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THE LEGALITY AND BENEFITS OF THE CLEAN POWER PLAN

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Before the Subcommittee on Environment
Committee on Science, Space, & Technology
United States House of Representatives

Thursday, May 26, 2016, 9:30 AM
2318 Rayburn House Office Building

I would like to thank the Subcommittee for inviting me to assist its members and their colleagues in considering the legality and benefits of the Clean Power Plan (CPP). The Clean Power Plan, a rule issued by the Environmental Protection Agency (EPA) last October, will produce critically important reductions in carbon dioxide emissions from what are by far the largest emitters in the United States: fossil-fuel-fired power plants. These reductions are necessary because the emissions of carbon dioxide and other heat-trapping greenhouse-gases pose a tremendous threat to Americans' health and welfare by driving long-lasting changes in our climate; these changes to our climate will cause a variety of other serious negative effects, which will only grow worse over time.

This is an incredibly important topic in its own right, and it is particularly important now because the Clean Power Plan has been challenged in court by states, including Oklahoma, and other opponents of the CPP in a case called *West Virginia v. EPA*, which is currently pending in the U.S. Court of Appeals for the D.C. Circuit. The full D.C. Circuit will be hearing oral argument in the case on September 27, 2016.[1]

I am currently Chief Counsel of the Constitutional Accountability Center, a public interest law firm, think tank, and action center, dedicated to realizing the progressive promise of our Constitution. I serve as counsel in *West Virginia v. EPA* to over 200 current and former members of Congress, who were sponsors of Clean Air Act (CAA) legislation, participated in drafting the 1990 CAA amendments, serve or served on key committees with jurisdiction over the CAA and EPA, and supported the passage of the CAA. The Constitutional Accountability Center filed an *amicus curiae* brief on behalf of these members of Congress in the D.C. Circuit arguing that the CPP is a lawful exercise

[1] This February the Supreme Court stayed implementation of the Plan pending disposition of the petitions for review the CPP's challengers filed in the D.C. Circuit and disposition of any petition for certiorari the Plan's challengers may ultimately file in the Supreme Court.

of the discretion Congress conferred on EPA in the CAA.[2] I also regularly speak on issues related to the Supreme Court, the lower federal courts, and the Constitution in public debates, on academic panels, and in the media.

Introduction and Summary

Over 50 years ago, Congress enacted the first CAA, a law dedicated to "protect[ing] the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[3] In 1970, Congress amended that law to "speed up, expand, and intensify the war against air pollution in the United States."[4]

To that end, Congress established a comprehensive program in which it gave EPA three authorities that, among them, would cover all dangerous pollutants emitted from stationary sources. The goal, in other words, was to ensure that there would be "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare."[5] To achieve that goal, the third of these three authorities was designed to fill gaps left by the other two, covering "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [the programs designed to address the other two categories of pollutants]."[6]

In establishing this scheme, Congress specified meaningful criteria that EPA would need to follow in developing and implementing emission standards for new pollutants, but also gave EPA discretion, as the delegated expert agency, to elaborate upon those criteria, to resolve ambiguities in them, and to apply them to specific new problems as they arose. Congress also intentionally drafted certain provisions of the CAA with broad language so EPA could play a key role in shaping the approach to developing and setting standards for specific sources and pollutants. Indeed, Congress conferred particularly broad authority on EPA with respect to the gap-filling provision mentioned above because it understood that EPA would need flexibility in implementing a provision designed to address such a diverse array of pollutants and sources, both known and unknown.

Pursuant to that authority, in October 2015, EPA published the CPP, which establishes emission guidelines for States to follow in developing plans to limit CO_2

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[2] Brief *Amici Curiae* of Current Members of Congress and Bipartisan Former Members of Congress in Support of Respondents, *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.), *available at* http://theusconstitution.org/sites/default/files/briefs/CAC-Members-Of-Congress-Amicus-CPP-3-31-2016.pdf.

[3] Pub. L. No. 88-206, § 1(b)(1), 77 Stat. 392, 393 (codified as amended at 42 U.S.C. § 7401(b)(1)).

[4] H.R. Rep. No. 91-1146 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356; *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) ("the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution").

[5] S. Rep. No. 91-1196, at 20 (1970) [hereinafter S. Rep.]; *id.* at 4 ("this bill would extend the Clean Air Act of 1963 as amended in 1965, 1966, and 1967 to provide a much more intensive and comprehensive attack on air pollution").

