ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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

No. 15-1363 (and consolidated cases)

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

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

On Petition for Review of Final Action of the
United States Environmental Protection Agency
80 Fed. Reg. 64,662 (Oct. 23, 2015)

BRIEF OF LEON G. BILLINGS AND THOMAS C. JORLING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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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 Respondent Environmental Protection Agency ("EPA").

References to the rulings under review and related cases also appear in the brief for Respondent EPA.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), *amici* Leon G. Billings and Thomas C. Jorling state that they are aware of seven other planned *amicus* briefs in support of Respondents in this case. Separate briefing is necessary because the other *amicus* briefs, to be filed by current members of Congress, former state and federal regulators, environmental and health groups, climate scientists and legal experts, do not address the unique perspective of *amici* Billings and Jorling as principal drafters of the 1970 Clean Air Act Amendments. The separate briefing will not burden this Court's resources, because the attached brief does not use all of the 7,000 words permitted an *amicus* brief, *see* Fed. R. App. P. 29(d).

Under Federal Rule of Appellate Procedure 29(c), *amici* state 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 *amici curiae* or their counsel contributed money that was intended to fund preparation or submission of the brief.

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GLOSSARY

"Act"	Clean Air Act
"BSER"	Best System of Emission Reduction
"EPA"	United States Environmental Protection Agency
"HAP"	Hazardous Air Pollutant
"NSPS"	New Source Performance Standards
"Rule"	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

INTEREST OF AMICI CURIAE

Amici, Leon G. Billings and Thomas C. Jorling, are former United States Senate staff members and environmental law and policy experts who were directly responsible for the drafting and deliberations that resulted in the 1970 Clean Air Act Amendments ("1970 Amendments"). *Amici* have a significant interest in the outcome of the legal issues in this case—specifically, in ensuring that the Clean Air Act ("Act") continues to be interpreted as a comprehensive framework for the regulation of all known and yet to be discovered air pollutants that affect public health and welfare, as was intended by the members of Congress and staff who drafted the law.

Leon G. Billings is an expert in the fields of environmental policy and clean air regulation. Mr. Billings has been intimately involved in clean air policy and law in the United States in his roles as staff director of the key subcommittee dealing with environmental matters in the Senate; a member of the Maryland State Legislature; and the founder of the Clean Air Trust and the Clean Air Trust Education Fund, entities dedicated to the preservation of the Act.

Mr. Billings participated directly and extensively in the drafting of multiple iterations of the Act. As the first full-time staff person for the Subcommittee on Air and Water Pollution ("Subcommittee") of the Senate

Committee on Public Works ("Committee"), Mr. Billings had primary responsibility for the Act and the Amendments of 1967, 1970 and 1977. From 1966 to 1978, Mr. Billings was the chief negotiator for the Senate Committee in conference committees with the United States House of Representatives, and he was responsible for drafting the Senate language in the Committee and Conference Reports on the Act. In addition, Mr. Billings represented the California South Coast Air Quality Management Agency in negotiations on the 1990 Clean Air Act Amendments ("1990 Amendments").

Thomas C. Jorling has been a leading environmental regulator, advocate, Senate staff member, and educator over the past 50 years. He has developed expertise in clean air and environmental policy in his roles as Committee Minority Counsel in the United States Senate; 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.

Mr. Jorling served as Minority Counsel to the Republican members (Senators Cooper, Boggs, Baker, Dole, Gurney and Packwood) of the

Committee throughout 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 committee staff members who were involved in the Subcommittee's and Committee's preparation and negotiation of the 1970 Amendments. In addition, Mr. Jorling was involved in the negotiation of the 1990 Amendments as Commissioner of the New York State Department of Environmental Conservation.

Amici are widely recognized as "architects" of the 1970 Amendments.[1] As such, they possess unique insight into the purpose and structure of the Act and have a strong interest in ensuring the preservation of the legal framework they and the participating members of Congress designed. Through their intimate involvement in the development of this landmark legislation, *amici* know that the Act was intended to create a comprehensive framework empowering the federal and state governments to regulate emissions of any and all air pollutants that harm human health and the environment. *Amici* submit this brief in support of Respondents and in

[1] In fact, Justice Breyer has cited Mr. Billings' leadership in drafting the 1970 Amendments as a valuable resource in the interpretation of the Act as it applies to stationary sources and greenhouse gas emissions. Transcript of Oral Argument at 40, *Utility Air Regulatory Group v. EPA*, No. 12-1146, 573 U.S. __ (2014).

support of EPA's decision to regulate carbon dioxide emissions under the Act. EPA's decision furthers the intent underlying the Act's comprehensive framework and is an appropriate and intended exercise of its authority under the Act.

