State Implementation Plans: Findings of Substantial Inadequacy and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

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Comments of Environmental and Community Groups Coalition:

350 NEW ORLEANS

A COMMUNITY VOICE

AIR ALLIANCE HOUSTON

CITIZENS FOR ENVIRONMENTAL JUSTICE

CLEAN AIR MUSCATINE

CLEANAIRE NC

CLIMATE REALITY PROJECT, NEW ORLEANS CHAPTER

COALITION AGAINST DEATH ALLEY

COMMUNITY IN-POWER AND DEVELOPMENT ASSOCIATION, INC.,

CONCERNED CITIZENS AROUND MURPHY

CONCERNED CITIZENS OF ST. JOHN

CONNECTICUT COALITION FOR ECONOMIC
AND ENVIRONMENTAL JUSTICE

DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE

DOWNWINDERS AT RISK EDUCATION FUND

EARTHJUSTICE

ENVIRONMENT TEXAS

ENVIRONMENTAL INTEGRITY PROJECT

GREATER NEW ORLEANS INTERFAITH CLIMATE COALITION

HEALTHY GULF

INCLUSIVE LOUISIANA

IOWA ENVIRONMENTAL COUNCIL

LOUISIANA ENVIRONMENTAL ACTION NETWORK

LOUISIANA LEAGUE OF CONSCIOUS VOTERS

MEMPHIS COMMUNITY AGAINST POLLUTION

NATURAL RESOURCES DEFENSE COUNCIL

NEW ORLEANS MUSICIANS CLINIC & ASSISTANCE FOUNDATION

PUBLIC CITIZEN'S TEXAS OFFICE

SIERRA CLUB

SOUTHERN ENVIRONMENTAL LAW CENTER

TEXAS CAMPAIGN FOR THE ENVIRONMENT

TEXAS ENVIRONMENTAL JUSTICE ADVOCACY SERVICES

April 25, 2023

Submitted via Regulations.gov

These comments are submitted on behalf of 350 New Orleans, A Community Voice, Air Alliance Houston, Citizens for Environmental Justice, Clean Air Muscatine, CleanAIRE NC, Climate Reality Project, New Orleans Chapter, Coalition Against Death Alley, Community In-Power and Development Association, Inc., Concerned Citizens Around Murphy, Concerned Citizens of St. John, Connecticut Coalition for Economic and Environmental Justice, Deep South Center for Environmental Justice, Downwinders at Risk Education Fund, Earthjustice, Environment Texas, Environmental Integrity Project, Greater New Orleans Interfaith Climate Coalition, Healthy Gulf, Inclusive Louisiana, Iowa Environmental Council, Louisiana Environmental Action Network, Louisiana League of Conscious Voters, Memphis Community Against Pollution, Natural Resources Defense Council, New Orleans Interfaith Climate Coalition, New Orleans Musicians Clinic & Assistance Foundation, Public Citizen's Texas Office, Sierra Club, Southern Environmental Law Center, Texas Campaign for the Environment, and Texas Environmental Justice Advocacy Services ("Environmental and Community Groups Coalition").

350 New Orleans is a volunteer climate activist group connecting our region to the international climate crisis movement led by 350.org. Our mission is to lend support to initiatives in New Orleans that raise consciousness and promote sound policy around the climate crisis.

A Community Voice ("ACV") is an affiliate of ACORN and a non-profit community organization comprised of working, poor, elderly, women, children, and families. We provide a community voice for our members and constituencies on the everyday issues that affect their daily lives, which enables them to improve the quality of their lives and those of others in the community.

Air Alliance Houston is a non-profit advocacy organization working to reduce the public health impacts from air pollution and advance environmental justice.

Citizens for Environmental Justice ("CFEJ") is a Corpus Christi-based group representing the local families impacted by pollution. CFEJ was founded in 2000 to address local issues of poverty, pollution and injustice, and to achieve environmental, social and economic justice.

Clean Air Muscatine's ("CLAM") mission is to improve air quality, which will enhance the community's health, economy, and quality of life.

CleanAIRE NC's mission is to advocate for the health of all North Carolinians by pursuing equitable and collaborative solutions that address climate change and air pollution.

Climate Reality Project, New Orleans Chapter's mission is to catalyze a solution to the climate crisis by making urgent action a necessity across every sector of society. We prioritize environmental and climate justice in the Gulf South.

Coalition Against Death Alley fights for the rights of residents in the area of Louisiana also known as Cancer Alley to live with clean air, clean water and clean soil.

Community In-Power and Development Association, Inc. ("CIDA") is a grassroots organization based in Port Arthur, Texas that advocates for environmental justice and economic and social rights.

Concerned Citizens Around Murphy is a neighborhood organization dedicated to revitalize St Bernard Parish, Louisiana, and renew the environment through enhanced public participation and resident advocacy, so that local residents may affect the ever-changing decisions.

Concerned Citizens of St. John's mission is to collect all facts about our environment and share that information with the citizens of St. John Parish. We aggressively advocate for the safety and future of the children of our parish and provide leadership in moving our community forward in all avenues that impact our daily lives.

The mission of the Connecticut Coalition for Economic and Environmental Justice is to create systemic change which eliminates environmental injustices in low-income and communities of color through educating our community, through promoting changes in governmental policy, and through promoting individual, corporate, and governmental responsibility towards our environment. We define

the environment as including the places where we live, work, pray, recreate, and go to school.

The Deep South Center for Environmental Justice is dedicated to improving the lives of children and families harmed by pollution and vulnerable to climate change through research, education, community and student engagement for policy change, as well as health and safety training for environmental careers.

Downwinders at Risk Education Fund is committed to working for environmental justice with communities impacted by the worst pollution; to deliver the best science to those communities; to making decisions about pollution and polluters more democratic; to providing solutions to the problems we spotlight, and to funding staff devoted to grassroots empowerment.

Earthjustice is the nation's largest nonprofit environmental law organization. It has long worked to close regulatory loopholes like the ones EPA now proposes to close, for it fights for a future where children can breathe clean air, no matter where they live, and where all communities are safer, healthier places to live and work.

At Environment Texas, our mission is to transform the power of our imaginations and our ideas into change that makes our world a greener and healthier place for all.

The Environmental Integrity Project ("EIP") is a non-profit non-partisan organization that advocates for effective enforcement of environmental laws. EIP has three goals: 1) to provide objective analyses of how the failure to enforce or implement environmental laws increases pollution and affects public health; 2) to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and 3) to help local communities obtain the protection of environmental laws.

The Greater New Orleans Interfaith Climate Coalition acts as a catalyst to educate, empower, engage, and equip faith leaders and communities to meet our moral, ethical, and spiritual responsibility to establish climate justice and promote care of the Earth, and all that dwell here, through a faith and reason perspective for a healthy world.

Healthy Gulf's purpose is to collaborate with and serve communities who love the Gulf of Mexico by providing research, communications and coalition-building tools needed to reverse the long-pattern of over exploitation of the Gulf's natural resources.

Inclusive Louisiana is a non-profit organization dedicated to protecting the residents of St. James Parish and neighboring parishes from environmental harm

caused by industrial pollution. Our mission is to spread enlightenment and hope to all people to create a fairer and more inclusive society.

The Iowa Environmental Council ("IEC") is Iowa's largest environmental alliance, with more than 100 organizations, more than 500 individual members, and an at-large board of farmers, business owners, and conservationists. IEC works to build a safe, healthy environment and sustainable future for all Iowans. Our members care about air quality across the state, and they hike, recreate, and enjoy the outdoors in Iowa and beyond.

The purpose of the Louisiana Environmental Action Network ("LEAN") is to foster cooperation and communication between individual citizens and corporate and government organizations in an effort to assess and mend the environmental problems in Louisiana. LEAN's goal is the creation and maintenance of a cleaner and healthier environment for all of the inhabitants of the state.

Louisiana League of Conscious Voters educates residents of areas affected by petrochemical pollution on how to advocate for themselves on environmental and climate justice issues in our state and throughout the Gulf South.

Memphis Community Against Pollution ("MCAP") is an environmental justice organization founded in Memphis, Tennessee. The organization's mission is to pursue environmental justice for Black communities in Southwest Memphis, protect the area's health and environment, and prevent environmental racism.

Natural Resources Defense Council's ("NRDC") mission is to safeguard the earth — its people, its plants and animals, and the natural systems on which all life depends.

New Orleans Musicians Clinic & Assistance Foundation's mission is to overcome health inequity and uplift the performers who are the heartbeat of our community.

Public Citizen's Texas Office is a nonprofit consumer advocacy organization that champions the public interest in the halls of power. We defend democracy, resist corporate power, and fight to ensure that government works for the people – not big corporations.

Sierra Club is one of the oldest and largest national nonprofit grassroots environmental organizations in the country, with approximately 722,000 members nationwide dedicated to exploring, enjoying, and protecting the wild places and resources of the earth; practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore

the quality of the natural and human environment; and using all lawful means to carry out these objectives.

Southern Environmental Law Center's ("SELC") mission is to protect the basic right to clean air, clean water, and a livable climate; to preserve our region's natural treasures and rich biodiversity; and to provide a healthy environment for all.

Texas Campaign for the Environment ("TCE") empowers Texans to fight pollution through sustained grassroots organizing campaigns that shift corporate and governmental policy. We envision a Texas free from pollution. As the largest environmental group in Texas organizing support through door-to-door canvassing, grassroots is both who we are and what we do.

Texas Environmental Justice Advocacy Services ("t.e.j.a.s.") is a non-profit group whose mission is to create sustainable, healthy communities in the Houston Ship Channel region by educating individuals on health impacts from environmental pollution and empowering them to promote the enforcement of environmental laws. In furtherance of this mission, t.e.j.a.s. engages in advocacy and organizing around environmental issues in Texas, particularly pollution created by refineries and petrochemical facilities along the Houston Ship Channel. t.e.j.a.s. has long advocated for more stringent startup, shutdown, and maintenance permit terms and enforcement when facilities violate their permits.

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I. Introduction

A. SSM Events Release Massive Amounts of Emissions, Occur Frequently, And Harm Public Health

Startup, shutdown, and malfunction ("SSM") loopholes unlawfully allow major industrial sources to pollute the air with impunity. The high concentrations of air pollution emitted during these events far exceed emission limitations that are meant to protect air quality and public health, and deeply threaten the health and wellbeing of nearby communities. Fenceline and downwind communities bear severe consequences from SSM emissions, and they are disproportionately low-income communities or communities of color that already struggle with air pollution burdens: precisely the types of environmental justice communities that most need relief. The worst of these SSM pollution events are occurring with increasing frequency during and around climate-fueled disasters, hitting climate-vulnerable communities already pummeled by the disasters themselves with additional air pollution burdens.

Industrial facilities of all kinds take advantage of unlawful SSM loopholes in SIPs. In North Carolina, the air agency has exempted emission violations for facilities including a large phosphate mine, natural gas power plant, wood pellet production facility, and pipeline compressor station. In Iowa, an SSM exemption applies to a range of emission sources at facilities like power plants, industrial grain processing plants, and herbicide manufacturers. The affirmative defense provision can be used by all major polluting facilities in Texas. During SSM events, industrial polluters release startlingly large quantities of pollutants[1] known to harm public health, including particulate matter ("PM"), sulfur dioxide ("SO2"), nitrogen oxides ("NOx"), carbon monoxide ("CO"), volatile organic compounds ("VOCs"), and more.[2] Even short periods of exposure to these pollutants can impair people's lung function, aggravate asthma, and cause respiratory and cardiovascular disease and other serious health problems.[3] "Excess emissions" events that occur during SSM periods are "frequent, large in magnitude, last from a few hours to several days (or even weeks) and can exceed a facility's routine annual emissions."[4]

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[1] *See*, *e.g.*, Env't Integrity Project, *The Polluter's Playbook: How Loopholes and Lax Enforcement Harm Air Quality in Texas* (Mar. 23, 2023) [hereinafter "EIP Polluter's Playbook Report"], https://environmentalintegrity.org/wp-content/uploads/2023/03/TX-Polluters-Playbook-final-report-3.23.23.pdf, (attached as Exhibit 1).

[2] Britney McCoy et al., *How big is big? How often is often? Characterizing Texas petroleum refining upset air emissions*. 44 Atmos. Environ. 4230 (Nov. 2010), https://doi.org/10.1016/j.atmosenv.2010.07.008 (attached as Exhibit 2).

[3] *See, e.g.,* Final Br. of Env't Intervenors at 1-4, *Env't Comm. of the Fla. Elec. Power Coord'g Grp. v. EPA*, No. 15-1239 (D.C. Cir. Oct. 31, 2016), ECF No. 1643796.

[4] Alex J. Hollingsworth et al., *The health consequences of excess emissions: Evidence from Texas*. 108 J. Env't Econ. Mgmt. 102449 (July 2021), https://doi.org/10.1016/j.jeem.2021.102449, (attached as Exhibit 3); Cynthia Murphy & David Allen, *Hydrocarbon emissions from industrial release events*

Texas, for example,[5] experiences excess emissions events involving the release of over 10 tons of a criteria pollutant on a daily basis.[6] Over a six-year period from September 2016 to August 2022, Texas industries reported 21,769 incidents in which refineries, chemical plants, and other facilities released unauthorized air pollution during startups and shutdowns, maintenance activity, breakdowns, and other accidents or "upset" events, from which more than 409,000 tons of air pollution were emitted.[7] Over 1,600 of these SSM emissions events during this six-year period lasted longer than a week, in many cases releasing thousands of pounds of pollution into the air, worsening regional air quality and harming public health. In 2022 alone, total reported emissions from SSM emissions events in Texas reached over 44.4 million pounds of pollution.[8]

These frequent, unregulated excess emission events degrade air quality in fenceline and downwind residential communities where people live, work, and play, causing devastating and expensive public health impacts. The consequences of this excess air pollution are serious, including premature mortality, healthcare costs, lost productivity, missed school days, birth defects, and psychological trauma.[9] Children, the elderly, and those with preexisting health conditions are particularly vulnerable to this pollution, as are those experiencing socioeconomic disparities.[10] In Texas alone, a 2019 study found that SSM events cause an average of 42 elderly deaths per year, with annual public health costs in excess of $250 million.[11] A 2018

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in the Houston-Galveston area and their impact on ozone formation. 39 Atmos. Env't. 3785 (July 2005), https://doi.org/10.1016/j.atmosenv.2005.02.051, (attached as Exhibit 4); Ex. 2, McCoy et al., *How big is big? How often is often? Characterizing Texas petroleum refining upset air emissions*.

[5] Texas is one of the only states that requires collection and publication of data on SSM emissions, in contrast to most other states that do not collect such data.

[6] Ex. 3, Hollingsworth et al., *The health consequences of excess emissions: Evidence from Texas*. The Clean Air Act requires EPA to set National Ambient Air Quality Standards ("NAAQS") for common air pollutants (also known as "criteria air pollutants"), and EPA has done so for ozone, particulate matter, carbon monoxide, lead, sulfur dioxide, and nitrogen dioxide.

[7] Ex. 1, EIP Polluter's Playbook Report at 3.

[8] *Id.* at 32.

[9] *Id.*; *see also* Al Shaw, *The Most Detailed Map of Cancer-Causing Industrial Air Pollution in the U.S.*, ProPublica (Nov. 2, 2021, updated Mar. 15, 2022), https://projects.propublica.org/toxmap/; *see also* Lylla Younes, et. al, *Poison in the Air*, ProPublica (Nov. 2, 2021), https://www.propublica.org/article/toxmap-poison-in-the-air (explaining significance of map); *see also* Sustainable Systems Research, LLC, *Evaluation of Vulnerability and Stationary Source Pollution in Houston* (Sept. 2020) [hereinafter "Houston Vulnerability Study"], https://www.nrdc.org/sites/default/files/houston-stationary-source-pollution-202009.pdf, (attached as Exhibit 5); *see also* Yukyan Lam et al., NRDC & t.e.j.a.s, *Toxic Air Pollution in the Houston Ship Channel: Disparities Show Urgent Need for Environmental Justice* (Aug. 31, 2021), https://www.nrdc.org/resources/toxic-air-pollution-houston-ship-channel-disparities-show-urgent-need-environmental, (attached as Exhibit 6).

[10] Qian Di et al., *Association of Short-Term Exposure to Air Pollution with Mortality in Older Adults*. 318 J. Am. Med. Ass'n 2446, 2452 (Dec. 2017), (attached as Exhibit 7).

[11] Ex. 1, EIP Polluter's Playbook Report at 4; *see also* Alex Hollingsworth et al., *The Health Consequences of Weak Regulation: Evidence from Excess Emissions in Texas* (May 3, 2019), https://dx.doi.org/10.2139/ssrn.3382541, (attached as Exhibit 8).

study by the American Chemical Society found that unauthorized pollution in Texas results in the premature deaths of at least 16 people a year.[12]

B. SSM Events are a Serious Environmental Justice Issue

SSM events are a serious environmental justice issue. A long history of social, economic, and political disenfranchisement as well as racism indoctrinated into planning and zoning has meant that Black, Hispanic, Indigenous, and low-income communities disproportionately live, work, and play in areas adjacent to power plants, oil refineries, chemical and petrochemical manufacturers, and other industrial facilities. Fenceline communities face the cumulative impacts of toxic air pollution from multiple facilities, and additional socioeconomic challenges, including inadequate access to high-quality health care, insufficient support systems, and other environmental burdens, that magnify and complicate the impacts of excess SSM pollution.[13] The COVID-19 pandemic has shone a spotlight on the disproportionate health outcomes of communities with unsafe air quality, as exposure to air pollution has contributed to the disparate impact of the disease on racial minorities.[14]

The Houston, Texas Ship Channel

The Houston Ship Channel, for example, has one of the highest concentrations of petrochemical facilities and petroleum refineries in the world. Houston is designated as a severe ozone nonattainment area, meaning that ambient ozone concentrations already exceed federal health and welfare-based standards. The Houston Ship Channel is located in Harris County, where an estimated 44.7% of the population speaks a language other than English at home, 16.4% live below the poverty line, and 64.7% is Black or Latino.[15] Several Harris County neighborhoods, such as Manchester, score high on multiple environmental justice indexes. Manchester scores above the 80th percentile for 11 different environmental justice indexes, including the National Air Toxics Assessment Air Toxics Cancer Risk index, the National Air Toxics Assessment Respiratory Hazard index, the PM2.5 index, and the Risk Management Plan Proximity index.[16]

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[12] Nikolaos Zirogiannis et al., *Understanding Excess Emissions from Industrial Facilities: Evidence from Texas*, Env't Sciences & Tech. (Jan. 27, 2018), https://pubs.acs.org/doi/abs/10.1021/acs.est.7b04887?src=recsys&journalCode=esthag, (attached as Exhibit 9).

[13] Gretchen T. Goldman et al., *Assessment of Air Pollution Impacts and Monitoring Data Limitations of a Spring 2019 Chemical Facility Fire*, Env't Justice (Dec. 2022), https://doi.org/10.1089/env.2021.0030, (attached as Exhibit 10).

[14] Eric Brandt, *Air Pollution, Racial Disparities, and COVID-19 Mortality*, 146 J. ALLERGY CLINICAL IMMUNOLOGY 61 (2020).

[15] U.S. Census Bureau, *Quick Facts: Harris County, Texas*, https://www.census.gov/quickfacts/fact/table/harriscountytexas/POP010220 (last visited April 24, 2023).

[16] EPA, *EJScreen*, https://ejscreen.epa.gov/mapper/ (last visited April 24, 2023).

Frequent SSM events at industrial facilities in the Houston Ship Channel release dangerous air pollutants that disproportionately impact low-income communities and communities of color in the area, including the Harrisburg/Manchester neighborhood[17] and Channelview, which experience greater emissions densities than more distant, higher-income neighborhoods.[18] Focusing on unauthorized emissions of VOCs, a 2019 study found that environmental justice communities concentrated around the Houston Ship Channel are disproportionately affected by unauthorized emissions: "unauthorized VOC emissions . . . are most prevalent in the area around the Ship Channel," and "vulnerable populations experience greater emissions densities (on average) than their more advantaged counterparts . . . due to the greater severity of emissions burdens that vulnerable populations bear when they live in tracts with emissions."[19]

These VOCs include chemicals that are extremely dangerous on their own, like the listed hazardous air pollutants benzene, toluene, and formaldehyde.[20] VOCs also cause ozone pollution, which has persistently blighted the Houston area. And the pollution harming these communities goes beyond VOCs to ozone, particulate matter, and others. Further, the spikes from so-called malfunctions contribute to chronic health risks.[21] In Houston, Black children are more than twice as likely to develop asthma than white children.[22] In the Harrisburg and Manchester communities, "[l]ong-term daily exposures to air pollution can lead to health effects that go unaddressed due to residents' limited financial and health care resources."[23] Today, Harrisburg/Manchester experiences among the greatest vulnerability from air emissions by surrounding industrial polluters.[24] Other communities of color, especially in eastern portions of Houston-Galveston-Brazoria ozone nonattainment area, bear a similar disproportionate emissions burden, including Pleasantville, Fifth Ward, Pasadena, Clinton Park, Galena Park, Deer Park, and Baytown.

