ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*,	§	
	§	
Petitioners,	§	
	§	
v.	§	No. 19-1140
	§	and consolidated cases
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	§	
	§	
Respondents.	§	

BRIEF OF PETITIONERS ROBINSON ENTERPRISES, INC., ET AL.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), petitioners Robinson Enterprises, Inc., *et al.*, (the "Robinson Petitioners") state as follows:

The Robinson Petitioners challenge the final action of Respondents published at 84 Fed. Reg. 32520 July 8, 2019, entitled "*Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations,*" (the "ACE Rule").

A. Parties, Intervenors, and *Amici*

PETITIONERS

Case No. 19-1175 (instant case)

Robinson Enterprises, Inc.; Nuckles Oil Company, Inc. dba Merit Oil Company; Construction Industry Air Quality Coalition; Liberty Packing Company LLC; Dalton Trucking, Inc.; Norman R. "Skip" Brown; Joanne Brown; the Competitive Enterprise Institute; and the Texas Public Policy Foundation

Case No. 19-1140 (lead)

American Lung Association and American Public Health Association

Case No. 19-1165

State of New York, State of California, State of Colorado, State of Connecticut, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, State of Wisconsin, District of Columbia, City of Boulder (CO), City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, and the City of South Miami (FL)

Case No. 19-1166

Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club

Case No. 19-1173

Chesapeake Bay Foundation, Inc.

Case No. 19-1176

Westmoreland Mining Holdings LLC

Case No. 19-1177

City and County of Denver (CO)

Case No. 19-1179

The North American Coal Corporation

Case No. 19-1185

Biogenic CO2 Coalition

Case No. 19-1186

Advanced Energy Economy

Case No. 19-1187

American Wind Energy Association, Solar Energy Industries Association

Case No. 19-1188

Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District

RESPONDENTS

United States Environmental Protection Agency, and, in case numbers 19-1140, 19-1175, 19-1176, 19-1179, 19-1185, Andrew Wheeler, Administrator of the United States Environmental Protection Agency

INTERVENORS

AEP Generating Company, AEP Generation Resources Inc., America's Power (formerly known as the American Coalition for Clean Coal Electricity), Appalachian Power Company, Chamber of Commerce of the United States of America, Indiana Michigan Power Company, Kentucky Power Company, Murray Energy Corporation, National Mining Association, National Rural Electric Cooperative Association, Public Service Company of Oklahoma, Southwestern Electric Power Company, Westmoreland Mining Holdings LLC, Wheeling Power Company, State of North Dakota, Indiana Energy Association Indiana Utility Group, State of West Virginia, State of Alabama, State of Alaska, State of Arkansas, State of Georgia, State of Indiana, State of Kansas, State of Kentucky, by and through Governor Matthew G. Bevin, State of Louisiana, State of Missouri, State of Montana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Wyoming, Phil Bryant, Governor of the State of Mississippi, and the Mississippi Public Service Commission, International Brotherhood of Electrical Workers, AFL-CIO, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, United Mine Workers of America, AFL-CIO, State of Nevada, Basin Electric Power Cooperative, State of New York, State of California, State of Colorado, State of Connecticut, State of Delaware, State of

Hawaii, State of Illinois, State of Maine, State of Maryland, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, the District of Columbia, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, City and County of Denver (CO), PowerSouth Energy Cooperative, Nevada Gold Mines LLC and Newmont Nevada Energy Investment LLC, Georgia Power Company, American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club

AMICI

National Association of Home Builders of the United States; Maximillian Auffhammer, Phillip Duffy, Kenneth Gillingham, Lawrence H. Goulder, James Stock, Gernot Wagner and the Union of Concerned Scientists; Institute for Policy Integrity of New York University School of Law; National Parks Conservation Association and Coalition to Protect America's National Parks; Thomas C. Jorling;

The American Thoracic Society, The American Academy of Allergy, Asthma & Immunology, The American College of Occupational and Environmental Medicine, and The National Medical Association; Professors of Administrative Law Todd Aagaard, Blake Emerson, Daniel Farber, Kathryn Kovacs, Richard Lazarus, Ronald Levin, and Nina Mendelson.

B. Rulings Under Review

These petitions for review challenge the Respondents' regulation under the Clean Air Act known as the ACE Rule, published in 84 Fed. Reg. 32520 (July 8, 2019).

C. Related Cases

To Robinson Petitioners' knowledge, all petitions challenging the ACE Rule have been consolidated at Case No. 19-1140.

In addition, Respondent United States Environmental Protection Agency promulgated a separate regulation for new and modified electric utility generating units (the "2015 New Units Rule"), which is being challenged in *State of North Dakota v. EPA*, No. 15-1381 (D.C. Cir.) ("*North Dakota*"), and at least two of the issues that the Robinson Petitioners raise in this case have also been raised in *North Dakota*, namely, that the 2015 New Units Rule failed to make a proper endangerment finding and that new and modified electric utility generating units cannot be regulated under Section 111 of the Clean Air Act because such units are already

regulated under Section 112 of the Clean Air Act. Proceedings in *North Dakota* are currently being held in abeyance, as EPA has proposed major amendments to the 2015 New Units Rule at issue in that case. *See* 83 Fed. Reg. 65424 (Dec. 20, 2018).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the petitioners in Case No. 19-1175 provide the following disclosures:

Robinson Enterprises, Inc. is a California corporation engaged in various businesses, including forest products and fuels. Robinson has no parent companies. No publicly held corporation has 10% or greater ownership in Robinson.

