ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 19-1140 (and consolidated cases)

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review of Final Action by the
United States Environmental Protection Agency
84 Fed. Reg. 32,520 (July 8, 2019)

FINAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF STATE AND MUNICIPAL, PUBLIC HEALTH AND ENVIRONMENTAL, POWER COMPANY, AND CLEAN ENERGY TRADE ASSOCIATION PETITIONERS

Richard L. Revesz
Jack Lienke
Max Sarinsky
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, 3rd Floor
New York, NY 10012
(212) 992-8932
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for Institute for Policy Integrity at New York University School of Law ("Policy Integrity") certify as follows:

Except for the following, all parties, intervenors and other amici appearing in this case are listed in the brief for Public Health and Environmental Petitioners:

Amici Curiae for Petitioners:

In support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners: Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz, James D. McCalley; Dallas Burtraw, Charles T. Driscoll, Jr., Amelia Keyes, Kathy Fallon Lambert; Professor Michael Greenstone; Senator Sheldon Whitehouse; Service Employees International Union; Patagonia Works, Columbia Sportswear Company; Environment America, and the National Trust for Historic Preservation.

References to the rulings under review and related cases also appear in the brief for Public Health and Environmental Petitioners.

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity ("Policy Integrity") is a nonpartisan, not-for-profit organization at New York University School of Law. Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has no parent companies. No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

For the reasons discussed in the March 20, 2020 Notice Regarding Consent of All Parties to Submission of Amicus Briefs as to why a single joint brief is not practicable in this case, the Institute for Policy Integrity files this separate amicus brief in compliance with the word limits set forth in this Court's Order of January 31, 2020.

Under Federal Rule of Appellate Procedure 29(a)(4)(E), Policy Integrity states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

ACE Rule	Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019)
Clean Power Plan	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
EPA	Environmental Protection Agency
2005 Mercury Rule	Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005)
Transport Rule	Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011)

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] submits this *amicus* brief in support of the challenge of the above-named petitioners to the Environmental Protection Agency's ("EPA") Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) ("ACE Rule"). The ACE Rule repeals Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Clean Power Plan") and institutes replacement guidelines for some existing sources.

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, focusing primarily on environmental issues. Policy Integrity has produced scholarship on the legality, economics, and design of Clean Air Act regulation and has filed *amicus* briefs in this Court and the Supreme Court regarding EPA's Clean Air Act authority. Most relevant here, Policy Integrity has produced extensive

[1] This brief does not purport to represent the views, if any, of New York University School of Law.

scholarship on the legal and administrative precedents supporting the Clean Power Plan,[2] and submitted an *amicus* brief in support of Respondents in *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. dismissed Sept. 17, 2019), arguing that regulatory and legislative history supported the Clean Power Plan's legality. Additionally, Policy Integrity's director, Richard L. Revesz, testified at congressional hearings about the Clean Power Plan's lawfulness.

Policy Integrity submitted public comments to EPA's proposed rules in this rulemaking, rebutting EPA's position that the Clean Power Plan was unlawful and critiquing the agency's cost-benefit analysis.[3] This brief expands upon those arguments, explaining that the Clean Power Plan was lawful and therefore the ACE Rule, which rests on the opposite premise, must be set aside.

SUMMARY OF ARGUMENT

EPA makes three key errors in concluding that Section 111(d) of the Clean Air Act restricts regulation to "the level of an individual facility," 84 Fed. Reg. at

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[2] *See, e.g.*, Richard L. Revesz, Denise A. Grab & Jack Lienke, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 Envtl. L. Rep. 10190 (2016) ("*Familiar Territory*"); Richard L. Revesz, Denise A. Grab & Jack Lienke, *Bounded Regulation: How the Clean Power Plan Conforms to Statutory Limits on EPA's Authority* (2016), https://policyintegrity.org/files/publications/Bounded_Regulation_Policy_Brief.pdf

[3] Policy Integrity's comments on the proposed Clean Power Plan repeal are at https://policyintegrity.org/documents/04.27.18_Policy_Integrity_CPP_Repeal_Proposal_Comments.pdf. Its comments on the proposed ACE Rule are at https://policyintegrity.org/documents/PolicyIntegrityACEComments2_2018.10.31.pdf.

32,523. The agency ignores regulatory precedent, mischaracterizes legislative history, and disregards an important interpretive canon that disfavors its reading.

For one, EPA is mistaken that the Clean Power Plan marked "the first time" that the agency interpreted Section 111(d) of the Clean Air Act "to authorize measures wholly outside a particular source," *id*. at 32,526, or to permit "generation-shifting measures" from higher- to lower-polluting electricity sources, *id.* at 32,528. To the contrary, EPA interpreted Section 111(d) in precisely these two fashions under the George W. Bush Administration when it issued the Clean Air Mercury Rule ("2005 Mercury Rule"), a cap-and-trade program for mercury emissions from coal-fired power plants. And the 2005 Mercury Rule, too, had considerable precedent: For decades, and under both political parties, EPA has, under related Clean Air Act provisions, set emission standards that were premised on the availability of flexible compliance mechanisms such as trading and averaging. Where these precedents affected the power sector, they encouraged generation shifting away from higher-polluting facilities.

