ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015
14-1112 & 14-1151

In the United States Court of Appeals for the District of Columbia Circuit

IN RE: MURRAY ENERGY CORPORATION,
Petitioner

MURRAY ENERGY CORPORATION,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,
Respondents.

FINAL BRIEF FOR INTERVENOR PEABODY ENERGY CORPORATION

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March 9, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and *Amici*. All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioner, Murray Energy Corporation.

B. Rulings Under Review. The Petition relates to EPA's proposed rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

C. Related Cases: *West Virginia v. EPA*, No. 14-1146 (D.C. Cir.) (petition to review EPA settlement).

Dated: March 9, 2015 /s/ Tristan L. Duncan

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Peabody provides the following disclosure:

Peabody Energy Corp. ("Peabody") is a publicly-traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU." Peabody has no parent corporation and no publicly held corporation owns more than 10% of Peabody's outstanding shares.

Peabody is the world's largest private-sector coal company and a global leader in sustainable mining and clean coal solutions. The company serves metallurgical and thermal coal customers in nearly thirty countries on five continents.

Dated: March 9, 2015 /s/ Tristan L. Duncan

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GLOSSARY

BSER	Best System of Emissions Reduction
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
EGU(s)	Electric Utility Steam-Generating Unit(s)
Peabody	Peabody Energy Corp.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether this Court should issue a writ of prohibition to confine EPA to its statutory jurisdiction, because its unlawful agency rulemaking raises serious constitutional questions under Articles I and II, the separation of powers, principles of federalism, the Tenth Amendment, and the Fifth Amendment.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioner Murray Energy Corporation.

CERTIFICATE OF COUNSEL PURSUANT TO LOCAL RULE 28(D)(4) REGARDING SEPARATE BRIEFING

Pursuant to D.C. Cir. Rule 28(a)(4), counsel states that a separate brief is necessary because this case presents a wide range of statutory, constitutional, and prudential questions. Accordingly, this separate brief is warranted regardless of whether Peabody Energy Corp. ("Peabody") is treated as an intervenor or *amicus*.

The joint intervenor brief filed by NFIB and UARG addresses many of the questions presented by the EPA rulemaking at issue. The *amici* brief filed by the Trade Association *amici* addresses the statutory construction questions presented by this case, and the *amici* brief filed by the National Mining Association and the American Coalition for Clean Coal Technology addresses only the jurisdictional questions.

The instant brief by Peabody Energy Corp., represented by Professor Laurence Tribe and other undersigned counsel, is distinctive because it addresses only the constitutional questions. Peabody and Professor Tribe submitted administrative comments to the EPA focusing exclusively on the constitutional questions

raised by the proposed rule, *see* Comments of Laurence H. Tribe and Peabody Energy Corporation, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Docket ID No. EPA-HQ-OAR-2013-0602-23587 (Dec. 1, 2014),[1] and likewise this separate brief focuses solely on those constitutional questions.

Separate briefing will not burden the Court. Undersigned counsel for Peabody has conferred at length with counsel for Intervenors UARG and NFIB, and they have agreed to allocate 1,750 words of the 8,750 word limit for the Intervenors' brief to Peabody. Accordingly, this brief will not add to the total briefing submitted to the Court.

Therefore, Peabody respectfully requests leave to file a separate intervenor's brief in this case, or alternatively for leave to file a separate *amicus* brief.

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[1] In addition to the joint comments with Professor Tribe, Peabody also submitted a set of comments on its own. Comments of Peabody Energy Corporation, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Docket ID No. EPA-HQ-OAR-2013-0602-24170 (Dec. 1, 2014).

Dated: March 9, 2015 /s/ Tristan L. Duncan

STATEMENT REGARDING AUTHORSHIP AND MONETARY CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(c), undersigned counsel states that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Peabody and its counsel, contributed money that was intended to fund preparing or submitting the brief.

Dated: March 9, 2015 /s/ Tristan L. Duncan

STANDARD OF REVIEW

Agency action is "unlawful" and must be "set[] . . . aside" when it is "(A)… not in accordance with law; (B) contrary to constitutional right, [or] power,…; [or] (C) in excess of statutory jurisdiction, authority, or limitations…." 5 U.S.C. § 706(2); *see also* 42 U.S.C. § 7607(d)(9).

