ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1140
(and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.,*

Respondents.

On Petition for Review of final Action by the
United States Environmental Protection Agency

BRIEF FOR U.S. SENATORS SHELDON WHITEHOUSE, JEFF MERKLEY, KIRSTEN GILLIBRAND, BRIAN SCHATZ, AND EDWARD J. MARKEY, AS *AMICI CURIAE* SUPPORTING THE STATE AND MUNICIPAL PETITIONERS, PUBLIC HEALTH AND ENVIRONMENTAL PETITIONERS, POWER COMPANY PETITIONERS, AND CLEAN ENERGY TRADE ASSOCIATION PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* U.S. Senators Sheldon Whitehouse, Jeff Merkley, Kirsten Gillibrand, Brian Schatz, and Edward J. Markey provide this certificate as to parties, rulings, and related cases. Counsel understands additional amici curiae may appear in this matter.

A. Parties and *Amici*

The parties, intervenors, and *amici* appearing before the district court and in this Court (except for Sen. Sheldon Whitehouse, Sen. Jeff Merkley, Sen. Kirsten Gillibrand, and Sen. Brian Schatz) are listed in the State and Municipal Petitioners' Opening Brief (State of New York, *et al.*), at i-vi, and in the Initial Opening Brief of Public Health and Environmental Petitioners (American Lung Association, *et al*). Counsel for the senators understands that additional *amici* likely will be appearing before this Court.

B. Ruling Under Review

These consolidated cases involve final agency action of the U.S. Environmental Protection Agency titled, "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From

Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," which appears in the Federal Register at 84 Fed.Reg. 32,520 (07/08/2019).

C. Related Cases

The matter has not previously been before this Court, and Counsel for amicus is not aware of any other related proceedings, as defined by Circuit Rule 28(a)(1)(C), currently pending before this or any other court.

DATED: April 24, 2020

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RULE 29(d) CERTIFICATE

Pursuant to Circuit Rule 29(d) counsel certifies that a separate brief is necessary to ensure that the Court is informed of and fully understands the political background of the agency rulemaking at issue in this proceeding.

DATED: April 24, 2020

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GLOSSARY

ACE	Affordable Clean Energy
AFPM	American Fuel and Petrochemical Manufacturers
ANPRM	Advanced Notice of Proposed Rulemaking
APA	Administrative Procedures Act
API	American Petroleum Institute
BSER	Best System of Emissions Reduction
CAA	Clean Air Act
CO_2	Carbon dioxide
CPP	Clean Power Plan
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
GDP	Gross Domestic Product
GHG	Greenhouse Gas
IWG	Interagency Working Group
JA	Joint Appendix
OIRA	Office of Information and Regulatory Affairs
PAC	Political Action Committee
RAGA	Republican Attorneys General Association

RSLC	Republican State Leadership Committee
SCC	Social Cost of Carbon
UARG	Utility Air Regulatory Group

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in an addendum to the State and Municipal Petitioners' Opening Brief.

AMICI CURIAE'S IDENTITY AND INTEREST

Senator Sheldon Whitehouse represents the State of Rhode Island. First elected to the United States Senate in 2006, Senator Whitehouse has been active seeking comprehensive solutions to address climate change. He is a member of the Senate's Environment and Public Works Committee and author of the American Opportunity Carbon Fee Act, which would reduce carbon pollution by roughly 50 percent.

Senator Jeff Merkley represents the State of Oregon–a state which is already feeling devastating impacts from climate chaos. First elected in 2008, Senator Merkley is a member of the Senate's Environment and Public Works Committee and is dedicated to making the transition to clean energy and clean transportation a central priority of the federal government. He introduced the 100 by 50 Act which would transition our country to 100 percent clean and renewable energy by 2050, and the Good Jobs in the 21st Century Energy Act to ensure the creation of good-paying union jobs in all aspects of the clean energy economy.

United States Senator Kirsten Gillibrand has represented the State of New York since 2009. She serves as a member of the Senate Committee on Environment and Public Works, where she has worked to address climate change.

Senator Brian Schatz has represented the State of Hawaii in the United States Senate since 2012. He works to develop legislative solutions that reduce carbon emissions, prepare our financial sector for climate-related risk, and increase the use of renewable energy. He is the chair of the Senate Democrats' Special Committee on the Climate Crisis and is a cosponsor of the American Opportunity Carbon Fee Act.

Senator Edward J. Markey represents the Commonwealth of Massachusetts in the United States Senate. He is a member of the EPW Committee and serves as Chair of the Senate Climate Change Task Force. Senator Markey's more than 40 years of legislative experience includes co-authorship with Congressman Henry Waxman of the only comprehensive climate legislation ever to pass a chamber of Congress. Then-Representative Markey was also the principal House author of a 1987 energy conservation act and a 2007 law to increase

national fuel economy standards. Senator Markey is the Senate sponsor of the Green New Deal resolution.

The senators file this brief to focus the Court's special attention on the web of political, financial, and professional connections between the political appointees at EPA responsible for promulgating the rule and the fossil-fuel industry that asked for it.

All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the senators or their counsel contributed money that was intended to fund preparing or submitting the brief.