EPA is also incorrect that its newfound reading of Section 111(d) is the "only interpretation compatible" with the Clean Air Act's legislative history. *Id*. at 32,526. Instead, as EPA recognized when it promulgated the Clean Power Plan, legislative history both from the 1970 enactment of the Clean Air Act and the subsequent amendments supports an expansive reading of the agency's authority over existing

sources. Most notably, in 1970 Congress rejected a provision that originated in the House bill that would have limited emission standards to technological improvements at individual sources, favoring the Senate's broader approach that gave EPA wide latitude to regulate pollution from existing stationary sources, including the types of techniques employed in the Clean Power Plan.

While justifying its approach by misstating regulatory precedent and statutory history, EPA disregards an important statutory canon that disfavors its approach: the direction that "statutes must be construed so as to avoid illogical or unreasonable results," *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 816 F.2d 761, 766 (D.C. Cir. 1987). When it proposed the ACE Rule, EPA recognized that replacing the Clean Power Plan with emission guidelines based purely on modest efficiency improvements at coal plants would result in significant increases of greenhouse gases and other air pollutants, with severe health consequences—including up to 1,630 premature deaths annually. Moreover, EPA conceded that health and environmental harms resulting from the rule would far outweigh the value of projected cost savings for regulated entities.[4] In the final version of the ACE Rule, the agency disavows this concession, implausibly claiming

[4] EPA, Regulatory Impact Analysis for the Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program 4-33 (2018) ("Proposed Rule RIA").

instead that a repeal of the Clean Power Plan would have no effect on emissions. But that assertion relies on patently unreasonable assumptions regarding state implementation of the Clean Power Plan. Setting aside these unreasonable assumptions reveals that the ACE Rule "does significantly more harm than good," *see Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015), and thus is an unreasonable result that the Clean Air Act must be interpreted to avoid.

In short, EPA's conclusion that Section 111(d) restricts EPA's authority to source-focused controls is premised on a series of missteps and inaccuracies. Accordingly, this Court should set aside the ACE Rule.

ARGUMENT

I. For Decades and Under Administrations of Both Parties, EPA Has Looked Beyond Individual Sources in Setting Emission Limits Under the Clean Air Act

In attempting to justify its repeal, EPA emphasizes the supposedly unprecedented nature of the Clean Power Plan, arguing that the rule "encompass[ed] measures the EPA had never before envisioned" in "traditional regulations" under the Clean Air Act. 84 Fed. Reg. at 32,523. EPA further claims that prior regulations "set performance standards based on the application of equipment and practices at the level of an individual facility." *Id*. But this is a rewriting of regulatory history that ignores the considerable precedent for standards based on a sector or source category's collective ability to reduce emissions.

Indeed, numerous prior EPA rulemakings—under both Section 111 and other Clean Air Act provisions—featured emission limits that regulated sources could achieve collectively through trading or averaging, with the availability of flexible compliance often justifying a more stringent standard. Contrary to the agency's characterization of its "long-standing interpretation" of Section 111(d), the 2005 Mercury Rule "include[d] control options that go beyond the source," *id.* at 32,525, including inter-source and interstate trading of emission credits. The 2005 Mercury Rule also set emission limits based, in part, on an assumption of generation shifting away from high-polluting electricity generators, belying EPA's claim that the agency "never understood" Section 111(d) to allow for this approach in "nearly 45 years" before issuing Clean Power Plan, *id.* at 32,528.

The 2005 Mercury Rule also had considerable precedent: For decades and under administrations of both parties, EPA has issued Clean Air Act regulations that rely on flexible compliance and generation shifting, even where the relevant statutory provision did not expressly authorize such an approach. Far from "encompass[ing] measures the EPA had never before envisioned," *id.* at 32,523, therefore, the Clean Power Plan in fact deployed approaches that are both reasonable and familiar.

A. EPA's Newfound Interpretation of Section 111(d) Contradicts Its Approach in the 2005 Mercury Rule

While EPA now claims that the Clean Power Plan marked a novel interpretation of Section 111(d), the 2005 Mercury Rule—promulgated under the George W. Bush Administration—directly refutes this claim.

The 2005 Mercury Rule set statewide targets for mercury emissions from coal-fired generating units using an approach that was later replicated in the Clean Power Plan in two important ways. First, EPA identified a "best system of emission reduction" that incorporated inter-source and interstate emission-credit trading. And second, in setting such standards, EPA anticipated production shifts from higher- to lower-emitting sources. *See* Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005).

Regarding credit trading, EPA explained in the 2005 Mercury Rule that "the phrase 'best system of emission reduction'" in Section 111(d) could encompass "the combination of the cap-and-trade mechanism and the technology needed to achieve the chosen cap level." *Id.* at 28,620. And in concluding that a cap-and-trade program for mercury emissions from coal units was adequately demonstrated and could be implemented at reasonable cost, the agency pointed to its "significant experience" using emission trading under other Clean Air Act provisions to produce substantial emission reductions while "maximizing overall cost-effectiveness." *Id.* at 28,617.

