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

Sent via Email and U.S. Mail

Re: Response of the States of West Virginia, Kentucky, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, and Wyoming to the July 28, 2022 Letter to EPA from the Attorneys General of Oregon, Minnesota, Delaware, Guam, Iowa, Maine, Michigan, and New Mexico regarding the "establishment of National Ambient Air Quality Standards (NAAQS) for greenhouse gases under Sections 108 through 110 of the Clean Air Act," https://www.doj.state.or.us/wp-content/uploads/2022/07/Multistate-NAAQS-Letter-to-Regan_2022-07-28.pdf

Dear Administrator Regan:

As state Attorneys General deeply concerned with the rule of law and the environmental resources of our States, we write in response to the July 28, 2022 letter from eight of our colleagues urging the EPA to establish National Ambient Air Quality Standards (NAAQS) for greenhouse gases under Sections 108 to 110 of the Clean Air Act (CAA). As we explain below, the letter's suggestions are equal parts imprudent and legally flawed. We urge the agency to reject them.

As an initial matter, it is surprising to see the letter suggest that EPA wield "newly discovered authority" under the CAA mere weeks after the Supreme Court rebuked the agency for doing just that under Section 111—one section over from the NAAQS provisions. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (quoting *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*")) (cleaned up). Contrary to the letter's framing, the Court in *West Virginia* did more than just "limit[]

the use of Section 111(d) of the Clean Air Act to address greenhouse gas emissions from power plants." Letter at 1. The Court's opinion is a warning: Federal agency "asserti[ons] [of] highly consequential power beyond what Congress could reasonably be understood to have granted" will not be tolerated. *West Virginia*, 142 S. Ct. at 2609. It is also the Court's third correction of this "particular and recurring problem" in the past two years. *Id.* at 2608-09; *see also Nat'l Federation of Indep. Business v. Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) (per curiam) (rejecting OSHA's broad public health edict for millions of American workers); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam) (blocking the CDC's foray into landlord-tenant law). And it puts federal agencies on notice that the Court is monitoring closely uses of administrative power beyond the limits Congress set. By calling for just such an action from EPA here—the exercise of expansive power in novel ways the statute cannot tolerate—the letter misses these points entirely. EPA should not repeat the same mistake.

The letter also mischaracterizes the text, purpose, and enforcement history of the Clean Air Act. To list CO_2 as a "criteria pollutant," EPA must "plan[] to issue [certain] air quality criteria" based on "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of" CO_2 "in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(1)(C), (2). But it is far from clear how EPA could craft those criteria, much less deploy them to form coherent "primary" or "secondary" standards (the letter doesn't suggest which kind) to which viable state or federal plans could be tailored. *See id.* §§ 7409(b) (standards), 7410(a) (state implementation plans to meet the standard), 7410(c) (federal implementation plan to bring States into compliance). For instance:

- How will EPA "determine what CO_2 concentration level is 'requisite to protect public health and welfare' allowing an adequate margin of safety" under Section 109? *See* Robert R. Nordhaus, *New Wine into Old Bottles: The Feasibility of Greenhouse Gas Regulation Under the Clean Air Act*, 15 N.Y.U. ENV'T L.J. 53, 61 (2007) (quoting 42 U.S.C. § 7409(b)); *see also* Nathan Richardson, et al., *Greenhouse Gas Regulation Under the Clean Air Act: Structure, Effects, and Implications of A Knowable Pathway*, 41 ENV'T L. REP. NEWS & ANALYSIS 10,098, 10,103 (2011) ("[I]t is not clear at what level a NAAQS for [greenhouse gases] should be set."). The letter's suggestion that a standard should be informed by estimates set, at least in part, by other countries is unreasonable and beyond the statute.

- How would a NAAQS for CO_2 respect the CAA's cooperative federalism regime? Unlike "traditional pollutants" that concentrate in ways that cause "primarily a local or regional problem," "[c]oncentrations of [greenhouse gases] are uniform nationally." Richardson, et al., *supra*, at 10,103. There would be little room for States to craft locally specific regulation that could ensure compliance within their borders.

