ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

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

No. 14-1146

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

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

CITY OF NEW YORK, *et al.*,
Intervenors for Respondent.

On Petition for Review of EPA Action

FINAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and *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 Respondent's brief.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), the Institute for Policy Integrity states that it is aware of no other planned *amicus* briefs in support of Respondent in this case.

Under Federal Rule of Appellate Procedure 29(c), the Institute for Policy Integrity states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity ("Policy Integrity") is a not-for-profit organization at New York University School of Law. Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has no parent companies. No publicly-held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

EPA:	Environmental Protection Agency

STATUTES AND REGULATIONS

All applicable statutes and regulations are included in the Statutory Addendum to the Brief for Respondent EPA.

INTEREST OF AMICUS CURIAE

Pursuant to this Court's order of January 21, 2015, Dkt. No. 1533159, the Institute for Policy Integrity at New York University School of Law[1] ("Policy Integrity") files this *amicus curiae* brief in support of Respondent, the Environmental Protection Agency ("EPA"). Petitioners seek judicial review of a 2010 settlement agreement between EPA and several states and nonprofit entities regarding the agency's obligations to control carbon dioxide emissions from the electricity sector under the Clean Air Act. Following that settlement agreement, EPA proposed a regulation entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014), also known as the "Clean Power Plan," to address greenhouse gas emissions from power plants. Petitioners argue that the settlement agreement is unlawful because EPA lacks authority to regulate greenhouse gases from power plants under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), because it regulated hazardous air pollutants from power plants under Section 112

[1] This brief does not purport to represent the views of New York University School of Law, if any.

of the Act, 42 U.S.C. § 7412.[2] If this Court decides to reach the merits of Petitioners' claims, Policy Integrity believes that an examination of EPA's regulatory history under Section 111(d) and the flexibility considerations weighing in favor of the use of that section support EPA's authority to promulgate the Clean Power Plan.

Policy Integrity is a nonprofit organization dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on environmental issues. Policy Integrity is a collaborative effort of faculty at New York University School of Law; a full-time staff of attorneys, economists, and policy experts; law students; and a Board of Advisors comprised of leaders in public policy, law, and government. Policy Integrity has produced scholarship on and has expertise in the regulation of greenhouse gases and other pollutants under the Clean Air Act, regulatory impact analysis, and rulemaking under the Administrative Procedure Act. Policy Integrity has previously filed amicus briefs in a number of significant cases in this Court and the Supreme Court involving EPA's authority to regulate pollutants, including greenhouse gases, under the Clean Air Act.

[2] Other petitioners have challenged the Clean Power Plan from different procedural postures in related cases that will be heard by the same panel as this proceeding. *See In re Murray Energy Corp.*, No. 14-1112, Dkt. No. 1522086 (Nov. 13, 2014).

Policy Integrity has a significant interest in the outcome of the legal issues presented in this case—in particular in ensuring that EPA has the authority to promulgate flexible standards to reduce carbon pollution, such as the Clean Power Plan standards under Section 111(d). Policy Integrity has participated extensively in rulemaking proceedings to support EPA's use of flexible mechanisms to reduce externalities from greenhouse gas pollution, including submitting comments to EPA with regard to the Clean Power Plan at issue in this case. In particular, Policy Integrity has written numerous analyses on the regulatory history of EPA's interpretations of the interplay between Sections 111(d) and Section 112 following the 1990 Clean Air Act Amendments, as well as on the policy implications of a decision to regulate greenhouse gases under Section 111(d) as opposed to other provisions of the Act. This brief builds upon that work, arguing that the regulatory history and policy context of Section 111(d) support EPA's authority to promulgate the Clean Power Plan.

SUMMARY OF ARGUMENT

Ever since the current version of Section 111(d) was enacted in the 1990 Clean Air Act Amendments, EPA has consistently—and under both Republican and Democratic presidential administrations—interpreted the so-called "Section 112 Exclusion" in ways that would authorize the regulation of greenhouse gases from existing power plants under the Clean Power Plan. In particular, EPA has consistently construed the Section 112 Exclusion to apply only to particular pollutants addressed under Section 112, rather than to entire source categories. This longstanding, consistent agency interpretation warrants particular deference and supports a decision by this Court to affirm EPA's authority to promulgate the Clean Power Plan.

Petitioners' reading of the Section 112 Exclusion as applying to entire source categories is not only inconsistent with the regulatory history; it could also foreclose EPA's ability to use the cost-minimizing flexible compliance mechanisms offered by Section 111(d) to address a variety of pollutants that could otherwise be subject to costlier and less-efficient technology-based regulation.

