL, AMERICA'S POWER, MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF APPELLANT AND REVERSAL

Of Counsel

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H. Street NW
Washington, DC 20062
Tel: (202) 463-5948

Counsel for Chamber of Commerce of the United States of America

F. William Brownell
Makram B. Jaber
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
Tel: (202) 955-1500
Fax: (202) 778-2201
bbrownell@HuntonAK.com
mjaber@HuntonAK.com

Counsel for Amici Curiae

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the *amici curiae* make the following disclosures:

American Chemistry Council ("ACC") is a trade association that represents companies across the United States engaged in the business of chemistry. This industry is a $770 billion enterprise and a key element of the nation's economy. It is the largest exporting sector in the United States, accounting for 12% of U.S. exports. As a representative of the nation's leaders in chemistry, ACC is committed to improved environmental, health, and safety performance through Responsible Care®, common-sense advocacy designed to address major public policy issues, and health and environmental research and product testing. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and defend against any threat to the nation's critical infrastructure. ACC has no parent corporation, and no publicly held company has 10 percent or greater ownership in ACC.

America's Power is the only national trade organization whose sole mission is to advocate at the federal and state levels on behalf of coal-fired electricity and the nation's coal fleet. Our membership is comprised of electricity generators, coal producers, railroads, barge operators, and equipment and supply manufacturers. It

has no parent corporation, and no publicly held company owns a 10 percent or greater interest in America's Power.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The U.S. Chamber has no parent corporation, and no publicly held company has a 10 percent or greater ownership interest in the U.S. Chamber.

The Missouri Chamber of Commerce and Industry ("Missouri Chamber") is the largest business association in Missouri. Representing thousands of employers, the Missouri Chamber advocates for policies and laws that will enable Missouri businesses to thrive, promote economic growth, and improve the lives of all Missourians. The Missouri Chamber also advocates for legislative policy and court outcomes that make Missouri attractive to job creators, and encourage existing job creators to stay and grow within Missouri. The Missouri Chamber has no parent corporation, and no publicly held company has a 10 percent or greater ownership interest in the Missouri Chamber.

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The National Mining Association ("NMA") is a national trade association that represents the interests of the mining industry, including the producers of most of America's coal, metals, and industrial and agricultural minerals. NMA has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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MISCELLANEOUS

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure,[1] the Chamber of Commerce of the United States of America, American Chemistry Council, America's Power, Missouri Chamber of Commerce and Industry, National Association of Manufacturers, and National Mining Association respectfully submit this brief as *amici curiae* in support of Appellant and reversal of the decision below. All parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICI*

Amici are trade associations whose members include companies that own and operate sources subject to the Prevention of Significant Deterioration ("PSD") requirements of the Clean Air Act ("CAA" or "Act"). These companies rely on their state implementation plans ("SIPs") to definitively set forth obligations under the Act. *Amici* have an interest in ensuring they can rely on laws and regulations (including SIPs) to be enforced as written. The certainty these SIPs provide allows companies to invest in projects that advance the CAA's goal of increasing the nation's productive capacity. *Amici* also have an interest in ensuring plaintiffs cannot pursue extra-statutory remedies, such as injunctions imposing billions of dollars in punitive relief for past violations. The district court's imposition of costly requirements on sources that were not at issue in the case makes the problem

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel or entity or person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

worse as the potential for the SIP to not be followed as written now has consequences for other investments and facilities.

ARGUMENT

Amici address the appropriate interpretation of the applicable regulations and the scope of injunctive remedies available. The district court failed to honor the system of cooperative federalism that grants states primary responsibility for air pollution prevention and allows Missouri to implement CAA regulations that limit PSD applicability to "modifications" that would increase a source's maximum ability (*i.e.*, potential) to emit. The court further exceeded its authority to enjoin CAA violations by imposing punitive relief for past violations and on sources that were not at issue in this case.

I. Missouri's SIP, Which Was Approved by EPA and Is Consistent with the Act, Governs PSD Applicability in Missouri.

A. The CAA Is Implemented Through SIPs.

Cooperative federalism is a bedrock principle underpinning the Act: "air pollution prevention … [and] control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Accordingly, many CAA requirements are implemented through state programs, with the federal role limited to reviewing and approving them for consistency with the Act and aiding in enforcement of approved state regulations.

Under Title I, states develop SIPs designed to carry out CAA programs, including PSD, which preserves existing air quality in areas that meet ambient air quality standards promulgated by the U.S. Environmental Protection Agency ("EPA"). *See id.* §§ 7410(a)(2)(J), 7471. States submit these SIPs to EPA, which must approve or disapprove them through notice-and-comment rulemaking. *Id.* § 7410(k). EPA regulations govern the submission, review, and required contents of SIPs. *See* 40 C.F.R. pt. 51; *id.* § 51.166 (PSD).

