ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016
No. 15-1363 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petition for Review of a Final Rule of the
United States Environmental Protection Agency

OPENING BRIEF OF INTERVENORS DIXON BROS., INC., NELSON BROTHERS, INC., WESCO INTERNATIONAL, INC., NORFOLK SOUTHERN CORP., JOY GLOBAL INC., GULF COAST LIGNITE COALITION, AND PEABODY ENERGY CORP. IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 15-1363: State of West Virginia; State of Texas; State of Alabama; State of Arizona Corporation Commission; State of Arkansas; State of Colorado; State of Florida; State of Georgia; State of Indiana; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Louisiana Department of Environmental Quality; Attorney General Bill Schuette, People of Michigan; State of Missouri; State of Montana; State of Nebraska; State of New Jersey; State of North Carolina Department of Environmental Quality; State of Ohio; State of South Carolina; State of South Dakota; State of Utah; State of Wisconsin; and State of Wyoming.

No. 15-1364: State of Oklahoma ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma and Oklahoma Department of Environmental Quality.

No. 15-1365: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers.

No. 15-1366: Murray Energy Corporation.

No. 15-1367: National Mining Association.

No. 15-1368: American Coalition for Clean Coal Electricity.

No. 15-1370: Utility Air Regulatory Group and American Public Power Association.

No. 15-1371: Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company.

No. 15-1372: CO_2 Task Force of the Florida Electric Power Coordinating Group, Inc.

No. 15-1373: Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

No. 15-1374: Tri-State Generation and Transmission Association, Inc.

No. 15-1375: United Mine Workers of America.

No. 15-1376: National Rural Electric Cooperative Association; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Electric Power Cooperative, Inc.; Corn Belt Power Cooperative; Dairyland Power Cooperative; Deseret Generation & Transmission Co-operative; East Kentucky Power Cooperative, Inc.; East River Electric Power Cooperative, Inc.; East Texas Electric Cooperative, Inc.; Georgia Transmission Corporation; Golden Spread Electrical Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Kansas Electric Power Cooperative, Inc.; Minnkota Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northeast Texas Electric Cooperative, Inc.; Northwest Iowa Power Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; San Miguel Electric Cooperative, Inc.; Seminole Electric Cooperative, Inc.; South Mississippi Electric Power Association; South Texas Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; Tex-La Electric Cooperative of Texas, Inc.; Upper Missouri G. & T. Electric Cooperative, Inc.; Wabash Valley Power Association, Inc.; Western Farmers Electric Cooperative; and Wolverine Power Supply Cooperative, Inc.

No. 15-1377: Westar Energy, Inc.

No. 15-1378: NorthWestern Corporation d/b/a NorthWestern Energy.

No. 15-1379: National Association of Home Builders ("NAHB").

No. 15-1380: State of North Dakota.

No. 15-1382: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Forest & Paper Association; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; Lignite Energy Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association.

No. 15-1383: Association of American Railroads.

No. 15-1386: Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC.

No. 15-1393: Basin Electric Power Cooperative.

No. 15-1398: Energy & Environment Legal Institute.

No. 15-1409: Mississippi Department of Environmental Quality; State of Mississippi; and Mississippi Public Service Commission.

No. 15-1410: International Brotherhood of Electrical Workers, AFL-CIO.

No. 15-1413: Entergy Corporation.

No. 15-1418: LG&E and KU Energy LLC.

No. 15-1422: West Virginia Coal Association.

No. 15-1432: Newmont Nevada Energy Investment, LLC, and Newmont USA Limited.

No. 15-1442: The Kansas City Board of Public Utilities — Unified Government of Wyandotte County/Kansas City, Kansas.

No. 15-1451: The North American Coal Corporation; The Coteau Properties Company; Coyote Creek Mining Company, LLC; The Falkirk

Mining Company; Mississippi Lignite Mining Company; North American Coal Royalty Company; NODAK Energy Services, LLC; Otter Creek Mining Company, LLC; and The Sabine Mining Company.

No. 15-1459: Indiana Utility Group.

No. 15-1464: Louisiana Public Service Commission.

No. 15-1470: GenOn Mid-Atlantic, LLC; Indian River Power LLC; Louisiana Generating LLC; Midwest Generation, LLC; NRG Chalk Point LLC; NRG Power Midwest LP; NRG Rema LLC; NRG Texas Power LLC; NRG Wholesale Generation LP; and Vienna Power LLC.

No. 15-1472: Prairie State Generating Company, LLC.

No. 15-1474: Minnesota Power (an operating division of ALLETE, Inc.).

No. 15-1475: Denbury Onshore, LLC.

No. 15-1477: Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation.

No. 15-1483: Local Government Coalition for Renewable Energy.

No. 15-1488: Competitive Enterprise Institute; Buckeye Institute for Public Policy Solutions; Independence Institute; Rio Grande Foundation; Sutherland Institute; Klaus J. Christoph; Samuel R. Damewood; Catherine C. Dellin; Joseph W. Luquire; Lisa R. Markham; Patrick T. Peterson; and Kristi Rosenquist.

Respondents:

Respondents are the United States Environmental Protection Agency (in Nos. 15-1364, 15-1365, 15-1367, 15-1368, 15-1370, 15-1373, 15-1374, 15-1375, 15-1376, 15-1380, 15-1383, 15-1398, 15-1410, 15-1418, 15-1442, 15-1472, 15-1474, 15-1475, and 15-1483) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1363, 15-1366, 15-1371, 15-1372, 15-1377, 15-1378, 15-1379, 15-1382, 15-1386, 15-1393, 15-1409, 15-1413, 15-1422, 15-1432, 15-1451, 15-1459, 15-1464, 15-1470, 15-1477, and 15-1488).

Intervenors and *Amici Curiae*:

Dixon Bros., Inc.; Gulf Coast Lignite Coalition; Joy Global Inc.; Nelson Brothers, Inc.; Norfolk Southern Corp.; Peabody Energy Corp.; and Western Explosive Systems Company are Intervenor-Petitioners.

Advanced Energy Economy; American Lung Association; American Wind Energy Association; Broward County, Florida; Calpine Corporation; Center for Biological Diversity; City of Austin d/b/a Austin Energy; City of Boulder; City of Chicago; City of Los Angeles, by and through its Department of Water and Power; City of New York; City of Philadelphia; City of Seattle, by and through its City Light Department; City of South Miami; Clean Air Council; Clean Wisconsin; Coal River Mountain Watch; Commonwealth of Massachusetts; Commonwealth of Virginia; Conservation Law Foundation; District of Columbia; Environmental Defense Fund; Kanawha Forest Coalition; Keepers of the Mountains Foundation; Mon Valley Clean Air Coalition; National Grid Generation, LLC; Natural Resources Defense Council; New York Power Authority; NextEra Energy, Inc.; Ohio Environmental Council; Ohio Valley Environmental Coalition; Pacific Gas and Electric Company; Sacramento Municipal Utility District; Sierra Club; Solar Energy Industries Association; Southern California Edison Company; State of California by and through Governor Edmund G. Brown, Jr., and the California Air Resources Board, and Attorney General Kamala D. Harris; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota by and through the Minnesota Pollution Control Agency; State of New Hampshire; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; and West Virginia Highlands Conservancy are Intervenor-Respondents.

Municipal Electric Authority of Georgia, Pedernales Electric Cooperative, Inc., and Philip Zoebisch are *amici curiae* in support of Petitioners. Pacific Legal Foundation, Texas Public Policy Foundation, Morning Star Packing Company, Merit Oil Company, Loggers Association of Northern California, and Norman R. "Skip" Brown are movant *amici curiae* in support of Petitioners.