Nuckles Oil Co., Inc. dba Merit Oil Company ("Merit Oil Company") is a California corporation and is a petroleum jobber, wholesaler, and distributor. Merit Oil Company has no parent companies. No publicly held corporation has 10% or greater ownership in Merit Oil Company.

Construction Industry Air Quality Coalition ("CIAQC") is a nonprofit California trade association representing the interests of other California nonprofit trade associations and their members whose air emissions are regulated by California state, regional, and local regulations, as well as federal regulations. CIAQC has no parent companies. No publicly held corporation has 10% or greater ownership in CIAQC.

Liberty Packing Company LLC ("Liberty") is a California limited liability company. Liberty has no parent companies. No publicly held corporation has 10% or greater ownership in Liberty.

Dalton Trucking, Inc. is a California corporation engaged in the business of operating and leasing loaders, dozers, blades, and water trucks and performs specialized services in open top bulk transportation, lowbed, general freight on flatbeds and vans, as well as rail, international, and 3PL services. Dalton Trucking, Inc. has no parent companies. No publicly held corporation has 10% or greater ownership in Dalton Trucking, Inc.

Norman R. ("Skip") Brown is an individual who resides in California.

Joanne Brown is an individual who resides in California

Competitive Enterprise Institute ("CEI") is a nonprofit, nonpartisan organization headquartered and incorporated in the District of Columbia. CEI is dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI's focus is on economic overregulation in areas ranging from technology and finance to energy and the environment.

Texas Public Policy Foundation ("TPPF") is a nonprofit, nonpartisan organization based in Austin, Texas. Among other things, TPPF's mission is to promote, defend, and ensure liberty, personal responsibility, property rights, criminal justice reform, greater educational opportunities for all, a balanced approach to environmental regulation, free speech, state's rights under the Tenth Amendment, energy sufficiency, and free enterprise in Texas and the United States by educating policymakers and informing the public policy debate with

academically sound research and outreach, and providing counseling, referral, and advocacy in support of its mission.

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GLOSSARY OF ABBREVIATIONS

ACE Rule	The Affordable Clean Energy Rule
CAA	The Clean Air Act
CAF	Center for the American Future
CEI	Competitive Enterprise Institute
CPP	The Clean Power Plan
CO2	Carbon Dioxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NSPS	New Source Performance Standards
PM2.5	Fine Particulate Matter
PM10	Coarse Particulate Matter
SIP	State Implementation Plan
TPPF	Texas Public Policy Foundation

STATEMENT OF JURISDICTION

These consolidated petitions seek review of the United States Environmental Protection Agency's ("EPA's") final agency action known as the ACE Rule, published at 84 Fed. Reg. 32520 (July 8, 2019).

On September 5, 2019, Petitioners in Case No. 19-1175, Robinson Enterprises, Inc. *et al.* (the "Robinson Petitioners"), filed their Petition for Review within the requisite 60-day period under Clean Air Act Section 307(b)(1), 42 U.S.C. § 7607(b)(1), and this Court has jurisdiction under that provision as well as under 5 U.S.C. §§ 702, 706.

STATEMENT OF ISSUES IN CASE NO. 19-1175

1.) Whether EPA impermissibly bypassed the required procedures set forth in Sections 108-110 of the Clean Air Act when it promulgated the ACE Rule.

2.) Whether EPA violated the Clean Air Act by failing to make a proper endangerment finding to support the ACE Rule.

3.) Whether EPA violated the Clean Air Act by impermissibly regulating emissions from electric utility generating units pursuant to Section 111 when emissions from such sources were already regulated under Section 112.

STATUTES AND REGULATIONS

Pertinent statutes, regulations, and related legislative and regulatory history are in the Addendum.

STATEMENT OF THE CASE AND FACTS

EPA's ACE Rule replaces the Clean Power Plan, 80 Fed. Reg. 64510 (October 23, 2015) ("CPP"), a regulation promulgated under Section 111(d) of the Clean Air Act (the "Act" or "CAA"), 42 U.S.C. § 7411(d). The CPP was challenged in this Court by numerous petitioners in *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir., October 23, 2015). The CPP regulated emissions of carbon dioxide from electric utility generating units by requiring extensive changes to the nation's energy grid.

Because the ACE Rule replaced the CPP, this Court issued an Order on September 17, 2019 (Doc. 1806952), dismissing the petitions consolidated in No. 15-1363 as moot. While circumscribing the scope of the CPP, the ACE Rule continues to regulate under Section 111(d) carbon dioxide emissions of existing electric utility generating units.

Because carbon dioxide is a ubiquitous substance emitted from numerous, diverse, man-made, and natural sources, Robinson Petitioners take the position that it is impermissible for EPA to regulate such emissions under the Act without first complying with the procedural requirements of Sections 108-110, leading to the establishment of National Ambient Air Quality Standards ("NAAQS") for carbon dioxide and requiring states to develop State Implementation Plans ("SIPs"). By using Section 111 to regulate carbon dioxide emissions solely from one source

category, namely, electric utility generating units, EPA impermissibly circumvented the NAAQS process mandated by Sections 108-110.

