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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
DIVISION 6: EUGENE

CLIMATE PROTECTION AND RESTORATION INITIATIVE, DONN J. VIVIANI, JAMES E. HANSEN, JOHN BIRKS, RICHARD HEEDE, LISE VAN SUSTEREN, CLIMATE SCIENCE, AWARENESS, AND SOLUTIONS,
Plaintiffs,

v.

MICHAEL S. REGAN, Administrator of the United States Environmental Protection Agency, and the **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**,
Defendants.

Case No. 6:22-CV-1772-MK

STATE *AMICI*'S CORRECTED MOTION TO APPEAR AS *AMICI CURIAE* AND BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS (DOC. 22)

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LOCAL RULE 7-1(a) CERTIFICATION

Pursuant to Local Rule 7-1(a), the Proposed *Amici* States certify that they made a good-faith effort through telephone conferences with Defendants on April 4, 2023, and with Plaintiffs on April 5, 2023, to resolve this dispute but were unable to do so. Defendants take no position on the States' request to appear as *amici curiae*. Plaintiffs oppose this Motion.

MOTION

The States of Alabama, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming (the "*Amici* States") file this Motion to Appear as *Amici Curiae* and file this brief is support of Defendants' Motion to Dismiss (DE22).[1] *Amici* States offer unique and crucially important perspectives on the implications of Plaintiffs' argument and request for relief, and believe their briefing will benefit the Court.

First, Plaintiffs' requested relief undoubtedly affects *Amici* States. Plaintiffs ask this Court to "[c]ompel rulemaking pursuant to Plaintiffs' Petition," DE1:27, which in turn demands that the Environmental Protection Agency (EPA) effect a rule to "phase out greenhouse gas," DE1-1:1. In EPA's words, Plaintiffs' proposed rulemaking "potentially affects an extraordinary number of industries and activities (*e.g.*, agriculture, transportation, utilities, etc.), including innumerable small sources of emissions (*e.g.*, residential homes)." DE1-2:5. Plaintiffs ask this Court to enact extraordinary relief capable of affecting "industries," "activities," and even "residential homes" across the Nation, including in each *Amici* State. Further, that expansive reading of EPA authority would "unquestionably ha[ve] an impact on federalism" and various powers of the States. *West Virginia*

[1] "DE" refers to docket entries in this case. Pin cites follow the colon and accord with CM/ECF pagination.

v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring). *Amici* States thus respectfully request the opportunity to be heard.

Moreover, *Amici* States' arguments differ from those of Defendants. *Amici* States not only provide legal analysis confirming EPA's conclusion that the Toxic Substances Control Act (TSCA), 15 U.S.C. §§2601-2692, does not permit the Agency to enact the rulemaking Plaintiffs demand, but also explain that recent Supreme Court precedent plainly forecloses Plaintiffs' arguments. Though in its denial of Plaintiffs' petition, the EPA declined to "opine on the outer extent of [its] authority under TSCA," DE1-2:6, *Amici* States explain that under *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), Plaintiffs' proposed rulemaking would drag EPA well beyond the "outer extent" (DE1-2:6) of TSCA's authorization.

INTRODUCTION

Plaintiffs' Petition to EPA (DE1-1) does much to highlight the importance of fossil fuels. "[B]eginning with the industrial revolution," the Petition explains, fossil fuels have played a significant role in the daily lives of many Americans. DE1-1:44. Initially used for "powering steam engines," they were eventually harnessed for "electrical power generation," "automobile and aircraft transportation," and the "heating of homes and commercial buildings." *Id.* And now "humanity[] reli[es] on fossil fuels to meet fundamental energy needs." *Id.* at 39. But all good things must come to an end; "humanity's reliance" notwithstanding, Plaintiffs now ask this Court to order "the timely phaseout of fossil fuels." *Id.* at 86; DE1:27 (requesting this Court to "[c]ompel rulemaking pursuant to Plaintiffs' Petition").

This Court should, like the Environmental Protection Agency, reject Plaintiffs' extraordinary request. As EPA detailed in its rejection of Plaintiffs' Petition (DE1-2) and its Motion to Dismiss (DE22), Plaintiffs failed to meet the basic requirements of a citizen-petition under Section 21 of the Toxic Substances Control Act. 15 U.S.C. §2620. But a more fundamental problem plagues Plaintiffs' demands. Because Plaintiffs' proposed rulemaking implicates issues of vast "economic and political significance," this is an "extraordinary case[]" requiring evidence of "clear congressional authorization" for the rulemaking Plaintiffs demand from EPA. *West Virginia*, 142 S. Ct. at 2608-09. That requisite evidence is nowhere to be found; TSCA allows EPA to regulate potentially harmful chemicals in interstate commerce, not to govern the Nation's energy consumption.

This lawsuit implicates "basic questions about self-government, equality, fair notice, federalism, and the separation of powers." *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring). The Court should recognize that "this is a major questions case" and reject the proposition that

EPA possesses the "unheralded power to regulate 'a significant portion of the American economy'" under a "long-extant statute" that the Agency has never used for a remotely similar purpose. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (UARG) (quoting *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 160 (2000)).

BACKGROUND

A. Introduction and Amendment of The Toxic Substances Control Act.

Passed in 1976, the Toxic Substances Control Act, 15 U.S.C. §§2601-2692, "authorizes the EPA to screen existing and new chemicals used in manufacturing and commerce to identify potentially dangerous products or uses that should be subject to federal control." CONGRESSIONAL RESEARCH SERVICE, THE TOXIC SUBSTANCES CONTROL ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 1 (2013) ("CRS Report") (discussing trajectory of law since it was proposed in 1971). Over the years, Congress has added to the statute to address specific toxins appearing in commercial products, such as asbestos (Title II; Pub. L. No. 99-519, 100 Stat. 2970), radon (Title III; Pub. L. No. 100-551, 102 Stat. 2755), lead (Title IV; Pub. L. No. 102-550, 106 Stat. 3912), toxic exposures in schools (Title V; Pub. L. No. 110-140, 121 Stat. 1640), formaldehyde emissions from composite wood products (Title VI; Pub. L. No. 111-199, 124 Stat. 1359), and elemental mercury (Title I §§6, 12; Pub. L. No. 110-414, 122 Stat. 4342).

Section 6 of TSCA authorizes EPA to regulate toxic substances in commerce that pose an unreasonable risk of injury to health or the environment. Accordingly, over the decades, EPA has acted under Section 6 to assess and regulate dangerous chemicals across a host of commercial products: fragrance compounds for air fresheners, soaps, shampoo, household detergents, and bleach, 68 Fed. Reg. 15,061, 15,065 (Mar. 28, 2003) (codified at 40 CFR §721.2584); household cleaning agent additives, 72 Fed. Reg. 14,681, 14,685 (Mar. 29, 2007) (codified at 40 CFR

§721.10007); curing agents, 74 Fed. Reg. 29,982, 29,985 (June 24, 2009) (codified at 40 CFR §721.10134); industrial solvents, 75 Fed. Reg. 4983, 4986 (Feb. 1, 2010) (codified at 40 CFR §721.10169); dye for imaging products, 77 Fed. Reg. 24,613, 24,617 (Apr, 25, 2012) (codified at 40 CFR §721.10415); coating additives, 80 Fed. Reg. 59,593, 59,596 (Oct. 2, 2015) (codified at 40 CFR §721.10854); film laminate in batteries and composite materials, 81 Fed. Reg. 81,250, 81,253 (Nov. 17, 2016) (codified at 40 CFR §721.10929); pigments for liquid and powder coatings, 83 Fed. Reg. 37,702, 37,704 (Aug. 1, 2018) (codified at 40 CFR §721.1102683); paint and coating removers, 84 Fed. Reg. 11,422 (Mar. 27, 2019) (codified at 40 CFR §751); and more.