Baltimore, MD; Boulder County, CO; Coral Gables, FL; Former EPA Administrators William D. Ruckelshaus and William K. Reilly; Grand Rapids, MI; Houston, TX; The Institute for Policy Integrity at New York University School of Law; Jersey City, NJ; Los Angeles, CA; Minneapolis, MN; National League of Cities; Pinecrest, FL; Portland, OR; Providence, RI; Salt Lake City, UT; San

Francisco, CA; The U.S. Conference of Mayors; and West Palm Beach, FL are *amici curiae* in support of Respondents. American Thoracic Society, American Medical Association, American College of Preventive Medicine, and American College of Occupational and Environmental Medicine are *amici curiae* in support of Respondents. The Service Employees International Union is a movant *amicus curiae* in support of Respondents.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," published on October 23, 2015, at 80 Fed. Reg. 64,662.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Counsel is aware of five related cases that, as of the time of filing, have appeared before this Court:

(1) *In re Murray Energy Corporation*, No. 14-1112,

(2) *Murray Energy Corporation v. EPA*, No. 14-1151 (consolidated with No. 14-1112),

(3) *State of West Virginia v. EPA*, No. 14-1146,

(4) *In re: State of West Virginia*, No. 15-1277, and

(5) *In re Peabody Energy Corporation*, No. 15-1284 (consolidated with No. 15-1277).

Per the Court's order of January 21, 2016, the following cases are consolidated and being held in abeyance pending potential administrative resolution of biogenic carbon dioxide emissions issues in the Final Rule: *National Alliance of Forest Owners v. EPA*, No. 15-1478; *Biogenic CO_2 Coalition v. EPA*, No. 15-1479; and *American Forest & Paper Association, Inc. and American Wood Council v. EPA*, No. 15-1485.

Dated: February 23, 2016 /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, the Intervenor-Petitioners provide the following disclosures:

Dixon Bros., Inc. ("Dixon Bros.") is a trucking company based in Newcastle, Wyoming that operates in the Upper Midwest and Mountain West (in Wyoming, South Dakota, Montana, North Dakota, Minnesota, and Nebraska). Dixon Bros. is privately owned, has no parent corporation, and no publicly held corporation owns more than 10% of Dixon Bros.'s outstanding shares.

Nelson Brothers, Inc. ("Nelson Brothers") is a blasting-products company that operates in West Virginia, Kentucky, Virginia, Alabama, Indiana, and Wyoming. Nelson Brothers is privately owned, has no parent corporation, and no publicly held corporation owns more than 10% of Nelson Brothers's outstanding shares.

Western Explosive Systems Company ("WESCO") is an explosives distributor and service provider for the mining, quarrying, and construction industries based in Salt Lake City, Utah and serving Arizona, California, Colorado, Idaho, Nevada, New Mexico, Utah, and Wyoming. WESCO is privately held company. WESCO has no parent corporation and no publicly held corporation owns more than 10% of WESCO's outstanding shares.

Norfolk Southern Corporation ("Norfolk Southern") is one of the nation's premier transportation companies. Its Norfolk Southern Railway Company subsidiary operates approximately 20,000 route miles in 22 states and the District of Columbia, serves every major container port in the eastern United States, and provides efficient connections to other rail carriers. Norfolk Southern operates the most extensive intermodal network in the East and is a major transporter of coal, automotive, and industrial products. Norfolk Southern is a publicly-traded company on the New York Stock Exchange ("NYSE") under the symbol "NSC." Norfolk Southern has no parent corporation and no publicly held corporation owns more than 10% of Norfolk Southern's outstanding shares.

Joy Global Inc. ("Joy Global") manufactures and markets original equipment and aftermarket parts and services for both the above-ground and underground mining industries and certain industrial applications. Joy Global's products and related services are used extensively for the mining of coal, copper, iron ore, oil sands, gold, and other mineral resources. Joy Global is a publicly-traded company on the NYSE under the symbol "JOY." Artisan Partners, L.P. holds roughly 14% in JOY shares. The limited partnership is a subsidiary of Artisan Partners Asset Management Inc., which is a publicly traded company on the NYSE under the symbol "APAM."

Gulf Coast Lignite Coalition ("GCLC") is a non-profit corporation organized under the laws of the State of Texas and comprised of individual electric generating and mining companies. GCLC participates on behalf of its members collectively in proceedings brought under United States environmental regulations, and in litigation arising from those proceedings, which affect electric generators and mines. GCLC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in GCLC.

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.

Dated: February 23, 2016 /s/ Tristan L. Duncan

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GLOSSARY

Act	Clean Air Act (42 U.S.C. § 7410 *et seq.*)
CAA	Clean Air Act (42 U.S.C. § 7410 *et seq.*)
CO_2	Carbon dioxide
EGU	Electrical Generating Unit
EPA	United States Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
GHGs	Greenhouse Gases
HAP	Hazardous Air Pollutant
JA	Joint Appendix
Peabody	Peabody Energy Corporation
RIA	Regulatory Impact Analysis
Rule	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60).
Section 111	42 U.S.C. § 7411
Section 111(b)	42 U.S.C. § 7411(b)
Section 111(d)	42 U.S.C. § 7411(d)
Section 111(h)	42 U.S.C. § 7411(h)
Section 112	42 U.S.C. § 7412

Section 112 Exclusion 42 U.S.C. § 7411(d)(1)(A)(i)

JURISDICTION

This case involves review of a final rule promulgated by the U.S. Environmental Protection Agency ("EPA") entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," and published at 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"). This Court has jurisdiction to review nationally applicable EPA final actions under Clean Air Act § 307(b)(1).

STANDING

As detailed in their motions to intervene, granted by the Court on January 11, 2016, Intervenors have standing because they are involved in the sale, mining, and transportation of coal. The Rule seeks to compel a substantial reduction in the use of coal for the generation of electricity, which directly harms Intervenors' businesses.[1] Individual Intervenors have standing because they have suffered, and will continue to suffer, an injury-in-fact caused by the Rule that is redressable by the relief they seek. Intervenor Gulf Coast Lignite Coalition has standing on

[1] Galli Decl. ¶¶9-13, Peabody Motion to Intervene, ECF Doc. 1580761 (D.C. Cir., Oct. 29, 2015), JA__; Dixon and Miller Decl. ¶¶4-6, JA__, Nelson Decl. ¶¶3-6, JA__, Frederick Decl. ¶¶3-6, JA__, Lawson Decl. ¶¶8-17, JA__, Major Decl. ¶¶4-6, JA__, Nasi Decl. ¶¶8-19, JA__, Joint Motion to Intervene, ECF Doc. 1584767 (D.C. Cir., Nov. 20, 2015); Coal Industry Motion for Stay, Exhibits 1-14, ECF Doc. 1580004 (D.C. Cir., Oct. 23, 2015), JA__ ("Coal Stay Mot.").

behalf of its members because (1) at least one member would have standing in its own right; (2) the interests the Coalition "seeks to protect are germane to its purpose[s]"; and (3) participation by an individual member is not necessary. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (citation omitted).

ISSUES PRESENTED

1. Whether the Rule is unlawful because the Clean Air Act unambiguously prohibits using Section 111(d) to regulate emissions from source categories (such as coal-fueled power plants) that are regulated under Section 112.

2. Whether EPA's attempts to justify the Rule — by positing that Congress unwittingly enacted "two versions" of Section 111(d) in 1990 and that the U.S. Code has been incorrectly codified for 25 years, and by creating an artificial "gap" in the Clean Air Act — trigger a separation-of-powers violation by usurping both the Legislative Branch's lawmaking power and the Judicial Branch's power to "say what the law is."

3. Whether the Rule should be construed to avoid violating the Tenth Amendment and principles of federalism.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in Petitioners' addendum.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Intervenors incorporate the Statements of Petitioners.

SUMMARY OF ARGUMENT

1. EPA has premised the Rule on a statutory provision — Section 111(d) of the Clean Air Act — that affirmatively ***prohibits*** what it seeks to do: to regulate coal-fueled power plants ***both*** under Section 111(d) ***and*** as a source category under Section 112's Hazardous Air Pollutants ("HAP") program. Since coal-fueled power plants already are regulated under Section 112, Section 111(d) expressly prohibits their double regulation here.

2. EPA's attempts to justify its statutory interpretation fall flat and give rise to serious separation-of-powers questions of their own, because they amount to ***lawmaking*** rather than ***rulemaking***. EPA advances an astonishing theory that the U.S. Code has contained the wrong version of Section 111(d) for the past 25 years. According to EPA, Congress unwittingly enacted two "versions" of Section 111(d) in 1990, one in a substantive House amendment and the other in a clerical Senate amendment, and the Office of the Law Revision Counsel mistakenly codified only one. (*See* 80 Fed. Reg. at 64,711–15.) EPA's extravagant theory misreads the legislative record. But even if there were two "versions" of Section 111(d) (and

there are not), EPA would lack the authority to decide which "version" to make legally operative.

