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The Honorable Michael Regan, Administrator
U.S. Environmental Protection Agency
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*Sent Via Email and U.S. Mail*

Dear Administrator Regan:

We write as a group of state and territorial attorneys general who have made addressing climate change a key initiative in our offices. We wish to underscore our support for the establishment of National Ambient Air Quality Standards (NAAQS) for greenhouse gases under Sections 108 through 110 of the Clean Air Act.[1] Adopting NAAQS would allow the EPA to comprehensively address the issue of greenhouse gas emissions and, we believe, would likely withstand court challenges.

In *West Virginia v. EPA*, the U.S. Supreme Court limited the use of Section 111(d)[2] of the Clean Air Act (the Act) to address greenhouse gas emissions from power plants, calling it an "ancillary" and "gap-filler" provision of the Act,[3] and saying that Congress could not

[1] 42 U.S.C. § 7408-7410.
[2] 42 U.S.C. § 7411(d).
[3] *West Virginia v. EPA*, No. 20-1530, slip op. at 5 ("gap-filler"), 6 ("ancillary") and 20 ("ancillary" and "gap filler") (U.S. June 30, 2022).

have intended such a provision to bestow broad powers on the EPA. We urge you to consider a different section of the Act and approach—NAAQS—to protect our air, and thus, our planet.

Section 108 of the Act is explicit: If a pollutant "may reasonably be anticipated to endanger public health or welfare," and its "presence … in the ambient air results from numerous or diverse mobile or stationary sources," the EPA is authorized to establish NAAQS.[4] Using NAAQS, the EPA sets a maximum level of a pollutant, and then the states must take the necessary steps to ensure that the level is not exceeded. The NAAQS approach to addressing greenhouse gases comes with several benefits.

First, in the *West Virginia* case, the Court expressly distinguished the NAAQS provisions from Section 111(d) in its discussion of emissions trading: "It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the NAAQS. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit"[5] (as the Court concluded EPA was doing in the Clean Power Plan under Section 111(d)).

Second, the Court's invocation of the "major questions doctrine" would not apply to NAAQS. Far from being "ancillary," the NAAQS provisions are the "engine that drives" the Act.[6] The NAAQS provisions have significant "history and . . . breadth"[7] because, since the Act was passed, EPA has successfully used NAAQS to fight pollutants like ozone, lead, and particulate matter. Of course, greenhouse gases are pollutants, too.[8]

Moreover, Congress intended NAAQS to have "vast economic and political significance,"[9] including generation-shifting, facility closures, and more:

> The protection of public health—as required by the national ambient air quality standards and as mandated by provision for elimination of emissions of supremely hazardous pollution agents—will require *major action* throughout the Nation. Many facilities will require *major investments* in new technology and new processes. Some facilities will need altered operating procedures or a change of fuels. Some facilities may be closed.[10]

Congress envisioned that actions in response to NAAQS could include: "[g]reater use of natural gas for electric power generation," development of new or improved land use and transportation policies, and that "as much as 75 percent of vehicle traffic may have to be

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[4] 42 U.S.C. § 7408(a)(1)(A) and (B).
[5] *West Virginia*, slip op. at 29-30.
[6] *Whitman v. American Trucking*, 531 U.S. 457, 468 (2001).
[7] *West Virginia*, slip op. at 17 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[8] *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).
[9] *West Virginia,* slip op. at 11 (quoting an EPA quotation of *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).
[10] National Air Quality Standards Act of 1970, Report of the Committee on Public Works, United States Senate, Together with Individual Views to Accompany S. 4358, S. Rep. No. 91-1196, at 2 (1970) (emphasis added).

restricted in certain large metropolitan areas."[11] While "highly consequential," these actions can reasonably be understood to fall expressly within the powers that Congress granted.[12]

Limiting the level of greenhouse gases in the air is central to preventing global temperature rise and concomitant climate disaster. In the Paris Agreement, which the United States recently rejoined, the nations of the world committed to limit global warming to no more than 2 degrees Celsius.[13] To achieve that goal, scientists have estimated that we must keep the concentration of carbon dioxide in the atmosphere to no more than 450 parts per million.[14] We do not presume to suggest at what level NAAQS should be set—that should be up to EPA's scientific judgment. But one option might be to adopt a carbon dioxide NAAQS that mirrors the Paris Agreement.

Finally, as you know, greenhouse gases can cross state and national boundaries. That is the reason the Clean Air Act contains a "good neighbor" provision addressing interstate pollution. The Court addressed this provision in *EPA v. EME Homer City Generation*, where it approved an agency rule creating a pollution budget for each of 27 states.[15] The EPA could take a similar approach with greenhouse gas NAAQS across all the states. The Clean Air Act also includes a provision that recognizes that pollutants can cross national boundaries. Section 179B of the Act says, in effect, if a state's plan to meet the NAAQS would otherwise be adequate, the state will not be held responsible if emissions from foreign countries prevent the State from complying with NAAQS.[16]

We thank you for your consideration of our suggestions in this letter, and for the work you are doing on climate change and so many other issues that profoundly affect our nation's public health and environment.

Sincerely yours,

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[11] *Id.*
[12] *West Virginia*, slip op. at 16-20 (discussing the major questions doctrine).
[13] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, at 2. https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.
[14] John Kemp, *Climate change targets are slipping out of reach*, Reuters, April 2019. https://www.reuters.com/article/energy-climatechange-kemp/column-climate-change-targets-are-slipping-out-of-reach-kemp-idUSL5N21Y4A0.
[15] 572 U.S. 489, 520 (2014).
[16] 42 U.S.C. § 7509a(a)(2).



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