NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-1050
Consolidated with Nos. 24-1052 and 24-1073

COMMONWEALTH OF KENTUCKY, et al.

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al*.,

Appellees.

Petition for Review

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

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MOTION OF GOVERNMENT ACCOUNTABILITY & OVERSIGHT FOR LEAVE TO FILE AS *AMICUS CURIAE*

Pursuant to Rule 29(a), Government Accountability & Oversight ("Proposed Amicus") moves for leave to file the accompanying amicus curiae brief in support of the Petitioner states in the above-captioned case (and any current and future cases regarding the same agency action). As described below and in the accompanying proposed brief, the Proposed Amicus has familiarity with government records and other public documents which bear upon the way that the Respondent has utilized its statutory powers in adopting the Rule that is at issue in this case. Proposed Amicus respectfully submits that these records and public statements of Respondents shed light on the fact that the Rule was issued pretextually and in violation of the Major Questions Doctrine.

Indeed, another nonprofit presciently foretold that which has now unfolded in this regard, specifically that that EPA sought to reinvent its authority under the Clean Air Act's National Ambient Air Quality Standards ("NAAQS") program by fundamentally transforming it into an unrecognizable and never intended backdoor framework for economy wide decarbonization. *New York et al. v. EPA et al.*, Docket No. 21-1028 (amicus brief of Energy Policy Advocates, filed February 22, 2021). That party presented this Court with records documenting the effort. Here, Proposed Amicus seeks to provide this Court with analysis and judicially noticeable records similarly revealing that EPA seeks to attain a regulatory end that

has never been granted to it by Congress and denied to it by the courts, and is doing so in violation of governing precedent through a pretextual "suite of rules" of which the Rule at issue is a part.

Proposed Amicus is a nonprofit based in Wyoming with no direct interest, financial or otherwise, in the outcome of the case, aside from its interest in good governance and advocating for the proper role of the federal judiciary. Because of its lack of a direct interest and its intimate and firsthand knowledge of the records illustrating the above-cited concerns about the EPA's desire to use this the Clean Air Act pretextually and toward an impermissible end, the Proposed Amicus can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, Government Accountability & Oversight respectfully requests that this Court grant leave to file the accompanying amicus curiae brief.

Congruent with Rule 29, counsel for Proposed Amicus provided notice to all counsel of record and counsel for the federal government of the *Amicus's* desire to file the brief. As of this filing, the Agency's counsel has responded that "EPA consents to your filing, provided it complies with the Federal Rules of Appellate Procedure." No other counsel responded.

Respectfully submitted this the 5th day of April, 2024,

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CERTIFICATE UNDER CIRCUIT RULE 29 (d)

Pursuant to Circuit Rule 29 (d), undersigned counsel certifies that it was not possible or practicable for Government Accountability & Oversight to join with other amici in a joint brief. This is partially due to the fact that the proposed amicus brief addresses an issue that, to undersigned counsel's knowledge, no party or potential amicus intends to address. It is also partially due to the fact that no counsel for any amici have yet entered an appearance in this case, and therefore undersigned counsel had no opportunity to confer with other potential amici.

/s/ Matthew Hardin
Matthew Hardin

DISCLOSURE STATEMENT

Undersigned counsel certifies pursuant to Circuit Rule 26.1 that Government Accountability & Oversight is a nonstock, nonprofit organization organized under the laws of Wyoming. It has no parent corporation or subsidiaries. Because it issues no stock, no individual or entity owns 10% or more of its stock.

/s/ Matthew Hardin
Matthew Hardin

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that:

1. This document complies with the type-volume limit of Fed. R. App. P. 27 (d) because, excluding the parts of the document exempted by the rules, this document contains 495 words, and

2. This document complies with the typeface requirements and the type-style requirements because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Matthew Hardin
Matthew Hardin

NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 24-1050
Consolidated with 24-1051, 24-1052 and 24-1073

COMMONWEALTH OF KENTUCKY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Respondents.

Petitions for Review of a Decision of the Environmental Protection Agency

BRIEF OF GOVERNMENT ACCOUNTABILITY & OVERSIGHT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Certificate of Parties, Rulings, and Related Cases

Pursuant to D.C. Circuit Rule 27(a)(4) and 28(a)(1)(A), I certify that the parties to this case are set forth below.

Petitioners: Kentucky, West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Wyoming, in No. 24-1050; Chamber of Commerce of the United States of America, American Chemistry Council, American Forest & Paper Association, American Petroleum Institute, American Wood Council, National Association of Manufacturers, National Mining Association, and Portland Cement Association, in No. 24-1051; Texas and the Texas Commission on Environmental Quality, in No. 24-1052; and President of the Arizona State Senate Warren Petersen, Speaker of the Arizona House of Representatives Ben Toma, and Arizona Chamber of Commerce and Industry, in No. 24-1073.

