

**States of California, Delaware, Hawaii, Illinois, Maine, Maryland, New Mexico,
New York, Oregon, Vermont, and Washington, the Commonwealth of
Massachusetts, the District of Columbia, the County of Broward (Florida), and
the Cities of Boulder (Colorado), Chicago (Illinois), New York (New York),
Philadelphia (Pennsylvania), and South Miami (Florida)**

January 9, 2018

Via express mail and submission to Regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
WJC West Building, Room 3334
1301 Constitution Avenue, NW
Washington, DC 20004

**Attention: Docket ID No. EPA-HQ-OAR-2017-0355
Repeal of Carbon Pollution Emission Guidelines for Existing Stationary
Sources: Electric Utility Generating Units**

**RE: Comments on EPA Administrator Scott Pruitt's Improper Prejudgment of
Outcome of Proposed Repeal of Clean Power Plan**

The states of California, Delaware, Hawaii, Illinois, Maine, Maryland, New Mexico, New York, Oregon, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, the County of Broward (Florida), and the Cities of Boulder (Colorado), Chicago (Illinois), New York (New York), Philadelphia (Pennsylvania), and South Miami (Florida) ("States and Local Governments") respectfully submit these initial comments on the Environmental Protection Agency's ("EPA") proposed repeal of the Clean Power Plan ("CPP").¹ This letter specifically focuses on the lack of due process and fairness resulting from Administrator Scott Pruitt's prejudgment of the outcome of this rulemaking and the procedural failure of EPA to disqualify Administrator Pruitt from all aspects of this rulemaking given his closed mind.² A new presidential administration may seek to implement different policy preferences through changes in existing regulations. But to maintain the integrity of the rulemaking process, any such changes must be made while adhering to standards intended to ensure that rulemaking processes are fair and rational. Because EPA's CPP repeal rulemaking process violates these standards, EPA must withdraw the proposed repeal.

Administrator Pruitt decided years ago that the CPP is unlawful and must be eliminated. As Oklahoma Attorney General, he attacked the CPP with detailed legal and factual criticisms. He ceaselessly worked through courts, legislatures, and the media to stop EPA from promulgating and implementing that rule, and he made himself into a prominent leader of the

¹ Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017).

² The States and Local Governments will separately submit comments on the other infirmities of the proposed CPP repeal.

effort to overturn it. Even after 5:40 p.m. on February 17, 2017, the moment when he was sworn in as Administrator and transformed from EPA's rival to its leader, Administrator Pruitt's legal and media campaign against the CPP continued unabated. EPA's proposed CPP repeal would achieve through rulemaking what he failed to achieve through litigation. And it would adopt the specific interpretation of the Clean Air Act, previously rejected by EPA, that Administrator Pruitt has long advanced to restrict EPA's ability to control power plant emissions. On both this interpretation and the legality of the CPP in general, Administrator Pruitt's mind is closed.

The public's constitutional and statutory rights to due process and fairness in an administrative rulemaking proceeding are violated when an agency decision maker acts with an unalterably closed mind and prejudices the outcome of what is supposed to be an unbiased process. Under such circumstances, that agency decision maker must be disqualified from participating in the rulemaking, or else any resulting administrative action will be invalid. Administrator Pruitt has a closed mind on the questions of whether the CPP should be repealed, whether the CPP is unlawful, and whether Clean Air Act section 111(d) (42 U.S.C. § 7411(d)) guidelines must be based only on controls imposed directly at the regulated sources (here, power plants). His predetermination of the answers to these questions renders him unable to fairly evaluate the existing EPA scientific and legal record and the comments being submitted by the public, all of which are essential components of a fair rulemaking process evaluating the merits of the CPP. His involvement in this rulemaking has irreparably tainted the current administrative process, and as a result, EPA must withdraw the proposed CPP repeal.

The substantive merits of Administrator Pruitt's firmly held views on the illegality of the CPP are not relevant to whether he may participate in a rulemaking that eliminates the CPP. Rather, it is the fact that he has prejudged the legality of the CPP that makes him ineligible to participate. EPA's failure to disqualify him means that any resulting rule will be invalid as a failure of due process, fairness, and the rule of law and as an arbitrary and capricious agency action. It is true that a violation of due process and fairness does not occur whenever a new agency decision maker, after an election, prefers a different outcome based on his alternative political philosophy, understanding of scientific principles, or favored constituency. But Administrator Pruitt's planned repeal of the CPP is the paradigm of the type of prejudging prohibited in the administrative rulemaking system. A private citizen (or even a state attorney general) has the luxury of making up his mind and never changing course. The decision maker in an administrative proceeding, however, does not.

Furthermore, EPA officials, including Administrator Pruitt himself, have abused their discretion in failing to recognize that he lacks the appearance of impartiality federal ethics regulations require of an agency decision maker and in failing to ensure that he is disqualified from participating in the CPP repeal.

I. ADMINISTRATOR PRUITT MUST BE DISQUALIFIED FROM THE CLEAN POWER PLAN REPEAL ADMINISTRATIVE PROCEEDING BECAUSE HE HAS PREJUDGED ITS OUTCOME

A. Legal standard for impermissible prejudgment in administrative rulemaking

Those interested in a rulemaking “have a right to a fair and open proceeding; that right includes access to an impartial decisionmaker.” *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1174 (D.C. Cir. 1979). A government decision maker has impermissibly prejudged the factual or legal issues in an administrative process if he has an unalterably closed mind on issues central to the proceeding. *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1180 (D.C. Cir. 1980); *C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1564 (D.C. Cir. 1991). A rulemaking with a predetermined outcome makes a farce out of statutorily mandated notice-and-comment procedures, whose purpose is “to give interested parties the opportunity to participate in rulemaking and to ensure that the agency has before it all relevant information.” *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011).

Unless the decision maker with the closed mind is recused from participating, the agency violates due process by conducting the rulemaking. *See Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d at 1170, 1174. A final agency action resulting from an unfair proceeding or undertaken in violation of due process is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and “contrary to constitutional right, power, privilege, or immunity,” and thus is invalid under both the Clean Air Act, 42 U.S.C. § 7607(d)(9)(A), (B), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (B). *See Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008) (disqualifying cabinet secretary from a rulemaking where he reportedly said that he “would approve the new rule even in the face of critical comments”); *Int’l Snowmobile Mfrs. Ass’n v. Norton*, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004) (finding agency prejudged outcome to ban snowmobile access to national parks where agency memorandum showed “sweeping condemnation” of such access and where official stated at press conference that “there will be, no future” for such vehicles in national parks); *cf. Lead Industries Ass’n*, 647 at 1179 (rejecting claim that EPA assistant administrator prejudged setting of emission standards but stating “a different question may be presented if it can be shown that an agency decision maker has exhibited the type of single-minded commitment to a particular position that makes him or her totally incapable of giving fair consideration to the issues that are presented for decision”).

B. Evidence of Administrator Pruitt’s impermissible prejudging of the CPP repeal

1. Administrator Pruitt has a closed mind on whether the CPP is legal

Administrator Pruitt is attempting to use the rulemaking process to fulfill a public promise—elimination of the CPP—that he has made continuously, for years, and that forms the foundation on which he constructed his public persona. While serving as Oklahoma Attorney General, Mr. Pruitt consistently told the courts, Congress, his constituents, his donors, and the media that the CPP was “wholly unlawful,” “blatantly unlawful,” “bogus,” “ultra vires,” “a

political power grab,” “invalid,” an improper “intrusion into state sovereignty,” and “antithetical to the Constitution.” It is not possible for him to reverse course now and impartially evaluate the CPP, nor has he shown any inclination to try to do so. As the mountain of self-promoting public proclamations, social media posts, interviews, and speeches cited herein demonstrates, Mr. Pruitt was not merely an attorney who represented the interests of his client in a prior job; instead, he is an individual who holds, and has unabashedly broadcast, a deep and unwavering conviction that the CPP is unlawful and must be eliminated.

When EPA proposed the CPP in the summer of 2014, Mr. Pruitt joined a petition for review asking the D.C. Circuit Court to stop the public comment period and prevent the agency from finalizing the rule.³ He explained that he would continue to sue EPA whenever it “takes actions that undermine our system and the rule of law.”⁴ Three weeks later he demanded that EPA withdraw the proposed CPP, claiming that it could not even be re-proposed because it was “wholly unlawful.”⁵ The comment letter he signed on behalf of other state attorneys general criticizing the proposed rule included a laundry list of grounds on which they asserted it was illegal, describing it as unauthorized by the Clean Air Act and “antithetical to the Constitution.”⁶ In the following days, he used social media to direct the public to articles portraying the CPP as illegal and himself as the one “leading opposition” to it.⁷ He penned an article on *The Hill* website stating that the CPP would “raise the cost of energy dramatically,” would most hurt “the poor, the single mothers, the elderly and minorities,” and would be “a direct violation of states’ traditional role in making their individual energy policies.” Because “the EPA does not have legal authority granted under the Clean Air Act” to implement the CPP, he argued that the “proposed rule should be withdrawn, or at least stayed, until the courts have a chance to weigh in on legal challenges against these regulations.”⁸

While EPA was evaluating public comments on the proposed CPP, Mr. Pruitt was lobbying the Oklahoma legislature to pass a bill that would give him the authority to prevent Oklahoma from submitting a state implementation plan to meet the rule’s guidelines. As passed by the legislature, Oklahoma Senate Bill 676 (2015-2016) required the Oklahoma Department of Environmental Quality first to submit any state implementation plan to the Attorney General and

³ Exhibit A15 (enclosed) (“Ex. A15”): Petition for Review, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. Aug. 1, 2014).

⁴ Ex. A16: Scott Pruitt, Facebook (Aug. 7, 2014), <https://www.facebook.com/ScottPruitt/posts/10152240553116643>.

⁵ Ex. A17: Letter from state attorneys general to Gina McCarthy, EPA Administrator, re: Request for Withdrawal (Aug. 25, 2014), at 3, <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2013-0602-14062&attachmentNumber=1&contentType=pdf>.

⁶ Ex. A19: Letter from Scott Pruitt, Oklahoma Attorney General, to EPA Docket (Nov. 24, 2014), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0602-25433>.

⁷ Ex. A18: Scott Pruitt, Facebook (Nov. 26, 2014), <https://www.facebook.com/ScottPruitt/posts/10152458863591643>;

Ex. A20: Scott Pruitt, Facebook (Dec. 1, 2014), <https://www.facebook.com/ScottPruitt/posts/10152467765126643>;

Ex. A21: Scott Pruitt, Facebook (Dec. 2, 2014), <https://www.facebook.com/ScottPruitt/posts/10152469582211643>;

Ex. A23: Scott Pruitt, Facebook (Dec. 20, 2014), <https://www.facebook.com/ScottPruitt/posts/10152504896201643>.

