Office of Attorney General
State of West Virginia

Patrick Morrisey
Attorney General

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The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Submitted via https://www.regulations.gov

Re: Comments of the States of West Virginia, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming, and the Commonwealth of Kentucky, on the proposed rule entitled *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Supplemental Finding; Notice of Proposed Rulemaking*, 87 Fed. Reg. 7,624 (Feb. 9, 2022) (Docket Nos. EPA-HQ-OAR-2018-0794; FRL-6716.2-01-OAR).

Dear Administrator Regan:

The undersigned States submit these comments on the Environmental Protection Agency's proposed rule on purportedly hazardous air pollutants ("HAPs") from coal- and oil-fired power plants. *See* National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Supplemental Finding; Notice of Proposed Rulemaking, 87 Fed. Reg. 7,624 (proposed Feb. 9, 2022) ("Proposed Rule"). As the States explain below, the Proposed Rule is an unwelcome and unjustified retreat from the agency's 2020 rule on the same issue, and it reincorporates several of the legal defects that marked earlier, related actions. We urge the agency to reject or substantially modify the Proposed Rule.

BACKGROUND

In the Clean Air Act ("CAA") Amendments of 1990, Congress called on EPA to impose emission limits on categories of stationary sources that emit certain HAPs. *See* 42 U.S.C. § 7412(b) (list of HAPs), (c) (list of source categories), (d) (emission standards). These stringent limits must reflect the "maximum degree of reduction in emissions" possible after "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." 42 U.S.C. § 7412(d)(2).

At the same time, Congress required EPA to perform two heavy lifts before it could apply those limits to electric utility steam generating units ("EGUs"). *First*, EPA had to study and report to Congress on the public health hazards "reasonably anticipated to occur as a result of [HAP] emissions by [EGUs] … *after imposition of the*" *CAA's other requirements*—including any "alternative control strategies for emissions which may warrant regulation under" Section 112. 42 U.S.C. § 7412(n)(1)(A) (emphasis added). EPA performed that study in 1998. *Second*, Congress empowered EPA to "regulate [EGUs] under [Section 112]" after that report only if it found "such regulation is appropriate and necessary." *Id.* This second task proved far more troublesome.

Regulators and stakeholders have sparred over the definition of "appropriate and necessary" for the past two decades. Between 2000 and 2012, for instance, EPA vacillated over whether it was "appropriate and necessary" to regulate coal- and oil-fired EGUs under Section 112 in a series of findings and rules. *See* 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000) ("2000 Finding") (regulation was "appropriate and necessary" because the EGUs were "significant emitters of HAP[s], including mercury"); 70 Fed. Reg. 15,994, 16,002 (Mar. 29, 2005) ("2005 Rule") (reversing conclusion in 2000 Finding because it "lacked foundation"; removing EGUs from list of regulated sources); 77 Fed. Reg. 9,304 (Feb. 16, 2012) ("2012 Rule") (reaffirming appropriate-and-necessary conclusion in 2000 Finding; promulgating a new national HAP emission standard called the Mercury and Air Toxics Standards ("MATS")). EPA seesawed in large part because it never settled on *what* it was supposed to consider (much less *how* to consider it) before making an "appropriate and necessary" finding.

In 2015, the Supreme Court provided at least a partial answer. West Virginia and several of the other undersigned States had challenged the 2012 Rule largely because of EPA's refusal to consider costs when it reaffirmed the 2000 Finding. The D.C. Circuit upheld that decision, but then-Judge Kavanaugh dissented in part. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court then reversed. *Michigan v. EPA*, 576 U.S. 743 (2015). In a pointed opinion, the Court rebuked EPA for refusing to even *consider* cost in its appropriate-and-necessary determination, much less assess "whether the costs of its decision outweighed the benefits." *Id.* at 750. EPA's "own estimate" had the rule costing "power plants … nearly $10 billion a year" while yielding just "$4 to $6 million" in annual quantifiable benefits. *Id.* at 750-51. Yet EPA treated that burden—or any other cost for that matter—as "irrelevant to the decision to regulate power plants." *Id.* at 758. In the Court's view, this decision meant EPA had "strayed

well beyond the bounds of reasonable interpretation" under the *Chevron* test. *Id.* at 743 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). On remand, the Court required EPA to "consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." *Id.* at 759.

Then-EPA Administrator Gina McCarthy seemed unfazed. She called *Michigan v. EPA* a "very narrow" ruling that would not affect the agency's other "plans to crack down on power plant emissions." Kate Sheppard, *EPA Chief Says She's Not Worried About Supreme Court Mercury Ruling*, HUFFINGTON POST (July 7, 2015, 2:49 PM), https://bit.ly/3IRFtqY. She further dismissed the ruling as practically irrelevant, as 70 percent of power plants had "already invested in technology to reduce their emissions" to comply with the rule. *Id.* In her view, this sunk-cost problem was cause for celebration because EPA was "well on [its] way to delivering the reductions in toxic air pollution that people expected." *Id.* But her statements carried a candid admission: With the mere threat of administrative enforcement action, EPA had forced compliance with an *unlawful* rule while the successful challenge to that rule made its way through the courts.