Respondents: United States Environmental Protection Agency ("EPA") and Michael S. Regan, in his official capacity as Administrator of the EPA.

Intervenors: Citizens for Pennsylvania's Future, Conservation Law Foundation, Natural Resources Defense Council ("NRDC"), Northeast Ohio Black Health Coalition, Rio Grande International Study Center, and Sierra Club

(collectively, "Health, Environmental, and Community Groups") have sought leave to intervene. The Court has not yet ruled on the issue of intervention.

Amici Curiae: No parties have sought amici curiae status at the time of this filing.

There are three related cases:

1. *Chamber of Commerce of the USA, et al v. EPA, et al*. (Case No. 24-1051). That case was consolidated with the instant matter on March 6, 2024.
2. *State of Texas, et al v. EPA, et al*. (Case No. 24-1052). That case was consolidated with the instant matter on March 6, 2024.
3. *Peterson, et al*. v. EPA, *et al*. (Case No. 24-1073). That was consolidated with the instant matter on March 25, 2024.

Rulings: This case is an original action in this Court and does not challenge any Ruling of the District Court.

Corporate Disclosure Statement

Pursuant to Circuit Rule 26.1, Government Accountability & Oversight hereby certifies that it is a nonprofit, nonstock corporation incorporated under the laws of Wyoming. As such, Government Accountability & Oversight has no parent company or subsidiaries and no entity owns any part of its stock. Nor does Government Accountability & Oversight own any shares of the stock of any other entity.

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Pursuant to Federal Rule of Appellate Procedure 29(a), Government Accountability & Oversight (Amicus, or "GAO") submits this brief in support of the Petitioner States, ("Petitioners") in the above-captioned case.

Statement of Identity, Interest in the Case, and Statement of Authority to File

GAO is a nonprofit incorporated in Wyoming which conducts research into government policy by seeking access to public records under the federal Freedom of Information Act and uses the information it obtains to educate the public. GAO has no direct interest, financial or otherwise, in the outcome of the case, aside from its interest in good governance, transparent governance conducted with the support of an educated populace.

Because GAO lacks a direct interest and has intimate and firsthand knowledge of public records and which illustrate the Respondent Agency's pretextual use of the regulation at issue here to pursue an entirely different goal than that for which Congress provided the statutory authority invoked, thereby making the rule an end-run around the Clean Air Act, Administrative Procedure Act ("APA") and other legal and political constraints, GAO can provide the Court with a perspective that is distinct and independent from that of the parties. Further, GAO's information relates this matter to the Supreme Court's rulings that the objective of this pretextual rule is not the Agency's to pursue and that that

objective raises and warrants analysis under the major questions doctrine and the doctrine against pretext. It appears no other party has yet raised the issues set forth in this brief, and the brief will therefore assist the Court in determining these issues.

GAO has sought leave to file this brief pursuant to a contemporaneously filed Motion for Leave to File as an *Amicus Curiae*. Circuit Rule 19(b).

Statement of Authorship and Financial Contributions

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

I. INTRODUCTION

Twenty-five States and eight major industry groups have sued in this Court to challenge a final regulation of the Environmental Protection Agency ("EPA" or "the Agency"). The regulation in question is the "Reconsideration of the National Ambient Air Quality Standards for Particulate Matter," published at 89 Fed. Reg. 16, 202 (Mar. 6, 2024) ("the Rule"). The Rule modifies the existing the primary annual PM2.5 standard by significantly lowering the permissible level.

Petitioners seek to vacate the rule because it is unlawful, arbitrary and capricious. GAO agrees and possesses information supporting that the Rule is in fact arbitrary and capricious and otherwise unlawful for reasons including that the Rule is a violation of the doctrine against pretext—i.e., based on factors other than the rationale given. *Department of Commerce v. New York,* 139 S. Ct. 2551 (2019) (remanding the case back to the agency where the evidence tells a story that does not match the secretary's explanation for his decision). Respondent Regan ("Regan") announced two years ago that a "suite of rules"[1] including on soot were forthcoming under various authorities—regardless of the purpose for which any particular authority was granted by Congress—as the Agency's contribution to an administration "whole of government" plan to advance key priorities, including very specifically a "climate" policy agenda largely centered on forcing changes in America's energy mix to reduce greenhouse gas emissions ("GHGs") ("Reducing Emissions and Accelerating Clean Energy"[2]).

