ORAL ARGUMENT HAS BEEN 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.

BRIEF FOR MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

On Petition for Review from the Environmental Protection Agency

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February 23, 2016

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Amici Curiae Members of Congress respectfully file this Certificate as to Parties, Rulings, and Related Cases, as required by Fed. R. App. P. 28(a)(1) and D.C. Cir. Rule 28(a)(1).

I. PARTIES AND AMICI

The Parties, Intervenors, and other Amici to the proceeding in this Court are listed in Petitioners' briefs filed with this Court on February 19, 2016.

II. RULING UNDER REVIEW

Under review in this proceeding is an Environmental Protection Agency ("EPA") final action identified as the *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, EPA-HQ-OAR-2013-0602, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (the "Final Rule").

III. RELATED CASES

This case is consolidated with Case Nos. 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, 15-1409, 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. Certain other related cases are set forth in Petitioners' briefs filed with this Court on February 19, 2016.

On February 9, 2016, the United States Supreme Court entered an order staying EPA's implementation of the Final Rule pending the outcome of the current litigation before this Court and/or the Supreme Court. (Case Nos. 15A773, 15A776, 15A778, 15A787, and 15A793).

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STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY

Amici are 34 Senators and 171 Representatives duly elected to serve in the Congress of the United States in which "[a]ll legislative Powers" granted by the Constitution are vested.[1] U.S. Const. art. I, § 1. A full list of Amici is provided below. Amici have strong institutional interests in preserving Congress' role in making law for the nation, including the determination of climate change-related laws and policies. In light of the issues in this case involving the Clean Air Act, 42 U.S.C. § 7401 et seq., Amici seek to provide new and additional insights for the benefit of the Court as it considers this important matter. Amici submit this brief as governmental entities, in an official capacity as officers of the United States, pursuant to Fed. R. App. P. 29(a) and D.C. Cir. Rule 29(b) and (d).

[1] No party's counsel authored this brief in whole or in part, nor has a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, nor has a person contributed money that was intended to fund preparing or submitting the brief. Other attorneys with the undersigned counsel's law firm are counsel of record for certain of the Petitioners, but those attorneys had no part in the authoring, preparing, or filing of this brief.

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GLOSSARY

CAA or the Act	Clean Air Act, 42 U.S.C. § 7401 et seq.
CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
Final Rule	*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, EPA-HQ-OAR-2013-0602, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
HAPs	Hazardous Air Pollutants
MATS Rule	Mercury and Toxic Standards Rule, 40 C.F.R. pt. 63, subpt. UUUU
OLRC	Office of Law Revision Counsel

STATEMENT REGARDING ADDENDUM

All pertinent statutes and regulations are contained in the Addendum to Petitioners' briefs filed with this Court on February 19, 2016.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . ." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S. Ct. 903, 912 (2001) (Scalia, J., majority opinion). "[W]hen Congress confers decisionmaking authority upon agencies," an important principle applies: Congress cannot give, and an agency cannot exercise, "decisionmaking authority" without an "intelligible principle" to which the agency "is directed to conform." *Id*. Thus, when an agency sets "air standards that affect the entire national economy," there must be "substantial guidance" from Congress that the agency must follow. *Id.* at 913. This case involves a new regulation where the agency fails to "conform" to clear congressional instructions and is seeking to usurp the role of Congress to establish climate and energy policy for the nation. *Cf.* U.S. Const. art. II, § 3 (requiring the Executive Branch to "take Care that the Laws be faithfully executed").

Since 1963, Congress has enacted a collection of federal air protection laws, most notably the Clean Air Act ("CAA" or the "Act") and its major amendments in 1970, 1977, and 1990. Petitioners challenge a rule issued by the U.S. Environmental Protection Agency ("EPA") ostensibly pursuant to CAA Section 111(d), a rarely used provision of the Act that reflects policy choices made by

Congress about the regulation of sources of emissions. *See* 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) ("Final Rule"). Congress amended Section 111(d) of the Act in 1990 to prevent duplicative regulation of the same source categories under both Sections 111(d) and 112 of the CAA. In 2011, the Supreme Court also recognized that "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated . . . under . . . [Section 112]." *Amer. Elec. Power. Co. v. Connecticut*, 564 U.S. 410, 131 S. Ct. 2527, 2537 n. 7 (2011) ("*AEP*"). Because EPA already regulates power plants under Section 112, Section 111(d) cannot serve as the statutory basis for EPA's authority to promulgate the Final Rule. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("If the statutory language is plain, we must enforce it according to its terms."). Thus, the Final Rule has no lawful basis.