I. SUMMARY OF ARGUMENT

This Court should vacate EPA's Affordable Clean Energy (ACE) Rule for two reasons. First, it should be vacated because it is arbitrary and capricious under the Administrative Procedure Act (APA).[1] As the record makes clear, the ACE Rule is the product of EPA political leadership uninterested in the science or economics of climate change

[1] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

and completely beholden to the fossil-fuel industry via close political, financial, and professional ties. Second, the EPA's ACE Rule should be vacated because it constitutes an illegal delegation of the agency's rulemaking authority to private entities: fossil-fuel companies and organizations representing their interests.[2] An agency so flagrantly captured by powerful special interests cannot meet APA standards for administrative fairness, and has conspicuously failed to do so here.

II. FACTUAL BACKGROUND

A. The ACE Rule Was Developed Under EPA Leadership Beholden to the Fossil-Fuel Industry

1. The Rule Was Developed Under the Tenure of Scott Pruitt, Andrew Wheeler, and Bill Wehrum

The ACE Rule was developed under the leadership of former EPA Administrator Scott Pruitt, current EPA Administrator Andrew Wheeler, and former EPA Assistant Administrator for Air and Radiation Bill Wehrum. Their ties to the fossil-fuel industry, which appears to have written the rule to serve its own interests at the

[2] *Ass'n of American Railroads v. USDOT*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated on other grounds,* 575 U.S. 43 (2015).

expense of the public policy mandated by Congress, are highly germane to this Court's review.

Pruitt became EPA Administrator on February 17, 2017. He oversaw EPA's original proposal to rescind the Clean Power Plan (CPP),[3] and the draft ACE Rule was sent to the Office of Information and Regulatory Affairs (OIRA) for review just three days after Pruitt resigned amidst corruption allegations. Wheeler was confirmed as EPA Deputy Administrator on April 12, 2018, became Acting Administrator on July 9, 2018, upon Pruitt's resignation, and was confirmed as Administrator on February 28, 2019. EPA's final ACE Rule was published under his name.[4]

Wehrum was confirmed as EPA Assistant Administrator for Air and Radiation in November 2017. As head of EPA's Office of Air and Radiation, Wehrum was responsible for day-to-day oversight and development of the original ACE Rule proposal and for the final rule

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[3] *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,* 82 Fed.Reg. 48,035 (11/16/2017).

[4] *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program,* 83 Fed.Reg. 44,746 (08/31/2018).

promulgated in July 2019.[5] It adopts the 2017 proposal to rescind the CPP and the 2018 ACE Rule proposal without substantial changes.

2. Pruitt, Wheeler, and Wehrum Have Long-Standing Ties to the Fossil-Fuel Industry

Before being confirmed as EPA Administrator, Pruitt served as Oklahoma's elected Attorney General. Pruitt's political career was largely underwritten by the fossil-fuel industry, the industry most affected by regulations to limit greenhouse gas (GHG) emissions. In Pruitt's four campaigns for elected office, the energy sector and associated industries and groups provided over $1,250,000 in donations to Pruitt—or about 44 percent of the total donations, and 55 percent of donations that can be tied to a particular sector.[6]

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[5] *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations,* 84 Fed.Reg. 32,561 (07/08/2019).

[6] Senators Whitehouse and Markey submitted a comment on the original ACE Rule proposal that catalogues political and financial ties between Pruitt and the fossil-fuel industry. *See* Sheldon Whitehouse & Edward J. Markey, *Comments on the EPA's Proposed Affordable Clean Energy Rule and Related Rulemaking* at 3 (10/31/2018) (hereafter cited as Whitehouse & Markey, *Comments*), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-23800

Energy-industry support for Pruitt went beyond direct contributions to his campaigns. In Pruitt's 2010 campaign for attorney general, an outside group called the Republican State Leadership Committee (RSLC) spent $150,000 on his behalf. Energy interests are among the RSLC's largest donors.[7]

Pruitt and his supporters also created political action committees (PACs) to expand his political influence. Run by Pruitt, the Oklahoma Strong Leadership PAC raised roughly $400,000 during the 2016 election cycle, almost 20 percent of it coming from energy interests.[8] Liberty 2.0, a super PAC created by Pruitt's supporters, raised approximately $450,000 during the 2016 election cycle, over a third of which came from energy interests.[9]

During this period, Pruitt also served as chair of the Republican Attorneys General Association (RAGA) which, under Pruitt's leadership, raised enormous sums from energy interests for its own

[7] *Id.* at 4.

[8] *Id.*

[9] *Id.*

PAC. During the 2014 and 2016 election cycles, energy interests contributed well over $5 million to RAGA's political arm.[10]

Fossil-fuel-backed outside spending groups continued to support Pruitt after President Trump nominated him to run EPA. The America Rising super PAC, which receives large donations from fossil-fuel interests, funded a campaign supporting Pruitt's confirmation, including a ConfirmPruitt.com website and ads targeting senators.[11]

The fossil-fuel industry's patronage of Pruitt's political career was not based on charity or coincidence. It showered money on Pruitt to reward and promote his long history of doing the industry's bidding—a pattern that continued at EPA.[12]

In 2011, Pruitt used his official Oklahoma Attorney General letterhead to press the case of Devon Energy—one of his biggest donors—before EPA. Devon's lawyers drafted a letter claiming EPA

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[10] *Id.* at 4-5.

