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.

CORRECTED REPLY BRIEF FOR INTERVENOR PEABODY ENERGY CORPORATION IN SUPPORT OF PETITIONER MURRAY ENERGY CORPORATION

TRISTAN L. DUNCAN
THOMAS J. GREVER
SHOOK, HARDY & BACON L.L.P.
2555 GRAND BLVD.
KANSAS CITY, MO 64108
TEL: (816) 474-6550
TLDUNCAN@SHB.COM
TGREVER@SHB.COM

LAURENCE H. TRIBE
420 HAUSER HALL
1575 MASSACHUSETTS AVE.
CAMBRIDGE, MA 02138
TEL: (617) 495-1767
TRIBE@LAW.HARVARD.EDU

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G STREET, N.W., SUITE 500
WASHINGTON, D.C. 20005
TEL: (202) 652-4511
JMASSEY@MASSEYGAIL.COM

February 27, 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: February 27, 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 Energy Corp. has no parent corporation and no publicly held corporation owns more than 10% of Peabody Energy Corporation's outstanding shares.

Dated: February 27, 2015 /s/Tristan L. Duncan

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 reply brief is necessary because this case presents a wide range of statutory, constitutional, and prudential questions. By Order of February 12, 2015, the Court granted Peabody's motion for leave to intervene in support of petitioner or in the alternative to participate as amicus curiae, and directed the clerk to file Peabody's separate Intervenor brief. Peabody seeks leave to file this separate reply brief for the same reasons as it sought to file its principal brief.

The joint intervenor brief filed by NFIB and UARG addresses many of the questions presented by the EPA rulemaking at issue. The instant reply 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 reply 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 875 words of the 4,375 word limit for the Intervenors' reply 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 reply brief in this case.

Dated: February 27, 2015 /s/ Tristan L. Duncan

[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 (Dec. 1, 2014).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

*Authorities chiefly relied upon

OTHER AUTHORITIES

GLOSSARY

EPA	United States Environmental Protection Agency
GHGs	Greenhouse gases
Law Profs. Br.	Brief of Amici Law Professors Supporting EPA
NRDC	Natural Resources Defense Council
Peabody	Peabody Energy Corp.

REPLY BRIEF FOR INTERVENOR PEABODY ENERGY CORP.

SUMMARY OF ARGUMENT

EPA's attempt to make law violates the separation of powers, raises further serious constitutional questions, and does not trigger *Chevron* deference. An extraordinary writ is warranted.

STANDING

EPA denies that harm to investor perceptions of Peabody (only one of Peabody's concrete injuries) confers standing. EPA Br. 17 n.6. But harm to reputation qualifies as Article III injury. *Meese v. Keene*, 481 U.S. 465, 474-75 (1987); *Foretich v. United States*, 351 F.3d 1198, 1210-12 (D.C. Cir. 2003); *cf. Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962 (D.C. Cir. 1980) (corporate "stigma"). EPA's cited cases are inapposite. *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013), does not involve reputational harm. *General Elec. Co. v. Jackson*, 610 F.3d 110, 120-21 (D.C. Cir. 2010), involved protectable interests under Fifth Amendment procedural due process and did not deny that reputational harms count as Article III injuries. If anything, the Court must have concluded that they did count, or else it would have dismissed GE's due process claim for lack of standing rather than addressing it on the merits.

ARGUMENT

I. EPA's Action Violates The Separation Of Powers.

EPA labels Peabody's argument a "non-delegation" objection. EPA Br. 51. That is at best misleading. Peabody's argument bears no resemblance to the usual non-delegation objection, where the claim is that Congress has provided an agency with an insufficiently intelligible principle to guide the agency's decisionmaking and to assist the court in reviewing the agency's actions. Here, in contrast, Peabody's argument is that EPA violates the separation of powers when it insists that the agency may choose between two competing candidates for the role of the "real" Section 111(d). This is not an exercise in resolving ambiguities but an ambitious gambit to decide what is the law of the land. EPA effectively seeks the role of the congressional Conference Committee reconciling two different versions of a bill. But "the lawmaking function belongs to Congress" and may not be appropriated by "another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996).

