NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 21-1028
Consolidated with 21-1060

STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; CITY OF NEW YORK,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY; JANE NISHIDA, IN HER OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition for Review of a Decision by a Federal Agency

BRIEF OF ENERGY POLICY ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES, AND FILING OF SEPARATE BRIEF

As required by Circuit Rules 28(a)(1) and 29(d), counsel for Proposed Amicus hereby certifies as follows:

A) Parties

The parties to this matter are:

State of New York,
State of California,
State of Connecticut,
District of Columbia,
State of Illinois,
State of Maryland,
Commonwealth of Massachusetts,
State of Minnesota,
State of New Jersey,
State of Oregon,
Commonwealth of Pennsylvania,
State of Rhode Island,
State of Vermont,
Commonwealth of Virginia,
State of Washington,
State of Wisconsin,
City of New York,
Petitioners,

and

Environmental Protection Agency,
Jane Nishida, in her official capacity as Acting Administrator of the United States Environmental Protection Agency,

Respondents.

B) Rulings Under Review

The agency action under review is identified in Petitioners' Joint Opening Brief for Petitioners.

C) Related Cases

There is one related case:

American Academy of Pediatrics v. EPA, 21-1060. That case was consolidated with the instant matter on February 16, 2021.

D) Separate Brief

Following discussions with various parties that are concerned generally with the issues in this matter, undersigned counsel certifies that he is not aware at this time if any of those entities have decided to file a brief or what the contents of any proposed brief might be. As such, it is not practicable at this time to file a joint amicus brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Energy Policy Advocates hereby certifies that it is a nonprofit, nonstock corporation incorporated under the laws of Washington State. As such, Energy Policy Advocates has no parent company or subsidiaries and no entity owns any part of its stock. Nor does Energy Policy Advocates own any shares of the stock of any other entity.

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GLOSSARY

CO2	Carbon Dioxide
CAA	Clean Air Act
CPP	Clean Power Plan
EPA	United States Environmental Protection Agency
EPAA	Energy Policy Advocates
FOIL	New York Freedom of Information Law
GHG	Greenhouse Gas
GHGs	Greenhouse Gases
NAAQS	National Ambient Air Quality Standards
OAR	Office of Air and Radiation
OAG	Office of Attorney General
USEPA	United States Environmental Protection Agency

STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND STATEMENT OF AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a) Energy Policy Advocates (Proposed Amicus, or "EPAA") submits this proposed *amicus curiae* brief in support of the Respondent U.S. Environmental Protection Agency ("USEPA") in the above-captioned case.

Proposed Amicus EPAA is a nonprofit based in Washington State which conducts research into government policy by seeking access to public records under the federal Freedom of Information Act and similar state transparency laws, and educating the public on same by broadly disseminating such information. EPAA has no direct interest, financial or otherwise, in the outcome of the case, aside from its interest in good governance and advocating for the proper role of the federal judiciary.

Because of its lack of a direct interest, combined with its intimate and firsthand knowledge of records illustrating the Parties' desire to use friendly litigation to vacate and thereby necessitate replacement of a properly enacted Rule to end-run the Clean Air Act and other legal and political constraints, EPAA can provide the Court with a perspective that is distinct and independent from that of the parties. Further, the courts have acknowledged that collusive litigation is

improper. This appears to be collusive litigation, and Proposed Amicus also seeks to provide this Court with records strongly suggesting that this is the case.

EPAA seeks to file this brief pursuant to a contemporaneously filed Motion for Leave to File as an *Amicus Curiae*. Circuit Rule 19(b).

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

I. INTRODUCTION

Fifteen States, the District of Columbia, and the City of New York have sued in this Court to challenge a final regulation of the Environmental Protection Agency ("USEPA"). The regulation in question is the *Review of the Ozone National Ambient Air Quality Standards*, 85 Fed. Reg. 87,256 (Dec. 31, 2020)("the Rule"). The Rule maintains the existing air quality criteria and the national ambient air quality standards ("NAAQS") for photochemical oxidants including ozone ("O3") under the Clean Air Act ("CAA"), without revision. Petitioners seek a determination that the final action is unlawful and arbitrary and capricious. They therefore argue that the Rule must be vacated.

