**ORAL ARGUMENT NOT YET SCHEDULED**

**Case No. 19-1140 (and consolidated cases)**

# United States Court of Appeals for the District of Columbia Circuit

AMERICAN LUNG ASSOCIATION, et al.,

*Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

*Respondents.*

ON PETITION FOR REVIEW OF FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## PAGE-PROOF BRIEF FOR STATE AND MUNICIPAL RESPONDENT-INTERVENORS

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Dated: July 16, 2020

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

### A. Parties

All parties, intervenors, and amici appearing in this Court are listed in the State and Municipal Petitioners' Opening Brief.

### B. Ruling Under Review

The final agency action issued in this proceeding is a regulation issued by the U.S. Environmental Protection Agency 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," published at 84 Fed. Reg. 32,520 (July 8, 2019).

### C. Related Cases

The final agency action at issue in this proceeding has not been previously reviewed in this or any other court. There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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## GLOSSARY

| | |
|---|---|
| Act | Clean Air Act |
| $CO_2$ | Carbon Dioxide |
| EPA | Respondent U.S. Environmental Protection Agency |
| JA | Joint Appendix |
| NAAQS | National Ambient Air Quality Standards |

## PRELIMINARY STATEMENT

The undersigned states and municipalities (State Respondent-Intervenors) are on the front lines of the fight to curb the devastating impacts of global climate change. *See* Appendix A to Comments of State Respondent-Intervenors (Oct. 31, 2018) (J.A.__). The regulation under review in these cases, although utterly ineffective, at least recognizes the obligation of Respondent U.S. Environmental Protection Agency (EPA) to regulate greenhouse gas emissions from existing fossil fuel-fired power plants, the largest stationary source of greenhouse gas emissions that are driving global climate change, under Clean Air Act section 111, 42 U.S.C. § 7411(d). *See 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, 32,533 (July 8, 2019) (the Rule). But even this weak rule is too much for two groups of petitioners: a pair of coal companies in Case Nos. 19-1176 and 19-1179[1] (Coal Petitioners) and a coalition of

[1] Westmoreland Mining Holdings LLC and The North American Coal Corp.

parties led by Robinson Enterprises, Inc. in Case No. 19-1175[2] (Robinson Petitioners). These petitioners seek to strip EPA's authority to regulate greenhouse gas emissions from existing power plants under section 111 at all.

Contrary to the arguments of Coal Petitioners and Robinson Petitioners, EPA possesses the legal authority – indeed, the obligation – to regulate greenhouse gas emissions from existing power plants under Clean Air Act § 111(d), 42 U.S.C. § 7411(d). State Respondent-Intervenors largely support EPA's opening brief on this issue, Proof Brief for the U.S. Environmental Protection Agency, et al., ECF#1847608, at 161-197 (June 16, 2020) (EPA Br.), and offer the following additional points in support of EPA's position.[3]

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[2] 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.

[3] In Case No. 19-1165, State Respondent-Intervenors have separately argued that the particular manner in which EPA chose to exercise its authority here is woefully inadequate and legally flawed. *See* State and Municipal Petitioners' Opening Brief, ECF#1838735 (Apr. 17, 2020).

## ISSUES PRESENTED

1) Should this Court reject Coal Petitioners' assertion that EPA needed to make new endangerment and significant contribution findings to support its authority under section 111 of the Clean Air Act, 42 U.S.C. § 7411, when (a) this argument is untimely because it effectively challenges a determination that EPA made in 2015; (b) the plain text of section 111(b) does not require these findings when EPA regulates new pollutants from already-regulated sources; and (c) EPA already made these findings about greenhouse gas emissions from power plants in 2015?

2) Should this Court reject the Robinson Petitioners' assertion that EPA cannot regulate greenhouse gas emissions from existing power plants under section 111(d) of the Act because it was required to regulate such emissions under sections 108-110, when (a) Robinson Petitioners lack standing because they have not established how their injuries would be redressed by a favorable ruling on the issue; and (b) nothing in section 111 prohibits such regulation where, as here, EPA has not yet regulated greenhouse gases under sections 108-110?