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[1] Jean Chemnick, Mike Lee, "What the EPA's New Plans for Regulating Power Plants Mean for Carbon: Administrator Michael Regan argues regulation of mercury, ozone, water and coal ash will also curb greenhouse gases," *Scientific American*, March 11, 2022, https://www.scientificamerican.com/article/what-the-epas-new-plans-for-regulating-power-plants-mean-for-carbon/ (last visited April 4, 2024).

[2] "President Biden and Vice President Harris have mobilized a whole-of-government effort in every sector of the economy – taking executive actions that will reduce greenhouse gas emissions, accelerate clean energy production and

Although the Agency cannot consider GHGs or "climate" as factors in setting a primary NAAQS for particulate matter,[3] the Agency did just that in significantly tightening the primary standard in order to compel "expedited retirement" of facilities because the Agency's goal is to force facilities to close as "the best tool for reducing greenhouse gas emissions."[4] Regan declared he intended to make the regulated community come around to the administration's view of "the future. And that future is clean energy."[5] Also, therefore, the administrative record is incomplete.[6] Just as admitting the climate or GHG basis of a modification of a

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deployment, and create good-paying jobs that strengthen the economy." *President Biden's Historic Climate Agenda*, https://www.whitehouse.gov/climate/ (last visited April 4, 2024).

[3] By statute the Agency can consider various "public welfare" factors only in setting a secondary standard under the NAAQS program. These welfare factors include, *inter alia*, climate. CAA section 302(h), 42 U.S.C. 7602(h)).

[4] Chemnick, Lee, "What the EPA's New Plans for Regulating Power Plants Mean for Carbon," *Scientific American* (March 11, 2022), https://www.scientificamerican.com/article/what-the-epas-new-plans-for-regulating-power-plants-mean-for-carbon/ (last visited April 4, 2024).

[5] Interview, "EPA Administrator Michael Regan discusses Supreme Court ruling on climate change," PBS, June 30, 2022, https://www.pbs.org/newshour/show/epa-administrator-michael-regan-discusses-supreme-court-ruling-on-climate-change.

[6] The Agency acknowledges in the administrative record that it initiated its review leading to the Rule by citing to a "Climate Crisis" Executive Order 13990. 89 Fed. Reg. 16,210, FN 16. 86 FR 7037, January 25, 2021. See also, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/. While that Executive Order focuses on forcing changes in the country's electricity generation mix, the rest of the Rule's

primary NAAQS would doom the Rule, omitting the previously announced if unlawful rationale leaves the Rule in violation of the APA as arbitrary and capricious, warranting this Court to vacate the Rule or at minimum remand it to a Special Master for discovery into the Agency's state of mind and supplementation of the record. *Telecomms. Research & Action Ctr. v. FCC*, 242 U.S. App. D.C. 222, 750 F.2d 70, 78 (1984) ("if an agency record is insufficient, the Court of Appeals may either remand the record to the agency for further development or appoint a special master under 28 U.S.C. § 2347(b)(3).").

Also, the object of the Agency's pretext which Regan announced, and therefore the Rule, violates the major questions doctrine, both standing alone and as part of the "suite of rules" of which Regan declared it is a part. By this "suite of rules" and each component rule the Agency seeks to do indirectly what it cannot do directly, which is to implement a policy that Congress never empowered the Agency to implement of coercing "expedited retirements" of politically disfavored facilities. The Agency forcing "generation shifting" is a major question calling for analysis under the major questions doctrine, which analysis confirms the Rule violates the Clean Air Act and Administrative Procedure Act and must be vacated.

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administrative record is bereft of the greenhouse gas, "climate" or "generation shifting" impetus.

This Court should vacate the Rule, or order discovery into the Agency's actual or pretextual reasoning for setting the standard at issue in this case in light of the clear evidence – and indeed admission – of pretext.

II. ARGUMENT

A. The Rule is Pretextual and Violates the Doctrine Against Pretext

1) Respondent Regan Confessed the Rule, When Issued, Would be Pretextual.

In 2022, Respondent EPA Administrator Michael Regan ("Regan") boasted that the Agency would be imposing a "suite of rules" under various authorities unrelated to regulating greenhouse gases (GHGs), "to marry a range of EPA authorities"[7] granted by Congress for other purposes but to attain what Regan described as the most efficient means of GHG reduction: forcing plants to close.