Furthermore, Robinson Petitioners take the position that EPA did not have the authority to regulate carbon dioxide emissions from existing electric utility generating units under Section 111(d) of the Act because EPA failed to make the requisite endangerment finding under Section 111(b) and because such units were already regulated under Section 112.

STANDARD OF REVIEW

The Court sets aside agency action or inaction when: (1) the agency fails to comply with a nondiscretionary statutory duty, *Bennett v. Spear*, 520 U.S. 154, 172 (1997); (2) the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law," 5 U.S.C. § 706, 42 U.S.C. § 7607(d)(9); or (3) the action contradicts congressional intent, *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

SUMMARY OF ARGUMENT

The ACE Rule violates the Clean Air Act for three reasons. First, Sections 108-110 of the Act set forth the regulatory path Congress prescribed for air pollutants in the "ambient air" emitted from "numerous or diverse" sources that "endanger"

human health or welfare. 42 U.S.C. § 7408(a)(1). EPA must follow NAAQS procedures to regulate emissions of such air pollutants from stationary sources.

Carbon dioxide is a ubiquitous substance emitted into the ambient air from numerous and diverse natural and man-made sources, thereby fitting the NAAQS regulatory path precisely. Rather than setting NAAQS for carbon dioxide emissions, EPA promulgated carbon dioxide emissions standards for *one* source category, namely, electric utility generating units, under Section 111(d). In so doing, EPA impermissibly failed to follow the Act's mandatory procedural requirements under Section 108-110.

Second, EPA impermissibly failed to make a proper endangerment finding for carbon dioxide emissions to support the ACE Rule.

Third, because emissions from electric utility generating units were regulated under Section 112 when the ACE Rule was promulgated, the Clean Air Act explicitly forbade EPA from regulating emissions from those same sources under Section 111.

STANDING

Petitioner Texas Public Policy Foundation ("TPPF") is a nonprofit, nonpartisan organization. Among other things, TPPF's mission is to promote, defend, and ensure liberty, personal responsibility, property rights, criminal justice reform, a balanced approach to environmental regulation, and free enterprise in

Texas and the United States by educating policymakers, informing the public policy debate with academically sound research and outreach, and providing counseling, referral, and advocacy in support of its mission. Sindelar Decl. ¶ 5.

The Center for the American Future ("CAF") is TPPF's legal arm, which is staffed by six attorneys who provide legal counseling, referral, and advocacy services to individuals and businesses injured by federal, state, or local government overreach. In addition, CAF provides legal support in connection with all of TPPF's activities. *Id*. ¶ 7. CAF attorneys litigate cases on behalf of TPPF clients in state and federal courts throughout the Nation seeking to protect individual and economic liberties. CAF attorneys also routinely counsel clients on how to defend their liberties. When necessary, CAF attorneys refer clients to private counsel or technical consultants such as engineers, surveyors, or scientists with the required expertise. *Id*. at ¶ 8.

EPA's promulgation of the ACE Rule and its predecessor the CPP have frustrated and impeded CAF's efforts to assist its clients in dealing with government overreach in areas such as protection of constitutional rights and economic liberties, including CAF's counseling, referral, and advocacy activities. For example, the challenged regulations have caused a drain on CAF's resources because CAF has had to divert significant time, effort, and resources from activities in the area of property rights and wetlands regulation in order to provide counseling, referral, and

advocacy services to those who are forced to deal with the requirements imposed by the ACE Rule and its predecessor the CPP, which have threatened individual liberty and economic freedom. This drain on CAF's resources is directly attributable to EPA's promulgation of the ACE Rule and its predecessor the CPP. *Id*. at ¶ 9.

By diverting CAF's limited resources, EPA's ACE and CPP rules have limited CAF's ability to provide legal support to TPPF's other major initiatives, thereby directly injuring TPPF's ability to fully implement those other initiatives such as immigration reform, criminal justice reform, health care policy, and local governance. TPPF's ability to engage in all aspects of its mission, through its various initiatives and centers, is harmed by the ACE Rule because the resources of CAF have been drained by the rule, thereby limiting TPPF's ability to fully engage in developing legal solutions to other issues that are essential to TPPF's mission. *Id*. at ¶ ¶ 10-11.

Federal regulation of carbon dioxide under the ACE Rule is of keen concern to TPPF because carbon dioxide is a substance that is virtually everywhere and in everything. Because air emissions of carbon dioxide occur in every sector of the Nation's economy, EPA's efforts to regulate carbon dioxide in the energy sector under the ACE Rule opens the floodgates for EPA to regulate every aspect of economic life in the Nation under the guise of regulating carbon dioxide emissions, thereby threatening personal liberties, property rights, and economic freedom of

Americans. Accordingly, TPPF has already expended, and will continue to expend, substantial resources to combat the current and future effects of the ACE Rule, thereby continuing to drain resources that TPPF would otherwise use to further its other essential work. *Id*. at ¶ ¶ 12-14.