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[17] Union of Concerned Scientists & t.e.j.a.s., *Double Jeopardy in Houston: Acute and Chronic Chemical Exposures Pose Disproportionate Risks for Marginalized Communities* at 5-6 (Oct. 2016) [hereinafter "Double Jeopardy in Houston"], https://www.ucsusa.org/resources/double-jeopardy-houston, (attached as Exhibit 11).

[18] Ex. 5, Houston Vulnerability Study at 22; *see also id.* at 24 tbl.5 (providing statistics).

[19] *Id.*

[20] *See* 40 C.F.R. § 51.100(s) (defining VOC as "any compound of carbon, excluding [certain compounds], which participates in atmospheric photochemical reactions"); EPA, *Technical Overview of Volatile Organic Compounds*, http://www.epa.gov/indoor-air-quality-iaq/technicaloverview-volatile-organic-compounds (discussing benzene, formaldehyde, and toluene as examples of VOCs); 42 U.S.C. § 7412(b)(1) (listing all three compounds as hazardous air pollutants).

[21] Ex. 5, Houston Vulnerability Study at 22.

[22] Mackenzie Brewer et al., *Does neighborhood social and environmental context impact race/ethnic disparities in childhood asthma?*, 44 Health & Place 86 (Mar. 2017), https://doi.org/10.1016/j.healthplace.2017.01.006, (attached as Exhibit 12).

[23] Ex. 11, Double Jeopardy in Houston at 6.

[24] Ex. 5, Houston Vulnerability Study at 25.

In the Houston communities of Galena Park and Manchester, since 2017, at least six industrial sources of air pollution have emitted large amounts of unauthorized VOC pollution during emissions events. Two of these facilities– Magellan's Galena Park Terminal and Pasadena Refining System's Pasadena Refinery–are among the top 20 emitters of VOCs during emissions events in Texas since 2017. These recurring releases pose a significant threat to people living nearby. An estimated 16,457 people live within one mile of at least one of these facilities, of which 93 percent (or 15,305 people) are people of color and 45 percent (or 7,406 people) are considered low-income. The area around these facilities is in the 97th percentile for cancer risk nationally.[25]

The communities bearing the brunt of SSM events also face disproportionate risk and vulnerability to climate impacts. While most SSM events do not result from climate-fueled disasters, some of the worst excess emission SSM events occur in their wake.[26] Consider, for example, Hurricane Harvey, which pummeled Houston's low-income communities and communities of color especially hard. In the aftermath, fenceline communities not only faced direct effects of the storm—which itself caused extensive property damage, widespread power outages, and brought toxic wastewater into the streets and people's homes—but also the astounding excess emissions from neighboring industrial facilities.[27]

When Texas experienced extremely low temperatures in February 2021, many facilities lost power, shut down, and emitted significant quantities of toxic chemicals into the air. Nearly 200 facilities in 54 counties reported releases of toxic chemicals from February 11 to 23, 2021, with nearly one-fifth of the excess pollution occurring in the Houston region.[28] Many releases in the Houston area came from facilities that also reported airborne emissions that exceeded state limits in the days after Hurricane Harvey in 2017. During these winter storms and resulting shutdowns, facilities released at least 3.5 million pounds of toxic chemicals into the air.[29]

As the impacts of climate change worsen, the frequency of high-magnitude disasters will increase, and with it the occurrence of SSM excess emissions events.

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[25] Ex. 1, EIP Polluter's Playbook Report at 23.
[26] Susan C. Anenberg & Casey Kalman, *Extreme weather, chemical facilities, and vulnerable communities in the U.S. Gulf Coast: A disastrous combination*, AGU (2019), https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2019GH000197, (attached as Exhibit 13).
[27] *Id.*
[28] Environmental Defense Fund Press Release, *Millions of Pounds of Air Pollution Released Because of Grid Failure, Freeze in Texas* (Feb. 23, 2021), https://www.edf.org/media/millions-pounds-air-pollution-released-because-grid-failure-freeze-texas, (attached as Exhibit 14).
[29] *Id.*

Louisiana's Cancer Alley

In Louisiana's Cancer Alley, an 85-mile-long corridor between Baton Rouge and New Orleans, over 150 industrial facilities pollute the air and lead to environmental harms that disproportionately affect communities of color.[30] In one Cancer Alley census tract, located in St. John the Baptist Parish, the cancer risk from air pollution is 1,000-in-1-million.[31] 59.1% of St. John's population is Black.[32] EPA has acknowledged that, in order to meet its commitment to environmental justice, it must perform new reviews and rulemakings for chloroprene and ethylene oxide, two hazardous air pollutants to which it attributes the alarming cancer rate in St. John.[33] Potential new rulemakings, however, cannot sufficiently advance environmental justice if polluters remain permitted to violate emission limits during SSM events.

C. Emissions During Startup, Shutdown, and Malfunction Events Can be Controlled, Even During Malfunctions / Emergency Operations

Parties opposing the 2015 SSM SIP Call have argued that the Clean Air Act somehow requires EPA to provide an accommodation for excess emissions during emergency SSM events because of the practical reality that control technology can fail. But as EPA has recognized, the *NRDC*[34] Court squarely confronted and rejected this argument because the argument conflicts with what Congress actually mandated in the Clean Air Act. So too did the *Sierra Club*[35] and *U.S. Sugar*[36] Courts.

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[30] *See* United Nations Human Rights Office of the High Commissioner, *USA: Environmental racism in "Cancer Alley" must end – experts* (Mar. 2, 2021), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26824&LangID=E, (attached as Exhibit 15); Tristan Baurick et al., *Welcome to "Cancer Alley," Where Toxic Air Is About to Get Worse*, ProPublica (Oct. 30, 2019), https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse, (attached as Exhibit 16).

[31] EPA, *2017 AirToxScreen*, https://www.epa.gov/AirToxScreen/2017-airtoxscreen-mapping-tool (last visited April 24, 2023).

[32] U.S. Census Bureau, *QuickFacts St. John the Baptist Parish, Louisiana*, https://www.census.gov/quickfacts/fact/table/stjohnthebaptistparishlouisiana/PST045217 (last visited April 24, 2023).

[33] *See* EPA, *EPA Should Conduct New Residual Risk and Technology Reviews for Chloroprene and Ethylene Oxide Emitting Source Categories to Protect Human Health* at 25 (May 6, 2021), https://www.epa.gov/sites/default/files/2021-05/documents/_epaoig_20210506-21-p-0129.pdf ("Unless the EPA conducts new RTRs using the new UREs for chloroprene and ethylene oxide[,] . . . the Agency may not meet its commitment and responsibility under Executive Order 12898 to achieve environmental justice."); EPA, *2017 AirToxScreen*, https://www.epa.gov/AirToxScreen/2017-airtoxscreen-mapping-tool (last visited April 24, 2023) (attributing nearly all the cancer risk in St. John the Baptist Parish to chloroprene and ethylene oxide emissions).

[34] *NRDC v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014).

[35] *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008).

[36] *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 607 (D.C. Cir. 2016).

And while some upsets may be truly unavoidable, many breakdowns are the result of operator errors, poor plant design, and a lack of preventive maintenance. Indeed, some facilities have significantly fewer malfunctions than others due to better management practices, adequate staffing and improved technologies.[37] By removing SSM affirmative defenses and exemptions, sources would have the proper incentives to make investments in accident prevention measures. Moreover, as noted in the attached report, prepared for Sierra Club by Dr. Ranajit (Ron) Sahu, Ph.D, QEP, CEM (Nevada), many sources can, in fact, operate pollution controls, such as Selective Catalytic Reduction ("SCR") technology, even during low operating temperatures that might occur during a truly unexpected malfunction without causing any irreversible adverse impacts to the SCR.[38] There are also several industry-recognized methods that can be used to maintain boiler/SCR exit gas temperature above the minimum operating temperature for SCR even during low load operations at a unit, including during startup and shutdown.[39] Thus, there are in fact technically feasible methods for operating SCR technology, even during periods of low load operation that might occur during emergency SSM operations.

In any event, removing SSM exemptions does not preclude a prosecutor's or court's consideration of true emergency events. Given the enormous amount of resources needed to bring an enforcement action under the Clean Air Act, it would be illogical for EPA or citizens with limited staff and budgets to bring enforcement actions against good actors who make proper investments and have rare unavoidable events. And indeed, even if an action is filed, as EPA and the *NRDC, Sierra Club*, and *U.S. Sugar* Courts recognized, sources are free to argue to a court that they should be subject to lessened (or no) civil penalties for any number of reasons, including based on practical considerations or emergencies. But the Clean Air Act makes clear that those penalty determinations are for the courts, not the states or EPA. Similarly, federal courts have broad authority to fashion appropriate injunctive relief for any violation of the Act, and a source operator can present argument or evidence concerning the appropriate injunctive relief under the specific circumstances of the case. But again, the ultimate decision about injunctive relief is up to the district court, and states and EPA lack authority to limit that judicial power through an affirmative defense. Thus, removal of affirmative defenses from state and federal operating permit programs and the permits themselves does not leave violators without protections: it just ensures civil penalties are assessed and injunctive relief determined in the way Congress intended.

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[37] *See* Env't Integrity Project, *Gaming the System, How Off-the-Books Industrial Upset Emissions Cheat the Public Out of Clean Air*, at 6-8, 11 (2004), https://environmentalintegrity.org/wpcontent/uploads/2016/11/2004_GamingTheSystem.pdf, (attached as Exhibit 17).

[38] Dr. Ranajit (Ron) Sahu, *Developing Alternate SSM Limits and Work Practices – Coal Units* (2016) (attached as Exhibit 19).

[39] *Id.* Attach. A, § 5.0.

II. General Background

A. Background

Though for decades EPA has recognized that SSM provisions that provide automatic exemptions for excess emissions violate Clean Air Act requirements, it did not initiate a broad effort to fix state provisions until Sierra Club reviewed SIPs for unlawful loopholes and petitioned EPA to issue a SIP call.[40] In 2015, in response to Sierra Club's petition, EPA issued a nationwide rule making clear that state-created affirmative defenses, director's discretion provisions, and exemptions are not consistent with the Clean Air Act and issued a "SIP call" requiring 36 states to eliminate these unlawful exemptions.[41] In doing so, EPA relied on the D.C. Circuit Court's 2008 decision *Sierra Club v. EPA*[42] and 2014 decision in *NRDC v. EPA*[43] confirming that the Clean Air Act prohibits SSM exemptions and affirmative defenses, respectively. EPA also found that director's discretion provisions unlawfully revise SIP requirements without agency approval and undermine citizen enforcement.

Nearly three years later, after a change in Administrations, EPA began undoing the 2015 SSM SIP call state by state. It first withdrew the SIP call for Texas, condoning Texas' affirmative defense against civil penalties notwithstanding the D.C. Circuit Court's decision in *NRDC.*[44] EPA then moved on to North Carolina, where the agency announced an "alternative policy" allowing SSM exemptions and withdrew the state's SIP call as it applied to director's discretion exemptions.[45] Next was Iowa, where EPA similarly announced an "alternative interpretation" allowing SSM exemptions, and withdrew the SIP call for the state's automatic SSM exemptions.[46] Environmental and community groups challenged these actions in the D.C. Circuit.

In October 2020, EPA published purported "guidance" describing EPA's intent to "review each SIP Call remaining from the 2015 Action in light of this new

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[40] State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, Final Rule, 80 Fed. Reg. 33,840, 33,843 (June 12, 2015) [hereinafter "2015 SSM SIP Call"].
[41] *Id.* at 33,840.
[42] *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008).
[43] *NRDC v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014).
[44] Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan Revision—Affirmative Defense Provisions, Final Rule, 85 Fed. Reg. 7,232 (Feb. 7, 2020) [hereinafter "Texas Withdrawal Rule"].
[45] SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes, Final Rule, 85 Fed. Reg. 23,700 (April 28, 2020) [hereinafter "North Carolina Withdrawal Rule"].
[46] Air Plan Approval; Iowa; Air Quality State Implementation Plan—Muscatine Sulfur Dioxide Nonattainment Area and Start-up, Shutdown, Malfunction SIP Withdrawal, Final Rule, 85 Fed. Reg. 73,218 (Nov. 17, 2020) [hereinafter "Iowa Withdrawal Rule"].

memorandum," which interpreted the Act to allow SSM exemptions and affirmative defense provisions.[47] After another change in Administration, EPA withdrew the Wheeler memo and issued a new memorandum in September 2021, signed by Deputy Administrator Janet McCabe, reinstating EPA's SSM policy, as described in the 2015 SSM SIP action.[48]

In April 2021, over 100 community and environmental groups signed on to a letter to President Biden and EPA Administrator Michael Regan, urging EPA to take swift action to protect fenceline communities, end free passes to pollute and close all SSM loopholes.[49] Also in April 2021, a coalition of community and environmental groups petitioned EPA to reconsider and rescind the final rules withdrawing the SSM SIP calls for Texas, North Carolina, and Iowa, and to once again require that the three states correct their SIPs and remove unlawful SSM loopholes.[50] Again in May 2022, 131 community and environmental groups demonstrated their strong support for EPA action to eliminate SSM loopholes by urging EPA to finalize the proposed rule to eliminate the affirmative defense provisions in EPA's regulations governing Clean Air Act Title V operating permits.[51] Recently, on March 22, 2023, community and environmental groups delivered over 7,000 public comments to EPA urging the agency to eliminate all unlawful loopholes from federal clean air rules, demonstrating the overwhelming strong support for EPA action.[52]

In September 2021, environmental groups filed a case against EPA for failing to timely respond to numerous SIP revisions that were submitted in response to the 2015 SSM SIP call, and for failing to issue findings of failure to submit to states that had ignored the SIP call. In response EPA issued findings of failure to submit for twelve states/air districts that failed to respond to the SIP Call,[53] and the

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[47] Mem. from EPA Administrator Andrew Wheeler to Regional Administrators 1–10, *Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans*, at 2 (Oct. 9, 2020), https://www.epa.gov/system/files/documents/2021-09/2020-ssm-in-sips-guidance-memo.pdf.

[48] Mem. from EPA Deputy Administrator Janet McCabe to Regional Administrators, *Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy* (Sept. 30, 2021), https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf [hereinafter "2021 McCabe Memo"].

[49] Letter to President Biden and Administrator Regan, *RE: Protect Fenceline Communities, End Free Passes to Pollute and Close All Startup, Shutdown, and Malfunction Loopholes* (May 18, 2021), (attached as Exhibit 20).

[50] Petition to EPA for Reconsideration and Rulemaking Addressing Startup, Shutdown, and Malfunction Loopholes in State Implementation Plans (Apr. 12, 2021), (attached as Exhibit 21).

[51] Community Groups' Letter to EPA, *RE: Protecting Fenceline Communities by Closing All Startup, Shutdown, and Malfunction Loopholes* (May 16, 2022), (attached as Exhibit 22).

[52] Comments to EPA, *Close All Startup, Shutdown, and Malfunction (SSM) Loopholes and protect communities from pollution*, (attached as Exhibit 23).

[53] Findings of Failure to Submit State Implementation Plan Revisions in Resp. to the 2015 Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 87 Fed. Reg. 1,680 (Jan. 12, 2022).

environmental groups entered a consent decree with EPA, establishing deadlines for EPA to act on the proposed SIP revisions.[54]

EPA is now proposing to reinstate its findings of substantial inadequacy and associated "SIP calls" that were withdrawn for the states of Texas, North Carolina, and Iowa for SSM loopholes in their SIPs that do not comply with statutory requirements and EPA's SSM policy. EPA is also proposing to issue new findings of substantial inadequacy and SIP calls to the states of Connecticut, Louisiana, Maine, and Wisconsin, and to Buncombe and Mecklenburg counties in North Carolina, and Shelby County in Tennessee.[55]

B. Real-World Impacts of SSM Events on Communities in Affected States

People living in fenceline and downwind communities routinely witness dangerous and disruptive SSM events, including fires, explosions, chemical spills, flaring, and large plumes of black smoke with noxious odors, at all hours of the day and night. Community members are told to shelter-in-place, but receive little other warnings or information and must themselves collect and spread information during these harmful upset events. Though they report their concerns to regulators, as years and decades go by, they feel nothing changes for the better. Here, we summarize and attach stories from people who live close to polluting facilities in states affected by the Proposed Rule and strongly support EPA's proposal. These same stories can be found in every state with problematic SSM provisions. Attached to our comments as Statements A through N are statements from people whose health and livelihood are at stake in this rulemaking.

Juan Parras from Houston Ship Channel

Juan Parras is the Executive Director of Texas Environmental Justice Advocacy Services ("t.e.j.a.s."), a non-profit group who has long advocated for more stringent SSM permit terms and enforcement when facilities violate their permits.[56]

Juan's office is about a half mile from the Houston Ship Channel, which has one of the largest concentrations of oil refineries in the world, as well as other industrial facilities. He regularly sees black smoke and smells noxious odors coming from the nearby facilities.[57] As part of his work, Juan meets with community members to discuss pollution problems in the region. During these trips, he can see and smell the pollution being emitted. Sometimes the air pollution is so bad that everyone has to retreat to protect their health, and may even need to shelter-in-

[54] Consent Decree, *Sierra Club. v. Regan*, Civ. 4:21-cv-06956-SBA, (N.D. Cal. June 27, 2022), ECF No. 38.
[55] State Implementation Plans: Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, Proposed Rule, 88 Fed. Reg. 11,842 (Feb. 24, 2023) [hereinafter "Proposed Rule"].
[56] Declaration of Juan Parras ¶¶ 1-2 (attached as Exhibit A).
[57] *Id.* ¶¶ 3-4.

place. Juan also leads groups of interested groups on "toxic tours" of the Houston Ship Channel to help them understand the poor living conditions of individuals living in fenceline communities. On night tours, flaring is frequently visible, and he has observed that many facilities flare at night instead of during daylight hours.[58]

t.e.j.a.s. conducts its own environmental incident investigations, collects data, and disseminates information to affected community members. This puts Juan outside, near refineries and other facilities for long periods of time during some of the area's worst pollution events. For example, fugitive emissions monitoring requires Juan to be outdoors with monitoring equipment between 30-45 minutes at a time. During catastrophic events, Juan must be very close to fires, flaring, and explosions so he can collect data for the community. t.e.j.a.s investigations are necessary because they have found emergency planning and response by local, state, and federal governments inadequate to protect their communities. For example, the Valero refinery in Manchester had a large benzene release during Hurricane Harvey and, nearly two years later, the community does not know what really happened during this release.[59]

Fires, explosions, accidental releases, chemical spills, and other incidents happen every day in Juan's community. In 2017, a water cooler blew up at the LyondellBasell refinery in Manchester, and everyone could see a big opaque cloud of smoke billowing out of the refinery. In 2016, the same refinery had a huge fire, and residents had to shelter in place. In July 2018, Valero had a chemical leak that traveled over adjacent communities and left brown and rust colored spots on cars and other property. The Pasadena Refining plant had a fire a few years back, where a worker was injured. That refinery also had an explosion in December 2011. A nearby chemical manufacturer, the Arkema plant, reported over 40 incidents between 2004 and 2013 according to data EPA collected. In March 2019, the Intercontinental Terminals Company ("ITC") had a massive chemical fire in Deer Park, Texas. The day before the ITC fire, there was another fire at the Exxon Baytown facility. And in April 2019, there was yet another tank farm fire, this time at the KMCO facility in Crosby, Texas. This fire killed a person and critically injured two others.[60]

Hilton Kelley from Port Arthur, Texas

Hilton Kelley was born in Port Arthur and returned to the area in 2000. For several years, he has lived downwind from the BASF Chemical plant and Total Petrochemicals and Refinery.[61] Port Arthur, where most residents are African

[58] *Id.* ¶¶ 5-6.
[59] *Id.* ¶¶ 8-9.
[60] *Id.* ¶¶ 9-12.
[61] Declaration of Hilton Kelley ¶ 2 (attached as Exhibit B).

American or Hispanic,[62] has one of the highest concentrations of hazardous waste and petrochemical facilities and refineries in the country.