[11] *Id.*

[12] Pruitt has taken full advantage of "the revolving door" between his regulatory agency and the industry he was supposed to regulate. *See* Gavin Bade, *Indiana coal miner hires ex-EPA head Scott Pruitt to lobby against plant closures,* Utility Dive (04/22/2019), https://www.utilitydive.com/news/indiana-coal-miner-hires-ex-epa-head-scott-pruitt-to-lobby-against-plant-cl/553155/

was overestimating the air pollution caused by natural-gas drilling and then sent it to Pruitt's office, which cut and pasted its text virtually verbatim onto his official state-government stationery, and then sent it to Washington over Pruitt's signature.[13]

In 2013, American Fuel and Petrochemical Manufacturers (AFPM), a fossil-fuel industry trade association and donor to Pruitt, gave him template language for a petition and urged him to sue the federal government over the Renewable Fuel Standard. The trade association noted that "this argument is more credible coming from a state." As requested, Pruitt sued.[14]

In early 2014, the energy industry, its corporate lawyers, Republican strategists, and the U.S. Chamber of Commerce, a major fossil-fuel ally, had already begun plotting strategy to oppose President Obama's soon-to-be announced carbon-pollution regulation, the CPP. Pruitt was among the key strategists involved in this early planning.[15]

Once confirmed as EPA Administrator, Pruitt opened the doors to his long-time benefactors in the fossil-fuel industry, an industry he now

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[13] Whitehouse & Markey, *Comments, supra* note 6, at 6.

[14] *Id.*

[15] *Id.* at 3-4.

regulated. In his first several weeks on the job, Pruitt met with more than forty energy interests; sixteen were petitioners in litigation against the CPP. During this same period, Pruitt met with almost no environmental groups.[16]

As EPA Administrator, Pruitt moved quickly to deliver industry's policy wish list. On March 2, 2017, just two weeks after Pruitt's confirmation, EPA withdrew its request that oil and gas companies provide detailed information regarding their facilities' methane emissions.[17] On April 18, 2017, Pruitt wrote to the American Petroleum Institute (API) and other oil-and-gas industry trade associations to announce that he was postponing implementation of a rule that would have required equipment retrofits in order to prevent leaks of methane and other dangerous gases.[18] These decisions are estimated to save oil

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[16] *Id.* at 6.

[17] *Notice Regarding Withdrawal of Obligation To Submit Information,* 82 Fed.Reg. 12,817 (03/07/2017).

[18] E. Scott Pruitt, April 18, 2017 letter to the American Petroleum Institute, *et al.*, *available at* https://www.epa.gov/sites/production/files/2017-04/documents/oil_and_gas_fugitive_emissions_monitoring_reconsideration_4_18_2017.pdf

and gas companies—many of them donors to Pruitt and the outside spending groups affiliated with him—millions of dollars.[19]

Rescinding the CPP, one of the fossil-fuel industry's top priorities, would require more time, as the rescission would have to go through the notice-and-comment period required by the APA.[20] Moreover, a flat repeal of the CPP would likely have been rejected by the courts in light of the Supreme Court's determination in *Massachusetts v. EPA*[21] that the Clean Air Act (CAA) authorizes the agency to regulate GHG emissions, and the agency's subsequent determination that GHG emissions endanger public health and welfare.[22] Achieving industry's longstanding goal of freeing itself from power-sector GHG regulations would require a carefully orchestrated replacement of the CPP. Under Pruitt's leadership, planning for this replacement, the rule today before this Court, began in earnest.

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[19] Whitehouse & Markey, *Comments, supra* note 6, at 7.

[20] 5 U.S.C. §553(c).

[21] 549 U.S. 497, 528-35 (2007).

[22] *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,* 74 Fed.Reg. 66,496 (12/15/2009).

Wheeler, like Pruitt, enjoys close ties to the fossil-fuel industry. Wheeler was a longtime lobbyist for energy interests before serving at EPA.[23] Most notably, he represented Murray Energy, whose CEO Bob Murray put the CPP's repeal atop an "Action Plan" he circulated to Vice President Mike Pence, Pruitt, Secretary of Energy Rick Perry, and others.[24] In March 2017, Wheeler even accompanied Murray to lobby Perry on this action plan[25] and his firm arranged for Murray to meet with Pruitt on the same subject.[26] Wheeler earned nearly $3 million for his lobbying firm by representing Murray Energy.[27] While lobbying for

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[23] Whitehouse & Markey, *Comments, supra* note 6, at 12.

[24] Bob Murray, *Action Plan for the Administration of President Donald J. Trump* (03/01/2017), https://www.nytimes.com/interactive/2018/01/09/climate/document-Murray-Energy-Action-Plan.html

[25] Kate Aronoff, *Exclusive Photos Contradict Murray Energy CEO's Claim He Had "Nothing To Do with" Rick Perry's Coal Bailout,* In These Times (12/06/2017), http://inthesetimes.com/features/murray_energy_trump_doe_coal_industry_grid_plan.html

[26] *Hearing on the Nomination of Andrew Wheeler to be Administrator of the EPA* 58 (01/16/2019), https://www.epw.senate.gov/public/_cache/files/6/c/6ca552e9-7080-46b2-9aba-50f858dbfb31/EFD9580A8C9CFC98C19BFF1248249EC7.spw-011619.pdf