ARGUMENT

I. SINCE THE 1990 CLEAN AIR ACT AMENDMENTS AND THROUGH ADMINISTRATIONS OF BOTH PARTIES, EPA HAS REPEATEDLY INTERPRETED SECTION 111(d) IN WAYS CONSISTENT WITH THE PROPOSED CLEAN POWER PLAN

During nearly twenty-five years of regulatory history, both Republican and Democratic administrations have consistently interpreted Section 111(d)'s so-called "Section 112 Exclusion" in ways that would authorize the regulation of greenhouse gases from existing power plants under the Clean Power Plan. Surprisingly, Petitioners and their amici argue the exact opposite: that EPA has consistently interpreted the Section 112 Exclusion in a way that precludes regulating power plants under Section 111(d). *See* Pet. Br., Doc. No. 1524569, at 31, Amicus Br. of Trade Ass'ns & Pac. Legal Found., Doc. No. 1526595, at 5; *see also* Br. for Intervenor-Petitioners Nat'l Fed'n of Indep. Bus. & Util. Air Regulatory Group at 14, *In re Murray Energy*, Nos. 14-1112 & 14-1151, Doc. No. 1529709 (D.C. Cir. Dec. 30, 2014). However, those briefs mischaracterize EPA's interpretations of the provision. In fact, since the passage of the 1990 Clean Air Act Amendments, EPA has consistently construed the Section 112 Exclusion to apply only to particular pollutants, rather than to entire source categories—an interpretation that affirms EPA's authority to promulgate the Clean Power Plan. *See* EPA Br., Doc. No. 1533964, at 51-54.

A. The Regulatory History of EPA's Interpretations of the Section 112 Exclusion Supports the Agency's Authority to Promulgate the Clean Power Plan

Section 111(d) authorizes the regulation of pollutants emitted by existing sources, as long as new source performance standards exist for that pollutant and source category—except in the case of pollutants already listed or regulated under one of two other Clean Air Act provisions: Section 108 or Section 112. EPA's historical interpretations of these exceptions have been overwhelmingly consistent since the current text was adopted in 1990, but critics of the proposed Clean Power Plan now question the scope of the "Section 112 Exclusion" based on a rare textual peculiarity. In the 1990 Amendments to the Clean Air Act, Congress passed and President George H.W. Bush signed into law two different provisions, with each amending the same text in Section 111(d) in seemingly different ways. The Senate amendment maintained the pre-1990 scope of the exclusion, which prevented hazardous pollutants listed under Section 112 from being regulated further under Section 111(d). The House amendment, on the other hand, is more ambiguous and subject to multiple interpretations—with many reasonable readings supporting the proposed Clean Power Plan. One specific and narrow reading advanced by opponents of the Clean Power Plan, however, could potentially exempt entire categories of existing sources from any Section 111(d) regulation for any pollutant

if such source categories are already regulated under Section 112, even for completely different pollutants.

Opponents of the Clean Power Plan have seized on this unusual textual problem, focusing on just one reading of the House provision and questionably interpreting the language to prohibit EPA from regulating greenhouse gases from power plants under Section 111(d), because power plants are already a category regulated under Section 112, albeit for different pollutants. *See, e.g.*, Pet. Br., Doc. No. 1524569, at 22-23. In contrast, EPA and scholars have offered a variety of compelling arguments based on the section's text, structure, and legislative history—as well as judicial principles of statutory interpretation and agency deference—that strongly support the agency's authority under Section 111(d) to regulate greenhouse gases from existing power plants, because greenhouse gases from power plants are not hazardous pollutants regulated under Section 112. *See*, *e.g.*, Robert R. Nordhaus & Avi Zevin, *Historical Perspectives on § 111(d) of the Clean Air Act*, 44 Envtl. L. Rep. 11,095 (2014).

EPA's consistent regulatory history of interpreting the Section 112 Exclusion in a way that would exclude only particular pollutants from Section 111(d)'s purview, rather than entire source categories, further supports the agency's authority to promulgate the Clean Power Plan. The Supreme Court has repeatedly recognized the importance of "accord[ing] particular deference to an

agency interpretation of longstanding duration." *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)) (internal quotation omitted); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009) (explaining that EPA's consistent interpretation of a statutory provision for over three decades, "[w]hile not conclusive, . . . surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion"). EPA's twenty-five-year history of consistent interpretation of the scope of the Section 112 Exclusion similarly warrants "particular deference."