Mr. Regan's announcement came on March 10, 2022, in his keynote address to CERAWeek, an energy industry conference in Houston. After Regan's prepared remarks, a reporter asked about vulnerabilities of the EPA's approach to climate regulation as manifested in the Obama-Biden Clean Power Plan, which was then awaiting judgment by the Supreme Court in *West Virginia v. EPA,* 142 S. Ct. 2587

[7] "Administrator Michael Regan, Remarks to CERAWeek About EPA's Approach to Deliver Certainty for Power Sector and Ensure Significant Public Health Benefits, As Prepared for Delivery," https://www.epa.gov/speeches/administrator-michael-regan-remarks-ceraweek-about-epas-approach-deliver-certainty-power.

(2022). Regan dismissed the notion that losing in *West Virginia* would derail the Agency, because it had abandoned the idea of relying on any specific grant of regulatory authority. Instead, Respondents planned to tighten rules under numerous and varied regulatory programs—extending to coal ash disposal and even the Clean Water Act—all at once, pressuring disfavored operations to close and compelling investment consistent with the EPA's desires. Regan's response to the questions was reported in, e.g., *Scientific American*, as follows:

> "The industry gets to take a look at this suite of rules all at once and say, 'Is it worth doubling down on investments in this current facility or operation, or should we look at the cost and say no, it's time to pivot and invest in a clean energy future?"' Regan told reporters after his keynote address.
>
> If some of these facilities decide that it's not worth investing in [control technologies] and you get an expedited retirement, that's the best tool for reducing greenhouse gas emissions,' he added.
>
> Asked whether he was concerned that a challenge to EPA's greenhouse gas authority now before the Supreme Court could deal a blow to the agency's climate ambitions, Regan pointed to progress that could be made under other Clean Air Act and Clean Water Act rules.
>
> 'I don't believe we have to overly rely on any one regulation,' he said.

> EPA can still achieve greenhouse gas reductions using regulations on mercury and other toxic air pollution, soot and other fine particles, and other types of pollution like coal ash and water-based emissions, he said."[8]

According to this reporting, upcoming regulation of soot, i.e., the Rule, along with "water and coal ash would help finish the job on curbing climate pollutants that market conditions started by shifting U.S. power generation away from high-emitting coal."[9]

There is no ambiguity in the confession of the "generation shifting" pretext—nor in the threat to industry to get with Respondents' program or pay the price, however risibly couched as a courtesy[10].

Far from disowning the above as a series of misstatements, EPA posted Regan's prepared remarks and neither EPA nor Administrator Regan have publicly challenged media reports of his comments. Then, just over three months later, on

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[8] Chemnick, Lee, "What the EPA's New Plans for Regulating Power Plants Mean for Carbon," *Scientific American*, March 11, 2022.

[9] *Ibid*.

[10] "Justice Holmes famously wrote that '[m]en must turn square corners when they deal with the Government.' *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188 (1920). But it is also equally true that "the Government should turn square corners in dealing with the people." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961) (Black, J., dissenting).". *Department of Homeland Security, et al., v. Regents of the University of California*, *et al.,* 140 S. Ct. 1891, 1909 (2020) (in which the U.S. Supreme Court cited both *Rock Island* and St. *Regis Paper Co*. in remanding an agency decision for more "reasoned analysis" in the administrative record).

the evening of the day that the Supreme Court issued its opinion in *West Virginia*, Regan appeared on PBS's *News Hour* to provide the Agency's reaction to the opinion. There, Regan "doubled down" on his own, reaffirming the pretext of using a "suite of regulations" across various media, not just air but also even water, in the effort "to regulate climate pollution." He said:

> We still will be able to regulate climate pollution. And we're going to use all of the tools in our toolbox to do so…
>
> And we're going to continue to use every tool we have to keep pace with tackling the climate crisis…
>
> And we're going to continue to use every tool in our toolbox…
>
> We have just lost some flexibility there. But we also have a suite of regulations that are facing the power sector. And so, as we couple the regulation of climate pollution with the regulation of health-based pollution, we are providing the power sector with a very clear picture of what regulations they're facing, so that they can make the right investment decisions.
>
> And we're hoping that, when they look at the regulation of waste and discharges in water, climate pollution, health-based pollution, they will see that it's not worth investing in the past and they will continue to do what they're doing now, which is invest in the future. And that future is a clean energy economy.[11]

[11] Interview, "EPA Administrator Michael Regan discusses Supreme Court ruling on climate change," PBS, June 30, 2022, https://www.pbs.org/newshour/show/epa-administrator-michael-regan-discusses-supreme-court-ruling-on-climate-change, See also, July 17, 2022 email from Joe Goffman to various individuals, Subject: "Culligan, Kevin shared 'Power Sector GHG reductions' with you," referencing