SUMMARY OF ARGUMENT

In this case Petitioners are challenging EPA's decision to regulate carbon dioxide emissions from electric generating units under section 111(d) of the Act as amended.[2] 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"). Carbon dioxide is an air pollutant as defined in the Act, *see Massachusetts v. EPA*, 549 U.S. 497 (2007), and EPA has found that carbon dioxide endangers the public health and welfare, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Petitioners ask the Court to set aside the Rule based on (1) an erroneous interpretation of section 111(d)'s exclusion for pollutants regulated under section 112, as amended in 1990, and (2) the unsupportable proposition that the Rule's Best System of Emission Reduction ("BSER") exceeds the bounds of the Act. Opening Brief of Petitioners on Core Legal Issues, at 41-68 ("Pet. Br."). Petitioners' arguments ignore essential elements of the Act.

[2] All citations are to the Act; the Table of Authorities provides parallel citations to the U.S. Code.

The 1970 Amendments were designed as an all-encompassing scheme for the regulation of emissions of any and all air pollutants that are harmful to human health and the environment. They granted EPA the flexibility to regulate all known and later discovered air pollutants. The purpose of this statutory scheme was to "establish that the air is a public resource" and to provide an "intensive and comprehensive attack on air pollution". S. Rept. 91-1196 at 4. Regulation of carbon dioxide is clearly contemplated by this design.

Section 111(d) is one of three key components of the regulation of emissions of harmful air pollutants from existing stationary sources, *e.g.*, industrial facilities and power plants, under the Act. First, sections 108 through 110 mandate promulgation of national air quality standards, and development of the state implementation plan mechanism, for air pollutants determined to be harmful to public health and welfare ("Criteria Pollutants"). Next, section 112 enables EPA to establish more stringent regulations for hazardous air pollutants ("HAPs"). Finally, section 111(d) "fills the gap" by empowering EPA to regulate any and all other harmful air pollutants that are neither Criteria Pollutants nor HAPs. Congress created a tripartite structure, consisting of sections 108 through 110, 112, and 111(d), to fully address the existing problem of air pollution that had plagued the

Nation for decades, and also any future air pollution problems. Both the statutory structure of and legislative history behind section 111(d) reflect this design.

EPA's promulgation of the Rule under section 111(d) of the Act fits squarely within the authority Congress delegated to the Agency. By seeking to vacate the Rule, Petitioners would, in fact, defeat the purpose of section 111(d), which is to control emissions of non-Criteria, non-HAPs air pollutants that adversely affect public health and welfare.

ARGUMENT

I. THE 1970 AMENDMENTS TO THE CLEAN AIR ACT WERE INTENDED TO PROVIDE EPA WITH A RANGE OF MECHANISMS TO ADDRESS ALL KNOWN AND LATER DISCOVERED AIR POLLUTANTS

A. The Stated Purpose of the Act and the History of Congressional Efforts Demonstrate a Comprehensive and Pollutant-Specific Focus

The stated purpose of the Act is straightforward and unequivocal: "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare" through the "prevention and control" of air pollution. § 101(b)(1)-(4). "Welfare" is defined broadly by the Act to include "effects on … weather … and climate … as well as on personal comfort and well-being." § 302(h); *see also* 1 Envtl. Policy Div., Library of Congress, A Legislative History of the Clean Air Act Amendments of 1970 (1974) ("Leg. Hist.") at 224 (Sep. 21, 1970) (Statement of Sen. Muskie) (observing that air pollution was known to "threaten irreversible atmospheric and climatic changes."); *id.* at 349 ("Unless this outpouring of contaminants is controlled, scientists tell us we may very well experience irreversible atmospheric and climatic changes".) (Sep. 21, 1970) (Statement of Minority Leader Sen. Scott). The members of Congress responsible for the central provisions of the 1970 Amendments acknowledged the breadth and significance of the legislation's goals. Senator Cooper, for example, referred

to the Act as "far reaching," and "necessary for life and for health, and responsive to our duty in husbandry to future generations." Leg. Hist. at 258-59 (Sep. 22, 1970).