⁸ Ex. C3: Press Release, Oklahoma Attorney General, The Hill: EPA’S clean power plan is wrong for states (Dec. 16, 2014), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=15058 (republishing Scott Pruitt & Jonathan Small, *EPA’S clean power plan is wrong for states*, The Hill, Dec. 16, 2014, <http://thehill.com/blogs/congress-blog/energy-environment/227176-epas-clean-power-plan-is-wrong-for-states>);

Ex. A22: Oklahoma Attorney General E. Scott Pruitt, Facebook (Dec. 16, 2014), <https://wayback.archive-it.org/2083/20150514181339/https://www.facebook.com/AttorneyGeneralPruitt?fref=nf>.

obtain his approval before submitting the plan to EPA.⁹ If the Attorney General determined that the state's plan did not comply with the Clean Air Act—which Mr. Pruitt had already said would be the case because the CPP itself was illegal—then Oklahoma would be unable to submit a CPP state implementation plan at all, regardless of the judgment of the Oklahoma Department of Environmental Quality. While the bill was being considered in the legislature, Mr. Pruitt told the public through the press and social media that EPA lacked authority for the “unlawful” CPP and that SB 676 was “a bulwark against the overreach of the EPA” and was necessary to defend Oklahoma “against the unlawful actions of the EPA” in the form of the CPP.¹⁰ When SB 676—giving Mr. Pruitt himself power to prevent Oklahoma from implementing the CPP—passed both houses in April 2015, he issued a press release praising it as “sending a clear signal that we will not comply with the EPA’s unlawful Clean Power Plan.”¹¹ Although Mr. Pruitt said he was disappointed that the Governor subsequently vetoed the bill,¹² he announced that he was headed to Washington, D.C., that day to further attack the CPP.¹³

Mr. Pruitt previewed his May 5, 2015, U.S. Senate testimony on “Legal Implications of the Clean Power Plan” as an update on his efforts to “fight this egregious example of overreach” and as a “direct rebuttal” of EPA’s claims about the CPP.¹⁴ He issued multiple reminders to draw attention to his appearance, both before and after the event.¹⁵ He testified to the Senate committee that “Quite simply . . . , the EPA does not possess the authority under the Clean Air

⁹ Ex. A34: S.B. 676, § 2.C., 2015-2016 Sess., (Okla. Apr. 24, 2015) (enrolled), http://webserver1.lsb.state.ok.us/2015-16bills/SB/SB676_ENR_RTF.

¹⁰ Ex. A25: Scott Pruitt, Facebook (Apr. 1, 2015), <https://www.facebook.com/ScottPruitt/posts/10152727510976643>; Ex. C5: Jim Inhofe & Scott Pruitt, *Senate Bill 676 protects Oklahoma businesses, families from EPA’s overreach*, Tulsa World, April 1, 2015, http://www.tulsaworld.com/opinion/readersforum/u-s-sen-jim-ihofe-and-oklahoma-attorney-general-scott/article_3ab87bba-6f7e-579f-aa41-624caa84b63b.html; Ex. A26: Scott Pruitt, Facebook (Apr. 2, 2015), <https://www.facebook.com/ScottPruitt/posts/10152730124186643> (linking to Ex. C4: Opinions & Editorials, Senator James M. Inhofe (Apr. 2, 2015), <https://www.ihofe.senate.gov/newsroom/oped/tulsa-world-us-sen-jim-ihofe-and-oklahoma-attorney-general-scott-pruitt-senate-bill-676-protects-oklahoma-businesses-families-from-epas-overreach>); Ex. A27: Scott Pruitt (@ScottPruittOK), Twitter, (Apr 9, 2015, 12:55 PM), <https://twitter.com/ScottPruittOK/status/586256082022051840>; Ex. A30: Scott Pruitt, Facebook (Apr. 22, 2015), <https://www.facebook.com/ScottPruitt/posts/10152773679326643>; Ex. A31: Press Release, Oklahoma Attorney General, AG Pruitt Comments on House Passage of Bill to Protect State from EPA Overreach (Apr. 23, 2015), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=15757; Ex. A32: Scott Pruitt, Facebook (Apr. 24, 2015), <https://www.facebook.com/ScottPruitt/posts/10152777810186643>.

¹¹ Ex. A33: Press Release, Oklahoma Attorney General, AG Pruitt Commends Oklahoma Senate for Final Passage of Bill Protecting State from EPA (Apr. 28, 2015), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=15769.

¹² Ex. A36: Scott Pruitt, Facebook (May 4, 2015), <https://www.facebook.com/ScottPruitt/posts/10152798834511643>.

¹³ Ex. A35: Scott Pruitt, Facebook (Apr. 30, 2015), <https://www.facebook.com/ScottPruitt/posts/10152799441126643>; Ex. A37: Scott Pruitt, Facebook (May 4, 2015), <https://www.facebook.com/ScottPruitt/posts/10152799432116643>.

¹⁴ Ex. A39: From the Desk of Scott Pruitt (Oklahoma Attorney General’s Office), May 4, 2015, <http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/468015/rec/14>.

¹⁵ Ex. A41: Scott Pruitt (@ScottPruittOK), Twitter (May 5, 2015, 6:45 AM), <https://twitter.com/ScottPruittOK/status/595584985609981953>; Ex. A40: Scott Pruitt, Facebook (May 5, 2015), <https://www.facebook.com/ScottPruitt/posts/10152799433896643>; Ex. A42: Scott Pruitt (@ScottPruittOK), Twitter (May 5, 2015, 7:18 AM), <https://twitter.com/ScottPruittOK/status/595593451766292480>; Ex. A44: Oklahoma Attorney General E. Scott Pruitt, Facebook (May 5, 2015), <https://wayback.archive-it.org/2083/20150514182234/https://www.facebook.com/AttorneyGeneralPruitt/photos/a.205545152798766.52828.194730097213605/995800250439915/?type=1>; Ex. A45: Scott Pruitt (@ScottPruittOK), Twitter (May 5, 2015, 11:49 AM), <https://twitter.com/ScottPruittOK/status/595661651321425921>.

Act to do what it is seeking to accomplish in the so-called Clean Power Plan,” and that Oklahoma was opposed to the CPP “because it is outside the authority granted to the EPA by the law.”¹⁶ Afterward, he continued to promote his testimony, explaining in his email newsletter that Oklahoma “continues to lead the charge against EPA overreach” and vowing to “continue to challenge the EPA’s unlawful rule that threatens energy affordability and reliability for consumers and industry.”¹⁷

In June 2015, the D.C. Circuit Court dismissed the lawsuits brought by Mr. Pruitt and others seeking to block EPA from even finalizing the CPP. *In re: Murray Energy Corp. v. EPA*, 788 F.3d 330 (D.C. Cir. 2015). Less than two months later, despite the unanimous ruling from the D.C. Circuit that the lawsuits challenging the CPP proposal were premature, Mr. Pruitt filed a similar lawsuit—this one in federal district court in Oklahoma—to again try to stop EPA from finalizing the rule. In the complaint and motion for preliminary injunction—both of which he signed himself and filed without any co-plaintiffs—Mr. Pruitt described the proposed CPP as “ultra vires,” based on “bogus authority,” “blatantly unlawful,” and “simply incompatible with the requirements of Section 111(d).” He told the court that the proposed CPP “plainly exceeds EPA’s authority under the Clean Air Act and . . . Constitution in at least five separate respects,” which he then detailed, and that “[t]he absurdity of EPA’s novel interpretation should not be overlooked.”¹⁸ He issued a press release announcing his lawsuit, describing the CPP as “an unlawful attempt to expand federal bureaucrats’ authority over states’ energy economies in order to shutter coal-fired power plants and eventually other sources of fossil-fuel generated electricity.”¹⁹ Days later he stated, “We must continue to push back against an agency that thinks they are above the law,” directing the public to an editorial praising his lawsuit.²⁰ When the district court quickly rejected his lawsuit, he filed an appeal, explaining in his newsletter that “I remain firm in believing the proposed plan” would “threaten the reliability and affordability of power in the state.”²¹

When EPA Administrator Gina McCarthy signed the final CPP on August 3, 2015, Mr. Pruitt immediately issued statements attacking the rule as unlawful, lacking in legal authority, and unconstitutional, again pledging that “My office will continue to challenge the EPA as long

¹⁶ Ex. A43: *Legal Implications of the Clean Power Plan: Hearing Before the S. Comm. on Environment & Public Works, Subcomm. on Clean Air & Nuclear Safety*, 114th Cong. (May 5, 2015) (written statement of E. Scott Pruitt, Attorney General, State of Oklahoma), https://www.epw.senate.gov/public/_cache/files/6/0/60e46f76-2eb8-4761-bd88-b89b31f7d0ad/01AFD79733D77F24A71FEF9DAFCCB056.agscottpruitt.pdf.

¹⁷ Ex. A46: Scott Pruitt (@ScottPruittOK), Twitter (May 6, 2015, 10:10 AM), <https://twitter.com/ScottPruittOK/status/595998972231208960>; Ex. A47: Scott Pruitt, Facebook (May 8, 2015), <https://www.facebook.com/ScottPruitt/posts/10152800692651643>; Ex. A48: From the Desk of Scott Pruitt (Oklahoma Attorney General’s Office), May 11, 2015, <http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/468032/rec/15>.

¹⁸ Ex. A50: Complaint (ECF #2) at ¶¶ 1, 67, 69, *Oklahoma v. McCarthy*, No. 4:15-cv-00369 (N.D. Okla. July 1, 2015); Ex. A51: Brief in Support of Plaintiff’s Motion for Preliminary Injunction (ECF #6) at 1, 17, *Oklahoma v. McCarthy*, No. 4:15-cv-00369 (N.D. Okla. July 1, 2015).

¹⁹ Ex. A49: Press Release, Oklahoma Attorney General, AG Pruitt Sues EPA for Unlawful Clean Power Plan Rule (Jul. 1, 2015), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=16092.

²⁰ Ex. A52: Scott Pruitt, Facebook (July 7, 2015), <https://www.facebook.com/ScottPruitt/posts/10152938237326643>.

²¹ Ex. A55: From the Desk of Scott Pruitt (Oklahoma Attorney General’s Office), July 27, 2015, <http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/468070/rec/25>; see also

Ex. A54: Scott Pruitt, Facebook (July 25, 2015), <https://www.facebook.com/ScottPruitt/posts/10152978582101643>.

as the administration continues to pursue this unlawful rule.”²² Two days later Oklahoma joined other states in an administrative petition to EPA to stay the CPP, again arguing for its illegality on various grounds,²³ and within two weeks these states had filed another premature challenge to the CPP in the D.C. Circuit.²⁴ Mr. Pruitt accompanied these actions by making personal appearances attacking the CPP and using his ongoing fight against EPA to advertise his reelection campaign website, ScottPruitt.com.²⁵

Challenges to the CPP finally became ripe when it was published in the Federal Register on October 23, 2015, and a group of state attorneys general and states filed a joint petition for review and a motion for emergency stay in the D.C. Circuit Court. But Mr. Pruitt was not among them. Instead, Oklahoma filed its own separate petition for review that same day and its own separate motion for a stay five days later.²⁶ His press release entitled “AG Pruitt Continues Fight against Unlawful Clean Power Plan” boasted that “Oklahoma was at the U.S. Court of Appeals D.C. Circuit as soon as the courthouse opened Friday morning to file its challenge to the unlawful rule.” Mr. Pruitt explained that “EPA has no authority under the Clean Air Act to achieve what it proposes in the 111(d) rule” and that he was “pursuing all available legal options to roll back this financially disastrous and unlawful EPA rule.”²⁷ Oklahoma’s stay motion argued that the Clean Air Act and the Constitution specifically deny EPA the authority it claimed in the CPP and that EPA’s actions under section 111(d) “fundamentally not only clash with the statutory text, but also impose unconstitutional burdens.”²⁸ Mr. Pruitt publicized his separate D.C. Circuit challenge—“As the EPA continues to push their unlawful rule, I continue to challenge it”—and urged supporters to “stand up against” the CPP just as he was.²⁹

²² Ex. A57: Press Release, Oklahoma Attorney General, AG Pruitt Says Final Clean Power Plan Still Unlawful (Aug. 3, 2015), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=16492;

Ex. A56: Scott Pruitt, Facebook (Aug. 3, 2015), <https://www.facebook.com/ScottPruitt/posts/10152998451841643>;

Ex. A58: Scott Pruitt, Facebook (Aug. 5, 2015), <https://www.facebook.com/ScottPruitt/posts/10153002012326643>.