[27] Lisa Friedman, *Andrew Wheeler, New E.P.A. Chief, Details His Energy Lobbying Past,* N.Y. Times (08/01/2018),

Murray Energy, Wheeler also served as president of the Washington Coal Club, a group dedicated to advancing coal-industry interests.[28]

Wheeler continued Pruitt's pro-fossil fuels agenda. EPA substantially weakened GHG emission standards for cars and light trucks, and is attempting to revoke California's authority under the CAA to set higher standards.[29] The California standards were expected to save consumers $1.7 trillion in fuel costs; weakening them hands the oil industry a massive windfall.[30] Wheeler has also proceeded to roll back two different methane regulations,[31] and to relax GHG-emission requirements on new coal-fired power plants.[32]

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https://www.nytimes.com/2018/08/01/climate/andrew-wheeler-epa-lobbying.html

[28] Washington Coal Club, 2016 Form 990, *available at* https://www.documentcloud.org/documents/4594012-Washington-Coal-Club-2016-1.html#document/p3/a437136

[29] These actions were taken following a lobbying blitz by the oil industry and many of the front groups it funds. *See generally* Sheldon Whitehouse, *et al.*, *Comments on EPA and NHTSA's Proposed Rule Freezing Fuel Economy and Greenhouse Gas Emissions Standards for Cars and Light Trucks,* at 6-13 (10/26/2018) https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5483

[30] *Id.* at 6, 25 & n.166.

[31] *See* Comment submitted by Senator Sheldon Whitehouse, *et al.*, (12/17/2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0998; Comment submitted by Sheldon Whitehouse, *et al.*,

Wehrum, too, enjoys close ties to the fossil-fuel industry. A longtime lawyer for energy companies and trade groups, Wehrum repeatedly sued EPA to block clean-air rules before he was nominated to run the EPA office that writes those rules. His clients included the Utility Air Regulatory Group (UARG), Duke Energy, Dominion Resources, API, AFPM, Chevron, ExxonMobil, Koch Industries, and Phillips 66, among other energy concerns.[33] In a likely violation of the Trump ethics pledge,[34] Wehrum met with UARG and several electric utilities to discuss replacing the CPP just weeks after he assumed his duties as Assistant Administrator.[35] At least one instance of Wehrum

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(11/25/2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0757-2130

[32] *See* Comment submitted by Senator Sheldon Whitehouse, https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0495-12549

[33] Whitehouse & Markey, *supra* note 6, at 12.

[34] Sheldon Whitehouse Oct. 10, 2018 letter to President Donald Trump, https://www.whitehouse.senate.gov/imo/media/doc/Wehrum%20Letter%20to%20President%20Trump.pdf

[35] William Wehrum, *Clean Air Act: Update on Stationary Source Regulations* (12/07/2017), https://www.documentcloud.org/documents/4776445-EPA-s-William-Wehrum-and-the-Effort-to-Move.html#document/p190/a448289

acting in favor of former clients has been referred to the EPA Inspector General for investigation.[36]

The views of all three men on the underlying science establishing the contribution of carbon pollution to climate change also align with the interests of the fossil-fuel industry. In March 2017, Pruitt stated "I think that measuring with precision human activity on the climate is something very challenging to do and there's tremendous disagreement about the degree of impact, so, no, I would not agree that [CO_2] is a primary contributor to the global warming that we see."[37] At his Senate confirmation hearing, Wheeler testified, "I believe that man has an impact on the climate but what's not completely understood is what the impact is."[38] Similarly, Wehrum testified at his Senate confirmation

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[36] Lisa Friedman, *Bill Wehrum, an Architect of E.P.A. Rollbacks, Faces New Ethics Inquiry,* N.Y. Times (07/22/2019), https://www.nytimes.com/2019/07/22/climate/william-wehrum-epa-inquiry.html

[37] Whitehouse & Markey, *Comments, supra* note 6, at 11.

[38] *Hearing on the Nominations of Kathleen Hartnett White to be a Member of the Council on Environmental Quality and Andrew Wheeler to be Deputy Administrator of the Environmental Protection Agency* 95 (11/08/2017), https://www.epw.senate.gov/public/_cache/files/5/0/505551c3-fc95-4c6e-8ae3-31a236ad54b3/613973623082D4C8E2A574B5C4ACFBB5.spw-110817.pdf

hearing that it was an "open question" whether human activities are the primary driver of climate change.[39] The Court should take notice of the extensive body of academic research that ties this type of climate-change denialism among policymakers to the fossil-fuel industry's decades-long efforts to cast doubt on climate science.[40]

Peer-reviewed research has concluded, as we have, that EPA is exhibiting many signs of regulatory capture under this leadership.[41] Among the findings pointing to regulatory capture are the facts that "appointees have deep ties with industries" and that "significant policy

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[39] *Hearing on the Nominations of Michael Dourson, Matthew Leopold, David Ross, and William Wehrum to be Assistant Administrators of the Environmental Protection Agency, and Jeffery Baran to be a Member of the Nuclear Regulatory Commission* 144 (10/04/2017), https://www.epw.senate.gov/public/_cache/files/8/a/8a316cbd-8530-47a1-b871-765471236559/8DD3338B178EBC207478F12BB8926D81.spw-100417.pdf

[40] *See, e.g.*, Naomi Oreskes & Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* 169-215 (Bloomsbury Publishing, 2011).