In furtherance of these broad goals, the mechanisms of the 1970 Amendments were targeted, overwhelmingly, at controlling emissions of specific air pollutants that are harmful to public health or welfare, regardless of source. *See* Leg. Hist. at 227 (Statement of Sen. Muskie) (referring to "pollutants" or "contaminants" as the basis for four of five core regulatory mechanisms ultimately enacted as sections 109, 110, 111(a)-(c), 112, and 111(d)).[3] The sources of those pollutants were then subject to enforceable requirements for the achievement of the intended reductions.

A review of the Nation's efforts to control air pollution prior to 1970 is instructive in understanding the scope of the Act's purpose and operation. Congress first attempted to address the air pollution problem in 1955. The Air Pollution Control Act, P.L. 84-159, authorized the Surgeon General to conduct research on air pollution, but it did not establish any limits on

[3] The pollutant-specific orientation of the other key provisions of the Act, including the mobile source standards of sections 202 through 209, the Prevention of Significant Deterioration program of section 169 (enacted in the 1977 Amendments), the visibility requirements of section 169A (enacted in the 1977 Amendments), and the section 401 acid rain deposition program (enacted in the 1990 Amendments), further demonstrates the pervasiveness throughout the Act of the pollutant-oriented approach.

emissions. In light of the need for more specific legislation to control emissions of air pollutants, Congress passed the Clean Air Act in 1963, P.L. 88-206, with the stated purpose of "promot[ing] the public health and welfare" through the "prevention and control" of air pollution. The 1963 Clean Air Act encouraged the States to cooperate in pollution control efforts and required the Public Health Service to publish air quality criteria documents for specific pollutants. In 1965, Congress amended the Act, P.L. 89-271, setting national automobile emissions standards for specifically identified pollutants. Congress added new regulatory tools to the Act in 1967, P.L. 90-148, directing air quality control regions around the country to adopt air quality standards for specific pollutants. This requirement was the precursor to the Act's National Ambient Air Quality Standards ("NAAQS") provisions.

In 1970, Congress amended the Act to create the current comprehensive framework, a response to the realization that "the air pollution problem [was] more severe, more pervasive and growing faster" than had been thought. Leg. Hist. at 225 (Sep. 21, 1970) (Statement of Sen. Muskie).[4] With each enactment from 1955 to 1970, Congress included

[4] Congress was concerned that no real progress had been made in the efforts to control air pollution. *See* Leg. Hist. at 116 (Dec. 18, 1970) (Statement of Rep. Hechler) ("We can no longer afford the pussyfooting, artful dogging,

additional tools and provided EPA and the States with expanded regulatory authority to address the totality of the air pollution problem. The enactments leading up to the 1970 Amendments also reflect the development of a regulatory framework based on the identification and regulation of specific air pollutants.

B. The Text and Structure of the Act Reflect the Broad Congressional Purpose and Pollutant-Specific Focus

The Act provides EPA with a number of regulatory tools to address various types of air pollutants with differing effects on public health and welfare. The foundational provisions of the Act reflect its prospective orientation.

First, the Act directs EPA to conduct extensive research on "the causes, effects (including health and welfare effects), extent, prevention and control of air pollution." § 103(a)(1). The inclusion of this research mandate reflects Congress's acknowledgment that the five Criteria Pollutants that had already been identified by EPA's predecessors by 1970 (namely ozone, particulate matter, carbon monoxide, sulfur dioxide and nitrogen oxide) did not represent the full scope of the air pollution problem.

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delays, end runs, and outright flouting of the intent of the legislation which has characterized the history of air pollution control."). It was obvious that the Nation faced an "environmental crisis." Leg. Hist. at 224 (Sep. 21, 1970) (Statement of Sen. Muskie).