²³ Ex. A59: Application for Administrative Stay by the State of West Virginia and 15 Other States (Aug. 8, 2015), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0602-37226>.

²⁴ Emergency Petition for Extraordinary Writ, *In re: West Virginia*, No. 15-1277 (D.C. Cir. Aug. 13, 2015). The court denied the petition four weeks later.

²⁵ Ex. A60: Scott Pruitt, Facebook (Aug. 7, 2015), <https://www.facebook.com/ScottPruitt/posts/10153012748781643>;

Ex. A61: Scott Pruitt, Facebook (Aug. 7, 2015), <https://www.facebook.com/ScottPruitt/photos/a.411319536642.197181.365679946642/10153003542416643/?type=3>;

Ex. A62: Scott Pruitt, Facebook (Aug. 13, 2015), <https://www.facebook.com/ScottPruitt/photos/a.411319536642.197181.365679946642/10153012005771643/?type=3>;

Ex. A64: Scott Pruitt (@ScottPruittOK), Twitter (Aug 27, 2015, 12:23 PM),

<https://twitter.com/ScottPruittOK/status/636982284982353920>; Ex. A65: Scott Pruitt, Facebook (Sept. 22, 2015),

<https://www.facebook.com/ScottPruitt/photos/a.10151911192121643.1073741826.365679946642/10153115310701643/?type=3>.

²⁶ Petition for Review, *Oklahoma v. EPA*, No. 15-1364 (D.C. Cir. Oct. 23, 2015).

²⁷ Ex. A68: Press Release, Oklahoma Attorney General, AG Pruitt Continues Fight against Unlawful Clean Power Plan (Oct. 23, 2015), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=16869.

²⁸ Ex. A70: Petitioner Oklahoma’s Motion for Stay of EPA’s Existing Source Performance Standards for Electric Generating Units (ECF #1580577) at 7, *Oklahoma v. EPA*, No. 15-1364 (D.C. Cir. Oct. 28, 2015).

²⁹ Ex. A69: From the Desk of Scott Pruitt (Oklahoma Attorney General’s Office), Oct. 26, 2015,

<http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/484558/rec/36>; Ex. A66: Scott Pruitt,

Facebook (Oct. 23, 2015), <https://www.facebook.com/ScottPruitt/posts/10153159627646643>; Ex. A67: Scott Pruitt

(@ScottPruittOK), Twitter (Oct. 23, 2015, 3:08 PM), <https://twitter.com/ScottPruittOK/status/657679984476209152>;

Ex. A71: Scott Pruitt, Facebook (Nov. 3, 2015), <https://www.facebook.com/ScottPruitt/posts/10153176015861643>.

After the D.C. Circuit Court denied Oklahoma's and the other petitioners' motions to stay the CPP on January 21, 2016, they appealed to the U.S. Supreme Court. Mr. Pruitt took that opportunity to publicly denounce the rule as "unlawful" and accuse EPA of intimidating the states to comply with the CPP "before this president leaves office."³⁰ When a divided Supreme Court stayed the CPP by a 5-4 vote pending the outcome of litigation in the D.C. Circuit, it said nothing about the merits of the case. Mr. Pruitt nevertheless trumpeted the decision as a victory for "freedom and the rule of law" and the Constitution and as a "major win against Obama's federal overreach."³¹ His office promoted a news story crediting his role, reminding the public that "Pruitt has fought the Clean Power Plan at every stage, including in the draft stage before the rule was finalized last year."³² Mr. Pruitt is quoted as explaining that EPA did not have authority for the CPP and "can't simply make it up." Although the stay was only temporary, Mr. Pruitt declared victory: "Our involvement in each of those of three signature issues of the president [immigration, water rule, and CPP] stops them dead in their tracks." "Each of those rules will be dormant and not survive his presidency."³³

Following the merits briefing on the CPP in the D.C. Circuit,³⁴ to which Oklahoma was a party, in the spring of 2016 Mr. Pruitt continued his crusade against the CPP, renewing his vow to "continue to fight against the . . . Clean Power Plan."³⁵ He campaigned explicitly on his success in keeping the CPP at bay: "To take a stand for my campaign is to take a stand for . . . Blocking the President's Clean Power Plan [and his immigration and water rules]."³⁶ Nevertheless, he predicted that the CPP was likely to survive his pending court challenge, though only by virtue of President Obama allegedly "pack[ing] the D.C. Circuit . . . because of these

³⁰ Ex. A72: Scott Pruitt, Facebook (Feb. 3, 2016), <https://www.facebook.com/ScottPruitt/posts/10153327223561643>; Ex. C7: News Stories, Oklahoma Attorney General, (Feb. 3, 2016) (republishing Timothy Cama, *State AGs bullish about challenge to 'unlawful' Obama climate rule*, The Hill, Feb. 3, 2016), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=18340.

³¹ Ex. A75: Scott Pruitt (@ScottPruittOK), Twitter (Feb 9, 2016, 3:58 PM), <https://twitter.com/ScottPruittOK/status/697207977128759296>; Ex. A74: Scott Pruitt, Facebook (Feb. 9, 2016), <https://www.facebook.com/ScottPruitt/posts/10153338067331643>; Ex. A77: Scott Pruitt (@ScottPruittOK), Twitter (Feb 9, 2016, 4:13 PM), <https://twitter.com/ScottPruittOK/status/697211672600023040>; Ex. A76: Scott Pruitt, Facebook (Feb. 9, 2016), <https://www.facebook.com/ScottPruitt/posts/10153338232306643>; Ex. A78: Scott Pruitt, Facebook (Feb. 10, 2016), <https://www.facebook.com/ScottPruitt/photos/a.411319536642.197181.365679946642/10153339403301643/?type=3>; Ex. A79: Scott Pruitt, Facebook (Feb. 12, 2016), <https://www.facebook.com/ScottPruitt/posts/10153342967351643>.

³² Ex. C8: News Stories, Oklahoma Attorney General (Feb. 10, 2016) (republishing Paul Monies, *U.S. Supreme Court grants stay on implementing Clean Power Plan*, The Oklahoman, Feb. 10, 2016), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=18424.

³³ *Id.*

³⁴ Along with EPA (represented by the U.S. Department of Justice), in 2016 the undersigned States and Local Governments explicitly rejected Oklahoma's interpretation of section 111(d) in briefs they submitted to the D.C. Circuit Court in *West Virginia v. EPA*, No. 15-1363, which had been consolidated with *Oklahoma v. EPA*, No. 15-1364. *See, e.g.*, Respondent EPA's Initial Brief (ECF #1605911) (D.C. Cir. Mar. 28, 2016); State Intervenor's Brief (ECF #1606037) (D.C. Cir. Mar. 29, 2016).

³⁵ Ex. A83: Scott Pruitt, Facebook (Apr. 5, 2016), <https://www.facebook.com/ScottPruitt/posts/10153465943531643>; Ex. A81: Scott Pruitt (@ScottPruittOK), Twitter (Mar. 16, 2016, 7:05 AM), <https://twitter.com/ScottPruittOK/status/710104587261202432>; Ex. A80: Scott Pruitt, Facebook (Mar. 16, 2016), <https://www.facebook.com/ScottPruitt/posts/10153408612316643>.

³⁶ Ex. A82: Scott Pruitt, Facebook (Mar. 30, 2016), <https://www.facebook.com/ScottPruitt/posts/10153451633661643>.

kinds of cases.”³⁷ He explained to supporters that for this reason³⁸ it was important for the next President to fill the vacancy on the Supreme Court with a Justice who would, after taking the bench in 2017, overrule any unfavorable CPP ruling from the D.C. Circuit Court.³⁹ He again testified in Congress that the CPP was an “audacious assertion of authority” by EPA and “violates the Constitution.” As support, he cited the recent Supreme Court stay, “entered because five members of that court thought it likely that the Plan was unlawful. And those five members of the Court were correct.”⁴⁰ Mr. Pruitt attached to his written testimony a biography that claimed “he led a 29-state coalition who obtained an unprecedented injunction from the U.S. Supreme Court barring the EPA’s ‘Clean Power Plan’ from going into effect.” Among other things, the biography claimed that “Oklahoma AG Scott Pruitt deserves particular credit for developing the federalist arguments and exposing how the Clean Power Plan commandeers states.”⁴¹ His campaign website similarly promoted him as the leader of the litigation against the CPP and promised that “his work continues in the remaining months of the Obama

³⁷ American Conservative Union, *Conservative Political Action Conference* (Mar. 3, 2016), <https://www.c-span.org/video/?405859-16/energy-sufficiency> (18:08-19:46):

But with respect to the lawsuit, it was a very very tragic thing that happened in this country when Justice Scalia passed. . . . And one - the very last thing that he did was to vote for this stay to prevent the EPA from forcing this unlawful rule upon this country. But now we have a situation where the D.C. court, the jurisdiction of this case is the D.C. court. And you may not remember, but this President packed the D.C. Circuit with his - with his justices just a few years ago because of these kinds of cases. And so, we are not terribly optimistic that at the D.C. Circuit, that we’re going to win as a collection of states. And if this case goes up to the Supreme Court with a four-to-four Court, it’s very possible that if the D.C. Circuit rules in the administration’s favor that it will be adverse to the states at the Supreme Court level. The good news is is that the Chief Justice and the Court can retain jurisdiction. They don’t have to actually give the D.C. Circuit deference. They can say, “Look, we argued the case, it’s four to four, we’re going to keep this case, and when we get the fifth Justice appointed, we’ll rehear the case.” I want you to hear this. This election in November is consequential for many reasons. But the most consequential reason, from my estimation, is the control of the U.S. Supreme Court going forward. We must have another Justice Scalia on the U.S. Supreme Court. We must have someone that recognizes the Constitution for what it is, the text and the originalism of it, to control the outer reach federal government. So, that’s what needs to occur in November, and then we’ll have a fifth Justice, and this case can be argued, and hopefully we’ll be protected as we head into 2017.

³⁸ At the time he made those statements, among the eighteen active and senior-status judges who could have been assigned to the three-judge panel for the CPP oral argument then scheduled for June 2, 2016, only four had been appointed by President Obama. The ten-judge *en banc* panel that ultimately heard oral argument on September 27, 2016, included those four judges. (Chief Judge Merrick Garland, whose nomination to fill the vacancy on the Supreme Court was still pending at that time, did not participate in the *en banc* argument.)

³⁹ American Conservative Union, *Conservative Political Action Conference* (Mar. 3, 2016), <https://www.c-span.org/video/?405859-16/energy-sufficiency> (18:08-19:46).

⁴⁰ *Ex. A84: Impact of the EPA’s Clean Power Plan on States: Hearing Before H. Comm. on Science, Space & Technology, Subcomm. on Environment*, 114th Cong. (May 26, 2016) (written statement of E. Scott Pruitt, Attorney General, State of Oklahoma), <https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY18-WState-SPruitt-20160526.pdf>; *id.* (video: Scott Pruitt testimony at 44:28-49:56), <https://science.house.gov/legislation/hearings/environment-subcommittee-hearing-impact-epa-s-clean-power-plan-states>.