[6] *See* 40 Fed. Reg. 53,340 (Nov. 17, 1975); *see also* 42 U.S.C. § 7411.

emissions from existing power plants.[7] As EPA explained, "[t]hese final guidelines, when fully implemented, will achieve significant reductions in CO_2 emissions by 2030, while offering states and utilities substantial flexibility and latitude in achieving these reductions."[8]

The CPP is necessary to the public health and welfare of our citizenry and will produce considerable benefits. EPA projects that the CPP will "help cut carbon pollution from the power sector by 30 percent from 2005 levels" and will "also cut pollution that leads to soot and smog by over 25 percent in 2030."[9] The CPP will also "lead to climate and health benefits worth an estimated $55 billion to $93 billion in 2030, including avoiding 2,700 to 6,600 premature deaths and 140,000 to 150,000 asthma attacks in children."[10] And it will achieve these environmental and public health benefits while also producing economic benefits, including new jobs and savings for U.S. households on their electricity bills.[11]

As I noted earlier, the CPP has been challenged in court by a number of opponents of the Plan, including Oklahoma and other states. These CPP opponents argue that the rule is invalid on the grounds that, among other things, the EPA acted without lawful authority in promulgating the rule and the rule unconstitutionally intrudes on state authority. These arguments are both wrong.

When Congress enacted and subsequently amended the CAA, it gave EPA the flexibility it would need to address a diverse array of pollutants that were not addressed in more specific terms elsewhere in the law. Congress did this because it wanted the CAA to be forward-looking, capable of addressing not only those pollutants that Congress specifically contemplated, but new ones that might arise in the future. Significantly, the Supreme Court has previously recognized that Congress drafted the CAA to provide the flexibility necessary to address new and evolving problems, and that EPA is at the front line in determining when and how, consistent with statutory guidance, to address those problems.[12]

The CPP is a valid exercise of the authority Congress conferred on EPA in the Clean Air Act because it is consistent with the text, structure, and history of that law. Most significantly, Congress enacted the 1970 amendments to the CAA to put in place a comprehensive regulatory regime that would govern all air pollutants that EPA

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[7] 80 Fed. Reg. 64,662 (Oct. 23, 2015).
[8] *Id.* at 64,663; *see* Respondent EPA's Initial Br., *West Virginia v. EPA*, at 10, No. 15-1363 (and consolidated cases) (D.C. Cir.), *available at* https://www.edf.org/sites/default/files/content/epa_merits_brief_-_march_28_-_2016.pdf [hereinafter Resp. EPA Br.] ("[f]ossil-fuel-fired power plants are by far the highest-emitting stationary sources of CO_2").
[9] EPA, Fact Sheet: Clean Power Plan Overview, https://www.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-overview (last updated Apr. 11, 2016).
[10] *Id.*
[11] *See infra* notes 68-74 & accompanying text.
[12] *See infra* notes 22-27 & accompanying text.

determined were harmful to the public health or welfare. Section 7411, the gap-filling provision mentioned earlier and the provision on which EPA relied in promulgating the CPP, was a critical component of that comprehensive program because it directed EPA to regulate "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [the NAAQS or NESHAP programs]."[13] If the courts were to conclude that the CPP is unlawful, EPA would not be able to do what Congress directed it to do in the CAA, that is, comprehensively regulate harmful air pollutants.

Moreover, the CPP does not intrude on state autonomy. To the contrary, it respects state authority by giving states the opportunity to design an emissions-reduction plan that makes sense for their power plants and citizens. If states choose not to avail themselves of that opportunity, EPA must directly regulate the emissions of the power plants within those states, but the states themselves face no sanctions and they are not compelled to take action to implement the resulting federal standards. Tellingly, 18 states and the District of Columbia have intervened in the legal challenge to the CPP to support the rule and its legality.

The Clean Power Plan Is A Lawful Exercise of Discretion that Congress Intentionally Conferred on the Environmental Protection Agency To Help It Achieve the Act's Broad Objectives

Because it is often impossible for Congress to anticipate in advance every problem that a law must address, or to specify every detail regarding how a problem should be addressed, the Supreme Court has long recognized that Congress may establish broad policy goals and provide guidance about how those policy goals should be effectuated, while leaving it to expert administrative agencies to determine how best to achieve those goals in a manner consistent with the guidance provided by statute.[14] This is particularly necessary in the context of environmental issues, where the issues are complicated and technical, and understanding of the precise nature of the problem is often evolving.