3) Should this Court reject Coal Petitioners' argument that EPA was prohibited from regulating greenhouse gas emissions from existing power plants under section 111(d) because it already regulates emissions of hazardous air pollutants from those power plants pursuant to section 112 of the Clean Air Act, where there is no basis in the text, history, or purpose of the Clean Air Act to conclude that Congress intended that result?

## STATUTES AND REGULATIONS

All relevant statutes and regulations were included in an Appendix attached to the State and Municipal Petitioners' Opening Brief, ECF#1838737 (Apr. 17, 2020) (State Op. Br.).

## STATEMENT OF THE CASE

### A. Statutory Background

Section 111(b) of the Clean Air Act requires EPA to maintain a list of "categories of stationary sources" that includes any "category of sources" that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Although the findings required to list a category of sources under section 111(b) are often referred to collectively as the "endangerment finding," *see* EPA Br. 162 n.46, they are in fact two

distinct inquiries: (1) does the source category at issue contribute significantly to air pollution, and (2) does that air pollution endanger public health and welfare? *See Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,510 64,529 (Oct. 23, 2015) (describing the two "components" of the endangerment finding). Once EPA makes the endangerment and significant contribution findings that warrant listing a "category of stationary sources" under section 111(b)(1)(A), it must establish "Federal standards of performance" limiting emission of air pollutants from "new sources" within that category. 42 U.S.C. § 7411(b)(1)(B).

Under section 111(d) of the Clean Air Act, EPA's establishment of standards of performance for *new* sources obligates it to ensure that States regulate *existing* sources as well. 42 U.S.C. § 7411(d). Pursuant to its section 111(d) authority, EPA has issued regulations under which States submit plans that establish standards of performance for existing sources that, if they were new, would be subject to a federal standard of performance under section 111(b). *See id.* § 7411(d)(1); 40 C.F.R. § 60.22a. Such state standards of performance must apply to "any air

pollutant . . . for which air quality criteria have not been issued or which is not included on a list published under" section 108, "or emitted from a source category which is regulated under" section 112. 42 U.S.C. § 7411(d)(1). Under sections 108 to 110, EPA establishes national ambient air quality standards (NAAQS) for certain pollutants, *id.* §§ 7408-7410, and under section 112, EPA regulates emissions of certain hazardous air pollutants, *id.* § 7412.[4]

### B. Factual and Procedural Background

State Respondent-Intervenors described the procedural history of the current Rule and its predecessor, the Clean Power Plan, in their opening brief. *See* State Op. Br. 4-22. As relevant here, State Respondent-Intervenors have fought for decades for EPA to meaningfully regulate the greenhouse gas emissions that are driving global climate change. As a result of State Respondent-Intervenors' efforts, *see Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA concluded that greenhouse gas emissions[5]

[4] For simplicity, the requirements of section 108 to 110 of the Clean Air Act are referred to as the NAAQS program.

[5] The 2009 endangerment finding defined the relevant air pollutants to include six specific, well-mixed greenhouse gases: carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perfluorocarbons, and sulfur hexafluoride. 74 Fed. Reg. at 66,516. Because carbon dioxide ($CO_2$) is the largest portion of these emissions (and because the other pollutants

from motor vehicles endanger public health and welfare. *See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("2009 endangerment finding"), *petition for review dismissed*, *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *rev'd in part sub nom Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). When EPA initially refused to regulate greenhouse gas emissions from power plants, the largest stationary source of such emissions, certain State Respondent-Intervenors brought suit directly against the country's five largest power-plant companies under federal common law. Although the Supreme Court rejected these federal common law claims, it did so only because it found such claims displaced by EPA's authority under section 111 of the Clean Air Act, which "'speaks directly' to emissions of carbon dioxide from" power plants. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011).

In 2015, EPA finally acted, as required, under section 111 to regulate greenhouse gas emissions from power plants in (a) the Clean

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can be described in terms of $CO_2$ equivalency), EPA and some record materials use the term "$CO_2$" to generically describe greenhouse gases. *See* EPA Br. 11 n.2.

Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), which contained regulations governing existing power plants under section 111(d); and (b) a rule containing federal standards of performance for new sources under section 111(b), 80 Fed. Reg. 64,510 ("2015 new source rule"). In the 2015 new source rule, EPA reasoned that no new endangerment finding was required to regulate greenhouse gas emissions from power plants, since EPA had previously listed power plants as a source category under section 111(b) for other pollutants. *Id.* at 64,530. But EPA nonetheless concluded that, if a new endangerment finding were required, it was making that finding based on the record before it, which showed that greenhouse gas emissions from power plants contribute significantly to air pollution that endangers public health and welfare. *Id.* at 64,530-531.

EPA's endangerment finding in the 2015 new source rule built on the conclusion of the 2009 endangerment finding that global climate change, driven by emission of greenhouse gases, endangers the public health and welfare. *See* 74 Fed. Reg. at 66,498. EPA updated that finding with more recent scientific assessments and observations that "strengthen[ed] the case that [greenhouse gases] endanger public health and welfare both for current and future generations." 80 Fed. Reg. at

64,517-522. Based on this more recent evidence, EPA emphasized that the adverse impact of "climate change driven by human emissions of [greenhouse gases] is already happening now and is happening in the United States." *Id.* at 64,520. Accordingly, EPA concluded that "reducing emissions of [greenhouse gases] across the globe is necessary in order to avoid the worst impacts of climate change." *Id.* Regarding the contribution of power plants to greenhouse gas emissions, EPA noted that power plants were the largest stationary sources of greenhouse gas emissions. *Id.* at 64,522.

Both the Clean Power Plan and the 2015 new source rule were challenged almost immediately. *See West Virginia v. EPA*, D.C. Cir. Docket No. 15-1363; *North Dakota v. EPA*, D.C. Cir. Docket No. 15-1381. Unlike the Clean Power Plan, EPA has never withdrawn or repealed the 2015 new source rule (which remains in effect), and the litigation over its legality remains pending.

In the Rule under review here, EPA has repealed the Clean Power Plan and replaced it with an ineffective regulatory regime that will do nothing to address the threat posed by climate change, and may even exacerbate that threat. *See* State Op. Br. 57-69. Coal Petitioners and

Robinson Petitioners, however, believe that even the current ineffective Rule goes too far, and argue that EPA lacks any authority to regulate greenhouse gas emissions from power plants under section 111(d).

## SUMMARY OF ARGUMENT

I. Coal Petitioners' argument that EPA was required to make a new endangerment finding to regulate greenhouse gas emissions from existing power plants under section 111(d) is both untimely and meritless. *See* Coal Industry Petitioners Opening Br., ECF#1838666, at 7-20 (Apr. 17, 2020) (Coal Br.). The argument is untimely because, as Coal Petitioners concede, *id.* at 8 n.2, EPA's decision that it did not need to issue a new endangerment finding was made in 2015, not in the 2019 Rule under review here. And this argument is meritless both because EPA is right that, under the plain language of section 111(b), no new endangerment finding is required for already-listed source categories; and because, in any event, EPA in 2015 *did* find that greenhouse gas emissions cause serious harms and that power plants contribute significantly to such emissions.

II. The Robinson Petitioners' argument that EPA should regulate greenhouse gas emissions from power plants under the NAAQS program

in sections 108 to 110 provides no basis to undercut EPA's section 111(d) authority here. *See* Br. of Petitioners Robinson Enterprises, Inc., et al., ECF#1838611, at 8-19 (Apr. 17, 2020) (Robinson Br.). First, Robinson Petitioners lack standing because, among other things, they have failed to establish how their injuries would be redressed by a court order requiring EPA to regulate greenhouse gas emissions under the NAAQS program rather than under section 111(d). Second, regulation under section 111(d) is precluded only when EPA has in fact regulated a pollutant under the NAAQS program. Because EPA has not regulated greenhouse gas emissions under the NAAQS program, there is no barrier to the agency regulating them under section 111(d).