A few months later, EPA solicited comments "only on the consideration of cost in making the appropriate determination and listing of EGUs." 80 Fed. Reg. 75,025, 75,027 (Dec. 1, 2015). Oddly, no "other aspects of the appropriate and necessary interpretation or finding" were on the table. *Id.* Within a year of the *Michigan v. EPA* ruling, EPA formalized Administrator McCarthy's assessment that the decision would not stand in the way of the agency's goals: "[C]onsideration of cost," it concluded, did "not cause [EPA] to change [its appropriate-and-necessary] determination." 81 Fed. Reg. 24,420 (Apr. 25, 2016) ("2016 Supplemental Finding"). West Virginia and many of the undersigned States returned to court to challenge this finding, too. The D.C. Circuit then held the matter in abeyance so EPA could take another look at the 2012 Rule after the change in presidential administrations. *See* Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 27, 2017), ECF No. 1672987. That case remains pending.

EPA then reconsidered the 2016 Supplemental Finding, proposing to reverse its prior "conclusion under CAA section 112(n)(1)(A), first made in 2000 and later affirmed in 2012 and 2016[,] … [and] correct[] flaws in [EPA's] prior 2016 response to *Michigan* [*v. EPA*]." 84 Fed. Reg. 2,670, 2,672, 2,678 (Feb. 7, 2019). In May 2020, EPA turned that proposed rule into a final one. *See* 85 Fed. Reg. 31,286 (May 22, 2020) ("2020 Rule"). Other parties challenged this rule in court. And, again, the D.C. Circuit held the challenge in abeyance while EPA reassessed the rule. *See* Order, *Am. Acad. of Pediatrics v. Regan*, No. 20-1221 (D.C. Cir. Feb. 16, 2021), ECF No. 1885509. These cases remain pending, too.

On February 1, 2022, EPA announced a proposal to reaffirm the underpinnings of the 2016 Supplemental Finding in response to President Biden's January 20, 2021, Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." Press Release, EPA Reaffirms Scientific, Economic, and Legal Underpinnings of Limits on Toxic Emissions (Feb. 1, 2022), https://bit.ly/3uGHS2v. Eight days later, EPA released a proposed rule that purports to do four things: (1) revoke the rescission of the appropriate-and-necessary finding in the 2020 Rule; (2) reaffirm the appropriate-and-necessary finding of the 2016

Supplemental Finding; (3) review "a residual risk and technology review (RTR) of [MATS]" from the 2020 Rule; and (4) solicit more information "on the performance and cost of new or improved technologies that control HAP emissions, improved methods of operation, and risk-related information to further inform the Agency's review of the MATS RTR as directed by" President Biden's executive order. 87 Fed. Reg. at 7,624.

DISCUSSION

After three incorrect appropriate-and-necessary findings across two presidential administrations bookending one cautionary Supreme Court case, EPA *again* sets out to bring EGUs within its Section 112 regulatory ambit without adequate statutory grounds. But the 2020 Rule has it right. And nothing in the Proposed Rule justifies a return in 2022 to the imprudent positions of 2016, 2012, and 2000.

According to EPA, the Proposed Rule improves upon the 2020 Rule, abides by *Michigan v. EPA*, and provides benefits—measurable or otherwise—that outweigh its costs. In reality, the Proposed Rule fails on all three counts. What the Proposed Rule *will* do is re-impose the same crushing costs and atmosphere of uncertainty that resulted from EPA's previous erroneous findings. Congress could not have intended for those results to follow when it enacted Section 112.

Congress intentionally "treat[ed] power plants differently from other sources for purposes of the hazardous-air-pollutants program." *Michigan*, 576 U.S. at 751. Indeed, "[i]f Congress had intended" to lump EGUs in with all other sources, it could have "automatically regulated [EGUs] under" Section 112(d) "as it did with other sources." *White Stallion Energy Ctr.,* 748 F.3d at 1264 (Kavanaugh, J., concurring in part and dissenting in part). But "Congress declined" that option "and instead directed EPA to regulate [EGUs]" under Section 112(d) only if appropriate and necessary. *Id.* And when placing EGUs in their own special category, "Congress [also] intended EPA to consider costs in deciding whether to regulate electric utilities at the threshold." *Id.*

Given the comprehensive regulatory scope of the CAA, Congress intentionally and correctly decided to treat power plants differently. For one, "whether regulation of power plants would still be needed after the application of the rest of the Act's requirements" is a real question. *Michigan*, 576 U.S. at 757. The agency itself appealed to this issue in its arguments during *Michigan v. EPA*. And the Supreme Court agreed that this concern was "undoubtedly *one* of the reasons Congress treated power plants differently; hence [Section 112(n)(1)(A)'s] requirement to study hazards posed by power plants' emissions after imposition of the requirements of [the rest of the Act]." *Id.* (quoting 42 U.S.C. § 7412(n)(1)(A) (emphasis in original)) (cleaned up). "But," the Court continued, "if uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains 'necessary,' not whether regulation is 'appropriate and necessary.'" *Id.* (emphasis in original). And that's not what Congress did.