Reflecting these considerations, when Congress enacted and amended the CAA, it established policy goals, provided meaningful guidance about how those goals should be effectuated, and conferred discretion on EPA to elaborate on those guidelines, resolve ambiguities in them, and apply them to new problems as they arose. Congress also drafted certain provisions, like the one on which EPA relied when promulgating the CPP, to give EPA the flexibility it would need to address a diverse array of pollutants that were not addressed in more specific terms elsewhere in the law. It was of critical importance to the Congress that enacted the CAA that the law be forward-looking, capable of addressing not only those pollutants that Congress specifically contemplated, but new ones that might arise in the future.

[13] 40 Fed. Reg. 53,340 (Nov. 17, 1975).
[14] *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

It bears emphasis that when Congress acted in 1970, it was well aware of the serious threat to the national welfare posed by air pollution, as well as the deficiencies of prior efforts to address the problem. As Senator Muskie explained on the Senate floor, the nation "seem[ed] incapable of halting the steady deterioration of our air, water, and land," and the consequences of that deterioration were tremendous. As he explained, "[t]he costs of air pollution can be counted in death, disease and debility; it can be measured in the billions of dollars of property losses; it can be seen and felt in the discomfort of our lives."[15]

The extent of the problem—and the need for immediate action to address it—prompted Congress to take significant action when it amended the CAA in 1970.[16] Perhaps most relevant here, Congress gave the federal government much greater responsibility for the fight against air pollution, including conferring discretion on EPA to ensure that it could apply the guidance Congress provided in the statute not only to the air pollution problems that then existed, but also to the air pollution problems science would identify in the future.[17]

In fact, these aspects of the CAA are apparent on the face of the statute itself. The Act, for example, requires the EPA Administrator to use his or her "judgment" to determine what pollutants to regulate consistent with the guidance provided in the statute.[18] The Act also delegates authority to EPA to determine how best to regulate those pollutants in light of the factors that Congress specified that it should take into account.[19] Moreover, reflective of Congress's desire to ensure that EPA could use the CAA's mandate to address new air pollution challenges, the CAA expressly confers on

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[15] *See, e.g.*, Debate on S. 4358 (Sept. 21, 1970) (statement of Sen. Muskie), *cited in* 136 Cong. Rec. S2826, S2833 (Mar. 21, 1990); *see id.* at S2834 ("we have learned that the air pollution problem is more severe, more pervasive, and growing faster than we had thought").

[16] *Id.* (1970 amendments to the CAA "face[] the environmental crisis with greater urgency and frankness than any previous legislation"); *id.* ("It is a tough bill, because only a tough law will guarantee America clean air.").

[17] *See, e.g.*, S. Rep. at 3 ("The extent of Federal involvement in the development and maintenance of air pollution control programs would be broadened. The pace and degree of enforcement will be quickened."); *Natural Res. Def. Council, Inc.*, 421 U.S. at 64 (Congress "sharply increased federal authority and responsibility in the continuing effort to combat air pollution").

[18] *See, e.g.*, 42 U.S.C. § 7411(b)(1)(A) (EPA Administrator shall "publish . . . 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.").

[19] *See, e.g.*, *id.* § 7411(d)(1) (EPA shall "prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which . . . establishes standards of performance for any existing source for any air pollutant [which meets specified criteria]" and "provides for the implementation and enforcement of such standards of performance"); *see also Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537-38 (2011).

EPA the discretion necessary to revise the lists of pollutants and sources that may be regulated.[20]

Recognizing the extent of the problem, Congress also directed EPA to take significant action when necessary to address the significant problem of air pollution, even though doing so might have a significant impact on the energy industry and national economy. Numerous provisions of the CAA reflect Congress's awareness that regulation under the Act might have such an impact.[21]

The Supreme Court has previously recognized that Congress drafted the CAA to provide the flexibility necessary to address new and evolving problems, and that EPA is at the front line in determining when and how, consistent with statutory guidance, to address those problems. As the Supreme Court recognized in *Massachusetts v. EPA*, the CAA—and its definition of "air pollutant"— "unquestionably" and "unambiguous[ly]" encompassed greenhouse gases, and the 1970 Act specifically addressed threats to climate.[22] Thus, even while in 1970 Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming," it made the conscious choice to draft parts of the CAA in broad language—language that "confer[red] the flexibility necessary to forestall . . . obsolescence."[23] Indeed, Congress understood that "without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete."[24]

The Supreme Court has also recognized the critical role that EPA plays in giving meaning to the terms in the CAA and determining how best to implement the guidance the CAA provides about how to effectuate its goal of addressing harmful air pollution. As the Court explained in *American Electric Power*, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants."[25] The reasons why Congress would delegate such decisionmaking to an expert agency like EPA were obvious; as the Court explained, "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required."[26] According to the Court, "[t]he Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators."[27]