If the ACE Rule is vacated, the injuries described above to CAF and TPPF will no longer be present. *Id*. at ¶ 15. Accordingly, Petitioner TPPF has suffered injury-in-fact traceable to the ACE Rule and redressable by this Court.

Petitioner Competitive Enterprise Institute ("CEI") is a nonprofit, nonpartisan public policy organization headquartered and incorporated in the District of Columbia dedicated to advancing the principles of limited government, free enterprise, and individual liberty, with a focus on economic overregulation in areas ranging from technology and finance to energy and the environment. Lassman Decl. ¶ 3. To operate its offices, CEI uses electricity supplied by Pepco, a unit of Exelon Corporation, which is a major energy provider in the United States. Pepco obtains approximately 28.5% of its electricity from coal-fired plants, which are the type of energy producing units that are heavily impacted by the ACE Rule. *Id.* at ¶ 4.

In its Regulatory Impact Analysis for the ACE Rule, EPA estimated that the rule would increase retail electricity prices. Any increase in CEI's electricity costs attributable to the ACE Rule, regardless of the amount, is a direct economic injury

to CEI redressable by a binding judgment that the ACE Rule was impermissibly promulgated by EPA. *Id.* at ¶ ¶ 5-6.

Standing requirements are met when any of the Robinson Petitioners meets them. *See e.g., Americans for Safe Access v. Drug Enforcement Administration*, 706 F.3d 438, 443 (D.C. Cir. 2013); D.C. Circuit Rule 28(a)(7).

ARGUMENT

I. EPA IMPERMISSIBLY BYPASSED THE REQUIRED PROCEDURES SET FORTH IN SECTIONS 108-110 OF THE CLEAN AIR ACT WHEN IT PROMULGATED THE ACE RULE.

A. EPA Cannot Use Section 111's Supplemental Authority Instead of NAAQS to Regulate Carbon Dioxide Emissions.

The Clean Air Act establishes a complex regulatory master plan through distinct administrative programs targeted at various sources of air pollution. Stationary sources are regulated under Title I of the Act, while mobile sources are regulated under Title II.

EPA promulgated the ACE Rule, and its predecessor, the CPP, under Title I, which contains three interweaving regulatory programs, each with its own purposes, triggers, and procedures.

First, Title I authorizes EPA to establish NAAQS under Sections 108-110, which prescribe maximum, uniform ambient air concentrations of certain air pollutants throughout the nation. 42 U.S.C. §§ 7408-7410.

EPA has set NAAQS for six air pollutants, known as "criteria pollutants": lead, nitrogen dioxide, particulate matter (including PM10 and PM2.5), carbon monoxide, ozone, and sulfur dioxide. 40 C.F.R. §§ 50.2-50.16. A "criteria pollutant" is one which "endangers" public health or welfare, is emitted from "numerous or diverse" sources and is present in the "ambient air." For such air pollutants, EPA issues air quality criteria under Section 108. 42 U.S.C. § 7408(a)(1)-(4). Based on those criteria, EPA promulgates NAAQS under Section 109. 42 U.S.C. § 7409(a)(1). States must then issue SIPs under Section 110 to ensure that NAAQS are attained for criteria pollutants within their jurisdictions. The NAAQS program is "the engine that drives nearly all of Title I." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Second, Title I contains a supplemental source-performance regulatory program under Section 111 by which EPA regulates air emissions from specific categories of sources for which a unique, source-category endangerment finding is made. 42 U.S.C. §7411(b)(1)(A). Section 111(b) regulates designated new and modified sources under the New Source Performance Standards ("NSPS") while Section 111(d) regulates designated existing sources. *Id.* at §7411(d)(1). As such, Section 111 emission source controls supplement but do not, and cannot, supplant NAAQS. *See Nat'l Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 327 (2d Cir. 1976) (there is "*no* support to appellant's position that the EPA Administrator may

order emission source controls *instead* of promulgating ambient air quality standards for substances, such as lead, which meet the criteria of §§ 108(a)(1)(A) and (B)") (citing *Train v. Nat'l Res. Def. Council*, 421 U.S. 60, 79 n.16 (1975) and *Union Electric Co. v. EPA*, 427 U.S. 246, 258 (1976) (emphasis added)). This Court and the Ninth Circuit agree. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 847 (D.C. Cir. 1972) (EPA "required" to use NAAQS to regulate air pollutants meeting Section 108's criteria); *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1201-02 (9th Cir. 1988) (citing *Train*, 545 F.2d 322-24) (use of NAAQS for air pollutants meeting Section 108's criteria is mandatory); *see also Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1136 (D.C. Cir. 1980).

Third, Title I includes Section 112, which authorizes EPA to impose strict national standards regulating certain air pollutants and source categories deemed hazardous. 42 U.S.C. § 7412.

Crucially, the Act states that EPA "shall" regulate under the NAAQS program air pollutants "the presence of which in the ambient air results from numerous or diverse" sources where such air pollutants "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1). Accordingly, the requirement to regulate under the NAAQS program the *types* of air pollutants described in Section 108 is mandatory and not discretionary. *See Am. Trucking Ass'ns v. U.S. EPA*, 175 F.3d 1027, 1033 (D.C. Cir.

