ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

Nos. 15-1363, 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-1488
(Consolidated)

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

BRIEF OF 166 STATE AND LOCAL BUSINESS ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Michael H. Park
CONSOVOY MCCARTHY PARK PLLC
3 Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

William S. Consovoy
Counsel of Record
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

Counsel for Amici Curiae

Dated: February 23, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* certify that:

(A) Parties and *Amici*

In addition to the parties and *amici* listed in Petitioners' Opening Brief, the *amici* listed below under "Interests of Amici Curiae" may have an interest in the outcome of this case.

(B) Rulings under Review

References to the rulings at issue appear in Petitioners' Opening Brief.

(C) Related Cases

References to the related cases appear in Petitioners' Opening Brief.

/s/ William S. Consovoy
William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
Counsel for Amici Curiae

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

No parties have objected to the filing of this brief.[1] Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that a separate brief is necessary because no other *amicus* brief of which we are aware will address the issues raised in this brief: namely, whether the final rule promulgated by the U.S. Environmental Protection Agency ("EPA"), entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015), usurps the authority of the States to establish standards of performance for existing sources and whether EPA's centrally-designed, top-down model will cause significant harms to local businesses. In light of *amici*'s activities and memberships, discussed more fully herein, they are particularly well-suited to discuss the important issues implicated by this case.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amici curiae* certify that no *amicus curiae* has outstanding shares or debt securities in the hands of the public, and none has a parent company. No publicly held company has a 10 percent or greater ownership interest in any *amicus curiae*.

/s/ William S. Consovoy
William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

GLOSSARY viii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

I. The Rule Usurps the Authority of the States to Establish Standards of Performance for Existing Sources. 13

II. EPA's Rule Will Cause Substantial Harm to Local Businesses, with Little to No Benefit. 20

CONCLUSION 27

CIRCUIT RULE 32(a)(2) ATTESTATION 28

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

CASES

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 17

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 19

Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n,
461 U.S. 375 (1983) 19

Bailey v. United States,
516 U.S. 137 (1995) 14

BedRocs Ltd., LLC v. United States,
541 U.S. 176 (2004) 14

Chevron U.S.A. Inc. v. NRDC, Inc.,
467 U.S. 837 (1984) 13

Clinton v. City of New York,
524 U.S. 417 (1998) 18

Conn. Dep't of Pub. Util. Control v. FERC,
569 F.3d 477 (D.C. Cir. 2009) 19

Crandon v. United States,
494 U.S. 152 (1990) 17

Del. Dep't of Natural Res. & Envtl. Control v. EPA,
785 F.3d 1 (D.C. Cir. 2015) 17

**FDA v. Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 16

In re Aiken Cnty.,
725 F.3d 255 (D.C. Cir. 2013) 18

**King v. Burwell*,
135 S. Ct. 2480 (2015) 17

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 24

Authorities upon which we chiefly rely are marked with asterisks.

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 19

Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory Comm'n, 939 F.2d 1047 (D.C. Cir. 1991) 16

Pub. Citizen v. NRC, 901 F.2d 147 (D.C. Cir. 1990) 18

Ry. Emp. Dep't v. Hanson, 351 U.S. 225 (1956) 19

**United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) 16, 17

STATUTES

42 U.S.C. § 7411(a)(1) 23

*42 U.S.C. § 7411(b)(1)(B) 13

*42 U.S.C. § 7411(d)(1) 13, 15, 17

42 U.S.C. § 7411(d)(2)(A) 14

42 U.S.C. § 7411(d)(2)(B) 14

REGULATIONS

40 C.F.R. § 60.21(e) 15

40 C.F.R. § 60.22(b)(5) 15

40 C.F.R. § 60.23 15

40 C.F.R. § 60.24(f) 15, 18

40 C.F.R. § 60.5855(a) 12

Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) 10, 12, 15, 25

Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) 13

OTHER AUTHORITIES

C. Boyden Gray, *A Cost-Benefit Analysis from EPA Lacking in Common Sense*, Wash. Times (July 29, 2014) 24

CO_2 Emission Performance Rate and Goal Computation Technical Support Document (Aug. 2015) 12

Michigan Department of Environmental Quality Air Quality Division, State Implementation Plan Submittal for Fine Particulate Matter ($PM_{2.5}$) (May 15, 2008) 20