B. President George H.W. Bush's EPA Viewed the Section 112 Exclusion to Apply Only to Particular Pollutants Addressed by Section 112, Not to Entire Source Categories

As early as six months after the passage of the 1990 Clean Air Act Amendments, the EPA under President George H.W. Bush indicated that the Section 112 Exclusion removed only certain pollutants, not entire source categories, from the purview of Section 111(d). In a May 1991 proposal of emissions guidelines for municipal solid waste landfills, EPA described the scope of Section 111(d) as follows: "When an NSPS [New Source Performance Standard] has been promulgated under section 111(b) for a category of sources, section 111(d) of the CAA [Clean Air Act] requires that States submit plans which establish emission standards for existing sources and provide for implementation

and enforcement of emission standards for the designated pollutant." 56 Fed. Reg. 24,468, 24,469 (proposed May 30, 1991). The agency then defined a "designated pollutant" under Section 111(d) as "one that may cause or contribute to endangerment of public health or welfare but is not 'hazardous' within the meaning of section 112 of the CAA [Clean Air Act] and is not controlled under sections 108 through 110 of the CAA [Clean Air Act]." *Id.* Though this proposed rulemaking never discussed the language of the 1990 amendments directly, *see id.* at 24,474, this framing shows that the agency determined that the Section 112 Exclusion applies to particular pollutants—namely those deemed "hazardous" under Section 112—rather than entire source categories.

Under the first Bush Administration's definition, EPA today would clearly have authority to regulate greenhouse gases from existing power plants, since greenhouse gases "contribute to endangerment of public health or welfare" but have not been listed as hazardous under Section 112 or controlled under Sections 108 through 110. *See id.* at 24,469.

C. President Clinton's EPA Continued a Pollutant-Focused View of the Section 112 Exclusion, Including Approving Section 111(d) Plans for Categories Also Regulated Under Section 112

The EPA during President Clinton's administration continued interpreting the exclusions in Section 111(d) to apply to pollutants, rather than to source categories. In 1998, EPA issued hazardous air pollutant standards under Section

112 for pulp and paper producers, including Kraft pulp mills. 63 Fed. Reg. 18,504 (Apr. 15, 1998) (to be codified at 40 C.F.R. pt. 63 subpt. S). In the rulemaking, EPA did not indicate any potential conflict with or the need to repeal its existing Section 111(d) guidelines on total reduced sulfur from Kraft pulp mills, which EPA had issued in 1979. 44 Fed. Reg. 29,828 (May 22, 1979). Moreover, after adopting the Section 112 standards pertaining to hazardous pollutants for these pulp mills, 63 Fed. Reg. 18,504 (Apr. 15, 1998), EPA continued to review and approve state implementation plans under Section 111(d) for total reduced sulfur emissions from the same sources. *See, e.g.*, 64 Fed. Reg. 59,718 (Nov. 3, 1999) (approving Maryland's 111(d) state air quality plan for total reduced sulfur emissions from existing Kraft pulp mills, even though Section 112 standards already applied to Kraft pulp mills).

President Clinton's EPA also continued work on the municipal solid waste landfill regulation first proposed by the previous administration, and continued to view the scope of Section 111(d) as excluding only certain pollutants, not entire source categories. In particular, in proposing to regulate the gases emitted from municipal solid waste landfills—which contain both "hazardous air pollutants" and other "non-hazardous" but still dangerous pollutants—EPA indicated that it would be permitted to simultaneously regulate landfill gas under both Section 111(d) and Section 112. *See* 65 Fed. Reg. 66,672, 66,674-75 (proposed Nov. 7, 2000) ("The

additional [Section 112] requirements [are] above and beyond the EG [Section 111(d) emission guidelines]. . . . [T]hese landfills continue to remain subject to the provisions of the EG [Section 111(d) emission guidelines] . . . as applicable.").

Petitioners' amici argue that in a 1995 background report on the development of the municipal solid waste landfill regulations, EPA interpreted the Section 112 Exclusion in Section 111(d) to apply to the entire source category of municipal landfills rather than to particular pollutants emitted from those landfills. *See* Amicus Br. of Trade Ass'ns & Pac. Legal Found., Doc. No. 1526595, at 9 (citing EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, at 1-6 (1995)). Contrary to Petitioners' amici's assertions, EPA never reached such a conclusion. In the 1995 report, EPA noted that municipal landfills could definitely be regulated under Section 111(d) because landfills had not yet been regulated under Section 112. However, EPA also explained that "some components of landfill gas are not hazardous air pollutants listed under section 112(b) and thus will not be regulated under a section 112(d) emission standard." EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, at 1-6 to 1-7 (1995). Thus, because the non-hazardous components of landfill gas would not trigger the Section 112 Exclusion, EPA reasoned that it would be allowed to

"establish[] emission guidelines under section 111(d)(1)(A) for sources of the designated pollutant landfill gas." *Id.* With this reasoning, EPA reaffirmed its interpretation that it may regulate under Section 111(d), despite a source category being subject to Section 112 standards, if particular targeted pollutants remain unregulated under Section 112. *Id.*