EPA has several tools to address SIPs it finds inconsistent with the Act, all involving notice-and-comment rulemaking. EPA may disapprove the SIP in whole or in part; or it may conditionally approve the SIP based on the state's commitment to adopt specific additional measures. 42 U.S.C. § 7410(k)(3), (4). Once approved, if EPA concludes a SIP is deficient, EPA may require (through notice-and-comment rulemaking) the state to revise the SIP. *Id.* § 7410(k)(5). Until a SIP revision curing the deficiency is approved, or until EPA develops a federal implementation plan to replace the SIP, the SIP defines the obligations of covered sources under state *and* federal law.

B. EPA Has Interpreted the Act to Allow for a Potential-to-Potential Emissions Test for PSD "Modifications."

The PSD program prohibits construction or modification of a major stationary source without obtaining a permit that includes emission limits representing "best available control technology" ("BACT"). *Id.* § 7475. Once a

SIP's PSD provisions are approved, the state agency has sole authority to issue permits to proposed sources, including determining BACT on a case-by-case basis. *See id.* § 7479(3) (BACT determined by "the permitting authority"). Nevertheless, EPA maintains authority under the CAA, along with the state, to pursue enforcement for violations. Under section 167, EPA may seek injunctive relief to prevent the construction or modification of a source not in compliance with the SIP's PSD requirements. *Id.* § 7477. And under section 113, EPA may commence a civil action "for a permanent or temporary injunction" or civil penalties "whenever [a source owner or operator] has violated, or is in violation of, any requirement or prohibition of an applicable" SIP or permit. *Id.* § 7413(b).

The CAA defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source …." *Id.* §§ 7411(a)(4), 7479(2)(C). Although this statutory definition has remained unchanged, EPA's interpretation of the types of emission increases that trigger PSD requirements as "modifications" has fluctuated. For much of the PSD program's life, EPA itself interpreted "modification" to require an increase in a source's potential emissions, just as the Missouri SIP applicable here does.

As an initial matter, the PSD program borrows its statutory definition of "modification" from the section 111 new source performance standards ("NSPS")

program. *Id.* § 7479(2)(C) (defining PSD modification by cross-reference to § 7411(a)). For NSPS purposes, EPA has always interpreted "modification" to mean a project that increases a source's maximum hourly emissions—a measure equivalent to potential annual emissions.[2] *See* 40 C.F.R. § 60.14(a)-(b); 39 Fed. Reg. 36,946, 36,947 (Oct. 15, 1974) (proposing hourly rate as NSPS test because it is triggered by "increased production capacity" but not by "increases in operating hours").

EPA first adopted a PSD regulatory program before Congress codified it into the CAA. 39 Fed. Reg. 42,510 (Dec. 5, 1974). In that original program, EPA defined "modification" based on changes in a source's potential emissions, noting its desire for consistency with NSPS. *Id.* at 42,513-14. When Congress enacted statutory PSD requirements in the 1977 CAA Amendments, it did so against the backdrop of existing PSD and NSPS programs that based modification on potential emissions increases. Far from rejecting this shared approach, Congress chose to define PSD modification via cross-reference to the Act's NSPS provisions. 42 U.S.C. § 7479(2)(C).

Following the 1977 Amendments, EPA adopted new regulations defining PSD requirements for SIPs. 43 Fed. Reg. 26,388 (June 19, 1978). Those

[2] A calculation of maximum hourly emissions assumes the source operates at its maximum capacity continuously, which is the same as its annual "potential."

regulations again defined "modification" based on a source's potential emissions, but limited PSD applicability to "major modifications," meaning projects that "increase[] the *potential* emission rate of any air pollutant regulated under the act" by specified amounts. *Id.* at 26,403 (emphasis added). Although litigants challenged virtually every aspect of these regulations—including aspects of the "major modification" definition—no party challenged EPA's use of potential emissions to define modification, and neither the court nor the parties suggested that was inconsistent with the CAA. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 402 (D.C. Cir. 1979) (per curiam) (noting without objection "[t]he regulations define 'major modification' by means of accumulated increases in potential emissions").

In proposing revisions to the 1978 PSD regulations after *Alabama Power*, EPA "propose[d] for now to approve a SIP revision if it satisfies … the existing [1978] regulations." 44 Fed. Reg. 51,924, 51,928 (Sept. 5, 1979). In the 1980 final rule, EPA "decided to treat PSD SIP revisions generally in the manner proposed," 45 Fed. Reg. 52,676, 52,726 (Aug. 7, 1980), although it made substantive changes to the rule. One of these changes was to redefine "major modification" so that PSD applicability for an existing source was based on whether a project increases the source's *actual* annual emissions. *See id.* at 52,735

(requiring "significant net emissions increase" for major modification), 52,736 (defining "net emissions increase" based on "actual emissions").