The special carve-out for power plants, combined with Congress's choice to regulate the same emissions under other sections of the CAA, means that EPA must be particularly deliberate

before deciding to impose additional burdens on the industry under Section 112. As the 2020 Rule acknowledged, "the CAA has assigned regulation of criteria pollutants to other provisions in title I of the CAA." 85 Fed. Reg. at 31,303. The NAAQS regime in Sections 107 to 110, for example, "requires the EPA to determine what standards for the ambient concentration of [particulate matter ("PM")] are necessary to protect human health." *Id.* The regional haze and acid rain programs in Title IV of the CAA are meant to reduce EGU emissions of certain conventional non-HAP pollutants. And EPA itself has, in the past, proposed that EGU mercury emissions fall under Section 111's umbrella for purposes of "establishing standards of performance" and "establish[ing] a mechanism by which [mercury] emissions from new and existing coal-fired Utility Units are capped at specified, nation-wide levels." 70 Fed. Reg. at 28,606. Congress knew right from the get go that treating power plants differently would avoid both the substantial costs of regulating under Section 112 pollutants already covered under these other programs and the risk of "increase[d] power rates, while potentially providing little or no public health benefit." 136 CONG. REC. 3493 (Mar. 6, 1990) (statement of Sen. Steve Symms). Retaining the 2020 Rule eliminates those risks, while returning to the flawed findings of 2016, 2012, and 2000 invites them back in.

For these and more reasons below, the undersigned States oppose revoking the 2020 Rule and repeating EPA's past mistakes by replacing it with the Proposed Rule.

I. The States Oppose Scrapping The 2020 Rule's Methodology And Findings.

After a 12-year drought, the 2020 Rule finally "treat[s] power plants *differently* from other stationary sources" the way Congress intended under the CAA. *Michigan*, 576 U.S. at 756 (emphasis in original). The 2020 Rule improved on EPA's earlier findings. And it did so while adhering to the Supreme Court's guidance in *Michigan v. EPA*. Cost, the Court stressed, is "a *centrally relevant* factor when deciding whether to regulate" because it reflects "the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." *Id.* at 752-53 (emphasis added). Agencies must evaluate costs given "the reality that 'too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.'" *Id.* (quotation omitted). This principle animates and sustains the 2020 Rule.

If EPA revokes the 2020 Rule, the agency will be back at odds with both the letter and spirit of Section 112 and *Michigan v. EPA*.

For starters, the Proposed Rule turns its back on the kind of appropriate-and-necessary determination that the Supreme Court expected under Section 112(n)(1)(A). The Court's opinion was clear: "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 576 U.S. at 752. "And Congress legislated against the backdrop of th[e] common understanding" that "consideration of cost" is a "central component of … environmental regulation." *White Stallion Energy Ctr.*, 748 F.3d at 1261 (Kavanaugh, J., concurring in part and dissenting in part). Tracking this "matter of common sense, common parlance, and common practice," *id.*, the 2020 Rule rightly concluded that regulation was not appropriate and necessary.

Monetized costs of regulation exceeded monetized benefits by "three orders of magnitude," unquantified HAP benefits did not alter the outcome of that cost-benefit comparison, and *practically all* the monetized benefits of regulation "were derived from non-HAP co-benefits." 85 Fed. Reg. at 31,302-03.

Several things drove this finding. One was that the 2012 Final Rule's regulatory impact analysis ("RIA") allowed for a "gross disparity between monetized costs and HAP benefits" given that "about 99.9 percent" of the 2012 Rule's monetized benefits "reflected in the RIA were derived from non-HAP co-benefits." 85 Fed. Reg. at 31,301-05. Another was the realization that those co-benefits come from pollutants *not addressed in Section 112* that thus cannot justify regulation under that section. A third is that the 2016 Supplemental Finding also gave far too much consideration to unquantified benefits and other impacts from regulation—which unfairly weighed down the benefits side of the scale. Indeed, it makes no more sense to deem a "regulation [] 'appropriate' if it does significantly more harm than good," *Michigan*, 576 U.S. at 752, than it does to "rely[] almost exclusively on benefits accredited to reductions in pollutants … already comprehensively regulated under other CAA provisions," 85 Fed. Reg. at 31,299, or those that cannot actually be sufficiently quantified and analyzed, *id.* at 31,297 (recognizing that "the overall amount of the benefits stays the same no matter what the distribution of those benefits is").

