ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 19-1019 (and consolidated cases)

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW JERSEY, CITY OF NEW YORK,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency,
Respondents,

HOMER CITY GENERATION, L.P., STATE OF TEXAS, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, UTILITY AIR REGULATORY GROUP,
Intervenors for Respondent

On Petition for Review of Final Action by the
United States Environmental Protection Agency
83 Fed. Reg. 65,878 (Dec. 21, 2018)

FINAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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April 26, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for Institute for Policy Integrity at NYU School of Law certify as follows:

Except for *amicus curiae* Institute for Policy Integrity at NYU School of Law, all parties, amicus, and intervenors appearing in this case are listed in Petitioners' opening briefs.

References to the final agency action under review and related and consolidated cases appear in Petitioners' opening briefs.

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity ("Policy Integrity") is a nonpartisan, not-for-profit organization at New York University School of Law. Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has no parent companies. No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Policy Integrity is not aware of any other organizations that plan to file *amicus* briefs in support of Petitioners. Under Federal Rule of Appellate Procedure 29(a)(4)(E), Policy Integrity states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Cross-State Air Pollution Rule, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011)	Cross-State Rule
Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)	Cross-State Update
Close-Out Rule, Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018)	Close-Out Rule
EPA	Environmental Protection Agency
Policy Integrity	Institute for Policy Integrity
Proof Opening Br. of Citizen Pets.	Citizen Br.
Opening Proof Br. for State Pets.	States Br.

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law[1] ("Policy Integrity") submits this *amicus* brief in support of Petitioners' challenge to the Environmental Protection Agency's ("EPA") Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018) ("Close-Out Rule"). Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on the proper use of cost-benefit analysis in environmental rulemaking.

In the Close-Out Rule, EPA failed to prohibit sources within states from emitting air pollution in amounts that "contribute significantly" to another's state's nonattainment of the 2008 national ambient and air quality standards for ozone, as required by the Clean Air Act. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Policy Integrity consists of a team of legal and economic experts, trained in the estimation of costs and benefits and the application of economic principles to regulatory decisionmaking, with a particular focus on the regulation of such interstate air pollution under the Clean Air Act. For example, Policy Integrity's Director,

[1] This brief does not purport to represent the views of New York University School of Law, if any.

Professor Richard Revesz, has written on the economic justifications for federal regulation of interstate externalities such as air pollution that flows downwind,[2] as well as on the importance of accurately quantifying the health and welfare benefits of environmental protections.[3] Additionally, Professor Revesz and Jack Lienke, Policy Integrity's Regulatory Policy Director, co-authored a book on the history of power-plant regulation under the Clean Air Act, including decades of efforts by states and EPA to combat interstate pollution from coal-fired plants.[4]

Policy Integrity has harnessed this expertise to file *amicus* briefs in other Clean Air Act cases concerning interstate air pollution. For example, Policy Integrity filed an *amicus* brief in Maryland and Delaware's challenge to EPA's denial of petitions seeking reductions of upwind ozone emissions and another *amicus* brief in *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014), in support of the Cross-State Air Pollution Rule ("Cross-State Rule"). *See* Br. of Inst. for Policy Integrity as *Amicus Curiae*, *Maryland v. EPA*, No. 18-1285 (D.C. Cir. Apr. 5, 2019);

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[2] Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341 (1996).

[3] *See, e.g.*, Kimberly M. Castle & Richard L. Revesz, *Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations*, 103 Minn. L. Rev. 1349 (2019); Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 Calif. L. Rev. 1423 (2014); *see also* Richard L. Revesz, Publications, NYU School of Law, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=20228 (last visited Apr. 26, 2019).

[4] Richard L. Revesz & Jack Lienke, *Struggling for Air: Power Plants and the "War on Coal"* (Oxford University Press 2016).

Br. of Inst. for Policy Integrity as *Amicus Curiae*, *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) (Nos. 12-1182, 12-1183). Professor Revesz's law review article on interstate externalities was cited prominently in the Supreme Court's majority opinion in *EME Homer City Generation, L.P.*, 572 U.S at 495.

In addition, Policy Integrity has participated as *amicus curiae* in many other Clean Air Act cases, including cases regarding Clean Air Act limits on mercury and ozone pollution. *See, e.g.*, Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (Nos. 14-46, 14-47, 14-49) (discussing EPA's calculation of costs and benefits in its regulation of mercury emissions from power plants); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. Aug. 4, 2016) (discussing the cost-benefit analysis EPA prepared in connection with its revision of national ozone standards).