However, in practice EPA continued limiting PSD applicability to those projects that increased a source's potential emissions. In interpretive documents issued shortly after promulgation and for several years thereafter, EPA read the CAA and its own rules to provide that only changes that increase a unit's maximum hourly emissions rate (which is equivalent to potential emissions) could be considered "major modifications." *See* Letter from Edward Reich, EPA, to Amasjit Gill (June 24, 1981), https://archive.epa.gov/airquality/ttnnsr01/web/html/p4_17.html; Memorandum from Edward Reich, EPA, to Charles Whitmore, EPA Region VII (Jan. 22, 1981), https://www.epa.gov/sites/production/files/2015-07/documents/crgilinc.pdf. EPA's rationale was that emission increases caused by increased hours of operation were (and still are) excluded from triggering PSD applicability. *See* 40 C.F.R. § 52.21(b)(2)(iii)(f).

EPA revised its regulations again in 1992, in response to *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), which struck down EPA's attempt to compare pre-project actual emissions to potential emissions for

determining PSD applicability.[3] These revisions allowed SIPs to include an "actual-to-projected-actual" emissions increase test for determining "major modifications" at electric generating units. 57 Fed. Reg. 32,314 (July 21, 1992). This test compares the source's actual annual emissions before a project to a projection of post-project annual emissions (excluding post-project emissions not caused by the project). *Id.* at 32,336-37. And in 2002, EPA revised its PSD regulations to authorize SIPs that extend this "actual-to-projected-actual" test for all source types. 67 Fed. Reg. 80,186 (Dec. 31, 2002).

Finally, since 2002, EPA has proposed three times to allow SIPs to follow the NSPS emissions increase approach by making an increase in maximum hourly emissions a prerequisite to PSD applicability. 70 Fed. Reg. 61,081 (Oct. 20, 2005); 72 Fed. Reg. 26,202 (May 8, 2007); 83 Fed. Reg. 44,746 (Aug. 31, 2018).

C. The Missouri SIP Explicitly Requires a Project to Increase Potential Emissions to Trigger PSD.

Missouri's SIP has an EPA-approved preconstruction permitting program called the "Construction Permits Rule." Mo. Code Regs. tit. 10, § 10-6.060; *see* 40 C.F.R. § 52.1320(c) (listing approved SIP provisions). That rule limits PSD applicability for existing sources to only those projects that are both a

[3] Potential emissions are almost always greater than actual emissions because few if any sources regularly operate at their maximum rate.

"modification," as defined in the SIP, and a "major modification," as defined by EPA.

EPA first approved the Construction Permits Rule in 1982. 47 Fed. Reg. 26,833 (June 22, 1982). The rule prohibits "construction or *modification* of any installation subject to this rule … without first obtaining a permit from the permitting authority under this rule." Mo. Code Regs. tit. 10, § 10-6.060(1)(C) (2006) (emphasis added); *see also id.* § 10-6.060 (2006) (rule's purpose is "establish[ing] requirements to be met prior to construction or *modification* of" covered sources) (emphasis added). The SIP defines "modification" as a project that "would cause an increase in potential emissions of any air pollutant emitted by the source operation." *Id.* § 10-6.020(2)(M)(10) (2006). The SIP then provides a PSD permit will be required if the modification also constitutes a "*major modification*," as defined in EPA's PSD regulations. *See Id.* § 10-6.060(8) (2006) (incorporating federal PSD rule). Accordingly, under Missouri's SIP as approved by EPA in 1982 and on multiple occasions thereafter, a project at an existing source is not subject to the Construction Permits Rule (and thus cannot trigger PSD) unless it increases the source's potential emissions. In 2006, EPA approved a revision to Missouri's SIP that incorporated EPA's 2002 PSD-rule revisions

while continuing to require PSD permits only for "modifications" that also constitute "major modifications." 71 Fed. Reg. 36,486 (June 27, 2006).[4]

D. The Court Must Apply the Missouri SIP As Written.

The district court erred by failing to give effect to the plain language of Missouri's SIP. Because the parties agree the projects at issue "were not expected to and did not increase the [facilities'] potential emissions," *see U.S. v. Ameren Missouri*, 158 F.Supp.3d 802, 809 n.4 (E.D. Mo. 2016) ("*Ameren I*"), there can be no liability here.

As described above, the plain text of the EPA-approved Missouri SIP establishes a two-step test for PSD applicability: the project must both trigger the Construction Permits Rule as a "modification" (defined in the SIP as requiring a potential emissions increase) *and* trigger PSD as a "major modification" (defined in EPA's regulations). *See supra* pp. 8-10. The district court recognized the Construction Permits Rule "governs all of the state's air quality construction permit programs, of which the PSD program is one subsection." *Ameren I*, 158 F.Supp.3d at 809. Yet the court accepted EPA's argument that the "major

[4] Missouri has reorganized the contents of its Construction Permits Rule since Ameren's Rush Island projects. The current version is not materially different on this issue. *See* Mo. Code Regs. tit. 10, § 10-6.060(1)(A)(4) (2019) (triggering PSD where "new construction and/or *modification* is [also] a *major modification* as defined in 40 CFR 52.21(b)") (emphases added).

modification" requirement is the sole PSD applicability criterion rather than part of a two-step inquiry. *Id.* at 809-10.