EPA appeals to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). But *Chevron* does not allow an agency to toss two "versions" of a statute into the air and choose which one to catch. EPA's approach violates the separation of powers by usurping congressional prerogatives and judicial authority, and the statute must be construed to avoid the constitutional questions raised by EPA's interpretation.

Chevron is inapplicable for further reasons. Section 111(d) is not ambiguous. In addition, the Supreme Court's decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), makes clear that *Chevron* deference would not apply here anyway.

Next, EPA seeks to create an artificial "gap" in the Clean Air Act to justify the Rule, but that argument fails. There is no regulatory "gap"; any "gap" would need to be filled by Congress rather than the agency; and in any event Section 111(d) is not a "gap-filling" provision that reserves power to EPA. What EPA argues is a "gap" is actually an affirmative prohibition on double regulation.

3. The Rule also violates the Tenth Amendment and principles of federalism by forcing States to implement EPA's Rule — to enact new state legislation, to promulgate new state rules, and to create entirely new state regulatory structures to

carry out the federal mandate. Under the doctrine of constitutional avoidance, Section 111(d) must be interpreted in a manner that escapes the serious constitutional difficulties raised by the Rule.

4. The purpose of the Constitution's structural divisions of power applies here with special force to prohibit executive overreach and protect individual liberties. The Rule exceeds EPA's lawfully delegated authority and threatens to run roughshod over individual rights in its attempt to transform the American energy sector.

STANDARD OF REVIEW

The Court must set aside final EPA action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law." (Clean Air Act ("CAA") § 307(d)(9) (42 U.S.C. § 7607(d)(9)).)

ARGUMENT

I. The Rule Violates an Express Statutory Prohibition.

The "Section 112 Exclusion" provides that Section 111(d) applies only to a pollutant "which is not … emitted from a source category which is regulated under section [112] of this title." (42 U.S.C. § 7411(d).)

Petitioners have shown in their Opening Brief that Section 111(d) prohibits exactly what EPA seeks to do in the Rule: to regulate coal power plants both under Section 111(d) and as a source category under the Section 112 hazardous air pollutants program.

Since the 1990 amendments, EPA has used Section 111(d) only twice, and both instances support Petitioners' interpretation of the Section 112 Exclusion. In 1995, in adopting a rule involving existing municipal landfills, the Clinton Administration EPA noted that Section 111(d) does not permit standards for emissions "from a source category that is actually being regulated under section 112"[2] — *i.e.*, precisely the circumstance here.

A decade later, in a 2005 rulemaking, the Bush Administration EPA agreed, recognizing that "a literal reading" of the text of Section 111(d) found in the United States Code provides that "EPA cannot" issue a mandate "under CAA

[2] EPA, *Air Emissions from Municipal Solid Waste Landfills — Background Information for Final Standards and Guidelines* 1-5 to 1-6 (1995), JA__.

section 111(d) for 'any pollutant' … that is emitted from a particular source category regulated under section 112," so "if a source category X is 'a source category' regulated under section 112, EPA could not regulate" any emissions "from that source category under section 111(d)." (70 Fed. Reg. 15,994, 16,031 (March 29, 2005).)

In the 2005 rule, EPA had "listed" coal- and oil-fired power plants for regulation under Section 112 but subsequently decided to regulate those plants under Section 111(d). Recognizing that it could not simultaneously regulate these plants under both programs, EPA sought to "delist" those plants under Section 112. This Court found the delisting improper and therefore held that the Section 111(d) standard was invalid in light of the Section 112 Exclusion. *See New Jersey v. EPA*, 517 F. 3d 574 (D.C. Cir. 2008) (Rogers, J.). The Court explained: "under EPA's own interpretation of [section 111(d)], it cannot be used to regulate sources listed under section 112." *Id*. at 583.

The Rule is thus contrary to both a plain reading and a bipartisan understanding of Section 111(d)'s meaning that was shared by the Clinton Administration in 1995 and the George W. Bush Administration in 2005 — the meaning treated as clearly correct by this Court in 2008. As recently as 2014, EPA acknowledged that "a literal" application of Section 111(d) would likely preclude

its proposal[3] and that "[a]s presented in the U.S. Code," the statute "appears by its terms to preclude" the Rule.[4]

This is another case where EPA changed its interpretation of the Clean Air Act but "had it right the first time." *Natural Resources Defense Council v. EPA*, 777 F.3d 456, 468 (D.C. Cir. 2014). EPA's view of the Section 112 Exclusion as it appears in the U.S. Code was correct in 1995, 2005, and 2014, and EPA is wrong today.

II. EPA's Attempts to Save Its Statutory Construction are Flawed.

Faced with the plain meaning of the Section 112 Exclusion and the longstanding bipartisan understanding of the statute prohibiting what the Rule seeks to do, EPA offers a series of arguments to rescue its statutory construction. None has merit.

A. EPA's "Two Versions of Section 111(d)" Theory Misreads the Legislative Record and Violates the Separation of Powers.

EPA attempts to justify casting aside the text of the Clean Air Act by asserting that (i) Congress enacted two "versions" of Section 111(d) as part of the

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[3] EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* ("Proposed Rule Legal Memo"), at 26, available at http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum, JA__.

[4] Proposed Rule Legal Memo at 22, JA__.

1990 Clean Air Amendments, one in a substantive "House" amendment and the other in a clerical "Senate" amendment; (ii) the Law Revision Counsel mistakenly codified the substantive amendment; and (iii) the United States Code has therefore been wrong for 25 years. (80 Fed. Reg. at 64,711–15.) This argument represents a flip-flop in the agency's position. The Legal Memo accompanying the proposed rule contended that "[t]he two versions conflict with each other and thus render the Section 112 Exclusion ambiguous."[5] In the Final Rule, EPA acknowledges that it has "revised" its position (80 Fed. Reg. at 64,711) and now contends that the House amendment is ambiguous, the Senate amendment is clear, but the two do not conflict (80 Fed. Reg. at 64,711–12, 64,715). EPA's distortions of the statutory language and contorted shifts in position are a blatant attempt to manufacture a pre-determined outcome and are necessary only because that outcome is not one Congress legislated. Such gymnastics might be worthy of Cirque du Soleil but cannot save EPA's argument.

1. EPA's Interpretation Ignores the 1990 Text and the Corresponding Legislative Record.

Petitioners have demonstrated that EPA's theory misreads the legislative text and the record that illuminates it were the text unclear — which it is not. The

[5] Proposed Rule Legal Memo at 23, JA__.

clerical amendment on which EPA relies simply deleted exactly six characters ("(1)(A)"), four of which were parentheses. It was not a separate "version" of Section 111(d) and therefore could not possibly authorize EPA to do anything. The situation of a conforming amendment rendered moot by an earlier substantive amendment in the same bill is quite common, and Congress and the Law Revision Counsel have an established rule to resolve it: If an amendment eliminates statutory text that a later amendment in the same bill seeks to amend, then the later amendment fails to execute.[6] Thus, in codifying the 1990 Amendments, the Law Revision Counsel simply followed standard textual practice. EPA has conceded, in an identical circumstance, that an amendment was "obviously in error" because the "section amended had been repealed" by an earlier amendment in the same bill.[7]

EPA's faulty "two versions" story can be traced to a palpable transcription error in 2004. In the Federal Register, EPA inexplicably ***quoted and cited as the Statutes at Large*** a document prepared by a paralegal at the Congressional

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[6] *See* United States Senate, Office of Legislative Counsel, *Legislative Drafting Manual* § 126(d) (1997) ("If, after a first amendment to a provision is made … the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed."), JA__; United States House of Representatives, Office of Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* (1995) ("The assumption is that the earlier (preceding) amendments have been executed."), JA__.

[7] Brief for Respondent at 48 n.23, in Nos. 14-1112 & 14-1151, ECF Doc. 1541205 (D.C. Cir., Mar. 9, 2015) (discussing 15 U.S.C. § 2081(b)(1)), JA__.