As for co-benefits in particular, crafting "reasonable regulation[s]" that "pay[] attention to the advantages *and* the disadvantages of agency decisions," *Michigan*, 576 U.S. at 753 (emphasis in original), must comport with Congress's "comprehensive framework directing the implementation of those standards in order to address the health and environmental impacts associated *with those pollutants*," 85 Fed. Reg. at 31,299-300 (emphasis added). Congress wanted Section 112 to focus on HAPs. That focus explains why, among other things, more rigorous standards apply under that section than for other CAA regulatory programs. EPA could address non-HAP pollutants under other sections, like Section 110. And the Supreme Court has cautioned EPA against relying on implicit authority where authority to perform the same task had "elsewhere, and so often, been expressly granted." *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 467 (2001); *accord Michigan*, 576 U.S. at 755-56. So it can't be right for EPA to invoke implicit authority to regulate HAPs based almost exclusively on co-benefits flowing from the regulation of non-HAP pollutants. That's what EPA recognized in the 2020 Rule.

The agency was also right in 2020 not to disproportionately load its analysis with unquantified and nonmonetized effects felt only by isolated communities or within only narrow pockets of potentially affected persons. This isn't to say that EPA "discount[ed] the existence or importance of the unquantified benefits of reducing HAP emissions." 85 Fed. Reg. at 31,304. But by evaluating "unquantified benefits separately in the comparison of benefits and costs" and speaking frankly about "the significant obstacles to successfully quantifying and monetizing the public health benefits from reducing HAP emissions," EPA remained clear-eyed about the reality that "unquantified benefits are unlikely to overcome the significant difference … between the monetized HAP-specific benefits and compliance costs of the MATS rule." *Id.* In this way, EPA checked its own temptation to overregulate, declining to use unquantified benefits as an easy patch. And under the 2020 Rule, EPA can continue to spot the line across which a regulation starts to

"do[] significantly more harm than good." *Michigan*, 576 U.S. at 752. Overall, the issue of "HAP benefits, as compared to costs," could remain "the primary question in making the 'appropriate and necessary' determination" under Section 112. 85 Fed. Reg. at 31,303. Given these considerations, EPA's only choice under *Michigan v. EPA* was to decline to regulate.

At bottom, the 2020 Rule is faithful to the Supreme Court's ruling in *Michigan v. EPA*, while the Proposed Rule contravenes it. The 2020 Rule respects Congress's choice to give power plants different treatment under the CAA, while the Proposed Rule ignores it. And the 2020 Rule properly concludes that it is neither appropriate nor necessary to regulate EGUs under Section 112, while the Proposed Rule expands that regulatory reach without a HAP-focused justification. The agency should not move backward.

II. The Agency Should Reject, Not Repeat, Its Mistakes From 2016, 2012, and 2000.

In its 2016 Supplemental Finding, EPA's "preferred" approach was to shun a cost-benefit comparison altogether in favor of a "cost reasonableness" assessment. 81 Fed. Reg. at 24,420, 24,428-31. Under that approach, EPA would evaluate the ability of the power sector as a whole to "reasonably absorb" an agency-dictated set of compliance costs "without impairing … [its] productive capacity." *Id.* The agency's alternative "benefit-cost" approach looked to the 2012 Rule's RIA, highlighting the annual benefits "of between $37 billion to $90 billion … in addition to many categories of unquantified benefits" as set against the same "projected $9.6 billion in annual costs" the Court addressed in *Michigan v. EPA*. *Id.* at 24,425. This cost assessment, EPA suggested, was based on the "significant consequences of an action in monetary terms in order to determine whether an action increases economic efficiency"—that is, "whether the willingness to pay for an action by those advantaged by it exceeds the willingness to pay to avoid the action by those disadvantaged by it." *Id.* at 24,423-25 & 24,423 n.13; *see also id.* at 24,421, 24,425-29.

West Virginia and many of the undersigned States have already explained that neither approach justified the agency's decision to regulate EGUs under Section 112, and the States incorporate those arguments here. *See* Final Opening Brief of State and Industry Petitioners, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Mar. 24, 2017), ECF No. 1667698 ("*Murray* Petitioners' Opening Brief"); Final Reply Brief of State and Industry Petitioners, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Mar. 24, 2017), ECF No.1667700 ("*Murray* Petitioners' Reply Brief"). In short, EPA's preferred "affordability" assessment did not satisfy the Supreme Court's directive to sufficiently "consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." *Michigan*, 576 U.S. at 759. EPA's alternative assessment was not up to the task, either, as EPA still could not explain how the costs predicted through a deficient cost assessment were balanced by a benefit side of the ledger held up almost entirely by co-benefits from the reduction of non-HAP pollutants regulated elsewhere in the CAA, and by vague "unquantifiable benefits." *See White Stallion Energy Ctr.*, 748 F.3d at 1259, 1263 (Kavanaugh, J., concurring in part and dissenting in part) (explaining that "the costs are huge, about $9.6 billion a year—that's billion with a b," and the rule was "among the most expensive rules that EPA has ever promulgated" (quotation omitted)). And EPA failed to consider any "alternative control strategies" and other costs relevant to the decision, as both the statute and *Michigan v. EPA* required. *Id.*