The current state of the law is to the Parties' express frustration, however the Rule is not unlawful, nor is it arbitrary and capricious.

Sections 108 and 109 of the Clean Air Act ("CAA") govern criteria pollutants.[1] Neither carbon dioxide ("CO2") nor a greenhouse gas ("GHG") proxy for CO2 is listed by Respondent USEPA as a criteria pollutant subject to NAAQS. Public records obtained by Proposed Amicus Energy Policy Advocates affirm that the Parties seek the regulatory effect of restricting CO2/GHGs as criteria pollutants governed by NAAQS. Unfortunately and contrary to duly-enacted law, however, they seek to do so without proposing a CO2 or GHG NAAQS, in recognition of the substantial legal and political obstacles to doing so.

[1] Section 108 (42 U.S.C. 7408) directs the Administrator to identify and list certain air pollutants and then to issue air quality criteria for those pollutants, *inter alia*, for which he plans to issue air quality criteria. Section 109 (42 U.S.C. 7409) directs the Administrator to propose and promulgate ''primary'' and ''secondary'' NAAQS for pollutants for which air quality criteria are issued (42 U.S.C. 7409(a)). Section 109(b)(1) defines primary standards as ones ''the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." A secondary standard, under section 109(b)(2), must ''specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air.''

When Petitioner Attorneys General and the Respondent's official presently responsible for the NAAQS programs, including the Rule at issue, Joe Goffman,[2] consulted about how to force greenhouse gas regulations through the CAA's NAAQS program in late 2019, the AGs were exploring regulating CO2 as a criteria pollutant,[3] thereby triggering a CO2 or GHG-equivalent NAAQS. That proposition has long been understood to carry considerable risk.[4] President Obama's first EPA Administrator, Lisa Jackson, rejected a climate NAAQS as not "advisable."[5] One prominent environmentalist group attorney, also seeking to quell controversy over the prospect early in the Obama administration, said "hell will freeze over before there's a NAAQS for CO2."[6]

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[2] Joe Goffman is both the Acting Assistant Administrator for EPA's the Office of Air and Radiation and Principal Deputy Assistant Administrator, https://www.epa.gov/aboutepa/about-office-air-and-radiation-oar. "OAR is responsible for administering the Clean Air Act." *Id*. Goffman also was working in the Agency as a member of the Biden Administration transition team prior to and when suit was filed on January 19, 2021.

[3] This would prompt a CO2 equivalent or GHG equivalent NAAQS, herein "CO2 eq", "GHG eq".

[4] A climate NAAQS, whether or not obscured within a "secondary ozone NAAQS," would require massive central regulation of nearly all aspects of economic life, essentially a perpetual "Lockdown Economy," requiring truly massive reductions in energy use emissions.

[5] Robin Bravender, "EPA chief signals opposition to Clean Air Act curbs on GHGs," E&E News, December 8, 2009, https://www.eenews.net/stories/85407.

[6] *Id.*

Records show the Petitioners' plan evolved out of perceived necessity because of the legal and political obstacles inherent in attempting to declare carbon dioxide a criteria pollutant, and in order to circumvent the federal judiciary's foreclosure of direct frontal attempts to impose GHG standards in *Util. Air Regulatory Grp. v. Envtl. Prot. Agency* 573 U.S. 302 (2014)[7] and *West Virginia et al. v. EPA*, 15-1363, 2019 U.S. App. LEXIS 29593 (D.C. Cir. Sep. 17, 2019). That plan became to try and use a secondary ozone NAAQS to regulate GHGs.