In 1978, for example, EPA deployed TSCA to regulate manufacturers' use of chlorofluorocarbons (CFCs) as a propellant in commercial aerosols. *See* Fully Halogenated Chlorofluoroalkanes, 43 Fed. Reg. 11,318 (Mar. 17, 1978) (the "CFC Regulation"). EPA noted that manufacturers could easily substitute the CFC propellant with safer alternatives and that EPA would "provide[] for exemptions" "where there [was] no alternative." *Id.* at 11,318-19 (noting that "hydrocarbon and carbon dioxide propellants are available as alternatives" and that "there are nonaerosol alternatives such as pump sprays, waxes, liquids, and powders"). Aside from use in aerosols, the rule did not cover any other uses or emissions of CFCs. *Id.* To the contrary, EPA's view was that further regulation of CFCs would properly fall under the Clean Air Act, not TSCA. ENVIRONMENTAL PROTECTION AGENCY, EPA-560/12-79-003, REPORT ON THE PROGRESS OF REGULATIONS TO PROTECT STRATOSPHERIC OZONE 1 (1979) ("1979 EPA Report") ("If EPA finds that there is need to require control of CFC emissions from nonaerosol uses, EPA will use the authority of Section 155 of the Clean Air Act."). Accordingly, EPA later promulgated regulations under the Clean Air Act to limit other sources of CFCs. *See* 40 CFR §82 (1982).

In 2016, Congress amended TSCA as legislators raised concerns that the statute was insufficient to protect consumers from toxic chemicals embedded in "basic, everyday things." 162 Cong. Rec. H3,029 (daily ed. May 24, 2016) (Statement of Rep. Diana DeGette); *see also, e.g.*, *id.* at H3,025-26 (Statement of Rep. Frank Pallone) ("Had the law worked effectively from the beginning, we might never have had BPA in baby bottles or toxic flame retardants in children's pajamas and in our living room couches."). Legislators emphasized that an effective TSCA needed to restrict toxic chemicals "that are on the market," in "active commerce." *Id.* at H3,028 (statement of Rep. Peter Welch); 162 Cong. Rec. S,3516 (daily ed. June 7, 2016) (joint statement of Senate Democratic negotiators); *see also, e.g.*, *id.* at S3521 (statement of Sen. James Inhofe) ("[T]his law regulates products in commerce[.]"); 162 Cong. Rec. H3,027 (daily ed. May 24, 2016) (statement of Rep. Paul Tonko) (emphasizing need "to get the most harmful chemicals out of commerce"); *id.* at H3,029 (statement of Rep. Diana DeGette) ("[F]or the first time, Americans will know exactly what is out there in commerce[.]"); *id.* (statement of Rep. Steny Hoyer) (describing TSCA's goal "to protect Americans from the risk posed by chemicals in commerce").

Many legislators voiced particular concern that the Act's cost-benefit and "least burdensome" requirements, 15 U.S.C. §2605 (2012) (amended 2016), were stymying EPA's efforts to regulate dangerous chemicals that otherwise fell squarely within TSCA's ambit. Several legislators homed in on the Fifth Circuit's decision regarding asbestos in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), as emblematic of the need for change. *See, e.g.*, 162 Cong. Rec. H3,025-26 (daily ed. May 24, 2016) (Statement of Rep. Frank Pallone) ("That court decision came down 25 years ago. Imagine the lives that could have been saved and the injuries that could have been prevented if that ban had stood."); *id.* at H3,029 (statement of Rep. Mark Green) ("[T]here are significant improvements over current law, including a fix of the 1991 'asbestos decision' that

crippled the [EPA's] ability to act."); *id.* (statement of Rep. Steny Hoyer) ("Under current law, it has become hard for the EPA to ban even substances that are known to cause cancer, such as asbestos."); 162 Cong. Rec. S3,514 (daily ed. June 7, 2016) (statement of Sen. Edward Markey) ("[W]hen the industry successfully overturned the EPA's proposed ban on asbestos, it also rendered the Toxic Substance[s] Control Act all but unusable."); *id.* at S3,516 (joint statement of Senate Democratic negotiators) (quoting and criticizing *Corrosion Proof Fittings*).

Congress then enacted an amendment specifying that EPA should assess risk "without consideration of costs or other nonrisk factors." 15 U.S.C. §§2605(a); 2605(b)(4)(A). Rather than refocusing EPA on a different *type* of danger—as Congress had done when it amended TSCA to target asbestos, lead, mercury, school toxins, radon, and formaldehyde—the 2016 amendment merely altered how EPA was to determine whether a "risk" was "unreasonable." 15 U.S.C. §2605(a). Legislators also made clear that in their amended statute "'[u]nreasonable risk' does not mean no risk; it means that EPA must determine, on a case-by-case basis, whether the risks posed by a specific high priority substance are reasonable in the circumstances of exposure and use." 162 Cong. Rec. S3,522 (daily ed. June 7, 2016) (statement of Sen. David Vitter).

B. Plaintiffs Petition EPA To "Phase Out Greenhouse Gas Pollution."

On June 16, 2022, Plaintiffs submitted to EPA their "Petition to Phase Out Greenhouse Gas (GHG) Pollution to Restore a Stable and Healthy Climate." DE1-1:1. Through the Petition, Plaintiffs "expressly request[ed] that EPA render a determination" that the "manufacture, processing, distribution in commerce, use, or disposal" of greenhouse gases and fossil fuels "present an unreasonable present risk of injury to health or the environment," and thus sought "to phase out the anthropogenic manufacture, processing, distribution, use, and disposal of greenhouse gas (GHG) emissions, fossil fuels, and fossil fuel emissions." *Id.* at 3; *see also, e.g.*, *id.* at 7 (same), 44

(advocating "a phaseout of fossil fuel emissions"). Throughout their Petition, Plaintiffs continually referred to these various groups of chemical compounds—*i.e.*, "greenhouse gas (GHG) emissions, fossil fuels, and fossil fuel emissions"—as "subject chemical substances and mixtures." *Id.* They never explained why *emissions* from the use of various commercial products and chemical compounds would be "subject" to regulation under TSCA—a statute designed to "regulat[e] … interstate commerce" involving "chemical substances and mixtures." 15 U.S.C. §2601(a)(3).