Petitioners' amici further argue that the 1995 background report acknowledged that the House amendment was the correct amendment and that, therefore, regulation of a source category under Section 112 would bar all Section 111(d) regulation for that category, even for other pollutants. *See* Amicus Br. of Trade Ass'ns & Pac. Legal Found., Doc. No. 1526595, at 9 (citing EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, at 1-5 (1995)). Although that 1995 background report did assume that the House amendment was the correct one, the agency still determined that, when landfills eventually became subject to regulation under Section 112, the non-hazardous components of landfill gas could nonetheless be subject to regulation under Section 111(d). *Id.* at 1-5 to 1-6. Moreover, the 1995 document is a background report and, as such, its contents do not constitute a formal interpretation warranting the deference given notice-and-comment rulemaking. *See United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (holding that "classification rulings[,] . . . policy statements, agency manuals, and

enforcement guidelines" are "beyond the *Chevron* pale" and do not warrant heightened deference). Indeed, EPA has never adopted a formal interpretation indicating that the House amendment should be given effect instead of the Senate amendment. As discussed below, on the two occasions when EPA has addressed the amendments directly in rulemaking, the agency has always interpreted Section 111(d) so as to give effect to both amendments, resulting in a pollutant-centric reading of the Section 112 Exclusion. *See* discussion of the Clean Air Mercury Rule and the Clean Power Plan, *infra*.

In its final Section 111(d) emissions guidelines for landfill gases, EPA declined to formally articulate the scope of Section 111(d), though the agency indicated that it might issue hazardous air pollutant standards that would also apply to landfills in the future. 61 Fed. Reg. 9905, 9906 (Mar. 12, 1996) ("[M]ercury might be emitted from landfills. The EPA is still looking at the possibility and will take action as appropriate in the future under [Section 112]."). And, indeed, when EPA did propose hazardous air pollutant standards under Section 112 for landfills in the final months of the Clinton administration, the proposed rule explicitly indicated that the Section 111(d) emissions guidelines would continue to apply to the mixture of "hazardous" and "non-hazardous" gases from the landfills. 65 Fed. Reg. at 66,674-75.

The interplay of Sections 111 and 112 also arose in a separate rulemaking on medical waste incinerators. Though medical waste incinerators were not regulated under Section 112, the Clinton EPA did note in proposing Section 111(d) guidelines for these sources that "control under section 111(d) is appropriate when the pollutant may cause or contribute to endangerment of public health or welfare but is not known to be 'hazardous' within the meaning of section 112 . . . ." 60 Fed. Reg. 10,654, 10,657 (Feb. 27, 1995) (proposed jointly under Sections 111(d) and 129).

In summary, all of the Clinton administration's interpretations would consistently allow EPA to regulate greenhouse gases from existing power plants under Section 111(d).

D. President George W. Bush's EPA Likewise Interpreted the Section 112 Exclusion to Apply Only to Particular Regulated Pollutants

The EPA under President George W. Bush continued to interpret the Section 112 Exclusion in Section 111(d) to apply to particular air pollutants, rather than to entire source categories regulated under Section 112. Much like under President Clinton, President George W. Bush's EPA continued to review and approve states' Section 111(d) plans for Kraft pulp mills, even though pulp and paper plants were also regulated under Section 112. *See* 68 Fed. Reg. 23,209 (May 1, 2003) (approving Maine's 111(d) state air quality plan for total reduced sulfur emissions

from existing Kraft pulp mills, even though Section 112 standards already applied to Kraft pulp mills); 72 Fed. Reg. 59,017 (Oct. 18, 2007) (same, for Virginia's plan).

Bush's EPA also finalized hazardous air pollutant standards for landfills under Section 112, which had been proposed in the Clinton administration's final days. Just as in the Clinton proposal, the final hazardous air pollutant standard indicated that the Section 111(d) emissions guidelines would continue operating. 68 Fed. Reg. 2227, 2229 (Jan. 16, 2003) ("[Qualifying sources] would continue to be subject to the EG [Section 111(d) emission guidelines] . . . as applicable, plus additional requirements imposed [under § 112]."). To that end, after the final hazardous air pollutant standard was published, EPA continued reviewing state plans for landfill gas under Section 111(d), explaining that the approvals were "based on section 111(d) requirements of the Act, not sections 110 and 112." 68 Fed. Reg. 74,868, 74,868 (Dec. 29, 2003) (approving Pennsylvania's 111(d) state air quality plan for total reduced sulfur emissions from existing municipal solid waste landfills, even though Section 112 standards already applied to municipal solid waste landfills); *see also* 68 Fed. Reg. 37,421, 37,422 (June 24, 2003) ("A designated pollutant means any air pollutant . . . which is not included on a list" published under Section 108 or Section 112.).