The records EPAA has obtained illuminate in detail how the challenge now before this Court itself seeks an arbitrary and capricious outcome, an outcome that sets in motion a coordinated effort among the Parties to vacate (requiring replacement of) the properly enacted Rule. Petitioners and Respondent, as currently staffed, planned the replacement to include a secondary NAAQS for ozone which transmogrifies the NAAQS program to regulate non-criteria pollutant CO2/GHGs, after activists were frustrated in their pursuits through proper channels. These records reflect a shared objective of Petitioners and Respondent to

[7] The Supreme Court held in this 9-0 opinion that while *Massachusetts v. EPA*, 549 U.S. 497 (2007) found that the Clean Air Act's general definition of "air pollutant" included greenhouse gas emissions, it does not require the Environmental Protection Agency (EPA) to include greenhouse gas emissions every time the Act uses the term "air pollutant."

thereby fundamentally transform the Clean Air Act's NAAQS provision into an unrecognizable and never intended framework for economy wide decarbonization.[8]

This approach of using a secondary ozone NAAQS as a "back door" to a desired but unattainable regulatory outcome is improper on its face. Further, however, records detailing the 2019-2020 planning efforts also revealed an alternate desired outcome or "motive" for this challenge, in the event the judiciary rejects a secondary ozone NAAQS as a GHG regulatory scheme. That motive is equally improper: to assist private plaintiffs against private parties in climate "public nuisance" litigation by obtaining a declaration, effectively, that the predominant "nuisance" claims are not in fact displaced by EPA regulatory authority under *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539, 564 U.S. 410, 426 (2011). Given that using the federal government to assist such private plaintiffs is also something the new administration promised to direct its

[8] See, e.g., "As justification for the abeyance, respondents cited an executive order by President Biden that directed review of certain agency actions related to the environment taken during the Trump administration. Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021). That order identified a non-exclusive list of agency actions for agency heads to review, including the EPA's ozone determination. Respondents' implication, of course, is that the federal government is likely to change its position regarding the 2020 rule." Motion of The States of Texas, Arkansas, Louisiana, Mississippi, Missouri, and Montana for Leave to Intervene as Respondents, at 3.

Attorney General to do -- highly improperly -- during the 2020 presidential campaign (see *infra*), Proposed Amicus also seeks to provide this information to the Court.

This suit to vacate the properly enacted Rule thereby triggering the need for a replacement rule is the pretextual culmination of a coordinated effort to revamp CAA's NAAQS program into a GHG regulatory regime, achieving a policy outcome that has been denied Petitioners and Respondent through the proper statutory and regulatory means.

II. ARGUMENT

The petition in this matter is pretextual and seeks to create an arbitrary regulatory outcome, not to vacate one. Worse, it seeks to do so for what records express to be improper purposes. This Court must uphold the current Rule to prevent such an end-run around current law and sound policy.

A. The Challenge is Improperly Founded.

Among the relevant public records obtained by Proposed Amicus are documents showing that as of October 2019 Petitioner Attorneys General were consulting with Joe Goffman, who is now Respondent U.S. Environmental Protection Agency's Principal Deputy Assistant Administrator for the Office of Air and Radiation ("OAR", responsible for greenhouse gas regulation), and also the

Acting Assistant Administrator for OAR.[9] These consultations specifically involved strategies for regulating GHGs through the NAAQS, replacing and expanding the Obama Administration's "Clean Power Plan" which was stayed by the United States Supreme Court in *West Virginia v. EPA*. Mr. Goffman was at the time employed at Harvard Law School which boasted that he was "'EPA's Law Whisperer' because 'his specialty is teaching old laws to do new tricks'" and that "he was one of the chief architects of the ground-breaking Clean Power Plan."[10]

Public records obtained by Proposed Amicus from Petitioner New York Office of Attorney General under New York's Freedom of Information Law show that, following initial discussions among themselves about approaching this problem by seeking to declare CO2 a criteria pollutant, Petitioner Offices of Attorney General ("OAGs") led by New York consulted with Mr. Goffman specifically because the former sought "people who have made the case for using

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[9] Proposed Amicus also possesses public records from Mr. Goffman's tenure at Respondent EPA during the Obama administration showing a long history of coordinating with Petitioner New York Attorney General and environmentalist groups, together, to advance the cause of GHG regulation and often used Gmail and AOL email accounts to conduct official business. As such, Proposed Amicus also notes that Goffman was working in the Agency as a member of the Biden Administration transition team prior to and when New York filed suit.

[10] "Joseph Goffman joins Environmental Law Program as new executive director," October 2, 2017, https://today.law.harvard.edu/joseph-goffman-joins-environmental-law-program-new-executive-director/ (last viewed February 11, 2021).