Furthermore, EPA found that a cap-and-trade program provided the "greatest certainty" that the desired emission reductions would be "attained and maintained." *See id.*

Regarding generation shifting, EPA justified the stringency of the 2005 Mercury Rule's emission caps based, in part, on the availability of "dispatch changes" as a compliance option. *Id.* at 28,619. The agency's modeling found that units for which it was "not cost effective to install controls" would "use other approaches for compliance," such as operating less frequently. *Id.* (describing "dispatch changes"). EPA's reliance on generation shifting in the 2005 Mercury Rule contradicts its claim in this rulemaking that it has "never understood" Section 111 to permit generation-shifting measures, with prior rules under this section limited to controls "that can be applied to individual sources," 84 Fed. Reg. at 32,528.

Many of the parties that now claim this approach is unlawful argued the opposite before this Court in litigation over the 2005 Mercury Rule, explaining that EPA provided "compelling legal justifications for a … cap-and-trade program" under Section 111(d) and that emission trading "maximizes [emission] reductions … while providing [electric generating units] flexibility to achieve those reductions in a cost effective manner." Joint Brief of State Respondent-Intervenors, Industry Respondent-Intervenors, and State Amicus, *New Jersey v. EPA*, 517 F.3d 574 (D.C.

Cir. 2008), 2007 WL 3231261, at *26. And EPA echoed this sentiment in the Clean Power Plan, explaining that because emission "trading is well-established for this industry and has the effect of focusing costs on the affected [sources] for which reducing emissions is most cost-effective," it is a permissible method of implementing Section 111(d). 80 Fed. Reg. at 64,709. Trading is especially useful to reduce emissions of carbon dioxide, EPA further explained, given the pollutant's "global nature … which makes the specific location of emission reductions unimportant." *Id.* at 64,725.

EPA now attempts to minimize the precedential import of the 2005 Mercury Rule by claiming that it relied on technological improvements that "could be applied to or at individual sources" and is thus "fundamentally different than the [Clean Power Plan]." 84 Fed. Reg. at 32,526 n.65. But this mischaracterizes the 2005 Mercury Rule: EPA never contemplated that sources would comply with either of that rule's two phases absent trading, through the installation of control technologies at every regulated source. As EPA explained in the 2005 Mercury Rule, only sources for which "installing controls" would be "cost effective" were expected to comply with the rule's long-term emission cap in that manner, whereas other units were expected not to apply technological improvements but rather "use other approaches for compliance including buying allowances, switching fuels, or making dispatch changes." 70 Fed. Reg. at 28,619.

The 2005 Mercury Rule's near-term emission cap, meanwhile, was set to take effect years before mercury-control technology would be broadly "available for commercial application," and regulated units were expected to comply with those caps through "efforts to reduce emissions of [sulfur dioxide and nitrogen oxides] in accordance with [the Clean Air Interstate Rule]," which, as discussed in Section I.B, *infra*, was a separate EPA cap-and-trade program to regulate those other pollutants. *Id.* at 28,620. Accordingly, regulated entities were expected to comply with both phases of the 2005 Mercury Rule through trading across facilities, not merely technological improvements at individual sources.

In short, the 2005 Mercury Rule was premised on many of the same tools as the Clean Power Plan. And although this Court ultimately struck down the 2005 Mercury Rule, that reversal was on grounds wholly unrelated to EPA's interpretation of Section 111(d). *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Accordingly, EPA's argument that the Clean Power Plan represented a novel interpretation of Section 111(d) falls flat.

B. Emission Trading and Averaging Have Played a Prominent Role in Clean Air Act Regulation for Decades

EPA has also applied emission trading and averaging under other Clean Air Act provisions to set stricter emission limits than were otherwise achievable through technological improvements alone. Like Section 111(d), these other provisions also do not expressly address this issue; additionally, several are related to Section 111(d)

or employ similar language. Specifically, EPA has set standards relying on flexible compliance mechanisms under the following Clean Air Act provisions:

Section 202: EPA has consistently set standards under Section 202, which governs emission standards for new motor vehicles and motor-vehicle engines, that manufacturers can meet through averaging, banking, and trading. *See, e.g.*, 48 Fed. Reg. 33,456 (July 21, 1983). This flexible compliance approach has allowed EPA to set more stringent standards than it otherwise would. In one rulemaking, for instance, the agency explained that the use of averaging, banking, and trading "allows us to set a numerically more stringent … standard than would otherwise be achievable" for the pollutant benzene, and for this "implementation to occur earlier." 72 Fed. Reg. 8,428, 8,431 (Feb. 26, 2007). And as EPA summarized in another rulemaking, averaging, banking, and trading "is an integral part of the standard setting itself, and is not just an add-on to help reduce costs," as it "resolves issues of cost or technical feasibility which might otherwise arise, allowing EPA to set a standard that is numerically more stringent." 77 Fed. Reg. 62,624, 62,788 (Oct. 15, 2012).