Second, the Act directs EPA to continually update the lists of Criteria Pollutants and HAPs. With respect to Criteria Pollutants, the EPA Administrator is required to publish "a list which includes each air pollutant ... which, in his judgment ... may reasonably be anticipated to endanger public health or welfare" and "from time to time thereafter revise" such list. § 108(a). The Administrator must then issue NAAQS for such pollutants, and the States must prepare implementation plans to attain these standards. §§109-110. The Administrator is also required to review and revise the list of HAPs, adding any pollutants which present a risk of adverse human health effects. §112(b)(2).[5]

Finally, under section 111(d), the Administrator must prescribe regulations for any air pollutant from existing stationary sources that is determined to be a threat and is not otherwise regulated as a Criteria Pollutant under sections 108 through 110 or as a HAP under section 112. Taken together, these three regulatory tools authorize the EPA to regulate any harmful air pollutant emitted by existing stationary sources, whether the pollutant was identified in 1970 or later determined to threaten human health

[5] Under the original 1970 version of section 112, the Administrator was required to identify and list all HAPs. In response to EPA's minimal progress in identifying and listing HAPs, Congress prepared an initial list of HAPs in the 1990 Amendments and granted the Administrator the authority to update the list as new pollutants are identified. *See* P.L. 101-549.

and welfare. There was no suggestion in these provisions of any intention to limit the agency's exercise of authority to act against harmful air pollutants; rather, it was clear that Congress meant to create a three-pronged regulatory regime with section 111(d) as an essential component. Having been intimately involved in drafting the 1970 Amendments, *amici* can confirm that this was what Congress intended when the 1970 Amendments were enacted into law.

The Act contains only one set of provisions that is based on sources (not specific pollutants), which are regulated through application of adequately demonstrated systems of emission reduction. Under sections 111(a)-(c), the Administrator is required to establish performance standards for newly constructed stationary sources or existing sources that undergo significant modifications that result in an increase of emissions ("NSPS"). The performance standards were keyed to emission sources, rather than specific pollutants, in order to prevent these sources from "shopping around" to locate in states with lenient air pollution rules and avoid states with more stringent air pollution regulations. *See* Leg. Hist. at 227 (Sep. 21, 1970) (Statement of Sen. Muskie).

The Act's differing mechanisms thus established an all-encompassing system of pollution reduction requirements with the flexibility to cover all

harmful air pollutants. The drafters of the 1970 Amendments had a clear purpose: to "combine[] air quality standards, local implementation plans, and national emission standards for new sources and for specific agents from old sources in a way that ... will accomplish the purpose of the country." Leg. Hist. at 261 (Sep. 21, 1970) (Statement of Sen. Cooper).

Courts have routinely acknowledged that the broad purpose of the Act is evident from its operative provisions. The Supreme Court has referred to the Act as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). More recently, the Court observed that EPA's mandate to protect the public health is "absolute" and was delivered by a Congress "unquestionably aware" of the implications of such a mandate. *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 465-66 (2001) (internal quotation marks omitted). The Court has also recognized that EPA's authority to regulate all air pollutants is "unambiguous." *Massachusetts v. EPA*, 549 U.S. at 529. Finally, the Court has stated that Congress understood "that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Id*. at 532. In short, by affirming the EPA's broad authority to regulate all air pollutants, the Supreme Court has accurately understood

the drafters' intent to deal with the totality of the serious problem of air pollution.

C. The Act Fully Accommodates the Rule's Proposed BSER Standards

Petitioners argue that the three "Building Blocks" for carbon dioxide emission reduction proposed by EPA in the Rule—(1) improving combustion efficiency at coal-fired power plants, (2) replacing coal-fired power with natural-gas fired power, and (3) replacing fossil fuel-fired power with renewable energy sources, 80 Fed. Reg. at 64,745-48—exceed EPA's statutory authority to require BSER for existing stationary sources and force changes in the utility sector. Pet. Br. at 50-56. Petitioners also argue that the Rule's BSER "transgresses EPA's authority under section 111(d) by … [relying on measures] such as temporarily reducing operations or shifting production to other facilities." Pet. Br. at 50. Notably, these arguments ignore the significant fact that the Rule's "determination of the BSER does not necessitate the use of the three building blocks to their maximum extent, or even at all," and that the Rule acknowledges that "there are numerous other measures available to reduce [carbon dioxide] emissions." 80 Fed. Reg. at 64,667.