The lower court erred by adopting EPA's litigating position. EPA approved the Construction Permits Rule's applicability requirements through notice-and-comment rulemaking into Missouri's SIP, and the courts and EPA must follow that rule's plain language. Whether EPA counsel now asserts the SIP's applicability language is inconsistent with EPA's implementing regulations is irrelevant. *See, e.g., Panhandle E. Pipe Line Co. v. FERC,* 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("It has become axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide [agency] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate.'"). EPA's approval of the SIP is binding on EPA and the public until revised or repealed following new notice-and-comment rulemaking. EPA cannot withdraw its approval of the SIP through a new interpretation advanced in enforcement litigation.

Indeed, EPA was on notice the Construction Permits Rule differed from EPA's PSD regulations and Missouri had declined EPA's request to adopt its different approach, yet EPA approved the SIP. *See* Appellant Br. at 45. After approving the SIP, EPA could have called for Missouri to revise it upon a determination it did not comply with the CAA. 42 U.S.C. § 7410(k)(5). But EPA

has not done so, and the Construction Permits Rule (including its two-part PSD applicability analysis) remains in Missouri's approved SIP. 40 C.F.R. § 52.1320(c).

In *U.S. v. Cinergy Corp.*, the Seventh Circuit rejected a similar EPA attempt to circumvent an approved SIP's plain language. 623 F.3d 455 (7th Cir. 2010). There, as here, EPA had approved a SIP limiting PSD applicability to projects that increase a source's potential emissions, *id.* at 457-58, yet EPA brought a PSD enforcement suit against Cinergy for projects that allegedly increased actual annual emissions but did not increase potential emissions. EPA argued the relevant SIP provisions, though approved by EPA, were inconsistent with its PSD regulations and the CAA and should be trumped by EPA's contrary litigation interpretation. *Id.*

The Seventh Circuit found this position "untenable," holding the CAA "does not authorize the imposition of sanctions for conduct that complies with a [SIP] that the EPA has approved," even where EPA argues the SIP *should not have been* approved. *Id.* So long as a SIP has approved status, its operative provisions define the obligations of sources it applies to. *Id.* at 459. The same is true here. *Cf. Nucor Steel-Arkansas v. Big River Steel, LLC*, 825 F.3d 444, 452 (8th Cir. 2016) (holding duly issued PSD permit is valid even if issued under approved SIP that arguably does not meet CAA's minimum requirements).

EPA argued below the Construction Permits Rule's plain language cannot possibly mean what it says, because making PSD applicability contingent on a potential emissions increase would be inconsistent with the CAA. But the history of EPA's implementation of the PSD program demonstrates Missouri's approach is entirely consistent with the Act. *See supra* pp. 3-8.

Congress defined "modification" for the PSD program by cross-reference to its definition in the NSPS program. 42 U.S.C. §§ 7411(a)(4), 7479(2)(C). Like the Missouri SIP's definition of "modification," for NSPS purposes EPA has always interpreted § 7411(a)(4) to require an increase in a source's potential emissions. *See* 40 C.F.R. § 60.14. Congress was well aware of this regulatory gloss when it enacted a unified statutory definition of "modification" for both the NSPS and PSD programs, suggesting Congress understood at least one possible outcome of its cross-reference to that provision would be a PSD modification test based on potential emissions.

Admittedly, the Supreme Court said in *dicta* Congress did not *require* EPA to use the same regulatory definition of "modification" for NSPS and PSD. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573-74 (2007). But surely Congress did not *preclude* it by adopting the same statutory definition of "modification" for both programs, and the Court never held a state could not adopt that definition in its SIP. To the contrary, the Court opined the exact approach

represented in Missouri's SIP—requiring both a "modification" and "major modification" to trigger PSD—"sounds right," but simply was not embodied in EPA's 1980 regulations as written. *Id.* at 581 n.8.

Furthermore, EPA itself has implemented the PSD program through regulations that based applicability for modifications on increases in a source's potential emissions. *See supra* Part I.B, at 3-8. In fact, in 2018, EPA proposed revisions to its PSD regulations explicitly allowing states to provide a similar two-part applicability test to the one in the Missouri SIP. 83 Fed. Reg. at 44,797-803. While EPA has not finalized this proposal, the fact it has once again proposed such an approach, coupled with the statutory and regulatory history described above, contradicts EPA's argument that the plain language of Missouri's SIP is inconsistent with the CAA.

Finally, the district court held EPA's interpretation of the Missouri SIP was owed deference under the *Chevron* and *Auer* doctrines. *Ameren I*, 158 F.Supp.3d at 811 (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997)). The court's application of *Chevron* is plainly wrong, as that is a doctrine of statutory interpretation and the Missouri SIP provision is a regulation. *See Chevron*, 467 U.S. at 842-43.

