EPN and L4GG Comments on
Rescission of the Greenhouse Gas Findings for Fossil Fuel-Fired Power Plants and Repeal of Regulations for Power Plant Greenhouse Gas Emissions Under Clean Air Act Section 111
EPA-HQ-OAR-2025-0124
November 02, 2026

The Environmental Protection Network (EPN) harnesses the expertise of more than 800 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

Lawyers for Good Government (L4GG) is a 501(c)(3) non-profit organization that utilizes a network of over 125,000 pro bono attorneys to provide 1:1 legal assistance to communities, community-based organizations, NGOs, and state, tribal, and local governments. L4GG works on a variety of issues, including immigration, gender justice, health equity, and climate and environmental justice. Above all, L4GG wants to ensure that the law - and the government implementing those laws - works for the people, instead of for the individual and corporate interests that already have too much power.

Introduction

EPN and L4GG find that EPA's September 17, 2026 proposal to rescind greenhouse gas (GHG) findings for fossil fuel-fired power plants and to repeal existing GHG emission standards under the Clean Air Act (CAA or the Act) Section 111[1] is neither legally nor scientifically credible, and its policy analyses are significantly inaccurate. Therefore, the proposal should be withdrawn.

First, the proposal's legal analyses are irreparably flawed and mistaken, including its interpretations of legal text, long-standing Supreme Court precedent, and administrative law principles. Collectively, case law significantly undercuts EPA's proposed interpretation and supports EPN and L4GG's view that EPA does have the statutory authority to regulate GHG emissions from power plants. Second, the proposal is based on an incorrect and misleading assertion of climate science as being "too uncertain" – an assertion made without explanation or supporting data, and clearly inconsistent with the consensus of scientific bodies around the world that global climate change, largely the product of human activities, does present a clear threat to public health. Third, the proposal's economic and policy analyses are significantly inaccurate, incomplete, biased and misleading. For example, it ignores metrics that clearly demonstrate that U.S. power plants do contribute significantly to the air pollution at issue here and instead present ones that obfuscate the significance of the sector's contribution. Its recent benefit/costs analysis accompanying the proposal fails even to quantify pollution reduction benefits.[2] As shown by earlier EPA benefit/cost analysis, estimated climate

[1] Rescission of the Greenhouse Gas Findings for Fossil Fuel-Fired Power Plants and Repeal of Regulations for Power Plant Greenhouse Gas Emissions Under CAA Section 11, 91 FR 59002 (September 17, 2026) available at https://www.federalregister.gov/d/2026-19072.

[2] While inadequately assessing cost and benefit, EPA also totally neglects to consider the distributive and cumulative impacts of its actions in disregard of the state of the science and evidence relevant to rational decisionmaking. See, e.g., Sanne H. Knudsen, *The Flipside of Michigan v. EPA: Are Cumulative Impacts Centrally Relevant?*, 2018 UTAH L. REV. 1

benefits alone (i.e., apart from those from projected ozone, particulate and mercury reductions) outweigh the costs of the action. The scope of net benefits has been recently analyzed by others, with Resources for the Future (RFF) estimating that the proposed action would result in GHG damages amounting to nearly $1.7 trillion.

In sum, the proposal is wholly unacceptable and, if finalized, would result in harm to Americans. EPN and L4GG strongly recommend that it be withdrawn.

Given the overlap between this proposal, EPA's prior proposal on June 25, 2025 (90 FR 25752), and EPA's proposal on August 1, 2025 (90 FR 36288) concerning Section 202 of the Act, EPN and L4GG are attaching EPN's comments on these prior proposals, and incorporates them by reference in their entirety.[3]

I. EPA's legal analysis is flawed and mistaken, and the proposed interpretation of Section 111(b)(1)(A) is by far not the best interpretation of that provision.

1. The common and statutory meanings of "pollution."

EPA proposes that Section 111(b)(1)(A) "is best read as authorizing the Agency to regulate emissions that contribute significantly to air pollution that itself endangers public health or welfare through local or regional exposure."[4]

To support its interpretation, EPA first points to several definitions of the words "pollutant," "pollution," "pollute," and "contaminate," from various dictionary sources dating from the late 1960s to the late 1970s. From these, EPA distills a core meaning - one substance making another substance dirty, impure, or unclean, and thereby toxic or dangerous. That's how air, soil, or water become polluted. From this, EPA analogizes that "air pollution" as used in Section 111 must "refer[ ] to that which itself endangers public health or welfare through local or regional exposure." According to EPA in this supplemental proposal, the contamination of the air must be such that the

(2018), https://digitalcommons.law.uw.edu/faculty-articles/230. This neglect of the full range of social, environmental, and public health costs and benefits belies EPA's supposed concern to focus its attention on local and regional matters (see below at fn. 7). Arguing against considering global conditions, and taking a narrow and impoverished look at the real-world impacts of its decision on communities, EPA leaves itself incapable of carrying out statutory duties. As noted below at footnote 39, from prior EPA decisionmaking: "Third, the Administrator is to consider the cumulative impact of sources of a pollutant in assessing the risks from air pollution, and is not to look only at the risks attributable to a single source or class of sources. Fourth, the Administrator is to consider the risks to all parts of our population, including those who are at greater risk for reasons such as increased susceptibility to adverse health effects." 74 FR at 18890-891.The state of the science and decisionmaking practice has continued to advance. See https://www.nationalacademies.org/projects/DELS-BEST-23-04l; https://www.ucs.org/resources/unfinished-business; https://www.epa.gov/system/files/documents/2024-12/ejtg_20241206_clean.pdf

[3] See Attachments 1 and 2: EPN Comments on EPA's Proposed Repeal of Greenhouse Gas Standards for Electric Generating Units, Docket ID EPA-HQ-OAR-2025-0124 (August 7, 2025); EPN Comments on Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, Docket ID EPA-HQ-OAR-2025-0194 (September 22, 2025).

[4] 91 FR at 59021.

dirty air hurts you by direct exposure to you. And more – the harmful, unclean air must be limited to your local or regional area.[5]

The first thing to note about these definitions is how broad and encompassing they are. That is not surprising, as the definitions are designed to cover a vast array of different situations. Dumping used oil on a sandbank makes the sandbank dirty and unclean. The oil is "chemical waste" that "contaminates the soil." This fits in the definitions EPA relies on. And so do numerous other examples.

Consider the air pollution identified as the elevated concentration of GHGs in the atmosphere. The GHG emissions from the ground level are gaseous substances, and they are typically waste products of fuel combustion. That fits EPA's definitions. These gases rise into the levels of our atmosphere where they mix with other GHGs and collectively increase the already elevated concentration of GHGs in this layer of the atmosphere. EPA says contamination means "to soil, stain, corrupt, or infect by contact or association." And it is assuredly the continual emissions of more and more GHGs into the atmosphere that make that concentration of gases more and more "corrupted" and harmful to the public. The air pollution EPA rejects is readily encompassed in the dictionary definitions upon which EPA relies.

These definitions are so broad that they provide no basis to narrow the meaning of "air pollution" in Section 111. At the same time, elevated concentrations of GHGs in the atmosphere readily fall within the broad scope of these definitions, and the definitions support reading the term "air pollution" in Section 111 to include elevated concentrations of GHGs in the atmosphere. The definitions do not in any way lead to, compel, or even suggest the overly narrow definition EPA proposes for "air pollution."

In fact, these definitions are limited to describing how the substance (soil, air, water) becomes polluted. They describe the process of a previously clean substance becoming what can fairly be called a "polluted" substance, by the addition of a contaminant. None of them speak to a different issue – how does the substance, once polluted, harm you? For example, there is no mention of harm through a person being directly exposed to the polluted substance. The definitions do not in any way limit "pollution" to that modality. They do not place any limits on how, once polluted, the substance harms you; and they palpably fail to support EPA's claim that "air pollution" can only mean pollution that harms you by direct exposure.

EPA's argument is also inconsistent with Title VI of the Act, which regulates ozone depleting substances (ODS). Many ODS are in no way directly harmful to humans. In fact, they were used specifically because of their non-toxic properties. They are pollutants because of their interaction with ozone in the upper atmosphere. It is the destruction of the ozone that causes the effect that matters. Congress decided to address ODS in the CAA because these were substances emitted into the air that posed a risk to public health and welfare. There was no hesitation or confusion about the fact that the adverse effects on public health are not the result of breathing in the substances but the consequence of chemical reactions in the upper atmosphere that result in downstream adverse effects such as skin cancer from solar radiation. For purposes of the CAA, the mechanism by which substances cause harm, or the location in the atmosphere where substances cause harm, are irrelevant to the assessment of whether the substances cause harm. The primary risk Congress was

[5] 91 FR at 59021-022.

addressing was of course to the stratospheric ozone layer, but it is worth noting that Congress was well aware that reducing chlorofluorocarbons under Title VI would also help address climate change. See Cong. Rec. Oct. 27, 1990 at 36065 (Senate Manager of the 1990 Amendments stating, in reference to Title VI, "I am very very pleased that in this legislation we start trying to tackle the global warming problem.") It is nonsensical and indefensible to claim that ODS' indirect worldwide effect makes them pollutants while the indirect worldwide effect of GHGs makes them *not* pollutants.

Likewise, nothing in the definitions point to how widespread the polluted substance might be. No definition refers to "local" or "regional" soil, air, or water. The definitions do not refer in any way to the geographic scope of the polluted substance. The definitions speak to how something becomes polluted - and elevated concentrations of GHGs in the atmosphere fit the definition - but they do not speak in any way to either the geographic range of the polluted substance or the mechanism by which the polluted substance might harm the public.

The definitions thus provide no support for EPA's proposed overly narrow definition of "air pollution." At the same time, elevated concentrations of GHG gases in the atmosphere comfortably fit within these definitions as "polluted air" or "air pollution."

Furthermore, EPA's reliance on dictionary definitions of "pollution" or "pollutant" is entirely misplaced. The CAA itself defines "air pollutant" and although EPA acknowledges the statutory definition it selectively and misleadingly quotes from the definition to omit the key language. As the Supreme Court noted in Massachusetts v. EPA, 549 U.S. 497 (2007):

> The Act defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive … substance or matter which is emitted into or otherwise enters the ambient air." §7602(g).

It is thus well-settled, black-letter law that "greenhouse gases fit well within the CAA's capacious definition of 'air pollutant'", *id.* EPA should follow the law and abandon its efforts to twist and ignore the statutory text and its own obligations.

2. Defining air pollution and geographic scope of assessment authority.

EPA also points to the definition in Section 302(h) of "[a]ll language referring to effects on welfare," as well as dictionary definitions for the terms "climate" and "weather" from the early 1970s. EPA believes all of the terms in Section 302(h) "refer[ ] to things and mechanisms of action that occur in a particular place or under regionally bounded conditions." Combined with the canon of statutory construction known as *noscitur a sociis* (i.e., deriving meaning of an ambiguous word or phrase by the surrounding text), EPA proposes that these definitions also support its narrow interpretation of "air pollution."

Section 302(h) identifies the example subject areas that EPA must assess when the statute calls for it to consider or address effects on public welfare, including effects on a wide variety of subjects.[6] The

[6] 42 U.S. Code § 7602(h) in Air Pollution Prevention and Control, General Provisions. "All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on

purpose of the definition is to provide direction for EPA when it implements various other provisions of the Act that refer to "public welfare."

For example, Section 108 calls for EPA to produce an assessment that "accurately reflect[s] 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 such pollutant in the ambient air, in varying quantities." It includes "any known or anticipated adverse effects on welfare." EPA implements this provision by developing an Integrated Science Assessment (ISA) for the pollutant, which is later used when EPA considers whether to revise the National Ambient Air Quality Standards (NAAQS) under Section 109, so that the NAAQS is "requisite" to protect the "public welfare." In developing the ISA, EPA conducts a comprehensive assessment of the science and analyzes the known, expected, and potential or possible adverse impacts of the air pollutant on the various subject matters identified by Section 302(h). In several cases this has included impacts on climate from elevated concentrations of GHGs in the atmosphere.[7]

Another example is Section 111, which refers to air pollution that may reasonably be anticipated to endanger public health or welfare. Given the definition of "effects on welfare," an assessment supporting an endangerment finding (whether affirmative or negative) must focus on assessing the likelihood the air pollution would lead to adverse or beneficial effects on any and all of the subject areas identified in Section 302(h), including soil, water, wildlife, damage to property, hazards to transportation, and so on, and assessing the nature and magnitude of any such effects. The assessment would include effects on weather or climate. The assessments would address the nature, scope, and magnitude of any such effects.

This is how EPA used Section 302(h) when it made the 2009 and 2015 Endangerment Findings. Sections 202 and 111 called for EPA to assess whether a certain air pollution was "reasonably anticipated to endanger public health or welfare." EPA considered what effects the elevated levels of GHGs would or might have on the wide range of subject areas covered by Section 302(h). For example, EPA evaluated the effects on sectors including food production and agriculture; forestry; water resources; sea level rise and coastal areas; energy, infrastructure, and settlements; and ecosystems and wildlife.[8]

As these examples show, the role of Section 302(h) is clear: to identify the wide range of subject areas that EPA must consider when a different provision of the statute calls on EPA to assess the effects of something on public welfare. This is an important but narrow role.

EPA claims that Section 302(h) "refers to things and mechanisms of action that occur in a particular place or under regionally bounded conditions," and that it thus speaks to air pollution with adverse impacts from local and regional exposure, not global climate change concerns that entail a very

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economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants."

[7] See, e.g., EPA "Air Quality Criteria for Particulate Matter and Sulfur Oxides," Vol. I Section 1.9 ("Effects on Visibility and Climate"), EPA-600/8-82-029a, December 1982; EPA "Air Quality Criteria for Particulate Matter," Vol. II Section 8.8 ("Climatic Effects"), EPA-600/P-95/0016F, April 1996; EPA "Integrated Science Assessment for Ozone and Related Photochemical Oxidants," Chapter 10 ("The Role of Tropospheric Ozone in Climate Change and UV-B Shielding Effects"), EPA 600/R-10/076F, February 2013.

[8] See 74 FR at 66531-66534.

different and much longer causal chain.[9] None of that can be found in the terms of Section 302(h), nor in the limited role it plays in the Act.

First, EPA says the definition "refers to things … that occur in a particular place or under regionally bounded conditions." Section 302(h) is the "effects on" any or all of the wide number of things listed in the definition. There is no reference to "local or regional" effects. In addition, the subject areas themselves provide no indication of the geographic scope of the various effects that might occur. Certainly, a virus or bacteria affecting an animal stock could be spread nationwide, as could an invasive and harmful plant or animal. It would certainly still be an "effect on welfare." Say an air pollution problem promoted the nationwide spread of an insect that infected dairy cattle across the country. That would certainly be an effect on welfare and fits comfortably within the scope of Section 302(h), but it is not limited locally or regionally. Effects on economic values can readily be nationwide in scope, not local or regional. Section 302(h) says nothing about the geographic scope of the effects on welfare that might arise.

That geographic scope is certainly relevant when, pursuant to another provision of the Act, EPA assesses the nature and magnitude of the effects of air pollution on the subject areas identified in Section 302(h). It would be relevant when the Administrator assesses endangerment for public welfare, but Section 302(h)'s definition in no way limits or binds EPA to any certain local or regional scope in its assessment.

Second, EPA says the definition "refers to … mechanisms of action that occur in a particular place or under regionally bounded conditions."[10] However, the definition says nothing about the mechanism of action by which air pollution affects the subject areas identified in the definition. EPA will look at the mechanism of action closely when EPA assesses how air pollution affects the public welfare, for example when it conducts an ISA under Section 108, or when EPA assesses the effects of elevated concentrations of GHGs in the atmosphere and determines whether this air pollution is "reasonably anticipated to endanger public … welfare" under various provisions of the Act that direct EPA to conduct an assessment of air pollution's effects on welfare. EPA implements these provisions by assessing the likelihood of the effect, its nature, scope, and severity of impact. This assessment includes determining and evaluating the mechanism of action on the subject areas listed in Section 302(h). Section 302(h) identifies the subject areas that EPA must consider. Nowhere does it direct or limit EPA's assessment in terms of geographic scope or "mechanisms of action."

EPA assertions are baseless pseudo-inferences misleadingly drawn from Section 302(h), a provision that plays an important but limited role – identifying subject areas for EPA to assess, nothing more.

EPA points to definitions of the terms "weather" and "climate," indicating that in the early 1970s, these terms would be taken to refer to a local or regional scope. EPA likewise points to the above noted canon of statutory construction, and notes that "none of the many terms listed in the definition of welfare would have been understood, absent modifying terms, to refer to global considerations. Nor has Congress added terms like "global" or "change" that would have expanded the scope of the effects on welfare encompassed within the definition."[11] As early as 1978, Congress

[9] 91 FR at 59022.
[10] 91 FR at 59022.
[11] 91 FR at 59022.

recognized the need to address climate as an issue with both global and local dimensions, showing a clear legislative purpose behind distinguishing the terms "weather" and "climate."[12]

EPA has both its logic and its facts wrong. Even assuming that Congress was concerned with local or regional climates, those climates are impacted by the global climate. It is impossible for the climate in, for example, the Northeastern United States to be completely unaffected by larger global climate forces, and in turn a climate influence that may initially be regional (e.g., wildfire smoke) will influence the global atmosphere and climate.

Section 302(h) defines "effects on welfare" to include "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." With the possible exception of visibility, all of these effects are influenced and can be negatively impacted by both weather and climate. In fact, they are currently being negatively impacted by changes to both weather and climate. Congress demonstrated a clear intent to define welfare as inclusively as possible by saying these effects are "not limited to" those listed above. In attempting to further narrow the definition, EPA contradicts this legislative intent.[13]

Historically, it is not surprising that the Act includes weather and climate in its definition of welfare. People in the early 1970s were well aware of the potential impacts of climate change. Scientific concerns about increased levels of GHGs causing the Earth to warm go back to the late 19th century. One of the earliest official government reports on climate change was in 1965, when President Lyndon B. Johnson's science advisory committee warned of the dangers of unchecked global warming and the ultimate need to protect people from these risks: "Man is unwittingly conducting a vast geophysical experiment. Within a few generations he is burning the fossil fuels that slowly accumulated in the earth over 500 million years." The report included an entire subpanel report on Atmospheric Carbon Dioxide, which noted that there was likely warming between 1885 and 1940. The report also expressed concern over melting Antarctic ice caps with resulting sea level rise as well as ocean acidification. All these impacts have, in fact, come to pass.[14]

Indeed, concerns with air pollution impacting the climate are part of the legislative history of the Act. Senator Edmund Muskie stated on the record during the CAA debate that emissions from human activities "threaten irreversible atmospheric and climatic changes" and Senator Caleb Boggs of Delaware cited CEQ's first annual report, which dealt extensively with climate. "Discussion of CO2 and climate also appeared in reports and congressional hearings on environmental problems more broadly, including in relation to intentional weather modification, nuclear energy, the

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[12] *See* Conference report filed in House (08/14/1978), H. Rept. 95-1489) (at https://www.congress.gov/bill/95th-congress/house-bill/6669?q=%7B%22search%22%3A%5B%22%5C%22climate+change%5C%22%22%2C%22%5C%22climate%22%2C%22change%5C%22%22%5D%7D&s=1&r=138). This summary of H.R. 6669 reflects a common-sense understanding that a "National Climate Program" should address effects of climate on a range of national welfare-related issues including human health; should involve international cooperation; and should *also* involve intergovernmental programs including action "on a statewide and regional basis."

[13] See, e.g. *Allen v. Milligan*, 599 U.S. 1, 40 (2023) (expansive meaning for "but not limited to").

[14] White House Report, "Restoring the Quality of Our Environment," Report of the Environmental Pollution Panel, President's Science Advisory Committee, November 1965. https://nsarchive.gwu.edu/document/31937-document-2-white-house-report-restoring-quality-our-environment-report-environmental.

development of supersonic aviation, and space exploration. CO2, climate, and the greenhouse effect were discussed in scores of Congressional hearings, including those specifically related to the consideration and drafting of the 1970 Clean Air Act (CAA). The impact of CO2 on climate was a major subject in the first report of the Council on Environmental Quality, released in draft form in 1969 and entered into Congressional testimony as part of the hearings for the 1970 Act. The topic was the subject of a wide variety of scientific papers and reports, several of which were transmitted to the Executive Branch and communicated to Congress in the 1960s and in 1970, particularly but not only in the context of urban air pollution."[15]

When EPA conducted its GHG Endangerment Findings in 2009 and 2015, it considered the effects on welfare that were occurring or might occur domestically. For example, EPA did not look at effects on vegetation or farming in Europe or Asia. It looked at the effects on these sectors in the United States. To the limited extent EPA considered effects occurring outside the United States, it was only to assess how those effects might in turn lead to effects within the United States. It would not make sense for Congress to add the modifier "global" to any of the subject areas in Section 302(h) unless it wanted EPA to base its findings on extraterritorial effects. There is no indication Congress intended that. The absence of the term global in the definition implies no more than, as is the usual case, Congress was concerned with domestic effects on, for example, agriculture, not extraterritorial effects on the same.

EPA's faulty logic and conclusions in this supplemental proposal arise in large part from its failure to accurately account for the several facets included within EPA's umbrella term "global climate change concerns." This error infects and undermines the entirety of its reasoning.

EPA's apparent thinking in this proposal is that everything involving "global climate change concerns" is solely global in nature, thus implying that the problem is too remote and beyond the reach of EPA regulation. EPA's argument is that, given this, and the failure of Section 302(h) to refer to global considerations, global climate change concerns cannot be addressed and air pollution as used in Section 111 cannot be global in nature.

This relies on a basic fallacy. Describing all concerns about global climate change as global in nature inaccurately characterizes both the science and the elements of an assessment underlying an Endangerment Finding.

First, only one aspect of "global climate change concerns" is truly global, and that is the elevated concentration of GHGs in the atmosphere. GHGs, once emitted, remain airborne for decades to centuries, and therefore become well mixed throughout the entire global atmosphere. The resulting atmospheric concentration (now at levels higher than ever experienced by human civilization) is generally homogenous on a global scale. So it is the only thing that is in fact "global" about global climate change or global climate change concerns with regard to public health and welfare in the United States.

In the real world, there is no such thing as an American atmosphere decoupled and unconnected to the rest of the global atmosphere.

[15] 116 Cong. Rec. 32901(1970).

This well-mixed layer retains heat, and this retained heat leads to changes in temperature across the globe, in the air, at ground level, and in the oceans. The globally-averaged temperature is rising, and the science tells us that 100 percent of it can be attributed to the human-induced buildup of GHGs in our atmosphere. All around the globe temperatures are rising at different rates for reasons that are generally well understood. In some limited cases (like over the north Atlantic Ocean), temperatures have been falling due to surrounding climatic changes. The average temperature of the United States is rising faster than the increase in the globally-averaged temperature because overall land areas are warming faster than ocean areas. Within the United States, Alaska has seen the greatest relative increase in temperature, because the polar regions are the fastest warming places on Earth. There are numerous places across the globe where temperatures are changing, and they are changing in numerous different magnitudes and rates.

Scientists and policy makers have found it useful and important to have a single metric that identifies the annual average temperature as a way to track average temperature change for the world. This metric is calculated by combining the different temperature measurements from a wide multitude of air and water sensors spread across the globe, with some values developed by modeling to fill gaps in measurements. These temperatures, varying around the world, are weighted and averaged to come up with a single number for the globe. The past, current, and future globally-averaged temperature can also be estimated with climate models. But that single number is a human abstraction, an "indicator."[16] It is not a single, global-wide temperature rise that every part of the world experiences uniformly. There is nothing "global" about the individual measurements that are made and there is nothing "global" about the way individual states, communities, businesses, and individuals within the United States experience the impacts of human-induced climate change.

The changes in temperature around the world are not globally uniform. Nor are the effects in the U.S. from the increased heat retained by the atmosphere. In the 2009 and 2015 Endangerment Findings, EPA comprehensively assessed the adverse and beneficial effects the retained heat in the atmosphere was having or could have, in the U.S., on all of the subject areas identified in Section 320(h). EPA considered the likelihood of the effects, as well as their nature and magnitude. EPA considered the effects on all of the subject areas that Section 302(h) identifies. This included effects that readily fall within the meaning of weather or climate. For example, EPA assessed the likelihood and magnitude of increased heat spells, increased drought, increased extreme weather events, increased hurricanes or increased severity of hurricanes, and changes in growing season patterns from changes in average weather patterns. Many of these effects were local or regional in nature. These readily fall under the terms "effects on … weather" or "effects on … climate" as used in Section 302(h). EPA also considered a wide range of other effects that readily fall into "effects on welfare," as used in Section 302(h).[17] EPA carefully assessed effects on all of the subject areas covered by Section 302(h), whether the effects occurred on a local, regional, or national level.

Congress did not need to add the modifier "global" to "climate" in Section 302(h) to direct EPA to analyze the "effects on welfare" or "climate" in the U.S. that could result from the increased heat retained by the elevated concentration of GHGs in the atmosphere. Sections 111 and 202 called for

[16] See https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature (Noting that the "concept of an average temperature for the entire globe may seem odd," but is "convenient for detecting and tracking changes in Earth's energy budget, which can only be directly measured from space." It "provides a consistent, reliable method for monitoring changes in Earth's surface temperature over time.")

[17] See, e.g. 74 FR 18886, 18902-903 (April 24, 2009), 74 FR 66496, 66530-535 (December 15, 2009).

EPA to assess whether these effects on the different subject areas identified in Section 302(h) were reasonably anticipated to endanger public welfare. The absence of the term "global" in Section 302(h) is just not relevant to understanding Congressional intent.

EPA confuses the global nature of the air pollution with the local, regional, or national scope of the adverse or beneficial effects that the air pollution might cause. EPA's proposal represents a disconnect from the text of Section 302(h) and the role it plays in the Act. This definition does no more than identify the subject areas that EPA must consider when other provisions in the statute call for EPA to assess "effects on welfare." It says nothing about the kind of air pollution that might cause such effects, nothing about the geographic scope of the air pollution or the range of its effects or the mode of action by which the air pollution might have "effects on welfare." This section does not support EPA's narrow interpretation of air pollution under Section 111. Rather, EPA's 2009 and 2015 Endangerment Findings were fully consistent with this section.

The terms 'global climate change' or 'global climate concerns' logically refer to the fact that numerous varying and different climates, spread across the globe, are and will be affected by the increased heat trapped by elevated concentrations of GHGs in the atmosphere. This is clearly and emphatically a concern for all parts of the globe and all parts of the United States. Climates are changing all across the globe, because of heat retained in the atmosphere, and this is of immense concern. Identifying this elevated concentration of GHGs in the atmosphere, this "polluted air," as air pollution and assessing its many and varied effects in the U.S., whether local, regional, or national, and judging whether the air pollution is reasonably anticipated to endanger public health or welfare, is fully consistent with all of the terms used in Sections 111 and Section 302(h). EPA's attempt to show otherwise fails as its logic and inferences collapse upon inspection.[18]

One last point concerns the canon of statutory construction *noscitur a sociis*. The case EPA cites involves a criminal statute that listed several specific kinds of actions that were prohibited and then included an "otherwise" clause that prohibited actions defined in much more general terms.[19] The question before the Court was the scope of the "otherwise" clause. The Court said:

> One way to discern the reach of an "otherwise" clause is to look for guidance from whatever examples come before it. Two general principles are relevant. First, the canon of noscitur a sociis teaches that a word is "given more precise content by the neighboring words with which it is associated." United States v. Williams, 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). That " avoid[s] ascribing to one word a meaning **2184 so broad that it is inconsistent with" "the company it keeps." Gustafson v. Alloyd Co., 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). And under the related canon of ejusdem generis, "a 'general or collective term' at the end of a list of specific items" is typically " 'controlled and defined by reference to' the specific classes ... that precede it." Southwest Airlines Co. v. Saxon, 596 U.S. 450, 458, 142 S.Ct. 1783, 213 L.Ed.2d 27 (2022) (quoting first Ali v. Federal Bureau of Prisons, 552 U.S. 214, 225, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008); then Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001));

[18] It also flies in the face of the scientific reality and lived experience recognized by other federal administrative agencies. For example, NOAA has a long-standing Regional Climate Services program to "provide tailored, comprehensive support to help address the unique challenges and vulnerabilities created by regional weather and climate conditions." https://www.ncei.noaa.gov/regional

[19] Fn. 136, 91 FR at 59022.

> accord, Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246, 252, 144 S.Ct. 905, 218 L.Ed.2d 204 (2024). These approaches to statutory interpretation track the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it.
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> To see why, consider a straightforward example. A zoo might post a sign that reads, "do not pet, feed, yell or throw objects at the animals, or otherwise disturb them." If a visitor *488 eats lunch in front of a hungry gorilla, or talks to a friend near its enclosure, has he obeyed the regulation? Surely yes. Although the smell of human food or the sound of voices might well disturb gorillas, the specific examples of impermissible conduct all involve direct interaction with and harassment of the zoo animals. Merely eating or talking is so unlike the examples that the zoo provided that it would be implausible to assume those activities were prohibited, even if literally covered by the language.
>
> The idea is simply that a general phrase can be given a more focused meaning by the terms linked to it. That principle ensures—regardless of how complicated a sentence might appear—that none of its specific parts are made redundant by a clause literally broad enough to include them. See Yates, 574 U.S., at 545–546, 135 S.Ct. 1074 (plurality opinion). For instance, a football league might adopt a rule that players must not "grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or otherwise attack, assault, or harm any player." If a linebacker shouts insults at the quarterback and hurts his feelings, has the linebacker nonetheless followed the rule? Of course he has. The examples of prohibited actions all concern dangerous physical conduct that might inflict bodily harm; trash talk is simply not of that kind. See 64 F.4th at 365–366 (Katsas, J., dissenting) (emphasis supplied).[20]

EPA cites this case and this canon of construction but fails to demonstrate how and why it applies to Section 302(h). As discussed above, there is no common element of local or regional scope or exposure as a single mechanism of action. There is no general term that needs to be aligned with the meaning of its more specific neighbors. This case and this canon of construction are irrelevant and provide no support for EPA's interpretation. The fact that virtually all of the specific items listed in the definition of welfare are negatively impacted by increased global temperatures and other impacts of climate change not only supports the idea that emissions that cause climate change are pollutants but would be sufficient even if the words 'weather' and 'climate' were not in the definition.

3. Ambient air.

EPA proposes that Section 111(b)(1)(A) "is best read as authorizing the Agency to regulate emissions that contribute significantly to air pollution that itself endangers public health or welfare through local or regional exposure."[21]

In effect EPA proposes that the best reading of Section 111 is that Congress wrote it as follows:

[20] *Fischer v. United States*, 603 U.S. 480, 487-488 (2024).
[21] 91 FR at 59021.

> The Administrator shall … which in his judgment cause, or significantly contribute to, …, *ambient* air pollution which may reasonably be anticipated to endanger public health or welfare *through exposure to the ambient air pollution*.

That is not the provision Congress adopted. EPA's proposal is not consistent with the text Congress adopted and is an attempt to justify reading various limitations into the text that are not there.[22]

Congress knew how to limit EPA's authority to focus on addressing ambient air pollution. Section 108 specifies criteria for listing air pollutants for the NAAQS program. In addition to being an air pollutant the "emissions of which, in [the administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," it must be one "the presence of which *in the ambient air* results from numerous or diverse mobile or stationary sources."(emphasis supplied). Congress mandated that EPA issue air quality criteria for listed pollutants, where the "[a]ir quality criteria for an air pollutant shall accurately reflect 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 such pollutant in the ambient air*, in varying quantities." (emphasis supplied).

EPA is required to issue "national *ambient air quality* standards" (emphasis supplied) for each listed air pollutant, where "[n]ational primary *ambient air quality* standards … shall be *ambient air quality* standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health" (emphasis supplied) and "[n]ational secondary *ambient air quality* standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to *protect the public welfare from* any known or anticipated adverse effects associated with *the presence of such air pollutant in the ambient air*." (emphasis supplied)[23]

Congress also knew how to limit EPA's authority to setting standards that address harmful exposure to the presence of local or regional air pollution. It did so for the NAAQS program but did not do so in Section 111. The clear differences in the provisions indicate that Congress did not write into Section 111 the restriction that EPA proposes Congress implicitly placed into it.

In Section 108, Congress used the same terms that it used in Section 111 – air pollutant, cause or contribute to air pollution, air pollution which may reasonably be anticipated to endanger public health or welfare. According to EPA's proposal, those words themselves embody and incorporate the concept of harm from local or regional exposure to the air pollution – as EPA says, the kind of air pollution addressed by the NAAQS program, such as ground level Ozone, PM, CO, Lead. According to EPA's proposal, these general terms already incorporate the limitation to ambient air and limitation to exposure from local or regional air pollution. Yet Congress inserted the term 'ambient' into Sections 108 and 109 in several different places. This is not accidental: this phrase was added because without it, the provision would not be limited to ambient air and exposure to harm from the ambient air pollution.

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[22] See the discussion of *Massachusetts v. EPA* below (Section II.1, starting p. 35) for the Supreme Court's reasoning, which supports the statutory analysis here.

[23] Also see the use of the term "ambient concentration" in Section 112(b)(2) and (3), concerning the listing of substances as hazardous air pollutants. The term is not found in Section 111.

Congress chose to limit the NAAQS provisions to ambient air pollution, but it did not do so in Section 111, which was adopted contemporaneously. As such, Section 111 is not limited in the way EPA proposes. As discussed above, EPA's arguments on the meaning of the general terms used in the endangerment provision and its arguments based on the terms in Section 302(h) fall apart upon inspection. In addition, they are contrary to the obvious and strong evidence that Congress knew how to limit air pollution to ambient air pollution when it wanted to, and it purposely did not do so in Section 111.

Even where Congress limited EPA to addressing ambient air pollution and the problems associated with such air pollution — the NAAQS program — EPA (with the express approval of the Clean Air Scientific Advisory Committee (CASAC)[24]) has, for many years, considered the global warming impacts of air pollution. For example, EPA has typically considered the warming effects associated with particulate matter (PM) in the air quality criteria that assess the available scientific information on the public health and welfare effects of PM.[25] In addition, EPA has similarly considered the effects of ambient levels of ozone on shielding the public from harmful UV-B radiation.[26] This is an indirect effect that does not stem from exposure to ozone, contrary to EPA's proposal to treat its statutory authority as limited to harms deriving from exposure to local and regional air pollution.[27]

4. Causation, proximate cause

EPA proposes that

> "Background principles of causation and proximate cause support our proposed interpretation of CAA section 111(b)(1)(A) as not extending to regulation of fossil fuel-fired power plants based on global climate change concerns. In particular, the EPA proposes that the terms "cause," "contribute," and "reasonably be anticipated to endanger" must be read consistent with these principles…Congress endorsed the incorporation of proximate cause principles when it added the phrase 'may reasonably be anticipated' to this section in the 1977 CAA Amendments. That phrase is another way of saying "reasonably foreseeable," a longstanding touchstone of proximate cause.[ ] … Global climate change concerns involve causal relationships that are too uncertain, conjectural, remote, and convoluted by

[24] The CASAC provides independent scientific advice and recommendations to EPA, and was established by Congress in 1977. See https://www.epa.gov/system/files/documents/2025-08/e-manifest-charter-2025.pdf.

[25] See, e.g., EPA "Air Quality Criteria for Particulate Matter and Sulfur Oxides," Vol. I Section 1.9 ("Effects on Visibility and Climate"), EPA-600/8-82-029a, December 1982; EPA "Air Quality Criteria for Particulate Matter," Vol. II Section 8.8 ("Climatic Effects"), EPA-600/P-95/0016F, April 1996; EPA "Integrated Science Assessment for Ozone and Related Photochemical Oxidants," Chapter 10 ("The Role of Tropospheric Ozone in Climate Change and UV-B Shielding Effects"), EPA 600/R-10/076F, February 2013.

[26] Id.

[27] *American Trucking Associations v. EPA*, 175 F.3d 1027, 1051-53 (D.C. Cir., 1999) ("The reference to "all identifiable effects" would seem on its face to include beneficent effects. EPA attempts to avoid this straightforward reading in several ways. ... But the phrase "pollutant" is simply a label used to identify a substance to be listed and controlled by the statute. ... this fact of nomenclature does not visibly manifest a congressional intent to banish consideration of whole classes of "identifiable effects.").

> intervening and confounding factors to fit within the terms 'cause,' 'contribute,' and 'reasonably be anticipated to endanger' as used in CAA section 111(b)(1)(A)."[28]

The principles of "proximate cause" are irrelevant to determining the meaning of the terms "cause," "contribute," and "reasonably be anticipated to endanger."

First, the terms "cause" and "contribute" refer to the relationship between the emissions of the air pollutant of concern and the associated air pollution. Section 111, along with several other provisions in the Act, asks the Administrator to judge whether emissions from the source category "causes, or contributes significantly to, air pollution."[29] That is separate from judging whether the air pollution is "reasonably anticipated to endanger public health or welfare."[30] In both the 2009 and 2015 Endangerment Findings, EPA judged that the relevant motor vehicle sources did contribute, and the relevant stationary sources did significantly contribute, to the air pollution. No one claims the emissions from these sources by themselves are the sole cause of the air pollution. It is a question of contribution, not sole causation. Issues of "proximate cause" are irrelevant to the issue of contribution to air pollution.

Second, EPA assigns proximate cause principles to the phrase "reasonably be anticipated to endanger" based on use of the word "anticipated," which it defines as foreseeable.[31] Proximate cause is irrelevant to determining the meaning of this phrase.

Proximate cause is a creature of the common law of torts. The law of torts involves determining when one person is liable to pay damages to a second person for injuries they caused to the second person. That has nothing to do with the scope of EPA's authority under Section 111, including its obligation to make the contribution and endangerment findings called for by Section 111. The cases cited by EPA make this clear. They all involve one party suing another party. One party's conduct was allegedly prohibited by statute, that conduct caused injuries to the other party, and the other party now seeks monetary damages. They are suing because the statute created a private cause of action for damages. The statute then determines the kind of causal link, between the prohibited conduct and the injury incurred, that must be shown in order to recover damages.

EPA cites various cases to support its approach. *Bank of Am. Corp. v. City of Miami,* 581 U.S. 189 (2017) involves a city suing a bank for damages from injuries caused by discriminatory lending practices, conduct prohibited by the Fair Housing Act. The Court said:

> The remaining question is one of causation: Did the Banks' allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services? The Eleventh Circuit concluded that the answer is "yes" because the City plausibly alleged that its financial injuries were foreseeable results of the Banks' misconduct. We conclude that foreseeability alone is not sufficient to establish proximate cause under the FHA and therefore vacate the judgment below.

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[28] 91 FR at 59023.

[29] Some provisions, like Section 202, do not call for "significant" contribution.

[30] EPA discusses these separate judgments in its prior comments on the June 25, 2025 and August 1, 2025 proposal.

[31] Fn. 144, 91 FR at 59023, and the later discussion of *Hicks v. United States*.

> It is a "'well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.'" *Lexmark*, 572 U.S., at ——, 134 S.Ct., at 1390. We assume Congress "is familiar with the common-law rule and does not mean to displace it sub silentio" in federal causes of action. *Ibid.* A claim for damages under the FHA—which is akin to a "tort action," *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003)—is no exception to this traditional requirement. "Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Lexmark*, supra, at ——, 134 S.Ct., at 1390. (emphasis added) 581 U.S. at 201-202.

The Court is clear – the statute created a private cause of action for damages that is akin to a common law tort claim, and in that context, Congress is presumed to have intended the common law principles of tort to apply to the cause of action.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) is the same. It involves one business suing another for damages from injuries caused by false advertising, conduct prohibited by the Lanham Act. The Court said:

> Second, we generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. For centuries, it has been "a well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause." *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 223, 9 L.Ed. 691 (1837); see *Holmes*, 503 U.S., at 287, 112 S.Ct. 1311 (SCALIA, J., concurring in judgment). That venerable principle reflects the reality that "the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated Gen. Contractors*, 459 U.S., at 536, 103 S.Ct. 897. Congress, we assume, is familiar with the common-law rule and does not mean to displace it sub silentio. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation. See, e.g., *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 346, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (securities fraud); *Holmes*, *supra*, at 268–270, 112 S.Ct. 1311 (RICO); *Associated Gen. Contractors, supra*, at 529–535, 103 S.Ct. 897 (Clayton Act). No party disputes that it is proper to read § 1125(a) as containing such a requirement, its broad language notwithstanding (emphasis added). 572 U.S. at 132.

Again, the Court is interpreting a private cause of action for damages created by statute, akin to a common law tort claim. In that context, the Court interprets the statute as incorporating common law principles of proximate cause as a limit on when damages could be recovered.

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) is the same. It involves an employee suing their employer for damages for injuries caused by conduct prohibited by the Civil Rights Act of 1964. The Court said:

> When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts. This case requires the Court to define those rules in the context of Title VII

> of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers. […]
>
> This case requires the Court to define the proper standard of causation for Title VII retaliation claims. Causation in fact—i.e., proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim, see Restatement of Torts § 9 (1934) (definition of "legal cause"); § 431, Comment a (same); § 279, and Comment c (intentional infliction of physical harm); § 280 (other intentional torts); § 281(c) (negligence). This includes federal statutory claims of workplace discrimination. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (In intentional-discrimination cases, "liability depends on whether the protected trait" "actually motivated the employer's decision" and "had a determinative influence on the outcome"); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (explaining that the "simple test" for determining a discriminatory employment practice is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" (internal quotation marks omitted)) (emphasis added). 570 U.S. at 342.

EPA also cites *Hicks v. United States*, 511 F.2d 407 (D. C. Circuit 1975). This case involves a suit against the United States under the Federal Tort Claims Act (FTCA). There was a "claim by private parties that the Hospital has been negligent in discharging a patient alleged to be suffering from a mental disease."[32] The court determined that the standard to determine negligence "is well-settled, and may be stated as requiring 'that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances.'"[33] The court also determined the standard for causation under the FTCA: "[l]iability for compensation for injury alleged to have been caused by negligence follows only if it is proven that the negligence was a proximate cause of the injury."[34] While this may be good law for evaluating a private claim for damages based on negligence under the Federal Tort Claims Act, it has no relevance to Section 111's endangerment provisions, nor to any of the other endangerment provisions in the CAA.

All of these cases involve one party suing another party for damages, alleging injuries caused by conduct that was prohibited by a federal statute, under a private cause of action created by statute. In all of these cases, the court turned to the common law of torts to determine the causation standard. These cases have no relevance to interpreting the scope of EPA's authority under section 111. The Administrator's exercise of judgment in determining whether emissions from sources cause or contribute to air pollution, and whether that air pollution is reasonably anticipated to endanger public health or welfare, has nothing to do with a statutory private cause of action for damages.

Yet EPA relies heavily on the common law of tort principle of proximate cause, assuming that Congress implicitly incorporated them into the CAA's endangerment provisions. From this, EPA infers that the terms "contribution," and "reasonably anticipated to endanger" are limited and

[32] 511 F. 2d at 414.

[33] Id. at 416.

[34] Id. at 420.

narrowed by the principle of proximate cause.[35] It concludes that "global climate change concerns involve causal relationships that are too uncertain, conjectural, remote, and convoluted by intervening and confounding factors to fit within the terms 'cause,' 'contribute,' and 'reasonably be anticipated to endanger' as used in CAA section 111(b)(1)(A)."[36]

The foundation for this logic is a wholly mistaken analogy of the CAA and its endangerment provisions to a statute that creates a private cause of action for damages, akin to a common law tort claim. The foundation for EPA's conclusions is mistaken, and the conclusions EPA draws are therefore similarly erroneous.

It is striking that EPA turns to this clearly irrelevant source of case law as the primary support for its proposed best reading of Section 111. Normally, one turns to the legislative history of the provision at issue and the relevant case law. That is what EPA did in 2009. Doing so leads to a dramatically different conclusion than in EPA's present, deeply flawed proposal.

In 1977, Congress comprehensively amended the Act and adopted several endangerment provisions throughout the Act, all of them identical or closely aligned with the endangerment provisions in Sections 202 and 111. Congress "was responding to an opinion issued by the D.C. Circuit regarding the pre-1977 version of section 211(c) of the Act. The legislative history of those amendments, particularly the report by the House Committee on Interstate and Foreign Commerce, demonstrate that EPA's interpretation is fully consistent with Congress' intent in crafting this provision. See H.R. Rep. 95–294 (1977), as reprinted in 4 A Legislative History of the CAA Amendments of 1977 (1978) at 2465 (hereinafter "LH")."[37] "In revising the statutory language, Congress relied heavily on the D.C. Circuit's en banc decision in *Ethyl Corp. v. EPA*, which reversed a 3-judge panel opinion regarding an EPA rule restricting the content of lead in leaded gasoline."[38] EPA's rulemaking provided an extensive discussion of the *Ethyl* case and the detailed legislative history behind Congress' 1977 amendments.[39]

This led directly to the interpretation EPA adopted and applied in 2009 and applied in 2015. Based on the text of the provisions at issue and their comprehensive legislative history, EPA interpreted the endangerment provisions (contribution and endangerment) as follows:

> First, the Administrator is required to protect public health and welfare. She is not asked to wait until harm has occurred but instead must be ready to take regulatory action to prevent harm before it occurs. The Administrator is thus to consider both current and future risks. Second, the Administrator is to exercise judgment by weighing risks, assessing potential harms, and making reasonable projections of future trends and possibilities. It follows that when exercising her judgment the Administrator balances the likelihood and severity of effects. This balance involves a sliding scale; on one end the severity of the effects may be significant, but the likelihood low, while on the other end the severity may be less significant,

[35] EPA proposes that the significant contribution requirement is best read to mean a significant contribution to the endangerment, not to the air pollution. In that context it proposes that principles of proximate cause also limit its meaning. This faulty reading of "contribution" is discussed later.

[36] 91 FR at 59023.

[37] 74 FR at 18886, 18891 (April 24, 2009).

[38] Id.

[39] See, e.g., Id. at 18891-93, 74 FR 66496, 66505-510 (December 15, 2009).

but the likelihood high. Under either scenario, the Administrator is permitted to find endangerment. If the harm would be catastrophic, the Administrator is permitted to find endangerment even if the likelihood is small. In the context of climate change, for example, the Administrator should take account of the most catastrophic scenarios and their probabilities. …

Because scientific knowledge is constantly evolving, the Administrator may be called upon to make decisions while recognizing the uncertainties and limitations of the data or information available, as risks to public health or welfare may involve the frontiers of scientific or medical knowledge. At the same time, the Administrator must exercise reasoned decision making, and avoid speculative or crystal ball inquiries. Third, the Administrator is to consider the cumulative impact of sources of a pollutant in assessing the risks from air pollution, and is not to look only at the risks attributable to a single source or class of sources. Fourth, the Administrator is to consider the risks to all parts of our population, including those who are at greater risk for reasons such as increased susceptibility to adverse health effects. If vulnerable subpopulations are especially at risk, the Administrator is entitled to take that point into account in deciding the question of endangerment. Here too, both likelihood and severity of adverse effects are relevant, and here too, catastrophic scenarios and their probabilities should be considered. …

This framework recognizes that regulatory agencies such as EPA must be able to deal with the reality that "[m]an's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations." See *Ethyl Corp v. EPA*, 541 F.2d 1, 6 (D.C. Cir.), cert. denied 426 U.S. 941 (1976). Both "the CAA 'and common sense * * * demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.' " See *Massachusetts v. EPA*, 549 U.S. at 506, n.7 (citing *Ethyl Corp.*). To be sure, the concept of "expected value" has its limitations in this context, but it is useful insofar as it suggests that when severe risks to the public health and welfare are involved, the Administrator need not wait as evidence continues to accumulate.

The Administrator recognizes that the context for this action is unique. There is a very large and comprehensive base of scientific information that has been developed over many years through a global consensus process involving numerous scientists from many countries and representing many disciplines. She also recognizes that there are varying degrees of uncertainty across many of these scientific issues. It is in this context that she is exercising her judgment and applying the statutory framework.[40]

EPA's 2009 and 2015 interpretation follows the plain and common meaning of the terms Congress employed, and faithfully follows the lengthy and detailed legislative history and relevant caselaw.[41]

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[40] 74 FR at 18890-891.

[41] See *Coalition for Responsible Regulation v. E.P.A.*, 684 F.3d 102, 127–28 (D.C. Cir. 2012) ("The court rejected the argument that the regulations had to 'be premised upon factual proof of actual harm,' *Ethyl,* 541 F.2d at 12, and instead deferred to EPA's reasonable interpretation that regulations could be based on a 'significant risk of harm,' id. at 13. Nothing in *Ethyl* implied that EPA's authority to regulate was conditioned on evidence of a particular level of mitigation; only a showing of significant contribution was required. EPA made such a determination in the Endangerment Finding").

EPA's proposed interpretation takes a different approach, both superficial and mistaken. It relies upon unfounded and faulty inferences from broad definitions of the terms in the statute, both in Section 111 and Section 302(h). It also relies upon an unfounded and arguably frivolous analogy to statutes that provide private causes of action to recover damages for injuries resulting from conduct prohibited by the statute. It ignores the actual legislative history where Congress spoke extensively about the endangerment provisions it adopted and ignores the seminal case Congress relied upon for its amendments. EPA's 2009 and 2015 readings are by far the best readings of the statute, whereas EPA's current proposed interpretation is convoluted, unsupported, and based on faulty logic.

EPA claims in the supplemental proposal that "[g]lobal climate change concerns involve causal relationships that are too uncertain, conjectural, remote, and convoluted by intervening and confounding factors to fit within the terms 'cause," 'contribute,' and 'reasonably be anticipated to endanger' as used in CAA section 111(b)(1)(A)."[42] EPA is basically claiming that the science involved in assessing the link between the air pollution (elevated concentrations of GHGs in the atmosphere) and the effects on public health and welfare is so uncertain and weak that by operation of law it is outside the scope of three terms used in Section 111's endangerment provisions.

The first thing to note is that EPA's conclusory assertions that the causal link is "too uncertain, conjectural, remote, and convoluted" are just that – conclusory assertions. EPA provides no explanation of what it means by "too uncertain," "too remote," or "too convoluted." EPA certainly fails to respond to and rebut the contrary scientifically-based conclusion reached by EPA in 2009 and 2015 – because there are no grounds on which to do so. EPA provides no assessment of the science at all to support these conclusions. The bald, conclusory assertions about the state of the science provide no support for EPA's conclusions, and it is arbitrary and capricious for EPA to rely on them. It is also inconsistent with the global consensus of scientific bodies around the world that GHG emissions are causing climate change.[43] Moreover, EPA's unfounded conclusion ignores the fact that most impacts from pollutants are based on some extended chain of events. Ozone is formed by a series of complex chemical interactions in the atmosphere, some of which come from hundreds, if not thousands of miles away, driven by the energy of the sun on hot summer days (the number of which are increasing due to climate change). Even once the ozone is formed, the health impacts do not occur until the ozone is breathed in and interacts with human biological systems, and these interactions lead to another series of often-complex processes that result in health impacts. Air toxics do not magically cause cancer without any mediating factors. They are ingested, interact with chemicals in the body, disrupt DNA-causing mutations which may or may not ultimately lead to a cell becoming cancer cells, which then replicate to create tumors causing the disease. Other chemicals cause cancer in humans through a different set of complex chemical interactions that reduce the effectiveness of the body's repair mechanisms, which result in a cancer that would have been prevented if the pollutant had not been in the body. Airborne heavy metals (e.g. mercury and lead) and Persistent Organic Pollutants (e.g. dioxins and PCBs) likewise have no adverse acute effects when inhaled, with effects manifesting only after complex metabolic reactions.[44] These chains of causation are easily as complex and extended as the impact of GHGs on climate.

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[42] 91 FR at 59023.

[43] https://web.archive.org/web/20170807111205/https://www.opr.ca.gov/s_listoforganizations.php.

[44] National Parks Service, "Air Toxics Effects on Human Health." https://www.nps.gov/subjects/air/humanhealth-toxics.htm (accessed October 27, 2026).

If EPA has scientific evidence that the "[g]lobal climate change concerns involve causal relationships that are too uncertain, conjectural, remote, and convoluted by intervening and confounding factors to fit within the terms 'cause,' 'contribute,' and 'reasonably be anticipated to endanger' as used in CAA section 111(b)(1)(A)"[45] or even a definition of what level of uncertainty makes it too uncertain, EPA needs to present that evidence and/or definition for public comment.

While EPA asserts that the science behind contribution and endangerment findings is too uncertain as a matter of law in the context of GHGs, the D.C. Circuit found the opposite. EPA's 2009 Endangerment Findings under Section 202 were reviewed by the D.C. Circuit and upheld in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 120-23 (D.C. Cir. 2012) (*CRR*).

The court recounted EPA's actions:

> EPA compiled a substantial scientific record, which is before us in the present review, and determined that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment Finding, 74 Fed. Reg. at 66,497. EPA went on to find that motor-vehicle emissions of greenhouse gases "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." *Id.* at 66,499.[46]

The court rejected arguments that EPA's interpretation of the endangerment provisions was unlawful:

> Industry Petitioners contend that EPA improperly interpreted CAA § 202(a)(1) as restricting the Endangerment Finding to a science-based judgment devoid of considerations of policy concerns and regulatory consequences. They assert that CAA § 202(a)(1) requires EPA to consider, *e.g.,* the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change. They maintain that eschewing those considerations also made the Endangerment Finding arbitrary and capricious.
>
> These contentions are foreclosed by the language of the statute and the Supreme Court's decision in *Massachusetts v. EPA*.[47]

The court agreed with EPA's interpretation of the contribution and endangerment provisions:

> This language requires that the endangerment evaluation "relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.' " *Massachusetts v. EPA,* 549 U.S. at 532–33, 127 S.Ct. 1438. At bottom, § 202(a)(1) requires EPA to answer only two questions: whether particular "air pollution"—here, greenhouse gases—"may reasonably be anticipated to endanger public health or welfare," and whether motor-vehicle emissions "cause, or contribute to" that endangerment.

[45] 91 FR at 59023.

[46] *CRR* at 117.

[47] Id.

> These questions require a "scientific judgment" about the potential risks greenhouse gas emissions pose to public health *118 **322 or welfare—not policy discussions. *Massachusetts v. EPA,* 549 U.S. at 534, 127 S.Ct. 1438. …
>
> Instead of focusing on the question whether greenhouse gas emissions may reasonably be anticipated to endanger public health or welfare, the factors State and Industry Petitioners put forth only address what might happen were EPA to answer that question in the affirmative. As EPA stated in the Endangerment Finding, such inquiries "muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question." 74 Fed. Reg. at 66,515.[48]

The court evaluated and upheld the broad scientific basis EPA relied upon for its findings:

> As an initial matter, State and Industry Petitioners question EPA's reliance on "major assessments" addressing greenhouse gases and climate change issued by the Intergovernmental Panel on Climate Change (IPCC), the U.S. Global Climate Research Program (USGCRP), and the National Research Council (NRC). Endangerment Finding, 74 Fed. Reg. at 66,510–11. These peer-reviewed assessments synthesized thousands of individual studies on various aspects of greenhouse gases and climate change and drew "overarching conclusions" about the state of the science in this field. *Id.* at 66,511. The assessments provide data and information on, *inter alia,* "the amount of greenhouse gases being emitted by human activities"; their continued accumulation in the atmosphere; the resulting observed changes to Earth's energy balance, temperature and climate at global and regional levels, and other "climate-sensitive sectors and systems of the human and natural environment"; the extent to which these changes "can be attributed to human-induced buildup of atmospheric greenhouse gases"; "future projected climate change"; and "projected risks and impacts to human health, society and the environment." *Id.* at 66,510–11. …
>
> Moreover, it appears from the record that EPA used the assessment reports not as substitutes for its own judgment but as evidence upon which it relied to make that judgment. EPA evaluated the processes used to develop the various assessment reports, reviewed their contents, and considered the depth of the scientific consensus the reports represented. Based on these evaluations, EPA determined the assessments represented the best source material to use in deciding whether greenhouse gas emissions may be reasonably anticipated to endanger public health or welfare. Endangerment Finding, 74 Fed. Reg. at 66,510–11. It then reviewed those reports along with comments relevant to the scientific considerations involved to determine whether the evidence warranted an endangerment finding for greenhouse gases as it was required to do under the Supreme Court's mandate in *Massachusetts v. EPA.*[49]

The court found the scientific record EPA relied upon provided substantial evidence to support EPA's considered judgments and properly addressed the issue of scientific uncertainty.

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[48] Id. at 117-118.

[49] Id. at 119-120.

Industry Petitioners also assert that the scientific evidence does not adequately support the Endangerment Finding. …

The body of scientific evidence marshaled by EPA in support of the Endangerment Finding is substantial. EPA's scientific evidence of record included support for the proposition that greenhouse gases trap heat on earth that would otherwise dissipate into space; that this "greenhouse effect" warms the climate; that human activity is contributing to increased atmospheric levels of greenhouse gases; and that the climate system is warming.

Based on this scientific record, EPA made the linchpin finding: in its judgment, the "root cause" of the recently observed climate change is "very likely" the observed increase in anthropogenic greenhouse gas emissions. Endangerment Finding, 74 Fed. Reg. at 66,518. EPA found support for this finding in three lines of evidence. …

To recap, EPA had before it substantial record evidence that anthropogenic emissions of greenhouse gases "very likely" caused warming of the climate over the last several decades. EPA further had evidence of current and future effects of this warming on public health and welfare. Relying again upon substantial scientific evidence, EPA determined that anthropogenically induced climate change threatens both public health and public welfare. It found that extreme weather events, changes in air quality, increases in food-and water-borne pathogens, and increases in temperatures are likely to have adverse health effects. *Id.* at 66,497–98. The record also supports EPA's conclusion that climate change endangers human welfare by creating risk to food production and agriculture, forestry, energy, infrastructure, ecosystems, and wildlife. Substantial evidence further supported EPA's conclusion that the warming resulting from the greenhouse gas emissions could be expected to create risks to water resources and in general to coastal areas as a result of expected increase in sea level. *Id.* at 66,498. Finally, EPA determined from substantial evidence that motor-vehicle emissions of greenhouse gases contribute to climate change and thus to the endangerment of public health and welfare.

Industry Petitioners do not find fault with much of the substantial record EPA amassed in support of the Endangerment Finding. Rather, they contend that the record evidences too much uncertainty to support that judgment. But the existence of some uncertainty does not, without more, warrant invalidation of an endangerment finding. If a statute is "precautionary in nature" and "designed to protect the public health," and the relevant evidence is "difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge," EPA need not provide "rigorous step-by-step proof of cause and effect" to support an endangerment finding. *Ethyl Corp. v. EPA,* 541 F.2d 1, 28 (D.C.Cir.1976). As we have stated before, "Awaiting certainty will often allow for only reactive, not preventive, regulation." *Id.* at 25. …

In *Massachusetts v. EPA* the Supreme Court confirmed that EPA may make an endangerment finding despite lingering scientific uncertainty. Indeed, the Court held that the existence of "some residual uncertainty" did not excuse EPA's decision to decline to regulate greenhouse gases. *Massachusetts v. EPA,* 549 U.S. at 534, 127 S.Ct. 1438. To avoid regulating emissions of greenhouse gases, EPA would need to show "scientific uncertainty ... so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming." *Id.* Clearly, then, EPA may issue an endangerment finding even while the

> scientific record still contains at least "some residual uncertainty." Industry Petitioners have shown no more than that.[50]

The D.C. Circuit upheld EPA's interpretation of the statute, and upheld EPA's endangerment findings as supported by the science, taking into account the uncertainty EPA recognized and accounted for. That is a far cry from - actually, the opposite of - EPA's proposed conclusion that the science is "too uncertain, conjectural, remote, and convoluted" to support a finding of endangerment. EPA's proposal flies in the face of this past record and relies upon no evidence or assessment of the science. As such, EPA's conclusory statements about the science can be given no credence and have no probative value.

This is so even without taking into account the reality that science has continued to progress over the almost 2 decades since the 2009 endangerment findings. For example, in July 2026 the National Academy of Sciences (NAS) released an update of its 2016 assessment of the science supporting attribution of individual extreme weather events to climate change from the ever increasing elevated concentration of GHGs in the atmosphere.[51] This goes beyond scientists' earlier capacity to draw causal links between air pollution and general trends in extreme weather events. The NAS says:

> Over the past 18 months, a committee of experts convened by the National Academies of Sciences, Engineering, and Medicine has examined the state of extreme event attribution (EEA) science at a moment of accelerating climate impacts and heightened societal attention. This study builds on the National Academies' 2016 report, Attribution of Extreme Weather Events in the Context of Climate Change, which provided an early assessment of a then-emerging field. In the years since, EEA has become a more mature and visible area of climate science, driven by advances in modeling, observations, and analytical techniques, as well as growing demand for timely, event-specific information. At the same time, the increasing frequency and severity of extreme events have sharpened questions about what attribution science can reliably say—and where its limits remain.[52]

The NAS discusses in detail the state of the science in this area, how it has progressed and what limitations remain.

> Over the past decade, advances in physical understanding—through accumulating observational and modeling evidence supporting long-standing theoretical expectations—together with improved and more sophisticated numerical models, expanded observational datasets, and advanced statistical and machine-learning techniques, have strengthened the foundation for extreme event attribution (EEA). This progress has led to more robust assessments and an increased ability to examine a broader range of extreme event types. Major developments in EEA include employment of multi-methods frameworks and the operationalization of EEA, with organizations now producing rapid attribution studies often within days of an event. Efforts have also expanded to attribute the real-world consequences of extremes (e.g., impacts on health, economics) through extreme event impact attribution (EEIA), and EEA and EEIA findings are increasingly used in practice.

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[50] Id. at 120-122.

[51] National Research Council. 2026. Attribution of Extreme Weather and Climate Events and Their Impacts. Washington, DC: The National Academies Press. https://doi.org/10.17226/28590.

[52] Id. at xiii.

> Significant challenges remain, however, including structural limitations of the process based models used in EEA studies, temporal and geographic limitations of observations, and understanding how dynamic—not just thermodynamic—drivers of extreme events might respond to climate change. Confidence in EEA studies thus varies significantly across different types of extremes, with the highest confidence associated with extreme cold and heat events and others strongly influenced by a warming atmosphere, such as large-scale heavy rainfall events. Conversely, confidence is lowest for phenomena where observational records are limited and those that depend on small-scale dynamical processes that are poorly resolved in global climate models, such as severe convective storms. The attribution of compounding, cascading and record-breaking events poses unique methodological challenges, and knowledge of the physical processes driving such events remains incomplete and is still emerging.[53]

This discussion shows a major advancement in this one area over the state of scientific knowledge EPA relied upon for the 2009 endangerment findings. And this is just one area of the science that has developed. EPA's proposal ignores the science, refuses to assess it and evaluate it, and has the audacity to propose that the science is by definition too uncertain to support endangerment findings under Section 111 for GHGs (while previously predicating conclusions about the endangerment finding on speculative, untested, and not widely accepted "science"). This is wholly unprincipled and untethered from widely accepted science. It provides no factual or legal basis for EPA's proposed interpretation of Section 111.[54]

5. Substantial contribution to endangerment.

Almost in passing, EPA claims that stationary sources must make a substantial contribution to the endangerment, not just to the air pollution. EPA claims that its arguments on the futility of regulating GHG emissions from fossil-fired electric generating units (EGUs) support this interpretation.[55]

First, the D.C. Circuit has already rejected this interpretation, and instead endorsed EPA's 2009 interpretation that the endangerment provisions involved two separate questions: 1) do the emissions contribute to the air pollution?; and 2) is the air pollution reasonably anticipated to endanger public health or welfare?

The court said:

> At bottom, § 202(a)(1) requires EPA to answer only two questions: whether particular "air pollution"—here, greenhouse gases—"may reasonably be anticipated to endanger public health or welfare," and whether motor-vehicle emissions "cause, or contribute to" that endangerment…

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[53] Id. at 1.

[54] If EPA believes the science is "too uncertain, conjectural, remote, and convoluted" to support a finding of endangerment then the proper action would be to assess and evaluate the current science and have the Administrator make a negative endangerment finding, based on a notice and comment record. EPA ignores that approach, presumably because it cannot develop a record that would support such a decision.

[55] 91 FR at 59024.

> To recap, EPA had before it substantial record evidence that anthropogenic emissions of greenhouse gases "very likely" caused warming of the climate over the last several decades. EPA further had evidence of current and future effects of this warming on public health and welfare. Relying again upon substantial scientific evidence, EPA determined that anthropogenically induced climate change threatens both public health and public welfare. … Finally, EPA determined from substantial evidence that motor-vehicle emissions of greenhouse gases contribute to climate change and thus to the endangerment of public health and welfare.[56]

EPA's 2009 contribution finding was based on the magnitude of emission of GHGs by motor vehicles, in comparison to other sectors of the economy and in comparison to other countries, as the best way to assess the contribution of the sector's emissions to air pollution. EPA did not assess how much endangerment was attributable to motor vehicle emissions and did not assess how effective future motor vehicle standards would be in addressing the endangerment caused by the air pollution. Instead, the court evaluated EPA's analysis of contribution.

The *CRR* court rejected industry arguments that: "CAA § 202(a)(1) requires EPA to consider, *e.g.,* the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change."[57]

The court said:

> These contentions are foreclosed by the language of the statute and the Supreme Court's decision in *Massachusetts v. EPA*…
>
> The additional exercises State and Industry Petitioners would have EPA undertake—*e.g.,* performing a cost-benefit analysis for greenhouse gases, gauging the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases, and predicting society's adaptive response to the dangers or harms caused by climate change—do not inform the "scientific judgment" that § 202(a)(1) requires of EPA. Instead of focusing on the question whether greenhouse gas emissions may reasonably be anticipated to endanger public health or welfare, the factors State and Industry Petitioners put forth only address what might happen were EPA to answer that question in the affirmative. As EPA stated in the Endangerment Finding, such inquiries "muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question." 74 Fed. Reg. at 66,515. (emphasis supplied)[58]

EPA's proposal repackages these same claims. EPA claims the category's emissions must substantially contribute to the endangerment, which EPA asserts has not or cannot be shown, and EPA's futility analysis purportedly shows this is not the case for EGUs. But, a substantial contribution to endangerment presumably would occur when removal of the emissions would cause a substantial reduction in the endangerment. This fits with EPA's reliance on the claimed futility analysis. It is just

[56] *CRR* at 117, 121.
[57] *CRR* at 117.
[58] Id. at 117-118.

a repackaging of the claim that the effectiveness of the standard setting is part of the threshold questions of contribution and endangerment. The Supreme Court in *Massachusetts v. EPA*, EPA in 2009, and the D.C. Circuit in *CRR* all rejected that approach. It is contrary to the terms of the statute and Congress' intent in adopting the endangerment provisions in the Act. EPA's proposal fails for lack of support in the science or in the law.[59]

6. Deviation from past practice.

EPA places weight on the fact that until 2015 it had implemented Section 111 to address ambient air pollution issues, like those covered by the NAAQS problems as well as others not within the NAAQS program, such as certain air toxics. EPA says that "EPA deviated from over forty years of precedent when it expanded the reach of CAA section 111 in the 2015 Findings."[60] EPA presumably means to say that EPA followed the correct interpretation for 40 years and then deviated from this practice, implying the new practice must be an incorrect interpretation. EPA does not identify any actual interpretation that EPA followed for 40 years, such as a discussion of authority in Federal Register notices where EPA explained that Section 111 was limited and EPA could only address air pollution that endangered public health or welfare through local or regional exposure. EPA points only to the kinds of air pollution EPA addressed over the prior 40 years. By itself, that does not show a long held agency interpretation that EPA then breached in 2015.[61]

EPA's description of past actions under Section 111 in the proposal clearly shows that these actions have changed over time, responding to gains in knowledge about an industry, its emissions, and their effects. That's how emissions of GHGs and the associated air pollution came before the agency. Clearly EPA knew much more about ground level ozone and PM and CO in the 1970s and 1980s than it did about GHGs. Even with ozone and PM, the science has changed in very significant and important ways since the 1970s. It wasn't until the late 1990s that the International Center for Technology Assessment and 18 other environmental and renewable energy industry organizations filed a Petition for Rulemaking calling for EPA to regulate GHGs from motor vehicles. The Agency of course had been monitoring and staying abreast of the growing field of climate science, but this rulemaking petition eventually triggered the litigation resulting in the *Massachusetts* case and the regulatory actions that flowed from that decision. Over time, scientific progress and the interaction with outside stakeholders and the judicial system led to the 2015 Findings. EPA did not forsake a longstanding interpretation when it took action in 2015. Instead, EPA addressed the GHGs through regulation when the weight of circumstances and evidence indicated that it was time to do so.