While Port Arthur was once a thriving community, Hilton moved back after a startling visit where he saw empty and dilapidated storefronts and several people sick with cancer and respiratory illnesses. He returned home to fight for environmental justice, founding two activist groups—the Community In-Power and Development Association, Inc. ("CIDA") and the Community Justice Advisory Committee Association ("CJAC"). Over the years Hilton has helped to successfully relocate families from the housing project where he spent his childhood, which was located on the fenceline of the Valero and Motiva refineries, to another part of town not directly in harm's way.[63]

Hilton has witnessed flaring events at refineries and chemical plants over the years. He routinely notices soot on the cars in his neighborhood, and a pungent, sulfurous odor in the air. His eyes frequently sting and water when he leaves his house, and when the air smells particularly strong of sulfur, his lips immediately chap and he feels a tingling sensation on his tongue. He also deals with hypertension, sinus problems, and allergies, and did not suffer from any of these ailments before moving back to Port Arthur. His grandson lives nearby and has, since birth, suffered from respiratory problems, allergies, and sinus infections. His grandson's symptoms persist, and worsen when he spends time outdoors.[64]

Hilton continues the fight for better regulation of toxic air pollution from large industrial sources in Port Arthur. Through his work with CIDA he successfully pressured Motiva to install updated pollution controls to reduce toxic emissions and pay for a community development center, and for Valero to fund a new health clinic. The groups continue to communicate with city councilmembers, the state environmental agency, and plant managers to improve transparency and keep pressure on industry to address air pollution.[65]

<u>Suzie Canales from Corpus Christi, Texas</u>

Suzie Canales has lived in Corpus Christi for more than 20 years. Corpus Christi is a port city where large quantities of petroleum products are imported and exported. Along the ship channel is a large cluster of major oil refineries and supporting chemical industrial facilities. The "refinery row" residential districts, which are primarily low income, African-American and Hispanic communities, are situated along the fencelines of these large facilities.[66]

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[62] *See* EPA, *Environmental Justice Showcase Communities*, https://www.epa.gov/environmentaljustice/environmental-justice-showcase-communities-region.
[63] Ex. B, Kelley Decl. ¶¶ 3-5.
[64] *Id.* ¶¶ 6-7.
[65] *Id.* ¶¶ 8-11.
[66] Declaration of Suzie Canales ¶¶ 2-3 (attached as Exhibit C).

Suzie is a co-founding member of the advocacy group Citizens for Environmental Justice ("CFEJ"), a Corpus Christi-based group representing the local families impacted by pollution. CFEJ was founded in 2000 to address local issues of poverty, pollution, and injustice, and to achieve environmental, social, and economic justice. As an organizer with CFEJ, Suzie launched a "bucket brigade" of citizens who use white painter's buckets to catch air quality samples. Through lab testing, these bucket brigades have shown that there are elevated levels of benzene coming from the refineries. As a result of a settlement over a permit challenge brought by CFEJ, the group started the Environmental Justice Housing Fund to administer awards to help relocate impacted people living closest to this facility.[67]

Almost weekly, work with CFEJ takes Suzie to the north side communities closest to the refineries. While working with members there, Suzie routinely experiences dizziness and headaches from chemical exposures. Whether outside patrolling (taking pictures or video of upset events to report to TCEQ) or inside speaking with members, the pollution, and the variety of smells is so pervasive that it is inescapable; Suzie has routinely smelled sweet smells (which she understands from her work on the bucket brigades to be benzene), offensive gaseous smells, and sulfuric smells, and smells similar to burnt cooking.[68]

Upsets are routine at many industrial facilities in the area. At least once per month, Suzie sees flaring and dark, dense plumes, and experiences rattling, tremors, window shaking, and loud roars like a plane taking off or landing. CFEJ members experience these events frequently too, and Suzie encourages them to call her and the TCEQ hotline to report the upset or malfunction. CFEJ members live with constant worry about explosions. Suzie used to know a member that would leave a packed bag with personal items by her front door in case she needed to leave in a rush due to an explosion or upset event—she has since passed away from cancer. CFEJ members have numerous health concerns and health issues that they believe to be related to and exacerbated by the pollution from frequent SSM events from nearby facilities, including: respiratory issues, asthma, cancer, auto-immune conditions, and skin conditions.[69]

[67] *Id.* ¶¶ 4-5.
[68] *Id.* ¶ 6.
[69] *Id.* ¶¶ 7-11.

Karla Land from Channelview, Texas

Karla Land has lived in Channelview, a working-class community with a large Hispanic population, since 1975. Her home is located in an industrial area, close to several refineries and chemical plants, such as the Exxon Baytown refinery and the LyondellBasell petrochemical facility, and is very close to the Ship Channel along the San Jacinto River.[70]

Over the years, Karla has routinely witnessed flaring events at nearby refineries and chemical plants. On several occasions, often in the evening, she has witnessed large black plumes of smoke coming from these facilities' stacks. She used to hear alarms from nearby facilities during these events, but no longer hears them even though she still sees the flaring occurring.[71] She routinely notices a layer of soot on cars and houses in her neighborhood. She used to frequently smell odors of rotten eggs, garbage, chemicals, and gasoline, but over the years, the odors from the facilities have desensitized her senses, and her sense of smell is now completely gone. Karla is concerned that, since she no longer hears alarms, she is not being notified when these events occur and often has to scour the media to try to determine if she is being exposed to dangerous levels of air pollution. Also, without her sense of smell, she is distressed that she is no longer able to detect troubling smells or identify the source. She has repeatedly tried to report flaring events to the local pollution control agency but does not consistently get a response, and when she does, they tell her the only thing they can do is offer shelter in the event of an explosion at one of the facilities.[72] During the 2019 fires at the Exxon refinery and ITC Deer Park chemical plant, where the ITC fire lasted several days, resulted in miles-long plumes of black smoke, and authorities issued shelter-in-place orders for the surrounding area, Karla's community was not properly notified or advised to take precautionary measures.[73]

Karla lives with a chronic sinus infection, which often leads to respiratory problems, and has to visit the doctor two to four times a year to receive treatment for bronchitis. She is often fatigued and dizzy, and at times barely has the energy to stand up and walk across a room. She wakes up every day coughing. Several of her friends and neighbors are living with cancer; she knows people with leukemia, lung cancer, and rare blood and bone cancers. Her brother, who also lives in the area, was diagnosed with a rare cancer in his sinuses. Her husband has been treated for skin cancer, and also suffers from a cough.[74]

Karla and her husband own a property several hours west of Channelview in Hill Country. They bought the property to retreat from the poor air quality. Karla

[70] Declaration of Karla Land ¶¶ 2-3 (attached as Exhibit D).
[71] *Id.* ¶¶ 3, 6.
[72] *Id.* ¶¶ 6-10.
[73] *Id.* ¶¶ 15-16.
[74] *Id.* ¶¶ 11-12.

almost immediately stops coughing when she arrives in the country, and is able to do a lot more physically, such as canoe and hike. Her symptoms quickly worsen again when she returns to the industrial area. While Karla enjoys her time in the country and feels very fortunate to have that access, it pains her that her time away is the only time when she feels she can truly breathe.[75]

Dewey Magee III from Portland, Texas

Dewey Magee III has lived in Portland, Texas for more than 50 years. His home is less than half a mile from the Gulf Coast Growth Ventures plastics plant and approximately four miles downwind from Cheniere's Portland LNG plant.[76] Dewey routinely sees the flare running in the middle of the night from the Cheniere plant, has noticed a slight chemical smell near his home during and after flaring, and on occasion, can hear the rumbling of the plant flare. He has witnessed flaring so bad that he thought the plant had experienced a catastrophic event. Dewey is aware that air pollution can travel several miles and is very concerned about the health impacts of being exposed to air pollution from SSM events at nearby industrial sources. He is particularly concerned about the health of his wife, who is sensitive to certain chemicals, and grandchildren, and his own health and the increased risk of cancer, as he has lost family members to leukemia and lung cancer.[77]

Craig Hampel from Houston, Texas

Craig Hampel has lived in Houston, Texas since 1996. Craig is an active person and spends a good deal of time outdoors, regularly walking on nearby trails and biking on the Bayou Bike Trail with his family.[78] He understands that Houston suffers from some of the nation's most polluted air from industrial facilities, and does not need more pollution to add to the problem. Craig's dealt with a respiratory infection and has been treated for adult onset asthma, and members of his family suffer from allergies. He receives text message alerts from the City of Houston, and when he receives alerts about poor air quality, he does not recreate outside or bike on those days. Also, living near I-45 in Houston, he tries to monitor and track highway pollution.[79] Craig is aware that industrial facilities in Houston, such as refineries, emit large amounts of air pollution during upset events, and is very concerned about the impacts of this pollution on his respiratory issues and the health of his family.[80]

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[75] *Id.* ¶ 17.
[76] Declaration of Dewey Magee III ¶¶ 2, 4 (attached as Exhibit E).
[77] *Id.* ¶¶ 5-11.
[78] Declaration of Craig Hampel ¶¶ 2-3 (attached as Exhibit F).
[79] *Id.* ¶¶ 4-6.
[80] *Id.* ¶ 7.

Belinda Joyner from Northampton County, North Carolina

Belinda Joyner, now in her sixties, returned to her hometown in Northampton County in her twenties to build a peaceful life with her family, but found her community invaded by air pollution.[81] She lives about a mile and a half from the Enviva Northampton wood pellet biomass plant, and can see the WestRock paper plant's smokestack from her front porch. She is often confronted with the smell of sulfuric acid from the WestRock plant.[82] Belinda is aware that the Enviva plant has taken advantage of the SSM loophole at the Ahoskie plant and it has tried to avoid using pollution controls during startup at its Northampton plant. An expansion of the Enviva plant has exacerbated noise pollution and traffic in the area, and Belinda is very concerned about the harmful impacts of increased air pollution from SSM events on her health and the health of her community—an African American community in a rural county. Neighbors have moved away due to concerns about pollution, an option that is not available to everyone.[83] Belinda tries to be a voice for her community, working with local organizations to fight the Enviva expansion and raise awareness about industrial air pollution before the state's environmental justice advisory board and state air quality officials.[84]

Michael Jemison from Concord, North Carolina

Michael Jemison has been a resident of Concord, North Carolina since 2002, and lives near the Piedmont Natural Gas Concord Compressor Station, one of multiple facilities that can take advantage of the state's exemptions for pollution violations during SSM events.[85] He serves on the Board of Directors as Vice Chair for CleanAIRE NC (formerly known as Clean Air Carolina). He first got involved with the organization in 2020, where he volunteered at an event at a high school to clean up an ozone garden—a garden that includes plants that show symptoms of high ozone levels, and act like a natural pollution monitoring system.[86] Michael tries to spend time outdoors daily, and enjoys walking, hiking, running, bicycling, and playing sports such as tennis and golf. He is very concerned about the health impacts of air pollution—such as nitrogen oxides that contribute to ozone and smog—from Piedmont's Concord Compressor Station and other industrial sources, especially on his many elderly neighbors, and on nearby communities of color and low-income neighborhoods that are adversely affected at disproportionate rates. Air pollution levels affect his decisions to engage in outdoor activities. He is concerned that there aren't enough air monitors around Concord, but still regularly receives updates on air quality, and when air pollution levels are high, he refrains from spending time outside, which harms his quality of daily life.[87]

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[81] Declaration of Belinda Joyner ¶¶ 1, 4-5 (attached as Exhibit G).
[82] *Id.* ¶¶ 3, 7.
[83] *Id.* ¶¶ 9-16.
[84] *Id.* ¶ 17.
[85] Declaration of Michael Jemison ¶¶ 2-3 (attached as Exhibit H).
[86] *Id.* ¶¶ 4-7.
[87] *Id.* ¶¶ 9-16.

Rebecca Sewell from Brevard, North Carolina

Rebecca Sewell has lived in Brevard, North Carolina for nearly 30 years.[88] She frequently travels to and recreates in an area close to the Duke Energy Cliffside coal-fired power plant in Rutherford County, near the Blue Ridge Parkway. As a retired healthcare professional, she is aware of and deeply concerned about the harmful environmental and health impacts of air pollution from coal-fired power plants. She understands that arsenic, dioxins, acid gases, lead, selenium, and other heavy metals in coal-fired power plant emissions have been shown to cause cancer, organ damage and failure, neurological impairment, and death. She is also aware that other pollution emitted by coal-fired power plants, such as particulate matter and nitrogen oxides, can cause and exacerbate heart and lung problems.[89] From the Blue Ridge Parkway, she frequently sees haze pollution in the direction of the coal plant, and refrains from playing tennis at a local club and visiting nearby parks due to their proximity to the plant and high pollution days.[90] Rebecca enjoys observing the incredible biodiversity of Great Smoky Mountains National Park, and for more than 40 years, her family has hiked, backpacked, camped, and tubed in the park. She is very concerned about the impacts of haze pollution on the park's rich biodiversity, and on her family's health and aesthetic enjoyment of the park.[91]

Ulla Reeves from Asheville, North Carolina

Ulla lives in Asheville, North Carolina, and regularly travels through Canton, where the Blue Ridge Paper Products Mill is located. Over the years, she has often smelled the sulfur-like stench of the mill at her home, as well as in other parts of Asheville and the surrounding areas. She is very concerned about the health harms from breathing the mill's emissions, and ventures outside less when she can smell the pollution.[92] As part of her work with the National Parks Conservation Association, she studies air pollution issues in national parks, including the Great Smoky Mountains National Park. She understands that pollution control devices can help protect public health by reducing haze pollution (which she knows through her work to be caused by emissions of sulfur dioxide, nitrogen oxides and volatile organic compounds), and when these devices aren't being used it puts communities and natural spaces at greater risk. Ulla and her husband regularly visit Great Smoky Mountains National Park and other nearby areas to hike, backpack, and camp. While visiting the Smokies, she has witnessed haze and visibility impairment that is likely directly associated with air pollution from the Blue Ridge Paper Products Mill and other industrial sources, especially in the area with larger vistas. This haze mars the aesthetic value of these otherwise resplendent outlooks and compromises Ulla's health and the health of her family.[93]

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[88] Declaration of Rebecca Sewell ¶ 2 (attached as Exhibit I).
[89] *Id.* ¶¶ 4-7.
[90] *Id.* ¶¶ 9, 11-12.
[91] *Id.* ¶¶ 13-20.
[92] Declaration of Ulla Reeves ¶¶ 2, 5 (attached as Exhibit J).
[93] *Id.* ¶¶ 4, 7-10.

Cynthia P. Robertson from Sulphur, Louisiana

Cynthia P. Robertson lives in Sulphur, Louisiana, about five miles from the nearest petrochemical plant in the Sulphur Industrial Complex on Highway 108, which includes several major petrochemical facilities, and about 25 miles from several liquid natural gas ("LNG") facilities.[94] After witnessing the impacts of Hurricanes Laura and Delta on the unhoused community in Sulphur, Cynthia began working with Micah 68, a local faith motivated organization that focuses on environmental justice and environmental education. Cynthia regularly cooks meals for the unhoused community, and recently bought a house next door to her own in order to store food for Micah 68 and to provide a gathering space for community members to organize against environmental justice issues in the area, including the dangers posed by nearby petrochemical and LNG facilities.[95]

Cynthia's community is well aware that they live in a dangerous area, and most community members have friends or family that work in the plants at the Sulphur Industrial Complex. Cynthia observes explosions happening at these plants as often as every two months, which are marked by loud booms that she can hear from inside her house that make her windows rattle violently. One recent explosion at a plant ten miles away shook her house so violently that she thought a tree had fallen on her house. These explosions have severely damaged her mental health, and she lives in constant fear that someone will be hurt by one of these explosions.[96]

Often, Cynthia will hear a roaring sound that is quickly followed by a strong burning smell. The air outside her home is often so acrid that it burns her throat and nose, and makes her eyes water. She routinely has to check outside to make sure the burning smell isn't coming from a fire, even though the smell is always emissions from the Sulphur Industrial Complex. Early last year, she installed a particulate matter ("PM") air monitor in her front yard, and almost every night the monitor flares up into the red zone (above 200 AQI, which is not safe to breathe). Usually, the tree line around her home is too high for her to see flares and plumes coming from the plants, but she often sees black smoke coming from the plants along the interstate, and sometimes the smoke travels high enough to be visible above the tree line.[97]

Cynthia understands that these all too frequent SSM events at nearby industrial sources worsen air pollution and threaten her health and the health of her community. Cynthia lives with an autoimmune disorder, and also has psoriatic arthritis, chronic fatigue, and myalgia. She is aware that there is evidence that autoimmune disorders and myalgia may be linked to and further exacerbated by air

[94] Declaration of Cynthia P. Robertson ¶ 2 (attached as Exhibit K).
[95] *Id.* ¶ 3.
[96] *Id.* ¶¶ 5, 11.
[97] *Id.* ¶¶ 6-8.

pollution. Poor health is common in Sulphur. It is also difficult to receive quality medical care in Sulphur, since doctors know it is unsafe to live in the area and are reluctant to move there.[98]

Sherry Leonard from Muscatine, Iowa

Sherry Leonard has lived in Muscatine, Iowa for over 40 years. Muscatine is a working, middle-class community, and is known as one of the most polluted towns in Iowa. Sherry lives near the South End neighborhood of Muscatine that is home to several major industrial facilities, including the Grain Processing Corporation corn and ethanol plant that runs entirely on fracked gas, MidAmerican's Louisa Generating Station, the largest coal-fired power plant in the area, and Monsanto, which produces Roundup and other pesticides. The Muscatine Power and Water coal-fired power plant is just a few miles away.[99] Sherry is aware that all these plants can take advantage of SSM loopholes and emit even more pollution into the community. Sherry used to work at Musco Lighting, and during her time there, she developed Asbestosis, a chronic lung disease, and Chronic Obstructive Pulmonary Disease ("COPD") from inhaling toxic chemicals and asbestos fibers at work and in her community. Though she no longer works at Musco Lighting, these chronic health conditions persist and continue to degrade her quality of life.[100] Over the years, Sherry has been involved with Sierra Club and a local group, Clean Air Muscatine ("CLAM"), and regularly monitors pollution and discusses air and water quality issues with other community members. About 12 years ago, she participated in a documentary highlighting the terrible pollution in the area and its harmful impacts on public health.[101]

Freedom Malik from Muscatine, Iowa

Freedom Malik lives in Muscatine, Iowa, a few miles from the nearest plant, the Grain Processing Corporation ("GPC") in the South End industrial area. The South End includes several other major industrial facilities, such as the Monsanto Company/Bayer CropScience LP Facility, and Muscatine Power and Water, among others.[102] GPC is visible from Freedom's kitchen window, and she sees plumes coming out of the plant's smokestacks every day. She can also smell the plant every day, a smell similar to old dog food and animal byproducts. She has to keep her windows shut to keep out the pollution and smells.[103]

Since moving to Muscatine in 2019, Freedom has had the worst headaches and allergies of her life. She is constantly sneezing and experiencing intense congestion and a running nose, and has frequent headaches. Checking and worrying

[98] *Id.* ¶¶ 4, 9, 11.
[99] Declaration of Sherry Leonard ¶¶ 3-4 (attached as Exhibit L).
[100] *Id.* ¶ 6.
[101] *Id.* ¶¶ 2, 7.
[102] Declaration of Freedom Malik ¶ 2 (attached as Exhibit M).
[103] *Id.* ¶ 4.

about air pollution has become a regular part of her life. She frequently checks air quality levels online so she knows what to expect when leaving the house, is repeatedly confronted with strong smells, and is less active and spends less time outside because of the pollution. She is concerned that her symptoms could be exacerbated by pollution emitted by the plants in South End, and over time, has become more aware of the dangers of living in the area. She is familiar with the stories of long-time residents and how cancer is common among those who have grown up close to the plants, and is worried that her family's health will be negatively impacted the longer they live there.[104]

Monica Rodriguez from Bridgeport, Connecticut

Monica Rodriguez lives in Bridgeport, Connecticut with her two children. Even though she works two part-time minimum-wage jobs, she receives food stamps and could not afford to live anywhere without government assistance.[105] She has asthma and so does her son and her daughter.[106] Many of the children in her community are sick with asthma.[107] Her son quit school because his asthma caused him to miss dozens of days of class for several years. The late-night emergency room visits wore out everyone in the family and caused Monica to miss work because she was so tired and stressed from seeing her son struggling to breathe.[108] Monica and her family recently moved away from the Wheelabrator Incinerator, which sometimes had emergency events but the community was never notified or evacuated. Their health problems improved almost immediately after moving away.[109]

Mary Johnson from Bridgeport, Connecticut

Mary Johnson is a 52-year-old African-American grandmother who has lived in Bridgeport, Connecticut for almost 30 years.[110] She and her family have serious respiratory issues from living so close to an incinerator that burns 24 hours a day. She has never smoked but her doctor tells her she has the lungs of a smoker. Mary cannot get a full-time job because of her health issues, but works with non-profits dealing with social issues, mostly in a volunteer capacity. Her family is overwhelmed by strange odors and dust from the incinerator and everyone in the community seems to have some type of cough or asthma.[111] One of her grandsons is far behind in school because he has missed so many days due to one sickness after another. He is a smart kid but is no longer interested in college.[112] In 2022 there

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[104] *Id.* ¶¶ 5-8.
[105] Statement of Monica Rodriguez ¶¶ 1-4 (attached as Exhibit N).
[106] *Id.* ¶ 3.
[107] *Id.* ¶ 6.
[108] *Id.* ¶ 4.
[109] *Id.* ¶¶ 6-7.
[110] Statement of Mary Johnson ¶¶ 1-4 (attached as Exhibit O).
[111] *Id.* ¶¶ 4-5.
[112] *Id.* ¶ 3.

was a fire at a nearby incinerator where the odor was stifling, but the community was not notified or evacuated.[113]

C. Legal Background

1. Automatic and Discretionary Exemptions Violate the Act's Continuity Requirement

Automatic and discretionary exemptions from SIP emission limitations during SSM periods violate the requirements of the Clean Air Act. SIPs must include emission limitations; [114] emission limitations must be "continuous," and they must be "enforceable."[115] Under the Act's plain text, emission limitations must "limit[] . . . emissions of air pollutants on a continuous basis."[116] This definition applies whenever "used in this chapter"—that is, across the Act.[117] And that mandate of continuity applies whether limitations are "established by the State or the Administrator."[118] The Act's requirement that emission limits apply continuously thus prohibits SIPs from containing exemptions—whether automatic or granted by state agency directors—for SSM periods.