III. Finally, as more thoroughly briefed by the non-governmental Respondent-Intervenors,[6] there is no merit to Coal Petitioners' argument that, because EPA is already regulating hazardous air pollutants from existing power plants under section 112, it is precluded from regulating

[6] The non-governmental Respondent-Intervenors are 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, Natura Resources Defense Council, and Sierra Club.

greenhouse gas emissions from those same sources under section 111(d). As has been extensively briefed in multiple rounds of litigation, there is no basis in the text, history, or purpose of the Clean Air Act to conclude that Congress intended that result.

## ARGUMENT

## POINT I

## COAL PETITIONERS' ARGUMENT THAT EPA WAS REQUIRED TO MAKE NEW SIGNIFICANT CONTRIBUTION AND ENDANGERMENT FINDINGS IS UNTIMELY AND MERITLESS

### A. Coal Petitioners' Challenge to EPA's 2015 Conclusion That No New Significant Contribution and Endangerment Findings Were Required Is Time-Barred.

As Coal Petitioners concede (Coal Br. 8 n.2), EPA decided to regulate greenhouse gas emissions from new power plants under section 111(b) in 2015. *See* 80 Fed. Reg. 64,510. As part of that 2015 new source rule, EPA concluded that it was not required to make new significant contribution and endangerment findings for greenhouse gas emissions because power plants were already listed as a source category under section 111(b) for other pollutants. *Id.* at 64,529-531. Coal Petitioners' disagreement with that conclusion amounts to a challenge to the 2015 new source rule. Indeed, Coal Petitioners' description of EPA's legal

position they are challenging cites *exclusively* to the 2015 new source rule, not the Rule under review in this proceeding. Coal Br. 2, 4, 8-10, 15-17.

Coal Petitioners are too late to raise such a challenge. Under the Clean Air Act, any challenge to an EPA rule must be commenced within 60 days of the rule's publication in the Federal Register. 42 U.S.C. § 7607(b). Here, however, Coal Petitioners did not file their petition for review until years after the publication of the 2015 new source rule. *See Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 457-458 (D.C. Cir. 2013), *cert. denied* 571 U.S. 1125 (2014) (dismissing as untimely petition to review EPA's refusal to revisit interpretation adapted in a prior regulation).

In fact, several coal industry groups timely raised the argument pressed by the Coal Petitioners here, but then told this Court not to resolve the issue because EPA claimed it was reviewing the 2015 new source rule. *See* State and Non-State Petitioners' and Petitioner-Intervenors' Response in Support of EPA's Motion to Hold Cases in Abeyance, *North Dakota v. EPA*, D.C. Cir. No. 15-1381, ECF#1668604 (March 30, 2017). Certain State Respondent-Intervenors opposed

abeyance and urged this Court to resolve the issue at that time, which would have resolved any doubt about the EPA's approach in the 2015 new source rule. Opposition of State Intervenors to EPA's Motion to Hold Cases in Abeyance, *id.*, ECF#1669738 (Apr. 5, 2017). That EPA has taken no action on the 2015 new source rule in the intervening three years does not mean the coal industry gets a second chance to challenge it.

There is no merit to Coal Petitioners' argument that their challenge is timely because the Rule under review here "necessarily raises" the issue of whether EPA should have made a new endangerment finding. Coal Br. 8 n.2. To the contrary, when EPA proposed the Rule, it explicitly noted that it was "not re-opening any issues related to [its] conclusion" to regulate greenhouse gas emissions from new power plants under section 111(b). 83 Fed. Reg. 44,746, 44,751 (Aug. 31, 2018). EPA reiterated its decision not to re-open this conclusion in the final rule, 84 Fed. Reg. at 32,533, notwithstanding attempts of several coal industry commenters to press EPA to reconsider the issue, Coal Br. 8 n.2. This Court has consistently rejected "bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened

the issue." *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989), *cert. denied* 497 U.S. 1003 (1990); *accord Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996); *Massachusetts v. Interstate Commerce Comm'n*, 893 F.2d 1368, 1372 (D.C. Cir. 1990).

### B. Section 111(b) Does Not Require New Endangerment and Significant Contribution Findings for Already-Listed Source Categories.