Based on *amici's* experience in drafting the 1970 Amendments, it is clear that Petitioners' view is far narrower than that of the drafting Congress,

which intended that section 111 be interpreted broadly and promote technological innovation. *See Sierra Club v. Costle*, 657 F.2d 298, 346 (D.C. Cir. 1981) (stating that section 111 "embraces consideration of technological innovation").

It is important to recall that the 1970 Amendments were enacted against the background of the limited ability of the 1955, 1963, 1965 and 1967 laws to adequately reduce air emissions. The Senate keenly understood that "tests of economic and technological feasibility … lead to inadequate standards" and "more tools were needed" to adequately address air pollution. Leg. Hist. at 125 (Statement of Sen. Muskie). Indeed, courts immediately affirmed that understanding: "The approach of the [Act] … was to shift from the approach of earlier legislation of establishing air pollution standards commensurate with existing technological feasibility to a bolder policy which forces technology to catch up with the newly promulgated standards." *NRDC v. EPA*, 489 F.2d 390, 401 (5th Cir. 1974), *rev'd on other grounds sub nom. Train v. NRDC*, 421 U.S. 60 (1975) (internal quotation marks omitted). Thus, in establishing EPA's basic duty to issue air quality control information to the States, Congress defined the obligation broadly:

> Such information shall include such data as are available on available technology and alternative methods of prevention and

> control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

§ 108(b)(1) (emphasis added). Similarly, in requiring that emission reduction plans be implemented under section 110 and in connection with section 111(d), Congress authorized the use of a broad range of techniques including:

> emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure [compliance], including, but not limited to, land-use and transportation controls.

P.L. 91-604, § 110(b)(2)(B) (*see* section II.A.1 *infra* for an explanation of section 111(d)'s use of section 110's regulatory mechanism). Congress expanded the available range of options further in 1990 to encompass "other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights)." § 110(a)(2)(A). As drafters of the 1970 Amendments, *amici* can state unequivocally that Congress intended for the entire Act to be viewed through the lens of the expansive range of pollution reduction methods described in these provisions.

Congress was, and has always been, concerned with reducing harmful air emissions, but not in limiting EPA or the States to any particular set of methods for doing so. This fact is further evidenced by the provisions

requiring extensive research activities into all types of pollution control processes and methods, including alternative strategies and technologies for preventing or reducing multiple air pollutants such as "energy conservation, including end-use efficiency, and fuel-switching to cleaner fuels." §§ 103(a)-(b), (g)(1); *see also Massachusetts v. EPA*, 549 U.S. at 530.

A later amendment to the Act also supports the conclusion that Congress intended that EPA and the States have significant latitude in developing techniques for controlling emissions. In 1977, recognizing that additional flexibility would aid in the achievement of emission reductions in areas that had not attained air quality standards, Congress amended the Act to codify EPA's Offset Policy (which had been established pursuant to the 1970 Amendments) by permitting States to allow sources to "offset" their emissions by obtaining reductions from other similar sources. § 173(c). The nonattainment offset program has been an unchallenged and uncontroversial success for four decades, affording states and emitters key flexibility to comply with the Act's requirements.[6]

[6] Similarly, regulated entities have long argued that the Act provides significant flexibility in compliance methods, enthusiastically supporting such concepts as fuel switching, trading and emissions "bubbles" in order to achieve the most cost-effective and efficient reductions. *See generally Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

It has consistently been Congress' intent, in both creating the Act and subsequently amending it, not to limit the manner in which emission reductions are achieved, but to grant EPA and the States broad authority to determine and apply the most feasible methods of achieving those reductions.

II. SECTION 111(d) WAS DESIGNED TO ALLOW EPA TO REGULATE EMISSIONS OF ALL NEW NON-CRITERIA, NON-HAZARDOUS AIR POLLUTANTS

A. Section 111(d) Provides Authority for EPA to Regulate Carbon Dioxide

Amici, having participated in the Conference proceedings in which section 111(d) was incorporated into the final 1970 Amendments, attest that section 111(d) grants EPA broad authority to regulate harmful air pollutants, such as carbon dioxide, that are emitted by existing stationary sources and are neither Criteria Pollutants nor HAPs. In discussing the relatively strict requirements for listing HAPs, the Senate Committee stated that section 114 of S. 4358, which became section 111(d) of the Act, should ensure that there were "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. It is clear to *amici* that, as described above, section 111(d) is one of three key provisions regulating existing stationary sources. These provisions reference each other and were meant

to function together to create the Act's regulatory scheme. Therefore, section 111(d) must be read in the context of the other key components of the Act, as a part of the comprehensive program to abate air pollution.