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[20] *See, e.g.*, 42 U.S.C. § 7408(a)(1) (EPA Administrator "shall from time to time thereafter revise" a list of pollutants that meet specified criteria); *id.* § 7411(b)(1)(A) (EPA Administrator shall "from time to time . . . revise" the list of categories of stationary sources).
[21] *Cf., e.g.*, 42 U.S.C. § 7617(c) (directing EPA to conduct an economic impact assessment prior to publishing a notice of proposed rulemaking under § 7411(d)).
[22] 549 U.S. 497, 528-29, 532, 506 (2007).
[23] *Id.* at 532.
[24] *Id.*
[25] 131 S. Ct. at 2538.
[26] *Id.* at 2539.
[27] *Id.*; *see id.* ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.").

Opponents of the CPP argue that the CPP is an effort by the Obama Administration to achieve through executive power what it could not achieve through legislative action, noting that legislative proposals for cap and trade have not passed. Opponents of the CPP often focus particular attention on H.R. 2454, the American Clean Energy and Security Act of 2009 (ACES), and suggest that ACES was an attempt to give EPA authority it did not otherwise have, *i.e.*, the authority to promulgate a rule like the Clean Power Plan.[28] But they ignore the fact that ACES itself recognized EPA's preexisting authority under the CAA to regulate CO_2.[29] Moreover, that bill was markedly broader than the rule.[30]

In any event, it is immaterial what legislation Congress has not passed; what matters are the laws Congress *has* passed.[31] Congress passed the Clean Air Act and its amendments, and the CPP is a lawful exercise of the authority Congress conferred on EPA in that Act, as the next section discusses. Congress can, of course, pass legislation to limit or otherwise circumscribe EPA's existing authority, but notably a number of bills have been introduced in the House to limit EPA's authority in that regard, and none has been enacted into law.[32]

The Clean Power Plan Is Consistent with the Text, Structure, and History of the Clean Air Act

As noted earlier, the Clean Air Act's express goal was to "protect . . . the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[33] To achieve that goal, Congress recognized three general categories of pollutants emitted from existing stationary sources: (1) criteria pollutants (covered by

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[28] Brief for Members of Congress as Amici Curiae in Support of Petitioners 20, *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.), *available at* https://www.edf.org/sites/default/files/content/2016.02.23_members_of_congress_amicus_brief_for_petrs.pdf.

[29] See H.R. 2454, 111th Cong. §§ 811, 831-35 (as placed on Senate calendar, July 7, 2009).

[30] Among other things, ACES would have established a national renewable portfolio standard, instituted a national economy-wide cap and trade program, built energy efficiency standards, established a self-sustaining Clean Energy Deployment Administration, and developed worker training programs.

[31] *See, e.g.*, *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) ("failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute" (quotation omitted)); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" (quotation omitted)).

[32] *See, e.g.*, H.R. 4036, 114th Cong. (2015); H.R. 1487, 114th Cong. (2015); H.R. 3895, 113th Cong. (2014); H.R. 4304, 113th Cong. (2014); H.R. 4850, 113th Cong. (2014); H.R. 4808, 113th Cong. (2014); H.R. 4286, 113th Cong. (2014); H.R. 910, 112th Cong. (2011); H.R. 4344, 111th Cong. (2009).

[33] 42 U.S.C. § 7401(b)(1).

the National Ambient Air Quality Standards (NAAQS) program[34]); (2) hazardous air pollutants (covered by the National Emission Standards for Hazardous Air Pollutants (NESHAP) program[35]); and (3) other "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [the NAAQS or NESHAP programs]"[36] (covered by the New Source Performance Standards (NSPS) program[37]). Taken together, these categories establish a comprehensive regulatory regime designed to leave "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare."[38] By enacting a gap-filling provision that would give EPA flexibility to address new pollution problems, Congress ensured that the federal government would be able to respond to new and diverse challenges not anticipated at the time the law was enacted, and that EPA could tailor regulations to the specific nature of the pollutant and source.