Section 202 is particularly instructive for EPA's regulation under Section 111(d) because the two provisions feature similar statutory directives. Specifically, Section 202 calls for standards "reflect[ing] the greatest degree of emission reduction achievable through the *application* of technology." 42 U.S.C. § 7521(a)(3)(A)(i) (emphasis added). The fact that EPA has consistently set

standards under this provision that are collectively achievable through averaging and trading across the source category undercuts the agency's argument that the word "application," which also appears in Section 111, requires emission reductions at "an [i]ndividual [s]ource," 84 Fed. Reg. at 32,524. EPA's argument is also undercut by the fact that this Court upheld the fleet-wide approach as a permissible interpretation of that statutory language, finding that Section 202 is "[l]acking any clear congressional prohibition of averaging." *Nat. Res. Def. Council v. Thomas*, 805 F.2d 410, 425 (D.C. Cir. 1986).

Section 110(a): EPA has also incorporated emission trading in rulemakings under the Good Neighbor Provision, which limits interstate pollution from stationary sources, 42 U.S.C. § 7410(a)(2)(D)(i)(I). In four rulemakings, EPA established statewide emission budgets for the power sector and crafted trading mechanisms for states as a flexible, cost-effective means of meeting their budgets: the 1998 NO_x SIP Call, promulgated during the Clinton Administration; the aforementioned Clean Air Interstate Rule, promulgated in 2005 during the George W. Bush Administration; and the 2011 Cross-State Air Pollution Rule ("Transport Rule") and 2016 Cross-State Air Pollution Rule Update, both promulgated during the Obama Administration. *See* 63 Fed. Reg. 57,356, 57,358–59 (Oct. 27, 1998); 70 Fed. Reg. 25,162, 25,162, 25,229 (May 12, 2005); 76 Fed. Reg. 48,208, 48,210–11 (Aug. 8,

2011); 81 Fed. Reg. 74,504, 74,508–09 (Oct. 26, 2016).[5] These precedents are particularly relevant because Section 111(d) directs EPA to follow "a procedure similar to that provided by section 110" when working with states to set standards for existing sources. 42 U.S.C. § 7411(d)(1).

In designing the Transport Rule—a federal implementation plan imposed upon 27 states—EPA specifically concluded that requiring "direct control[s]" at individual sources "would result in fewer emission reductions and higher costs compared to [a trading-based approach]," 76 Fed. Reg. at 48,272–73, which EPA ultimately adopted, *id.* at 48,210, meaning that the use of trading enabled the agency to set a more stringent standard. In justifying emission budgets under the Transport Rule, furthermore, EPA assumed that regulated entities would comply in part by "increas[ing] dispatch of lower-emitting generation." *Id.* at 48,252. Like the Clean Power Plan, therefore, the Transport Rule based its emission standards on assumptions of trading and generation shifting, producing what the Supreme Court—in upholding that rule as a valid exercise of EPA's discretion—called a "cost-effective allocation of emission reductions" and a "workable[] and equitable interpretation of the Good Neighbor Provision," *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 524 (2014).

[5] This Court remanded the 2016 Update to EPA on unrelated grounds. *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019).

Section 169A: EPA also used emission trading to address regional haze under the Clean Air Act's visibility-protection provision, 42 U.S.C. § 7491. In 2012, EPA approved a trading program proposed by a group of western states and municipalities to address their collective contributions to haze in the Colorado Plateau. 77 Fed. Reg. 73,926, 73,927 (Dec. 12, 2012); 77 Fed. Reg. 74,355, 74,357 (Dec. 14, 2012); 77 Fed. Reg. 70,693, 70,695 (Nov. 27, 2012); 77 Fed. Reg. 71,119, 71,121 (Nov. 29, 2012). In approving the program, EPA found that interstate trading "would result in greater reasonable progress than [installation of the best available retrofit technology]" at individual sources. 77 Fed. Reg. at 73,928. Once again, therefore, the flexibility provided by trading enabled EPA to achieve greater emission reductions than it otherwise would have. *See WildEarth Guardians v. EPA*, 770 F.3d 919, 923 (10th Cir. 2014) (upholding program and EPA's conclusion that "this alternative program [was] better than [the best available retrofit technology] in improving air visibility"). Notably, Section 169A does not expressly authorize the use of trading. This Court has nevertheless found that EPA has "wide discretion" under that provision to allow trading that "ensure[s] reasonable progress" toward meeting national visibility goals. *Util. Air Regulatory Grp. v. EPA*, 471 F.3d 1333, 1340–41 (D.C. Cir. 2006).