Even if Coal Petitioners' challenge were timely, it would be meritless. If a source category has already been listed pursuant to an endangerment finding under section 111(b), then no new finding is necessary to authorize EPA to regulate pollutants of other emissions from the same source category. The text of section 111(b) is unambiguous: it is only when EPA is establishing "a list of categories of stationary sources" that EPA must find that the listed sources "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once a "category of stationary sources" is listed, EPA is authorized to establish "standards of performance" for new sources and emission guidelines for existing sources within such category—without

any requirement to issue a new endangerment finding. *Id.* § 7411(b)(1)(B), (d)(1). This bifurcated approach makes sense: once EPA concludes that a source category contributes significantly to harmful air pollution and must be regulated under section 111, it need not revisit that conclusion each time it identifies a new pollutant that exacerbates the harm to public health and welfare. The unambiguous language of section 111(b) thus forecloses Coal Petitioners' interpretation.

Here, EPA satisfied the endangerment-finding requirement for power plants well before it promulgated the 2015 new source rule. In 1971, EPA listed fossil-fuel-fired power plants for regulation under section 111, finding that this source category "contribute[s] significantly to air pollution which causes or contributes to the endangerment of public health." 36 Fed. Reg. 5,931 (Mar. 31, 1971). As EPA determined when it issued the 2015 new source rule, "because [such power plants] had previously been listed, it was unnecessary to make an additional finding as a prerequisite for regulating $CO_2$ . . . . [U]nder [Clean Air Act] section 111(b)(1)(A), findings are category-specific and not pollutant-specific." 84 Fed. Reg. at 32,533.

Contrary to Coal Petitioners' arguments (Coal Br. 10-11), EPA's interpretation of section 111(b) in the 2015 new source rule is consistent with the structure of the Clean Air Act. Coal Petitioners rely on other sections of the Clean Air Act that explicitly require a pollutant-specific endangerment finding. Coal Br. 10; *compare* 42 U.S.C. § 7408(a)(1) (requiring EPA to publish a list of any "air pollutant . . . emissions of which . . . cause or contribute to air pollution"), *with id.* § 7411(b) (requiring EPA to publish a list that includes any "category of sources" that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"). But the distinct language of these separate provisions only confirms that Congress knew how to require a pollutant-specific endangerment finding when it intended to do so. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (the "usual rule" is that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended") (citation omitted). By contrast, in section 111(b), unlike in other Clean Air Act sections, Congress directed EPA to make the endangerment and significant contribution findings only before listing a source category.

Coal Petitioners are also wrong to argue that this interpretation of section 111(b) renders EPA's regulatory authority "absurdly broad." Coal Br. 9. Although EPA need not make new endangerment and significant contribution findings each time it regulates additional pollultants from already-listed sources, its decision to regulate additional pollutants must still be reasonable and appropriate. *See Motor & Equip. Mfrs. Ass'n v EPA*, 627 F.2d 1095, 1106 (D.C. Cir. 1979) ("The Administrator must give reasoned consideration to the issues before him and reach a result that rationally flows from this consideration."). And EPA must further comply with section 111(a)(1), which requires that standards of performance "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction" that EPA has determined to be "adequately demonstrated" under defined statutory criteria. 42 U.S.C. § 7411(a)(1). Both of these constraints would prevent EPA from arbitrarily issuing emission guidelines for "steam, oxygen, or other harmless airborne substances" based on its previous listing of the power plant source category. *Contra* Coal Br. 11.

In other words, EPA's discretion continues to be governed by the constraints that Congress chose—but not by the artificial limitations that

Coal Petitioners press here. *See Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1753 (2020) (rejecting argument that "statute's plain language" would lead to "any number of undesirable policy consequences" because "[t]he place to make new legislation, or address unwanted consequences of old legislation, lies in Congress").