SUMMARY OF ARGUMENT

As explained in the brief of petitioner Murray Energy Corporation's ("Murray"), EPA's rulemaking violates the plain text and legislative history of Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), judicial precedent interpreting that section, and EPA's own prior interpretations of the provision.

Peabody will not repeat those arguments. Rather, it submits this brief to emphasize that the rulemaking also raises grave constitutional questions and that EPA is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

STANDING

Peabody has standing to intervene in support of petitioner Murray Energy Corporation. Peabody is a publicly-traded company and is the world's largest private-sector coal company. (Declaration of Frederick D. Palmer at ¶2.) Its products fuel approximately 10 percent of America's and 2 percent of the world's electricity. (*Id.* at ¶3.) In addition to its mining operations, Peabody markets coal and brokers coal sales. (*Id.* at ¶4.) Peabody also has an ownership interest in a 1,600 megawatt coal-fueled electricity generation plant in the United States. (*Id.*)

EPA's Proposed Rule specifically targets coal producers by forcing decisions by states to reduce the amount of electricity generated by coal. The Proposed Rule seeks to reduce coal generation by 22% by 2020 and by 27% by 2025.[2]

Moreover, the mere pendency of the Proposed Rule causes harm to Peabody. Peabody's status as a publicly traded company

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[2] U.S. ENVIRONMENTAL PROTECTION AGENCY, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED CARBON POLLUTION GUIDES FOR EXISTING POWER PLANTS AND EMISSION STANDARDS FOR MODIFIED AND RECONSTRUCTED POWER PLANTS, 3-32 (2014).

means that it is affected by investor perceptions of the short-term impacts of the Proposed Rule on Peabody's business. (*Id.* at ¶10.) Further, Peabody's utility customers must make future planning and investment decisions based on existing and potentially forthcoming federal regulations. (*Id.* at ¶¶5-9.) EPA's Proposed Guidelines disrupt utility planning, creating risks to reliability and future planning, because utilities cannot make improvements in their systems without fear of EPA's proceeding against the utilities as though the Guidelines were in place. (*Id.* at ¶6.) On the other hand, if a utility attempted to follow the Proposed Guidelines — for example, by replacing coal-fired EGUs with natural gas on the assumption that EPA will finalize the Proposed Guidelines — litigation at the state level would likely ensue, and the utility planning system would be disrupted for an extended period. (*Id.* at ¶6.) Either way, utility planning will be chaotic. (*Id.* at ¶¶8-9.)

Accordingly, the Proposed Rule is having an immediate effect on Peabody, its customers, and the communities it serves. If EPA proceeds to finalize the Proposed Rule based on its incorrect

interpretation of Section 111(d) of the Act, Peabody's investment-backed interests will be irreparably harmed.

ARGUMENT

EPA's interpretation of Section 111(d) is not entitled to *Chevron* deference. Under the plain language of Section 111(d) "the intent of Congress is clear," so "that is the end of the matter." 467 U.S. at 842. Even if that were not true, EPA's attempts to trigger *Chevron* fail.

I. EPA Seeks to "Make" Law, Not to "Execute" It.

EPA has not identified any "ambiguity" in Section 111(d) that would trigger *Chevron* deference. According to EPA, in enacting the 1990 amendments to the Clean Air Act, Congress effectively created *two different* versions of Section 111(d), and since 1990 the U.S. Code has reflected the wrong version, due to a mistake by the Office of Law Revision Counsel of the House of Representatives. In essence, EPA maintains that it should be allowed to pick which version of Section 111(d) it wishes to enforce.

For all the reasons discussed in the Petitioner's and other Intervenors' Briefs, this argument reflects an incorrect understanding of the text and history of Section 111, but even on its own terms, it also is not a basis for *Chevron* deference. As the

Supreme Court has explained, "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014). "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, faithfully execute[s] them." *Id.*; *see also Loving v. United States*, 517 U.S. 748, 758 (1996).

Here, EPA is not seeking to fill interstitial gaps in the statutory scheme, or to resolve ambiguities in the House amendment or the Senate amendment, but rather to choose which version of the statute the agency wishes to make legally operative. This is an attempt to exercise *lawmaking* power, not an exercise in *executing* the law. It is an impermissible power-grab under the separation of powers, not a proper use of *Chevron*. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority."). The Constitution would not even permit Congress to delegate to the EPA the kind of law-selecting authority EPA is claiming for itself here; *a fortiori*,

the EPA cannot claim such authority where Congress has not purported to make such an unconstitutional delegation.