NAAQS" to regulate GHGs. These documents suggest that Petitioners' deliberations with a network of former EPA officials now turned activists, with whom Mr. Goffman put Petitioners in contact, led to Petitioner OAGs settling on the use of secondary NAAQS as their vehicle to obtain preferred policy goals but in hopes of skirting certain, substantial political and legal headwinds. This decision was made after taking "a hard look at the steps needed to actually develop a GHG NAAQS, as well as to implement it," and "issues in setting the NAAQS" for "CO2 and other GHG". Email Subject fields reveal that OAG consultations with Mr. Goffman and his network, and among Petitioner OAGs included, e.g., "GHG NAAQS — Structure of the discussion tomorrow at 3," "NAAQS call," and "GHG calls debrief."

Other emails specifically show that Mr. Goffman arranged for former senior career EPA officials to counsel these OAGs, led as in this suit by New York, telling EPA's former Associate Director for Science Policy and New Programs John Bachmann, *inter alia*, "You may be able to talk [New York OAG's Michael Myers] through the some [sic] NAAQS issues and/or identify others who would be good to talk to." Records show that after Goffman arranged for consultation, Mr. Bachmann then explained at length the reasons for and means of using a secondary

ozone NAAQS as the "backdoor" method to obtain the desired regulation of greenhouse gases.

Mr. Bachmann provided the unambiguously titled document "ClimateNAAQS.ppt", which Petitioner New York then circulated to other Petitioner OAGs as part of their extensive follow-up on Bachmann's recommended course of using an ozone NAAQS (and also possibly a secondary particulate matter NAAQS) to regulate GHGs. Bachmann noted that "new legislation requiring specific actions would be much better than NAAQS, and yet I'm mindful of the obvious problem of how to get such legislation even with a new administration". His "ClimateNAAQS.ppt" slide show, obtained by Proposed Amicus from another Petitioner OAG (Minnesota), stated, *inter alia*:

> Policy Assessment decisions
>
> • Primary standards: GHG do not cause health effects, but subsequent changes in climate can do indirectly
>
> • But Primary NAAQS attainment date is 10 years after designation
>
> • Secondary Standards: Climate is listed in the Act as a welfare effect
>
> • Secondary Standards attainment "as expeditiously as practicable"

Petitioners' consultation with Bachmann, which addressed the impracticality of seeking to impose NAAQS by declaring CO2 or GHGs as criteria pollutants -- which has the added political burden of requiring standards be attained in ten years

while a secondary NAAQS (for e.g., ozone, particulate matter) has no such deadline -- led to Bachmann's suggestion that "We can test run a GHG NAAQS now" using secondary NAAQS.[11]

Supporting the secondary NAAQS approach were suggestions passed through Bachmann to Petitioner OAGs from retired EPA Office of General Counsel lawyer Nancy Ketcham-Colwill, after Bachmann spoke with Petitioner New York OAG and explained the OAGs' wishes to both Ms. and Mr. Ketcham-Colwill.[12] The Ketcham-Colwills provided counsel on "using the NAAQS for GHGs," in an email conveyed by Bachmann, that:

> First, the most promising avenue for using the NAAQS may be to set just a secondary NAAQS (no margin-of-safety conundrum, no

[11] "[R]ecommending that climate be considered in setting a secondary PM NAAQS as a basis for recommending the same thing for ozone during public comments I'll deliver in person at CASAC's December 5th meeting down here. Ozone is short lived climate forcer, and it would force more attention on methane as a precursor. We can test run a GHG NAAQS right now….." (ellipses in original) Also, "recommendations to consider the effects of climate in the review of the secondary standard for ozone." Obtained by Proposed Amicus under New York's FOIL.

