ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1140 (and consolidated cases)

AMERICAN LUNG ASSOCIATION, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

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

CORRECTED BRIEF OF THOMAS C. JORLING AS AMICUS CURIAE IN SUPPORT OF STATE AND MUNICIPAL, PUBLIC HEALTH AND ENVIRONMENTAL, POWER COMPANY, AND CLEAN ENERGY TRADE ASSOCIATION PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and other *amici* appearing in this case are listed in the brief for petitioner American Lung Association.

References to the rulings under review and related cases also appear in the brief for petitioner American Lung Association.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), *amicus* Thomas C. Jorling states that he is aware of other planned *amicus* briefs in support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners in this case. Separate briefing is necessary because none of the other *amicus* briefs will address the unique perspective of *amicus* Jorling as a principal staff drafter of the 1970 Clean Air Act Amendments. *See* Fed. R. App. P. 29(a)(5).

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel contributed money that was intended to fund preparation or submission of the brief.[1]

[1] Counsel Theodore E. Lamm and Sean B. Hecht provide their institutional affiliations solely for purposes of identification and do not imply any institutional endorsement of the views expressed here.

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GLOSSARY

"1970 Amendments"	1970 Clean Air Act Amendments
"1977 Amendments"	1977 Clean Air Act Amendments
"Act"	Clean Air Act
"BSER"	Best system of emission reduction
"EPA" or "Agency"	United States Environmental Protection Agency
"FERC"	Federal Energy Regulatory Commission
"GHG"	Greenhouse gas
"Plan"	Clean Power Plan
"Rule"	Affordable Clean Energy Rule

INTEREST OF AMICUS CURIAE

Amicus Thomas C. Jorling is a former United States Senate staff member and environmental law and policy expert who was directly engaged in the drafting and deliberations that resulted in the 1970 Clean Air Act Amendments, P.L. 91-604 ("1970 Amendments"). *Amicus* has a significant interest in the outcome of the legal issues in this case—specifically, in ensuring that the Clean Air Act, 42 U.S.C. § 7401 et seq. ("Act"), continues to be interpreted as it was written and intended by the members of Congress and staff who drafted the law: a comprehensive and flexible framework capable of effectively regulating all air pollutants that may adversely affect public health and welfare.

Mr. Jorling has been a leading environmental regulator, advocate, and educator for over 50 years. He has developed renowned expertise in air quality and environmental policy in his leadership roles in government, industry, and the academy, including Minority Counsel for the United States Senate Committee on Public Works ("Committee"), Assistant Administrator at the United States Environmental Protection Agency ("EPA"), Commissioner of the New York State Department of Environmental Conservation, Director of the Center for Environmental Studies at Williams

College, and Vice President of Environmental Affairs for International Paper Company.

Amicus Jorling served as Minority Counsel to the Republican members of the Committee from 1968 to 1972, including all of the development and passage of the 1970 Amendments. As Minority Counsel to the full Committee and its five subcommittees, Mr. Jorling was one of the select group of Senate staff members who were involved in the Committee's conduct of the legislative process leading to enactment of the 1970 Amendments, giving him first-hand participation in crafting the Act and unique insight into its structure and purpose. Mr. Jorling and majority counterpart Leon G. Billings staffed the Committee's Subcommittee on Air and Water Pollution through 30 days of public hearings, 20 days of closed markup sessions, 2 days of floor debate, and 6 days of closed conference meetings with the House of Representatives, gaining unparalleled understanding of the Act's design and underlying principles. Based on this intimate knowledge, Mr. Jorling also authored a contemporaneous, authoritative analysis of the 1970 Amendments as part of the Environmental Law Institute's effort to develop the first "comprehensive and analytical description of this new body of federal law." Fed. Env. Law at 4. As Commissioner of the New York State Department of Environmental

Conservation, Mr. Jorling had direct responsibility for state implementation of the Act, developing further first-hand insight into its design and allocation of authority between EPA and the states.