7. International provisions in CAA.

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[59] EPN's prior comments on EPA proposal to rescind GHG endangerment findings for motor vehicles and for EGUs also addressed the two steps in the contribution and endangerment findings, and the lack of relevance of factors such as the effectiveness or cost of controls adopted after affirmative endangerment findings were made. See Attachements: "EPN Comments on EPA's Proposed Repeal of Greenhouse Gas Standards for Electric Generating Units," Docket No.: EPA-HQ-OAR-2025-0124 August 7, 2025; "EPN Comments on Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards," EPA-HQ-OAR-2025-0194 September 22, 2025. These comments are attached as part of the present comment.

[60] 91 FR at 59024.

[61] The Agency also fails to note the two opinions of EPA's General Counsels that the CAA provides authority to regulate GHGs if the agency makes an affirmative Endangerment Finding. See section II. infra.

EPA points to the fact there are several provisions in the Act that address international emissions. Based on this, it argues that "Congress has specifically provided in the CAA when and how the EPA may consider international emissions" and that "[n]one of these provisions encompass GHG emissions, and all support the conclusion that Congress does not presume that general authorities in the CAA encompass international emissions. Rather, Congress knows how to provide for the consideration of and regulation in response to international emissions, and has not done so for GHG emissions, either in CAA section 111 or elsewhere."[62]

The negative implication EPA draws is no more than a conclusory assertion. That is not enough. As the Supreme Court has said, "We have repeatedly emphasized that '[t]he force of any negative implication ... depends on context.' (citations omitted)."[63] EPA has proposed no explanation of why the provisions they refer to clearly or even impliedly show Congressional intent to exclude international emissions from every other provision in the Act.

These provisions address multiple elements associated with air pollution. One addresses emissions from within the U.S. that leave the U.S. and cause or contribute to air pollution that is reasonably anticipated to endanger outside the U.S. Another involves air pollution from outside the U.S. that enters the U.S. and interferes with a State achieving or maintaining a NAAQS. Another involves a detailed program to address a specific class of chemicals which interfere with the protective layer of stratospheric ozone in the upper atmosphere, with an international treaty addressing these chemicals. All three address different situations, with little in common other than an involvement with international emissions to one degree or another. EPA provides no explanation why the set of provisions at issue in this supplemental proposal provide the negative implication EPA asserts in a conclusory fashion.

These provisions also provide telling insights. They tell us that Congress was aware that air pollution can involve emissions that cross into or out of our border, which Sections 115 and 179B address. They tell us that Congress was aware that air pollution can involve global air pollution, and that emissions from across the globe can collect in the atmosphere and through indirect effects can endanger public health or welfare throughout the world. Title VI, adopted in the 1990 Amendments, addresses one such global air pollution problem. They tell us that Congress was aware that situations like these could be public health and welfare problems that can and should be addressed by EPA, and that Congress was determined to address at least some of these problems in detail.[64]

On the opposite side, there are many things that these provisions do NOT do. They do not tell us that Congress intended to prohibit EPA from addressing any and all other air pollution problems involving international emissions. They do not tell us that Congress implicitly prohibited any further action in the area of international emissions, and that this had to be read into all general language that would otherwise authorize EPA to address such air pollution, no matter how serious the problem. They provide no basis for the negative implication EPA proposes, especially, as noted above, remembering that Congress explicitly limited some provisions to ambient air pollution

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[62] 91 FR at 59024.

[63] *Rutherford v. United States*, 2026 WL 1485535 (S. Ct. May 28, 2026).

[64] In fact, EPA has consistently included **Global warming potential** in its review of the *overall risks to human health and the environment* as part of acceptability determinations for substitutes of ozone depleting substances under Section 612 of the Act. See: https://www.epa.gov/snap/snap-program-overview

problems in Sections 108 and 109, but did not limit Section 111 and other provisions in the same way.

The absence of a negative implication is even clearer when two other provisions of the Act addressing international emissions are considered.

Starting in 1977, Congress required EPA to address a global air pollution problem – the harm to the ozone layer in the upper atmosphere from anthropogenic emissions of pollutants such as halogens. Section 126 of the 1977 amendments to the Act added a new Part B to Title I, including new Sections 150 through 159. The purpose of the new Part was:

> (1) to provide for a better understanding of the effects of human actions on the stratosphere, especially the ozone in the stratosphere, (2) to provide for a better understanding of the effects of changes in the stratosphere, especially the ozone in the stratosphere on the public health and welfare, (3) to provide information on the progress of regulation of activities which may reasonably be anticipated to affect the ozone in the stratosphere in such a way as to cause or contribute to endangerment of the public health or welfare, and (4) to provide information on the need for additional legislation in this area, if any.[65]

EPA was required to conduct a study "of the cumulative effect of all substances, practices, processes, and activities which may affect the stratosphere, especially ozone in the stratosphere. The study shall include an analysis of the independent effects on the stratosphere especially ozone in the stratosphere of— (1) the release into the ambient air of halocarbons, (2) the release into the ambient air of other sources of chlorine."[66]

Congress adopted various provisions addressing reporting, monitoring, interagency actions, international involvement, State programs, and other relevant provisions. Congress also authorized EPA to regulate this global air pollution problem:

> If at any time…in the Administrator's judgment, any substance, practice, process, or activity may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, and such effect may reasonably be anticipated to endanger public health or welfare, the Administrator shall promptly promulgate regulations respecting the control of such substance, practice, process, or activity, and shall simultaneously submit notice of the promulgation of such regulations to the Congress.[67]

In these provisions Congress showed that it recognized that emissions of various substances – halogens and other like substances – could be polluting the air in the upper atmosphere in a way that reduced the protective layer of ozone in the upper atmosphere. Congress did not use the general terms 'air pollutant' and 'air pollution' because it identified the specific emissions of concern (halogens and other like substances), and the specific air pollution problem of concern (chemical substances in the air that degraded the protective stratospheric ozone layer). It did use general language not far from the endangerment provisions adopted in Section 111 and elsewhere in the Act in addressing this global air pollution problem.

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[65] Section 150. Part B was replaced with a new Title VI in the 1990 amendments to the Act.

[66] Section 153.

[67] Section 157(a).

As far back as 1977, Congress recognized that global air pollution problems may need to be addressed by EPA through regulatory control programs. In this case, Congress considered air pollution problematic where anthropogenic emissions from around the globe were rising into the upper atmosphere and collectively could be having an effect on the chemistry in the upper atmosphere - that in turn would produce an indirect effect on the surface that might reasonably be anticipated to endanger public health or welfare.

The global air pollution problem Congress started to address in 1977 bears strong resemblance to the air pollution problem at issue here - global emissions of anthropogenic GHGs rising into the atmosphere and changing the physical qualities of the atmosphere, leading to indirect effects on the surface that might be reasonably anticipated to endanger public health or welfare. Congress used general language in Section 111's endangerment provisions that is very similar to the language Congress used in 1977 in Section 157(a) to address a global air pollution problem akin to GHGs in the atmosphere. This is yet another example that undercuts EPA's proposed negative inference that in 1977 Congress limited EPA's broad authority under Section 111 and similar provisions to a limited subset of ambient air pollution problems.

Finally, Congress did address GHG emissions and global air pollution from one sector of U.S. sources when it adopted the Renewable Fuel program in 2005 and amended it in 2007, Section 211(o). Congress mandated that motor vehicle fuel must include certain amounts of renewable fuel. Renewable fuel is defined by comparing the lifecycle GHG emissions for the renewable fuel to the lifecycle GHG emissions for a baseline gasoline or diesel fuel, with the renewable fuel having to meet a specified percentage reduction in lifecycle GHG emissions. The lifecycle emissions of the fuels include the emissions of GHGs during operation of the vehicle as well as upstream emissions associated with the production of the fuel, including in many cases international emissions. The goal of the program is to reduce the GHG emissions footprint from this part of the transportation sector.

Congress clearly determined that GHG emissions associated with the operation of motor vehicles was an appropriate problem for EPA to address. Congress has by no means impliedly or explicitly shown through any of the legislative actions discussed above that EPA is prohibited from addressing this kind of global air pollution problem under Section 111's endangerment provisions. In fact, in Section 211(o)(12), Congress explicitly noted that nothing in the Renewable Fuel Standard program should be construed to limit EPA's authority regarding GHGs under other provisions of the CAA.

8. Best interpretation of Section 111's endangerment provisions.

For the reasons discussed above, EPA's proposed interpretation of Section 111(b)(1)(A) - that it only "authorizes[es] the Agency to regulate emissions that contribute significantly to air pollution that itself endangers public health or welfare through local or regional exposure" and excludes GHGs – is a demonstrably flawed interpretation of this provision. The best reading of this provision is found in EPA's 2009 rulemaking interpreting a very similar provision in Section 202, its 2015 rulemaking when EPA made Endangerment Findings under Section 111(b), and in prior EPN comments submitted in this and a related rulemaking (see attachments).

II. The case law does not support EPA's proposal – it significantly undercuts it.

EPA proposes that its interpretation of Section 111 "is, at a minimum, not foreclosed by *Massachusetts*, *AEP*, *American Lung Association*, or *West Virginia*. These cases addressed distinct questions and, in important respects, support the EPA's authority and obligation to determine whether GHG emissions from power plants satisfy the statute's prerequisites for imposing regulation."[68] Upon inspection, EPA's assertion fails. These cases significantly undercut, and arguably foreclose, EPA's proposed interpretation.

1. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

In EPA's view, "[i]n Massachusetts, the Supreme Court rejected the argument that GHGs are not "air pollutants" under the Act-wide definition, … On this basis, the Court stated that the EPA "has the statutory authority to regulate the emission of such gases from new motor vehicles." Id. at 532. However, *Massachusetts did not address the question whether "air pollution" can be interpreted to include elevated concentrations of GHGs in the atmosphere.* That is, *the Court did not consider whether the Act-wide definition of "air pollutant" in CAA section 302(g) necessarily means that GHGs are also cognizable air pollution* under any of the Act's provisions, nor did it hold that such emissions meet any of the statutory standards for regulation in the Act" (emphasis supplied).[69] EPA also pointed to several differences between Sections 111 and 202, *e.g.,* significant contribution versus contribution, and an alleged bifurcated standard setting under Section 111 and not Section 202.

The Court in *Massachusetts* had before it "two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute."[70]

The Court evaluated EPA's reasons for concluding it lacked authority to regulate GHGs. Notwithstanding two prior General Counsel opinions that EPA did have statutory authority to regulate GHGs if it made affirmative endangerment findings, EPA reasoned that several factors showed Congress did not intend to authorize regulation of GHGs under Section 202.[71] EPA then argued that since Congress did not intend to grant regulatory authority, the statutory term "air pollutants" must be read to exclude GHGs for purposes of Section 202 and any other regulatory provision in the Act. EPA employs the same logic in this proposal – several factors show Congress could not have intended to authorize EPA to regulate GHGs under Section 111, therefore the statutory term "air pollution" as used in Section 111(b) must be read to exclude GHGs.

The Court recounted the several factors that lead EPA to conclude Congress could not have intended to authorize regulation of GHGs under Section 202.

> In concluding that it lacked statutory authority over greenhouse gases, EPA observed that *Congress* "was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990," yet it *declined to adopt a proposed amendment establishing binding* *512 *emissions limitations.* Id., at 52926. Congress *instead chose to authorize further investigation into climate change. Ibid.* (citing §§ 103(g) and 602(e) of the Clean Air Act Amendments of 1990, 104 Stat. 2652, 2703, 42 U.S.C. §§ 7403(g)(1) and 7671a(e)). EPA

[68] 91 FR at 59029.
[69] Id.
[70] 549 U.S. 407, 505 (2007).
[71] Id. at 510-511.

> further reasoned that *Congress' "specially tailored solutions to global atmospheric issues,"* 68 Fed.Reg. 52926—in particular, its 1990 enactment of a *comprehensive scheme to regulate pollutants that depleted the ozone layer,* see Title VI, 104 Stat. 2649, 42 U.S.C. §§ 7671–7671q—*counseled against reading the general authorization of § 202(a)(1) to confer regulatory authority* over greenhouse gases.
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> EPA stated that it was "*urged on in this view*," 68 Fed.Reg. 529 by this Court's decision in *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). In that case, relying on "tobacco['s] unique political history," *id.*, at 159, 120 S.Ct. 1291, we invalidated the Food and Drug Administration's reliance on its general authority to regulate drugs as a basis for asserting jurisdiction over an "industry constituting a significant portion of the American economy," *ibid.*
>
> EPA reasoned that climate change had its own "political history": *Congress designed the original Clean Air Act to address local air pollutants rather than a substance that "is fairly consistent in its concentration throughout the world's atmosphere,*" 68 Fed.Reg. 52927; *declined in 1990 to enact proposed amendments to force EPA to set carbon dioxide emission standards for motor vehicles*, *ibid.* (citing H.R. 5966, 101st Cong., 2d Sess. (1990)); and *addressed global climate change in other legislation*, 68 Fed.Reg. 52927. Because of this political history, and because imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco, EPA was persuaded that it lacked the power to do so. Id., at 52928. In essence, *EPA concluded* that climate change was so important that unless *Congress* spoke with exacting specificity, it *could not have meant the Agency to address it*.
>
> *513 Having reached that conclusion, *EPA believed it followed that greenhouse gases cannot be "air pollutants" within the meaning of the Act. See ibid.* ("It follows from this conclusion, that [greenhouse gases], as such, are not air pollutants *under the [Clean Air Act's] regulatory provisions* ..."). The *Agency bolstered this conclusion* **1451 by explaining that if carbon dioxide were an air pollutant, the only feasible method of reducing tailpipe emissions would be to improve fuel economy. But because Congress has already created detailed mandatory fuel economy standards subject to Department of Transportation (DOT) administration, the Agency concluded that EPA regulation would either conflict with those standards or be superfluous. Id., at 52929 (emphasis supplied).[72]

The Court summarized EPA's position: "[b]ecause EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an "air pollutant" within the meaning of the provision."[73] The Court proceeded to reject this interpretation, both interpreting the Act's definition of "air pollutant" as unambiguously covering GHGs and rejecting each of the factors EPA relied upon in reaching its faulty conclusion.

The Court rejected EPA's reliance on various provisions enacted after Section 202. Such actions are unpersuasive and in any case fail to show any intention to preclude regulatory authority for EPA.

> EPA invokes postenactment congressional actions and deliberations it views as tantamount to a congressional command to refrain from regulating greenhouse gas emissions. Even if such postenactment legislative history could shed light on the meaning of an

[72] Id. at 511-513.

[73] Id. at 528.

> otherwise-unambiguous statute, EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding *530 emissions limitations to combat global warming tells us nothing about what Congress meant when it amended § 202(a)(1) in 1970 and 1977. And unlike EPA, we have no difficulty reconciling Congress' various efforts to promote interagency collaboration and research to better **1461 understand climate change with the Agency's pre-existing mandate to regulate "any air pollutant" that may endanger the public welfare. See 42 U.S.C. § 7601(a)(1). Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it… We can point to no such enactments here: EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles.[74]

EPA's current reliance on a negative inference from Congress' actions to address specific pollutants like CO, PM, and acid rain, its failure to adopt specific GHG regulatory provisions for Section 111 and other provisions, and Congress' adoption of the Title VI program is likewise unpersuasive and does not demonstrate that Congress in 1970 and 1977 intended to exclude GHGs from Section 111.[75]

The Court rejected EPA's assertion that the 1970 and 1977 Congress intended to only authorize regulation of local pollutants, not global pollutants. The Court recognized that "[w]hen Congress enacted these provisions; the study of climate change was in its infancy."[76] It also noted that "[t]he Council on Environmental Quality had issued a report in 1970 concluding that '[m]an may be changing his weather.'" Environmental Quality: The First Annual Report 93. Considerable uncertainty remained in those early years, and the issue went largely unmentioned in the Congressional debate over the enactment of the CAA. But see 116 Cong. Rec. 32914 (1970) (statement of Sen. Boggs referring to Council's conclusion that "[a]ir pollution alters the climate and may produce global changes in temperature")."[77] And more importantly it said:

> *While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.* See Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) ("[T]he *fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth"* (internal quotation marks omitted)). Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles (emphasis supplied).[78]

The same holds here – Congress did not have global climate change and GHG air pollution high on its priorities in 1970 and 1977, but it was not ignorant of this issue and was aware that the future might bring new air pollution problems that would need to be addressed. It addressed this not by

[74] Id. at 529-531.
[75] 91 FR at 59025-26.
[76] 549 U.S. at 507.
[77] Id. at fn. 8.
[78] Id. at 532.

locking down Section 111 and other regulatory provisions and limiting them to the air pollution problems then existent but instead adopted endangerment provisions in Section 111 and elsewhere that were phrased expansively and meant to be responsive to future scenarios. Section 111, like Section 202, conferred the flexibility to address air pollution situations not expressly anticipated by Congress in 1970 and 1977. That is exactly the case here.

The Court also addressed EPA's claims that the scientific uncertainty warranted not regulating GHGs under Section 202.[79] The Court said:

> Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed.Reg. 52930–52931. *If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty*—which, contrary to Justice SCALIA's apparent belief, post, at 1466 – 1468, is in fact all that it said, see 68 Fed.Reg. 52929–52930 ("We do not believe ... that it would be either effective or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time" (emphasis added))—*is irrelevant*. The *statutory question is whether sufficient information exists to make an endangerment finding* (emphasis supplied).[80]

The same answer applies here. EPA has not assessed the science and determined it is so uncertain that it cannot make a judgment on endangerment.[81] Instead, EPA has pointed to irrelevant principles of proximate cause and made unsupported claims that the science is too uncertain, convoluted and attenuated with respect to causal links. EPA cannot rest on that. EPA has to make the determination *Massachusetts* calls for and cannot rely on vague references to scientific uncertainty as a basis to conclude Congress did not intend to include GHGs in Sections 111's regulatory scope.

EPA has also pointed to the futility of regulating GHGs from power plants as another reason Congress did not intend to include GHGs in Section 111's scope. The Court spoke to this issue as well, both in the context of standing and in assessing EPA's alternative bases for denying the rulemaking petition. The Court said:

> EPA nevertheless maintains that *its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries* that the Agency cannot be haled into federal court to answer for them. For the same reason, EPA *does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries*. That is especially so because predicted increases in greenhouse *524 gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.
>
> But EPA overstates its case. Its argument rests on *the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.* Yet accepting that

[79] This argument was raised by EPA as one of the alternative bases for denying the petition for rulemaking.

[80] 549 U.S. at 534.

[81] EPA abandoned all reliance on the DOE Climate Working Group report as a basis for rescinding the vehicular endangerment finding, which report was resoundingly discredited and not defended by either DOE or EPA. The agency makes no effort to resuscitate that discredited report here.

> premise would doom most challenges to regulatory action. *Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop*. See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind")...*That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction* to determine whether that step conforms to law.
>
> And *reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere*—according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. ¶ 30, Stdg.App. 219. That accounts for more than 6% of worldwide carbon dioxide emissions. Id., at 232 (Oppenheimer Decl. ¶ 3); see also MacCracken Decl. ¶ 31, at 220. *To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world,* *525 outpaced only by the European Union and China.22 Judged by any **1458 standard, *U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming*."[82]
>
> "While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. … Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions *526 substantially over the next century: *A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere* (emphasis supplied).[83]

Finally, and most tellingly, the Court responded to a dissent by Justice Scalia. Justice Scalia did not accept that the definition of "air pollutant" unambiguously included GHGs. He thought the definition was ambiguous and that the Agency's definition was reasonable and should be given deference under *Chevron*.[84] EPA's interpretation was that GHGs had to be chemical or other substances that enter the ambient air, but they also had to be "agents of air pollution," and while GHGs met the first criteria, it was not an agent of air pollution. Justice Scalia said:

> Unlike "air pollutants," *the term "air pollution" is not itself defined by the CAA;* thus, once again *we must accept EPA's interpretation of that ambiguous term, provided its interpretation is a "permissible construction of the statute." Chevron*, 467 U.S., at 843, 104 S.Ct. 2778. In this case, the petition for rulemaking asked EPA for "regulation of [greenhouse gas] emissions from motor vehicles to reduce the risk of global climate change." 68 Fed.Reg. 52925. Thus, in deciding whether it had authority to regulate, *EPA had to determine whether the concentration of greenhouse gases assertedly responsible for "global climate change" qualifies as "air pollution." EPA began with* the commonsense observation that the *"[p]roblems associated with atmospheric concentrations *559 of CO2," id., at 52927, bear little resemblance to what would naturally be termed "air pollution":*

[82] Id. at 523-525.

[83] Id. at 525-526.

[84] EPA properly recognizes that *Chevron* has been overruled and Agency interpretations are no longer given binding deference just because they are reasonable. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

> "EPA's *prior use of the CAA's general regulatory provisions provides an important context. Since the inception of the Act, EPA has used these provisions to address air pollution problems that occur primarily at ground level or near the surface of the earth.* For example, national ambient air quality standards (NAAQS) established under CAA section 109 address concentrations of substances in the ambient air and the related public health and welfare problems. This has meant setting NAAQS for *concentrations of ozone, carbon monoxide, particulate matter and other substances in the air near the surface of the earth, not higher in the atmosphere .... CO2, by contrast, is fairly consistent in concentration throughout the world's atmosphere up to approximately the lower stratosphere.*" *Id.*, at 52926–52927.

In other words, *regulating the buildup of CO2 and other greenhouse gases* in the upper reaches of the atmosphere, which is alleged to be causing global climate change, *is not akin to regulating the concentration of some substance that is polluting the air.*

We need look no further than the dictionary for confirmation that *this interpretation of "air pollution" is eminently reasonable. The definition of "pollute," of course, is "[t]o make or render impure or unclean."* Webster's New International Dictionary 1910 (2d ed.1949). And the first three definitions of "air" are as follows: (1) "[t]he invisible, odorless, and tasteless mixture of gases which surrounds the earth"; (2) "[t]he body of the earth's atmosphere; esp., the part of it near the earth, as distinguished from the upper rarefied part"; (3) "[a] portion of air or of the air considered with respect to physical characteristics or as affecting the *560 senses." Id., at 54. *EPA's conception of "air pollution"—focusing on impurities in the "ambient air" "at ground level or near the surface of the earth"—is perfectly consistent with the natural meaning of that term.*

In the end, *EPA concluded that* since "CAA authorization to regulate is generally based on a finding that an air pollutant causes or contributes to air pollution," 68 Fed.Reg. 52928, the *concentrations of CO2 and other greenhouse gases allegedly affecting the global climate are beyond the scope of CAA's authorization to regulate. "[T]he term 'air pollution' as used in the regulatory provisions cannot be interpreted to encompass global climate change." Ibid.* Once again, the Court utterly fails to explain why this interpretation is incorrect, let alone so unreasonable as to be unworthy of *Chevron* deference (emphasis supplied).[85]

EPA's current proposal tracks the reasoning in EPA's 2003 denial of the rulemaking petition and tracks Justice Scalia's dissent in *Massachusetts*. But Justice Scalia's views were directly rejected by the Court.

> In dissent, *Justice SCALIA maintains that because greenhouse gases permeate the world's atmosphere rather than a limited area near the earth's surface, EPA's exclusion of greenhouse gases from the category of air pollution "agent[s]" is entitled to deference* under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). See post, at 1469 – 1470. EPA's distinction, however, finds *no support in the text of the statute, which uses the phrase "the ambient air" without distinguishing between atmospheric layers.* Moreover, *it is a plainly unreasonable reading of a sweeping statutory provision* designed to capture "any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). *Justice SCALIA does not (and cannot) explain why Congress would define "air pollutant" so carefully and so broadly, yet confer on EPA the authority to narrow that definition whenever expedient by asserting that a*

[85] Id. at 558-560.

> *particular substance is not an "agent." At any rate, no party to this dispute contests that greenhouse gases both "ente[r] the ambient air" and tend to warm the atmosphere. They are therefore unquestionably "agent[s]" of air pollution"* (emphasis supplied).[86]

GHGs are "unquestionably "agent[s] of air pollution."" They enter the ambient air and warm the atmosphere. The *Massachusetts* Court was clear – elevated concentrations of GHGs in the atmosphere are air pollution. EPA's assertion that "*Massachusetts* did not address the question whether 'air pollution' can be interpreted to include elevated concentrations of GHGs in the atmosphere" is false.[87]

The Court's reasoning in *Massachusetts* applies directly to Section 111. Likewise, the Court's rejection in *Massachusetts* of the various reasons EPA relied upon in that case applies to EPA's current proposal. EPA recycles many of the same arguments EPA relied upon in 2003 to now argue that heat-trapping GHGs in the atmosphere are not "air pollution,"and they should be rejected for the reasons given by the *Massachusetts* Court.

This is common sense. If emissions of GHGs are air pollutants, then the elevated concentration of GHGs in the atmosphere that warms the planet is air pollution. Endangerment Findings are the statutory tool to determine whether or not these emissions may be regulated. That is the best interpretation of Section 111's endangerment provisions, not EPA's proposal. *Massachusetts* fully supports EPA's 2009 interpretation, and it very strongly undercuts, if not forecloses, EPA's proposed interpretation.

2. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) ("*UARG*").

EPA proposes that:

> *UARG* [Utility Air Regulatory Group] thus makes clear that the EPA's authority to regulate an "air pollutant" must be evaluated in the context of the particular statutory provision that confers authority to regulate, and, notably, the Court has not yet had cause to analyze the term "air pollution" in the context of CAA section 111(b)(1)(A).[88]

The *UARG* Court first decided "whether EPA permissibly interpreted the statute to provide that a source may be required to obtain a Prevention of Significant Deterioration (PSD) or Title V permit on the sole basis of its potential greenhouse-gas emissions."[89] EPA's position was that GHGs were at that point a regulated air pollutant and PSD permitting applied to "any" regulated pollutant. The Court rejected this categorical approach.

The Court noted that EPA had previously interpreted the PSD program as applying to major sources of any regulated air pollutant, even though the statute referred to major sources of "any air pollutant". EPA had taken the same approach in other operative provisions of the Act, narrowing the scope of the term "any air pollutant" based on the context of the provision. The Court approved of this approach.

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[86] Id. at fn. 26.
[87] 91 FR at 59029.
[88] 91 FR at 59029.
[89] 573 U.S. at 315.

> *Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act *where their inclusion would be inconsistent with the statutory scheme.* The Act-wide definition to which the Court gave a "sweeping" and "capacious" interpretation, id., at 528, 532, 127 S.Ct. 1438, is not a command to regulate, but a description of the universe of substances EPA may consider regulating under the Act's operative provisions. *Massachusetts* does not foreclose the Agency's use of statutory context to infer that certain of the Act's provisions use "air pollutant" to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. (emphasis supplied)[90]

For example, the Court explained why GHGs were included in the regulatory scope for Section 202.

> EPA's inaction with regard to Title II was not sufficiently grounded in the statute, the Court said, in part because *nothing in the Act suggested that regulating greenhouse gases under that Title would conflict with the statutory design.* Title II would not compel EPA to *regulate in any way that would be "extreme," "counterintuitive," or contrary to " 'common sense.' "* *Id.*, at 531, 127 S.Ct. 1438. At most, it would require EPA to take *319 the modest step of adding greenhouse-gas standards to the roster of new-motor-vehicle emission regulations. *Ibid.* (emphasis supplied).[91]

The Court readily found that reading "any regulated pollutant" to include GHGs was clearly inconsistent with this specific statutory scheme and therefore was not a permissible interpretation.

> EPA itself has repeatedly acknowledged that *applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design*…
>
> Like EPA, we think it *beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases* at the 100– and 250–tons–per–year levels set forth in the statute *would be "incompatible" with "the substance of Congress' regulatory scheme."* Brown & Williamson, 529 U.S., at 156, 120 S.Ct. 1291. A brief review of the relevant statutory provisions *leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens* (emphasis supplied).[92]

This determination was limited to sources that were brought into the PSD program solely on the basis of their GHG emissions. The Court determined including GHGs in the PSD program for these sources would amount to overthrowing the statutory scheme and was therefore not a permissible interpretation.

The second question concerned sources that were already subject to the PSD program, e.g. because of their PM or NOx emissions. The Act and EPA's regulations required such "anyway" sources to meet emissions criteria for any regulated pollutant. Did that include GHGs? Or were they excluded as they were for sources subject to PSD solely because of GHG emissions? The Court's analysis for "anyway" sources was straightforward:

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[90] Id. at 319.

[91] Id. at 318-319.

[92] Id. at 321-322.

> *Even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA's interpretation is unreasonable.* We are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation. And it is not yet **2449 clear that EPA's demands will be of a significantly different character from those traditionally associated with PSD review. In short, the record before us *does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases* (emphasis supplied).[93]

EPA states that "EPA's authority to regulate an 'air pollutant' must be evaluated in the context of the particular statutory provision that confers authority to regulate."[94] *UARG* supports that generality, but it also teaches much more. To exclude GHGs from the term air pollutant, or as EPA proposes from the term "air pollution," for a specific statutory provision, you need to show that including GHGs in the provision would be clearly contrary and incompatible to the design of the statutory scheme, that it would be extreme and would make the provision "disastrously unworkable." Absent that, GHGs would be included in the term air pollutant and air pollution for that provision.

EPA's proposal makes no such claims, nor could it. Just as GHGs can fit in the Best Available Control Technology (BACT) program for PSD, that can fit in Section 111's regulatory structure for new and in-use sources. EPA's proposal is no more than an attempt to rely on a variety of weak and illogical claims to try and support a categorical exclusion of GHGs from the regulatory provisions in Section 111. It previously took the same approach for Section 202, which the *Massachusetts* Court rejected. It is a categorical approach that fails, just as the PSD program failed to exclude GHGs in *UARG* for "anyway" sources.

3. *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*").

The Court in *AEP* described the *Massachusetts* Court's holding:

> In *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), this Court held that the *Clean Air Act,* 69 Stat. 322, as amended, 42 U.S.C. § 7401 et seq., *authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. … Massachusetts* held that the Environmental Protection Agency (EPA or Agency) had misread the Clean Air Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. **2533 549 U.S., at 510–511, 127 S.Ct. 1438. *Greenhouse gases*, we determined, *qualify as "air pollutant[s]" within the meaning of the governing Clean Air Act provision*, id., at 528–529, 127 S.Ct. 1438 (quoting § 7602(g)); *they are therefore within EPA's regulatory ken.* Because EPA had authority to set greenhouse gas emission standards and had offered no "reasoned explanation" for failing to do so, we concluded that the Agency had not acted "in accordance with law" when it denied the requested rulemaking. Id., at 534–535, 127 S.Ct. 1438 (quoting § 7607(d)(9)(A)). (emphasis supplied)[95]

[93] Id. at 332.

[94] 91 FR at 59029.

[95] 564 U.S. at 415.

Likewise:

> *Massachusetts* made plain that *emissions of carbon dioxide qualify as air pollution subject to regulation under the Act.* 549 U.S., at 528–529, 127 S.Ct. 1438. And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants.[96]

While the Court did state that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants," it also said, "were EPA to decline to regulate **2539 carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, … EPA's judgment, we hasten to add, would not escape judicial review."[97]

The Court's description of the ruling in *Massachusetts* follows from the discussion of *Massachusetts* above – GHGs fit the definition of air pollutants, these air pollutants are associated with air pollution (elevated concentrations of the GHGs in the atmosphere that trap warmth), and "emissions of carbon dioxide qualify as air pollution subject to regulation under the Act" and are "within [its] regulatory kin."

That is the default position for Section 111 and other operative provisions of the Act. As in *UARG*, there may be a contextual basis to permissibly interpret a specific operative provision as not including GHGs. The *UARG* Court found that was the case for PSD permits, but only for sources brought into the PSD program solely because their GHG emissions exceeded the statutory limits. The Court found regulation of GHGs was not precluded for sources otherwise within the scope of the PSD program. Deciding that the default inclusion of authority to regulate GHGs does not apply is a provision-specific issue. A high hurdle must be met – showing that the structure, design, and intent of the provision are such that it is clearly contrary and inconsistent with the statutory structure to include GHGs as air pollutants and air pollution in that specific provision, and that it would be "disastrously unworkable" to include GHGs in this specific provision. EPA's proposal fails to make any such showing. Absent that, GHGs are air pollutants and heat-trapping GHGs in the atmosphere are air pollution for purposes of Section 111.

4. *West Virginia v. EPA*, 597 U.S. 697 (2022).

In *West Virginia,* the Court addressed the standard setting rules EPA adopted under Section 111(d) for power plants that were in-use sources, not new sources. The rules were for fossil-fueled power plants. They set GHG emission limits for the plants, and States in turn would adopt the actual control requirements for the plants. EPA adopted limits that were intentionally designed to shift production of electricity away from fossil fuels, and towards renewable sources such as wind and solar.

The Court interpreted the scope of the statutory criteria for standard setting, the "best system of emission reduction," and held that EPA's production-shifting standards exceeded EPA's authority under this provision. This case concerned standard setting under Section 111(d), not endangerment findings under Section 111(b).

The Court briefly discussed the *AEP* case, stating that:

[96] Id. at 424.
[97] Id. at 426.

> The dissent also cites our decision in *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011). Post, at ——. The question there, however, was *whether Congress wanted district court judges to decide,* under unwritten federal nuisance law, "*whether and how to regulate carbon dioxide emissions from powerplants."* 564 U.S. at 426, 131 S.Ct. 2527. *We answered no, given the existence of Section 111(d)* (emphasis supplied).[98]

It's important to note that the Court referred specifically to Section 111(d). EPA's proposal refers to this quote in a much more general way, taking it out of context and implying that the Court was talking about all of Section 111 or at least included the scope of endangerment findings under Section 111(b). That is wrong; this language has nothing to do with EPA's authority to make endangerment findings under Section 111(b).

The text and context of the Court's quoted statement makes that clear. The State common law nuisance suits involved in *AEP* were suits against fossil fuel companies for emissions from their in-use power plants. Those are the plants for which EPA establishes standards of performance under Section 111(d). That is why the *West Virginia* Court referred to Section 111(d) when it talked about EPA deciding "whether and how" to regulate GHG emissions from in-use power plants, instead of federal courts hearing State law nuisance suits concerning these in-use power plants.

Section 111(d) is a standard setting provision. It is triggered once EPA sets performance standards for new sources, which occurs after EPA makes endangerment findings under Section 111(b). The statute directs "whether" these sources will be regulated. "Under Section 111(d), once EPA "has set new source standards addressing emissions of a particular pollutant under ... section 111(b),"[99] it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. § 7411(d)(1)."[100] The function of Section 111(d), once it is triggered, is to set the standards of performance for existing sources – the "how" the *West Virginia* Court referred to. Neither the "whether" or the "how" referred to in *AEP* and *West Virginia* have to do with endangerment findings.

5. Conclusions from applicable Supreme Court precedent.

Contrary to EPA's assessment of the above cases, the Supreme Court has clearly concluded that emissions of GHGs from power plants and other sources and the corresponding elevated concentration of heat-retaining GHGs in the atmosphere is an air pollution problem fully within the scope of the terms used in Section 111(b)(1)(a) – "causes, or significantly contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." This is clear from the *Massachusetts* case, especially the rejection of Justice Scalia's dissent; and from statements by the Court in subsequent cases describing the *Massachusetts* decision.

It's clear this is the default rule to apply. Under appropriate circumstances, the context for a specific statutory provision can show that this default rule should not apply. However, a compelling showing must be made, such as a showing that the statutory design would be totally transformed into something that was disastrously unworkable and that Congress clearly did not want. The *UARG* case

[98] 597 U.S. at 730.

[99] 91 FR at 59029.

[100] 597 U.S. at 710.

provides an example of this high threshold being met for one group of GHG sources but not another. EPA's proposal fails to even try to make the kind of showing required by the *UARG* Court for this default rule not to apply to Section 111(b). EPA's proposal is not much more than a reiteration of EPA's position before the Court in *Massachusetts* and Justice Scalia's dissent, both of which were rejected by the Court. EPA's proposal is inconsistent with the case law and what it requires to exclude GHGs from the endangerment provision in Section 111(b).

III. The Major Question Doctrine Does Not Apply

EPA solicits comment on "the proposed application of the major questions doctrine to the 2015 Findings."[101] The short answer is that the major question doctrine does not apply. A Section 111 (b)(1)(A) finding that a source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" is simply a "scientific judgment".[102] Although an affirmative finding triggers a duty to issue some type of standards, the finding itself says nothing about the content of those standards.[103]

It is the "*exercise* of powers of vast economic and political significance"[104] that implicates the major question doctrine, not just a scientific judgment. There is nothing of breathtaking "economic and political significance"[105] in a scientific judgment or finding of scientific fact by itself (notwithstanding the need for thorough consideration and expert determination attendant upon such a finding). This is hardly surprising, given that the bare finding is not an "exercise" of any sort of regulatory power. A finding, for example, that the forever chemicals per- and polyfluoroalkyl substances are hazardous air pollutants would not implicate the major question doctrine, notwithstanding that some type of standards under CAA section 112 would follow.[106] So here, the Section 111(b) scientific judgment of contribution to air pollution which endangers is just a finding. Divorced from any standards, there is nothing to which the major question doctrine can apply.

Accordingly, all of the Supreme Court cases where the Court has invoked the major question doctrine involved regulatory standards—that is, "exercise" of regulatory authority—not bare factual findings or scientific judgments.[107]

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[101] 91 FR at 59035.

[102] *Massachusetts*, 549 U.S. at 534.

[103] See id. at 533 noting the "significant latitude as to the manner, timing, content, and coordination of [EPA's] regulations" under the parallel CAA section 202(a).

[104] *UARG*, 573 U.S at 324 (emphasis added).

[105] *W. Va*., 597 U.S. at 700.

[106] Cf. *Chamber of Commerce v. EPA*, 187 F. 4th 636, 666-67 (D.C. Cir. 2026) (Upholding designation of per- and polyfluoroalkyl substances as hazardous substances under CERCLA and holding among other things that the designation was not arbitrary notwithstanding that later action pursuant to it might have presently unascertainable enormous direct and collateral economic consequences, with no hint that the major question doctrine might be relevant much less applicable.)

[107] See *UARG* (regulatory standards affecting millions of small stationary sources); *Biden v. Nebrask*a, 600 U.S. 477 (2023) (cancellation of student debt); *Learning Resources v. Trump,* 607 U.S. 229 (2026) (no. 24-1287) (imposition of tariffs); *National Federation of Independent Business v. Dept. of Labor, OSHA*, 595 U.S. 109 (2022) (cancellation of large amounts of student debt); *Alabama Ass'n of Realtors v. Dept. of Health and Human Services*, 594 U.S. 758 (2021)(massive eviction moratorium).

The agency misreads *West Virginia v. EPA*, which similarly involved only the exercise of regulatory authority. EPA's proposal states that "the Court held that the EPA's statutory authority to establish emission limits under CAA Section 111(a)(1) and (d) 'is not close to the sort of clear authorization required by our precedents.'"[108] This statement is untrue. The Court in fact stated: "Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach."[109] The language EPA misleadingly quotes out of context states that the statutory phrase 'best system of emission reduction' does not convey clear enough authorization for the Clean Power Plan exercise of the delegated Section 111 authority.[110] The issue which implicated the major question doctrine, and the only issue the Court decided, was EPA's particular exercise of its delegated regulatory authority under Section 111: standards predicated on generation shifting, effectively determining the means by which electricity is generated nationwide.[111]

The *West Virginia* Court thus did not consider the predicate Endangerment Finding (or for that matter, any other potential standard) as implicated in any way by its holding. The Court in fact contrasted the Section 111 new source standards for GHGs, predicated on technology-based control of stack emissions (carbon capture and sequestration), with the Clean Power Plan establishing standards beyond the fence line for existing sources. It found that it was these later standards which required clear Congressional authorization.[112] That new source standard, of course, required the predicate Endangerment Finding.[113]

The *West Virginia* court did say that the Clean Power Plan was suspect because, by effectively determining the nationwide energy mix for electricity generation, EPA was seeking to regulate well outside its normal area of expertise.[114] But determining if emissions of air pollutants contribute to air pollution which endangers public health and welfare could not be more directly within EPA's core expertise. Indeed, Congress has assigned this duty repeatedly and consequentially to EPA throughout the CAA.[115]

The agency nevertheless maintains that "[b]y asserting authority to regulate GHG emissions from fossil fuel-fired power plants in response to global climate change concerns", the major question doctrine is implicated.[116] The short answer is that Congress made the policy choice to delegate authority to EPA to control emissions of "air pollutants", a term which encompasses GHGs. *Massachusetts*,: "Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an 'air pollutant' within the meaning of the provision. The statutory text forecloses EPA's reading. The CAA's sweeping

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[108] 597 U.S. at 732.
[109] 597 U.S. at 732.
[110] 597 U.S. at 732.
[111] 597 U.S. at 720 (the issue before the Court is whether "restructuring the Nation's overall mix of electricity generation could be considered a Best System of Emission Reduction within the meaning of [CAA] Section 111").
[112] Id. at 712.
[113] See also id. at 726, 727, and 734 where the Court similarly referred to EPA's exercise of authority under Section 111 by means of technology-based standards requiring reduction of emissions from the emitting source.
[114] 597 U.S. at 701.
[115] See e.g. CAA sections 108 (a)(1)(A), 111 (b)(1)(A), 202 (a)(1), 213 (a)(1).
[116] 91 FR 59033.

definition of "air pollutant" includes 'any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air…' § 7602(g)."[117]

The agency also asserts that the 2015 endangerment finding resulted in a "'transformative expansion in [its] regulatory authority".[118] In addition to ignoring the holding of *Massachusetts*, the agency ignores that the finding by itself transforms nothing. EPA's exercise of authority could, for example, result in standards which reflect current practice as Best System of Emission Reduction (BSER) - in which event there is no expansion of EPA's range of discretionary authority at all, much less a transformative one. In this regard, the 2024 standards, predicated on within-plant fuel switching, a practice noted favorably by the *West Virginia* court,[119] and carbon capture and sequestration, a technology-based means of reducing individual sources' air pollutant emissions traditionally utilized by EPA in Section 111 regulations for this source category and many others,[120] are not transformative.

The agency continues that "it is 'highly unlikely that Congress would leave to agency discretion' the decision of how power plants generate electricity."[121] The Endangerment Finding determines nothing beyond the fact of contribution to air pollution which endangers. It does not determine even whether there need to be reductions in stack air pollutant emissions, much less the nature of electricity generation. Any impacts on generation of electricity might or might not result from subsequent standards, and from those standards alone.

The agency also maintains that "[b]efore the 2015 Findings, 'Congress considered and rejected multiple times' legislation that would have authorized or required the EPA to regulate GHG emissions", citing to *West Virginia,* 597 U.S. at 731. This is another misreading. The *West Virginia* court noted that Congress had previously considered but not enacted cap-and-trade regulatory systems for GHG control, calling into question EPA's current authority to do so: "At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon…Congress, however, has consistently rejected proposals to amend the CAA to create such a program."[122] The Endangerment Finding is quite evidently not a cap-and-trade emission control scheme. In addition, EPA has been regulating GHG for years and Congress has not acted to stop it. EPA cannot credibly take the position that Congressional inaction is proof that EPA cannot in any way regulate GHGs as pollutants, in the face of Congressional inaction in response to EPA treating GHGs as pollutants for over a decade.

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[117] 549 U.S. at 528-29.

[118] 91 FR 59033 quoting 597 U.S. at 724.

[119] The Court included "fuel-switching" as among the kind of "traditional pollution control measure" that the agency "had always before selected" as BSER, contrasting it to the Clean Power Plan's effort to "improve the overall power system by lowering the carbon intensity of power generation" rather than "improving the performance of individual sources." 597 U.S. at 720.

[120] As just noted, the *West Virginia* court stated multiple times, seemingly positively, that EPA had traditionally implemented section 111 with technology-based standards requiring reduction of emissions of air pollutants from individual sources, and favorably compared the new source standards predicated on performance of carbon capture and sequestration with the sweeping outside the fence line controls of the Clean Power Plan.

[121] 91 FR 59033, citing *West Virginia,* 597 U.S. at 729.

[122] Id.

The agency's reference to specific legislative control of hydrofluorocarbons (HFCs), and to research and development grants,[123] again says nothing about authority to make a finding of contribution to air pollution which endangers public health or welfare under CAA Section 111 (b)(1)(A). Thus, the HFC phase out provisions in the American Innovation and Manufacturing (AIM) Act provide an instance of Congress telling EPA to regulate one type of GHG in a certain way. They say nothing about EPA's authority for other types of sources, and different GHGs under a different statutory provision. Further, research and development efforts do not constitute a "distinct regulatory scheme" that displaces the agency's authority. Rather, "[c]ollaboration and research do not conflict with any thoughtful regulatory effort; they complement it."[124]

In any case, the agency's reference to failed legislation misses the forest for the trees. In the multiple Congresses serving since EPA promulgated the Endangerment Finding, there has been no failed legislation regarding how EPA is to regulate GHG emissions from power plants, new motor vehicles, no failed legislation addressing the Section 111 GHG standards, any of the vehicle GHG standards, and no failed legislation addressing the Endangerment Finding, much less legislation directly seeking to remove that extant authority from EPA or to overrule *Massachusetts.* Nor have there been any congressional repeals of these standards, which would have been well within congressional authority under the Congressional Review Act.

In short, the major question doctrine has no applicability here. Even if it did, Congress provided clear authority to make the endangerment finding.[125]

IV. EPA's So-Called Futility Analysis Obscures the Obvious Fact that Power Plants Significantly Contribute to the Air Pollution that Endangers Public Health and Welfare

For reasons stated above, EPA is proposing the wrong test for whether Section 111 emission sources significantly contribute to the air pollution that endangers public health or welfare. EPA is abandoning the straightforward approach upheld by the D.C. Circuit and consistent with *Massachusetts v. EPA,* that looks at how significantly the Section 111 emission sources contribute to the endangering air pollution. Instead, it proposes to evaluate how much the endangerment from the air pollution could be curtailed when only considering emission reductions from the Section 111 sources and nothing else.

EPA's so-called futility analysis hides from public view the very obvious fact that U.S. fossil fuel-fired power plants are one of the world's largest sources of CO2 and GHG emissions, and it also hides from public view the impacts to public health and welfare in the United States from these emissions by using a truncated version of EPA's previous social cost of carbon analyses.

Using emissions remains a straightforward, readily quantifiable, scientifically credible and reasonable way to judge significant contribution. We present two graphics at the end of this section showing how CO2 emissions from U.S. fossil fuel-fired power plants compare to other nations' emissions on both a cumulative basis and an annual basis. Between 1900 and 2024, U.S. power plants contributed

[123] 91 FR 59033-34.

[124] *Massachusetts*, 549 U.S. at 530.

[125] *Massachusetts*, 549 U.S. at 528-34.

to about 6-7% of the world's total, approximately 108-126 billion metric tons of CO2 emissions compared to the world's total 1,800 billion metric tons (see Figure 1). Cumulative emissions are important to consider because CO2, once emitted, remains in the atmosphere for decades and a portion for even centuries, so the human-induced amount of CO2 in our atmosphere today is the result of both historic and current emissions. The total emissions (i.e., not just fossil fuel-fired electricity generation but all sectors) of only two nations – the United States and China – are clearly responsible for more emissions since 1900 than the U.S. power sector in isolation, meaning the U.S. power sector's emissions have contributed more carbon to our atmosphere than every other nation's, including total cumulative emissions from Germany, Japan, India, the United Kingdom, France, etc. For the year 2024 alone, U.S. power plants contributed just under 4% (1.4 billion metric tons) of the world's total CO2 emissions (38.6 billion metric tons) (see Figure 2 infra). Only total CO2 emissions from all of China, the United States, India and Russia were greater in the year 2024.

Viewed either way, it is clear that U.S. power plant emissions are one of the world's largest sources of CO2 emissions, by far the most important greenhouse gas emitted by this sector. These metrics alone clearly demonstrate that U.S. power plants contribute significantly to the air pollution at issue here. EPA chooses not to present these straightforward and comparable metrics for public comment. Instead, as discussed further below, EPA chooses to present an analysis that obfuscates the significance of the sector's contribution to air pollution that endangers public health and welfare in the United States.

To follow the current EPA's reasoning, no country's emissions that are roughly equal to or less than those of the U.S. power sector would meet the significance test under Section 111 of the Act. The total emissions from nearly every single country on the planet would be labeled insignificant. This is an absurd stance. Likewise, it is not clear if even the emissions of those very few countries with greater emissions than the U.S. power sector would meet this new significance test. No bright line has been identified under which emissions are deemed de minimis and above which emissions are deemed significant. Since 1900, the U.S. power sector contributed 6-7% of the world's CO2 emissions and China as a whole contributed "only" just under 16%. So are all of China's emissions de minimis too? It's not clear from EPA's reasoning, and the fact that it is unclear shows an obvious flaw in EPA's new approach.

EPA previously used straightforward and common-sense reasoning to determine that emissions under Section 111 contributed significantly to the air pollution: if the source is one of the largest for the United States and indeed one of the world's largest sources of greenhouse gas emissions, it clearly contributes significantly to the air pollution that endangers.

EPA's current proposed approach is indefensible not only because it understates the impact of one of the largest sectors of one of the world's largest sources, but also because it apparently involves looking at each sector that produces greenhouse gas emissions in isolation and saying that this sector has de minimis emissions, with the apparent goal of preventing any regulation of GHGs. For example, EPA has now said that neither transportation (28% of US emissions by EPA's own estimates),[126] nor electric power generation (25% of U.S. emissions) are significant contributors. It presumably follows in EPA's view that the remaining sectors of the economy – industrial emissions (23%), residential and commercial emissions (13%) and agricultural emissions (10%) – are likewise

[126] Figures for each economic sector taken from https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions, which appears to be based on the *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2022.*

insignificant. So the inevitable result of EPA's proposed approach is a conclusion that the United States is not actually contributing meaningfully to greenhouse gas emissions, and thus EPA is powerless to do anything. This is both factually false and legally wrong. It is indisputable that the United States is a major contributor to greenhouse gases emissions driving climate change (both currently and cumulatively). As the Supreme Court recognized in *Massachusetts*, the fact that many sectors (and countries) contribute to greenhouse gas emissions is a reason for proceeding step-by-step, not for stepping away entirely and abandoning responsibilities assigned by Congress. EPA cannot blinker itself by looking at individual pieces of the economy and then complain the pieces are too small to matter.

As commenters pointed out in responding to the June proposal, EPA has regulated many sources that are 1% or less of the total problem.[127] It is unlikely that EPA could have made the progress it has on many issues if it had not taken this approach. EPA has responded in essence "well, everything is different" – but the history of pollution control over the years shows that there are few environmental problems that can be tackled except by making incremental progress one source at a time.

This argument displays a fundamental lack of comprehension (or, more likely, willful ignorance) of the impact of small changes in risk when applied over hundreds of millions of people or tens of thousands of miles of coastline. While a fraction of a degree may not matter in 999,999 cases, in that millionth case, it might be the difference between surviving a heatstroke or not surviving it. While a fraction of a centimeter may sound inconsequential, there may be one electrical substation where it means a power outage that might not have happened. EPA is well versed in this kind of calculus: 1 part per billion of ozone is tiny, but when applied across the U.S. population, it can mean calculable changes in the number of cases of asthma, lung disease, and even death. The imperative to avoid increments of future warming is also stated in the Intergovernmental Panel on Climate Change's 2023 Synthesis Report, finding with "very high confidence" that "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming."[128]

EPA has also abandoned its use of the social cost of CO2 and other greenhouse gases in its regulatory impact analysis, a practice it utilized since 2008. EPA did not make use of these social cost metrics in its previous Section 202 or Section 111 endangerment and cause or contribute findings; EPA appropriately used this metric in the subsequent rulemaking phases to conduct the benefit-cost analyses for the resulting regulations under Sections 202 and 111. It is also important to look at in this case because these social cost metrics were developed and intended for the exact purpose of estimating the climate benefits of specific greenhouse gas emission reduction actions.

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[127] See *CRR*, 684 F. 3d at 128, regarding magnitude of reductions: "Nothing in *Ethyl* implied that EPA's authority to regulate was conditioned on evidence of a particular level of mitigation; only a showing of significant *contribution* was required. EPA made such a determination in the Endangerment Finding, concluding that vehicle emissions are a significant contributor to domestic greenhouse gas emissions. *See, e.g.,* Endangerment Finding, 74 Fed. Reg. at 66,499. Further, in the preamble to the Tailpipe Rule itself, EPA found that the emission standards would result in meaningful mitigation of greenhouse gas emissions. For example, EPA estimated that the Rule would result in a reduction of about 960 million metric tons of CO_2e emissions over the lifetime of the model year 2012–2016 vehicles affected by the new standards."

[128] See https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf at 14.

In its current proposal, EPA presents an analysis intended to show that there would be little benefit of reducing CO2 emissions from U.S. power plants alone (their futility argument); but it fails to use social cost metrics. EPA previously conducted an analysis addressing the same exact question: what are the benefits of actions under Section 111 of the Act? EPA conducted that analysis in 2024 with social cost of CO2 and greenhouse gas metrics. These social cost metrics previously described by EPA represent

> the monetary value of the net harm to society associated with a marginal increase in CO2 emissions in a given year, or the benefit of avoiding that increase. In principle, SC-CO2 includes the value of all climate change impacts (both negative and positive), including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC-CO2, therefore, reflects the societal value of reducing emissions of CO2 by one metric ton and is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect CO2 emissions. In practice, data and modeling limitations restrain the ability of SC-CO2 estimates to include all physical, ecological, and economic impacts of climate change, implicitly assigning a value of zero to the omitted climate damages. The estimates are, therefore, a partial accounting of climate change impacts and likely underestimate the marginal benefits of abatement.[129]

EPA then stated that its social cost of carbon estimates "reflect recent advances in the scientific literature on climate change and its economic impacts and incorporate recommendations made by the National Academies of Science, Engineering, and Medicine." Further, EPA previously "solicited public comment and conducted external peer review of these [social cost of carbon] estimates."

Using these social cost metrics, EPA previously estimated that the climate benefits (e.g., the avoided damages to public health, agriculture, and coastal property) of the emission reduction actions under Section 111 would be $270 billion over the years 2024 to 2047. EPA also estimated there would be additional health benefits of $120 billion over that time due to co-reductions in particulate matter (PM) and ozone. For a single year, the climate benefits were estimated at $14 billion. The climate benefits alone outweighed the estimated costs.

These estimated benefits cannot possibly be considered insignificant or de minimis, which is why the current EPA has completely abandoned – with no credible scientific or economic justification – the use of the social cost of greenhouse gases and disregarded this previous analysis. In fact, EPA has recently decreed (separate from the current proposal) that the social cost of greenhouse gases shall no longer be used, which in essence arbitrarily sets the social cost of greenhouses to a value of zero. See *Coalition for Responsible Regulation v. EPA,* 684 F. 2d at 332 (960 million metric tons of CO2 removed over the life of the initial vehicular greenhouse gas standards "would result in meaningful mitigation").

There have been critiques of the social cost of greenhouse gas estimates because they typically represent monetized damages (or monetized avoided damages) at the global scale. It is true that one ton of CO2 emitted from the United States or from China or from anywhere in the world causes the same amount of net damage globally because the CO2 (and other greenhouse gases as well) remain

[129] EPA RIA 2024, p. 4-3.

in the atmosphere for several years. However, EPA previously addressed this point in its regulatory impact analysis where it also calculated U.S.-specific climate benefits of the 2024 actions under Section 111. It showed that U.S.-specific climate benefits were still significant ($42 billion) and significantly outweighed estimated costs of the action:

> Applying the U.S.-specific partial SC-GHG estimates derived from the multiple lines of evidence described above to the GHG emissions reduction expected under the final rules would yield substantial benefits. For example, the present value of the climate benefits of the final rules over 2024 - 2047 as measured by FrEDI from climate change impacts in CONUS are estimated to be $42 billion (under a 2 percent near-term Ramsey discount rate). However, the numerous explicitly omitted damage categories and other modeling limitations discussed above and throughout U.S. EPA (2023c) make it likely that these estimates underestimate the benefits to U.S. citizens and residents of the GHG reductions from the final rule [4-22].

Even if the estimated benefits are 'only' $42 billion instead of $270 billion, it is nonsensical to conclude that $42 billion in benefits is insignificant and de minimis. Further, there is no plausible scenario in which the value of these climate benefits could be zero, as this proposal implies. This is an irrational and counterfactual position for *any* decisionmaker to take, especially EPA given the breadth of responsibility given to the agency by Congress.

We turn now to EPA's new proposed analysis, which it deems to be the proper test of whether emissions under Section 111 sources significantly contribute to the air pollution that endangers public health and welfare. EPA's new analysis is essentially a truncated, diminished version of the social cost of GHG analysis that EPA previously used. Its analysis moves along the causal chain from emissions to changes in atmospheric concentrations to changes in globally-averaged temperature and sea level rise but stops short of translating those forced climatic changes into either physical or monetized damages to public health and welfare. In fact, EPA's analysis uses one of the core models to translate emissions into climatic outcomes (FaIR) that was used in EPA's previous analysis that employed the social cost of greenhouse gas metrics. Now it chooses to disregard this readily-available information.

EPA estimates that the U.S. power sector baseline emissions alone could be responsible for 5% of the additional, human-induced buildup of carbon in the atmosphere by 2050 and 6% of the additional buildup by 2100, under one scenario and set of assumptions. This translates, according to the EPA analysis, to 2% of the total anthropogenic globally-averaged temperature increase by 2050 and 3% by 2100, relative to the year 2026. Without further discussion and analysis, EPA wants to end the analysis there and simply and dismissively claim that because these percentages are "small" (without indicating what that threshold looks like), they should be deemed de minimis.

According to EPA's own Temperature, CO2 Concentration, and Sea Level Rise Impacts of CO2 Emissions from U.S. Electricity Generating Units Technical Memo Table 3, reducing US GHG emissions 50% would reduce global concentrations 3%. This number is an underestimate: the baseline case does not take into account the Administration's efforts outside of the regulatory sphere to increase use of coal and gas and decrease renewables, which drives an increase in emissions of GHG and a range of other pollutants. In the proposal, EPA cites the 2023 version of "GHG emissions of all world countries," released by the Publications Office of the European Union (EPA proposal footnote 6). However, the more recent 2026 version shows that U.S. emissions are increasing significantly (+2.2%), more than China which barely budged (+0.1%) and certainly more

than other countries like India, Brazil, and Japan, or even the totality of the European Union - all of which saw reduced GHG emissions.[130] This means that the estimates in the proposal are underestimates and U.S. GHG emissions are likely to grow more over time and become an ever larger part of the problem. This is critical because EPA's legal case stems in large part on the idea that there is no benefit to reducing these emissions. This argument falls apart because the emissions are significant now and increasing, not decreasing, in significance.

EPA makes no attempt to translate what are actually significant climatic changes driven by one emissions source into public health and welfare impacts. Again, had EPA simply applied the social cost of GHGs to its theoretical emission reduction scenarios in its analysis, it would reveal net benefits of several billion dollars, like its previous analysis in 2024. For example, if we take the lowest social cost of CO2 estimate from EPA's 2024 analysis ($140 per metric ton of CO2 in 2019 dollars) and apply it to the theoretical 50% emission reduction from the U.S. power sector in the year 2026 in EPA's current proposal (770 million metric tons of CO2) the result is $107.9 billion in annual monetized benefits. Even if EPA were to take the social cost of carbon from the Administration's first term of $1 - $6/ton the benefits would be between $770 - $4,620 million annually which greatly exceeds the equivalent annualized value estimate of the cost savings of $23 million.

In its Response to Comments for its June 2025 EGU proposal, EPA dismisses the use of SCC to calculate impacts by saying, "EPA now recognizes there are significant uncertainties associated with performing monetized impacts quantifications, and such quantifications can be readily manipulated to support a preferred regulatory outcome. The EPA's recognition of the problems and inherent biases in SCC calculations aligns with Executive Order (E.O. 14154,"Unleashing American Energy," which withdrew earlier guidance on calculating the social cost of carbon, as well as the subsequent memorandum from the Office of Management and Budget (OMB), M-25-27, which directed agencies not to quantify or monetize the impacts of GHG emissions, except to the extent required by law, "because the uncertainties in performing monetized impacts quantifications are too great." This response is completely inadequate. EPA is now taking the position, on the basis of literally no analysis (scientific or otherwise), that there are no impacts because it chooses not to count them, despite a strong argument that doing so is required by law including the CAA and the Administrative Procedures Act.

EPA does not analyze the actual level of uncertainty involved in the calculation of SCC (something multiple organizations and governments around the world, including the first Trump Administration, found sufficient certainty to develop). EPA also does not provide the public with any standard of how uncertain something has to be before the uncertainties are too great for a value to be calculated. EPA always estimates the costs of potential regulations and those calculations are very uncertain since they must take into account not only current technology but the unknown and unknowable future technological improvements both large and small. These estimates have been shown to consistently overestimate the total costs of regulations.[131] EPA needs to make clear and allow public comment on the difference between the relative uncertainties of SCC estimates and the costs of regulations which are also subject to "significant uncertainties" and "such quantifications

[130] https://op.europa.eu/en/publication-detail/-/publication/0f66a509-a849-11f1-b25c-01aa75ed71a1/.

[131] See: https://grist.org/wp-content/uploads/2010/10/harringtonmorgensternnelson_regulatory_estimates.pdf
https://pdf.wri.org/factsheets/factsheet_for_epa_regulations_cost_predictions_are_overstated.pdf
https://blogs.edf.org/climate411/2010/12/02/there-they-go-again/
https://www.pew.org/~/media/assets/2011/03/industry-clean-energy-factsheet.pdf

can be readily manipulated to support a preferred regulatory outcome." EPA also needs to be clear what its standard of "too uncertain" is and explain how it came up with it. EPA also needs to explain how the impact of GHGs on climate is so uncertain that its impacts cannot be considered but it is so certain that EPA can calculate the temperature impact of GHG reductions to the hundredth of a degree.

In its proposal, EPA says that the NAS report,[132] and prior information released by NAS, do not differ in any material respect from or conflict with the legal rationales set forth in this supplemental proposal. This is simply not true. The NAS report clearly shows that emissions of GHGs result in harms to welfare, as defined by section 202. In addition, the 2017 NAS report offered suggestions for improving the social cost of calculation. The NAS did not suggest that SCC should be abandoned or that it was too uncertain to be calculated.[133] As stated above, the existence of a SCC even at the levels used in the first Trump Administration reflects the fact that each of the 1.5 billion tons of CO2 released by the power sector causes damage to welfare – making the statement even more ridiculous. EPA's legal argument is that U.S. GHG emissions not only do not but cannot impact welfare, a scientific judgment for which EPA does not provide evidence and which the NAS clearly refutes. EPA also asserts without support that we are not seeing increased impacts from global warming, something which the NAS and the broader scientific community dispute based on extensive evidence and analysis.[134, 135]

The EPA's current analysis also does not address the progress made in the climate scientific community, especially since the time of EPA's 2009 endangerment finding, in defensibly attributing specific extreme events, including those in the United States, to human-induced climate change. The heat wave that killed hundreds of people in the Pacific Northwest in 2021, for example, was assessed to be a nearly impossible event without human-induced climate change.[136] We note that the total, cumulative economic damages that have occurred in the U.S. due to extreme weather and climate events since 1980 amount to at least over $3 trillion. There is not yet a consensus view on the extent to which these damages can be attributed to human-induced climate change. Still, there is undoubtedly a climate signal in these damages which have been increasing dramatically in the more recent years since 1980.[137] Further, EPA makes no attempt to compare these contributions by the

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[132] National Academies of Sciences, Engineering, and Medicine. 2026. Attribution of Extreme Weather and Climate Events and Their Impacts. Washington, DC: National Academies Press. *https://doi.org/10.17226/28590*.

[133] https://www.nationalacademies.org/news/report-recommends-new-framework-for-estimating-the-social-cost-of-carbon

[134] National Academies of Sciences, Engineering, and Medicine. 2026. Attribution of Extreme Weather and Climate Events and Their Impacts. Washington, DC: National Academies Press. https://doi.org/10.17226/28590.

[135] Forster, P. M., Smith, C., Walsh, T., Lamb, W. F., Lamboll, R., Cassou, C., Hauser, M., Hausfather, Z., Lee, J.-Y., Palmer, M. D., von Schuckmann, K., et al. (2025). Indicators of Global Climate Change 2024: annual update of key indicators of the state of the climate system and human influence. Earth System Science Data, 17(6), 2641–2680. https://doi.org/10.5194/essd-17-2641-2025 https://essd.copernicus.org/articles/17/2641/2025/#section10.

[136] Philip, S.Y (2022) Rapid attribution analysis of the extraordinary heat wave on the Pacific coast of the US and Canada in June 2021. *Earth System Dynamics.* doi: https://doi.org/10.5194/esd-13-1689-2022.

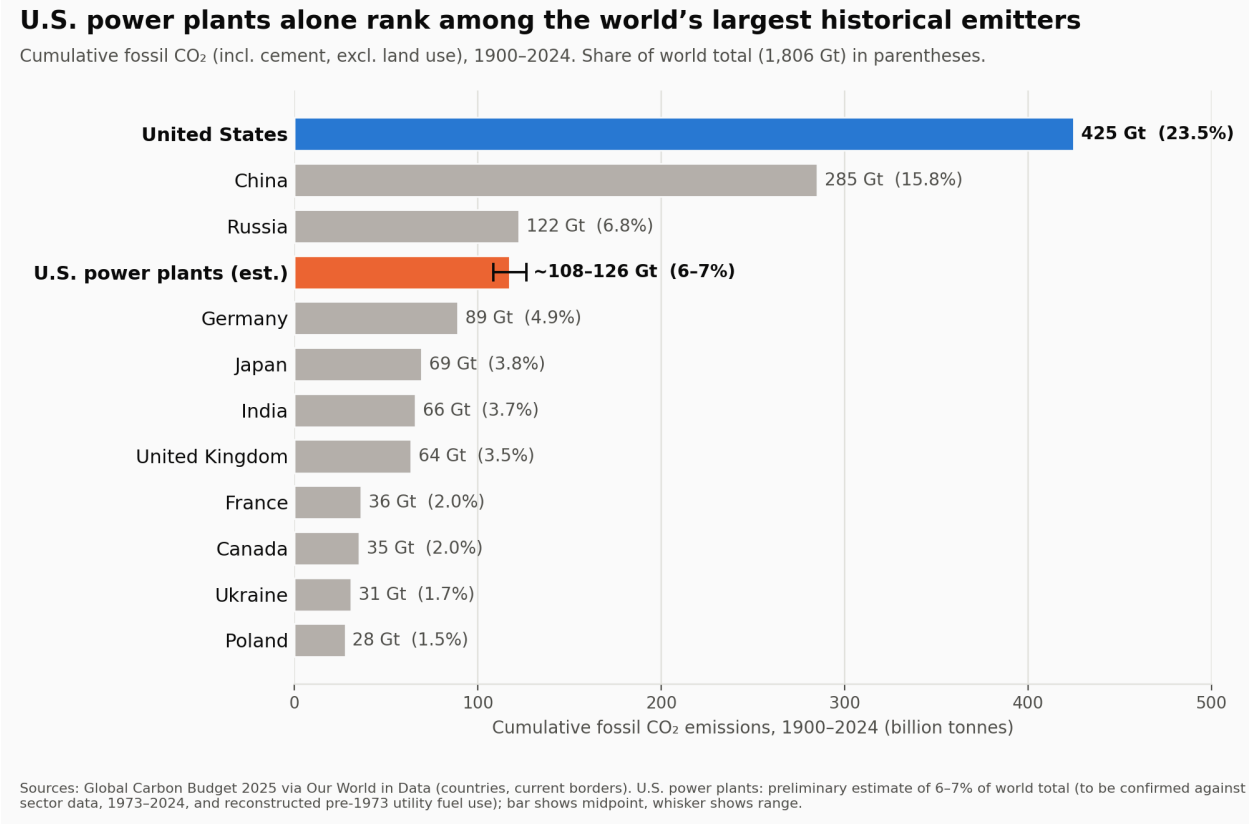
[137] See *Sierra Club v. United States Dep't of Transportation*, 125 F.4th 1170, 1183 (D.C. Cir. 2025) ("PHMSA's consideration of the probability of a rail accident involving LNG tank cars was demonstrably inadequate. We have noted that "a finding of no significant impact is appropriate only if a grave harm's probability is so low as to be remote and speculative, or if the combination of probability and harm is sufficiently minimal." Standing Rock, 985 F.3d at 1049 (cleaned up). Here, a derailment resulting in the release of LNG was undoubtedly a "grave harm"; and the risk of that happening was neither "so low as to be remote and speculative" nor "sufficiently minimal" under the circumstances. Id.

U.S. power sector to climatic changes to those of other sources. Doing so would undoubtedly reveal that the U.S. power sector is, as we already know, and will continue to be for the foreseeable future, one of the world's largest contributors to human-induced climate change.