1. Petitioners' Interpretation Ignores the Relationships Between Key Sections of the Act

Petitioners claim that EPA is statutorily barred from regulating under section 111(d) any source that emits a single pollutant that is regulated under section 112. Petitioners' attempt to diminish the significant role of section 111(d) ignores its statutory purpose, which is to ensure that the Act regulates all air pollutants that threaten the public health and welfare. In addition, Petitioners' argument that the Act bars "double regulation" of power plants or other air pollution-emitting facilities flies in the face of the Act's provisions and more than 45 years of implementation. The Act recognizes that different air pollutants present differing health impacts and environmental risks. *See* S. Rept. 91-1196 at 18 (noting that "pollution agents and combinations of those agents fall into three general categories" requiring three different regulatory mechanisms). As a result, stationary sources, including power plants, have long been subject to multiple emission reduction requirements under section 110, section 112, section 111(d) and, more recently, the acid rain provisions of section 401. To the extent the Act

seeks to prevent "double regulation," it is only of pollutants, not sources of emissions.

Section 111(d) contains two exclusions: EPA may only regulate an air pollutant (1) for which air quality criteria have not been established or which is not listed as a Criteria Pollutant under section 108, and (2) which is not regulated as a HAP under section 112. § 111(d)(1). Section 112 also contains an exclusion: A pollutant may not be regulated as a HAP if it is listed as a Criteria Pollutant under section 108. § 112 (b)(2). These exclusions, together, ensure that no individual pollutant is "double regulated" under any of the above core provisions. Petitioners argue that the exclusions in section 111(d) eliminate from its purview any source, rather than any pollutant, which is regulated under section 112. This argument subverts the fundamental purpose of the Act, which is to ensure that all air pollutants that threaten public health or welfare are regulated.

2. Petitioners' Interpretation Would Produce an Absurd Result

As discussed above, EPA may not use section 111(d)(1) to regulate Criteria Pollutants listed under Section 108 or HAPs listed under Section 112. If the section 111(d) exclusion relating to section 112 is applied source-wide, as Petitioners contend, a source subject to reduction requirements for HAPs could emit, without any limitation, any non-HAP

and non-Criteria air pollutant. This interpretation would shield these sources from regulation under section 111(d), creating precisely the gap that section 111(d) was intended to fill.

The irrationality of Petitioners' proposed interpretation is apparent from a simple example. If a facility emits a Criteria Pollutant such as nitrogen dioxide and a HAP such as chlorine, and that same facility also emits numerous other pollutants not currently listed as Criteria Pollutants or HAPs, EPA would be barred from regulating any of those other pollutants under section 111(d).

It would be contrary to the letter and intent of the Act to restrict EPA's regulatory authority in this way. Based on the extensive experience of *amici* in the drafting and negotiation of these provisions, *amici* confirm that it is also contrary to the history of the Act and the goals of its drafters.

B. The Legislative History of Section 111(d) Demonstrates that Petitioners' Proposed Interpretation Is Erroneous

Petitioners' interpretation of section 111(d) is contrary to the history of the 1970 Amendments, which clearly shows Congress's intent to regulate all air pollutants which threaten public health or welfare. The evolution of section 111(d) through the legislative process in 1970 shows that the Senate, recognizing that scientific and other advancements would reveal future air

pollutants that would require control, established a mechanism for regulating such future pollutants from existing sources. *See* S. Rept. 91-1196 at 18.

The Senate bill, S. 4358, passed by the Senate on September 22, 1970, contained a section entitled "National Emission Standards – Selected Air Pollution Agents" ("Section 114"). This section authorized the Administrator to publish, and revise at any time, a list of pollutants for which he determined emission reductions were appropriate in order to "insure that emissions of such pollution agent or combination of agents … shall not endanger public health." Leg. Hist. at 561. Section 114 was understood to "provide[] authority to control pollution not covered by the ambient air standards or by hazardous substance emission controls." Leg. Hist. at 328 (Sep. 22, 1970) (Statement of Sen. Murphy). The provision allowed states to submit implementation plans for the enforcement of any emission standard established under Section 114. *See id*. at 564.