Amicus is widely recognized as an architect of and expert on the 1970 Amendments and has a strong interest in ensuring the preservation of the expansive legal framework that he and Mr. Billings assisted the members of the Committee in drafting and enacting. Specifically, *amicus's* experience and expertise in drafting and negotiating the 1970 Amendments compel him to demonstrate that Section 111(d) of the Act is integral to the flexible federal authority Congress deemed essential to address the nation's air pollution challenge in a comprehensive fashion. *Amicus* and his fellow staffers helped the members of the Committee to design a regulatory scheme that enabled the federal government to address that challenge fully, including under circumstances not specifically foreseen by that Congress. *Amicus* submits this brief in support of Petitioners and in support of the legal interpretation of the Act reflected in the Clean Power Plan.

SUMMARY OF ARGUMENT

In this case Petitioners are challenging EPA's Affordable Clean Energy Rule ("Rule"), 84 Fed. Reg. 32,520 (July 8, 2019), and its claim that EPA is legally compelled to repeal the Clean Power Plan ("Plan"). The Plan employed regulatory mechanisms authorized under Section 111(d) of the Act, 42 U.S.C. § 7411(d), to reduce emissions of carbon dioxide, a climate change-inducing greenhouse gas ("GHG"), from existing fossil fuel-fired power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015). As rationale, EPA claims that two of the "building blocks" that support the Plan's GHG emission targets—replacing coal-fired power with natural gas-fired power, and replacing fossil fuel-fired power with renewable energy—exceeded the authority Congress granted to EPA under Section 111(d) of the Act, thus compelling repeal of the Plan. 84 Fed. Reg. 32,523-529. This interpretation of the Act fundamentally misunderstands its text and structure, its legislative history, and the intent of the Congress that crafted it.

Based on his extensive experience in both helping to draft and later implementing the Act, *amicus* can confirm that Section 111(d) was designed to provide EPA the flexibility to utilize a best system of emission reduction encompassing the structure and content offered in the Plan. The enacting Congress created Section 111(d) as an essential component of a tripartite

structure to regulate stationary source emissions of all air pollutants potentially harmful to public health and welfare, with no gaps in coverage of individual air pollutants or in means to effectively control them. 42 U.S.C. §§ 7409-7412. The members of the Committee made abundantly clear during deliberation on the bill that this structure was intended precisely to spur innovation in the regulated industries and throughout the economy, as had occurred in response to national challenges from World War II to the moon landing. Leg. Hist. at 227 (Sept. 21, 1970) (Statement of Sen. Muskie). Within this structure, the drafters included Section 111(d) specifically to ensure comprehensive EPA authority to regulate stationary source emissions of all known and later discovered air pollutants—and they crafted it to provide the flexibility necessary to play this crucial residual role.

It is against this backdrop of an expansive law, designed to comprehensively and aggressively address the "environmental crisis" facing the nation, Leg. Hist. at 224 (Sept. 21, 1970) (Statement of Sen. Muskie), that EPA properly issued the Plan to address carbon dioxide emissions from existing power plants. In the Rule, EPA argues that the Plan exceeded EPA's legal authority under Section 111, and thus must be repealed, because it purportedly relied in part on methods other than technologies or systems that can be applied directly to an existing source. 84 Fed. Reg. 32,524. This

admittedly "narrow" reading of EPA's authority, 84 Fed. Reg. 32,523, bears little resemblance to the Act as the Committee members, with the assistance of *amicus*, drafted it and as Congress ultimately enacted it. As many courts have affirmed, the drafters designed the Act to authorize a range of flexible emission control measures, from stack controls and process changes to fuel switching and credit trading. *See, e.g.*, *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (upholding EPA policy allowing emissions trading between multiple sources within a single "bubble"). The Plan fulfilled this design by allowing states to deploy the most cost-effective options available to achieve GHG emission reduction targets that were based on systems already widely used in the industry to achieve that reduction. Not only does EPA's repeal and replacement of the Plan rely on a misinterpretation of Section 111 and the Agency's authority thereunder, but its misinterpretation would defeat the purpose of the entire Act by crippling its ability to employ the most cost-effective tools available to address the single greatest air pollution problem now facing the nation.