To address pollutants that fall within the third category, the Act requires, in § 7411, for EPA to "establish a procedure" by which States can set standards of performance for existing sources for, in pertinent part, "any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title [i.e., regulated as part of the NAAQS program] or emitted from a source category which is regulated under section 7412 of this title [i.e., regulated as part of the NESHAP program]."[39]

Opponents of the CPP argue that this provision's reference to "source categor[ies] . . . regulated under section 7412" leaves EPA without authority to regulate CO_2 emissions from the "source category" of power plants because EPA already regulates *other* pollutants emitted from that "source category" under § 7412. In other words, according to CPP opponents, EPA's decision to regulate hazardous pollutants emitted from power plants deprives it of the authority to regulate any other non-hazardous pollutants emitted from power plants, including CO_2. This is wrong because, most significantly, that argument would undermine the "legislative plan" Congress put in place when it enacted the CAA.[40]

As noted earlier, Congress enacted the 1970 amendments to the CAA to put in place a comprehensive regulatory regime that would govern all air pollutants that EPA determined were harmful to the public health or welfare. Section 7411 was a critical component of that comprehensive program because it directed EPA to regulate

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[34] *Id.* §§ 7408-7410.
[35] *Id.* § 7412.
[36] *See* 40 Fed. Reg. 53,340 (Nov. 17, 1975).
[37] *Id.* § 7411.
[38] S. Rep. at 20.
[39] 42 U.S.C. § 7411(d)(1).
[40] *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (words must be interpreted "in their context and with a view to their place in the [law's] overall statutory scheme" (quotation omitted)).

"pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [the NAAQS or NESHAP programs]."[41] If the courts were to conclude that the CPP is unlawful, EPA would not be able to do what Congress directed it to do in the CAA, that is, comprehensively regulate harmful air pollutants. Indeed, under the view of the CPP opponents, there is a category of serious pollutants—non-hazardous, non-criteria pollutants that are emitted by existing sources whose emission of hazardous pollutants is regulated—that are subject to no CAA regulation at all.

Importantly, the argument that § 7411 does not authorize the CPP relies on legislative language adopted during the 1990 amendments to the CAA. Before those amendments, § 7411(d) plainly applied to existing sources of any air pollutant "for which air quality criteria have not been issued [under the NAAQS program] or which is not included on a list published under [S]ection 7408(a) [also under the NAAQS program] or 7412(b)(1)(A) [under the NESHAP program]."[42] In other words, § 7411 played a critical gap-filling function, permitting EPA to regulate non-hazardous and non-criteria pollutants emitted by existing sources. Opponents of the CPP argue that the 1990 amendments intentionally eliminated this gap-filling function, but they point to no evidence—*none*—that supports this claim. The 1990 amendment on which the CPP's opponents rely must be read "in [its] context and with a view to [its] place in the [CAA's] overall statutory scheme."[43] Read properly, it preserves EPA's long-standing authority to use § 7411 to address dangerous pollutants that could not otherwise be addressed.

Significantly, the interpretation offered by the CPP's opponents also directly contradicts the unambiguous text of § 302(a) of the 1990 amendments. As the government explained in the brief it filed in the D.C. Circuit, when Congress amended the Act in 1990, it redrafted the provision governing the § 7412 program, which in turn meant the cross-references in § 7411(d)(1)(A) needed to be updated.[44] In attempting to update that cross-reference, Congress inadvertently enacted into law two inconsistent amendments: § 108(g) (the House approach), which replaced the cross-reference to "[Section] [74]12(b)(1)" with the phrase "or emitted from a source category which is regulated under [S]ection [74]12," *and* § 302(a) (the Senate approach), which replaced the cross-reference with a new cross-reference, i.e., "[Section] [74]12(b)," thus plainly preserving § 7411's preexisting gap-filling authority.[45] It is well-established that when

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[41] 40 Fed. Reg. 53,340 (Nov. 17, 1975).
[42] 42 U.S.C. § 7411(d)(1) (1988).
[43] *Brown & Williamson*, 529 U.S. at 133 (internal quotation & citation omitted).
[44] Resp. EPA Br. at 77.
[45] A brief account of the drafting history of the relevant provisions demonstrates the utter lack of support for the idea that § 108(g) was intended to eliminate § 7411(d)'s gap-filling function. When Congress was considering how to amend the Act, the House and Senate initially adopted different approaches to amending § 7412. The House bill as introduced did not mandate EPA regulation of hazardous pollutants sources, instead allowing EPA to decline to regulate under § 7412 if it found that regulation was not "warrant[ed]." H.R. 3030, 101st Cong. § 301, *reprinted in* 2 *A Legislative History of the Clean Air Act Amendments of 1990*, at 3737, 3937 (1993). Thus, there was the potential for a regulatory gap—one that would have been at odds with Congress's intent to establish a comprehensive regulatory scheme—and so the conforming amendment in the House bill (§ 108(g)) was intended to avoid that gap, making clear that EPA

two inconsistent provisions are enacted into law, the courts should "fit, if possible, all parts into a harmonious whole."[46] In this case, it is easy to "fit . . . all parts into a harmonious whole" because both provisions can be read to preserve § 7411's preexisting authority.