Furthermore, contrary to the policy choices made by Congress, the Final Rule seeks to transform the nation's electricity sector by setting carbon dioxide ("CO_2") emission reduction mandates for the States. Congress never authorized EPA to compel the kind of massive shift in electricity generation effectively mandated in the Final Rule. To the contrary, the plain language of Section 111(d) authorizes EPA to establish procedures for the States to submit plans establishing "standards of performance" for "existing sources," 42 U.S.C. § 7411(d), and, in

turn, Congress defined "standard of performance" in terms of the "application of" the "best system of emission reduction" for those sources. *Id.* at § 7411(a).

The Final Rule goes well beyond the clear statutory directive by, among other things, requiring States to submit, for approval, state or regional energy plans to meet EPA's predetermined CO_2 mandates for their electricity sector. In reality, if Congress desired to give EPA sweeping authority to transform the nation's electricity sector, Congress would have provided for that unprecedented power in detailed legislation. Indeed, when an agency seeks to make "decisions of vast 'economic and political significance'" under a "long-extant statute," it must point to a "clear" statement from Congress. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S. Ct. 1291, 1315 (2000)). EPA can point to no statement of congressional authorization for the Final Rule's central features, precisely because there is none.

Nor has Congress authorized EPA to make the policy choices that are reflected in the Final Rule—a rule that imposes enormous costs on States and the public without achieving meaningful climate benefits. Because of the Final Rule, States will face unprecedented new regulatory burdens, electricity ratepayers will be subject to billions of dollars in compliance costs, and American workers and their families will experience the hardship of job losses due to power plant

shutdowns, higher electricity prices, and overall diminishment of the nation's global economic competitiveness. Choices of this nature are inherently Congressional decisions. *See W. Minn. Mun. Power Agency v. Fed. Energy Regulatory Comm'n*, 806 F.3d 588, 593 (D.C. Cir. 2015) ("Agencies are empowered to make policy only insofar as Congress expressly or impliedly delegates that power.") (citing *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445 (2014)). Congress has not authorized EPA to make the central policy choices in the Final Rule and, in many respects, has affirmatively rejected those policies, as it certainly did with respect to cap-and-trade programs for CO_2 emissions from power plants.

Accordingly, the Final Rule that has been properly stayed by the Supreme Court should now be vacated by this Court.

ARGUMENT

I. Congress Excluded Section 112-Regulated Power Plants From Concurrent Regulation Under Section 111(d).

The Final Rule cites CAA Section 111(d) as its sole statutory basis, *see* 80 Fed. Reg. at 64,710, even though Congress clearly stated that provision does not apply to sources regulated under Section 112 (the "Section 112 Exclusion"). EPA seeks to avoid the Section 112 Exclusion, both as written by Congress and as articulated by the Supreme Court, in two ways: first, by effectively rewriting Section 111(d), and second, by relying on an inexecutable remnant of statutory

language that was properly excluded from the U.S. Code when the 1990 amendments to the CAA were codified in 1992. Both infringe upon the legislative powers of Congress and must be rejected.

A. EPA May Not Disregard Section 111(d)'s Plain Meaning.

Section 111(d) is a provision of limited scope and applicability and, as such, has only been employed by EPA with respect to a few source categories like fertilizer plants and pulp mills, primarily in the 1970s and 1980s. Since 1990, when Section 111(d) was narrowed even further, only one other source category has been regulated under this authority—municipal landfills. *See* 40 C.F.R. pt. 60, subpt. CC.

In Section 111(d), Congress excluded from regulation under that provision any existing source categories that are regulated under Section 112, which is a section of the Act establishing costly and burdensome standards for sources of hazardous air pollutants ("HAPs"). Specifically, in Section 111(d), Congress authorized EPA to issue procedures for States to establish standards of performance[2] "for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112]." 42 U.S.C.