1999) (overruled on other grounds by *Whitman*, 531 U.S. at 473-76); *see also Kennecott*, 462 F. 2d at 847.

Because carbon dioxide is a ubiquitous substance in the ambient air emitted by numerous or diverse sources, EPA impermissibly circumvented the required procedures set forth in the NAAQS program by promulgating the ACE Rule under the supplemental regulatory program of Section 111. *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 319 (2014) (*"UARG")* (EPA's authority under the CAA is limited to regulating "only those [air pollutants] that may sensibly be encompassed *within the particular regulatory program.*") (emphasis added); *see also Train*, 545 F.2d at 327 (source-specific controls under Section 111 are a supplement to and not a replacement for the NAAQS program).

Accordingly, EPA's promulgation of the ACE Rule to govern carbon dioxide emissions under Section 111 is contrary to the design and structure of the Act. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (agency interpretation that is inconsistent "with the design and structure of the statute as a whole" is illegitimate); *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (internal citations and quotation marks omitted). EPA may not cherry-pick particular terms of the

CAA to support its preferred avenue of regulation where, as here, that avenue is foreclosed by the Act's language and architecture. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) ("In expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole law.") (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)).

And the language of Section 108 is unambiguous. Emissions from "numerous or diverse" sources that "endanger" human health or welfare "shall" be regulated as NAAQS pollutants. 42 U.S.C. § 7408(a)(1). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

Accordingly, carbon dioxide emissions were illegitimately regulated by the ACE Rule because the Act cannot be interpreted to ignore the mandated procedures for regulating ubiquitous substances like carbon dioxide set forth in the NAAQS program. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (agencies must use the specific "*means* . . . prescribed [by] Congress . . . for the pursuit of [statutory] purposes") (emphasis added); *see also Corley v. United States*, 556 U.S. 303, 314 (2009) (no statute should be read to render any part "inoperative or superfluous, void or insignificant") (citation omitted).

Furthermore, the fact that the Section 108 endangerment finding is specifically keyed into emissions from "numerous or diverse sources," while the

Section 111 finding is not, reflects congressional intent. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (Where language is included in one sentence of a statute but excluded in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

B. EPA's Effort to Justify Regulating Carbon Dioxide Emissions under Section 111's Supplemental Authority Without First Using NAAQS is Meritless.

Some of the Robinson Petitioners filed comments with EPA during the comment period on the proposed ACE Rule setting forth the specific arguments made in Section I.A., *supra*.[1] In response, EPA stated that the arguments were not "on point" because carbon dioxide is not regulated as a criteria pollutant under the NAAQS program and "thus regulation of CO2 under section 111(d) is not barred by the 'criteria pollutant' exclusion in Section 111(d)(1)(A)(i)." EPA *Response to Comments, Chapter 1 – Legal Authority – Response to Comment 16*, p. 20.[2] EPA's reliance on Section 111(d)(1)(A)(i) is fatally flawed.

Congress enacted Section 111 as a supplement to NAAQS because of its desire to level the playing field for states competing for new industrial growth. Under NAAQS, as implemented through SIPs, areas with cleaner air could gain an economic advantage over those in nonattainment areas because the former could set

[1] *See* JA---; Addendum-0026
[2] *See* JA---; Addendum-0053

less stringent pollution control requirements to meet NAAQS. *See Sierra Club v. Costle*, 657 F.2d 298, 331, 339-40 (D.C. Cir. 1981); *see also* 44 Fed. Reg. at 33583, 33603, 33609 (Table 4) (June 11, 1979). NSPS emission controls under Section 111(b) apply to new sources without regard to the actual ambient air quality in a particular area, but rather, impose technology requirements at the time a source is built regardless of location. *See* 44 Fed. Reg. at 33581-82 (June 11, 1979) (EPA summarizing the purposes identified in H.R. Rep. No.95-294, 95th Cong., 1st Sess. 184-86 (1977), 4 L.H. at 2651-53). Under Section 111(b)'s NSPS program, EPA sets uniform, national, technology-based emissions standards for new stationary sources of NAAQS pollutants without reference to *where* those sources are located, thereby leveling the economic playing field among states seeking to comply with NAAQS. *Id.*

EPA's *Response to Comment 16* ignores the distinct purposes and functions of the NAAQS and NSPS programs. But an informed and careful reading of the interplay between those statutory programs leads to an inexorable conclusion. Endangerment findings and regulatory procedures for air pollutants emitted from "numerous or diverse sources" must be made and conducted in the first instance under the NAAQS program of Sections 108-110 and only then supplemented as necessary under Section 111(b)'s NSPS source-category program. *See Train*, 545 F.2d at 327 (NSPS cannot be used "*instead* of promulgating ambient air quality

standards") (citing *Train*, 421 U.S. at 79 n.16 and *Union Electric Co.*, 427 U.S. 246, 258 (emphasis added)). Conversely, air pollutants that are *not* emitted from "numerous or diverse" sources may be regulated in the first instance under Section 111(b)'s NSPS source-category program *if* EPA makes the required endangerment finding under Section 111(b). Indeed, such an endangerment finding for new sources made under Section 111(b) is itself a prerequisite for regulating existing sources of non-NAAQS pollutants under Section 111(d). *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*").

