ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

No. 15-1363 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et. al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petitions for Review of Final Agency Action of the United States Environmental Protection Agency 80 Fed. Reg. 64,662 (Oct. 23, 2015)

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS STATE OF WEST VIRGINIA, *et. al.*

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the unauthorized actions taken by the Environmental Protection Agency in this case.

INTRODUCTION

Once again, the Environmental Protection Agency ("EPA" or "the Agency") is disregarding limits on its authority placed on the Executive branch by the Constitution's principles of federalism and separation of powers and, in so doing, promulgates a rule allowing granting itself broad new power to regulate the United States' electrical grid. EPA ignores unambiguous limitations contained within the Clean Air Act ("CAA" or "the Act"), forgoes the fact it lacks the requisite expertise to regulate the power sector, and engages in an unconstitutional

[1] Pursuant to D.C. Circuit Rule 29, Amicus Curiae report that neither the State of West Virginia nor the Environmental Protection Agency take a position regarding the filing of this brief. The states of Missouri and Louisiana consent to the filing of this brief. Additionally, pursuant to Fed. R. App. 29(c)(5), Amicus Curiae states that (1) no party's counsel authored the brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person-other than the Counsel for the Amici or their employers – contributed money that was intended to fund preparing or submitting this brief.

legislative act. It does all of this in an attempt to snuff out the most essential component of this nation's electrical power generation. Such brazen action should not be permitted by this Court.

For reasons stated by Petitioners and for reasons stated herein, *Amicus Curiae* Landmark respectfully urges the Court to vacate EPA's Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units ("the Rule").

ARGUMENT

I. THE ENVIRONMENTAL PROTECTION AGENCY MAY NOT RELY ON A DRAFTING ERROR TO REGULATE THE NATION'S ENERGY SECTOR.

As it has repeatedly throughout the current administration's regulatory actions, EPA's Rule stretches the bounds of the Act beyond any rational basis and disregards its clear limitations. *See, e.g.* 75 Fed. Reg. 17,004 ("Timing Rule"), 75 Fed. Reg. 31,514 ("Tailoring Rule"), both of which were rejected by the Supreme Court. EPA relies on a tortured interpretation of Section 111(d) of the Act, 42 U.S.C. § 7411(d), as legislative basis for the Rule. 80 Fed. Reg. at 64,710. In short, EPA states that Section 111(d) is ambiguous and this ambiguity provides the necessary predicate for EPA to mandate new guidelines that will, in effect, regulate the nation's power grid.

In the 1990 Amendments to the Clean Air Act, the Senate passed a "conforming amendment" resulting in two differing versions – one from the Senate and one from the House to Section 111(d) appearing in the Statutes At Large. *See* Pub. L. No 101-549, § 302, 104 Stat. 2399, 2467 (1990). As aptly explained by Petitioner, the version enacted by the House of Representatives is controlling. *See*, Opening Br. For Petitioners on Core Legal Issues ("Br. For Pet.") at 68-74.

Contrary to EPA's assertions, the language in the House amended version of 111(d) is perfectly clear. Inclusion of the Senate amended version (passed almost two months before the House version) into the Statutes at Large amounts to a "drafting error" and cannot formulate the basis for EPA's immense regulatory scheme that will adversely affect the nation's energy sector.

A. While Two Versions Of Section 111(d) Appear In the Statutes At Large, The Version Passed By The House Is Clear, Unambiguous And Controlling.

The version of Section 111(d) passed by the House and appearing in the United States Code provides that the Administer shall prescribe regulations from any existing source:

> (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) [42 USCS § 7408(a)] or emitted from a source category which is regulated under section 112 [42 USCS § 7412] but

> (ii) to which a standard of performance under this section would apply if such existing source were a new source…

According to this clear and unambiguous language, section 111(d) applies only to sources that have "not been issued or which is not… regulated under section 112 [42 USCS § 7412]." Thus, regulation of sources under section 112 bars regulation of those sources under section 111(d).