Yet EPA has recycled this flawed approach in the Proposed Rule. As a result, the States' objections from five years ago are relevant again. It remains the case that neither the "cost reasonableness" approach nor the purported benefit-cost comparison justifies the appropriate-and-necessary conclusion Congress required.

The agency's preferred "totality of the circumstances" approach in the Proposed Rule recasts the "cost reasonableness" assessment from the 2016 Supplemental Finding. It is no more persuasive under a new name. As EPA pointed out in its 2020 Rule, the 2016 Supplemental Finding erred by "consider[ing] cost insofar as the Agency at the time analyzed whether the utility industry as a whole could continue to operate, and found that it could (*i.e.*, that costs were 'reasonable')." 85 Fed. Reg. at 31,294. This anything-short-of-shutdown cost analysis fell far below the bar the Supreme Court set in *Michigan v. EPA*. The Court stressed that cost is "a *centrally relevant* factor when deciding whether to regulate." *Michigan*, 576 U.S. at 752-53 (emphasis added). Broadly asserting that a "regulation will not fundamentally impair the functioning of a major sector of the economy" fails to meaningful engage with the required cost analysis. 85 Fed. Reg. at 31,294. Costs are not relevant only when they are crippling. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 668 n.4 (1980) (Powell, J., concurring in part and concurring in the judgment) ("The cost of complying with a standard may be 'bearable' and still not reasonably related to the benefits expected.").

Further, by using the entire industry as its benchmark, EPA fails to account for specific localized costs and disadvantages of subjecting specific EGUs to Section 112's strict program. EPA should instead consider factors like the primary and secondary types and amounts of HAP emissions from particular EGUs, along with the scope, detail, and effect of state and local air pollution control regulations with which those units must also comply. Vague assurances against catastrophic harm to the power industry as a whole are not enough. If they were, just about any rule could satisfy the cost requirement with a little favorable framing. This illusory analysis is not what Congress intended for a mandatory appropriate-and-necessary finding under Section 112(n)(1)(A).

The Proposed Rule suffers from the same flaws. Specifically, it considers consequences "for the electricity generating sector and society" and "compliance costs comprehensively," along with their "effect … on the economics of power generation more broadly." *See* 87 Fed. Reg. at 7,663. This broad-brush approach confirms that EPA has given virtually "no thought *at all*," *Michigan*, 576 U.S. at 751 (emphasis in original), to localized considerations. For instance, Section 112 regulation will most assuredly cause disproportionate effects (including broader consequences like economic dislocation) on certain sectors (like coal generation). At a more granular level, certain EGUs within those sectors (like individual coal plants) and certain associated communities (such as those uniquely dependent on those power plants) will suffer still greater harms. Yet EPA says nothing on these issues. EPA thus appears to have embraced a standard that would allow it to impose onerous regulations that could eventually cause coal- and oil-fired plants to shut down—so long as the agency assures itself that other parts of the "electricity generating sector" could fill the gap. This is a mistake with steep potential costs for many EGUs and communities despite an

EPA estimate that the industry as a whole will be able to handle the regulatory burden. *See* JAMES E. MCCARTHY, CONG. RSCH. SERV., R42144, *EPA'S UTILITY MACT: WILL THE LIGHTS GO OUT?* (2012) (stating that the 2012 Rule's "costs will fall primarily on older coal-fired units that do not have state-of-the art pollution controls"). The CAA and the Supreme Court jointly rejected this sort of selective attention to certain "[a]ttenuated considerations," especially where that approach could "do[] significantly more harm than good" to the EGUs or industries EPA undercounts in its appropriate-and-necessary assessment. *Michigan*, 576 U.S. at 752, 758-59. To put a fine point on it: meaningful cost-benefit analysis does not permit EPA to take an economy-wide approach that nevertheless causes whole swathes of EGUs to shutter; Section 112 contemplates regulation, not elimination. *See* 42 U.S.C. § 7412(d)(2) (directing EPA to require the "maximum degree of emission reduction" that is "achievable" by sources, and listing control measures that do *not* include total cessation of operations).