National Federation of Independent Business, Comments on the Proposed Rule for Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Dec. 1, 2014) 26

NERA, Energy and Consumer Impacts of EPA's Clean Power Plan (2015) 22

New York State Implementation Plan for Regional Haze (Feb. 2010) 20

Office of Mgmt. & Budget, Exec. Office of the President, OMB, 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities (2013) 25

Parker & Blodgett, Cong. Research Serv., *"Carbon Leakage" and Trade: Issues and Approaches* (Dec. 19, 2008) 24

Public Utility Commission of Texas, Comments on Proposed Rule for Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Dec. 6, 2014) 21

Testimony of Asim Z. Haque, Vice-Chairman, Public Utilities Commission of Ohio, before Energy Mandates Study Committee (Feb. 5, 2015) 23

GLOSSARY

CAA	Clean Air Act
CO_2	Carbon Dioxide
DOL	Department of Labor
EPA	United States Environmental Protection Agency
NERA	National Economic Research Associates
OMB	Office of Management and Budget
Rule	U.S. Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

INTERESTS OF *AMICI CURIAE*

Amici Curiae State and Local Business Associations include 166 separate state and local business organizations from 40 different states. Collectively, *amici*'s members include businesses of every size and in every industry, and conduct business throughout the entire United States. An important function of *amici* is to represent the interests of their members before all branches of federal and state governments, including the courts.

Amici have an especially strong interest in the development of sound energy policy and economically responsible environmental regulations. But *Amici* and their members will bear enormous economic and social disruptions as a direct result of the Rule. *Amici* respectfully submit this brief to explain the severe consequences to small, medium, and large businesses and their local communities that will flow from EPA's regulation of carbon emissions from existing power plants.

Amici Curiae State and Local Chambers and Other Business Groups include the following organizations:[2]

Texas Association of Business

Pennsylvania Chamber of Business and Industry

[2] Additional information about *amici curiae* is available at the following website: www.pachamber.org/cppamicus.