Likewise, EPA's interpretation of the SIP is not entitled to *Auer* deference. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2414-15 (2019) (warning against "'reflexive'"

application of *Auer* "without significant analysis of the underlying regulation"). First, *Auer* deference is only available where an agency interprets its own regulations, and the Missouri SIP was promulgated by Missouri, not EPA. *Id.* at 2414 (*Auer* presumes "Congress intended for courts to defer to agencies when they interpret *their own* ambiguous rules.") (emphasis added). Second, *Auer* only applies where a regulation is "genuinely ambiguous" after exhausting all tools of construction. *Id.* at 2415. As discussed above, Missouri's SIP is unambiguous: its PSD provisions are a subsection of the Construction Permits Rule, and that rule (including the PSD subsection) only applies to projects that constitute "modification." Third, the interpretation asserted here lacks the "character and context" to merit deference. *Id.* at 2416. It is merely a "'convenient litigating position'" advanced for the first time by EPA counsel, and it is inconsistent with EPA's contemporaneous understanding of the SIP at the time of its approval. *Id.* at 2417-18; *see* Appellant Br. at 45 (noting EPA flagged differences from its PSD regulations during SIP review but nonetheless approved SIP).

In sum, Missouri's approved SIP makes an increase in potential emissions a prerequisite to PSD applicability. Under the Act, courts must give effect to the EPA-approved requirements states adopt in their SIPs, even if EPA now disagrees with their application. Allowing the district court's decision to stand would create untenable uncertainty for American industry, which must be able to rely on laws

and regulations to be enforced as written so that companies can invest in projects without fear of second-guessing years after.

II. The Act Does Not Authorize the District Court's Injunctive Relief.

A. The CAA Does Not Authorize Injunctive Relief for Past Violations.

Even if EPA could have established PSD liability, the remedy ordered in this case exceeds the court's authority under the Act. *See U.S. v. Ameren Missouri*, 2019 WL 4751941 (E.D. Mo. Sept. 30, 2019) ("*Ameren III*") (granting EPA's requested injunctive relief). The CAA and Missouri SIP authorize injunctive relief for ongoing or prospective violations, not past violations.

It is settled law in this Court that constructing or modifying a source without a PSD permit is not an ongoing violation, but rather a one-time violation that is complete once the source has been constructed or modified. *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1014 (8th Cir. 2010) (holding "the PSD requirements are conditions of construction [or modification], not operation"); *accord U.S. v. Luminant Generation Co.*, 905 F.3d 874 (5th Cir. 2018) (vacated on other grounds); *Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666 (10th Cir. 2016); *U.S. v. EME Homer City Generation, L.P.*, 727 F.3d 274 (3d Cir. 2013); *U.S. v. Midwest Generation, LLC*, 720 F.3d 644 (7th Cir. 2013); *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316 (11th Cir. 2007). And as the lower court conceded, "the applicable provisions of the Missouri SIP"

produce the same result: they "prohibit *construction and beginning operation* without a permit but do not prohibit *ongoing operation* without a permit into perpetuity." *U.S. v. Ameren Missouri*, 2012 WL 262655, at *8 (E.D. Mo. Jan. 27, 2012) (emphases added).

The Act's plain language limits injunctive relief to cases involving ongoing or future violations and does not authorize injunctions for wholly past violations. Federal courts have "jurisdiction to restrain [a] violation" of or "require compliance" with the CAA or an applicable SIP. 42 U.S.C. § 7413(b). These forms of relief are inherently forward-looking. A court cannot "restrain" a violation that is no longer taking place, and cannot "require compliance" by a defendant that is not currently violating the law. *See Homer City*, 727 F.3d at 292. In a separate PSD-specific enforcement provision, section 167 authorizes EPA to seek an injunction "as necessary to *prevent* the construction or modification of a major emitting facility." 42 U.S.C. § 7477 (emphasis added). But this only confirms the prospective nature of injunctive relief in PSD cases: EPA cannot "prevent" the modification of a source that has already been modified.

The court below opined that following this plain language reading of the CAA would "allow Ameren and other parties to entirely evade the permitting requirements." *U.S. v. Ameren Missouri*, 372 F.Supp.3d 868, 872 (E.D. Mo. 2019) ("*Ameren II*"). But the Act does provide a remedy for cases involving past

violations: civil penalties. *See* 42 U.S.C. § 7413(b). EPA chose not to pursue that remedy here. EPA's decision to abandon its civil penalty claims does not permit the court to reach beyond the remedies Congress provided and grant injunctive relief for wholly past violations.

The court pointed to section 113(b)'s generic catch-all phrase authorizing "any other appropriate relief" to justify granting injunctive relief for Ameren's PSD violations. *Ameren II*, 372 F.Supp.3d at 871-72. But that phrase does not expand the list of available remedies to include injunctive relief for past violations. It follows a list of enumerated remedies courts may grant, in which the only authorized injunctive relief is forward-looking. *See* 42 U.S.C. § 7413(b). "Where general words follow specific words in a statutory enumeration, the established interpretative canons of *noscitur a sociis* and *ejusdem generis* provide that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *U.S. v. Walker*, 393 F.3d 819, 824 (8th Cir. 2005) (citing *Washington State Dep't. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2003)).