[12] "Nancy and Jim Ketcham-Colwill who worked on parts of the [2008 GHG ANPR] at EPA [who] had thoughts on some retired EPA lawyers and I've left a message with probably the best one for your purpose." December 11, 2019 email from Bachmann to New York OAG's Myers, Subject: Fwd: Draft note on NAAQS lawyers and EPA GHG ANPR 2008 info. Produced to Proposed Amicus by Petitioner Vermont Office of the Attorney General under that state's open records law. Available at https://climatelitigationwatch.org/wp-content/uploads/2021/02/20201123-VT-OAG-Records-Produced-Redacted-Final.pdf, "Record 1," pp. 7-8.

statutory attainment deadline). The [2008 "Greenhouse Gas (GHG) Advanced Notice of Proposed Rulemaking" (ANPR) July 30, 2008, Federal Register Vol. 73, No. 147, p. 44354-44520[13]] discusses that option and there's a decent legal argument for it since GHGs don't directly (e.g., through inhalation) harm human health and the first listing criterion is whether the pollutant is reasonably expected to endanger public health OR welfare. The CAA definition of welfare include effects on climate, and Congress added that effect to the welfare definition in 1970 out of concern for anthropogenic climate change…

As we discussed, a NAAQS, even a secondary NAAQS, would take lots of time to implement, so is both a long shot and a longer-term strategy, when what we need is something more sure-fire and quick. But that would take legislation. Personally, we strongly believe that the next Administration should have a double-barrel strategy of pushing for legislation AND moving forward with CAA regulation (and other measures) in case Congress stalls out, as usual…

In our note yesterday we had said that even a 2dary NAAQS would surely be set below current levels given the CAA standard-setting criteria, but perhaps an argument might be made that current levels haven't bought us dangerous warming — yet (the effects of CO2 concentrations take years to fully assert themselves). The standard-setting criteria for 2dary [sic] standards call for protecting

[13] See, https://www.epa.gov/sites/production/files/2015-01/documents/2008_09_ghgfull.pdf.

> public welfare from "any known or anticipated adverse effects," so just avoiding "dangerous" warming might not cut it, particularly since climate change is already fueling more fire, floods, extreme weather, etc. But setting a NAAQS at current levels would avoid nonattainment NAAQS requirements for a while. Actually, the NAAQS would probably need to be set at the CO2 level expected for the time period relevant for designations.
>
> The science and statute would make a maintenance level NAAQS a hard sell and short-lived, but it's another interesting angle and possibly a useful gamble.[14]

This "long shot," "useful gamble" does appear, from the available record, to be where Petitioners ended up after consulting with Goffman, and the parties to whom Goffman referred Petitioners. Proposed Amicus respectfully states that Petitioners and Respondent have no interest in maintaining the standard that went into effect in December after the most recent notice and comment rulemaking.

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[14] December 3, 2019 email from Nancy Ketcham-Colwill to John Bachmann, forwarded on December 11, 2019 by Bachmann to New York OAG's Myers, Subject: Fwd: Draft note on NAAQS lawyers and EPA GHG ANPR 2008 info. Produced to Proposed Amicus by Petitioner Vermont Office of the Attorney General under that state's December 3, 2019 email from Nancy Ketcham-Colwill to John Bachmann, forwarded on December 11, 2019 by Bachmann to New York OAG's Michael Myers, Subject: Fwd: Draft note on NAAQS lawyers and EPA GHG ANPR 2008 info. Produced to Proposed Amicus by Petitioner Vermont Office of the Attorney General under that state's open records law. Available at https://climatelitigationwatch.org/wp-content/uploads/2021/02/20201123-VT-OAG-Records-Produced-Redacted-Final.pdf, "Record 1," pp. 7-10.

Some of these public records obtained by Proposed Amicus also articulate other purposes for the instant matter. In addition to using the replacement ozone NAAQS, which this suit seeks to necessitate, as a Trojan Horse to import the politically elusive regulatory regime for greenhouse gases, public records demonstrate an improper and illegitimate intended use of the regulatory process here. Records suggest that the Petitioners expect that if their "long shot" "useful gamble" fails to pay off, by losing in litigation triggered by the replacement rule, i.e., originally by this suit, they possibly might provide private tort litigants a better chance of succeeding in "public nuisance" litigation[15] by obtaining a clear declaration that the spate of climate "nuisance" claims are not in fact displaced by