Lastly, this new analysis by EPA belies the agency's own statements that global climate concerns are too uncertain, conjectural or remote to be evaluated for the significance test under Section 111. To the contrary, this so-called futility analysis shows that the mechanisms, science and tools to estimate how emissions translate into climatic changes (which in turn have been translated into monetized damage functions by the scientific community) are credible and robust and anything but conjectural and remote. The EPA proposal wants to have it both ways: it says the science is too conjectural to satisfy the endangerment test yet is precise enough to show a couple digits past the decimal that climate change caused by Section 111 sources is de minimis.

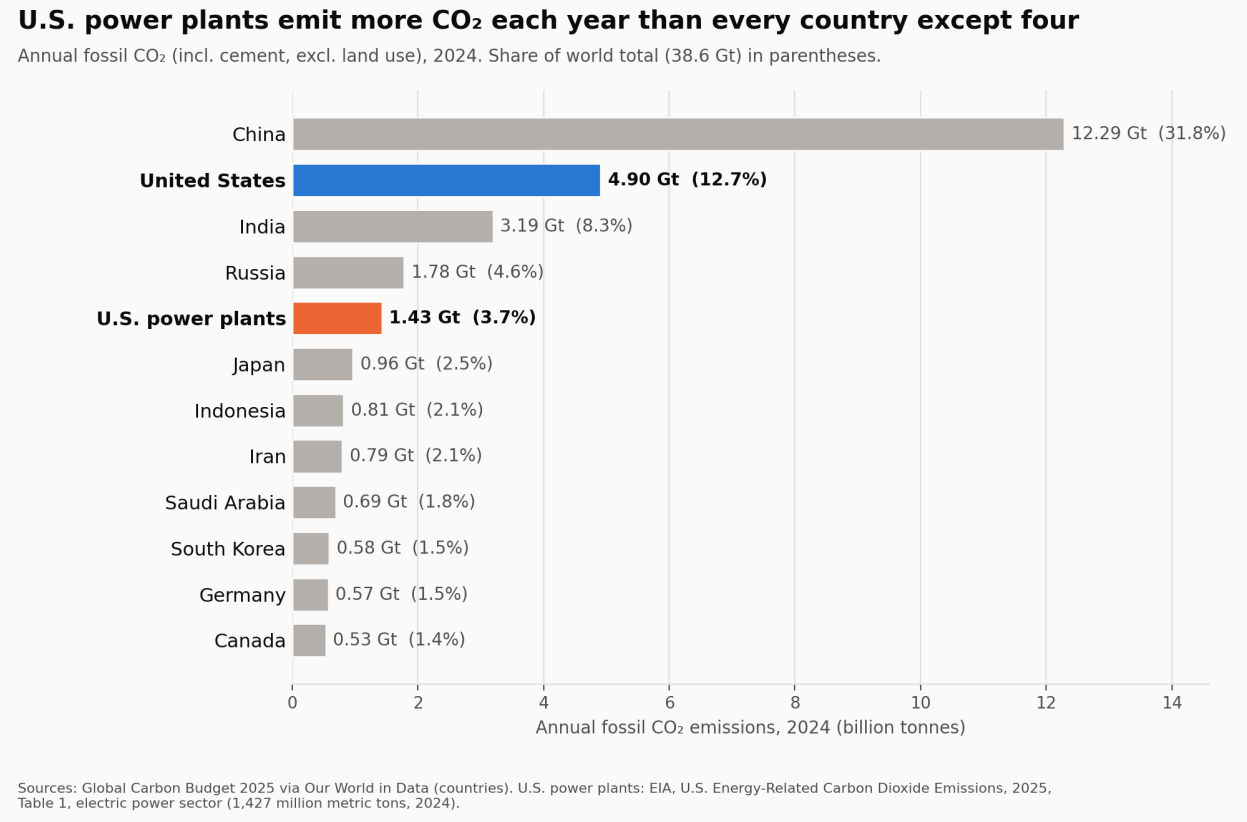
EPA's analysis is apparently an attempt to show the smallest numbers possible in order to back up its pre-ordained policy not to regulate greenhouse gas emissions at all by stating the significance test under Section 111 cannot be met. It is not sound science.

Figure 1



PHMSA found only that there was a "low probability" of a high-consequence rail accident, J.A. 446–50, which was plainly insufficient to support a finding of no significant impact under our precedents."). In other words, the graver the risk, the greater the likelihood of the significance of adding to that risk. EPA ignores this established principle here.

Figure 2



V. Economics/Regulatory Impact Analysis

EPA's 24-page economic analysis for this supplemental proposal is inadequate, given the consequences if this proposal is finalized. First, EPA's Regulatory Impact Analysis (RIA) assumes that nearly all of the impacts associated with repealing GHG requirements on the power sector have already been accounted for in the Final Partial Carbon Pollution Standards (CPS) Repeal, which was finalized on the same day as this supplemental proposal was released. So, EPA's economic analysis only looks at the small sliver of remaining requirements on power plants (i.e., Phase 1 efficiency-based requirements for new turbines and requirements in the 2015 NSPS that have been in place for over a decade), rather than the full picture. [138]

Because of this assumption, the quantified impacts for this supplemental proposal appear much smaller than they really are. EPA estimated that the compliance cost savings over 20 years are only $370 million (present value, 3% discount rate), which is much less than the Final Partial CPS Repeal ($160 billion, present value, 3% discount rate). These cost savings are a drop in the bucket compared to revenues of the power sector, and they are even smaller when you account for the tax transfers ($100 million less). However, this assumption obscures the actual impact that declaring the EPA has no authority to regulate GHG from power plants could have. For example, if the Final Partial CPS Repeal is vacated, then this proposal (if finalized) would have all of the impacts quantified in this

[138] As explained in section III above, the endangerment finding itself is not an exercise of regulatory authority to which the major question doctrine can apply. We discuss here something different: cost implications of eliminating actual regulatory standards.

economic analysis plus the Final Partial CPS Repeal's RIA. In addition, the costs of the supplemental proposal based on this assumption are less than the $100 million per year threshold that triggers a full evaluation of the impacts in a RIA, which deprives the public of the information needed to properly evaluate this action.

Second, EPA does not quantify any of the health, climate, or environmental impacts used to underpin the RIA. Unlike other rulemakings, EPA does not even include an estimate of the changes in emissions associated with this supplemental proposal in the economic analysis, let alone monetize those impacts. This omission is particularly noteworthy given that the Integrated Planning Model (IPM) that EPA used to quantify the compliance cost savings automatically quantifies the changes in emissions of CO2, annual NOx, ozone season NOx, SO2, mercury, and directly emitted particles. Further, the analysis also does not disclose where these emission increases would occur, even though state-level emission changes are a routine IPM model output. EPA provides no explanation for why it omits this important information from the economic analysis.

Even if the economic analysis included the emission changes, it is unlikely that EPA would have monetized the impacts on public health and climate. As shown in the Final Partial CPS Repeal RIA, EPA routinely provides the same illegitimate excuses for no longer using the historical peer-reviewed methods to quantify these impacts. For climate impacts, EPA stated that it no longer monetizes impacts associated with CO2 emissions changes due to Section 6 of Executive Order 14154 "Unleashing American Energy", which is a political justification rather than a technical or legally binding explanation. EPA needs to explain and present for comment the actual level of uncertainty in these calculations and what standard of uncertainty makes the cutoff too uncertain to calculate. For health effects associated with PM2.5 and ozone exposure, EPA claims that it is re-evaluating its peer-reviewed historical methods due to vague, unclarified and unjustified uncertainties, even though it clearly has methods to quantify and monetize those impacts. If EPA cannot do a complete analysis of the costs, benefits and health impacts of its actions, as it has for its entire 56 year history, it needs to hold off on those actions until it can. By refusing to monetize these impacts, EPA is asserting that they view the foregone benefits from reducing air pollution and carbon pollution as zero (i.e., worthless), which is demonstrably false.

Nearly every full quantification of both the costs and the benefits of repealing GHG standards for power plants shows that the foregone benefits exceed the compliance cost savings. For example, Resources for the Future (RFF) estimated that cost savings from the repeal are dramatically offset by the GHG damages that the rollback causes.[139] They estimate these GHG damages to amount to nearly $1.7 trillion. RFF arrives at this figure using the modeled change in CO2 emissions from the rollback, the social cost of carbon, and a 2 percent discount rate consistent with the Office of Management and Budget's 2023 guidelines. On net, repealing the standards harms society by almost $1.5 trillion, even before accounting for health damages from the widespread deterioration of air quality, which especially affect areas with higher un-retrofitted coal-fired generation.

EPA's analysis makes clear that the agency assumes only one method of compliance and ignores the use of renewables - which the standards were designed to encourage. This would lead to cost savings as new renewables are cheaper than natural gas.

[139] Resources for the Future (2026) Losing the Endangerment Finding: The Costs and Benefits of Repealing Greenhouse Gas Emissions Standards for Power Plants.

Third, EPA's economic analysis only quantifies the compliance cost savings to the power sector. EPA did not evaluate the impacts of the real resource costs paid by society or the social costs across the entire economy, as the agency has done for other power sector rulemakings. Combined with the refusal to quantify and monetize foregone benefits, this sole focus on compliance cost savings provides a skewed and incomplete snapshot of the impacts of this supplemental proposal.

Finally, EPA did not assess any alternatives in the economic analysis. EPA only evaluates the proposed full repeal of all remaining GHG requirements on power plants. This failure to evaluate alternatives is contrary to both OMB's requirements in Circular A-4: Regulatory Analysis and EPA's own Guidelines for Preparing Economic Analyses (see section 3.2.1 Need to Assess Multiple Options).

Conclusion

EPA's proposed rescission of the GHG endangerment findings and repeal of emissions standards under Section 111 of the CAA is legally unsupportable, scientifically unsound, and economically flawed. The proposal relies on overly narrow legal interpretations that misapply and misconstrue statutory text and judicial precedent, mischaracterizes well-established climate science as overly uncertain, and utilizes an incomplete economic analysis that obscures the massive health and environmental benefits of regulating power plant emissions. Given these fundamental defects, EPN and L4GG strongly urge EPA to withdraw the proposed action in its entirety.

Attachment 1:

EPN Comments on EPA's Proposed Repeal of
Greenhouse Gas Standards for Electric Generating Units
Docket No.: EPA-HQ-OAR-2025-0124
August 7, 2025

The Environmental Protection Network (EPN) harnesses the expertise of more than 700 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

EPN appreciates the opportunity to comment on EPA's proposal, Repeal of Greenhouse Gas (GHG) Emissions Standards for Fossil Fuel-Fired Electric Generating Units. The proposed rulemaking suggests that the Clean Air Act (CAA) requires EPA to make a finding that GHG emissions from fossil fuel-fired power plants contribute significantly to dangerous air pollution before those emissions can be regulated. EPA is also proposing a finding that GHG emissions from fossil fuel-fired power plants do not contribute significantly to dangerous air pollution. In addition and as an alternative, EPA proposes the repeal of a narrower set of requirements that includes the emission guidelines for existing fossil fuel-fired steam generating units, the carbon capture and sequestration/storage (CCS)-based standards for coal-fired steam generating units undertaking a large modification, and the CCS-based standards for new base load stationary combustion turbines, all of which are part of the agency's Carbon Pollution Standards (CPS) promulgated in 2024.

Overview of Major Comments

Potential Harm to Public Health

There are huge public health benefits to the existing CPS. While not relevant to an endangerment finding, the public health benefits of the existing regulations to the public dwarf the special-interest benefits of repealing air pollution controls. The benefit-cost analysis presented in the preamble focuses only on the compliance cost savings (Table 1 and the Regulatory Impact Assessment (RIA) Table 1-1). Additional consideration of the public health benefits (see RIA Table 6-2) shows large negative net benefits. For example, the particulate matter (PM) 2.5- and ozone-related health benefits in terms of Present Value are -$130 billion (2024 dollars, 3% discount rate) and -$76 billion (2024 dollars, 7% discount rate).[140] This huge disbenefit overwhelms the compliance cost savings of $19 billion (3% discount rate) and $9.6 billion (7% discount rate). The disbenefit would be even larger if foregone climate benefits were considered. EPA's proposed repeal of the GHG emissions standards, in part to address Executive Order 14241, is thus calculated to adversely impact public health. It is clear that this proposed action does not, as claimed, "promote the public health or welfare through energy dominance and independence secured by using fossil fuels to generate power."[141]

[140] The foregone health benefits, according to EPA's RIA for the 2024 Carbon Pollution Standards, include 1,200 avoided premature deaths, 870 avoided hospital and emergency room visits, 1,900 avoided cases of asthma onset, and 360,000 avoided cases of asthma symptoms.
[141] 90 FR at 25755.

Furthermore, it is concerning that the agency has not adequately addressed Executive Order 13045 ("Protection of Children From Environmental Health Risks and Safety Risks"). The preamble clearly notes that environmental health or safety risks from the proposed action has a disproportionate effect on children. It further admits that the proposal will result in an increase in pollution which endangers children's health compared to the prior standards. As such, the proposal fails to evaluate the effects of the planned regulation on children and fails to explain why the regulation is preferable to potentially effective and reasonably feasible alternatives.

Significant Harm to Economic Growth

The labor impacts presented in section 5.4 of the RIA indicate the potential for significant job losses resulting from the proposed rule. The RIA cites the reduction in the number of construction-related jobs related to: (1) the installation of new pollution control equipment; (2) constructed new capacity; and (3) constructed battery storage systems. These job losses are estimated to exceed the potential increase in non-construction jobs.[142] While EPA has tried to dismiss its analysis, citing the "significant challenges when trying to evaluate the employment effects from the repeal of an environmental regulation," the calculations certainly indicate the potential for this proposed action to be a major job killer. EPA needs to provide a better explanation of those supposed "significant challenges" and improve its analysis. The agency cannot claim that the rule promotes public health and welfare when it results in increased death and disease and results in fewer jobs for the public.

Flawed Statutory Interpretations

A new endangerment finding is not required here. EPA's proposed interpretation is starkly at odds with the clear meaning of the statute, and with the statutory structure. The best interpretation of significant contribution in CAA section 111 is that contribution involves the relationship between the category's emissions and the level of the air pollution. Significance of the contribution involves characteristics that relate to contribution. Significance does not relate to characteristics of the nature of the endangerment or the kind or impact of standards that would be set if the threshold determination on authority to control emissions is made. Furthermore, as discussed further in the body of our comments, EPA's proposal ignores the clearly established statutory two step process of 1) determining whether a category of sources causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare; and 2) determining an appropriate regulation based on the criteria established in section 111. EPA's proposed interpretation is inconsistent with the text and context of the statute, inconsistent with EPA's past practice over many decades, and the proposal's approach has been rejected in the case law.

The facts are clear - fossil fuel electric generating units (EGUs) are significant contributors to GHG air pollution. Even if EPA's proposed determination were valid, this does not authorize EPA to cancel the current GHG standards. The current standards were lawfully adopted under a valid finding of significant contribution. EPA's proposed negative determination is not a valid basis for EPA to cancel the lawful, pre-existing GHG standards.

Lack of Factual Support for the Proposal's Rationale

In addition to being legally flawed, EPA's proposal is arbitrary and capricious because it is based on statements that are unsupported by evidence. The proposal provides no evidence to support its various assertions that it uses as the policy basis for this action. There is no evidence to show that

[142] The RIA notes also the analysis did not include the employment losses likely to result from the decrease in development and construction of new transmission and distribution capacity due to the proposed action.

this action would promote public health or welfare through energy dominance and independence secured by using fossil fuels to generate power. It claims without evidence that the "attenuated chain of causation" is such that EPA cannot link the reduction in GHG emissions to benefits. In fact, EPA has done just that for over a decade including during the first Trump Administration, as has other governments and organizations. The proposal claims that since 90% CCS is too difficult for sources to achieve, no reductions are reasonably achievable despite the fact that the proposal includes examples of successful CCS projects. In all of these cases, EPN requests the chance to comment on any additional data and options EPA comes up with to support these and other points in the proposal.

Increased Regulatory Uncertainty

One of the goals of the proposed rule is to "resolve a decade's worth of regulatory uncertainty brought on by the Agency's novel attempts to regulate GHG emissions from fossil fuel-fired power plants under Clean Air Act (CAA) section 111." Regulatory stability is a desirable outcome. However, the proposal fails in this effort. Rather than working within the regulatory structures created by the Clean Power Plan, the Affordable Clean Energy Plan, and the Carbon Pollution Standards (CPS), this administration has chosen an even more radical departure and path — no regulation. EPA's proposal would create instability by choosing a path clearly counter to statute and case law. This reality is noted even by the regulated community. Note American Electric Power's statements to EPA that "American Electric Power still believes the advancement of carbon capture and sequestration (CCS) is critical for the sustainability of coal-fired generation."[143] Far from being punitive or a source of uncertainty, regulatory standards resulting in secure management of otherwise-emitted CO_2 are a lifeline to the industry, preserving a place for coal-fired generation in a lower carbon world.

I. EPA is not required to make a substantial contribution/endangerment finding for GHGs [or any other pollutant added after initial source category listing] under Section 111.

EPA proposes that CAA section 111(b) requires a new cause or contribute finding each time EPA regulates an additional air pollutant from a source category already listed under CAA section 111(b)(1). The agency thus maintains that EPA's action in 2015 combining listed categories was a listing of a new category for regulation of GHGs[144] and could be justified only if GHG emissions from the category cause or contribute to the air pollution which endangers. Applying this asserted principle generally, the agency proposes that "to interpret CAA Section 111 as requiring the EPA to determine that emissions of an air pollutant from an existing source category significantly contribute to dangerous air pollution before imposing standards of performance for that air pollutant on the relevant source categories."[145] In the alternative, the agency seeks comment on an alternative that would allow EPA to adopt this approach as within its authorized discretion.

As a "best reading" of the statute, EPA is not mandated to make pollutant-by-pollutant cause or contribute findings. That approach is potentially atextual and also runs counter to the standard principle of statutory construction that Congress, in the CAA, knew how to specify pollutant-by-pollutant threshold listing determinations and didn't do so in section 111(b)1.

[143] 80 FR at 64572.
[144] 90 FR at 25762.
[145] 90 FR at 25763.

The agency also proposes as an alternative that it can adopt its approach as a matter of discretion (the administrator's "judgment" referred to in CAA section 111(b)(1)(A)).[146] The proposal is worded inartfully, such that it is unclear if the agency is referring to taking discretionary action which would not be binding on any future administrator, or if it means that this is the only way its "judgment" can be exercised. If the latter, then this is just the original proposal slightly repackaged, and illegal for the same reasons. If the former — a genuinely discretionary determination stating only what this administrator plans to do — the agency should state so directly.

A. Not a New Listing.

No sources are added to the universe of regulated sources as a result of the 2015 action combining fossil fuel steam generating units (listed in 1971) and fossil fuel combustion turbines (listed in 1979).[147]

B. Pollutant-by-Pollutant Threshold Determinations are not Mandated.

1. "The Administrator shall, within 90 days from, December 31, 1970, publish (and from time to time …revise) a list of *categories of stationary sources.* He shall include *a category of sources* in such list if, in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA section 111(b)(1)(A) (emphasis supplied)

A "category" is simply not an air pollutant. "Air pollutant" is a defined term: "any air pollution agent or combination of such agents … substance or matter which is emitted into or otherwise enters the ambient air."[148] A "category" is not defined in the Act, but is certainly not something which is emitted into the ambient air. A standard dictionary definition is "a class of things having a shared characteristic." Indeed, through decades of CAA regulatory actions EPA has consistently interpreted "category" to be a group of sources with common characteristics.

Moreover, CAA section 111(f)(2) — a provision added in the 1990 amendments which requires EPA to set standards of performance for listed major source categories for which EPA has not set standards — is written only in terms of quantities of air pollutants emitted, and the extent to which "such pollutant" might "reasonably be anticipated to endanger public health or welfare" and, even when setting standards of performance, does not mandate that the listing has to be pollutant specific, and a significant contribution finding made for each pollutant. Indeed, under EPA's proposed interpretation, section 112(f)(2)(B) — which directs EPA to consider "the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare" in promulgating standards of performance — would be essentially superfluous, since EPA would already have been required to make a cause or significant contribution finding for that pollutant. Instead, Congress included a provision to prod EPA's consideration of extent of harm in

[146] 90 FR at 25765.

[147] *American Trucking Ass'n v. EPA* ("ATA I"), 175 F. 3d 1027, 1055 (D.C. Cir. 1999) (reversed on different ground by *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001)) (no new listing of PM2.5 required because PM2.5 was already included within the particulate matter indicator (total suspended particulate); so even though the PM2.5 indicator would occasion more regulation of emitting sources, no new listing required; similarly here, already-listed sources will be subject to regulation for a new pollutant, but no sources are being added to listed source category that weren't there already).

[148] CAA section 302(g).

promulgating standards of performance, since the listing itself was not required to do so. So the text of section 111(b) on its face does not support the proposal, and section 111(f)(2) likewise indicates that new, per-pollutant significant contribution determinations aren't mandated.

2. The structure of the CAA makes clear that pollutant-by-pollutant significance determinations are not mandated under section 111(b).

Congress, in the CAA, knew how to specify pollutant by pollutant findings as the trigger for regulation — including via a listing mechanism tied to amount of contribution — when it wished to. The following provisions are illustrative:

- Pre-1990 section 112 (contemporaneous with section 111), reads:
  Section 112 of the CAA, as amended December 31, 1970 (Public Law 91-604), directs the Administrator of the Environmental Protection Agency to publish, no later than March 31, 1971, and from time to time thereafter revise, *a list of air pollutants which in his judgment may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness and to which no national ambient air quality standard is applicable.* Within 180 days from the inclusion of any air pollutant in the list, the Administrator is required to publish proposed regulations establishing emission standards for such pollutant.[149]

- CAA section 108(a)(1)(A). EPA is to publish "a list which includes *each air pollutant emissions of which*, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health."

- CAA section 213(a)(2) (non road engines and vehicles): "[AX} shall determine …*whether emissions of [CO], [NOx], and [VOC] from* nonroad engines and nonroad vehicles (other than locomotives….) are significant contributors to ozone or [CO] concentrations in more than one [non-attainment area for each pollutant]."

- CAA section 202(a)(1) requires standards *for any air pollutant* from new motor vehicles or new motor vehicle engines which causes, or contributes to, air pollution which endangers.

So Congress could have written a provision like one of these, e.g., "The Administrator shall list a source category which emits a pollutant which causes or contributes to air pollution which endangers, and shall from time to time determine if additional air pollutants emitted by that category cause or contribute to air pollution which endangers." Congress knew how to write such a provision if it wanted that result and chose not to do so.

EPA requests whether its proposed interpretation that a pollutant-specific contribution finding is mandated to avoid implicating the major question doctrine, and specifically, whether "the proposed interpretations …are necessary to prevent the Agency from improperly expanding its regulatory authority by determining that emissions of de minims amounts of air pollutants … should be regulated under CAA section 111."[150]
The premise of this question is false. EPA itself states that there have been "prior EPA decisions not to regulate certain air pollutants under CAA section 111 on grounds that they had little impact or

[149] 36 FR 5931 (the original list of hazardous air pollutants (HAP)).
[150] 90 FR at 25778.

that no effective controls were available," which determinations were upheld by the D.C. Circuit.[151] The D.C. Circuit's decision in Portland Cement Ass'n v. EPA. 665 F. 3d 177, 193 (D.C. Cir. 2011) likewise upholds an EPA decision under section 111(b)(1) not to regulate an air pollutant emitted from a listed source category. Thus, if pollutant emissions from a source category listed in section 111(b) are de minimis, if controls are too costly, if controls would result in unacceptable non-air environmental impacts, etc., EPA may choose not to regulate at all per CAA section 111(a). Consequently, listing a source category does not compel standards of performance for each pollutant emitted by the category.[152] So EPA's solicitation addresses a non-issue, and it is perplexing that the agency even solicits this comment.

More generally, the major question doctrine applies in situations where an agency asserts unheralded power of vast significance, based on obscure statutory provisions heretofore never invoked for that purpose, extending to issues and policies outside the agency's delegated area of expertise, and possibly also including Congressional rebuffs of the regulatory approach at issue.[153] None of these factors are present here. West Virginia itself notes that EPA has implemented CAA section 111(a) for decades by requiring at-the-source improvements.[154] Regulating harmful air pollutant emissions from a source, per the criteria and constraints of section 111(a), does not assert "unprecedented authority over industry" or somehow set' national energy policy."[155] There have been no Congressional rebuffs over EPA's decades of regulation in this manner. The major question doctrine has no applicability here.

II. EPA's Justification for Mandated Reading Lack Merit

In addition to being atextual, the agency's asserted justifications simply don't make sense. EPA proposes that since "standard of performance" is pollutant specific, the cause or contribute finding must be as well for each regulated pollutant.[156] This is both an ipse dixit ('it is so because I say it is'), and reads the statute backwards. It puts the best system of emission reduction (BSER) cart before the categorical listing horse. The statute does the opposite. The fact that EPA must set standards of performance with respect to individual pollutants does not tell us anything about which pollutants it may regulate and, importantly here, does by no stretch of the imagination require that those pollutants have been singled out in the original endangerment and contribution findings under section 111(b) (1)(A).

EPA states that the 'standard of performance' and categorical listing need to be read as a cohesive whole.[157] In addition to being atextual, Congress knew how to write a provision where the contribution finding was determinative of standards. A good example is CAA section 110(a)(2) (D), the Good Neighbor provision, whereby a state implementation plan (SIP) is to prohibit emissions which contribute significantly to non-attainment out of state. It didn't adopt this approach in section 111.

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[151] 90 FR at 25764, citing *National Lime Ass'n v. EPA*, 627 F. 2d 416, 428 and n. 27 (D.C. Cir. 1980) (upholding EPA determination not to regulate NOx, SO2, and CO from lime plants per CAA section 111(a)).
[152] See also 80 FR at 64259-31 (October 23, 2015) (EPA must have rational basis to establish NSPS for pollutants emitted by a listed source category).
[153] West Virginia, 597 U.S. 697, 724, 730.
[154] 597 U.S. at 734.
[155] 597 U.S. at 724, 729.
[156] 90 FR at 25763.
[157] Ibid.

EPA also states that "not adopting the approach reads cause or contribute out of the statute for any additional pollutant not initially cited as a basis, evading the cause or contribute finding after that initial listing." This results in a situation where all pollutants emitted by the source get regulated, and "[N]othing in CAA section 111 suggests that Congress intended the EPA to regulate emissions of any and all air pollutants regardless of the magnitude of emissions (i.e., including de minimis emissions)."[158] But this proves too much. EPA is perfectly capable of determining not to regulate an emitted air pollutant in determining BSER, as even the proposal acknowledges.[159] So this argument is a strawman. It could easily make sense for a BSER to encompass air pollutants not initially tied to contribution to air pollution which endangers. BSER isn't tied directly to the basis for listing, but rather to considerations of available control technology at reasonable cost, energy considerations, non-air effects of the pollution control, etc.

The proposal is inconsistent with EPA's past practice. Even for this source category before the 2015 rule, EPA has added pollutants without altering the initial basis for listing the source category.[160] In its GHG-centric proposal, EPA ignores the implications of its proposal for all other section 111 standards of performance.

EPA cites CAA section 111(b)(3) as equating categories and air pollutants.[161] That provision does no such thing. It requires the agency to publish information about control technology for source categories and air pollutants. This can readily be done separately. For instance, wet scrubbers can work for every source in a category to remove PM. The category doesn't do anything to control certain HAP, but control technologies exist which are effective for that HAP (e.g. certain emerging types of Hg control). In any case, this tangential provision hardly nullifies the plain text of section 111(b)(1)(A). EPA also cites the work practice provision of CAA section 111(h), and an innovative technology waiver provision in section 111(j) as support.[162] Section 111(h) by its terms relates to when a "standard of performance" isn't enforceable. It has nothing to do with categorical listing. And allowing certain allowances for an innovative technology for a particular pollutant again has nothing to do with the initial listing determination. Far from being a "best interpretation," EPA's proposal is outright legally untenable.

III. EPA's proposed interpretation and finding of no significant contribution is unlawful.

EPA proposes to interpret the term "significantly" contribute in section 111(b) to include consideration of "effectiveness of emissions reduction controls, cost-reasonableness of those controls, impacts on the affected industry, and impacts of the emissions on public health and welfare. EPA proposes to conclude that "significantly contributes" incorporates background legal principles of proximate cause that inform both whether an air pollutant contributes to dangerous air

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[158] Ibid.

[159] Fn. 95, 90 FR at 25762. See also 73 FR at 35858 (June 24, 2008) ("The Agency has always interpreted [the requirement to establish standards of performance] as providing the Administrator with significant flexibility in determining which pollutants are appropriate for regulation under section 111(b)(1)(B)").

[160] See 77 FR 9453 (February 16, 2012) (adding alternative standard for CO to 40 CFR Part 60 subpart Da standards); 78 FR 28606 (May 18, 2005) (adding mercury to then-existing 40 CFR part 60 subpart HHHH, ultimately vacated on other grounds).

[161] 90 FR at 25764.

[162] Ibid.

pollution and the extent of contribution required to trigger regulation based on the particular form of dangerous air pollution identified."[163]

The text and context of section 111 make clear that issues related to standard setting only become relevant *after* EPA makes an affirmative contribution/endangerment finding. They are not relevant to determining significant contribution. The Supreme Court in *Massachusetts* and the D. C. Circuit in *Coalition for Responsible Regulation* are clear – EPA's "judgment" is constrained, EPA can only consider factors that are legally relevant under the statute, and these kinds of policy considerations are not legally relevant to determining contribution.[164]

Section 111 is just one of many provisions where Congress followed a two-step process, with the first step a threshold identifying whether EPA has authority to adopt federal controls on emissions, and a second step where Congress specifies what kind of controls EPA can adopt. This pattern throughout the CAA clearly indicates that the two steps involved are separate and apart and involve consideration of different factors. Factors relating to endangerment and factors relating to standard setting are not relevant for determining contribution or significance of contribution.

The term "significant" does not change this. EPA's interpretation is inconsistent with the ordinary meaning of "significant" as it is used in Section 111. In addition, factors that are legally irrelevant for determining contribution are irrelevant for determining significant contribution - significant contribution is a subset of the universe of contributions.

EPA points to the Clean Air Act's "Good Neighbor" SIP provision for support, but this is of no help. Under that provision determining significant contribution establishes two things - whether a State must control emissions and exactly what amount of emissions it must control. That is very different from section 111. The Good Neighbor provision and other SIP provisions addressing transport make it clear Congress knew how to authorize EPA to consider factors related to emission controls when it makes a significant contribution determination. Congress did not do that in Section 111.

EPA seeks support in the common law principles of "proximate cause" to argue various uncertainties heighten the threshold for determining significant contribution. Proximate cause is a creature of tort law, and it arises when one party sues another for damages, claiming their injuries were caused by the other party's unlawful conduct. Proximate cause has nothing to do with a statutory provision addressing when EPA, an administrative agency, has authority to adopt emissions controls under Section 111.

The facts are clear – fossil-fueled EGUs are significant contributors to GHG air pollution.

a. The U.S. is still the second largest emitter of GHGs in the world.
b. EGUs are still a very large percentage of total US GHG emissions - 25%. EGU emissions are the second largest source of GHG emissions in the U.S., just behind transportation at 28%.
c. EGUs emit more GHGs than all of the U.S. industry sectors combined.

[163] 90 FR at 25765.

[164] Massachusetts v. EPA, 549 U.S. 497 (2007), Coal. for Responsible Regul., Inc. v. E.P.A., 684 F.3d 102 (D.C. Cir. 2012), aff'd in part, rev'd in part sub nom. Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302 (2014), and amended sub nom. Coal. for Responsible Regul., Inc. v. Env't Prot. Agency, 606 F. App'x 6 (D.C. Cir. 2015)

d. Globally, the power sector is the largest source of GHG emissions, outranking industry, transport, buildings, agriculture, and other sectors. The U.S. power sector emits 11% of the global power sector's GHG emissions.
e. U.S. EGUs emit more GHGs than all of the countries in the world, with the exception of three countries – China, India, and Russia. Again – only three countries in the world emit more GHGs than the U.S. EGUs.

The global nature of air pollution has not changed. As the D. C. Circuit said:

> While the percentage contribution of this sector may appear relatively small in comparison to total emissions worldwide, '[t]he global nature of the air pollution problem means that '[a] country or a source may be a large contributor, in comparison to other countries or sources, even though its percentage contribution may appear relatively small' in the context of total emissions worldwide.[165]

EPA proposes to "repeal all greenhouse gas standards for the power sector" based on its negative determination on significant contribution. Even if EPA's proposed determination were valid, it does not authorize EPA to cancel these GHG standards. The current GHG standards were lawfully adopted under a valid finding of significant contribution. EPA's proposed negative determination is not a valid basis for EPA to cancel the lawful, pre-existing GHG standards.

A. Analysis of text and context of CAA Section 111.

1. The text of Section 111 does not support EPA's proposed interpretation.

(a) Section 111 requires EPA to establish a list of categories of stationary sources.

A category is included in the list if in EPA's judgment it causes or contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.[166] Once a category is listed, EPA is required to adopt federal "standards of performance" for new sources within the category. A standard of performance is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[167] Congress spelled out the timeline for EPA to establish the standards and specified that EPA was to review and revise the standards at least every eight years.

Congress established a two-step approach that EPA must follow. These steps address different questions, *on a different timeline*. The first step is a requirement that EPA list categories that meet the contribution/endangerment criteria. This is a threshold determination. It identifies when EPA has authority to adopt federal controls on emissions from source categories. Unless and until EPA makes an affirmative determination, EPA has no authority to adopt federal controls on emissions from the category.

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[165] Am. Lung Ass'n. v. Env't Prot. Agency, 985 F.3d 914, 977 (D.C. Cir. 2021) (rev'd on other grounds sub nom West Virginia v. EPA, 597 U.S. 697 (2022).
[166] Section 111(b)(1)(A).
[167] Section 111(b)(1)(B), (a)(1).

The second step is a requirement that EPA adopt emissions standards for the listed categories. Assuming an affirmative determination is made in the first step, Congress spelled out the timing and nature of federal controls EPA must adopt. EPA is required to propose controls within one year, receive comment on the proposal, and issue a final rule within one year of the proposal. In addition, EPA is required to review and revise the standards every eight years. Congress also specified the nature of the controls EPA is to adopt, in the definition of "standards of performance." Setting the appropriate standards involves evaluating complex questions of availability and performance of emissions control technology, cost, and the like. EPA has been conducting this kind of standard setting for decades.

The text and structure of section 111 make clear that the two steps are separate and distinct. They call for consideration of different factors. For the first step, the factors EPA must consider involve questions on the level of air pollution and the risks and severity of adverse effects on public health and welfare from the air pollution. It also involves questions of the relationship between emissions from the source category and the levels of air pollution. EPA is to exercise its judgment in evaluating these questions and making the determination called for in the first step. However, EPA's judgment is not free ranging. EPA's judgment is constrained by the text of section 111, with Congress directing EPA to focus only on the threshold issues of contribution and endangerment in the first step.

(i) EPA has no authority to establish federal controls on a source category unless and until EPA makes a final affirmative determination on the threshold issue of contribution and endangerment. That means when EPA is making the contribution and endangerment determinations, EPA has no authority to adopt federal controls for that source category, either then or in the future. Such authority only arises after EPA has finished making these determinations. Thus, when EPA is making these determinations, it solely focuses on the question of contribution and endangerment. Issues related to future controls — their timing, cost, impact on emissions reductions, and so on — are irrelevant to EPA's threshold determination and cannot be considered in making that determination.

This makes eminent sense. The first threshold step calls for analyzing the risks and severity of adverse effects from air pollution and analyzing emissions contribution from a source category to levels of the air pollution. That judgment can be made without consideration of means of control, the issues of contribution and endangerment can readily be assessed without any consideration of the potential impacts of future controls. The scientific and technical issues involved in determining contribution and endangerment can be fully considered without any consideration of the impacts of future controls.

Taking the cost, effectiveness, and impacts of future emissions controls into account when making the threshold contribution or endangerment finding short-circuits the two-step process Congress required. EPA's proposed approach requires two different "decisions" on standard setting. The first is a projection of future decisions based on projections of many technical and other conditions and circumstances. This provisional analysis and decision would be considered in the first threshold step. The second decision on standard setting would be based on the rulemaking process called for by Congress, involving a proposal based on detailed analyses, a comment period, and a final decision. It would result in actual standards the affected sources have to meet. Of course, the second decision on standards would only occur if EPA made an affirmative determination in the first step. If the provisional, projected future standards considered in the first threshold step led to a negative

determination at the first step, there would be no actual future decision on standards. This is a convoluted commingling of the two separate steps Congress specified in section 111. This commingling effectively puts the BSER cart in front of the listing determination horse.

(ii) Congress also constrained EPA's judgment on whether a category's contribution to the air pollution levels is "significant." The term significant modifies contribution. It does not modify endangerment and does not modify anything about the standard setting process. The factors and issues that EPA can consider in determining significance must relate to the issue of contribution - the relationship between the amount of emissions from the category and the air pollution that endangers. Significant contribution is a subset of the universe of situations that are considered contribution. Factors that are irrelevant to determine contribution are by definition irrelevant for purposes of considering significance of the contribution.

(iii) The Supreme Court confirmed these points in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, EPA refused to make a determination whether emissions of GHGs from motor vehicles cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare, under section 202(a)(1) of the Act. EPA "refused to comply with this clear statutory command," relying on "a laundry list of reasons not to regulate." For example, EPA based its decision on various policy reasons – the administration preferred other ways to address climate change ("a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming"), EPA considered the emissions controls that would be adopted ineffective and inappropriate as a remedial measure ("curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue""), and adoption of emissions controls on motor vehicles would interfere with other important policies of the administration ("regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions").[168]

The Court made clear that the use of the term "judgment" constrained EPA and was not a vehicle to go beyond the terms of the statute. The Court said:

> While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. § 7521(a)(1), that *judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger *533 public health or welfare,"* ibid. Put another way, the use of *the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits*." 549 U.S. at 532-33. … But once EPA has responded to a petition for rulemaking, its *reasons for action or inaction must conform to the authorizing statute.* Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. Ibid. *To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design*. (emphasis added) 549 U.S. at 532-533.

The Court made clear that the various policy reasons relied upon by EPA were not relevant to the determination of cause or contribute to endangerment.

[168] 549 U.S. at 533.

> The *alternative basis for EPA's decision*—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—*rests on reasoning divorced from the statutory text*. … Although we have neither the expertise nor the authority to evaluate *these policy judgments*, it is evident they *have nothing to do with whether greenhouse gas emissions contribute to climate change*. Still less do they amount to a reasoned justification for declining to form a scientific judgment. … *Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time*. See 68 Fed.Reg. 52930–52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. *That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty*—which, contrary to Justice SCALIA's apparent belief, post, at 1466 – 1468, is in fact all that it said, see 68 Fed.Reg. 52929–52930 ("We do not believe ... that it would be either effective or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time" (emphasis added))—*is irrelevant*. (emphasis added) 549 U.S. at 533-34.

The Court was clear – policy judgments concerning the appropriateness of future emissions controls that could be adopted under the Act are irrelevant to the scientific judgment needed to determine cause or contribute and endangerment. Likewise, policy concerns over interference with other administration policies are irrelevant, as are concerns over uncertainty of the science. Scientific uncertainty is relevant only if the uncertainty is so high that a reasoned determination cannot be made.

The policy concerns EPA relies upon in the proposal are of the same nature as those rejected by the Court in *Massachusetts*. They are irrelevant to the scientific judgment required for the threshold first step determination. Since they are irrelevant, the *Massachusetts* Court decided they could not be relied upon to justify refusing to make a determination. For the same reasons, they are irrelevant for purposes of making a negative determination on significant contribution or endangerment.

Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) follows the same approach. In that case, industry argued that:

> EPA *improperly interpreted* CAA § 202(a)(1) *as restricting the Endangerment Finding to a science-based judgment devoid of considerations of policy concerns and regulatory consequences*. They *assert* that CAA § 202(a)(1) *requires EPA to consider, e.g., the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change*. They maintain that eschewing those considerations also made the Endangerment Finding arbitrary and capricious. (emphasis added) 684 F.3d at 117.

The D.C. Circuit was clear – EPA has no authority to consider such policy considerations when making the science-based judgment on contribution and endangerment.

> This language requires that the endangerment evaluation "relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Massachusetts v. EPA,* 549 U.S. at 532–33, 127 S.Ct. 1438. At bottom, § 202(a)(1) requires EPA to answer only two questions: whether particular "air pollution"—here, greenhouse gases—"may reasonably be anticipated to endanger public

health or welfare," and whether motor-vehicle emissions "cause, or contribute to" that endangerment.

These questions require a "scientific judgment" about the potential risks greenhouse gas emissions pose to public health or welfare—not policy discussions. *Massachusetts v. EPA,* 549 U.S. at 534, 127 S.Ct. 1438. In *Massachusetts v. EPA,* the Supreme Court rebuffed an attempt by EPA itself to inject considerations of policy into its decision. At the time, EPA had "offered a laundry list of reasons not to regulate" greenhouse gases, including that a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions, and that curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue." *Id.* at 533, 127 S.Ct. 1438 (citations omitted). The Court noted that "these policy judgments…have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment." *Id.* at 533–34, 127 S.Ct. 1438. In the Court's view, EPA's policy-based explanations contained "no reasoned explanation for [EPA's] refusal to decide" the key part of the endangerment inquiry: "whether greenhouse gases cause or contribute to climate change." *Id.* at 534, 127 S.Ct. 1438.

As in Massachusetts v. EPA, a "laundry list of reasons not to regulate" simply has "nothing to do with whether greenhouse gas emissions contribute to climate change." Id. at 533–34, 127 S.Ct. 1438. The additional exercises State and Industry Petitioners would have EPA undertake—*e.g., performing a cost-benefit analysis for greenhouse gases, gauging the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases, and predicting society's adaptive response to the dangers or harms caused by climate change—do not inform the "scientific judgment*" that § 202(a)(1) requires of EPA….. *The statute speaks in terms of endangerment, not in terms of policy*, and EPA has complied with the statute." (emphasis added) 684 F.3d at 117-118.

The courts could not be clearer – the policy considerations that EPA proposes to rely upon to justify its negative determination on significant contribution are irrelevant to determining contribution under section 111.

The term "significant" does not change this. It modifies contribution, with significant contribution a subset of the universe of situations covered by contribution. Factors that are irrelevant for determining contribution are by definition irrelevant for determining the subset of contributions that are considered significant.

(iv) Congress used the same basic two-step structure employed in section 111 throughout various provisions addressing EPA authority to adopt federal controls on emissions sources. See section II.2. below. Congress used this structure to answer two different questions – do the circumstances involving emissions from sources and air pollution levels warrant authorizing EPA to adopt federal controls? If so, what kind of federal controls is EPA to adopt? The consistent use of the same basic statutory structure throughout the Act supports the interpretation discussed above.

In other provisions of the Act Congress addressed when and to what extent EPA should require states to control certain emissions in their SIPs. In various provisions Congress explicitly made levels of emissions control a factor in determining significant contribution. Congress knew how to

authorize EPA to consider future emissions control when determining contribution, and it did not take this approach in section 111.
For example, when Congress addressed interstate transport of air pollution it specified that a state SIP must contain provisions that prohibit sources from emitting amounts of emissions which contribute significantly to nonattainment in downwind states. Section 110(a)(2)(D)(i)(I). As explained above, the significant contribution finding in the Good Neighbor provision is distinctly different from the significant contribution finding in section 111. In the SIP provision, the contribution finding performs two functions – it identifies whether the state has to include provisions in its SIP to control emissions, and it identifies the amount of emissions that must be controlled. This is distinctly different in substance from section 111. The SIP provision combines two questions (duty to adopt controls and amount of reductions required by the controls), while these two questions are kept separate in section 111 (authority to adopt controls, based on contribution/endangerment determination, and amount of reductions to achieve through the controls based on the separate standard setting provision, BSER).

In making the significant contribution determination under this SIP provision, EPA considered factors related to emissions control, such as cost, because EPA had to determine the amount of emissions reductions that the state had to achieve. Determining the amount of required emissions reductions is a core part of emissions standard setting, and it is logical to consider standard setting factors such as cost of emissions controls in making this kind of determination. The cases considering EPA's authority under this SIP provision recognize the dual role the significant contribution determination plays in the good neighbor SIP provision.

The Supreme Court addressed this as follows:

> Under the Transport Rule, *EPA employed a "two-step approach" to determine when upwind States "contribute[d] significantly to nonattainment,"* id., at 48254, *and therefore in "amounts" that had to be eliminated.* At step one, called the "screening" analysis, the Agency excluded as de minimis any upwind State that contributed less than one percent of the three NAAQS3 to any downwind State "receptor," a location at which EPA measures air quality. See id., at 48236–48237.4 If all of an upwind State's contributions fell below the one-percent threshold, that State would be considered not to have " contribute [d] significantly" to the nonattainment of any downwind State. Id., at 48236. States in that category were screened out and exempted from regulation under the rule. […]
>
> *Taken together, the screening and control inquiries defined EPA's understanding of which upwind emissions were within the Good Neighbor Provision's ambit.* In short, under the Transport Rule, an upwind State "contribute[d] significantly" to downwind nonattainment to the extent its exported pollution both (1) produced one percent or more of a NAAQS in at least one downwind State (step one) and (2) could be eliminated cost-effectively, as determined by EPA (step two). See id., at 48254. *Upwind States would be obliged to eliminate all and only emissions meeting both of these criteria.* […]
>
> We conclude that the Good Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in Chevron. *The statute requires States to eliminate those "amounts" of pollution that "contribute significantly to nonattainment" in downwind States.* 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Thus, EPA's task15 is to reduce upwind pollution, but only in "amounts" that push a downwind State's pollution concentrations above the relevant

> NAAQS. As noted earlier, however, the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States. See supra, at 1593 – 1594. *The statute therefore calls upon the Agency to address a thorny causation problem: How should EPA allocate among multiple contributing upwind States responsibility for a downwind State's excess pollution?* […]
>
> Persuaded that the Good Neighbor Provision does not dictate the particular allocation of emissions among contributing States advanced by the D.C. Circuit, we must next decide whether the allocation method chosen by EPA is a "permissible construction of the statute." Chevron, 467 U.S., at 843, 104 S.Ct. 2778. As EPA interprets the statute, upwind emissions rank as "amounts [that] ... contribute significantly to nonattainment" if they (1) constitute one percent or more of a relevant NAAQS in a nonattaining downwind State and (2) can be eliminated under the cost threshold set by the Agency. See 76 Fed.Reg. 48254. In other words, *to identify which emissions were to be eliminated, EPA considered both the magnitude of upwind States' contributions and the cost associated with eliminating them.* […]
>
> Using costs in the Transport Rule calculus, we agree with EPA, also makes good sense. *Eliminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address.* Efficient because EPA can achieve the levels of attainment, i.e., of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution. Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. They will have to bring down their emissions by installing devices of the kind in which neighboring States have already invested. […]
>
> *Obligated to require the elimination of only those "amounts" of pollutants that contribute to the nonattainment of NAAQS in downwind States, EPA must decide how to differentiate among the otherwise like contributions of multiple upwind States.* EPA found decisive the difficulty of eliminating each "amount," i.e., the cost incurred in doing so. *Lacking a dispositive statutory instruction to guide it, EPA's decision, we conclude, is a "reasonable" way of filling the "gap left open by Congress."* (emphasis added) *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 500-504, 513-514, 6518-520 (2014).

This SIP provision and section 111 differ dramatically in terms of substance. Section 111 calls for EPA to determine significant contribution to air pollution. If and only if EPA makes an affirmative determination, EPA is to adopt controls that reduce emissions using technology that is BSER. The determination of significant contribution to the air pollution and the determination of BSER in the standard setting are two separate decisions. The SIP provision is different. The determination of significant contribution requires EPA to determine the amount of emissions from an upwind state that must be reduced. The decision on contribution and the decision on what reductions must be achieved are one and the same. This is substantively different from section 111, and the factors EPA can consider under the good neighbor SIP provision do not support their consideration under section 111.

It would be a different situation if section 111 was phrased along the lines of "EPA shall prohibit a source category from emitting amounts of an air pollutant that significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare." That would be analogous to the good neighbor SIP provision. Of course, in that case Congress would not have prescribed BSER as the standard setting provision. The significant contribution determination would have already determined what amount of emissions had to be reduced. Congress did not use this approach in section 111, and EPA's interpretation of the substantively different Good Neighbor provision is not relevant for purposes of section 111.

Congress also adopted other SIP provisions that took an approach somewhat similar to the Good Neighbor provision when it addressed issues of visibility transport (EPA can remove a State or portion of a State from a visibility transport region if the control of emissions will not significantly contribute to protection or enhancement of visibility in Class I areas, section 169B) and the interstate transport commission (EPA may remove a State or portion of a State from the commission where EPA determines control of emissions in the State will not significantly contribute to attainment of the NAAQS in downwind areas, section 176A).

These SIP provisions show that Congress knew how to specify when the contribution finding includes consideration of future emissions controls, such as the amount of reductions that future controls would achieve. It did not include such considerations in section 111's contribution finding.

(b) EPA improperly relies on the irrelevant principles of "proximate cause."

EPA proposes that when Congress used the term "significant contribution" in section 111 it "incorporate[d] background legal principles of proximate cause that inform both whether an air pollutant contributes to dangerous air pollution and the extent of contribution required to trigger regulation based on the particular form of dangerous air pollution identified."[169] The "global scale of that analysis and attenuated chain of causation" meant that the "threshold for significant contribution … is heightened by the multiple intervening actors, uncertainties, and extrapolations necessary to draw a connection between emissions by a source category and dangerous air pollution in the form of adverse effects in the U.S. from anthropogenic climate change, as discussed further below. Under the EPA's proposed interpretation, this attenuated causal chain would require a greater volume and percentage of contribution than a more direct causal relationship to account for the degree of uncertainty and extrapolations involved. In other words, emissions of an air pollutant by a source category cannot be said to contribute significantly to a third or fourth order adverse consequence involving multiple independent domestic and global actors unless the contribution is sufficiently significant that regulation would have a discernible impact on the potential danger."[170] EPA based its proposed finding of no significant contribution in part on "considerations of … the attenuated nature of the causal chain between the volume of GHG emissions from the EGU source category and potential danger to public health and welfare arising from anthropogenic climate change."[171]

EPA's proposal is flawed in several ways. EPA is not interpreting the term "cause," EPA is interpreting "significant contribution." The meaning of the term cause is not before EPA. The background principles of proximate causation are not relevant to evaluate contribution.

[169] 90 FR at 25765.
[170] 90 FR at 25757.
[171] 90 FR at 25767.

In addition, principles of proximate cause are not relevant to the judgments EPA must make under section 111. Proximate cause is a creature of the common law of torts. The law of torts involves determining when one person is liable to pay damages to a second person for injuries they caused to the second person. That has nothing to do with the scope of EPA's authority under section 111, including its obligation to determine contribution of GHG emissions from fossil fuel fired EGUs to global air pollution. The cases cited by EPA make this clear. All of the cases involve private parties suing other parties. They allege one party's conduct was prohibited by statute, that conduct caused injuries to the other party, and the other party now seeks monetary damages.

EPA cites various cases to support its approach. *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189 (2017) involves a city suing a bank for damages from injuries caused by discriminatory lending practices, conduct prohibited by the Fair Housing Act. The Court said:

> The remaining question is one of causation: *Did the Banks' allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services*? The Eleventh Circuit concluded that the answer is "yes" because the City plausibly alleged that its financial injuries were foreseeable results of the Banks' misconduct. We conclude that foreseeability alone is not sufficient to establish proximate cause under the FHA and therefore vacate the judgment below.
>
> *It is a " 'well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.' " Lexmark,* 572 U.S., at ——, 134 S.Ct., at 1390. We assume Congress "is familiar with the common-law rule and does not mean to displace it *sub silentio* " in federal causes of action. *Ibid. A claim for damages under the FHA—which is akin to a "tort action," Meyer v. Holley,* 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003)*—is no exception to this traditional requirement. "Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits*." *Lexmark, supra,* at ——, 134 S.Ct., at 1390.
>
> *In these cases, the "conduct the statute prohibits" consists of intentionally lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms*. The City alleges that the Banks' misconduct led to a disproportionate number of foreclosures and vacancies in specific Miami neighborhoods. *These foreclosures and vacancies purportedly harmed the City*, which lost property-tax revenue when the value of the properties in those neighborhoods fell and was forced to spend more on municipal services in the affected areas. (emphasis added) 581 U.S. at 201-202.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) involves one business suing another for damages from injuries caused by false advertising, conduct prohibited by the Lanham Act. The Court said:

> Second, we *generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute.* For centuries, it has been "a well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause." *Waters v. Merchants' Louisville Ins. Co.,* 11 Pet. 213, 223, 9 L.Ed. 691 (1837); see *Holmes,* 503 U.S., at 287, 112 S.Ct. 1311 (SCALIA, J., concurring in judgment). That venerable *principle reflects the reality that "the judicial remedy cannot encompass every*

> *conceivable harm that can be traced to alleged wrongdoing." Associated Gen. Contractors,* 459 U.S., at 536, 103 S.Ct. 897. Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation.* See, *e.g., Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 346, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (securities fraud*); Holmes, supra,* at 268–270, 112 S.Ct. 1311 (RICO); *Associated Gen. Contractors, supra,* at 529–535, 103 S.Ct. 897 (Clayton Act). No party disputes that it is proper to read § 1125(a) as containing such a requirement, its broad language notwithstanding. (emphasis added) 572 U.S. at 132.

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) involves an employee suing their employer for damages for injuries caused by conduct prohibited by the Civil Rights Act of 1964. The Court said:

> *When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts.* This case requires the Court to define those rules in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* which provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers. […]
>
> This case requires the Court to define the proper standard of causation for Title VII retaliation claims. *Causation in fact—i.e.,* proof that the defendant's conduct did in fact cause the plaintiff's injury—*is a standard requirement of any tort claim,* see Restatement of Torts § 9 (1934) (definition of "legal cause"); § 431, Comment *a* (same); § 279, and Comment *c* (intentional infliction of physical harm); § 280 (other intentional torts); § 281(c) (negligence). *This includes federal statutory claims of workplace discrimination. Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (In intentional-discrimination cases, "liability depends on whether the protected trait" "actually motivated the employer's decision" and "had a determinative influence on the outcome"); *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (explaining that the "simple test" for determining a discriminatory employment practice is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" (internal quotation marks omitted)). (emphasis added) 570 U.S. at 342.

All of these cases involve one party suing another party for damages, alleging injuries caused by conduct that was prohibited by a federal statute. In all of these cases the Court pointed to the common law of torts as a background to determine the causation requirement implied by the statute. These cases are irrelevant to interpreting the scope of EPA's authority under section 111. EPA's rulemaking under section 111 has nothing to do with someone suing someone else to collect damages for injuries caused by conduct prohibited by a federal statute. It should be obvious these cases and the tort principles they rely upon are irrelevant here.

EPA improperly relies on this tort law principle to claim the alleged uncertain link between GHG emissions from EGUs and damage from climate change mean there is not significant contribution. For example, EPA improperly analogizes section 111's contribution determination to ""[t]he proximate-cause analysis [asking] 'whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits'," and claiming that under the principles of proximate cause, the

appropriate analysis "asks whether the air pollutant emissions have a sufficiently close connection to the endangerment caused by the air pollution."[172] EPA seemingly is asking whether EGU emissions (the analogy to prohibited conduct under tort analysis) have a direct enough causal link to the damage caused by the air pollution (the analogy to harm to a private party under tort analysis). But this is not a tort case. This is not a case of one party suing EGUs for damages caused by emissions that the statute prohibits, where the directness of the link between the emissions and the injuries is relevant. Section 111 does not call for the kind of analysis EPA points to. Proximate cause and other aspects of tort law are of no import here.

EPA's proposal also unlawfully mixes the contribution determination and the separate endangerment determination. Section 111, like many other provisions in the Act, establishes a two-step analysis for determining whether EPA has authority to adopt controls for a source category. EPA must judge whether the air pollution is reasonably anticipated to endanger public health or welfare. EPA also must judge whether a source category contributes significantly to this air pollution. These judgements are to be based on science, not policy and not issues concerning the emissions controls that can only be adopted if an affirmative determination is made. The endangerment and contribution judgments are separate and distinct from each other and from the judgments involved in setting controls if an affirmative determination is made.

EPA is not contesting or revising the endangerment determination. Instead, EPA is revisiting and re-judging the separate issue of significant contribution. However, EPA improperly conflates the two in its proposal.

EPA claims it is a "particularly demanding analytical task by evaluating the significance of contribution to global, well-mixed air pollution that results from a combination of pollutants from a large and diverse array of sources that in turn, creates elevated global concentrations that, in turn, the Agency determined play a causal role in environmental phenomena that, in turn, the Agency determined adversely affect the public health and welfare." This results in an "attenuated chain of causation" involving "multiple intervening actors, uncertainties, and extrapolations necessary to draw a connection between emissions by a source category and dangerous air pollution in the form of adverse effects in the U.S. from anthropogenic climate change."[173]

EPA is mixing up the issue of contribution by the source category with the separate issue of endangerment from the air pollution. The third or fourth order consequences and the uncertainties and extrapolations referred to concern the air pollution and whether it endangers public health or welfare. That is not at issue in this rulemaking, and it is not relevant to the separate issue of contribution to the air pollution from EGUs.[174]

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[172] Fn. 116, 90 FR at 25767.

[173] 90 FR at 25767. Also see at 25767 ("a third or fourth order adverse consequence involving multiple independent domestic and global actors.")

[174] In addition, EPA fails to account for the increasing certainty in the science concerning the dangers presented by GHG air pollution levels. For example, the IPCC's 2023 Sixth Assessment Report (found at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) finds clear causal linkages from emissions to damages and warns that limiting global warming to 1.5°C and 2°C involves rapid, deep and in most cases immediate greenhouse gas emission reductions from all sources and sectors, particularly from CO2 from fossil fuel combustion.

EPA seems to claim there needs to be a link showing that emissions from EGUs endanger public health or welfare. EPA places importance on "the attenuated nature of the causal chain between the volume of GHG emissions from the EGU source category and potential danger to public health and welfare arising from anthropogenic climate change."[175] The issue before EPA is not whether there is a direct enough causal chain between EGU emissions and danger to public health and welfare. The relevant causal link is between the air pollution and the endangerment of public health or welfare. EGU emissions only come into play in the significant contribution determination, which does not include a criterion of causing danger.

A simple example makes this clear. Assume three sources each emit one third of the total emissions that make up the air pollution. The resulting concentration of the air pollution is high enough that it makes the air pollution dangerous, but the concentrations contributed by each source would not by itself be dangerous. The air pollution is dangerous, and contributing one third of the emissions is clearly a significant contribution to the air pollution. There is no requirement that a source's emissions be dangerous by itself.

EPA also places importance on the fact that there are multiple, diverse, and independent domestic and global sources of emissions. This is irrelevant to the contribution determination. Cf. State of Massachusetts, 549 U.S. at 525-26 ("Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions" since "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.") The question is not how many different sources emit the pollutants that end up making up the air pollution. EPA seems to argue that this multiplicity of actors makes the causal link between GHG emissions and danger from climate change less direct, and therefore less significant. This is irrelevant for the reasons discussed above.

It also fails to recognize that a million metric tons (MMT) of GHGs emitted by EGUs acts the same way as a MMT of GHGs emitted by another source, whether domestic or global. The EGUs' tons end up well mixed in the atmosphere along with all of the tons emitted by other sources.[176] The endangerment comes from the aggregate concentration of GHGs in the atmosphere, the air pollution. The issue in this rulemaking is not whether the air pollution endangers; that is a given. The issue here is whether the emissions from EGUs make a significant contribution to the total amount of GHGs in the atmosphere comprising the air pollution. The number and location of all of the other sources of GHGs is irrelevant to making a judgment about the degree of contribution from EGUs.

Finally, EPA again improperly ties its judgment on contribution to the effects that control measures would have in terms of reducing the danger from the air pollution. EPA states that "emissions of an air pollutant by a source category cannot be said to contribute significantly to a third or fourth order adverse consequence involving multiple independent domestic and global actors unless the contribution is sufficiently significant that regulation would have a discernable impact on the potential danger."[177] As discussed above, the impact of future control measures, including their effectiveness in addressing the air pollution, is not a factor that is legally relevant in determining the

[175] 90 FR at 25767.
[176] This comparison assumes the same pollutant is involved, e.g. an MMT of CO2 from one source compared to an MMT of CO2 from another source, or an MMT of CH4 compared to another MMT of CH4.
[177] 90 FR at 25767.

threshold issues of significant contribution and endangerment. The many and varied issues concerning appropriate control measures arise after EPA makes an affirmative determination on contribution and endangerment. Both the Supreme Court and the D.C. Circuit have made clear issues concerning the kinds and impacts of future control measures are not relevant in making the threshold scientific judgments on contribution and endangerment.

(c) Common, ordinary meaning of "significant/significance," "contribution."

EPA claims that the "ordinary meaning" of the term significant contribution supports its proposed interpretation of that phrase. The ordinary meaning of these terms, read in context as they must be, do just the opposite.

The term contribution means "to have a share in bringing about (a result); be partly responsible for."

> The ordinary meanings of the words "contribute" and "factor" suggest that the phrase "contributing factor" is broad indeed. See Webster's New World College Dictionary 317 (4th ed. 1999) (*defining "contribute," in the relevant sense, to mean)*; id., at 508 (defining "factor" as "any of the circumstances, conditions, etc. that bring about a result"). Showing that an employer acted with retaliatory animus is one way of proving that the protected activity was a contributing factor in the adverse employment action, but it is not the only way. (emphasis supplied) *Murray v. UBS Securities, LLC*, 144 S. Ct. 445, 455 (S. Ct. February 8, 2024).

EPA points to one possible meaning of the term significant:

> the term "significant[ ]" is defined as "having or likely to have influence or effect: important." [fn 101] "Important" is similarly defined, in turn, as "marked by or indicative of significant worth or consequence : valuable in content or relationship."[fn 102]. 90 FR at 25765.

The dictionary definition EPA relies on provides an example of this meaning – "a significant piece of legislation."

This is just one of that dictionary's primary meanings of significant. There is a parallel meaning – "of a noticeably or measurably large amount." Two examples are provided for this parallel meaning – "a significant number of layoffs" and "producing significant profits."

These are two different meanings and usages, and this difference is reflected in several other dictionary definitions.

1. https://dictionary.cambridge.org/dictionary/english/significant
important or noticeable:

Examples: There has been a significant increase in the number of women students in recent years.

The talks between the USA and the USSR were very significant for the relationship between the two

countries.

There was no significant change of blood pressure.

2. https://www.britannica.com/dictionary/significant
(1) large enough to be noticed or have an effect
Examples: A significant number of customers complained about the service.
He won a significant amount of money.
There is a significant difference in prices between the two stores.
(2) very important
Examples: a significant event in the history of our nation
Fish is a significant part of their diet.
It is significant that she never mentioned him.

3. https://www.oxfordlearnersdictionaries.com/definition/english/significant
large or important enough to have an effect or to be noticed
Examples: There are no significant differences between the two groups of students.

4. https://www.collinsdictionary.com/us/english-language-learning/significant
(1) adjective
A significant amount or effect is large enough to be important or affect a situation to a noticeable degree.
Examples: A small, but significant number of 11-year-olds are illiterate.
The number of Senators now supporting him had increased significantly.
(2) adjective
A significant fact, event, or thing is one that is important or shows something.
Examples: I think it was significant that he never knew his own father.
Your work has shown a significant improvement.
a significant increase/decrease/reduction/loss
a significant amount/number/part/portion

There are two primary meanings of "significant," and they differ in usage and general meaning. One is an indication of importance - that is the indication EPA relies on. This meaning is used to refer to the importance of a fact, event, or thing. The examples provided include:

- a significant piece of legislation (from the dictionary definition EPA relies upon)
- The talks between the USA and the USSR were very significant for the relationship between the two countries.
- a significant event in the history of our nation
- Fish is a significant part of their diet.
- It is significant that she never mentioned him.
- I think it was significant that he never knew his own father.
- Your work has shown a significant improvement.
- a significant increase/decrease/reduction/loss
- a significant amount/number/part/portion

The other primary meaning of significant is large enough to be noticed or have an effect. The examples provided include:

- a significant number of layoffs
- producing significant profits

- There has been a significant increase in the number of women students in recent years.
- A significant number of customers complained about the service.
- He won a significant amount of money.
- There is a significant difference in prices between the two stores.
- A small, but significant number of 11-year-olds are illiterate.
- The number of Senators now supporting him had increased significantly.

While there is some limited overlap between the meanings, their difference in usage is clear. The indication of importance often is typically used when referring to a single event or fact – "a significant piece of legislation," meaning an important piece of legislation, the example used in the dictionary EPA relies upon. The indication of large enough to be noticed or have an effect is typically used when referring to things or events in multiple numbers, with the size or number of things being large enough to be considered significant.

The statutory context here – volume or magnitude of emissions of air pollutants in relation to the concentration in the air of the pollutants – clearly speaks to the meaning large enough to be noticed or have an effect. That makes much more sense in this context. Congress is not addressing the importance of a piece of legislation or the importance of a historical event; it is addressing the amount of emissions and their relationship to levels of air pollution.

EPA's proposal ignores this ordinary meaning of "significant contribution." Instead, EPA focuses on importance and value, cherry-picking a definition to promote its policy goal and ignoring the statutory context for the word significant. The D. C. Circuit recently rejected this improper approach to statutory construction.

> "Pursuant to the text, as amended, the Act prohibits the FDA from approving another application "for the same drug for the same disease or condition" as an orphan-designated and approved drug during the earlier drug's seven-year exclusivity period. 21 U.S.C. § 360cc(a). Jazz argues that "same" here means "the one previously referred to; aforesaid." See Same, Collins English Dictionary 1750 (12th ed. 2014).
>
> For support, *Jazz relies on the Eleventh Circuit's interpretation of "same" in this context to mean "being the one under discussion or already referred to."* Catalyst Pharms., Inc. v. Becerra, 14 F.4th 1299, 1307–08 (11th Cir. 2021) (citing Same, Merriam-Webster's Collegiate Dictionary Online). *But the Eleventh Circuit brushes past Merriam-Webster's first sense of the adjective "same," which defines it as "resembling in every relevant respect," and instead adopts the second definition of the term without explanation*. Id. (citing Same, Merriam-Webster's Collegiate Dictionary Online). Merriam-Webster's first sense also fits with Black's contemporary definition. Same, Black's Law Dictionary 1541 (10th ed. 2014) ("Identical or equal; resembling in every relevant respect."). As a matter of ordinary meaning, a drug that is clinically superior to another drug does not resemble that drug in every relevant respect. Indeed, narcolepsy patients would most likely find it "relevant" that they no longer must wake up at night for a second dose of medication. […]
>
> It is also *a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.*" Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (quotation omitted)....

> *Beyond the context of the other subsections in section 360cc, Jazz's statutory interpretation fits poorly with the statutory scheme as amended in 2017*." *Jazz Pharms., Inc. v. Kennedy*, No. 24-5262, 2025 WL 1775121, at *5 and *16 (D.C. Cir. June 27, 2025) (emphasis added).

As noted above, contribution means "to have a share in bringing about (a result); be partly responsible for." Contribution of emissions from a source category to air pollution then means the share its emissions provide in bringing about the air pollution, the degree to which the source category is partly responsible for the air pollution. Significant contribution would be a subset of this, a contribution of emissions that is large enough to be noticed or have an effect on the air pollution.

Instead, EPA focuses on its improper definition for "significant" and argues that:

> Whether a source category's contribution to air pollution should be considered "important" or "valuable" entails consideration of the influence, effect, or usefulness of finding such contribution. If regulating emissions of a particular pollutant from a source category would have little effect on dangerous air pollution, that source category's contribution to the air pollution is not significant. By the same token, if regulating emissions would not be useful, taking into account, inter alia, the impacts on, and the Administration's policies concerning, the source category, that source category's contribution to the air pollution is not significant. 90 FR at 25765.

EPA claims a category's contribution of emissions to the air pollution is not significant if future reductions in emissions from controls are not significant in terms of addressing the dangers of the air pollution. This relies upon a meaning of significant that is not applicable in this statutory context. And it makes no sense, a simple example shows why.

Consider a case where current air pollution levels are harmful and present clear risks to the public health or welfare. Take a source category that contributes 90% or more of the total emissions that result in this level of harmful air pollution. Assume EPA projects that future adoption of emission controls would only reduce the level of the air pollution by a small amount, say 1% or even lower. Under EPA's proposal, the source category would not significantly contribute to the current air pollution. That fails logic and fails any meaningful common or ordinary usage of the term significant as used in section 111.[178]

It's easy to see the source of EPA's error. EPA is using the term significant as if it modifies EPA's remedial power. Its logic is that contribution to the air pollution cannot be significant if the remedy EPA may adopt does not discernably or noticeably or sufficiently solve the air pollution problem. That is not how Congress structured section 111 and the many other similar federal provisions described below.[179]

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[178] cf. 597 U.S. at 524 ("[EPA's] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. … They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."). See also id. at 525-26.