EPA contends that the exclusion contained in Section 111(d) "does not bar the regulation [under section 111(d)] of non-HAP [Hazardous Air Pollutants] from a source category, regardless of whether that source category is subject to standards from HAP under CAA section 112." Id. at 64,711. EPA also believes that, while the version of section 111 passed by the Senate is "clear and unambiguous," the version passed by the House "is ambiguous." 80 Fed. Reg. at 64,712. This purported ambiguity (according to EPA) permits it to exercise its discretion and interpret the House version in such a manner that permits it to regulate Electric Generating Units ("EGUs") under section 111(d). EPA appropriates a legislative role by reconciling the two versions in such a fashion that permits regulation. *See*, 80 Fed. Reg. 64,715 ("The Section 112 Exclusion in section 111(d) does not foreclose the regulation of non-HAP from a source category regardless of whether that source category is also regulated under CAA section 112.").

Simply put, EPA is barred from regulating EGUs under Section 111(d) because it already regulates these entities under Section 112. In February of 2012, EPA established "[National Emission Standards for hazardous air pollutants] NESHAP that will require coal- and oil-fired EGUs to meet hazardous air pollutant (HAP) reflecting the application of the maximum achievable control technology. [("MATs rule".)]" 77 Fed. Reg. 9,304.

The regulation of EGUs under section 112 triggers the clear prohibition contained in section 111(d). This should end the matter. EPA, however, disregards this language and forges ahead – thus necessitating an analysis of EPA's authority under the well-known framework established in *Chevron v. National Resources Defense Council, Inc.* 467 U.S. 837 (1984).

The commands of *Chevron* require an examination of "whether Congress has directly spoken on the precise question at issue." *Id.* at 842. If Congress has done so, a court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 47 U.S. at 843. When a statute is clear, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

When "Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible." *Food and Drug Administration v. Brown & Williamson Tobacco*,

529 U.S. 120, 132 (2000). U.S. Circuit Judge David S. Tatel put it succinctly when he noted ambiguous language obligates "courts, acting pursuant to the Supreme Court's *Chevron* decision, interpret as a delegation of authority to the agency to fill in the gaps." The Honorable David S. Tatel, *The Administrative Process And The Rule Of Environmental Law,* 34 Harv. Envtl. L. Rev. 1, 4 (2010).

Congress, however, specifically carved out an exemption in Section 111(d) for sources that are already regulated under section 112. As aptly explained by Petitioner, the legislative history of section 111(d) precludes regulation of sources already subject to regulation under section 112(d). In short, the Senate itself receded to the House version of 111(d) despite the fact that both versions appear in the Statutes at Large. S. 1630, 101st Cong., § 108 (Oct. 27, 1990), JA__, reprinted in 1 Leg. History at 885 (1998) (Chafee-Caucus Statements of Senate Managers). Further, EPA has previously acknowledged the Senate's version as a "drafting error." *See* 70 Fed. Reg. at 16,031.

Moreover, the statute must provide an "intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001). Courts should "not ask the hard-to-manage question whether the legislature has exceeded the permissible level of distraction…" Cass R. Sunstein, *Nondelegation Canons*, 67 U. L. Rev. 315, 338 (2000). Instead, courts examine "the far more manageable question whether the

agency has been given discretion to decide something that (under the appropriate canon) only legislatures may decide." *Id.*

Section 111(d) provides no intelligible principle whereby EPA may disregard the clear prohibition and regulate sources already subject to regulation under section 112. In short, there is no legislative delegation from Congress. The language is clear and "absent an extraordinarily convincing justification," EPA cannot "ratify an interpretation that abrogates the enacted statutory text." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). The justifications proffered by EPA that the Senate version of section 111(d) is ambiguous and thus entitled to deference do not constitute "extraordinary circumstances."