Other courts have agreed the CAA does not authorize injunctive relief for wholly past violations, particularly in the PSD context. In *Homer City*, the Third Circuit read sections 113(b) and 167 to limit injunctive relief for PSD violations to cases where there is an ongoing violation, holding "[e]ach type of relief in [the

CAA's] list (except for civil penalties) is necessarily forward-looking." 727 F.3d at 292 (footnote omitted). The court rejected a broad reading of section 113(b)'s catch-all authorizing "any other appropriate relief," holding "any injunctive relief available under this residual phrase must be limited to ongoing violations, consistent with the specific forward-looking injunctive remedies that precede it." *Id.* at 293.

Likewise, in *U.S. v. Luminant Generation Company*, the court held the CAA does not authorize injunctive relief for past violations. 2015 WL 5009378, at *7 (N.D. Tex. Aug. 21, 2015). A divided panel of the Fifth Circuit later reversed that ruling with little textual analysis of the operative CAA provisions. *See Luminant*, 905 F.3d at 887-88. However, the Fifth Circuit granted Luminant's petition for *en banc* rehearing to address the panel's decision on the availability of injunctive relief. *U.S. v. Luminant Generation Co.*, 929 F.3d 316 (5th Cir. 2019). EPA voluntarily dismissed its enforcement case with prejudice before the court could issue its *en banc* decision. As a result, the panel decision was vacated, leaving the underlying district court decision (including its holdings on the availability of injunctive relief) as good law.

B. The CAA Does Not Authorize Injunctive Relief Directed at a Source That Did Not Violate the CAA.

Even if the CAA authorized injunctive relief for past violations, it does not authorize injunctive relief against a source that *never violated the CAA at all*. Yet

that is what the district court granted by ordering Ameren's Labadie plant to reduce emissions as a remedy for PSD violations at Ameren's Rush Island plant.

As discussed above, section 113(b) only allows EPA to pursue injunctive relief to "restrain [a] violation" of or "require compliance" with the CAA or an applicable SIP. 42 U.S.C. § 7413(b). But Ameren was never alleged—let alone found—to have violated or to be in violation of the CAA at Labadie. Thus, the district court's Labadie order does not "restrain" any violation and does not require "compliance" with any requirement of the Act that Labadie has violated. The injunction on its face exceeds the limits imposed on a court's equitable powers under section 113(b) to enjoin only the unlawful conduct at the source that is the subject of the civil action.

Likewise, the ordered relief for Labadie is not authorized under the court's power to grant "any other appropriate relief." Again, such "other" relief must be interpreted consistently with the enumerated items that precede it. *Homer City*, 727 F.3d at 292. Each of the relevant forms of relief listed in section 113(b) relates to *violations* that have occurred or are occurring. *See* 42 U.S.C. § 7413(b) (listing maximum civil penalty amounts "for each violation"); *id.* (granting jurisdiction to "restrain such violation" via injunction). Interpreting "any other appropriate relief" to allow imposition of injunctive relief upon sources that *have not violated the CAA* would nullify the most basic limitation Congress placed on courts' authority

under section 113(b).

Moreover, the injunction granted here—ordering emission reductions at one plant to address so-called "excess emissions" from another— is punitive rather than merely remedial, setting it outside the equitable authority of any court. An injunction that "goes beyond remedying the damage caused to the harmed parties by the defendant's action," *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996), is impermissible.

In requiring emission reductions from Labadie, the court purported to "offset" the "harm" caused by the "excess emissions" resulting from PSD violations at Ameren's Rush Island plant. *Ameren III*, 2019 WL 4751941, at *74. The court calculated these "excess emissions" as the difference between what Rush Island actually emitted after the projects and the amount it hypothetically would have emitted had it obtained and complied with PSD permits containing BACT limits prior to undertaking the projects. *Id.* at *31.

However, the district court's concept of "excess emissions" resulting from Ameren's PSD violations is based on the false premise Ameren had a legal obligation to operate the Rush Island units at those hypothetical BACT levels. As this Court and many others have recognized, the Act's "PSD requirements [including BACT] are conditions of *construction*, not *operation*." *Otter Tail*, 615 F.3d at 1014 (emphases added); *see also Homer City*, 727 F.3d at 284 (CAA does

not prohibit "operating a facility [subject to PSD] without BACT or a PSD permit").

Put differently, the CAA requires a source that triggers PSD to obtain a PSD permit containing BACT limits before undertaking construction or modification, but it does not establish a "freestanding requirement" to operate that source with BACT. *Otter Tail*, 615 F.3d at 1016-17 (BACT requirement "is best understood as requiring that BACT limits be incorporated into a facility's construction plans and PSD permits, not as establishing an ongoing duty to apply BACT independent of the permitting process"). Indeed, courts have made clear the duty to apply BACT "is tied specifically to the construction process," and where the source does not undergo a PSD permit proceeding establishing BACT limits prior to construction, it has no legal obligation to comply with BACT. *See id.* at 1016-17; *see also Homer City*, 727 F.3d at 286 ("[J]ust because the PSD program requires a source to obtain a permit that sets some operating conditions does not mean that the PSD program requires a source without a permit to comply with operating conditions."); *id.* at 288 ("Without an issued PSD permit, there are no BACT emission limits to violate").