[41] Lindsey Dillon, *et al.*, *The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture,* 108 Am. J. Pub. Health S89, S89-S93 (2018), https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360.

changes … favor businesses and industry, while probably incurring considerable health and environmental consequences."[42]

In sum, key figures at EPA overseeing development of the ACE Rule were long-time advocates for the industry they were entrusted to regulate. They have crafted and/or lobbied for industry's policy and political priorities for decades. As the following sections will show, when given the opportunity to set government policy on one of the fossil-fuel industry's most important priorities, they chose to abdicate the responsibility conferred by Congress, and to instead do industry's bidding—despite overwhelming economic and scientific evidence demonstrating the need for large reductions in GHG emissions.

B. The ACE Rule Is the Product of an Agency Captured by Industry

1. EPA Ignored Extensive Scientific and Economic Analyses about the Effects of Climate Change

In recent years, economists representing interests as varied as central banks and the real-estate industry have produced an enormous volume of research demonstrating that climate change, and the failure

[42] *Id.* at S91-S92.

to plan for an orderly transition to a low-carbon economy, credibly threaten staggeringly large economic losses.

Warnings about a collapse in coastal property values have come from Freddie Mac,[43] the industry publication *Risk & Insurance*,[44] and the Union of Concerned Scientists.[45] Freddie Mac warns that coastal-property losses from rising seas "are likely to be greater in total than those experienced in the housing crisis and the Great Recession."[46] The First Street Foundation calculates that coastal properties from Texas to Maine have already lost almost $16 billion in value since 2005.[47]

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[43] Freddie Mac, *Life's a Beach* (04/25/2016), http://www.freddiemac.com/research/insight/20160426_lifes_a_beach.html

[44] Dan Reynolds, *Coastal Mortgage Value Collapse*, Risk & Ins. (04/07/2017), http://riskandinsurance.com/coastal-mortgage-value-collapse/

[45] Union of Concerned Scientists, *Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate* (06/18/2018), https://www.ucsusa.org/sites/default/files/attach/2018/06/underwater-analysis-full-report.pdf

[46] Freddie Mac, *Life's a Beach*, *supra* note 44.

[47] First Street Foundation, *State by State Analysis: Property Value Loss from Sea Level Rise* (08/08/2019) ("From Maine to Texas, the data shows that increased tidal flooding driven by sea level rise has eroded $15.9 billion in relative property values between 2005 and 2017."), https://firststreet.org/press/property-value-loss-from-sea-level-rise-state-by-state-analysis/

An additional risk comes from stranded fossil-fuel assets—reserves that can't be burned and facilities that won't be used. The World Bank places the market value of stranded fossil-fuel assets "around US$20 trillion." [48] The Bank of England warns "investments in fossil fuels and related technologies … may take a huge hit."[49] High-cost producer regions like the U.S. could "lose almost their entire oil and gas industry,"[50] with consequences extending well beyond the fossil-fuel industry, likely producing a decline in U.S. GDP of more than than five percent, with millions of jobs lost.[51] The economic consequences to the U.S. will be worse "if it continues to promote fossil fuel production and consumption [rather] than if it moves away from them."[52]

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[48] Vladimir Stenek, *Carbon Bubbles & Stranded Assets* (The World Bank, 06/03/2014), http://blogs.worldbank.org/climatechange/carbon-bubbles-stranded-assets

[49] Paul Fisher, *Confronting the challenges of tomorrow's world,* at 5 (Bank of England, 03/03/2015), https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/confronting-the-challenges-of-tomorrows-world.pdf?la=en&hash=DA7050DCC625A7127875DA88665B67094914CB2B

[50] J.-F. Mercure, *et al.*, *Macroeconomic impact of stranded fossil fuel assets,* 8 Nature Climate Change 588, 591 (06/04/2018), https://www.nature.com/articles/s41558-018-0182-1

[51] *Id.* at 590-92.

[52] *Id.* at 592.

Many others have warned of the serious damage that unchecked climate change will do to the global economy. The Fourth National Climate Assessment cautions that "with continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century—more than the current gross domestic product (GDP) of many U.S. states."[53] Credible reports and papers paint a grim picture of massive economic losses from unchecked climate change. The ACE Rule fails to address any of this evidence.

Climate science is even more well-documented than climate economics. The heat-trapping qualities of CO_2 have been understood since the nineteenth century, and an overwhelming body of scientific research establishes beyond any doubt that combustion of fossil-fuels is driving climate change. Climate science is so well-established in the record of this rulemaking that we do not feel it necessary to further

[53] 2 U.S. Global Research Program, *Fourth National Climate Assessment* 26 (2018), https://nca2018.globalchange.gov/downloads/

brief the Court on this subject.[54] As with climate economics, the ACE Rule does not seriously address climate science.

2. The ACE Rule Almost Entirely Adopts the Fossil-Fuel Industry's Requests

EPA announced in October 2017 that it planned to rescind and replace the CPP, one of the fossil-fuel industry's primary priorities for the Trump administration. EPA solicited input on what should replace it through an advanced notice of proposed rulemaking (ANPRM).[55] Numerous industry groups submitted recommendations, almost all of which the ACE Rule adopts.