In its *Response to Comment 16*, EPA turns this carefully designed regulatory pecking order on its head by positing that Section 111(d)(1)(A)(i)'s prohibition against regulating emissions of NAAQS pollutants from *existing* sources is tantamount to permission to regulate non-NAAQS pollutants from those sources. There are **five reasons** why EPA's response is textually and legally incorrect and logically nonsensical.

First, the very next sentence of the statutory text limits EPA's authority to regulate air emissions from existing stationary sources under section 111(d) to those sources for "which a standard of performance under this section would apply *if* such existing source were a *new* source" under Section 111(b). 42 U.S.C. 7411(d)(1)(A)(ii) (emphasis added). A new source could not be regulated under Section 111(b) without EPA first making a proper pollutant-specific and category-

specific endangerment finding. *AEP*, 564 U.S. at 424. Not only has no such finding been made under Section 111(b) with regard to carbon dioxide emissions from electric utility generating units to support the ACE Rule but, just as importantly, no such finding *could* be made under Section 111(b) because carbon dioxide "meet[s] the criteria set forth in § 108(a)(1)(A) and (B)," and accordingly, any endangerment finding for that substance must be made, if at all, only under Section 108. *See Train*, 545 F.2d at 327.

Second, Section 111(d)'s mere prohibition against regulating emissions of NAAQS pollutants from existing sources is not the same as permission to regulate non-NAAQS pollutants that meet the regulatory standard set forth in Section 108. "[S]tatutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole." *UARG*, 573 U.S. at 321 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Given the intricate design of the CAA, not every air pollutant can be regulated under every provision of the Act, and EPA is limited to regulating "only those that may sensibly be encompassed *within the particular regulatory program.*" *Id.* at 319 (emphasis added). Unlike Section 108, which focuses on specific air pollutants, Section 111(d) focuses on source categories *per se*. Given the disparate focus, language, and procedures of the two regulatory programs, Congress could not have intended to *permit* EPA to obviate the need to establish NAAQS under Sections 108-110 for

ubiquitous substances like carbon dioxide by merely *prohibiting* regulation under Section 111(d) of already-regulated NAAQS pollutants. Prohibiting one type of action is not tantamount to granting authority to take a wholly different action. Accordingly, the mandatory NAAQS procedures for regulating air pollutants that meet the statutory criteria set forth in Section 108 cannot be circumvented by the expedient of using Section 111(d). *See Train*, 545 F.2d at 327.

Third, permitting a ubiquitous substance like carbon dioxide to be regulated in the first instance under Title I's category-specific provisions of Section 111(d) runs afoul of the Supreme Court's principle that Congress does not "hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman*, 531 U.S. at 468). The elephant of regulating pervasive carbon dioxide emissions permeating the ambient air cannot hide in the limited, source-specific-category mousehole of Section 111(d). *See Train*, 545 F.2d at 327.

Fourth, sanctioning EPA's promulgation of the ACE Rule under Section 111(d) would "sail[] close to the wind with regard to the principle that legislative powers are nondelegable." *Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting). In determining whether an agency's asserted delegation of authority from Congress runs afoul of the nondelegation doctrine, courts analyze the relationship between "the degree of agency discretion" and "the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. *Whitman* featured a

prototypical example of how the acceptable amount of discretion necessarily varies in relation to the extent of the delegated power, stating that "Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,'" but "substantial guidance" is required for "setting air standards that affect the entire national economy." *Id.* The ubiquitous nature of carbon dioxide counsels caution in interpreting the exclusionary language of Section 111(d) to provide EPA with the inclusive authority to regulate large swaths of the national economy by *in seriatim* regulating emissions of carbon dioxide from source category after source category, thereby circumventing the holistic approach required for emissions from numerous or diverse sources set forth in the NAAQS program. *See U.S. v. Kirby*, 74 U.S. 482, 486 (1868) ("All laws should receive a sensible construction.").

Fifth, while the Clean Air Act gives EPA the discretion to determine whether a particular air pollutant poses a danger to human health or welfare, it does not give EPA the discretion to cherry-pick the procedure under which that pollutant will be regulated. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking."); *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 125 ("Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise

its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (internal citations and quotation marks omitted). Thus, although EPA is not obligated to regulate carbon dioxide emissions, if it chooses to do so under Title I of the Act it may not substitute the supplemental procedures of Section 111 for the first-level ones mandated by NAAQS.

Accordingly, EPA was not free to ignore the CAA's required use of the NAAQS program to regulate ubiquitous emissions of carbon dioxide by using a supplemental authority to regulate only one specific category of sources of the substance, thereby establishing an administrative precedent for piecemeal regulation of carbon dioxide not permitted by a careful analysis of the language and structure of the Act.

AEP does not change the foregoing analysis. It is true that, in dicta, the Supreme Court observed that, after making a proper endangerment finding under Section 111(b) for carbon dioxide emissions from fossil-fuel fired power plants, EPA could then regulate new and existing sources of carbon dioxide from those plants. *AEP*, 564 U.S. at 424. But the precise issue of whether EPA could *circumvent* the requirements of Sections 108-110 of the Act with regard to an air pollutant emitted into the ambient air from numerous or diverse sources was not addressed by the *AEP* Court, nor was it raised by the parties. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (holding that judicial decisions do

not stand as binding precedent for points not raised, not argued, and hence not analyzed).