The additional points the agency goes out of its way to emphasize cannot make up for these flaws, either. The Proposed Rule insists, for example, that EPA's prior regulatory compliance and control cost estimates were well off of the costs that the regulated industries actually incurred, and that it is "not possible to quantify or monetize most of th[e] advantages" of regulating HAPs from EGUs. 87 Fed. Reg. at 7,664-69. And it tries to buttress these points by characterizing the overall decision to regulate as one that is "worth it" because it focuses on "protecting and serving the American public." *Id.* at 7,664. Indeed, EPA likens its efforts here to the Transportation Security Administration's airport security regulations that "protect[] from terrorist attacks" or the Food and Drug Administration's e-cigarette regulations that home in on the possible safety risks of a new product in the market. *Id.* at 7,663-64.

None of these factors justify EPA's approach in the Proposed Rule.

First, EPA may not ignore costs merely because it finds estimating them a challenge. Yes, the original cost estimates were likely difficult. And the revised estimates may be just as challenging to formulate. But this difficulty does not excuse EPA from adequately completing the task, particularly in light of the Court's caution against unduly "wasteful expenditure devoted to one problem." *Michigan*, 576 U.S. at 753. It also does not mean that the consequences of EPA's flawed estimates are any less significant here. EPA's mistakes will most assuredly place similar burdens on the coal sector that led to plant closures after the 2012 Rule and 2016 Supplemental Finding. *See Murray* Petitioners' Opening Brief at 64-71 (describing data presented to EPA "showing that it had vastly underestimated EGU retirements"); *Murray* Petitioners' Reply Brief at 30-36 (explaining how EPA did not dispute that it ignored "power plant layoffs," "coal industry impacts," the "hardest hit consumers," and other relevant costs and disadvantages). The agency's mistakes "may well mean considerably fewer resources [were and are] available to deal effectively with other (perhaps more serious) problems," too. *Michigan*, 576 U.S. at 752-53. These costs matter. Remember: In *Michigan v. EPA*, the Supreme Court criticized EPA for finding that "[c]ost does not have to be read into the definition of 'appropriate.'" 77 Fed. Reg. at 9,327. Yet so long as the projected calculation of those costs remains enough of a mystery, EPA can deem a "regulation [] 'appropriate'" even if considering its *actual* costs would reveal that the regulation "does significantly more harm than good." *Michigan*, 576 U.S. at 752.

This misstep should sound all too familiar. EPA has come right back to the position that led to the Supreme Court's rebuke in *Michigan v. EPA*. Except now, instead of "preclud[ing EPA] from considering *any* type of cost," *Michigan*, 576 U.S. at 752 (emphasis in original), EPA fails to sufficiently *specify* the costs it will consider. For example, the agency has failed to adequately delineate and justify the separate costs and benefits of regulating mercury, non-mercury metal HAPs, and acid gas HAPs. *See Murray* Petitioners' Opening Brief at 16-17 (detailed breakdown of the "imbalance between costs and benefits" associated with each), 40-41; *Murray* Petitioners' Reply Brief at 12-14. "Appropriate and necessary" means that the agency must adequately consider the regulatory cost-benefit breakdown of *each* HAP it wants to regulate. EPA cannot find it "appropriate and necessary" to regulate one HAP and then leap into regulating all of them for a covered source. *See*, *e.g.*, 42 U.S.C. § 7412(d)(2) (requiring EPA to "tak[e] into consideration the cost of achieving such *emission* [in the singular] reduction" (emphasis added)). EPA should take a more constrained approach given the uniquely inflexible nature of Section 112 regulation.

Likewise, the agency has merely stated that a "residual risk review requires EPA to consider whether, after imposition of the CAA section 112(d)(2) [maximum achievable control technology] standard, there are remaining risks from HAP emissions that warrant more stringent standards." 87 Fed. Reg. at 7,634 (citing 42 U.S.C. § 7412(f)). And it now requests comments on its reconsideration of the 2020 Rule's risk assessment, which concluded in part that "residual risks due to emissions of air toxics from the Coal- and Oil-Fired EGU source category are acceptable and that the current [standard] provides an ample margin of safety to protect public health and to prevent an adverse environmental effect." *Id.* at 7,632. But the agency refuses to adequately specify (much less consider) the potential costs that will flow from that second stage of regulation and the potential residual risk review standards that may issue from it. *See* 42 U.S.C. § 7412(f). That is as improper now as it was years ago.