The D.C. Circuit Court of Appeals confirmed the Act's plain meaning prohibits SSM exemptions in the 2008 *Sierra Club* case, *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). There, the court held that the Act's requirement for "continuous" emission limitations unambiguously prohibits "temporary, periodic, or limited systems of control."[119] In requiring that emission limitations be "continuous," Congress thus gave states no authority "to relax emission standards on a temporal basis."[120] The court therefore held the challenged SSM exemptions in EPA-established emission standards under 42 U.S.C. § 7412 were unlawful. The court reiterated this plain-text understanding in *U.S. Sugar Corp.*, stating that exemptions are not "consistent with the Agency's enabling statutes."[121]

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[113] *Id.* ¶ 8.

[114] SIPs must include "emission limitations and other control measures" 42 U.S.C. § 7410(a)(2)(A). Contrary to the arguments of some SIP Call opponents, a provision that meets all the elements of an "emission limitation," but is subject to an SSM exemption, is not an "other control measure": it is an illegal emission limitation. *See* 2015 SSM SIP Call, 80 Fed. Reg. at 33,896 (EPA disagrees with the commenters' conclusion that the mere act of labeling certain SIP provisions as 'control measures, means, or techniques' rather than as 'emission limitations' can be a means to circumvent the requirement that emission limitations must regulate sources continuously.")

[115] 42 U.S.C. §§ 7602(k); 7410(a)(2)(A).

[116] *Id.* § 7602(k).

[117] *Id.*; s*ee, e.g.*, *McEvoy v. IEI Barge Servs., Inc.*, 622 F.3d 671, 675 (7th Cir. 2010) ("[T]there is no language in the statute indicating that the definitions [in 7602] are not applicable across-the-board.").

[118] 42 U.S.C. § 7602(k).

[119] *Sierra Club v. EPA*, 551 F.3d at 1027 (quoting H.R. Rep. No. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170).

[120] *Id.* at 1028.

[121] *U.S. Sugar Corp. v EPA*, 830 F.3d 579, 607 (D.C. Cir. 2016).

The court's reasoning in those cases "applies equally in the context of emission limitations required in SIPs," as EPA itself correctly noted in briefing defending its SIP Call.[122] Nothing in Section 112 of the Act differentiates the *Sierra Club* ruling from applying to SIPs in Section 110. Like Section 112, the emission limitations subject to exemptions in SIPs include limits that must meet Congressionally-set minimum standards of pollution control: the "best available control technology" and "lowest achievable emission rate" requirements for new and modified major sources built in, respectively, attainment and nonattainment areas,[123] "best available retrofit technology" requirement for certain existing sources,[124] and the "reasonably available control technology" requirement for existing sources in nonattainment areas).[125]

In addition to violating the Act's continuity requirement, emission limitations subject to exemptions also violate both Congress's instruction that citizens may enforce emission limitations and the requirement that SIPs contain "enforceable emission limitations." Emission limitations in SIPs must be "enforceable,"[126] and state and federal emission limitations and permit conditions must be enforceable by citizens.[127] Congress enacted the Act's citizen suit provision, 42 U.S.C. § 7604, "to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."[128] Congress expressly authorized citizen suits over violations of "an emission standard or limitation under this chapter,"[129] which Congress defined to include an "emission limitation" "in effect under . . . an applicable implementation plan."[130] That expressly includes "the portion (or portions) of the implementation plan . . . approved under section 7410."[131] Read together, these provisions mean that citizens have the right to bring suits in federal court over violations of emission limitations, including those established in EPA-approved SIPs. Automatic exemptions strip citizens of the right to enforce emission limitations at all when the exemption applies; discretionary exemptions similarly block enforcement unless citizens can somehow prove the director's decision to excuse a violation was unlawful.[132]

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[122] Resp't EPA Final Answering Br. at 40, *Env't Comm. of the Fla. Elec. Power Coord'g Grp. v. EPA,* No. 15-1239, (D.C. Cir. Oct. 28, 2016), ECF No. 1643446. *See, e.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019) ("[J]ust as binding as this holding is the reasoning underlying it.").
[123] 42 U.S.C. §§ 7475(a)(4); 7479(3); 7501(3).
[124] *Id.* § 7491(b)(2)(A), (g)(2).
[125] *Id.* §§ 7502(c)(1); 7503(a)(2).
[126] *Id.* § 7410(a)(2)(A).
[127] *Id.* § 7604(a), (f).
[128] *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974).
[129] 42 U.S.C. § 7604(a)(1).
[130] *Id.* § 7604(f).
[131] *Id.* § 7602(q).
[132] 2015 SSM SIP Call, 80 Fed. Reg. at 33,929.

2. Vague General Duty Requirements Are Not Continuous and Enforceable Emission Limitations Because They Do Not Limit Emissions and Are Not Legally or Practically Enforceable

"General duty" type provisions that would apply during periods of SSM pollution, such as the obligation to "minimize emissions," cannot substitute for the continuous and enforceable emission limitations Congress mandated. Not only do such generic provisions fail to meet the level of control required by the applicable stringency requirements, such as reasonably available control technology (RACT) in nonattainment areas, best available control technology (BACT) for certain sources in attainment areas, and best available control technology (BART) for sources impacting regional haze, generic duty provisions are not legally or practically enforceable, as required by the Act.

These provisions often do not include clear standards and recordkeeping and monitoring requirements, rendering them not just legally but also practically enforceable.[133] Congress carefully cabined citizen suits to violations of clear standards, requiring plaintiffs to allege a violation of "a specific strategy or commitment in the SIP."[134] Congress intended that a citizen suit "would not require reanalysis of technological or other considerations at the enforcement stage."[135] Since general duty provisions are not quantifiable or objective, they run afoul of these limitations and thus conflict with congressional intent that citizens be able to enforce emission limitations contained in SIPs.

Courts have repeatedly rejected attempts to enforce general duty provisions.[136] For these reasons, EPA correctly recognized in the 2015 SSM SIP Call that "[t]he existence of these generic provisions does not . . . legitimize exemptions": an emission limitation that is not enforceable contravenes the Act.[137]

3. Affirmative Defense Provisions

i. Affirmative Defense Provisions are Inconsistent with the Act

Affirmative defenses that prohibit courts from imposing penalties if certain conditions are met conflict with the clear text and structure of the Act. Congress gave courts, not EPA or states, jurisdiction to provide remedies in civil suits for violations of emission standards.[138] The Act also prescribes factors that courts must

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[133] *Id.* at 33,928; *see also, e.g.*, *id.* at 33,903-04, 33,916.
[134] *Coal. Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 769 (2d Cir. 1992) (citations omitted).
[135] S. Rep. No. 91-1196, at 36.
[136] *See, e.g.*, *McEvoy,* 622 F.3d at 678.
[137] 2015 SSM SIP Call, 80 Fed. Reg. at 33,890, 33,903-04.
[138] *NRDC v. EPA*, 749 F.3d 1055 (affirmative defense against civil penalties conflicts with Clean Air Act sections 304 and 113).

consider in determining the amount, if any, of any civil penalties to assess for any violation. Affirmative defense provisions unlawfully abrogate these provisions of the Act.

Congress unambiguously expressed its intent that courts determine the amount, if any, of civil penalties to assess in lawsuits over violations of emission standards in SIPs on a case-by-case basis, leaving no room for states to create or EPA to approve affirmative defenses. As explained in detail below, Congress made clear that (1) community members can sue over violations of emission standards established by SIPs;[139] (2) district courts determine the amount, if any, of civil penalties to assess against the violator;[140] and (3) the court must consider specific factors in making that determination.[141] Because "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[142]

The plain language of the Act is clear. Congress gave express, exclusive grant of "jurisdiction" to the federal district courts "to apply any appropriate civil penalties" in citizen suits to enforce violations of emission limitations.[143] Congress authorized citizen suits for violations of any "emission limitation" "which is in effect under … an applicable implementation plan."[144] Thus, whenever a citizen brings an enforcement action over a violation of an emission limit in a SIP, the federal district court—not any other entity—has authority to determine the amount, if any, of civil penalties to apply.

The D.C. Circuit Court of Appeals confirmed this plain reading in the *NRDC* case, holding that § 7604(a) "creates a private right of action, and as the Supreme Court has explained, 'the Judiciary, not any executive agency, determines "the scope"—including the available remedies —"of judicial power vested by" statutes establishing private rights of action.'"[145] Any SIP that is enforceable under § 7604 has been approved by EPA.[146] Thus, when an EPA-approved SIP includes an affirmative defense, EPA has illegally claimed authority to determine the scope of judicial power.[147]

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[139] 42 U.S.C. § 7604(a)(1), (f).
[140] *Id.* § 7604(a).
[141] *Id.* § 7413(e)(1).
[142] *Chevron v. NRDC*, 467 U.S. 837, 842-43 (June 25, 1984).
[143] 42 U.S.C. § 7604(a); *id.* § 7413(e)(1) (providing mandatory factors for court to consider "[i]n determining the amount of any penalty to be assessed under this section or section 7604(a)").
[144] *Id.* § 7604(a)(1), (f).
[145] *NRDC,* 749 F.3d at 1063 (emphasis omitted) (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013)); *see generally Int'l Union v. Faye*, 828 F.3d 969, 974 (D.C. Cir. 2016) ("the reasoning necessary to [prior] decision compels" the outcome of the current one).
[146] *See, e.g.*, *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1174-75 (9th Cir. 2015).
[147] *See, e.g.*, *Michigan v. EPA,* 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("If EPA lacks authority under the Clean Air Act, then its action is plainly contrary to law and cannot stand.").

Congress expressly required district courts to consider certain factors when they decide the amount, if any, of civil penalties to apply for a violation:

> In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.[148]

Individual courts are left to decide on a case-by-case basis how to weigh these criteria in determining what penalty, if any, is appropriate. Affirmative defenses, however, purport to strip courts of authority to weigh the criteria.

Context and structure further confirm affirmative defenses violate § 7604(a) and § 7413(e)(1). First, Congress specified a single circumstance in which district courts lack authority to apply appropriate civil penalties—in suits against EPA over its failure to perform a nondiscretionary duty.[149] This sole exception strengthens the conclusion that Congress left no room for states to create or EPA to approve other exceptions, like affirmative defenses.[150] Second, Congress was also well aware that it could have precluded district courts from imposing penalties in civil suits for violating emission limits where a violator had "sufficient cause" or some other arguably mitigating factors were present. Congress specifically prohibited courts from applying penalties "for noncompliance with administrative subpoenas," if "the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action."[151] It also provided a specific "affirmative defense" to prosecutions in a narrow category of criminal enforcement cases, and preserved existing affirmative defenses available in other criminal cases.[152] Congress's decision not to include such mitigating factors for violating emission limits must be respected.[153]

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[148] 42 U.S.C. § 7413(e)(1).
[149] *Id.* § 7604(a).
[150] *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 20 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.").
[151] 42 U.S.C. § 7413(e)(1).
[152] *Id.* § 7413(c)(5)(C)-(D).
[153] *See, e.g., Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002).

ii. Affirmative Defenses Chill Citizen Enforcement and Operate in Practice as a Free Pass to Pollute

Thanks in part to the historic presence of affirmative defenses and other loopholes, the Clean Air Act is notoriously difficult to enforce.[154] Citizen suits under the Act often involve complex technical issues that require many hours of expert and attorney time.[155]

Affirmative defenses in SIPs make enforcement even more difficult and expensive. The burden on nonprofit plaintiffs to overcome the highly technical factors in affirmative defenses is exceedingly high and "makes it very difficult to bring a Clean Air Act citizen suit in a cost-effective manner."[156] The affirmative defense increases the power imbalance between deep-pocketed polluters, who have ready access to information about emissions events and the cause thereof, and community groups, who are often ill-resourced and are likely not as familiar with the practices and inner workings of the polluting facility. The result is fewer enforcement cases, notwithstanding the severe impacts violations have. Affirmative defenses therefore make polluters less likely to face penalties for unlawful pollution releases, thus giving them less incentive to make the investments necessary to avoid breakdowns and otherwise remain in compliance.[157]

Though industrial polluters contend that excess emissions are unavoidable during periods of SSM operations, settlement agreements have proven that industrial sources can, in fact, reduce their emissions during SSM events, and can

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[154] *See, e.g.*, Jim Hecker, *The Difficulty of Citizen Enforcement of the Clean Air Act,* 10 Widener L. Rev. 303 (2004) [hereinafter "Hecker Article"] (describing in detail the author's experience litigating five citizen suits between 1995 and 2004) (attached as Exhibit 24); 2015 SSM SIP Call, 80 Fed. Reg. at 33,870 ("affirmative defense provisions interfere with effective enforcement of SIP emission limitations according to CAA section 304"); *see also* State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Supplemental Proposal to Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States, Proposed Rule, 79 Fed. Reg. 55,920, 55,935 (Sep. 17, 2014).
[155] Ex. 24, Hecker Article at 310; *see also Env't Tex. Citizen Lobby v. ExxonMobil*, 824 F.3d 507 (5th Cir. 2016) (overturning district court decision declining to order any relief after 13-day bench trial regarding 13,000 days of self-reported violations at industrial complex).
[156] Decl. of James M. Hecker ¶ 15, Br. of Pet'rs at 216, *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. Aug. 23, 2013) (No. 10-1371); Comments of Env't & Community Grps. Coalition on Proposed SIP Call Withdrawal Rule for Texas at 25-26 (June 28, 2019), EPA-R06-OAR-2018-0770-00001, https://www.regulations.gov/comment/EPA-R06-OAR-2018-0770-0035 (attached as Exhibit 25) [hereinafter "Comments of Env't and Community Grps. Coalition on TX SIP Call Withdrawal Rule"] (discussing unsuccessful enforcement case where affirmative defense was raised).
[157] *See* 2015 SSM SIP Call, 80 Fed. Reg. at 33,955-56 ("Elimination of … affirmative defense provisions should provide increased incentive for sources to be properly designed, operated and maintained in order to reduce emissions at all times.").

reduce the frequency of malfunctions.[158] Affirmative defenses give sources a free pass to avoid taking those steps.

A dramatic example of a large polluter's abuse of the SSM affirmative defense is Sierra Club's case to enforce violations at Luminant's Big Brown coal-fired power plant in Texas, where the defendants argued that the power plant's thousands of self-reported opacity exceedances were not violations of the Texas SIP or the facility's Title V permit.[159] The case, *Sierra Club v. Energy Future Holding Corp.*, No. 12-cv-108-WSS, 2014 WL 2153913 (W.D. Tex. (Mar. 28, 2014)), shows how polluters have abused Texas's affirmative defense provision, with the court's misunderstanding and misapplication of it resulting.[160]

Harris County, which is home to the "proliferating air polluting" petroleum and petrochemical industry along the Houston Ship Channel, submitted comments into the 2019 Texas Withdrawal Rule docket[161] and participated as amicus in the 2020 case challenging EPA's withdrawal of the 2015 SSM SIP Call for Texas.[162] We attach and incorporate those important comments, brief and attached declaration in full in these comments.

Harris County drew from its vast "experience with affirmative defenses to demonstrate that regulated entities regularly wrongly claim affirmative defenses and seldom provide regulators with adequate information to evaluate their claims, that obtaining required documentation shifts the burden onto the regulator, and that the overwhelming majority of affirmative defense claims are meritless."[163] An attached affidavit by a Texas Commission on Environmental Quality (TCEQ) investigator describes how "most regulated entities claim affirmative defenses" for their SSM events, and they often "incorrectly claim that they have met the

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[158] *See Id.* at 33,985.
[159] *Sierra Club v. Energy Future Holdings Corp.*, No. 12-cv-108-WSS, 2014 WL 2153913, at *3 (W.D. Tex. Mar. 28, 2014).
[160] *See* Ex. 25, Comments of Env't and Community Grps. Coalition on TX SIP Call Withdrawal Rule at 25-27.
[161] Adrian Garcia, Comments on Proposed Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan Revision—Affirmative Defense Revisions (June 28, 2019), ("Harris County Precinct 2 is home to the largest concentration of petrochemical manufacturing in the United States, and our residents bear a disproportionate share of the air pollution burden from industry emissions."), https://www.regulations.gov/comment/EPA-R06-OAR-2018-0770-0028 (attached as Exhibit 26); *see also* Hon. Lina Hidalgo, Comments on Proposed Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and Call for Texas State Implementation Plan Revision—Affirmative Defense Revisions (June 27, 2019), (attached as Exhibit 27), and Vince Ryan, Comments on Proposed Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and Call for Texas State Implementation Plan Revision—Affirmative Defense Revisions (June 28, 2019), https://www.regulations.gov/comment/EPA-R06-OAR-2018-0770-0019 (attached as Exhibit 28).
[162] Corrected Br. Amicus Curiae of Harris County, TX in Support of Pet'rs, *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. Dec. 8, 2020), ECF No. 1874908 (attached as Exhibit 29).
[163] *Id.* at 4.

affirmative defense when they have not," shifting the responsibility to the regulator to evaluate whether or not the violation actually met the criteria. In the investigator's experience reviewing 18 invocations of the affirmative defense, only one event met all of the affirmative defense criteria.[164] Evaluating the eleven affirmative defense criteria takes a significant amount of time, especially because the polluters do not provide enough information with their request, requiring investigators to draft questions for them to respond to.[165]

A recent report confirms that the affirmative defense for excess emission events is routinely claimed by polluters and routinely granted by TCEQ. During the six-year period from September 2016 to August 2022, TCEQ designated one half of one percent of reported emissions events (119 out of 21,769) to be "excessive," meaning that the state required the companies to perform analyses to determine the cause of the problem and to submit plans for preventing future upsets.[166] Of the 1,633 unexpected emissions events that lasted longer than a week, TCEQ only designated 27—less than two percent—as excessive and requiring a cleanup plan.[167] A 2017 report similarly found that TCEQ penalizes only about three percent of unexpected emissions events each year.[168]

Even in the rare cases in which TCEQ brings an enforcement action, the penalties it imposes are uniformly far below the state-law maximum rate, which itself is significantly lower than the maximum rate under the federal Clean Air Act. The total amount of penalties levied by the TCEQ against the 20 sources that reported the most frequent upset events totals less than a quarter million dollars ($210,709), which averages out to less than $50 for each reported emissions event.[169] The lack of enforcement and penalties for excess emissions means companies have no incentive to prevent malfunctions from recurring, even when they happen over and over again and release large quantities of pollution.[170]

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[164] *Id.* at 35.
[165] *Id.* at 36.
[166] Ex. 1, EIP Polluter's Playbook Report at 3-4.
[167] *Id.* at 8.
[168] *Id.* at 3-4; Env't Integrity Project and Env't Texas, *Breakdowns in Enforcement* (July 7, 2017), https://environmentalintegrity.org/wp-content/uploads/2017/02/Breakdowns-in-Enforcement-Report.pdf, (attached as Exhibit 30).
[169] Ex. 1, EIP Polluter's Playbook Report at 4-5, 28.
[170] *Id.* at 4.

III. EPA Must Reinstate the SIP Calls for North Carolina, Iowa, and Texas

A. North Carolina

EPA's Proposed Rule correctly affirms that the director's discretion SSM exemptions in North Carolina's SIP continue to violate the Clean Air Act.[171]

Responding to the 2015 SSM SIP Call's findings of substantial inadequacy,[172] North Carolina in 2016 revised its SIP and adopted 15A N.C. Admin. Code 02D .0545, a revised version of Section .0535 without the proscribed SSM exemptions.[173] Embedded in both this new regulation and amendments to Section .0535, however, were "springing" clauses that allowed the unlawful SSM exemptions to come back into force in the event the 2015 SSM SIP call were invalidated or withdrawn.[174] When EPA finalized its withdrawal of the 2015 SSM SIP call in April 2020,[175] it also revived North Carolina's unlawful SSM exemptions.