Plaintiffs nevertheless proceeded on the presumption that TSCA covers greenhouse-gas emissions and asserted that "[o]ne central factual predicate and two legal suppositions undergird[ed] the Petition." *Id.* at 4. The "factual predicate," according to Plaintiffs, was that "atmospheric concentrations of key greenhouse gases" had exceeded "the danger zone" and thus needed to "be dialed back to eliminate their unlawful imposition on humanity and nature." *Id.* The purported "legal suppositions" arose under TSCA. Based on Plaintiffs' reading of the Act, TSCA authorizes EPA to (1) "restrict or phase-out the manufacture (including production and importation) and, as warranted, the processing, distribution, use, or disposal" of greenhouse gas emissions, fossil fuels, and fossil fuel emissions; and (2) "compel industry to remove and, as necessary, to securely sequester legacy GHG emissions." *Id.*

Plaintiffs dedicated a section of the Petition to their understanding of EPA's legal authority to regulate fossil-fuel use under TSCA. They began with the United States' participation in the "1992 United Nations Framework Convention on Climate Change" and its involvement in the "Paris Agreement." DE1-1:9. Then they discussed TSCA. *Id.* at 10. Noting that "TSCA conveys express authority to the Agency to pursue restrictions by rule where it determines that 'the manufacture, processing, distribution in commerce, use or disposal of a chemical substance or mixture,

or any combination of such activities, present "an unreasonable risk of injury to health or the environment,"'" *id.* (quoting 15 U.S.C. §2605) (emphasis added by Plaintiffs), they contended that "[f]ossil fuel GHG emissions manifestly present" an "imminent, unreasonable, serious and widespread risk" falling within TSCA's regulatory scope, *id.* Plaintiffs again elided the question whether "emissions"—that is, the ultimate byproduct of chemicals "manufacture[d], process[ed], distribut[ed] in commerce, use[d] or dispos[ed] of"—fell within TSCA's ambit. *Id.*

Plaintiffs' statutory analysis then became more granular. Acknowledging that the "Citizens' petitions" provision of TSCA (15 U.S.C. §2620) required them to "'set forth the facts which it is claimed establish that it is *necessary* to issue, amend, or repeal a rule,'" DE1-1:11 (quoting 15 U.S.C. §2620(b)(1)) (emphasis added), they observed that "Congress did not define the term 'necessary[]'" and thus interpreted the term to mean "needed" or "warranted under the circumstances," *id.* (quotation marks omitted). Plaintiffs further acknowledged that while TSCA's regulation applies to chemicals presenting an "unreasonable risk of injury to health or the environment," the term "unreasonable risk" also "is not expressly defined in TSCA." *Id.* at 12. Based on the 2016 amendments, *see supra* §A, Plaintiffs concluded that a "lowered financial cost" cannot support a reasonability determination and that, instead, "a risk must be deemed 'unreasonable' unless the running of it is necessary to the avoidance of a greater injury to health or the environment," DE1-1:12. Only TSCA, Plaintiffs asserted, "authorizes the Agency" to effect their proposed rules. *Id.* at 23.

Having purported to establish EPA's legal authority to enact a "phaseout of fossil fuel emissions" (*id.* at 44) under Section 6 of TSCA, Plaintiffs offered additional details about their proposal. They noted that the chemicals they seek to regulate drive things like "the internal com-

bustion engine" and the Nation's energy production, *id.* at 16, and even "observe[d] that humanity[] reli[es] on fossil fuels to meet fundamental energy needs," *id.* at 39. Apparently acknowledging that "fundamental energy needs" on which "humanity[] reli[es]" are likely to implicate questions of national importance (*id.*), Plaintiffs reasoned that TSCA is the tool to resolve these questions because it refers to "the environment," a term that "admits of no local or locale limitation" and thus does not "constrain[]" TSCA "to bite-sized problems." *Id.* at 18 (quoting 15 U.S.C. §2603(6)).

Although Plaintiffs recognized that 15 U.S.C. §2620 required them to show their proposal was "necessary" and interpreted that term to mean "warranted under the circumstances," DE1-1:11, the Petition never addressed the myriad other fossil-fuel-reduction initiatives taking place at the federal, state, and local levels. And while noting both that a reasonable-risk evaluation requires consideration of human health and welfare (*id.* at 12) and that "humanity[] reli[es] on fossil fuels to meet fundamental energy needs" (*id.* at 39), the Petition never explained what fuel sources are fit to take the place of fossil fuels and thus ensure "humanity's" ability to continue "meet[ing] fundamental energy needs."

C. EPA Denies Plaintiffs' Petition.

On September 21, 2022, EPA rejected Plaintiffs' proposal. DE1-2:1. The Agency identified a bevy of fatal defects.

First, EPA explained, Plaintiffs' demand for a risk assessment of greenhouse gases (DE1-1:7) necessarily failed because "[c]itizens may not petition under TSCA section 21 for a standalone risk determination." DE1-2:3. More significantly, EPA concluded that, "[a]s an initial matter, the petitioners' request for a rule [was] insufficient because it lack[ed] specificity, especially *in comparison to the magnitude of the request*." *Id.* at 5 (emphasis added). Plaintiffs had failed to

"sufficiently clarify the contours of the 'rule' under TSCA they assert[ed] it [was] necessary for the Agency to issue," which was especially damning given that "Petitioners' request potentially affects an extraordinary number of industries and activities (*e.g.*, agriculture, transportation, utilities, etc.) including innumerable small sources of emissions (*e.g.*, residential homes)." *Id.* And absent the requisite specificity, EPA had no way to "determine within 90 days whether the petition set[] forth the facts which it is claimed establish that it is necessary to issue a TSCA section 6(a) rule." *Id.* Nor did Plaintiffs' Petition provide enough information for EPA to determine "whether any part of the requested rule … falls beyond the outer bounds of EPA's regulatory authority under TSCA section 6(a)." *Id.*

In this vein, EPA also noted that Plaintiffs had failed to specifically identify the chemical substances over which they demanded regulation. *Id.* Plaintiffs "attempted to group together very different types of substances under one defined term that the petition labeled as 'subject chemical substances and mixtures.'" *Id.*; *accord* DE1-1:3 (labeling "greenhouse gas (GHG) emissions, fossil fuels, and fossil fuel emissions" as "'subject chemical substances and mixtures'"). "Yet even within each of these three broad groups, there is a multitude of chemical substances that might fit," and "the petition did not specify the extent of the chemical substances or mixtures for which rulemaking action was sought and did not explain the basis or boundary for any categorization." DE1-2:5.