- And in light of the diffuse nature of greenhouse gas emissions, is it even possible for regulators to meet air quality standards for CO_2? If EPA goes down this road, "whatever level" it chooses "for NAAQS will result in the entire country either being in attainment or nonattainment." Richardson, et al., *supra*, at 10,103. This means that no matter what policies a given State enacts, it would almost certainly remain in nonattainment status unless *other* regions—or more

to the point, other *countries*—take similarly aggressive steps. *See, e.g.*, Emma Newburger, *China's Greenhouse Gas Emissions Exceed Those of the U.S. and Developed Countries Combined, Report Says*, CNBC.com (May 6, 2021), https://cnb.cx/3vHgGlM (reporting that in 2019 China emitted nearly 2.5 times as many greenhouse gas emissions as the United States); *Carbon Footprint by Country 2022*, WORLD POPULATION REVIEW, https://bit.ly/3Su0Ggp (noting that the United States borders the 11th (Canada) and 14th (Mexico) largest emitters of greenhouse gases). The Act is not meant to be an exercise in regulatory frustration. *See also* Nordhaus, *supra*, at 63 (a NAAQS for CO_2 cannot "control[] global CO_2 concentrations" to sustain a "workable framework on which to erect a domestic climate policy").

These are just some of the statutory problems with the letter's proposal. Given these, it is no surprise that EPA has never found it appropriate to create a NAAQS for CO_2—even at the time it issued its endangerment finding on greenhouse gases. *See EPA's Endangerment Finding*, EPA (Dec. 7, 2009), https://bit.ly/3Smpirs. The "important distinction," stressed then-Administrator Lisa Jackson, was that "[n]othing in today's [endangerment finding] requires any regulatory action." *Greenhouse Gas Emissions and Health*, C-SPAN (Dec. 7, 2009), https://bit.ly/3QhZhaW (13:19 to 13:55). As for any possible action the agency *could* consider, she went on to explain that EPA "has never believed that setting a national ambient air quality standard for greenhouse gases was advisable." *Id.* Indeed, this is "the mainstream view held by [the agency], industry, and most environmental groups": a NAAQS for greenhouse gases is "the wrong approach, both politically and practically." Nathan Richardson, *Playing Without Aces: Offsets and the Limits of Flexibility Under Clean Air Act Climate Policy*, 42 ENV'T L. 735, 767 (2012).

EPA should avoid committing to the kind of agency overreach the Supreme Court rejected for Section 111(d). EPA cannot exercise expansive power—either directly *or* indirectly—that Congress did not clearly give to reach the outcome our colleagues who wrote the letter urge. *See, e.g.*, *Biden's 'BackDoor' Climate Plan*, WALL STREET JOURNAL (Mar. 17, 2021, 6:32 PM), https://on.wsj.com/3bBMwcv (discussing a "backdoor" proposal to "reduce CO_2 emissions by tightening ozone standards" under NAAQS instead of "regulating CO_2 as a criteria pollutant").

These concerns are all the greater because this type of regulation would have economy-wide effects. For instance, one study concluded that over a fifteen-year period counties targeted by similar regulations lost almost 600,000 jobs. Michael Greenstone, *The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufactures*, 110 J. POL. ECON. 1175, 1176 (2002) (estimating the counties also lost $37 billion in capital stock and $75 billion of industrial output). Many of these counties are rural areas where replacement jobs are either unavailable or inaccessible. This is why even the most vigorous supporters of expanded EPA power recognize that we have yet to find a way for a NAAQS for CO_2 to "protect[] public welfare or health from climate change without devastating the U.S. economy." Michael A. Quirke, *We Can Fight Climate Change with the Army We Have*, 31 VILL. ENV'T L.J. 1, 34 (2019) ("[T]he economic impact of nonattainment can cost a region billions of dollars."). The Court emphasized that "both separation of powers and a practical understanding of legislative intent" demand a "reluctan[ce] to read into ambiguous statutory text"

this kind of lurking delegation of "unprecedented power over American industry." *West Virginia*, 142 S. Ct. at 2609, 2612; *see also* Richardson, et al., *supra*, at 10,103 ("Regulation of GHGs via the NAAQS program would necessarily be economywide (encompassing all stationary sources) and nationwide.").

The letter disregards entirely the consequences of its suggested approach for the nation's economy and industrial capacity. The Supreme Court's decision this summer marks the second time the Court has rebuked EPA for novel interpretations of the CAA specifically that would give the agency "unheralded" power to regulate "a significant portion of the American economy." *UARG*, 573 U.S. at 324. EPA should heed the Court's instruction and abide by the regulatory framework Congress set. Accordingly, the undersigned States urge the EPA to reject the suggestions of the July 28, 2022 letter.

Sincerely,

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