[2] A "standard of performance" is defined under Section 111 to mean "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

§ 7411(d). EPA has previously explained that, by inserting the Section 112 Exclusion into the Act, "the House [of Representatives] did not want to subject Utility Units [power plants] to duplicative or overlapping regulation." 70 Fed. Reg. 15994, 16031 (Mar. 29, 2005). EPA also has acknowledged that "a literal reading of [the House] amendment is that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112." *Id.* As explained in pt. I.B of this brief, the House amendment is the statutory language properly in the U.S. Code.

EPA currently regulates, among other things, coal-fired power plants under a rule issued in 2012 under the authority of CAA Section 112. *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012) (codified at 40 C.F.R. pt. 63, subpt. UUUU) ("Mercury and Air Toxics Standards" or "MATS Rule"). Therefore, according to the plain language of the Section 112 Exclusion, EPA cannot *also* regulate the same power plants under Section 111(d).

In the Final Rule, however, EPA has effectively rewritten the law to allow it to regulate power plants under both Section 111(d) and Section 112, so long as EPA simply identifies *different pollutants* for each rule. *See* 80 Fed. Reg. at 64,710 ("[S]ection 111(d) applies to *air pollutants* that are not regulated . . . as a *hazardous air pollutant* (HAP) under CAA section 112.") (emphases added). This

new interpretation is not what the statute says in plain terms, as EPA had recognized for two decades prior to the Final Rule.

In addition to contradicting the statute's plain language, EPA's new interpretation of Section 111(d) also differs from the Supreme Court's own explanation of Section 111(d) in *AEP*. There, the Court articulated the Section 112 Exclusion in the context of a CO_2-specific case without limiting its application to the *same pollutants*. Specifically, the Supreme Court explained: "There is an exception: EPA may not employ [Section 111(d)] *if existing stationary sources* of the pollutant in question *are regulated* under . . . the 'hazardous air pollutants' program, [Section 112]." *AEP*, 131 S. Ct. at 2537 & n. 7 (emphases added). While it is true that, in 2011, the Supreme Court acknowledged EPA's ability to regulate power plants under Section 111(d), *id*. at 2537–38, EPA effectively surrendered such authority when it issued the MATS Rule in 2012—a rule promulgated under Section 112 that remains in effect today. In other words, because EPA chose to promulgate the MATS Rule (thereby regulating coal-fired power plants under Section 112), EPA cannot rely on Section 111(d) as the source of its authority for the Final Rule. The plain language of the statute cannot be read otherwise, and EPA's purported "interpretation" should be accorded no deference. *Utility Air Regulatory Grp.*, 134 S. Ct. at 2446 (stating that EPA may not "rewrite clear statutory terms to suit its own sense of how the statute should operate").

B. The U.S. Code Sets Forth the Complete and Accurate Text of Section 111(d) as Amended.

To support its reinterpretation of Section 111(d), EPA relies on an obsolete "conforming amendment" in the Statutes at Large. EPA claims there are really "two differing amendments"—House and Senate—which were "never reconciled in conference." 80 Fed. Reg. at 64,711. In EPA's view, because the U.S. Code reflects only the House amendment, the Code language is incomplete. "Both amendments," EPA reasons, "were enacted into law, and thus both are part of the current CAA." 80 Fed. Reg. at 64,711–12. Contrary to EPA's assertions, the House and Senate reconciled their substantive amendments to the CAA in conference, and their agreement is accurately reflected in the text of Section 111(d) in the U.S. Code. A brief examination of the legislative history of the amended Section 111(d) in the U.S. Code eliminates any confusion about what constitutes the correct text of the statute.

1. The Senate Receded to the House, Making the Senate's Conforming Amendment Obsolete.

The legislative history of the 1990 amendments to the CAA shows that Congress intended the language in the U.S. Code to be the law. The provisions of Section 111(d) in the U.S. Code were proposed by the President in legislation

formally submitted to Congress in the summer of 1989,[3] which was subsequently incorporated into legislation considered and passed by the House. The Senate and House conferees considered and amended the substantive section containing House-originated statutory language providing that sources regulated under Section 112 cannot be regulated under Section 111(d). The Senate then expressly receded to the House with respect to this substantive provision.[4] To say the Senate "receded" to the House is simply to say that, as agreed to by the House and Senate conferees, the substantive House amendment controls. Moreover, by receding to the House language, the conferees effectively removed obsolete references to Section 112(b)(1)(A) in the underlying Clean Air Act.