[179] As discussed above and in Section II.2.(b), Congress knew how to direct EPA to consider the impact of control measures when it makes a significant contribution finding. See CAA Section 169B (EPA can remove a State or portion of a State from a visibility transport region if the control of emissions will not significantly contribute to protection or enhancement of visibility in Class I areas), Section 176A (EPA may remove a State or portion of a State from the

2. Context of Section 111.

The wide variety of CAA provisions addressing federal and State emission controls supports EPN's interpretation.

(a) Federal controls.
Section 111 is just one of many provisions where Congress followed a two-step process, with the first step a threshold identifying whether EPA has authority to adopt federal controls on emissions, and a second step where Congress specifies what kind of controls EPA can adopt.

This pattern throughout the CAA clearly indicates that the two steps involved are separate and apart and involve consideration of different factors. Factors relating to endangerment and factors relating to standard setting are not relevant for determining contribution or significance of contribution.

CAA Section	**First step – threshold, identifying whether EPA has authority to adopt federal controls on emissions.**	**Second step - if threshold step met, identifying whether EPA must or may adopt federal controls.**	**Second step – specifying what kind of federal emissions controls EPA can adopt.**
Section 108	EPA lists criteria pollutants. Include on list if EPA judges cause/contribute to air pollution that endangers. 108(a)(1)(a)	If pollutant listed, EPA shall adopt NAAQS.	NAAQS must meet requirements of 109(a), (b).
Section 112	Congress lists pollutants. EPA can add to list based on adverse health effects from exposure. 112(b)(1), (2). Area sources. 112(k)(3)(B) EPA shall identify not less than 30 hazardous air pollutants which present the greatest threat to public health.	EPA shall adopt controls.	Standard setting specified. 112(d), (f).
	Accidental releases – EPA list substances which are known to cause or contribute or may reasonably be anticipated to cause death, etc., or harm environment. 112(r)(3).		Standard setting specified. 112(r)(1), (5), (7).

interstate transport commission where EPA determines control of emissions in the State will not significantly contribute to attainment of the NAAQS in downwind areas). Congress did not do this in Section 111. In addition, EPA's reliance on lack of usefulness in advancing other administration policies is unlawful, as discussed elsewhere.

Section 122	EPA determine whether radioactive and other emissions will cause/contribute to endangerment.	If affirmative determination, list under sections 108 or 112 if cause /contribute air pollution reasonably anticipated to increase mortality. List under 111 if emitting significant amounts.	Standard setting specified in sections 109, 111, or 112.
Section 202	EPA determine whether emissions cause/contribute to endangerment. 202(a)(1)	EPA shall adopt standards.	Congress specifies what kind of standards to adopt. In some cases, Congress specified level of standards. 202(a)(1), (a)(2), (a)(3), (b), (d), (f) –(k), (m).d
	EPA conducts study of need for and feasibility of means of control of air toxics emissions from motor vehicles. 202(l)(1).	EPA shall adopt standards.	Standards specified. 202(l)(2).
Section 211	EPA determines if emissions cause/contribute to endangerment. 211(c)(1)(A)	EPA may adopt controls, prohibitions.	Controls/prohibitions specified in 211(c). Congress specified various controls in (g) – (o).
Section 213	EPA determines if emissions of new nonroad are significant contributors to ozone or CO levels in more than one nonattainment area. If yes, EPA adopt standards for classes/categories which cause/contribute to such air pollution. 213(a)(1), (2).	EPA shall adopt standards. 213(a)(3).	Standards specified 213(a)(3), (4). Standards required for locomotives, 213(a)(5).
	EPA determine if any other emissions from new nonroad significantly contribute to endangerment. If yes, EPA determine if classes/categories cause/contribute to such air pollution. 213(a)(4)	EPA may adopt standards. 213(a)(4)	Standards specified. 213(a)(4).
Section 231	EPA determines if emissions cause/contribute to air pollution which endangers. 231(a)(2)(A).	EPA shall adopt standards.	Standards specified. 231(a)(2)(A),(B); (b)
Section 303	EPA determine if pollution sources present imminent, substantial endangerment. 303.	EPA may sue to enjoin persons.	EPA may sue to enjoin any person who cause/contribute to the pollution to stop emissions that cause/contribute.

Section 602	Congress lists substances. EPA shall add to list if find cause/contribute significantly to harmful effects on the stratosphere. 602(a),(b).		Congress specifies phase out of substances. 604, 605.
Section 615	EPA judges whether a substance, practice, etc. may reasonably be anticipated to affect the stratosphere and such effect may reasonably be anticipated to endanger public health or welfare.	EPA shall regulate.	EPA shall promptly regulate such substance, practice, etc.

Congress consistently set up a two-step structure in determining whether and how EPA was authorized to adopt federal controls for emissions. The first step involves identifying whether EPA has authority to adopt controls. In many cases this involves a determination whether emissions from certain sources cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In some cases Congress specified that significant contribution was an element of the threshold test. In some cases, Congress itself made the threshold authority determination, e.g. section 112's list of HAPs and section 602's list of substances.

Congress also specified whether EPA must or may adopt controls, and specified what kind of controls EPA could adopt. Typically, Congress specified factors that EPA had to consider in setting standards. In some cases, Congress went into some detail in specifying the kind of control, in other cases Congress provided EPA great discretion in determining the kind of control to adopt.

The consistency of Congress' use of this structure throughout the Act makes it clear that Congress was acting intentionally. Congress intended that the first threshold question was determining when EPA had authority to adopt controls, and the second step was specifying what kind of controls EPA could adopt. These steps address different questions, and different factors are relevant to answering each of those questions. In section 111, EPA's role is to determine whether emissions from certain sources contribute significantly to certain air pollution. This determination is separate from and does not involve whether the air pollution endangers and does not involve what kind or the impact of emissions controls EPA may adopt in the future if EPA makes an affirmative threshold determination.

(b) State controls, SIPs.

Congress did not follow this consistent structure when it addressed a different question – when and how should EPA require States to address emissions controls in their SIPs?

(i) State SIPs are largely designed to achieve attainment and maintenance of the NAAQS set by EPA. The NAAQS are the result of the two-step process Congress set for EPA in sections 108 and 109. Most of Congress' direction to states concerns what elements a state SIP must contain to address emissions of the NAAQS pollutants, when a state has to achieve attainment of the NAAQS, and what happens if it does not.

(ii) In section 110, Congress addressed when a state SIP had to contain measures to address emissions from the State that affected the air quality of downwind states. Congress specified that a state SIP had to contain provisions that prohibit sources from emitting amounts of emissions which contribute significantly to nonattainment in downwind states. This is called the Good Neighbor provision.[180]

Congress chose to structure the contribution finding in section 110's Good Neighbor provision differently than how Congress chose to structure the contribution finding in section 111. In section 110, the contribution finding performs two functions – it identifies the threshold question of whether the state has to include provisions to control emissions, and it identifies the amount of emissions that must be controlled. As noted earlier, Congress did not choose to combine these two steps for section 111, contrary to EPA's proposal.

(iii) In Part C, Congress addressed visibility impairment. EPA determines areas where visibility is an important value. States with listed areas must adopt SIP provisions that make reasonable progress to address visibility impairment. In addition, states that may reasonably be anticipated to cause or contribute to visibility impairment in listed areas have to adopt such SIP provisions.[181]

EPA also establishes a visibility transport region and adds a state or portion of a state to the region if there is significant contribution to visibility impairment in a Class I area. EPA can remove a state or portion of a state if the control of emissions will not significantly contribute to protection or enhancement of visibility in Class I areas under section 169B. In this case, unlike section 111, EPA looks at the results of standard setting — for purposes of removal, the degree of contribution is based on the level of emissions remaining after controls are adopted — before determining whether standards will be required.

(iv) Congress adopted the same approach to an interstate transport commission concerning NAAQS pollutants. Section 176A establishes an interstate transport commission where EPA determines interstate transport of pollutants that contribute significantly to NAAQS violations in other states. States or portions of states are added to the commission based on a determination of significant contribution to NAAQS violations, and states or portions of states are removed where EPA determines control of emissions in the state will not significantly contribute to attainment of the NAAQS in downwind areas.[182] As with visibility impairment, Congress specified when EPA's determination of contribution would take into account the level of emissions after controls were adopted. This is different from the approach Congress employed for section 111 and the federal controls noted above.

For both visibility impairment and interstate transport of NAAQS pollutants, it is important to note that the decision to initially include a state or portion of the state is based on contribution prior to controls, as in the federal controls noted above. It is only when Congress addressed removal of a state or portion of the state that it authorized EPA to consider the level of emissions after controls are adopted in making the contribution finding.

(c) Overall.

[180] Section 110(a)(2)(D)(i)(I).
[181] Section 169A(a)(2), (ii).
[182] Section 176A(a).

It is clear Congress knew how to authorize EPA to consider the impacts of future emissions controls when it made a contribution finding. It did not take this approach in section 111 and did not take it in the many similar provisions for federal controls noted above.

The different Congressional approach for provisions addressing states and for provisions addressing federal controls, combined with the consistency of the two-step approach employed for the provisions on federal controls, make it clear that under section 111 the characteristics that make a source category's contribution significant are separate and distinct from the characteristics that make air pollution dangerous, separate and distinct from the characteristics and impacts of the standard setting that occurs only if an affirmative threshold determination is made, and separate and distinct from other policy considerations of the administration.

B. Past EPA practice.

For many decades EPA determined contribution under a variety of provisions addressing EPA's authority to adopt emissions controls. Throughout, EPA's core focus has been evaluating the inventory of emissions from the relevant sources, and in many cases comparing this inventory to inventories of other relevant sources and groups of sources. Several examples are included in this table.

CAA Section, Air Pollutant, and Emissions Control		**Date Enacted**
Section 202(a)		
GHGs	74 FR 66496, 66506, 66507-508, 66515-516, 66537-540, 66541-545)	December 15, 2009
Section 231(a)		
GHGs	81 FR 54422, 54424, 54426-427, 54434-438, 54459-4, 5446-474	August 15, 2016
CO, HC, NOx	38 FR 19088, 19089	July 17, 1973
Pb	88 FR 72372, 72378-385, 72393-393, 72397-402	October 20, 2023
Section 213(a)(2),(3),(4)		
Large CI land based >37Kw (CO, NOx, VOC, PM, smoke)	59 FR 31306 Significant contribution finding. 59 FR at 31307-310. Large CI – contribution finding, (a)(3), (a)(4). 59 FR at 31309.	June 17, 1994

Small CI land based <37Kw (CO, NOx, VOC, PM, smoke)	63 FR 56968 Contribution finding 63 FR at 56968-969	October 23, 1998
Large SI, Recreational (Regional haze, visibility HC, NOx, CO, PM)	67 FR 68242, 68242-249	November 8, 2002
Nonroad Diesel (regional haze, visibility)	69 FR 38958, 38963	June 29, 2004
Section 211(c)(1)		
Highway Diesel S (PM)	66 FR 5002, 5006-07, 5008; RIA Appendix A pp. A1-A3.	January 18, 2001
Nonroad Diesel S (PM)	69 FR 38958, 38962, 38963 ; RIA pp2-1 – 2-3, Chpt. 5 Appendix 5A pp 5-99 – 5-101.	June 24, 2004
Highway Gasoline S (PM)	65 FR 6698, 6703; RIA Appendix D, pp D-2 – D-3.	February 10, 2000
RFG (NOx)	59 FR 7716, 7745, 7750-752	February 16, 1994
Section 111(b)		
Initial list	36 FR 5931	March 31, 1971
Additional list	38 FR 15406	June 11, 1973
Primary Aluminum plants	39 FR 37668, 37730	October 23, 1974
Petroleum refinery Sulfur recovery plants	41 FR 43866	October 4, 1976
MSW Landfill	56 FR 24468, 24473-474	May 30, 1991

C. Best interpretation of significant contribution as used in Section 111.

All of the above analysis strongly shows that the best interpretation of Section 111(b)'s term "significantly contributes" is as follows:

> Contribution of emissions from a source category to air pollution means the share of emissions that the category provides or is responsible for in bringing about the air pollution. Significant contribution is a subset of this –- a contribution that is large enough to be noticed or have an effect on the air pollution.

The requirement that EPA exercise its judgment refers to judgment on issues that are relevant to contribution. The text and structure set by Congress call for EPA to judge contribution to air pollution at a point when EPA has no authority to adopt future emissions controls. That authority follows from the determination EPA makes; it does not exist at the point Congress requires a determination on contribution. The potential for future emissions reductions if EPA makes an affirmative determination on contribution is not relevant to the prior threshold issue of contribution. Likewise, the effects of future controls on other policies of the administrations are not relevant to EPA's judgment on contribution.

As shown in EPA's many past determinations on contribution, the primary metric to evaluate contribution involves magnitude of emissions, and the relationship this magnitude has to the level of air pollution that endangers. In many cases this becomes a relative comparison of magnitude of emissions from the source category to the magnitude of emissions from other parts of the total inventory of emissions. To make an apple to apple comparison, this relative comparison typically considers the magnitude of the source category's emissions and compares it to the magnitude of various other inventories, such as the total emissions that produce the air pollution, and the total emissions from various subsets of sources that are part of the total inventory. In specific cases there may be additional metrics that can be useful, but this kind of comparison of magnitudes is a core and primary factor in evaluating the relationship between a source category's emissions and the levels of air pollution of concern.

D. EPA's proposed interpretation is unlawful.

EPA's proposed interpretation of significant contribution is based on two different kinds of considerations.[183] Each of them is unlawful.

1. One kind of consideration that EPA relies upon concerns factors that are relevant to determining appropriate control measures under section 111(a) once an affirmative contribution/endangerment finding is made under section 111(b). This includes the projected impacts of such control measures and their impact on the endangerment, as well as consideration of how the control measures would affect the administration's overall policy on energy production.

Under this umbrella, EPA considers the effectiveness of emissions reduction controls, the cost effectiveness and reasonableness of those controls, and the impacts on the industry. EPA also considers the impact that emissions reductions under the projected controls would have on reducing the endangerment from the air pollution. Finally, EPA takes into consideration the impact of the controls on the President's overall policy on energy generation.

After evaluating these factors EPA concludes that there are serious flaws in the current standards and that it is unlikely that EPA could develop a BSER that would result in "any meaningful, cost reasonable GHG emission reductions," and therefore "the contribution of this source category to GHG air pollution is not significant."[184] EPA determines that "only extraordinary emissions reductions on a global scale would have any impact on the potential endangerment of public health

[183] 90 FR at 25755, 765-768.
[184] 90 FR at 25766.

and welfare in this context," and therefore "GHG emissions from the EGU source category do not contribute significantly to dangerous air
pollution."[185] EPA also relies upon a claim that even if all GHG emissions from EGUs were eliminated, "the risks to public health and welfare attributed to anthropogenic climate change would not be meaningfully different."[186]

EPA proposes that controls on EGUs would interfere with "this Administration's national policy that energy production is essential to the public welfare" (referring to the statutory definition of "welfare" in CAA Section 302(h)) and "[t]his entails continued and increasing reliance on fossil fuels to meet increasing demand for electricity generation."[187] This "Administration's priority is to promote the public health and welfare through energy dominance and independence secured by using fossil fuels to generate power."[188]
The other kind of consideration involves factors characteristic of the global nature of GHG emissions sources and GHG air pollution. EPA relies upon principles of proximate cause from the area of tort law to find that there is a higher threshold for contribution because there are multiple intervening actors and various uncertainties and extrapolations needed to draw a causal link between EGU emissions and the adverse domestic effects of climate change. The "attenuated causal chain" requires a "greater volume and percentage of contribution than a more direct causal relationship to account for the degree of uncertainty and extrapolations involved."[189]

This also considers claims that EGU emissions are a "small and decreasing part of global emissions"[190] because of a "large and growing share of GHG emissions from international sources."[191]
EPA bases its authority to take these various factors into consideration on the use of the term "judgment," the alleged ordinary meaning of the undefined term "significant," and EPA's prior interpretation of the CAA's Good Neighbor provision, involving obligations on states to address interstate transport of pollutants.

2. The various factors EPA considers in the first area are legally irrelevant and are unlawful for EPA to consider in determining significant contribution under section 111(b).[192] Section 111, like many other provisions in the Act, addresses federal authority to establish emission controls on source categories using a two-step approach. The first is a threshold step. EPA is to determine whether air pollution is reasonably anticipated to endanger public health or welfare and determine whether a source category contributes significantly to this air pollution. If and only if EPA makes an affirmative determination, EPA has authority to and must adopt emissions controls on the source category. Congress specifies the nature of appropriate emission controls in section 111(a), defining "standard of performance," BSER. Under this two-step approach, contribution and endangerment are determined first and are separate and distinct from the subsequent determination of the appropriate emission controls. This is the approach taken by Congress in section 111, and it is mirrored by many other provisions throughout the Act addressing when EPA has authority to adopt

[185] Id.
[186] 90 FR at 25768.
[187] 90 FR at 25766.
[188] 90 FR at 25755.
[189] 90 FR at 25767.
[190] 90 FR at 25755.
[191] 90 FR at 25768.
[192] The discussion here incorporates all of the prior analysis of EPA's proposed interpretation.

emissions controls on sources. Under this approach, the factors that determine BSER and the impacts from BSER are irrelevant to the factors that determine contribution or endangerment.

As discussed above, both the Supreme Court and the D.C. Circuit have been clear that the factors EPA considers in the first area are irrelevant to the scientific judgment that must be made concerning significant contribution. EPA may not consider the standard setting factors of cost, cost effectiveness, or cost reasonableness in determining significant contribution. EPA may not consider the degree of mitigation of the air pollution's harms that an appropriate emissions control might achieve. EPA may not consider other policies of the administration, such as an overall policy to promote use of fossil fuels to generate electricity.
The agency's invocation of national energy policy to increase fossil fuel utilization, and its reliance on "welfare" to justify this consideration, is clearly improper. EPA is considering a factor legally irrelevant to the threshold contribution determination. EPA's authority to interpret significant contribution under section 111 is limited to factors legally relevant to air pollution. EPA has no authority to interpret this provision as a backdoor way to adopt and implement a national energy policy that promotes use of fossil fuels to generate electricity.[193] EPA's effort to justify its invocation of national energy policy by considerations of public welfare is of no avail. That definition is relevant to the endangerment determination, which is not at issue in this rulemaking. In addition, that general definition does not authorize EPA to incorporate any one of a myriad number of national, societal impacts of potential future control measures as a factor EPA can lawfully consider in determining significance of contribution, a threshold step that precedes EPA having authority to adopt control measures.[194]

The courts are clear that EPA's "judgment" is constrained to only consider the factors that are legally relevant when determining contribution. It is not permission to consider a wide range of factors and allegedly desirable policy considerations.[195]

In addition, the undefined term "significant" does not support EPA's proposal. EPA relies upon a meaning of significant ("important") that is not relevant in this context. As discussed above, the ordinary meaning of significant that is appropriate in this context is "large enough to be noticed or have an effect."[196] EPA ignores this meaning and instead relies on a meaning that does not apply in this context.

As discussed above, the Act's Good Neighbor SIP provision does not support EPA's proposed interpretation, it undermines it. The Good Neighbor provision is distinctly different from the significant contribution finding in section 111. The contribution finding in the Good Neighbor provision performs two functions – it identifies whether the state has to include provisions in its SIP to control emissions, and it identifies the exact amount of emissions that must be controlled.[197] This is distinctly different from section 111. The SIP provision combines two questions (duty to adopt controls and amount of reductions required by the controls), while these two questions are kept

[193] *West Virginia v. EPA*, 597 U.S. 697, 728-731(June 30, 2022).
[194] See id., *West Virginia v. EPA*.
[195] EPA's reliance on *Michigan v. EPA*, 576 U.S. 743, 753 (see 90 FR 25765, fn.104) is apposite. That case concerns a very different statutory provision in section 112(n)(1)(A), calling for EPA to determine whether "regulation is necessary and appropriate" with respect to emissions of HAPs from electric utility steam generating units.
[196] As discussed below, the emissions from EGUs are far and away large enough to be noticed and have an effect.
[197] States must "prohibit[]… amounts [of any air pollutant] which will contribute significantly to [nonattainment or maintenance of attainment in a downwind State]" Section 110(a)(2)(D). See the discussion of this provision above.

separate in section 111 (authority to adopt controls, based on contribution/endangerment determination; and achievement of emissions controls through the separate standard setting provision, BSER). The Good Neighbor provision and other SIP provisions concerning transport make it clear that Congress knew how to authorize EPA to consider factors related to emissions control when making a significant contribution finding. Congress did not do so in section 111(b).

3. In the second area of consideration, EPA improperly relies upon principles of "proximate cause," taken from the common law of tort. These tort principles have no relevance in interpreting section 111(b)'s significant contribution determination. As discussed above, these principles address suits by private parties seeking to recover monetary damages for injuries allegedly caused by another party's conduct. The case law cited by EPA addresses this situation, where the alleged injury is caused by conduct that is prohibited by statute. These situations have nothing to do with a federal statute addressing the scope of an administrative agency's authority to adopt emission controls to address air pollution problems. It is improper for EPA to rely on these tort principles as a basis for determining contribution at all, much less deciding there is a heightened threshold for making such a determination.

As discussed above, EPA's reliance on the alleged attenuated causal link between EGU emissions and harm from global climate change mixes up issues relevant to determining endangerment and issues relevant to determining contribution. The attenuated causal linkage is largely a consideration already taken into account in making the endangerment finding, a finding EPA does not contest, and which has only become scientifically more certain over time. Likewise, the consideration of the existence of multiple and diverse domestic and foreign sources of GHG emissions is irrelevant, especially given the nature of the air pollution as a well-mixed aggregate of gases, where what matters is the amount of emissions of the specific pollutant, not the identity or characteristics of the source. Finally, as discussed above the courts have been clear that the global nature of the air pollution and its sources does not authorize EPA to base its decision on a claim that the relative contribution of EGUs is "just too small" when compared to total global emissions. EPA must look at the size of the category's emissions in a context where there are many countries and sources; various comparisons are highly relevant, such as comparisons between the source category and the U.S. total, and comparisons to other countries. It is improper to narrowly focus on a comparison between the source category and the global total. The courts are also clear that the projected future increase in emissions from some other countries and the inability of controls on the source category by itself to make a large impact on the global air pollution problem is not a valid reason to make a negative determination on contribution.
For all of these reasons, including the more detailed discussion above, EPA's proposed interpretation and application of its interpretation is unlawful.

4. Based on its proposed negative determination on significant contribution, EPA proposes to "repeal all greenhouse gas standards for the power sector, specifically the 2015 NSPS and the CPS."[198] Even assuming the validity of EPA's proposed negative determination, it does not authorize EPA to cancel the pre-existing and lawful GHG standards for these sources. A valid negative determination on significant contribution might mean EPA would no longer have authority to adopt new or additional GHG standards for this source category. But the pre-existing GHG standards for this source category were lawfully adopted under a valid finding of significant contribution. The D.C. Circuit upheld the lawfulness of EPA's prior significant contribution finding, and EPA's proposed

[198] 90 FR at 25768.

negative determination on contribution does not change or undermine the validity of EPA's prior affirmative determination. EPA's proposed negative determination on significant contribution has no legal effect on EPA's prior standard setting for this category and is not a lawful basis for EPA to cancel the existing GHG standards.

E. Under the best interpretation of significant contribution, EGU's clearly meet the significant contribution criterion.

In its 2015 rulemaking, EPA determined that GHG emissions from EGUs contributed significantly to the endangerment from GHG air pollution. EPA found that emissions from EGUs amounted to about one-third of all U.S. emissions. EGUs were far and away the largest stationary source of GHG emissions — emissions from EGUs were about three times the level of the next 10 categories of stationary sources combined. A single new coal fired power plant could emit millions of tons of GHGs. Emissions from EGUs far exceeded in magnitude the emissions from motor vehicles. EPA specified the very large level of emissions from these sources in Tables 3 and 4.[199]

The D.C. Circuit found this evidence more than enough to justify a significant contribution finding.

> The *EPA … chose to regulate carbon dioxide emissions from electricity-generating plants specifically because greenhouse gas pollution endangers public health and welfare and contributes significantly to air pollution. See id. at 64,530–64,531*. The EPA found in particular that increased atmospheric levels of greenhouse gases, including carbon dioxide, could lead to, among other things, more frequent extreme weather events and wildfires; threats to mental and physical health, especially for children and the elderly; reduced access to food and safe water; and mass migrations and displacements as a result of rising sea levels. *Id.* at 64,517–64,520. […]
>
> *Given that the United States, at the time of the endangerment finding, was the second-largest emitter of greenhouse gases in the world*, see 2009 Endangerment Finding, 74 Fed. Reg. at 66,538, *it was not arbitrary or capricious for the EPA to conclude that the source of close to one-third of those emissions is a significant contributor to air pollution by any measure.* The global nature of the air pollution problem means that *"[a] country or a source may be a large contributor, in comparison to other countries or sources, even though its percentage contribution may appear relatively small" in the context of total emissions worldwide.* Id. Looking just at the Coal Petitioners' calculations, *power plants contributed a hefty 4.5 percent to global greenhouse gas emissions in 2013*. See Coal Pet'rs Br. 18. More to the point, *a holding that greenhouse gas emissions by fossil-fuel-fired power plants are not significant would make it nigh impossible for any source of greenhouse gas pollution to cross that statutory threshold.*17 For those reasons, we hold that the New Source Rule's endangerment finding provided a sufficient basis for the EPA's promulgation of the ACE Rule." (emphasis added) *Am. Lung Ass'n v. Env't Prot. Agency*, 985 F.3d 914, 977 (D.C. Cir. 2021), rev'd on other grounds and remanded sub nom. *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

The current situation is very similar to the situation before EPA in 2015.

[199] 80 FR at 64522-523, 530-531.

1. The U.S. is still the second largest emitter in the world.[200]
2. EGUs are still a very large percentage of total US GHG emissions (25%). EGU emissions are the second largest source of emissions in the U.S., just behind transportation at 28%.[201] CO_2 emissions from coal burning power plants alone rank as the second largest source category in the US GHG inventory, after mobile sources.[202]
3. EGUs emit more greenhouse gases than all of the U.S. Industry sector combined.[203]
4. The global power sector is the largest source of GHG emissions, outranking industry, transport, buildings, agriculture, and other global sectors.[204] Global emissions of CO2 from the power sector were 14,650 MMT CO2, with the U.S. power sector emitting 11% of the global power sector's emissions.[205]
5. U.S. EGUs emit more GHGs than all of the countries in the world, with the exception of three countries – China, India, and Russia. Again – only three countries in the world emit more GHGs than U.S. EGUs.[206]

Here are some examples[207]:

China	15,160
India	3,897
Russia	2,622
[U.S. EGUs	1,577]
Brazil	1298
Indonesia	1152
Japan	1107
Iran	960
Saudi Arabia	787
Germany	762
Canada	745
Mexico	687
Australia	569
France	416

[200] U.S. EPA, "Global Greenhouse Gas Overview," https://www.epa.gov/ghgemissions/global-greenhouse-gas-overview, ("Emissions by Country").
[201] Total U.S. emissions for 2022 are 6343.2 MMT CO2 Eq. EGUs are 1577.5, Transportation is 1801.5. Transportation is 28% of total U.S. emissions. "Table ES-5," U.S. EPA, "Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2022," EPA 430-R-24-004, April 2024 (hereafter "U.S. GHG Inventory 2024"), https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks.
[202] "Figure ES-16," U.S. GHG Inventory 2024.
[203] "Figure ES-13," "Table ES-5," U.S. GHG Inventory 2024.
[204] "Figure 5," International Energy Agency, "CO2 Emissions in 2022," https://www.iea.org/reports/co2-emissions-in-2022.
[205] 1577.5 MMT CO2 Eq./14,650 MMT CO2. Table ES-5, U.S. GHG Inventory 2024, p.9, International Energy Agency, "CO2 Emissions in 2022," https://www.iea.org/reports/co2-emissions-in-2022.
[206] https://www.climatewatchdata.org/ghg-emissions?end_year=2022&start_year=1990. Also see "Table 1," European Commission, Joint Research Centre, "GHG emissions of all world countries, 2024", https://data.europa.eu/doi/10.2760/4002897.
[207] Data for 2022, in Mt CO2eq/yr. "EDGAR GHG emissions," (Edgar_2024_GHG_Booklet_2024, xlsx), https://edgar.jrc.ec.europa.eu/report_2024#emissions_table

The global nature of air pollution has not changed. EGUs are still very large contributors in comparison to other countries and other sources. "While the percentage contribution of this sector may appear relatively small in comparison to total emissions worldwide, "[t]he global nature of the air pollution problem means that "[a] country or a source may be a large contributor, in comparison to other countries or sources, even though its percentage contribution may appear relatively small" in the context of total emissions worldwide. […] More to the point, a holding that greenhouse gas emissions by fossil-fuel-fired power plants are not significant would make it nigh impossible for any source of greenhouse gas pollution to cross that statutory threshold."[208] EPA's view that EGUs are "only" 3% of total global emissions is of no import in this global context.

The Supreme Court recognized the same, when it addressed standing issues:

> Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere—according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. ¶ 30, Stdg. App. 219. That accounts for more than 6% of worldwide carbon dioxide emissions. Id., at 232 (Oppenheimer Decl. ¶ 3); see also MacCracken Decl. ¶ 31, at 220. To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world outpaced only by the European Union and China.22 Judged by any standard, U. S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming. *Massachusetts*, 549 U.S. at 524-525.

All of this shows that EGUs are clearly very significant contributors to global concentrations of GHGs.

It is also clear that this situation is not likely to change anytime soon. Demand for electricity and therefore electricity generation will increase in the future, leading to the potential of even greater emissions levels from EGUs absent appropriate regulation and increased use of renewable or non-emitting energy. Levels of GHG emissions are not static over time. Although U.S. emissions from the power sector have declined in recent years due in part to shifts among fuel types (e.g., from coal to natural gas and renewable energy), there are no guarantees that emissions won't rise in the future. The administration and Congress are taking multiple actions currently that are specifically designed to result in increased fossil fuel emissions in the power sector, such as executive actions that add barriers to renewable energy (e.g., canceling permits for new offshore wind projects), its efforts to rescind Greenhouse Gas Reduction Grants, the removal of tax credits for renewable energy in the "Big Beautiful Bill," and the devaluing of energy efficiency (e.g., eliminating the office in EPA that implements the Energy Star program).

Demands for electricity are also increasing due to changes in technology, society, and economic factors, such as increasing electrification of buildings (e.g., appliances and heating), transportation (e.g., growth in electric vehicles), and industry, particularly rapid growth in cloud computing, artificial intelligence applications (e.g., ChatGPT and Claude), data centers, and cryptocurrency mining (e.g.,

[208] *Am. Lung Ass'n v. Env't Prot. Agency*, 985 F.3d at 977. In any case, in the global context, 3% of global emissions is a significant contribution to emissions. Id. at 977 ("power plants contributed a hefty 4.5 percent to global greenhouse gas emissions in 2013").

bitcoin and stablecoin). Policy efforts by the administration to expand domestic manufacturing could also prompt increasing US electric power demand.

The growth in demand for power for data centers and digital currency mining is particularly striking. These facilities consume large amounts of power both for running their computing equipment and to keep the equipment cool. Because these facilities need to run 24/7 with no downtime, they have installed backup diesel generators in the event of outages, which could increase emissions from the sector in the future. Regional transmission organizations (which coordinate multi-state wholesale power delivery) have been forecasting increased growth in these sectors, such as 60 percent growth in the Midwest region over the next twenty years.[209] The U.S. Department of Energy (DOE) projected in 2024 that energy use from data centers alone has tripled over the past decade and could grow from 4 percent in 2023 to 7 to 12 percent of total US electricity demand in the next 3 years (i.e., by 2028).[210]

EPA instead focuses on the trend for other countries to increase their use of fossil fuels. EPA states that:

> This relative decline is driven in part by increases in GHG emissions from developing countries that are rapidly electrifying and increasing their energy demands, including through the robust deployment of fossil fuel-fired EGUs—a trend that is likely to persist going forward. … Limiting the use of coal and other fossil fuels in U.S. EGUs does not significantly impact global GHG concentrations when other countries continue to increase their use of fossil fuels. The EPA proposes to find that the large and growing share of GHG emissions from international sources strengthens the conclusion that U.S. fossil fuel-fired electricity generation, including U.S. coal use for electricity generation, does not contribute significantly to globally elevated concentrations of GHGs in the atmosphere. 90 FR at 25768.

This ignores consideration of future increases in electricity demand and therefore potential increases in emissions from the U.S. power sector. In addition, the Supreme Court rejected this approach in a related context, involving standing. The Court said:

> For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.
>
> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 489 (1955) ("[A] reform may take one

[209] Testimony of Jennifer Curran, Senior Vice President, Planning and Operations Midcontinent Independent System Operator, Inc. (MISO) Before the House Committee on Energy and Commerce, Subcommittee on Energy, March 25, 2025 - https://democrats-energycommerce.house.gov/sites/evo-subsites/democrats-energycommerce.house.gov/files/evo-media-document/witness-testimony_curran_eng_grid-operators_03.25.2025.pdf

[210] See the LBNL report from 2024 at https://escholarship.org/uc/item/32d6m0d1.

> step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed. Cf. *SEC v. Chenery Corp.*, 332 U. S. 194, 202 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations"). That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law. *Massachusetts*, 549 U.S. at 523-524.

Likewise, the Court stated that:

> Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. 549 U.S. at 525-26.

Overall, it is clear that GHG emissions from EGUs contribute significantly to air pollution that endangers public health and welfare, under the best reading of the term significant contribution as used in CAA section 111.

F. Conclusion.

The best interpretation of significant contribution in section 111 is that contribution of emissions from a source category means the share of emissions that the category provides or is responsible for in bringing about the air pollution. Significant contribution is a subset of this - a contribution that is large enough to be noticed or have an effect on the air pollution. The facts are clear - emissions from fossil fueled EGUs contribute significantly to GHG air pollution.

EPA's proposed interpretation of significant contribution is unlawful. It is inconsistent with the text and context of the statute and with EPA's past practice over many decades. The Supreme Court and the D. C. Circuit have clearly rejected the approach EPA takes in its proposed interpretation. Even if its proposed finding of no significant contribution were valid, it does not authorize EPA to cancel the current GHG standards. The current standards were lawfully adopted under a valid finding of significant contribution. EPA's proposed negative determination is not a valid basis for EPA to cancel the lawful, pre-existing GHG standards.

IV. EPA's Proposal Contains Rationales Not Supported by Evidence

In addition to being legally flawed, EPA's proposal is arbitrary and capricious because it is based on statements that are unsupported by evidence. This fails the most basic test of administrative law. "Our well-worn arbitrary-and-capricious standard ensures that an administrative agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983)." [211] Specifically, CAA section 307(d)(3) states:

[211] *FDA v. Wages and White Lion Investments, LLC,* 604 U.S. ___ (2025) (not published yet)

> In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose […] The statement of basis and purpose shall include a summary of—
>
> (A) *the factual data* on which the proposed rule is based;
>
> (B) *the methodology used in obtaining the data and in analyzing the data.* (emphasis added)

This proposal fails to meet that test. Among the many examples of "rationales" without support are:

EPA says that this action is consistent with "this Administration's priority is to promote the public health or welfare through energy dominance and independence secured by using fossil fuels to generate power." However, EPA does not show how increased fossil fuel use will improve either public health or welfare.

1. According to the US Energy Information Administration, the U.S. has been a net energy exporter since 2019 and had record high energy exports in 2023 (last year of available data). So, by any reasonable definition, the U.S. is already energy independent.

2. To the extent that there are any benefits to increased fossil fuel energy production, they come from the value of an increased energy supply. But increasing the U.S. energy supply is inconsistent with this administration's actions to decrease energy production from the renewable energy sector which we detailed earlier in our comments. By its own actions, the administration shows that increasing U.S. energy supply is NOT the actual objective. It is not clear what the administration's actual objective is, but EPA is acting like the actual objective is to increase pollution. This runs contrary to the first listed purpose of the CAA which says, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[212]

3. The proposal says that significant increases in GHG emissions from other countries, particularly China and India, will swamp any reductions in U.S. GHG emissions. Besides being irrelevant (both legally and morally as we cannot excuse the pollution we create by saying they do it too), the facts are that world emissions are peaking. The World Economic Forum reports that world "[e]nergy-related emissions are on the cusp of a prolonged period of decline for the first time since the Industrial Revolution. Peak energy emissions is here."[213] Emissions from China are peaking,[214] while India just recently hit the 50% of non-fossil power milestone ahead of its 2030 target.[215] This means that if the administration goes forward with all its plans, U.S. EGUs will have an increasing percentage of world GHG emissions.

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[212] CAA Section 101(b)(1).

[213] https://www.weforum.org/stories/2024/11/peak-energy-emissions-a-historic-moment-overshadowed-by-the-endurance-of-fossil-fuels/

[214] https://www.carbonbrief.org/analysis-clean-energy-just-put-chinas-co2-emissions-into-reverse-for-first-time/

[215] https://www.reuters.com/business/energy/india-hits-50-non-fossil-power-milestone-ahead-2030-clean-energy-target-2025-07-14/?utm_source=cbnewsletter&utm_medium=email&utm_term=2025-07-15&utm_campaign=Daily+Briefing+India+hits+energy+milestone+EU-China+summit+Catastrophe+bond+sales.

The proposal quotes from Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241. "The Executive Order specifically found that "beautiful clean coal resources will be critical to meeting the rise in electricity demand due to the resurgence of domestic manufacturing and the construction of artificial intelligence data processing centers" and to increasing "energy supply," lowering "electricity costs," stabilizing the power grid, creating "high paying jobs," supporting "burgeoning industries," and assisting allies abroad." Again, EPA does not provide any information to back the Executive Order's pronouncements. The administration can say whatever it wants, but rulemakings require a record that supports the decision made. EPA cannot blindly rely on administration policy statements without producing evidence to support the connection between those statements and legitimate CAA objectives. Failure to do so is arbitrary and capricious.

A key part of administrative law is that agencies have to undertake reasoned decision making. EPA cannot use an Executive Order as the basis for a rulemaking without facts to support the positions in the order. Otherwise, the Administrative Procedure Act (APA) and judicial review of regulations would be meaningless if all an agency has to do is point to an Executive Order as justification for every rule they promulgate. It is worth noting that the administration's actions in the energy field are increasing the costs of electricity and not lowering them.[216]

In addition, while the Executive Order talks about promoting "Beautiful Clean Coal," this action appears to be the first of a number of deregulations that will eliminate the requirements that might actually make the use of coal clean. The administrator's list of deregulatory actions shows almost half of them would have the effect of making coal dirtier.[217]

As we pointed out above, EPA claims in its proposal that there it is a "particularly demanding analytical task by evaluating the significance of contribution to global, well-mixed air pollution that results from a combination of pollutants from a large and diverse array of sources that in turn, creates elevated global concentrations that, in turn, the Agency determined play a causal role in environmental phenomena that, in turn, the Agency determined adversely affect the public health and welfare." This results in an "attenuated chain of causation" involving "multiple intervening actors, uncertainties, and extrapolations necessary to draw a connection between emissions by a source category and dangerous air pollution in the form of adverse effects in the U.S. from anthropogenic climate change." Our earlier comments focused on how this statement is irrelevant to this deregulatory action. Not only are these statements legally irrelevant, they are factually unsupported and false. There is a clear scientific link between emissions and damages and the fact that the increased emissions increase damages. Multiple administrations, including the first Trump Administration, have come up with estimates of the Social Cost of Carbon (SCC). The SCC is an estimate of the cost, in dollars, of the damage done by each additional ton of carbon emissions. As such it is a determination of the chain of causation from emissions — such as those from EGUs — to damage suffered by Americans and people around the world. It also serves as an estimate of the benefit of any action taken to reduce a ton of carbon emissions. For purposes of this discussion, it actually doesn't matter what that number is as long as it is positive. Any positive number shows that the chain of causation is not too attenuated to connect EGU GHG emissions to damage.

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[216] https://www.americanprogress.org/article/the-one-big-beautiful-bill-act-is-crushing-americas-electricity-system/ and https://www.nytimes.com/2025/06/04/climate/electricity-prices-republican-big-beautiful-bill.html

[217] https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history

The federal government is not the only organization that has determined a positive SCC. The Canadian government,[218] New York Department of Environmental Conservation,[219] William Nordhaus and his team at Yale,[220] Resources for the Future,[221] have all come up with estimates. In fact, as additional scientific evidence of the damage caused by increased concentrations of GHGs in the atmosphere comes in, these estimates have increased over time.[222] If EPA has actual facts and data as opposed to hand waving it should present that data and allow the public to comment on it.

We note that while the current administration has determined to no longer use a SCC, its determination like this rulemaking has provided no scientific support for its decision. Whether the EPA wants to establish or use a SCC or not, the fact remains that it can, as others have, connect GHG emissions to harm to the American public.

V. Additional comments on Alternative Proposals for Carbon Capture Sequestration

EPN believes EPA's BSER determinations or standards of performance and related requirements for new and reconstructed intermediate load and low load fossil fuel-fired stationary combustion turbines and phase 1 for new and reconstructed base load fossil fuel-fired stationary combustion turbines are flawed. The BSER determination is flawed by not having any requirements that reduce dangerous pollution. EPA says that efficiency standards for coal-fired plants would make the plants more cost effective, increasing their being dispatched and thus increasing GHG emission. Since increased use of gas would reduce emissions, by EPA's own logic there would be positive benefits from requiring efficiency improvements in combustion turbines. At a minimum those should be required.

A. Alternative Proposal–Carbon Capture and Storage

EPA should be considering tax credits when determining the cost of the control. The agency may not permissibly ignore existing laws which affect regulatory costs. Doing so necessarily overestimates or underestimates actual cost impacts, or otherwise overlooks or ignores an important consideration — impermissible under standard principles of administrative law. Thus, among other things, the existing IRS section 45Q tax credit for carbon capture and sequestration needs to be accounted for in EPA's consideration of cost. There are a myriad of tax and other laws that impact the economics of any system of regulatory compliance.

EPA should not repeal the 90% CCS-based requirements of the emission guidelines pertaining to long-term coal-fired steam generating units. The argument to repeal this guideline is deeply flawed because EPA has ignored the potential for CO_2 removal rates below 90% and concluded that the only viable options are 90% or 0% removal. Even if one improperly disregards EPA's pre-existing

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[218] https://www.canada.ca/en/environment-climate-change/services/climate-change/science-research-data/social-cost-ghg.html

[219] https://dec.ny.gov/regulatory/guidance-and-policy-documents/climate-change-guidance-documents

[220] https://economics.yale.edu/sites/default/files/2024-03/barrage-nordhaus-2024-policies-projections-and-the-social-cost-of-carbon-results-from-the-dice-2023-model.pdf

[221] https://www.rff.org/topics/scc/

[222] https://research.vu.nl/en/publications/social-cost-of-carbon-estimates-have-increased-over-time

robust record showing that 90% removal is not only feasible but has been achieved at commercial scale, EPA's proposal clearly shows that some non-zero level of CO_2 removal has been demonstrated, but concludes that because EPA now estimates (improperly) that 90% removal is not possible, the only remaining option is to require 0% removal. This contradicts the information in the proposal as well as sound engineering analysis. EPA needs to show why levels currently achieved cannot be achieved in the future.

EPN disagrees with EPA's proposed conclusion that 90% CCS is not an adequately demonstrated system of emission reduction. As noted above, removal percentages other than 90% are demonstrated – as are 90% removals. It is not reasonable to conclude that any other removal percentage greater than zero is not adequately demonstrated even if one concludes mistakenly that 90% removal has not been adequately demonstrated. The proposal similarly concludes that, because it is "unlikely that infrastructure necessary for CCS can be deployed by the January 1, 2032, compliance date," use of CCS is therefore not achievable at all. This all-or-nothing position ignores the potential for later compliance dates or partial EGU category compliance. As the proposal states, the U.S. has broad availability of the geologic formations that may potentially be suitable for CO2 sequestration, many of which have been or are being evaluated for use as long-term CO2 storage.[223] These evaluations include permitting and transport pipeline requirements. Substantial expertise exists within industry to support these efforts.

The performance expectation of the CO_2 capture system at Boundary Dam Unit 3 of 90% removal is unrealistic. The proposal's insistence that the only viable options are 90% removal or 0% removal is again contradicted by the information presented in the proposal itself. The proposal notes that the Boundary Dam CCS system was able to achieve as much as 63% CO_2 removal over the course of a year, yet concludes that the inability to demonstrate 90% removal means the only appropriate option is 0% removal. The proposal further implies requirements for operational standards that are unrealistic, noting that the CCS system's availability was less than 100%. Any major engineered system will necessarily have less than 100% availability.

EPN believes EPA should solicit comments on existing CCS technologies and consider all projects with varying levels of CO_2 removal. Limiting the question to whether 90% removal is adequately demonstrated shows that EPA is not interested in any level of CO_2 removal other than 90% or 0%, a false choice. To adequately evaluate alternative options, EPA must request information about existing CCS projects and technologies that have demonstrated CO_2 removals less than 90% and use that information to meaningfully analyze the viability of other CO_2 removal levels.

EPN thinks the proposed conclusion that the cost of 90% CCS for long-term coal-fired steam generating units is reasonable, and the IRC section 45Q tax credit should be taken into account when calculating the costs of CCS in the context of a BSER analysis. EPA's conclusion is flawed for not giving full credit to the 45Q tax credit. In addition, there are billions of dollars in benefits, so even if the costs are between $1-3 billion more than estimated by EPA in 2024, the 2024 rule would still show net benefits.

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[223] See National Energy Technology Laboratory, "Carbon Capture and Storage Database," https://netl.doe.gov/carbon-management/carbon-storage/worldwide-ccs-database). See also the recent assessment from the Department of Energy's Office of Clean Energy Demonstration: "North America has abundant subsurface storage resources for CO2 ranging anywhere from 2400 billion to 21,000 billion metric tons of potential storage resources." https://www.energy.gov/sites/default/files/2024-04/OCED_Portfolio_Insights_CC_part_i_FINAL.pdf (at p. 14)

EPN believes EPA's projected costs of CCS for existing coal-fired steam generating units, including on the interplay of design capture efficiency, actual capture efficiency, and cost effectiveness are inaccurate. The proposal's conclusions regarding cost effectiveness are based on inappropriate assumptions regarding capital and operating costs and lack meaningful analysis. The proposal appears to assume that capital and operating costs for the CCS system will be constant regardless of the system's level of operation and therefore assumes that costs per ton of CO_2 removed will increase as capture efficiency decreases due to operational considerations or a system's inability to achieve a 90% design removal. This assumption does not account for lower capital and operating costs for lower design and operational removal.

EPN strongly disagrees with EPA's determination that because CCS infrastructure may not be deployed by the January 1, 2032, compliance date, the degree of emission limitation is not achievable for long-term coal-fired steam generating units. The proposal concludes that, because it is "unlikely that infrastructure necessary for CCS can be deployed by the January 1, 2032, compliance date," use of CCS is therefore not achievable at all. This all-or-nothing position ignores the potential for later compliance dates or partial EGU category compliance. As the proposal states, the U.S. has broad availability of the geologic formations that may potentially be suitable for CO_2 sequestration, many of which have been or are being evaluated for use as long-term CO_2 storage.[224] These evaluations include permitting and transport pipeline requirements. Substantial expertise exists within industry to support these efforts.

EPN Recommends Consideration of Alternatives to 90% CO_2 Capture CCS

EPA proposes eliminating the requirement for 90% CO_2 capture using CCS, arguing that that level of capture has not been adequately demonstrated and associated costs are not reasonable, but provides no consideration of substitute alternatives to control CO_2. In fact, EPA's proposal states that "*Whether CCS with other, lower rates of capture could be the BSER is outside the scope of this repeal action*."[225]

EPA cannot curtail public comment addressing reasonable alternatives to what it proposes. It is a standard principle of administrative law that agencies must address such reasoned alternatives.[226]

EPN believes such options should be within the scope of this action, and, therefore, recommends that before finalization of this subject rule, that EPA investigate and consider information on lower capture rates for CCS in determining BSER, and that a supplementary NPRM be developed for public comment. Based on information in the proposal, there is reason to believe that some lower rates may have been adequately demonstrated and may have reasonable associated cost. Consideration could be given to a multi-step BSER process, starting with a lower percentage now with the expectation of moving to higher ones in later years.

B. Alternative Proposal–Natural Gas- and Oil-Fired Steam EGUs

[224] See National Energy Technology Laboratory, "Carbon Capture and Storage Database," https://netl.doe.gov/carbon-management/carbon-storage/worldwide-ccs-database

[225] 90 FR at 25773.

[226] See *Spirit Airlines, Inc. v. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (citing *Chamber of Com. v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005) ("Where a party raises facially reasonable alternatives, the agency must either consider those alternatives or give some reason for declining to do so.")

EPN does not support any of EPA's arguments for repealing the requirements of the emission guidelines pertaining to natural gas- and oil-fired steam generating units. EPA is proposing to eliminate CO_2 removal requirements entirely based upon administrative costs. The proposal recognizes that the BSERs or presumptive standards in the CPS are "not unreasonable or inappropriate," meaning that EPA understands the BSERs or presumptive standards in the CPS to be both reasonable and appropriate. The proposal also notes that existing natural gas- and oil-fired units emit CO_2 at nearly three times the rate of other electric generating units, accounting for 3.5% of emissions but only 1.2% of electricity generation. This higher rate of emissions strongly justifies retaining the reasonable and appropriate standards.

The proposal further states that EPA expects generation from existing natural gas- and oil-fired units to decrease below current levels, making the administrative efforts less efficient. However, EPA and other agencies are taking steps to keep existing power generating plants in operation.[227] These actions indicate that the administration sees a need to extend the operating life of EGUs, undercutting their statement that existing natural gas- and oil-fired units will reduce their operations.

C. Alternative Proposal–Phase 2 Standards

EPN's comments on Alternative Proposals for Phase 1 standards also apply to Phase 2 standards.

[227] See Air Plan Partial Approval and Partial Disapproval; Colorado; Regional Haze Plan for the Second Implementation Period, https://www.federalregister.gov/documents/2025/07/16/2025-13342/air-plan-partial-approval-and-partial-disapproval-colorado-regional-haze-plan-for-the-second; Trump Administration's DOE Is Forcing Coal Plants to Stay Open. Michigan Is the First Target. Also see https://www.nrdc.org/bio/derrell-e-slaughter/trump-administrations-doe-forcing-coal-plants-stay-open-michigan-first

Attachment 2:

EPN Comments on Reconsideration of
2009 Endangerment Finding and Greenhouse Gas Vehicle Standards
EPA-HQ-OAR-2025-0194
September 22, 2025

The Environmental Protection Network (EPN) harnesses the expertise of more than 700 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

EPN would first like to thank the current EPA career staff — dedicated public servants who continue to show up everyday to protect human health and the environment, despite working under hostile conditions. We see you, we thank you, and we know you are fighting for all of our wellbeing.

I. Introduction

EPN calls for the EPA Administrator to rescind this proposal and implement the existing rules. EPA has a basic duty to the public to do an honest analysis of the impacts of their proposed action on the environment, public health and welfare, gas prices, and jobs. That analysis should then be presented to the American people so they can comment on it.

The "legal analysis" that undergirds this action is both deeply flawed and dishonest.
This proposal misrepresents the Clean Air Act (CAA) by conveniently ignoring key parts of the law that the courts have affirmed require EPA to act on climate change. For example, they eliminate the words "weather" and "climate" from the definition of "welfare." The Administrator does this to pretend that the Act cannot be used to regulate greenhouse gas (GHG) emissions. He imagines that the best reading of CAA does not allow the regulation of GHGs while ignoring that GHG regulation has been upheld in three separate Supreme Court opinions. Zeldin also misconstrues recent Supreme Court cases and decisions and imagines a best reading of the CAA that ignores the plain language of the law. He also imagines a test that the CAA can only regulate local and regional impacts, a test that simply does not exist and is inconsistent with a number of CAA provisions, including provisions protecting the ozone layer.

The Administrator has made no demonstration how the scientific bases for the 2009 Endangerment Finding have been weakened or contradicted.
The Administrator claims that, since 2009, the scientific evidence that climate change harms human health and the environment has been weakened or contradicted. This claim is made despite publication of numerous major national and international assessments of the science that demonstrate climate change is now causing such harm and those harms will worsen in the future without effective action. EPA's claims ignore these scientifically-robust findings. Instead, they base their claims upon fatally-flawed information presented as science. EPA fails to provide any scientifically valid information that weakens or contradicts the scientific basis for the Endangerment Finding.

EPA cannot simply refer to a study, or even multiple studies, as scientific justification for a decision as consequential as this proposal to rescind the Endangerment Finding. Instead, EPA must

thoroughly explain its scientific rationale. When EPA first published its proposed Endangerment Finding in 2008, it described in detail the scientific basis for the proposed decision in more than 11 pages in the proposed rule and an
accompanying 150-page technical support document. EPA thoroughly explained how it interpreted the available scientific information, including the known uncertainties in the science. Today, Zeldin provides no such evaluation of the body of science necessary to show why its reliance on a single, flawed report is valid.

The analysis of the impacts of this action is woefully inadequate.
The length of EPA's Regulatory Impact Analysis (RIA) for the current proposal is a mere 3% of the combined length of the RIAs of the two most recent rules that EPA is rescinding. The RIA does not include any analysis of vehicle technology or economics, which may explain why the proposal shows a lack of understanding that electric vehicles (EVs) are both more efficient and more powerful than gas vehicles. EPA does not explain why American car companies cannot in six years produce EVs comparable to those produced in China today. EPA also excludes any analysis of potential alternative regulatory options such as extending the deadline or reducing the stringency of the standard. Instead, EPA takes an all or nothing approach as though regulatory options do not exist.

The Administrator ignores the benefits of pollution reduction from the existing regulations and the significant increase in gas prices that would result from this action.
EPA imagines that there are no benefits from reduced GHG emissions and reduces, without technical justification, the particulate matter (PM) and ozone benefits of rules it is proposing to rescind. The Administrator, without justification, says that rescinding a series of rules that all had positive net benefits will result in costs. The three most recent rules that would be rescinded by EPA's action had between $198 billion - $252 billion in net benefits including between $17 billion – $22 billion in health benefits.

The proposed action ignores the Energy Information Administration's (EIA) analysis (cited by EPA) that shows that Americans will have to pay a total of $4.1 trillion in increased gasoline costs to oil companies as gas prices rise by 2050. That's not surprising, since increasing demand for gasoline would naturally increase its price. EPA also needs to explain how the public benefits from a rule that, according to the same EIA analysis, shows a net loss of 3,760,000 jobs between 2025 and 2050.

II. EPA's proposed interpretation that CAA § 202(a) requires treating contribution, endangerment, and standard setting as a "cohesive whole" is unlawful.

A. Introduction

The best reading of § 202(a)'s threshold provision on contribution and endangerment is embodied in EPA's 2009 "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." That EPA action was comprehensive and exhaustive in its discussion of what the provision meant and how EPA applied it to the facts and evidence before it. As discussed below, this reading is fully supported by § 202(a)'s text and structure, its context in the Act, important case law, and past agency practice in interpreting this and other similar threshold provisions. In contrast, EPA's proposed interpretation is inconsistent in all of these respects. The proposal is noted for its lack of depth of analysis, its failure to discuss past reasoning and actions, and its failure to explain how its proposal could or should be implemented with respect to emissions

of greenhouse gases from motor vehicles. EPA's proposal is unlawful and is far from the best reading of § 202(a).[228]

B. The best reading of § 202(a).

1. The text and context of § 202(a).

Section 202(a) establishes a two step process to determine whether EPA has authority to and must set standards for new motor vehicles. The first step asks whether emissions from new motor vehicles cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare. If EPA makes an affirmative determination on this threshold step, then Congress has determined that EPA must set standards for new motor vehicles applicable to the emissions. Section 202(a) and other provisions provide EPA with instructions on how to set standards and give EPA significant discretion in what standards it sets.
EPA is required to follow this two-step approach. These steps address different questions, on a different timeline. The first step is a requirement that EPA determine the class or classes of motor vehicles that meet the contribution/endangerment criteria. This is a threshold determination. It identifies when EPA has authority to and must adopt federal emissions standards for new motor vehicles. Unless and until EPA makes an affirmative determination, EPA has no authority to adopt federal emissions standards for emissions of the relevant air pollutants from new motor vehicles.

The second step is a requirement that EPA adopt emissions standards for new motor vehicles. Assuming an affirmative determination is made in the first step, Congress provided direction and significant discretion on the adoption of emissions standards for new motor vehicles. Congress specified various factors that EPA must take into consideration in setting standards under § 202(a). Setting the appropriate standards involves evaluating complex questions of availability and performance of emissions control technology, cost, and the like. EPA has been conducting this kind of standard setting for new motor vehicles for decades.

The text and structure of § 202(a) make clear that the two steps are separate and distinct. They call for consideration of different factors. For the first step, the factors EPA must consider involve questions on the level of air pollution and the risks and severity of adverse effects to public health and welfare from the air pollution. It also involves questions of the relationship between emissions from the source category and the levels of air pollution. EPA is to exercise its judgment in evaluating these questions and making the determinations called for in the first step. However, EPA's judgment is not free ranging. EPA's judgment is constrained by the text of § 202(a), with Congress directing EPA to focus only on the threshold issues of contribution and endangerment in the first step.

(i) *EPA has no authority to establish federal emissions standards for a class or classes of new motor vehicles unless and until EPA makes a final affirmative determination on the threshold issue of contribution and endangerment.* That means when EPA is making the contribution and endangerment determinations, EPA has no

[228] The discussion below routinely refers to findings or determinations on contribution and endangerment. These terms are used for convenience, and do not indicate or imply that the threshold agency judgments under § 202(a) are solely factual findings or determinations. As EPA recognized in its 2009 proposal, the agency's judgment in applying the scientific evidence to the statutory criteria has to be grounded squarely in the science of climate change and also embody relevant policy considerations. 74 FR 18886, 18892 fn.10 (April 24, 2009). In addition, the discussion below generally refers to findings on contribution, as compared to cause or contribute, given EPA did not and apparently does not now claim that motor vehicle emissions cause the relevant greenhouse gas air pollution.

authority to adopt federal controls for that group of new motor vehicles, either then or in the future. Such authority only arises after EPA has finished making these determinations. Thus, when EPA is making these determinations, it solely focuses on the question of contribution and endangerment. Issues related to future controls — their timing, cost, impact on emissions reductions, and so on — are irrelevant to EPA's threshold determination and cannot be considered in making that determination.

This makes eminent sense. The first threshold step calls for analyzing the risks and severity of adverse effects from air pollution and analyzing emissions contribution from motor vehicles to levels of the air pollution. That judgment can be made without consideration of means of emissions control - the issues of contribution and endangerment can readily be assessed without any consideration of the potential impacts of future controls. The scientific and technical issues involved in determining contribution and endangerment can be fully considered without any consideration of the impacts of future controls.
Taking the cost, effectiveness, and impacts of future emissions controls into account when making the threshold contribution or endangerment finding short-circuits the two-step process Congress required. EPA's proposed approach requires two different "decisions" on standard setting. The first is a projection of future decisions on emissions standards based on projections of many technical and other conditions and circumstances, potentially covering many years into the future. According to EPA this provisional analysis and decision should be considered in the first threshold step. The second decision on standard setting would be based on the rulemaking process called for by Congress, involving a proposal based on detailed analyses, a comment period, and a final decision on standards for specific model years. It would result in actual standards the affected vehicles have to meet. Of course, the second decision on standards would only occur if EPA made an affirmative determination in the first step. If the provisional, projected future standards considered in the first threshold step led to a negative determination at the first step, there would be no actual future decision on standards. This is a convoluted commingling of the two separate steps Congress specified in § 202(a). This commingling effectively puts the standard setting cart in front of the contribution and endangerment determination horse.

(ii) *Congress also constrained EPA's "judgment" on whether motor vehicles contribute to the air pollution and whether the air pollution endangers.* The Supreme Court confirmed these points in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, EPA refused to make a determination whether emissions of GHGs from motor vehicles cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare, under § 202(a)(1) of the Act. EPA "refused to comply with this clear statutory command," relying on "a laundry list of reasons not to regulate." For example, EPA based its decision on various policy reasons – the administration preferred other ways to address climate change ("a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming"), EPA considered the emissions controls that would be adopted ineffective and inappropriate as a remedial measure ("curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue""), and adoption of emissions controls on motor vehicles would interfere with other important policies of the administration ("regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions").[229]

[229] 549 U.S. at 533.

The Court made clear that the use of the term "judgment" constrained EPA and was not a vehicle to go beyond the terms of the statute. The Court said:

> "While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. § 7521(a)(1), **that judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,"** [...] Put another way, **the use of the word "judgment" is not a roving license to ignore the statutory text**. It is but a direction to exercise discretion within defined statutory limits. […] But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, **EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.** [...] To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design." 549 U.S. at 532-533 (emphasis added)

The Court made clear that the various policy reasons relied upon by EPA were not relevant to the determination of cause or contribute to endangerment.

> "The alternative basis for EPA's decision—that **even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text.** […] Although we have neither the expertise nor the authority to evaluate these policy judgments, **it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment**. … Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed.Reg. 52930–52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty—which, contrary to Justice SCALIA's apparent belief, post, at 1466 – 1468, is in fact all that it said, see 68 Fed.Reg. 52929–52930 ("We do not believe ... that it would be either effective or appropriate for EPA *to establish [greenhouse gas] standards for motor vehicles* at this time" (emphasis added))—is irrelevant." 549 U.S. at 533-34. (emphasis added)

The Court was clear – policy judgments concerning the appropriateness of future emissions controls that could be adopted under the Act are irrelevant to the scientific judgment needed to determine cause or contribute and endangerment. Likewise, policy concerns over interference with other administration policies are irrelevant, as are concerns over uncertainty of the science. Scientific uncertainty is relevant only if the uncertainty is so high that a reasoned determination cannot be made.

The policy concerns EPA relies upon in the proposal are of the same nature as those rejected by the Court in *Massachusetts*. They are irrelevant to the scientific judgment required for the threshold first step determination. Since they are irrelevant, the Court decided in *Massachusetts* that they could not

justify refusing to make a determination. For the same reasons, they are irrelevant for purposes of making an affirmative or negative determination on contribution or endangerment.

Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) follows the same approach. In that case, industry argued that:

> "EPA improperly interpreted CAA § 202(a)(1) as restricting the Endangerment Finding to a science-based judgment devoid of considerations of policy concerns and regulatory consequences. They assert that CAA § 202(a)(1) requires EPA **to consider, e.g., the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change**. They maintain that eschewing those considerations also made the Endangerment Finding arbitrary and capricious." 684 F.3d at 117. (emphasis added)

The D.C. Circuit was clear – EPA has no authority to consider such policy considerations when making the science-based judgment on contribution and endangerment.

> "This language requires that the endangerment evaluation "relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Massachusetts v. EPA*, 549 U.S. at 532–33, 127 S.Ct. 1438. At bottom, **§ 202(a)(1) requires EPA to answer only two questions: whether particular "air pollution"—here, greenhouse gases—"may reasonably be anticipated to endanger public health or welfare," and whether motor-vehicle emissions "cause, or contribute to" that endangerment.**
>
> **These questions require a "scientific judgment" about the potential risks greenhouse gas emissions pose to public health or welfare—not policy discussions.** *Massachusetts v. EPA*, 549 U.S. at 534, 127 S.Ct. 1438. In *Massachusetts v. EPA*, the Supreme Court rebuffed an attempt by EPA itself to inject considerations of policy into its decision. At the time, EPA had "offered a laundry list of reasons not to regulate" greenhouse gases, including that a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions, and that curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue." Id. at 533, 127 S.Ct. 1438 (citations omitted). The Court noted that "**these policy judgments…have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment."** Id. at 533–34, 127 S.Ct. 1438. In the Court's view, EPA's policy-based explanations contained "no reasoned explanation for [EPA's] refusal to decide" the key part of the endangerment inquiry: "whether greenhouse gases cause or contribute to climate change." Id. at 534, 127 S.Ct. 1438.
>
> As in *Massachusetts v. EPA*, a "laundry list of reasons not to regulate" simply has "nothing to do with whether greenhouse gas emissions contribute to climate change." Id. at 533–34, 127 S.Ct. 1438. The additional exercises State and Industry Petitioners would have EPA undertake—e.g., performing a cost-benefit analysis for greenhouse gases, gauging the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases,

> and predicting society's adaptive response to the dangers or harms caused by climate change—do not inform the "scientific judgment" that § 202(a)(1) requires of EPA….. **The statute speaks in terms of endangerment, not in terms of policy, and EPA has complied with the statute.**" 684 F.3d at 117-118. (emphasis added)

The courts could not be clearer – the policy considerations that EPA proposes to rely upon to justify its proposed interpretation of contribution and endangerment are irrelevant to making these actions under § 202(a).

Congress used the same basic two-step structure employed in § 202(a) throughout various provisions of the Act addressing EPA authority to adopt federal controls on emissions sources.[230] Congress used this structure to answer two different questions – do the circumstances involving emissions from sources and the risk of harm from the air pollution levels meet the criteria for authorizing EPA to adopt federal controls? If so, what kind of federal controls is EPA to adopt? The consistent use of the same basic statutory structure throughout the Act supports the interpretation discussed above.

(iii) *In other provisions of the Act, Congress addressed when and to what extent EPA should require states to control certain emissions in their state implementation plans (SIPs).* Unlike § 202(a), in various SIP provisions, Congress explicitly made levels of emissions control a factor in determining contribution. For example, when Congress addressed interstate transport of air pollution it specified that a SIP must contain provisions that prohibit sources from emitting amounts of emissions which contribute significantly to nonattainment in downwind states.[231] The significant contribution finding in the Good Neighbor provision is distinctly different from the contribution finding in § 202(a). In the SIP provision, the contribution finding performs two functions – it identifies whether the state has to include provisions in its SIP to control emissions, and it identifies the amount of emissions that must be controlled. This is distinctly different in substance from § 202(a). The SIP provision combines two questions (duty to adopt controls and amount of reductions required by the controls), while these two questions are kept separate in § 202(a) (authority and duty to adopt controls, based on contribution/endangerment determination, and amount of reductions to achieve through the controls based on the instructions and discretion provided in the standard setting provisions of § 202).

In making the significant contribution determination under this SIP provision, EPA considered factors related to emissions control, such as cost, because EPA had to determine the amount of emissions reductions that the state had to achieve. Determining the amount of required emissions reductions is a core part of emissions standard setting, and it is logical to consider standard setting factors such as cost of emissions controls in making this kind of determination. The cases considering EPA's authority under this SIP provision recognize the dual role the significant contribution determination plays in the Good Neighbor SIP provision.

The Supreme Court addressed this as follows:

> "Under the Transport Rule, EPA employed a "two-step approach" to determine when upwind States "contribute[d] significantly to nonattainment," id., at 48254, and therefore in

[230] See section II.B.1.(iii) below.
[231] Section 110(a)(2)(D)(i)(I).