In 2005, the George W. Bush administration decided to remove power plants from coverage under Section 112 and instead regulate their mercury emissions under Section 111(d), in its Clean Air Mercury Rule. 70 Fed. Reg. 15,994, 16,031-32 (Mar. 29, 2005).[3] In that rule, EPA interpreted the Section 112 Exclusion to apply to listed hazardous air pollutants that are emitted from source categories actually regulated under Section 112. EPA did not apply the exclusion to any hazardous air pollutant on a list in Section 112—as one might read the Senate Amendment alone. Neither did EPA apply the exclusion to all pollutants from entire source categories regulated under Section 112—as one might read the House Amendment alone. 70 Fed. Reg. at 16,031-32. EPA intended its interpretation to give effect to the amendments from both houses of Congress. In particular, its interpretation "gives effect to the Senate's desire to focus on HAP [hazardous air pollutants] listed under section 112(b) . . ." 70 Fed. Reg. at 16,032. The interpretation also "gives effect to the House's desire to . . . avoid duplicative regulation of HAP [hazardous air pollutants] for a particular source category." *Id.*

In order to understand how EPA's interpretation gives effect to both amendments, it can be helpful to consider an example. For the Clean Air Mercury Rule, the House Amendment— any air pollutant "emitted from a source category which is regulated under section 7412," Pub. L. No. 101-549, § 108(g), 104 Stat.

[3] This rulemaking was eventually struck down on unrelated grounds in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

2399, 2467 (1990)—acting alone would not have blocked the rule under EPA's interpretation, since the agency was concurrently removing power plants from coverage under Section 112. However, the Senate Amendment—any air pollutant included on a list published under Section 7412(b), Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990)—acting alone might have barred the Clean Air Mercury Rule, since mercury was listed under Section 112. In contrast, EPA's interpretation giving effect to both amendments—"any hazardous air pollutant listed under section 112(b) that may be emitted from that particular source category," 70 Fed. Reg. at 16,031-32—could have allowed the rule, since, even though mercury was listed under Section 112, it would no longer be emitted from a regulated source category once EPA removed power plants from Section 112 coverage.

Even Petitioners agreed with this interpretive approach when EPA adopted it in 2005. In defending against a challenge to the Clean Air Mercury Rule before this Court, several of the Petitioners here[4] had filed a brief supporting EPA's "reasoned way to reconcile the conflicting language" in the House and Senate Amendments and arguing that the "Court should defer to EPA's interpretation."

[4] In particular, West Virginia, Alabama, Indiana, Nebraska, South Dakota, and Wyoming were parties to that brief. Other parties to portions of that brief include petitioner-intervenors Utility Air Regulatory Group and amicus in support of petitioner National Mining Association in the related *Murray Energy* cases (Nos. 14-1112 and 14-1151).

Joint Br. of State Respondent-Intervenors et al. at 25, *New Jersey v. EPA*, 517 F.3d 574 (2008) (Nos. 05-1097 et al.).

In the Clean Air Mercury Rule proceeding, in reaching its conclusion on how to interpret Section 111(d), EPA relied not just on legislative history, but also on prior regulatory practice under the Act. For example, the agency noted that, "EPA has historically regulated non-HAP [non "hazardous air pollutants"] under section 111(d), even where those non-HAP [non "hazardous air pollutants"] were emitted from a source category actually regulated under section 112." 70 Fed. Reg. at 16,032. Ultimately, through this rulemaking, EPA revised the definition of "designated pollutants" (i.e., those pollutants subject to Section 111(d)), confirming that Section 111(d) can regulate pollutants emitted by source categories regulated under Section 112 so long as those particular pollutants are not also listed under Section 112. 70 Fed. Reg. 28,606, 28,649 (May 18, 2005). Applying that definition today, EPA would be authorized to regulate greenhouse gases from existing power plants.

Though Petitioners and their amici argue that EPA conceded in the Clean Air Mercury Rule preamble that Section 111(d) requires EPA to exclude entire source categories covered under Section 112 from regulation under Section 111(d), *see* Pet. Br., Doc. No. 1524569, at 8; Amicus Br. of Trade Ass'ns & Pac. Legal Found., Doc. No. 1526595, at 9, EPA has never interpreted Section 111(d) in this

fashion. EPA's statements about potential "literal" interpretations of the text pertain solely to the House's version of the 1990 Amendments. 70 Fed. Reg. at 16,031-32.[5] EPA has consistently maintained that the proper interpretation of Section 111(d) must give effect to the Amendments of both houses of Congress, not selectively favor either the House's version or the Senate's version. 70 Fed. Reg. at 16,031-32.