⁴¹ *Id.*

presidency.”⁴² He discussed his latest trip to Congress in his newsletter, explaining that he testified that, with the CPP, “we didn’t get democracy, we got regulatory cramdown.”⁴³

Mr. Pruitt traveled to Washington, D.C., again in late September 2016 to watch the CPP oral argument before the D.C. Circuit Court. On the eve of the argument he reminded his constituents that, “As I have said many times, this is an effort I believe to be extraordinary in cost, extraordinary in scope and extraordinary as it relates to the intrusion into the sovereignty of the states.”⁴⁴ After the argument, he issued a statement from outside the courthouse, accusing EPA of “abusing and disrespecting the vertical separation of powers defined by our Constitution.”⁴⁵

Days after the November 2016 election, Mr. Pruitt again used his opposition to the CPP to direct the public to his “Oklahoma Strong” political action committee website. “Over the last 6 years, I have done my part, fighting tirelessly against the Affordable Care Act, WOTUS, Immigration, and the Clean Power Plan. Which one of these should President-elect Trump tackle first?”⁴⁶ Within a month, President-elect Trump announced that Mr. Pruitt was his nominee to be EPA Administrator, apparently in large part because of his history of challenging EPA’s legal authority. The Trump transition explained that “Mr. Pruitt has been a national leader against the EPA’s job-killing war on coal.”⁴⁷

During his Senate confirmation hearing the next month, while he was still in the midst of suing EPA to undo the CPP, Mr. Pruitt continued to demonstrate that his long-held view that the CPP was illegal would not change. He testified that “the Clean Power Plan did not reflect the authority of Congress given to the EPA to regulate CO₂,” and explained why he maintains that position.⁴⁸ In response to written questions from Senators, Mr. Pruitt provided further evidence that his mind was already made up regarding the legality of the CPP, which he would soon be responsible for implementing:

⁴² *Ex. C9: Meet Scott*, <http://scottpruitt.com/meet-scott/> (Sept. 26, 2016)

[<https://web.archive.org/web/20170130031627/http://scottpruitt.com/meet-scott/>].

⁴³ *Ex. A85*: From the Desk of Scott Pruitt (Oklahoma Attorney General’s Office), May 27, 2016,

<http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/491984/rec/54>.

⁴⁴ *Ex. A87*: From the Desk of Scott Pruitt (Oklahoma Attorney General’s Office), Sept. 26, 2016,

<http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/493308/rec/62>.

⁴⁵ *Ex. A88*: Press Release, Oklahoma Attorney General, AG Pruitt Continues Fight to Protect Rule of Law Following Clean Power Plan Arguments (Sept. 27, 2016),

https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=25889.

⁴⁶ *Ex. A89*: Scott Pruitt, Facebook (Nov. 17, 2016), <https://www.facebook.com/ScottPruitt/posts/10153988260521643>;

see also *Ex. A90*: Scott Pruitt (@ScottPruittOK), Twitter (Nov. 17, 2016, 8:51 AM),

<https://twitter.com/ScottPruittOK/status/799293948611203072>.

⁴⁷ *Ex. A91*: Press Release, Donald J. Trump, President-Elect Donald J. Trump Intends to Nominate Oklahoma Attorney General Scott Pruitt to Serve as the Administrator of the Environmental Protection Agency (Dec. 8, 2016),

<http://www.presidency.ucsb.edu/ws/index.php?pid=119781>.

⁴⁸ *Ex. A92: Nomination of Attorney General Scott Pruitt to Be Administrator of the U.S. Environmental Protection Agency: Hearing Before S. Comm. on Environment & Public Works, 114th Cong., at 114-115 (Jan. 18, 2017) (transcript)*, https://www.epw.senate.gov/public/?a=Files.Serve&File_id=1291A5E0-B3AA-403D-8CE3-64CB2EF86851.

I, along with the Supreme Court, which issued a stay against the Clean Power Plan in February 2016, believe the EPA exceeded the bounds of authority established by Congress in the Clean Air Act. In particular, the Rule attempted to supplant decisions traditionally preserved for the states, including the establishment of intrastate energy policies, for agency mandated alternatives that would have increased the price of electricity for local citizens and reduced reliability.⁴⁹

After he took the oath of office on February 17, 2017, and became Administrator Pruitt, he resigned as Oklahoma Attorney General.⁵⁰

2. Administrator Pruitt has specifically prejudged the question of whether section 111(d) standards can be based on actions outside of a power plant's "fenceline"

Administrator Pruitt's prejudgment that the CPP is illegal goes far deeper than just his conception of federalism or "the rule of law." His proposed repeal of the CPP is explicitly based on the specific legal interpretation of section 111 he promoted for years as Oklahoma Attorney General. Although EPA already expressly considered and rejected his legal interpretation in promulgating the CPP, Administrator Pruitt is now attempting to swap EPA's current legal interpretation for the one for which he has long argued.

For years Administrator Pruitt argued that EPA must adopt a view of its authority under section 111(d) that would limit consideration of the "best system of emission reduction" ("BSER") to those control measures that could be applied at the site of the power plant only. This interpretation both ignores the characteristics of the pollutant at issue (carbon dioxide) and the interconnected nature of the nation's electricity grid in determining the BSER for fossil-fueled power plants. He developed and promoted his own alternative section 111(d) regulatory scheme for power plants based on his particular interpretation of section 111. He testified in Congress in support of his position, and he filed numerous legal briefs attempting to convince a court of it. In October 2017 Administrator Pruitt proposed that this exact legal interpretation replace EPA's existing interpretation, with his preexisting interpretation serving as the explicit justification for repealing the CPP. Given his long record of promoting his particular legal interpretation of BSER under section 111, up through and including his CPP repeal proposal, it is

⁴⁹ Ex. A93: [Excerpts of] Questions for the Record for the Honorable E. Scott Pruitt, Senate Environment and Public Works Committee, Hearing Entitled, "Nomination of Attorney General Scott Pruitt to be Administrator of the U.S. Environmental Protection Agency," at 199 (Jan. 18, 2017) (hereafter "Questions for the Record"), full document available at https://www.epw.senate.gov/public/_cache/files/6d95005c-bd1a-4779-af7e-be831db6866a/scott-pruitt-qfr-responses-01.18.2017.pdf.

⁵⁰ Ex. A96: Letter from E. Scott Pruitt, Oklahoma Attorney General, to Mary Fallin, Governor, State of Oklahoma, (Feb. 17, 2017), <https://www.ok.gov/governor/documents/2-17-17%20%20Pruitt%20Resignation%20Letter.pdf>; Ex. A97: Press Release, U.S. Environmental Protection Agency, Scott Pruitt Confirmed and Sworn in as EPA Administrator (Feb 17, 2017), <https://www.epa.gov/newsreleases/scott-pruitt-confirmed-and-sworn-epa-administrator>; Ex. A99: Scott Pruitt (@ScottPruittOK), Twitter (Feb. 17, 2017, 8:59 PM), <https://twitter.com/ScottPruittOK/status/832816771207925760>; Ex. A98: Scott Pruitt, Facebook (Feb. 17, 2017), <https://www.facebook.com/ScottPruitt/posts/10154244467001643>.

clear that—regardless of the merits of his argument—he has impermissibly prejudged this rulemaking decision.

Even before EPA first proposed a rule to limit carbon dioxide emissions from existing power plants under section 111(d), Mr. Pruitt publicly attacked the suggestion that the Clean Air Act allowed EPA to consider any emission reductions other than those achieved by controls applied at the power plant itself. He testified before Congress in November 2013 to promote that view. With his written testimony, he submitted to Congress a white paper he wrote along with other state attorneys general, entitled “Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act.”⁵¹ In it, he argued that there is no adequately demonstrated control technology to remove carbon dioxide from a power plant’s smokestack, and therefore the only things EPA can consider under section 111(d) are “standards based on cost-effective efficiency improvements at electric generating units, because more efficient units will produce lower CO₂ emissions per unit of heat input or electricity output.” Emission guidelines based on measures such as generation shifting or demand reduction, he argued, “do not conform to the limitations Congress has placed on EPA in the Clean Air Act, nor do they properly preserve the primary role of States in the development of standards of performance for existing sources.”⁵²

Mr. Pruitt further promoted his interpretation of section 111(d) on May 20, 2014, just two weeks before EPA proposed the CPP, when he published *The Oklahoma Attorney General’s Plan: The Clean Air Act Section 111(d) Framework that Preserves States’ Rights*. His press release announced that Mr. Pruitt “unveiled his proposal to give states flexibility to address carbon dioxide emissions standards from existing power plants.”⁵³ Distinguishing his *Plan* from EPA’s anticipated proposal, his press release reported:

Attorney General Pruitt said the Oklahoma Attorney General’s Plan is a better approach to addressing emissions standards. The plan allows each state to set emissions standards for existing units by evaluating each unit’s ability to improve efficiency and reduce carbon dioxide emissions in a cost effective way. The

⁵¹ Ex. A6: EPA’s Proposed GHG Standards for New Power Plants and H.R. ___, *Whitfield-Manchin Legislation: Hearing Before H. Comm. on Energy & Commerce, Subcomm. on Energy & Power*, 113th Cong. (Nov. 14, 2013) (written statement of E. Scott Pruitt, Attorney General, State of Oklahoma), <http://docs.house.gov/meetings/IF/IF03/20131114/101482/HHRG-113-IF03-Wstate-PruittE-20131114-U1.pdf>.

⁵² *Id.* In EPA’s 2014 “Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units,” the agency explicitly cited to this white paper Mr. Pruitt submitted to Congress as an example of an alternative legal interpretation. EPA explained that some stakeholders contended, “as a legal matter, the BSER is limited to measures that may be undertaken at the affected electric generating units (EGUs), including on-site controls, activities, or work practices, and cannot include measures that are beyond the affected units.” Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, 76-77 & n.61, <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2013-0602-0419&contentType=pdf>. The CPP, of course, did not adopt Mr. Pruitt’s legal interpretation. He now proposes explicitly to “rescind” that Legal Memorandum because it is inconsistent with his interpretation. See 82 Fed. Reg. at 48,042/3-48,043/1.

⁵³ Ex. A9: Press Release, Oklahoma Attorney General, “Oklahoma Attorney General’s Plan” Offers State-Focused Framework for Power Plant Emissions Standard (May 20, 2014), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=14211.

Oklahoma Attorney General's Plan institutes a unit-by-unit, 'inside the fence' approach to determining state emissions standards.⁵⁴

The text of the *Plan* (which refers to itself as "OKAG Plan") is simultaneously a detailed rejection of the legal interpretation of section 111(d) and BSER that EPA makes in the CPP and also a preview of Administrator Pruitt's October 2017 justification for repealing the CPP:

- "The OKAG Plan institutes a unit-by-unit, 'inside the fence' approach to determining State emission standards."
- "With the OKAG Plan, the resource planning function is not usurped by an allocation system or CO₂ budget and instead remains where it belongs – 'inside the fence' in the hands of state regulators."
- "Furthermore, the 'inside the fence' model ensures that emissions reductions are limited to the engineering limits of each facility."⁵⁵
- "The only way to achieve cost-effective emission reductions for a coal generator would be to improve the efficiency of the unit As a result, CO₂ performance standards must be based on unit-by-unit evaluations of available cost-effective efficiency."⁵⁶

Mr. Pruitt then proceeded to publicly promote his *Plan* and its "inside the fence," "unit-by-unit" legal interpretation of section 111(d) as a better alternative to the upcoming EPA proposal. The day he released his *Plan* he appeared at an event at the National Press Club in Washington, D.C., to debate its merits, which he said he hoped would persuade EPA that his "unit-by-unit, inside-the-fence strategy" would prevail.⁵⁷ He advertised that appearance on social media, highlighting his role "fighting the EPA,"⁵⁸ and linked to a news story that compared his *Plan*'s "unit-by-unit" approach to the supposedly impermissible plan he anticipated from EPA.⁵⁹

⁵⁴ *Id.*; see also Ex. A11: Oklahoma Attorney General E. Scott Pruitt, Facebook, (May 21, 2014),

<https://wayback.archive-it.org/2083/20150514181339/https://www.facebook.com/AttorneyGeneralPruitt?fref=nf>.