"amounts" that had to be eliminated. At step one, called the "screening" analysis, the Agency excluded as de minimis any upwind State that contributed less than one percent of the three NAAQS to any downwind State "receptor," a location at which EPA measures air quality. See id., at 48236–48237. If all of an upwind State's contributions fell below the one-percent threshold, that State would be considered not to have " contribute [d] significantly" to the nonattainment of any downwind State. Id., at 48236. States in that category were screened out and exempted from regulation under the rule. […]
Taken together, the screening and control inquiries defined EPA's understanding of which upwind emissions were within the Good Neighbor Provision's ambit. In short, under the Transport Rule, an upwind State "contribute[d] significantly" to downwind nonattainment to the extent its exported pollution both (1) produced one percent or more of a NAAQS in at least one downwind State (step one) and (2) could be eliminated cost-effectively, as determined by EPA (step two). See id., at 48254. Upwind States would be obliged to eliminate all and only emissions meeting both of these criteria. […]

We conclude that the Good Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in Chevron. **The statute requires States to eliminate those "amounts" of pollution that "contribute significantly to nonattainment" in downwind States.** 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Thus, EPA's task is to reduce upwind pollution, but only in "amounts" that push a downwind State's pollution concentrations above the relevant NAAQS. As noted earlier, however, the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States. See supra, at 1593 – 1594. The statute therefore calls upon the Agency to address a thorny causation problem: How should EPA allocate among multiple contributing upwind States responsibility for a downwind State's excess pollution? […]

Persuaded that the Good Neighbor Provision does not dictate the particular allocation of emissions among contributing States advanced by the D.C. Circuit, we must next decide whether the allocation method chosen by EPA is a "permissible construction of the statute." Chevron, 467 U.S., at 843, 104 S.Ct. 2778. As EPA interprets the statute, upwind emissions rank as "amounts [that] ... contribute significantly to nonattainment" if they (1) constitute one percent or more of a relevant NAAQS in a nonattaining downwind State and (2) can be eliminated under the cost threshold set by the Agency.
See 76 Fed.Reg. 48254. **In other words, to identify which emissions were to be eliminated, EPA considered both the magnitude of upwind States' contributions and the cost associated with eliminating them.** […]

Using costs in the Transport Rule calculus, we agree with EPA, also makes good sense. Eliminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address. Efficient because EPA can achieve the levels of attainment, i.e., of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution. Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. They will have to bring down their emissions by installing devices of the kind in which neighboring States have already invested. […]

> **Obligated to require the elimination of only those "amounts" of pollutants that contribute to the nonattainment of NAAQS in downwind States, EPA must decide how to differentiate among the otherwise like contributions of multiple upwind States.** EPA found decisive the difficulty of eliminating each "amount," i.e., the cost incurred in doing so. Lacking a dispositive statutory instruction to guide it, EPA's decision, we conclude, is a "reasonable" way of filling the "gap left open by Congress."" *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 500-504, 513-514, 6518-520 (2014). (emphasis added)

This SIP provision and § 202(a) differ dramatically in terms of substance. Section 202(a) calls for EPA to determine contribution to air pollution that endangers. If and only if EPA makes an affirmative determination, EPA is to adopt controls that reduce emissions using the standard setting provisions of § 202. The determination of contribution to the air pollution and the determination of standard setting are two separate decisions. The SIP provision is different. The determination of significant contribution requires EPA to determine the amount of emissions from an upwind state that must be reduced. The decision on contribution and the decision on what reductions must be achieved are one and the same. This is substantively different from § 202(a), and the factors EPA can consider under the Good Neighbor SIP provision do not support their consideration under § 202(a).

It would be a different situation if § 202(a) was phrased along the lines of "EPA shall set standards that prohibit new motor vehicles from emitting amounts of an air pollutant that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare." That would be analogous to the Good Neighbor SIP provision. Of course, in that case Congress would not have prescribed the various standard setting provisions in § 202(a) that it did. The contribution determination would have already determined what amount of emissions had to be reduced. Congress did not use this approach in § 202(a), and the substantively different Good Neighbor provision is not relevant for purposes of § 202(a). Congress also adopted other SIP provisions that took an approach somewhat similar to the Good Neighbor provision when it addressed issues of visibility transport (EPA can remove a State or portion of a State from a visibility transport region if the control of emissions will not significantly contribute to protection or enhancement of visibility in Class I areas, § 169B) and the interstate transport commission (EPA may remove a State or portion of a State from the commission where EPA determines control of emissions in the State will not significantly contribute to attainment of the national ambient air quality standards (NAAQS) in downwind areas, § 176(a).

These SIP provisions show that Congress knew how to specify when the contribution finding includes consideration of future emissions controls, such as the amount of reductions that future controls would achieve. It did not include such considerations in § 202(a)'s contribution or endangerment determinations.
In a similar vein, Congress specified in § 211(c)(2)(A) that EPA was to consider the relative effectiveness and appropriateness of vehicle controls as an alternative to fuel controls when making the threshold contribution and endangerment findings under § 211(c)(1). Congress instructed EPA to consider various kinds of control strategies as part of making the threshold determination on whether EPA had the authority to adopt fuel controls as a response to an air pollution problem.

Both the SIP provisions and the fuel provision show that Congress knew how to authorize EPA to take factors relevant to the control program into account when making the threshold determinations on contribution or endangerment that would decide whether EPA had authority to adopt a control program. It did not do so in § 202(a). This absence is a telling indication that EPA has no authority to take factors relevant to the future control program into account when making the threshold contribution and endangerment findings under § 202(a).

(iv) *Section 202(a) is just one of many provisions where Congress followed a two-step process*, with the first step a threshold identifying whether EPA has authority to adopt federal controls on emissions, and a second step where Congress specifies what kind of controls EPA may or must adopt.

This pattern throughout the CAA clearly indicates that the two steps involved are separate and apart and involve consideration of different factors relating to standard setting that are not relevant for determining contribution or endangerment.

CAA Section	**First step – threshold, identifying whether EPA has authority to adopt federal controls on emissions.**	**Second step - if threshold step met, identifying whether EPA must or may adopt federal controls.**	**Second step – specifying what kind of federal emissions controls EPA can adopt.**
108	EPA lists criteria pollutants. Include on list if EPA judges cause/contribute to air pollution that endangers. 108(a)(1)(a)	If pollutant listed, EPA shall adopt NAAQS.	NAAQS must meet requirements of 109(a), (b).
112	Congress lists pollutants. EPA can add to the list based on adverse health effects from exposure. 112(b)(1), (2). Area sources – 112(k)(3)(B) EPA shall identify not less than 30 hazardous air pollutants which present the greatest threat to public health.	EPA shall adopt controls.	Standard setting specified. 112(d), (f).
	Accidental releases – EPA list substances which are known to cause or contribute or may reasonably be anticipated to cause death, etc., or harm environment. 112(r)(3).		Standard setting specified. 112(r)(1), (5), (7).
122	EPA determine whether radioactive and other emissions will cause/contribute to endangerment.	If affirmative determination, list under sections 108 or 112 if cause /contribute air pollution reasonably	Standard setting specified in sections 109, 111, or 112.

		anticipated to increase mortality. List under 111 if emitting significant amounts.	
202	EPA determine whether emissions cause/contribute to endangerment. 202(a)(1)	EPA shall adopt standards.	Congress specifies what kind of standards to adopt. In some cases, Congress specified level of standards. 202(a)(1), (a)(2), (a)(3), (b), (d), (f) –(k), (m).
	EPA conducts study of need for and feasibility of means of control of air toxics emissions from motor vehicles. 202(l)(1).	EPA shall adopt standards.	Standards specified. 202(l)(2).
211	EPA determines if emissions cause/contribute to endangerment. 211(c)(1)(A)	EPA may adopt controls, prohibitions.	Controls/prohibitions specified in 211(c). Congress specified various controls in (g) – (o).
213	EPA determines if emissions of new nonroad are significant contributors to ozone or CO levels in more than one nonattainment area. If yes, EPA adopt standards for classes/categories which cause/contribute to such air pollution. 213(a)(1), (2).	EPA shall adopt standards. 213(a)(3).	Standards specified 213(a)(3), (4). Standards required for locomotives, 213(a)(5).
	EPA determine if any other emissions from new nonroad significantly contribute to endangerment. If yes, EPA determine if classes/categories cause/contribute to such air pollution. 213(a)(4)	EPA may adopt standards. 213(a)(4)	Standards specified. 213(a)(4).
231	EPA determines if emissions cause/contribute to air pollution which endangers. 231(a)(2)(A).	EPA shall adopt standards.	Standards specified. 231(a)(2)(A),(B); (b)
303	EPA determine if pollution sources present imminent, substantial endangerment. 303.	EPA may sue to enjoin persons.	EPA may sue to enjoin any person who cause/contribute to the pollution to stop

			emissions that cause/contribute.
602	Congress lists substances. EPA shall add to list if find cause/contribute significantly to harmful effects on the stratosphere. 602(a),(b).		Congress specifies phase out of substances. 604, 605.
615	EPA judges whether a substance, practice, etc. may reasonably be anticipated to affect the stratosphere and such effect may reasonably be anticipated to endanger PH or W.	EPA shall regulate.	EPA shall promptly regulate such substance, practice, etc.

Congress consistently set up a two-step structure in determining whether and how EPA was authorized to adopt federal controls for emissions. The first step involves identifying whether EPA has authority to adopt controls. In many cases this involves a determination whether emissions from certain sources cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In some cases Congress specified that significant contribution was an element of the threshold test. In some cases, Congress itself made the threshold authority determination, e.g. § 112's list of hazardous air pollutants (HAPs) and § 602's list of substances.

Congress also specified whether EPA must or may adopt controls, and specified what kind of controls EPA could adopt. Typically, Congress specified factors that EPA had to consider in setting standards. In some cases, Congress went into some detail in specifying the kind of control, in other cases Congress provided EPA great discretion in determining the kind of control to adopt.

Congress' consistent use of this structure throughout the Act makes it clear that Congress was acting intentionally. Congress intended that the first threshold question was determining when EPA had authority to adopt controls, and the second step was specifying what kind of controls EPA could adopt. These steps address different questions, and different factors are relevant to answering each of those questions. In
§ 202(a), EPA's role is to determine whether emissions from certain sources contribute to air pollution that endangers. This determination is separate from and does not involve what kind or the impact of emissions controls EPA may adopt in the future if EPA makes an affirmative threshold determination.

2. EPA past practice.

For many decades EPA determined contribution and endangerment under a variety of provisions addressing EPA's authority to adopt emissions controls. Throughout, EPA's core focus has been evaluating contribution by considering the inventory of emissions from the relevant sources, and in many cases comparing this inventory to inventories of other relevant sources and groups of sources. EPA has evaluated endangerment by considering the science and other evidence of the air pollution and its impact on public health or welfare. In many cases for criteria pollutants, the endangerment determination has been based in large part on the NAAQS program. For example:

CAA Section, Air Pollutant, and Emissions Control		Date Enacted
Section 202(a)		
GHGs	74 FR 66496, 66506, 66507-508, 66515-516, 66537-540, 66541-545)	December 15, 2009
Section 231(a)		
GHGs	81 FR 54422, 54424, 54426-427, 54434-438, 54459-4, 5446-474	August 15, 2016
CO, HC, NOx	38 FR 19088, 19089	July 17, 1973
Pb	88 FR 72372, 72378-385, 72393-393, 72397-402	October 20, 2023
Sections 213(a)(2),(3),(4)		
Large CI land based >37Kw (CO, NOx, VOC, PM, smoke)	59 FR 31306 Significant contribution finding. 59 FR at 31307-310. Large CI – contribution finding, (a)(3), (a)(4). 59 FR at 31309.	June 17, 1994
Small CI land based <37Kw (CO, NOx, VOC, PM, smoke)	63 FR 56968 Contribution finding 63 FR at 56968-969	October 23, 1998
Large SI, Recreational (Regional haze, visibility HC, NOx, CO, PM)	67 FR 68242, 68242-249	November 8, 2002
Nonroad Diesel (regional haze, visibility)	69 FR 38958, 38963	June 29, 2004
Section 211(c)(1)		
Highway Diesel S (PM)	66 FR 5002, 5006-07, 5008; RIA Appendix A pp. A1-A3.	January 18, 2001
Nonroad Diesel S (PM)	69 FR 38958, 38962, 38963 ; RIA pp2-1 – 2-3, Chpt. 5 Appendix 5A pp 5-99 – 5-101.	June 24, 2004
Highway Gasoline S (PM)	65 FR 6698, 6703; RIA Appendix D, pp D-2 – D-3.	February 10, 2000
RFG (NOx)	59 FR 7716, 7745, 7750-752	February 16, 1994

The above analysis shows that the interpretation of contribution and endangerment taken by EPA in 2009 is far and away the best reading of § 202(a).[232]

C. EPA's proposed interpretation is unlawful.

1. EPA's proposed interpretation.

EPA proposes that "section 202(a) does not authorize the EPA … to issue standalone findings that do not apply the statutory standard for regulation as a cohesive whole."[233] EPA claims that EPA did not have "'procedural discretion' to issue standalone findings without considering regulatory response and severed the finding of endangerment from the finding of contribution to that endangerment."[234] EPA claims that it improperly "assumed that statutory silence granted discretion to construe the scope of our authority and asserted or implied that the Supreme Court's decision in Massachusetts required us to read the statute as authorizing the regulation of GHG emissions in response to global climate change concerns."[235] EPA claims that it improperly "reasoned that "[t]he text of CAA section 202(a) is silent on this issue" and "invoked the procedural discretion that is provided by CAA section 202(a)'s lack of specific direction." 74 FR 66501."[236]

EPA claims that it is unlawful to sever standard setting under § 202(a) from the determinations on contribution and endangerment. It claims § 202(a) "requires issuing emission standards together with the findings necessary to invoke our regulatory authority, rather than severing the regulatory action into separate endangerment and standards-setting proceedings…it is impermissible for the Administrator to make an endangerment finding without prescribing the emission standards required in response to such a finding, and conversely, that it is impermissible to prescribe emission standards without making the source- and air-pollutant specific findings required by the statute."[237] EPA claims this approach resulted in EPA failing to consider adaptation and mitigation, costs of regulating, and the beneficial impacts of GHGs when making the endangerment finding.[238] EPA claims this led to errors in later standard settings as well – failure to consider adaptation and mitigation, and changes in the scientific evidence concerning climate change, meaning EPA failed to analyze whether "endangerment and contribution remained accurate with respect to the source category at issue. As a result, the decision to sever meant that the EPA has never meaningfully considered or invited public comment on the cost, effectiveness, and continued propriety of its GHG regulatory program."[239]

EPA also claims that it was improper to "sever" the determination of contribution from the determination on endangerment, and that EPA's interpretation of contribution and endangerment was unlawful. Contribution and endangerment must be considered in a "single causal chain," and the

[232] See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 394 (2024)(contemporary and consistent views of a coordinate branch of government can provide evidence of the law's meaning).
[233] 90 FR at 36298.
[234] Id. at 36299.
[235] Id.
[236] Id. at 36303.
[237] Id. at 36302.
[238] Id.
[239] Id.

"emission [from the vehicles at issue in the standard setting] must cause or contribute to the danger posed by the air pollution to a sufficient extent to satisfy the standard for regulation."[240] EPA was required to determine whether emissions from motor vehicles as a whole, as well as from classes of vehicles being regulated, had "a more than de minimis effect on the danger identified with respect to elevated concentrations of GHGs in the upper atmosphere."[241] EPA claims that background principles of "proximate cause" apply under § 202(a), such that "emissions from new motor vehicles and new motor vehicle engines in the United States do not have a sufficiently close connection to the adverse impacts identified in the Endangerment Finding to fit within the legal meaning of "cause" or "contribute.""[242] EPA claimed that "[t]he Endangerment Finding largely avoided addressing this problem by severing the question whether GHG emissions from new motor vehicle engines contribute to GHG concentrations in the atmosphere from the question whether GHG concentrations in the atmosphere endanger public health and welfare…Nevertheless, even with respect to endangerment and contribution in isolation, we propose that global climate change concerns involve analyzing causal relationships that are too uncertain, too remote, and too confounded by intervening and confounding factors to fit within the terms "cause" and "contribute" as used in CAA section 202(a)."[243]

EPA proposes that "severing the endangerment and cause or contribution findings leads to untenable results and lacks any limiting principle" pointing to theoretical regulation of water vapor emissions as an example.[244] EPA also proposes that severing the endangerment findings from the standard setting leads to unlawful results – failure to "consider whether emission standards for new motor vehicles would be futile as a means to address the identified dangers of GHG emissions from all anthropogenic sources."[245] EPA claims that it also failed to consider another "foreseeable" consequence of regulation – carbon leakage.[246]

EPA argues that it failed to properly consider contribution and endangerment "in context." Endangerment cannot mean "any predicted negative impact to any public health or welfare value," and EPA avoided this concern by determining contribution as any amount above de minimis levels, "even if those emissions did not themselves contribute to a danger in any meaningful sense."[247]

EPA argues that EPA compared "apples to oranges" because motor vehicles do not emit two of the gases included in the mix of gases considered as the air pollution.

Finally, EPA argues that EPA in effect read the term "new" out of the statute by using emissions for the entire fleet in a certain year as the basis for determining contribution.[248]

2. Determining contribution and endangerment separate and apart from standard setting is not a violation of a procedure required by § 202(a).

EPA appears to argue that § 202(a) establishes a procedural requirement, such that EPA has to adopt emission standards at the same time it makes the contribution and endangerment findings. EPA argues it improperly relied upon the silence in the statute and discretion under *Chevron* to exercise

[240] Id. at 36303, 304.
[241] Id. at 36304.
[242] Id. at 36301.
[243] Id.
[244] Id.
[245] Id. at 36305.
[246] Id.
[247] Id.
[248] Id.

procedural discretion and sever the standard setting from the contribution/endangerment findings.[249]

EPA did not rely on *Chevron* in determining that it had the discretion to decide contribution and endangerment in a separate, prior proceeding from subsequent standard setting proceedings. It is basic administrative law that EPA had such discretion.

> "Finally, EPA's approach coheres with basic principles of administrative law. In general, the choice between various procedural channels lies within the "informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947). That discretion properly includes judgments about the scope of rulemakings and when to relegate ancillary issues to separate proceedings: "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop." Massachusetts, 549 U.S. at 524, 127 S.Ct. 1438; see, e.g., Grp. Against Smog & Pollution, 665 F.2d at 1292 ("... EPA cannot soundly be charged with arbitrariness merely because it chose a separate rulemaking proceeding as the process for proposing a revised standard in lieu of an undertaking to do so in the narrower context of the opacity standard proceedings as petitioners requested."). Once the agency has resolved an issue in a separate proceeding, it may defend against related criticism by "simply refer[ing]" to the other proceeding, so long as the "reasoning remains applicable and adequately refutes the challenge." Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993). EPA reasonably reads "as appropriate," in paragraph (3)(B), to leave undisturbed these background norms of broad but reviewable procedural discretion." *Alon Refining Krotz Springs Inc. v. EPA*, 936 F.3d 628, 659 (D.C. Cir. 2019).

As EPA explained in 2009:

> The text of CAA section 202(a) is silent on this issue. It does not specify the timing of an endangerment finding, other than to be clear that emissions standards may not be issued unless such a determination has been made. EPA is exercising the procedural discretion that is provided by CAA section 202(a)'s lack of specific direction. … Since Congress was silent on this issue, and more than one procedural approach may accomplish the requirements of CAA section 202(a), EPA has the discretion to use the approach considered appropriate in this case. … the Supreme Court has noted, the agency has 'significant latitude as to the manner, timing, [and] content * * * of its regulations . * * *' *Massachusetts v. EPA*, 549 U.S. at 533. That includes the discretion to issue them in a separate rulemaking.[250]

EPA's proposal imposes a restraint on EPA's discretion that the text of the provision does not contain. Section 202(a) specifies that EPA must set standards if and only if EPA makes the contribution and endangerment findings. This means EPA cannot adopt standards until those findings are final, but it fails to specify the timing by which EPA must propose or adopt the standards. Unlike various other provisions in the Act, this section does not specify or impose restraints on the timing of EPA's actions. For example, § 108 specifies that EPA must propose a NAAQS for a pollutant at the same time that it first issues air quality criteria for the pollutant and must issue final NAAQS within 90 days after proposal. Likewise, § 111 specifies that once EPA lists a category of stationary sources based on a determination of significant contribution and endangerment it must propose standards within one year and issue a final rule within one year of proposal. Section 202(a) does not contain any prescriptions or limits on the timing of the

[249] Id. at fn.42, 36299.
[250] 74 FR at 66501- 502.

contribution and endangerment finding or on the standard setting that follows such findings. That lack of specific direction is the source of EPA's procedural discretion, not *Chevron*.

EPA's proposal would prohibit EPA from making a contribution and endangerment finding for the aggregate group of all new motor vehicles unless EPA was also ready to adopt standards for all vehicles at the same time. As EPA explained in 2009:

> EPA has the discretion under CAA section 202(a) to consider classes or categories of new motor vehicles separately or together in making a contribution and endangerment determination. This discretion would be removed under commenters' interpretation, by limiting this to only those cases in which EPA was also ready to issue emissions standards for all of the classes or categories covered by the endangerment finding. However, nothing in the text of CAA section 202(a) places such a limit on EPA's discretion in determining how to group classes or categories of new motor vehicles for purposes of the contribution and endangerment findings. This limitation would not be appropriate, because the issues of contribution and endangerment are separate and distinct from the issues of setting emissions standards.[251]

Even if EPA's proposed interpretation was right, this would not be a basis to rescind the 2009 contribution and endangerment findings. At most it would be a harmless procedural error, a difference in timing of marginal relevance with no substantial likelihood of affecting a regulatory outcome. See CAA § 307(d)(8).

EPN recognizes that the core of EPA's proposed objection to "standalone" contribution and endangerment findings is not procedural in nature. EPA's proposal is premised on its interpretation of the substantive requirements of § 202(a), that contribution, endangerment, and standard setting must occur at the same time because they are substantively interrelated. The next sections show that this interpretation is unlawful.

> 3. Factors relevant to standard setting under § 202(a) are not relevant to determining contribution or endangerment.

EPA proposes that the standard setting must be done at the same time as the threshold contribution and endangerment finding, as various factors in the standard setting are relevant and must be considered in making the threshold findings of contribution and endangerment. EPA points to issues such as adaptation and mitigation, costs of regulating, and the beneficial impacts of GHGs when making the endangerment finding. EPA claims it must consider the cost, effectiveness, and continued propriety of its GHG regulatory program when it makes the required threshold determinations. In effect, EPA claims the statute must be interpreted as if Congress said:

> The Administrator shall by regulation prescribe (and from time to time revise) standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. *In exercising his judgment, the Administrator shall consider whether regulatory control of such emissions is reasonable and appropriate.*

But Congress did not adopt such a provision. The various factors EPA says it must consider are legally irrelevant and are unlawful for EPA to consider in determining contribution and

[251] Id. at 66502.

endangerment under § 202(a).[252] We reiterate that § 202(a), like many other provisions in the Act, addresses federal authority to establish emission controls on source categories using a two-step approach. The first is a threshold step. EPA is to determine whether air pollution is reasonably anticipated to endanger public health or welfare and determine whether a source category contributes significantly to this air pollution. If and only if EPA makes an affirmative determination, EPA has authority to and must adopt emissions controls on the source category. Congress specifies the nature of appropriate emission controls in § 202(a). Under this two-step approach, contribution and endangerment are determined first and are separate and distinct from the subsequent determination of the appropriate emission controls. This is the approach taken by Congress in § 202, and it is mirrored by many other provisions throughout the Act addressing when EPA has authority to adopt emissions controls on sources. Under this approach, the factors that determine standard setting under § 202(a) and the impacts of the standards are irrelevant to the factors that determine contribution or endangerment.

Likewise, in 2009, EPA explained in detail why future adaptation to climate change is not relevant to determining endangerment from the air pollution. First, EPA was careful to distinguish involuntary adaptation from intentional or planned adaptation. EPA recognized that the environment was projected to change in many ways in response to increased global temperatures and climate change. As much as possible this was taken into account in determining endangerment.

EPA made several points in its discussion of adaptation. EPA explained that the threshold inquiry is whether the contribution and endangerment criteria are satisfied, and only if they are met do the criteria for regulatory action go into effect. This reflects the basic separation of two different decisions—is this a health and welfare problem that should be addressed, and if so, what are the appropriate mechanisms to address it? An approach considering adaptation and mitigation as part of an endangerment finding inappropriately combines two separate inquiries, changing the focus from determining how serious is the air pollution problem to determining how good a job are people and society likely to do in addressing or solving the problem. EPA recognized that such an approach would dramatically increase the complexity of the issues before EPA and would involve the agency in determinations that are different from the kinds of technical and scientific judgments inherent in the determination of risk. EPA pointed to the structure of CAA § 202(a) and the various other similar provisions, indicating Congress' intention to separate the question of is there a problem we need to address from the question of what the appropriate way is to address the problem. EPA also explained that the legislative history shows Congress was focused on issues of science and medicine, including issues at the frontiers of these fields. It referred to data, research resources, science and medicine, chemistry, biology, and statistics. There is no indication Congress envisioned exercising judgment on the very different types of issues involved in projecting the actions involved in adaptation and mitigation.[253]

The threshold step of contribution and endangerment addresses whether there is a problem from the air pollution. Section 202's provisions on standard setting address how to respond to the problem. Future, intentional societal adaptation is another aspect of addressing what might be done to address the endangerment. Intentional societal adaptation is like setting emissions standards for motor vehicles, a component of what can or should be done to address the endangerment. It is a

[252] The discussion here incorporates all of the prior analysis of EPA's proposed interpretation.
[253] 74 FR at 66512-14.

distinctly different issue than the threshold issue of whether the air pollution endangers public health or welfare in the first place.[254]

EPA claims its approach in 2009 was unlawful because EPA failed to consider adaptation and mitigation and costs of regulating.[255] EPA also states that the endangerment finding's conclusions regarding extreme weather events was "fatally undermine[d]" due to the "decision to exclude adaptation and mitigation information from the analysis."[256] Likewise with respect to sea level rise.[257] EPA states that adaptation refers to "adjustments to the effects of climate change that lessen impacts," and mitigation refers to "reductions in emissions and global concentrations unrelated to CAA section 202(a) regulation."[258] The CWG Draft Report EPA relies on refers to air conditioning as an adaptive measure to avoid heat mortality, and building codes and better weather predictions as adaptive measures for heat mortality, sea level rise, and extreme weather events.[259]

As discussed above, both the Supreme Court and the D.C. Circuit have been clear that the factors relevant to addressing the endangerment –- setting appropriate emissions standards, or how other agencies, governmental bodies, or society in general may respond to climate change — are irrelevant to the scientific judgment that EPA must make concerning contribution or endangerment. EPA may not consider the standard setting factors of cost, cost effectiveness, or cost reasonableness in determining contribution or endangerment. EPA may not consider societal adaptation or the degree of mitigation of the air pollution's harms that an appropriate emissions control might achieve.[260] EPA may not consider other policies of the administration. EPA's authority to determine contribution and endangerment under § 202(a) is limited to factors legally relevant to air pollution. Factors relevant to standard setting come afterwards, if EPA makes an affirmative determination on contribution and endangerment. The same applies to issues of adaptation or mitigation.

The issue of how much risk air pollution presents is distinctly different from how people or society may respond to reduce or mitigate the risk. In assessing the health risk from exposure to an air toxic, such as benzene, one looks at the likelihood of cancer occurring. One does not look at how effective current and future treatments for leukemia may be at prolonging the life of a cancer patient, or look at how practical it would be for people to move to a different location as a way to reduce the risk from exposure to a harmful carcinogen.[261] Similarly, in addressing the risk to children from exposure

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[254] Id.
[255] 90 FR at 36302.
[256] Id. at 36309.
[257] Id.
[258] Id. at 36303.
[259] A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate, Climate Working Group, Department of Energy, Washington, DC, July 23, 2025. (CWG Draft Report) ix, 112-113.
[260] *Coalition for Responsible Regulation*, 684 F.3d at 117-118 ("As in Massachusetts v. EPA, a "laundry list of reasons not to regulate" simply has "nothing to do with whether greenhouse gas emissions contribute to climate change." Id. at 533–34, 127 S.Ct. 1438. **The additional exercises State and Industry Petitioners would have EPA undertake**—e.g., performing a cost-benefit analysis for greenhouse gases, **gauging the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases, and predicting society's adaptive response to the dangers or harms caused by climate change—do not inform the "scientific judgment***"* that § 202(a)(1) requires of EPA….. The statute speaks in terms of endangerment, not in terms of policy, and EPA has complied with the statute." (emphasis added)).
[261] See § 112(f)(2), where Congress codified prior case law and used risk from exposure as the criteria, not risk from exposure adjusted by projections of treatment measures or measures to mitigate risk. Also see *NRDC v. EPA*, 824 F. 2d 1146, 1164 (D.C. Cir. 1987) (en banc) ("We find that the congressional mandate to provide "an ample margin of safety" "to protect the public health" requires the Administrator to make an initial determination of what is "safe." **This**

to lead from gasoline, the D.C. Circuit looked at EPA's evaluation of the risk from exposure via inhalation and ingestion of dirt. Neither the agency nor the court considered how effective parental controls could be in keeping children indoors or keeping them from ingesting dirt while playing outside.[262] Likewise, when EPA determines the appropriate level for a NAAQS for ozone it considers the risk of adverse harm from exposure. EPA does not consider how effective asthma inhalers could be at reducing the harm from asthma attacks and does not consider whether people could stay indoors more often than they otherwise would to reduce the risk of harm.[263]

EPA's proposal fails several basic administrative law requirements. EPA makes various assertions about the need to consider adaptation and mitigation but fails to provide any factual basis to explain how this is feasible or practical, or how EPA could take any such evidence into consideration. EPA fails to explain how it would answer numerous basic questions that its proposal raises. How far into the future should EPA project adaptation and mitigation? What types of adaptation and mitigation would EPA need to consider? How would it evaluate such projections (cost? effectiveness? probability of occurrence?)?[264] Would adaptation and mitigation have to remove all anticipation of endangerment to avoid an affirmative determination on endangerment?[265] How does this consideration fit with the preventive nature of the Act and this provision?

The absence of factual evidence and analysis and the absence of explanation of how adaptation and mitigation could and should be taken into account in an endangerment finding is a basic failing of reasoned decision-making. In addition to the lack of legal basis for EPA's proposed interpretation concerning adaptation and mitigation, the proposal fails basic tenets of reasoned administrative decision-making. It is a proposed interpretation based on superficial assertions with nothing underlying it or supporting it.

EPA claims that the text of § 202(a) requires that EPA take into consideration technology and other factors related to emission standards when making determinations on contribution and

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determination must be based exclusively upon the Administrator's determination of the risk to health at a particular emission level"and "without any consideration of technologically feasible controls." Id. at 1163-65.) (emphasis added)

[262] *Ethyl Corp.v. EPA*, 541 F. 2d 1, 30-33(D.C. Cir. 1976).

[263] *Murray Energy v. EPA*, 936 F. 3d 597, 606, 609, 611-613 (D.C. Cir. 2019).

[264] One recent study projects that resilience adaptation costs for buildings from extreme weather events alone will total $38 trillion by 2050, with $6 trillion for mitigation needed as well. Kotz, M., Levermann, A. & Wenz, L. "The economic commitment of climate change," *Nature* 628, 551–557 (2024)("spending on building resilience to damaging weather extremes will exceed transition spending sixfold, with US$38 trillion needed to tackle the effects of "committed" climate damages, compared to estimated mitigation costs of US$6 trillion").

[265] For example, the CWG Draft Report at 113 refers to increased use of air conditioning and stronger building codes as examples of future adaptation. Consider the city of Phoenix, which has ample air conditioning. The risk of severe injury from extreme heat is nevertheless present. See https://www.nytimes.com/2024/07/14/us/heat-wave-pavement-burns.html ("In 2022, the Arizona Burn Center at Valleywise Health Medical Center in Phoenix, the largest burn center in the Southwest, admitted 85 patients for contact burns over the summer. Last year, as Phoenix sweltered through 31 straight days of temperatures above 110 degrees, that number climbed to 136 patients, 14 of whom died. This year, the center has already treated 50 patients, and four of them died") (emphasis original). Miami Beach has building codes, which, as the DOE Report notes, have been made more stringent. This doesn't change the inherent risk from climate endangerment. See https://www.businessinsider.com/coastal-properties-expensive-problem-revealed-miami-sinking-beachfront-high-rises-2025-1 ("In a study published in the journal *Earth and Space Science* in December, researchers found that 35 buildings along the coasts of Miami's barrier islands sunk into the ground by 2 to 8 centimeters between 2016 and 2023. This sinking phenomenon, called subsidence, is happening "almost everywhere that we look").

endangerment. This misreads the text of § 202(a).

EPA argues that "Section 202(a)(2) expressly provides that "[a]ny regulation prescribed under paragraph (1) of this subsection . . . shall" provide adequate time for "the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 64 CAA section 202(a)(1) authorizes the Administrator to "by regulation prescribe" standards "in accordance with the provisions of this section" and does not separately authorize standalone findings, meaning any action taken "under paragraph (1) of this subsection" is subject to the considerations in paragraph (2)."[266]

The regulations referred to in § 202(a)(2) are the emissions standards EPA sets under § 202(a)(1). Section 202(a)(1) directs that the Administrator "shall by regulation prescribe … standards applicable to the emission of any air pollutant from … new motor vehicles or new motor vehicle engines." The reference to "prescribe" "by regulation" refers to an action EPA must take – "EPA shall by regulation prescribe" – and the action that § 202(a)(1) mandates is setting emissions standards. What EPA has to "prescribe" by regulation are emission standards.

This mandate to set emission standards arises only if EPA makes affirmative determinations on contribution and endangerment. There is no mandate in § 202(a)(1) that EPA make affirmative determinations, just the opposite. The provision clearly directs EPA to use its scientific judgment in making either affirmative or negative determinations. If EPA makes affirmative determinations, then EPA's obligation to prescribe standards arises. At that point EPA must "by regulation prescribe" emission standards for the relevant air pollutant. The reference in § 202(a)(2) to a "regulation prescribed" under § 202(a)(1) refers to the emissions standards that EPA "shall … prescribe" by regulation. It does not refer to the separate threshold action EPA takes to make determinations on contribution and endangerment.[267]

EPA claims that "EPA did not consider "carbon leakage," which "refers to the situation that may occur if, for reasons of costs related to climate policies, businesses were to transfer production to other countries with laxer emission constraints . . . [and] could lead to an increase in their total emissions." Foreign governments have recognized that carbon leakage can mitigate or even lead to an increase in total emissions which would significantly impact the claimed benefits of the regulatory actions. Accordingly, we propose that refusing to consider these foreseeable consequences was inconsistent with the statutory scheme."[268]

This claimed inconsistency derived from EPA's severing of the standard setting from the contribution and endangerment determinations. As discussed above, factors relevant to standard setting are irrelevant to determining the science-based issues of contribution and endangerment. Clearly EPA could consider this kind of issue in the standard setting for motor vehicles, but there is no reason to think it is relevant to the business of manufacturing new motor vehicles. The standards apply to the product, not the business, and apply to imported vehicles as well as vehicles produced domestically. EPA fails to provide any evidence or argument that the GHG standards for new motor vehicles would have any effect on the carbon leakage EPA refers to. This may or may not be an issue

[266] 90 FR at 36303.
[267] EPA's reliance on *Michigan v. EPA*, 576 U.S. 743, 753 (see 90 FR 25765, fn.104) is also inapposite. That case concerns a very different statutory provision that calls for EPA to determine if regulations are "necessary and appropriate" with respect to emissions of HAPs from electric utility steam generating units.
[268] 90 FR at 36305.

for GHG standards that apply to facilities, but it's hard to see how it has any relevance in the context here, emissions standards for new motor vehicles.

The courts are clear that EPA's "judgment" is constrained to only consider the factors that are legally relevant when determining contribution and endangerment. It is not permission to consider a wide range of additional factors and allegedly desirable policy considerations.

EPA's proposed interpretation is no more than a backdoor way to add to § 202(a) a criterion calling for EPA to decide whether, in EPA's judgment, it is reasonable and appropriate to regulate GHG emissions to address global climate change. Congress did not adopt such a provision in § 202(a). Congress decided that if emissions from motor vehicles contributed to air pollution that endangers, then EPA is required to establish standards applicable to such emissions. Congress gave EPA large discretion in what standards to set, but Congress decided when EPA was required to set standards. EPA's proposed interpretation takes that decision away from Congress and reserves it to EPA's judgment. That is contrary to § 202(a).

As discussed above, the Act's Good Neighbor SIP provision does not support EPA's proposed interpretation, it undermines it. The Good Neighbor provision is distinctly different from the contribution and endangerment finding in § 202(a). The contribution finding in the Good Neighbor provision performs two functions – it identifies whether the state has to include provisions in its SIP to control emissions, and it identifies the exact amount of emissions that must be controlled.[269] This is distinctly different from § 202(a). The SIP provision combines two questions (duty to adopt controls and amount of reductions required by the controls), while these two questions are kept separate in § 202(a) (authority to adopt controls, based on contribution/endangerment determination; and achievement of emissions controls through the separate standard setting provision). The Good Neighbor provision and other SIP provisions concerning transport make it clear that Congress knew how to authorize EPA to consider factors related to emissions control when making a contribution or endangerment finding. If it wanted to, it knew how to and could have. Congress did not do so in § 202(a), and that is telling. Likewise § 211(c)(2)(A) shows that Congress knew how to direct EPA to consider and evaluate different kinds of control strategies before authorizing EPA to adopt fuel-based controls. Congress did not do that in § 202(a).

Under EPA's proposed interpretation, it is required to evaluate the effectiveness and other aspects of potential control strategies as part of deciding whether motor vehicle emissions contribute to air pollution that endangers. EPA does not explain how this would be done. For example, would EPA look only at the standards that could be adopted for the next few model years? Would EPA be required to project the potential for future advances in technology that might warrant greater emission reductions? How far out would EPA have to project the effectiveness, cost, and other factors of future standards? This interpretation calls for EPA to either make future projections that are largely speculation or to rely on no more than near-term projections that can be made with relative accuracy. Either way distorts the decision-making in ways that agency practice has shown to be wrong. EPA has almost 50 years of experience in setting standards for motor vehicles. In the 1970s, 1980s, 1990s, or even later, could EPA have accurately projected the advances in control strategies that could be achieved in aftertreatment for gasoline powered vehicles? Or the aftertreatment of particulate matter (PM) traps and selective catalytic reduction (SCR) for diesel-powered vehicles? Or the growing use of electric power to propel vehicles in whole or in part?

[269] States must "prohibit[]… amounts [of any air pollutant] which will contribute significantly to [nonattainment or maintenance of attainment in a downwind State]" Section 110(a)(2)(D). See the discussion of this provision above.

The answer is clearly no. EPA's historical practice in this area shows that having EPA decide whether to address an air pollution problem on EPA's projection of the future costs and effectiveness and feasibility of control technologies is a futile exercise, and one that is obviously biased to produce a negative decision.

That is certainly why EPA is proposing this interpretation – it is looking for any plausible or implausible argument that would allow it to say it has no authority to regulate GHGs from motor vehicles. However, the interpretation EPA has latched onto is not how Congress constructed § 202(a).

The Supreme Court has recognized this as well. In a related context, involving redressability and standing, the Court said:

> "But EPA overstates its case. Its argument rests on the **erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop**. See Williamson v. Lee Optical of Okla., Inc., 348 U. S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead **whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.** Cf. SEC v. Chenery Corp., 332 U. S. 194, 202 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations"). **That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction** to determine whether that step conforms to law." *Massachusetts*, 549 U.S. at 523-524. (emphasis supplied)
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> 4. Section 202(a) does not authorize EPA to determine whether emissions from motor vehicles contribute sufficiently enough to the endangerment to warrant regulatory control.

EPA proposes that it was improper to sever the contribution and endangerment findings, and that these determinations, like the standard setting, must be implemented as a "cohesive whole." According to EPA, this means that it is not enough to determine that the air pollution is reasonably anticipated to endanger public health or welfare. EPA also must determine whether emission from motor vehicles contribute to this endangerment in a direct enough and to a large enough degree to warrant regulatory controls.

EPA claims that contribution and endangerment must be considered in a "single causal chain," and the "emission [from the vehicles at issue in the standard setting] must cause or contribute to the danger posed by the air pollution to a sufficient extent to satisfy the standard for regulation."[270] EPA is required to determine whether emissions from motor vehicles as a whole, as well as from classes of vehicles being regulated, had "a more than de minimis effect on the danger identified with respect to elevated concentrations of GHGs in the upper atmosphere."[271] EPA claims it is required to

[270] 90 FR at 36303, 304.
[271] Id. at 36304.

"consider whether emission standards for new motor vehicles would be futile as a means to address the identified dangers of GHG emissions from all anthropogenic sources."[272]

In effect, EPA proposes that § 202(a) should be interpreted as if it were written:

> The Administrator shall by regulation prescribe (and from time to time revise) standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute *sufficiently enough* to, …, *endangerment from* air pollution which may reasonably be anticipated to endanger public health or welfare.

But that is not the provision Congress adopted. Congress directed EPA to determine contribution to air pollution, not contribution to the endangerment from the air pollution.[273]

At its core, this aspect of EPA's proposal is the same as the prior claim that standard setting must be considered in making contribution and endangerment findings. The only purpose in determining whether emission from motor vehicles contribute sufficiently enough to the risk from the air pollution is to determine whether it is reasonable and appropriate to set standards to control the vehicle emissions. Instead of arguing the controls are too expensive, EPA is arguing the risk added by motor vehicles emissions is not large enough to warrant regulation. This is clear from EPA's claim that it must "consider whether emission standards for new motor vehicles would be futile as a means to address the identified dangers of GHG emissions from all anthropogenic sources."[274]

As discussed above, these standard setting factors are relevant in determining what should be done to address the climate change problem, but they are legally irrelevant in determining the threshold questions of contribution and endangerment. Congress established the contribution and endangerment criteria as the threshold test to determine whether there was an air pollution problem that EPA should address. It established the standard setting provisions to answer a different and separate question – how should EPA address the air pollution problem.

The additional role that EPA calls for the contribution determination to play – requiring EPA to decide whether motor vehicles contribute enough to the risk from the air pollution to warrant standard setting – is the same role that EPA proposes in claiming that standard setting has to be taken into account when making the contribution and endangerment findings. EPA assigns to itself the role of determining when a regulatory control program is appropriate and reasonable. Congress did not assign this role to EPA – Congress decided that standards should be set if vehicle emissions contributed to the air pollution and the air pollution endangers. Congress gave EPA broad discretion on what standards to set, but Congress decided the threshold question whether EPA was required to set standards.

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[272] Id. at 36305.

[273] Congress wanted EPA to "assur[e] consideration of the cumulative impact of all sources of a pollutant in setting ambient and emission standards, not just the extent of the risk from the emissions from a single source or class of sources of the pollutant." H.R. Rep. No. 95-294 at 51. Congress mandated consideration of the cumulative impacts of all sources aggregated, and did not mandate two considerations – consideration of the impacts from all the sources that make up the air pollution plus consideration of the risk from the single class of sources for which standards are set.

[274] 90 FR at 36305.

EPA proposes to rescind the determinations made in 2009, but fails to explain how EPA is now evaluating the sufficiency of the risk from motor vehicles. EPA presents no modeling or any other evidence to show or argue that under its proposal the risk from motor vehicle emissions would not be sufficient enough to warrant regulation. EPA appears to rely on a claim that removing light-duty vehicles would make no measurable impact on the global warming trend. EPA states that motor vehicle emissions "did not themselves contribute to a danger in any meaningful sense" and "reducing GHG emissions from all vehicles and engines in the United States to zero would not have a scientifically measurable impact on GHG emission concentrations or global warming potential (CWG Draft Report at 130)."[275]

The CWG Draft Report claims that "the impact of reducing the rate of global warming by eliminating U.S. [cars and light-duty trucks] CO_2 emissions would be far below the limits of measurability…Consequently, in contrast to the case of local air contaminants like particulates and ozone, even the most aggressive regulatory actions on GHG emissions from U.S. vehicles cannot be expected to remediate alleged climate dangers to the U.S. public on any measurable scale."[276] This derives from the scale of the global air pollution and impact on global warming.

It is erroneous to discuss this in terms of measurability and to make claims concerning measurability. Impacts of reductions in specific amounts of GHG emission on attributes such as global temperature are not something that are directly measured. However, such impacts are quantifiable through estimation or modeling. Claiming the impact of this amount of reductions is "immeasurable" implies a near-zero effect that cannot be quantified, which is not a supportable claim and is misleading.

One measures the impact of a change in X on an attribute Y by measuring Y before and after the change in X, while keeping all other factors constant. For example, one measures the impact of adding a certain amount of salt to water on the water's boiling temperature by measuring the water's boiling temperature before adding the salt, measuring it after adding the salt, and keeping all other factors that affect boiling temperature the same, e.g., keeping the altitude/air pressure the same. One cannot follow that procedure when "measuring" the impact of a change in vehicle emissions on global temperatures. It is not a laboratory experiment that can be done. Modeling is the appropriate tool to use to try to quantify the impact of GHG reductions on global temperature.

Likewise, in almost all cases one cannot measure the health impact of a reduction in emissions. Take the case of the impact of changes in PM levels on mortality levels. Sometimes there are fortuitous circumstances that lead to an almost laboratory-like setting, such as when an industrial facility shuts down, and mortality and PM levels are measured both before and after the facility shuts down and other relevant factors are basically constant before and after. This can provide what is called a natural experiment.[277] But other than this kind of unusual real-world situation, the impact of reductions in PM or ozone or other criteria pollutants on mortality or other health attributes is modeled, not measured. The modeling is subject to close scrutiny and typically becomes more and more reliable at predicting the impact of emissions reductions as the body of empirical and other science grows and expands in depth and comprehension. Likewise the impacts of a certain reduction

[275] Id.

[276] CWG Draft Report at 130.

[277] See 71 FR 61144, 61186, 61223 (October 17, 2006); EPA "Air Quality Criteria for Particulate Matter," EPA/600/P-95/0016F, April 1996, Vol. III. pp. 12-96, 12-115, 12-330.

in emissions of GHGs on global temperature would be modeled, not measured. EPA has done this in prior motor vehicles standard setting rulemakings.[278] One can argue about the importance or value to place on the modeled impacts, but one must accept that the appropriate approach is to model any such impact.[279] It is not appropriate to claim something has no impact because it is not directly measurable or would have no measurable impact.

The CWG Draft Report cited by EPA states that emissions from light-duty vehicles "account for only 3.0 percent of global energy-related CO_2 emissions," and reducing all the emissions from these vehicles:

> "would also reduce the overall warming trend by at most about 3 percent. For the period 1979-2023, which has the most extensive global coverage of a variety of weather data types, warming trends are determined to a precision of about ±15 percent, so the impact of reducing the rate of global warming by eliminating U.S. vehicle CO_2 emissions would be far below the limits of measurability."[280]

The CWG Draft Report fails to cite any source for the values that it cites or further explain its analysis, but it appears that it is referring to a scenario where future emissions from these vehicles were eliminated. To determine the impact of this change in emissions on global temperatures –- a key metric of climate change –- one would model or estimate future global temperatures with and without the change in emissions and compare the difference in modeled temperatures. The report appears to assume that removing 3% of global energy-related CO_2 emissions would lead to a reduction in the future warming trend of up to 3% (over some time frame which is not specified), which it claims falls within the +/-15% precision for past warming trend and is therefore not measurable.

This appears faulty. The CWG Draft Report appropriately recognizes that a 3% reduction in global energy-related CO_2 emissions would reduce the future global warming trend by up to 3%. That means a future warming trend that included U.S. light-duty vehicle emissions (a projected level of global temperature with a band around it of +/-15%) would adjust downward if those emissions were removed, and there would be a new, lower warming trend (a lower projected future global temperature, lower because of the change in emissions, with a +/-15% band around it). The change of emissions would lower the entire band of the projected warming trend. The change in the warming trend is not somehow lost in the band of the prior warming trend. It is a new warming trend, positioned lower on the graph than the prior warming trend to reflect the lower projected global temperature resulting from the change in emissions. There would be overlap between the +/-15% bands for the prior projected warming trend with the vehicle emissions and the lower projected warming trend without the emissions, but they would clearly be different warming trends. This change in the warming trend would not be measurable, because you cannot measure two future warming trends with and without the change in emissions. But there would be a clear, quantifiable, and important impact shown in the change in the modeled warming trend based on the change in emissions. In addition to this significant substantive error, we note further that the failure of the

[278] See, e.g. 75 FR at 25496 (May 7, 2010).
[279] See 90 FR at 36505, fn.70. The referenced article discusses modeled global temperature changes from various emissions reduction scenarios, and describes the author's view on the importance or value of such reductions and impacts.
[280] CWG Draft Report at 130.

Report to disclose its methodology – leaving commenters to guess at the intended meaning – is a violation of CAA § 307(d)(3)(B), which requires proposals to set forth "the methodology used… in analyzing the data."[281]

It is important to point out that EPA (and the CWG Draft Report it relies upon) fails to mention how the most recent body of science characterizes the implications of incremental emission increases or decreases and related incremental increases or decreases in global warming. The congressionally-mandated Fifth National Climate Assessment (2023) stated "[e]ach additional increment of warming is expected to lead to more damage and greater economic losses compared to previous increments of warming, while the risk of catastrophic or unforeseen consequences also increases."[282] Likewise, the IPCC (2023) stated "[w]ith every additional increment of global warming, changes in extremes continue to become larger."[283]

In addition, the D. C. Circuit rejected a similar claim in *Catawba County, N.C v. EPA*. The Court said:

> "[P]etitioners insist that the verb "contribute" necessarily connotes a significant causal relationship, meaning that EPA may not designate a county as contributing to nonattainment if "corrective measures in [the county] will do nothing to address the problem or help achieve compliance in the nonattainment area." We reject both the major and the minor premise. … But even were we to think that "contribute" unambiguously means "significantly contribute," we still disagree that "significantly contribute" unambiguously means "strictly cause." Given that the statute uses the word "contribute" and that a contribution may simply exacerbate a problem rather than cause it, we see no reason why the statute precludes EPA from determining that a county's addition of PM2.5 into the atmosphere is significant even though a nearby county's nonattainment problem would still persist in its absence. In fact, a contrary interpretation of "contribute" would effectively preclude a nonattainment designation for any attaining county when the cause of the violation is metropolitan-wide. We may not interpret "contribute" in a way that does such violence to section 107(d)'s very purpose."[284]
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> 5. Section 202(a) does not authorize EPA to determine whether emissions from motor vehicles contribute in a direct enough way to the endangerment to warrant regulatory control.

EPA also claims that it must show that the emissions from motor vehicles have a direct enough causal connection to the endangerment to satisfy the contribution criterion. EPA claims that background legal principles of "proximate cause" apply under § 202(a), such that "emissions from

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[281] Also see Dessler, A.E. and R.E. Kopp (Ed.) (2025), "Climate Experts' Review of the DOE Climate Working Group Report." DOI: to be assigned, URL to be assigned, (Comment submitted to the U.S. Department of Energy, docket number DOE-HQ-2025-0207, in response to their report "A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate") at pp. 406-416, esp. 415-416.

[282] 5th National Climate Assessment, Report-In-Brief (2023), p. 24. https://toolkit.climate.gov/sites/default/files/2025-07/NCA5_2023_FullReport.pdf

[283] IPCC "Climate Change 2023 Synthesis Report," p.69. https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf

[284] *Catawba County*, 571 F.3d 20, 38-39 (D.C. Cir. 2009).

new motor vehicles and new motor vehicle engines in the United States do not have a sufficiently close connection to the adverse impacts identified in the Endangerment Finding to fit within the legal meaning of "cause" or
"contribute.""[285] EPA claimed that "global climate change concerns involve analyzing causal relationships that are too uncertain, too remote, and too confounded by intervening and confounding factors to fit within the terms cause" and "contribute" as used in CAA section 202(a)."[286]
In effect, EPA proposes that § 202(a) should be interpreted as if it was written:

> The Administrator shall by regulation prescribe (and from time to time revise) standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute *directly enough* to, …, *endangerment from* air pollution which may reasonably be anticipated to endanger public health or welfare.

But that is not the provision Congress adopted. Congress directed EPA to determine contribution to air pollution, not contribution to the endangerment from the air pollution.

EPA is proposing to rescind the 2009 contribution finding. EPA did not make a finding of causation in 2009, nor has it in any subsequent GHG findings. The meaning of the term "cause" is not before EPA. The background principles of proximate causation are not relevant to evaluate contribution.

More directly, principles of proximate cause are not relevant to the judgments EPA must make under § 202(a). Proximate cause is a creature of the common law of torts. The law of torts involves determining when one person is liable to pay damages to a second person for injuries they caused to the second person. That has nothing to do with the scope of EPA's authority under § 202(a), including its obligation to determine contribution of GHG emissions from motor vehicles to global GHG air pollution. The cases cited by EPA make this clear. All of the cases involve private parties suing other parties. One party alleges the other party's conduct was prohibited by statute, that conduct caused injuries to the party, and the party now seeks monetary damages.

EPA cites various cases to support its approach.[287] *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189 (2017), involves a city suing a bank for damages from injuries caused by discriminatory lending practices, conduct prohibited by the Fair Housing Act. The Court said:

> "The **remaining question is one of causation: Did the Banks' allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services?** The Eleventh Circuit concluded that the answer is "yes" because the City plausibly alleged that its financial injuries were foreseeable results of the Banks' misconduct. We conclude that foreseeability alone is not sufficient to establish proximate cause under the FHA and therefore vacate the judgment below.
>
> It is a "'well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.'" Lexmark, 572 U.S., at

[285] 90 FR at 36301.
[286] Id.
[287] Id. at 36301, fn. 57.

——, 134 S.Ct., at 1390. We assume Congress "is familiar with the common-law rule and does not mean to displace it sub silentio " in federal causes of action. Ibid. *A claim for damages under the FHA*—**which is akin to a "tort action,"** Meyer v. Holley, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003)—**is no exception to this traditional requirement. "Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.**" Lexmark, supra, at ——, 134 S.Ct., at 1390.

In these cases, the "conduct the statute prohibits" consists of intentionally lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms. The City alleges that the Banks' misconduct led to a disproportionate number of foreclosures and vacancies in specific Miami neighborhoods. These foreclosures and vacancies purportedly harmed the City, which lost property-tax revenue when the value of the properties in those neighborhoods fell and was forced to spend more on municipal services in the affected areas." (emphasis added) 581 U.S. at 201-202.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) involves one business suing another for damages from injuries caused by false advertising, conduct prohibited by the Lanham Act. The Court said:

"Second, we **generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute**. For centuries, it has been "a well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause." Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213, 223, 9 L.Ed. 691 (1837); see Holmes, 503 U.S., at 287, 112 S.Ct. 1311 (SCALIA, J., concurring in judgment). That venerable principle reflects the reality that "the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." Associated Gen. Contractors, 459 U.S., at 536, 103 S.Ct. 897.

Congress, we assume, is familiar with the common-law rule and does not mean to displace it sub silentio. **We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation.** See, e.g., Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 346, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (securities fraud); Holmes, supra, at 268–270, 112 S.Ct. 1311 (RICO); Associated Gen. Contractors, supra, at 529–535, 103 S.Ct. 897 (Clayton Act). No party disputes that it is proper to read § 1125(a) as containing such a requirement, its broad language notwithstanding." (emphasis added) 572 U.S. at 132.

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) involves an employee suing their employer for damages for injuries caused by conduct prohibited by the Civil Rights Act of 1964. The Court said:

"**When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited**

> **conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts.** This case requires the Court to define those rules in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers. […]
> **This case requires the Court to define the proper standard of causation for Title VII retaliation claims. Causation in fact**—i.e., proof that the defendant's conduct did in fact cause the plaintiff's injury—**is a standard requirement of any tort claim**, see Restatement of Torts § 9 (1934) (definition of "legal cause"); § 431, Comment a (same); § 279, and Comment c (intentional infliction of physical harm); § 280 (other intentional torts); § 281(c) (negligence). **This includes federal statutory claims of workplace discrimination.** Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (In intentional-discrimination cases, "liability depends on whether the protected trait" "actually motivated the employer's decision" and "had a determinative influence on the outcome"); Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (explaining that the "simple test" for determining a discriminatory employment practice is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" (internal quotation marks omitted))." 570 U.S. at 342. (emphasis added)

All of these cases involve one party suing another party for damages, alleging injuries caused by conduct that was prohibited by a federal statute. In all of these cases the Court pointed to the common law of torts as a background to determine the causation requirement implied by the statute's federal cause of action. These cases are irrelevant to interpreting the scope of EPA's authority under § 202(a). EPA's determinations on contribution and endangerment under § 202(a) have nothing to do with someone suing someone else to collect damages for injuries caused by conduct prohibited by a federal statute. It should be obvious these cases and the tort principles they rely upon are irrelevant here.

EPA improperly relies on this tort law principle to claim the alleged uncertain link between GHG emissions from motor vehicles and damage from climate change mean the contribution criterion is not met. EPA claims that "[a]s a general matter, there is a point at which harm no longer has a sufficiently close connection to the relevant conduct to reasonably draw a causal link. We propose that emissions from new motor vehicles and new motor vehicle engines in the United States do not have a sufficiently close connection to the adverse impacts identified in the Endangerment Finding to fit within the legal meaning of "cause" or "contribute.""[288]

EPA seemingly is asking whether motor vehicle emissions (the analogy to prohibited conduct under tort analysis) have a direct enough causal link to the damage caused by the air pollution (the analogy to harm to a private party under tort analysis). But this is not a tort case. This is not a case of one party suing motor vehicle owners or manufacturers for damages caused by emissions that the statute prohibits, where the directness of the link between the emissions and the injuries is relevant. Section 202(a) does not call for the kind of analysis EPA points to. Proximate cause and other aspects of tort law are of no import here.

[288] Id. at 36301.

EPA's proposal also unlawfully mixes the contribution determination and the separate endangerment determination. Section 202(a), like many other provisions in the Act, establishes a two-step analysis for determining whether EPA has authority to adopt controls for a source category. EPA must judge whether the air pollution is reasonably anticipated to endanger public health or welfare. EPA also must judge whether a source category contributes to this air pollution. These judgements are to be based on science not policy and not issues concerning the emissions controls that can only be adopted if an affirmative determination is made. The endangerment and contribution judgments are separate and distinct from each other and from the judgments involved in setting controls if an affirmative determination is made.

EPA improperly conflates the contribution and endangerment determinations in its proposal. EPA proposes that "global climate change concerns involve analyzing causal relationships that are too uncertain, too remote, and too confounded by intervening and confounding factors to fit within the terms "cause" and "contribute" as used in CAA section 202(a)."[289]

EPA is mixing up the issue of contribution by motor vehicles with the separate issue of endangerment from the air pollution. The uncertainties and remoteness and confounding by other factors concerns science and the evidence used to determine whether the air pollution endangers public health or welfare. That is not relevant to the separate issue of contribution to the air pollution from motor vehicles.[290]

EPA seems to claim there needs to be a direct enough link showing that emissions from motor vehicles cause a sufficient enough degree of the endangerment to public health or welfare from the overall GHG air pollution. The issue before EPA is not whether there is a direct enough causal chain between motor vehicle emissions and the endangerment to public health and welfare. The relevant causal link is between the air pollution and the endangerment of public health or welfare. Motor vehicle emissions only come into play in the contribution determination, which does not include a criterion of causing danger or contributing to the danger to some unspecified degree.

A simple example makes this clear. Assume three sources each emit one third of the total emissions that make up the air pollution. The resulting concentration of the air pollution is high enough that it makes the air pollution dangerous, but the concentrations contributed by each source would not by itself be dangerous. The air pollution is dangerous, and contributing one third of the emissions is clearly a contribution to the air pollution. There is no requirement that a source's emissions by themselves in isolation be dangerous.

EPA also fails to recognize that a million metric tons (MMT) of one kind of GHG emitted by motor vehicles acts the same way as an MMT of the same kind of GHG emitted by any other source, whether domestic or global. The motor vehicle tons end up well mixed in the atmosphere along with

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[289] Id.

[290] In addition, EPA fails to account for the increasing certainty in the science concerning the dangers presented by GHG air pollution levels. For example, the IPCC's 2023 Sixth Assessment Report (found at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) finds clear causal linkages from emissions to damages and warns that limiting global warming to 1.5°C and 2°C involves rapid, deep and in most cases immediate greenhouse gas emission reductions from all sources and sectors, particularly from CO_2 from fossil fuel combustion.

all of the tons emitted by other domestic and international sources.[291] The endangerment comes from the aggregate concentration of GHGs in the atmosphere, the air pollution. In determining whether the emissions from motor vehicles contribute to the total amount of GHGs in the atmosphere comprising the air pollution, the location of all of the other sources of GHGs is irrelevant to making a judgment about the degree of contribution from motor vehicles.

6. EPA did not improperly assign emissions from all other sources to motor vehicles.

EPA proposes that the 2009 interpretation is not "consistent with the language of CAA section 202(a) and the structure of the CAA, which requires making distinct findings for regulating distinct types of emission sources and authorizes different regulatory tools when such standards are met," and instead of making such distinct findings "[t]he Endangerment Finding effectively attributed the total GHG emissions coming from all of these various distinct sources within the United States, as well as from all international sources, to the mobile sources regulated under CAA section 202(a) without having made the requisite determinations for any of those sources and without considering the different regulatory tools Congress authorizes for those sources as compared to CAA section 202(a) sources."[292]

It is somewhat hard to respond to this claim as it is almost impossible to know what it means. Yes, the Act has separate provisions addressing various kinds of sources, and Congress structured those provisions similar to § 202(a) – a threshold requirement that EPA determine cause or contribute and endangerment before it has authority to adopt controls, other provisions on the nature of controls EPA was authorized to adopt if and only if the threshold determinations were made, and provision on whether or not EPA was required to adopt controls. These other provisions are separate and distinct from § 202(a), and § 202(a) makes no reference to them. They provide context, showing Congress adopted a similar approach across the Act, but nothing in § 202(a) ties them in any way to the threshold determination in § 202(a).

Nowhere in the 2009 threshold determinations of contribution and endangerment did EPA assign or attribute any emissions from any other source to motor vehicles. The contribution finding estimated GHG emissions from U.S. motor vehicles by looking at emissions from just motor vehicles. In the contribution analysis, EPA compared U.S. motor vehicle emissions to other groups of emissions –- total global GHG emissions, total United States emissions and total emissions from various other countries, and emissions from other source categories in the United States. This was a comparison to motor vehicle emissions; no emissions from other sources were in any way assigned to motor vehicles. In the endangerment analysis, EPA looked at global concentrations of GHGs, past and projected global temperature trends, and analysis of current and projected impacts across numerous parts of society from the temperature trends. EPA never claimed that all identified threats to public health and welfare caused by GHG-induced climate change were solely due to U.S. vehicle emissions. Nowhere in this process did EPA assign emissions to U.S. motor vehicles.

Since EPA's proposal refers to emissions from the aggregate of domestic and foreign sources, and the endangerment analysis concerns the global concentration of GHGs, perhaps EPA means that the air pollution considered in the endangerment analysis could not include emissions from these

[291] This comparison assumes the same pollutant is involved, e.g. an MMT of CO2 from one source compared to an MMT of CO2 from another source, or an MMT of CH4 compared to an MMT of CH4 from another source.
[292] Id. at 36304.

other sources unless and until EPA made findings under these other provisions of the Act. Nothing in the Act supports such a convoluted interpretation. EPA explained in great detail why it considered the air pollution as the global concentrations of the mix of gases.[293] Congress specifically called for EPA's 2009 approach to endangerment when it adopted the 1977 amendments to the Act. Congress required that EPA "assur[e] consideration of the cumulative impact of all sources of a pollutant in setting ambient and emission standards, not just the extent of the risk from the emissions from a single source or class of sources of the pollutant," and "require[d] consideration of cumulative or synergistic effects of multiple pollutants to mandate evaluations of total body burden of contaminants."[294] As EPA stated in 2009, "Finally, the phrase "cause or contribute" ensures that all sources of the contaminant which contribute to air pollution are considered in the endangerment analysis (e.g., not a single source or category of sources). It is also intended to require the Administrator to consider all sources of exposure to a pollutant (for example, food, water, and air) when determining risk. [H.R. Rep. 95–294 at 51, 4 LH at 2518]."

Perhaps this is yet another way that EPA argues that it is required to consider the various aspects of control measures as part of the process of determining contribution and endangerment. Perhaps this is another way of arguing the contribution, endangerment, and standard setting provisions are all interrelated and need to be considered together. EPA says it was unlawful for EPA to make contribution and endangerment findings without "considering the different regulatory tools Congress authorizes for those sources as compared to CAA section 202(a) sources." The response to this is the same as the response to the claim EPA must consider the aspects and impacts of motor vehicle standards as part of determining contribution and endangerment. This proposed approach is inconsistent with § 202(a)'s text and structure. Congress required a threshold determination of authority to regulate -– determination of contribution and endangerment — separate and apart from the decision on appropriate standard setting if the threshold determination is affirmative. The various aspects of the regulatory control measures for motor vehicles are not legally relevant to determining the threshold requirements of contribution and endangerment. Likewise, the various aspects of potential control measures on sources other than motor vehicles (assuming the threshold determination on authority is satisfied under those separate statutory provisions) is legally irrelevant to determine whether emissions from motor vehicles contribute to air pollution that endangers.

> 7. EPA did not interpret endangerment to mean any negative impact on public health or welfare, and did not determine contribution as any level above de minimis.

EPA claims that the 2009 action was unlawful because it failed to properly consider contribution and endangerment "in context." EPA claims endangerment cannot mean "any predicted negative impact to any public health or welfare value," and EPA avoided this concern by determining contribution as any amount above de minimis levels, "even if those emissions did not themselves contribute to a danger in any meaningful sense."[295] This mischaracterizes EPA's interpretation of § 202(a) and its application in 2009.

With respect to endangerment, EPA was clear that this was a complex exercise of judgment, not a simple determination requiring no more than any prediction of some harm to public health or welfare. EPA described the several aspects of determining endangerment.

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[293] 74 FR at 66517. Also see 66517-519.
[294] H.R. Rep. No. 95–294 at 51.
[295] 90 FR at 36305.

"[T]he Administrator is required to protect public health and welfare, but she is not asked to wait until harm has occurred," and is to consider both current and future risks.[296] EPA's exercise of judgment involves:

> "weighing risks, assessing potential harms, and making reasonable projections of future trends and possibilities. It follows that when exercising her judgment the Administrator balances the likelihood and severity of effects. This balance involves a sliding scale; on one end the severity of the effects may be of great concern, but the likelihood low, while on the other end the severity may be less, but the likelihood high. Under either scenario, the Administrator is permitted to find endangerment. If the harm would be catastrophic, the Administrator is permitted to find endangerment even if the likelihood is small."[297]

The Administrator is called upon to recognize and take into account the range of scientific evidence including any limitations and uncertainties in the evidence.

> "Because scientific knowledge is constantly evolving, the Administrator may be called upon to make decisions while recognizing the uncertainties and limitations of the data or information available, as risks to public health or welfare may involve the frontiers of scientific or medical knowledge. At the same time, the Administrator must exercise reasoned decision making, and avoid speculative inquiries."[298]

EPA is to take into account risk across all parts of the population, not just the average or general risk to society.

> "Fourth, the Administrator is to consider the risks to all parts of our population, including those who are at greater risk for reasons such as increased susceptibility to adverse health effects. If vulnerable subpopulations are especially at risk, the Administrator is entitled to take that point into account in deciding the question of endangerment. Here too, both likelihood and severity of adverse effects are relevant, including catastrophic scenarios and their probabilities as well as the less severe effects."[299]

This describes a complex decision making process, focused on evaluating all of the evidence, including its strengths and weaknesses. It calls for looking at all elements of society in evaluating endangerment. It calls for balancing the likelihood risk of an adverse effect with the severity of the effect. It calls for evaluating current as well as future conditions. It calls for an exercise of judgment in all of these matters, employing reasoned decision making and not speculative inquiries.[300]

EPA has provided no evidence that, in the approximately 45 years that EPA has made decisions concerning the endangerment criterion, EPA found endangerment based on a simplified prediction of any negative impact on public health or welfare, and that it did this by determining that contribution meant any level above de minimis amounts.

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[296] 74 FR at 66505.
[297] Id.
[298] Id. at 66505-506.
[299] Id. at 66506.
[300] Id. at 66506-509.

EPA also mischaracterizes EPA's 2009 action, claiming that "[f]ollowing the logic of the Endangerment Finding, any "air pollutant" emitted at more than de minimis volumes would trigger our authority."[301]

EPA did not make any such finding and did not determine motor vehicles contributed to GHG air pollution because their contribution was more than a de minimis level. EPA rejected the idea that it had to or did establish a bright line test defining contribution, much less a bright line test determining any level above de minimis levels would meet the contribution criterion.

EPA said:

> "Given this context, it is entirely reasonable for the Administrator to interpret CAA section 202(a) to require some level of contribution that, while more than de minimis or trivial, does not rise to the level of significance. …
>
> It is also reasonable for EPA to decline to establish a "bright-line 'objective' test of contribution." 571 F.3d at 39. As noted in the Proposed Findings, when exercising her judgment, the Administrator not only considers the cumulative impact, but also looks at the totality of the circumstances (e.g., the air pollutant, the air pollution, the nature of the endangerment, the type of source category, the number of sources in the source category, and the number and type of other source categories that may emit the air pollutant) when determining whether the emissions justify regulation under the CAA. Id. (It is reasonable for an agency to adopt a totality-of-the-circumstances test)."[302]

Far from basing its contribution decision on a determination that motor vehicles contributed to GHG air pollution because their emissions levels were above a de minimis level, EPA found that:

> "[e]ven if EPA agreed that a level of significance was required to find contribution, for the reasons discussed above, EPA would find that the contribution from CAA section 202(a) source categories is significant. Their emissions are larger than the great majority of emitting countries, larger than several major emitting countries, and they constitute one of the largest parts of the U.S. emissions inventory."[303]

EPA's claim — that the 2009 interpretation was unlawful because it embodied anything above de minimis level — mischaracterizes EPA's actual decision. Even if correct, EPA's proposal's claim of an unlawful interpretation would not be a basis to rescind the Endangerment Finding because EPA did not apply any such interpretation.