EPA further determined Plaintiffs had "failed to demonstrate that regulation under TSCA is 'necessary' under the unique circumstances presented." *Id.* The Agency specifically focused on President Biden's "whole of government approach to using federal tools to reduce GHG emissions"; the Bipartisan Infrastructure Law of 2021 (Infrastructure Investment and Jobs Act), Pub. L. No. 117-58, 135 Stat. 429, which, EPA asserts, "advances a variety of infrastructure investments

that will reduce transportation-related GHG emissions"; and the Inflation Reduction Act of 2022 (IRA), Pub. L. No. 117-169, 136 Stat. 1818, which EPA described as "the most significant climate legislation ever." *Id.* at 6-7. By foregoing any analysis of these various programs' impacts, Plaintiffs could not "demonstrate[] that all of the existing and anticipated federal programs … will fail to achieve sufficient progress towards meeting U.S. GHG reduction targets." *Id.* at 6. Plaintiffs' failures relieved EPA from having to "opine on the outer extent of [its] authority under TSCA to phase out greenhouse gases or fossil fuels." *Id.*

Equally critically, the Agency concluded that, contrary to Plaintiffs' reading of the law, "EPA does not have legal authority under TSCA to require removal and sequestration of historical GHG emissions … or to establish and atmospheric GHG abatement fund." *Id.* at 9. This was more than a minor issue given the way Plaintiffs envisioned their proposed rulemaking. "[R]emov[ing] and securely sequester[ing] legacy GHG emissions" or alternatively "pay[ing] into an Atmospheric Carbon Abatement fund" were integral components of Plaintiffs' Petition, DE1-1:30; indeed, Plaintiffs referred to EPA's supposed ability to "compel industry to remove and, as necessary, to securely sequester legacy GHG emissions" as one of "two legal suppositions" which "under-gird[ed]" their proposal. *Id.* at 4. But, according to EPA, that essential "supposition[]" is patently wrong: "EPA considers such historical GHG emissions to be legacy disposals … and EPA has interpreted legacy disposals to be excluded from those 'conditions of use' that EPA evaluates and regulates under TSCA." DE1-2:9 (citing *Safer Chemicals v. EPA*, 943 F.3d 397, 425-26 (9th Cir. 2019) for "upholding EPA's exclusion of legacy disposals from consideration as conditions of use under TSCA Risk Evaluation rule").

Accordingly, "EPA denied the request to initiate a proceeding for the issuance of a rule under TSCA section 6(a)." *Id.*

D. Plaintiffs Repackage Their Petition as a Federal Lawsuit.

On November 12, 2022, Plaintiffs filed their complaint and initiated this lawsuit. DE1. In their complaint, Plaintiffs "incorporate[d] by reference all facts alleged in [their] Petition," *id.* at 18, and ultimately sought relief mirroring what the Biden Administration previously denied: "Compel rulemaking pursuant to Plaintiffs' Petition," *id.* at 27.

Plaintiffs open their complaint with the assertion that the relief they seek is "necessary … to eliminate the unreasonable risk of injury that GHGs present to health or the environment." *Id.* at 2. They then offer several examples of the "injury that GHGs present" to them specifically. They allege that such injuries include suffering from "smoke incursions stemming from wildfires" that have become "more intense and more widespread due to climate change"; being forced "to cut back on outdoor activities, including even walking" "on pain of further damaging their health"; personal expenditures "to purchases in-room air filters capable to removing [*sic*] fine particulates"; increasingly "encounter[ing] … the Portuguese Man o' War" while swimming in the Pacific Ocean; and learning that "young people near and dear … have been immediately impacted by their sense that grownups in general, and the government in particular," have failed "to actually fix the problem" of "climate change." *Id.* at 4-10.

Plaintiffs then divide their complaint into two substantive sections. First, they present a section which provides an overview of their Petition and discusses TSCA (at 15-18) and the Petition's primary assertions (at 18-21). They title their second section, "Defendants' Denial of Plaintiffs' Petition," and home in on the lack of any inter-party dispute over the factual "risk[s] of greenhouse gas emissions" (at 21-23) before asserting that the federal government's efforts to reduce emissions are "legally insufficient" (at 23-26).

Plaintiffs reallege various facts from their Petition and offer short responses to some (but not all) of EPA's reasons for rejecting their requests. For example, in responding to EPA's unequivocal declaration that it "does not have legal authority under TSCA to require removal and sequestration of historical GHG emissions … or to establish and atmospheric GHG abatement fund," DE1-2:9, rather than offer competing statutory interpretation Plaintiffs provide an anecdote about an in-person meeting they had with "over a dozen EPA personnel" and aver that "none of them indicated that the Agency believed it lacked adequate authority under TSCA to compel removal of legacy GHG emissions," DE1:17-18.[2] They take the same tack regarding EPA's conclusion that Plaintiffs failed to show the proposed rulemaking was "necessary," DE1-2:5-6, again ignoring 15 U.S.C. §2620's express text and asserting that "[n]one of" the EPA personnel with whom they met "provided any indication that the Agency deemed itself to already be taking sufficient action," DE1:17-18.

Plaintiffs come closest to engaging the legal questions at issue when they declare the federal government's environmental efforts "legally insufficient" and claim that "TSCA mandates that EPA regulate to eliminate the risk of injury to health and the environment posed by greenhouse gas emissions …." *Id.* at 23. Despite EPA's statement that "a multitude of chemical substances … might fit" within this broad bucket of "emissions" and that Plaintiffs had failed to "explain the basis or boundary for any categorization," DE1-2:5, in their complaint Plaintiffs still decline to specify which chemicals they contend TSCA authorizes EPA to regulate. (And, as in their Petition, Plaintiffs still decline to explain how TSCA permits EPA to regulate "emissions" at all.) Instead, they assert EPA's efforts are "legally insufficient" because they are "insufficient to

[2] In their Petition, Plaintiffs maintained that TSCA "clearly permits the Agency to address legacy emissions." DE1-1:16. They appear to have abandoned that position in their complaint.

meet the 1.5° C warming target" established under the Paris Agreement, DE1:23, and because EPA referred to "future anticipated mitigation efforts" without "specify[ing] the contours of these magical future efforts," *id.* at 24.

Plaintiffs further chide EPA's discussion of ongoing federal efforts to combat pollution as "entirely irrelevant to the operative statutory question—whether the chemicals and mixtures at issue present an unreasonable risk of injury to health or the environment." *Id.* at 24-25. But Plaintiffs never attempt to explain what constitutes an "unreasonable risk" in the first place.

ARGUMENT

I. The Major Questions Doctrine Makes Clear That EPA May Not Use TSCA To "Phase Out Greenhouse Gas Pollution."

In its rejection of Plaintiffs' Petition, EPA twice acknowledged that the proposed rulemaking might "fall[] beyond the outer bounds of EPA's regulatory authority under TSCA section 6(a)." DE1-2:5; *see also id.* at 6 (noting that, but for its facial defects, the Petition might otherwise force Agency to "opine on the outer extent of [its] authority under TSCA to phase out greenhouse gases or fossil fuels"). The Agency's skepticism over its authority to "phase out" fossil fuels and greenhouse gases is appropriate. Just last term the Supreme Court reaffirmed the "major questions doctrine," explaining that there exist "'extraordinary cases' … in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022) (quoting *Brown & Williamson*, 529 U.S. at 159-60). In such cases "[t]he agency instead must point to 'clear congressional authorization' for the power it claims." *Id.*

The legal theory underlying Plaintiffs' claims—*i.e.*, that TSCA grants EPA the power to eliminate the Nation's fossil-fuel usage—unequivocally implicates such an "extraordinary case[]."