Ohio Chamber of Commerce

Alaska Chamber of Commerce

Arizona Chamber of Commerce and Industry

Arkansas State Chamber of Commerce/Associated Industries of Arkansas

Associated Industries of Missouri

Association of Commerce and Industry

Bakersfield Chamber of Commerce

Beaver Dam Chamber of Commerce

Billings Chamber of Commerce

Birmingham Business Alliance

Bismarck Mandan Chamber of Commerce

Blair County Chamber of Commerce

Bowling Green Area Chamber of Commerce

Bullitt County Chamber of Commerce

Business Council of Alabama

Campbell County Chamber of Commerce

Canton Regional Chamber of Commerce

Carbon County Chamber of Commerce

Carroll County Chamber of Commerce

Catawba Chamber of Commerce

Central Chamber of Commerce

Central Louisiana Chamber of Commerce

Chamber Southwest Louisiana

Chamber630

Chandler Chamber of Commerce

Colorado Association of Commerce and Industry

Colorado Business Roundtable

Columbus Area Chamber of Commerce

Dallas Regional Chamber

Davis Chamber of Commerce

Detroit Regional Chamber of Commerce

Eau Claire Area Chamber of Commerce

Erie Regional Chamber & Growth Partnership

Fall River Area Chamber of Commerce & Industry

Fremont Area Chamber of Commerce

Georgia Association of Manufacturers

Georgia Chamber of Commerce

Gibson County Chamber of Commerce

Gilbert Chamber of Commerce

Grand Junction Area Chamber

Grand Rapids Area Chamber of Commerce

Great Lakes Metro Chambers Coalition

Greater Flagstaff Chamber of Commerce

Greater Green Bay Chamber of Commerce

Greater Irving-Las Colinas Chamber of Commerce

Greater Lehigh Valley Chamber of Commerce

Greater Muhlenberg Chamber of Commerce

Greater North Dakota Chamber of Commerce

Greater Orange Area Chamber of Commerce

Greater Phoenix Chamber of Commerce

Greater Shreveport Chamber of Commerce

Greater Summerville/Dorchester County Chamber of Commerce

Greater Tulsa Hispanic Chamber of Commerce

Greater West Plains Area Chamber of Commerce

Hartford Area Chamber of Commerce

Hastings Area Chamber of Commerce

Hazard Perry County Chamber of Commerce

Illinois Manufacturers Association

Indiana Chamber of Commerce

Indiana County Chamber of Commerce

Iowa Association of Business and Industry

Jackson County Chamber

Jax Chamber of Commerce

Jeff Davis Chamber of Commerce

Johnson City Chamber of Commerce

Joplin Area Chamber of Commerce

Kalispell Chamber of Commerce

Kansas Chamber of Commerce

Kentucky Association of Manufacturers

Kentucky Chamber of Commerce

Kingsport Chamber of Commerce

Kyndle, Kentucky Network for Development, Leadership and Engagement

Latino Coalition

Lima - Allen County Chamber of Commerce

Lincoln Chamber of Commerce

Longview Chamber of Commerce

Loudoun Chamber of Commerce

Lubbock Chamber of Commerce

Madisonville-Hopkins County Chamber of Commerce

Maine State Chamber of Commerce

Manhattan Chamber of Commerce

McLean County Chamber of Commerce

Mercer Chamber of Commerce

Mesa Chamber of Commerce

Metro Atlanta Chamber of Commerce

Metropolitan Milwaukee Association of Commerce

Michigan Chamber of Commerce

Michigan Manufacturers Association

Midland Chamber of Commerce

Milbank Area Chamber of Commerce

Minot Area Chamber of Commerce

Mississippi Economic Council – The State Chamber of Commerce

Mississippi Manufacturers Association

Missouri Chamber of Commerce

Mobile Area Chamber of Commerce

Montana Chamber of Commerce

Montgomery Area Chamber of Commerce

Morganfield Chamber of Commerce

Mount Pleasant/Titus County Chamber of Commerce

Myrtle Beach Chamber of Commerce

Naperville Area Chamber of Commerce

Nashville Area Chamber of Commerce

National Black Chamber of Commerce

Nebraska Chamber of Commerce and Industry

Nevada Manufacturers Association

New Jersey Business & Industry Association

New Jersey State Chamber of Commerce

New Mexico Business Coalition

Newcastle Area Chamber of Commerce

North Carolina Chamber of Commerce

North Country Chamber of Commerce

Northern Kentucky Chamber of Commerce

Ohio Manufacturers Association

Orrville Area Chamber of Commerce

Oshkosh Chamber of Commerce

Paducah Area Chamber of Commerce

Paintsville/Johnson County Chamber of Commerce

Pennsylvania Manufacturers Association

Port Aransas Chamber of Commerce/Tourist Bureau

Powell Valley Chamber of Commerce

Putnam Chamber of Commerce

Rapid City Area Chamber of Commerce

Rapid City Economic Development Partnership

Redondo Beach Chamber of Commerce

Roanoke Valley Chamber of Commerce

Rock Springs Chamber of Commerce

Salt Lake Chamber of Commerce

San Diego East County Chamber of Commerce

San Gabriel Valley Economic Partnership

Savannah Area Chamber of Commerce

Schuylkill Chamber of Commerce

Shoals Chamber of Commerce

Silver City Grant County Chamber of Commerce

Somerset County Chamber of Commerce

South Bay Association of Chambers of Commerce

South Carolina Chamber of Commerce

South Dakota Chamber of Commerce

Southeast Kentucky Chamber of Commerce

Southwest Indiana Chamber

Springerville-Eagar Chamber of Commerce

Springfield Area Chamber of Commerce

St. Louis Regional Chamber

State Chamber of Oklahoma

Superior Arizona Chamber of Commerce

Tempe Chamber of Commerce

Tennessee Chamber of Commerce and Industry

Tucson Metro Chamber of Commerce

Tulsa Chamber of Commerce

Tyler Area Chamber of Commerce

Upper Sandusky Area Chamber of Commerce

Utah Valley Chamber

Victoria Chamber of Commerce

Virginia Chamber of Commerce

Wabash County Chamber of Commerce

West Virginia Chamber of Commerce

West Virginia Manufacturers Association

Westmoreland County Chamber of Commerce

White Pine Chamber of Commerce

Wichita Metro Chamber of Commerce

Williamsport/Lycoming Chamber of Commerce

Wisconsin Manufacturers & Commerce

Wyoming Business Alliance

Wyoming State Chamber of Commerce

Youngstown Warren Regional Chamber

SUMMARY OF THE ARGUMENT

Amici stand together for the interests of all businesses in America that will bear the direct economic and social disruptions of the regulations at issue in this case and submit this brief in support of Petitioners' legal challenge to EPA's *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"). This brief, in particular, seeks to highlight some of the devastating economic costs of EPA's regulatory overreach.