ARGUMENT

I. INTRODUCTION

The Plan established guidelines for existing fossil fuel power plants for emissions of carbon dioxide pursuant to Section 111(d) of the Act. 80 Fed. Reg. 64,662. (EPA promulgated the Plan following the Agency's issuance of an endangerment finding for GHGs, 74 Fed. Reg. 66,496 (Dec. 15, 2009), and GHG emission standards for both light-duty vehicles, 75 Fed. Reg. 25,324 (May 7, 2010), and newly built and modified fossil fuel power plants, 80 Fed. Reg. 64,510 (Oct. 23, 2015).) The Plan, recognizing that carbon dioxide emissions from existing fossil fuel-powered stationary sources are a major source of climate-altering GHG emissions, identified an adequately demonstrated, cost-effective "best system of emission reduction" ("BSER") for emission reduction based on three "building blocks": improving efficiency at coal-fired power plants; substituting natural gas-fired power for coal-fired power; and substituting renewable energy for fossil fuel-fired power. 80 Fed. Reg. 64,745-48. EPA used this BSER to set emission reduction targets for each state to meet through its own implementation plan. States could then deploy a wide range of tools, from individual rate-based emission standards to interstate emission trading systems, to meet the targets, 80 Fed. Reg. 64,832-64,840, thereby

"facilitating states' development of state plans encompassing maximum flexibilities," 80 Fed. Reg. 64,726. This structure "help[s] protect human health and the environment from the impacts of climate change," leveraging "the accelerating transition to cleaner power generation that is already well underway in the utility power sector" in a manner that "will not compromise the reliability of our electric system, or the affordability of electricity for consumers." 80 Fed. Reg. 64,663.

The Plan's flexible approach to addressing harmful air pollution accords completely with the intent and design of both the Act in general and Section 111(d) in particular. However, in the Rule, EPA now argues that the Plan is inconsistent with the regulatory mechanisms authorized by the Act and must be repealed. 84 Fed. Reg. 32,523. Based on his intimate involvement in the drafting of the Act, *amicus* is unequivocally certain that the Rule's interpretations of the purpose and structure of the Act, the scope of Section 111(d), and nature of EPA's authority are incorrect.

II. THE ACT AFFORDS EPA A FLEXIBLE AND COMPREHENSIVE TOOLKIT TO ADDRESS AIR POLLUTION

A. The Structure of the Act Relies on Flexible Implementation of Section 111(d)

The structure of the Act's provisions regulating stationary source emissions is well understood. But a brief review of those mechanisms is

essential to fully grasp what Congress intended by that design. To achieve air quality standards that "seemed impossible to meet," the Act created "five sets of requirements" for stationary sources of air pollution:

- National primary Ambient Air Quality Standards to protect public health from harmful "criteria" pollutants under current Section 109 of the Act;
- Secondary Ambient Air Quality Standards to protect public welfare, also under current Section 109;
- Federal standards of performance for newly constructed sources of pollution under Section 111(b);
- Enhanced federal authority to set standards for emissions of toxic or hazardous air pollutants under Section 112; and
- The "authority to set emission standards for selected pollutants which cannot be controlled through the ambient air quality standards and which are not hazardous substances" under Section 111(d).

Leg. Hist. at 227 (Sept. 21, 1970) (Statement of Sen. Muskie). These provisions constitute the structure that the members of the Committee responsible for the 1970 Amendments understood were necessary to build an "intensive and comprehensive attack on air pollution." S. Rept. 91-1196 at 4 (1970).

In these provisions, the drafters of the 1970 Amendments crafted three regulatory mechanisms for three categories of existing stationary source pollution that merited different regulatory approaches: ambient air quality standards and state implementation plans for criteria pollutants; federal emission standards for hazardous pollutants; and a hybrid approach for any other pollutants. 42 U.S.C. §§ 7409, 7410, 7411(d), 7412. Their intent, which was widely shared in Congress, was to create an all-encompassing regime covering all known and later discovered air pollutants, including the maximum flexibility needed to carry out Congress's "duty in husbandry to future generations." Leg. Hist. at 259 (Sept. 22, 1970) (Statement of Sen. Cooper). *Amicus* and his colleagues included Section 111(d) as a central part of this regime to ensure there would be "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rept. 91-1196 at 20.

B. The History of Section 111(d) Demonstrates an Expansive, Flexible Provision

The history of Section 111(d) underscores the broad regulatory authority Congress granted to EPA when it created the provision. The Senate version of the 1970 Amendments bill, S. 4358, included the provision as a separate Section 114, under the title "National Emission Standards – Selected Pollution Agents." The drafters created this section to provide EPA

with "authority to control pollution not covered by the ambient air standards or by hazardous substance emission controls" and to "delegate enforcement authority" to those states that develop adequate "procedure[s] for enforcement." Leg. Hist. at 328 (Sept. 22, 1970) (Statement of Sen. Murphy), 560-65 (S. 4358 § 114(j)(1)). The House bill included no equivalent provision. *See* Leg. Hist. at 910-940.