In the proposed rule, EPA has tried to do what the Supreme Court said it could not back in 2012: interpret Section 112(n)(1)(A) "in a way that 'harmonizes' the program's treatment of power plants with its treatment of other sources," and thus "overlook[s] the whole point of having a separate provision about power plants." *Michigan*, 576 U.S. at 756. The agency must carefully consider regulatory costs for EGUs at the outset because that is *what Congress directed*. *See White Stallion Energy Ctr.*, 748 F.3d at 1264 (Kavanaugh, J., concurring in part and dissenting in part) ("Congress intended EPA to consider costs in deciding whether to regulate electric utilities at the threshold."). Congress did not decide this arbitrarily. And no matter how difficult costs may be to quantify, EPA must abide by this decision by regulating EGUs *only* when it can show that it is appropriate and necessary using some kind of empirical, supportable evidence. Because EPA fails to make that showing with the Proposed Rule, Congress's "narrow standards … [that] apply when deciding whether to regulate other sources," like the "volume of pollution emitted by the source, [] and the threat posed by the source 'to human health or the environment,'" should stay right where they are—regulating other sources. *Michigan*, 576 U.S. at 756-57 (quoting 42 U.S.C. § 7412(c)(1), (3)). The Supreme Court rejected in 2015 the "preference for symmetry" the Proposed Rule indulges again. *Id.* at 757 (quotation omitted). No matter how many other reasons

EPA may muster in its support, that preference "cannot trump an asymmetrical statute" any more now than it could then. *Id.*

Second, the Proposed Rule continues to rely on a fog of co-benefits, unquantified benefits, and qualitative benefits that obscures the flaws in its appropriate-and-necessary finding. To be sure, the Proposed Rule learned from the agency's past failings by largely banishing the term "co-benefits" from the new proposal's text. But the concept and consideration of co-benefits remain prominent. *See*, *e.g.*, 87 Fed. Reg. at 7,636-37 ("[I]f we also account for the non-HAP benefits" like benefits "of coincidental reductions in [particulate matter] and ozone that flow from the application of controls on HAP, the balance weighs even more heavily in favor of regulating HAP emissions from coal- and oil-fired EGUs."). The agency's heavy reliance on co-benefits is just as improper now as it was in the 2016 Supplemental Finding and the 2012 Rule.

Nor does EPA sufficiently explain its about face on this point since 2020. *See* 85 Fed. Reg. at 31,299 (criticizing earlier appropriate-and-necessary findings for "relying almost exclusively on benefits accredited to reductions in pollutants not targeted by CAA section 112 … given that those other pollutants are already comprehensively regulated under other CAA provisions"). With the Proposed Rule, EPA fails to adequately explain how regulation under Section 112 isn't redundant given the CAA's other programs and the benefits they produce. And EPA also fails to explain why it has refused to adequately consider alternative control strategies for all relevant costs—including the disadvantages of costly and inflexible regulation under Section 112 that EPA could avoid by deploying alternative control strategies under Section 111, *see* 42 U.S.C. § 7411(b), (d), or through States' regulation, *see* 42 U.S.C. § 7401(a). Both the statute and *Michigan v. EPA* require it to do so for those factors. *See Michigan*, 576 U.S. at 752 (explaining that "'cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost" too); *Murray* Petitioners' Opening Brief at 58-64. Congress did not intend for unjustified double and triple costs on the regulated public. The agency itself seemed to acknowledge this very point—albeit implicitly—in the immediate aftermath of *Michigan v. EPA*. The Supreme Court's "very narrow" ruling, it said, "hinged on a very specific section of the Act that applies exclusively to the regulation of air toxics from power plants," which meant "that rules and programs that reduce other types of pollutants under other sections of the Clean Air Act—like ozone and fine particles (smog and soot) can continue without interruption or delay." *In Perspective: the Supreme Court's Mercury and Air Toxics Rule Decision*, EPA BLOG (June 30, 2015), https://bit.ly/epablog. The agency's decision to ignore that reality now is inexplicable.

Moreover, EPA leans heavily on the idea that "[m]ost"—not many or some, but *most*—of the "HAP [b]enefits" justifying its appropriate-and-necessary finding "[c]annot [b]e [q]uantified or [m]onetized." 87 Fed. Reg. at 7,644. By surrendering to uncertainty, EPA has erred in the same way at least three times now. *See* 80 Fed. Reg. at 75,040; 81 Fed. Reg. at 24,420; 77 Fed. Reg. at 9426-32; 65 Fed. Reg. at 79,825. Although "each advantage and disadvantage" need not be "assigned a monetary value," EPA must still "decide … within the limits of reasonable interpretation [] how to account for cost." *Michigan*, 576 U.S. at 759; *see also*, *e.g.*, *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("The mere fact that the magnitude of time-on-task effects is *uncertain* is no justification for *disregarding* the effect

entirely." (emphases in original)). And a critical piece of that puzzle is not only explaining "how much the regulations would cost," but also respecting the "common sense and sound government practice" of truly "understand[ing] the benefits from the regulations." *White Stallion Energy Ctr.*, 748 F.3d at 1258-59 (Kavanaugh, J., concurring in part and dissenting in part). But if—as EPA seems to attempt here—a regulatory decision is founded on the mere *possibility* of a benefit that "[c]annot [b]e [q]uantified or [m]onetized," Congress's threshold to regulate EGUs under Section 112 ceases to exist, and with it goes EPA's claimed regulatory justification. *See Michigan*, 576 U.S. at 757 ("[I]f uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains 'necessary,' not whether regulation is 'appropriate *and* necessary.'" (emphasis in original)).