First, as a legal matter, EPA has unlawfully usurped the States' authority to regulate existing electrical generating units under Section 111 of the Clean Air Act ("CAA"). Section 111(b) grants EPA authority to establish "standards of performance" for *new* stationary sources; but Section 111(d) grants the States authority to establish those standards for *existing* sources. By displacing the authority reserved to the States in setting standards of performance for existing sources, which it clearly has done, EPA has violated the statute's unambiguous terms. Even if the statute were ambiguous, however, EPA's interpretation would not be entitled to deference. Administrative deference attaches only if the federal agency is the law's principal administrator and has the relevant expertise. In light of Congress's delegation of authority over existing sources to the States, and the Rule's preoccupation with reformulating energy policy (a matter not within EPA's

core competency or jurisdiction) rather than emission control technology, EPA can make neither showing.

Second, EPA has misapplied Section 111(d) to impose State-by-State production limits on fossil-fuel electricity generators, rather than emission guidelines for stationary sources within the source category. By imposing State-by-State mandates for the reduced operation of an entire category of sources, EPA has violated the statute's unambiguous terms.

The legal defects in EPA's Rule are amply demonstrated in Petitioners' briefs and will not be restated here. The main purpose of this brief is to illuminate how EPA's overreach will cause substantial harm to local businesses and economies while doing little, if anything, to accomplish its stated objective of ameliorating the effects of global climate change. The availability of affordable electricity is a key feature of American enterprise's competitiveness, yet the Rule harms significant numbers of local communities, particularly in economically challenged rural areas, which would have their employment and tax bases decimated by the Rule. The States have traditionally been responsible for ensuring adequate, reliable, and cost-efficient supplies of electricity are available to the public while considering the unique circumstances of local businesses and communities. By drastically reconfiguring the nation's power sector, the Rule will raise the cost of operations throughout the entire economy, which will threaten

individual businesses, countless jobs, and entire communities. Meanwhile, EPA points to purported "co-benefits" of the Rule, which misleadingly distort its real costs. In particular, most of the Rule's alleged benefits are the result of projected reductions of other pollutants, which are not the direct target of the Rule or within the scope of Section 111(d). Put simply, the Rule's massive economic costs far outweigh its limited environmental benefits.

Thus, *amici* respectfully request that this Court grant the petitions for review and vacate the Rule.

ARGUMENT

I. The Rule Usurps the Authority of the States to Establish Standards of Performance for Existing Sources.

In the Rule, EPA established national "emission performance rates" for existing electric generating units, *see* CO_2 Emission Performance Rate and Goal Computation Technical Support Document (Aug. 2015), that EPA itself admits cannot be achieved by any existing facility. 80 Fed. Reg. at 64,754. The Rule then requires the States to submit plans for meeting EPA's nationally-set emissions performance standards for existing utilities. 40 C.F.R. § 60.5855(a). But EPA has no authority to establish such "standards of performance" under the CAA. *See* Brief for Petitioners on Core Legal Issues ("Pet. Br.") at 29-41. The statute, instead, grants that power to the States. As explained below, therefore, the Rule

conflicts with the "unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

The CAA draws a sharp line between EPA's authority over "new" sources, on the one hand, and "existing" sources, on the other. Specifically, Section 111(b) empowers EPA to "establish[] Federal standards of performance for *new* sources within such category [of stationary sources]." 42 U.S.C. § 7411(b)(1)(B) (emphasis added). In implementing the President's Climate Plan, EPA exercised that authority to impose revised standards of performance on new coal-fired and natural gas-fired electric generating units. EPA, *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,510 (Oct. 23, 2015).