Research Service that was included in the Committee Print of the 1990 Amendments' legislative history.[8] This document incorrectly uses brackets to alter the statutory text: "any air pollutant … which is not … included on a list published under section 108(a) **[**or emitted from a source category which is regulated under section 112**]** **[**or 112(b)**]**."[9] EPA then quoted this altered text as the Statutes at Large. EPA is simply incorrect to state that "two amendments are reflected in parentheses in the Statutes at Large." (69 Fed. Reg. 4652, 4684 (Jan. 30, 2004).) This statement is flatly wrong — the Statutes at Large show one operative amendment and one that is undeniably inoperative, a fact also reflected in the U.S. Code — yet EPA rests its entire case on obviously mistaken transcription.

Thus, there is simply nothing to the fanciful suggestion that there are two "versions" of Section 111(d).

2. EPA's Interpretation Violates the Separation of Powers.

Even if there were two "versions" of Section 111(d) (and there are not), EPA would lack the authority to choose which "version" to make legally operative. That would be a usurpation of Congress's power under Article I, because the

[8] Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1990* at (Comm. Print 1993), JA__.

[9] *Id*. (emphasis added).

choice of which "version" of a statute to make legally operative is a quintessential exercise of lawmaking power. *See Whitman v. American Trucking Ass'ns, Inc.*, 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."). EPA's gambit is also a usurpation of the Judiciary's power to "say what the law is" under Article III.[10] It certainly is not a matter governed by *Chevron*, because EPA was never (nor could it constitutionally have been) delegated the lawmaking authority to determine which "version" of Section 111(d) was to be the law of the land. "[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." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).[11] At the very least, the serious constitutional questions raised by EPA's approach eliminates any possible claim to *Chevron* deference and requires that Section

[10] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[11] *See also United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2000) (stating that Congress must have "delegated authority to the agency" to resolve the specific issue); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (declining to apply *Chevron* deference to agency guideline where congressional delegation did not include "authority to promulgate rules or regulations" (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976)); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (rejecting application of *Chevron* because "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority").

111(d) be construed as Petitioners contend, to avoid those monumental questions. *See Edward J. DeBartolo Corp. v. Florida Gulf Construction Trades Council*, 485 U.S. 568, 574–75 (1988) (noting that "statutory interpretation by the Board would normally be entitled to deference," but not deferring because it would raise a serious constitutional issue avoidable through alternative interpretation).

The situation here — where an earlier, substantive amendment moots a later, clerical one in the same bill — has occurred dozens of times in the U.S. Code.[12] It

[12] *See*, *e.g.*, 15 U.S.C. § 2064, Amendments, 2008, Subsec. (d)(2); 15 U.S.C. § 2081, Amendments, 2008, Subsec. (b)(1); 29 U.S.C. § 1053, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 290bb-25, Amendments, 2000, Subsec. (m)(5); 42 U.S.C. § 300aa-15, Amendments, 1989, Subsec. (e)(2); 42 U.S.C. § 300ff-13, Amendments, 1996, Subsec. (b)(4)(B); 42 U.S.C. § 300ff-15, Amendments, 1996, Subsec. (c)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (a)(1); 42 U.S.C. § 300ff-28, Amendments, 1996, Subsec. (b)(1); 42 U.S.C. § 677, Amendments, 1989, Subsec. (e)(1); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(B); 42 U.S.C. § 1320a-7a, Amendments, 1997, Subsec. (i)(6)(C); 42 U.S.C. § 1395*l*, Amendments, 1990, Subsec. (a)(1)(K); 42 U.S.C. § 1395u, Amendments, 1994, Subsec. (b)(3)(G); 42 U.S.C. § 1395x, Amendments, 1990, Subsec. (aa)(3); 42 U.S.C. § 1395cc, Amendments, 2010, Subsec. (a)(1)(V); 42 U.S.C. § 1395ww, Amendments, 2003, Subsec. (d)(9)(A)(ii); 42 U.S.C. § 1396(a), Amendments, 1993, Subsec. (a)(54); 42 U.S.C. § 1396b, Amendments, 1993, Subsec. (i)(10); 42 U.S.C. § 1396r, Amendments, 1988, Subsec. (b)(5)(A); 42 U.S.C. § 3025, Amendments, 1992, Subsec. (a)(2); 42 U.S.C. § 3793, Amendments, 1994, Subsec. (a)(9); 42 U.S.C. § 5776, Amendments, 1988; 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(4); 42 U.S.C. § 6302, Amendments, 2007, Subsec. (a)(5); 42 U.S.C. § 6991e, Amendments, 2005, Subsec. (d)(2)(B); 42 U.S.C. § 7414, Amendments, 1990, Subsec. (a); 42 U.S.C. § 8622, Amendments, 1994, Par. (2); 42 U.S.C. § 9601, Amendments, 1986, Par. (20)(D); 42 U.S.C. § 9607, Amendments, 1986, Subsec. (f)(1); 42 U.S.C. § 9874, Amendments, 1990, (d)(1); 42 U.S.C. § 9875, Amendments, Subsec. (c).

has never before resulted in the remarkable situation where an agency is permitted to choose between those different laws to determine which is ***truly*** the law of the land. Indeed, in every other instance, the substantive amendment simply has been given effect. EPA's position would call into question dozens and perhaps hundreds of statutory changes throughout the U.S. Code. It would wreak havoc by allowing agencies to make their own law willy-nilly throughout the Code.

Further, even under EPA's manifestly mistaken view that there exist two distinct "versions" of Section 111(d), at most its job would be to reconcile them by applying both prohibitions to the extent possible, *see FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133 (2000), not by choosing to throw the substantive amendment into the trashcan, as the Rule effectively does. Indeed, one could easily harmonize the two "versions" by applying both prohibitions simultaneously: EPA would be prohibited from using Section 111(d) ***both*** for ***source categories*** regulated under Section 112 ***and*** for ***pollutants*** regulated under Section 112. This reconciliation would still mean that the Rule must fall because coal-fueled power plants are a "source category" regulated under Section 112 and are therefore excluded entirely from regulation under Section 111(d).

The separation of powers concerns in this case are not simply academic. In the last several months, EPA has taken the highly unusual step of attempting to block the routine positive law codification of the Clean Air Act, in a vain bid to

rescue its meritless statutory interpretation.[13] The codification of the Clean Air Act recently completed by the Law Revision Counsel, submitted to Congress, and approved by the House Judiciary Committee simply restates the familiar form of Section 111(d) as it has existed in the U.S. Code for 25 years.[14] After not participating in the process for eight years, EPA submitted an eleventh-hour objection taking issue with the entire codification process and complaining that the Law Revision Counsel's codification of Section 111(d) "fails to include legislative language that is relevant to whether EPA has statutory authority to issue the Clean Power Plan and regulate greenhouse gas emissions from power plants and other stationary sources."[15] The Law Revision Counsel responded with a five-page letter rebutting EPA's specious argument point-by-point.[16] EPA's interference both reveals its own recognition that the text of Section 111(d) in the United States Code repudiates the statutory basis for the Rule, and also represents a back-door attempt by EPA to rewrite Section 111(d).

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[13] *See* Letter of House Energy & Commerce Committee to EPA dated Nov. 2, 2015 ("Energy & Commerce Letter"), JA__.

[14] *See id.* at 2.

[15] EPA Letter of July 27, 2015, at 3, included as Attachment 1 to Energy & Commerce Letter, JA__.

[16] *See* Law Revision Counsel Letter of Sept. 16, 2015, included as Attachment 2 to Energy & Commerce Letter, JA__.

B. *Chevron* Does Not Apply Because the Rule is an Example of Lawmaking, Not Interstitial Gap-Filling.

EPA seeks deference under *Chevron*. Section 111(d) is not ambiguous, however, and thus no deference is due. Moreover, the Supreme Court's decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), makes clear that *Chevron* does not apply here. Like the IRS in *King*, EPA is not expert in proper legislative drafting methodology or the execution of superfluous clerical amendments. Those issues lie within the expertise of, and have been entrusted to, the Law Revision Counsel.