[15] Petitioner OAGs have entered confidentiality agreements, obtained by Proposed Amicus EPAA, "Regarding Participation in Climate Change Public Nuisance Litigation," purporting a common legal interest in these matters, which "Climate Change Litigation includes, but may not be limited to: *City of Oakland, et al. v. BP P.L. C., et al*. (N.D. Cal. 17-cv-06011), *City and County of San Francisco, et al. v. BP P.L.C., et al*. (N.D. Cal. 17-cv-06012), *San Mateo v. Chevron Corp*. (N.D. Cal. 17-cv-04929), *Rhode Island v. Chevron Corp.* (R.I. Super. Ct. PC-2018-4716, and D. R.I. 18-00395), *Mayor & City Council of Baltimore v. BP p.l.c.* (Md. Cir. Ct. 24-C-18-004219 and D. Md. 18-02357), *City of New York v. BP p.l.c.* (S.D.N.Y 18- 00182), *King County v. BP p.l.c.* (Wash. Super. Ct. 18-2-11859-0 and W.D. Wash. 18-00758), and *Board of County Commissioners of Boulder County, et al., v. Suncor Energy, et al.*, No. 19-1330 (10th Cir.), and any appeals arising from those matters."

EPA regulatory authority and *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539, 564 U.S. 410, 426 (2011).[16]

[16] Further troubling and adding to concerns that this, too, is or will be pursued as a shared objective of the regulatory actions set in motion by the instant case is that the new administration ran for office vowing to deploy its Department of Justice to assist the same plaintiffs in private litigation. See, specifically, "Biden will instruct the Attorney General to…(iii) strategically support ongoing plaintiff-driven climate litigation against polluters." https://joebiden.com/environmental-justice-plan/ (last viewed February 11, 2021). Similarly, Proposed Amicus also notes correspondence it obtained of Bachmann pointing Petitioner New York OAG to a then-recent law review article convincing him that "there are reasons to push a GHG NAAQS approach other than an intent to actually do one." Howard M. Crystal et al., *Returning to Clean Air Act Fundamentals: A Renewed Call to Regulate Greenhouse Gases Under the National Ambient Air Quality Standards (NAAQS) Program*, 31 Geo. Env't L. Rev. 233, 235 (2019). The article argues, *inter alia*, that even losing an effort to obtain GHG through NAAQS, in court, might nonetheless erode the defense of private parties sued in an ongoing epidemic of "public nuisance" climate litigation, coordinated in part by the same Petitioners according to other public records. *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2539, 564 U.S. 410, 426 (2011)). "To be sure, in 2011 the Supreme Court ruled that federal nuisance claims against power plants over greenhouse gas emissions are displaced by Clean Air Act Section 111, because that provision expressly provides for the EPA to regulate those plants' greenhouse gas emissions (which it did with the CPP). However, in more recent cases defendants and their allies are arguing that even entities that are *not* regulated under Section 111 remain immune from tort liability, on the grounds that any and all such regulation of greenhouse gases must be done by the EPA in light of its comprehensive power under the Clean Air Act. If it turns out the EPA cannot enact a greenhouse gas NAAQS, these defenses to climate change tort suits will have less force. Accordingly, resolving the scope of the EPA's power to regulate under a NAAQS—even if it meant Congress expressly removing that power—may be an improvement over the current *status quo*, under which the *possibility* of a greenhouse gas NAAQS theoretically exists, but the EPA refuses to act." Crystal, et al. at 283 (citations omitted)).

For these reasons, Proposed Amicus wishes to provide this Court with the extensive documentary trail supporting the argument that the instant matter is designed to obtain what could not otherwise be obtained through the ordinary political and regulatory processes, with the alternate goal of strengthening the arguments of private tort litigants in event this challenge fails.

B. This Challenge Seeks to Cause, Rather than Prevent, Arbitrary and Capricious Agency Action.

Although the Petitioners claim that they seek to overturn an arbitrary and capricious final agency action, they in fact seek *to cause* such an outcome. This Court cannot allow the properly adopted Rule to be vacated as part of a plan by aligned Parties to substitute a regulation they prefer, which they began designing before the Rule was even proposed, in hopes of this moment.