The legislative history also shows that a Senate-originated provision—a non-substantive "conforming amendment" in language revising Section 112—was inadvertently included in the enacted statute. The Senate amendment's sole purpose was to update a cross-reference to account for the fact that parts of Section 112 were renumbered by other amendments. Once the substantive House provisions were adopted—which removed the reference to Section 112(b)(1)(A)—this technical edit was rendered inexecutable because the reference it replaced no

[3] *See* Proposed Legislation, "Clean Air Act Amendments of 1989," available at http://docs.house.gov/meetings/IF/IF03/20151022/104065/HHRG-114-IF03-20151022-SD009.pdf.

[4] Chafee-Baucus Statement Of Senate Managers, S. 1630, The Clean Air Act Amendments Of 1990, 136 Cong. Rec. S16933–53.

longer existed. Specifically, because the House amendment removed the reference to Section 112(b)(1)(A) entirely, there was no "(1)(A)" left to remove through a "conforming amendment."

The independent Office of Law Revision Counsel ("OLRC"), discharging its statutory duty to make technical, non-substantive corrections when compiling enacted statutes for inclusion in the U.S. Code, identified this obsolete provision and corrected it in 1992.[5] In fact, as the Law Revision Counsel has explained in correspondence:

> The amendments made by Public Law 101-549 were first reflected in the Code in Supplement II to the 1988 edition of the Code, published in 1992. With respect to section 302(a) [*i.e.*, the Senate amendment language], that Supplement included an amendment note for 42 U.S.C. § 7411 [CAA Section 111], saying, "§ 302(a), which directed the substitution of '7412(b)' [CAA Section 112(b)] for '7412(b)(1)(A)' [CAA Section 112(b)(1)(A)] **could not be executed** because of the prior amendment" made by section 108(g) [*i.e.*, the House amendment language].[6]

[5] The OLRC is an independent, non-partisan office within the House of Representatives, which Congress has charged with preparing a compilation of the laws of the United States "which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections . . . with a view to the enactment of each title as positive law." 2 U.S.C. § 285(b)(1).

[6] Letter from Ralph V. Seep, Law Revision Counsel, Office of the Law Revision Counsel, to Hon. Tom Marino, Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary, at 3 (Sept. 16, 2015) ("OLRC Letter") (emphasis added). A copy of the letter is attached to the November 2, 2015 letter from Reps. Upton, Murphy, and Whitfield to EPA Administrator McCarthy, which is available at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20151102EPA.pdf.

The OLRC, thus, did exactly what it was required to do: it eliminated the obsolete conforming amendment because it "could not be executed."

2. Removing Obsolete Conforming Amendments Is Standard Practice.

There is nothing unusual about the OLRC removing an obsolete conforming amendment inadvertently included in the Statutes at Large.[7] Under standard OLRC practice, the presence of an inexecutable conforming amendment in the Statutes at Large cannot be taken as evidence that there are somehow two separate, competing versions of the same provision, as EPA would have it. This is because basic principles of legislative drafting, as reflected in House and Senate drafting manuals, require that substantive amendments be applied first, followed by any remaining conforming amendments that have not been rendered obsolete.[8]

Here, the OLRC followed this standard procedure by giving precedence to the substantive House provision over what otherwise would have been a necessary, but non-substantive, technical correction. There was no dispute about whether the Senate text was a conforming amendment.[9]

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[7] *See* Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, at 36 n.15 (collecting examples), *West Virginia v. EPA*, No. 15A-773 (U.S. Jan. 26, 2016).

[8] *See* Senate Legislative Drafting Manual § 126(b)(2)(A); *accord* House Legislative Counsel's Manual on Drafting Style § 332(b)(2) (identifying a conforming amendment as "relat[ed] [to the] principal amendment").