In any event, "[t]his is hardly an ordinary case." *Brown & Williamson Tobacco Co.*, 529 U.S. at 159. Rather, the statutory question is one of "deep 'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489 (quoting *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*")). The emphasis the Rule's defenders place on its allegedly huge import to our nation's response to climate change, far from helping EPA's case, undermines its very foundations. For it is "especially unlikely" that Congress would have silently delegated to EPA — an agency with "no expertise" in regulating electricity production and transmission and no experience in exercising so sweeping a power — the authority to re-engineer the entire U.S. power sector to address a global challenge. *Id.* (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67

(2006)). Not even FERC or the Cabinet-level Department of Energy, much less EPA, has been delegated power by Congress to assert authority over intrastate electricity generation and distribution. *See* Federal Power Act, 16 U.S.C. § 824(a); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). According to EPA, it may regulate generation of electricity far beyond FERC's jurisdiction, rendering moot the limits on FERC authority recently noted in *FERC v. Electrical Power Supply Ass'n.,* 136 S. Ct. 760, 774 (2016) ("Taken for all it is worth, that statutory grant could extend FERC's power to some surprising places. … We cannot imagine that was what Congress had in mind.").

If Congress had intended to confer such revolutionary power on EPA, it would have said so clearly. Indeed, in the one instance in the 1990 Clean Air Act amendments where Congress ***did*** intend that EPA address a major question regarding power plant regulation, it ***expressly delegated*** that authority to EPA. *See* 42 U.S.C. § 7412(n)(1)(A). Congress does not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. If ever there were an elephant in a mousehole, the Rule is it — and it is an unlawful elephant to boot.

The Rule is not an example of interstitial rulemaking. Quite the reverse — it is an example of executive usurpation of legislative and judicial authority. In the

words of the EPA Administrator, the Plan seeks to effect an "historic"[17] and comprehensive "transformation"[18] of the electric utility industry.

The changes wrought by the Rule are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency rulemaking. Tellingly, EPA expects that the Rule will be implemented through the adoption of a cap-and-trade system similar to the program that the Administration proposed but that Congress rejected in 2009. (80 Fed. Reg. at 64,665.) Under EPA's view of Section 111(d), there would have been no need for new legislation seven years ago. EPA is trying to adopt its Rule in the face of congressional rejection of cap-and-trade. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb …. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

That EPA's authority is at its "lowest ebb" is underscored by the fact that

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[17] See EPA Fact Sheets describing the Power Plan, available at http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants, JA__.

[18] "EPA Chief Lays Out Bold Vision for Power Plant Greenhouse Gas Rule," *SNL Renewable Energy Weekly* (Feb. 14, 2014), JA__.

Congress affirmatively ***rejected*** such cap-and-trade legislation, partly out of concern for disproportionate harm to coal-reliant States.[19] *See Pacific Gas & Elec.*, 461 U.S. at 219-20 (treating Congress's rejection of proposed amendment as proof that federal agency lacked asserted power). Now, EPA is forcing those States (and their consumers, communities, businesses, and utilities) to bear the burden for a stated objective that is global in nature. EPA seeks to pit different parts of the country against one another and to foist potentially ruinous burdens on coal-reliant communities. But balancing competing interests of such magnitude is the role of Congress, not an unelected agency.

EPA seeks to make legislative policy in other ways as well. The agency has framed the Rule as a matter of economic development — an area outside EPA's delegated responsibility — rather than as matter of environmental protection. EPA's Administrator testified before the Senate Environment and Public Works Committee on July 23, 2014: "The great thing about this [EPA Power Plan]

[19] *See*, *e.g.*, Bradford Plumer, "Analyzing the House Vote on Waxman Markey," *New Republic* (June 29, 2009) (quoting Sen. Claire McCaskill as expressing concern about "unfairly punish[ing] businesses and families in coal dependent states like Missouri"), JA__.

proposal is that it really is an investment opportunity. ***This is not about pollution control.***"[20]

Further, the economic impact of the Rule is far more severe and selective than that of ordinary regulation. When the proposed Rule was announced, Secretary of State John Kerry described its expected impact not just on fossil fuel in general but on coal-fueled power plants in particular: "We're going to take a bunch of them out of commission."[21] This deliberate targeting is qualitatively different from other programs. For example, the transportation sector accounts for 27% of total greenhouse gas emissions, barely less than 31% from the entire electric power industry,[22] and yet transportation does not face the same treatment. Although EPA regulates cars (including their greenhouse gas emissions), it does not embark on a "war" against the automobile.

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[20] 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), JA__.

[21] See Coral Davenport, "Strange Climate Event: Warmth Toward U.S.," *N.Y. Times* (Dec. 11, 2014), JA__.

[22] EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* ("RIA") at 2-25 (Table 2-15) (Oct. 23, 2015), available at http://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf, JA__.

Congress, not an unelected agency, is the proper body under our system of government to make the value judgments and decide the trade-offs implicated by EPA's Rule. As Justice Kennedy has opined, "[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances."[23] The Rule represents a unilateral end-run by an unaccountable agency around the democratic process. As Justice Jackson warned,

> That authority [vested by the Constitution in a federal branch] must be matched against words of the Fifth Amendment that "No person shall be … deprived of life, liberty, or property, without due process of law." … One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not men, and that we submit ourselves to rulers only if under rules.[24]

Not only is EPA unable to invoke *Chevron* deference, but worse yet, the Rule represents Executive overreach in its most pernicious form. In *Hampton v. Mow Sun Wong*,[25] the Supreme Court invalidated a Civil Service Commission regulation denying federal employment to non-citizens — even though the agency

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[23] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Mistretta v. United States*, 488 U.S. 361, 374 (1989)).

[24] *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring).

[25] 426 U.S. 88, 116 (1976).

(unlike EPA here) was ***not*** found to have acted beyond its statutory mandate — simply because the decision to bar aliens from federal employment was not one with which Civil Service Commission officials were specifically charged, nor one they were competent to make.[26] Even more clearly, EPA should not be permitted to behave here as though it were a junior-varsity legislature.

C. EPA's Claim of a "Gap" in the Clean Air Act is Wrong and Contrary to the Supreme Court's *UARG* Decision.

EPA claims that its statutory interpretation is necessary to plug a "gap" in the Clean Air Act (80 Fed. Reg. at 64,715.) But EPA is wrong — for many reasons. EPA attempts to shove the Rule into a "mousehole," but the Rule is no mouse.

1. There is a Prohibition, Not a "Gap."

There is no gap in EPA's authority with respect to coal-fueled power plants. They are regulated extensively under Section 112 and other provisions of the Clean Air Act, and for that reason Congress has precluded their regulation under Section 111(d). In the regulatory impact analysis central to the *Michigan* case, EPA touted

[26] *See also National Cable Television Ass'n v. United States*, 415 U.S. 336, 341–42 (1974) (opining that construing statute to vest agency with power to tax would pose "constitutional problems").

its Section 112 rules as ways of reducing CO_2 emissions and even claimed a $360 million annual "co-benefit" on the basis of those reductions.[27]

2. This Case Involves Regulatory Duplication, Not A "Gap."

This case involves ***duplication*** (regulation of the same source category under both Section 111(d) and Section 112), not a regulatory "gap." The Section 112 Exclusion dates to the 1990 Clean Air Act amendments, which revised Section 112 by replacing its prior pollution-specific focus (*see* 42 U.S.C. § 7412 (1988)) with an expansive new "source category" structure and aligned Section 111(d) with this new source-category approach. (*See* Pub. L. 101-549, § 301, 104 Stat. 2,399, 2,531–74 (1990).) The Section 112 Exclusion provides that existing sources may be subjected to national standards under Section 112 *or* to state-by-state standards under Section 111(d), but forbids subjecting those existing sources simultaneously to both. This safeguard protects against inconsistent, unaffordable, and excessive regulation of existing sources. EPA officials supported this provision and testified

[27] EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards* 5-88 to 5-92, 5-96 (Table 5-19) (Dec. 2011), available at http://www3.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf, JA__.

before Congress in 1990 that imposing emission standards on existing sources *seriatim*, even for different pollutants, would be "ridiculous."[28]

With respect to power plants in particular, Congress directed EPA to subject them to a Section 112 national emission standard only if "appropriate and necessary" (42 U.S.C. § 7412(n)(1)), giving EPA the choice of whether to proceed with a Section 112 national standard or to proceed by mandating state-by-state standards for power plants under the Section 111(d) program. *See Michigan,* et al. *v. EPA,* et al., 135 S. Ct. 2699, 2705-06 (2015). EPA expressly chose to use the Section 112 national emission standard program for coal-fueled power plants and is thus now precluded from using Section 111(d) to impose the Power Plan.

