

**EXCERPTS FROM PETITIONERS'
OPENING BRIEF ON CORE LEGAL ISSUES**

- **ON EPA’S ATTEMPTED “AGGRESSIVE TRANSFORMATION” AND “DECARBONIZING” OF THE ELECTRICITY SECTOR:**
 - Aggressive: Relying on an obscure provision of the Clean Air Act, EPA’s Rule seeks to effect an “aggressive transformation” of the mix of electricity generation in nearly every State by systematically “decarboniz[ing]” power generation and ushering in a new “clean energy” economy. Pp. 2-3 (the phrases in quotes are from EPA itself)

- **ON EPA’S AUDACIOUS ANTI-CARBON “GENERATION SHIFTING” THEORY:**
 - Unprecedented: EPA’s audacious assertion of authority in this Rule is more far-reaching than any previous effort by the agency. ... Indeed, for 45 years, EPA has consistently interpreted section 111 standards of performance in this way—not only in the five instances in which it has addressed existing sources, but also in the more than one hundred rulemakings in which it has adopted standards for new sources. P. 4-5
 - Unlawful: EPA’s legal theory is at odds with the plain language of section 111 and certainly is not “clearly” authorized by that provision... EPA may seek to reduce emissions only through measures that can be implemented by individual facilities. P. 4
 - Forced shutdowns: the reduction requirements can be met only by shutting down hundreds of coal-fired plants, limiting the use of others, and requiring the construction and operation of other types of facilities preferred by EPA—a directive EPA euphemistically calls “generation shifting.” P. 4
 - Threat to every sector: But EPA’s theory of “generation shifting”—which is not about making regulated sources reduce their emissions while operating but rather about preventing many sources from operating at all—does not stop with the power sector. EPA’s newly-discovered authority threatens to enable the agency to mandate that any existing source’s owners in any industry reduce their source’s production, shutter the existing source entirely, and even subsidize their non-regulated competitors. P. 6

- **ON EPA’S BREATHTAKING POWER GRAB:**
 - Breathtaking: If upheld, the Rule would lead to a breathtaking expansion of the agency’s authority. P. 6
 - Tying States’ hands: Additionally, even if EPA were permitted to regulate in this instance, the Rule is unlawful because it prevents States from exercising the authority granted to

them under section 111 to establish standards of performance and to take into consideration the remaining useful life of an existing source when applying a standard to that source. P. 5

- Leaving no choice: In order to pass constitutional muster, cooperative federalism programs must provide States with a meaningful opportunity to decline implementation. But the Rule does not do so; States that decline to take legislative or regulatory action to ensure increased generation by EPA's preferred power sources face the threat of insufficient electricity to meet demand. The Rule is thus an act of commandeering that leaves States no choice but to alter their laws and programs governing electricity generation and delivery to accord with federal policy. P. 5-6
- FERC turf takeover: The Rule's restructuring of nearly every State's electric grid would exceed even the authority that Congress gave to the Federal Energy Regulatory Commission ("FERC"), the federal agency responsible for electricity regulation. P. 6
- Central planner: Section 111(d) would be transformed from a limited provision into the most powerful part of the Clean Air Act, making the agency a central planner for every single industry that emits carbon dioxide. P. 6
- **ON EPA'S DECISION TO IGNORE & CIRCUMVENT CONGRESS:**
 - Unlawfully duplicative: The Rule is further barred by the fact that coal-fired electric generating units are already regulated under section 112 of the Clean Air Act. See 77 Fed. Reg. 9304 (Feb. 16, 2012). Section 111(d) expressly prohibits EPA's use of that section to require States to regulate "any air pollutant ... emitted from a source category which is regulated under section [1]12." P. 5
 - Frustration: Although Congress has debated a number of bills designed to achieve that very result [carbon reductions], it has not adopted any such legislation. Frustrated with Congress, EPA now purports to have discovered sweeping authority in section 111(d) of the Clean Air Act—a provision that has been used only five times in 45 years—to issue a "Power Plan" that forces States to fundamentally alter electricity generation throughout the country. P. 3
 - Defies congressional intent: Congress did not intend and could not have imagined such a result when it passed the provision more than 45 years ago. P. 6