North Carolina thus continues to unlawfully exempt regulated facilities from complying with Section 110 emission limitations during times of start-up and shut-down,[176] provided a state official (or "director") determines those excess emissions were "unavoidable."[177] Under a separate director's discretion provision, excess emissions may also be exempted if the director determines they are the result of a "malfunction."[178] Subsections .0535(c)(1)–(7) describe the factors the director is required to consider in assessing whether the emissions were the product of a "malfunction" and thus whether to grant an exemption. Most of these factors are

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[171] Proposed Rule, 88 Fed. Reg. at 11852-54.
[172] *See* 2015 SSM SIP Call, 80 Fed. Reg. 33,840 (requiring that states included in the SIP call submit revised SIPs to EPA no later than Nov. 22, 2016).
[173] *Compare* 15A N.C. Admin. Code 02D .0545(c), (g), *with id.* § .0535(c), (g).
[174] 15A N.C. Admin. Code 02D .0535(a) (2016) (attached as Exhibit 31) (noting that "15A NCAC 02D .0535 shall not be in effect if 15A NCAC 02D .0545 is valid," but that if the 2015 SSM SIP Call were "declared or adjudged to be invalid or unconstitutional or stayed by the United States Court of Appeals for the Fourth Circuit, by the District of Columbia Circuit, or by the United States Supreme Court; or (2) withdrawn, repealed, revoked, or otherwise rendered of no force and effect by the United States Environmental Protection Agency, Congress, or Presidential Executive Order; such action shall render Rule .0545 of this Subchapter as invalid, void, stayed, or otherwise without force and effect upon the date such action becomes final and effective. At the time of such action, sources that were subject to Rule .0545 of this Subchapter shall be subject to this Rule."); § .0545(a) (functionally the same).
[175] North Carolina Withdrawal Rule, 85 Fed. Reg. 23,700.
[176] 15A N.C. Admin. Code 02D .0535(g) (as readopted Nov. 2020) (start-up and shut-down).
[177] *Id.* § .0535(a)(2) (defining "malfunction" as "any unavoidable failure of air pollution control equipment, process equipment, or process to operate in a normal and usual manner that results in excess emissions." This definition further notes that "[e]xcess emissions during periods of routine start-up and shut-down of process equipment shall not be considered a malfunction. Failures caused entirely or in part by poor maintenance, careless operations, or any other upset condition within the control of the emission source shall not be considered a malfunction.").
[178] *Id.* § .0535(c) (malfunction).

incorporated by reference into the exemption for emissions during periods of start-up and shutdown.[179]

In addition to purporting to define parameters for an exemption the Clean Air Act does not sanction, these factors must only be "considered" and would thus permit exemptions to be granted arbitrarily and capriciously—even assuming such exemptions were lawful under some circumstances. Most troublingly, .0535(c) also permits the director to consider "any other pertinent information," a catch-all provision broad and vague enough to swallow up any limits on discretion arguably present in the rest of .0535(c)(1)-(7).

These provisions are unlawful in substance and in form. For reasons explained in greater detail above, Section 302(k)'s definition of "emission limitation" as "continuous" applies throughout the Clean Air Act, including to limitations imposed under Section 110 by states.[180] Nowhere does Section 302(k)[181] or any other part of the Clean Air Act provide for exemption from applicable emission limitations when an exceedance is deemed "unavoidable." These discretionary exemption provisions are also procedurally defective: Even if these exemptions were permissible under some circumstances, we strongly agree with EPA's conclusion that these provisions permit "case-specific revision[s] of the SIP without meeting the statutory requirements of the CAA for SIP revisions."[182]

In defending North Carolina's SSM exemptions, EPA argued that Section 110 of the Clean Air Act only requires that the cumulative effect of a state's provisions satisfy the state's general duty[183] to ensure emissions do not cause an exceedance of the NAAQS.[184] As we and others—including EPA in its initial 2015 SSM SIP Call—have pointed out in prior stages of this dispute, if remaining below the NAAQS were all the Clean Air Act required, EPA could in theory approve a SIP consisting only of that requirement.[185] But it cannot; such a requirement is, by itself, "not clearly enforceable, legally or practically,"[186] and additionally, to be approved by EPA, SIPs

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[179] *See id.* § .0535(g) ("To determine if excess emissions are unavoidable during start-up or shut-down the Director shall consider the items listed in Subparagraphs (c)(1), (c)(3), (c)(4), (c)(5), and (c)(7) of this Rule along with any other pertinent information.").
[180] *See* 42 U.S.C. § 7602 (prefacing definitional section by noting that all definitions apply "[w]hen used in this chapter," i.e., throughout the Clean Air Act); *id.* § 7602(k).
[181] 42 U.S.C. § 7602(k).
[182] Proposed Rule, 88 Fed. Reg. at 11,854.
[183] *See* 15A N.C. Admin. Code 02D .0501(c).
[184] *See, e.g.*, North Carolina Withdrawal Rule, 85 Fed. Reg. at 23,705 ("Region 4 interprets CAA section 110(a)(2)(A) to mean a state may provide exemptions… so long as the SIP … meet[s] the requirements of attaining and maintaining the NAAQS ….").
[185] Proof Opening Br. of Pet'rs at 39, *Sierra Club v. EPA*, No. 20-1229 (D.C. Cir. Nov. 25, 2020), ECF No. 1873196 (noting that § .0501(e)'s requirements were "hopelessly generic"); 2015 SSM SIP Call, 80 Fed. Reg. at 33,889-90, 93. We incorporate in full the Proof Opening Brief referenced in this footnote.
[186] Proof Opening Br. of Pet'rs at 17.

must meet *all* applicable requirements of the Act.[187] The Act requires that the state impose discrete emission limitations,[188] which are defined by Section 302(k) as requirements that apply "on a continuous basis."

North Carolina addressed these deficiencies in its SIP in 2016. But these fixes depend for their legal effect on EPA finalizing the reinstatement of its 2015 SSM SIP Call. We therefore strongly support EPA's proposal to do so.

B. Texas

The affirmative defense provision in Texas's SIP[189] contravenes the Clean Air Act and must be removed. The provision has not been changed since EPA correctly called it in 2015, and there is no doubt that it is an archetypical affirmative defense provision: in limiting district courts' authority to assess appropriate civil penalties, it ignores various criteria district courts are legally required to consider,[190] and constrains how district courts weigh the remaining factors because, if they are met, the affirmative defense bars the court from assessing any penalty. As we have explained numerous times,[191] as well as above, affirmative defense provisions are unlawful, and EPA's 2020 about-face regarding the Texas affirmative defense provision was not just illegal but also arbitrary. Though we incorporate by reference those arguments here in full, we expand on a few key points here.

First, EPA's proposal correctly recognizes that its 2020 action misread *NRDC*. The logic of that case's holding that affirmative defenses contravene §§ 304(a) and 113(e) applies just as much to affirmative defenses regarding violations of standards established under § 110 as it does to affirmative defenses regarding violations of standards established under § 112. Sections 304(a) and 113(e) are general provisions that apply to all emission standards established under the Act: "statutes are not chameleons, acquiring different meanings when presented in different contexts."[192] Nothing about *NRDC*'s reasoning on affirmative defenses depends in any way on § 112 or even, more generally, that the standards at issue were established in the first instance by EPA rather than a state.[193] Indeed, as

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[187] *See* 42 U.S.C. §§ 7410(a)(2), (k)(5); 7602(k).
[188] 42 U.S.C. § 7410(a)(2)(A).
[189] 30 Tex. Admin. Code § 101.222(b)-(e).
[190] The criteria the affirmative defense ignores are "the size of the business, the economic impact of the penalty on the business, … payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance," and "such other factors as justice may require." 42 U.S.C. § 7413(e)(1).
[191] *See, e.g.*, Final Br. of Env't Intervenors at 33-51, *Env't Comm. of the Fla. Elec. Power Coord'g Grp. v. EPA*, No. 15-1239 (D.C. Cir. Oct. 31, 2016), ECF No. 1643796; Suppl. Br. of Env't Intervenors at 3-5, No. 15-1239 (D.C. Cir. Feb. 9, 2022), ECF No. 1934424; Proof Opening Br. of Pet'rs at 24-45, *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. Nov. 13, 2020), ECF No. 1871212; Ex. 25, Comments of Env't and Community Grps. Coalition on TX SIP Call Withdrawal Rule at 12-33.
[192] *Maryland v. EPA*, 958 F.3d 1185, 1202 (D.C. Cir. 2020).
[193] *See NRDC*, 749 F.3d at 1062-64.

explained above, all elements—emission standards and affirmative defenses—in SIPs are approved by EPA, meaning an affirmative defense in a SIP is EPA's usurping power from federal courts just as much as an affirmative defense in a § 112 rule is. *NRDC*'s logic is thus a binding holding of the D.C. Circuit, and EPA must follow it.[194]

Second, the Fifth Circuit's *Luminant* case was wrongly decided inasmuch as it upheld EPA's prior approval of Texas's affirmative defense. As EPA notes, the Fifth Circuit decided *Luminant* at step 2 of *Chevron*.[195] The Fifth Circuit erred. In *Luminant*, the Fifth Circuit did not address the Clean Air Act's citizen suit provision,[196] which was key to both the D.C. Circuit's holding in *NRDC* and EPA's position on affirmative defenses in the SSM SIP Call.[197] The Fifth Circuit mentioned the citizen suit provision only in passing, when discussing the background related to the environmental petitioners arguments in that case.[198] As discussed above, § 7604(a) (together with § 7413(e)(1)) unambiguously precludes EPA from approving affirmative defense provisions into SIPs. *Luminant* was wrongly decided—and the Fifth Circuit should not have deferred to EPA—because, among other reasons, the court there did not address § 7604(a).

Moreover, the *Luminant* court wrongly found that § 7413(e)(1) was ambiguous because it "does not discuss whether a state may include in its SIP the availability of an affirmative defense against civil penalties for unplanned SSM activity."[199] That analysis assumes that so long as the Clean Air Act does not explicitly say whether EPA has authority, the Act is ambiguous. Courts have correctly rejected such analysis.[200] Further, *Luminant* is wrongly decided because,

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[194] *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019). *NRDC* contains a judicially modest footnote, wherein the Court expressly notes that, as the issue was not presented, it does not specifically evaluate the question of whether affirmative defenses are appropriate in SIPs. 749 F.3d at 1064 n.2; *see* 2015 SSM SIP Call, 80 Fed. Reg. at 33,854 (concluding similarly regarding footnote 2); 79 Fed. Reg. at 55,932 (similar). Nevertheless, as explained herein, *NRDC*'s binding logic controls the outcome here.

[195] Proposed Rule, 88 Fed. Reg. at 11,855. Thus, to the extent that ruling is correct, EPA can depart from it now, as EPA says. *Id.*

[196] 42 U.S.C. § 7604(a).

[197] *See Luminant Generation v. EPA*, 714 F.3d 841, 852 (5th Cir. 2013) (holding, at *Chevron* step 1, that "section 7413 does not discuss whether a state may include in its SIP the availability of an affirmative defense" and thus, at *Chevron* step 2, asking "whether the EPA's interpretation of section 7413…is entitled to deference").

[198] *Id.* at 851 (citing 42 U.S.C. §§ 7413(b) and 7604(a)).

[199] *Luminant*, 714 F.3d at 852.

[200] *E.g.*, *NRDC*, 749 F.3d at 1064 (quoting *Ry. Labor Exec.s' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)); *accord, e.g.*, *Sierra Club v. EPA*, 21 F.4th 815, 828 (D.C. Cir. 2021); *Shays v. FEC*, 414 F.3d 76, 108 (D.C. Cir. 2005); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see also Sierra Club*, 21 F.4th at 828 ("Nor, contrary to EPA's argument, does it make any difference that four judges in other circuits—three in the Fifth and one in the Ninth—have found the statute ambiguous."); *Friends of the Earth v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006) (refusing EPA request that Court

as *NRDC* and multiple Supreme Court cases make clear, EPA has no authority to interpret the scope of remedies available in a citizen suit.[201]

Third, the claim that affirmative defenses are permissible because, purportedly, "states have latitude to define in their SIPs what constitutes an enforceable emission limitation, so long as the SIP meets all applicable [Act] requirements,"[202] fails twice over. First, as explained above, the Act requires that civil penalties be available as relief—to be determined by a federal judge—in an enforcement action, so a SIP that limits their availability would not meet all "applicable requirements" of the Act.[203] Indeed, EPA has repeatedly correctly recognized that 1970s-era case law does not, and even at the time did not, give states "carte blanche" over SIPs that result in NAAQS attainment and maintenance.[204] Second, affirmative defenses are not emission limitations or control measures: they are not "a requirement…which limits the quantity, rate, or concentration of emissions of air pollut[ion]," or any type of control at all.[205] They are ancillary provisions that purport to limit the liability of a source of air pollution when it violates an emission limitation.[206]

Fourth, states cannot lawfully create affirmative defenses in their SIPs under the guise of developing programs for enforcing emission control measures.[207] Governmental enforcement powers cannot abrogate citizen enforcers' statutory rights.[208] Here, specifically, an enforcement program—a phrase naturally read as a plan or scheme for exercising the police power to ensure sources comply with emission limitations[209]—cannot reasonably be read to encompass creating an affirmative defense that, rather than enforcing anything, only eliminates an enforcement remedy for a violation. The Act itself expressly specifies the remedies available and the way a court is to assess civil penalties when a polluter violates an emission limit in a SIP.[210] It is unreasonable to conclude that Congress allowed

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follow Second Circuit in rejecting plain meaning of Clean Water Act because D.C. Circuit's case law on statutory interpretation differs from Second Circuit's).

[201] *See, e.g.*, *NRDC*, 749 F.3d at 1063; *Smith v. Berryhill*, 139 S. Ct. 1765, 1778-79 (2019); *City of Arlington*, 133 S. Ct. at 1871 n.3.

[202] Texas Withdrawal Rule, 85 Fed. Reg. at 7,235, 7,237 & n.20.

[203] 42 U.S.C. § 7410(a)(2)A).

[204] Resp't EPA Final Answering Br. at 136, *Envt. Comm. of the Fla. Elec. Power Coord'g Grp. v. EPA,* No. 15-1239 (D.C. Cir. Oct. 28, 2016), ECF No. 1643446; 2015 SSM SIP Call, 80 Fed. Reg. at 33,877-80.

[205] 42 U.S.C. § 7602(k).

[206] *See NRDC v. EPA*, 489 F.3d 1364, 1373-74 (D.C. Cir. 2007) (holding that ancillary provisions are not emission standards).

[207] *See* Texas Withdrawal Rule, 85 Fed. Reg. at 7,236 (citing 42 U.S.C. § 7410(a)(2)(C)).

[208] *See Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994).

[209] Webster's Seventh New Collegiate Dictionary 275, 680 (1971).

[210] *See* 42 U.S.C. § 7413(e)(1); 7604(a), (f).

states to undermine those remedies through the requirement that states develop an enforcement program.[211]

Finally, though the affirmative defense must be removed from Texas's SIP regardless of air quality issues in the state, it bears noting that stationary sources of air pollution burden both Texans and residents of other states with dangerous air pollution. The Houston and Dallas areas both are severe nonattainment areas for ozone because of their longstanding failure to attain the 2008 national ambient air quality standard for ozone; they are also nonattainment under the 2015 standard. San Antonio and El Paso too are nonattainment under the 2015 ozone standard, with El Paso also designated nonattainment for coarse particulate matter. Some or all of various counties throughout the state are also designated nonattainment for sulfur dioxide. Though there are no relevant, currently operating regulatory air quality monitors in the Permian Basin, air quality modeling indicates that at least portions of the area violate the ozone and sulfur dioxide standards.[212] Emissions from Texas contribute to unhealthy levels of ozone pollution in other states, like New Mexico, Illinois, Michigan, and Wisconsin.[213] Unauthorized excess emissions, which the affirmative defense routinely protects against civil penalty, exacerbate these poor air quality conditions.[214]

C. Iowa

For the reasons explained above, including regarding North Carolina's SIP, EPA must reinstate its SSM SIP call to Iowa. SSM exemptions violate the Act. There is no dispute that the relevant provision, IAC 567-24.1(1), is an SSM exemption of precisely the sort that EPA has long found illegal. We once again

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[211] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not … hide elephants in mouseholes.").

[212] Env't Integrity Project, Petition for Reconsideration of Air Quality Designation for Ector County, Texas for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard—Round 3, at 2-7 (Oct. 22, 2020), https://environmentalintegrity.org/wp-content/uploads/2020/10/Petition-for-Reconsideration_Odessa-Texas-SO2-NAAQS_Oct2020.pdf (attached as Exhibit 32); Ex. 1, EIP Polluter's Playbook Report at 8, 13. In Howard County, TX, within the Permian Basin, a regulatory monitor for sulfur dioxide reported valid design values for the 2017-2019 and 2018-2020 period; both violated the 75 ppb standard. EPA, Sulfur Dioxide Design Values, 2021, tbl.6 (May 24, 2022), (attached as Exhibit 33).

[213] Letter from Ilan Levin, Assoc. Dir., Env't Integrity Project et al. to Dr. Earthea Nance, Adm'r, EPA Region 6 (Feb. 14, 2023), https://environmentalintegrity.org/wp-content/uploads/2023/02/Unhealthy-Levels-of-Ozone-Persist-in-the-Permian-Basin_Letter-to-USEPA_Feb14.2023.pdf (New Mexico) (attached as Exhibit 34); EPA, Air Quality Modeling Final Rule Technical Support Document: 2015 Ozone NAAQS Good Neighbor Plan at App. C, C-3, C-5, C-7 (2023), https://www.epa.gov/system/files/documents/2023-03/AQ%20Modeling%20Final%20Rule%20TSD.pdf (Illinois, Michigan, New Mexico, and Wisconsin) (attached as Exhibit 35).

[214] Ex. 1, EIP Polluter's Playbook Report at 11-24, 30 (explaining how Texas's affirmative defense allows polluters to emit more pollution).

incorporate by reference the many times we have explained why SSM exemptions like Iowa's are illegal and arbitrary,[215] and expand on a few key points below.

First, EPA's fundamental claim in 2020—that emission limitations didn't have to apply continuously so long as EPA thought the SIP was strong enough as a whole to continuously attain and maintain the NAAQS—is meritless. By its plain text, the Act requires that emission limitations apply continuously and that SIPs meet all applicable requirements of the Act.[216] The overall strength of a SIP provides no valid basis for overriding the Act's text.

EPA's 2020 claims also ignored that the SIP requirements it identified provided important protections for communities. The requirement that sources continuously limit their emissions is, in reality, often the only way to ensure NAAQS and increment compliance.[217] By contrast, the other SIP requirements EPA pointed to in 2020 were hopelessly generic, like the broad requirement for governmental entities to ensure NAAQS attainment and maintenance and for polluters to maintain pollution controls, post hoc, or otherwise not helpful at preventing NAAQS violations.[218] Again, even if NAAQS attainment and maintenance were the sole relevant question for whether a SIP meets the Act's requirements (and it is not), Iowa's SSM exemption still fatally undermines the SIP.

Second, an independent, but related basis for EPA to call Iowa's SIP is that the SSM exemption applies to emission limitations that must meet substantive stringency requirements, and, just as in *Sierra Club*, the exemption illegally means the relevant emission limitations do not comply with the Act. A SIP established under section 110 can include emission limitations that must meet substantive stringency standards, such as a reasonably available control technology (RACT), best available control technology (BACT), best available retrofit technology (BART), or lowest achievable emission rate (LAER) standard. Indeed, even in the same proceeding wherein EPA wrongly withdrew the 2015 SSM SIP Call to Iowa, EPA found various permit limitations constitute RACM/RACT.[219] Some limits included

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[215] *See, e.g.*, Final Br. of Env't Intervenors at 24-33, *Env't Comm. of the Fla. Elec. Power Coord'g Grp. v. EPA*, No. 15-1239 (D.C. Cir. Oct. 31, 2016), ECF No. 1643796; Suppl. Br. of Env't Intervenors at 3-5, No. 15-1239, (D.C. Cir. Feb. 9, 2022), ECF No. 1934424; Proof Opening Br. of Pet'rs at 22-45, *Sierra Club v. EPA*, No. 20-1229 (D.C. Cir. Nov. 25, 2020), ECF No. 1873196; Joint Comments of Env't & Pub. Health Orgs. on Iowa Withdrawal Rule at 5-20, 27-29 (July 22, 2020), EPA-R07-OAR-2017-0416-0060, https://www.regulations.gov/comment/EPA-R07-OAR-2017-0416-0060.

[216] *See* 42 U.S.C. §§ 7410(a)(2), (k)(5); 7602(k).

[217] *See* Final Br. of Env't Intervenors at 14-15, 27.

[218] Joint Comments of Env't & Pub. Health Orgs. on Iowa Withdrawal Rule at 15-16.