As further detailed in the Energy Policy Advocates amicus brief in *New York et al. v. EPA,*[12] the Agency has prioritized finding such backdoor or proxy regulation pathways to force GHG emission reductions since the first days of the current administration; indeed, the Agency initiated this discretionary review of the PM2.5 NAAQS just thirty-three days after the 2020 review was completed (by statute reviews must occur within five years). These plans were never altered even after the Supreme Court rejected "what EPA called 'generation shifting' at the grid level—i.e., a shift in electricity production from higher- emitting to lower-emitting producers." *West Virginia*, 142 S. Ct. at 2593. EPA persisted, pretextually seeking to force premature closure of reliable generation in the face of a crisis of reliability, the critical importance of which EPA acknowledges.[13] The escalating threat of a

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"EPA's CAA toolbox" at https://govoversight.org/wp-content/uploads/2024/02/b5-and-22EPAs-CAA-toolbox22.jpg.

[12] *New York et al. v. EPA et al.*, Docket No. 21-1028 (amicus brief of Energy Policy Advocates, filed February 22, 2021).

[13] Respondents have acknowledged that the Agency must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid." *West Virginia v. EPA*, 142 S. Ct 2587, 2596 (2022) (quoting concession in EPA's brief). See also, e.g., "Joint Memorandum on Interagency Communication and Consultation on Electric Reliability U.S. Department of Energy U.S. Environmental Protection Agency," https://www.epa.gov/system/files/documents/2023-03/DOE-EPA%20Electric%20Reliability%20MOU.pdf. There are indications that this nod is a mere rhetorical response to these ever-increasing threats to systemic reliability

failing electricity grid following years of this particular policy agenda, as a result of which "coal- and natural-gas-fired power plants are retiring faster than new solar and wind power can replace them,"[14] is not coincidental.[15] This makes EPA's

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as efforts to force an "energy transition" advance. For example, then-Federal Energy Regulatory Commissioner James Danly went public to rebut claims that the Agency did more than political consulting with aligned appointees on proposed rules' effects on electric reliability, rather than with, e.g., "the Commission." https://www.ferc.gov/sites/default/files/2023-12/Danly%20Comment%2012-20-23.pdf. See also, e.g., Rich Nolan, "The EPA's Coming Energy Catastrophe," RealClear Energy, November 8, 2023, https://www.realclearenergy.org/articles/2023/11/08/the_epas_coming_energy_catastrophe_991539.html.

[14] Arianna Skibell, "Electric grid woes foretell risk of blackouts," Politico, April 3, 2024, https://www.politico.com/newsletters/power-switch/2024/04/03/electric-grid-woes-foretell-risk-of-blackouts-00150393.

[15] See, e.g., Brad Plumer and Nadja Popovich, "A New Surge in Power Use is Threatening U.S. Climate Goals," *New York Times*, March 15, 2024, https://www.nytimes.com/interactive/2024/03/13/climate/electric-power-climate-change.html, which despite the headline describes North American Electric Reliability Corporation (NERC) warnings of declining reliability due largely to premature retirements of coal-fired generation, https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2023.pdf. See, e.g., Robert Walton, "Rising peak demand, 83 GW of planned retirements create blackout risks for most of US: NERC," December 14, 2023, https://www.utilitydive.com/news/generator-retirements-threaten-grid-reliability-NERC/702504/#:~:text=NERC%27s%2010%2Dyear%20reliability%20assessment,transition%20of%20the%20resource%20mix. The *Times* story was published one day after the nation's largest power grid (PJM) Independent Market Monitor, warned that it is at risk of losing up to 58,000 MW in power generation by the end of the decade due primarily to the retirement of thermal generators. https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2023/2023-som-pjm-vol1.pdf

gambit more obviously a violation of the Clean Air Act, both individually and as part of the broader "suite of rules," and this Court must now force EPA to account for its own statements.

2) The Rule is Pretextual.

So long as one takes Respondent Regan at his word, the Rule is a pretextual attempt to achieve through the back door what the Agency has so far not managed to do through the front door, but without proposing a carbon dioxide (CO2) or GHG NAAQS in recognition of the substantial legal and political obstacles to doing so, including Supreme Court precedent. The Rule impermissibly seeks to use non-GHG or "climate" regulatory authorities to achieve GHG reductions, specifically by forcing retirement of politically disfavored facilities. EPA does not have the authority to use this and other regulations Mr. Regan cited as a proxies for greenhouse gas regulation it is unable to find approval for. Clean Air Act authority granted to EPA by Congress to regulate soot and other fine particles was not granted for the purpose being used here.