⁵⁵ Ex. A10: E. Scott Pruitt, The Oklahoma Attorney General's Plan: The Clean Air Act Section 111(d) Framework that Preserves States' Rights 2 (Apr. 2014), http://documents.nam.org/ERP/OK_AG_Pruitt_Plan_05.20.14.pdf [<https://web.archive.org/web/20170709131349/https://www.ok.gov/oag/documents/Oklahoma%20Attorney%20General%27s%20Plan.pdf>].

⁵⁶ *Id.* at 7-8.

⁵⁷ Ex. C1: The Oklahoma Attorney General's Plan: The Clean Air Act §111(d) Framework That Preserves States' Rights, 44 Env'tl. L. Rep. News & Analysis 11045 (May 20, 2014) (transcript available at https://www.eli.org/sites/default/files/elr/featuredarticles/article_2014_11_44.11045.pdf) (video available at <https://fedsoc.org/commentary/videos/the-oklahoma-attorney-general-s-plan-the-clean-air-act-section-111-d-framework-that-preserves-states-rights-event-audio-video>).

⁵⁸ Ex. A12: Scott Pruitt, Facebook (May 22, 2014), <https://www.facebook.com/ScottPruitt/posts/10152089044466643>; Ex. A13: Scott Pruitt (@ScottPruittOK), Twitter (May 22, 2014, 5:03 PM), <https://twitter.com/ScottPruittOK/status/46962955599081473>.

⁵⁹ Ex. A14: Scott Pruitt, Facebook (May 29, 2014), <https://www.facebook.com/ScottPruitt/posts/10152103676451643> (linking to Ex. C2: Michael Bastasch, *AG: EPA's 'Cap-And-Trade Scheme' Would Violate The Clean Air Act*, The Daily Caller, May 29, 2014, <http://dailycaller.com/2014/05/29/ag-epas-cap-and-trade-scheme-would-violate-the-clean-air-act/>).

While EPA was considering comments on the proposed CPP, Mr. Pruitt continued to push for his *Plan*'s "inside-the-fence" legal interpretation of BSER and to make himself the face of that position. He was the principal commenter in a letter to EPA attacking the proposed CPP. He wrote that EPA's consideration of emission reductions beyond "source-level, inside-the-fenceline measures" "violates Section 111(d)'s plain-text requirement that the performance standards established for existing sources by the states must be limited to measures that apply at existing power plants themselves."⁶⁰ He provided a detailed legal argument for his position that "Section 111(d) unambiguously mandates that . . . states must establish standards of performance applicable to *individual sources* of pollutants."⁶¹ He argued that the term BSER only allows application of controls "*to the individual sources*" and that "whatever the 'best system' is, it must be a system that reduces emissions from *a particular source*."⁶² He argued this same view to the Senate in May 2015, testifying that section 111(d) standards are only those that can be met "by existing industrial sources through source-level, 'inside-the-fence-line' measures," and that the CPP "violates Section 111(d)'s plain-text requirement that the performance standards established for existing sources by the States must be limited to measures that apply at existing power plants themselves."⁶³

Mr. Pruitt's July 2015 Oklahoma-only, premature district court lawsuit to stop EPA from finalizing the CPP echoed his legal interpretation of BSER as promoted in his *Plan*. In the preliminary injunction motion he signed, Mr. Pruitt told the court that the proposed CPP "is also unlawful because it relies on 'beyond-the-fenceline' measures that do not concern the emissions performance of individual sources and are therefore outside the regulatory scope of Section 111(d)."⁶⁴ He told the court that "EPA lacks authority under the CAA to regulate beyond-the-fenceline," and that "consistent with plain meaning, 'best system of emission reduction' must be limited to on-site measures to avoid constitutional infirmity."⁶⁵ Mr. Pruitt also wrote that:

[W]hile the first "building block"—reducing emissions by improving sources' efficiency—may be lawful to the extent that it is "achievable," measures that involve reducing the utilization of coal-fired power plants in favor of other generation sources or reducing energy consumption are not permissible components of the "best system of emission reduction" that underlies a Section 111 standard.⁶⁶

⁶⁰ Ex. A19: Letter from Scott Pruitt, Oklahoma Attorney General, to EPA Docket (Nov. 24, 2014), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0602-25433>.

⁶¹ *Id.* at 16 (emphasis in original).

⁶² *Id.* at 18-19 (emphasis in original).

⁶³ Ex. A43: *Legal Implications of the Clean Power Plan: Hearing Before the S. Comm. on Environment & Public Works, Subcomm. on Clean Air & Nuclear Safety*, 114th Cong. (May 5, 2015) (written statement of E. Scott Pruitt, Attorney General, State of Oklahoma), https://www.epw.senate.gov/public/_cache/files/6/0/60e46f76-2eb8-4761-bd88-b89b31f7d0ad/01AFD79733D77F24A71FEF9DAFCCB056.agscottpruitt.pdf.

⁶⁴ Ex. A51: Brief in Support of Plaintiff's Motion for Preliminary Injunction (ECF #6) at 13, *Oklahoma v. McCarthy*, No. 4:15-cv-00369 (N.D. Okla. July 1, 2015).

⁶⁵ *Id.* at 19, 24.

⁶⁶ *Id.* at 13-14.

The proposed CPP repeal notice Administrator Pruitt would sign two years later makes the same argument:

While building block 1 constituted measures that could be applied directly to a source—that is, integrated into its design or operation—building blocks 2 and 3 employed measures that departed from this traditional, source-specific approach to regulation and that were expressly designed to shift the balance of coal-, gas-, and renewable-generated power at the grid-wide level, subjecting these building blocks to claims that they constituted energy, rather than environmental, policy.

82 Fed. Reg. at 40,037/3.

Although the October 2017 CPP repeal notice did not specify who had been “subjecting” building blocks 2 and 3 to those “claims,” Administrator Pruitt was certainly among them. When he filed the Oklahoma-only motion to stay the final CPP in October 2015, he told the court that “serious constitutional doubt as to the Rule’s validity may be avoided only by interpreting Section 111(d)’s ‘best system of emission reduction’ standard consistent with its plain meaning as limited to facility-based measures like control systems and work practices,” that “EPA, however, itself lacks the authority to carry out all but the first of these building blocks, as well as supporting actions necessary to reorganize the production, regulation, and distribution of electricity,” that “consistent with plain meaning, ‘best system of emission reduction’ must be limited to inside-the-fenceline measures to avoid constitutional infirmity,” and that his inside-the-fenceline interpretation, “limited to source-level measures, also avoids constitutional doubt, because it concerns only sources of emissions themselves.”⁶⁷ He sounded the same note in Congress while the CPP litigation was pending in the D.C. Circuit, testifying that section 111(d) standards “must reflect the ‘application of the best system of emission reduction’ to that ‘source,’ i.e., to a ‘building, structure, facility, or installation.’”⁶⁸ Thus, not only is Administrator Pruitt attempting to replace EPA’s current legal interpretation with the one he had been promoting, he is also justifying that change on the ground that he (and others) had previously criticized EPA’s interpretation.

⁶⁷ Ex. A70: Petitioner Oklahoma’s Motion for Stay of EPA’s Existing Source Performance Standards for Electric Generating Units (ECF #1580577) at 2-3, *Oklahoma v. EPA*, No. 15-1364 (D.C. Cir. Oct. 28, 2015). Joint filings Mr. Pruitt made against the CPP with other state attorneys general are consistent. Oklahoma also joined the application for an administrative stay of the CPP in August 2015, which argued that “EPA is limited to requiring the States to adopt energy policy measures that ‘hold[] the industry to a standard of improved design and operational advances.’ [citation] Blocks 2 and 3 go well beyond this, and are thus entirely unlawful.” Ex. A59: Application for Administrative Stay by the State of West Virginia and 15 Other States (Aug. 5, 2015) at 4, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0602-37226>.

⁶⁸ Ex. A84: *Impact of the EPA’s Clean Power Plan on States: Hearing Before H. Comm. on Science, Space & Technology, Subcomm. on Environment*, 114th Cong. (May 26, 2016) (written statement of E. Scott Pruitt, Attorney General, State of Oklahoma), <https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY18-WState-SPruitt-20160526.pdf>; *id.* (video: Scott Pruitt testimony at 44:28-49:56), <https://science.house.gov/legislation/hearings/environment-subcommittee-hearing-impact-epa-s-clean-power-plan-states>.

3. Administrator Pruitt's statements since taking over EPA continue to show a closed mind

After becoming Administrator, Mr. Pruitt did not pretend that his new job had opened his once-closed mind. He instead made a seamless transition from champion of the fight against the CPP to biased decision maker in the CPP repeal administrative process. He continues to publicly attack the CPP as unlawful and call for its repeal. The only difference is that now he occupies the office that has the power to determine the fate of the CPP.

The day after he was sworn in, Administrator Pruitt and EPA both used official social media accounts to promote a *Wall Street Journal* interview in which he stated that the “past administration didn’t bother with statutes” and “disregarded the law,” and in which he explained that he expected to quickly withdraw the CPP.⁶⁹ In a subsequent television interview on *This Week*, he even went so far as to accuse the Obama Administration of intentionally trying to “kill jobs throughout the country through the Clean Power Plan,” a statement that EPA highlighted in a press release.⁷⁰

After President Trump issued Executive Order 13783 on March 28, 2017, calling for a “review” of the CPP, Administrator Pruitt signed an “Announcement” that EPA would be reviewing the CPP.⁷¹ That evening EPA asked the D.C. Circuit Court, poised to issue a ruling on the legality of the CPP, to hold in abeyance the CPP challenges, which had been pending before the *en banc* Court since the oral argument six months earlier.⁷² The abeyance EPA requested continues to this day.

The next day Administrator Pruitt appeared on the Hugh Hewitt radio show and confirmed that withdrawal of the CPP was a foregone conclusion now that he was in charge. He reiterated his long-held belief that, through the CPP, EPA had “reimagined its authority under the Clean Air Act to regulate CO₂ with stationary sources in a way that just isn’t consistent with the framework that Congress passed.” Explaining the significance of the new Executive Order, he said, “really what happened yesterday with the Clean Power Plan is cleaning up the mess, you know, clearing the decks, if you will.”⁷³ The day after, Administrator Pruitt signed letters to all

⁶⁹ Ex. A100: Scott Pruitt, Facebook (Feb. 18, 2017), <https://www.facebook.com/EPAScottPruitt/posts/1408365892541915> (linking to Ex. C10: Kimberley A. Strassel, *Scott Pruitt's Back-to-Basics Agenda for the EPA*, Wall Street Journal, Feb. 17, 2017, <https://www.wsj.com/articles/scott-pruitts-back-to-basics-agenda-for-the-epa-1487375872>).

⁷⁰ Ex. A103: Press Release, U.S. Environmental Protection Agency, EPA Administrator Pruitt Previews President Trump’s Executive Order on Energy Independence (Mar. 26, 2017), <https://www.epa.gov/newsreleases/epa-administrator-pruitt-previews-president-trumps-executive-order-energy-independence>; see also Ex. A101: Scott Pruitt (@EPAScottPruitt), Twitter (Mar. 26, 2017, 7:37 AM), <https://twitter.com/EPAScottPruitt/status/846008281260834816>; Ex. A102: Scott Pruitt, Facebook (Mar. 26, 2017), <https://www.facebook.com/EPAScottPruitt/posts/1444794498899054>.