II. EPA'S FAILURE TO MAKE AN APPROPRIATE ENDANGERMENT FINDING UNDER SECTION 111(b) IS FATAL TO THE ACE RULE.

For the reasons set forth in the joint opening brief of Westmoreland Coal Company (Case No. 19-1176) and North American Coal Company (Case No. 19-1179) (the "Coal Brief"), EPA's failure to make an appropriate endangerment finding under Section 111(b) is fatal to the ACE Rule.

III. IT WAS IMPERMISSIBLE FOR EPA TO REGULATE EMISSIONS FROM ELECTRIC UTILITY GENERATING UNITS UNDER SECTION 111 BECAUSE SUCH UNITS WERE ALREADY REGULATED UNDER SECTION 112 OF THE CLEAN AIR ACT.

For the reasons set forth in the Coal Brief, EPA impermissibly promulgated the ACE Rule under Section 111 because electric utility generating units were already regulated under Section 112

CONCLUSION

For these reasons, the Court should vacate the ACE Rule.

DATED: April 17, 2020

Respectfully submitted,

/s/Theodore Hadzi-Antich

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I hereby certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and this Court's January 31, 2020, order providing that Petitioner's brief not exceed 4,500 words, because this brief contains 4,459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed April 17, 2020 with the Clerk of Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*,	§	
Petitioners,	§	
v.	§	No. 19-1140
	§	and consolidated cases
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	§	
Respondents.	§	

DECLARATION OF GREG SINDELAR

I, Greg Sindelar, do hereby declare:

1. I am an adult resident of Travis County, in the State of Texas.

2. I have worked for the Texas Public Policy Foundation ("TPPF") since 2007.

3. I serve as the Chief Operating Officer of TPPF. I have served in that capacity since 2014.

4. Prior to serving in my current position, I served as Director of Operations of TPPF. I served in that capacity from 2007 to 2014.

5. TPPF is a nonprofit, nonpartisan organization. Among other things, TPPF's mission is to promote, defend, and ensure liberty, personal responsibility, property rights, criminal justice reform, greater educational opportunities for all, a balanced approach to environmental regulation, free speech, state's rights under the 10th Amendment, energy sufficiency, and free enterprise in Texas and the United States by educating policymakers, informing the public policy debate with academically sound research and outreach, and providing counseling, referral, and advocacy in support of its mission.

6. In my capacity as Chief Operating Officer of TPPF, I oversee its business functions, including: Accounting/Finance, Human Resources, Information Technology, Facilities, and Events. I also serve as a member of TPPF's Senior

Leadership Team. I am involved in strategic planning, having spearheaded an internal process to define TPPF's and each of its operational unit's vision, current status, and path forward, providing benchmarks and accountability to each department. I am familiar with the activities of all the organization's centers and initiatives, including but not limited to the Center for the American Future and Life: Powered.

7. The Center for the American Future ("CAF") is TPPF's legal arm, which is staffed by six attorneys who provide legal counseling, referral, and advocacy services to individuals and businesses injured by federal, state, or local government overreach in a variety of areas consistent with and that advance TPPF's mission and goals as a non-profit research institute, among which are property rights, free speech, and environmental regulation. In addition, CAF provides legal support in connection with all of TPPF's activities.

8. CAF attorneys are currently litigating cases on behalf of TPPF clients in state and federal courts throughout the nation seeking to protect their individual and economic liberties. As part of their work, CAF attorneys routinely counsel clients on steps they can take to protect their personal and economic liberties and, when necessary, CAF attorneys refer clients to private counsel or technical consultants such as engineers, surveyors, or others with expertise necessary to protect the clients' interests.

9. EPA's promulgation under the Clean Air Act of the Affordable Clean Energy Rule (ACE) and its predecessor the Clean Power Plan (CPP) have frustrated and impeded CAF's efforts to assist its clients in dealing with federal, state, and local government overreach in areas such as protection of constitutional rights and economic liberties, including CAF's counseling, referral, and advocacy activities in those areas. The challenged regulations have caused a drain on CAF's resources because CAF has had to divert significant time, effort, and resources from such activities in the area of property rights and wetlands regulation, for example, in order to provide counseling, referral and advocacy services to those who are forced to deal with the requirements imposed by the ACE rule and its predecessor the CPP, which themselves have threatened individual liberty and economic freedom. These injuries to CAF's limited resources are directly attributable to EPA's promulgation of the ACE rule and its predecessor the CPP.

10. By diverting CAF's limited resources in the manner described in Paragraphs 7-9, EPA's ACE and CPP rules have also limited CAF's ability to provide legal support to TPPF's other major initiatives, thereby directly injuring TPPF's ability to fully implement those other initiatives.

11. TPPF's mission includes developing solutions for issues such as immigration, criminal justice reform, fiscal policy, health care policy, education policy, and local governance. TPPF's ability to engage in all aspects of its mission, through its numerous initiatives and centers, is harmed by the ACE Rule because the resources of CAF, TPPF's legal arm, have been drained by the rule as set forth in Paragraphs 7-10, thereby limiting TPPF's ability to fully engage in developing legal solutions to the other issues that are essential to its mission.