II. EPA DOES NOT POSSESS THE REQUISITE EXPERTISE, LET ALONE AUTHORITY TO REGULATE THE POWER SECTOR.

While the language contained in section 111(d) clearly prohibits EPA from regulating sources that are subject to regulation under 112, EPA should also not be entitled to deference for the simple fact that EPA does not possess the requisite expertise to regulate the power sector. As the Supreme Court recently explained, when an agency has no expertise in a particular subject matter, its regulations are not entitled to *Chevron* deference. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). As recently as last year, this Court warned EPA about regulating beyond its area of

expertise by regulating grid reliability. *See Del. Dept. of Nat. Resources v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) ("An undercurrent coursing through this case has been that, while EPA justifies the 2013 Rule on the basis of supporting 'system reliability,' grid reliability is not subject of the Clean Air Act and is not the province of EPA." (internal citations omitted)).

A. EPA's Regulatory Authority Is Limited.

EPA's regulatory authority pertaining to power plants has, in the past, been limited to promulgating requirements that plants install cleaner equipment or implement cleaner processes. *See, e.g.* 42 U.S.C. § 7470, 7661a (Prevention of Significant Deterioration 'PSD' and Title V permitting programs). This authority is specifically granted by statute and does not extended into wholesale regulation of the national power grid. Instead, that regulatory power is shared between the Federal Energy Regulatory Commission ("FERC") and the States. *Federal Energy Regulatory Commission v. Electric Power Supply Association*, 136 S. Ct. 760, 193 L. Ed. 2d 661, 669 (2016).

It is the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et. seq.* that vests FERC, not EPA, with authority to regulate the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. 16 U.S.C. § 824(b)(1). Further, the FPA also contemplates a role for the states in regulating the energy sector. The FPA "also limits FERC's regulatory

reach, and thereby maintains a zone of exclusive state jurisdiction." *FERC v. Electric Power Supply Assoc.*, 193 L. Ed. 2d at 669. Commentators have noted that the "jurisdictional lines Congress drew in the 1935 Act [Federal Power Act] have remained largely unaltered." Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 Iowa L. Rev. 885, 893 (2015).

B. FERC -- And Not EPA -- Has Regulatory Authority Over The Nation's Power Grid.

FERC has exclusive jurisdiction over the "transmission of electric energy in interstate commerce," and over the "sale of electric energy at wholesale in interstate commerce," and "over "all facilities for such transmission or sale of electric energy." 16 U.S.C. § 824(b). *See also*, Lawrence R. Greenfield, *An Overview of the Federal Energy Commission and Federal Regulation of Public Utilities in the United States* (Feb. 19, 2016, 11:31 AM), http://www.ferc.gov/about/ferc-does/ferc101.pdf.

Petitioner extensively explains the enormous impact the Rule will have on the power sector. In short, the Rule dictates to the states the power mix they may have, the new plants and infrastructure they must approve, and how various kinds of plants are operated. *See generally* Opening Br. for Petitioners On Procedural and Record Based-Issues. Should the Rule be upheld as valid, EPA, not FERC

(and certainly not the States) would be the entity with authority over electric power plants and the power grid.

The Administration itself makes no attempt to hide the fact the Rule will allow EPA to regulate the energy grid. It has described the Rule as creating a new "clean energy economy" and "decarbonize[ing]" the power sector. Executive Office of the President, *Climate Change and President Obama's Action Plan*, (Feb. 22, 2016, 3:53), https://www.whitehouse.gov/climate-change. The coal industry will experience extinction. Secretary of State John Kerry has stated that the Rule will "take a bunch [of coal-fired plants] out of commission." Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, The New York Times, Dec. 11, 2014 (Feb. 22, 2016, 4:08), http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=0.

EPA may not "bring about an enormous and transformative expansion of [its] authority" by asserting a purported statutory ambiguity. *Util. Air Regulatory Group v. EPA*, 134 S. C.t 2427, 2444 (2014). This is especially true when an agency attempt to expand its authority by "claim[ing] to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Id.*

FERC and the States have shared regulatory authority over the power grid for decades and EPA has never attempted to use the CAA to appropriate this authority. Thus, should this Court find any ambiguity in Section 111(d), it should resolve such ambiguity by ruling that 111(d) does not give EPA the power to regulate existing EGUs.