In sum, § 7411 was enacted to serve a critical gap-filling function as part of the CAA's comprehensive program to ensure that all dangerous pollutants can be addressed, and nothing in the 1990 amendments changed that. The rule is a valid exercise of that authority, and one that helps effectuate the policy that Congress set for the nation in the CAA. To hold otherwise would critically undermine not only the nation's fight against air pollution, but also the statutory scheme that Congress put in place when it enacted the CAA.

The Clean Power Plan Is a Textbook Example of "Cooperative Federalism" and Does Not Improperly Intrude on State Authority

In order to achieve important policy objectives while also respecting state authority, Congress will often use an approach commonly referred to as "cooperative federalism." Under a cooperative federalism approach, states are given a choice: they can choose to regulate in a certain area themselves by the means that are best suited to their local conditions, or they can decline to do so and the federal government will regulate directly. The Supreme Court has repeatedly approved of such "cooperative federalism" regimes,[47] and the Clean Power Plan is a "[t]extbook [e]xample" of the "[c]ooperative [f]ederalism" approach.[48]

Tellingly, although Oklahoma and some states argue that the CPP unconstitutionally intrudes on their authority, 18 other states and the District of Columbia, as well as six municipalities, have intervened in the lawsuit currently pending in the D.C. Circuit in order to support the Clean Power Plan and the EPA. As these

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could address a hazardous air pollutant under § 7411(d) if it were emitted from a source that was not being regulated under § 7412. *See* 69 Fed. Reg. 4652, 4685 (Jan. 30, 2004) (noting the possibility that "the House did not want to preclude EPA from regulating under section [7411(d)] those pollutants emitted from source categories which were not actually being regulated under section [7412]"). Importantly, it was not intended to prevent EPA from regulating under § 7411(d) non-hazardous pollutants emitted from sources regulated under § 7412. The Senate bill included a list of pollutants, a list of source categories, and a mandate for EPA to set standards covering all such pollutants from all such sources. S. 1630, 101st Cong. § 301, *reprinted in* 3 *id.* at 4119, 4407. Thus, the conforming amendment in the Senate bill (§ 302) needed to make no corresponding change because regulation under § 7412 remained mandatory, and it simply updated the cross-reference. In the end, the bill that passed the House adopted the mandatory version of § 7412, but with no change to its conforming amendment, and both the House and Senate conforming amendments were inadvertently enacted into law.

[46] *Brown & Williamson*, 529 U.S. at 133 (quotation omitted).

[47] *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *New York v. United States*, 505 U.S. 144 (1992).

[48] Resp. EPA Br. at 98.

states and municipalities explain in the brief they have filed in the D.C. Circuit, they "have a compelling and urgent interest in reducing dangerous carbon-dioxide pollution from the largest source of those emissions: fossil-fueled power plants."[49]

As the support of these states helps demonstrate, the Clean Power Plan is entirely lawful from a federalism perspective. As the government explains in its brief, the Clean Power Plan "cannot be meaningfully distinguished from the examples of cooperative federalism [previously approved by the Supreme Court]. States are given a choice: they can take advantage of the Rule's flexibility to develop their own plans to reduce power plants' CO_2 emissions, or they can decline to do so and EPA will directly regulate those sources' CO_2 emissions instead."[50] In fact, as the government further notes, "the Rule shows a deep respect for states' sovereignty by giving them the opportunity to design an emissions-reduction plan that makes sense for their citizens. If states choose not to avail themselves of that opportunity, they face no sanctions and they are not compelled to take action to implement the resulting federal standards."[51]

The states that support the CPP make the same point in their brief in the D.C. Circuit, noting that the CPP is "agnostic about the specific means by which States and power plants achieve the Rule's emission limits. . . . [T]he Rule . . . gives States substantial flexibility to determine how emission limits will be met, so long as the Rule's pollution-reduction goals are satisfied."[52] Thus, "States and power plants may implement the Rule's required emission reductions through a broad range of available measures, including not just the specific 'generation shifting' measures identified by EPA as part of the 'best system,' but also (1) increases in energy efficiency at power plants ('heat rate' improvements); (2) use of natural gas alongside coal to fuel plants ('co-firing'); (3) demand-side measures like energy efficiency programs; or (4) some combination of these and other options."[53]

Moreover, if states choose not to submit their own plan, the plan EPA would put in place "would directly regulate power plants, not 'States as States.'"[54] Significantly, even if a state chooses not to submit a plan and EPA thus regulates power plants in that state, "the Rule imposes no constraints on how States may exercise their authority over power plants."[55] In their brief, the states provide a helpful example from Oklahoma. In a previous rule, "EPA had identified scrubbers as the 'best available retrofit technology'

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[49] Proof Brief for State and Municipal Intervenors in Support of Respondents 1, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.), *available at* https://www.edf.org/sites/default/files/content/cities_and_states.pdf [hereinafter States Br.].