Researchers at the University of Maryland Francis King Carey School of Law and the Center for Progressive Reform have documented how thoroughly the ACE Rule follows industry's wish list. They compared comments submitted by fossil-fuel industry trade associations

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[54] *See, e.g.*, Comment submitted by Center for Biological Diversity, *et al.* (04/26/2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-20637.

[55] *State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generation Units,* 82 Fed.Reg. 61,507 (12/28/2017).

under the ACE Rule ANPRM and in response to the Obama administration's CPP proposal with the final ACE Rule.[56]

They found that 15 of 17 industry requests for the original CPP proposal were adopted in the ACE Rule. Two were partially adopted and none were rejected.[57] With respect to industry requests made in comments to the ANPRM, 31 were adopted, three were partially adopted, and only three were rejected.[58]

Five of industry's requests largely determined the overall architecture of the ACE Rule:

1. The CPP was illegal and should be rescinded and replaced;

2. The best system of emissions reduction (BSER) should be limited to actions that can be taken at individual plants;

3. BSER should exclude technologies such as carbon capture claimed to not be "adequately demonstrated;"

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[56] James Goodwin, *Deregulation on Demand: Trump EPA Panders to Polluters in Dismantling Clean Power Plan,* at 4-5 (Center for Progressive Reform, April 2020), https://progressivereform.org/our-work/regulatory-policy/deregulation-on-demand/#_ftn1. Specifically, they reviewed comments submitted by the American Coal Council, the American Council for Clean Coal Electricity, API, the National Association of Manufacturers, the National Mining Association, the U.S. Chamber of Commerce, and UARG.

[57] *Id.* at 9-16.

[58] *Id.* at 17-27.

4. BSER should be defined as small heat-rate improvements at individual plants; and

5. Primary authority under the replacement regulation should lie with the states.[59]

EPA adopted all five of these requests. The ACE Rule replaces the CPP with a rule that limits BSER to actions that can be taken at individual plants, and chooses the least stringent of such actions—small improvements in heat rate—over other approaches, such as carbon capture, that would produce dramatically larger reductions in GHG emissions. The rule tells states to set heat-rate improvements for individual plants, while depriving them of real regulatory authority to reduce overall emissions.

III. ARGUMENT

A. The ACE Rule Is Arbitrary and Capricious

The APA authorizes courts to set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[60] "Normally, an agency rule would be arbitrary and capricious if the agency has [1] relied on factors which

[59] *See generally id.*

[60] 5 U.S.C. §706(2)(a).

Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[61]

An agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[62] "In reviewing that explanation, [a court] must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[63] In certain circumstances, heightened scrutiny is appropriate, and particularly if "from a combination of danger signals," it appears "that the agency has not really taken a 'hard

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[61] *State Farm,* 463 U.S. at; *see, e.g., Nat'l Lifeline Ass'n v. FCC,* 921 F.3d 1102, 1110 (D.C. Cir. 2019); *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.,* 429 F.3d 1136, 1145 (D.C. Cir. 2005).

[62] *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)).

[63] *Id.* (citing *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974)).

look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[64]

Close scrutiny also is appropriate for regulatory decisions that, like the ACE Rule, constitute an abrupt change in course. An agency making a regulatory U-turn must "provide a more detailed justification … when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy…. It would be arbitrary and capricious to ignore such matters."[65] "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past...."[66] "'[A] reasoned explanation is needed for disregarding

[64] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970); *see Nat'l Lime Ass'n v. EPA,* 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980)(applying *Greater Boston's* "hard look" standard to judicial review of agency rulemaking). In *Greater Boston Television*, the biggest "danger signal" requiring a "hard look" was the fact that the chair of the Federal Communications Commission (FCC) had had potentially improper contacts with an executive from a regulated industry. *See id. See also, Massachusetts v. EPA*, 549 U.S. 497, 528-35 (2007)) (constraining EPA's discretion and subjecting the agency's deferral of a decision to what amounts to a hard-look review).

[65] *FCC v. Fox Television Stations*, 566 U.S. 502, 515-16 (2009).

[66] *Id.* at 537 (Kennedy, J., concurring).

facts and circumstances that underlay or were engendered by the prior policy.'"[67]

Another "danger signal" that triggers heightened scrutiny arises where, as here, an agency has demonstrated "undue bias towards particular private interests."[68] Here, the EPA engaged in a sham decision-making process lacking any rational connection between the record facts and the final rule. At every turn, EPA rejected well-established scientific and economic research and agency technical expertise showing an urgent need to dramatically reduce GHG emissions. It instead embraced self-serving proposals from the fossil-fuel industry that will not significantly reduce emissions. The resulting do-nothing rule cannot be deemed the product of "reasoned decision-making."

The ACE Rule cannot be analyzed independent of the deep ties that bind EPA's political leadership to the fossil-fuel industry. Although a Court might accord agency rulemaking some deference,

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[67] *Encino Motorcars, LLC v. Navarro,* 136 S.Ct. 2117, 2126 (2016) (quoting *Fox Television,* 566 U.S. at 515-16).

[68] *NRDC v. SEC*, 606 F.2d 1031, 1050 n.23 (D.C. Cir. 1979).

none is warranted on such a troubling record as is presented here—replete with so many danger signals.