[219] Iowa Withdrawal Rule, 85 Fed. Reg. at 73,225; Approval of Iowa's Air Quality Implementation Plan; Muscatine Sulfur Dioxide Nonattainment Area, Proposed Rule, 82 Fed. Reg. 40,086, 40,096-97 & n.17 (Aug. 24, 2017); *see also, e.g.*, Iowa Dep't of Natural Res., Attach. D., Monsanto Air Construction Permits at 6 (PDF 7), 6 (PDF 19), EPA-R07-OAR-2017-0416-0007 [hereinafter "Monsanto Air Construction Permits"],

in that proceeding's docket constitute BACT, too.[220] Just as *Sierra Club* held that an emission limitation established under section 112 must continuously meet section 112's stringency requirements, so too must an emission limitation established under RACT, BACT, BART, or LAER continuously meet the appropriate stringency requirements. Iowa's SSM exemption means they don't do so continuously. That discontinuity is illegal. EPA therefore must issue a SIP call to Iowa.

D. EPA Should Recognize That the SIP Call Withdrawal Rules For Texas, North Carolina, and Iowa Violated Regional Consistency

As explained in our comments on EPA's SIP Call Withdrawal Rules for Texas, North Carolina, and Iowa, EPA's withdrawal of its national SIP Call for those states was based on an interpretation of the Clean Air Act that "varies from national policy," and the Agency was therefore required, under 40 C.F.R. § 56.5(b), to obtain the concurrence of the relevant EPA Headquarters Office. EPA recognized so much in its 2021 McCabe Memo that these actions "were undertaken as intentional deviations" from EPA policy "as provided under EPA's Regional Consistency regulations."[221] Moreover, as with EPA's SIP Call Withdrawal Rules, when "regulatory actions may involve inconsistent application of the requirements of the act, the Regional Offices *shall* classify such actions as special actions," and "*shall* follow" the Agency's guidelines for processing state implementation plans, including EPA's guidance document State Implementation Plans—Procedures for Approval/Disapproval Actions, OAQPS No. 1.2-005A or revisions.[222] Compliance with EPA's consistency regulations and guidance is required to give meaning and effect to Congress's "mandate to assure greater consistency among the Regional Offices in implementing the Act."[223]

Although the Texas, North Carolina, and Iowa rulemakings included perfunctory letters purporting to demonstrate that EPA had obtained the requisite concurrences, there was no record evidence that EPA had, in fact, complied with its consistency regulations and mandatory guidance documents in proposing to exempt those states from the national SSM policy. EPA's guidance documents make clear that where a proposed action "would have significant national policy implications (i.e., establish a precedent), a more complete review is required," including the potential establishment of a steering committee or interagency review.[224] "The

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https://www.iowadnr.gov/Portals/idnr/uploads/air/implementation/attachmentd_monsantopermits.pdf.

[220] *E.g.*, Monsanto Air Construction Permits at 6 (PDF 7).

[221] 2021 McCabe Memo at 3.

[222] 40 C.F.R. § 56.5(c) (emphasis added).

[223] Regional Consistency, Proposed Rulemaking, 44 Fed. Reg. 13,043, 13,045 (Mar. 9, 1979); *see also* 42 U.S.C. § 7601(a)(2)(A) (directing EPA to establish regulations that "shall be designed" to "assure fairness and uniformity" in the application of the Clean Air Act).

[224] EPA, Guidelines: Revisions to State Implementation Plans—Procedures for Approval/Disapproval Actions § 7.2.c (OAQPS No. 1.2-005A) (Apr. 1975) [hereinafter, "SIP Guidelines"].

necessity for this review shall be determined through consultation between the [Regional Office] and [the Office of Air and Waste Management]"; and any such review "shall be coordinated through the appropriate section of [the Office of Air and Waste Management]."[225] Moreover, a "full concurrence" by each of the affected EPA sections "will be necessary."[226]

EPA's SIP Guidelines provide additional and detailed requirements for EPA Headquarters review and concurrence for "special actions" like the SIP Call Withdrawal Rules, which involved inconsistent application of the requirements of the Clean Air Act.[227] Specifically, although normal actions require minimal Headquarters' review, the Guidelines make clear that "special actions" require concurrence at the Assistant Administrator or General Counsel level.[228] In other words, in each case—the Texas, North Carolina, and Iowa SIP Call Withdrawals—concurrence by the Director of Air Quality Planning and Standards was not sufficient.

Moreover, the special action category is generally reserved for actions with national policy implications, and EPA's Guidelines specifically required review of the Texas, North Carolina, and Iowa SIP Call Withdrawals and concurrence *before* publication in the Federal Register by the Office of the Administrator (including the Office of General Counsel), the Office of Air, Noise, and Radiation, the Office of Enforcement, and the Office of Planning and Management.[229] Because that did not happen, the Texas, North Carolina, and Iowa actions were inconsistent with EPA regulations, and unlawful. EPA should recognize in the final rule that it did properly follow the regional consistency requirements in issuing the SIP Call Withdrawal Rules for Texas, North Carolina, and Iowa.

Compliance with EPA's consistency regulations and guidance is not a mere formalism, and requires more than simply checking the "concurrence" box. Indeed, EPA's consistency regulations make clear that in approving inconsistent regional applications of national Clean Air Act rules or interpretations, the agency must also "[p]rovide mechanisms for identifying and *correcting inconsistencies by*

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[225] *Id.*

[226] *Id.* § 7.2.

[227] 40 C.F.R. § 56.5(c). As noted, in reviewing State Implementation Plans, the Regional Office "shall follow" the SIP Guidelines, and "[w]here regulatory actions may involve inconsistent application of the requirements of the act, the Regional Offices shall classify such actions as special actions." *See* 40 C.F.R. § 56.5(c). EPA's mandatory SIP Guidelines, in turn, refers to EPA's separate "Guidelines for Determining the Need for Plan Revisions to the Control Strategy Portion of the Approved SIP,' OAQPS No. 1.2-011," which "explains the rationale EPA applies in determining when to call for a plan revision," and sets out the process the Agency must follow in issuing a "special action." SIP Guidelines § 7.1.

[228] SIP Guidelines § 7.2.

[229] *Id.* §§ 6.1, 6.3, fig.3. The fundamental purpose of Headquarters review of special actions is to ensure that all relevant staff have adequately reviewed issues with national policy implications, or issues that may result in inconsistent litigation positions.

standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act."[230] In promulgating those consistency regulations, EPA explained that the agency "interprets § 301(a)(2) of the Act as a mandate to assure greater consistency among the Regional Offices in implementing the Act, certainly *not* as a license to institutionalize the kind of inconsistencies that prompted Congress to enact this provision."[231] Thus, EPA may not simply issue Section 56.5(b) concurrences for any region that requests it, as the agency did with the Texas, North Carolina, and Iowa rules. [232] Instead, EPA had an obligation to "*correct[]* inconsistencies by *standardizing"* the nationally-applicable policies that must be employed by the EPA regional offices implementing and enforcing the Act.[233] EPA's approach to Texas, North Carolina, and Iowa—that is, exempting multiple regions from compliance with the nationally-applicable SSM SIP Call—not only created a patchwork of regionally-applicable Clean Air Act policies, but it impermissibly and unlawfully "institutionalize[d] the kind of inconsistencies that prompted Congress to enact," 42 U.S.C. 7601(a)(2).[234]

In contrast to the agency's previous attempt to dismantle the 2015 SIP Call piecemeal, EPA's SIP Call Reinstatement appropriately seeks to "correct[]" the agency's inconsistent approach to SSM affirmative defenses and exemptions by conducting a national rulemaking "standardizing" its nationally-applicable SSM policy, reinstating its SIP Call for Texas, North Carolina, and Iowa, and properly recognizing additional unlawful affirmative defense and exemption provisions in SIPs across the country.[235] EPA's proposed SIP Call Reinstatement is not only consistent with the Clean Air Act's substantive requirements, as discussed throughout these comments, but it is required by the agency's regional consistency regulations.

IV. EPA Must Find the SSM Provisions in Additional States Substantially Inadequate

A. Connecticut

EPA correctly proposes to find that CT Sec. 22a-174-38(c)(11) is an unlawful automatic exemption.[236] That section of the Connecticut SIP provides a SSM exemption to certain emission limits and operating requirements that otherwise

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[230] 40 C.F.R. § 56.3(b) (emphasis added).
[231] Regional Consistency, Proposed Rulemaking, 44 Fed. Reg. at 13,045 (emphasis added).
[232] SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes, Proposed Rule, 84 Fed. Reg. 26,031, 26,038 & n.42 (June 5, 2019) (proposing to concur with EPA Region 4's withdrawal of the SSM SIP Call for North Carolina under 40 C.F.R. § 56.5, based, in part, on *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012)).
[233] 40 C.F.R. § 56.3(b) (emphasis added).
[234] Regional Consistency, Proposed Rulemaking, 44 Fed. Reg. at 13,045; *see also* 42 U.S.C. § 7410(l).
[235] 40 C.F.R. § 56.3(b).
[236] Proposed Rule, 88 Fed. Reg. at 11,857.

apply to municipal waste combustors. EPA properly concludes that this exemption violates Clean Air Act §§ 110(a)(2)(A) and 302(k) requirements that SIP limits be continuous.[237]

The exemption from Connecticut's SIP also violates both Congress's instruction that citizens may enforce emission limitations and the requirement that SIPs contain "enforceable emission limitations."[238] Exemptions of emission limitations in SIPs also conflict with underlying stringency requirements such as reasonable available control technology (RACT) in nonattainment areas and the ozone transport region of which Connecticut is a part, best available control technology (BACT) for major new sources of emissions in attainment areas, and best available retrofit technology (BART) for to protect visibility in special areas.

B. Maine

EPA properly found that ME 06–096 Chapter 138–3–O and ME 06–0096 Chapter 150–4–C are unlawful automatic exemptions.[239] EPA should finalize its Proposed Rule and issue a SIP Call to Maine for these harmful loopholes as quickly as possible.

ME 06–096 Chapter 138–3–O is an automatic exemption from reasonable available control technology (RACT) standards (which apply in nonattainment areas) for stationary sources of nitrogen oxides.[240] Though the exemption contains a requirement that the facility to provide records "to demonstrate that the facility was being operated to minimize emissions," this vague requirement is not itself a substitute emission limitation because it does not adequately reduce emissions, and is not practically or legally enforceable because there is no "meaningful and objective standard for a court to assess."[241] Congress intended that a citizen suit "would not require reanalysis of technological or other considerations at the enforcement stage,"[242] and this standard clearly would require such considerations.

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[237] *Id.*
[238] *See* 42 U.S.C. §§ 7410(a)(2)(A); 7604.
[239] Proposed Rule, 88 Fed. Reg. at 11,862.
[240] *Id.* at 11,858 ("For any source that employs the use of a continuous emissions monitoring system, periods of startup, shutdown, equipment malfunction and fuel switching shall not be included in determining 24-hour daily block arithmetic average emission rates provided that operating records are available to demonstrate that the facility was being operated to minimize emissions.").
[241] *Id.* Congress carefully cabined citizen suits to violations of clear standards, requiring plaintiffs to allege a violation of "a specific strategy or commitment in the SIP." *Coal. Against Columbus Ctr.*, 967 F.2d at 769 (citations omitted).
[242] S. Rep. No. 91-1196, at 36.

ME 06–0096 Chapter 150–4–C is an impermissible automatic exemption from visible emission standards for outdoor wood boilers and outdoor pellet boilers.[243]

These provisions in the Maine SIP allow sources to release uncontrolled emissions during certain times. Automatic exemptions like ME 06–096 Chapter 138–3–O and ME 06–0096 Chapter 150–4–C violate the Act's requirement that SIP emission limitations apply continuously.[244] Exemptions of emission limitations in SIPs also conflict with underlying stringency requirements such as reasonable available control technology (RACT) in nonattainment areas and the ozone transport region of which portions of Maine are a part, best available control technology (BACT) for major new sources of emissions in attainment areas, and best available retrofit technology (BART) for to protect visibility in special areas. Maine's provisions allowing emission exceedances also preclude any enforcement by EPA or the public, contrary to the Act's provisions granting citizens the right to enforce emission limitations in SIPs.[245] There are no appropriate alternative emission limits in the Maine SIP that apply during these exempted periods.[246] Even if Maine could point to some general duty type provision that applies during exempted periods, such provisions could not meet applicable stringency requirements, are not clearly part of the emission limitation, and are not legally and practically enforceable.

C. North Carolina

In addition to the director's discretion provisions EPA initially included in its 2015 SSM SIP Call for North Carolina, EPA's Proposed Rule correctly identifies additional provisions in state and local air regulations that unlawfully exempt SSM events and thus violate the Clean Air Act.[247] We support EPA's proposal to also find these provisions substantially inadequate.

One statewide provision, 15A N.C. Admin. Code 02D .1423(g), provides a categorical "automatic" SSM exemption for large internal combustion engines. This provision was submitted by the state to EPA for review in 2017, which EPA then used as a pretense to reconsider the entirety of its 2015 SSM SIP Call for North Carolina.[248] This exemption is even less defensible than the discretionary exemptions permitted by section .0535. It states that during SSM events, the

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[243] Proposed Rule, 88 Fed. Reg. at 11,858 ("No person shall cause or allow the emission of a smoke plume from any outdoor wood boiler or outdoor pellet boiler to exceed an average of 30 percent opacity on a six-minute block average basis, except for no more than two six minute block averages in a 3-hour period.")
[244] 42 U.S.C. §§ 7602(k); 7410(a)(2)(A); *Sierra Club v. EPA*, 551 F.3d at 1027-28.
[245] 42 U.S.C. §§ 7604(a)(1), (f); 7602(k), (q).
[246] Proposed Rule, 88 Fed. Reg. at 11,858.
[247] Proposed Rule, 88 Fed. Reg. at 11,858-59.
[248] *See* North Carolina Withdrawal Rule, Proposed Rule, 84 Fed. Reg. 26,031.

"emission standards of this Rule shall not apply."[249] Providing for any discontinuity of an emission limitation—much less one that applies automatically—is at odds with the Act's firm requirement that emission limitations apply continuously.

Local air quality regulations in Buncombe and Mecklenburg counties—home to the cities of Asheville and Charlotte, respectively—also contain identical unbounded director's discretion provisions for periods of malfunction, which EPA has for the first time also noted and included in its Proposed Rule. They both only require that the operator of a regulated point source "demonstrate[] to the Director, that the excess emissions are the result of a malfunction."[250] If so, the operator is exempt from both the emission limitations *and* related reporting requirements.

Regulatory agencies responsible for enforcing North Carolina's emission limitations cannot decline to apply them for reasons not contemplated by the Clean Air Act—whether those reasons are applied automatically by the regulations themselves (for example, by section .1423(g)) or in an ad hoc manner by local regulators (in the case of Mecklenburg and Buncombe counties). And as EPA has noted in the Proposed Rule, "[t]here are no other provisions in the NC SIP that could act as an appropriate alternative emission limit to fill the periods of time the emission limit does not apply."[251] These exemptions also frustrate the Clean Air Act by precluding or creating additional barriers to public enforcement of what are otherwise clear violations of facilities' legal duties under the Act.[252]

We therefore firmly support EPA's conclusion that these provisions are also substantially inadequate and must be included in the instant SIP call.

D. Tennessee

EPA properly proposes to conclude that Shelby County Air Code 3-17 and corresponding City of Memphis Code 16-83 contain an unlawful director's discretion provision.[253] Shelby County Air Code 3-17 incorporates by reference Chapter 1200-

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[249] 15A N.C. Admin. Code 02D .1423(g).

[250] *See* Western North Carolina Regional Air Quality Agency Air Quality Code (WNCRAQ Air Quality Code) Section 4.0535(c) (Buncombe County), https://www.buncombecounty.org/common/asheville-buncombe-air-quality-agency/regulations/chapter-4.0533-end.pdf (Section 4.0535(c) is the same as what the Proposed Rule calls Section 1-137(c)); Mecklenburg County Air Pollution Control Ordinance (MCAPCO) Rule 2.0535(c), https://localdocs.charlotte.edu/LUESA/MCAPCO/2010_MCAPCO.pdf.

[251] Proposed Rule, 88 Fed. Reg. at 11,859.

[252] *See id.*; Proof Opening Br. of Petitioners at 21, *Sierra Club v. EPA,* No. 20-1229 (D.C. Cir. Nov. 25, 2020), ECF No. 1873196 ("The rule also unlawfully interferes with Petitioners' ability to minimize air pollution and protect the health of their members and the public, including through Clean Air Act citizen suits.").

[253] Proposed Rule, 88 Fed. Reg. at 11,859-60. EPA explains that it selected the City of Memphis Air Code "to represent" the Shelby County portion of the Tennessee SIP—and that the Shelby County implementation plan also includes other cities and towns.

3-5 of the Tennessee Air Pollution Control Regulations, which applies to visible emissions from stationary sources. Tennessee Compilation of Rules and Regulations 1200-3-5-.02(1) was SIP-called in the 2015 SSM SIP call and provides that "due allowance may be made" for visible emissions above SIP limits when emissions are "necessary or unavoidable due to routine startup and shutdown conditions." EPA correctly reasons that this director's discretion provision violates the requirements from Clean Air Act §§ 110(a)(2)(A) and 302(k) that SIP limits be continuous.[254]

This director's discretion provision also violates both Congress's instruction that citizens may enforce emission limitations and the requirement that SIPs contain "enforceable emission limitations."[255]

E. Wisconsin

EPA properly found that Wis. Admin. Code NR 431.05(1)–(2) and NR 436.03(2) contain impermissible automatic and director discretion exemptions.[256] EPA's proposal to remove Wisconsin's unlawful SSM loopholes is long overdue. Environmental advocates petitioned EPA to remove these exemptions over a decade ago in 2012. EPA noted the petition in the 2015 SSM SIP Call, and that it intended to act in a future rulemaking.[257]

NR 431.05(1) provides an automatic exemption for all air contaminant sources during cleaning or when a new fire is started.[258] Though the provision purports to limit opacity to 80% during such periods, that is "functionally uncontrolled emissions" since "a source displaying 80% opacity would likely be operating without any emissions controls at all."[259] As EPA explains, even if such a limit were appropriate for certain narrowly defined sources in specific scenarios, Wisconsin's provision conflicts with EPA's SSM policy because it applies to all air contaminant sources.[260]

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[254] *Id.* at 11,860.
[255] *See* 42 U.S.C. §§ 7410(a)(2)(A); 7604.
[256] Proposed Rule, 88 Fed. Reg. at 11,860.
[257] 2015 SSM SIP Call, 80 Fed. Reg. at 33,880 n.108.
[258] Proposed Rule, 88 Fed. Reg. at 11,860 ("No owner or operator of a direct or portable source on which construction or modification is commenced after April 1, 1972 may cause or allow emissions of shade or density greater than number 1 of the Ringlemann chart or 20% opacity with the following exceptions: (1) When combustion equipment is being cleaned or a new fire started, emissions may exceed number 1 of the Ringlemann chart or 20% opacity but may not exceed number 4 of the Ringlemann chart or 80% opacity for 6 minutes in any one hour. Combustion equipment may not be cleaned nor a fire started more than 3 times per day.")
[259] *Id.*
[260] *Id.*

NR 431.05(2) is an unbounded director discretion exemption that applies to all air contaminant sources.[261] It allows exceptions to "emissions of shade or density greater than number 1 of the Ringlemann chart or 2 percent opacity" "as permitted by the department" "for good cause" as long as "no hazard or unsafe conditions arise."[262] The vague criteria provides the department with unbounded discretion to approve exceedances of the emission limitation.

NR 436.03(2) is also a broad unbounded director discretion exemption that applies to all air contaminant sources.[263] It allows the director to excuse emission exceedances during SSM events so that no emission limit applies during these times. This provision also includes vague language that gives the department broad discretion to approve exceedances.

These provisions in the Wisconsin SIP allow sources to release uncontrolled emissions during certain times, or give the department unbounded discretion to excuse emission exceedances. Automatic exemptions like NR 431.05(1) violate the Act's requirement that SIP emission limitations apply continuously.[264] Exemptions of emission limitations in SIPs also conflict with underlying stringency requirements such as reasonable available control technology (RACT) in nonattainment areas, best available control technology (BACT) for major new sources of emissions in attainment areas, and best available retrofit technology (BART) for to protect visibility in special areas. For example, NR 436.03(2) allows exemptions from *any emission limitation* set in "NR 400 to 499," which is the entire air pollution control chapter in Wisconsin's regulations, and includes emission limitations for major stationary sources in prevention of significant deterioration areas and nonattainment areas, for BART-eligible sources and for hazardous air pollutants.