[50] Resp. EPA Br. at 100.

[51] *Id.* at 101.

[52] States Br. at 14-15.

[53] *Id.* at 15; *see also* Resp. EPA Br. at 17 ("[S]tates and sources have the flexibility to choose from a wide range of measures to achieve the emission limitations, including technological controls such as carbon sequestration or co-firing . . . . The Rule also accommodates emission-trading programs and other compliance strategies that significantly enhance flexibility and cost-effectiveness.").

[54] States Br. at 18.

[55] *Id.* at 22.

for coal plants."[56] Notwithstanding EPA's determination, "Oklahoma regulators . . . denied a request from the Oklahoma Gas and Electric Company to install scrubbers at one plant and convert two other coal plants to natural gas."[57] As the states explain, "[t]he federal plan there did not preclude Oklahoma from reaching this determination, nor did it allow the company to ignore Oklahoma's independent state-law authority to review and deny such an application. The Rule here is similar and would not preclude State regulators from exercising their independent judgment when entertaining power-plant applications."[58]

Opponents of the CPP also argue that the CPP interferes with states' "exclusive" control over the mix of energy inside their states,[59] but this argument ignores that, as the states that support the CPP note in their brief, "States' decisions regarding their energy sectors have long been constrained by the concurrent regulatory authority of Congress."[60] Congress's "[c]oncurrent . . . jurisdiction over aspects of running a power plant properly reflects the fact that many of those aspects likely affect multiple States due to safety and environmental risks that cross state lines, as well as the interconnected nature of the electricity market."[61] Moreover, as the states also note, "any changes to energy mix would merely be an incidental effect of the Rule's permissible focus on reducing carbon-dioxide emissions."[62]

In short, there is no federalism bar to the Clean Power Plan. It is, as noted earlier, a "textbook example" of the types of "cooperative federalism" programs frequently adopted by Congress and federal agencies and repeatedly approved by the Supreme Court.

The Clean Power Plan Will Produce Significant Environmental, Public Health, and Economic Benefits

The Clean Power Plan is not only entirely lawful, it is also essential to protecting the public health and welfare of the nation and its citizens and will produce significant environmental, public health, and economic benefits.

As the government explained in the brief it filed in support of the CPP in the D.C. Circuit, "CO_2 and other heat-trapping greenhouse-gas emissions pose a monumental threat to Americans' health and welfare by driving long-lasting changes in our climate,

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[56] *Id.* at 22.
[57] *Id.* at 22-23.
[58] *Id.* at 23.
[59] Opening Br. of Petitioners on Core Legal Issues 39-40, *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.), *available at* https://www.edf.org/sites/default/files/content/2016.02.19_petrs_opening_brief_pt._1.pdf.
[60] States Br. at 9.
[61] *Id.* at 10.
[62] *Id.* at 12; *see id.* at 13 ("it would be difficult or even impossible for EPA to require meaningful pollution reductions from power plants if . . . its regulations could not in any way affect state or private choices about energy generation").

leading to an array of severe negative effects, which will worsen over time. These effects include rising sea levels that could flood coastal population centers; increasingly frequent and intense weather events such as storms, heat waves, and droughts; impaired air and water quality; shrinking water supplies; the spread of infectious disease; species extinction; and national security threats."[63] Further, "[f]ossil-fuel-fired power plants are by far the highest-emitting stationary sources of CO_2, generating approximately 37% of all domestic man-made CO_2 emissions—almost three times as much as the next ten stationary-source categories combined."[64] Thus, "[n]o serious effort to address the monumental problem of climate change can succeed without meaningfully limiting these plants' CO_2 emissions."[65]