Id. at 2608. Indeed, Plaintiffs demand nothing less than to "phase out" all of the Nation's "anthropogenic manufacture, processing, distribution, use, and disposal of greenhouse gas (GHG) emissions, fossil fuels, and fossil fuel emissions." DE1-1:3. As EPA has itself acknowledged, Plaintiffs' proposed rulemaking "potentially affects an extraordinary number of industries and activities" along with "innumerable small sources of emissions"—including "residential homes." DE1-2:5. Equally galling, despite acknowledging that "humanity[] reli[es] on fossil fuels to meet fundamental energy needs," DE1-1:39, Plaintiffs do not even attempt to show that alternative sources of energy could meet these demands.

The "economic and political significance" of Plaintiffs' requested relief resists overstatement. *West Virginia*, 142 S. Ct. at 2608. And instead of showing that EPA enjoys "clear congressional authorization" to enact Plaintiffs' proposed rules, *id.* at 2609, they ask this Court to divine implicit authority to deindustrialize the United States based on an implausible, decontextualized, and atextual reading of TSCA. This Court should follow EPA's lead and reject Plaintiffs' demands.

A. Plaintiffs' Petition Presents a Major Question.

At its core, the major questions doctrine is a form of clear statement rule under which Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160). In such circumstances clear language is necessary because "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,'" and federal courts "must be guided to a degree by common

sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133.

The major questions doctrine thus flows from a well-accepted assumption about legislation: "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). But the doctrine's roots run much deeper. "In Article I, 'the People' vested '[a]ll' federal 'legislative powers ... in Congress.'" *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting U.S. Const. Preamble; Art. I, §1). This means that Congress may not delegate "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 20 (1825) (Marshall, C.J.). And while litigants, academics, and courts alike might debate the precise contours of "legislative" power, *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring), "where a serious doubt of constitutionality is raised[] it is a cardinal principle that [the Supreme Court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided," *Crowell v. Benson*, 285 U.S. 22, 62 (1932). "[T]he Constitution's rule vesting federal legislative power in Congress"—and the major questions doctrine's respect for that rule—is therefore "vital to the integrity and maintenance of the system of government ordained by the Constitution." *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

So where, for example, the Supreme Court was tasked with determining "whether EPA could construe the term 'air pollutant,' in a specific provision of the Clean Air Act, to cover greenhouse gases," the Court "noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before

been subject to such requirements," and thus rejected such a reading despite its "textual plausibility." *West Virginia*, 142 S. Ct. at 2608 (citing *UARG*, 573 U.S. at 324). The Court employed similar analysis when the Attorney General declared that a statute authorizing him to revoke medical licenses "inconsistent with the public interest" (21 U.S.C. §823(f)) permitted him to revoke medical licenses from any physician prescribing substances for assisted suicide—even where euthanasia was lawful under state law. *See Gonzales v. Oregon*, 546 U.S. 243 (2006). "The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation," the Court explained, was "not sustainable." *Id.* at 267. And the Court employed the same framework in its "recent decision invalidating the Occupational Safety and Health Administration's mandate that '84 million Americans . . . either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense.'" *West Virginia*, 142 S. Ct. at 2608 (quoting *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam) (*OSHA*)). Noting that OSHA's mandate "applie[d] to roughly 84 million workers," the Court found it "telling that OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation of [that] kind—addressing a threat that is untethered, in any causal sense, from the workplace." *OSHA*, 142 S. Ct. at 662, 666.

Plaintiffs' legal theory would grant EPA the authority to issue decisions of "vast 'economic and political significance,'" *UARG*, 573 U.S. at 324, teeing up precisely the sort of "extraordinary case[]" that warrants the major question doctrine's application, *West Virginia*, 142 S. Ct. at 2608. Start with Plaintiffs' own averments. They filed their Petition—and this lawsuit, through which they seek to "[c]ompel" EPA to enact their Petition (DE1:27)—to "phase out the anthropogenic manufacture, processing, distribution, use, and disposal of greenhouse gas (GHG) emissions, fossil fuels, and fossil fuel emissions." DE1-1:3. They acknowledge that the compounds and products

they seek to "phase out" "drive[] the pistons in an internal combustion engine" (*id.* at 16), "made automobile and aircraft transportation possible" (*id.* at 44), "made heating of homes and commercial buildings convenient," (*id.*), and currently supply almost all of Americans' energy needs (*id.* at 45). And they even note that it's not just America that finds fossil fuels useful; "humanity[]" itself currently "reli[es] on fossil fuels to meet fundamental energy needs." *Id.* at 39; *see also* DE1-2:5 ("Petitioners' request potentially affects an extraordinary number of industries and activities …."). On Plaintiffs' theory, when Congress enacted TSCA in 1976 (or when it amended the Act in 2016), it delegated to EPA control over all Americans' energy consumption. To say nothing of such a delegation's constitutionality, a conveyance of more significant economic power is difficult to fathom. *UARG*, 573 U.S. at 324.

Not that the political implications of Plaintiffs' theory are any less significant. "Phas[ing] out" (DE1-1:3) fossil fuels by Article II or Article III fiat would quash "earnest and profound debate across the country," *Gonzales,* 546 U.S. at 267-68, that has taken place with Congress under Article I. Indeed, the legislative branch has been heavily involved in issues touching on climate change and fossil-fuel consumption. *See, e.g.*, S. Con. Res. 8, S. Amend. 646, 113th Cong. (2013) (considering carbon tax); Climate Protection Act of 2013, S. 332, 113th Cong. (2013) (fees on greenhouse gas emissions); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009); American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009) (greenhouse gas cap-and-trade program); *see also, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 506-09 (2007) (describing congressional efforts to address climate change). Section 6 of TSCA did not end that important national discussion.

The scope of Plaintiffs' proposed rulemaking—which could, by EPA's telling, exert power over "an extraordinary number of industries and activities" and even "residential homes," DE1-

2:5—well exceeds that of rules affecting the national cigarette market (*Brown & Williamson*, 529 U.S. 120), "large office and residential buildings, hotels, large retail establishments, and similar facilities" across America (*UARG*, 573 U.S. at 310 (quotation marks omitted)), and even the national energy grid (*West Virginia*, 142 S. Ct. 2587). Because Plaintiffs' reading of TSCA would require Congress to have delegated to EPA "unheralded power to regulate 'a significant portion of the American economy,'" *UARG*, 573 U.S. at 324, "both separation of powers principles and a practical understanding of legislative intent" require Plaintiffs to "point to 'clear congressional authorization' for the power" they assume belongs to EPA, *West Virginia*, 142 S. Ct. at 2609. As the next section explains, they cannot do so.