8. EPA's claim of a lack of limiting principles for contribution and endangerment is unfounded.

EPA claims that § 202(a) mandates EPA to analyze the extent to which emissions from motor vehicles contribute to the danger from GHG air pollution. EPA says without this limitation EPA's 2009 interpretation lacks any limiting principle. It gives a hypothetical obligation to regulate water

[301] 90 FR at 36301. Also see Id. at 36304, 305, 307.
[302] 74 FR at 66542.
[303] Id.

vapor emissions as an example of the unlimited nature of EPA's interpretation. This argument is specious.

EPA claims:

> "Nowhere in the Endangerment Finding did the Administrator consider the extent to which emissions from CAA section 202(a) sources have a more than de minimis effect on the danger identified with respect to elevated concentrations of GHGs in the upper atmosphere—let alone whether emissions from any particular class or classes of sources that EPA intended to regulate had such an effect. …
>
> We are also concerned that severing the endangerment and cause or contribution findings leads to untenable results and lacks any limiting principle. To illustrate the problem, the same logic would allow the EPA to issue emission standards for water vapor (H_2O), another substance emitted by new motor vehicles and engines that is also considered a powerful GHG. Considered in isolation, H_2O concentrations in the atmosphere can be said to endanger public health or welfare by resulting in rain that leads to slip-and-fall injuries, drownings, and damage to crops, livestock, and property, including through pools, rivers, and floodwater, although water vapor is not itself harmful and is necessary to sustain life. Also considered in isolation, CAA section 202(a) sources can be said to "contribute" to elevated H_2O concentrations in the atmosphere from all anthropogenic sources, and these emissions of water vapor would thereby assertedly "contribute" to global climate effects similar to those attributed to other GHGs. CAA section 202(a) does not contemplate prescribing emission standards for such an omnipresent, naturally occurring, and essential component of the ambient air, and stakeholders have not petitioned for such regulation, because the text requires analyzing the extent to which emissions contribute to the danger. The logic of regulating water vapor would appear to be absurd, but it is the same logic required to regulate GHGs under CAA section 202(a)."[304]

First, EPA's 2009 interpretation is clearly limited by the terms Congress chose to limit EPA's discretion. The phrase "reasonably anticipated to endanger public health or welfare" has extensive legislative history and a long history of implementation by EPA. Likewise, the terms cause or contribute. While these terms may be broad, they are clearly not unlimited. EPA points to no application of these or similar terms, used in numerous provisions throughout the Act, during EPA's 50-year history as evidence that they are unlimited in scope and fail to restrain EPA's actions in rational and reasoned ways. EPA's application of these terms in specific cases has often been the subject of judicial review, and no case has indicated that they are vague and unlimited in the manner suggested by EPA.[305] Neither EPA nor any court has suggested EPA's proposed interpretation is required to avoid a standardless or unlimited grant of power to EPA.

Instead EPA relies upon a hypothetical involving water vapor. EPA says that its 2009 interpretation would require EPA to make a contribution and endangerment finding for water vapor because vehicles emit it at more than de minimis levels and its presence in the air can endanger public health

[304] 90 FR at 36304.
[305] See, e.g., *Bluewater Network v. EPA*, 370 F.3d 1 (D.C. Cir. 2004), *Catawba County, N.C. v. EPA*, 571 F.3d 20 (D.C. Cir. 2009).

and welfare. This response is illustrative of the agency's lack of command of basic climate science, as well as its failure to address prior agency reasoning and findings.

Surprisingly, EPA fails to discuss or even mention that EPA addressed this specific issue in 2009 and explained why water vapor was not included in the definition of the air pollutant and air pollution and not part of the contribution and endangerment finding. EPA made clear that it was not required to include water vapor under its interpretation of § 202(a).

> "A number of public comments question the exclusion of water vapor from the definition of air pollution because it is the most important greenhouse gas responsible for the natural, background greenhouse effect. The Administrator's reasoning for excluding water vapor was described in the Proposed Findings and is summarized here with additional information in Volume 10 of the Response to Comments document. First, climate change is being driven by the buildup in the atmosphere of greenhouse gases. The direct emissions primarily responsible for this are the six well-mixed greenhouse gases. Direct anthropogenic emissions of water vapor, in general, have a negligible effect and are thus not considered a primary driver of human-induced climate change. EPA plans to further evaluate the issues of emissions of water that are implicated in the formation of contrails and also changes in water vapor due to local irrigation. At this time, however, the findings of the IPCC state that the total forcing from these sources is small and that the level of understanding is low.
>
> Water produced as a byproduct of combustion at low altitudes has a negligible contribution to climate change. The residence time of water vapor is very short (days) and the water content of the air in the long term is a function of temperature and partial pressure, with emissions playing no role. Additionally, the radiative forcing of a given mass of water at low altitudes is much less than the same mass of carbon dioxide. Water produced at higher altitudes could potentially have a larger impact. The IPCC estimated the contribution of changes in stratospheric water vapor due to methane and other sources, as well as high altitude contributions from contrails, but concluded that both contributions were small, with a low level of understanding. The report also addressed anthropogenic contributions to water vapor arising from large scale irrigation, but assigned it a very low level of understanding, and suggested that the cooling from evaporation might outweigh the warming from its small radiative contribution."[306]

While EPA's proposal fails to discuss this issue, in 2009 EPA looked comprehensively at the issue of water vapor, including the different direct, anthropogenic sources of water vapor. These sources include combustion at low altitudes, high altitude contrails, and sources like local irrigation. Anthropogenic emissions of water vapor have a negligible effect on atmospheric concentrations and are short-lived. Overall direct anthropogenic emissions of water vapor have a negligible effect as a driver of climate change. Emissions from combustion at low altitudes, which would include motor vehicle emissions, have a negligible contribution to climate change. This was because the residence time of water vapor in the air was very short-term, and the water content in the air over the long-term is the result of temperature and air pressure conditions. Emissions from combustion

[306] See 74 FR at 66520. Also see "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA's Response to Public Comments (RTC) Volume 9: The Cause or Contribute Finding" (RTC Vol. 9) at pp. 14-15, RTC Vol. 10 at 4, 9-10.

played no role in the water content in the atmosphere over the longer terms relevant for climate change purposes.

EPA's hypothetical does not show that EPA's 2009 interpretation is overly broad and must be reined in to be lawful. Just the opposite. EPA's 2009 action shows that the interpretation it used allowed EPA to not include water vapor in the contribution and endangerment findings based on a reasoned and rational analysis that was fully consistent with the statute.

> 9. EPA properly included two gases in the definition of GHG air pollutant for purposes of the contribution finding.

EPA claims that severing the endangerment and contribution findings was inconsistent with § 202(a) because the gases emitted by vehicles do not include two of the gases included in the definition of "air pollution."

> "The Administrator defined the relevant "air pollution" as the combination of six "well-mixed GHGs" but found that CAA section 202(a) sources emitted only four of them: CO2, methane, NOX, and HFCs. 74 FR 66538. As a result, the "air pollution" identified as endangering public health or welfare included PFCs and SF6, and the "air pollution" used to conclude that CAA section 202(a) sources satisfy the regulatory standard did not. Contrary to the EPA's conclusion at the time, 74 FR 66541, that difference is material, as PFCs and SF6 are asserted to have many times the global warming potential of CO2.67 Severing the endangerment and cause-or-contribute analysis allowed the Agency to compare apples and oranges in a manner the statute does not authorize."[307]

EPA fails to discuss EPA's rationale in 2009 for including these two gases and fails to show that this rationale is inconsistent with § 202(a).

EPA defined both the "air pollution" used in the endangerment finding and the "air pollutant" used in the contribution finding as the mix of six GHGs. EPA explained why it chose this specific group of six gases.

> "(1) These six greenhouse gas share common properties regarding their climate effects; (2) these six greenhouse gases have been estimated to be the primary cause of human-induced climate change, are the best understood drivers of climate change, and are expected to remain the key driver of future climate change; (3) these six greenhouse gases are the common focus of climate change science research and policy analyses and discussions; (4) using the combined mix of these gases as the definition (versus an individual gas-by-gas approach) is consistent with the science, because risks and impacts associated with greenhouse gas-induced climate change are not assessed on an individual gas approach; and (5) using the combined mix of these gases is consistent with past EPA practice, where separate substances from different sources, but with common properties, may be treated as a class (e.g., oxides of nitrogen)."[308]

EPA does not claim that this is in any way unreasonable or inconsistent with the Act.

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[307] 90 FR at 36304.
[308] 74 FR at 66517. Also see 66517-519.

EPA also explained in detail why it used the same definition for the "air pollutant" when making the contribution finding, recognizing that two of the six gases were not emitted by motor vehicles. EPA explained that:

> "By defining well-mixed greenhouse gases as a single air pollutant comprised of six substances with common attributes, the Administrator is giving effect to these shared attributes and how they are relevant to the air pollution to which they contribute. The fact that these six substances share these common, relevant attributes is true regardless of the source category being evaluated for contribution."[309]

EPA showed that this was fully consistent with past EPA practice –- defining the air pollution and air pollutant, and the associated emissions standards, as a mix of compounds, such as volatile organic compounds (VOCs), PM, and oxides of nitrogen. EPA has never required that vehicles emit all of the individual components of these mixes of compounds when it made the relevant endangerment or contributions standards or adopted emission standards for those mixes. EPA explained that:

> "it is not necessarily the source category being evaluated for contribution that determines the reasonableness of defining a group air pollutant based on the shared attributes of the group."[310]

For example, electronics manufacturers might emit some of the mix of six gases but not CO_2 or CH_4, absent combustion of fossil fuel on site.[311]

EPA explained that the Act's definition of "air pollutant" fully supported its definition of air pollutant for purposes of the contribution finding.

> "Thus, the first step in analyzing whether emissions of any air pollutant from new motor vehicles cause or contribute to air pollution which endangers is to define the term "air pollutant." Section 302(g) states that as used in the CAA,
>
> > [t]he term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used. (Emphasis added).
>
> This language clearly contemplates that EPA may combine two or more air pollution agents into one air pollutant. Once one thinks of GHGs as air pollution agents, rather than air pollutants themselves, the concept of combining several for purposes of defining a single air pollutant under section 302(g) becomes clearer.

[309] Id. at 66541. Also see RTC Vol. 10 at 2-4.
[310] Id.
[311] Id.

> The language of CAA section 302(g) is quite broad, providing EPA ample discretion to determine what combination of air pollution agents are a reasonable definition of air pollutant. As the Supreme Court noted in Massachusetts v. EPA, 549 U.S. 497 (2007), this is a "sweeping" and "capacious" definition, and GHGs are "unquestionably 'agents' of air pollution." 549 U.S. at 528, 532, 529 n.26. Although the Court did not interpret the term "combination of" air pollution agents, there is no reason this phrase would be interpreted any less broadly than the definition as a whole. Congress used the term "any," which is typically given an expansive meaning, and did not qualify the kind of combinations that the agency could define as a single air pollutant."[312]

This analysis shows that EPA was clearly justified in the definition of air pollutant that it used in the contribution finding, and it was fully consistent with the requirements of § 202(a). EPA fails to address any of this analysis.

EPA also concluded in 2009 that it would not matter if it had defined the air pollutant to include just four of the six gases, that it would not change the decision on contribution. This is obvious. It would not change the calculation of the amount of emissions of GHGs from motor vehicles, which was done on a CO_2-equivalent perspective. Nor would it have changed any of the calculations of the emissions of GHGs from a global, country, United States, or other sectors, as they were also all done on a CO_2-equivalent perspective. Also, nothing in § 202(a) says that the air pollutant and the air pollution have to be identical. It's clear that vehicle emissions of these four gases contribute in a significant way to the global concentration of the mix of six gases, whether the air pollutant is defined as the six gases or four gases.

EPA refers to a large difference in global warming potential between the two gases and presumably CO_2, but that difference was already accounted for in developing CO_2-equivalent levels for the amount of emissions from the various sources of emissions.

EPA is not clear on what its proposed interpretation requires EPA to do. Did it require EPA to define the "air pollution" and make an endangerment finding looking solely at four of the six gases, because vehicles emit only four of the gases? That would make no sense, for all of the reasons EPA discussed in explaining why it included all six gasses in the definition of GHGs, including that the scientific community has for decades taken this approach in developing the very large body of evidence to anthropogenic emissions and climate change. It would also be inconsistent with how EPA has approached mixtures of compounds like NO_x, PM, and VOCs over many decades.

EPA's claim that the 2009 interpretation and approach was inconsistent with § 202(a) is meritless.

> 10. EPA's 2009 interpretation did not unlawfully limit EPA's ability to evaluate its GHG control program for motor vehicles in future standard setting.

EPA claims that failure to conduct standard setting at the same time as the contribution and endangerment findings and to take standard setting issues into account in making these findings also lead to errors in future standard setting.

[312] RTC Vol. 10 at 1.

> "Severance also shaped all subsequent standards prescribed and revised in reliance on the Endangerment Finding in a manner we propose to conclude was unlawful. … Nor did we consider the impacts of adaptation or mitigation or consider when prescribing standards whether, in light of more recent empirical data, the Endangerment Finding's analysis of endangerment and contribution remained accurate with respect to the source category at issue. As a result, the decision to sever meant that the EPA has never meaningfully considered or invited public comment on the cost, effectiveness, and continued propriety of its GHG regulatory program."[313]

Contrary to this assertion, EPA's GHG standard settings for motor vehicles has consistently looked closely at what the science says about climate change and GHG air pollution, and EPA carefully evaluates the cost, effectiveness, and many other factors in evaluating the propriety of the GHG standards. EPA has continued to find that climate change problems and GHG air pollution continue to warrant regulation of GHG from motor vehicles, and that the GHG standards at issue are fully appropriate under § 202(a).

One example is EPA's recent rule establishing GHG and other standards for light-duty and medium-duty vehicles for Model Year 2027 and later. EPA discussed the need for control of GHG emissions to address climate change.

> "Despite the significant emissions reductions achieved by these and other rulemakings, air pollution from motor vehicles continues to impact public health, welfare, and the environment. … In addition, the effects of climate change represent a rapidly growing threat to human health and the environment, and are caused by GHG emissions from human activity, including motor vehicle transportation. Addressing these public health and welfare needs will require substantial additional reductions in criteria pollutants and GHG emissions from the transportation sector. Recent trends and developments in vehicle technologies that reduce emissions indicate that more stringent emissions standards are feasible at reasonable cost and would lead to significant improvements in public health and welfare."[314]

EPA discussed the magnitude of GHG emissions from vehicles, as well as the continuing scientific evidence indicating the risks from global climate change and the clear need for ongoing and additional reductions in GHG emissions from motor vehicles.

> "U.S. source of GHG emissions, representing 29 percent of total GHG emissions. Within the transportation sector, light-duty vehicles are the largest contributor, at 58 percent, and thus comprise 16.5 percent of total U.S. GHG emissions, even before considering the contribution of medium-duty Class 2b and 3 vehicles which are also included under this rule. GHG emissions have significant impacts on public health and welfare as evidenced by the well documented scientific record and as set forth in EPA's Endangerment and Cause or Contribute Findings under CAA section 202(a). Additionally, major scientific assessments continue to be released that further advance our understanding of the climate system and the impacts that GHGs have on public health and welfare both for current and future generations, as discussed in section II.A of this preamble, making it clear that continued

[313] 90 FR at 36303.
[314] 89 FR 27842, 844 (April 18, 2024).

> GHG emission reductions in the motor vehicle sector are needed to public health and welfare."[315]

EPA was clear that "EPA is establishing both criteria pollutant and GHG standards in this rulemaking given the need for additional reductions in emissions of these air pollutants to protect public health and welfare and based on EPA's assessment of the suite of available control technologies for those pollutants, some of which are effective in controlling both GHGs and criteria pollutant emissions."[316]

EPA "carefully" considered a wide variety of factors in setting the appropriate emission standards:

> "including technological feasibility and cost of the standards and the available lead time for manufacturers to comply with them. Our analysis for this action supports the conclusion that the final standards are technologically feasible and that the costs of compliance for manufacturers will be reasonable. The standards will result in significant reductions in emissions of criteria pollutants, GHGs, and air toxics, resulting in significant benefits for public health and welfare. We also estimate that the standards will result in reduced vehicle operating costs for consumers and that the benefits of the program will exceed the costs. Based on EPA's analysis, it is the agency's assessment that the standards are appropriate and justified under CAA section 202(a)."[317]

The remainder of the rulemaking record goes into exhaustive detail on all of these issues.[318] This is just one of EPA's GHG standard setting rulemakings since 2009; they all take the same approach.

EPA's claim that the interpretation taken in 2009 kept EPA from "meaningfully consider[ing] or invit[ing] public comment on the cost, effectiveness, and continued propriety of its GHG regulatory program" is wrong. The record shows that EPA did consider the continued propriety of its GHG program for motor vehicles and appropriately determined that the circumstances called for continuing and strengthening the program.

> 11. EPA did not read "new" out of the statute and did not misread *Massachusetts*.

EPA claims that the 2009 contribution and endangerment findings were unlawful because it read the term "new" out of the statute.

> "The Endangerment Finding also did not limit its analysis of contribution to "new motor vehicles or new motor vehicle engines" in the United States, which are the only sources covered by the EPA's CAA section 202(a) authority. Because the Administrator considered all sources in analyzing the danger posed by elevated concentrations of GHGs in the upper atmosphere, the endangerment analysis necessarily included emissions from foreign and domestic vehicles that had been in use for years or decades and were not "new." Even when analyzing contribution, the Administrator used emission estimates from "the entire fleet of

[315] Id.
[316] Id.
[317] Id. at 27845.
[318] See, e.g. II.A. Climate Change From GHG Emissions; IV. Technical Assessment of the Standards; V. EPA's Basis That the Final Standards are Feasible and Appropriate Under the Clean Air Act; VI. How will this rule reduce GHG emissions and their associated effects?; and VIII. Estimated Costs and Benefits and Associated Considerations.

> motor vehicles in the United States for a certain calendar year" rather than projecting emissions from new motor vehicles and engines over time. 74 FR 66543. That decision increased the absolute contribution figure by orders of magnitude, including because newer vehicles and engines tend to be more efficient and emit less. Difficulties in disaggregating emission data from emission sources, however reasonable, do not license us to read the term "new" out of the statutory text."[319]

EPA sets standards for new motor vehicles that apply both when the vehicles are brand new and when they are in operation in the real world. The standards apply throughout the "useful life" of the vehicle, a period of time or mileage that is set either by the statute or by EPA. EPA can enforce the standards throughout the useful life of the vehicle, under its authority to order manufacturers to recall and remedy vehicles that fail to meet the standards during their useful life. Because of this, manufacturers design their vehicles so they will achieve the standards throughout the vehicle's useful life.

The Act requires that emissions standards apply while the vehicles are in operation in the real world. This is designed to ensure that the benefits to public health and welfare from the emissions standards are achieved in the real world and are not just a showroom artifact. For example, the corporate average fuel economy (CAFE) standards apply only at the point the vehicle is new; manufacturers are not subject to in-use standards or enforcement of in-use standards. Section 202(a)'s standards are different.

Motor vehicle emissions occur throughout the real world operation of the vehicles, not just when they are brand new and have not been sold. Emissions from the vehicle continue as long as it is operated in the real world, including the time period or mileage after the vehicle's "useful life" has expired for purposes of the emissions standard.

EPA has always calculated the emissions of vehicles by determining emissions throughout the real-world, actual life of the vehicles. Any other approach would be absurd and would not reflect the real-world impact of the emissions standards. EPA calculates the emissions benefits of a new or revised standard by projecting what emissions would be over a period of time for the entire fleet of vehicles and compares that to a projection of what the emissions would be for the same fleet and time period if the standards are adopted. The difference is the emissions impacts of the standards over time. These projections take into account the changeover in the year by year composition of the fleet as older cars are retired and new cars are added. Eventually the fleet is composed of only vehicles subject to the new standard. This changeover takes some time, but it is not that long. EPA does not determine emissions impact of adopting a standard by assuming the only vehicles in the real world are new vehicles, with more new vehicles added each year.[320]

In 2009, EPA discussed in detail how it would determine emissions from new motor vehicles for purposes of the contribution finding. EPA discussed many of the points noted above and explained that:

> "consistent with its traditional practice, it used the recent motor vehicle emissions inventory for the entire fleet as a surrogate for estimates of emissions for just new motor vehicles and

[319] 90 FR at 36304.
[320] E.g., see 89 FR 27842, 28097-099 (April 18, 2024).

engines. This was appropriate because future projected emissions are uncertain, and current emissions data are a reasonable proxy for near-term emissions.

In effect, EPA is using the inventory for the current fleet of motor vehicles as a reasonable surrogate for a projection of the inventory from new motor vehicles over the upcoming years. New motor vehicles are produced year in and year out, and over time the fleet changes over to a fleet composed of such vehicles. This occurs in a relatively short time frame, compared to the time period at issue for endangerment. Because new motor vehicles are produced each year, and continue to emit over their entire life, over a relatively short period of time the emission from the entire fleet is from vehicles produced after a certain date. In addition, the emissions from new motor vehicles are not limited to the emissions that occur only during the one year when they are new, but are emissions over the entire life of the vehicle. In such cases, EPA has traditionally used the recent emissions from the entire current fleet of motor vehicles as a reasonable surrogate for such a projection instead of trying to project and model those emissions. While this introduces some limited degree of uncertainty, the difference between recent actual emissions from the fleet and projected future emissions from the fleet is not expected to differ in any way that would substantively change the decision made concerning cause or contribution. There is not a specific numerical bright line that must be achieved, and the numerical percentages are not treated and do not need to be treated as precise values. This approach provides a reasonable and clear indication of the relative magnitudes involved, and EPA does not believe that attempting to make future projections (for both vehicles and the emissions value they are compared to) would provide any greater degree of accuracy or precision in developing such a relative comparison."[321]

Far from reading the term "new" out of the statute, EPA developed an emissions inventory that is a reasonable projection of the magnitude of emission from new motor vehicles over their aggregate lifetimes. EPA explained why the surrogate EPA used is a reasonable way to determine the emissions from new motor vehicles, especially in the context of making contribution and endangerment findings. EPA explained the uncertainty and potential difference in emissions based on using a surrogate was not expected to have any substantive impact on the contribution determination.

The agency fails to discuss any of the analysis or reasoning previously provided by EPA. It does no more than allege that EPA read the term out of the statute, and claims without evidence that EPA's approach led to an erroneous estimate that was orders of magnitude higher than the actual emission level. The agency's reference to new vehicles being more efficient and emitting less fails to account for the fact that EPA was modeling emissions from vehicles that would be produced assuming no GHG standards and no change in CAFE standards – the baseline of the then current situation when EPA made the contribution finding. There is no reason to expect there would be orders of magnitude difference in the absolute level of emissions, and the agency produces no evidence to support its hyperbolic claim.

EPA also claims that in 2009 EPA misconstrued the *Massachusetts* opinion, reading it as "requir[ing] us to read the statute as authorizing the regulation of GHG emissions in response to global climate change concerns."[322]

[321] 74 FR at 66543-544.
[322] 90 FR at 36299.

EPA did not misread the Court's decision in *Massachusetts*. EPA explained in detail what it believed the *Massachusetts* case stood for.

EPA recognized that "[b]efore the Administrator may issue standards addressing emissions of greenhouse gases from new motor vehicles or engines under § 202(a), the Administrator must satisfy a two-step test. First, the Administrator must decide whether, in her judgment, the air pollution under consideration may reasonably be anticipated to endanger public health or welfare. Second, the Administrator must decide whether, in her judgment, emissions of an air pollutant from new motor vehicles or engines cause or contribute to this air pollution. If the Administrator answers both questions in the affirmative, she must issue standards under section 202(a)." [323]

If EPA makes an affirmative finding on contribution and endangerment, then EPA has authority to issue GHG standards for new motor vehicles.[324]

EPA recognized that "[u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[325]

EPA recognized that the Supreme Court "was not dictating EPA's action on remand and was not deciding whether or not EPA must find that greenhouse gases endanger public health or welfare. Nor did the Court rule on "whether policy concerns can inform EPA's actions in the event that it makes such a finding." Id. at 534–35. The Court also observed that under CAA § 202(a), "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." Id. at 533. Nonetheless, any EPA decisions concerning the endangerment and cause or contribute criteria must be grounded in the requirements of CAA section 202(a)."[326]

The Court recognized the preventive nature of the endangerment criterion, citing the *Ethyl* case.[327]

EPA understood *Massachusetts* as explaining that its "judgment in making the endangerment and contribution findings is constrained by the statute, and EPA is to decide these issues based solely on the scientific and other evidence relevant to that decision. EPA may not "rest[] on reasoning divorced from the statutory text," and instead EPA's exercise of judgment must relate to whether an air pollutant causes or contributes to air pollution that endangers."[328] The Administrator's judgment was to be a "scientific judgment."[329]

[323] 74 FR at 18888.
[324] 74 FR at 66502.
[325] Id. at 18889.
[326] Id.
[327] Id. at 66506, 66507 fn.6.
[328] Id. at 66507.
[329] Id. at 66515, 516.

EPA recognized that *Massachusetts* rejected various arguments as a basis for refusing to make a decision on contribution and endangerment, reasons such as the projected effectiveness or appropriateness of regulatory controls to address GHG emissions from vehicles.[330]

EPA understood that GHGs readily fall within the Act's definition of air pollutant.[331]

EPA claims that in 2009 EPA read *Massachusetts* as requiring it to read § 202(a) as authorizing EPA to set standards for GHGs in response to global climate change concerns. Nowhere in 2009 did EPA suggest any such reading of *Massachusetts*. EPA read it for what it said – GHGs are air pollutants; EPA was required to make a judgement on whether there was an air pollution problem that was reasonably anticipated to endanger public health or welfare and on whether emissions from motor vehicles caused or contributed to this air pollution; these judgments are scientific judgments and are to be made subject to the constraints of the statute; and if EPA made affirmative findings then EPA was authorized to set emission standards for new motor vehicles applicable to this air pollutant.

EPA's claim that it did otherwise in 2009 is groundless.

D. Conclusion

For all of the reasons discussed above, EPA's 2009 interpretation of § 202(a) is far and away the best reading of that provision.

III. EPA's proposal to rescind the 2009 contribution and endangerment findings and various GHG emissions standards is contrary to the mandate of *Massachusetts*.

In *Massachusetts*, the Court addressed EPA's failure to determine whether emissions of GHGs from new motor vehicles cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare. EPA advanced a "litany" of reasons why it did not need to make such a decision, which the Court rejected. The Court ruled that EPA was required to make the decisions called for by § 202(a), and the reasons advanced by EPA were irrelevant to such a decision and were no basis for refusing to decide. The Court said:

> "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. **Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do**. Ibid. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design. …
>
> In short, EPA has offered **no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore**

[330] Id. at 66508.
[331] Id. at 66510, 66537.

> **"arbitrary, capricious, ... or otherwise not in accordance with law."** 42 U.S.C. § 7607(d)(9)(A). We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 843–844, 104 S.Ct. 2778, 81 L.Ed.2d 694, at 1. We hold only that EPA must ground its reasons for action or inaction in the statute." (emphasis supplied) 549 U.S at 533-535.

In response EPA proposed and finalized its determination that GHG emissions from new motor vehicles contributed to GHG air pollution that was reasonably anticipated to endanger public health and welfare. The determinations were upheld by the D.C. Circuit and the Supreme Court denied requests to review that portion of the D.C. Circuit's opinion.[332]

In this action, EPA is proposing to rescind the 2009 determinations and vacate the emissions standards and related regulations adopted based on the 2009 determinations. This proposal fails to take the action that the Supreme Court mandated in *Massachusetts*. The proposed rescission is unlawful under *Massachusetts* because it would return the agency to the same position that the Court rejected in *Massachusetts*. A rescission would leave an absence of a decision on whether GHG emissions from new vehicles do or do not contribute to GHG air pollution that is or is not reasonably anticipated to endanger public health or welfare. EPA could propose a negative determination on contribution, and/or a negative determination on endangerment, but has not done so. That would be the lawful way to rescind the 2009 determinations. EPA's proposed approach is not lawful.

It is instructive to compare the way EPA responded in 2009 to the *Massachusetts* decision to the way EPA is responding now. In 2009, EPA proposed to make affirmative determinations on contribution and on endangerment to both public health and public welfare. EPA supported its determinations with a Technical Support Document (TSD) that provided the scientific and technical basis for EPA's determinations. The TSD itself was a long, extensive, and detailed summary of the robust, peer-reviewed, and comprehensive body of literature that had been developed over many years on the scientific issues relevant to determining contribution and endangerment. EPA described the history and content of the TSD:

> "In 2007, EPA initiated its assessment of the science and other technical information to use in addressing the endangerment and cause or contribute issues before it under CAA section 202(a). This scientific and technical information was developed in the form of a TSD in 2007. An earlier draft of this document was released as part of the ANPR published July 30, 2008 (73 FR 44353). That earlier draft of the TSD relied heavily on the IPCC Fourth Assessment Report of 2007, key NRC reports, and a limited number of then available synthesis and assessment products of the U.S. Climate Change Science Program (CCSP; now encompassed by USGCRP). EPA received a number of comments specifically focused on the TSD during the 120-day public comment period for the ANPR.
>
> EPA revised and updated the TSD in preparing the Proposed Findings on endangerment and cause or contribute. Many of the comments received on the ANPR were reflected in the draft TSD released in April 2009 that served as the underlying scientific and technical basis

[332] *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

> for the Administrator's Proposed Findings, published April 24, 2009 (74 FR 18886). The draft TSD released in April 2009 also reflected the findings of 11 new synthesis and assessment products under the U.S. CCSP that had been published since July 2008.
>
> The TSD that summarizes scientific findings from the major assessments of the USGCRP, the IPCC, and the NRC accompanies these Findings. The TSD is available at www.epa.gov/climate change/endangerment.html and in the docket for this action. It also includes the most recent comprehensive assessment of the USGCRP, Global Climate Change Impacts in the United States, published in June 2009. In addition, the TSD incorporates up-to-date observational data for a number of key climate variables from the NOAA, and the most up-to-date emissions data from EPA's annual Inventory of U.S. Greenhouse Gas Emissions and Sinks, published in April, 2009. And finally, as discussed in Section I.B of these Findings, EPA received a large number of public comments on the Administrator's Proposed Findings, many of which addressed science issues either generally or specifically as reflected in the draft TSD released with the April 2009 proposal. A number of edits and updates were made to the draft TSD as a result of these comments."[333]

EPA described the TSD as follows:

> "This document reviews a wide range of observed and projected vulnerabilities, risks, and impacts due to the elevated levels of GHGs in the atmosphere and associated climate change. Any known or expected impacts of elevated atmospheric concentrations of GHGs or of climate change are documented as well (recognizing that climate impacts can have both positive and negative consequences). The extent to which observed climate change can be attributed to anthropogenic GHG emissions is assessed. The term "climate change" in this document generally refers to climate change induced by human activities, including activities that emit GHGs. Future projections of climate change, based primarily on future scenarios of anthropogenic GHG emissions, are shown for the global and national scale. …
>
> This document relies most heavily on existing, and in most cases very recent, synthesis reports of climate change science and potential impacts, which have undergone their own peer-review processes, including review by the U.S. government. Box 1.1 describes this process. The information in this document has been developed and prepared in a manner that is consistent with EPA's Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency (U.S. EPA 2002). In addition to its reliance on existing and recent synthesis reports, which have each gone through extensive peer-review procedures, this document also underwent a technical review by 12 federal climate change experts, internal EPA review, interagency review, and a public comment period."[334]

EPA prepared an extensive summary of the relevant scientific and technical information, pulling together analysis and information from numerous comprehensive and detailed public assessments of the science, reflecting the consensus work of thousands of scientists and thousands of pages of analysis and assessment. EPA took extensive public comment on the TSD twice – with the ANPRM

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[333] 74 FR at 66510.

[334] Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act at 3-5.

and with the NPRM. In both cases EPA updated the TSD in light of public comments and more recent science. EPA conducted a robust peer review process for the TSD, recognizing that the numerous assessments it summarized had also received extensive and robust peer review. The technical and scientific work undergirding EPA's 2009 determinations reflected an immense amount of work by EPA and by hundreds if not thousands of scientists around the globe.

The breadth and comprehensiveness of the body of scientific information before the agency in 2009 can be seen in the broad scope of coverage by the TSD, including:

- Greenhouse Gas Emissions and Concentrations
- Global and U.S. Observed and Projected Effects From Elevated Greenhouse Gas Concentrations
- Direct Effects of Elevated Greenhouse Gas Concentrations
- Radiative Forcing and Observed Climate Change
    - a. Radiative Forcing Due to Greenhouse Gases and Other Factors
    - b. Global Changes in Temperature
    - c. U.S. Changes in Temperature
    - d. Global Changes in Precipitation
    - e. U.S. Changes in Precipitation
    - f. Global Sea Level Rise and Ocean Heat Content
    - g. U.S. Sea Level Rise
    - h. Global Ocean Acidification
    - i. Global Changes in Physical and Biological Systems
    - j. U.S. Changes in Physical and Biological Systems
    - k. Global Extreme Events
    - l. U.S. Extreme Events
- Attribution of Observed Climate Change to Anthropogenic Greenhouse Gas Emissions at the Global and Continental Scale
    - a. Attribution of Observed Climate Change to Anthropogenic Emissions
    - b. Attribution of Observed Changes in Physical and Biological Systems
- Projected Future Greenhouse Concentrations and Climate Change
- U.S. Observed and Projected Human Health and Welfare Effects from Climate Change
    - Human Health
        - a. Temperature Effects
        - b. Extreme Events
        - c. Climate-Sensitive Diseases
        - d. Aeroallergens
    - Air Quality
    - Food Production and Agriculture
        - a. Crop Yields and Productivity
        - b. Irrigation Requirements
        - c. Climate Variability and Extreme Events
        - d. Pests and Weeds
        - e. Livestock
        - f. Freshwater and Marine Fisheries
    - Forestry
        - a. Forest Productivity
        - b. Wildfire and Drought Risk

c. Forest Composition
d. Insects and Diseases

Water Resources
a. Water Supply and Snowpack
b. Water Quality
c. Extreme Events
d. Implications for Water Uses

Sea Level Rise and Coastal Areas
a. Vulnerable Areas
b. Extreme Events

Energy, Infrastructure, and Settlements
a. Heating and Cooling Requirements
b. Energy Production
c. Infrastructure and Settlements

Ecosystems and Wildlife
a. Ecosystems and Species
b. Ecosystem

U.S. Regional Climate Change Impacts
a. Northeast
b. Southeast
c. Midwest
d. Great Plains
e. Southwest
f. Northwest
g. Alaska
h. Islands

Observed and Projected Human Health and Welfare Effects From Climate Change in Other World Regions

Impacts in Other World Regions
a. National Security Concerns
b. Overview of International Impacts

With this vast body of peer reviewed information before it, EPA explained in detail the legal approach it was taking in making the determinations.[335] EPA explained the approach it would take for evaluating the evidence before it.[336] EPA explained in detail how it determined that GHG air pollution was reasonably anticipated to endanger public health and public welfare. This involved an extensive discussion of each of the several areas in which global climate change could impact public health or welfare. EPA evaluated both near term and long term effects. EPA evaluated the degree of uncertainty for each step, as well as the likely probability of an effect occurring. EPA considered both positive and negative impacts. EPA exercised its judgement to weigh and balance all of this and determine whether overall an affirmative endangerment determination was warranted.[337] EPA likewise carefully evaluated all of the scientific and technical information before it concerning the level of GHG emissions from new motor vehicles and how they relate to emissions from other source categories, to total U.S. emissions, and to emissions globally and for other countries. EPA

[335] 74 FR at Section II.
[336] Id. at Section III.
[337] Id. at Section IV.A. and B.

explained why this information warranted a determination that emissions from new motor vehicles contribute to the GHG air pollution.[338]

In addition to responding to major comments on the ANPRM in the proposal, and throughout the final decision, EPA prepared a very large and comprehensive Response to Comments, comprising 11 volumes and numerous Appendices focused on the many varied areas and issues relevant to the determinations.

It's hard to even compare EPA's current proposal to EPA's actions in 2009. In 2009, EPA had before it an incredibly large body of scientific and technical information and evidence. EPA provided an in-depth and comprehensive evaluation of this information and evidence, and carefully and in a detailed way applied the legal structure established by § 202(a)(1) to this information and evidence, resulting in robust determinations of contribution and endangerment.

EPA's current proposal does none of this. EPA's current proposal can be summed up as (1) a long explanation of why EPA now thinks that it applied the wrong legal framework in 2009; (2) a small scattering of information from a very limited and yet-to-be-peer reviewed draft scientific assessment, prepared by five authors handpicked by DOE to "challenge the mainstream consensus;"[339] (3) a variety of conclusory factual and scientific assertions with very limited and in many cases no support or analysis cited by EPA; and (4) various assertions that EPA has considered a wide range of evidence and information, with no evidence of any kind to support these conclusory statements. Based on this paucity of information and analysis, EPA proposes to rescind the 2009 contribution and endangerment findings, claiming EPA applied the wrong law in 2009 and EPA no longer has confidence in the validity of the science supporting the 2009 contribution and endangerment findings.[340]

The weakness of this record and the analysis supporting EPA's proposal stems from EPA's apparent view that it does not need to make an actual determination on contribution and endangerment, whether it be affirmative or negative. EPA apparently believes all it has to do is cast some degree of doubt on EPA's 2009 action, and that is enough to rescind the 2009 determinations. That flies in the face of the Court's directive in *Massachusetts*. If EPA were to propose and make final negative determinations on contribution and/or endangerment, that would amount to rescinding the 2009 determinations. Absent that EPA has no basis to rescind the 2009 determinations and leave an absence of a decision one way or the other on contribution and endangerment, the issues *Massachusetts* said EPA had to decide.

For similar reasons, the proposed rescission by itself does not support vacating the current or past GHG emissions standards. They were adopted pursuant to the 2009 determinations, which were upheld as legally valid by the D.C. Circuit. This would be the case even if the rescission were lawful. Absent negative determinations, the current standards were legally adopted and continue to be lawful unless and until there are valid negative determinations that displace the 2009 determinations.

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[338] Id. at Section V.

[339] DOE Climate Report at x.

[340] For just one example, see 90 FR at 36289 ("Upon review of the underlying actions and intervening legal and scientific developments, including recent decisions by the U.S. Supreme Court and the scientific information summarized in this preamble, the EPA no longer believes that we have the statutory authority and the record basis required to maintain this novel and transformative regulatory program.")

Any EPA proposal and final action to make negative contribution and/or endangerment determinations would require the kind of record and analysis that EPA developed in 2009. The current proposal fails miserably to provide a lawful basis to make such determinations. EPA would need to start again.

The approach EPA is taking has also led it to make numerous failures under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) and subsequent cases. If an agency wants to revoke or change its prior position or action, it needs to identify that it is doing so and explain why it is changing, including explaining why the evidence, analysis, and conclusions leading to the prior action are no longer correct. EPA fails to do this in numerous areas, failing to explain what EPA did in 2009 and why EPA did it, and why EPA now believes that EPA's past analysis and judgments were wrong and why EPA's current analysis and judgment are right. Some of these matters have been discussed above, such as EPA's current assertions about regulation of water vapor or inclusion in the air pollutant of two gases that vehicles do not emit. EPA fails to explain the position EPA took in the past and the justifications EPA provided and fails to explain why that prior position and justification is no longer warranted. These are just two examples of a problem that infects the proposal throughout.

Likewise, EPA makes many conclusory assertions with no analysis or evidence to support it. For example, EPA claims that:

> "[t]he Administrator reviewed available information, including the most recently available scientific information, bearing on the assumptions and conclusions in the Endangerment Finding, the impacts of global GHG concentrations on public health and welfare in the United States, and the relative contribution of domestic emissions from new motor vehicles and engines to global GHG concentrations. As previously explained, this review included the 2025 CWG Draft Report, which analyzes empirical data, peer-reviewed studies, and available scientific information bearing on direct human influence on ecosystems and climate, climate response to CO_2 emissions, and impacts on ecosystems and society. The Administrator also considered available assessments by the U.S. Government and relevant international bodies, including the Third, Fourth, and Fifth NCAs reported by the USGCRP and AR5 and AR6 by the United Nations IPCC. The Administrator also considered critiques of the NCAs, and the Fifth NCA in particular, and reviewed these analyses for consistency with OMB information quality guidelines 88 and the transparency and reliability requirements of Executive Order 14303, "Restoring Gold Standard Science."[341]

There is nothing in the record to support this conclusory and superficial assertion. Compare this short, unsupported, conclusory assertion with EPA's 2009 TSD. It is arbitrary and capricious to fail to consider relevant information and evidence, and to fail to demonstrate such consideration in the record.

A. "Air pollution" in § 202(a) does not include global GHGs, limited to exposure to local, regional pollution.

In the proposal, EPA takes the position that,

[341] 90 FR at 36307-308.

> "CAA section 302(h) also provides that any reference to "effects on welfare includes, but is not limited to, effects on" the environment, property, transportation hazards, and "on economic values and on personal comfort and well-being." The EPA proposes that this statutory language is best read as authorizing the Agency to identify and regulate, as an integral part of a rulemaking prescribing emissions standards, air pollutants that cause or contribute to air pollution that itself endangers public health and welfare through local or regional exposures."[342]

This position is not supported by the statute and is inconsistent with any previous determination by EPA in the past. It shows the weakness of EPA's argument that their quote of CAA § 302(h) has been edited to omit § 302(h)'s specific reference to both weather and climate. The section in its entirety reads:

> "(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, **weather,** visibility, and **climate**, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants." Emphasis added.

In addition to specifically listing weather and climate, all of the listed categories of effects are influenced and can be negatively impacted by both weather and climate. In fact, they are currently being negatively impacted by changes to both weather and climate. Instead of being a limited list, Congress has added "but not limited to," demonstrating a clear intent to make welfare as inclusive as possible, not narrowed in definition as EPA attempts to do.

It is not surprising that the Act includes weather and climate in its definition of welfare. Scientific concerns about increased levels of GHGs causing the Earth to warm go back to the late 19th century. One of the earliest official government reports on climate change was in 1965, when President Lyndon B. Johnson's science advisory committee warned of the dangers of unchecked global warming and the ultimate need to protect people from these risks: "Man is unwittingly conducting a vast geophysical experiment. Within a few generations he is burning the fossil fuels that slowly accumulated in the earth over 500 million years."[343] The report included an entire subpanel report on Atmospheric Carbon Dioxide, which noted that there was likely warming between 1885 and 1940. The report also expressed concern over melting Antarctic ice caps with resulting sea level rise as well as ocean acidification. (All these impacts have, in fact, come to pass.) Indeed these concerns are part of the legislative history of the Act. Senator Edmund Muskie stated in the record during the CAA debate that emissions from human activities "threaten irreversible atmospheric and climatic changes" and Senator Caleb Boggs of Delaware cited CEQ's first annual report, which dealt extensively with climate.[344]

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[342] Id. at 36300

[343] White House Report, "Restoring the Quality of Our Environment," Report of the Environmental Pollution Panel, President's Science Advisory Committee, November 1965.
https://nsarchive.gwu.edu/document/31937-document-2-white-house-report-restoring-quality-our-environment-report-environmental

[344] 116 Cong. Rec. 32901(1970).

> "Discussion of CO2 and climate also appeared in reports and congressional hearings on environmental problems more broadly, including in relation to intentional weather modification, nuclear energy, the development of supersonic aviation, and space exploration. CO2, climate, and the greenhouse effect were discussed in scores of Congressional hearings, including those specifically related to the consideration and drafting of the 1970 Clean Air Act (CAA). The impact of CO2 on climate was a major subject in the first report of the Council on Environmental Quality, released in draft form in 1969 and entered into Congressional testimony as part of the hearings for the 1970 Act.10 The topic was the subject of a wide variety of scientific papers and reports, several of which were transmitted to the Executive Branch and communicated to Congress in the 1960s and in 1970, particularly but not only in the context of urban air pollution."[345]

In addition, CAA § 115 specifically deals with International Air Pollution. While that section has not been used for GHG control, it does provide a mechanism that could be used to enforce climate treaties between the U.S. and other countries.

EPA further argues that the mechanism of the harm of "air pollutants" must be the same as those of the other pollutants already regulated. EPA says that:

> "CAA section 202 specifically addresses hydrocarbons (HCs), carbon monoxide (CO), oxides of nitrogen (NO_X), and particulate matter (PM), all of which harm health and the environment through exposure (e.g., inhalation and dermal contact) or by causing or contributing to air pollution that harms health and the environment through exposure (e.g., smog and acid rain). That pattern holds for the criteria pollutants identified in the CAA—CO, lead, ground-level ozone (O3), nitrogen dioxide (NO2), PM, and sulfur dioxide (SO2)—as well as the initial list of hazardous air pollutants in CAA section 112(b)(1)."[346]

There are two major problems with this reading. First, it functionally rewrites the statute from "public health or welfare" to just "public health." To review the list of welfare impacts in § 302(h), none of them are caused by either inhalation or dermal contact, and most are not direct impacts on human beings at all. The list is: "soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." EPA's restricted interpretation is inconsistent with the damage to soils, crops, wildlife, damage to and deterioration of property, hazards to transportation (such as flooding caused by increased storms and sea level rise), none of which involve a human being having any contact with a pollutant. More to the point, impacts on weather and climate obviously are not based on a person inhaling or touching any pollutant. EPA rewriting the act to remove clear statutory text cannot meet the *Loper Bright* test of best statutory interpretation.

On the basis of nothing more than not wanting to regulate, EPA is trying to draw an extremely fine distinction between various impacts to say one set is covered but another set is not. GHGs, through

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[345] Climate Change and the Clean Air Act of 1970 Part I: The Scientific Basis. Naomi Oreskes, Colleen Lanier-Christensen, Hannah Conway, and R. Ashton Macfarlane. https://www.worthingtoncaron.com/documents/Climate-Change-and-the-Clean-Air-Act-of-1970.pdf

[346] 90 FR 36300.

their interactions with infrared radiation, change the environment and thus cause negative effects on both health and welfare. EPA is taking the position that only interactions with molecules can make something an air pollutant and that interaction in the environment with energy doesn't count. If so, EPA should point to some legislative language or legislative text to support that position. In fact, the CAA has at least three provisions that regulate chemicals based on their impact on energy in the environment. Radionuclides, a listed air toxic, can cause negative impacts through the release, among other things, of gamma radiation, which is pure energy. The Act has an entire Title, Title VI, whose sole purpose is to reduce UV radiation from entering the atmosphere. Finally, the CAA has an entire subpart on visibility protection -– §§ 169A and 172 — that regulates sources of GHGs to improve visibility which ultimately impacts individuals through sunlight which is pure energy. Analogously, GHGs create most of their impact by preventing the release of infrared radiation into space. Among the many effects of this energy are its interactions with the human body.

EPA once again makes enormous and unsupported leaps of logic by saying GHGs can't be a pollutant because:

> "[a]s discussed in section IV.A.2 of this preamble, the only references to GHGs in the CAA are in non-regulatory contexts in which Congress authorized funding for various forms of research and grant programs. The choice to limit such references to non-regulatory solutions further supports the conclusion that the CAA section 202(a) regulatory authority for responding to endangerment does not encompass GHG emissions on the basis of global climate change concerns."[347]

The reasoning as best as we can tell is that since the CAA doesn't regulate GHGs, they can't be pollutants. This goes against the structure of the CAA, which has multiple provisions — §§ 108, 111, 112, 202, and 602 — with the same basic structure: Congress lists a number of pollutants and allows the Administrator to add additional pollutants. More importantly, the first two purposes of the CAA are:

> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
> (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution.[348]

The clear reading of the purpose of a research program under the CAA is to "achieve the prevention and control of air pollution." If Congress included research and grant programs with regards to GHGs clearly, they did so because they considered them air pollutants. Research and grants under the CAA are not just random scientific endeavors for the sake of increasing random aspects of human knowledge; their purpose is helping the Agency learn so it can better address air pollution. If GHGs were not air pollutants, the research and grants would be inappropriate. Combining the research and grants conducted on air pollutants with the Act's provisions requiring it to expand the list of pollutants when the correct information is presented means that EPA, in regulating GHG emissions from motor vehicles and other sources, is doing exactly what Congress intended, consistent with the structure of the Act. The Supreme Court directly addressed this issue in *Massachusetts* when it said, "And unlike EPA, we have no difficulty reconciling Congress' various

[347] Id. Fn 49
[348] CAA § 101(b)

efforts to promote interagency collaboration and research to better understand climate change with the agency's pre-existing mandate to regulate "any air pollutant" that may endanger the public welfare. See 42 U. S. C. §7601(a)(1). **Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it**." (emphasis added)

Nonetheless, EPA seems to pin its interpretation of § 202(a) on the idea that the CAA is focused only on local or regional air pollution problems. While we do not doubt that current EPA leadership wants to believe this, the Act does not in fact say that – ever. EPA does not explain and, in fact, tries to hide why the Act lists weather and climate as welfare effects. It ignores Title VI, which deals with a different global environmental problem (protection of the ozone layer). It also ignores § 115, which creates a structure which would allow for the implementation of an international agreement on climate change. It pretends that the CAA is not clearly and explicitly designed to add new pollutants to those already regulated. In *Bostock v. Clayton County*, 590 U.S. 644, the Supreme Court stated that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." EPA has created exceptions out of whole cloth that are inconsistent with the plain language of the statute and its structure for adding new pollutants.

As the Supreme Court said in *Massachusetts*,

> "While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. See Pennsylvania Dept. of Corrections v. Yeskey, 524 U. S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (internal quotation marks omitted)). Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."

But *Massachusetts v. EPA* was not the only case where the Courts have held that the CAA "authorize[s] EPA to regulate carbon-dioxide emissions," which are the most prevalent vehicle GHG emissions, under a range of CAA programs. In *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Court said, "We also held, consequently, that the Environmental Protection Agency is **empowered and required** by Title II of the Act to regulate greenhouse gas emissions from mobile sources (such as cars and trucks) if it decides that greenhouse gases "contribute to . . . air pollution which may reasonably be anticipated to endanger public health or welfare." (emphasis added.) Finally, in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), the Supreme Court focused on CO2 emissions from power plants instead of mobile sources but held that because the CAA covers GHGs "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. … And we think it equally plain that **the Act "speaks directly" to emissions of carbon dioxide** from the defendants' plants." (emphasis added.)

EPA also has decided that despite the fact that GHG emissions are the cause of virtually all the clearly stated welfare impacts listed in the CAA, the connection is too extenuated to count. The link is very simple: GHGs hold heat in the atmosphere, which impacts the climate, which causes and contributes to impacts that endanger public health and welfare. While GHG emissions from the U.S. transportation sector are not the only cause of climate change, the scale of these emissions is huge

and significant. Transportation emissions are the number one source of emissions from the U.S., which is the country with the second most annual emissions and largest historical GHG emissions. The level of GHG emissions from the transportation sector is larger than the emissions from all but two other countries. They certainly contribute to the air pollution at issue.

In trying to make this three-step process (emissions – heat – impact) sound so complicated that it "no longer has a sufficiently close connection to the relevant conduct to reasonably draw a causal link," EPA forgets that most of the impacts from pollutants are based on some extended chain of events. Ozone is formed by a series of complex chemical interactions in the atmosphere on a variety of chemicals, some of which come from hundreds, if not thousands of miles away, driven by the energy of the sun on hot summer days. (Days that are increasing due to climate change.) Even once the ozone is formed, the health impacts do not occur until the ozone is breathed in and interacts with human chemistry, and these interactions lead to another series of often complex processes to result in health impacts. Air toxics do not magically cause cancer. They are ingested, interact with chemicals in the body, disrupt DNA causing mutations which may or may not ultimately lead to a cell becoming cancer cells, which then create tumors causing the disease. Other chemicals cause cancer in humans through a different set of complex chemical interactions that reduce the effectiveness of the body's repair mechanisms which result in a cancer that would have been prevented if the pollutant had not been in the body. These chains of causation are easily as complex and extended as the impact of GHGs on climate.

In summary, EPA says,

> "Throughout this section, we propose that the Endangerment Finding relied on various forms of Chevron deference to depart from the best reading of the statute and exceeded the EPA's authority in several fundamental respects, any one of which would independently require rescission to conform to the best reading of the law."

However, in *Loper Bright*, the Supreme Court expressly overturned the doctrine of deference to agency statutory interpretation, ruling that statutes "have a single, best meaning" that is informed, but not dictated, by Executive Branch practice.[349] It is EPA in 2025 that ignores the clear best reading of the statute by ignoring the plain language of the statute, the structure of the Act and the clear Supreme Court precedent interpreting § 202 to pretend that EPA does not have the authority to regulate GHGs. It is EPA in 2025 that created out of whole cloth a new test for regulation that does not exist in the statute. As best we can tell, EPA is now hoping that the Court has not made reasoned and principled decisions based on law but instead made decisions because they want to increase pollution.

Similarly, EPA misinterprets *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). EPA acts like it invalidated EPA regulating GHG for purposes of point source determination but actually, the case only invalidated the Tailoring Rule. The Court said, "EPA may, however, continue to treat greenhouse gases as a "pollutant subject to regulation under this chapter" for purposes of requiring BACT for "anyway" sources." In other words, GHG can be regulated as part of the BACT process under New Source Review. What the Court held was that EPA had to accept the CAA as it is not as it wishes it was. The Court held that "[a]gencies must always " 'give effect to the unambiguously expressed intent of Congress.'" National Assn. of Home Builders v. Defenders of Wildlife, 551 U.S.

[349] 603 U.S. at 400–01.

644, 665. [...] The power to execute the laws does not include a power to revise clear statutory terms that turn out not to work in practice." Applied to this situation, EPA cannot pretend that the term "welfare" in § 202 does not include weather and climate, and EPA cannot create a local/regional test that does not exist in the statute.

EPA proposes that "air pollution" and "endangerment" in § 202(a) are limited to air pollution that endangers public health or welfare through local or regional exposure to the air pollution itself. EPA points to harm "through exposure (e.g., inhalation and dermal contact) or by causing or contributing to air pollution that harms health and the environment through exposure (e.g., smog and acid rain)."[350] According to EPA these terms do not include concentrations of GHGs that affect public health and welfare indirectly and not by exposure to the GHGs themselves. EPA bases this on various dictionary definitions of pollutant and pollution, Congress' instructions to EPA in § 202 addressing standards for criteria pollutants like CO and PM, background principles of tort law embodied in the term proximate cause, and by EPA's past practice.[351]

In effect EPA proposes that the best reading of § 202(a) is that Congress wrote it as follows:

> The Administrator shall by regulation prescribe (and from time to time revise) standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, …, *ambient* air pollution which may reasonably be anticipated to endanger public health or welfare *through exposure to the ambient air pollution*.[352]

That is not the provision Congress adopted. EPA's proposal is not consistent with the text Congress adopted and is an attempt to justify reading various limitations into the text that are not there.

The dictionary definitions that EPA points to do not contain the limitations that EPA proposes. The general and broad scope of those definitions readily include concentrations of GHGs in the upper atmosphere as pollutants and pollution.[353]

EPA points to various instructions from Congress in § 202(a), calling for EPA to adopt emission standards for HCs, CO, NOx, and PM. Congress did address those pollutants by mandating that EPA adopt more stringent standards for those pollutants. One can imply from this that Congress reviewed EPA's prior actions, determined that the public needed greater protection, and responded by mandating that EPA provide greater protection by setting more stringent emissions standards for motor vehicles. One cannot imply from this a Congressional intent to forbid EPA from taking other unspecified actions to protect the public health from different air pollutants, whether similar or not to the ones Congress did address. EPA takes provisions showing that Congress intended to make sure the public received adequate protection from some pollutants and infers from that a Congressional intent to make sure the public could not receive adequate protection from other

[350] 90 FR at 36300.
[351] Id. at 36300-302. The irrelevance of the tort law principle of proximate cause is addressed elsewhere in our comments.
[352] EPA's reference to exposure to local or regional air pollution, citing as examples CO, NOx, SOx, ozone, and PM, refers to ambient air pollution. Ambient air is the air in the lower atmosphere to which people and the environment can be exposed. See 40 CFR 50.1(e).
[353] 90 FR at 36300.

pollutants that it did not specifically address. This negative implication does not follow, either from the text of § 202(a) or from the specific emissions standards that Congress mandated in § 202.

This is especially so given Congress did address GHG emissions from motor vehicles when it adopted the Renewable Fuel program in 2005, and amended it in 2007. In § 211(o), Congress mandated that motor vehicle fuel must include certain amounts of renewable fuel. Motor vehicle fuel meets the definition of renewable fuel if the lifecycle GHG emissions for the fuel are a specified percentage below the lifecycle GHGs emissions for a baseline gasoline or diesel fuel. The lifecycle emissions of the fuel include the emissions of GHGs during operation of the vehicle as well as various upstream emissions associated with the production of the fuel. The program looks at motor vehicle emissions of GHGs as well as other aspects of the lifecycle GHG emissions of the fuel used to power motor vehicles.

The goal of the program is to reduce the GHG emissions footprint from this part of the transportation sector. Congress clearly determined that GHG air pollution associated with the operation of motor vehicles was an appropriate air pollution problem for EPA to address. If EPA is looking for evidence of congressional intent, this is directly on point and supports EPA's 2009 interpretation.

Congress knew how to limit the air pollution EPA had authority to address to ambient air pollution. Section 108 specifies criteria for listing air pollutants for the NAAQS program. It includes the typical requirement – it must be an air pollutant "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." Congress also specified that it be an air pollutant "the **presence of which in the ambient air** results from numerous or diverse mobile or stationary sources."(emphasis supplied).[354]

Congress mandated that EPA issue air quality criteria for listed pollutants, where the "[a]ir quality criteria for an air pollutant shall accurately reflect 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 such pollutant in the ambient air**, in varying quantities." (emphasis supplied).[355]

EPA is required to issue "national **ambient** air quality standards" (emphasis supplied) for each listed air pollutant, where "[n]ational primary **ambient** air quality standards … shall be **ambient** air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health" (emphasis supplied) and "[n]ational secondary *ambient* air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to **protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air**." (emphasis supplied)[356]

Congress knew how to limit EPA's authority to setting standards that address harmful exposure to local or regional air pollution. It did so for the NAAQS program but did not do so in § 202(a). The

[354] Section 108(a)(1).
[355] Section 108(a)(2).
[356] Section 109(a),(b).

clear differences in the provisions indicate that Congress did not write into § 202(a) the restriction that EPA currently proposes to read into that provision.

Even where Congress limited EPA to addressing ambient air pollution and the problems associated with such air pollution — the NAAQS program — EPA has for many years considered the global warming impacts of air pollution. For example, EPA has typically considered the warming effects associated with PM in the air quality criteria that assesses the available scientific information on the public health and welfare effects of PM.[357] In addition, EPA has considered the effects of ambient levels of ozone on shielding the public from harmful UV-B radiation.[358] This is an indirect effect that does not stem from exposure to ozone, contrary to EPA's proposed statutory limitation to harms deriving from exposure to local and regional air pollution.[359]

The overall context of the Act also makes clear that Congress was fully aware that air pollution could have international or global aspects that needed to be addressed. For example, Congress addressed situations where air pollution is transported from overseas into the United States, and vice versa.[360] EPA is required to address GHG emissions from the use of motor vehicle fuels, including full lifecycle GHG emissions, which includes both domestic and international emissions.[361] Starting in 1977, Congress required EPA to address a global air pollution problem – the harm to the ozone layer in the upper atmosphere from anthropogenic emissions of pollutants such as halogens. Section 126 of the 1977 amendments to the Act added a new Part B to Title I, including new §§ 150 through 159. The purpose of the new Part was:

> "(1) to provide for a better understanding of the effects of human actions on the stratosphere, especially the ozone in the stratosphere, (2) to provide for a better understanding of the effects of changes in the stratosphere, especially the ozone in the stratosphere on the public health and welfare, (3) to provide information on the progress of regulation of activities which may reasonably be anticipated to affect the ozone in the stratosphere in such a way as to cause or contribute to endangerment of the public health or welfare, and (4) to provide information on the need for additional legislation in this area, if any."[362]

EPA was to conduct a study "of the cumulative effect of all substances, practices, processes, and activities which may affect the stratosphere, especially ozone in the stratosphere. The study shall include an analysis of the independent effects on the stratosphere especially ozone in the

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[357] See, e.g., EPA "Air Quality Criteria for Particulate Matter and Sulfur Oxides," Vol. I Section 1.9 ("Effects on Visibility and Climate"), EPA-600/8-82-029a, December 1982; EPA "Air Quality Criteria for Particulate Matter," Vol. II Section 8.8 ("Climatic Effects"), EPA-600/P-95/0016F, April 1996; EPA "Integrated Science Assessment for Ozone and Related Photochemical Oxidants," Chapter 10 ("The Role of Tropospheric Ozone in Climate Change and UV-B Shielding Effects"), EPA 600/R-10/076F, February 2013.

[358] Id.

[359] *American Trucking Associations v. EPA*, 175 F.3d 1027, 1051-53 (D.C. Cir., 1999) ("The reference to "all identifiable effects" would seem on its face to include beneficent effects. EPA attempts to avoid this straightforward reading in several ways. … But the phrase "pollutant" is simply a label used to identify a substance to be listed and controlled by the statute. … this fact of nomenclature does not visibly manifest a congressional intent to banish consideration of whole classes of "identifiable effects.") The same can be said of EPA's attempt to avoid the straightforward reading of § 202(a).

[360] Section 115.

[361] Section 211(o)(1)(G),(H).

[362] Section 150. This Part B was replaced with a new Title VI in the 1990 amendments to the Act.

stratosphere of— (1) the release into the ambient air of halocarbons, (2) the release into the ambient air of other sources of chlorine."[363]

Congress adopted various provisions addressing reporting, monitoring, interagency actions, international involvement, State programs, and other relevant provisions. Congress also authorized EPA to adopt controls to address this global air pollution problem.

> "If at any time…in the Administrator's judgment, any substance, practice, process, or activity may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, and such effect may reasonably be anticipated to endanger public health or welfare, the Administrator shall promptly promulgate regulations respecting the control of such substance, practice, process, or activity, and shall simultaneously submit notice of the promulgation of such regulations to the Congress."[364]

Congress recognized that emissions of various substances – halogens and other like substances – were polluting the air in a way that reduced the protective layer of ozone in the upper atmosphere. Congress did not need to use the general terms air pollutant and air pollution because it identified the emissions of concern, halogens and other like substances, and identified the specific air pollution problem of concern, chemical substances in the air that degraded the protective stratospheric ozone layer. Way back in 1977, Congress recognized that global air pollution problems may need to be addressed by EPA through regulatory control programs. This is yet another example that undercuts EPA's proposed negative inference that somehow Congress limited EPA's broad authority under § 202(a) to an unspecified, narrow subset of air pollution problems.

In addition, as noted above, the Act's definition of "welfare" also specifically references "climate."[365] All of these provisions clearly indicate that Congress was aware of the international and global aspects of air pollution, and the need to address them in the appropriate circumstances. In § 202(a), Congress relied upon the broad and general terms that it used there and in § 302, terms which readily encompass the GHG air pollutants and air pollution EPA addressed in the 2009 contribution and endangerment findings. Congress did not limit § 202(a) to ambient air pollution, as it did for the NAAQS program. Congress made clear, in the Renewable Fuel provisions, that it recognized that motor vehicles and their fuels are part of our nation's greenhouse gas emissions, are part of the greenhouse gas air pollution problem, and recognized that this was a problem that needed to be addressed. Nowhere in § 202(a) did Congress indicate, expressly or impliedly, that EPA's authority was limited in the way EPA proposes. All of the indications are to the contrary.

Finally, EPA's proposal is nothing more than a repackaging of Justice Scalia's dissent in the *Massachusetts* case.[366] The dissent's analysis was rejected by the Supreme Court, with good reason.[367] The same result applies here – EPA's proposed interpretation is contrary to the best reading of § 202(a).

B. The Major Question Doctrine Does Not Apply Congress Directly Commanded EPA to Develop Standards for Vehicular Air Pollutant Emissions Which Contribute to Endangerment

[363] Section 153.
[364] Section 157(a).
[365] Section 302(h).
[366] 549 U.S. at 555-561.
[367] 549 U.S. at 528-533, and 529 fn. 26.

The agency maintains that the major question doctrine applies and supports its determination to rescind the Endangerment Finding. Specifically, the agency states that the doctrine applies when agency action touches on economically and politically significant issues,[368]and where the agency claims an "unheralded power" resulting in "transformative expansion" of its heretofore exercised delegated powers.[369] The agency also notes that Congress has preferred a carrot of incentives to address the issue of global climate change, not the stick of standards, and has disapproved certain GHG control measures via the Congressional Review Act.[370] The agency further claims *Massachusetts* dealt only with the issue of whether GHGs are pollutants, not with the question of what resulting standards might be once EPA made a decision to find endangerment, although the agency solicited comment on whether the decision also dealt with the major question doctrine in some manner.[371]

The specific transformative authorities the agency claims are at issue are an "electric vehicle (EV) mandate," and a determination of how much gasoline can be used per vehicle.[372] The agency finds these purported mandates analogous to the vacated cap-and-trade scheme of the Clean Power Plan which the *West Virginia* Court noted had EPA determining the nationwide appropriate electricity generating mix.[373]

The agency further asserts that § 202 (a)(1)'s command for EPA to "'prescribe…. 'standards' for certain air pollutants" does not "clearly authorize the EPA to decide the Nation's response to climate change concerns."[374] The upshot, according to the agency, is that EPA is "preclude[d] from asserting authority to regulate in response to global climate change concerns."[375]

The agency misstates both the law and the facts. The major question doctrine has no applicability here, and if it does, §§ 202(a)(1) and (2) clearly authorize the agency to find that GHG air pollution endangers, and that EPA may develop technology-based standards to address vehicular emissions which contribute to that endangerment.

1. The elements of the major question doctrine

The agency properly states that the major question doctrine could apply when an agency regulates in areas of high economic and political significance, and that congressional action or inaction in these areas can be suggestive. But it errs in suggesting that these are the sole, or determinative, criteria for the doctrine's applicability.

For the major question doctrine to apply, an agency must not only be asserting unheralded power, but doing so using an authority "discovered in a long-extant statute" and resulting in an "unprecedented change from past agency practice."[376] Not only must an agency be claiming

[368] 90 FR at 36299 /1.
[369] Id. at 36306.
[370] Id.
[371] Id. at 36307.
[372] Id. at 36306-37.
[373] Id.
[374] Id. at 36299/3.
[375] Id.
[376] *West Virginia*, 597 U.S. 697, 700 (2022). See also id. at 724 noting a "newfound power in the vague language of an ancillary statutory provision."

heretofore never-asserted power based on some ancillary, never previously-invoked authority, but the agency must be acting outside its normal area of expertise: "There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide ... trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." […] "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so."[377]

None of these elements are satisfied here.

2. There is no Transformative Expansion in Agency Power.

(i) *The Supreme Court has Held Repeatedly that EPA Possess Authority to Develop Standards Addressing Global Climate Change.* Contrary to the agency's assertions, the Court in *Massachusetts* was categorical: "If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles. (stating that '[EPA] shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles')."[378] And, in answer to whether *Massachusetts* considered the major question doctrine, the plain answer is that it didn't need to, since, as just quoted, it found clear congressional delegation to EPA to promulgate standards for pollutants contributing to the climate air pollution which endangers public health and welfare.

If this were not enough, the Court further addressed the question in *American Electric Power v. Connecticut,* 564 U.S. 410 (2011), stating without any hedging language that: "the Clean Air Act **and the EPA actions it authorizes** displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. 549 U.S., at 528–529, 127 S.Ct. 1438. And it is equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants."[379](emphasis added).

This holding is decisive. EPA is provided authority to address global climate change by the CAA, and this authority obviously (and necessarily) extends to the implementing standards which EPA must again, necessarily, promulgate.

The agency also ignores that the *West Virginia* Court approvingly noted EPA's prior regulatory regime based on "ensuring the efficiency of pollution performance of each individual source."[380] Putting this together with the holding of *American Electric Power* (which preceded *West Virginia*) results in the principle that EPA can regulate GHG emissions at the emitting source.

Moreover, the agency's assertions that the implementing standards' impact on EPA's authority to find that GHG air pollution endangers public health and welfare is logically fallacious. The statute sets out a two-step process, and the first part of which – unrelated to any resulting standards – is a

[377] Id. at 729 (citations omitted).
[378] *Massachusetts*, 549 U.S. at 533; see also *Coal. for Resp. Regulation,* 684 F. 3d at 126 (same).
[379] Id. at 424.
[380] 597 U.S. at 727.

scientific determination of whether type of air pollution endangers public health and welfare, and whether vehicular emissions cause or contribute to that endangerment. EPA's assertion at 90 FR 36299 that standards impact on that initial determination has it exactly backwards.