12. Further, federal regulation of carbon dioxide under the ACE rule is of keen concern to TPPF because carbon dioxide is a ubiquitous substance that is virtually everywhere and in everything. Because air emissions of carbon dioxide occur in every sector of the nation's economy, EPA's efforts to regulate carbon dioxide in the energy sector under the ACE rule opens the floodgates for EPA to regulate virtually every nook and cranny of economic life in the nation under the guise of regulating carbon dioxide emissions, thereby threatening personal liberties, property rights, and economic freedom of Americans. These issues caused by the ACE Rule threaten liberty and TPPF's goal of promoting personal and economic freedom and ensuring that Americans continue to benefit from our abundant energy resources. Accordingly, we have already expended, and will continue to expend, the resources to combat the current and future effects of the ACE Rule, thereby draining resources that we would otherwise use to further our mission regarding the many other issues with regard to which we are active.

13. For example, "Life: Powered" is an initiative of TPPF to inform the national discussion about energy resources and to advocate for energy policies that promote economic freedom and advance the human condition. Its central goal is to ensure that Americans continue to benefit from abundant, reliable, safe, and clean energy. Life: Powered and its predecessors, the Armstrong Center for Energy and the Environment and Fueling Freedom Project, have long worked to combat the federal regulation of carbon dioxide emissions, including educating lawmakers and the public about market-based solutions

for environmental quality, testifying before Congress, and submitting comments to EPA advocating against carbon dioxide emissions regulation under the Clean Air Act. Life: Powered has six staff members and a limited budget with which to combat the federal regulation of carbon dioxide emissions. Careful decisions must be made to best allocate its limited resources.

14. EPA's CPP was the first federal agency rule to regulate carbon dioxide emissions from power plants. When EPA first proposed the CPP in 2014, Life:Powered's predecessors, the Armstrong Center and Fueling Freedom Project, had to expend time and money educating federal government officials, legislators, and the general public about the CPP and its requirements and effects on the energy market. When the EPA issued the final ACE rule in 2019, it repealed the CPP, but established emissions guidelines for states to use when developing plans to limit carbon dioxide emissions at coal-fired electric generating units. As an organization dedicated to states' rights under the 10th Amendment, the ACE rule forces TPPF to expend time and money to advocate against the federal regulation of carbon dioxide emissions. These advocacy efforts take time and financial resources away from other important initiatives in which TPPF is involved, and CAF attorneys are closely involved in assisting Life:Powered in its efforts to combat federal regulation of carbon dioxide, thereby further draining CAF's resources from its other functions of providing counseling, referral, and advocacy services to its clients. Accordingly, the injury to TPPF's other initiatives is a direct result of EPA's promulgation of the ACE rule.

15. If the ACE rule is vacated, the injuries described above to CAF and TPPF will no longer be present.

I declare under penalty of perjury under the laws of the State of Texas and the United States that the foregoing is true and correct.

Executed on this 18 day of October, 2019.

GREG SINDELAR

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*,	§	
Petitioners,	§	
v.	§	No. 19-1140
	§	and consolidated cases
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	§	
Respondents.	§	

DECLARATION OF KENT LASSMAN

I, Kent Lassman, do hereby declare:

1. I am an adult resident of the City of Alexandria, Virginia.

2. I am President and CEO of the Competitive Enterprise Institute (CEI), a nonprofit organization headquartered and incorporated in the District of Columbia. I have held that position since April, 2016, and am fully familiar with CEI's structure, programs and activities.

3. CEI is a nonprofit, nonpartisan public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI's focus is on economic overregulation in areas ranging from technology and finance to energy and the environment.

4. CEI uses electricity to operate its offices. This electricity is supplied by Pepco, a unit of the Exelon Corporation, which is the major energy provider in the United States. Pepco obtains approximately 28.5% of its electricity from coal-fired plants. Pepco, *Environmental Fuel Source Information* (covering calendar year 2018), p.2. https://www.pepco.com/MyAccount/MyBillUsage/Documents/Pepco%20DC%20Fuel%20Mix%20Insert_4.19_ADAcomp.pdf (last visited Feb. 19, 2020). Coal plants are the type of plants that would be impacted most heavily by the ACE Rule.

5. In its Regulatory Impact Analysis for the ACE Rule, EPA estimated that the rule could increase retail electricity prices, though it claimed that this increase would be small. 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* (June, 2019), p. 3-27, https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf (last visited Feb. 19, 2020).

6. Any increase in CEI's electricity costs attributable to the ACE Rule, regardless of the amount of that increase, is a direct economic injury to CEI redressable by a binding judgment that the ACE Rule was impermissibly promulgated by EPA. Furthermore, EPA acknowledges that its estimate of electricity cost increases to consumers has limitations and uncertainties. *Id.* Moreover, that estimate involves "retail price projections at a national level" (*id.*), so the price impacts where CEI is located could be greater than predicted by EPA.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury and under the laws of the District of Columbia and the United States that the foregoing is true and correct.

Executed on this 19th day of February, 2020.

KENT LASSMAN

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