There was no comparable provision in the House bill, H.R. 17255. *See* Leg. Hist. at 910-940. After discussing Section 114, the Conferees agreed that non-Criteria Pollutants and non-HAPs should be regulated. Discussing the core requirements from S. 4358 that migrated into the final bill, the conferees noted:

> [Section 114] provided the Administrator with 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.

Leg. Hist. at 125 (Dec. 18, 1970) (Statement of Sen. Muskie). In order to reconcile the structures of S. 4358 and H.R. 17255 while retaining the gap-filling regulatory authority contained in the Senate bill, the conferees decided to incorporate the basic elements of Section 114 into a new subsection (d) of section 111, using an implementation plan procedure "similar to that provided by [section 110]" to achieve the necessary reductions. § 111(d)(1). This approach would give EPA the flexibility to regulate the third category of pollutants while obviating the need for an entirely new regulatory mechanism. The result of this action was to authorize the Administrator, in sections 111(a)-(c), to issue standards of performance to control any pollutants emitted by new or modified stationary sources of air pollution, and in section 111(d), to regulate newly identified non-Criteria Pollutants and non-HAPs from existing stationary sources. § 111(a)-(d).

To achieve the goal of protecting public health and welfare from all harmful air pollutants, section 111(d) authorizes the Administrator to establish the best system of emission reduction for specific air pollutants that are revealed, through science and advanced monitoring and measuring techniques, to adversely affect public health or welfare and which are

emitted by stationary sources, but do not qualify as Criteria Pollutants or HAPs. § 111(d)(1). Carbon dioxide is one such pollutant.

Amici affirm, based on their considerable experience in drafting and negotiating the 1970 Amendments, that section 111(d) was a key component of the regulatory scheme for existing stationary sources established by the 1970 Amendments.

III. THE 1990 AMENDMENTS DID NOT ALTER THE MEANING OF SECTION 111(d)

Petitioners urge the Court to read the 1990 Amendments to "prohibit[] EPA from employing section 111(d) to regulate a source category that is already regulated under section 112." Pet. Br. at 61. Petitioners base their argument on the text of the House version of the 1990 Amendments. Unlike the Senate version, which simply replaced an old cross-reference with an updated one, the House version replaced the exclusion in section 111(d) for "any air pollutant … which is not included on a list published under section … 112(b)(1)(A)" with an exclusion for "any air pollutant … emitted from a source category which is regulated under [section 112]". *Compare* Pub. L. No. 101-549 § 108(g) *with* Pub. L. No. 101-549 § 302(a).[7] Respondent,

[7] Both the Senate version and the House version of section 111(d) were signed into law; the Congressional Research Service, in its official print of the amended Act, included both provisions with a footnote stating that they "appear to be duplicative" and "in different language, change the reference

Respondent-Intervenors, and other *amici curiae* have briefed the Court extensively on how incompatible the Petitioners' theory is with the text of the Act and the legislative history of the Senate and House versions of the 1990 Amendments.

Based on their unique experience in the drafting and negotiation of the 1970 Amendments and their participation in the 1990 Amendments, *amici* conclude that Petitioners' attempt to significantly narrow the scope of section 111(d) is neither logical nor sustainable. It rests on a reading of the Act as amended by the House that has no support in the legislative history of the 1990 Amendments, and it does not comport with the purpose and scope of the Act.

Sections I and II *supra* show that section 111(d) was intended as an essential component of the Act's three-pronged approach to the regulation of all air pollutants emitted by existing stationary sources. Based on the extensive legislative history of section 114 of S. 4358, the 1970 Senate bill, which was transferred to section 111(d) of the Act during the Conference Committee deliberations, it is clear that section 111(d) was designed as an essential provision to fill the gap between regulation of Criteria Pollutants

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to section 112." 1 Envtl. Policy Div., Library of Congress, A Legislative History of the Clean Air Act Amendments of 1990 (1993), at 46 ("1990 Leg Hist.").

and HAPs. If Congress had intended to drastically limit the scope of this provision in 1990, it would have done so clearly and expressly. It is telling that when the provision was amended in 1990, no one in Congress expressed any intention to change section 111(d) and thereby fundamentally alter the Clean Air Act's legislative scheme.