B. TSCA Contains No Clear Statement Permitting EPA to "Phase Out Greenhouse Gas Pollution."

The Supreme Court's major questions cases make clear that ambiguous textual inferences are insufficient to constitute "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2609 (quoting *UARG*, 573 U.S. at 324). In *Brown & Williamson*, *UARG*, *Gonzales*, *OSHA*, and others, all of the "regulatory assertions had a colorable textual basis." *Id.* But that didn't cut it. "[C]ommon sense as to the manner in which Congress [would have been] likely to delegate" the asserted power remained essential to the statutory analysis. *Brown & Williamson*, 529 U.S. at 133. This is because "Congress does not alter a regulatory scheme's fundamental details in vague terms or ancillary provisions." *Whitman*, 531 U.S. at 458. Or, as then-Judge Kavanaugh put it, "[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity … an ambiguous grant of statutory authority is not enough." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

Instead, where proposed agency power implicates a major question, "courts must look to the legislative provisions on which the agency seeks to rely with a view to their place in the overall

statutory scheme." *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring) (discussing *Brown & Williamson*, *Gonzales*, among others). They should also consider "the age and focus of the statute … in relation to the problem the agency seeks to address." *Id.* at 2623; *see also UARG*, 573 U.S. at 324 (rejecting agency's "claim[] to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy") (quotation marks omitted). And, of course, an agency's "past interpretations of the relevant statute" help justify or reject a newly proposed interpretation. *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring); *see also OSHA*, 142 S. Ct. at 666 ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace.").

So, where in TSCA do Plaintiffs find "clear congressional authorization" (*UARG*, 573 U.S. at 324) to "phase out" (DE1-1:3) fossil-fuel emissions? They never say. But the portion of text on which their Petition and complaint almost entirely rely comes from TSCA §6, which discusses EPA's ability to "prohibit[] or otherwise restrict[] the manufacturing, processing, or distribution in commerce" of chemicals that "present[] an unreasonable risk of injury to health of the environment." 15 U.S.C. §2605(a); *see* DE1:2, 13-15. This language cannot be read to constitute "clear congressional authorization" to exert plenary authority over the Nation's energy consumption. *West Virginia*, 142 S. Ct. at 2609 (quoting *UARG*, 573 U.S. at 324).

1. Interpreting the text of TSCA §6 to imbue EPA with the power to regulate the energy consumption of every business and residential home in America (DE1-2:5) fails to read "the words of [TSCA] … in their context and with a view to their place in the overall statutory scheme"—a "fundamental canon of statutory construction." *Davis v. Michigan Dept. of Treasury*, 489 U.S.

803, 809 (1989). Most straightforwardly, nothing in TSCA remotely suggests EPA has the power to regulate the energy sources on which "humanity[] reli[es]" (DE1-1:39) out of existence.[3]

Moreover, as noted above, *supra* Background §A, TSCA furnishes EPA with the authority to regulate "potentially dangerous chemicals *in U.S. commerce*," CRS Report 1 (emphasis added); *see also* 15 U.S.C. §2601(a)(3) (referring to "the effective regulation of *interstate commerce in such chemical substances*") (emphasis added). Nowhere does the statute provide authority to regulate chemicals that are not themselves a part of commercial activity. And by definition, emissions—that is, the byproducts or consequences of converting commercially traded fuel into energy—are not "chemical substances" in "interstate commerce." 15 U.S.C. §2601(a)(3). Plaintiffs' concession that "no other federal statute … authorizes the Agency" to effect the rulemaking they seek (DE1-1:23) does not imply such power must exist under TSCA—rather, it confirms that *no statute* provides EPA the power to enact Plaintiffs' extraordinary demands.

Congress did not pass TSCA to regulate emissions, and nothing in the statute provides EPA the authority to do so. Just as the Supreme Court rejected OSHA's claim that its "authority to regulate occupation-specific risks" would allow it to enact a "general public health measure," *OSHA*, 142 S. Ct. at 665-66, Plaintiffs' "indiscriminate approach fails to account for [the] crucial distinction" (*id.*) between chemicals which are the objects of "interstate commerce" (15 U.S.C. §2601(a)(3)) and those that are not. Simply put, TSCA allows EPA to regulate specific chemicals

[3] Plaintiffs claim "it was not Plaintiffs' burden to provide a detailed draft rule," DE1:22, and that "the range of alternatives required for final policy choices" need not happen "at this stage," DE1-1:15. But TSCA requires EPA to consider precisely these factors before issuing a rulemaking under TSCA §6. *See* 15 U.S.C. §2605(c)(2)(A), (g)(1). Plaintiffs offer no support for the argument that EPA must assess a risk's reasonability without considering its potential downsides, which in turn ignores the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 142 S. Ct. at 2607 (quoting *Davis*, 489 U.S. at 809).

in commerce that present a direct threat to health or the environment, *see, e.g.*, 15 U.S.C. §2601; CRS Report 1-3, not to order "a phaseout of fossil fuel emissions," DE1-1:44.

2. TSCA's "age" and EPA's "past interpretations" of the Act underscore this conclusion. *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring). The statute has existed since 1976; not once in the nearly half-century since its inception has EPA attempted to use the Act to regulate national energy consumption. *See supra* Background §A.

Though Plaintiffs point to EPA's 1978 regulation of chlorofluorocarbons (CFCs), *see* CFC Regulation, in an attempt to support their reading of the statute (DE1:15-16; DE1-1:17), that regulation decisively undermines their position. First off, the regulated CFCs were objects—not mere byproducts—of commerce. As explained in its 1979 report on the CFC Regulation, producers of commercial aerosols used the CFCs "as propellants in aerosol products." 1979 EPA Report 1. Moreover, that report also emphasized the limited impact of EPA's new rule. There, the agency explained that "[a]t the time of publication of the EPA rule, there were six manufacturers of CFCs in the United States" and "the regulation of aerosols would not have a major effect on these firms." *Id.* at 12. And while "[a]pproximately 2,000 jobs were estimated to be lost in the filling, valve, and container segments of the aerosol industry," EPA concluded that "[w]ith the exception of the filling segment of the aerosol industry, the impact on small businesses was expected to be minimal." *Id.* Tellingly, EPA's 1979 report further stated that "[i]f [the Agency] finds that there is a need to require control of CFC emissions from nonaerosol uses, EPA will use the authority of Section 155 of the Clean Air Act." *Id.* at 1. The narrow, targeted CFC Regulation enacted under TSCA bears no resemblance to the sprawling rulemaking Plaintiffs demand.

What's more, as explained above (*supra* Background §C) EPA seems to acknowledge these problems. In its denial of Plaintiffs' Petition, the agency twice refers to the Petition's potential to

drag EPA past the limits of its statutory authority, *see* DE1-2:5, 6, and expressly acknowledges the "extraordinary number of industries and activities" Plaintiffs' proposed rulemaking would impact, *id.* at 5. And EPA also denied a similar Petition in 2016. *See* DE1-1:13 (discussing "earlier petition filed by present Petitioner Viviani and the Center on Biological Diversity"). Though that petition sought a narrower rulemaking focused on carbon dioxide ($CO_{2)}$ emissions and their impact on oceans, *id.*, the Agency's response was telling. Addressing the petitioners' contention that a provision of TSCA §6 allows the agency to compel various CO_2-mitigation measures, the agency explained that the provision "is intended to address chemical substances and mixtures that *move in the stream of commerce, not air pollution that is a byproduct* of industrial and other activity on a global scale." Carbon Dioxide Emissions and Ocean Acidification; TSCA Section 21 Petition; Reasons for Agency Response, 80 Fed. Reg. 60,577, 60,581 (Oct. 7, 2015) (emphasis added).