Section 211: EPA has also set standards designed to be met collectively when regulating motor-vehicle fuels under Section 211, 42 U.S.C. § 7545. For example,

under the Reagan Administration in 1982, EPA promulgated a standard for the lead content of gasoline that some refineries could satisfy only by obtaining blending components or "lead credits" from others. 47 Fed. Reg. 49,322, 49,324 (Oct. 29, 1982) (explaining that promulgated standards "should generally be achievable . . . through use of the averaging provisions in the regulations"). This Court upheld that approach as reasonable, deferring to EPA's judgment that "small refineries that lack[ed] octane-enhancing equipment [could] purchase high-octane blending components or lead credits from better equipped refineries at reasonable cost." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983). In the Court's view, "[a]lthough lead-credit trading was a new idea, EPA had sufficient reason to believe that a market for lead credits would develop" given the competitive nature of the refining industry and EPA's experience with similar programs. *Id*. at 535–36.

* * *

As these precedents illustrate, the Clean Power Plan simply applied familiar mechanisms that EPA has used for decades under administrations of both parties to set and enforce emission standards. Indeed, "EPA not only allowed beyond-the-fenceline reduction techniques as a compliance mechanism" under numerous Clean Air Act provisions "but also took such techniques into account when determining the stringency of emission limits." *Familiar Territory* at 10,192. EPA is thus

incorrect that the Clean Power Plan was incompatible with "traditional regulations" under the Clean Air Act limited to "the level of an individual facility," 84 Fed. Reg. at 32,523.

II. EPA Mischaracterizes the Clean Air Act's Legislative History and Disregards Its Support for Flexible Approaches

EPA's claim that Section 111(d) prohibits regulation beyond the individual source also relies upon a misunderstanding of the Clean Air Act's legislative history. While EPA opines that "the only interpretation compatible" with the Clean Air Act's history is "that a 'system of emission reduction' is limited to control technologies or techniques that can be integrated into an individual source's design or operation," *id.* at 32,526, closer inspection of that history reveals that Congress sought to grant the agency broader discretion—and, at a minimum, did not unambiguously limit the agency's authority as EPA now argues.

EPA's key error is its contention that "both the Senate and House bills" from the Clean Air Act's 1970 enactment "contemplated only control measures … [at] an individual source," and so the final bill's definition of "standard of performance"—which was inserted at the conference stage and reads much like the current definition in Section 111—must reflect such an approach, *id.* Specifically, EPA mischaracterizes the Senate bill, which, as detailed below, supplied the "means of preventing and controlling air pollution" that was adopted in the final legislation, 80 Fed. Reg. at 64,701 (internal quotation marks omitted).

Under the Senate's approach, EPA was authorized to set standards for stationary sources "reflect[ing] the greatest degree of emission control" achievable through "the latest available control technology, processes, operating methods, or other alternatives." S. 4358, 91st Cong. § 6 (1970). And such "other" alternatives, the Senate report explained, encompassed "[t]he maximum use of available means of preventing and controlling air pollution." S. Rep. No. 91-1196, at 16 (1970). Given that the Senate defined these "other" alternatives in such broad fashion and without any source-focused restriction, EPA's cursory argument that the Senate's use of "'other alternatives' … must be interpreted … to denote measures that can be applied to individual sources," 84 Fed. Reg. at 32,526 n.61, rings hollow.

And because EPA misreads the Senate bill, its interpretation of the Clean Air Act's history is unpersuasive. Specifically, while EPA stresses the House bill's technological approach, *see, e.g.*, *id*. at 32,525—which would have required new sources to "prevent and control [their] emissions to the fullest extent compatible with the available technology and economic feasibility," H.R. 17255, 91st Cong. § 5 (1970)—it disregards the significance of the final legislation's omission of any restriction for new or existing sources under Section 111 to technological or other source-focused improvements. That omission signifies a rejection of the House bill's requirement that emission standards be "compatible with the available technology," *id.*, especially once the Senate bill is properly understood as granting EPA broad

authority beyond technological or source-focused approaches. The House bill in fact focused only on new sources and "did not provide for the direct regulation of existing sources," 80 Fed. Reg. at 64,701 n.238, further indicating that the final legislation—which, like the Senate bill, permitted expansive regulation of both new and existing stationary sources—broadly reflected the Senate's approach to emission control.

As EPA recognized in the Clean Power Plan, when both the House and Senate bills are properly understood, Section 111's authorization for EPA to apply "the best system of emission reduction" that "tak[es] into account the cost of achieving such reduction," 42 U.S.C. § 111(a)(1), is best seen as "blend[ing] the broad spirit of" the Senate bill's emission controls "with the cost concerns identified in [the House bill]." 80 Fed. Reg. at 64,764; *see also* H.R. 17255, 91st Cong. § 5 (emphasizing "economic feasibility" in emission standards). Indeed, as explained by Sen. Edmund Muskie, the leading Senate sponsor of the bill, the "system of emission reduction" incorporated into the conference bill authorizes standards "based on the latest available control technology, processes, operating methods, and other alternatives," echoing the Senate's approach. 80 Fed. Reg. at 64,764 & n.485 (citing Sen. Muskie, S. Consideration of H.R. Rep. No. 91-1783 (Dec. 17, 1970) (Conf. Rep.)). This history therefore "strongly suggests that Congress intended to authorize the EPA to consider a wide range of measures in calculating a standard of performance for stationary sources" consistent with the Senate bill's approach, and "[a]t a minimum"

provides "no indication that Congress intended to preclude [the] measures" used in the Clean Power Plan. 80 Fed. Reg. at 64,764.