Litigation among friendly or aligned litigants has been employed to establish Agency obligations "with little to no public input or transparency" or meaningful participation.[17] As Respondent USEPA itself put it in announcing a directive which USEPA has apparently and recently removed from its website, "Over the years,

[17] See, e.g., News Release, "Administrator Pruitt Issues Directive to End EPA 'Sue & Settle,'" Environmental Protection Agency, October 16, 2017, https://archive.epa.gov/epa/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle.html. The directive was previously located at https://www.epa.gov/newsroom/directive-promoting-transparency-and-public-participation-consent-decrees-and-settlement (last viewed February 12, 2021).

outside the regulatory process, special interest groups have used lawsuits that seek to force federal agencies – especially EPA – to issue regulations that advance their interests and priorities, on their specified timeframe." *Id*.

The U.S. Chamber of Commerce notes, "'Sue and Settle' refers to when a federal agency agrees to a settlement agreement, in a lawsuit from special interest groups, to create priorities and rules outside of the normal rulemaking process. The agency intentionally relinquishes statutory discretion by committing to timelines and priorities that often realign agency duties."[18] The Heritage Foundation wrote of the practice, "Rules that affect the way an agency does business, especially ones that could saddle Americans with significant costs, are intended to be proposed and debated openly. The public is supposed to have ample opportunity to comment before being subjected to new rules that can affect their livelihoods. But under 'sue and settle,' that's not the case. Agencies simply caved, unable or unwilling to fight the lawsuits. Worse, they would agree to make changes that went beyond what the law required…"[19]

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[18] "Sue and Settle: Regulating Behind Closed Doors," March 6, 2018, https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors

[19] Edwin J. Fuelner, PhD, "Burying "Sue And Settle'," October 31, 2017, https://www.heritage.org/government-regulation/commentary/burying-sue-and-settle.

These organizations describe what Proposed Amicus has found is now underway with the filing of this suit to vacate the Rule at issue, supported both by Petitioners and the current Respondent official responsible for responding to their challenge, when in the private sector. A half-hearted (or non-existent) Agency defense of its Rule, or consent decree among friendly litigants, necessitates replacement of the Rule.[20] Such a replacement Rule has been the subject of the above-described planning as revealed in these public records, and therefore this challenge is almost certainly intended by the Parties to set in motion the "backdoor" effort to impose restrictions on non-criteria pollutants via NAAQS.

This Court has held that "Agency action is arbitrary or capricious if 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Guedes v. BATFE*, 440 U.S. App. D.C. 141, 172, 920 F.3d

[20] See FN 8, *supra*; see also, "The intervenor States cannot trust that the federal government will serve as adequate representatives of their interests—or that it will provide an adequate defense of the 2020 rule—going forward. Motion of The States of Texas, Arkansas, Louisiana, Mississippi, Missouri, and Montana for Leave to Intervene as Respondents, at 9.

1, 32 (2019), quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

Here, the Petitioners allege that the existing Rule is arbitrary and capricious, but the records Energy Policy Advocates has obtained suggest that this describes the very suit seeking a replacement rule the Petitioners have developed, in consultation with Respondent, for the reasons articulated, *supra*. The replacement regulation the Parties consulted on together was for the purpose of thwarting, rather than implementing, Congressional intent in the Clean Air Act by using a program never intended to serve as an end-run framework for economy-wide decarbonization, to impose a regulatory regime denied the Parties to date through the proper processes.

The January 19, 2021 filing before this Court, preceding by a day the change in staffing atop both the Environmental Protection Agency and the Department of Justice, is a befitting coda to the events preceding the suit. This timing and history, and the apparent alignment of interests between the nominal adversaries in this litigation which has been revealed by the records discussed herein, suggest that both particular caution and the inclusion of more voices are in order.