The Administrator's confessions of an improper purpose for the Rule blatantly violate the historical prohibition on pretext,[16] and also recent precedent

[16] See, e.g., "The Prohibited Pretext Doctrine's foundation was laid out in *McCulloch v. Maryland*…. A century after McCulloch, the Supreme Court

including *Department of Commerce v. New York,* 139 S. Ct. 2551 (2019), which had been decided just three years prior to Regan's announcement. By this "suite of rules" to try and do cumulatively what the Agency is prohibited from doing through a single rule, EPA is trying "the ultimate work-around" (*infra*) to impose its climate agenda, tightening every screw available to it to force regulated parties to bend to a governmental will it is barred from directly imposing. This Rule is breathtakingly pretextual.[17]

3) The Rule Violates the Doctrine Against Pretext.

The pretextual exercise of power runs afoul of basic universal rules applied across government and across the world and is grounded—like the major questions doctrine—in the principle of separation of powers.

For example:

> "In the judicial process … One of such rules is that if a legislature is prohibited from doing something, it may not do so even under the 'guise or pretence' of doing something that appears to be within its lawful jurisdiction…. This rule may broadly be explained as the observance of

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developed the Prohibited Pretext Doctrine further [i]n *Bailey v. Drexel Furniture Co.*," 259 U.S. 20, 34 (1922). Brett W. Hastings, *Taxation Without Limitation: The Prohibited Pretext Doctrine v. the Sebelius Theory*, 15 Marquette Elder's Advisor 229 (2014).

[17] See also, *United States v. Butler*, 297 U.S. 1, 68 (1936). "It is an established principle that the attainment of a prohibited end may not be accomplished under *the pretext of the exertion of powers which are granted*." (*emphasis added*).

> 'good faith' in the exercise of legislative powers, and it is implied in the operation of the maxim 'what cannot be done directly cannot be done indirectly.'"[18]

Pretextually using legal authorities which were provided for one purpose for another purpose altogether violates the pretext doctrine, *Department of Commerce v. New York*, 139 S. Ct. at 2551, and is separately a violation of the Administrative Procedure Act for being arbitrary and capricious.[19] Although *Department of Commerce* has been described as the "Dawn of Pretext Review,"[20] as far back as 1935 the Supreme Court declared that it was "an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." *United States v. Butler*, 297 U.S. 1, 68 (1935).

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[18] D. K. Singh, "*What Cannot Be Done Directly Cannot Be Done Indirectly": Its Meaning and Logical Status in Constitutionalis*m, 29 The Modern Law Review, 273, 288 (1966).

[19] Although the *Department of Commerce* Court treated pretext as a basis for remand separate from consideration of the Administrative Procedure Act's bar on arbitrary and capricious agency action, at least one other court, *Ctr. for Biological Diversity v. Kempthorne*, No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *11 (D. Ariz. Mar. 6, 2008), has found that pretextual rulemaking violates the APA's prohibition against arbitrary and capricious actions. *See* Jack Thorlin, *Can Agencies Lie? A Realist's Guide to Pretext Review*, 80 Md. L. Rev. 1021, 1033 (2021).

[20] *Id*. at 1040.

The district court in *Department of Commerce* followed prior interpretations of the APA's requirement of a reasoned decision-making process and held that there must be disclosure of the actual reasons for the decision made. ("[T]he evidence is clear that Secretary Ross's rationale was pretextual — that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum . . . ." *New York v. U.S. Dep't of Com.,* 351 F. Supp. 3d 502, 660 (S.D.N.Y. 2019)). In an opinion written by Chief Justice John Roberts and joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, the 5-4 majority in *Department of Commerce* opened the relevant discussion regarding Secretary Wilbur Ross's reinstatement of a citizenship question in the 2020 census by noting, "[f]irst, in order to permit meaningful judicial review, an agency must 'disclose the basis' of its action." *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). They concluded that, "[a]ltogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision." *Id*. at 2553. Pointing to "a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers,'" the Court agreed the matter required depositions of senior Department officials. *Id*. at 2574. [21]

[21] In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Supreme Court noted that where "the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence," *Id*. at 404, "[t]he

The Rule at issue here requires no guesswork, as Respondents boldly announced their pretext. The question at hand is one of protecting the legitimacy of the regulatory process. The presumption of regularity granted to executive agencies is surmountable when there is evidence of pretextual rulemaking or otherwise bad faith. As one author notes about the pretext doctrine, "what is pretext if not a form of 'bad faith'?"[22] Thanks to Respondent Regan's candor, this is a clear case.