"[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *West Virginia*, 142 S. Ct. at 2610 (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)). And "it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant." *UARG*, 573 U.S. at 324. EPA's unequivocal "want of assertion of power" confirms exactly what its "established practice" suggests: TSCA does not provide EPA the power to "phase out greenhouse gas pollution." DE1-1:1.

II. Even Taken At Face Value, TSCA's Plain Text Undercuts Plaintiffs' Arguments.

But it's not just the major questions doctrine that dooms Plaintiffs' claim. TSCA's plain text also cuts against their position. No plausible reading of TSCA authorizes the Agency to ad-

dress legacy emissions, regulate chemicals outside the stream of commerce, or fundamentally redesign our Nation's energy consumption. Yet Plaintiffs' proposal relies on every one of these faulty assumptions. This section responds to each in turn.

A. TSCA Does Not Authorize EPA to Impose Cleanup Costs or Obligations on Fossil-Fuel Producers.

The law in this Circuit is unequivocal: "TSCA does not address a substance that has already been disposed of and remains so." *Safer Chemicals,* 943 F.3d at 426; *see also* DE1-2:9 (EPA citing *Safer Chemicals* to support proposition the Agency "does not have legal authority under TSCA to require removal and sequestration of historical GHG emissions from the atmosphere, or to establish an atmospheric GHG abatement fund …."). Ignoring controlling precedent and the view of the Agency they ask this Court to compel, Plaintiffs' Petition contends TSCA "clearly permits" EPA to order removal and sequestration of legacy emissions because it "authorizes EPA to impose requirements 'prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture. . . by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes.'" DE1-1:16 (quoting 15 U.S.C. §2605(a)(6)(A)). Plaintiffs' conclusion simply does not follow from the textual premise. The Ninth Circuit was correct when it held that "TSCA unambiguously does not require past disposals to be considered," *Safer Chemicals*, 943 F.3d at 425, and Plaintiffs offer no argument to the contrary.

First, TSCA authorizes EPA "to determine whether a chemical substance presents an unreasonable risk. . . *under the conditions of use*," 15 U.S.C. §2605(b)(4)(A) (emphasis added), and the statute defines "conditions of use" as circumstances "under which a chemical substance is intended, known, or reasonably foreseen *to be* manufactured, processed, distributed in commerce, used, or disposed of," *id.* at §2602(4) (emphasis added). As the Ninth Circuit explained, "when 'to be' is combined with 'used' and 'disposed of,' two plain meanings result: future uses, and future

disposals." *Safer Chemicals*, 943 F.3d at 424. Thus, "TSCA's statutory definition of 'conditions of use' unambiguously does not reach legacy disposals." *Id.* at 426. In other words, "TSCA does not address a substance that has already been disposed of and remains so." *Id.*

Second, EPA has repeatedly taken the position that it cannot use TSCA to regulate past emissions. DE1-2:5; 80 Fed. Reg. 60,577, at 60,581 (Oct. 7, 2015); DE22:43. As EPA has explained, although TSCA provides "*some* authority to address past harms, it is intended to address chemical substances and mixtures that move in the stream of commerce, not air pollution that is a byproduct of industrial and other activity on a global scale." 80 Fed. Reg. 60,577, at 60,581 (Oct. 7, 2015) (emphasis added). After all, "[a]pplying this provision to past anthropogenic CO_2 emissions does not make sense where CO_2 has mixed throughout the global atmosphere and there is no way to connect the CO_2 with any one entity for repurchase." *Id.* EPA reiterated its reasoning in its 2022 denial, unequivocally stating that it "does not have legal authority under TSCA to require removal and sequestration of historical GHG emissions from the atmosphere, or to establish an atmospheric GHG abatement fund and require historical GHG emitters to pay into the fund based on such historical GHG emissions." DE1-2:9 (citing *Safer Chemicals*, 943 F.3d at 425-26). When even "EPA … admits the statute is not designed to grant" authority over past emissions, it is "patently unreasonable—not to say outrageous"—for Plaintiffs to insist on the opposite. *UARG*, 573 U.S. at 324.

Notwithstanding the statute's plain text, the Ninth Circuit's clear precedent, and EPA's repeated rejections, Plaintiffs contend that the authority to "prohibit[] or otherwise regulat[e] any manner or method of disposal of such substance or mixture" grants authority to impose cleanup costs and obligations. DE1-1:16 (quoting 15 U.S.C. §2605(a)(6)(A)). But regulating a "manner or method of disposal," *id.*, is categorically different from regulating "a substance that has already

been disposed of and remains so." *Safer Chemicals*, 943 F.3d at 426. Tellingly, Plaintiffs never cite *Safer Chemicals* (or any other case) despite EPA's citation in its denial of Plaintiff's Petition. "When there is apparently dispositive precedent, [a litigant] may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari but may not simply ignore it." *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (Posner, J.). Yet that is precisely the tack Plaintiffs take here.

With Plaintiffs' position on past emissions foreclosed, they attempt to confuse the issues by citing examples in which CO_2 supposedly constitutes a commercial product rather than an emission. DE1-1:16 (stating that "CO_2 is the chemical product that drives the pistons in an internal combustion engine" and that "CO_2 is used in enhanced oil recovery"). Not only are these examples highly questionable (people usually purchase gasoline, not CO_2, when they fill up their tanks), but they're irrelevant; Plaintiffs do not merely ask EPA to regulate the *ongoing use* of CO_2 in driving pistons or recovering oil—they demand that EPA regulate *past emissions* of CO_2. Even spotting Plaintiffs their strained examples, these arguments do nothing to disturb the conclusion that "TSCA does not address a substance that has already been disposed of and remains so." *Safer Chemicals*, 943 F.3d at 426.

B. EPA's 1978 Regulation of Chlorofluorocarbons Highlights the Errors in Plaintiffs' Interpretation of TSCA.

EPA's 1978 regulation of CFCs provides an ordinary example of a targeted regulation restricting a single use of a single substance for which feasible alternatives existed. Thus, contrary to Plaintiffs' contentions, the regulation provides no support for the proposition that EPA has authority to impose vast regulations impacting the very operations that "humanity[] reli[es] on … to

meet fundamental energy needs." DE1-1:39. Just the opposite—EPA's targeted CFC regulation underscores the flaws in Plaintiffs' boundless demands.