By promulgating this Rule, EPA not only violates the principle enunciated in *King v. Burwell* (that an agency with no expertise is not entitled to Chevron deference) but violates traditional notions of separation of powers by engaging in a fundamentally legislative act.

III. EPA ENGAGED IN AN UNCONSTITUTIONAL LEGISLATIVE ACT WHEN IT "RECONCILED" TWO VERSIONS OF SECTION 111(d).

As stated previously, EPA has engaged in a legislative act by attempting to reconcile what it believes to be two controlling versions of Section 111(d). The clear and unambiguous language in this section does not permit EPA to regulate EGUs subject to regulation under 112. Article I, § 1 of the Constitution vests "all legislative Powers herein granted… in a Congress of the United States." This express grant "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001). When Congress authorizes an agency to establish rules "Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Am.*

Trucking Ass'ns., 531 U.S. at 472 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

The legislative power rests solely within Congress under our constitutional system. This concept is central to the separation of powers. "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving v. United States*, 517 U.S. 748, 757 (1996). Thus, "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." *Id.* at 757-758. Accordingly, "[i]ll suited to the task [of lawmaking] are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control." *Id.* at 758. This assignment of powers "allows the citizen to know who may be called to answer for making, or not making those delicate and necessary decisions essential to governance." *Id.*

Separation of powers prevents accumulation of power and encroachments upon liberty. "The accumulation of powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison) (C. Rossiter ed., 1961). Consequently,

"There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," *The Federalist* No. 47 (James Madison) (C. Rossiter ed., 1961) (quoting Montesquieu, *The Spirit of the Laws*).

As noted by Judge Tatel, "The legislative process set out in the Constitution with its bicameralism and veto provisions, is designed to make it difficult to alter the legal status quo. By contrast, agencies, staffed by appointment and somewhat insulated from political accountability, can exercise such power with one bureaucratic pen stroke." The Honorable David S. Tatel, *The Administrative Process And The Rule Of Environmental Law*, 34 Harv. Envtl. L. Rev. 1 (2010).

Of course, there is a constitutionally permissible role for administrative rulemaking. Amicus acknowledges there are instances where a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 120-121 (1976). Further, separation of powers "does not mean that [the three branches] ought to have no partial agency in, or no control over the acts of each other." As the Court has acknowledged, Congress is the only body that "can make a rule of prospective force." *Loving*, 517 U.S. at 758. "To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Id.*

There are limits to the agency's authority however. In *Field v. Clark*, the Court stated, "The true distinction… is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." The Court then distinguished the actions. "The first cannot be done; to the latter no valid objection can be made." *Field v. Clark*, 143 U.S. 649, 693-692 (1892), quoting *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852). Thus, "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things which the law makes, or intends to make, its own action depend." *Id.* at 694.

"EPA may not 'avoid Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) (quoting, in part, *Engine Mfrs. Ass'n. v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). Further, EPA cannot "set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications." *Friends of the Earth, Inc. v. EPA*, 446 F.3d at 145. Commenting publicly on EPA's actions in *Friends of the Earth*, Judge Tatel stated "EPA's decision to ignore the statute's plain words rather than returning to Congress for authority to pursue its preferred policy still

baffles me." The Honorable David S. Tatel, *The Administrative Process And The Rule Of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 3-4 (2010).

In light of these clear edicts, EPA's decision to disregard the clear language of Section 111(d) and attempt to interpret it in such a manner that permits it to regulate the energy grid should not be upheld.

CONCLUSION

For reasons stated herein, Amicus Landmark respectfully requests the Court immediately vacate the Rule and, once again, instruct the EPA to comply with the statutory limitations placed on it by Congress in accordance with the Constitution of the United States.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Richard P. Hutchison, hereby certify that this Brief complies with the type-volume limitations set forth for Amicus Curiae briefs in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,283 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) ant he type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point type face.

Respectfully submitted,

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February 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on this 23 day of February, 2016, a copy of the foregoing Brief of Amicus Curiae Landmark Legal Foundation In Support Of Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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