Accordingly, where a defendant violates PSD by failing to obtain a permit, "it does not continue to do so by failing to comply with a hypothetical set of operational parameters that would have been developed through the permitting

process." *Otter Tail*, 615 F.3d at 1016. There can be no "excess emissions" created by a hypothetical BACT limit that the source is presumed to have exceeded.

The lower court's unprecedented and unlawful order to an uninvolved plant puts American industry at great disadvantage by creating uncertainty as to future pollution control requirements and untenable exposure to punitive and unpredictable judicial mandates. This Court should vacate.

C. Even If Injunctive Relief Were Available, the Court Could Not Force Ameren to Obtain a PSD Permit for the Projects in Question.

Even assuming the statute authorized injunctive relief for wholly past violations, a court cannot compel a source to obtain a PSD permit as the sole remedy for a PSD violation. As an initial matter, where the project has already been completed, neither the CAA, nor EPA's PSD regulations, nor Missouri's SIP provides an avenue for obtaining a PSD *pre*construction permit *after* construction or modification. "[I]t would not be 'appropriate' for a district court to award relief that is impossible to fulfill." *Homer City*, 727 F.3d at 295 (citing section 113(b)'s authorization of "other appropriate relief").

More fundamentally, forcing a source to obtain a PSD permit for the project at issue without leaving open other avenues that were available under the CAA before the violation exceeds a court's power to grant remedial relief. Where not

otherwise constrained, a court's equitable authority encompasses ordering a "remedial" injunction that "restore[s] the status quo" that would have prevailed had the defendant not violated the law. *Kokesh v. SEC*, 137 S.Ct. 1635, 1644-45 (2017). Relief that goes farther constitutes a penalty and falls outside the court's equitable authority. *Id.* at 1645 (holding SEC's request for disgorgement punitive, and therefore beyond court's equitable authority, because it "leaves the defendant worse off" than if it had not violated the law).

Here, restoring the status quo does not mean forcing Ameren to obtain PSD permits for its projects. The law provided *two* ways for Ameren to undertake the projects at issue while complying with the CAA and Missouri's SIP: either obtain a PSD permit prior to modification, *or* ensure the projects do not trigger PSD by obtaining a "synthetic minor" permit limiting any emissions increase at the source to less than PSD "significance" thresholds. *See* 40 C.F.R. § 52.21(b)(23) (significance thresholds).

The CAA is agnostic as to these outcomes. At its core, the PSD program is not about forcing emission reductions, but about regulating projects that *increase* emissions—after all, its purpose is "preserv[ing] … existing clean air resources," 42 U.S.C. § 7470(3), not improving them. Thus, the proper remedy to "enforce the statute[]" and "grant complete relief to fulfill the [CAA's] purposes," *Ameren III*, 2019 WL 4751941, at *62-63 (internal quotation omitted), is to prohibit such

emission increases by limiting the source's emissions to no more than the source could lawfully emit without triggering PSD requirements. An injunction that goes beyond that (such as one forcing the source to obtain a PSD permit) would "leave[] the defendant worse off" than the status quo before the violation and is thus beyond the court's equitable authority. *Kokesh*, 137 S.Ct. at 1645.

The court below held it was compelled to order Ameren to obtain a PSD permit. *Ameren III*, 2019 WL 4751941, at *66 ("By statute and regulation, once Ameren undertook major modifications, Ameren was required to comply with BACT."). But the court's equitable discretion is not so cramped. In a similar case involving a Safe Drinking Water Act program in which water systems that do not take certain avoidance actions must install expensive filtration systems, the First Circuit upheld a district court's authority to grant an injunction that preserved the status quo before the violation by allowing the defendant, after the fact, to take the action that would have avoided triggering the filtration requirement, rather than forcing compliance with that requirement. *U.S. v. Mass. Water Res. Auth.*, 256 F.3d 36 (1st Cir. 2001). The court held "'[u]nless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion.'" *Id.* at 48 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 322 (1982) (Stevens, J., dissenting)). But there are important limits on that

discretion: courts must "focus on the relevant statute's substantive purposes, rather than its technical requirements." *Id.* at 57.

Here, the CAA's "substantive purposes" are completely effectuated by prohibiting Ameren from operating its units with higher emissions than would have been allowed under the pre-project status quo—not by ordering it to obtain PSD permits.

D. The District Court Usurped the State Permitting Authority's Statutory Role by Determining BACT for the Rush Island Units.