EPA erroneously assumes that the Statutes at Large reflect "two" separate versions of Section 111(d) and that in 1990 the Office of Law Revision Counsel (the "Revisor") overlooked the Senate's clerical amendment. That is untrue. Rather, the Revisor properly recognized

that the cross-reference that the Senate amendment sought to update was mooted by the substantive House amendment, which replaced the relevant statutory language in Section 111(d). The Revisor correctly explained that the Senate's clerical amendment "could not be executed." Revisor's Note, 42 U.S.C. § 7411.

Such interplay between clerical and substantive amendments is common. *E.g.*, States Intervenor Br. 11 n.6. EPA's position would wreak havoc by allowing agencies to make their own law throughout the U.S. Code.

EPA's amici cite *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (Law Profs. Br. 11), but no court has ever found a *Chadha* violation in the dozens of legislative situations like this one. Amici are simply wrong that some "functionary's editorial decision" was given effect "over the legal text approved by Congress and signed by the President." *Id.* Both bicameralism and presentment were fully satisfied when the President signed the substantive House amendment enacted by both Houses.

II. EPA Is Not Entitled To *Chevron* Deference.

EPA cannot claim *Chevron* deference to sustain the extraordinary law-choosing role it asserts here, because *Chevron* deals only with the

degree of deference an agency should receive when it resolves an ambiguity Congress has left in the law the agency is charged with enforcing; *Chevron* has no bearing on an agency's entirely different power to decide for itself *what law Congress has enacted.*

Moreover, even if there were statutory ambiguity (and there is not), EPA has failed to show another *Chevron* prerequisite: that Congress even *sought* to delegate *to EPA* the authority to resolve the issue. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013) ("[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.").

III. EPA's Action Raises Grave Constitutional Questions Which This Court Should Avoid By Construing EPA's Statutory Authority Narrowly.

EPA's invasion of state sovereignty constitutes irreparable injury, which warrants an extraordinary writ. NRDC Br. 31 contends that EPA's plan is permissible under *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). But *Hodel* involved a program that left states a genuine option whether to participate,

leaving "the full regulatory burden [on] the Federal Government," *id.* at 288, if they chose not to. The states have no genuine choice here.

NRDC asserts that it would be "improper" for this Court to reach the constitutional objections raised by Peabody (including the Fifth Amendment). NRDC 30. But the only way this Court can *avoid* reaching those objections is to construe EPA's statutory authority narrowly enough so that EPA's actions do not raise them. *Edward J. DeBartolo Corp. v. Florida Gulf Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). That is precisely what Peabody urges: this Court should hold that the Clean Air Act prohibits the Proposed Rule.

CONCLUSION

The Petition should be granted and a writ of prohibition issued.

February 27, 2015

Respectfully submitted,

/s/Tristan L. Duncan
Tristan L. Duncan
Thomas J. Grever
SHOOK HARDY & BACON L.L.P.
2555 GRAND BOULEVARD
KANSAS CITY, MO 64018
Tel: (816) 474-6550
Fax: (816) 421-5547
tlduncan@shb.com
tgrever@shb.com

Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G STREET, N.W., SUITE 500
WASHINGTON, D.C. 20005
TEL: (202) 652-4511
FAX: (312) 379-0467
jmassey@masseygail.com

Laurence H. Tribe
420 HAUSER HALL
1575MASSACHUSETTS AVE.
CAMBRIDGE, MA 02138
TEL: (617) 495-1767
tribe@law.harvard.edu

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that this brief contains 874 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.

/s/Tristan L. Duncan

CERTIFICATE OF SERVICE

I hereby certify that on this day, February 27, 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