The statutory plan for existing sources, however, is fundamentally different. Under Section 111(d), "each *State* shall submit to the Administrator a plan which … establishes standards of performance for *any existing source* for any air pollutant." 42 U.S.C. § 7411(d)(1) (emphasis added). EPA's power over existing sources is thus far more limited. First, EPA may issue "regulations which shall establish a procedure … under which each State shall submit" its plan. *Id*. Those regulations, moreover, "shall permit the State in applying a standard of performance to any particular source … to take into consideration, among other factors, the remaining useful life of the existing source to which such standard

applies." *Id*. Second, EPA is empowered to "enforce the provisions of such plan in cases where the State fails to enforce" them. *Id*. § 7411(d)(2)(B). Third, EPA may "prescribe a plan for a State in cases where the State fails to submit a satisfactory plan." *Id.* § 7411(d)(2)(A).

There can be no question, then, that EPA lacks the statutory authority it seeks to deploy here. "The preeminent canon of statutory interpretation requires us to 'presume that the legislature says in a statute what it means and means in a statute what it says there.'" *BedRocs Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citation omitted). In Section 111, Congress gave EPA authority to establish standards of performance only for new sources. There would be no point to Section 111(d) if EPA could wield that same authority over existing sources. Courts must "assume that Congress used two terms because it intended each to have a particular, non-superfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995). EPA's interpretation of Section 111 would collapse the distinction between "new" and "existing" sources. The agency's interpretation of the statute should be rejected for that reason alone.

Interpreting Section 111(d) according to its plain meaning also comports with Congress's practical judgment. The CAA, including Section 111(d), employs a "cooperative federalism" structure under which the federal government develops baseline standards but expressly leaves to the States the right to "establish" and

"apply" those standards. 42 U.S.C. § 7411(d)(1). Under this model, as EPA's own rules reflect, Congress tasked EPA with setting an "emission guideline" that "reflects the application of the best system of emission reduction," and it tasked the States with submitting plans that establish standards of performance for existing sources. 40 C.F.R. §§ 60.21(e), 60.22(b)(5), 60.23. Importantly, the "States may provide for the application of less stringent emissions standards or longer compliance schedules than those otherwise required" by an EPA emission guideline based on factors such as "[u]nreasonable cost of control resulting from plant age, location, or basic process design"; "[p]hysical impossibility of installing necessary control equipment"; and "[o]ther factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable." 40 C.F.R. § 60.24(f).

In shaping this regime, Congress recognized that the States, not the federal government, have the facts on the ground and the relationships with local businesses and communities needed to determine what emission rates and compliance deadlines are actually achievable by existing sources in that State. The Rule nakedly disregards Congress's directive, replacing this cooperative-federalism model with an unprecedented federal command-and-control structure. As EPA acknowledges, it has established mandatory "state-specific rate-based and mass-based goals," 80 Fed. Reg. 64,667-68, and has forbidden the States from

making "additional goal adjustments based on remaining useful life and other facility-specific factors," 80 Fed. Reg. at 64,870. This cannot be squared with the plain text of Section 111(d). Federal agencies are charged with *interpreting* statutes in order to "implement a particular provision or fill a particular gap." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). They are not empowered to *rewrite* a federal law, as EPA did here, in a manner that subverts Congress's will.

But even if Section 111(d) were ambiguous, which it is not, there would be no basis for deferring to EPA's interpretation. No deference is owed "to an agency's interpretation of statutes that … are outside the agency's particular expertise and special charge to administer." *Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991). EPA cannot pass either prong of this test. First, deference "to an agency's construction of a statute that *it administers* is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (emphasis added). Congress gave the States—not EPA—the responsibility in Section 111(d) to "establish" and "apply" performance standards for existing sources.

The fact that EPA administers other provisions of the CAA, or has general rulemaking authority, does not alter this conclusion. *See Adams Fruit Co. v.*

Barrett, 494 U.S. 638, 649-50 (1990). In *Adams Fruit*, the Department of Labor ("DOL") sought deference to its interpretation of Section 1854(a) of the Migrant and Seasonal Agricultural Worker Protection Act. *Id.* at 649. Like EPA, DOL administered various other provisions of the law and had rulemaking authority. *See id*. at 649-50. But that was immaterial. The Court would not permit the agency "to bootstrap itself into an area in which it has no jurisdiction." *Id*. at 650. So too here. A far more "specific responsibility for administering" Section 111(d) than what EPA can claim would be needed "to trigger[] *Chevron*." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment).