### C. In Any Event, EPA Made the Endangerment and Significant Contribution Findings in the 2015 Rule.

Finally, even if EPA were required to issue new endangerment and significant contribution findings specifically about greenhouse gas emissions from power plants, it in fact did so in 2015. *See* EPA Br. 168-69. In promulgating the 2015 new source rule, EPA documented the many harms to public health and welfare attributable to greenhouse gas pollution and concluded that power plants, the largest stationary source of greenhouse gas emissions, contributed significantly to that pollution and related harms. 80 Fed. Reg. at 64,530-31. EPA's analysis built on and updated its 2009 endangerment finding for greenhouse gases, 79 Fed. Reg. at 1,452-55, with new scientific assessments and observations accumulated over the intervening six years, 80 Fed. Reg. at 64,517-19. In 2015, EPA specifically found that "[e]missions of CO2 from the burning of fossil fuels have ushered in a new epoch where human activities will

largely determine the evolution of the Earth's climate," 80 Fed. Reg. at 64,517 (quoting National Research Council, Climate Stabilization Targets, at 3). The recent assessments "confirm[ed] and strengthened the conclusion that [greenhouse gases] endanger public health now and in the future." *Id.* at 64,517. EPA catalogued an extensive list of climate change impacts, including "increased extreme weather events, wildfire, decreased air quality, threats to mental health, and illnesses transmitted by food, water, and disease-carriers such as mosquitoes and ticks." *Id.* at 64,518. EPA concluded that climate change was "touch[ing] nearly every aspect of public welfare." *Id.* at 64,517.

Coal Petitioners err in arguing that EPA failed to adequately consider whether power plants "significantly contribute" to greenhouse gas pollution by not identifying a threshold above which power plants' emissions would be deemed "significant." Coal Br. 17-18. When determining that a source category's emissions contribute significantly to dangerous air pollution under section 111(b)(1)(A), EPA historically has not identified a precise numerical or percentage threshold that emissions

would need to exceed to warrant regulation.[7] Indeed, as EPA recognized in the 2009 endangerment finding (which Coal Petitioners quote only selectively, Coal Br. 18), using such a threshold would make little sense for high-volume pollutants such as $CO_2$:

> The[] unique, global aspects of the climate change problem tend to support consideration of contribution at lower percentage levels of emissions than might otherwise be considered appropriate when addressing a more typical local or regional air pollution problem. In this situation it is quite reasonable to consider emissions from source categories that are more important in relation to other sources, even if their absolute contribution initially may appear to be small.

74 Fed. Reg. at 66,538.

This Court upheld the 2009 endangerment finding's analysis, including its decision not to adopt a defined threshold for endangerment. *Coal. for Responsible Regulation*, 684 F.3d at 117-23 ("EPA need not establish a minimum threshold of risk or harm before determining whether an air pollutant endangers."). More broadly, this Court has held that agencies need not identify artificial, bright-line thresholds before

[7] *See* 51 Fed. Reg. 869 (Jan. 8, 1986); 48 Fed. Reg. 48,328 (Oct. 18, 1983); 48 Fed. Reg. 37,578 (Aug. 18, 1983); 47 Fed. Reg. 49,606 (Nov. 1, 1982); 47 Fed. Reg. 49,278 (Oct. 29, 1982); 47 Fed. Reg. 47,778 (Oct. 27, 1982); 47 Fed. Reg. 16,582 (Apr. 16, 1982); 44 Fed. Reg. 49,9222 (Aug. 21, 1979); 38 Fed. Reg. 15,380 (June 11, 1973); 36 Fed. Reg. 5931 (Mar. 31, 1971).

concluding that their rules are justified. *See Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1348 (D.C. Cir. 1985) ("[N]or are we aware of any case that imposes such a requirement—whereby an agency would, presumably, announce a rule that more than 1,000 injuries is significant and less than 1,000 is not."). This principle is particularly appropriate with respect to greenhouse gas emissions.