Policy Integrity's expertise in the Clean Air Act and in economic analysis gives it a unique perspective from which to evaluate EPA's claim in the Close-Out Rule that cost considerations excuse the agency from imposing any additional reductions under the Good Neighbor Provision of the Clean Air Act for the 2008 national ambient air quality standard for ozone. All parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

In the Close-Out Rule, EPA has refused to order upwind states to adopt either short- or long-term strategies to cut interstate emissions that "contribute significantly" to downwind attainment problems under the 2008 ozone national ambient air quality standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I). To justify that decision, EPA falls back on its analysis in the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016) ("Cross-State Update"), a prior rule that very openly only provided a "partial remedy" for interstate emissions. *Id.* at 74,521. Petitioners have offered several grounds for vacating EPA's decision. This *amicus* brief focuses on two specific problematic aspects of EPA's decision.

First, EPA's claim that any control strategies that could be implemented in time for the next attainment deadline in 2021 were already judged not cost-effective is based on a fundamental misunderstanding of the nature of cost-effectiveness analysis. Cost-effectiveness analysis must be performed by reference to the goal that needs to be achieved. Performing the analysis for the Close-Out Rule by reference to the goal of the Cross-State Update is inappropriate because, by the agency's own admission, the two rules have different goals.

When EPA performed the analysis in the Cross-State Update, the goal was to implement a "partial remedy" for the 2017 ozone season. *Id.* at 74,521. But the

Supreme Court has made clear that the Good Neighbor Provision of the Clean Air Act seeks attainment of the standards "in *every* downwind state." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 522 (2014) (emphasis in original). And Petitioners have pointed to evidence showing upwind emissions that continue to "contribute significantly" to nonattainment of the 2008 ozone standard in a way that should be remedied under the Clean Air Act, even after the Cross-State Update. Thus, EPA now must promulgate a rule that "fully address[es]" upwind states' obligations under the Good Neighbor Provision. *See New York v. Pruitt*, No. 18-406, 2018 WL 2976018, at *1, *4 (S.D.N.Y. June 12, 2018).

EPA dismisses that evidence by claiming that, even if true, short-term remedies were already judged to be not cost-effective in the Cross-State Update. But rather than judging the available options with the earlier "partial" goal in mind, a proper cost-effectiveness analysis would judge them by reference to the goal of providing a full remedy for downwind states, which is the relevant goal for this proceeding. EPA's failure to perform that analysis violates its statutory obligation under the Good Neighbor Provision.

Second, EPA's assertion that longer-term controls need not be adopted because EPA's projections find no attainment problems in 2023 is also without merit. That finding relies on several unreasonable assumptions, including the assumption that EPA's own plans to repeal significant pollution controls for motor

vehicles, along with controls for other sources, will not affect attainment or maintenance. EPA's analysis in the Close-Out Rule has left downwind states without the redress due to them under the Good Neighbor Provision. The rule should therefore be vacated.

ARGUMENT

EPA ABDICATED ITS RESPONSIBILITY TO PROHIBIT INTERSTATE AIR POLLUTION THAT WILL CONTRIBUTE SIGNIFICANTLY TO VIOLATIONS OF THE 2008 NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE

A. The Cross-State Update Provided Only a Partial Remedy

The Good Neighbor Provision of the Clean Air Act helps get at a "complex problem": When one state can emit air pollution that flows downwind and primarily harms another state, the polluting state has no incentive to stem the harmful amounts of pollution without federal regulation. *See EME Homer City Generation, L.P.*, 572 U.S at 495 (citing Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996)); *see also* David A. Dana, *One Green America: Continuities and Discontinuities in Environmental Federalism in the United States*, 24 Fordham Envtl. Law Rev. 103, 105 (2013).

In the Cross-State Update, EPA exercised its authority under the Good Neighbor Provision to regulate interstate emissions and promulgated a rule to aid downwind states in their efforts to meet the 2008 national ambient air quality standard for ozone. But the Cross-State Update was only a partial remedy because it

was already 2016 and the states' next attainment deadline was July 20, 2018. 81 Fed. Reg. at 74,507. The 2017 ozone season was the last season from which states could gather data to show attainment by that deadline. *Id.* Thus, EPA decided that it needed more time "to evaluate whether the upwind states' emission reduction obligations should be more stringent considering other factors not addressed" by the Cross-State Update and chose to implement only a partial remedy, using some strategies that could be implemented before that 2017 ozone season. *Id.* at 74,520-21.