Second, EPA lacks the "expertise" that is the touchstone for *Chevron* deference. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Mead Corp.*, 533 U.S. at 228 (looking to the "relative expertness" of the agency). Indeed, as Petitioners demonstrate, EPA itself has admitted that it lacks expertise to "manage[] energy markets." Pet. Br. 35-36. Moreover, this Court has recently clarified that "grid reliability" and similar concerns are not "the province of the EPA." *Del. Dep't of Natural Res. & Envtl. Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015). But the States traditionally have exercised just such expertise, and it is the States that are best-positioned to determine what emissions reductions are achievable given "the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d). And they have expertise in evaluating whether the "cost" of

achieving the reduction far exceeds the environmental benefit or whether a modification is a "[p]hysical impossibility." 40 C.F.R. § 60.24(f). EPA clearly lacks the jurisdiction and expertise to restructure the electricity sector in all of the States. No deference is owed to a regulatory agenda so removed from EPA's enabling legislation and specialized experience.

In the end, the President undoubtedly disagrees with Congress's decision not to pass carbon-limiting legislation. But the Constitution does not give the executive branch "the unilateral power to change the text of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 447 (1998). As this Court has explained, "the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013). EPA may disagree with Congress's decision not to enact a cap and trade regime for existing sources in an effort to reduce carbon emissions, but that was Congress's decision to make. "When Congress gives an agency its marching orders, the agency must obey all of them, not merely some." *Pub. Citizen v. NRC*, 901 F.2d 147, 156 (D.C. Cir. 1990).

Accordingly, the fact that climate change is a politically sensitive issue does not authorize deference to an impermissible construction of the CAA. Congress's refusal to pass certain laws "does not justify unconstitutional remedies." *Clinton*, 524 U.S. at 449, 452-53 (Kennedy, J., concurring). Regardless of legislative

inaction, agencies "are not at liberty to rewrite [laws] to reflect a meaning [they] deem more desirable." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008). Congress has been entrusted with "the final say on policy issues." *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 234 (1956). On this issue, Congress granted the States—not EPA—the power to establish standards of performance for existing sources. That is the end of the matter as far as *Chevron* is concerned.

II. EPA's Rule Will Cause Substantial Harm to Local Businesses, with Little to No Benefit.

The Rule not only exceeds EPA's authority, but the centralized, command-and-control model it installs will cause significant harm to local businesses and economies, while doing little to accomplish its stated objective of ameliorating climate change. "[T]he States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); *see also Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377-78 (1983); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). States have exercised this authority, which Section 111(d) preserves, successfully to balance the CAA's environmental goals with the economic needs of local communities.

Time and again, the States have been able to create satisfactory plans for existing sources—and the broader electricity system that EPA seeks to regulate—

that are appropriately sensitive to the unique circumstances of individual businesses and communities. For example:

- The New York State Department of Environmental Conservation's Division of Air Resources prepared a State Implementation Plan addressing reductions in the emissions of visibility impairing pollutants in the northeastern United States along I-95. *See* New York State Implementation Plan for Regional Haze, at 9-11 (Feb. 2010) (establishing regional progress goals specific to the local region to recognize the different needs of high- and low-traffic areas), *available at* http://goo.gl/exHJVN.

- In Michigan, after EPA designated a seven-county area as nonattainment, the State determined that the issue was limited to a small geographic area. Michigan imposed local controls on a handful of sources in that area and was thus able to avoid broader controls that would have impacted businesses in other areas. *See* Michigan Department of Environmental Quality Air Quality Division, State Implementation Plan Submittal for Fine Particulate Matter ($PM_{2.5}$), at 45-49 (May 15, 2008), *available at* http://goo.gl/y6YabL.

Moreover, the States have made sustained environmental progress without causing economic harm. For example:

- New Jersey already has invested approximately $3.27 billion in ratepayer funds to advance solar development and energy efficiency initiatives before 2013. These prior investments continue to expand renewable energy generation and produce energy savings. *See* Motion to Stay by West Virginia *et al.*, Declaration of New Jersey Department of Environmental Protection in Support of Stay, ¶ 15 (Oct. 23, 2015).

- The Public Utility Commission of Texas has significantly expanded renewable energy options within the framework of the State's uniquely competitive wholesale and retail electricity markets. This is a complicated process, requiring constant local-level supervision to integrate renewable energy sources while maintaining grid reliability.