At conference, the House conferees supported this broad pollution control authority over existing sources as essential to the comprehensive coverage of the Act. In order to achieve a workable compromise before the close of the 91st Congress, they proposed incorporating its substance into regulatory mechanisms that already existed in the House bill. The Senate Committee members agreed. To achieve this, the conference bill combined regulatory mechanisms to address new sources (S. 4358 § 113) and the "selected pollution agents" provisions (S. 4358 § 114) under a single Section 111. For non-criteria, non-hazardous pollutants from existing sources, the conference bill adopted Section 110's state implementation plan procedure and the expansive "emission standards" mechanism in what became Section 111(d), streamlining the existing source and new source provisions while

maintaining needed flexibility. P.L. 91-604 § 111(d); 42 U.S.C. § 7411(d).[2] The House bill managers' report on the merged conference bill made no comment on any disagreement between the House and Senate bills in Section 111(d), while it describes extensively how conflicting provisions were resolved in Sections 109, 110, 112, and elsewhere—evidence of the broad agreement on the substantive gap-filling purpose of the "selected pollution agents" provision. H.R. Rept. 91-1783 at 42-45 (1970) (Conf. Rept.). Merging the provisions had neither the purpose nor the effect of limiting the tools available under Section 111(d).

Amicus noted the breadth and comprehensiveness of Section 111(d) in his contemporaneous analysis of the 1970 Amendments. As he said then,

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[2] The 1970 Amendments did not define "emission standards," but deployed the term to distinguish between existing source standards for criteria pollutants and existing source standards for all other pollutants. The 1977 Amendments to the Act replaced "emission standards" with Section 111(a)'s "standards of performance" concept. P.L. 95-95. One scholar has observed that both terms are meant to connote simply "a standard [that] has the effect of limiting emissions" and that the contrast between these two standards may be considered "superficial." David P. Currie, *Direct Federal Regulation of Stationary Sources Under the Clean Air A*ct, 128 U. PA. L. REV. 1389, 1407 (1980). While *amicus* was not involved in drafting the 1977 Amendments, his work on the 1970 Amendments included crafting the "standards of performance" mechanism, which he and his fellow drafters designed to facilitate maximum flexibility in achieving emission targets. The conference report for the 1977 Amendments stated only that the change "makes clear that standards adopted for existing sources under Section 111(d) of the act are to be based on available means of emission control (not necessarily technological)." H.R. Rept. 95-564 at 129 (1977).

Section 111(d) "provides a mechanism to regulate those air pollutants which otherwise might not be subject to any regulation" under the Act. Fed. Env. L. at 1106. Congress created Section 111(d)'s gap-filling provision to afford EPA the regulatory flexibility needed to address air pollutants that were not yet identified or not amenable to classification as criteria or hazardous pollutants. Congress rationally would not have designed, and in fact did not create, limited or "narrow" regulatory authority to perform this essential role—rather, the drafters crafted the language of Section 111(d) precisely to deliver on the Act's "intensive and comprehensive" approach, S. Rept. 91-1196 at 4, by granting EPA the flexible authority to identify the best systems available to protect human health and the environment.

C. The Drafters of the Act Were Clear about the Need for Flexible Regulatory Tools to Implement Section 111(d)

The background of Congress's prior efforts to reduce harmful air pollution illuminates the intended scope of the 1970 Amendments' stationary source provisions, including Section 111(d). From the 1955 Air Pollution Control Act, which authorized research on air pollution, through the 1963 Clean Air Act and the 1965 and 1967 amendments, which created a limited federal standard-setting and enforcement framework, the federal government and the states remained largely unable to address the nation's air pollution problem. *See* P.L. 84-159, 88-206, 89-271, 90-148.