As the United States Supreme Court has written, "The Constitution deals with substance, not shadows." *Cummings v. Missouri*, 71 U.S. 277 (1867). But substituting shadows for substance is exactly what Respondents' have done in promulgating this Rule, led by the Respondent Administrator who confessed to its pretextual nature, even boasted of it, and the "law whispering" Assistant Administrator for Air and Radiation managing the Rule's implementation[23].

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court may require the administrative officials who participated in the decision to give testimony explaining their action, *Id*. at 420, noting that affidavits are often "merely 'post hoc' rationalizations … [which] cannot serve as a sufficient predicate for agency action," *Id*. at 419. Here, it is the administrative record that is the post hoc rationalization, after the clumsy confession of purpose met *West Virginia v. EPA*.

[22] Thorlin, *Can Agencies Lie? A Realist's Guide to Pretext Review*, 80 Md. L. Rev. at 1031.

[23] Assistant Administrator Joseph Goffman is called "'EPA's Law Whisperer' because 'his specialty is teaching old laws to do new tricks'". "Joseph Goffman joins Environmental Law Program as new executive director," October 2, 2017,

In *West Virginia v. EPA*, the Supreme Court found such an administrative work-around impermissible in this very same context of Respondent EPA forcing "generation shifting." Both Chief Justice Roberts's majority opinion and Justice Gorsuch's concurrence took pains to undermine the increasing use of such pen-and-phone regulations as substitutes for laws passed by the people's representatives, 142 S. Ct. at 2626 and 2643, referencing other such candid outbursts about end-run rulemaking influencing the Court's reversal of other executive overreach ("if Congress won't act soon . . . I will," *Id*. at 2622, and "that an agency is attempting to '"work [a]round"' the legislative process to resolve for itself a question of great political significance." *Id*. at 2621. To this Pantheon of Executive Branch euphemisms, "law whispering" should now be added.

From this series of rejections of pen-and-phone governance cited by Justice Gorsuch, some lawyers involved in the climate-regulation industry took the lesson that bragging about clever regulatory approaches would also come back to haunt inventive use of the Clean Air Act to achieve GHG reductions. Two weeks after *West Virginia* was issued, the Environmental Law Institute hosted a webinar[24]

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https://today.law.harvard.edu/joseph-goffman-joins-environmental-law-program-new-executive-director/.

[24] https://www.eli.org/events/west-virginia-v-epa-analyzing-supreme-courts-decision.

in which panelists urged activists to be careful in their press releases and that "we don't want the political appointees to get out in front of the lawyers." That July 2022 counsel came too late, with the Administrator having already burdened the "suite of rules" with his March announcement of the strategy to attain reductions by forcing facility retirements.

Further, EPA has identified for Amicus GAO emails and memos specifically discussing EPA's "power sector climate strategy" which contain the phrase "suite of rules." The Agency insists on heavily redacting or completely withholding those records, but the fact of the records' existence should be enough for the courts to order discovery into which of EPA's two stories is the truth.[25] Precedent allows for other methods of discerning a regulator's state-of-mind, where substantial questions about pretext exist as Respondent Regan has ensured they do here. Litigation affidavits fail to present contemporaneous records of agency intent and

[25] See, e.g., Email from Maria Laverdiere, Subject: Time-Sensitive: Expected SEEC Questions re: OAR work, at https://govoversight.org/wp-content/uploads/2024/04/Suite-of-Rules-ref-in-SEEC-related-corresp.pdf, and March 14, 2022 email from Jackie Ashley, Subject: RE: Urgent question - has the administrator said anything publicly re: dates for MATS?, Attachment: MATS Talkers on RTR and comment 1-27-21.docx, at https://govoversight.org/wp-content/uploads/2024/04/Email-URgent-Question-re-MATS-suite-of-rules.pdf. The former is at issue in *Government Accountability & Oversight v. EPA,* DDC 24-523 (RBW), and *Government Accountability & Oversight v. EPA*, DDC 24-811 (RBW).

are often little more than "post facto justifications"[26] However, parties challenging these rules would benefit from the "suite of rules" emails and memos EPA is zealously shielding from scrutiny.

Alternately, this Court can simply take Administrator Regan at his word, the candor of which makes the Supreme Court's conclusion in the census case worth quoting at length here:

> "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case… We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act [APA] calls for an explanation for agency action. What was provided here was more of a distraction."

Dept of Comm., 139 S. Ct. at 2575.

To believe the Administrator's own words, or not to believe—that is the question. Amicus suggests this Court should believe Respondent Regan, and conclude that the Agency is doing with the Rule at issue here what the Supreme Court struck down *West Virginia*. The backdoor or proxy use of regulations to

[26] See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 409. "Such an explanation will, to some extent, be a 'post hoc rationalization,' and thus must be viewed critically."

achieve GHG emission reductions by forcing "generation shifting" is impermissible, whether viewing the Rule in isolation or, as Administrator Regan's comments demand, as part of the "suite of rules" to force the regulated community to come around to the administration's desires on "invest[ing] in the future."