3. Any "Gap" Would Need To Be Filled By Congress, Not EPA.

Even if there were a "gap" (and there is not), EPA would lack the power to plug it. EPA lacks "free-form discretion." *NRDC*, 777 F.3d at 468. An administrative agency "is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'" *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (citation omitted).

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[28] *Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Cmte. on Energy and Natural Res.*, 101st Cong. 603 (1990), JA__.

EPA previously told the Supreme Court that "key provisions of the CAA cannot coherently be applied to greenhouse gas emissions."[29] EPA's newfound assertion that it is entitled to fill a "gap" in its authority is an attempt to exercise lawmaking power it does not possess. *See South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006) ("EPA's interpretation of the Act in a manner to maximize its own discretion is unreasonable.").

Tellingly, when the government previously confronted acid rain and chlorofluorocarbons ("CFCs"), Congress created separate new titles in the Clean Air Act (Titles IV-A and VI, respectively), rather than relying on EPA to fabricate authority from existing provisions of the Act for pollutants with worldwide sources and global implications. In the 1977 amendments to the Clean Air Act, Congress added statutory ozone layer-specific authority and in the 1990 Amendments added Title VI to regulate CFC emissions. Similarly, Congress amended the Clean Air Act in 1990 to include the Title IV acid rain program specifically to address sulfur dioxide and nitrogen oxides from power plants. These examples are instructive here, reinforcing the conclusion that Section 111(d) was not designed to bear the

[29] *See* Brief for the Federal Respondent at 23, No.05-1120, *Massachusetts v. EPA*, 549 U.S. 497 (2007), available at http://findlawimages.com/efile/supreme/briefs/05-1120/05-1120.mer.resp.fed.pdf, JA__.

weight of the Rule.

4. Section 111(d) Is Not A "Gap-Filling" Provision.

Even if there were a "gap" (and, again, there is not), Section 111(d) is not a "gap-filling" provision. Even before the 1990 amendments, a leading Senate architect of the legislation (Sen. Durenberger) described Section 111(d) as an "obscure, never-used section of the law."[30] By EPA's own count, over the past 40 years it has used Section 111(d) to regulate only four pollutants and five sources — and only one pollutant (landfill gases) since 1990. (*See* 79 Fed. Reg. at 34,844 ("Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories (*i.e.*, sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), Kraft pulp plants (total reduced sulfur), and municipal solid waste landfills (landfill gases)).").) All these situations involve unique, localized pollutants emitted from distinctive sources. None of them concerned a ubiquitous substance like CO_2, benign in itself, emitted from sources across the nation and indeed the globe, rather than from discrete local sources. Atmospheric CO_2 is the intermingled result of all human activity and Mother Nature. *See American Elec. Power Co. v. Connecticut*,

[30] *Clean Air Act Amendments of 1987: Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcmte. on Envtl. Prot. of the S. Cmte. on Env't and Public Works*, 100th Cong. 13 (1987), JA__.

131 S. Ct. 2527, 2538 (2011) ("After all, we each emit carbon dioxide merely by breathing.").

EPA would turn Section 111(d) into one of the Clean Air Act's most powerful provisions and render most of its other provisions surplusage. Yet no prior Section 111(d) regulation has ever involved a pollutant on the scale of CO_2 or an attempt to re-engineer an entire sector of the economy.

D. EPA Lacks Legal Authority to Limit the Section 112 Exclusion to Hazardous Air Pollutants.

EPA argues that the phrase "regulated under section 112" is ambiguous as to whether the Section 112 Exclusion applies to ***pollutants*** listed under Section 112(b) or to ***source categories*** regulated under Section 112. (80 Fed. Reg. at 64,713–15.) Yet EPA's own Legal Memorandum accompanying the proposed rule found no such ambiguity, properly recognizing that "[a]s presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from Section 111(d) ***any*** pollutant if it is emitted from a source category that is regulated under Section 112."[31]

Congress's handiwork is utterly unambiguous. The statute refers to "a source category which is regulated under section [112]" — not to "a pollutant

[31] Proposed Rule Legal Memo 22 (emphasis added), JA__.

which is on a list published under section [112(b)]." Moreover, the phrase "any air pollutant" cannot refer solely to substances on the Section 112(b) list because that same phrase is also modified by the words "for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title." "[A]ny air pollutant" must be broader than substances "on a list published under Section 112(b)" because it must also include these other two categories, which are not coextensive.

EPA complains that the plain meaning of Section 111(d) would bar the agency from regulating non-HAP emissions from source categories regulated under Section 112. But what EPA claims is a vice in the statute is actually a virtue. Applying the Section 112 Exclusion on the basis of source categories is a natural consequence of Congress's decision in 1990 to rewrite Section 111(d) to mirror the "source category" structure of the newly amended Section 112. In 1990, Congress fundamentally expanded the scope of which substances are regulated under Section 112 and required regulation under Section 112 by "source category." *Compare* Pub. L. 101-549, § 301, 104 Stat. 2,399, 2,531-74 (1990) (creating new Section 112), *with* 42 U.S.C. § 7412 (1988). The ordinary reading of the 112 Exclusion is

better (not worse) because it aligns Section 111(d) with the "source category" focus of post-1990 Section 112.[32]

Moreover, EPA's argument is foreclosed by the Supreme Court's decision in *UARG*, which teaches that, once Congress has addressed the issue, EPA has no power to redefine words or reassign the phrases to circumvent the legislative judgment. "The power of executing the laws" "does not include a power to revise clear statutory terms that turn out not to work in practice," or to revise them "to suit [EPA's] own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446. The highly "specific" language in Section 111(d) is the end of the matter, leaving nothing for EPA to add or subtract because Congress "has already" made its own "judgment." *Id.* at 2448. "An agency has no power to 'tailor' legislation

[32] EPA's Section 111(b) Rule for new power plants concedes the source-category focus of Section 111: there, EPA contends that its critical regulatory decision is whether to list a source category under Section 111 and that, after it makes such a source-category decision, the agency need not make a pollutant-specific endangerment finding. (80 Fed. Reg. at 64,529–30.) While EPA's conclusion is wrong (the source category must next be linked to a specific pollutant in an endangerment finding), its premise concedes that the 1990 Amendments realigned Sections 111 and 112 to focus on source categories, and framed the 112 Exclusion toward that end. *See New Jersey*, 517 F.3d at 578, 583; *Envt'l Defense, Inc. v. EPA*, 509 F.3d 553, 560-61 (D.C. Cir. 2007) (holding that EPA was arbitrary and capricious in interpreting same statutory term differently in different subsections); *Dep't of Treasury, IRS, Office of Chief Counsel v. Fed. Labor Rel'ns Auth.*, 739 F.3d 13, 17-21 (D.C. Cir. 2014) (finding agency's action arbitrary and capricious because it applied "two inconsistent interpretations of the very same statutory term").

to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 2445.

EPA errs in imputing to the 1990 Congress a monolithic intention to ensure that the agency is authorized to regulate every conceivable emission under whatever section of the Clean Air Act the agency chooses, regardless of statutory overlaps and duplications. The Supreme Court has already rejected that very imputation and made clear in *UARG* that EPA is ***not*** automatically entitled to regulate ***all forms*** of greenhouse gas emissions under any Clean Air Act provision the agency chooses, merely because it possesses authority to regulate CO_2 from mobile sources. *Id.* at 2440-41.

EPA misconstrues the 1990 amendments as favoring more regulation above all other concerns. That construction ignores the necessary policy trade-offs that inevitably accompany legislation. As the Supreme Court has instructed, "no legislation pursues its purposes at all costs." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (internal quotation marks and citation omitted). "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that ***whatever*** furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original); *see also Alabama Power Co.*

v. EPA, 40 F.3d 450, 455–56 (D.C. Cir. 1994) ("an express intent to maximize emission reduction could not be read into the statute without a clearer statement from Congress").