That problem was "more severe, more pervasive and growing faster than had been thought," largely due to the fact that under the prior legislation "[c]onsiderations of technology and economic feasibility…[were] used to mitigate against protection of public health and welfare." Leg. Hist. at 225-226 (Sept. 21, 1970) (Statement of Sen. Muskie).[3] In response, Congress crafted a law that would "require new kinds of decisions with respect to transportation and land-use policies…new discipline of our desire for luxury and convenience…a new perspective on our world," Leg. Hist. at 231 (Sept. 21, 1970) (statement of Sen. Muskie); "have a profound impact on the economic and governmental characteristics of the American Nation," Leg Hist. at 264 (Sept. 21, 1970) (statement of Sen. Baker); and "abandon[] the old assumption of requiring the use of only whatever technology is already proven and at hand," requiring "a massive effort…by industry and through the willingness of citizens throughout the country to make the sacrifices necessary." Leg. Hist. at 258, 262 (Sept. 21, 1970) (statement of Sen. Cooper).

[3] The Act defines "welfare" to include not only the natural environment but also "climate," "property," and "economic values," further demonstrating the drafters' intent to afford EPA the broadest authority needed to tackle existing and future air pollution problems. 42 U.S.C. § 7602(h).

Amicus can attest that the drafters of the 1970 Amendments crafted each of the operative provisions of the Act, including Section 111(d), based on this shared understanding that no adequate set of emission reduction systems—technologies, processes, or other measures—could be specified in advance to achieve the Act's goals. Rather, both legislators and staff members such as *amicus* knew that addressing known and future air pollution problems under each of the stationary source provisions would require and drive a wide range of protective measures, including steps like those taken in the Plan.

D. Section 111(d) Encompasses Each of the Clean Power Plan's Building Blocks as BSER

1. Section 111 permits measures beyond those applicable at individual facilities

In spite of the expansive, technology-forcing, innovation-driving authority Congress handed EPA to address all air pollutants, EPA now claims that because Section 111(d)'s regulatory mechanism requires the "application of the best system of emission reduction" to set performance standards for carbon dioxide emissions, EPA's authority is limited exclusively to standards based on technologies or processes that can be directly applied "at" an individual regulated stationary source, excluding the Plan's two building blocks that involve shifting power generation among

stationary sources (i.e., "generation-shifting"). 84 Fed. Reg. 32,524. This narrow interpretation fundamentally misconstrues the plain text of Section 111(d).

Section 111(d) directs EPA to create procedures for states to establish existing source "standards of performance" for non-criteria, non-hazardous pollutants for which new source standards have been promulgated (as have been for carbon dioxide). 42 U.S.C. § 7411(d)(1). A "standard of performance" is a standard reflecting "the degree of emission limitation achievable through the application of [BSER]." 42 U.S.C. § 7411(a)(1). EPA argues that since a dictionary definition of the verb "to apply" requires both an indirect and a direct object—i.e., "someone must apply *something* to *something else*"—BSER must be limited to technologies like "add-on controls (e.g., scrubbers) and inherently lower-emitting processes/practices/designs" "that can be put into operation *at*" an individual emitting facility. 84 Fed. Reg. 32,524 (emphasis in original).

However, *amicus* and the other drafters did not include the word "at" in the relevant sections or otherwise indicate that Section 111(d) mechanisms should be limited to only those that can be deployed "at" a source. Rather, Congress wrote Section 111(d) to require emission standards (later amended to standards of performance) "for" existing sources. 42

U.S.C. § 7411(d). This choice was intentional, capturing a wider range of possible solutions to reduce emissions than just those that can be "put into operation *at*" a source. As contemporaneous Senate analysis noted, the term "standards of performance" encompasses "process changes, operation changes, direct emission control, *or other methods*." S. Rept. 91-1196 at 17 (emphasis added). This analysis made no mention of required application "at" individual facilities—or of any other limitation on Section 111(d) mechanisms. The plain text demonstrates that the drafters of the 1970 Amendments indeed designed the provision to permit a wider range of measures capable of filling the regulatory gap between Sections 110 and 112 through selection of the most effective methods to achieve needed levels of emission reduction.