EPA's statement that response to climate change is beyond the purview of the Act is further belied by the requirement in § 109(b) that EPA adopt secondary NAAQS to protect public welfare from adverse effects. Public welfare includes adverse effects on climate.[381] The renewable fuel provision of § 211(o) is likewise premised on achieving positive GHG emission balance for vehicular fuels, as explained earlier.

In short, the Supreme Court has twice held both that EPA has authority to make an endangerment finding respecting global climate change, and the authority to issue standards addressing pollutant contributions to that air pollution. The agency's assertions that the nature of resulting standards impacts the authority to find endangerment reflects a logical fallacy. The agency's authority to find endangerment from GHG air pollution is unmistakably clear.[382]

(ii) *The standards are not transformative or unheralded.* As to the standards themselves, the § 202(a)(1) and (2) standards for the vehicular GHG emissions contributing to endangerment assert the same authority as asserted in earlier § 202(a) rules for both criteria pollutants and GHGs, and are premised on technical and policy judgments regarding motor vehicle pollution control that lie in the heartland of EPA's expertise. As in prior CAA § 202(a) rulemakings, EPA assessed the availability of potential technologies to reduce the pollutant at issue, the lead time necessary for development and deployment of those technologies, the cost of compliance with the standards, the cost to purchasers, and the broader societal, energy security and economic impacts. And as in those prior rules, EPA exercised its policy judgment and technical expertise to determine the final standards giving due consideration to the enumerated statutory and other relevant criteria.

EPA and Congress have been controlling emissions from the transportation sector since the beginning of the CAA. EPA's own website[383] includes a long list of emission controls of vehicle and other mobile sources starting with the 1970 CAA which required a 90% reduction of emissions. Every decade since the 1970s has seen its share of new and increasingly stringent standards. Control of vehicle emission is hardly a "little used gap filler;" it is literally one of the CAA's signature programs at the heart of the Act.

As it has in the five plus decades of exercising its § 202(a) authorities, for GHG control, EPA evaluated the control technologies to further control emissions of the contributing pollutant emissions from new motor vehicles and engines, their feasibility, and effectiveness at controlling GHGs. Although the specific facts surrounding each standard vary, these are all among the kinds of considerations that EPA regularly evaluates in its motor vehicle rules, including in all of EPA's prior criteria pollutant rules: the nature of the industry and the regulated vehicles, the availability of control technologies, costs, emissions impacts, health and welfare impacts, economic and other

[381] CAA § 302(h) (definition of "effects on welfare").

[382] If, against our view, the agency is correct on this point, then it has no authority over GHG emissions from aircraft, and must revoke the section 231 aircraft GHG standards, which would expose U.S. aircraft to substantial restrictions and financial penalties potentially including loss of landing rights in all European Union venues.

[383] https://www.epa.gov/transportation-air-pollution-and-climate-change/timeline-major-accomplishments-transportation-air

impacts, cost-benefits analysis, and of course the resulting emission standards. Indeed, many of the standards EPA now proposes to rescind are premised on the use of control technologies that are common for criteria pollutant control, including exhaust gas recirculation, variable valve actuation, and turbo downsizing.[384] Other mundane potential control technologies are better tires and aerodynamic body designs. To say that standards – which include all of the first two phases of light- and heavy-duty GHG standards – premised on these run-of-the-mill common technologies are transformative borders on nonsense.

What the agency apparently regards as transformative are the most recent sets of standards, the light- and medium-duty multi-pollutant standards commencing in model years 2027-2032, and the Phase 3 standards for heavy-duty vehicles commencing in model year 2027 and also extending to model year 2032.[385] This is a gross mischaracterization.

First, looking at the forest instead of the trees, if the GHG standards are transformative– including the most recent ones which are the only ones that were even premised in part on use of electrified powertrains – one would have expected strident opposition from the regulated industry. Instead, regulated industry supports both the light-, medium-, and heavy-duty 2027-2032 model year rules.[386]

Second, the standards are performance-based and do not mandate anything. Manufacturers are free to meet the standards in any way they choose. For example, there have been hundreds of thousands of successful certifications of compliance for meeting the Phase 2 heavy-duty GHG standards, and not one used EPA's modelled compliance pathway.[387] Not only are the standards performance-based rather than mandates, but the standards are met by means of fleetwide averaging (that can also include banking and trading of credits). This means that individual vehicles do not have to meet any particular standard.[388] In no way do the standards announce what the market share of any vehicle type, be it electrified or internal combustion engine (ICE), will be.[389]

Moreover, EPA demonstrated that these standards are achievable without any addition of BEVs (battery electric vehicles, operating entirely on electric power trains) to the existing light-, medium-, or heavy duty fleets.[390] Even in each rule's principal technological compliance pathway – an analysis EPA must prepare to show that the technology-based performance standards are feasible at

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[384] See 76 FR at 57119, 57139 , and 57173-74 (Sept. 15, 2011) (phase 1 heavy duty GHG standards, and standards for heavy duty pickups and vans premised on use of aerodynamic improvements, lower rolling resistance tires, extended idle reduction, low friction lubricants, electrified power steering, downweighting, turbocharging); 81 FR at 73612-618, 73696-705 (Oct. 25, 2016) and Phase 2 RIA at 2-56 to 78 (phase 2 heavy duty GHG standards and standards for heavy duty pickups and vans based on these same improvements, and engine improvements including cooled exhaust gas recirculation, variable valve timing, engine friction reduction. Phase 2 standards for heavy duty pickups and vans were premised, in one of EPA and NHTSA's joint analyses, on some modest penetration of strong hybrids, but EPA also showed that these standards were achievable without any use of strong hybrids. 81 FR at 73803/2 and 804/1.

[385] See 90 FR at 36307 referring to an "electric vehicle mandate."

[386] See 89 FR 27854-54 (light and medium duty), 89 FR 29448-49 (heavy duty). Compare 985 F. 3d 914, 940-41 (D.C. Cir. 2021), reversed in *West Virginia* (fierce opposition from regulated industry to Clean Power Plan).

[387] Phase 3 Response to Comments (RTC) at 117-118.

[388] Individual vehicles are certified to a Family Emission Limit, but this Limit is determined solely by the manufacturer and can be at whatever level the manufacturer chooses, consistent with the manufacturer's fleet, on average, meeting the promulgated standard. See generally, Phase 3 RTC at 1349-60.

[389] Compare *West Virginia,* 549 U.S. at 731 n. 4.

[390] See 89 FR at 28082-085 (light- and- medium duty); see also 89 FR at 27856 (alternative compliance pathways for light- and medium-duty vehicles showing feasible compliance pathways with lower BEV penetration rates than premised in the agency's principal compliance pathway demonstration).

reasonable cost in the lead time provided[391] – BEVs make up a small percentage of vehicles in the respective fleets. For light duty vehicles, BEVs remain a minority of the fleet until model year 2031, and even in the final year of the program are a slight majority of vehicles (56% of the light duty fleet).[392] For heavy duty vehicles, BEVs are projected to remain a small minority of the fleet for all subcategories for the entirety of the program, with the only exception being for light heavy-duty vocational vehicles in the program's final model year, when the percentage in the modelled compliance pathway rises from 46% to 60%.[393] For all of the initial phases of the light-, medium-, and heavy-duty standards – that is, for every vehicular GHG standards before those commencing in model year 2027 – no BEVs at all were projected as part of the modelled technological compliance pathways. How can these conceivably be considered to be "EV mandates"? And despite the agency's assertions, EPA did not decide how much gasoline is used in America. In the analysis of impact of the standard EPA noted that the percentage of cars that use gasoline for all/some of their energy ranged from 65% to 44%, and EPA demonstrated for all vehicle classes that the standards were achievable without resort to any utilization of BEVs.

These modest incremental additions, reflecting technology already well-integrated in the light-, medium-, and heavy-duty fleets, are not 'transformative' by vehicle number or percentage. They are, for example, far less transformative than the criteria pollutant standards premised on use of a catalytic converter, an innovative technology not even commercialized at the time of the standards, which was adopted uniformly by manufacturers, and which necessitated significant changes to every fuel and engine control system for every ICE.[394] Nor are the standards transformative because infrastructure is needed for charging BEVs. NOx control via SCR, a nearly-uniform means of vehicular NOx control, requires a nationwide network of urea dispensaries (including dedicated storage tanks). And of course, gasoline for ICE vehicles requires nationwide supporting refueling infrastructure as well.

The agency states that these latest vehicle GHG standards (the agency does not differentiate among the various vehicle GHG standards, but, as explained above, it is impossible to regard the earlier standard phases when they are premised on garden variety engine and vehicle controls, rather than on electrified power trains and are not remotely analogous to the type of scheme vacated by the Court in *West Virginia*), are analogous to the feature of the Clean Power Plan vacated in *West Virginia*.[395] Specifically, the agency asserts that including BEVs as part of a modelled compliance pathway is analogous to nationwide determinations of amounts of electricity-generating fuels – regulations extending outside the boundaries of the emitting facilities. Even if one puts aside the drastic factual differences between standards that mandate nothing and are achievable without use of electrified power trains to a nationwide allocation of electricity fuels, the analogy is grossly misplaced. A proper analogy would be if EPA had premised these standards on use of mass transit, bicycling, or some means other than direct control of the emissions of the contributing pollutant at the emission source. Instead, the standards are actually analogous to direct CO_2 control of utility

[391] See *NRDC v. EPA*, 655 F. 2d at , 328, 333-34 (D.C. Cir. 1981); see also Phase 3 RTC at 116.
[392] 90 FR at 27856.
[393] See 89 FR at 29452
[394] https://edu.rsc.org/feature/the-evolution-of-catalytic-converters/2020252.article#:~:text=The%20engine%20was%20calibrated%20to,fuel%20for%20the%20combustion%20reaction
[395] 90 FR at 36636-37.

stack emissions, which, as noted above, the *West Virginia* Court found to be permissible.[396] The Court observed that a wide range of technologies could fall under this regime, including stack-based controls, as noted above, which again are directly analogous to the tailpipe emission standards for GHGs.

> 3. The standards also are not economically transformative, unheralded, or otherwise out of the ordinary.

In evaluating whether a regulation is of vast economic and political significance, the Supreme Court has typically compared the effects of the current rule with those of prior exercises of the agency's authority. In particular, the Court has paid special attention to the number of directly affected entities and the costs of complying with the regulation—whether in the form of dollars or other economic consequences such as forced plant closures or permitting delays. In some cases, the Court has also considered the costs to customers of the regulated entity. Under these principles, the major question doctrine has no applicability here.

First, both the Phase 3 rule and the multi-pollutant light and medium-duty rule regulate the same community of regulated entities as earlier rules: light-, medium- and heavy-duty vehicle manufacturers. Congress provided explicit textual authorization for regulating these entities, which EPA has been doing for five decades, and they comprise "a relative handful of large sources capable of shouldering heavy substantive and procedural burdens" of § 202(a) regulation, a far cry from the millions of regulated entities that the Court found to give rise to major questions in other cases. Indeed, the estimated cost of the Phase 3 rule is less than that estimated for EPA's Heavy Duty NOx rule.[397]

Nor does either rule impose the kinds of other economic disruptions that the Supreme Court has noted in prior cases. For example, the rule does not require, legally or practically, any vehicle manufacturers to shut down or even to reduce their production. Nor does the rule create any or excessive delays in their ability to continue to produce vehicles.

As for purchaser costs, the statute does not require consideration of such costs. Congress, of course, recognized that pollution control would entail costs, and the technologies used to meet EPA's motor vehicle emission standards have historically increased costs for purchasers. There are a subset of pollution control technologies, however, that "pay back" the increased upfront costs to purchasers through operating savings. When such technologies are available, they will obviously be of greater interest to purchasers. In the final rules, EPA considered the upfront costs associated with purchasing less polluting vehicles, including (for compliance pathways involving BEVs) the costs of any charging infrastructure where applicable, as well as the costs of operating such vehicles over their lifetime. EPA also evaluated whether the incremental upfront cost would "pay back" over time through operating savings, which we find to be a particularly useful metric for ascertaining willingness to purchase. EPA found that the standards, and specifically zero-emission vehicle (ZEV) technologies, do pay back within the usual period of first ownership of the heavy-duty vehicle.

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[396] See also *West Virginia,* 597 U.S. at 726-27, approvingly noting how a "technology-based" approach to regulation traditionally "focuses upon the control technologies that are available to industrial entities and requires the agency to ensure that regulated firms adopt the appropriate cleanup technology." Further similar approving language is found at 597 U.S. at 726, 727, and 734.

[397] Compare 88 FR at 4311 (Jan. 24, 2023) (estimated cost of heavy duty NOx rule over the life of the program as $4.7 billion) with estimated cost of HD GHG Phase 3 standards over life of the program ($1.1 billion). 90 FR at 29456/3.

Indeed, purchaser fuel cost savings far exceed the rules' costs such that both the rules show net benefits from fuel savings alone, before one even considers the pollution control benefits. For light- and medium-duty plug-in hybrid vehicles (not even for a BEV), EPA estimated that over the average period of first ownership of eight years, a MY 2032 PEV owner will on average save more than $8,000 on purchase and operating costs compared to a gasoline vehicle that meets these standards – far in excess of the estimated $2,100 increase in vehicle purchase price attributable to the pollution control technology.[398]
Focusing on the light- and medium-duty rule, the rule's costs are not so vast as to be unprecedented or transformative. Even without considering the associated fuel savings, the per-vehicle costs are small relative to what Congress itself accepted in enacting § 202.[399]

The total costs of compliance for the light- and medium-duty rule is greater than for prior rules. This is partly because, notwithstanding the significant emissions reductions achieved through compliance with prior GHG rules, manufacturers are projected to produce more vehicles than ever before to meet increasing consumer demand. And even these kinds of metrics reflect an iterative strengthening of the program, not the kind of unprecedented and transformative change that gives rise to a major question. They are a far cry, for instance, from the multiple order-of-magnitude increases in the number of regulated entities and in costs that the Court found in *Utility Air*.[400] The size of the impacts, moreover, is largely a product of the large size of the vehicle market, as well as EPA's choice to assess impacts through 2055, which allows the agency to consider the long-term impacts of the rule in light of the gradual turnover of the motor-vehicle fleet.

These rules do not create vast economic impacts of an unprecedented kind. The rules build upon the market's transition to ZEVs—in response to emerging technological developments. And contrary to the agency's flamboyant assertions, the rules are not a ZEV mandate as a manufacturer can comply with the standards without producing additional ZEVs.

> 4. The standards are based on a central CAA provision, are in the wheelhouse of EPA's expertise, and reflect consistent past agency practice

As noted above, *West Virginia* stressed that the Court's skepticism was heightened by EPA's reliance on an obscure, hitherto largely unused ancillary provision of the Act, which EPA was implementing in a way utterly at odds with its consistent past practice.[401]

The opposite is true here. Section 202(a)(1) and (2) are core provisions of the Act. As explained above, EPA implemented these provisions for GHG emissions in precisely the same manner as it has been doing for over 50 years for all other vehicular pollutants whose emission contributes to endangering air pollution.

Moreover, unlike the Clean Power Plan, the vehicular GHG standards fall squarely within EPA's area of expertise. Since the Act's inception in 1970, EPA has regulated vehicular pollutant emissions

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[398] See Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles RIA, Section 4.2.2.
[399] See *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979) ("Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers.").
[400] See 573 U.S. 302, 322 (2014).
[401] 597 U.S. at 724.

using its delegated § 202(a) authority. Though the individual facts vary per rule, EPA's basic methodology, reflecting *NRDC v. EPA*,[402] is to promulgate technology-based standards by evaluating available control technologies, their feasibility and performance considering inherent variability, their cost, how quickly they can be commercialized into the new motor vehicle fleet, impacts on vehicle price to consumers, energy security, safety, and other related factors. The ultimate object is to show, often via a potential compliance pathway, the major steps needed for technology development, at what cost, and how any technological difficulties may be resolved within the lead time provided.[403] EPA's expertise in this area is colossal, although little to none of it is evident in the present proposal.

5. Congressional Actions

Normally, failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress" adopted.[404] The situation in *West Virginia* was an exception to this general principle due to the strong correspondence in both substance and timing to the regulatory scheme of the Clean Power Plan. Specifically, the Court in *West Virginia* noted that Congress had both specifically and repeatedly rejected legislation that would have authorized the same cap-and-trade regime EPA adopted in the Clean Power Plan, and also, in the 1990 amendments, had adopted a cap-and-trade program for acid rain but not for § 111 sources.[405]

There is no such correspondence between legislative efforts and EPA vehicle standards. In the multiple Congresses serving since EPA promulgated the Endangerment Finding, there has been no failed legislation regarding how EPA is to regulate GHG emissions from new motor vehicles, no failed legislation addressing any of the vehicle GHG standards themselves, and no failed legislation addressing the Endangerment Finding. Nor have there been any congressional repeals of the vehicle standards, well within congressional authority under the Congressional Review Act.[406] In fact, unlike a cap-and-trade program for CO_2 emissions, since the 1973 energy crisis, Congress has included EPA within overall goals of reducing gasoline consumption. As noted above, Congress mandated in § 211(o) that motor vehicle fuel must include certain amounts of renewable fuel based on the lifecycle GHG emissions for the fuel being a specified percentage below the lifecycle GHGs for a baseline gasoline or diesel fuel. The lifecycle emissions of the fuel include the emissions of GHGs during operation of the vehicle as well as various upstream emissions associated with the production of the fuel. Congress also charged EPA with adopting the fuel economy test protocols for determining a vehicle's miles per gallon of gasoline, which information in turn is used to enforce Corporate Fuel Economy standards. EPA also used this information for the Fuel Economy labelling program, which posts fuel economy ratings on all new ICE vehicles.

Rather than point to non-existent specific correspondences, EPA references the "One Big Beautiful Bill": "We propose that this legislation, which was the product of substantial national debate and revised and rescinding funding for provisions of the IRA that were themselves the product of substantial national debate, indicates that the EPA erred in attempting to resolve significant policy

[402] *NRDC v. EPA*, 655 F. 2d
[403] See 655 F. 2d at 328, 333-34.
[404] *Bostock v. Clayton*, 140 S Ct 1731, 1747 (2020).
[405] 597 U.S. at 733.
[406] The agency points to CRA actions involving different rules involving non-vehicular emissions, and to CRA actions respecting certain section preemption waivers for particular California programs including for ZEVs. 90 FR at 36307. These are inapposite since they do not involve the federal § 202 (a) GHG standards. All of the GHG vehicle standards were subject to the CRA, and no resolutions to rescind these rules were even introduced, much less adopted.

issues on its own accord in the Endangerment Finding."[407] But Congress did nothing that impacted either the Endangerment Finding or the auto rules. Congress revoked some of the "carrot[s]"[408] from the Inflation Reduction Act. This situation is nothing like the series of correspondences noted by the Court in *West Virginia*.

Separately, the agency references Congress' support for research and incentives for ZEVs as undermining EPA's CAA authority.[409] But such efforts do not constitute a "distinct regulatory scheme" that displaces the agency's authority. Rather, "[c]ollaboration and research do not conflict with any thoughtful regulatory effort; they complement it."[410]

6. Statutory text provides clear authorization

The statute clearly authorizes EPA to consider ZEV technologies in setting emission standards under § 202(a). Section 202(a)(2) requires the Administrator to establish emission standards for classes of motor vehicles based on the "development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." "Motor vehicles" are defined broadly to mean "any self-propelled vehicle designed for transporting persons or property on a street or highway."[411] ZEV technologies are "technologies" that reduce emissions and apply to "motor vehicles." Thus, EPA may consider such technologies in determining the emissions standards. The statutory context, purpose, and history, as well as administrative precedent, support this conclusion. Indeed, the statute unambiguously mandates EPA to consider ZEVs based on the voluminous records for each of the standards, as they are highly effective pollution control technologies available during the timeframe of the rules and at a reasonable cost. There is not even any dispute on this point. In addition: (1) in § 202(a), Congress made the major policy decision to regulate air pollution from motor vehicles and appropriately delegated to EPA the interstitial judgments of identifying available pollution control technologies—like ZEV technologies—and the level of the standards; (2) the statutory language is clear, and does not rely on modest or vague terms; and (3) the statutory provision is central to controlling motor vehicle emissions, not some ancillary or backwater enactment.

First, in enacting § 202(a), Congress itself made the relevant major policy decision: to regulate dangerous air pollution from motor vehicles—a term which Congress broadly defined to include "any self-propelled vehicle designed for transporting persons or property on a street or highway."[412] Granting the Executive Branch such authority was a decision of enormous import. To that point, Congress' prior forays into air pollution control had largely focused on research, funding, and study. Motivated by recent environmental crises and a growing awareness of the dangers of air pollution to public health and welfare, Congress in 1965 conferred upon the agency authority to regulate motor vehicle emissions.

Congress also made the key policy decision that motor vehicle emissions control would be achieved through a technology-based approach: EPA is to identify the available control technologies and establish emission standards based on the performance of such technologies, their costs, and the

[407] 90 FR at 36606-07.
[408] 90 FR at 36606.
[409] 90 FR at 36294.
[410] *Massachusetts* 549 U.S. at 530.
[411] CAA section 216(2).
[412] CAA Section 216 (2).

lead-time necessary for their development and application. It charged the agency with technical determinations and policy judgments of an interstitial nature: what kind of pollution is harmful to public health and welfare, which classes of motor vehicles cause or contribute to such pollution, what technologies exist to mitigate such pollution, the rate and costs at which such technologies can be adopted, the appropriate stringency of the emissions standards in light of findings on technology and costs, and how such standards should be complied with and enforced. Congress conferred on the Administrator the authority to make these subsidiary, but also significant, judgments, recognizing both his expertise in this area, as well as the need to confer "regulatory flexibility" absent which "changing circumstances and scientific developments would soon render the Clean Air Act obsolete."[413] These sorts of technical and policy determinations were well within Congress power to delegate, and such delegations are ubiquitous throughout the CAA.

In subsequent amendments to the Act, Congress made clear the reach of § 202(a): it could be used to drive not merely modest reductions in motor vehicle emissions, but order-of-magnitude reductions. For example, in the 1970 CAA amendments, Congress mandated that the Administrator issue regulations to reduce emissions of certain pollutants by 90% over a five-year period. The 1990 Amendments required 100% phase-in of a new set of demanding standards over a six to seven model-year period. Congress further clarified that EPA should not view even such enormous reductions as the full extent of Congress' pollution-control intentions, but expressly empowered the agency to go still further.

The agency fails to seriously question this beyond suggesting that the final rule is unlawful absent an explicit legislative command to consider ZEVs or (conversely) to only consider technologies applicable to ICE vehicles.[414] But Congress did not limit EPA's authority to ICE vehicles, which is the necessary implication of the agency's present assertions. Instead, Congress made the major policy decision here to control motor vehicle pollution via a technology-based approach and delegated to the Administrator the responsibility to implement that policy. Were this not so, any time a significant new pollution control technology has come along—and many have over the years—Congress would need to pass a new statute. There is no good reason for why Congress must turn into a perpetual monitor of new technological developments in the field of motor vehicle emissions control, as opposed to delegating such technical matters to the expert agency.

Second, the statutory language is clear, and does not use modest words, vague terms, or subtle devices.[415] On the contrary, the statute is replete with clear language. Among other things, § 202(a)(1) directs the Administrator to regulate emissions from "motor vehicles," which, we reiterate, the statute defines as "any self-propelled vehicle designed for transporting persons or property on a street or highway." Unlike other statutory provisions, Congress intentionally abstained from using limiting language such as "internal combustion engine" or "gasoline" or "diesel" engine vehicles.[416] Section 202(a)(2) then directs EPA to establish the standards based on the "development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period," and does not confine the agency to consider any specific technology, but rather contains explicitly expansive language on the types of eligible technology. Again, Congress made the

[413] *Massachusetts*, 549 U.S. at 532.
[414] See 90 FR at 36299/3 ("Congress did not *clearly* decide the nation's response to global climate change concerns by empowering the Agency to 'prescribe …standards' for certain air pollutants emitted by new motor vehicles and engines" (emphasis original).)
[415] *West Virginia*, 597 U.S. at 723.
[416] Compare CAA section 216(10) defining "nonroad engine" to be "an internal combustion engine".

major policy decision to regulate air pollution from motor vehicles and entrusted the means of achieving such regulation to the Administrator's judgment. "The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence."[417]

Third, as noted above, § 202(a) is not a mere "ancillary" or backwater provision, but rather has been the cornerstone of motor vehicle emissions regulation since its enactment in 1965. Section 202(a)(1) confers on EPA the "general regulatory power" to regulate motor vehicle emissions.[418] Additionally, over the course of the CAA Amendments of 1970, 1977, and 1990, Congress directed EPA to exercise this authority to promulgate many specific and stringent standards for controlling motor vehicle emissions.[419] Congress also enacted numerous other provisions providing for compliance with and enforcement of such standards in CAA §§ 203-208.

In sum, there is clear Congressional authorization for the GHG standards. In § 202(a), Congress made the major policy decision to control air pollution from motor vehicles and directed EPA to do so through a technology-based approach. The determination of what technology is available for achieving this policy is a subsidiary technical and policy judgment that Congress plainly entrusted to the Administrator's expertise. The statutory text of § 202(a), read in its context, is clear. And decades of legislative and administrative precedent specifically support the Administrator's authority to consider ZEVs, a highly effective pollution control technology. Even were a Court to apply the major questions framework, no major question exists. The final light- and medium-duty multi-pollutant and Phase 3 rules represent an iterative strengthening of the heavy-duty GHG standards based on the agency's evaluation of updated data within its technical expertise. The impacts of these rules are analogous to and, in many instances, less significant than their predecessors. And while the indirect impacts of the rule are not a suitable basis for assessing a major question, the agency performed a comprehensive assessment of such effects, finding that the final rules do not cause significant indirect harms, have the potential for indirect benefits, and create huge net benefits for society. Additional factors considered by the courts also counsel against application of the major questions doctrine. In these rules, EPA did what it has been doing for over fifty years: evaluating updated data on pollution control technologies and setting emissions standards accordingly. These rules are not an extraordinary and unprecedented assertion of agency power that implicates the major questions doctrine.

C. The agency lacks authority to revoke the vehicle standards**.**

Section 202(a)(1)-(2) does not authorize EPA to revoke standards. Instead, Congress enacted a comprehensive scheme for EPA to "prescribe (and from time to time revise) in accordance with the provisions of this section" motor vehicle emission standards. The word "revise" means "to make a new, amended, improved, or up-to-date version of",[420] or "to change or modify."[421] The meaning of the word "revise" is to give the agency power to change the standards, but not to repeal or waive

[417] *Massachusetts,* 549 U.S. at 532.
[418] *NRDC v. EPA*, 655 F. 2d at 322.
[419] See, e.g. §§ 202(b), 202(g) through (j), and 202(l).
[420] Websters 3d New Intl. Dict 1944 (1966). The authority to "revise" standards was expressly added in the 1970 Amendments. Pub. L. No. 91-604, 84 Stat. 1676, 1690 (1970) (adding "revise" to Clean Air Act § 202(a)).
[421] The American Heritage Dictionary of the English Language 1112(1st ed. 1969); see also Black's Law Dictionary 1484 (4th ed. 1968) (defining "REVISE" as "To review, re-examine for correction; to go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it; as, to revise statutes, or a judgment.").

them. This meaning is supported by the modifying statutory phrase "from time to time," which evinces Congress's expectation that EPA will regularly revisit the standards to amend, improve, and update them, an expectation that makes the most sense if the standards remain in existence.

This meaning is further supported by the lead time requirement in § 202(a)(2), which states that "any revision" of a § 202(a)(1) standard "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." This provision indicates that revisions mean different standards that require regulated manufacturers to develop and apply emissions technology on a specific time frame. It is rendered meaningless if standards are revoked. Likewise, in 42 USC § 17013 Congress established an "Advanced technology vehicles manufacturing incentive program," to support the manufacture of advanced technology vehicles, which the statute defines as including certain vehicles that exceed "125 percent of the greenhouse gas emissions and fuel efficiency standards established by the final rule of the Environmental Protection Agency entitled "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2 " (81 Fed. Reg. 73478 (October 25, 2016))." This provision would lose its meaning if those standards were revoked. Finally, Congress knew how to authorize EPA to eliminate existing motor vehicle standards. See § 202(a)(6) (authority to "revise or waive the application" of certain requirements relating to motor vehicle vapor recovery). It did not do so on § 202(a)(1)-(2).

Repeal of the standards also fails to promote the Act's anti-backsliding purpose. The D.C. Circuit has found that the CAA "[c]onsidered as a whole … reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter."[422] Section 202(b)(1)(c) reflects this purpose; it states that "**[a]ny** revised standard shall require a reduction of emissions from the standard that was previously applicable" (emphasis added). Previously, EPA has stated that this provision does not apply to GHG standards due to the reference in § 202(b)(1)(A) to CO and HC standards,[423] but the final sentence of § 202(b)(1)(C) refers to standards outside of subsection (b) and involving pollutants beyond those enumerated in § 202(b)(1)(A), indicating that the provision's reach is not limited in the way EPA has indicated. Given the overarching anti-backsliding goal of the Act, the omission of authority in § 202(a)(1) to revoke standards is best understood as intentional.

IV. Climate Science

A. EPA's use of the DOE CWG Draft Report fails to meet OMB and EPA Information Quality Standards

EPA requested comments on "All aspects of this proposal, including legal and scientific developments that are being subject to public comment for the first time (C–1)."

The report published by the U.S. Department of Energy (DOE), "A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate," has not been peer reviewed by an external, objective body and is being subject to public comment for the first time.[424] The report claims to review "scientific certainties and uncertainties in how anthropogenic carbon dioxide (CO_2) and other

[422] *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006).
[423] 77 FR at 62784-785 n. 440 (Oct. 15, 2012).
[424] https://www.energy.gov/articles/department-energy-issues-report-evaluating-impact-greenhouse-gasses-us-climate-invites

greenhouse gas emissions have affected, or will affect, the Nation's climate, extreme weather events, and selected metrics of societal well-being." The report, referred to here as the Climate Working Group (CWG) Report, was authored by five people hand-selected by the DOE political appointee. In casting climate science as either uncertain or uncompelling, the CWG Draft Report thereby seeks to ignore the state of knowledge that has culminated from decades of scientific understanding regarding the causes and consequences of climate change.

1. The purpose of the CWG Report means it must be subject to EPA's information quality guidelines.

The CWG Draft Report is subject to the Information Quality Guidelines (IQGs) issued by EPA. As stated in EPA's Information Quality Guidelines, EPA guidelines apply when it "distributes information prepared or submitted by an outside party in a manner that reasonably suggests that EPA endorses or agrees with it."[425] There is no question that EPA endorses and agrees with the information contained within the CWG Draft Report. As stated in the proposed rule's preamble, "the Administrator received and evaluated the draft report submitted by the U.S. DOE CWG to Secretary of Energy Christopher Wright on May 27, 2025, titled 'Impacts of Carbon Dioxide Emissions on the U.S. Climate' (2025 CWG Draft Report)."[426] The DOE announcement stated that the CWG Draft Report "was published today as part of the U.S. Environmental Protection Agency's (EPA) proposed rule repealing the 2009 Endangerment Finding."[427] Because the CWG's stated purpose is to support the proposed EPA rule and EPA is using the CWG as its primary source of scientific information, the IQGs are applicable.

EPA's IQGs state that "major scientifically and technically based work products (including scientific, engineering, economic, or statistical documents) related to Agency decisions should be peer-reviewed."[428] Even more critically, the Office of Management and Budget (OMB) Guidelines mandate peer review.[429] Peer review of such work products, including those from sources outside EPA, is guided by the EPA Peer Review Handbook.[430] The EPA Peer Review Handbook derives from OMB's peer review guidelines and provides guidance for review of influential scientific information (ISI) and highly influential scientific assessments (HISAs).

2. EPA's use of the Draft CWG Report means it must meet the criteria of a highly influential scientific assessment and, per the OMB Guidelines and EPA's own procedural rules, must therefore undergo rigorous external peer review.

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[425] USEPA (2002). Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-008, Washington, DC October 2002, p. 24.
[426] USEPA (2025). Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, Federal Register 90, 36292. Christy, J. et al. (2025). A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate, Climate Working Group, Department of Energy, Washington, DC, July 23, 2025, https://energy.gov/sites/default/files/2025-07/DOE_Critical_Review_of_Impacts_of_GHG_Emissions_on_the_US_Climate_July_2025.pdf.
[427] https://www.energy.gov/articles/department-energy-issues-report-evaluating-impact-greenhouse-gasses-us-climate-invites
[428] USEPA. (2002). *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*, Section 4.2.
[429] See section IV.A.6 in these comments.
[430] USEPA. (2015). *Peer Review Handbook*, 4th Edition. U.S. Environmental Protection Agency, EPA/100/B-15/001, Washington, DC, October 2015.

The CWG Draft Report is a highly influential scientific assessment, based on OMB's and EPA's criteria that a HISA: "(i) could have a potential impact of more than $500 million in any year, or (ii) is novel, controversial, or precedent-setting or has significant interagency interest."[431] Use of the CWG Draft Report in the proposed rule meets both these criteria. Peer review prior to dissemination is mandatory. See section IV.A.6.(i) in these comments.

There has been no process that remotely satisfies the requirement of external peer review prior to dissemination of a HISA. A critical characteristic of external peer reviewers is independence, that is, reviewers "are generally not employed by the agency or office producing the document."[432] The CWG Draft Report was reviewed only by DOE employees. The review of the CWG Draft Report did not follow best practices to ensure transparency, including publication of reviewers' names and positions, charge questions to the reviewers, reviewers' comments, or the CWG authors' responses to review comments. Contrary to the EPA peer review guidelines, the review did not provide opportunities for public participation in the peer review process – hardly surprising, given that there has been no peer review process.

EPA's Peer Review Handbook states that the "Administrator may waive or defer the peer review provisions of the OMB Peer Review Bulletin for ISI (including HISAs) if there is a compelling rationale for the waiver or deferral."[433] The Handbook also notes that "The use of waivers is expected to be limited to unusual and compelling situations not otherwise covered by the exemptions, such as situations in which unavoidable legal deadlines prevent full implementation of the OMB Peer Review Bulletin's peer review provisions."[434] Even if one assumes that this language can countermand explicit requirements in the OMB Guidelines, there are no "unavoidable legal deadlines" or similar situations that would meet the criteria of "unusual and compelling situations."[435]

In summary, HISA's must undergo external peer review prior to dissemination, and the absence of the peer review process here is highly prejudicial.[436] This violates CAA §§ 307(d)(9)(A) and 307(d)(9)(D).[437] Any final action that relies in any way on this improperly disseminated HISA is void for this reason alone.

3. The CWG Report demonstrates a lack of objectivity and comprehensiveness, making its conclusions unsuitable for use in an EPA rulemaking of this magnitude

The Information Quality Act (IQA) directs OMB to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by

[431] USEPA. (2015). *Peer Review Handbook*, 4th Edition, Section 3.2.3.
[432] OMB. (2004). *Final Information Quality Bulletin for Peer Review.* https://www.epa.gov/sites/default/files/2015-01/documents/omb_final_info_quality_bulletin_peer_review_2004_1.pdf
[433] USEPA. (2015). *Peer Review Handbook*, 4th Edition, Section 3.3.3.
[434] USEPA. (2015). *Peer Review Handbook*, 4th Edition, Section 3.3.3.
[435] OMB. (2004). *Final Information Quality Bulletin for Peer Review.* https://www.epa.gov/sites/default/files/2015-01/documents/omb_final_info_quality_bulletin_peer_review_2004_1.pdf
[436] See section IV.A.6.(ii) in these comments.
[437] Id.

Federal agencies."[438] Per OMB, objectivity "includes whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner."[439] The CWG Draft Report not only fails to demonstrate processes to maximize objectivity, its development and content makes plain its intent to present a biased and predetermined view of climate science. As one climate scientist explained, "Their goal is not to weigh the evidence fairly but to build the strongest possible case for [carbon dioxide's] innocence. This is a fundamental departure from the norms of science."[440]

The foundation upon which this biased Report is built begins with the intentional selection of five authors, each of whom has an extensive public record expressing views contrary to the consensus on the causes and consequences of climate change. Although there is value in including contrarian perspectives in an assessment of the science, excluding other perspectives leads to biased conclusions that fail to meet the standards of objectivity and completeness – to say nothing of the legal obligation to base conclusions consistent with the evidence of record.[441] DOE's failure to conduct a meaningful, independent peer review of the draft document adds to the biased conclusions. That such biased conclusions were the aim is demonstrated by the complete lack of transparency in the review process and the wholesale disregard of requirements to conduct external peer review before dissemination of highly influential scientific assessments.

It is clear from its failure to meaningfully consider EPA's characterization of the science for the 2009 Endangerment Finding and in more recent rulemakings, as well as the most recent consensus science, that DOE sought a characterization of climate science that presented only narrow, contrarian views. The CWG Draft Report and EPA's proposed rule seek to ignore and sidestep decades of scientific inquiry and debate by innumerable scientists around the world, published in national and international assessments that have been transparently reviewed by hundreds of independent experts and by governments, including the U.S. government, around the world. A shift in the science of such magnitude would reasonably take months of evaluation from EPA and independent experts, additional analysis of the consequences of such a major shift, and appropriately, engagement with the National Academies of Science, Engineering, and Medicine (NASEM). In other words, EPA was obligated to do here what it did in 2009, which was to explain what it considered the best available sources of widely-vetted scientific information (namely the assessments of the Intergovernmental Panel on Climate Change (IPCC), U.S. Global Change Research (USGCRP) and NASEM), place the key findings of those assessments in a technical support document, peer review that technical support document, and meticulously explain how the information from the assessments led to the findings that the directly-emitted GHGs endanger public health and welfare.

The Administrator's (and DOE Secretary's) apparently unquestioning acceptance of the Draft CWG Report and its preeminent role in EPA's proposed rule is further evidence that the Report was written for the express purpose of supporting the Administrator's predetermined policy.

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[438] Public Law No. 106–554 (2001). Treasury and General Government Appropriations Act for Fiscal Year 2001, § 515(a).
[439] OMB. (2001). *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies.* https://www.govinfo.gov/content/pkg/FR-2002-02-22/pdf/R2-59.pdf
[440] Voosen, P. (2025). "Contrarian climate assessment from U.S. government draws swift pushback," Science, July 30, 2025, doi: 10.1126/science.zknz5jm.
[441] *Motor Veh. Mfr's v. State Farm Mutual Automobile Ins. Co.* , 463 U.S. 29, 43 (1983) ("offered an explanation for its decision that runs counter to the evidence before the agency").

Not only does this bias violate the norms of high quality, objective science to inform policy decisions, it undermines the institutional scientific integrity of both DOE and EPA. Looking beyond DOE and EPA, the disbanding of the USGCRP and shutting down the USGCRP website along with access to previous National Climate Assessments, combined with deep reductions in funding and staff to conduct climate research across all agencies signal a government-wide effort to eradicate objective climate information and elevate whatever "alternative facts" are needed to justify desired policies. No deference is owed to such flagrantly biased and outright suppression of actual agency expertise.

4. DOE's dismissal of the CWG Draft Report authors casts doubt upon the ability of DOE to adequately respond to public comments

After receiving 59,563 public comments,[442] DOE dismissed the authors of the CWG Draft Report.[443] This action calls into question whether DOE will prepare a serious and valid response to the public comments. EPA's Peer Review Handbook states that, "Adequate documentation is needed to show whether comments were accepted or rejected."[444] To meet EPA's peer review requirements, that documentation should not only show whether comments were accepted or rejected, but also describe the response to peer review comments, including how accepted comments were incorporated into the Report.

5. The Report fails to meet the standards of scientific information quality demanded for use in highly impactful EPA actions and further fails even to meet the standards of good scientific practice.

EPA should not rely upon the CWG Draft Report in any manner unless (1) it is finalized, and (2) EPA fully responds to all significant adverse comments submitted to DOE on the draft report. Failure to do so would remove any reasoned basis to rely on the report as a credible source of information.

To remedy this problem EPA must:

- Remove the CWG Draft Report and its conclusions from use in EPA's rulemaking process unless and until the Report has been revised to adequately address significant adverse public comments, including issues raised by the recent NASEM report;[445] and
- Ensure a revised report meets EPA's IQGs, including adequately responding to issues raised by the NASEM report and the public review, and publishing the public comments and the authors' responses to those comments.

6. Violations of Information Quality Act and Implementing Regulations

[442] DOE (2025). "A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate (Rulemaking Docket)," https://www.regulations.gov/docket/DOE-HQ-2025-0207, accessed September 15, 2025.
[443] Tollefson, J. (2025). "Trump team disbands controversial US climate panel," Nature, Sep. 11, 2025, https://www.nature.com/articles/d41586-025-02942-8.
[444] USEPA (2015). Peer Review Handbook, 4th Edition. U.S. Environmental Protection Agency, EPA/100/B-15/001, Washington, DC, October 2015.
[445] National Academies of Sciences, Engineering, and Medicine. 2025. Effects of Human-Caused Greenhouse Gas Emissions on U.S. Climate, Health, and Welfare. Washington, DC: The National Academies Press. https://doi.org/10.17226/29239.

The proposal contains wholesale violations of the Information Quality Act and implementing regulations. In particular, it disseminates a Highly Influential Scientific Assessment (HISA) in disregard of all applicable requirements necessary to ensure and maximize quality, objectivity, and integrity — all aspects sadly lacking in the disseminated information.

(i) *Text of Act and Regulations*. The Information Quality Act, (Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153-154 (2000)), provides:

> (a) In General. – The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines … that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies …
> (b) Content of Guidelines. – The guidelines under subsection (a) shall –
> (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
> (2) require that each Federal agency to which the guidelines apply –
> (A) issue guidelines **ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency,** …".

Of particular importance here are the OMB's implementing regulations dealing with dissemination of Influential Scientific Information (ISI) and (most important) HISA. ISI are "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions a significant precedent, model or methodology."[446] Indicia include:

- Is likely to have an annual effect on the economy of $100 million or more.
- Is likely to adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or state, tribal or local governments or communities.
- Addresses significant controversial issues.
- Focuses on significant emerging issues.
- Has significant cross-Agency/interagency implications.
- Involves a significant investment of Agency resources.
- Considers an innovative approach for a previously defined problem/process/methodology.

A scientific assessment — an evaluation of a body of scientific/technical knowledge that typically synthesizes multiple inputs, data, models and assumptions and/or applies best professional judgment to bridge uncertainties in available information — is considered "highly influential" if, in addition to meeting criteria of ISI, "an agency or the OIRA Administrator determines that the dissemination could have a potential impact of more than $500 million in any one year on either the

[446] OMB Information Quality Bulletin, 70 FR at 2667 (Jan. 15, 2005).

public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest."[447]

The CWG Draft Report is a HISA: it addresses significant controversial and emerging issues; it is avowedly innovative (see, e.g., DOE Sec. Wright's statements at viii of the Review[448]); and is likely to contribute to adverse environmental effects and to enormous effects on the economy. EPA has provided its own flamboyant imprimatur by its iterative use throughout the proposed preamble.

The OMB Guidelines mandate peer review of a HISA: "To the extent permitted by law, each agency shall conduct peer reviews on all information subject to this Section [HISAs]. The peer reviews shall satisfy the requirements of Section II of this Bulletin [for Influential Scientific information], as well as the additional requirements found in this Section."[449]

"Shall conduct" is an explicit requirement.

That peer review of HISAs is a mandated requirement is emphasized throughout the Bulletin:

> "**This Bulletin also applies stricter minimum requirements for the peer review of highly influential scientific assessments, which are a subset of influential scientific information.** … **To ensure that the Bulletin is not too costly or rigid, these requirements for more intensive peer review** apply only to the more important scientific assessments disseminated by the federal government. Even for these highly influential scientific assessments, the Bulletin leaves significant discretion to the agency formulating the peer review plan. In general, an agency conducting a peer review of a highly influential scientific assessment **must ensure that** the peer review process is transparent by making available to the public the written charge to the peer reviewers, the peer reviewers' names, the peer reviewers' report(s), and the agency's response to the peer reviewers' report(s)[450];
>
> "Section III requires a more rigorous form of peer review for highly influential scientific assessments. The requirements of Section II of this Bulletin apply to Section III, but Section III has some additional requirements, which are discussed below…
> **If information is covered by Section III, an agency is required to adhere to the peer review procedures specified in Section III**…"[451]

Indeed, even ISI is required to be peer reviewed:

> "This section applies to influential scientific information that the agency or the Administrator determines to be a scientific assessment that: (i) could have a potential impact of more than $500 million in any year, or (ii) is novel, controversial, or precedent-setting or

[447] OMB Information Quality Bulletin (December, 2004) , 70 FR 2664, 2667 (Jan. 15, 2005); also printed as Appendix B to EPA's Peer Review Handbook.

[448] https://www.energy.gov/sites/default/files/2025-07/DOE_Critical_Review_of_Impacts_of_GHG_Emissions_on_the_US_Climate_July_2025.pdf

[449] 70 FR at 2675-76.

[450] EPA Peer Review Handbook at B-3 (emphasis added).

[451] EPA Peer Review Handbook at B-23 (emphasis added).

> has significant interagency interest. 2. In General: To the extent permitted by law, **each agency shall conduct peer reviews on all information subject to this section. The peer reviews shall satisfy the requirements of Section II of this Bulletin, as well as the additional requirements found in this section."**[452]

The Guidelines do afford agencies discretion in determining the precise manner of peer review of HISAs (and ISIs as well), but do not give discretion to ignore peer review altogether, nor to ignore basic parameters of that review. Of importance here, among those basic parameters is a requirement that peer review of a HISA (or ISI) **must precede any dissemination** of the HISA by the agency. Inclusion of a HISA as a prominent aspect of an agency proposed action most certainly qualifies as dissemination:

> "This Bulletin **establishes minimum standards f**or when peer review i**s required** for scientific information and the types of peer review that should be considered by agencies in different circumstances. …Section II requires each agency to subject "influential" scientific information to peer review **prior to dissemination**."[453]

> "The term "dissemination" means **agency initiated or sponsored distribution of information to the public**. …In the context of this Bulletin, the definition of "dissemination" modifies the definition in OMB's government-wide information quality guidelines to address the need for peer review **prior to official dissemination** of the information product."[454]

> "As a matter of effective agency information resources management, agencies s**hall** develop a process. for reviewing the quality (including the objectivity, utility, and integrity) of information **before it is disseminated**. Agencies shall treat information quality as integral to every step of an agency's development of information, including creation, collection, maintenance, and dissemination. This process shall enable the agency to substantiate the quality of the information it has disseminated through documentation or other means appropriate to the information."[455]

OMB reiterated in 2019 that "[t]he IQA **requires** agencies conduct pre-dissemination review of their information products," and "[f]or the subset of scientific information that is "influential," **peer review is a required component of pre-dissemination review**, as described in OMB's Final Information Quality Bulletin for Peer Review (Bulletin). The Bulletin's purpose is to increase the quality and credibility of scientific information used by the government.[456]

Other mandated parameters of the pre-dissemination peer review process are opportunities for public participation in that process via comments to the reviewers on the HISA (or ISI), and public meetings of the peer review panel.

The OMB Guidelines contain a disclaimer that the Guidelines do not create legal rights or obligations:

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[452] EPA Peer Review Handbook at B-39 (emphasis added).
[453] EPA Peer Review handbook at B-12 (emphasis added).
[454] EPA Peer review handbook at B-35 (emphasis added).
[455] Guidelines, sec. III.2, 67 FR at 8459 (an earlier iteration of the Guidelines).
[456] Memorandum M-19-15 (April 24, 2019) at 2, 4. (emphasis added).

> "This Bulletin is intended to improve the internal management of the executive branch, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its agencies or other entities, its officers or employees, or any other person."[457]

As discussed below, this means that neither the Information Quality Act (IQA) or the OMB Guidelines themselves create a private right of action. However, as also explained below, this does not insulate agency action violating or ignoring its provisions from judicial review under the CAA's judicial review provisions (or under the APA for non-CAA actions).

EPA's own Peer Review Handbook contains all of these same provisions and expands upon them, with one caveat: the Handbook does not use mandatory language, but rather couches everything with qualifiers like "should," "generally," and the like.[458] Again, this does not insulate agency action which ignores Handbook practices from review.

(ii) *Violations of IQA*. EPA's use of the CWG Draft Report violates every requirement set out: no peer review, no dissemination prior to peer review, and none of the (many) further mandated steps for HISA peer review set out in the Guidelines. It should be noted that the Climate Report itself maintains, without explanation, that it is in compliance with DOE's information quality guidelines.[459] Whether or not this is the case, the issue is EPA's use of the CWG Draft Report, not DOE's, and EPA's use of the review disregards each and every applicable requirement.

Although the IQA and Guidelines themselves do not create a cause of action for their violation, violation of their requirements violates the CAA. First, there is the violation of substantive requirements of the OMB Guidelines. This is "action…not in accordance with law." CAA § 307(d)(9)(A), and the OMB Guidelines provide "meaningful standards for defining the limits of [the agency's] discretion," giving us "'law to apply' under § 701(a)(2)." *Heckler*, 470 U.S. at 834, 105 S.Ct. 1649."[460] For the same reason, there is "law to apply" for purposes of the CAA analogue to APA § 701(a)(2).

The fact that EPA's own version of the Guidelines is not mandatory is no defense. These statements do not override the express requirements of the OMB Guidelines.[461] The court held there that the EPA Guidelines and Peer Review Handbook are written conditionally and so are not automatically violated by deviation therefrom, but stated further that "[s]uch a [conditional] statement would not override a specific commitment made elsewhere in the document."[462] Even if the OMB Guidelines are considered to be superseded by EPA's non-binding Guidelines and Handbook, agencies must comply even with their own non-binding regulations.[463]

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[457] 70 FR at 2677.

[458] https://www.epa.gov/sites/default/files/2020-08/documents/epa_peer_review_handbook_4th_edition.pdf

[459] CWG Draft Report at iii.

[460] *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020).

[461] See *API v. EPA*. 684 F. 3d 1342, 1348 (D.C. Cir. 2012).

[462] 684 F. 3d at 1348.

[463] See, e.g. *National Developmental Ass'n v. EPA,* 752 F. 3d 999, 1009 (D.C. Cir. 2014); *Steenholdt v. FAA*, 314 F. 3d 633, 639 (D.C. Cir. 2003); *Environmentel, LLC v. FCC,* 661 F. 3d 80, 85 (D.C. Cir. 2011).

Moreover, it is axiomatic that "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." Any such deviation requires some type of reasoned explanation.[464]

Physicians for Soc. Resp. v. Wheeler applies these principles to a situation similar to the one here. EPA took action (via Memorandum) changing certain advisory panel eligibility requirements. It took this action without acknowledgement (or evident awareness) of Office of Governmental Ethics regulations and its own past practices. The court found that this violated fundamental administrative law tenets both to provide reasonable explanations for changes of position, and to consider all significant aspects of the contemplated action:

> "[C]ore principles of administrative law dictate that "an agency changing its course must supply a reasoned *analysis* indicating that prior policies and standards are being deliberately changed, not casually ignored," *Lone Mountain Processing, Inc. v. Secretary of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (emphasis added) (internal quotation marks omitted). That "analysis" is entirely missing from the Directive and its accompanying Memorandum. **An agency's wholesale failure to address "past practice and formal policies regarding [an issue], let alone to explain its reversal of course ... [is] arbitrary and capricious."** *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 927 (D.C. Cir. 2017)." [465]

That neither the Office of Governmental Ethics regulations nor EPA's applicable policies were binding[466] (i.e. not absolute requirements), did not alter this analysis.[467] The Office of Governmental Ethics regulations still were a body of law to apply, making EPA's action justiciable[468] and rendering the agency's failure to acknowledge (much less explain) the deviation arbitrary and capricious. The court further found that this violation was prejudicial.

Similarly here, EPA blithely disseminated the CWG Draft Report without any acknowledgement of IQA requirements, OMB Guidelines pertaining to dissemination of scientifically influential and highly influential assessments, and EPA's own exhaustive policies regarding outside peer review, in advance of agency action, of such significant information and assessments. The absence of any awareness of these requirements, much less the reasoned explanation required for this radical disregard of IQA, OMB Implementing Guidelines, and agency procedures, renders this an action "without observance of procedure required by law."[469]
CAA § 307 (d)(9)(D) requires that agency procedural violations are reversible only if "there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." That showing of prejudice is readily apparent:

— The CWG Draft Report is a HISA, and plays a significant part of the agency's proposal to rescind the Endangerment Finding; as set out in excruciating detail in both the OMB Guidelines and

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[464] *FCC v. Fox Television Station*, 556 U.S. 502, 515 (2009).

[465] 956 F. 3d at 644.

[466] The Office of Governmental Ethics regulations included a provision giving implementing agencies discretion to establish alternative procedures, and so there was no substantive violation for EPA deviating from those rules. 684 F. 3d 644. The OMB Information Quality Act Guidelines do not contain such a blanket carte blanche to implementing agencies; key provisions relating to HISA's, in particular, are unqualified and written as mandates. These provisions are quoted above.

[467] 956 F. 3d at 644.

[468] Id.

[469] CAA § 307(d)(9)(D).

EPA's Peer Review Handbook, peer review of such documents is ordinarily essential; after all, these requirements are considered essential to the purpose of the IQA of "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, …"

— Pre-proposal review is critical to the integrity of the process: "When an information product is a critical component of rule-making, **it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach** or the positions of interest groups have hardened. If review occurs too late, it is unlikely to contribute to the course of a rulemaking."[470] The D.C. Circuit likewise has spoken to the critical importance of peer review to the scientific integrity of agency decision making.[471] The public was denied that integrity here due to the agency's disregard of the mandated peer review process.

— Public comment on a rule, and on its critical scientific underpinnings, is not an adequate substitute for the mandated peer review (which, as just noted, should precede any proposal as well).[472]

7. Violation of the Environmental Research Development Demonstration Authorization Act

The Environmental Research Development Demonstration Authorization Act (ERDDA), 42 USC § 4365 (c)(1), requires the Administrator to submit to the Science Advisory Board (SAB) — "shall make available to" the SAB — any "proposed criteria document, standard, limitation, or regulation, … together with relevant scientific and technical information in the possession of the (EPA)...on which the proposed action is based" at the time it provides that proposal to another agency of the government for formal review. The SAB is then to review and comment on the proposal, which the Administrator is to consider, although the Administrator is not required to obtain SAB approval for any final action.

EPA and the SAB have adopted procedures to implement this statutory requirement, whereby EPA provides SAB with a description (including a pertinent summary of potential issues of scientific concern) of planned major actions not yet proposed and the SAB determines, in a public forum, which of these actions merits its consideration and comment. Among other things, there is to be "EPA transmittal to the SAB Staff Office of all proposed actions sent to the Office of Management and Budget for interagency review, as well as the relevant supporting scientific and technical information;" and "identif[ication of] aspects … of the scientific and technical basis supporting the

[470] OMB Bulletin, op cit,. at B-14 (emphasis added).

[471] See, e.g. *New Mexico Cattle Growers' Ass'n v. United States Fish & Wildlife Serv.*, No. 24-5075, 2025 WL 2423596, at 7 (D.C. Cir. Aug. 22, 2025) where the court stated "[b]ut the fact that study results are influenced by discretionary decisions regarding data inputs and study design does not shield researchers' conclusions from scrutiny or invite agencies to baselessly rely on shoddy studies. Rather, the peer review process and the discipline provided by competing research studies guard against cherry-picking or poor design by forcing scientists to identify, explain, and submit for public scrutiny the discretionary choices that are inevitable in research design."

[472] EPA Peer Review Handbook at section 1.2.12, 1.2.13; OMB Bulletin at B-4.

planned actions that may warrant review, or not, by the full SAB;" and "prepar[ation of] a report to the full SAB with recommendations for or against peer review for each planned action."[473]

In addition to reviewing proposed regulations themselves, the SAB is also to review HISAs:

> "The EPA's SAB is a statutorily established committee with a broad mandate to provide advice and recommendations to the Agency on scientific and technical matters. … In a complementary semiannual process coordinated by the EPA Office of Policy, the SAB also considers **review of science supporting major planned Agency actions** (Tier 1 and Tier 2 actions) that are in the pre-proposal stage. **HISAs or other scientific work products associated with highly visible or controversial environmental issues, or products that include novel scientific methods or approaches, are most suited to review by the SAB.**"[474]

ERDDAA applies to "regulations." Whether or not rescission of the Endangerment Finding is a regulation, the amendment of all of the vehicle GHG emission standards indisputably is.[475]

ERDDAA applies "at the time any proposed … regulation under the Clean Air Act … is provided to any other Federal agency for formal review and comment."[476] The SAB-EPA memorandum quoted above assumes that ERDDA applies when EPA transmits draft regulations to OMB for inter-agency review, and SAB review is premised on that assumption.

As with its disregard of the IQA, EPA ignored every one of ERDDA's mandatory requirements ("shall make available"): no notice to SAB either of the agency action, or of the scientific and technical information — notably the HISA CWG Draft Report. Like the IQA violations, this is action "without observance of procedure required by law."[477] It also is potentially arbitrary and capricious for failing to consider the need for SAB review of "HISAs or other scientific work products associated with highly visible or controversial environmental issues, or products that include novel scientific methods or approaches."[478]

These errors, like those of the IQA violations, are "so serious and related to matters of central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."[479] For many of the reasons noted with respect to the previous violations, prejudice is evident here:

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[473] Memorandum from Associate Administrator for Policy Victoria Arroyo, Deputy Assistant Administrator for the Office of Research and Development Christopher Frey, and Director of the SAB Staff Office Thomas Brennan issued on February 28, 2022. https://sab.epa.gov/ords/sab/sab_apex/r/files/static/v403/Science%20Supporting%20EPA%20Decisions.pdf.

[474] EPA Peer Review handbook, section 4.7.2. (emphasis added).

[475] See e.g. *Cent. Texas Tel. Co-op., Inc. v. F.C.C.*, 402 F.3d 205, 211 (D.C. Cir. 2005) ("a 'second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.' *Am. Mining Cong. v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1109 (D.C.Cir.1993), *quoting Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan,* 979 F.2d 227, 235 (D.C.Cir.1992).")

[476] 42 USC § 4365(c)(1)

[477] CAA § 307 (d)(9) (D)

[478] EPA Peer Review Handbook section 4.7.2., and CAA section 307 (d)(9) (D) (i).

[479] CAA § 307 (d)(9) (D) (iii) (referring back to final sentence of section 307 (d)(8); see also *Coalition for Responsible Regulation*, 684 F. 3d at 124 (applying this CAA prejudicial error test to purported violation of ERDDAA).

— The CWG Draft Report is a HISA, and plays a significant part of the agency's proposal to rescind the Endangerment Finding; "In a complementary semiannual process coordinated by the EPA Office of Policy, the SAB also considers review of science supporting major planned Agency actions (Tier 1 and Tier 2 actions) that are in the pre-proposal stage. HISAs or other scientific work products associated with highly visible or controversial environmental issues, or products that include novel scientific methods or approaches, are most suited to review by the SAB."[480]

— "Scientific and technical peer review is essential to assessing the quality of the science supporting EPA decisions and maintaining the integrity of the agency's regulatory and policy processes. The SAB provides independent scientific and technical peer review and advice to the EPA Administrator" pursuant to the directive of ERDDA.[481]

— Pre-proposal review is critical to the integrity of the process: "When an information product is a critical component of rule-making, **it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach** or the positions of interest groups have hardened. If review occurs too late, it is unlikely to contribute to the course of a rulemaking."[482]

— Public comment on a rule, and on its critical scientific underpinnings, is not an adequate substitute for the mandated SAB review (which, as just noted, should precede any proposal as well).[483]

The proposal must be withdrawn, the CWG Draft Report submitted for the mandated peer review following the procedures set out in the OMB IQA Guidelines and echoed (and expanded upon) in EPA's own Peer Review handbook, and the Review submitted to the SAB for review.

B. EPA must demonstrate why its interpretation of the science underpinning the proposed rule is valid

EPA requested comments on their assertion that "The scientific underpinnings of the Endangerment Finding are weaker than previously believed and contradicted by empirical data, peer-reviewed studies, and scientific developments since 2009 (C-2)."

The EPA's proposal asserts that the "Administrator considered the assessments of the IPCC and the National Climate Assessment" as part of its science review. However, EPA does not demonstrate and explain how it considered those assessments or the broad body of scientific evidence relied upon in the 2009 Endangerment Finding. Instead, EPA's proposal relies entirely upon the science presented in the CWG Draft Report published by DOE, which remains in draft form.

Numerous adverse comments submitted to DOE and now in the public record have strongly and comprehensively contested the validity of the scientific opinions and assessment contained in that Report. Those comments demonstrate that the Report neglects to incorporate the findings of major

[480] EPA Peer Review Handbook at section 4.7.2.
[481] 2022 Memorandum op cit., at 1.
[482] OMB Bulletin, op cit,. at B-14 (emphasis added).
[483] EPA Peer Review Handbook at section 1.2.12, 1.2.13; OMB Bulletin at B-4.

assessments. It ignores broad bodies of literature. It refers to studies that have been shown to be wrong. It omits information from other references that would contradict the Report's conclusions.

In contrast, the 2009 Endangerment Finding devoted seven pages of the preamble to a discussion of EPA's approach to evaluating the evidence. The section covered five topics relevant to the science: (1) the science on which the decisions were based; (2) the appropriate role of adaptation and mitigation issues; (3) the geographical scope of impacts; (4) the temporal scope of impacts; and (5) the impacts of potential future regulations and processes that generate greenhouse gas emissions. Furthermore, EPA developed and published a 210-page Technical Support Document (TSD) to provide further detailed information regarding how EPA interpreted the then-existing body of science in the context of the Endangerment Finding.

EPA fails to explain why it now is abandoning its previous approach of relying primarily on the major well-vetted assessments of the IPCC, USGCRP, and NASEM. These assessments represented the work of thousands of authors, prepared over multiple years. This approach was thoroughly explained and documented in the 2009 Endangerment Finding and the TSD and has been fully reviewed and found to be scientifically and legally sound. EPA fails to explain why now it relies on a single, non-peer-reviewed report written within two months by just five scientists farmed out to DOE. EPA's failure to explain why it is taking a new approach is even more striking when considering the enormous body of science that has been developed in the time since the 2009 Endangerment Finding.

Far from weakening the scientific underpinnings of the 2009 Endangerment Finding, the body of science developed since 2009 has substantially reduced the major uncertainties regarding the causes and consequences of climate change. In 2007, the IPCC concluded in its Fourth Assessment Report that, "[m]ost of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations."[484] By 2023, the IPCC's conclusion stated that, "Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming."[485] More directly, the NASEM report evaluated how the body of relevant science has changed since 2009 and concluded not only that EPA was correct in its assessment of the science in 2009, but that the 2009 Finding "is now reinforced by even stronger evidence."

Regardless of how or whether DOE revises the CWG Draft Report, EPA is responsible for demonstrating that the scientific background upon which the proposed rule is based meets necessary information quality standards and appropriately considers and reflects the full body of knowledge. This demonstration must explain why the CWG Draft Report and proposed rule both omit major aspects of the understanding of the causes and consequences of climate change.

The 2009 Endangerment Finding TSD examined the direct effects of elevated GHG concentrations, radiative forcing and observed climate change, attribution of observed climate change to

[484] IPCC, 2007: *Summary for Policymakers*. In: Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp. https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_spm.pdf

[485] IPCC, 2023: *Summary for Policymakers*. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001

anthropogenic emissions, and projected future climate change. The TSD also considered the impacts to human health, air quality, food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure and settlements, ecosystems and wildlife, and regional climate change impacts. In contrast, neither the proposed rule nor the CWG Draft Report address air quality, water quality, energy, infrastructure and settlements, or ecosystems and wildlife. Both the proposed rule and the CWG Draft Report omit numerous aspects of the impacts of climate change on human health, food production, forestry, and coastal areas. This omission is despite enormous advances in understanding by the scientific community and climate adaptation practitioners.

The CWG Draft Report also contains numerous instances in which the authors, whether knowingly or due to unfamiliarity with the topic, mischaracterized the research they cited as evidence for their conclusions. The Report relies upon cherry-picked data and parameters that ignore the broader context and other results to reach erroneous conclusions. A more comprehensive evaluation of research results and assessments consistently demonstrates conclusions contrary to those made in the Report.

These serious scientific shortcomings have been identified in detail by the Dessler and Kopp review, a compendium of public technical comments on the Report.[486] Even if DOE revises the CWG Draft Report to adequately address these issues, as well as other issues that may be identified by the public and NASEM reviews, it remains EPA's responsibility to both ensure that the proposed rule is based upon high quality scientific information and to respond to the Dessler and Kopp review which we are incorporating by reference into our comments.

EPA must fulfill this responsibility by conducting its own meaningful evaluation of the currently available science, which it has yet to do. Simply stating that the Administrator "reviewed available information" is a woefully insufficient demonstration of a meaningful evaluation. As an example of such a demonstration, the 2009 Endangerment Finding extensively described how the available science was considered in both the rule preamble and the associated TSD. EPA drew from multi-volume Assessment Reports published by IPCC, Synthesis and Assessment Products published by USGCRP, and consensus reports published by the National Research Council (NRC, then part of the NASEM). Each of these organizations followed practices to ensure the development of high-quality scientific information, including broad authorship, independent and rigorous peer review to facilitate objectivity of conclusions, and (in the case of IPCC and USGCRP) public input and transparent processes.

Even though EPA drew from these sources of high-quality scientific information in 2009, it still conducted its own evaluation to ensure the science was applicable to the specific policy questions. EPA has failed to conduct such a meaningful evaluation to determine the applicability of the CWG Draft Report, the most recent major assessments, the NASEM report, and other studies to its current proposal.

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[486] Andrew Dessler, Robert E. Kopp. *Climate Experts' Review of the DOE Climate Working Group Report.* Comment submitted to the U.S. Department of Energy, docket number DOE-HQ-2025-0207, in response to their report "A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate" ESS Open Archive. September 09, 2025. https://drive.google.com/file/d/1PwAR8I9YYmPhbQ6CRekHkroJGMbjbX7l/view.

To remedy this problem, EPA must publish its own evaluation of the current scientific understanding of the causes and consequences of climate change before proceeding with the rulemaking.

C. EPA is responsible for adequately responding to public comments submitted to the DOE docket for the CWG Report

Although EPA cannot take responsibility for revising the CWG Draft Report in response to comments submitted to DOE, EPA is responsible for addressing any significant adverse comments that may affect the scientific basis for the proposed rule. After receiving 59,563 public comments,[487] DOE dismissed the authors of the CWG Report.[488] This dismissal calls into question whether DOE will prepare a serious and valid response to the public comments. For the 2009 Endangerment Finding, public comments were accepted for 60 days and the responses to comments were published six months later with the publication of the final Finding. The CAA requires that the "promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period."[489] Given the dismissal of the Report's authors, it is difficult to see how DOE intends to adequately respond to the 60,000 comments in a reasonable period. If EPA relies upon the draft report in any manner, then it is incumbent on EPA to respond to all of the numerous, significant comments submitted to DOE that provide a comprehensive and in-depth analysis of the many scientific shortcomings of the Report.

Furthermore, unlike the 2009 Finding, the responses to comments will be prepared by a third party, rather than by EPA. It is entirely unclear what, if any, formal relationship now exists between DOE and the CWG Report authors. The authors are (apparently) no longer contractually obligated to DOE, which raises questions about responsibility and accountability of the DOE response to comments and any possible revision of the Report.

Simply shifting sponsorship of the CEG Draft Report from EPA to DOE does not absolve EPA of the responsibility for the scientific information presented in the Report and used as the scientific basis for the proposed rule. The circumstances (as noted earlier in these comments) make it clear that the sole purpose of DOE's establishment of the Climate Working Group was to prepare the CWG Draft Report on EPA's behalf. In essence, DOE has provided the equivalent of the TSD that accompanied EPA's proposed Endangerment Finding in 2009 and provided for public comment concurrent with the proposal itself. This shift of agency cannot be used to avoid the requirements of the CAA to develop and publish a response to each of the significant comments on the Report.

D. EPA fails to demonstrate how the scientific bases for the 2009 Endangerment Finding have been weakened or contradicted

[487] DOE (2025). "A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate (Rulemaking Docket)," https://www.regulations.gov/docket/DOE-HQ-2025-0207, accessed September 15, 2025.
[488] Tollefson, J. (2025). "Trump team disbands controversial US climate panel," Nature, Sep. 11, 2025, https://www.nature.com/articles/d41586-025-02942-8.
[489] CAA § 307(d)(6)(B).

EPA asserted that "[t]he scientific underpinnings of the Endangerment Finding are materially weaker than previously believed and contradicted by empirical data, peer-reviewed studies, and scientific developments since 2009."[490]

However, EPA ignores most of the scientific record available when the 2009 Endangerment Finding was published and fails to consider how EPA then evaluated the science to determine whether such a finding was necessary and appropriate. There are numerous examples in the DOE CWG Draft Report and the current proposal that demonstrate a surprising amount of ignorance or apathy about how EPA characterized the state of the science in the 2009 Finding and TSD. A thorough evaluation of EPA's previous characterization of the science is a reasonable and necessary foundation of support for the assertion that the Finding's scientific underpinnings are weaker or have been contradicted.