Additionally, while EPA narrowly focuses on the Clean Air Act's enactment, the law's two subsequent amendments further undermine the agency's interpretation. First, in 1977, Congress narrowed the scope of EPA's authority under Section 111 to require the "best *technological system* of continuous emission reduction" for new sources while maintaining EPA's flexibility to regulate existing sources based on the "best *system* of continuous emission reduction." *Id.* at 64,764–65 (emphasis added). Then, in 1990, Congress eliminated this restriction, reinstating EPA's broad authority over both new and existing sources without limitation to "technological system[s]." *Id.* at 64,765–67. Congress's explicit restriction of EPA's authority over new sources to "technological system[s]" in the 1977 amendments—coupled with its later removal of that provision—provides further support that the agency's authority over existing sources contains no comparable restriction.

Accordingly, by ignoring relevant statutory developments, EPA fails to appreciate its wide latitude to select the "best system of emission reduction" under Section 111(d)—including the measures adopted in the Clean Power Plan—and arbitrarily limits itself to the technological measures mandated by the ACE Rule.

III. EPA Irrationally Chooses an Interpretation of "Best System of Emission Reduction" That Will Cause Premature Deaths and Other Substantial Social Harms

In addition to misconstruing regulatory precedent and legislative history, EPA unreasonably concludes that the Clean Air Act precludes application of a regulatory system that would be highly beneficial for society.

As EPA explained both when it issued the Clean Power Plan and when it proposed to repeal that rule, the approaches embodied in the Clean Power Plan are highly effective at reducing pollution in a cost-efficient manner, and thus yield greater health and welfare benefits per compliance dollar than regulatory alternatives that apply controls at individual sources. Indeed, the flexible compliance mechanisms used in the Clean Power Plan not only reduce pollution more cheaply than the ACE Rule's source-focused controls, as EPA's own analyses show,[6] but can also achieve a substantially greater *volume* of emission reduction than the ACE Rule—including reductions well beyond those required in the Clean Power Plan.[7]

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[6] *Compare* EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule ES-7, ES-9 (2015) (summarizing projected emission reductions and compliance costs under mass-based compliance model and revealing average abatement cost per ton of carbon dioxide in 2030 of $12.35) *with* EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units ES-5 to 6 (2019) ("ACE Rule RIA") (showing average abatement cost for 2030 of $25.45 per ton).

[7] *See, e.g.*, Environmental Defense Fund, Comment Letter 10–11 (Oct. 31, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24419 (forecasting 48 percent carbon dioxide emission reduction below 2005 levels

EPA's position that Section 111(d)'s "best system of emission reduction" forecloses such approaches—thereby imposing substantial societal harm and preventing the agency from securing maximum emission reductions considering cost—ignores the "golden rule[] of statutory interpretation … that unreasonableness of the result produced by one among alternative possible interpretations … is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *United States v. Ripley*, 926 F.2d 440, 448 (5th Cir. 1991) (internal quotation marks omitted). Indeed, agencies must construe statutes "to avoid illogical or unreasonable results," *Brock*, 816 F.2d at 766, and so EPA's conclusion that Section 111(d) requires regulation that will "do[] significantly more harm than good," *Michigan*, 135 S. Ct. at 2707 (interpreting "appropriate")—a normally "unreasonable" position, *id.* at 2708—cannot stand.

While EPA's regulatory impact analysis for the ACE Rule ("ACE Rule RIA") makes the unprecedented claim that repealing the Clean Power Plan would cause no impact on emissions, this "unsupported supposition[]" is not owed deference and cannot save the agency's interpretation. *See McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). To justify this

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by 2030 through use of updated emission limits under Section 111(d) and full trading); Natural Resources Defense Council, Comment Letter 20 (Oct. 31, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24271 (projecting 60 percent decrease from 2005 levels by 2030).

claim, EPA dubiously predicts near-universal participation in large multistate trading programs to allow underperforming states to meet their Clean Power Plan targets without any additional emission reductions. *See* ACE Rule RIA at 2-24. But as detailed below, this heroic assumption is implausible.

A. EPA's Prior Analyses All Concluded that the Clean Power Plan Would Yield Considerable Health and Welfare Benefits

Until issuing the ACE Rule, EPA's consistent position under both the Obama and Trump Administrations was that the Clean Power Plan would produce public-health, environmental, and productivity benefits that vastly exceeded its compliance costs—and thus, that repealing that rule would cause considerable societal harm.