⁷¹ Review of the Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017).

⁷² Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance (ECF #1668274), *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Mar. 28, 2017).

⁷³ Ex. C11: Interview by Hugh Hewitt with Scott Pruitt, EPA Administrator, *EPA Administrator* [sic] *Scott Pruitt: “The Days Of ‘Sue And Settle’ ...Have Ended.”* (Mar. 29, 2017) (transcript available at

state governors offering his opinion that they no longer had any obligation to comply with the Clean Power Plan and that any deadlines would be tolled while the Supreme Court stay was in effect. “The days of coercive federalism are over,” he proclaimed.⁷⁴

He was on *Fox News Sunday* three days later to further praise the executive order and criticize the legal foundation of the CPP, arguing that “The past administration just made it up. They re-imagined authority under the statute.” As to what to do about the carbon dioxide emissions the CPP was designed to reduce, Administrator Pruitt said, “you can’t just simply, from the EPA perspective, make that up. You can’t do what the President did previously with the Clean Power Plan, President Obama, and his administration, to simply re-imagine authority. That’s why we have a U.S. Supreme Court stay against the Clean Power Plan.”⁷⁵ Despite the absence of any court rulings on the merits of the CPP, he justified repeal of the CPP on the mere existence of the litigation he recently led against the rule:

You’ve talked about many times, the regulatory overreach, about executive fiat that the previous administration engaged in. We can’t continue that process because what happens, Chris [Wallace], is clean air is not advanced because you have the litigation such as the Clean Power Plan. You have stays of enforcement against that Clean Power Plan, and there’s no progress being made with clean air and we also are spending money on litigation.⁷⁶

In May 2017 Administrator Pruitt wrote an editorial again attacking the legality and wisdom of the CPP and confirming that he had prejudged the outcome of the “review” of the CPP. He wrote in an editorial that for those who “expect lawful, effective and economically sound regulation — the Clean Power Plan failed on all three counts.” He proclaimed that President Trump’s executive order “was a moment in which a promise became an economic reality. As EPA Administrator, I immediately ordered my Agency to comply with the March 28

<http://www.hughhewitt.com/epa-administrator-scott-pruitt-days-sue-settle-ended/>) (audio available at <http://www.hughhewitt.com/wp-content/uploads/03-29hhs-pruitt.mp3>).

⁷⁴ See, e.g., Ex. A108: Letter from Scott Pruitt, EPA Administrator, to Matt Bevin, Governor of Kentucky (Mar. 30, 2017), https://www.epa.gov/sites/production/files/2017-03/documents/ky_bevin.pdf; Ex. A107: Press Release, U.S. Environmental Protection Agency, EPA Administrator Sends Clean Power Plan Guidance Letter to Governors (Mar. 30, 2017), <https://www.epa.gov/newsreleases/epa-administrator-sends-clean-power-plan-guidance-letter-governors-0>; Ex. A110: Scott Pruitt, Facebook (Mar. 31, 2017), <https://www.facebook.com/EPAScottPruitt/posts/1450735668304937>; Ex. A111: Scott Pruitt, Facebook (Mar. 31, 2017), <https://www.facebook.com/EPAScottPruitt/posts/1450940428284461>. A number of the undersigned state attorneys general responded to Administrator Pruitt’s letter, disagreeing with his legal opinion and pointing out that his attempt to “persuade the Governors of his view of how a stay issued in the course of the litigation should affect parties’ future compliance responsibilities” was “inconsistent with his agreement not to participate in the litigation in light of his representation of Oklahoma in the case.” Ex. B12: Letter from Michael J. Myers, Assistant Attorney General, Office of the New York Attorney General, to Kevin S. Minoli, EPA Acting General Counsel (Aug. 30, 2017), https://ag.ny.gov/sites/default/files/2017_0830_letter_to_epa_re_cpp_stay.pdf.

⁷⁵ Interview by Chris Wallace, *Fox News Sunday*, with Scott Pruitt, EPA Administrator, *Scott Pruitt on balancing environmental, economic priorities* (Apr. 2, 2017) (preliminary transcript available at <http://www.foxnews.com/transcript/2017/04/02/scott-pruitt-on-balancing-environmental-economic-priorities-mitch-mcconnell-on-gorsuch-nomination-health-care-reform.html>) (video available at <http://video.foxnews.com/v/5382367267001/?#sp=show-clips>).

⁷⁶ *Id.*

executive order, and signed four new rules, which included a review of the Clean Power Plan.”⁷⁷ EPA issued his editorial, verbatim, as a news release. A week later he directed the public to an article that showed he still held the view that all of the lawsuits he filed, such as the one to invalidate the CPP, were correct.⁷⁸ An EPA press office statement on the article quotes him as explaining that he sued his agency so many times because, “They deserved it and they deserved it because they exceeded their statutory authority, they exceeded their constitutional authority.”⁷⁹

The notice of proposed rulemaking to withdraw the CPP, which Administrator Pruitt signed on October 10, 2017, states that he intends to “rescind” EPA’s 2014 “Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units” because it is “inconsistent with the statutory interpretation proposed” in the proposed CPP repeal rule. Specifically, the Legal Memorandum is objectionable to Administrator Pruitt because significant portions are “devoted to arguing that the BSER on which performance standards under CAA section 111(d) is based can encompass measures other than physical or operational changes taken at the level of and applicable to an individual source.” 82 Fed. Reg. at 48,042/3. In other words, Administrator Pruitt wants to “rescind” the Legal Memorandum because EPA’s existing legal interpretation is contrary to one he has spent years promoting.

Although the October 10, 2017, CPP repeal notice ostensibly requests public comment, Administrator Pruitt’s statements surrounding release of the proposal indicate his mind is made up. EPA’s press release announcing the proposal said that the Supreme Court’s stay prevented the CPP’s “devastating effects to be [sic] imposed on the American people.” Continuing to cast himself as a defender against this alleged devastation, Administrator Pruitt pledged that he was committed to “righting the wrongs of the Obama administration by cleaning the regulatory slate,” and criticized the CPP for requiring actions “outside the fence line.”⁸⁰ He told another media outlet that, unlike the Obama Administration, he would not simply make up the law. He explained that when EPA did so in the CPP, the “Supreme Court intervened and said, stop the enforcement of the rule because it’s going to impact the marketplace in ways that we don’t think

⁷⁷ Ex. C12: Press Release, U.S. Environmental Protection Agency, In Case You Missed It ...EPA is Putting American Workers First (May 2, 2017) (republishing Scott Pruitt, *EPA is putting American workers first*, Washington Times, May 2, 2017), <https://www.epa.gov/newsreleases/case-you-missed-it-epa-putting-american-workers-first-0>; Ex. A113: U.S. Environmental Protection Agency (@EPA), Twitter (May 2, 2017, 7:50 AM), <https://twitter.com/EPA/status/859419758990635008>.

⁷⁸ Ex. A114: Scott Pruitt (@EPAScottPruitt), Twitter (May 11, 2017, 12:05 PM) <https://twitter.com/EPAScottPruitt/status/862745467679121408> (linking to article entitled *Scott Pruitt Explains Why He Sued EPA So Many Times: ‘They Deserved It’*).

⁷⁹ Ex. A116: Press Release, U.S. Environmental Protection Agency, EPA’s Weekly Round-Up (May 12, 2017), <https://www.epa.gov/newsreleases/epas-weekly-round>.

⁸⁰ Ex. A117: Press Release, U.S. Environmental Protection Agency, EPA Takes Another Step To Advance President Trump’s America First Strategy, Proposes Repeal Of “Clean Power Plan” (Oct. 10, 2017), <https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal>; see also Ex. A118: Scott Pruitt, Facebook (Oct. 10, 2017), <https://www.facebook.com/EPAScottPruitt/posts/1649983501713485>.

meet the statutory criteria or authority of the agency.”⁸¹ In fact, the Supreme Court’s order contained no discussion of its reasoning whatsoever.⁸²

Administrator Pruitt has demonstrated time and again that his mind is unalterably closed and that he has prejudged whether the CPP should be repealed, whether it is within EPA’s legal authority, and specifically whether section 111(d) guidelines must be based solely on controls applied directly at power plants. On October 11, 2017, the day after formally proposing to repeal the CPP, Administrator Pruitt again appeared on the Hugh Hewitt radio show to promote his position.⁸³ Mr. Hewitt reminded Administrator Pruitt that he must not prejudge the outcome of the administrative process:

Because I know you know from your time as Attorney General of Oklahoma that the Agency is obliged to take seriously the comments it receives during this process, you will not prejudge the conclusion. . . . The first thing is you have to revoke a deficient rule if indeed it is found by the notice and comment process to be deficient. Is that in fact correct, Scott Pruitt? Is that the order you’re following?

Despite this clear prompting, Administrator Pruitt responded by explaining how, in fact, he had already determined the scope of EPA’s legal authority and had settled upon an approach he preferred, *The Oklahoma Attorney General’s Plan*:

Yes. Yes, yes, Hugh, I think that as we look at the sequencing of this, I mean, you’ve got a rule that’s been stayed by the U.S. Supreme Court. But you don’t know how long that stay is going to, you know, remain in place. . . . So this is a

⁸¹ Ex. C16: Interview by Rob Bluey with Scott Pruitt, EPA Administrator (Oct. 17, 2017) (transcript available at <http://dailysignal.com/2017/10/20/trumps-epa-chief-charts-new-course-interview-scott-pruitt/>) (video available at Heritage Foundation, Facebook (Oct. 17, 2017),

<https://www.facebook.com/heritagefoundation/videos/10155780088559481/> (Pruitt interview at 11:35-46:32)). Administrator Pruitt continues to share the video of this interview through his official EPA Facebook account. *See* Scott Pruitt, Facebook (Oct. 17, 2017), <https://www.facebook.com/EPAScottPruitt/> (last visited Jan. 8, 2018).

⁸² Ex. A73: *Chamber of Commerce v. EPA*, No. 15A787 (U.S. Feb. 9, 2016) (order granting application for stay), http://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf. In addition to this and the explanation of the Supreme Court’s reasoning that he provided during his Senate confirmation process (*see* text at note 49, *supra*), Administrator Pruitt recently testified to Congress with yet another theory about the Court’s rationale for the stay:

[I]t was unprecedented for the U.S. Supreme Court to enter a stay against the Clean Power Plan.

And, as you know, you don’t get a stay of enforcement on a rule unless there’s a likelihood of success on the merits later. And so, there was an understanding that the steps taken by the previous administration, Building Blocks 1, 2, 3, and 4, there was a reimagining of authority that took place under Clean Air Act that caused a lot of confusion as to what was authorized and what wasn’t.

That’s not the proper way to approach these issues

Ex. A119: *The Mission of the U.S. Environmental Protection Agency: Hearing Before H. Comm. on Energy & Commerce, Subcomm. on Environment*, 115th Cong. (Dec. 7, 2017), at 51-52 (preliminary transcript), <http://docs.house.gov/meetings/IF/IF18/20171207/106701/HHRG-115-IF18-Transcript-20171207.pdf>; *id.* (video: testimony at 56:17-57:08), <https://energycommerce.house.gov/hearings/mission-u-s-environmental-protection-agency/>.