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[261] *Id.* at 11,860-61 ("No owner or operation of a direct or portable source on which construction or modification is commenced after April 1, 1972 may cause or allow emissions of shade or density greater than number 1 of the Ringlemann chart or 2 percent opacity with the following exceptions: (2) Emissions may exceed number 1 of the Ringlemann chart or 20 percent opacity for stated periods of time, as permitted by the department, for such purpose as an operating test, use of emergency equipment, or other good cause, provided no hazard or unsafe condition arises.")

[262] *Id.*

[263] Proposed Rule, 88 Fed. Reg. at 11,861 ("Emissions in excess of the emission limitations set in NR 400 to 499 may be allowed in the following circumstances: (a) When an approved program or plan with a time schedule for correction has been undertaken and correction is being pursued with diligence; (b) When emissions in excess of the limits are temporary and due to schedule maintenance, startup or shutdown of operations carried out in accord with a plan and schedule approved by the department; (c) The use of emergency or reserve equipment needed for meeting of high peak loads, testing of the equipment or other uses approved by the department. Such equipment must be specified in writing as emergency or reserve equipment by the department. Upon startup of this equipment notification must be given to the department which may or may not give approval for continued equipment use.")

[264] 42 U.S.C. §§ 7602(k); 7410(a)(2)(A); *Sierra Club v. EPA*, 551 F.3d at 1027-28.

Unbounded director discretion provisions like NR 431.05(2) and NR 436.03(2) give the state discretion to allow automatic exemptions, which violates the Act's requirements for the same reasons. Additionally, such provisions violate the Act's mandated SIP revision process.[265]

Wisconsin's provisions allowing emission exceedances also preclude any enforcement by EPA or the public, contrary to the Act's provisions granting citizens the right to enforce emission limitations in SIPs.[266]

There are no appropriate alternative emission limits in the Wisconsin SIP that apply during these exempted periods.[267] Even if Wisconsin could point to some general duty type provision that applies during exempted periods, such provisions could not meet applicable stringency requirements, are not clearly part of the emission limitation, and are not legally and practically enforceable.

F. Louisiana

EPA correctly proposes to find that Louisiana Administrative Code Title 33 Chapter 9 Section 917 ("LAC 33:III.917"), is an impermissible director discretion exemption.[268] EPA should finalize its Proposed Rule and issue a SIP Call to Louisiana for this harmful loophole as quickly as possible.

EPA's proposal to remove Louisiana's unlawful SSM loophole is long overdue, especially given the Louisiana Department of Environmental Quality's ("LDEQ's") routine approval of such variances, which have effectively allowed various sources to operate in violation of permitted or SIP emission limitations for thousands of hours. Indeed, as EPA's 2023 Louisiana SSM Example Memorandum makes clear, over just a short period of time—from January 1, 2021 through October 18, 2022—there were approximately 205 requests for emission variances.[269] Of the eight examples EPA evaluated, several of the Louisiana-approved variances lasted for months at a time, resulting in significant excess emissions.[270] In effect, LDEQ has unilaterally authorized these facilities to violate their permits or SIP limits without consequence.

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[265] *See* 42 U.S.C. §§ 7410(a)(1) & (2), (i), (k), (l); 7515; 2015 SSM SIP Call, 80 Fed. Reg. at 33, 928 & n.298; *Comm. for a Better Arvin*, 786 F.3d at 1174 ("Once approved by EPA, a 'SIP becomes federal law . . . and cannot be changed unless and until EPA approves any change.'").
[266] 42 U.S.C. §§ 7604(a)(1), (f); 7602(k), (q).
[267] Proposed Rule, 88 Fed. Reg. at 11,861.
[268] *Id.*
[269] Mem. from Alan Shar (EPA Region 6) to 2023 SSM SIP Call Action Docket, *Examples of Approved Louisiana Variances Providing for Excess Emissions During Periods of Startup, Shutdown, and Malfunction*, at 4 (Feb. 14, 2023), EPA-HQ-OAR-2022-0814-0007 [hereinafter "Louisiana SSM Example Memorandum"].
[270] *See, e.g., id.* at 19 (authorizing a variance for 12 months); *id.* at 25 (7 months); *id.* at 5 (6 months); *id.* at 11 (12 months).

These variances have resulted in disproportionate and adverse impacts to environmental communities. It is worth noting that of the eight examples EPA evaluated, six of the facilities—Shell Pipeline, Norco Hydrogen, and Norco Refinery in Norco, Louisiana; Koch Methanol in St. James, Louisiana; Geismar Methanol in Geismar, Louisiana; and Cornerstone Chemical in Waggaman, Louisiana—are located in communities in an area known as "Cancer Alley," a region that stretches along the Mississippi River from Baton Rouge to New Orleans. Cancer Alley experiences the highest cancer risk in the nation due to the myriad industrial facilities sited in the region.[271] According to EPA's EJScreen tool,[272] the communities of St. James, Norco, Waggaman, and Geismar are disproportionately lower income and identify as Black. These are the same communities that are also home to massive petrochemical and industrial facilities, which emit many thousands of tons of criteria pollutants every year. LDEQ's routine exemption of SSM emissions therefore contributes to the significant environmental and health burden that Black communities in and around these communities already bear from the existing plants. Louisiana's variance provision not only violates the Clean Air Act, but it raises serious environmental justice concerns.

LAC 33:III.917 is a broad and vague unbounded director discretion exemption that applies to all air contaminant sources.[273] The facilities noted above are just a few of the hundreds of such facilities that pollute Louisiana and can take advantage of this loophole. LAC 33:III.917 allows the director to excuse emission exceedances during SSM events so that no emission limit applies during these times. This provision also includes vague language that gives the department broad discretion to approve violations of "any provisions of these regulations," based on vague assertions of "undue hardship," or that compliance would be "unreasonable, impractical, or not feasible."[274]

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[271] Seven of the top ten census tracts with the highest cancer risk in the nation are located along this corridor, concentrated around point sources located in St. John the Baptist Parish and St. Charles Parish. *See* EPA, *National Air Toxics Assessment, 2014 NATA: Assessment Results* (last updated Feb. 13, 2023), https://www.epa.gov/national-air-toxics-assessment/2014-nata-assessment-results#nationwide; *see also* EPA, National Cancer Risk by Tract, https://www.epa.gov/sites/default/files/2018-08/nata2014v2_national_cancerrisk_by_tract_srcgrp.xlsx (Aug. 10, 2018)(in column H, filter largest to smallest).

[272] EPA, *EJScreen*, https://ejscreen.epa.gov/mapper/ (last accessed April 24, 2023), (attached as Exhibit 36).

[273] 88 Fed. Reg. at 11,861 ("The provision authorizes a state official to grant a 'variance' from any generally applicable SIP emission limitation if the state official 'finds that by reason of exceptional circumstances strict conformity with any provisions of [Louisiana's air quality] regulations would cause undue hardship, would be unreasonable, impractical or not feasible under the circumstances.' This provision could be read to mean that once the state official has granted a variance for excess emissions due to conditions that make it difficult for sources to comply with otherwise applicable SIP limitations, those excess emissions are not violations.")

[274] LAC 33:III.917.A.

Louisiana's variance provisions therefore allow sources to release uncontrolled emissions indefinitely during "exceptional circumstances," which is not defined in the SIP, and it gives LDEQ unbounded discretion to excuse any such emission exceedances. Variances like LAC 33:III.917.A violate the Act's requirement that SIP emission limitations apply continuously.[275] Exemptions of emission limitations in SIPs also conflict with underlying stringency requirements such as reasonable available control technology ("RACT") in nonattainment areas, and best available control technology ("BACT") for major new sources of emissions in attainment areas. LAC 33:III.917.A, as noted, allows exemptions from "*any provisions* of [Louisiana's SIP]" (emphasis added), which is the entire air pollution control chapter in Louisiana's regulations, and includes emission limitations for major stationary sources in prevention of significant deterioration areas and nonattainment areas, for BART-eligible sources and for hazardous air pollutants. Unbounded director discretion provisions like LAC 33:III.917.A, give the state discretion to allow automatic exemptions, which violates the Act's requirements for the same reasons. Additionally, such provisions violate the Act's mandated SIP revision process.[276]

Louisiana's provisions allowing emission exceedances also preclude any enforcement by EPA or the public, contrary to the Act's provisions granting citizens the right to enforce emission limitations in SIPs.[277]

There are no alternative emission limits in the Louisiana SIP that apply during these exempted periods.[278] Even if Louisiana could point to some general duty type provision that applies during exempted periods, such provisions could not meet applicable stringency requirements, are not clearly part of the emission limitation, and are not legally and practically enforceable.

V. EPA Has Authority to Issue a SIP Call for the Unlawful SIP Provisions

The Clean Air Act requires that SIPs not only provide for attainment and maintenance of the NAAQS, but comply with other legal requirements—like the bar on SSM exemptions and affirmative defenses—the Act establishes. The Act grants EPA authority to require states to correct problematic SIPs through the "SIP Call" provision.[279] Section 7410(k)(5) states that "[w]henever" EPA finds that a SIP is "substantially inadequate" to "attain or maintain the relevant [NAAQS], to mitigate adequately [certain] interstate pollutant transport … or to otherwise comply with

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[275] 42 U.S.C. §§ 7602(k); 7410(a)(2)(A); *Sierra Club v. EPA*, 551 F.3d at 1027-28.
[276] *See* 42 U.S.C. §§ 7410(a)(1) & (2), (i), (k), (l); 2015 SSM SIP Call, 80 Fed. Reg. at 33,928 & n.298; *Comm. for a Better Arvin*, 786 F.3d at 1174 ("Once approved by EPA, a 'SIP becomes federal law . . . and cannot be changed unless and until EPA approves any change.'")
[277] 42 U.S.C. §§ 7604(a)(1), (f); 7602(k), (q).
[278] Proposed Rule, 88 Fed. Reg. at 11,861.
[279] As EPA notes in the Proposed Rule, EPA also has authority to address problematic SIPs through the error correction mechanism in section 110(k)(6) of the Act. 88 Fed. Reg. at 11,850, n.18.

any requirement of this chapter," then EPA "shall" require the State to "revise the [SIP] as necessary to correct such inadequacies." (emphasis added). Because the statute uses the word "or", EPA may issue a SIP Call on three independent bases. The SIP Call provision requires EPA to "notify the State of the inadequacies," and make public the notice and findings of inadequacies. EPA reasonably found in the Proposed Rule that each of the SIP-called provisions is "substantially inadequate" to "comply with any requirement" of the Act.

1. "Whenever" means EPA can fix previously-approved SIPs

The plain meaning of "whenever" allows EPA to issue a SIP Call for previously-approved provisions no matter how long those provisions have been in place.[280]

2. EPA is not required to make any factual findings when it issues a SIP Call under the "otherwise comply with any requirement" prong

The statute plainly does not require EPA make any factual findings when it makes a legal determination that a SIP does not comply with statutory requirements under the "otherwise comply with any requirement" prong of Section 7410(k)(5).[281]

Factual findings may be required if EPA were to issue a SIP Call based on one of the two other bases for a SIP Call failure to "attain or maintain" NAAQs or "mitigate adequately [certain] interstate pollutant transport").[282] The statute plainly states that the "otherwise comply with any requirement" prong applies separately and independently of the first two grounds. Non-compliance with the NAAQs is an independent basis for a SIP Call and therefore irrelevant when EPA issues a SIP Call based on legal deficiencies.

3. SIPs that contain SSM loopholes are "Substantially Inadequate"

In the 2015 SSM SIP Call, EPA interpreted "substantially inadequate" in the 2015 SIP Call to mean "whether the provision meets the fundamental CAA requirements applicable to such a provision."[283] That interpretation is more forgiving of SIP failings than the statutory language demands. The statute indicates that Congress intended states to comply with all requirements of the Act and that the failure to comply with "any" requirement "shall require the State to

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[280] Proposed Rule, 88 Fed. Reg. at 11,850 & n.19.
[281] 2015 SSM SIP Call, 80 Fed. Reg. at 33,931-37, 33,926-27; *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1167 (10th Cir. 2012) ("On its face, the statute says nothing about whether the agency is required to make a specific factual finding about a state's current SIP before calling the SIP.").
[282] 2015 SSM SIP Call, 80 Fed. Reg. at 33,932 & nn.309-310 (noting examples).
[283] *Id.* at 33,926.

revise the plan."[284] EPA's 2015 interpretation suggests that even though "substantially" only modifies the inadequacy of the SIP to comply with a requirement, it has extended the "substantial" modifier to the nature of the noncompliance and the importance of the requirement being violated. Thus, instead of just assessing whether the SIP is substantially incapable of complying with the requirements of the Act, EPA's 2015 interpretation may also limit the agency to such noncompliance that goes to fundamental purposes of the Act—a limitation that is not on the face of the statute. EPA identifies no basis for such a limitation, nor is one evident. Instead, the Act mandates that whenever EPA finds a SIP is substantially inadequate to comply with any requirement of the Act—not just "fundamental" ones—it must issue a SIP call.

In any event, SSM exemptions and affirmative defense provisions violate requirements of the Act, and those requirements are fundamental to the Act, *see* supra section II.C; thus, EPA properly found such provisions are substantially inadequate to meet the Act's requirements.

4. The *Union Electric* and *Train* decisions Do Not Undermine the Act's Requirement that Emission Limitations Must Apply Continuously

In past proceedings regarding the 2015 SSM SIP Call, parties have wrongly sought to rely on inapposite quotations from the Supreme Court's 1970s *Union Electric* and *Train* decisions. These decisions stand for the proposition that states have broad latitude in how to craft SIPs, but they in no way undermine the Act's requirement that each SIP emission limitation must limit "air pollutants on a continuous basis."[285]

To the contrary, the early *Union Electric*, *Train*, and subsequent cases hold that SIPs must not only provide for timely attainment and maintenance of NAAQS but "also satisf[y] [§ 7410's] *other general requirements*."[286] Indeed, the D.C. Circuit has made clear it has avoided suggesting "that under [§ 7410] states may develop their plans free of extrinsic legal constraints," including those contained in the Act.[287]

Further, in response to longstanding failures to achieve clean air, Congress amended the Act in 1990 to add more detailed requirements for how SIPs must work.[288] As the *South Coast* Court explained, "the [pre-1990] approach, which specified the ends to be achieved but left broad discretion as to the means, had done

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[284] 42 U.S.C. § 7410(k)(5).
[285] 42 U.S.C. § 7602(k).
[286] *Train v. NRDC*, 421 U.S. 60, 79 (1975) (emphasis added); *see Union Elec. Co. v. EPA*, 427 U.S. 246, 265 (1976); *CleanCOALition v. TXU Power*, 536 F.3d 469, 472-73 (5th Cir. 2008) (describing an additional requirement SIPs must meet).
[287] *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1047 (D.C. Cir. 2001).
[288] *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 886-87 (D.C. Cir. 2006).

little to reduce the dangers of key contaminants," leading Congress to amend the Act.[289] Congress' unwillingness to rely on the "old ends-driven approach that had proven unsuccessful,"[290] is reflected in the specific minimum requirements added throughout the Act. For example, before the 1990 Amendments, 42 U.S.C. § 7502(b)(3) required state implementation plans to achieve "reasonable further progress [in reducing annual emissions] . . . including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology."[291] The 1990 Amendments no longer allow such open-ended planning and now specify for moderate and more polluted ozone areas the minimum sources that must be subject to reasonably available control technology,[292] and the minimum emission reductions that must be achieved in the interim years leading up to the attainment deadline.[293] Congress was no longer willing to give states unfettered "power to determine which sources would be burdened by regulation and to what extent."[294] The 1990 Amendments include a long list of specific measures that certain states must adopt, [295] including vehicle inspection and maintenance programs, fuel requirements, transportation control measures, controls on specific pollutant precursors, and more prescriptive permitting requirements.[296]

Moreover, despite arguments from opposing parties, demonstrating compliance with the national standards is not the sole measure for SIP approval. Under the 1990 Amendments, state implementation plans in nonattainment areas must also "meet the applicable requirements of part D."[297] EPA, for its part, cannot approve a plan if it "interfere[s] with any applicable requirement concerning attainment . . . *or any other applicable requirement of this chapter*."[298] This independent obligation to meet Congress' specified requirements in addition to demonstrating attainment is further highlighted in section 107(d)(3)(E), added by the 1990 Amendments, which now provides that EPA cannot redesignate a nonattainment area as an attainment area unless it finds not only that the area has attained the NAAQS, but also that "the State containing such area has met all [the] requirements applicable to the area under section 7410 of this title and part D of this subchapter."[299] Even attainment areas are subject to minimum control

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[289] *Id.*
[290] *Id.* at 887.
[291] 42 U.S.C. § 7502(b)(3) (1989).
[292] *Id.* § 7511a(b)(2).
[293] *Id.* § 7511a(b)(1)(A).
[294] *Union Elec.*, 427 U.S. at 269.
[295] 42 U.S.C. § 7407(d)(3)(E).
[296] *See, e.g.*, 42 U.S.C. §§ 7511a(b)(3), (b)(4), (b)(5), (c)(2)(C), (c)(3), (c)(4), (d), (e)(3), (f) (measures for ozone nonattainment areas); 7512a(a)(6), (b)(2), (b)(3) (measures for carbon monoxide areas); 7513a(e) (measures in particulate matter nonattainment areas).
[297] *Id.* § 7410(a)(2)(I).
[298] *Id.* § 7410(*l*) (emphasis added).
[299] *See id.* § 7407(d)(3)(E)(v).

requirements and not just a general duty to maintain compliance with the national standards.[300]

VI. EPA Should Implement This SSM SIP Call More Swiftly Than It Did the 2015 One.

1. EPA Should Give States 6 Months Maximum to Remove Unlawful Provisions

Communities have been waiting for far too long to breathe the clean air they are entitled to. In order to curb the public health impacts of unlawful SSM provisions as quickly as possible, and because more time is not necessary, EPA should give states 6 months to respond to the SIP Call. Importantly EPA also must act quickly to finalize the Proposed Rule to start the clock ticking as soon as possible.

The Act allows EPA to establish any "reasonable deadline" for states to respond to the SIP Call, as long as the deadline does not exceed 18 months. Section 7410(k)(5) states that EPA "may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions" in response to a SIP Call.

Experience with the 2015 SSM SIP Call shows how state and EPA delays make the SIP revision process stretch out for years, even decades, allowing pollution from SSM events to continue to harm communities across the country. EPA gave states the maximum time allowable (18 months) under the Act to respond to the 2015 SSM SIP Call, making SIP submissions due on November 16, 2016.[301] Even with this generous amount of time, twelve states/air districts have still failed to respond to the SIP Call almost eight years later.[302] EPA, for its part, delayed acting on the state SIP Call revisions that some states submitted on time, requiring community and environmental groups to file a lawsuit to force EPA to act in accordance with its statutory-mandated duties to approve or disapprove proposed SIPs.[303] Pursuant to the consent decree in that case, EPA will continue taking action on those SIP submissions until October 2023 at the latest.[304]

Even with the consent decree deadlines in place, some states may further delay relief for communities by gaming the process. After EPA proposed to

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[300] *See, e.g.*, *id.* §§ 7470-7479 (outlining minimum control requirements for permits in attainment areas); § 7491 (requiring minimum controls for visibility protection).
[301] 2015 SSM SIP Call, 80 Fed. Reg. at 33,930.
[302] Findings of Failure to Submit State Implementation Plan Revisions in Resp. to the 2015 Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 87 Fed. Reg. 1,680 (Jan. 12, 2022).
[303] *Sierra Club. v. Regan*, Civ. 4:21-cv-06956-SBA (N.D. Cal. 2022).
[304] *See* Consent Decree, Civ. 4:21-cv-06956-SBA, (N.D. Cal. June 27, 2022), ECF No. 38.

disapprove Georgia's SIP submission, Georgia withdrew its SIP submission, meaning EPA no longer has a consent decree deadline to act on Georgia's SIP submission. EPA did not issue a finding of failure to submit to Georgia along with the twelve other states and air districts since, at the time, Georgia did have a SIP submission pending. Thus, neither Georgia nor EPA is subject to any court-ordered or sanctions-backed timeline to respond to the 2015 SSM SIP Call at present, forcing environmental groups to again put EPA on notice of intent to file a lawsuit to require EPA to fulfill its statutory duty to act to implement the 2015 SSM SIP Call. This frustratingly slow implementation of the 2015 SIP Call lends strong support for EPA to establish a quick timeline for states to respond.

EPA should also consider that communities will continue to be harmed by the unlawful SSM provisions for long after the SIP provisions are fixed.[305] The unlawful provisions will remain in permits until those permits are revised.[306]

All of the states and air districts subject to the Proposed Rule have been on notice for many years that SSM exemptions and affirmative defense provisions are unlawful under the Act, and since the 2015 SSM SIP Call that EPA intended to remove all such provisions from all SIPs. Although EPA did not identify all the deficient SIP provisions addressed here in 2015, all the states and air districts included in the Proposed Rule were aware that the SSM provisions in their SIPs were identical or nearly identical to the called SIPs in the 2015 SIP Call Rule. All the states and air districts therefore have already had many years to determine how to address any potential issues involved in removing the unlawful SSM provisions.