EPA has described the critical significance of reducing greenhouse gas emissions as much and as quickly as possible, even if the reduction, when measured as a percentage of total greenhouse gas emissions, appears small. In the Clean Power Plan preamble, EPA noted that $CO_2$ "is a unique air pollutant and controlling it presents unique challenges," in part because "$CO_2$ is emitted in enormous quantities, and those quantities, coupled with the fact that $CO_2$ is relatively unreactive, make it much more difficult to mitigate by measures or technologies that are typically utilized." 80 Fed. Reg. at 64,689. As a result of the "enormous quantity" of $CO_2$ being emitted – it is "emitted in far greater quantities than all other air pollutants *combined*" – and the fact that $CO_2$ "is an unavoidable product" of numerous human activities, reductions of emissions from even the largest sources, such as power plants, may

appear negligible when considered as a percentage of total emissions. *Id.* at 64,689-690; *see also* 74 Fed. Reg. at 66,538 ("[T]he global nature of the air pollution problem and the breadth of countries and sources emitting greenhouse gases means that no single country and no single source category dominate or are even close to dominating on a global scale."). Nonetheless, as EPA noted in the 2015 new source rule, "[t]he faster emissions are reduced, the lower the risks posed by climate change." 80 Fed. Reg. at 64,520. The stark reality of climate change is that emissions of greenhouse gases must be reduced, in absolute terms, as quickly as possible.

The fact that power-sector emissions of $CO_2$ are currently decreasing (Coal Br. 18) also does not undermine EPA's endangerment finding. Even with those reductions, power plant emissions still are the largest stationary source of greenhouse gas emissions, which must be reduced as quickly as possible to address the endangerment to public health and welfare caused by climate change. *See* 80 Fed. Reg. at 64,520. Indeed, if the downward trend in greenhouse gas emissions from power plants were a justification for declining to regulate them, any complementary market or regulatory change that reduces air pollutant

emissions by any degree would have the absurd effect of eliminating those pollutants from EPA regulation. In the absence of regulation, air pollution would then be allowed to increase in response to market forces regardless of its impact on human health and the environment.

Ultimately, EPA's determination that power-plant greenhouse gas emissions contribute significantly to the dangers of climate change is not unreasonable simply because Coal Petitioners, in ongoing denial of the underlying science, disagree with that assessment. EPA reviewed the "relevant data," including the latest science on climate change and its dangers to public health and welfare, the role of greenhouse gases in driving climate change, and the contribution of the source category. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (citations omitted). EPA considered the recent science regarding the global, national and regional impact of climate change, 80 Fed. Reg. at 64,520-522, as well as the relevant source category's contribution, *id.* at 64,523-34, and reasonably concluded that this large domestic contributor to the problem was significant. Coal Petitioners'

mere disagreement with that conclusion is no basis for overturning EPA's considered judgment.

## POINT II

## THE POTENTIAL FOR NAAQS REGULATION OF GREENHOUSE GAS EMISSIONS DOES NOT PRECLUDE REGULATION OF THOSE EMISSIONS UNDER SECTION 111(D)

This Court should reject the Robinson Petitioners' argument that EPA cannot regulate greenhouse gas emissions from power plants under section 111(d) because it was required to regulate such emissions under the NAAQS program in sections 108 to 110 for two independent reasons.

First, EPA is correct that Robinson Petitioners have failed to allege a cognizable injury for standing purposes. EPA Br. 190-92. But Robinson Petitioners' standing also fails for a separate reason: they have not explained how substituting regulation of greenhouse gas emissions under the NAAQS program for regulation under section 111(d) would redress their alleged injuries. Robinson Br. 4-8. To the contrary, a court order requiring EPA to regulate greenhouse gas emissions from power plants under the NAAQS program, which is considerably more comprehensive than section 111(d), EPA Br. 194 n.54, might well *exacerbate* those injuries. Accordingly, Robinson Petitioners have not met their burden to

establish their standing. *See, e.g., Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (petitioner has the burden to show that it is "likely" that injury will be "redressed by a favorable decision") (internal quotation marks and citation omitted).