Toward the end of the George W. Bush administration, in response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA again characterized Section 111(d) in a manner that would allow it to cover the regulation of greenhouse gases from existing power plants. Specifically, in its advanced notice of proposed rulemaking on greenhouse gases in 2008, EPA considered the possibility of regulating greenhouse gases under Section 111(d). In assessing the potential of this provision, EPA noted, "where a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP [hazardous air pollutant] listed under 112(b) that may be emitted from that particular source category." 73 Fed. Reg. 44,354, 44,487 (July 30, 2008) (quoting EPA's interpretation of the Section 112 Exclusion from its Clean Air Mercury Rule, 70 Fed. Reg. at 16,029-32). Thus,

[5] Moreover, even if one were to focus solely on the House amendment, there are multiple "literal" readings of that amendment. "Literal" is not the same as "unambiguous." *See* EPA Br., Doc. No. 1533964, at 35 & n.20.

throughout the George W. Bush administration, EPA consistently interpreted the Section 112 Exclusion in a way that would permit regulation of greenhouse gases from power plants under Section 111(d).

E. President Obama's EPA Also Reads the Section 112 Exclusion to Apply Only to Particular Pollutants, Rather Than Entire Source Categories

The EPA under President Obama continued an interpretation of the Section 112 Exclusion that focuses on particular pollutants regulated under Section 112, rather than on source categories. When promulgating rules under Section 112 for the regulation of hazardous air pollutants from power plants, EPA again indicated that the Section 112 Exemption applied to particular pollutants regulated under that section, not entire source categories. 77 Fed. Reg. 9304, 9447 (Feb. 16, 2012) ("(a) Designated pollutant means any air pollutant, the emissions of which are subject to a standard of performance for new stationary sources, but for which air quality criteria have not been issued and that is not included on a list" published under Section 108 or Section 112.). This focus is consistent with how each of the previous three presidential administrations—going back to just months after the 1990 Clean Air Act Amendments were passed—have interpreted the scope of the Section 112 Exclusion.

Further, simultaneously with proposing the Clean Power Plan, EPA reiterated support for the same interpretation of the Section 112 Exclusion as

officially propounded in the Clean Air Mercury Rule under the George W. Bush administration, and as illustrated through practice and regulatory statements for decades. In its legal memorandum accompanying the proposed rule, EPA explained that it "continues to view . . . as reasonable" the Bush administration interpretation of Section 111(d) that gives effect to both the House amendment and the Senate amendment. EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 26-27 (2014), http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf. The memorandum also found reasonable the agency's determination that "[w]here a source category is regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP listed under section 112(b) that may be emitted from that particular source category." *Id.* at 26. EPA further noted that it was reasonable for the agency to conclude that a reading of the Section 112 Exclusion that foreclosed the regulation of all pollutants from any source category regulated under Section 112 would be inconsistent with

> (i) Congress' desire in the 1990 [Clean Air Act] Amendments to require the EPA to regulate more substances, and not to eliminate the EPA's ability to regulate large categories of air pollutants, and (ii) the fact that the EPA has historically regulated non-hazardous air pollutants under section 111(d), even where those air pollutants were emitted from a source category actually regulated under section 112.

Id. at 26-27. The legal memorandum accompanying the proposed Clean Power Plan is yet another example of EPA interpreting the Section 112 Exclusion to apply to specific pollutants regulated under Section 112, not whole source categories.

From shortly after the passage of the 1990 Clean Air Act Amendments, through over two decades of administrations of both parties, EPA has consistently interpreted the Section 112 Exclusion in Section 111(d) to apply to particular pollutants, rather than to entire source categories. In light of EPA's consistent, reasonable interpretation of the Section 112 Exclusion, this Court should grant additional deference to the agency's approach and find that EPA has the authority to regulate greenhouse gases from power plants under Section 111(d).

II. PETITIONERS' READING OF THE SECTION 112 EXCLUSION COULD RESTRICT EPA'S USE OF SECTION 111(d), WHICH WOULD PREVENT THE AGENCY AND STATES FROM TAKING ADVANTAGE OF THE SECTION'S COST-MINIMIZING FLEXIBLE COMPLIANCE MECHANISMS

Section 111(d) allows for EPA, states, and sources to use flexible compliance mechanisms to meet emission guidelines. These flexible compliance approaches, in turn, lower compliance costs and increase efficiency of regulatory programs. If Petitioners' reading of the Section 112 Exclusion is adopted, that would foreclose the use of Section 111(d) and its flexible compliance mechanisms for a variety of harmful pollutants.