III. The Rule Violates the Tenth Amendment and Principles of Federalism.

Twenty-seven (27) States have challenged the Rule — the most ever to challenge an EPA rule — representing almost 80% of the Rule's projected emissions reductions. The 18 States that have filed in support of the Rule represent only 12% of the emissions reductions — including two States that the Rule does not affect (Vermont and Hawaii).[33]

Petitioners have explained why the Rule violates state sovereignty, but private parties as well as States can invoke the protections of federalism. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

A. The Rule Impermissibly Commandeers the States by Directing Them to Administer a Federal Program.

The Supreme Court has made clear that the federal government may not compel the States to implement federal regulatory programs. *See Printz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 176-77

[33] Robin Bravender, "44 States Take Sides in Expanding Legal Brawl," *Greenwire* (Nov. 4, 2015), JA__.

(1992). Because this limitation on federal power arises from a structural constitutional principle, "a 'balancing' analysis" is "inappropriate." *Printz*, 521 U.S. at 932. "[N]o comparative assessment of the various interests can overcome that fundamental defect." *Id.*

The Rule suffers from a dramatic form of the same defect. It invades state regulatory control in an unprecedented manner under the Clean Air Act. It requires many States to enact new legislation and develop completely new regulatory structures within EPA's prescribed timetable. EPA goes to great lengths to appear as though it gives States some degree of freedom, but in truth it offers only Potemkin choices. All of the important decisions have already been made by EPA.

Similarly, in *New York v. United States*, the Court held that the federal government could not put a State to the Hobson's choice of either taking title to nuclear waste or enacting particular state waste regulations. Although the statute purported to give a State a choice between those options and the ability to fine-tune the federal mandate, the Court explained that "[n]o matter which path the State chooses, it must follow the direction of [the federal government]." 505 U.S. at 177. The Court found that the purported "latitude given to the States to implement Congress' plan" and the supposed options "to regulate pursuant to Congress'

instructions in any number of different ways," did not offer any genuine ability to exercise discretion or choice. *Id.* at 176-77.

EPA's interpretation here would "confer on federal agencies ultimate decisionmaking authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect." *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting). "If cooperative federalism is to achieve Congress' goal of allowing state governments to be accountable to the democratic process in implementing environmental policies, federal agencies cannot consign States to … ministerial tasks …, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight." *Id.*

It is no answer to say that some States support EPA's Rule. Anti-commandeering principles bar unlawful complicity as much as coercion. *See Printz*, 521 U.S. at 921 (stating that federal-state separation is one of the "structural protections of liberty" designed to "reduce the risk of tyranny and abuse ***from either front***") (emphasis added). Thus, no State — including the States that support the Rule — can permissibly collude with EPA to aggrandize the agency's authority. *See New York*, 505 U.S. at 181-82.

This submissive role for the States confounds the political accountability that the Tenth Amendment is meant to protect. The Supreme Court has warned that

"where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[34]

That is exactly what will occur here: the Rule will force States to adopt policies that will raise energy costs, threaten consumers on fixed and limited incomes, and deprive the States of tax revenue from coal royalties and severance payments, which States use to fund schools and social services[35] — but those policies will be cloaked in the Emperor's garb of state "choice," even though in fact the policies are compelled by EPA. EPA thumbs its nose at democratic principles by confusing the chain of decision-making between federal and state regulators to avoid political transparency and accountability.

Significantly, Congress did not delegate power to EPA in a way that clearly set up this entirely avoidable constitutional confrontation. It certainly did not expressly authorize, much less direct, the EPA to interpret the Clean Air Act so as

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[34] *New York*, 505 U.S. at 169; *see also Printz*, 521 U.S. at 922–23 (citing "accountability" as reason to prohibit federal government from forcing state officials to implement federal policy); *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014); *Bond*, 131 S. Ct. at 2364–65.

[35] State of North Dakota, Motion for Stay at 13-15, No. 15-1380, *North Dakota v. EPA*, ECF Doc. 1580920 (D.C. Cir., Oct. 29, 2015), JA__.

to violate federalism and the Tenth Amendment. At the very least, the serious constitutional questions raised by the Rule eliminate any agency claim to *Chevron* deference and require that this Court construe Section 111(d) as not authorizing EPA's extravagant assertion of authority.

B. A "Federal Plan" is No Solution.

EPA's response is that, if a State declines to propose a state plan, the agency will impose a "Federal Plan" instead. (*See* 80 Fed. Reg. at 64,942.) But this is no solution at all, for several reasons.

1. States Face Commandeering Even Under a Federal Plan.

If a State refuses to submit a "State Plan" as part of EPA's effort to reengineer the energy sector, EPA will impose a "Federal Plan." That plan will require a significant curtailment of coal-fueled generation and, as a consequence, will force States to take a number of legislative and regulatory actions to ensure that the power needs of the public are met. The state government will have no choice but to adopt new or strengthened laws requiring the development of renewable resources, and it will have to make power plant siting decisions, issue permits, grant certificates of public convenience and necessity, and make innumerable other decisions to ensure the power stays on. (*See, e.g.*, 220 Ill. Stat. 5/8-406(b) (utility must obtain certificate of public convenience and necessity

before beginning construction).) A State cannot simply remain passive in the face of the Rule. Otherwise, it will face the very real danger that EPA's shutdown of coal power plants will lead to brownouts and blackouts for its consumers and businesses, unless new generation is built and new transmission lines are constructed.

Under any scenario, the States are dragooned as foot soldiers in EPA's revolution, whether they like it or not. The States' ability to "choose" not to authorize new generation, to undertake extensive planning to ensure that the Rule's transformation of the power sector does not imperil the sector's reliability, or to process or issue permits is no "choice" at all. It is a gun to the head: knuckle under or face blackouts. That is the very defect that the Court identified in striking down the Medicaid expansion in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

New York v. United States (on which EPA relies) is not to the contrary. There, the back-up federal option, 505 U.S. at 174, entailed no direct regulation of anything in a noncomplying State. Rather, it merely authorized complying States with waste disposal sites to raise fees and ultimately shut their sites to waste from freeloading States that were not managing their own waste. Moreover, the "federal option" in *New York* was enacted by Congress, where States, through their representation in the Senate and in other ways, retain an assured avenue of direct political influence over how the legislature will decide to regulate their citizens

under Article I. But the situation is entirely different where, as here, a ***federal agency*** decides how the people in noncomplying States will be regulated, because an agency is not open to the structurally assured state influence that rescued the fallback in *New York* from constitutional infirmity.

2. The "Federal Plan" Abrogates the Bargain of Cooperative Federalism.

Even with the "Federal Plan" option, the Rule still amounts to a breach of the "cooperative federalism" bargain that Congress and the States struck in the Clean Air Act. The Supreme Court has instructed that state participation in federal programs is "in the nature of a contract," with the key question being "whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *NFIB*, 132 S. Ct. at 2602 (internal quotation marks and citations omitted). The Rule improperly remakes the agreement between States and the Federal Government that has existed since the Clean Air Act was enacted in 1970. States could not have expected, when they adopted plans to regulate conventional pollutants like NO_2, SO_2, and particulates, that EPA would seek to dictate state energy policies by forcing the phase-out of the currently most reliable and affordable sources of electricity and their replacement with EPA's preferred sources.

The Rule is completely unlike genuine examples of cooperative, rather than coercive, federalism; it is ***entirely different*** from anything EPA has ever attempted

under Section 111(d). As this Court has recognized, "novelty may, in certain circumstances, signal unconstitutionality." *Am. Assoc. of Railroads v. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013). Here, that message is loud and clear.

In *Mississippi Commission on Environmental Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015), this Court quoted *NFIB* for the proposition that Congress's power under the Spending Clause "does not include surprising participating States with post-acceptance or retroactive conditions," *id.* at 179, and explained that the Medicaid expansion struck down in *NFIB* was "a ***new*** condition that had not been part of the original program." *Id.* (emphasis in original). That is exactly the situation here: no State would have dreamed that the 1990 Amendments would have led to anything as intrusive as the Federal Plan.

Accordingly, EPA's gambit would require citizens to surrender their right to be represented by an accountable and responsive government that accords with the postulates of federalism.[36] The Rule therefore violates the Tenth Amendment and principles of federalism.