To achieve that partial goal, EPA looked at strategies that cost between $1,400/ton of nitrogen oxide removed and $6,400/ton of nitrogen oxide removed. *Id.* at 74,541-43. The agency ultimately chose the abatement-cost threshold of $1,400/ton, which it found would achieve at least a partial remedy through "meaningful and timely improvements in downwind ozone air quality to address interstate ozone transport." *Id.* at 74,508. But EPA emphasized that the reductions required by the Cross-State Update would represent "for most states, a first, partial step to addressing a given upwind state's significant contribution to downwind air quality impacts" for the 2008 national ambient air quality standard for ozone. *Id.* at 74,522. And the Cross-State Update made clear that the agency would need to evaluate "what further steps may be necessary to fully address" interstate emissions that significantly contribute to nonattainment or interference with maintenance in other states. *Id.* at 74,522. As part of that evaluation, EPA intended to look at longer-

term strategies as well as emissions reductions from sources other than power plants, which could include sources such as motor vehicles and industrial facilities. *See id.* at 74,513, 74,522.

B. EPA's Refusal to Provide a Full Remedy Now Is Arbitrary and Capricious

Now, modeling results submitted to the record confirm that several states will likely face nonattainment and maintenance problems again in 2020, making it impossible to meet their new attainment deadline of July 20, 2021, under the 2008 national ambient air quality standard for ozone. *See* 83 Fed. Reg. at 65,908; Opening Proof Br. for State Pets. ("States Br.") at 12-14; Proof Opening Br. of Citizen Pets ("Citizen Br.") at 12. As a result, EPA still has an obligation to "fully address" upwind emissions which "contribute significantly" to those problems. *See New York*, 2018 WL 2976018, at *9.

Nevertheless, in the Close-Out Rule, EPA declines to impose any new enforceable reductions to address the remaining nonattainment problems caused by interstate pollution. EPA's refusal to consider either short- or long-term strategies to address those problems and to thus provide a full remedy is arbitrary and capricious.

1. EPA Irrationally Claims that Available Short-Term Strategies Are Not Cost-Effective

In refusing to implement any short-term strategies, EPA claims that the Cross-State Update already found that any available short-term strategies were "not cost-

effective relative to other short-term control strategies." 83 Fed. Reg. at 65,893-94. But cost-effectiveness analysis has meaning only with reference to a particular goal, and citing cost-effectiveness considerations—adopted with reference to a partial goal—without consideration of the new goal of providing a full remedy under the Good Neighbor Provision is analytically flawed.

Agencies use cost-effectiveness analysis to identify the "least costly" option for meeting a pre-determined goal. EPA, *Guidelines for Preparing Economic Analyses* at 1-5[5] (2010); *see also* Exec. Order No. 12,866 §1(b)(5), 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993) (directing agencies to "design [] regulations in the most cost-effective manner to achieve the regulatory objective"). In the absence of a predetermined goal, a traditional cost-benefit analysis would weigh the costs and benefits and allow the agency to choose a goal that maximizes the net benefits. *See* Exec. Order No. 12,866 §1(a). But when Congress has directed an agency to meet a specific goal, weighing the costs and benefits is not enough. *See* Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 Duke L. J. 1067, 1069, 1075-79 (2003). Instead, in cases where, like here, there is a pre-determined

[5] Website urls are provided for this document and many other cited documents in the Table of Authorities.

goal, agencies should use cost-effectiveness analysis to choose the least costly option for reaching that goal. Exec. Order No. 12,866 §1(b)(5).[6]

Thus, in determining cost-effectiveness, a proper analysis starts with identifying the relevant goal. Say an agency has a statutory mandate to reduce 100 tons of pollution. Is a technology that can accomplish this goal for $5,000 per ton cost-effective? It depends. If the only other means of reducing those 100 tons of pollution costs $10,000 per ton, then yes, the $5,000 per ton solution is cost-effective because that solution would impose a cost of $500,000 rather than $1,000,000 to reach the same goal. If, by contrast, there is a technology that would do the job for only $2,500 per ton, resulting in a total expense of $250,000, then the $5,000 option is not cost-effective. Similarly, if the goal goes up to 200 tons, meeting the 200-ton goal might be costlier, but the *cost-effectiveness* should be determined by looking only at the various options available to meet that new 200-ton goal.