The CWG Draft Report and the proposed rule both mischaracterize or omit numerous detailed evaluations EPA presented in the TSD on topics including the effects of CO_2 on plant growth, use of emission scenarios, the frequency and magnitude of extreme events, and sea level rise and ocean acidification. The Report and proposed rule are entirely silent regarding numerous impacts of climate change that were addressed in the 2009 Finding and TSD, as noted above.

The Report and proposed rule also ignore an explicit evaluation of the scientific basis for the 2009 Finding. Duffy et al. evaluated the scientific evidence as of 2018 to determine whether and how the scientific bases for the 2009 Endangerment Finding may have changed. They found that, "Newly available evidence about a wide range of observed and projected impacts strengthens the association between the risk of some of these impacts and anthropogenic climate change, indicates that some impacts or combinations of impacts have the potential to be more severe than previously understood, and identifies substantial risk of additional impacts through processes and pathways not considered in the Endangerment Finding."[491]

Finally, the recently released NASEM report[492] explicitly concludes that "EPA's 2009 finding that the human-caused emissions of greenhouse gases threaten human health and welfare was accurate, has stood the test of time, and is now reinforced by even stronger evidence." The NASEM report was expressly developed to evaluate the change in scientific understanding of the causes and consequences of climate change since the Endangerment Finding in response to EPA's claim that the science has been weakened or contradicted in the intervening years.

EPA must demonstrate in detail how this peer-reviewed report, prepared by a panel with relevant and diverse expertise in climate science and impacts, has wrongly concluded that the scientific basis for the 2009 Endangerment Finding has been weakened or contradicted by the scientific findings since the Finding.

Far from being weaker or contradictory, the scientific basis for the Endangerment Finding has become stronger over the years. EPA now relies on the deeply flawed CWG Report and fails to consider the broader body of science that directly contradicts their assertion that the scientific

[490] 90 FR at 36292

[491] Duffy, P.B. et al. "Strengthened scientific support for the Endangerment Finding for atmospheric greenhouse gases," *Science* 363, 5982(2019). DOI:10.1126/science.aat5982

[492] "Effects of Human-Caused Greenhouse Gas Emissions on U.S. Climate, Health, and Welfare" National Academies of Sciences, Engineering, and Medicine. 2025. The National Academies Press. https://doi.org/10.17226/29239.

evidence supporting the 2009 Finding is now weaker or contradictory to that used to support the Finding.

E. EPA's discussion of emissions scenarios fails to acknowledge projections used to support the Endangerment Finding

The proposal states, "The Endangerment Finding relied primarily on IPCC AR4 to predict global temperature increases between 1.8 and 4 degrees Celsius by 2100"[493] This statement further demonstrates EPA's current failure to evaluate the scientific basis of support for the 2009 Endangerment Finding. The proposal's emphasis on the representative concentration pathway (RCP8.5) is misplaced and largely irrelevant. In 2009, EPA looked at both current conditions and projected future conditions. The stated reasons supporting the findings of endangerment to public health and welfare regarding future conditions did not rest solely on estimated outcomes under the high-end RCP 8.5 scenario. Directionally and qualitatively, many of the future identified risks are very similar under all considered future scenarios, especially over the next few decades. EPA previously described an independent set of emissions scenarios that fell between the extremes reported in IPCC's fourth assessment report (AR4). The TSD for the Endangerment Finding presented the emission scenarios used in its analysis in Figure 6.2.[494] Emissions projected by EPA's central scenario in 2009 were within 1% of observed global emissions of CO_2 from fossil fuel combustion and industrial processes for 2024.[495] Likewise, the increase in U.S. mean surface temperature in 2023 relative to a 1900-1950 baseline fell almost exactly in the center of the temperature range projected in the 2009 TSD.[496] EPA's current proposal is remiss in its failure to consider the emission scenarios actually used in policy formulation and how projected emissions and associated projected temperatures anticipated observed conditions. The focus on RCP8.5 in the current proposal draws attention away from the fact that actual policy formulation relied on by EPA in the Endangerment Finding was both reasonable and resulted in remarkably accurate projections.

F. EPA mischaracterizes the Endangerment Finding's evaluation of evidence regarding impacts of increasing CO_2 on agricultural yields

The proposal states that, "the Administrator is concerned that the Endangerment Finding did not adequately balance the projected adverse impacts attributed to global climate change with the potential benefits to the United States of increased GHG concentrations, and increased CO_2 concentrations in particular."[497]

Again, this demonstrates EPA's failure to adequately examine how it considered the body of science when developing the Endangerment Finding. Contrary to the above statement in the proposal, in 2009 EPA stated that "The Administrator acknowledges that plants including agricultural crops respond to carbon dioxide positively based on numerous well-documented studies. However, previous assessments of food production and agriculture have been modified to highlight increasing

[493] 90 FR at 36308.
[494] USEPA. (2009). *Technical Support Document for the Endangerment and Cause or Contribute Findings for Greenhouse Gases.* https://www.epa.gov/climate-change/technical-support-document-endangerment-and-cause-or-contribute-findings-greenhouse
[495] IEA. (2025). *Global Energy Review 2025.* https://www.iea.org/reports/global-energy-review-2025/co2-emissions
[496] USEPA. (2024). *Climate change indicators in the United States* (Fifth ed., EPA 430-R-24-003). www.epa.gov/climate-indicators
[497] 90 FR at 36309.

vulnerability, stress, and adverse impacts from climate change over time, based on improvements in the understanding of plant physiology, concern over impacts on plant pests and pathogens, and the implications of changes in average temperatures for temperature extremes and for changes in the patterns of precipitation and evaporation."[498] EPA's efforts in 2009 to compare projected adverse impacts with the potential benefits were far more extensive than the one-sided effort made in the CWG Draft Report, which focused only on studies that evaluated the effects of elevated CO_2 concentrations alone and ignored the substantial body of literature showing that changes in temperature and precipitation patterns, including changes in extreme weather events, are likely to overwhelm CO_2's benefits.[499]

G. EPA provides no substantive evidence that the Fifth National Climate Assessment failed to meet OMB information quality guidelines

Concerns regarding whether the Fifth National Climate Assessment (NCA5) met the requirements of OMB guidelines on quality, objectivity, utility, and integrity of information disseminated by Federal agencies are wholly invalid. First, NCA5 cannot possibly have been subject to Executive Order 14303, which was published May 29, 2025, 18 months after the publication of NCA5.

Second, the Administrator provides no examples of the substance of his concerns, raising the possibility that his request for comments is no more than a fishing expedition for critical comments regarding NCA5's information quality. The statement that "several public watchdog organizations have raised concerns" is, while literally true, a gross exaggeration. A thorough search for public documents raising concerns about the information quality of NCA5 revealed but a single document: a June 11, 2025, letter from Protect the Public Trust and the CO2 Coalition to the Director of the Office of Science and Technology Policy, Michael Kratsios, and Acting Administrator of the Office of Information and Regulatory Affairs, Jeffrey Clark.[500]

The letter bases its claims that NCA5 failed to meet OMB information quality guidelines entirely on a 47-page document written by Richard Lindzen and William Happer, well-known deniers of climate science.[501] The document recycles tiresome and long-debunked claims regarding climate science as detailed by Dr. Michael MacCracken's response to this document submitted to EPA's docket for this rulemaking.[502] The document's claims that NCA5 fails to meet OMB information quality guidelines rest entirely on the fact that the authors, Lindzen and Hopper, disagree with the conclusions of NCA5. That this letter was sent less than three weeks before the publication of the proposed rule raises concerns that the letter was submitted with the explicit purpose of deflecting criticisms of the information quality of the CWG Draft Report, which is prominently cited in the proposed rule (that, as noted, violates each and every one of the OMB IQA Guidelines respecting dissemination of HISAs).

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[498] 74 FR at 66536.
[499] CWG Report at 105-106.
[500] Michael Chamberlain and Gregory R. Wrightstone, (2025). Letter to Michael J.K. Kratsios and Jeffrey B. Clark, Re: Request for Correction under EO 14303 and the Information Quality Act Concerning the 5th. National Climate Assessment Published by the U.S. Global Change Research Program, June 11, 2025, https://www.regulations.gov/document/EPA-HQ-OAR-2025-0194-0019.
[501] Lindzen, R. and Hopper, W. (2025). *Greenhouse Gases and Fossil Fuels Climate Science*, Appendix to Chamberlain and Clark letter, https://www.regulations.gov/document/EPA-HQ-OAR-2025-0194-0019.
[502] Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, https://www.regulations.gov/docket/EPA-HQ-OAR-2025-0194.

NCA5 meets every criterion specified by OMB in its information quality guidelines: quality, an encompassing term comprising objectivity, utility, and integrity. Appendix 2 (Information Quality) of NCA5 describes the processes and actions taken by the NCA5 development team to ensure adherence to the OMB information quality guidelines.[503] These actions include the transparent and fully independent review of the draft NCA5 by NASEM,[504] a step explicitly recognized by OMB as meeting their information quality guidelines.[505] The NASEM review included an explicit Statement of Task to guide the review. USGCRP, the lead in development of NCA5, had no input on membership of the NASEM review panel. NCA5 included four opportunities for public input and review.[506] It relied upon a large and diverse author team to ensure diversity of perspectives and limit the potential for influence of individual bias. It was reviewed by agency experts who were not involved in writing the report. Until the Executive Office of the President of the Trump Administration shut down the website, summaries of public and NASEM review comments and NCA5 author responses to those comments were publicly available.

In contrast, the CWG Draft Report followed none of these information quality processes. The CWG Draft Report has only authors, hand-picked by the Secretary of Energy, and all with well-known biases against the consensus of climate science. There was no independent peer review (all reviewers were DOE employees). There is no public record of review comments and author responses. There was no opportunity for public input prior to publication and use in a major policy action. In short, the CWG Draft Report is exactly the type of biased, opaque, poor-quality information the OMB information guidelines were designed to prevent Federal agencies from disseminating or using in agency actions.

Seeking comments to suggest the reverse is true is not just disingenuous, it is a bad faith effort to read shoddy science into the public record, undermine confidence in agency scientific processes, and libel the efforts of hundreds of dedicated authors and agency experts involved in the development of NCA5.

V. Proposed Repeal of GHG Emission Standards

A. Requisite Technology

As an alternative ground of decision, the agency proposes that, assuming that air pollution from the six well-mixed greenhouse gases endangers public health and welfare and that emissions from new motor vehicles contribute to that endangerment, there is no "requisite technology" for new light-,

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[503] Champion, S.M. et al. (2023). Appendix 2. *Information quality, in: Fifth National Climate Assessment* (Crimmins, A.R. et al., eds.) U.S. Global Change Research Program, Washington, DC.
[504] National Academies of Sciences, Engineering, and Medicine. 2023. *Review of the Draft Fifth National Climate Assessment.* Washington, DC: The National Academies Press. https://doi.org/10.17226/26757.
[505] Office of Management and Budget (2005). Final Information Quality Bulletin for Peer Review, Section IV. Alternative Procedures, Federal Register, 70, 2672, Friday, January 14, 2005.
[506] National Oceanic and Atmospheric Administration (2020). *Request for Comment on the Draft Prospectus of the Fifth National Climate Assessment*, Federal Register, 85, 41567, Friday, July 10, 2020. National Aeronautics and Space Administration (2020). *Request for Public Nominations for Authors and Scientific/Technical Inputs and Notice of Planned Public Engagement Opportunities for the Fifth National Climate Assessment*, Federal Register, 85, 65433, October 15, 2020. National Oceanic and Atmospheric Administration (2022). *Public Comment on the Annotated Outline of the Fifth National Climate Assessment*, Federal Register, 87, 940, January 7, 2022. National Oceanic and Atmospheric Administration (2022). *Availability for Public Comment on the Draft Fifth National Climate Assessment (NCA5) United States Global Change Research Program (USGCRP)*, Federal Register, 87, 67873, Thursday, November 10, 2022.

medium-, or heavy-duty vehicles which meaningfully addresses those identified dangers.[507] The agency maintains that even if all emissions from these vehicles were eliminated, the effect on global warming trends would be "below the scientific threshold for measurability" because within the precision range (+/- 15%) for global warming trends, and thus "not a reliable measure for regulatory purposes."[508] The agency further states that only technologies which physically remove greenhouse gases from the ambient air would have the "requisite" meaningful effect, and such technologies would not be emission standards for purposes of § 202(a).[509]

This alternative has been rejected by the D.C. Circuit, in an opinion binding on the agency. It is also atextual, and inconsistent with the CAA's structure and purpose. Furthermore, the agency's purported measurability metric is factually in error.

1. This alternative was rejected by the Court.

The agency neglects to mention that the Court rejected this alternative in *Coalition for Resp. Regulation v. EPA*, 684 F. 3d 102, 127-128 (D.C. Cir. 2012). The Supreme Court denied certiorari on this issue.[510] Since the agency appears oblivious to this applicable law, we quote it in full:

> "Turning to the APA, Industry Petitioners contend, relying on *Small Refiner Lead Phase–Down Task Force v. EPA,* 705 F.2d 506, 525 (D.C.Cir.1983), and *Ethyl Corp. v. EPA,* 541 F.2d 1 (D.C.Cir.1976), that EPA failed both to justify the Tailpipe Rule in terms of the risk identified in the Endangerment Finding and to show that the proposed standards "would meaningfully mitigate the alleged endangerment," Industry Tailpipe Br. 35. Instead, they maintain that EPA "separated these two integral steps," *id.* at 11, and "concluded that it had no obligation to show ... 'the resulting emissions control strategy or strategies will have some significant degree of harm reduction or effectiveness in addressing the endangerment,' " *id.* at 11–12 (quoting Endangerment Finding, 74 Fed. Reg. at 66,508). **These contentions fail.**
>
> Petitioners' reliance on *Small Refiner,* 705 F.2d at 525, is misplaced; the court there laid out guidelines for assessing EPA's discretion to set numerical standards and Petitioners do not challenge the substance of the emission standards. In *Ethyl,* 541 F.2d at 7, the court assessed the scope of EPA's authority, under CAA § 211(c)(1), 42 U.S.C. § 1857f–6c(c)(1) (1970) (*currently codified as amended at* 42 U.S.C. § 7545(c)(1)), to regulate lead particulate in motor-vehicle emissions. The court rejected the argument that the regulations had to "be premised upon factual proof of actual harm," *Ethyl,* 541 F.2d at 12, and instead deferred to EPA's reasonable interpretation that regulations could be based on a "significant risk of harm," *id.* at 13. **Nothing in *Ethyl* implied that EPA's authority to regulate was conditioned on evidence of a particular level of mitigation; only a showing of significant *contribution* was required**. EPA made such a determination in the Endangerment Finding, concluding that vehicle emissions are a significant contributor to domestic greenhouse gas emissions. *See, e.g.,* Endangerment Finding, 74 Fed. Reg. at 66,499. **Further, in the preamble to the Tailpipe Rule itself, EPA found that the emission standards would result in meaningful mitigation of greenhouse gas emissions. For**

[507] 90 FR at 36311-12.
[508] Id. at 36311/2.
[509] Id.
[510] 571 U.S. 951 (2013).

> **example, EPA estimated that the Rule would result in a reduction of about 960 million metric tons of CO2e emissions over the lifetime of the model year 2012–2016 vehicles affected by the new standard**s. *See* Tailpipe Rule, 75 Fed. Reg. at 25,488–90. Other precedent is likewise unhelpful to Petitioners: in *Chemical Manufacturers Association v. EPA,* 217 F.3d 861, 866 (D.C.Cir.2000), "**nothing in the record" indicated that the challenged regulatory program would "directly or indirectly, further the Clean Air Act's environmental goals," whereas here the record is fulsome,** *see supra* Part II." (emphasis supplied).

The agency's disregard of applicable law here is unfortunate. In any case, for the agency's purposes, this issue is settled law binding on the agency, certiorari having been denied on this issue.[511] Moreover, failure to cite plainly relevant authorities raises attorney ethical questions regarding duty of competence, as well as obligation not to make meritless arguments.[512]

2. The agency's alternative is without merit.

First, the text of § 202(a)(1) is clear: ""If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles. [CAA section 202 (a)(1)] (stating that '[EPA] shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles')."*Massachusetts*, 549 U.S. at 533; see also *Coal. for Resp. Regulation*, 684 F. 3d at 126 (same).

The standards EPA is obligated to issue are technology-based: EPA is to consider cost and lead time for "requisite technology", and standards must be applicable for vehicles' useful life. CAA §§ 202(a)(1) and (2); see *NRDC v. EPA*, 655 F. 2d 318, 324-27 and 328 (D.C. Cir. 1981) construing §§ 202(a)(1) and (2) as being technology-forcing. "Requisite" means "needed for a particular purpose"[513] and the statute specifies what that purpose is: the technology that is needed to meet the standard being set under § 202(a)(1).

There is no language tying the §§ 202(a)(1) and (2) standards to an environmental outcome. Congress knew how to write such standards, including in provisions with a two-step process one of whose steps includes technology-based standards.[514] Congress did not adopt this approach in §§

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[511] 571 U.S. 951 (2013)). See also *Heartland Plymouth Court MI v. NLRB*, 838 F. 3d 16, 21-22 (D.C. Cir. 2016) (non-acquiescence cannot be invoked where agency has not contemporaneously sought Supreme Court review, and candidly and transparently indicated its disagreement with the court decision.)

[512] See e.g. American Bar Ass'n, Model Rules of Professional Conduct, Rule 1.1(duty of competence) and see also *U.S. v. Booze*, 293 F. 3d 516 at 519 n. 2 (D.C. Cir. 2002) ("The omission is all the more egregious …. Apparently government counsel either cited the case without reading all of it or knowingly ignored its holding"); *Caudel v. District of Columbia*, 707 F. 354, 363 (D.C. Cir. 2013) ("Counsel has an obligation—as Justice Holmes put it—to 'play the game according to the rules.'").

[513] Merriam Webster.

[514] See, e.g. CAA § 112 (f)(2)(A) (EPA must further promulgate standards to remove residual risk if that quantum of risk remains after application of technology-based standards); 110(a)(1)(a), 172(c)(1), 189(b)(1)(B) (States must submit plans providing for implementation, maintenance, and enforcement of primary NAAQS which Plans must provide for implementation of Reasonably Available Control Measures or Best Available Control Measures depending on circumstances); 110(a)(2)(D) (i) (State plans must prohibit emissions which contribute significantly to non-attainment or maintenance of primary or secondary NAAQS in other States); 209(b)(1) and (2) (determination that State standards must be at least as protective of public health and welfare as applicable federal standards).

202(a)(1) and (2). EPA must promulgate technology-based standards upon finding endangerment and contribution.
Technology-based standards represent a congressional choice to use the best technology to reduce pollutant emissions.[515]
The agency's proposed alternative negates this congressional scheme. Instead of using available, cost-effective technology to reduce emissions of pollutants contributing to endangerment, the agency would decide not to issue any standards, notwithstanding that there are enormous reductions to be had at reasonable cost and within reasonable lead times. This is antithetical to the statutory text, and to its precautionary and preventative purpose.[516]

The agency points to the term "requisite technology" in § 202(a)(2), indicating that it gives the agency license to consider the non-enumerated factor of contribution to an environmental result. But, under the associated words canon of statutory construction (noscitur a sociis), "a general phrase can be given a more focused meaning by the terms linked to it."[517] Here, all of the associated terms involve availability of control technology and its technological feasibility. Similarly, the reference to "such pollution" in § 202(a)(1) appears in the context of consideration of standards' useful life. Again, this reference relates exclusively to technological means of controlling vehicular pollutant emissions. Moreover, reading these two fleeting terms divorced from their context to authorize wholesale negation of the Congressional scheme makes no sense.[518]

In addition, "requisite" is used in § 109(b) "requisite to protect the public health." It was interpreted by the Supreme Court in Whitman: "Requisite, in turn, "'mean[s] sufficient, but not more than necessary.'"[519] Under the same meaning canon of statutory construction, "requisite" should have this same meaning in § 202(a)(2).[520] Thus, "requisite technology" must be referring to technology sufficient, but not more than necessary, to meet the technology based § 202(a)(1) and (2) standards. Again, it is not a free standing directive turning a technology-based standard into a risk-based standard.

The agency makes much of the Supreme Court's statement in *Massachusetts* that it was not addressing the question of "whether policy concerns can inform EPA's actions in the event that it makes such a finding,"[521] This language cannot be read as an affirmative authorization to consider factors other than those Congress authorized, much less to effectively usurp the Congressional judgment about

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[515] See, e.g. *Nat. Res. Def. Council v. E.P.A.*, 529 F.3d 1077, 1079 (D.C. Cir. 2008) ("Instead of basing its regulations on health risks (the "ample margin of safety"), EPA was required by the 1990 amendments to adopt technology-based standards in the first instance. That is to say, in the first round of regulation, the agency was obliged to look to the best available control technology to control emissions for each category of major sources that emits one or more of the listed hazardous air pollutants….").
[516] See, e.g. *Mexichem Specialty Resins v. EPA*, 758 F. 3d 544, 567 (D.C. Cir. 2015) ("We have consistently held that, in situations in which an agency must make a judgment in the face of a known risk of unknown degree, the 'agency has some leeway reasonably to resolve uncertainty, as a policy matter, in favor of more regulation or less.' "citing *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 316 (D.C.Cir.1992); *Lead industries Ass'n v. EPA*, 647 F.2d 1130, 1153 (D.C. Cir. 1980) (recognizing the "precautionary nature" of the law requires the EPA to "err on the side of caution").
[517] *Fischer v. United States*, 603 U.S. 480, 489 (2024).
[518] *American Trucking Ass'n v. Whitman*, 531 U.S. 457, 468 (2001) ("Congress does not hide elephants in mouseholes").
[519] 531 U.S. at 473.
[520] See *Azar v. Allina Health Services*, 587 U.S. 566, 574 (2019) (recounting the usual rule that a word carries the same meaning throughout a single statute).
[521] 549 U.S. at 534–35.

the way to go about reducing emissions of pollutants emissions found to be contributing to endangerment of public health and welfare.

This is not to say that §§ 202 (a)(1) and (2) mandate standards where the standards would not directly or indirectly further statutory goals. But that is not the case here. The Supreme Court spoke to this issue, in the context of standing, in *Massachusetts*:

> "EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the Agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.
>
> But EPA overstates its case. I**ts argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.** …That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.
>
> **And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere—according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. … That accounts for more than 6% of worldwide carbon dioxide emissions. *Id.,* at 232 …To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China. Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming….**
>
> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. …**Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevan**t. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: **A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."** *Massachusetts v. EPA*, 549 U.S. 497, 525–26 (emphasis added).

And, as noted above, in rejecting the argument the agency now puts forward, the *Coal. for Resp. Regulation* court found that:

> Nothing in *Ethyl* implied that EPA's authority to regulate was conditioned on evidence of a particular level of mitigation; only a showing of significant *contribution* was required. … Further, in the preamble to the Tailpipe Rule itself, EPA found that the emission standards would result in meaningful mitigation of greenhouse gas emissions. For example, EPA estimated that the Rule would result in a reduction of about 960 million metric tons of CO2e emissions over the lifetime of the model year 2012–2016 vehicles affected by the new standards.[522]

The emissions reductions in the standards at issue here, just for forthcoming model years, far exceed those cited in binding precedent as emphatically meaningful and congruent with the requirements of §§ 202(a)(1) and (2).[523]

As noted in section II.C.4 above, EPA (as well as the CWG Draft Report) also has disregarded the urgency of avoiding incremental emissions on global warming trends: "[e]ach additional increment of warming is expected to lead to more damage and greater economic losses compared to previous increments of warming, while the risk of catastrophic or unforeseen consequences also increases."[524] Likewise, the IPCC (2023) stated "[w]ith every additional increment of global warming, changes in extremes continue to become larger."[525] As also explained in detail above, the proposal's reference to measurability reflects a fundamental fallacy: it is not appropriate to claim something has no impact because it is not directly measurable or would have no measurable impact. As discussed, there would in fact be a clear, quantifiable, and important impact shown in the change in the modeled warming trend based on the change in emissions.

B. Regulatory Impact Analysis

The draft Regulatory Impact Analysis (RIA) is fatally flawed and inadequate to support this proposed action. The slim document pales in comparison to EPA's extensive past analyses. At 60 pages and 15 short tables, it includes no automotive technology feasibility, cost, or efficiency analysis, and includes no alternative regulatory scenarios whatsoever. In contrast, the Office of Transportation and Air Quality (OTAQ) RIAs for previous light-duty GHG rulemakings were typically 500-1000 pages long, with hundreds of detailed tables of results and citations for every important data set and assumption, and included multiple alternative regulatory scenarios.

The RIA ignores economic reality and the increased pollution and resulting disease and death this action will cause, as many as 2,500 lives a year. It imagines a bizarre world of economics where, even though individuals would save roughly $6,000 over the lifetime of owning an electric car or light truck, it instead concludes that consumers will save money by buying gas vehicles. It takes the position that rescinding a series of rules that all have order of magnitude positive net benefits will result in net costs. The three most recent rules proposed to be rescinded by this action had between

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[522] 684 F. 2d at 128.

[523] See 89 FR at 27858 (7.2 billion metric tons cumulative net GHG reductions from light- and medium-duty vehicles); 89 FR at 29454 (1.025 billion metric tons cumulative GHG reductions from heavy duty vehicles).

[524] 5th National Climate Assessment, Report-In-Brief (2023), p. 24. https://toolkit.climate.gov/sites/default/files/2025-07/NCA5_2023_FullReport.pdf

[525] IPCC "Climate Change 2023 Synthesis Report," p.69. https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf

$198 billion - $252 billion in net benefits, including between $17 billion – $22 billion in health benefits. If EPA has a detailed analysis showing that EPA's earlier analysis was wrong, it should show it and let the public comment on it. This is especially true of the health benefits, which EPA reduces by an order of magnitude without justification.

The RIA claims the existing rules will result in increased pollution as people hold on to their existing gas cars longer, resulting in increased emissions. This shows a fundamental misunderstanding of the car market; in the real-world, cars that work are driven by someone, whether that means they are sold one or more times. This is the reality of the existing car market in which only the top 20% of individuals by income can afford a new car. In addition, new cars will not have a better emission profile if EPA eliminates all the rules that require reduced emissions in the future. EPA cannot simultaneously take credit for improved emissions based on standards that it is actively working to rescind.

1. EPA's Scenarios in the RIA show Net Costs of this Action Unless They Ignore Gas Savings

There are seven vehicle GHG repeal scenarios analyzed (all with 3% or 7% discount rates):

1. Inputs from 2024 rules (except no social cost of carbon)
2. Same as #1 and no IRA tax credits or California Advanced Clean Truck program
3. Same as #2 and assuming $1 lower gasoline and $0.25 lower diesel
4. Same as #2 and only counting the first 2.5 years of fuel savings
5. Same as #3 and only counting the first 2.5 years of fuel savings
6. Same as #1 and zero fuel savings
7. Same as #6 and with much higher vehicle costs

First, we must point out again that the RIA is inaccurate in all its scenarios by assuming that there is no benefit from decreased GHG emissions. The RIA does not include any climate science, and instead uses the CWG Draft Report for climate science. We have already explained what the report is a flawed basis of a regulation. But here we note that numerous adverse comments submitted to DOE have strongly and comprehensively contested the validity of the scientific opinions and assessment contained in CWG's Draft Report. EPA should not rely upon the CWG Draft Report in any manner unless (1) it is finalized, if it is finalized, and (2) EPA fully responds to all significant adverse comments submitted to DOE on the draft report. EPA must also respond to the scientific criticism of the report that parties submit to EPA. Failure to do so would remove any reasoned basis to rely on the report as a credible source of information. Alternatively EPA can produce and propose its own document explaining its position on climate science for public review and comment.

It is noteworthy that only scenarios 1 and 2 have semi-reasonable accounting of consumer fuel savings by using the 2023 Annual Energy Outlook (AEO) fuel prices, updated to reflect inflation. These scenarios show that this action has net costs to society. Scenario 2 has a net cost of $350 billion through 2055, or annualized cost of $18 billion per year (3% discount rate) and a net cost of $50 billion through 2055, or annualized cost of $4 billion per year (7% discount rate). It is odd that Scenario 2 did not use AEO 2025 Alt Transportation (no GHG/CAFE standards, ACT, and fewer tax credits) fuel prices, since EPA specifically asked AEO to conduct this analysis. We can only guess that EPA was trying to ignore the large increase in gasoline prices. According to the analysis, this action will increase gas prices by 5 cents per gallon by 2030, 25 cents per gallon by 2035, 44 cents

per gallon by 2040, 67 cents per gallon by 2045 and 76 cents per gallon by 2050. The Energy Information Administration (EIA) finds that Americans will pay $4.1 trillion (non-discounted) more for gasoline by 2050.

Scenarios 3 and 5 assume gasoline to be $1 cheaper and diesel is assumed to be $0.25 cheaper than adjusted AEO 2023. This is unjustifiable since the AEO includes an analysis of all the actions of the Trump Administration, including this action and how they increase gasoline prices for all Americans. This increase is basic economics. The law of supply and demand tells us that if you increase the demand for a product, in this case gasoline, by reducing the number of EVs and increasing the number of gas vehicles, that increased demand will result in increased prices. If EPA wants to take the position that the law of supply and demand is incorrect, it should lay out that argument and allow the public to comment on it.

Scenarios 4 and 5 only count fuel savings for the first 2.5 years, on the theoretical claim that the value of all other fuel savings must be countered by some other unidentified loss of value to the consumer. This is flawed since the fuel savings continue far beyond the first 2.5 years. Just because people are not perfectly rational economic actors who can properly discount long term savings does not mean those savings don't exist. People will continue to save money for the full life of the car. It is a well-known principle of behavioral economics that people are imperfect economic actors. For example, "the lowest price at which consumers agree to part from a good (selling price) is often considerably higher than the highest price at which they agree to acquire the same item (buying price);" even though those prices should be the same.[526] More importantly, EPA cannot simply manufacture some unjustified loss of value so they can pretend that this action has benefits. Finally, as stated above, gasoline prices will rise for all Americans as gasoline demand rises. Those costs are excluded from these scenarios.

Scenarios 6 and 7 completely exclude fuel savings, extending the theoretical speculation to a ridiculous extreme. EPA rejected both of these claims in the past and concluded that "a dollar saved is a dollar saved" and that OTAQ would only account for other "lost value" if and when a defensible, quantifiable argument could be made for such lost value. The current RIA does not present a defensible and quantifiable argument. If EPA were to come up with one, it should present it to the public for comment.

2. The RIA Uses an Inadequate and Outdated Vehicle Technology Arguments

Since the RIA did not include any automotive technology feasibility, cost, or efficiency updates whatsoever, it inherently ignores ongoing technology improvements made by automotive engineers and forces the RIA to rely on the technology feasibility, cost, and efficiency assumptions in past EPA rules. Interestingly, the RIA (page 28) stipulates that, even by deleting the consumer electric vehicle tax credits from the Inflation Reduction Act, manufacturers are projected to be able to comply with the existing light-duty GHG standards for all but one future year, model year (MY) 2032. In other words, even with light-duty electric vehicles being more expensive for consumers in the absence of the tax credits, manufacturers would be able to comply in MY 2026-2031 and MY 2033 and later. The RIA also stipulates that one way to address any compliance deficits in MY 2032

[526] Carmon, Z., & Ariely, D. (2000). *Focusing on the forgone: How value can appear so different to buyers and sellers.* Journal of consumer research, 27(3), 360-370. https://web.mit.edu/ariely/www/MIT/Papers/bb.pdf.

would be to take advantage of the average, banking, and trading flexibilities that are longstanding pillars of the light-duty GHG program.

Of course, this finding of the RIA, that the light-duty GHG standards are feasible for all but a single year, also begs the very obvious question, Why does EPA not define and analyze an alternative regulatory scenario where the MY 2032 standards would be slightly modified? All previous EPA light-duty GHG rulemakings have included multiple alternative regulatory scenarios so that the public can consider and comment on the alternative scenarios. This RIA does not bother to provide the public with this opportunity because, of course, EPA's mind is made up.

3. The RIA Presents an Unrealistic Portrait of Electric Cars

As we said elsewhere in our comments, EPA's proposal and the RIA continuously denigrate electric vehicles, ignoring that they have improved power over gas vehicles and that their initial sales costs are expected to come down over time. Regardless of higher initial costs, which are partially offset by more features and improved power (which EPA also ignores), EVs save money in the long run. Administration Zeldin acknowledged this when he had the goal of making it "cheaper for Americans to buy cars" – not *own* cars. EPA repeats many of the myths that exist around EVs: that charging takes too long, lack of range, there's nowhere to charge, electricity is too expensive and others – none of these claims are true.[527] While EPA focuses on EVs in its claim that sales are dropping (which is incorrect, sales are still increasing albeit at a slower rate), it is ignoring the fact that compliance with the standard is expected to include hybrids and plug-in hybrids and that, as a group, sales of the three types of vehicles are increasing. [528]

The lack of technical analysis in the RIA helps explain why recent events during the comment period show how incorrect EPA is about its claims about EVs. As stated in our comments section discussing how rescinding the GHG rules will not improve public health and welfare, Ford recently announced that they will build a $30,000 electric truck for sale in 2027, and the DOT announced that they will release billions of dollars to further build out a charging infrastructure in the US. This charging infrastructure will solve the biggest concern for consumers – how to charge their EV on long trips. Further good news for the future of EVs is the announcement by Chinese company BYD that it has a new system for EVs that will allow the cars to be charged in 5 minutes – roughly the time it takes to fuel a gas-powered vehicle.[529] Mercedes currently can charge an EV in 10 minutes. This announcement is consistent with the Chinese EV industry which is producing EVs at the same price and with improved performance over gas cars. Additionally, during the comment period, ChargePoint and Eaton have introduced a new innovative system that delivers up to 600kW for

[527] Threewit, C. (2025). *Reasons People Don't Buy Electric Cars (and Why They're Wrong).* U.S. News. https://cars.usnews.com/cars-trucks/advice/why-people-dont-buy-electric-cars#:~:text=EVs%20Are%20Too%20Expensive,now%20than%20they%20once%20were.

[528] USEIA. (2024). *U.S. share of electric and hybrid vehicle sales reached a record in the third quarter.* https://www.eia.gov/todayinenergy/detail.php?id=63904

[529] Lee, D. (2025). *BYD unveils battery system that charges EVs in five minutes.* Fortune. https://fortune.com/2025/03/17/byd-battery-system-charging-5-minutes-tesla-superchargers/

passenger EVs and supports megawatt charging for commercial fleets. The system needs 30% less space with as much as a 30% reduction in both capital and operating costs.[530]

EPA needs to explain and present for public comment an analysis why in six years American car companies cannot build cars that are equal to the cars that Chinese car companies are producing today. If EPA thinks, despite recent technological advances, that meeting the standard in six years is too soon and the industry needs more time, EPA needs to analyze regulatory options (as it normally does) to delay or otherwise ease the standards by a few years, rather than remove them. If EPA did a proper, forward-looking analysis it would not be surprised by multiple announcements during the very short comment period that show that the assumptions of automotive technology and costs that EPA relied on are incorrect and outdated.

This lack of forward-looking analysis is not only arbitrary and capricious, it is illegal. In adopting standards under CAA § 202(a), EPA need not consider "solely technology in being" in assessing feasibility, but may also consider "the probable or likely sequence of the technology already experienced."[531] Congress has embraced this consistent view of § 202 and directed EPA to push technologies further. In the 1977 CAA amendments, Congress, impatient with the lack of progress in controlling truck pollution, imposed technology-forcing standards requiring, for specified pollutants, the "greatest degree of emission reduction achievable through the application of technology which [EPA] determines will be available."[532] EPA is "expected to press for the development and application of improved technology rather than be limited by that which exists today."[533] In the 1990 amendments, Congress reaffirmed EPA's authority to adopt standards more protective and technologically ambitious than those Congress prescribed.[534]

Overall, the reality of both electric cars and the car market show that EPA's made-up and unjustified Vehicle Composition and Vehicle Quality "costs" of this rule are imaginary. Especially projecting forward to 2032 when the standards go into effect. This means that 83 to 92% of the supposed benefits of this proposal simply do not exist.

4. The RIA Ignored Increases in the Cost of Gasoline and the Loss of Jobs

Most conveniently for this action, EPA ignores the massive increases in the cost of gasoline that will result from this action. According to the analysis of the EIA, this action will increase gas prices by 5 cents per gallon by 2030, 25 cents per gallon by 2035, 44 cents per gallon by 2040, 67 cents per gallon by 2045 and 76 cents per gallon by 2050—an amazing $4 trillion in non-discounted increased costs to all consumers.[535] This increase in gas prices is to be expected based on the law of supply and demand; significantly increasing the demand for gasoline has to result in a significant increase in its

[530] The EV Report. (2025). *Eaton and ChargePoint Unveil Ultrafast EV Chargers.* https://theevreport.com/eaton-and-chargepoint-unveil-ultrafast-ev-chargers

[531] *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 628 (D.C. Cir. 1973)

[532] Pub. L. No. 95-95, § 224, 91 Stat. 685, 765 (*codified at* 42 U.S.C. § 7521(a)(3)(A)(i))

[533] *Nat. Res. Def. Council, Inc. v. EPA*, 655 F.2d 318, 328 (D.C. Cir. 1981). See also *NRDC v. Thomas*, 805 F.2d 410, 414-16 (D.C. Cir. 1986).

[534] See 42 U.S.C. § 7521(i)(1)-(2), (i)(3)(B)-(C) (affirming that EPA retained "authority under subsection (a) to promulgate more stringent standards" than those prescribed in § 7521(g)).

[535] USEIA. (2025). *Annual Energy Outlook 2025*. https://www.eia.gov/outlooks/aeo/

cost. EPA also needs to explain how the public benefits from a rule that according to the same AEO analysis that EPA requested shows a net loss of 3,760,000 jobs between 2025 and 2050.[536]

5. RIA Ignores the Benefits of GHG Reduction

The RIA is also flawed because it imagines that there are no benefits at all for reductions in GHG emissions. This is false. EPA seems to be following the same chain of logic it uses in its proposal to Repeal Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units.[537] The agency claims in its proposal that there is a "particularly demanding analytical task by evaluating the significance of contribution to global, well-mixed air pollution that results from a combination of pollutants from a large and diverse array of sources that in turn, creates elevated global concentrations that, in turn, the Agency determined play a causal role in environmental phenomena that, in turn, the Agency determined adversely affect the public health and welfare." This results in an "attenuated chain of causation" involving "multiple intervening actors, uncertainties, and extrapolations necessary to draw a connection between emissions by a source category and dangerous air pollution in the form of adverse effects in the U.S. from anthropogenic climate change."[538] Our earlier comments focused on how this view is irrelevant to that deregulatory action.[539] Not only is this view of climate change legally irrelevant, it is also factually unsupported and false, and indeed, found already to be illegal.[540] There is a clear scientific link between emissions and damages and the fact that increased emissions increase damages. Multiple administrations, including the first Trump Administration, have come up with estimates of the Social Cost of Carbon (SCC). The SCC is an estimate of the cost, in dollars, of the damage done by each additional ton of carbon emissions. As such it is a determination of the chain of causation from emissions — such as those from EGUs — to damage suffered by Americans and people around the world. It also serves as an estimate of the benefit of any action taken to reduce a ton of carbon emissions. For purposes of this discussion, it actually doesn't matter what that number is as long as it is positive. Any positive number shows that the chain of causation is not too attenuated to connect EGU GHG emissions to damage. We also point to our earlier comments showing that the chain of causation is not unusually long or attenuated and that the chain of causation from pollution is at least as long and complex for many other pollutants.

The federal government is not the only organization that has determined a positive SCC. Many other organizations and governments including (and this is a small sample) the Canadian

[536] Id.
[537] 90 FR 25752
[538] Id. at 25767
[539] https://www.environmentalprotectionnetwork.org/wp-content/uploads/2025/08/EPN-Comments-on-Repeal-of-GHG-Standards-for-EGUs.pdf
[540] *Center for Biological Diversity v. NHTSA*, 538 F. 3d 1172 (9th Cir. 2008).

government,[541] New York Department of Environmental Conservation,[542] William Nordhaus and his team at Yale,[543] and Resources for the Future,[544] have all come up with estimates. In fact, as additional scientific evidence of the damage caused by increased concentrations of GHGs in the atmosphere comes in, these estimates have increased over time.[545] If EPA has actual facts and data as opposed to hand waving it should present that data and allow the public to comment on it.

We note that while the current administration has determined to no longer use a SCC, that determination provided no scientific support to the decision, similar to what is being done in this proposed rulemaking. Whether the EPA wants to establish or use a SCC or not, the fact remains that it can and has, as others have, connected GHG emissions to harm to the American public.

EPA is also discounting the benefits of the transition to a low carbon economy. NASEM's 2021 Report "Accelerating Decarbonization of the U.S. Energy System" determined: If done right, a transition to decarbonization can provide more and better-quality jobs, and economic benefits that exceed costs. The energy transition provides an opportunity to build a more competitive U.S. economy and to increase the availability of high-quality jobs. A transition to decarbonization in the United States could prevent half a million premature deaths or more over the next decade from pollution from the production and use of fossil fuels. The U.S. could save so much money in health and fossil-fuel costs by decarbonizing its economy, that it makes financial sense to do it regardless of climate change.[546]

Others have also found that decarbonizing the economy of which the Endangerment Finding and related motor vehicle rules which EPA proposes to rescind in this action are part of that process is a clear loser for the U.S. The World Resource Institute found that without new policies, the United States will face economic damages from climate change equivalent to 1-3% of GDP per year by 2100. In a worst-case scenario, the damage could reach 3.7-10%.[547] The Union of Concerned Scientists, in their 2023 report, "Accelerating Clean Energy Ambition,"[548] write:

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[541] Government of Canada. (2023). *Social Cost of Greenhouse Gas Estimates – Interim Updated Guidance for the Government of Canada.* https://www.canada.ca/en/environment-climate-change/services/climate-change/science-research-data/social-cost-ghg.html

[542] New York State. (2025). *Climate Change Guidance Documents.* https://dec.ny.gov/regulatory/guidance-and-policy-documents/climate-change-guidance-documents

[543] Barrage, L., & Nordhaus, W. (2024). *Policies, projections, and the social cost of carbon: Results from the DICE-2023 model.* Proceedings of the National Academy of Sciences. https://economics.yale.edu/sites/default/files/2024-03/barrage-nordhaus-2024-policies-projections-and-the-social-cost-of-carbon-results-from-the-dice-2023-model.pdf

[544] Resources for the Future. (n.d.). *Social Cost of Carbon.* https://www.rff.org/topics/scc/

[545] Tol, R. S. (2023). *Social cost of carbon estimates have increased over time.* Nature climate change, 13(6), 532-536. https://research.vu.nl/en/publications/social-cost-of-carbon-estimates-have-increased-over-time

[546] National Academies of Sciences, Engineering, and Medicine. (2021). Accelerating decarbonization of the US energy system. https://nap.nationalacademies.org/catalog/25932/accelerating-decarbonization-of-the-us-energy-system

[547] Jaeger, J., & Saha, D. (2020). *10 charts show the economic benefits of US climate action.* World Resources Institute. https://www.wri.org/blog/2020/07/economic-benefits-climate-action-us

[548] Clemmer, S., Cleetus, R., Martin, J., de Moura, M. C. P., Arbaje, P., Chavez, M., & Sattler, S. (2023). *Accelerating Clean Energy Ambition: How the US Can Meet Its Climate Goals While Delivering Public Health and Economic Benefits.*

> "Fully decarbonizing the economy results in even greater health benefits. Achieving the long[1]term climate targets results in even greater reductions in major air pollutants and more than twice as many avoided premature deaths and avoided health care costs. These additional benefits are due primarily to phasing out coal in the power sector by 2030 and significantly reducing oil and gas use between 2030 and 2050. These public health benefits yield additional near-term savings and exceed the long-term costs of decarbonizing the US economy. The avoided costs of climate impacts significantly boost the overall benefits. Over the past five years, the United States has experienced 90 extreme weather and climate-related disasters, with damages exceeding $1 billion each time; climate change worsened many of these events. Together, the disasters have caused more than $620 billion in total damages and 1,750 deaths (NOAA 2023). Using the social cost of carbon, we estimated that the avoided climate damages from reducing CO2 emissions to meet US climate goals will exceed $400 billion by 2035 under the IRA Reference case and nearly $1.3 trillion by 2050 under the Net Zero cases (EPA 2022)."

It is not only advocacy groups who are concerned about the financial impact of climate change. In his 2020 letter to CEOs,[549] Larry Fink, the CEO of Blackrock (the world's largest asset management firm) stated:

> "Climate change has become a defining factor in companies' long-term prospects. … But awareness is rapidly changing, and I believe we are on the edge of a fundamental reshaping of finance.
> The evidence on climate risk is compelling investors to reassess core assumptions about modern finance. Research from a wide range of organizations – including the UN's Intergovernmental Panel on Climate Change, the BlackRock Investment Institute, and many others, including new studies from McKinsey on the socioeconomic implications of physical climate risk – is deepening our understanding of how climate risk will impact both our physical world and the global system that finances economic growth. [...]
>
> Investors are increasingly reckoning with these questions and recognizing that **climate risk is investment risk. Indeed, climate change is almost invariably the top issue that clients around the world raise with BlackRock.** From Europe to Australia, South America to China, Florida to Oregon, investors are asking how they should modify their portfolios. They are seeking to understand both the physical risks associated with climate change as well as the ways that climate policy will impact prices, costs, and demand across the entire economy. [...] [G]overnment must lead the way in this transition."

The reinsurance company Swiss Re, one of the world's largest providers of insurance to other insurance companies, analyzed the financial impact of climate change and discovered that "the effects of climate change can be expected to reduce global economic output by 11 percent to 14

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https://www.ucs.org/sites/default/files/2023-11/accelerating-clean-energy-ambition-report.pdf

[549] Fink, L. (2020). *Larry Fink's 2020 letter to CEOs: A Fundamental Reshaping of Finance.* https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter

percent by 2050 compared with growth levels without climate change," amounting to as much as $23 trillion in reduced annual global economic output as a result of climate change.[550]

Of course, the impacts are not just international. The McKinsey Global Institute looked at impacts on the Florida real estate market as an example of impacts of Climate Change in the U.S.[551] They found:

- Climate change is projected to exacerbate flooding due to storm surges, precipitation intensity, and rising sea levels that increase tidal flooding. For example, the frequency of tidal flooding from rising sea levels is expected to grow from a few days a year to 30 to 60 times per year in 2030 and more than 200 times per year in 2050 for stations near Florida's coast, according to First Street Foundation.
- Average annual damage from storm surges in Florida's residential real estate market total $2 billion today, a figure that could increase to $3 billion to $4.5 billion, by midcentury depending on whether the exposure is expected as constant or as seeing some buildup.
- Individual counties can see more extreme increases. Examples are Volusia, St. Johns, and Broward counties, which could see their average annual losses grow by approximately 80 percent by 2050.
- Rising sea levels also increase the damage caused by "tail" events in all counties. Florida's real estate losses during storm surge from a 100-year event are expected to be $35 billion today and projected to grow to $50 billion to $75 billion by 2050.
- Projected increase in tidal flooding frequency and severity could result in a $10 billion to $30 billion devaluation in exposed properties by 2030, and $30 billion to $80 billion by 2050, all else being equal.

Deloitte's Global Turning Point Report[552] laid out the cost of inaction:

- A 5.4°F/3° C increase in global temperature will result in economic damages that grow and compound affecting every industry and region. Resulting in $14.5 trillion (present value $) in US economic losses over the next 50 years.
- $1.5 trillion in economic losses in the US in the year 2070 alone.
- This means a lifetime loss of $70,000 for every American.

They also laid out the benefits of action:

- By accelerating decarbonization the US could by the late 2040's complete a transformation that delivers huge economic gains $3 trillion added to the US economy over the next 50 years
- In 2070 the annual economic gain would be $885 billion

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[550] Flavelle, C. (2021). *Climate change could cut world economy by $23 trillion in 2050, insurance giant warns.* The New York Times, 22. https://www.nytimes.com/2021/04/22/climate/climate-change-economy.html

[551] Woetzel, J., Pinner, D., Samandari, H., Engel, H., Krishnan, M., Kampel, C., & Vasmel, M. (2020). *Will mortgages and markets stay afloat in Florida.* McKinsey Global Institute. https://www.mckinsey.com/business-functions/sustainability/our-insights/will-mortgages-and-markets-stay-afloat-in-florida

[552] Deloitte. (2022). *The turning point: a Global Summary.* https://www.deloitte.com/global/en/issues/climate/global-turning-point.html

As stated in the report, "A loss of $14.5 trillion or a gain of $3 trillion the choice is ours." In this action and other actions EPA is taking such as its rescinding GHGs for EGUs EPA is choosing but ignoring trillions in costs.

In addition, EPA ignores the climate risks for the federal government including the Department of Defense (DOD). Federal funding for disaster assistance since 2005 has totaled at least $450 billion and will likely increase due to climate change.[553] In January 2019, during the first Trump Administration, DOD stated that the effects of a changing climate are a national security issue with potential impacts to the department's missions, operational plans, and installations.[554] Since 2010, DOD has identified climate change as a threat to its operations and its almost $1.2 trillion global real-estate portfolio. For example, six DOD installations in the Alaskan Arctic are threatened by permafrost thaw. DOD's 2018 (also during the first Trump Administration) preliminary assessment of extreme weather and climate effects at installations was based on the installations' reported past experiences with extreme weather rather than an analysis of future vulnerabilities based on climate projections.[555]

The development of improved electric vehicles, which the Endangerment Finding and related rules encourage, can help save soldiers' lives. Between 2003 and 2007 in the Iraq War, there were 2,858 resupply convoy casualties. Half of all casualties resulted from the transport of fuel. The transport of fuel was the cause of 5-6% of all US casualties during that time.[556]

Among the costs of the rule that the RIA ignores is the costs of adaptation and mitigation of the effects of climate change that will result from this and other actions of EPA such as EPA's effort to repeal GHG standard for Electric Generating Units. In this action, EPA criticizes the Endangerment Finding for failing to account for adaptation and mitigation for reducing the effects of climate change. Specifically, the federal register notice says:

> The Administrator further notes that the risks anticipated in the Endangerment Finding resulted, in part, from the Agency's decision at the time to ***categorically exclude consideration of adaptation and mitigation that should have been incorporated into the analysis as credible and relevant information***. We propose that the data on weather events, coupled with the Agency's decision to exclude mitigation and adaptation information from the analysis, fatally undermines the Endangerment Finding's conclusions in this respect. FR Notice at p 36309 (emphasis added).

If the Endangerment Finding is flawed for not considering the benefits of adaptation and mitigation, then this action and the RIA are fatally flawed for not considering the costs of adaptation and mitigation in their analysis of this action. Adaptation and mitigation are not free. Actions such as building seawalls and moving communities and roads to higher ground have costs, and those costs

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[553] U.S. Government Accountability Office. (2019). *Climate Resilience: A Strategic Investment Approach for High-Priority Projects Could Help Target Federal Resources.* https://www.gao.gov/assets/gao-20-127-highlights.pdf

[554] U.S. Government Accountability Office. (2019). *Climate Resilience: DOD Needs to Assess Risk and Provide Guidance on Use of Climate Projections in Installation Master Plans and Facilities Designs.* https://www.gao.gov/assets/700/699680.pdf

[555] Wallace, J. (2021). *Melting permafrost puts military on unstable ground.* Greenwire. https://www.eenews.net/greenwire/2021/05/21/stories/1063732977?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Agreenwire

[556] National Defense Center for Energy and Environment (NDCEE). (2009). *Sustain the mission project: Casualty factors for fuel and water resupply convoys* (No. NDCEE0545). https://apps.dtic.mil/sti/citations/ADB356341

should be accounted for. EPA also ignores that mitigation and adaptation is not always available. The lobster fisherman will lose that market altogether if the lobsters continue to move as they already have to Canadian waters in search of the colder water.

6. This Rule Damages the Long-term future of the American Auto Industry

The U.S. auto industry would be at an international disadvantage if it doesn't move quickly to produce electric vehicles. As the National Academy of Science stated:

> Additionally, for U.S. automakers, a potential negative outcome of other countries enacting these ZEV regulations prior to the United States is that these countries will have the opportunity to establish and shape relevant supply chains, which may put them in a stronger position to supply the U.S. market if ZEV policy is enacted. For instance, China is the biggest market for vehicle sales in the world and a jurisdiction that has staked out an ambitious program to convert its fleets to electric vehicles.[557]

In fact, automakers have committed to producing electric vehicles, (this information from May 2025).[558] These plans of the major automotive companies show that by 2030, 2 years in advance of the standards, most car companies plan on being half electric (including hybrids) or more. EPA should acknowledge that automobile company public plans are better than their guesses on future sales. This shows that EPA is being unjustifiably pessimistic in their analysis.

In addition, EPA is undermining the significant investments already made by the private sector. When regulating against the backdrop of an existing regulatory structure, agencies must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[559] For decades, companies have depended on the regulatory stability provided by EPA's consistent recognition of technological advances that support more stringent vehicle emission standards. The electric vehicle supply chain has been ramping up to support a growing fleet of zero-emission vehicles. Existing EPA standards have recognized that the private sector has already made "billions of dollars' worth of investments" in electric vehicle technologies and has "significant plans to transition to a zero-carbon fleet over the next ten to fifteen years."[560] These investments in electric vehicle technology and supporting infrastructure create genuine reliance interests that weigh in favor of maintaining EPA's existing standards.[561] The private sector reasonably relied on the overwhelming evidence of the impact of GHG emissions on public health and welfare supporting the Endangerment Finding, multiple court cases, EPA's longstanding unchallenged authority to adopt innovation-enabling standards that consider electric vehicles. EPA now seeks to upset a well-established regulatory program and harm other private companies that acted under the reasonable assumption that EPA's authority to regulate in this manner was a settled question.

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[557] National Academies of Sciences, Engineering, and Medicine. (2021). *Assessment of technologies for improving light-duty vehicle fuel economy—2025-2035*. Chapter 12.4.1, p. 12-401.
https://www.nap.edu/catalog/26092/assessment-of-technologies-for-improving-light-duty-vehicle-fuel-economy-2025-2035

[558] Kwon, A. (2025). *EVs are still charging ahead (pun intended)*. Autoblog.
https://www.autoblog.com/features/every-major-automakers-ev-roadmap-what-to-expect-by-2030

[559] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[560] 89 Fed. Reg. at 29,445.

[561] *See Ky. Mun. Energy Agency v. FERC*, 45 F.4th 162, 182 (D.C. Cir. 2022) ("[I]nvest[ing] hundreds of millions of dollars" after an agency decision is "substantial evidence of reliance.").

7. Conclusion: The RIA is Wholly Inadequate

Our comments clearly show the inadequacy of EPA's analysis, which does not include:

1. A serious forward-looking review of vehicle technology or economics consistent with the kind of analysis that has been done for years on motor vehicle regulations.
2. A basic understanding of the power/efficiency tradeoff with EVs and how it differs from internal combustion vehicles.
3. A substantive review of the non-GHG health impacts of vehicle emissions (VOCs, NOx, PM, and toxics).
4. An analysis of the costs of mitigation and adaptation. A topic that the proposal faults the Endangerment Finding for not doing.
5. The increases in the cost of gasoline that naturally result from an increase in gasoline demand.
6. The net job losses that result from this proposed action.
7. Any scientific, detailed, and independent analysis of the impact of GHG emissions and increased temperature on public health and welfare.
8. Any analysis of potential alternative regulatory options such as extending the MY32 deadline or reducing the stringency of the standard. Instead EPA takes an all or nothing approach as though regulatory options do not exist.

As a result EPA needs to redo the RIA and make it available for public comment.

C. Rescinding motor vehicle (MV) GHG standards will harm public health and welfare.

EPA is taking the position that rescinding the MV GHG standard will improve public health and welfare. We strongly disagree with EPA's assertion. All of the rules that EPA is rescinding in this action have positive net benefits. The Clean Car Rule avoids over 3,000 deaths and has annual net benefits of $96 billion. The Clean Truck Rule (phase 3) will save over 100 lives and has annual net benefits of over $10 billion.[562] If EPA has a detailed analysis that shows why the previous analyses and assessments are incorrect they should produce it and let the public comment on it, as EPA did when the original rules were written.

EPA claims that this rescission has net positive benefits, mostly from so-called "Vehicle Composition" damages.[563] The agency cherry-picked the data from the U.S. Energy Information Agency's most recent Annual Energy Outlook (AEO), but ignored the very real $4 trillion in additional gasoline costs that the report found would result from the repeal of the Endangerment Finding and associated rules. The AEO analysis determined that these actions will increase gas prices by 5 cents per gallon by 2030, 25 cents per gallon by 2035, 44 cents per gallon by 2040, 67 cents per gallon by 2045, and 76 cents per gallon by 2050.[564]Apparently, EPA imagines a world in

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[562] https://www.environmentalprotectionnetwork.org/epafacts/facts-rollbacks-of-pollution-rules-will-cost-over-200k-lives/

[563] Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards Draft Regulatory Impact Analysis, Table RIA-1

[564] https://www.eia.gov/outlooks/aeo/

which the law of supply and demand is no longer in force and significantly increasing the demand for gasoline would not significantly increase its costs.

While we will address the many problems with the draft Regulatory Impact Analysis (RIA) in another section, we do want to address a number of the other fallacies in the proposal.

In attacking GHG regulation, EPA continually plays the game of slicing up the contribution of any source to world GHG emissions. EPA believes that if they can slice the pie into small enough pieces, they can forget that the pie exists.[565] This approach is inconsistent with § 202(a), which says "cause or **contribute to**" – contribution counts. The legislative history of the revisions in the 1977 CAA § 202(a)(1) are meant to "assur(e) consideration of the *c***umulative impacts of all sources of a pollutant** in setting ambient and emissions, not just the extent of the risk from the emissions from a single source or class of sources of the pollutant." (emphasis added.)

More importantly, this argument was already made by EPA and rejected by the Supreme Court in *Massachusetts*,

> "But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. See Williamson v. Lee Optical of Okla., Inc., 348 U. S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. Cf. SEC v. Chenery Corp., 332 U. S. 194, 202 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations"). That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law. And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere—according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. ¶30, Stdg. App. 219. That accounts for more than 6% of worldwide carbon dioxide emissions. Id., at 232 (Oppenheimer Decl. ¶3); see also MacCracken Decl. ¶31, at 220. To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China.[Footnote 22] Judged by any standard, U. S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.
>
> While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. See also Larson v. Valente, 456 U. S. 228, 244, n. 15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision

[565] This reminds us of one definition of irresponsibility – no raindrop thinks it is responsible for the flood.

> will relieve his every injury"). Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant.[Footnote 23] Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." 549 U.S. at 524.

EPA also ignores other actions it takes under the CAA, that address very small contributions to environmental problems. In reality there is no other way to address the problem. As the old saying goes, a journey of 1,000 miles begins with a single step. Specific examples include the implementation of the Good Neighbor provisions of the CAA EPA set 1% contribution as significantly contributing to nonattainment of the NAAQS. EPA has numerous Control Technology Guidelines which form the basis of RACT controls on sources, many of which contribute a very small percentage of VOC emissions in a metro area.

The proposal says that significant increases in GHG emissions from other countries, particularly China and India, will swamp any reductions in U.S. GHG emissions. Besides being irrelevant (both legally and morally as we cannot excuse the pollution we create by saying they do it, too), the facts are that world emissions are peaking. The World Economic Forum reports that world "[e]nergy-related emissions are on the cusp of a prolonged period of decline for the first time since the Industrial Revolution. Peak energy emissions is here."[566] This means that if the administration goes forward with all its plans, U.S. motor vehicles will have an increasing percentage of world GHG emissions.

EPA's analysis is based on incorrect assumptions. EPA overstates the cost differential between EVs and gas sport utility vehicles (SUVs). As would be expected with new technology, car manufacturers are building EVs as more expensive models as they build economies of scale that will bring down costs. Take the best-selling electric SUV, the Tesla model Y, and the most popular gas SUV, the Toyota RAV4. First, we would point out that the Tesla is the second-best selling SUV in the U.S. in 2025 and is the bestselling SUV made by an American car company.[567] Second, while the Tesla is more expensive, it is a luxury car compared to the Toyota. It has multiple features that the Toyota doesn't have and the Tesla has a higher overall rating from Edmunds including a rating of 8.5 (out of 10) for driving experience compared to a score of 7 for the Toyota. (All comparisons are for the most popular model of each car.) Among the features that it has as standard features are parking assistance, heated and cooled seats, and a sunroof, some of which are not available on the RAV4. EPA notes that Americans have shown that they highly value performance and power at the expense of fuel economy. What EPA does not note is that since EVs have instant torque they are more powerful than ICE vehicles. Model Y has 295 horsepower and goes from 0 to 60 in 6.5 seconds

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566 https://www.weforum.org/stories/2024/11/peak-energy-emissions-a-historic-moment-overshadowed-by-the-endurance-of- fossil-fuels/ Emissions from China are peaking, while India just recently hit the 50% of non-fossil power milestone ahead of its 2030 target. See also: https://www.carbonbrief.org/analysis-clean-energy-just-put-chinas-co2-emissions-into-reverse-for- first-time/ and https://www.reuters.com/business/energy/india-hits-50-non-fossil-power-milestone-ahead-2030-clean-energy-target-2025-07-14/?utm_source=cbnewsletter&utm_medium=email&utm_term=2025-07-15&utm_campaign=Daily+Briefing+India+hits+energy+milestone+EU-China+summit+Catastrophe+bond+sales.

567 https://www.visualcapitalist.com/best-selling-cars-us-h1-2025/

while the RAV4 has 203 horsepower and takes 8 seconds to go from 0 to 60. Moving from an ICE vehicle to an EV does not reduce performance and power, it improves it, so to the extent that the public values performance they are getting a benefit not a cost from EVs. This is not surprising when one looks at the history of energy efficient cars. Since 1970 cars have been slightly more than twice as efficient in miles per gallon and have almost twice as much horsepower.

EPA has a long history of overestimating the costs of control technologies and this action is no exception.[568,569,570,571] In this proposal, EPA works hard to manufacture analyses to show net costs. In the RIA, five of the seven modeling scenarios fail to account for trillions of dollars of higher fuel costs that consumers will bear due to both less-efficient new vehicles and higher gasoline prices for all drivers of both new and used vehicles. Despite ignoring GHG costs, Scenarios 1 and 2 still show that repealing the existing standards results in a net cost to society, under both the 3% and 7% discount rates (because at least they account for increased lifetime consumer fuel costs, even as they ignore the higher fuel prices).

Ford recently announced that it will sell a $30,000 electric truck in 2027. (The cheapest Ford F-150 gas model sold today has an MSRP of over $45,000.) The key to the reduced price is changes in the manufacturing process.[572]As to additional benefits to the consumer, the truck will be able to power a home for up to 6 days – something no current ICE could do. If Ford can do it, other manufacturers can do it as well. Not only can U.S. manufacturers do it, they need to as the Chinese auto industry is currently producing EVs that are price equivalent to ICE vehicles and offer superior performance.[573] If China can do it today, EPA would need to produce actual evidence to show why U.S. car makers can't.[574]

The biggest issue that is slowing the adoption of EV is range anxiety. That will quickly fade as more chargers are built across the U.S. The proposal assumes that the Trump Administration's freeze of federal funds for vehicle charging would be permanent and takes credit for that as a savings. But since the proposal was published, the U.S. Department of Transportation, after losing in court, has agreed to lift the freeze and will release the money to states to begin charger projects.[575]

EPA is also wrong when it says that EVs don't reduce pollution. There are numerous analyses that show that EVs reduce GHG even with the current grid,[576] including the agency's own analysis.[577] If EPA has a detailed analysis to challenge these reports, it should present it to the public for comment. EPA is also incorrect when it says that if cars are more expensive people will continue to drive older cars with worse mileage. First of all, if EPA removes the standards requiring cars to be

[568] Morganstern, Richard, William Pizer, and Jhih-Shyang Shih. 1997. "Are We Overestimating the Real Cost of Economic Costs of Environmental Protection," Discussion Paper 97-36-REV. Washington, D.C.: Resources for the Future.
[569] http://www.4cleanair.org/Documents/EPAsBoilerMACTControllingEmissionsofHazardousAirPollutantspdf.pdf p 9
[570] https://smallbusinessmajority.org/sites/default/files/research-reports/Benefits_of_CAA_100410.pdf
[571] Anderson, J.F., and T. Sherwood. 2002. Comparison of EPA and Other Estimates of Mobile Source Rule Costs to Actual Price Changes. SAE Technical Paper 2002-01-1980. Warrendale, PA: Society of Automotive Engineers.
[572] https://www.motortrend.com/news/ford-universal-ev-platform-affordable-pickup-truck-preview
[573] https://www.theatlantic.com/technology/archive/2025/08/ford-china-electric-cars/683880/
[574] See also our discussion of the RIA and the other technological advancements announced during the comment period alone that are not included in EPA's analysis of the costs and benefits of EVs.
[575] https://www.washingtonpost.com/climate-solutions/2025/08/15/electric-vehicle-chargers-federal-infrastructure/
[576] https://yaleclimateconnections.org/2023/09/electric-vehicles-reduce-carbon-pollution-in-all-u-s-states/
[577] https://www.epa.gov/greenvehicles/electric-vehicle-myths

more efficient, as it proposes to do, then new cars will not actually be more efficient. More importantly, EPA ignores the real world situation where cars that work will be driven by someone and will even be sold one or more times during their functional lifetime. This is the reality of the existing car market in which only the top 20% of individuals can afford a new car. Operating cars are simply too valuable an asset not to be utilized.

EPA also ignores the broader benefits from reducing GHG gas emissions. As a 2021 The National Academies of Science, Engineering, and Mathematics report determined: If done right, a transition to decarbonization can provide more and better-quality jobs, and economic benefits that exceed costs. The energy transition provides an opportunity to build a more competitive U.S. economy and would increase the availability of high-quality jobs. A transition to decarbonization in the United States could prevent **half a million premature deaths or more over the next decade from pollution from the production and use of fossil fuels. The U.S. can save so much money in health and fossil-fuel costs by decarbonizing its economy that it makes financial sense to do it regardless of climate change**.[578]

D. EPA cannot take the position that the CAA does not cover GHGs but at the same time take the position that the CAA covers GHG emissions so Federal Common Law Litigation is preempted.

In its action EPA takes the position that

> "[t]he CAA would continue to preempt Federal common-law claims for GHG emissions because "Congress delegated to EPA the decision whether and how to regulate" such emissions. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011)." [EPN points out that this quote proves our larger point that the CAA **does** cover GHG emissions.] …The bases for repeal proposed in this action would not foreclose us from regulating CO_2, methane, NOX, HFCs, PFCs, or SF6 emissions from new motor vehicles or engines if the Administrator determines that one or more of those gases meet the requirements for regulation under CAA section 202(a), as discussed herein. As noted above, we seek comment on the continued preemptive effect of the CAA in the event that the EPA finalizes the proposed rescission or otherwise concludes that it lacks authority to regulate GHG emissions under CAA section 202(a) or any other specific regulatory provision of the CAA." 90 FR 36315

But EPA in section IV of the preamble EPA also says:

> "In this section, the EPA proposes to rescind the Endangerment Finding by concluding, based on multiple, independent alternative legal rationales, that the Agency's unprecedented foray into regulating GHG emissions from new motor vehicles and engines is inconsistent with the best reading of CAA section 202(a). Under any proposed alternative, the **EPA would lack authority to retain existing GHG emission standards for new motor vehicles and engines**. [...] Our primary proposal to rescind the Endangerment Finding by concluding that **CAA section 202(a) does not authorize the EPA to prescribe standards for GHG emissions based on global climate change concerns**. [...]

[578] https://nap.nationalacademies.org/catalog/25932/accelerating-decarbonization-of-the-us-energy-system

> Next, we propose that the Nation's response to global climate change concerns generally, and specifically whether that response should include regulating GHG emissions from new motor vehicles and engines, is an economically and politically significant issue that triggers the major questions doctrine under UARG and West Virginia, and ***t*hat Congress did not clearly authorize the EPA to decide it by empowering the Administrator to "prescribe . . . standards" under CAA section 202(a)**." Emphasis added. [579]

EPA cannot say that they cannot regulate GHG because they are not covered by the CAA and at the same time say that the CAA preempts common law litigation because the CAA does cover GHGs and the Administrator could use the CAA to regulate them. EPA can say that the CAA doesn't cover GHGs so legally it can't regulate, or EPA can say the CAA does cover GHGs so other actions are preempted but they can't say both. EPA's effort to have its cake and to eat it too is illegitimate, EPA must choose.

[579] 90 FR 26398-9