2. Other key terminology supports the Plan

EPA also misreads other key terminology in attempting to narrow the scope of Section 111(d), extracting a cramped interpretation that bears little resemblance to the broad provision that the drafters of the 1970 Amendments produced. EPA argues that the Plan's interpretation of the word "system" ("a set of measures that work together to reduce emissions," 80 Fed. Reg. 64,762) is overbroad and "could create unbounded discretion." 84 Fed. Reg. 32,528. To support this reading, EPA claims that the Plan

impermissibly relies both on the dictionary definition of "system"—a "set of measures"—and on the "absence of an express textual commandment forbidding" such a reading. *Id*. But the Plan's understanding of the broad meaning of the word "system" is precisely what *amicus* and the drafters intended that word to convey when they crafted Section 111, which Congress reflected in its recognition (in deliberations on the 1977 Amendments) that Section 111(d) "systems" were "not necessarily technological." H.R. Rept. 95-564 at 129. The Rule, by contrast, looks outside the text of the Act to import its preferred limiting principle into Section 111(d).

EPA's apparent position is that textual constraints on the agency's authority—including that BSER be "adequately demonstrated" and take "the cost of achieving" emission reductions into account—insufficiently limit that authority. 42 U.S.C. § 7411(a)(1)). But the drafters did not design the comprehensive provisions of the 1970 Amendments to require EPA to construct its own extra-textual limiting principles. Congress indeed did not include an express textual commandment forbidding the Plan's reading of "system" because Congress did not intend to forbid it. Rather, Congress designed the flexible regulatory mechanism of BSER for Section 111(d) standards of performance, like that of their predecessor "emission

standards," to strengthen—not hinder—EPA's ability to meet present, emerging, and later-recognized pollution challenges.

In addition, EPA asserts that because Section 112 arguably limits the term "measures" to four specific items, Section 111(d) should be similarly limited. 84 Fed. Reg. 32,528. But Section 111(d) and Section 112 are based on different regulatory mechanisms designed for different types of air pollutants, and the Act gives no indication that this illustration is meant to apply outside Section 112, much less in a limiting fashion. Congress affirmatively chose to make this enumeration in Section 112—which requires strict, source-specific control of certain toxic air pollutants due to the direct threat they pose to the health of individuals in close proximity to the source—but not in Section 111, which was designed to deal with pollutants posing a wide range of threats to health and welfare. EPA should honor that choice rather than treat it as an omission. In its hunt for narrowness, EPA is also simply incorrect when it asserts that "[m]easures" "are further defined" in Section 112 as including solely four types of listed measures. That section describes "measures, processes, methods, systems or techniques *including, but not limited to,* measures" that fall within those four categories. 42 U.S.C. § 7412(d)(2) (emphasis added). EPA appears to confuse an illustrative example for an express limitation.

EPA also argues that the Agency had not, prior to the Plan, interpreted "system" to encompass generation-shifting. 84 Fed. Reg. 32,528. This is not accurate; EPA has, for example, previously understood BSER to encompass cap-and-trade mechanisms at least partly reliant on generation-shifting. 70 Fed. Reg. 28,606, 28,617; *see New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (vacating rule on other grounds). But even the absence of prior Agency action would not reflect narrow intent on the part of the enacting Congress. Rather, it demonstrates the flexibility the drafters of the 1970 Amendments included in Section 111(d): They simply authorized EPA to require emission standards, later refined to standards of performance reflecting the "degree of emission limitation" that the "best system" adequately demonstrated could achieve, for any non-criteria, non-hazardous pollutants known or later discovered. Carbon dioxide is the first such pollutant for which shifting coal- to natural gas-fired power and fossil fuel-fired to renewable power represents the best system of emission reduction.[4]

[4] EPA similarly misreads the requirement of "continuous emission reduction" contained in the definition of "standard of performance." 42 U.S.C. § 7602(l). EPA notes that this requirement was added in the 1977 Clean Air Act Amendments to affirm court decisions that deemed intermittent or supplemental control measures inadequate, quoting a commentator who described Congress's intent to "forbid reliance on intermittent control strategies, such as…reductions in plant output." 84 Fed. Reg. 32,531-532 (internal quotation marks omitted). But generation-shifting on a continuous basis—as the Plan envisions, and which *amicus* knows the

Finally, EPA argues that including generation-shifting in BSER "contravenes" Section 111 because it would call for "non-performance" of a source, and "non-performance" cannot form a "standard of performance." 84 Fed. Reg. 32,532. This is incorrect. The Senate's own analysis of the 1970 Amendments understood that existing sources of pollutants could be "closed down" should they fail to meet the standards of the Act; it follows logically that a Congress contemplating such a scenario would also intend for reduced output to serve as a viable means of complying with those standards. S. Rept. 91-1196 at 3. Standards of performance are meant to be based on cost-effective and adequately demonstrated systems, including but not limited to replacing existing processes or units with lower- or zero-emitting processes or units. Here, as in the other examples above, EPA attempts to narrow Section 111(d) beyond usefulness to achieve its desired result. This interpretation and others in the Rule simply fail to account for either the text of the Act or the intent of the drafting Congress.