[36] The "Federal Plan" also raises serious constitutional questions under the unconstitutional conditions doctrine. *See Agency for Int'l Dev. v. Alliance for Open Society*, 133 S. Ct. 2321, 2328 (2013); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831–37 (1987). EPA proposes to condition its decision not to impose its fallback "Federal Plan" on the willingness of the State to waive its constitutional right not to be "commandeered" (and the rights of citizens not to have their State government abdicate its own sovereignty). *See South Dakota v.*

IV. The Purpose of the Constitution's Structural Divisions of Power Applies Here With Special Force to Prohibit Executive Overreach and Protect Individual Liberties.

This case illustrates the importance of structural constitutional principles — both separation of powers and federalism — in protecting individual liberty and preventing Executive overreach. The Supreme Court has explained that the ultimate purpose of structural divisions of power is to "protect[] the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond*, 131 S. Ct. at 2364. "When government acts in excess of its lawful powers, that liberty is at stake." *Id*.

That is precisely the situation here. At its core, the issue the Rule presents is whether EPA is bound by the rule of law and must operate within the framework established by the United States Constitution. The Rule exceeds EPA's lawfully delegated authority and threatens to run roughshod over individual liberties in its attempt to transform the American energy sector. It imposes trade-offs and makes policy judgments appropriate for Congress, not a politically unaccountable agency. It usurps legislative and judicial power and presents the risk of the very kind of arbitrary and abusive governance that the Supreme Court has condemned.

Dole, 483 U.S. 203, 210–11 (1987) (suggesting that Spending Clause may not be used to encourage constitutional violations harming third parties).

The individual rights and liberties that hang in the balance here are not mere abstractions. The Rule will more than halve coal-fueled power generation in the United States, reducing it far below its lowest level since the government began systematically tracking energy developments.[37] It will result in the economic devastation of States and rural, economically depressed communities that rely on coal.[38]

The character of this governmental action is extraordinary, both in the sweeping manner in which it exceeds delegated power and in the egregious way it singles out certain disfavored entities to bear the burden of achieving a goal that is national, indeed global, in nature.[39] The Rule flies in the face of structural

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[37] EVA Report 28 (attached to Schwartz Decl.), Coal Stay Mot., Ex. 1, JA__. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("What makes the right to mine coal valuable is that it can be exercised with profit. ***To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.***") (emphasis added).

[38] Schwartz Decl. ¶4, JA__, EVA Report 69-72, JA__, Coal Stay Mot. Ex. 1; Schwartz Reply Decl. ¶18, Joint Reply in Support of Motions for Stay, Ex. A, ECF Doc. 1590337 (D.C. Cir. Dec. 23, 2015) ("Joint Stay Reply"), JA__.

[39] *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("forcing some people alone to bear burdens which in all fairness and justice should be borne by the public as a whole" implicates Fifth Amendment rights); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1071–72 (1992) (Stevens, J. dissenting) ("[O]ne of the central concerns of our takings jurisprudence is 'prevent[ing] the public from loading upon one individual more than his just share of the burdens of government. … For example, in the case of so-called 'developmental exactions,' we have paid special attention to the risk that particular landowners might 'b[e]

limitations on governmental power that are designed to prevent violations of liberty, arbitrary deprivations of property,[40] and indefensible denials of equality.

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singled out to bear the burden' of a ***broader problem not of his own making***.") (emphasis added).

[40] In certain applications, the Rule will have disproportionately severe impacts that may give rise to constitutional concerns. (*See* Schwartz Decl. ¶31 (Ex. 1), JA__; Murray Decl. ¶¶37-42 (identifying Murray Energy coal mines that are significant suppliers of the retiring units) (Ex. 9), JA__; Neumann Decl. ¶¶2, 6-18 (consequences of retiring Coal Creek and Coyote stations) (Ex. 6), JA__; Cottrell Decl. ¶¶7, 9 (consequences of retiring Naughton station) (Ex. 10), JA__; Jenkins Decl. ¶¶7-8 (lost coal transportation) (Ex. 11), JA__; Siegel Decl. ¶6 (Ex. 5), JA__; Marshall Decl. ¶11–18 (Ex. 3), JA__; McCourt Decl. ¶7–8 (Ex. 7), JA__, all in Coal Stay Mot.; Schwartz Reply Decl. ¶18, Joint Stay Reply, Ex. A, ECF Doc. 1590337 (D.C. Cir., Dec. 23, 2015) JA__.) Forced shut-downs will strand hundreds of millions of dollars of investments in power plants and the mines supplying them. (*See* Joint Motion to Intervene, ECF Doc. 1584767 (D.C. Cir., Nov. 20, 2015), JA__.) For example, if the Rule forces the Red Hills (Mississippi) Plant to retire, it will necessarily result in the permanent shutdown of the Red Hills Mine, which was acquired and developed at significant cost for the sole purpose of supplying coal to the nearby plant. (Neumann Decl. ¶¶5, 19-28 (Ex. 6), Coal Stay Mot., JA__; John Neumann, *Comments of the North American Coal Corp. on Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* 5-9, Dkt. No. EPA-HQ-OAR-2013-0602-22519 (Dec. 1, 2014), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-22519, JA__; *see also* Brummett Decl. ¶¶ 14-15, 18-19, 40-42 (San Miguel Electric Cooperative, Inc.), Ex. G, Utility and Allied Pet'rs Stay Mot., ECF Doc. 1580014 (D.C. Cir., Oct. 23, 2015) ("Utility Stay Mot."), JA__.) An agency may not interpret a statute so as to create "'an identifiable class of cases in which application of [the] statute will necessarily constitute a taking,'" unless the statute expressly authorizes this result. *See Bell Atl. Tele. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)); *see also id.* at 1445-57 (holding that administrative interpretation of statute that creates class of takings is not afforded *Chevron* deference; further, a "policy of avoidance" and "a narrowing

The Rule also exhibits a "bait-and-switch" feature that will frustrate government-created reasonable expectations.[41] The Rule is exactly the kind of abusive action that structural constitutional principles were intended to preclude.

EPA defends its power grab on the grounds that it has the potential of averting global harm, even though the agency has declined to quantify ***any impact***

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construction" should be used to prevent executive encroachment on Congress's exclusive powers to appropriate funds).

[41] After requiring coal-fired power plants to install the very costly "Maximum Achievable Control Technology" that the Clean Air Act mandates under Section 112 (Schwartz Decl. ¶¶44-45, 74-93, Coal Stay Mot., JA__), EPA is now telling the States to take actions that would force those very same power sources to shut down or significantly curtail their coal-based operations, essentially stranding the billions of dollars that EPA has required them to invest. (Brummett Decl. ¶¶ 14-15, 18-19, Utility Stay Mot., JA __.) EPA's own modeling shows that the Rule will cause the closure of 53 coal-fired generating units in 2016 and the closure of another 3 units by 2018. (Schwartz Decl. ¶¶ 4, 16-22, 27-31, Coal Stay Mot., JA__; EVA Report 11-15, 62-64, Coal Stay Mot., JA__.) When EPA initially promised confidential treatment to pesticide makers who submitted proprietary data in their registration applications, and then subsequently reversed course and publicly disclosed the data, the Supreme Court had no difficulty finding that the manufacturers could bring a claim for a compensable taking. *See Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1011-13 (1984). Similarly, when the federal government encouraged banks to take over failing savings and loan associations by promising that they could take advantage of a special accounting treatment, and then later changed its mind and disallowed the accounting treatment, the Supreme Court held that the banks could sue for breach of contract. *United States v. Winstar Corp*., 518 U.S. 839 (1996).

of the Rule on global temperatures or the environment — not a thousandth of a degree of temperature or single millimeter of sea level change.[42]

In any event, the Constitution and laws of the United States cannot be cast aside on the basis of expedience. A rule-making process that would permit an unelected agency to make such sweeping fundamental policy choices — and to avoid political accountability for doing so — runs counter to the Constitution's structural divisions of power designed to protect individual liberties and vindicate the Rule of Law.

[42] *See* RIA at ES-10 through ES-14, JA__.

CONCLUSION

The Petitions for Review should be granted, and the Rule should be vacated.

Respectfully submitted.

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I hereby certify that on this day, February 23, 2016, 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