⁸³ Ex. C17: Interview by Hugh Hewitt with Scott Pruitt, EPA Administrator, *EPA Administrator Scott Pruitt On Clean Power Plan Rulemaking* (Oct. 11, 2017) (transcript available at <http://www.hughhewitt.com/epa-administrator-scott-pruitt-clean-power-plan-rulemaking/>) (audio available at <http://www.hughhewitt.com/wp-content/uploads/10-11hhs-pruitt.mp3>).

situation, Hugh, that we had to provide clarity first and foremost about the deficiency of this particular rule. But we have also been doing our work to prepare for, you know, what does the statute allow us to do? I actually introduced something in June of 2015 [sic], Hugh, called the Oklahoma Plan. I went through a Section 111 of the Clean Air Act and evaluated what authority existed to regulate CO₂ under Section 111, which deals with power generation facilities. I was at the National Press Club that very month about five or so days before the Clean Power Plan came out, and was debating someone from the NRDC, and shared this entire plan with them. There are steps that we can take with respect to this issue. But they are modest. They are humble

As noted above, the merits of Administrator Pruitt's firmly held views on the illegality of the CPP are not relevant to whether he may participate in a rulemaking that eliminates the CPP. It is because he has an unalterably closed mind on the subject that due process, fairness, and the requirements of rational decision making are violated by his participation in the process.

C. Administrator Pruitt's prejudging of issues is not excused because he is a lawyer

EPA cannot rationalize Administrator Pruitt's past actions as Oklahoma Attorney General as merely the work of a hired lawyer doing the bidding of an impersonal client "state," such that he still has an open mind on whether to repeal the CPP. As an initial matter, the Attorney General of Oklahoma is not just any lawyer, acting in his client's best interests without regard to his own views. In Oklahoma the Attorney General is an independently elected officer who is not appointed by the Governor. The Attorney General is "the chief law officer of the state." Okla. Stat. Ann. tit. 74, § 18 (West). His duties "call for the exercise of personal judgment based on the facts and circumstances surrounding each particular question," and he "possesses complete dominion over every litigation in which he properly appears in the interest of the State." *State ex rel. Derryberry v. Kerr-McGee Corp.*, Okla., 516 P.2d 813, 818, 821 (Okla. 1973).

In this capacity, as previously described, Mr. Pruitt built his reputation around fighting certain regulations adopted by the Obama Administration, and he made great efforts to promote himself as one of the leaders in the struggle against the CPP specifically. He made sure that the public was well aware of his crusade against the CPP, sought campaign donations for his efforts, and even lobbied for a change to Oklahoma law that would effectively give him veto power over Oklahoma's ability to implement the CPP. These are not the actions of a mere hired advocate whose mind might remain open enough, once in the job as regulator, to fairly consider a rule he had previously opposed on behalf of a client.

D. Administrator Pruitt has made an irrevocable promise to repeal the CPP

An agency decision maker is free to express opinions and discuss policy positions as part of the rulemaking process, so long as "he remain[s] free, both in theory and in reality, to change his mind upon consideration of the presentations made by those who would be affected." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d at 1172. Having vowed to fulfill President Trump's promise to abolish the CPP, Administrator Pruitt has no such freedom in theory or in reality.

Administrator Pruitt, as a practical matter, cannot now change his mind “upon consideration of the presentations” of the public.

With Administrator Pruitt, Vice President Pence, and a group of coal company executives and miners looking on and applauding, President Trump signed the executive order directing EPA to “review” the CPP.⁸⁴ No one could mistake this, however, for an invitation to Administrator Pruitt to dispassionately consider the wisdom of the rule. The President told those gathered and the public that:

One after another, we’re keeping our promises and putting power back into the hands of the people. First, today’s energy independence action calls for an immediate reevaluation of the so-called Clean Power Plan. Perhaps no single regulation threatens our miners, energy workers, and companies more than this crushing attack on American industry.⁸⁵

The White House press release of the same day further cast revealing the CPP as the completed fulfillment of one of candidate Donald Trump’s promises.

FULFILLING HIS PROMISE: By taking action on the Clean Power Plan, President Trump is fulfilling his promise to the American people. As a candidate, Mr. Trump promised “we will eliminate... the Clean Power Plan—these unilateral plans will increase monthly electric bills by double-digits without any measurable improvement in the climate.”⁸⁶

A few days later Administrator Pruitt himself equated the “review” of the CPP with a campaign promise fulfilled (adding that the CPP stay further justified the executive order):

... I think what’s important this past week is to recognize that the President is keeping his promise to the American people to roll back regulatory overreach that’s been occurring the last several years. And as you know, the Clean Power Plan is subject to a U.S. Supreme Court stay. And the steps that have been taken by the EPA historically, have equally been challenged several times with respect to CO₂ regulation. And each of those times the Supreme Court and courts have entered and said that the power that’s been used has been an overreach. And so, the President is keeping his promise to deal with that overreach⁸⁷

⁸⁴ Nine months later, Administrator Pruitt continues to use a picture from the event as the cover photo on his official EPA Facebook account. Ex. A120: Scott Pruitt, Facebook, <https://www.facebook.com/EPAScottPruitt/> (last visited Jan. 8, 2018).

⁸⁵ Ex. A104: Remarks by President Trump at Signing of Executive Order to Create Energy Independence, White House (Mar. 28, 2017) (transcript available at <https://www.whitehouse.gov/the-press-office/2017/03/28/remarks-president-trump-signing-executive-order-create-energy>) (video available at https://www.youtube.com/watch?v=OdkThe_O50M, see 7:56-9:29).

⁸⁶ Ex. A105: Fact Sheet, White House, President Trump’s Energy Independence Policy (Mar. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/28/president-trumps-energy-independence-policy>

⁸⁷ Interview by Chris Wallace, Fox News Sunday, with Scott Pruitt, EPA Administrator, *Scott Pruitt on balancing environmental, economic priorities* (Apr. 2, 2017) (preliminary transcript available at <http://www.foxnews.com/transcript/2017/04/02/scott-pruitt-on-balancing-environmental-economic-priorities-mitch->

EPA also issued a press release, using various sources to praise the executive order and attack the CPP, quoting one who declared that “By executive order, President Trump has axed the CPP.”⁸⁸ And, weeks before Administrator Pruitt signed the proposed CPP repeal, President Trump himself bragged that the rule was already gone. Campaigning for former Alabama Attorney General and CPP litigation opponent Luther Strange, President Trump declared mission accomplished, slashing Xs in the air with an imaginary pen:

As your Attorney General, Luther helped you lead the fight in court against the Obama Administration’s big power grabs. That includes challenging the EPA’s Clean Power Plan, which, by the way, did you see what I did to that? Boom. Gone. Look at that guy. He knows. Gone. And I did that one without Luther.⁸⁹

Administrator Pruitt has, consistent with his previous statements and actions, personally, irrevocably committed himself to fulfilling President Trump’s promise to end the CPP. A week after proposing the CPP repeal, Administrator Pruitt repeated the claim that the Obama Administration had declared a war on coal and fossil fuels, but that “It ended under President Trump.”⁹⁰ Weeks later, in a pre-taped address, he explained:

There’s great optimism across the country because of President Trump’s leadership and those that are leading across the country to get tremendous change with respect to regulatory reform. And just to update you a little bit on what we’ve been doing – we’ve been providing clarity, regulatory reform in areas that matter. We’ve withdrawn the Clean Power Plan, and we’re providing, you know, certainty and clarity there.⁹¹

And there is no reason to think that in this rulemaking Administrator Pruitt will open his mind to a new perspective on the CPP when this is how he sees his role with respect to President Trump: “I seek every day, and I mean this sincerely, to bless him. I want to bless him and the decisions he’s making.”⁹²

mccconnell-on-gorsuch-nomination-health-care-reform.html) (video available at <http://video.foxnews.com/v/5382367267001/?#sp=show-clips>).

⁸⁸ Ex. A112: Press Release, U.S. Environmental Protection Agency, High Accolades Across the Country on Trump’s Energy Independence Executive Order (Apr. 4, 2017), <https://www.epa.gov/newsreleases/high-accolades-across-country-trumps-energy-independence-executive-order>.

⁸⁹ President Trump Remarks at Senator Strange Campaign Rally, Huntsville, Ala. (Sept. 22, 2017), at 1:00:40-1:01:20, <https://www.c-span.org/video/?434480-1/president-trump-campaigns-alabama-senator-luther-strange>.

⁹⁰ Ex. C16: Interview by Rob Bluey with Scott Pruitt, EPA Administrator (Oct. 17, 2017) (transcript available at <http://dailysignal.com/2017/10/20/trumps-epa-chief-charts-new-course-interview-scott-pruitt/>) (video available at Heritage Foundation, Facebook (Oct. 17, 2017),

<https://www.facebook.com/heritagefoundation/videos/10155780088559481/> (Pruitt interview at 11:35-46:32)).

⁹¹ The Heartland Institute, *Scott Pruitt at Heartland’s America First Energy Conference* (Nov. 14, 2017), <https://www.youtube.com/watch?v=SvXvoZ6o1sM>.

⁹² Ex. C16: Interview by Rob Bluey with Scott Pruitt, EPA Administrator (Oct. 17, 2017) (transcript available at <http://dailysignal.com/2017/10/20/trumps-epa-chief-charts-new-course-interview-scott-pruitt/>) (video available at Heritage Foundation, Facebook (Oct. 17, 2017), <https://www.facebook.com/heritagefoundation/videos/10155780088559481/> (Pruitt interview at 11:35-46:32)).

Given his personal commitment to make true the President's promise that the CPP is dead, Administrator Pruitt is not remotely able to fairly consider the comments from members of the public who want the CPP's effective carbon dioxide emissions reductions nor is he free to change his mind about whether to repeal the rule. He must therefore be disqualified from participating in rulemaking concerning repeal of the CPP. *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d at 1172; *cf. Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d at 1261 ("Given these definite statements from the Assistant Secretary . . . , it does not seem that the [agency] could have issued any other rule than the one that was ultimately contained in the [final rule]."). EPA's failure to disqualify him to date constitutes a procedural violation that would subject any final action to reversal by a reviewing court. *See* 42 U.S.C. § 7607(d)(9)(D); 5 U.S.C. § 706(2)(D). Because EPA cannot legally finalize the proposed CPP repeal through this tainted rulemaking process, it must withdraw the proposal.

II. EPA'S FAILURE TO REQUIRE ADMINISTRATOR PRUITT TO UNDERGO THE ETHICS AUTHORIZATION PROCESS BEFORE PARTICIPATING IN THE RULEMAKING DISREGARDS REQUIRED PROCEDURES IN VIOLATION OF THE CLEAN AIR ACT

An independent reason that EPA must withdraw the CPP repeal proposal is that, because EPA failed to observe procedures required by law, any resulting final rule would be subject to reversal. *See* 42 U.S.C. § 7607(d)(9)(D); 5 U.S.C. § 706(2)(D). Federal ethics regulations provide a mechanism for EPA to analyze the appearance of lack of impartiality by Administrator Pruitt in connection with this rulemaking, but EPA did not follow those procedures and claims that it need not do so. That failure is arbitrary and capricious and is "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such error[] had not been made." 42 U.S.C. § 7607(d)(9)(D). *See United States v. Caceres*, 440 U.S. 741, 754 (1979) ("Agency violations of their own regulations . . . may well be inconsistent with the standards of agency action which the APA directs the courts to enforce."); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 523 (D.C. Cir. 1983) ("At a minimum, failure to observe the basic APA procedures, if reversible error under the APA, is reversible error under the Clean Air Act as well.").

First, EPA failed to require Administrator Pruitt to follow the procedures specified in 40 C.F.R. § 2635.502(d) to obtain ethics authorization before he became involved in the CPP repeal rulemaking. That provision sets forth a multifactor test for determining whether an agency employee may participate in a particular matter where it would raise a question in the mind of a reasonable person about the employee's impartiality.