3. Contemporaneous understanding of Section 111 supports the Plan

EPA's exceedingly narrow interpretation of Section 111(d) also conflicts with contemporaneous understanding of the provision. While EPA

1970 drafters countenanced—would by definition constitute "continuous emission reduction" and satisfy the statutory definition.

now argues that BSER permits only systems that can be "put into operation at" an emitting facility, as noted earlier, the Senate's own analysis of the term shows it is broader: "standards of performance…refers to the degree of emission control which can be achieved through process changes, operation changes, direct emission control, or other methods." S. Rept. 91-1196 at 17.

Contrary to EPA's assertion, "operation changes" and "other methods" easily encompass the generation-shifting approach included in the Plan's BSER. As *amicus* wrote in his contemporaneous analysis, standards of performance (which he and his fellow drafters included in the 1970 Amendments as Section 111(a), and the 1977 Amendments integrated into the current Section 111(d)) "are not simply stack control standards. They must be based not only upon technology for stack controls, they must also include any technology or process change which will reduce emissions." Fed. Env. L. at 1086. Congress gave EPA the authority to set emission standards based on the full range of adequately demonstrated emission reduction technologies or processes, but not to "determine the most economic, acceptable technique to apply" in order to meet those standards. S. Rept. 91-1196 at 17. The former is exactly what the Plan did.

III. THE RULE MISCASTS THE FEDERAL ROLE UNDER SECTION 111(d)

A. The Rule Misunderstands the Relationship Between Federal and State Authority in Sections 110 and 111

In support of its desired interpretation of the Act, and in contrast to the text, structure, and drafters' intent, EPA asserts that the Agency's "role under [Section 111(d)] is narrow." 84 Fed. Reg. 32,523. As evidence for this proposition, EPA cites the requirement that each state "submit…a plan which establishes standards of performance…and provides for the implementation and enforcement of such standards." 42 U.S.C. § 7411(d). (EPA also cites the Act's general finding that "air pollution control at its source is the primary responsibility of States." 42 U.S.C. § 7401(a)(3).) But Congress's inclusion of state implementation plans in Section 111(d), and its reference to the Section 110 procedure for preparing them, proves precisely the opposite point. Section 110's state implementation plan requirement for meeting national ambient air quality standards is equally subject to the Act's general finding on state responsibility. And Section 110 requires EPA to promulgate a federal implementation plan for any state whose own plan is determined inadequate to meet federal standards. 42 U.S.C. § 7410(c). Section 111(d) matches this requirement by granting EPA the authority to prescribe federal plans and enforce compliance with state plans where necessary. 42 U.S.C. § 7411(d)(2).

This structure, based on Congress's recognition that states "did not respond adequately" to the near-complete authority they held under prior iterations of the Act, is hardly a basis for limiting the suite of adequately demonstrated emission reduction systems EPA may use to set emission standards. Leg. Hist. at 226 (Sept. 21, 1970) (Statement of Sen. Muskie). In Section 111(d), Congress gave EPA a key role in standard-setting—not merely the advisory role EPA appears to want. Rather, in both Sections 110 and 111(d), Congress afforded EPA the authority to ensure compliance with standards it deems necessary to protect public health and welfare. As *amicus* wrote in his contemporaneous analysis of the 1970 Amendments, the Act reflects "nearly total federal supervisory and approval authority" to set ambitious standards that may lead states to enforce innovative developments. Fed. Env. L. at 1063. The drafters included Section 110's implementation plan mechanism in Section 111(d) as a reflection of this expansive federal authority, and the Plan delivered on that structure by setting emission limitations based on three permitted building blocks and allowing states the freedom to meet them in the most cost-effective manner.