The first danger signal is the fossil-fuel industry's unprecedented access to EPA political leadership. Pruitt met with over a dozen petitioners against the CPP in just his first several weeks on the job. A month after he released the proposal to rescind the CPP, in remarks to the fossil-fuel-funded Heartland Institute, Pruitt stated "[w]e've withdrawn the Clean Power Plan."[69] Such a statement calls into serious question EPA's meaningful compliance with APA notice-and-comment requirements.

Wheeler's and Wehrum's records are no better. Just before joining EPA, Wheeler was lobbying for a CEO whose top priority was rescinding the CPP. Wehrum met with industry groups to discuss power-sector GHG regulations in a seeming violation of the Trump ethics pledge. These are the sorts of "improper contacts" and "undue bias" that troubled this Court in *Greater Boston Television* and *NRDC*.[70]

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[69] Comment submitted by Xavier Becerra, Attorney General, State of California, *et al.*, pg. 22 (01/09/2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-7861

[70] *See supra* notes 64 & 68.

Another prominent danger signal stems from the ACE Rule's abrupt U-turn away from the CPP policy of reducing GHG emissions (by almost 20 percent),[71] and from the EPA's 2009 endangerment finding. EPA admits that "the impacts of the [ACE Rule] in terms of change in emissions … are small compared to the recent market-driven changes that have occurred in the power sector."[72] The ACE Rule would do almost nothing to reduce GHG emissions compared to a baseline scenario of no regulation.[73]

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[71] *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,* 80 Fed.Reg. 64,924 (10/23/2015).

[72] *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed.Reg. 32,561 (07/08/2019).

[73] GHG emissions reductions would average roughly 0.5 percent annually. *See id.* It is of note that EPA largely abandoned comparing the ACE Rule to the CPP. In the original ACE Rule proposal, such a comparison showed that the ACE Rule resulted in higher CO_2 emissions as well as additional deaths, illness, and lost work and school days among other costs. *See* EPA, *Regulatory Impact Analysis for the Proposed Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program* (Aug. 2018), https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf. By changing the baseline used in the final rule to a no regulation scenario, EPA was able

EPA's 2009 endangerment finding contains a richly sourced summary of how climate change harms public health and welfare, through its effects on temperature, air quality, extreme-weather events, diseases and aeroallergens, agriculture, forestry, water resources, sea-level rise, energy, infrastructure, settlements, ecosystems, and wildlife.[74]

EPA's decision, with the CPP Rule's repeal and ACE Rule's adoption, to *not* regulate GHG emissions demands real explanation. But EPA provides none, running afoul of *Fox Television* and *Encino Motorcars*. Given its 2009 endangerment finding, the agency needs to explain how a rule that results in essentially zero GHG emission reductions comports with the direction given to it by Congress. EPA's failure to explain why it promulgated a rule that doesn't actually accomplish its ostensible purpose should be fatal.

In fact, the rule's regulatory-impact analysis' only engagement with climate science and economics is a mention that since EPA's 2009

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to avoid these unflattering comparisons, which would be almost impossible to defend as an exercise in reasoned decision-making.

[74] *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,* 74 Fed.Reg. 66,523 *et seq*. (12/15/2009).

endangerment finding "other science assessments suggest accelerating trends" for climate change.[75] This militates in favor of a rule *more* stringent than the CPP, rather than the do-nothing rule birthed by EPA's political leadership.

Yet another danger signal arises from EPA's treatment of the social cost of carbon (SCC) used to measure the monetary benefits of reducing GHG emissions. The rule uses two SCC estimates, $1/metric ton and $6/metric ton (in 2015 dollars),[76] that are many times less than other recent estimates of the SCC. The SCC determined by the prior administration's Interagency Working Group (IWG), which commenters noted "is widely considered by economic and legal experts to reflect an extremely conservative estimate of the true costs of greenhouse gas emissions and should be treated as a lower-bound estimate,"[77] provides a central-case estimate of roughly $48/metric ton (in 2015 dollars).

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[75] EPA, *Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units*, at pg. 4-1 (June 2019), https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[76] *Id*. at pg. 4-4.

[77] Comment submitted by Susanne Brooks, Environmental Defense Fund, et al. (10/31/2018),

In order to justify regulations that do next to nothing to limit GHG emissions, EPA needed to find some way to reduce the monetary value of emissions reductions. Instead of trying to fudge the science or the economics, EPA cooked the books by fudging the math.

The record shows that EPA's political leadership was not guided by scientific, economic, and technical expertise in its development of the ACE Rule. Time and again, it adopted industry positions in their entirety, even when they conflicted with the consensus view of climate scientists and economists. The result is precisely what the fossil-fuel industry wanted: the CPP repealed and replaced with a rule requiring only *de minimis* GHG emission reductions achieved through minor technological tinkering. The factual record laid out above presents precisely the sort of "danger signals" that demand "hard look" review. Potentially improper contacts between regulators and regulated industries,[78] "abrupt shifts in policy,"[79] and "undue bias towards

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https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24812

[78] *Greater Boston Television*, 444 F.2d at 844-45.