Furthermore, a more expensive technology would be cost-effective if the cheaper one does not lead to attainment of the goal. For example, a technology that could reduce pollution at a cost of $1,000 per ton but that would eliminate only 50

[6] Of course, even where the goal is predetermined and cost-effectiveness analysis is used to choose the least costly way of achieving that goal, a cost-benefit analysis may still show, as was the case in the Cross-State Rule, that the requirement "provide[s] society with a substantial net gain in social welfare." Cross-State Air Pollution Rule, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,314 (Aug. 8, 2011).

total tons is *not* a more cost-effective means of fulfilling the agency's mandate than the $5,000 solution. Even though the technology is cheaper, it is *insufficiently effective* because it will not achieve the relevant goal: to reduce 100 tons of pollution.

In the case of interstate air pollution, the goal is to provide downwind states with a full remedy for emissions that "contribute significantly" to nonattainment of the national ambient air quality standards, and there can be multiple pathways to meeting that goal. Thus, EPA has in the past reasonably used cost-effectiveness analysis to select pollution control strategies and to allocate emission-reduction burdens among the states. *See EME Homer City Generation*, 572 U.S. at 519–20. But in this case, EPA used cost-effectiveness analysis in the Cross-State Update to meet only a partial goal and now that EPA must provide a full remedy under the Good Neighbor Provision it must perform the analysis with reference to that goal.

Indeed, states face their next attainment deadline in 2021, and there are at least two other possible short-term options for addressing good-neighbor obligations in time for that deadline, which EPA could have assessed using cost-effectiveness analysis. First, EPA could have considered requiring sources to operate their existing selective catalytic reduction equipment, as EPA contemplated when setting the reductions in the Cross-State Update. *See* States Br. at 35-38; Citizen Br. at 32-33. According to EPA's own analysis, plants are not operating their equipment at the level EPA determined was cost-effective in the Cross-State Update, *see* States Br.

at 35-38, and a proper cost-effectiveness analysis would consider that option when assessing the least cost option for providing a full remedy now.

Second, EPA could have considered the option of turning on idled selective non-catalytic reduction controls. *See* 81 Fed. Reg. at 74,541; Citizen Br. at 33. The fact that EPA ruled out this option for purposes of the Cross-State Update is irrelevant. 83 Fed. Reg. at 65,894. As the Cross-State Update was only a "partial remedy," 81 Fed. Reg. at 74,521, the analysis in that rule does not answer the question about what options are the cost-effective options for addressing the different goal of providing a full remedy under the Good Neighbor Provision now.

To illustrate the point, imagine insulating an old house better in the winter. Taping the windows with weatherproofing tape is an option that provides some insulation and can be implemented right away, which might cost $5 for the roll of tape. But the next year, with more time, the homeowner might decide to better weather-proof the house. To reach that new target, an alternative could be to replace the windows. That option would provide additional insulation and would likely be much more expensive than the roll of tape. But when selecting the new windows, the homeowner would not rule out a $500 window merely because it is more expensive than the $5 roll of tape. Instead, if the homeowner is set on meeting the new target, the homeowner would rule out the $500 window only if she found an

equivalent window for $300.[7] In other words, if the tape roll does not actually help the homeowner meet the new insulation target, the tape may be less costly, but it is not more cost-*effective*.

EPA's analysis in the Close-Out Rule is irrational because it is equivalent to a decision not to install new windows on the grounds that the windows are more expensive than a tape roll. The alternative to selecting one of the identified options is that EPA abdicates its responsibility to order pollution reductions from states that "contribute significantly" to nonattainment or interfere with maintenance in downwind states, while downwind states are left to implement reductions that are far costlier on a per-ton basis than any of the identified options. *See* Comments of the Attorneys General of the States of New York, Connecticut, Maryland, and New Jersey, and the Corporation Counsel of the City of New York at 19 (Aug. 31, 2018) (cataloging the per-ton cost of implementing additional controls in New York, New Jersey, and Maryland). That result violates the Clean Air Act.