Second, Robinson Petitioners' argument is substantively meritless. Section 111(d)(1) provides for regulation of pollutants "for which air quality criteria have not been issued or which is not included on a list published under" the statutory provisions governing the NAAQS program. 42 U.S.C. § 7411(d)(1). But nothing in section 111(d)(1) prohibits regulation of pollutants which could or should have, but have not yet, been regulated or listed under the NAAQS program. Accordingly, the text of section 111(d) does not preclude EPA from regulating those pollutants under that section.[8]

*NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976), the principal case relied upon by the Robinson Petitioners (Robinson Br. 9-17) is not to the contrary. There, the Second Circuit held that EPA was required to regulate certain pollutants under the NAAQS program because they met

[8] Because EPA has not attempted to regulate greenhouse gases under the NAAQS program, this Court need not decide whether EPA would have the authority or obligation to do so.

the statutory criteria in section 108(a)(1)(A) and (B). 545 F.2d at 325. But *Train* said nothing about whether such pollutants could be regulated under section 111(d) while unlisted under section 108. Likewise, the other cases cited by the Robinson Petitioners (Robinson Br. 10), describe the mandatory requirements of section 108, but are silent as to whether a pollutant could be regulated under section 111(d) in the absence of a section 108 listing. *See, e.g., Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 847 (D.C. Cir. 1972). Indeed, regulation of pollutants under the NAAQS program is a complex, multi-year process. *See generally* 42 U.S.C. §§ 7408-7410. Even for pollutants that might qualify for regulation under the NAAQS program, section 111 ensures that there are "no gaps" in regulation of "stationary source emissions that pose any significant danger to public health or welfare." *See* S. Rep. 91-1196, at 20 (Sept. 17, 1970).[9]

[9] EPA overstates its case when it claims that "whether to make Section 7408 findings and treat a particular pollutant as a criteria pollutant is 'entrust[ed] to [EPA's] *sole judgment*.'" EPA Br. 194 (quoting *Zook v. EPA*, 611 Fed. App'x 725, 726 (D.C. Cir. 2015)). To the extent the unreported decision in *Zook* has precedential value, *contra* D.C. Cir. Rule 32.1(b)(1)(A), it noted only EPA's discretion to make an initial endangerment finding under section 108 or section 111. 611 Fed. App'x at 726. Ultimately, this Court need not resolve the scope of EPA's discretion once EPA has made an endangerment finding; under any

Robinson Petitioners' argument fails because there is no basis to preclude EPA from relying on section 111(d) to regulate a pollutant merely because it could have, but has not yet, regulated that pollutant under the NAAQS program in section 108.

**POINT III**

**EPA'S REGULATION OF HAZARDOUS POLLUTANTS FROM POWER PLANTS UNDER SECTION 112 DOES NOT PRECLUDE IT FROM REGULATING GREENHOUSE GAS EMISSIONS FROM POWER PLANTS UNDER SECTION 111(D)**

State Respondent-Intervenors join the argument of EPA and non-governmental Respondent-Intervenors that regulation of $CO_2$ emissions from existing power plants under section 111(d) is not precluded by EPA's regulation of hazardous air pollutants from the same power plants under section 112, 42 U.S.C § 7412. As State Respondent-Intervenors have previously argued, *see, e.g.,* Final Br. of State Intervenors, *West Virginia v. EPA*, D.C. Cir. No. 15-1363, ECF#1610024 (April 22, 2016); Final Br. of State Intervenors, *In re Murray Energy Corp.*, D.C. Cir. No. 14-1112, ECF#1541226 (March 9, 2015), there is no basis in the text, history, or

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interpretation, EPA is not precluded from regulating air pollutants under section 111 that it has not yet regulated under the NAAQS program.

purpose of the Clean Air Act to conclude that Congress intended that result.

## CONCLUSION

For the reasons described above, the petitions for review filed by Coal Petitioners in Case Nos. 19-1176 and 19-1179 and Robinson Petitioners in Case No. 19-1175 should be denied.

Dated: Albany, New York
July 16, 2020

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned attorney, Brian Lusignan, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing format order dated January 31, 2020 (Doc. No. 1826621). According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 5,607 words, which, when added to the words of the other coordinating respondent-intervenors, does not exceed the 14,560-word limit in the Court's order.

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/s/ *Brian Lusignan*
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## CERTIFICATE OF SERVICE

I certify that on July 16, 2020, the foregoing Page-Proof Brief for State and Municipal Respondent-Intervenors was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

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