A. Section 111(d) Permits States to Use Flexible Compliance Mechanisms to Meet EPA's Emission Guidelines, Which Helps Decrease the Costs of Effectively Reducing Pollution Such as Greenhouse Gases

Economists and policymakers broadly agree about the benefits of allowing flexible compliance mechanisms, in order to help remedy environmental harms while minimizing costs. *See, e.g.*, Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 Yale. J. on Reg. 109, 110-113 (1989) (reviewing literature discussing the benefits of flexible compliance mechanisms). Legal academics agree that Section 111(d) provides valuable flexible regulatory options for EPA and the states in addressing the harms from climate change. *See* Gregory E. Wannier, et al., *Prevailing Academic Views on Compliance Flexibility Under Section 111 of the Clean Air Act*, Inst. for Policy Integrity Disc. Paper No. 2011/2 (2011), *available at* http://policyintegrity.org/files/publications/Prevailing_Academic_View_on_Compliance_Flexibility_under_Section_111.pdf. Section 111(d) allows EPA to set emission guidelines for the states, and then empowers states to determine the appropriate mix of flexible compliance methods to implement those guidelines. *See id.* Compared to federally-prescribed technology-based standards on particular sources, which allow for less opportunity to reduce costs of compliance through trading and other mechanisms, the flexible compliance options available under Section 111(d) help achieve environmental benefits at lower costs.

Experience has borne out the substantial benefits from flexible compliance mechanisms. Flexible regulatory programs created under the Clean Air Act have proven successful at reducing environmental harms while also reducing costs of compliance. Perhaps most famously, the Title IV acid rain trading program substantially reduced harmful sulfur dioxide emissions at a lower cost than site-specific controls. *See* A. Denny Ellerman et al., *Markets for Clean Air: The U.S. Acid Rain Program* 122 (2000) (finding a substantial reduction in sulfur dioxide since the 1990s, about two-thirds of which was attributable to the acid rain trading program); Curtis Carlson et al., *Sulfur Dioxide Control by Electric Utilities: What Are the Gains from Trade?*, 108 J. Pol. Econ. 1292, 1293 (2000) (finding savings from trade of $700-$800 million per year). Likewise, the marketable permit system that the EPA created under President Reagan to phase lead out of gasoline accelerated the removal of lead from gasoline by years and reduced costs by hundreds of millions of dollars. Richard G. Newell & Kristian Rogers, *The U.S. Experience with the Phasedown of Lead in Gasoline* 12-13 (Resources for the Future Discussion Paper, 2003). Similarly, the Cross-State Air Pollution Rule, which allows for interstate emissions trading and was recently upheld by the Supreme Court in *EPA v. EME Homer City Generation, L.P.*, ___U.S.___, 134 S. Ct. 1584, 1610 (2014), is anticipated to reduce harmful nitrogen oxide and sulfur dioxide emissions while minimizing costs through trading. EPA estimated that

annualized costs of the program would be about $650 million less per year by allowing emissions trading rather than mandating direct control. *See* EPA, *Regulatory Impact Analysis for the Proposed Federal Transport Rule* 10 tbl. 1-4 (2010).

State-level programs that have addressed greenhouse gases through trading programs have also proven effective while lowering costs of compliance. The Northeast's Regional Greenhouse Gas Initiative has achieved its emissions goals while not just reducing costs but, according to some economic analyses, providing $1.6 billion in net economic benefits to the region due to the emissions auction program. *See* Paul J. Hibbard et al., *The Economic Impacts of the Regional Greenhouse Gas Initiative on Ten Northeast and Mid-Atlantic States* 1-2 (2011). Likewise, the initial results from California's carbon market show that it appears to be reducing greenhouse gas emissions while supporting economic growth in the state. Katherine Hsia-Kiung & Erica Morehouse, *Carbon Market California: A Comprehensive Analysis of the Golden State's Cap and Trade Program, Year Two: 2014* at 2-3 (2014).

As economic theory and practical experience have shown, flexible compliance mechanisms can provide effective environmental protection while minimizing costs. Section 111(d) allows EPA to set state-specific emission guidelines for greenhouse gases, which the states would then be able to meet

through their chosen mix of flexible compliance options. Preserving the agency's ability to use the flexible compliance mechanisms of Section 111(d) is, therefore, desirable from the perspective of efficiently and effectively reducing harmful air pollution, including greenhouse gases.