II. EPA's Action Raises Grave Constitutional Questions, and the Canon of Constitutional Avoidance Prohibits EPA's Reading of Section 111(d).

Next, EPA is not entitled to *Chevron* deference, under the rule of constitutional avoidance. EPA's mandate calling for the development of state-by-state emission standards for existing power plants raises a host of constitutional questions. As the brief of Petitioner Murray Energy Corporation demonstrates, the mere pendency of EPA's rulemaking will burden state governments, cost the private sector untold millions of dollars in compliance costs, and weaken the nation's power grid by pressuring existing coal-fired power plants to shut down. These irreparable injuries demonstrate the need for this Court to issue the extraordinary writ pursuant to Petitioner's request. They also show that EPA is not entitled to *Chevron* deference because they underscore the grave constitutional questions raised by EPA's actions.

EPA would impose immediate obligations on states to design compliance programs in violation of the Tenth Amendment and

principles of federalism. The Proposed Rule would lock states into a framework where the goals are set by EPA, the means to be used to achieve those goals are set by EPA, and even the 13-month timetable for the enactment and implementation of new legislation is set by EPA. If a state fails to formulate a plan, EPA will mandate a federal plan and will likely seek to impose severe sanctions.[3] This commandeering violates the Constitution under *New York v. United States*, 505 U.S. 144, 177 (1992), and *Printz v. United States*, 521 U.S. 898, 926 (1997). The potential sanctions faced by a noncomplying state resemble those held impermissible in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601-05 (2012). Thus, the Proposed Rule predictably will trigger violations of the Tenth Amendment's anti-commandeering doctrine and federalism principles.

EPA does not contend that the Proposed Rule will have any measurable impact on global climate. In fact, EPA has sought to justify the EPA Power Plan as an economic measure, not a

[3] 42 U.S.C. § 7509(a), (b)(1), and (b)(2).

"pollution control" plan. EPA Administrator Gina McCarthy testified before the Senate Environment and Public Works Committee on July 23, 2014: "The great thing about this [EPA Power Plan] proposal is that it really is an investment opportunity. *This is not about pollution control*."[4]

EPA's unilateral policy change will upset settled, investment-backed expectations, with no corresponding benefit. It will operate in retroactive fashion to strand the very investments the federal government has encouraged. The agency seeks to single out a select set of victims – including coal-reliant consumers, communities, regions, businesses and utilities – to bear a substantial share of the economic burden for a stated objective that is global in nature. These arbitrary impacts raise serious questions under the due process, takings, and equal

[4] U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014), *available at* http://energycommerce.house.gov/press-release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight (emphasis added).

protection components of the Fifth Amendment. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 522-23 (1998).

Deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting request for "administrative deference" because agency interpretation raised constitutional question); *Edward J. DeBartolo Corp. v. Florida Gulf Constr. Trades Council*, 485 U.S. 568, 574-75 (1988) (rejecting *Chevron* because agency interpretation would raise serious constitutional issue); *Bell Atl. Tel. Cos. v. FCC*, 24 F. 3d 1441, 1445 (D.C. Cir. 1994) (narrowly construing agency order to avoid possible taking issue).

This Court should avoid any construction that might trigger such grave constitutional problems, especially when Congress never authorized such a result. In such a situation, both the separation of powers and the Fifth Amendment operate to check the unilateral power of the Executive and vindicate "the principle that ours is a government of laws, not of men." *Youngstown Sheet*

& Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petitioner's Brief and supporting Intervenors' and Amici Briefs, this Court should grant Murray Energy's Petition and issue a writ of prohibition.

March 9, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that this brief contains 1,605 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief and is proportionally spaced.

The undersigned further certifies that the accompanying brief has been prepared using 14-point Century Schoolbook typeface, and is double-spaced (except for headings and footnotes).

/s/ Tristan L. Duncan
Tristan L. Duncan

CERTIFICATE OF SERVICE

I hereby certify that on this day, March 9, 2015, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/ Tristan L. Duncan
Tristan L. Duncan