The 1978 rule restricted the use of CFCs *in* commercial products—not the mere emission of CFCs—reflecting EPA's correct and long-standing understanding that TSCA only grants authority to regulate substances in commerce. The 1978 regulation targeted manufacturers' use of CFCs as a propellant in commercial aerosols; it did not purport to regulate emissions themselves. CFC Regulation at 11,319. This limited action under TSCA makes sense, since it is "the Clean Air Act," not TSCA, that "specifically address[es] the protection of the ozone layer." *Id.* at 11,319. Accordingly, EPA noted that any further regulation of CFCs would properly fall under the Clean Air Act. *See* 1979 EPA Report at 1. Whereas the Clean Air Act explicitly authorizes EPA to conduct "air pollution control," 42 U.S.C. §7401(a)(3), TSCA has no such language. Accordingly, EPA acted under TSCA only to regulate the narrow use of CFCs in a specific product, whereas it has acted under the Clean Air Act for all further regulation of CFCs. *See, e.g.*, 40 CFR §82 (1982) (regulating CFCs under the Clean Air Act).

Additionally, EPA's 1978 rule considered the availability of practical alternatives to the restricted CFC use. TSCA explicitly requires consideration of "whether technically and economically feasible alternatives that benefit health or the environment, compared to the use so proposed to be prohibited or restricted, will be reasonably available as a substitute when the proposed prohibition or other restriction takes effect." 15 U.S.C. §2605(c)(2)(C). EPA's 1978 regulation did just that, noting that manufacturers could easily substitute the CFC propellant with safer alternatives, since "hydrocarbon and carbon dioxide propellants [were] available as alternatives" and "there [were] nonaerosol alternatives such as pump sprays, waxes, liquids, and powders." CFC Regulation at 11,318-19 (Mar. 17, 1978). Further, EPA noted that, "where there is no alternative

to a chlorofluorocarbon spray," the agency had "provided for exemptions from this regulation." *Id.* at 11,319. Indeed, by the end of 1978—the same year EPA promulgated the rule—all companies subject to the rule appeared to have "successfully converted to substitute propellants," reflecting the immediate availability of feasible substitutes. 1979 EPA Report at 13.

And EPA's 1978 regulation meticulously targeted a single, nonessential use of CFCs. TSCA repeatedly emphasizes consideration of "economic consequences" and "the likely effect … on the national economy, small business, [and] technological innovation." 15 U.S.C. §2605(c)(2)(C); *id.* at §2605(g)(1). EPA's 1978 rule thus reflected thorough consideration of economic consequences. For example, though EPA determined that CFCs posed a hazard in multiple uses, the 1978 rule regulated only a single use—aerosol propellant. CFC Regulation at 11,319 (Mar. 17, 1978). Moreover, the agency granted exemptions "for certain essential uses including nonconsumer electronics/electrical and aviation uses." *Id.* A year later, EPA emphasized the limited impact of its 1978 rule: Only "[f]ive companies" manufactured CFCs for propellant use at the time of the rule's publication, and these companies were all "capable of adapting to the rule with very little effect on their profits." 1979 EPA Report at 12. Thus, "EPA concluded that the regulation of aerosols would not have a major effect on these firms." *Id.*

In stark contrast, Plaintiffs' proposed rule would overhaul entire industries by restricting fossil-fuel consumption absent any identified alternatives. Whereas the 1978 rule banned a *use* of CFCs *in* a commercial product, Plaintiffs seek to ban *emissions* from critical energy sources. Moreover, despite claiming that "[t]here are viable alternatives to the continued heavy reliance on fossil fuels," *id.* at 8, Plaintiffs make no attempt to even name these alternatives, instead declaring that EPA need not "assess the range of alternatives" "at this stage," *id.* at 15; *but see supra* n.2. And, of course, the scope and economic impact of Plaintiff's proposed regulation is incalculably larger

than that of the 1978 rule. The 1978 rule targeted a single use of a single substance manufactured by five firms that could easily adapt without losing profits; here, Plaintiffs seek to regulate a group of chemicals that drive things like "the internal combustion engine," DE1-1:16, and the "fundamental energy needs" that "humanity[] reli[es] on," *id.* at 39.

Far from supporting Plaintiffs' position, DE1:16, the 1978 regulation highlights that Plaintiffs' proposed rules are anathema not only to TSCA's text but also to EPA's historical interpretation of its authority under the statute.

C. TSCA's 2016 Amendment Did Not Secretly Imbue EPA with Authority to "Phase Out Greenhouse Gases."

Far from authorizing EPA to regulate greenhouse gas emissions, TSCA's 2016 amendment emphasized the statute's focus on toxins in commerce and the economic considerations attendant to any TSCA §6 regulation. While Congress altered *how* EPA could assess whether particular chemicals present an unreasonable risk, the 2016 amendment did not extend TSCA to cover new, previously uncovered *types* of environmental dangers. Under no plausible interpretation did the 2016 amendments secretly provide EPA with the power to enact "a phaseout of fossil fuel emissions," DE1-1:44, and thus they provide no help to Plaintiffs' case.

The legislative history agrees with the text, showing that Congress intended the 2016 amendment to regulate products in commerce, not emissions. During congressional debates, legislators repeatedly discussed the need for safe chemicals "in active commerce." 162 Cong. Rec. S,3516 (daily ed. June 7, 2016) (joint statement of Senate Democratic negotiators); *see supra* Background §A. After all, getting "harmful chemicals out of commerce," 162 Cong. Rec. H3,027 (daily ed. May 24, 2016) (statement of Rep. Paul Tonko), was the whole point of TSCA. Rather than seeking to shift TSCA's scope to cover air pollution, legislators noted the opposite: "EPA may *not* promulgate a rule under section 6 of TSCA" when the agency "already regulates that

chemical through a different statute under its own control, like the Clean Air Act." 162 Cong. Rec. H3,028 (daily ed. May 24, 2016) (statement of Rep. Robert Pittenger) (emphasis added).

The legislators merely curtailed TSCA's least-burdensome requirement as a targeted response to a Fifth Circuit decision invalidating an asbestos rule. In *Corrosion Proof Fittings*, the Fifth Circuit vacated the rule because "EPA rejected calculating how many lives a less burdensome regulation would save, and at what cost." 947 F.2d at 1214-16. Congress appears to have viewed that test as overly stringent. *See generally supra* Background §A. So Congress clarified that EPA should assess risk "without consideration of costs or other nonrisk factors" and removed the "least burdensome" requirement. 15 U.S.C. §2605(a), (b)(4)(A) (2016); 15 U.S.C. §2605(a) (2012). But nothing in the TSCA suggests it was intended to regulate air pollution. Rather, while the Clean Air Act expressly references "air pollution prevention," 42 U.S.C. §7401(a)(3), the TSCA does not address (or even mention) greenhouse gases, despite Congress' practice over the years of repeatedly adding Titles to focus TSCA on specific types of dangers, *see* Titles II, III, IV, V, VI.

Plaintiffs thus defy logic when they insist that Congress tacitly effected major statutory changes permitting (indeed, requiring) EPA to "phase out" fossil-fuel use across the Nation. *Cf., e.g.*, *West Virginia*, 142 S. Ct. at 2614 ("Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times."). Plaintiffs' proposed rulemaking exceeds EPA's authority, and EPA rightfully rejected their Petition.

CONCLUSION

Because TSCA does not grant EPA the power to "phase out" fossil-fuel use across the Nation, the *Amici* States respectfully request that the Court grant Defendants' Motion to Dismiss.

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Wyoming Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Oregon by using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for *Amicus* State of Alabama