As EPA found when promulgating the Clean Power Plan, the rule was expected to "reduc[e] emissions of [carbon dioxide] and criteria pollutant[s]" such as particulate matter and sulfur dioxide, thereby mitigating the impacts of climate change and producing other "health and welfare benefits." 80 Fed. Reg. at 64,928. To be sure, as demand in recent years has shifted away from coal and toward natural gas and renewables due to market developments, national power-sector emissions have declined and thus the Clean Power Plan's emission guidelines would yield a significantly smaller decrease than initially projected. *See* ACE Rule RIA at 2-3. Nonetheless, as EPA has continued to find, the Clean Power Plan would still play an important role in reducing emissions of carbon dioxide and other criteria pollutants, and would thus continue to yield important societal benefits.

Indeed, when the Trump Administration proposed the ACE Rule—just ten months before its finalization—it concluded that the Clean Power Plan would yield considerable public-health and welfare benefits, and that the harms from repealing the rule would greatly exceed any potential benefits of the proposed replacement. In fact, EPA found that the proposed version of the ACE Rule would result in $3.7–$10.8 billion in net costs in the year 2030 (with similar net costs in other years). Proposed Rule RIA at ES-17. These costs included up to 1,630 premature deaths in 2030 due to higher emissions of ozone and particulate matter, along with up to 120,000 cases of exacerbated asthma and 48,000 lost work days. *Id.* at 4-33. And by substantially increasing greenhouse gas emissions, the agency projected that its proposed actions would produce $2.5–$3.8 billion in total climate costs in 2030 alone. *Id.* at 7-8 (using central three percent discount rate).

As these analyses demonstrate, the Clean Power Plan would have produced important health and welfare benefits—even taking into account recent power-sector developments—and thus repealing the rule and replacing it with a less effective system of emission reduction is very harmful. EPA's conclusion that the Clean Air Act requires such societal harm violates the "golden rule[] of statutory interpretation" that statutes should be construed to favor the "reasonable result," *Ripley*, 926 F.2d at 448 (internal quotation marks omitted). Yet EPA never even considers this statutory canon, nor, as detailed above, can it point to any "clear

intent" of Congress that may render such canon inapplicable, *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1077 (7th Cir. 2013) (noting that courts normally "favor the more reasonable result").

B. EPA's Novel Position that Repealing the Clean Power Plan Would Not Increase Emissions Is Unsupported and Unreasonable

EPA reversed its position just ten months after publishing the dire analysis of its proposal, suddenly finding—contrary to all previous analyses—that repealing the Clean Power Plan would "likely" produce "no change in emissions and therefore no cost savings or changes in health disbenefits." ACE Rule RIA at 2-1. But this conclusion is premised on "sheer speculation" rather than "logic and evidence," and so does not merit deference. *Sorenson v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (internal quotation marks omitted).

EPA's conclusion rests in part on recent developments in the power sector, but those developments alone are insufficient to justify EPA's assumption that the Clean Power Plan would have no impact. As noted above, while recent shifts in the power sector away from coal have resulted in a decrease in emissions, those declines alone do not meet the Clean Power Plan's mandates. Indeed, EPA's own analysis of the ACE Rule finds that eighteen states are not on track to meet their Clean Power Plan targets without additional emission reductions beyond their current trajectory. *See* ACE Rule RIA at 2-31. As a result, the agency further admits, implementation of the Clean Power Plan would continue to result in substantial emission decreases—

between 3.0 and 5.8 percent nationally by 2035 for carbon dioxide, sulfur dioxide, nitrogen oxides, and mercury—so long as interstate trading is limited. ACE Rule RIA at 2-37.

Yet EPA assumes away these considerable impacts by speculating that nearly all states would enter large interstate trading programs to comply with the Clean Power Plan, with emission caps set at the same aggregate levels as the Clean Power Plan's targets. In effect, therefore, EPA assumes that states with allowance surpluses would absorb the shortfalls of states with deficits, allowing those states to meet their Clean Power Plan obligations without any additional emission reductions. *Id.* at 2-19 to 28. This assumption breaks with EPA's prior analyses: In analyzing both the Clean Power Plan and the regulatory proposal for the ACE Rule, EPA assumed that while emission trading would occur within individual states, there would be no interstate trading. ACE Rule RIA at 2-3 (noting that the agency previously modeled the Clean Power Plan "with no interstate trading").

EPA's current assumption would require nearly every state that has reduced its emissions to voluntarily render those reductions illusory by allowing nearby states to increase their emissions relative to the Clean Power Plan's requirements. This is implausible. Many states have taken affirmative steps to reduce their emissions in the name of curbing climate change, and—through law, practice, and public statements—have expressed a strong preference not to relinquish those gains.

EPA's theory, which assumes that nearly all such states would voluntarily enable neighboring states to evade otherwise-required emission reductions, lacks any "reasonable concurrence … [with] reality," and so EPA's reliance on it is not "reasonable in context." *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 69 (D.C. Cir. 2017), *modified on reh'g*, 883 F.3d 918 (2018).