B. Petitioners' Reading of the Section 112 Exclusion Could Bar the Application of Section 111(d) to Other Harmful Pollutants, Potentially Foreclosing the Use of Flexible, Cost-Minimizing Tools to Address Pollution

Petitioners here argue that EPA's regulation of hazardous pollutants from power plants under Section 112 forecloses the agency's use of Section 111(d) to regulate any other pollutants from these sources. If adopted by this Court, Petitioners' reading of the Section 112 Exclusion could limit the agency's ability to promulgate regulations allowing for flexible, state-selected compliance options under Section 111(d). In particular, EPA could be foreclosed from using Section 111(d) to address harmful pollutants that remain unregulated under Section 112, after the relevant source category has become subject to Section 112 regulations for other pollutants. EPA's options for flexible regulatory tools could be limited for a variety of pollutants, not just carbon dioxide. Dozens of source categories besides power plants, covering a wide variety of industrial processes, are listed under Section 112. *See* 67 Fed. Reg. 6521 (Feb. 12, 2002). Petitioners' reading could prevent EPA from regulating under Section 111(d) any pollutants from these sources that are not already subject to National Ambient Air Quality Standards or

hazardous air pollutant standards. Any of the pollutants already regulated under Section 111(d)—including fluoride, sulfuric acid mist, and total reduced sulfur—might escape control, as might other pollutants that have not yet been regulated. *See, e.g.*, 42 Fed. Reg. 12,022 (Mar. 1, 1977) (fluoride from phosphate fertilizer plants); 42 Fed. Reg. 55,796 (Oct. 18, 1977) (sulfuric acid mist from sulfuric acid plants); 44 Fed. Reg. 29,828 (May 22, 1979) (total reduced sulfur from Kraft pulp mills). Alternatively, without the availability of Section 111(d), EPA might be forced to turn to technology-based standards under the Act to address unresolved air pollution. Technology-based, command-and-control standards, such as those mandated by Section 112, would impose higher costs on regulated entities than the flexible compliance mechanisms available under Section 111(d). *See* Winston Harrington & Richard D. Morgenstern, *Economic Incentives versus Command and Control: What's the Best Approach for Solving Environmental Problems*, Resources, Fall/Winter 2004, at 15.

Even Petitioners in this case have acknowledged the benefits to be gained from the more flexible, state-designed regulatory options under Section 111(d), as opposed to the less flexible, command-and-control standards available to EPA under some other provisions of the Clean Air Act like Section 112. In briefing

supporting EPA's Clean Air Mercury Rule, several of the Petitioners in this case[6] acknowledged the benefits of flexible compliance mechanisms and advocated for the use of Section 111(d) over Section 112, arguing,

> A cap-and-trade program [under section 111(d)] also benefits State citizens by allowing market forces to govern the choice and timing of emission controls. Under a cap-and-trade program, control equipment is generally installed first at those plants where the cost of control per unit of emissions is the lowest, which are generally the largest and highest emitting facilities. Moreover, in the heavily regulated industry of electricity production, lower compliance costs associated with a cap-and-trade approach will inevitably be passed on to the citizens of each State.

Joint Br. of State Respondent-Intervenors et al. at 28, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (Nos. 05-1097 et al.). These parties further extolled the benefits of Section 111(d)'s flexible compliance mechanisms:

> [The] State[s] also favor [the Clean Air Mercury Rule] because it provides States broad discretion in deciding how to allocate mercury allowances among EGUs [electricity generating units]. This discretion, which is not available under a command-and-control approach, allows State regulators to tailor a State's mercury plan to address such issues as new source set asides to permit construction of new capacity to meet electricity demand growth, the banking of allowances to encourage the retirement of older, less efficient EGUs [electricity generating units], and incentives to promote the installation of novel mercury controls.

[6] In particular, West Virginia, Alabama, Indiana, Nebraska, South Dakota, and Wyoming were parties to that brief.

Id. at 28-29. Likewise, Murray Energy Corporation, petitioner in the related cases 14-1112 and 14-1151, has recently filed a brief supporting a Supreme Court challenge to the Mercury and Air Toxics Standards rule, arguing, "Section 111 is far more flexible and less costly than Section 112 because Section 111 would allow state and local governments to continue to tailor their power generation fleets to address differing local circumstances." Br. of Murray Energy Corp. as Amicus Curiae Supporting Petitioners at 20, *Michigan v. EPA*, Nos. 14-46 et al. (Supreme Court of the United States, Jan. 27, 2015).

Despite recognizing the benefits of the flexible regulatory mechanisms provided by Section 111(d) in earlier rulemakings, Petitioners here make a short-sighted argument that could foreclose EPA's ability to invoke Section 111(d)'s flexible compliance options in the future. A reading of the Section 112 Exclusion that would permit the agency to continue using Section 111(d) for pollutants that remain unregulated after Section 112 standards are imposed for other pollutants would allow EPA and the states to continue taking advantage of flexible compliance mechanisms to decrease pollution-reduction costs.

CONCLUSION

For the foregoing reasons, if this Court decides to reach the merits of Petitioners' claims, it should uphold EPA's authority to promulgate the Clean Power Plan under Section 111(d).

DATED: March 4, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae In Support of Respondent contains 6615 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

DATED: March 4, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2015, I filed the foregoing Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae In Support of Respondent through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users. I also caused the foregoing to be served via Federal Express on counsel for the following parties at the following addresses:

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