Because the public record clearly reflects the Agency admitting to pretextual rulemaking, the object of which pretext being unconstitutional pursuant to *West Virginia*, this Court should overturn the Rule in its entirety. Alternately, the Court should order discovery to discern Mr. Regan's true purpose in promulgating the Rule, consistent with *Department of Commerce*.

B. The Rule Violates the Major Questions Doctrine.

Respondents' choice to determine "how Americans get their energy" imposes burdens of "economic and political significance," which violates the Constitution given the absence of "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2609. It is outside the Respondents' authority. Specifically, addressing whether generation shifting can be a "system of emission reduction" under CAA Section 111, the majority wrote:

> There is little reason to think Congress assigned such decisions to the Agency. … "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so…

> We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades.

West Virginia 42 S. Ct. at 2596.

West Virginia addressed power the Agency claimed under a specific rule. That regulation, known as the "Clean Power Plan," was one of several Agency attempts in recent years to deploy the CAA to restrict GHGs from the power sector, particularly CO2, none of which efforts passed judicial muster. However, the Court has not limited application of the major questions doctrine to a discrete agency action. Reading the recent string of major-question rulings striking down administration overreach cited in *West Virginia*, this seems particularly apparent in the case of an agency repeatedly confessing that it seeks to force "expedited retirements" through a "suite of rules" after having been denied that goal through a particular rule. To so limit the doctrine would fly in the face of the Court's position as articulated in *Cummings*, that "[w]hat cannot be done directly cannot be done indirectly." 71 U.S. at 277.

Regardless, the totality of the record reveals that the Rule warrants major-question analysis both individually and as part of the "suite of rules" approach to achieve greenhouse gas reductions through retirement of certain facilities,

burdened as it is by Administrator Regan's insistence of the intended cumulative effects with other regulations.

C. The Rule Must be Rejected.

This Court has held that "Agency action is arbitrary or capricious if 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Guedes v. BATFE*, 920 F.3d 1, 32 (2019), quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). Taking Respondent Regan at his word, the Agency proceeded pretextually, already a brazen move to announce and particularly so post-*Department of Commerce v. New York*, but toward an objective that was soon made untenable by *West Virginia v. EPA*. The administrative record does not reflect this announced consideration, which is in one respect wise given that "generation shifting" and a GHG or climate rationale in modifying a primary NAAQS would doom the Rule; however, omitting these truths from the record should be similarly fatal to the Rule.

This Court has long recognized that such an approach runs contrary to the notion that an agency should only exercise its considerable rule-making authority with "a degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

In *West Virginia*, the United States Supreme Court added its clearest statement yet to the admonition against agencies purporting to find elephants in legislative mouseholes and claiming authority (indeed, this particular authority) never specifically granted them by Congress. 142 S. Ct. at 2622. Asserting powers never expressly granted is the hallmark of the current administration's oft-proclaimed "whole of government" approach to advancing key priorities, including very specifically its "climate" agenda, using every conceivable lever of federal power. This implicates another, even more basic standard, the doctrine against the pretextual exercise of authority as articulated in *Department of Commerce v. New York*. The Rule at issue here offends both precedents.

This Court must vacate the Rule to prevent such an end-run around current law and sound policy. This Court should reject the Respondents' political gamesmanship, reject Respondents' pretextual Rule that was unlawfully enacted,

and leave it to the legislature to determine whether Respondents should possess the power they seek.

IV. CONCLUSION

For these reasons stated above, Amicus wishes to provide this Court with the extensive documentary trail supporting the argument that the instant matter is a violation of the proper and ordinary regulatory process. Accordingly, the Amicus suggests that this Court should consider and take judicial notice of the records cited herein, and strike down the Rule in recognition of the improper motivations and considerations that drove it and which are part of the public record. At minimum, a Special Master is warranted pursuant to *Telecomms. Research & Action Ctr.*, 750 F.2d at 78 and 28 U.S.C. § 2347(b)(3), to oversee discovery into the Agency's state of mind or, in short, which of its tales is the truth.

Respectfully submitted this the 5th day of April, 2024,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(g)(1), that the following brief contains 5,524 words, as counted by counsel's word processing system (Microsoft Word), and thus complies with the 6,500 word limit. See Fed. R. App. P. 32 (a) (7) and 29 (a)(5). Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 using size 14 Times New Roman font.

Dated: April 5, 2024

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