2. The Close-Out Rule's Conclusion that Long-Term Strategies Need Not Be Implemented Is Fundamentally Flawed

EPA also refuses to consider other longer-term strategies, such as controls for non-power plant sources, claiming that any longer-term strategies could not be

[7] A rational homeowner would likely also consider fuel savings when calculating the cost of different weather-proofing options, but this example simplifies the analysis by removing that factor for purposes of illustration.

installed until 2023 and that EPA's modeling showed no attainment problems in 2023. 83 Fed. Reg. at 65,903-4, 65,907. Petitioners have explained the problems with the latter contention, showing how EPA's modeling relies on arbitrary and improper assumptions of voluntary controls, among other problems. States Br. at 42-43; *see also* Citizen Br. at 32.

Additionally, EPA's 2023 modeling relies on the assumption that several significant and related pollution-control rules will remain in place, even though EPA has recently proposed to repeal those rules. 83 Fed. Reg. at 65,915. For example, the Close-Out Rule's modeling relies on the continued viability of existing emissions standards for passenger cars and light trucks. *Id.* But in August 2018, EPA and the National Highway Traffic Safety Administration proposed to repeal those vehicle emissions standards. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018). And by all accounts, the two agencies still intend to finalize a rule that would make significant cuts to vehicle emissions standards.[8]

EPA claims that its "normal practice" is to ignore the impact of such proposed rules as "speculative." 83 Fed. Reg. at 65,915. But that is not true. EPA's guidelines

[8] *See* EPA Staff Crafts New Analysis of Flaws, Possible Fixes For Vehicle GHG Plan, *InsideEPA* (Apr. 16, 2019); Coral Davenport, Automakers Plan for Their Worst Nightmare: Regulatory Chaos After Trump's Emissions Rollback, *N.Y. Times* (Apr. 10, 2019) .

state that the agency should include in its analysis those regulations that were in place *ex ante* or are reasonably certain to be implemented. Specifically, EPA's guidelines contemplate incorporating the "impact of other rules currently under consideration" if they "fundamentally affect[] the economic analysis." EPA, Guidelines for Preparing Economic Analyses at 5-2. In those cases, "multiple scenarios, with and without these rules in the baseline, may be necessary." *Id.* And EPA's practice has been to include in its analysis related regulations that are promulgated as well as ones that have been proposed at the time of the analysis.[9] Here, contrary to EPA's claim, *see* 83 Fed Reg. at 65,915, EPA's plans to repeal several significant emissions controls would very likely fundamentally affect the modeling and economic analysis of the Close-Out Rule. *See* Comments of Earthjustice, et al. on EPA's Proposed Bad Neighbor Rule at 31-32 (Aug. 31, 2018).[10] In the Close-Out Rule, EPA has relied on voluntary controls to find no

[9] *See* EPA, EPA-452/R-15-003, Regulatory Impact Analysis for the Clean Power Plan Final Rule, at 1-5 (Oct. 23, 2015), https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf. Recently, EPA has taken this a step further and relied on truly speculative analysis to justify repealing significant wetlands protections. In that proposal, EPA reduced its estimate of forgone benefits based on the assumption that state-level regulations might be proposed to fill the gap left by EPA's withdrawal of wetlands protections. *See* EPA and Army Corps of Engineers, Economic Analysis for the Proposed Revised Definition of "Waters of the United States" at 56-59 (2018), https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-supporting-documents.

[10] *See also* National Highway Traffic Safety Administration, Draft Environmental

attainment problems in 2023, and even that finding is true only by a very small margin. *See* States Br. at 47; 83 Fed. Reg. at 65,918. Particularly given that small margin of error, EPA should have considered the impact of the repeals in assessing possible future attainment scenarios.

EPA "has a statutory obligation to avoid 'under-control,' *i.e.*, to maximize achievement of attainment downwind." *EME Homer City Generation*, 572 U.S. at 523. EPA's failure to address the nonattainment and maintenance problems at issue in this rule is arbitrary and capricious.

CONCLUSION

The court should vacate the Close-Out Rule.

DATED: April 26, 2019

Respectfully submitted,

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Impact Statement at 4-34, NHTSA-2017-0069 (July 2018) (describing increases of nitrogen oxide that can be expected from the vehicle repeal), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ld_cafe_my2021-26_deis_0.pdf.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 3726 words (as counted by counsel's word processing system) excluding those portions exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), which is less than one-half the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

DATED: April 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, I filed the foregoing Final Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of Petitioners through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users.

DATED: April 26, 2019

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