B. The Rule Incorrectly Invokes the Federal Power Act to Limit EPA's Authority

As another basis for arguing that the Plan exceeded federal authority, EPA looks to the Federal Power Act's reservation to the states of authority

over the need for and type of generating facilities to be licensed. 84 Fed. Reg. 32,530. EPA claims that "including generation-shifting measures…in the BSER…established a rule predicated largely upon actions in the power sector outside the scope of the Agency's authority to compel," arguing that since even the Federal Energy Regulatory Commission ("FERC") "would not have such authority, the only reasonable inference is that Congress did not intend to give the EPA that authority" via Section 111. *Id*. But the Plan did not "compel" generation-shifting measures. Section 111 requires standards of performance, but not the use of specific means to achieve them. Here, the Plan employed generation-shifting as a basis to set state emission reduction targets, not a required compliance method.

Moreover, EPA inaccurately describes its own authority under the Clean Air Act. The primary purpose of the 1970 Amendments is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare," 42 U.S.C. § 7401(b)(1), and Congress expressly designed the statutory scheme to protect public health, even where that would require technological innovation, S. Rept. 91-1196 at 2. As *amicus* wrote in his contemporaneous analysis, the 1970 Amendments "were directed first at repairing" a core flaw in the prior iterations of the Act: "because it did not affirmatively press technology, the law, in a perverse

turn, actually authorized restraint." Fed. Env. L. at 1061-62. "All of the procedural, programmatic, and other requirements" of the 1970 Amendments are "more meaningful if read in relationship to [that] repair." *Id*. As the Supreme Court has recognized, Congress was "unquestionably aware" that implementing stringent standards under the Act could have industry-altering implications, *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 465-66 (2001).

We must infer that in so prioritizing protection of public health and welfare, Congress gave EPA the tools to fully carry out this mandate, including those that might have significant effects on regulated sources. "It is virtually always proper for a court to assume Congress wanted the statute to work and, at least, did not intend a set of interpretations that would preclude effective administration." Stephen Breyer, "Judicial Review of Questions of Law and Policy," 38 Admin. L. Rev. 363, 368 (1986). Absent an express limitation, which Congress did not include in the Act, there is little reason to import one from a different law.

Congress was also aware that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). Congress, with the close assistance of *amicus* and colleagues, crafted the Act with the

flexibility needed to protect public health and welfare from air pollution, with the expectation that "industry [would do] what had to be done." Leg. Hist. at 227 (Sept. 21, 1970) (Statement of Sen. Muskie). As the Rule itself acknowledges, the Plan did just this by "provid[ing] emissions guidelines, leaving the states with the flexibility to create their own compliance measures." 84 Fed. Reg. 32,530. Comparison to FERC's limited authority to regulate intrastate power markets is simply unavailing. Congress intended to, and did, write the "strongest possible air pollution legislation," affording EPA the regulatory tools and flexibility needed to conduct a "dynamic and aggressive assault on our national air pollution problems." Leg. Hist. at 349 (Sept. 22, 1970) (Statement of Sen. Scott).

C. The Plan Accords with the Act's Grant of Federal Authority

As with EPA's claims regarding the meaning of terms like "system," "continuous," and "performance," here the Agency similarly views the Act through a lens that obscures its governing principle. Congress wrote the 1970 Amendments based on the recognition that "the quality of our air is most valuable, most essential, to the quality of our environment and to the quality of our lives upon this planet." Leg. Hist. at 130 (Dec. 18, 1970) (Statement of Sen. Muskie). Congress, with the assistance of *amicus* and colleagues, crafted provisions commensurate with this recognition, including

the essential provisions of Section 111(d) that attack pollution challenges otherwise unaddressed under the law. Nowhere is the intended strength and dynamism of these provisions clearer than where, as now, EPA is presented with an air pollution problem of "unusual importance." *Massachusetts*, 549 U.S. at 506. Members of the 91st Congress, assisted by *amicus* and his fellow staffers, built the Act to rise to the challenge of air pollution—not shrink from it—and the Plan followed through on this design. EPA is not legally compelled to repeal it. Indeed, as *amicus* has demonstrated, repealing the Plan and replacing it with a rule premised on EPA's mistaken interpretation violates the letter, structure, and spirit of the Act.

CONCLUSION

For the foregoing reasons, the above-captioned petitions for review should be granted.

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Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point font and contains 5890 words exclusive of the statement regarding separate briefing; certificate as to parties, rulings and related cases; table of contents; table of authorities; signature lines; and certificates of service and compliance.

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which served a copy of the document on all counsel of record in the case.

Dated: April 20, 2020

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