Finally, *if* liability were found and *if* the court had authority to grant injunctive relief for past PSD violations, that authority did not extend to developing BACT limits for Rush Island and requiring operation in compliance with them. Under the CAA, establishing BACT is inextricably linked to the PSD permitting process, which is the exclusive purview of the SIP-approved permitting authority. By arrogating that task to itself, the district court upset the CAA's assigned roles and violated fundamental separation of power principles.[5]

[5] The court claimed its remedial order would not violate the CAA or separation of powers because rather than "write and issue a permit" itself, it simply ordered Ameren to propose a specific technology as BACT in its PSD permit application, with the permitting authority having final say on any permit's contents. *Ameren III*, 2019 WL 4751941, at *68. This ignores that the order tied the hands of the permitting authority by requiring Rush Island to meet emission limits *the court determined* represent BACT. *Id.* at *79.

The CAA assigns the relevant permitting authority the sole authority and discretion to determine BACT for a source as part of a PSD permit proceeding. 42 U.S.C. § 7479(3); *see Otter Tail*, 615 F.3d at 1011 ("BACT … is an emission limitation … which the *permitting authority*, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for the facility in question." (emphasis added) (internal quotation and citation omitted). Moreover, a source's BACT determination is "inextricably linked to the permitting process," and "[t]he duty to obtain a PSD permit and the duty to apply BACT are most sensibly construed as going hand in hand." *Id.* at 1017. Therefore, the district court's injunction violates the CAA's text granting permitting authorities the exclusive authority to develop BACT limits through permit proceedings.

By usurping this role, the district court overstepped the fundamental separation of powers under the U.S. Constitution. Congress in the CAA established a "prescribed order of decisionmaking" in which "the first decider under the Act is the expert administrative agency" and courts participate only through "review [of] agency action." *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426, 427 (2011) ("*AEP*"). Where an action involves a "determination of policy or judgment which the agency alone is authorized to make and which it has

not made, a judicial judgment cannot be made to do service for an administrative judgment." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Notably, Congress's decision to allocate primary regulatory responsibility to specialized executive agencies rather than courts reflects the relative expertise and institutional capabilities of the two branches. As the Fourth Circuit put it, "we doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 305 (4th Cir. 2010) ("*TVA*"). Agencies are "better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *AEP*, 564 U.S. at 428.

Lastly, *amici* note even if the district court had authority to determine BACT emission limits for sources that violated PSD, it erred by setting those limits based on BACT as it would be determined *now* rather than as BACT would have been determined *at the time of the violations*. Because BACT for a source represents what is "achievable" considering factors like cost, technological developments, and performance of other similar sources, *see* 42 U.S.C. § 7479(3), the level of emission control representing BACT for a particular source may change over time.

Here, the court acknowledged that if Ameren had applied for a PSD permit prior to undertaking the projects at issue in 2007 and 2010, the permitting authority

would have adopted different and less stringent BACT limits than those the court required based on its determination of "current" BACT. *See Ameren III*, 2019 WL 4751941, at *31 (identifying BACT at time of violations as 0.08 lb/mmBTU for Rush Island Unit 1 and 0.06 lb/mmBTU for Unit 2); *id.* at *32, 79 (requiring compliance with 0.05 lb/mmBTU for both units based on "current BACT"). Therefore, the ordered relief "does not simply restore the status quo; it leaves the defendant worse off," *Kokesh*, 137 S.Ct. at 1645, and by any measure it exceeds the court's equitable authority.

CONCLUSION

The decision below should be reversed.

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Respectfully submitted,

/s/ Makram B. Jaber
F. William Brownell
Makram B. Jaber
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
Tel: (202) 955-1500
Fax: (202) 778-2201
bbrownell@HuntonAK.com
mjaber@HuntonAK.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Chemistry Council, America's Power, Missouri Chamber of Commerce and Industry, National Association of Manufacturers, and National Mining Association

Of Counsel

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H. Street NW
Washington, DC 20062
Tel: (202) 463-5948

Counsel for Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* Chamber of Commerce of the United States of America, American Chemistry Council, America's Power, Missouri Chamber of Commerce and Industry, National Association of Manufacturers, and National Mining Association in Support of Appellant and Reversal complies with the requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in proportionally spaced 14-point Times New Roman type.

I further certify that the foregoing brief complies with the type volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,491 words, excluding exempted portions, according to the count of Microsoft Word.

In accordance with Local Rule 28A(h)(2), I hereby certify that the electronic version of the foregoing brief has been scanned for viruses and the brief is virus-free.

/s/ Makram B. Jaber
Makram B. Jaber

Dated: January 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2020, I caused to be electronically filed the foregoing Brief of *Amici Curiae* Chamber of Commerce of the United States of America, American Chemistry Council, America's Power, Missouri Chamber of Commerce and Industry, National Association of Manufacturers, and National Mining Association in Support of Appellant and Reversal with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system.

Participants in the case who are registered CM/ECF users and will be served by the Court's CM/ECF system.

/s/ Makram B. Jaber
Makram B. Jaber