Finally, EPA cannot erase the robust cost analysis *Michigan v. EPA* demanded by broadly pronouncing that it needs to "protect and serve" the American public. When an agency explains its decision to regulate, "conclusory statements will not do; an agency's statement must be one of *reasoning*." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (cleaned up) (emphasis in original). Every agency no doubt believes that its decisions protect or serve the American public. But no court has held that a noble objective gives the agency freedom to regulate without consideration of the real-world impacts that follow. And in any event, *Congress* sets the framework within which EPA serves the American people. Even the best of motives cannot excuse regulation without first making the threshold findings Congress wrote into the CAA.

It is no small thing that EPA is so unwilling to quantify costs and benefits. By dismissing costs and benefits as unmeasurable, EPA has effectively overlooked them. But the agency must not "'fail to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Michigan*, 576 U.S. at 752 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Nor can it employ a fluid method driven by a combination of co-benefits, unquantifiable benefits, and qualitative factors as an excuse to "justify more stringent regulations." Juan Carlos Rodriguez, *EPA Aims For Certainty With Rule Supporting Mercury Regs*, LAW360 (Feb. 3, 2022, 8:49 PM), https://bit.ly/3iSQZYA ("What people need to think about is whether this softer metric approach is departing from traditional, historic approaches and whether that's OK."). The appropriate-and-necessary determination is an important safeguard against unnecessarily costly regulation; it is not simply a box to check when rushing toward "tightening the original emission limits." Sean Reilly, *Epic Battle Looms As EPA Prepares To Revive Air Toxics Rule*, E&E NEWS (Sept. 10, 2021, 1:38 PM), https://bit.ly/3J0qJWx.

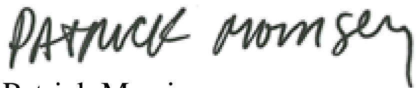
Put simply, Congress did not empower EPA to tighten particulate matter regulations through Section 112 when other CAA programs are meant to address that issue. EPA should be especially reluctant to bypass Sections 109 and 110. Under those provisions, a framework of cooperative federalism "allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288-89 & n.30 (1981); *see also* Br. of Amicus Curiae CATO Institute, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Nov. 25, 2016), ECF No. 1647667 (explaining in detail why "co-benefits are irrelevant to the

Section 112 'appropriate and necessary' finding" given the CAA's other programs, and why EPA's reliance on "unquantified benefits of HAP reductions" is "even more speculative and specious"). Because Section 112 uses a more aggressive, top-down approach, EPA would be better advised to employ the other provisions whenever possible. Statutes, after all, "must be read consistent with principles of federalism inherent in our constitutional structure." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). And that is especially the case here, where Congress wrote several CAA sections to embody the exact kind of cooperative federalism EPA now seeks to avoid by rerouting as much regulation to flow through Section 112 as possible. *See generally* 42 U.S.C. §§ 7409, 7410, 7411. This statutory evasion runs contrary to the letter and the spirit of the statute, and it has no place in this rulemaking effort.

CONCLUSION

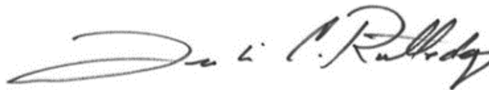
The undersigned States urge EPA to reject the Proposed Rule. For the reasons discussed above, the Proposed Rule is unsound. At some point along the way, EPA forgot that Congress decided to "treat[] power plants differently from other sources for purposes of the hazardous-air-pollutants program" in the CAA. *Michigan*, 576 U.S. at 751. We urge EPA to remember that reality again, and to take seriously its statutory duty to make an appropriate and necessary finding built on a concrete and responsible cost assessment.

Sincerely,



Patrick Morrisey
West Virginia Attorney General

Steve Marshall
Alabama Attorney General



Leslie Rutledge
Arkansas Attorney General

Todd Rokita
Indiana Attorney General

Derek Schmidt
Kansas Attorney General

Daniel Cameron
Kentucky Attorney General

Jeff Landry
Louisiana Attorney General

Lynn Fitch
Mississippi Attorney General

Eric Schmitt
Missouri Attorney General

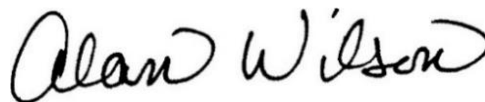
Austin Knudsen
Montana Attorney General

Doug Peterson
Nebraska Attorney General

Drew Wrigley
North Dakota Attorney General

Dave Yost
Ohio Attorney General

John O'Connor
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Jason Ravnsborg
South Dakota Attorney General

Ken Paxton
Texas Attorney General

Sean D. Reyes
Utah Attorney General

Bridget Hill
Wyoming Attorney General