The coordination of supposedly adversarial parties is corrosive to both litigation and the norms of agency rule-making. As the D.C District Court held in

an unpublished opinion, "To the extent the law disallows claims against one's self, it does so to preclude collusive litigation by which third parties may incur vicarious liability." *Leavell v. Shaw*, 946 F. Supp. 46, 47, 1996 U.S. Dist. LEXIS 18022, *5 (D.D.C. October 31, 1996). Similarly, the First Circuit expressed its concern that the Executive Branch may turn to friendly litigation to escape legislative enactments with which it disagrees. *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 17 (1st Cir. 2020) ("We have paid attention, too, to the possibility that this litigation is collusive, with defendants having agreed to judgment just days after the suit was filed. A state official unhappy with the lawful decisions of the state legislature should not be able to round up an agreeable plaintiff who then uses collusive litigation to 'force' the state to do what the official wants.").

Here, Energy Policy Advocates respectfully submits that the Petitioners and the Respondent have interests so aligned and positions so pre-ordained as a result of prior consultation on precisely the outcome this litigation seeks to compel that the Respondent agency is similarly situated to an individual who attempts to claim against himself. Just as the First Circuit recognized in *Gorbea*, here the Executive Branch has teamed up with the Petitioners and entangled the judiciary in what would otherwise and rightly be the subject of a legislative battle over what Congress does – and does not – intend for the Agency to regulate under the Clean

Air Act. This Court has long recognized that such an approach runs contrary to the notion that an agency should only exercise its considerable rule-making authority with "a degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

This Court should decline the Petitioners' invitation to become entangled in political gamesmanship, or oversee Respondent's acquiescing in a pretextual suit to vacate a properly adopted Rule for these preordained purposes. It should instead uphold a Rule that was lawfully enacted using the ordinary regulatory process, and leave it to subsequent regulatory processes or legislative enactments to change such a Rule, rather than sanction the described, pretextual *pas de deux*.

III. CONCLUSION

Energy Policy Advocates files this brief because it appears that without amicus participation the matter will lack informed balance among interests represented in what is designed to be the first, necessary step on the path to imposing the Parties' shared desire for a replacement rule on which the Parties also coordinated before this Rule at issue was even conceived. The Petitioners and Respondent are in express alignment and spent months of working together in

planning for this moment.[21] The federal government has an interest in its proposed final rule, if an interest that this Court will very soon see has been reversed with the employment of the new Acting Assistant Administrator who consulted with Petitioners on replacing the Rule prior to assuming his position with USEPA. Proposed Amicus, however, can oppose Petitioners' action, having in its possession an extensive collection of public records setting forth what is transpiring among the various parties.

The Proposed Amicus supports the Rule as properly enacted. Proposed Amicus can demonstrate that the Parties have collaborated to use this Court to impose an elusive greenhouse gas agenda through a "backdoor" that recasts the Clean Air Act from its current form, if without legislation because that does not have the necessary political support. The Proposed Amicus seeks to protect the

[21] EPAA notes that this case was consolidated with *American Academy of Pediatrics v. EPA*, 21-1060, on February 16, 2021. The Petitioners in that case include, *inter alia*, Appalachian Mountain Club and Sierra Club, represented by EarthJustice. Public records obtained by Energy Policy Advocates show that both parties, again represented by EarthJustice, have since April 2019 been sharing information about ozone NAAQS litigation under a "Common Interest Agreement" with Petitioner Offices of the Attorney General for New Jersey and New York, which Offices also entered a common interest agreement, verbatim but for the Parties, on April 4, 2019 with Petitioner Offices of the Attorney General for Connecticut, Massachusetts, and also Petitioner New York City. Proposed Amicus obtained both pacts from Petitioner New Jersey Office of the Attorney General under that state's Open Public Records Act.

integrity of the regulatory process, the legislative process, and the judicial processes which the collaborating Parties hope to circumvent with friendly litigation.

Accordingly, the Proposed Amicus files this proposed *Amicus Curiae* brief under Fed. R. App. P. 29(a) in support of the Rule. This Court should uphold the Rule and reject an attempt by friendly litigants to overturn it.

Respectfully submitted this the 22nd day of February, 2021,

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February 22, 2021

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CERTIFICATE OF FILING AND SERVICE

I, Christopher C. Horner, hereby certify pursuant to Fed. R. App. P. 25(d) that, on February 22, 2021 the foregoing Brief of Energy Policy Advocates as Amicus Curiae in Support of Respondent was filed through the CM/ECF system and served electronically on registered parties.

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