Local governments and communities in Texas, however, are making substantial progress on their own.[3]

- As of 2012, South Dakota's wind energy already comprised 24 percent of its power generation, none of which is recognized by the Rule. *See* Motion to Stay by West Virginia *et al.*, Declaration of South Dakota Department of Environment & Natural Resources, ¶ 18 (Oct. 23, 2015) ("S.D. Decl."). It bears noting that most, if not all, such progress the States have made in wind energy installation will not count towards compliance credit under the Rule.

Instead of allowing States to implement and enforce performance standards for existing emissions sources, however, the Rule scraps Congress's design in favor of a centrally-designed, blunderbuss approach. In so doing, EPA has adopted a regulatory model that does not (and cannot) account for the unique circumstances that different communities throughout the nation confront. In short, it eliminates the flexibility that is the centerpiece of Section 111(d).

The Rule requires a fundamental restructuring of the power sector, compelling States, utilities, and suppliers to adopt EPA's preferred sources of power and fuel and to redesign their electricity infrastructure. In order to achieve the Rule's emission reduction demands, the States will be forced to shift from coal-fired plants to other electricity generation measures. The Rule thus mandates

[3] *See* Public Utility Commission of Texas, Comments on Proposed Rule for Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Dec. 6, 2014), *available at* http://goo.gl/KiXQlf; *see also* Motion to Stay by West Virginia *et al.*, Declaration of Brian H. Lloyd, ¶¶ 71-72, 78-81 (Oct. 23, 2015).

changes to the power generation mix in individual States, usurping the States' traditional authority in this area and causing substantial economic harm.

Specifically, the Rule will cause numerous coal-fired plants to retire in the near future. Coal mines associated with the shuttered plants will have to reduce operations or close entirely, laying off their employees in the process. Thousands of businesses providing support services to coal-fired plants and coal mines will suffer, and many will have to lay off workers or close their doors entirely. In many areas, power generation and mining jobs are the principal drivers for the local economy. Meanwhile, consumers will see their electricity rates rise as affordable power sources close and utilities are forced to build expensive new plants. In short, the economic consequences of the Rule will be substantial. *See* Motion to Stay by Chamber of Commerce of the United States of America *et al.*, Declaration of Karen Alderman Harbert, Ex. 7-A, ¶¶ 17-28 (Oct. 23, 2015).

These concerns are not theoretical. Just a few examples of the harms the Rule will cause include the following:

- National Economic Research Associates ("NERA") recently found that the Rule will cause average annual electricity rates to spike between 11 and 14 percent nationwide, with 28 states potentially facing peak year electricity price increases of at least 20 percent. Further, NERA projects that compliance would require $192 billion in energy efficiency expenditures, which would overwhelm the benefits from those expenditures. *See* NERA, Energy and Consumer Impacts of EPA's Clean Power Plan 5, 7, 39-40 (2015), *available at* http://goo.gl/Yn5ki8.

- In Ohio, the Rule "would cause wholesale market energy prices to be 39 percent higher in calendar year 2025 than prices would otherwise be," costing Ohioans "approximately $2.5 billion (in nominal dollars) more for electricity in 2025 alone." Testimony of Asim Z. Haque, Vice-Chairman, Public Utilities Commission of Ohio, before Energy Mandates Study Committee, at 3-4 (Feb. 5, 2015), *available at* http://goo.gl/MGPr9f.

- South Dakota has only one coal-fired plant and one natural gas plant, so shutting down the coal plant could leave customers without electricity. *See* S.D. Decl. ¶ 17.

In short, the result will be economic disaster. By reconfiguring the nation's power sector in an extremely short period of time, the Rule will raise the cost of operations for countless businesses. That approach, in turn, threatens to drive jobs overseas and force businesses to close, causing harm to communities that provide the workforce for this industry. Moreover, poor and rural communities will suffer disproportionately because they are served by smaller utilities that will be compelled to shut down or engage in expensive "generation shifting" or purchasing allowances and credits in renewable energy technologies, the costs of which will be borne by their relatively small base of rate payers.