After engaging in a thorough analysis of the possible ways to reduce these emissions and soliciting extensive stakeholder input, the EPA promulgated the CPP. The benefits of the Clean Power Plan from both an environmental and a public health perspective are significant. Notably, EPA projects that the CPP "will help cut carbon pollution from the power sector by 30 percent from 2005 levels" and "will also cut pollution that leads to soot and smog by over 25 percent in 2030."[66] Moreover, "[t]he Clean Power Plan will lead to climate and health benefits worth an estimated $55 billion to $93 billion in 2030, including avoiding 2,700 to 6,600 premature deaths and 140,000 to 150,000 asthma attacks in children."[67]

Moreover, the CPP will produce these public health and environmental benefits while also producing economic benefits. As the states that support the CPP note in the brief they filed in the D.C. Circuit, "[t]he experience of power plants in [their] States has shown that these reductions in carbon-dioxide emissions can be achieved without impeding economic growth or threatening grid reliability. Indeed, [the states'] carbon-reduction initiatives have delivered significant economic benefits. For example, in [the Regional Greenhouse Gas Initiative's[68]] first three years, participating States realized $1.6 billion in net economic benefits, largely from reduced energy bills for consumers. Similarly, in Illinois, growth in the wind industry spurred by state regulations created 10,000 new local jobs and economic benefits totaling $3.2 billion between 2003 and 2010."[69]

Significantly, Oklahoma is another state that might benefit from growth in the wind industry. According to a report prepared by professors at Oklahoma State University and funded by the State Chamber of Oklahoma Research Foundation, "in the

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[63] Resp. EPA Br. at 1.
[64] *Id.* at 10.
[65] *Id.*
[66] EPA, Fact Sheet: Clean Power Plan Overview, https://www.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-overview (last updated Apr. 11, 2016).
[67] *Id.*
[68] "[T]hrough the Regional Greenhouse Gas Initiative (RGGI), nine northeast and mid-Atlantic States . . . agreed on limits for [carbon-dioxide] emissions and created a trading program through which plants can buy and sell allowances to meet the agreed-upon limits." States Br. at 27.
[69] *Id.* at 28-29 (internal footnotes omitted).

past 12 years, Oklahoma has grown from having no utility-scale wind energy capacity to now having nearly 4,000 megawatts of capacity, making it the fourth-largest wind energy state in the United States."[70] According to that same report, "[w]ind energy projects have made significant contributions to the tax base of several counties, notably including several counties with population losses or growth rates below the state average," and more generally, "Oklahoma's relatively young wind energy industry has made important contributions to the state and stands poised to make even greater contributions in the future."[71]

Moreover, recent reports highlight the economic benefits that the CPP will likely produce. For example, one comprehensive analysis of clean energy jobs in the country found that "more than 2.5 million Americans now work in clean energy at businesses across all 50 states."[72] The report also concluded that "continued implementation of the federal Clean Power Plan is one of the most important steps state policymakers can take, right now, to ensure the clean energy industry achieves its job-creating potential."[73] Another report concluded that if states prioritize energy efficiency in meeting the CPP goals, U.S. households could save between 5% and 20% on their monthly electricity bills in 2030.[74]

In sum, the CPP is necessary to achieve critical reductions in carbon dioxide emissions, and its implementation will produce environmental, public health, and economic benefits.

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[70] Shannon L. Ferrell & Joshua Conaway, Wind Energy Industry Impacts in Oklahoma 5 (Nov. 2015), http://www.okstatechamber.com/sites/www.okstatechamber.com/files/RevisedReport_WindStudy9_3_15.pdf.

[71] *Id.* at 36.

[72] Environmental Entrepreneurs (E2), Clean Jobs America: A comprehensive analysis of clean energy jobs in America 4 (Mar. 2016), *available at* http://www.e2.org/wp-content/uploads/2016/03/CleanJobsAmerica_FINAL.pdf.

[73] *Id.* at 15. Although a full economic impact study has not yet been performed on the final rule, a 2015 study that "present[ed] an economy-wide assessment of the employment impacts associated with" the proposed Clean Power Plan concluded that the proposed Plan was "likely to increase U.S. employment by up to 273,000 jobs." Industrial Economics, Incorporated & Interindustry Economic Research Fund, Inc., Assessment of the Economy-wide Employment Impacts of EPA's Proposed Clean Power Plan ES-1, 4-1 (Apr. 14, 2015), http://www.inforum.umd.edu/papers/otherstudies/2015/iec_inforum_report_041415.pdf.

[74] M.J. Bradley & Associates LLC, EPA's Clean Power Plan: Summary of IPM Modeling Results 21 (last updated Mar. 4, 2016), http://www.mjbradley.com/sites/default/files/MJBA_CPP_IPM_Summary.pdf.

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