Indeed, several states with stringent carbon-emission standards expressly limit emission trading with states lacking such standards. California, which passed a series of measures to reduce its carbon footprint in order to help curb the "serious threat" from climate change and "encourag[e] other states" to undertake similar reductions, Cal. Health & Safety Code § 38501, permits linkage only with cap-and-trade programs with requirements "equivalent to or stricter than" its own, Cal. Gov't Code § 12894(f)(1). Similarly, before linking with another state's trading program, Washington must consider that program's "[c]ompatibility" with Washington's own "requirements," Wash. Rev. Code § 19.405.130(1)(b), which call for the state's electricity supply to be carbon-neutral by 2030, *id.* § 19.405.010(2). And Colorado law limits the state's flexibility to link with states lacking "sufficient rigor" in their clean-energy programs. Colo. Rev. Stat. 25-7-105(1)(e)(V). In spite of these restrictions, EPA implausibly assumes that Washington and Colorado will link with nearby states lacking comparable requirements, such as Idaho and Montana. ACE Rule RIA at 2-24.

In addition to these express limitations, numerous other states have, through the Regional Greenhouse Gas Initiative ("RGGI"), established a practice of linking only with states that commit to substantial emission reductions. Indeed, because the RGGI emission cap has declined on a yearly basis, new states that are admitted into the coalition must cut their emissions in line with the reductions of other participating states.[8] In contrast to this established practice, EPA assumes that one current and two prospective RGGI members—New Jersey, Pennsylvania,[9] and Virginia,[10] respectively—will break with RGGI to link with states that have not taken comparable steps to reduce their emissions, ACE Rule RIA at 2-24 (including West Virginia, which has the greatest shortfall from its Clean Power Plan target, *id.* at 2-24, 2-31).

Still more states, both through their ambitious climate targets and public comments opposing EPA's regulatory proposal, have expressed a strong commitment to reducing greenhouse gas emissions—a commitment that would be undermined by trading in the manner EPA assumes. In fact, numerous states,

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[8] *See* The Regional Greenhouse Gas Initiative, Elements of RGGI (last visited Apr. 23, 2020), https://www.rggi.org/program-overview-and-design/elements (showing declining annual cap levels).

[9] Pennsylvania Governor Tom Wolf signed an executive order in October 2019 committing the state to joining RGGI. *See* Pa. Exec. Order No. 2019-07 (Oct. 3, 2019).

[10] Timothy Biller, *Virginia Enacts Aggressive Clean Energy Laws*, The Nat'l L. R. (Apr. 17, 2020), https://www.natlawreview.com/article/virginia-enacts-aggressive-clean-energy-laws.

including Maine, Nevada, New York, and New Mexico, have recently enacted legislation requiring their electricity producers to eliminate or sharply reduce emissions.[11] And nineteen states (most of which now challenge the ACE Rule) filed comments opposing the Clean Power Plan repeal, emphasizing that the "harms attributable to climate change will only worsen in the future unless we act now to substantially cut emissions of carbon dioxide and other greenhouse gases."[12] Yet despite these states' clear priority to substantially cut emissions, EPA assumes, without evidence, that nearly all of them would help other states avoid reducing their own emissions by entering the interstate programs that the agency supposes.

These assumptions are fanciful. Because this court only defers to an agency's "predictive judgments … so long as they are reasonable," *Burlington N. & Santa Fe Ry. v. STB*, 526 F.3d 770, 781 (D.C. Cir. 2008) (internal quotation marks omitted), EPA's assumptions about interstate trading—and, accordingly, its conclusion that the Clean Power Plan would result in no emission reductions—cannot save the agency's conclusion that the Clean Air Act requires imposition of a system that,

[11] Brad Plumer, *Blue States Roll Out Aggressive Climate Strategies. Red States Keep to the Sidelines*. N.Y. Times (June 21, 2019), https://www.nytimes.com/2019/06/21/climate/states-climate-change.html. All of the four states listed above are on track to meet their Clean Power Plan targets. *See* ACE Rule RIA at 2-31.

[12] New York et al., Comment Letter 2, 37 (Apr. 26, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-20778.

according to EPA's evidence-based projections, would inflict considerable net social harm.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions.

DATED: April 23, 2020

Respectfully submitted,

/s/ Richard L. Revesz_____
Richard L. Revesz
Jack Lienke
Max Sarinsky
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Third Floor
New York, NY 10012
(212) 992-8932
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae In Support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners contains 6,474 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

DATED: April 23, 2020

Respectfully submitted,

/s/ Richard L. Revesz_____
Richard L. Revesz
Jack Lienke
Max Sarinsky
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Third Floor
New York, NY 10012
(212) 992-8932
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2020, a true and correct copy of the foregoing Final Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: April 23, 2020

Respectfully submitted,

/s/ Richard L. Revesz_____

Richard L. Revesz
Jack Lienke
Max Sarinsky
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, Third Floor
New York, NY 10012
(212) 992-8932
richard.revesz@nyu.edu
Counsel for Amicus Curiae
Institute for Policy Integrity