For many, if not all, of the states and air districts subject to the rule, fixing the unlawful provisions is straightforward and does not require more than 6 months. The affirmative defense provision in Texas must simply be eliminated from the SIP; the provision is not related to any emission limitation that might need additional time and consideration. And especially given the outsized problem of SSM events and abuse of the affirmative defense provision in Texas, *see supra* at section II.C.3.ii, changing this provision must proceed as quickly as possible. As another example, in 2016 North Carolina already submitted to EPA a SIP revision in response to the 2015 SIP Call.[307] As noted in comments submitted by the Office of Management and Budget into the rulemaking docket, EPA should not continue to draw out the process of eliminating provisions that are harming the health and

[305] *See supra* section X; Proposed Rule, 88 Fed. Reg. at 11,862.
[306] *See* 2015 SSM SIP Call, 80 Fed. Reg. at 33,955 ("sources will continue to be authorized to operate in accordance with existing permit terms until such time as the permits are revised after the necessary SIP revision").
[307] Ltr. From S. Holman, NCDEQ to H. Toney, EPA, State Implementation Plan Revisions for Startup, Shutdown, and Malfunction (Nov. 22, 2016).

well-being of communities and that courts have found are inconsistent with federal court jurisdiction or are unlawful under the Act.[308]

2. EPA Should Issue Sanctions Expeditiously Where States Fail to Submit or Submit a Deficient SIP Revision in Response to the SIP Call.

EPA should notify states that it intends to issue a finding of failure to submit on the day after the deadline to every state and air district that fails to respond to the Final Rule. As explained in the preceding section, Progress on removing unlawful provisions that harm communities has proceeded at a snail's pace, and EPA should do everything in its power to remove these provisions as quickly as possible.

VII. EPA Should Find that the Excess Emissions from SSM Events Result in Disproportionate and Adverse Impacts to Environmental Justice Communities and Require Swifter Action as a Result.

EPA acknowledges that the Proposed Rule will "reduce[] excess emissions during SSM periods and improve human and environmental health for U.S. citizens, including people of color, low-income populations, and/or indigenous peoples."[309] But without further analysis EPA incorrectly concludes that "it is not practicable to assess whether the conditions that exist prior to this proposed action result in disproportionate and adverse effects on people of color, low-income populations, and/or indigenous peoples" because "EPA cannot geographically identify or quantify the resulting source-specific emission reductions."[310] Commenters dispute the contention that EPA must specifically identify and/or quantify source-specific reductions in order to find that SSM events (the conditions that the Proposed Rule intends to address) may result in disproportionate and adverse impacts on environmental justice populations.

Executive Order 12898 provides that "[t]o the greatest extent practicable and permitted by law … each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States."[311] Under the Order, all federal agencies "shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income … [and] shall use this information to determine whether their programs,

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[308] Off. of Mgmt. and Budget, *Comments of SIPs SSM Proposed Action* (Feb. 2, 2023), https://www.regulations.gov/document/EPA-HQ-OAR-2022-0814-0003.
[309] Proposed Rule, 88 Fed. Reg. at 11,863.
[310] *Id.* at 11,864-65.
[311] Exec. Order No. 12898 § 1-101 (Feb. 11, 1994).

policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations[.]"[312] President Biden's E.O. 14008 directs federal agencies to develop programs to address disproportionate adverse impacts as well as accompanying economic challenges.[313]

In accordance with these directives, EPA should do three things. First, EPA should identify, review and summarize studies showing the environmental justice communities disproportionately are located near major polluting facilities that experience SSM events,[314] and are disproportionately impacted by SSM emissions. Second, EPA should find that excess emissions events disproportionately impact environmental justice communities, and that the Proposed Rule is likely to reduce the existing disproportionate and adverse effects on such communities. Third, to address this disproportionate high and adverse impact, EPA should quickly finalize and implement the rule as quickly as possible, as discussed in the previous section.

Studies into excess emissions from large industrial facilities have found a correlation between the percentage of Black and Hispanic populations and exposure to excess emissions.[315] For example, a recent study finds that environmental justice communities concentrated around the Houston Ship Channel are disproportionately affected by unauthorized emissions: "unauthorized VOC emissions…are most prevalent in the area around the Ship Channel," and "vulnerable populations experience greater emissions densities (on average) than their more advantaged counterparts…due to the greater severity of emissions burdens that vulnerable populations bear when they live in tracts with emissions."[316]

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[312] *Id.* § 3-302.

[313] Exec. Order. No. 14008, 86 Fed. Reg. 7,619, 7,622-24 (Jan. 27, 2021).

[314] *E.g.,* Ex. 10, Goldman et al., *Assessment of Air Pollution Impacts and Monitoring Data Limitations of a Spring 2019 Chemical Facility Fire*; Amanda Starbuck, *New Rep., Interactive Map Show that People of Color and the Poor Are More Likely to Live Near Chemical Hazards,* Ctr. for Effective Gov't (Jan. 21, 2016), https://www.foreffectivegov.org/blog/new-report-interactive-map-show-that-people-color-and-poor-are-more-likely-live-near-chemical-h, (attached as Exhibit 37); *Living in the Shadow of Danger, Poverty, Race, and Unequal Chemical Facility Hazards,* Ctr. for Effective Gov't (Jan. 2016), https://doi.org/10.13140/RG.2.1.2202.7284, (attached as Exhibit 38) ("People of color and people living in poverty, especially poor children of color, are significantly more likely to live in these fenceline zones; A disproportionate number of chemical facility incidents occur in neighborhoods that are predominately populated by people of color."); Ronald White, *Life at the Fenceline,* Env't Just. Health All. for Chemical Policy Reform, Coming Clean, Campaign for Healthier Sols. at 40 (Sept. 2018), https://ej4all.org/assets/media/documents/Life%20at%20the%20Fenceline%20-%20English%20-%20Public.pdf (attached as Exhibit 39) ("[f]enceline zones around hazardous facilities are disproportionately Black, Latino, and impoverished.").

[315] Zhengyan Li et al., *Racial, Ethnic, and Income Disparities in Air Pollution: A Study of Excess Emissions in Texas*, 14 PLOS ONE 8 (Aug. 2, 2019), https://doi.org/10.1371/journal.pone.0220696, (attached as Exhibit 40).

[316] Ex. 5, Houston Vulnerability Study at 24 *see also id.* at 25, Table 5 (providing statistics).

Another study found surrounding environmental justice communities experienced disproportionate impacts from two major chemical release events at the Chevron refinery in Richmond, California.

> The larger of these events … resulted in a 3.7-fold increase in the number of people seeking care at emergency departments from zip codes closest to the refinery, with the visits for numerous sensory/nervous system conditions (migraine headaches, eye conditions, and dizziness), asthma, upper and lower respiratory conditions, chest pain, and non-medical related poisonings being elevated.[317] The most impacted zip codes closer to the refinery had a much higher proportion of residents of color than those farther away (76% vs. 45%).[318]

As discussed above, EPA's 2023 Louisiana SSM Example Memorandum demonstrates that Louisiana's SSM loophole allows facilities in Cancer Alley – an area that is disproportionately lower income and African American and has some of the highest cancer rates in the nation - to release excess emissions for sometimes months at a time.[319] Relatedly, EPA itself has reached the preliminary conclusion that air pollution control decisions in Louisiana have "an adverse disparate impact on residents who identify as Black" living in St. James Parish, Louisiana.[320]

EPA should review these and related studies and other data to find that excess emissions events disproportionately impact environmental justice communities, and that the Proposed Rule is likely to reduce the existing disproportionate and adverse effects on such communities. To address these effects, EPA should finalize and implement the rule as quickly as possible.

VIII. The D.C. Circuit is the Only Appropriate Venue for Review of the Final Rule Here.

Under the Clean Air Act's venue provision, § 307(b)(1), the U.S. Court of Appeals for the D.C. Circuit is the only appropriate venue for review of any "nationally applicable" EPA final action, and regional or local actions where EPA has made and published a finding that the action is "based on a determination of

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[317] Linda L. Remy et al., *Hospital, Health, and Cmty. Burden After Oil Refinery Fires, Richmond, Cal. 2007 and 2012*. Env't Health (May 16, 2019), https://doi.org/10.1186/s12940-019-0484-4 (attached as Exhibit 41).

[318] Jill Johnston & Lara Cushing, *Chemical Exposures, Health, and Env't Just. in Cmtys. Living on the Fenceline of Indus.,* Curr Env't Health Rep. at 7 (Mar. 1, 2021), https://doi.org/10.1007/s40572-020-00263-8 (attached as Exhibit 42).

[319] *See* Section V.F *infra* for further discussion and exhibits.

[320] Ltr from L. Dorka, EPA, to LDEQ, Re: Letter of Concern (Oct 12, 2022), https://www.epa.gov/system/files/documents/2022-10/2022%2010%2012%20Final%20Letter%20LDEQ%20LDH%2001R-22-R6%2C%2002R-22-R6%2C%2004R-22-R6.pdf (attached as Exhibit 43).

nationwide scope or effect."[321] EPA correctly reasons that the final action here will be nationally applicable under § 307(b)(1).[322] EPA also correctly proposes to, in the alternative, make and publish a finding that the final action will be based on a determination of nationwide scope or effect under § 307(b)(1).[323]

A. The Final Rule Will Be Nationally Applicable.

Congress's intent in enacting the Act's venue provision was clear: to ensure a single location for review of—and thus uniformity in—nationally significant issues by "plac[ing] nationally significant decisions in the D.C. Circuit."[324]

The rulemaking here is nationally applicable for all the reasons that EPA notes:

> The EPA is proposing to issue SIP calls to eight states (applicable in 10 statewide and local jurisdictions) located in four of the ten EPA regions pursuant to a uniform process and analytical approach. The EPA is proposing to apply a nationally consistent policy regarding SSM provisions in SIPs in each of these eight states as a follow-up to EPA's larger 2015 SSM SIP Action, in which the Agency issued SIP calls pursuant to the same nationally consistent policy to 36 states (applicable in 45 statewide and local jurisdictions), for which petitions for review were all filed in the D.C. Circuit in 2015. The jurisdictions that would be affected by this action, if finalized, represent a wide geographic area and fall within six different judicial circuits.
>
> If the Administrator takes final action on this proposal, then, in consideration of the effects of the action across the country, the EPA views this action to be "nationally applicable."[325]

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[321] 42 U.S.C. § 7607(b)(1).
[322] *See* Proposed Rule, 88 Fed. Reg. at 11,865.
[323] *See Id.*
[324] *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 673 (7th Cir. 2017) (noting Clean Air Act's "obvious aim of centralizing judicial review of national rules in the D.C. Circuit"); *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011) (the Act "evinces a clear congressional intent" to centralize review in the D.C. Circuit of "matters on which national uniformity is desirable"); *see also Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1054 (D.C. Cir. 2018) (Silberman, J., concurring) (noting Act's "clear Congressional mandate" for "uniform judicial review of regulatory issues of national importance").
[325] Proposed Rule, 88 Fed. Reg. at 11,865.

This rulemaking is also nationally applicable for an additional reason not mentioned by EPA: it revises the nationally applicable 2015 SSM SIP call by reinstating that rule's findings of substantial inadequacy and associated requirements that Texas, North Carolina, and Iowa correct the unlawful SSM loopholes in their SIPs—findings and requirements that EPA had withdrawn in 2020 through three separate rules. Each of those withdrawal rules from 2020 revised the SSM SIP call by (1) creating an exception to the SIP call's nationwide, categorical prohibition against unlawful SSM loopholes and (2) making the 2015 rule inapplicable in a state where it previously applied. Now, EPA is effectively revising the nationally applicable 2015 rule again so that the 2015 rule categorically prohibits unlawful SSM loopholes and once again applies in Texas, North Carolina, and Iowa.

Consistent with Congress' intent with the venue provision, any challenges to the nationally significant final rule here must be heard in the D.C. Circuit to ensure centralized, uniform judicial review. The D.C. Circuit is already considering challenges to the 2015 SSM SIP call and thus is well versed in the legal issues presented by the current rulemaking, which applies the same national policy as the 2015 rule. If challenges to the final rule here were heard in the regional Circuits, this would conflict with Congress' intent, resulting in a patchwork of potentially conflicting decisions from six additional Circuits beyond the D.C. Circuit. Judicial review in the regional Circuits would therefore foster exactly the "piecemeal review" and "potentially inconsistent results" that Congress sought to avoid with the Clean Air Act's venue provision.[326]

B. EPA Correctly Proposes to Make and Publish a Finding that the Final Action Will Be Based on a Determination of Nationwide Scope or Effect.

EPA should also, in the alternative, make and publish a finding that the final action here is based on a determination (or determinations) of nationwide scope or effect under 42 U.S.C. § 7607(b)(1) that identifies with particularity the determinations that formed the basis of the Final Rule.[327]

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[326] *Texas*, 2011 WL 710598, at *4; s*ee Sierra Club v. EPA*, 955 F.3d 56, 65 (D.C. Cir. 2020) (Wilkins, J., concurring) ("In order to prevent a patchwork of regional interpretations of nationally applicable agency actions, section 307(b)(1) … vested exclusive jurisdiction in the [D.C. Circuit] to review all final EPA actions of nationwide consequence …."); *S. Illinois Power Coop.*, 863 F.3d at 674 ("Overlapping, piecemeal, multicircuit review of a single, nationally applicable EPA rule is potentially destabilizing to the coherent and consistent interpretation and application of the Clean Air Act.").

[327] The Fifth Circuit Court of Appeals has held that such determinations are reviewed *de novo* (i.e., without deference to EPA's characterizations of the rule), and have rejected determinations of nationwide scope and effect where EPA failed to reasonably articulate the "core" determinations

Here, EPA should publish a particularized finding that any final rule is based on determinations of nationwide scope and effect. Among other determinations, the rule will be based on EPA's nationwide determination that SSM SIP affirmative defenses and exemptions are unlawful under the Clean Air Act, and that any SIP that includes such provisions is "substantially inadequate" to meet the Clean Air Act's requirements and must be removed from the state plan.[328] EPA reached the same conclusion in its 2015 SIP call in reasoning that the 2015 rule was based on a determination of nationwide scope or effect.[329] The final rule will also be based on a determination of nationwide scope or effect because it will have an effect across multiple U.S. courts of appeals.[330] It would be arbitrary and capricious for EPA to refuse to make and publish such a finding.

IX. EPA Should Encourage States to Add Reporting and Notification Provisions.

EPA should encourage states to make information about excess emission events easily and quickly accessible to the public so that communities can be informed about the quality of their air and pollution from neighboring facilities. Exposing communities to harmful pollution is bad enough; secret exposure to harmful pollution is unacceptable. States should create a publicly-available electronic database of this information similar to databases in Texas and Louisiana.[331] Open records request laws are insufficient because the public is not made aware of these events when they occur in the first place, and often requests take several weeks to fulfill.

Reporting provisions help enhance compliance and enforcement efforts. Making pollution data public is a low-cost, efficient manner to drive pollution reduction. It is widely recognized that this is a key benefit of the Toxic Release Inventory program.[332] Moreover, contemporaneous reporting of the conditions

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upon which the rule is based. *Texas v. EPA*, 829 F.3d 405, 421-22 (5th Cir. 2016); *see also Texas v. EPA*, 706 F. App'x 159, 164-65 (5th Cir. 2017).

[328] Proposed Rule, 88 Fed. Reg. at 11,850.

[329] 2015 SSM SIP Call, 80 Fed. Reg. at 33,883 (finding that the "underlying basis for the SIP call has 'nationwide scope and effect'" because it was "applying the same legal and policy interpretation to each of these states").

[330] *See* H.R. Rep. No. 95-294, at 324 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1403 n.10 (stating that the D.C. Circuit should be the venue for SIP actions based on "determination[s] of nationwide scope or effect (including a determination which has scope or effect beyond a single judicial circuit)") (emphasis added).

[331] *See* La. Dep't of Env't Quality's Electronic Document Mgmt. Sys., http://edms.deq.louisiana.gov/app/doc/querydef.aspx; Tex. Comm'n Env't Quality, Air Emission Event Rep. Database, https://www2.tceq.texas.gov/oce/eer/.

[332] Archon Fung, *Reinventing Env't Regul. From the Grassroots Up: Explaining and Expanding the Success of the Toxics Release Inventory*, Env't Mgmt. (Feb. 25, 2000), http://www.ncbi.nlm.nih.gov/pubmed/10594186.

surrounding the violation, including the type and the quantity of the pollution released, the legal limit, the cause of the violation, and any measures taken to limit or prevent the emissions, is necessary to ensure that all stakeholders can respond to problems in real time and that enforcement resources are promptly targeted towards violations where further actions are warranted. Following issuance of EPA's Proposed SSM SIP Call in 2013, Jefferson County, Kentucky took initiative to revise its problematic regulations immediately, and included much-needed notification and reporting requirements. The state explained that notification requirements ease the administrative burden in determining whether and how much excess emissions occur at facilities.[333] The information also enables state agencies to better respond to citizen inquiries about excess emission events.[334]

X. EPA Should Act Swiftly to Eliminate SSM Loopholes Everywhere They Are Found in EPA Rules.

Commenters appreciate EPA's action on the Proposed Rule, however, EPA must act swiftly to remove all unlawful loopholes everywhere they are found in state and EPA's rules. We attach our 2022 Petition for Rulemaking as Exhibit 44, where we describe the problem in detail. EPA has promulgated at least 97 SSM loopholes in its regulations under Section 111 and 112 that still exist today, each of which violate the Act's clear requirements.[335] The same legal reasoning applies to each of these unlawful provisions no matter the source category: every SSM exemption and affirmative defense violates the Clean Air Act. The most efficient and effective approach for EPA to take to bring its regulations into compliance with the law and to provide vital public health and welfare protections to communities—especially overburdened communities facing cumulative impacts from multiple types of sources that can rely on various SSM exemptions—is to remove all remaining Section 111 and 112 loopholes (where a category-specific rulemaking is not already under way) through a single rulemaking. This would ensure EPA finally and fully complies with *Sierra Club v. EPA*, and *NRDC v. EPA* without any further agency delay. By contrast, waiting to eliminate the SSM exemptions and affirmative defense provisions through case-by-case rulemakings when each subpart is revised under the Clean Air Act's periodic review and revision provisions,

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[333] *See, e.g,* Lauren Anderson, *Jefferson County, KY Nov. 9 2010 SIP Revision* at Regul. 1.07-15 (May 22, 2013), https://www.regulations.gov/document/EPA-R04-OAR-2013-0272-0002 ("Much of the current burden on the District is in determining whether excess emissions occurred, and, if so, the amount of excess emissions. A proposed new provision specifically requires a company that filed an initial excess emission report to file a negative report if excess emissions did not occur. Further, the revised language highlights that the company is required to identify and calculate the amount of excess emissions that occurred. By not using its resources to determine whether excess emission occurred and the amount, the District will reduce its workload.")

[334] *Id.* at Regul. 1.07-13.

[335] *See* Exhibit 1 to 2022 Petition for Rulemaking, (attached as Exhibit 44) for an inventory of these exemptions.

as EPA has been doing to date, would mean that many communities have to wait years or even decades longer for relief from dangerous SSM emissions.[336]

There is strong public support for EPA to remove these harmful loopholes. Recently 131 community and environmental groups from across the country signed a letter urging EPA to act,[337] and over 7,000 public comments were delivered to EPA urging the agency to eliminate all unlawful loopholes from federal clean air rules.[338] And with these comments we submit additional individual public comments into the docket to support EPA's current proposal and continue to urge EPA to close all unlawful loopholes, including 54 individuals from Louisiana,[339] and 269 from other affected states.[340]

Thank for your consideration of these comments.

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[336] The Office of Inspector General recently highlighted the longstanding agency delay in fulfilling these review obligations, finding that the agency has 93 overdue section 112 rulemakings, almost half of which are overdue by more than five years. EPA Off. of Insp. Gen., *Rep.: The EPA Needs to Develop a Strategy to Complete Overdue Residual Risk and Tech. Reviews and to Meet the Statutory Deadlines for Upcoming Reviews*, Rep. No. 22-E-0026 (Mar. 30, 2022), https://www.epa.gov/office-inspector-general/report-epa-needs-develop-strategy-complete-overdue-residual-risk-and-0.

[337] Ex. 22, Community Groups' Letter to EPA.

[338] Ex. 23, Comments to EPA.

[339] Louisiana Comments to EPA, *Close These Dangerous Loopholes* (Apr. 2023), (attached as Exhibit 45).

[340] National Comments to EPA, *Close All Startup, Shutdown, and Malfunction (SSM) Loopholes and protect communities from pollution*, (Apr. 2023) (attached as Exhibit 46).

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