There was no testimony, no comment in the hearing record, and no statement in the report or the floor debates of either house of Congress regarding an intention to change the scope of section 111(d). The Conference Report accompanying the 1990 Amendments skips from a discussion of the changes to section 110 to a lengthy discussion of the new and expanded section 112. The Report makes no mention at all of an expanded exclusion under section 111(d). H.R. Rept. 101-490, at 150-154. The "Section-by-Section Analysis" contained in the Report does note other changes that were made to section 111, but it is silent as to section 111(d). H.R. Rept. 101-490, at 271-272. It would be quite surprising if Congress severely reduced the scope of section 111(d) without any discussion whatsoever. *See generally* 1990 Leg. Hist.[8] In fact, the clearest expression

[8] The Conference Report accompanying S. 1630 does make explicit reference to the concept of "dual regulation" under section 112 with respect to the Atomic Energy Act (not section 111(d)), H.R. Rept. 101-952, at 339, and the concept was discussed extensively in the floor debates, see 1990 Leg. Hist. at 779-85 (Oct. 27, 1990) (Statement of Sen. Burdick), 1152-53

of Congress's intent with respect to regulation of HAPs can be found in section 112(d)(7) of the 1990 Amendments, entitled "Other requirements preserved":

> "No emission standard or other requirement promulgated under [section 112] shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to [section 111] … or other authority of [the Act]."

§ 112(d)(7). Based on their extensive experience in drafting and implementing the Act, *amici* confirm that this provision reinforces Congress's intent that the Act be read and implemented as broadly as possible.

Amici not only played key roles in drafting the 1970 Amendments, but also actively participated in the legislative process during the passage of the 1990 Amendments. *Amici* were aware of Congress' goal of "strengthening the Clean Air Act … [in light of] the need for stricter emissions controls … and the growing evidence of global climate change", 1990 Leg. Hist. at 786 (Oct. 27, 1990) (Statement of Sen. Mitchell), and would have been keenly alert to any proposed reduction in the scope of section 111(d) at that time.

(Oct. 26, 1990) (Statement of Sen. Simpson). The 1990 Amendments addressed the issue by eliminating EPA's obligation to regulate radionuclides as HAPs if they were adequately regulated under the AEA, § 112(d)(9). Had Congress been concerned about dual regulation of sources under sections 111(d) and 112, it likely would have mentioned that concern or included a similarly explicit obligation.

However, *amici* were and are unaware of any such proposal, and they are confident that the change to section 111(d) contained in the House version of the 1990 Amendments was not intended to reduce its scope.

There is absolutely nothing in the Act, the purpose of which is to protect the public health and welfare from air pollution, § 101(b)(1), that would support the interpretation that Petitioners are advancing. Based on the text, legislative history and stated purposes of the Act, *amici* contend that there is no basis to assert that Congress agreed to allow a source to emit multiple health- or welfare-damaging air pollutants with immunity, merely because that source is already subject to regulation for other air pollutants. Congress would not have taken such a drastic action without explicitly explaining its rationale and its intent to do so; yet nothing in the record of the 1990 Amendments or the experience of *amici* provides any such explanation.

Section 111(d) should be interpreted in light of the purpose and letter of the Clean Air Act, which is to regulate all air pollutants that have the potential to damage public health and welfare, including carbon dioxide. The Supreme Court has stated, in the context of landmark federal legislation, that "a fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 576 U.S. __ (2015), No. 14-114, Slip Op.

at 21. *Amici's* extensive first-hand experience demonstrates that the Act was created and amended to improve, not hinder, the Nation's ability to reduce air pollution—and it should be interpreted, "if at all possible … in a way that is consistent with the former, and avoids the latter." *Id*.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: April 1, 2016

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 6,075 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 1, 2016, the foregoing brief was served upon all registered counsel via the Court's ECF system.

Dated: April 1, 2016

Respectfully submitted,

/s/
Charles S. Warren