Finally, not only will the Rule impose significant economic harm to industry and local economies, but it will do so with little to no impact on climate change, based on EPA's own analysis. Section 111 requires EPA to account for the costs of compliance with the Rule. *See* 42 U.S.C. § 7411(a)(1). Instead of acknowledging the true costs of the Rule, however, EPA resorts to unacceptable methods of

inflating its purported benefits and undercounting its true costs. For example, EPA wrongly points to foreign benefits to justify domestic costs[4] and fails to account for "carbon leakage," which is the risk that energy-intensive domestic industries will move plants and activities abroad in response to the Rule.[5] *See* C. Boyden Gray, *A Cost-Benefit Analysis from EPA Lacking in Common Sense*, Wash. Times (July 29, 2014), *available at* http://goo.gl/Lzu3hq.

Not only does EPA engage in faulty and deceptive economic reasoning, but it also impermissibly relies on the Clean Power Rule's alleged "co-benefits"—*i.e.*, incidental reductions in emissions of criteria pollutants (mainly $PM_{2.5}$ and its precursors SO_2 and NOx) that are already addressed in the National Ambient Air Quality Standards and the state plans to attain and to maintain those standards. Reliance on such co-benefits to justify the Rule violates Section 111(d), which expressly excludes criteria pollutants from the scope of the CAA's delegation of rulemaking authority. But most of the benefits EPA attributes to the Rule are, in

[4] Indeed, the Rule is arbitrary because it relies on projected *foreign* benefits, which are beyond the scope of the CAA. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (regulation premised upon "factors which Congress has not intended [an agency] to consider" is arbitrary).

[5] The Rule will raise electricity costs, affecting the profitability of firms and the economic welfare of consumers. Carbon leakage is a material risk under these circumstances. *See, e.g.*, Parker & Blodgett, Cong. Research Serv., *"Carbon Leakage" and Trade: Issues and Approaches* 1 (Dec. 19, 2008), *available at* http://goo.gl/QRmZtR. By failing to account for carbon leakage, EPA "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

fact, co-benefits. Of particular note, although the Rule is directed at greenhouse gas emissions, 80 Fed. Reg. at 64,662, most of the projected benefits come from claimed reductions of other pollutants, such as particulate matter ($PM_{2.5}$) and ozone. Indeed, EPA's invocation of so-called "co-benefits" is a well-worn accounting trick used repeatedly for the same pollutants in prior CAA rulemakings; OMB found that "the large estimated benefits of EPA rules issued pursuant to the [CAA] are mostly attributable to the reduction in public exposure to a single air pollutant: *fine particulate matter*." Office of Mgmt. & Budget, Exec. Office of the President, OMB, 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities 15 (2013) (emphasis in original), *available at* https://goo.gl/ufrmSO. EPA's reliance on co-benefits is particularly problematic because EPA has an independent statutory responsibility to establish ambient air quality standards for particulate matter. Because EPA already regulates $PM_{2.5}$ under Sections 108 and 109, the benefits of those actions cannot be used to justify the Rule under Section 111(d). Permitting EPA to use such illusory and statutorily irrelevant co-benefits to justify the Rule would thus amount to an unconstitutional delegation of legislative power.

At base, the point of cost-benefit analysis is to ensure that new regulatory burdens are worth the upheaval they will undoubtedly cause. Including incidental emissions reductions of non-target pollutants (especially where those non-target

pollutants are separately regulated), however, masks the Rule's costs by failing to consider whether the non-target pollutant could be regulated more effectively through different means. Including unlawful co-benefits thus obscures the impact of the rule on the targeted pollutant (CO_2) and creates deliberate confusion regarding the Rule's costs and benefits. Without the artificial consideration of these purported co-benefits, the Rule's benefits would be seen for what they are: vastly exceeded by its costs.[6]

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court grant the petitions and vacate the Rule.

Respectfully submitted,

By: /s/ William S. Consovoy

Michael H. Park
CONSOVOY MCCARTHY PARK PLLC
3 Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

Counsel for Amici Curiae

Dated: February 23, 2016

[6] *See* National Federation of Independent Business, Comments on the Proposed Rule for Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, at 65-74 (Dec. 1, 2014), *available at* https://goo.gl/WuQLyc.

CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ William S. Consovoy
William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 5,041 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ William S. Consovoy

William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ William S. Consovoy

William S. Consovoy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
Counsel for Amici Curiae