[79] *United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983).

particular private interests"[80] are all present in this tawdry tale of industry capture. No court could reasonably conclude that EPA "genuinely engaged in reasoned decision-making,"[81] or that EPA has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[82]

B. EPA Improperly Delegated this Rulemaking to a Regulated Industry

An agency rulemaking should be vacated if a court finds that the agency delegated its rulemaking authority to one or more private interests, because Congress "cannot delegate regulatory authority to a private entity."[83] "Although objections to delegations are 'typically presented in the context of a transfer of legislative authority from the Congress to agencies,' … 'the difficulties sparked by such allocations are

[80] *NRDC v. SEC*, 606 F.2d at 1050 n.23.

[81] *Greater Boston Television*, 444 F.2d at 851.

[82] *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

[83] *Ass'n of American Railroads v. USDOT*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated on other grounds,* 575 U.S. 43 (2015).

even more prevalent in the context of agency delegations to private individuals.'"[84]

While it is clear that an agency may not *explicitly* delegate its rulemaking authority to private interests, an agency that *implicitly* delegates its rulemaking authority to private interests raises the same concerns. An agency is effectively captured by the private interests when its "'regulation is … directed away from the public interest and toward the interest of the regulated industry' by 'intent and action' of industries and their allies."[85]

As described above, the ACE Rule was the product of a process that was effectively delegated to the fossil-fuel industry, with a politicized and industry-captured EPA serving as but a rubber stamp adopting industry groups' requests.

The fossil-fuel industry had open access to EPA political leadership overseeing this rulemaking, even in violation of ethics rules.

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[84] *Id.* (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,* 737 F.2d 1095, 1143 (DC Cir. 1984)).

[85] Lindsey Dillon, *et al.*, *The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture,* 108 Am. J. Pub. Health S89, S89 (2018) (quoting Daniel Carpenter & David A. Moss, "Introduction," in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 13 (Cambridge University Press, 2014)).

EPA political leadership was closely tied to the fossil-fuel industry and had a long history of hostility towards rules designed to reduce GHG emissions including the CPP, particularly on behalf of industry donors who bankrolled their political careers or industry clients they represented as lawyers or lobbyists prior to joining the Trump administration.

This extreme and well-documented regulatory capture of the EPA is evidence that it has effectively delegated its authority to the fossil-fuel industry. There is no substantive difference between an agency explicitly telling a company or industry to write a rule for it, and an agency telling a company or industry that it will write whatever rule the company or industry wants. Like Scott Pruitt's Devon Energy letter, the substance is all industry, whatever the letterhead, and the public interest is ignored.

C. The Trump Administration and the Fossil-Fuel Industry Have the Same Strategy on Climate Change

As this Court evaluates the ACE Rule's specific provisions in light of the fossil-fuel industry's capture of EPA, it should consider how the ACE Rule fits into industry's overall plan of blocking action on climate

change. This plan is being executed both in rulemaking and in the government's position in litigation across the country.

As shown above, the ACE Rule is a do-nothing, industry-designed rule by which EPA has effectively shirked its duty to regulate GHG emissions under the CAA. The Trump administration and industry are simultaneously telling courts that federal action under the CAA is the *only* available legal route to regulate GHGs. The Trump administration recently argued in *Juliana v. United States,* for example, that citizen suits seeking redress for climate damages are displaced by the CAA.[86] Its contentions mirror the position taken by the fossil-fuel industry in public-nuisance lawsuits brought by states and municipalities against fossil-fuel companies.[87] The fossil-fuel industry is asserting in those cases that federal law preempts states and municipalities from suing

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[86] Appellants' Opening Brief at 53, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082) (petition for en banc rehearing filed 03/02/2020). As Judge Josephine L. Staton observed in dissent: "In these proceedings, the government accepts that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. ... Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation." *Juliana,* 947 F.3d at 1175 (Staton, J., dissenting).

[87] *See, e.g.*, Appellants' Opening Brief at 56-58, *San Mateo v. Chevron*, No. 18-15499 (9th Cir.).

fossil-fuel companies for damages caused by climate change. This would create an industry-friendly outcome in which states had no regulatory authority, the federal government abdicated its regulatory authority, and fossil fuel emissions could spew without meaningful restraint.

IV. CONCLUSION

The ACE Rule cannot be properly understood in a vacuum. With former fossil-fuel industry lobbyists and lawyers at the helm, EPA has decided to do nothing about GHG emissions. The ACE Rule is not the product of reasoned decision-making by EPA that in any serious way grapples with the evidence of harms from climate change.

The record of this case, and of other regulatory matters of which this Court may take notice, indeed raise the question whether this EPA is even capable of fair decision-making in matters involving the interests of the fossil-fuel industry, or whether rampant cronyism, conflicts of interest, and corruption leave EPA under present leadership unable to conform itself to the strictures of the APA.

The rule should be vacated.

DATED: April 24, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 29(a)(5) and 32(a)(7), the undersigned certifies that this brief has been prepared in a proportionally spaced typeface, using the Century Schoolbook 14-point font. According to the word-processing system used to prepare the brief, Microsoft Word (version 16.36), it contains 6,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1).

DATED: April 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2020, a true and correct copy of the foregoing document was filed with the Clerk of the United States Court of Appeals for the District of Columbia via the Court's CM/ECF system. Counsel for all parties will be served electronically by the Court's CM/ECF system.

DATED: April 24, 2020

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