As Administrator Pruitt conceded in his May 4, 2017, recusal memorandum, he would need to obtain ethics authorization to participate in any of the lawsuits he filed against EPA while serving as Oklahoma Attorney General⁹³—including his lawsuits against the CPP—as

⁹³ Ex. B8: Memorandum from E. Scott Pruitt, EPA Administrator, to Acting Assistant Administrators, et al., My Ethics Obligations (May 4, 2017), *available at* <https://foiaonline.regulations.gov/foia/action/public/view/record?objectId=090004d2812efc2b&fromSearch=true>

each is considered a “particular matter involving specific parties,” and he has a covered relationship with his recent employer, the State of Oklahoma.⁹⁴ He has not, however, recused himself from participating in EPA rulemakings directly related to litigation matters on which he has acknowledged a conflict.

Although the current CPP repeal rulemaking would achieve the exact same outcome Administrator Pruitt sought in his various attempts to overturn the CPP through the courts, neither Administrator Pruitt nor EPA’s Designated Agency Ethics Official have even evaluated whether he can be involved in this rulemaking under the federal ethics procedures.⁹⁵ Not only has Administrator Pruitt not obtained any authorization before participating in the rulemaking on the CPP, EPA denies any obligation for him to do so. In a September 2017 interview, EPA’s Designated Agency Ethics Official explained that although Administrator Pruitt “recused himself from specific cases . . . the ethics rules authorize [him] to participate in generally applicable regulatory actions.”⁹⁶ Administrator Pruitt made a similar claim in his May 4, 2017, recusal memorandum, stating that the ethics limitation in 40 C.F.R. § 2635.502(d) “does not extend to particular matters of general applicability, such as rulemaking.”⁹⁷ This is a misunderstanding of the law and an abuse of discretion.

(original version; memorandum updated May 17, 2017 (Ex. B9)). In that memorandum Administrator Pruitt set forth his ethics obligations with respect to the CPP litigation (among other cases), explaining that “Thus far, I have not participated in any of the cases listed in this recusal statement officially at all.”

⁹⁴ An employee has a covered relationship with a person or entity for whom he “served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.” 5 C.F.R. § 2635.502(b)(iv).

⁹⁵ EPA’s failure to undertake this practice is shown by its inability to produce any evidence that it did so. On April 7, 2017, the California Attorney General made a request to EPA under the Freedom of Information Act for records pertaining to EPA’s efforts to ensure that Administrator Pruitt complies with federal ethics regulations.

Ex. B7: Letter from Timothy E. Sullivan, Deputy Attorney General, California Attorney General’s Office, to National Freedom of Information Officer, EPA (Apr. 7, 2017), https://oag.ca.gov/system/files/attachments/press_releases/FOIA%20Letter%20to%20EPA.pdf. Because EPA failed to respond to the request, California was forced to sue EPA in U.S. District Court for the District of Columbia on August 11, 2017. *See Ex. B11*: Complaint, *California v. EPA*, No. 1:17-cv-01626 (D.D.C. Aug. 11, 2017). Pursuant to a stipulated schedule, on November 15, 2017, EPA produced all records in its possession pertaining to eighteen subcategories of requested records. That production consisted of only seven documents. EPA’s final response to the below requests demonstrated that it did not possess any of the following records:

7. Impartiality Determinations (including any determinations under 5 C.F.R. § 2635.502) regarding Scott Pruitt’s authorization or ability to participate as Administrator in an activity or decision.

8. Requests by Scott Pruitt to any EPA employee for an Impartiality Determination (including any determination under 5 C.F.R. § 2635.502).

10. Documents reviewed by EPA ethics officials in evaluating an Impartiality Determination (or other determination under 5 C.F.R. § 2635.502) regarding Scott Pruitt.

11. Notices of disqualification and disqualification statements required by 5 C.F.R. § 2635.502(e) regarding Scott Pruitt.

EPA will not complete its production of records related to other subcategories until May 7, 2018, well after the comment period for the proposed CPP repeal closes on January 16, 2018.

⁹⁶ Ex. C14: Robin Bravender, *A specialist in Greek drama is killing the climate rule*, E&E News Climatewire (Sept. 11, 2017), <https://www.eenews.net/stories/1060060183>.

⁹⁷ Ex. B8: Memorandum from E. Scott Pruitt, EPA Administrator, to Acting Assistant Administrators, et al., My Ethics Obligations (May 4, 2017), available at <https://foiaonline.regulations.gov/foia/action/public/view/record?objectId=090004d2812efc2b&fromSearch=true> (original version; memorandum updated May 17, 2017 (Ex. B9)). When this conflict was pointed out to him by Senators during his confirmation process, Administrator Pruitt responded similarly that he did not understand federal

While it is generally true that the obligation to seek prior ethics authorization applies in the case of a “particular matter involving specific parties,” and that rulemakings of general applicability are usually not treated as a “particular matter involving specific parties,” the general rule instructing all federal employees to avoid the appearance of impropriety in carrying out their official duties still applies:

Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

5 C.F.R. § 2635.101(b)(14). Moreover, the ethics regulations specify that involvement in matters that do not involve “specific parties,” such as most rulemakings, may still require the employee first to obtain proper ethics authorization when there is a reasonable question as to whether participation “would raise a question regarding his impartiality.” 5 C.F.R. § 2635.502(a)(2).⁹⁸ In such a circumstance, the employee must seek authorization before participating in the matter and cannot participate without such authorization. *Id.* (stating that the employee should use the same process to determine whether to participate as would apply to the other conflicts described in that section).⁹⁹

As discussed in Section I, *supra*, the record overwhelmingly shows that Administrator Pruitt has already made up his mind and cannot impartially determine whether it is appropriate to repeal the CPP. Reasonable people can and have questioned Administrator Pruitt’s ability to be

ethics regulations on recusal to apply to regulatory rulemakings of general applicability. *See Ex. A93*: Questions for the Record 118 (response to Sen. Markey questions 15, 16), 120 (Markey 21), 226 (response to Sen. Whitehouse question 88) (full document available at https://www.epw.senate.gov/public/_cache/files/6d95005c-bd1a-4779-af7e-be831db6866a/scott-pruitt-qfr-responses-01.18.2017.pdf).

⁹⁸ The preamble to the Office of Government Ethics’ proposed rule introducing this provision (which was adopted in the final rule), explains that even apart from “particular matters involving specific parties,” an employee is expected to use the ethics authorization process when an appearance problem arises: “Notwithstanding the section’s use of this concept [specific parties] and its focus on specified relationships, questions about an employee’s impartiality can arise from any number of interests or relationships an employee might have and *in connection with his or her participation in matters that do not necessarily involve specific parties*. Proposed § 2635.502 therefore provides that *an employee should use the process* set forth in that section when circumstances other than those specifically described raise questions about his or her impartiality in the performance of official duties.” Standards of Ethical Conduct for Employees of the Executive Branch, Proposed Rule, 56 Fed. Reg. 33,778, 33,786 (July 23, 1991) (emphasis added); *see also Ex. B1*: Memorandum from Robert I. Cusick, Director, U.S. Office of Government Ethics, to Designated Agency Ethics Officials, “Particular Matter Involving Specific Parties,” “Particular Matter,” and “Matter,” No. DO-06-029 (Oct. 4, 2006) at 7, n.9 (“[A]n agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee’s impartiality reasonably may be questioned under the circumstances.”), [https://www2.oge.gov/Web/OGESites/0/C10C6B23AC67F74685257E96005FBDD7/\\$FILE/do-06-02_9.pdf](https://www2.oge.gov/Web/OGESites/0/C10C6B23AC67F74685257E96005FBDD7/$FILE/do-06-02_9.pdf).

⁹⁹ The procedure to be followed to resolve issues described in 5 C.F.R. § 2635.502 is found in subsection (d). As a result of that procedure, “Unless the employee is authorized to participate in the matter [by the agency designee], an employee shall not participate in a particular matter involving specific parties when . . . the role of a person with whom he has a covered relationship[] is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter.” 5 C.F.R. § 2635.502(e).

impartial as to rulemaking on the rules he sought to overturn in his previous job.¹⁰⁰ And publicly available information showing his history of advocating on behalf of and fundraising from industries that have opposed the CPP and other EPA regulations exacerbates the appearance of lack of impartiality he created through his own statements and actions.¹⁰¹ In view of these circumstances, it was arbitrary and capricious for EPA not to go through the process described in 40 C.F.R. § 2635.502(d) to determine whether Administrator Pruitt should have been disqualified from the CPP repeal rulemaking.

Second, EPA's error is so serious and related to matters of such relevance to the CPP repeal that there is a substantial likelihood that it will affect any final rule undoing the CPP. It is important to the integrity of this rulemaking process that Administrator Pruitt not have participated, as his involvement tainted what is supposed to be an objective and fair decision making process. Indeed, avoiding after-the-fact repercussions of a conflicted employee's involvement in a matter was one of the reasons why the Office of Government Ethics promulgated the regulation in 5 C.F.R. § 2635.502(a)(2). As it explained:

[E]mployees have long been obligated to act impartially and to avoid even the appearance of loss of impartiality. However, they have not been provided a specific mechanism to resolve difficult issues of whether, in particular circumstances, a possible appearance of loss of impartiality is so significant that it should disqualify them from participation in particular matters. The proposed rule would provide employees with *a means to ensure that their conduct will not be found, as a matter of hindsight, to have been improper*.¹⁰²

Because EPA failed to undertake proper ethics review and disqualification procedures in the face of Administrator Pruitt's obvious appearance of lack of impartiality, any final rule repealing the CPP will likely be invalidated. EPA should withdraw its proposal.

* * *

Administrator Pruitt has already made up his mind that the CPP must be repealed. In light of his past conduct and his statements that the CPP is invalid as a matter of law and should not be implemented, Administrator Pruitt has already prejudged the outcome of the current administrative process to determine whether it should be repealed. His participation to date and his continued participation in this rulemaking proceeding is therefore a violation of due process and principles of fair rulemaking. *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d at 1170,

¹⁰⁰ See, e.g., Ex. B6: Letter from 30 U.S. Senators to Scott Pruitt, Attorney General of Oklahoma (Feb. 16, 2017) ("[A]s EPA Administrator, even if you were recused from participating in decision-making on the litigation itself, you may attempt to use your authority to direct EPA personnel to change EPA regulations to accomplish exactly the same outcome your lawsuits sought to accomplish. Such an action would be a clear attempt to bypass the spirit of the conflict of interest regulations."), <https://www.wyden.senate.gov/download/?id=4F2F7979-432B-4046-98C3-6EFEEE2DE627&download=1>.

¹⁰¹ See, e.g., Alex Guillén & Esther Whieldon, *Energy executives, secretive nonprofit raise money to back Pruitt*, Politico (Jan. 6, 2017), <https://www.politico.com/story/2017/01/scott-pruitt-epa-nonprofit-backers-233306>.

¹⁰² Standards of Ethical Conduct for Employees of the Executive Branch, Proposed Rule, 56 Fed. Reg. 33,778, 33,786 (July 23, 1991) (emphasis added).

1174. Because of this, any resulting rule repealing the CPP should be struck down on the ground that it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “contrary to constitutional right, power, privilege, or immunity.” 42 U.S.C. § 7607(d)(9)(A), (B); 5 U.S.C. § 706(2)(A), (B). EPA must therefore withdraw its proposed rule repealing the CPP.

Sincerely,

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Exhibits B1-B12
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