[9] The Senate language is found in Section 302 of the Public Law text. As the Law Revision Counsel explains: "Note that the heading of section 302 of Public Law 101-549 is

As the Law Revision Counsel notes, EPA has not identified any provision in the revised Section 112 language that would still require the conforming amendment in Section 111:

> If there is no such provision in section [112], the reason may be that the inclusion of section 302(a) in Public Law 101-549 was a mistake—perhaps because it was a remnant of an early version of the bill that contained provisions making changes that were later dropped from the bill—and not an attempt to pass off a significant change as a conforming amendment.[10]

Because the obsolete conforming amendment has no substantive effect on Section 112—and neither EPA nor anyone else has shown otherwise—"section 302(a) [the Senate amendment] would properly be treated as a dead letter." *Id.*

3. EPA's Reinterpretation Is Implausible.

EPA's argument that Congress intended to give substantive weight to an obsolete conforming amendment assumes an implausible view of the legislative process. As the Law Revision Counsel observes:

> For a member to include under the heading "CONFORMING AMENDMENTS" a provision that actually is intended to make a change in the meaning or effect of a law, not as an adjunct to but as an addition to changes made elsewhere in a bill, would be seen as a breach of trust among the members, to put it mildly.[11]

'SEC. 302. CONFORMING AMENDMENTS.' A legislator uses that heading to indicate to the other members of the legislative body that the section contains nothing that would change the meaning or effect of the law, [and] that it contains only technical changes in provisions of law that are inarguably necessary to allow changes made in other sections to be effectuated . . . ." OLRC Letter, at 4.

[10] *Id.*

[11] *Id.*

There is no evidence that such a breach of trust occurred.

In fact, EPA itself has repeatedly acknowledged that the presence of the obsolete Senate amendment language in section 302(a) of the Public Law print of the bill is the result of "apparent drafting errors."[12] As this Court found in *American Petroleum Institute v. SEC*, a mere "scrivener's error" should not be taken as "creating an ambiguity." 714 F.3d 1329, 1336–37 (D.C. Cir. 2013). EPA nevertheless now seeks to transform this technical error that had no substantive effect into a statutory "ambiguity," thereby "laying claim to extravagant statutory power over the national economy"—even though "the authority claimed would render the statute 'unrecognizable to the Congress that designed' it." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quotation omitted).

II. Through the Final Rule's Expansive Regulatory Requirements, EPA Has Usurped the Role of Congress.

The Final Rule, which spans 303 pages of the Federal Register, is a testament to the creative inclinations of federal agencies. Virtually no part of the nation's electricity sector is unaffected. Creativity is one thing; the bounds of the law are quite another. As described below, EPA is seeking to exercise powers the agency simply does not have. Just as the courts lack "creative power akin to that

[12] *See* Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, at 21, available at http://www.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf; *see also* 70 Fed. Reg. at 16,031 (acknowledging that the Senate amendment is nothing more than a "a drafting error . . . [that] should not be considered").

vested in Congress,"[13] federal agencies, too, lack such powers unless they are delegated by Congress, and even then, only within the parameters set by law.[14] Any congressional grant of authority to an agency, including the authority given to EPA under the CAA, is subject to a duty to act "in accordance with law." *See* 5 U.S.C. § 705; *see also* 42 U.S.C. § 7607(d)(9). The regulatory scheme adopted by EPA in the Final Rule violates the bounds of the Act in at least four respects.

A. The Final Rule Violates the Clean Air Act's Foundational Principle of Cooperative Federalism and the Tenth Amendment.

Under our constitutional system of government, the "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925, 928, 117 S. Ct. 2365, 2380–81 (1997) (explaining that State officers cannot be "'dragooned' . . . into administering federal law"). Congress was well aware of this fact when it enacted the CAA, which is built on a principle that the federal government will work cooperatively with the States to achieve air quality goals. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001). Under cooperative federalism statutes, Congress may choose to give agencies, such as EPA, a

[13] *AEP*, 131 S. Ct. at 2536.

[14] *See Am. Trucking Ass'ns*, 531 U.S. at 472, 121 S. Ct. at 912 ("[The] Constitution . . . permits no delegation of [legislative] powers . . ., and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.") (quotation marks and citations omitted; emphasis in original).

prescribed role to set national standards while leaving the administration, implementation, and enforcement of those standards primarily in the hands of the States. With respect to the electricity sector, Congress has sought to guard the States' traditional powers over electricity generation, distribution, and use from the kinds of encroachments found in the Final Rule. In particular, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206, 103 S. Ct. 1713, 1723 (1983); *see also* 16 U.S.C. § 824(b)(1) (reserving jurisdiction over electric generation, distribution, and intrastate transmission to the States); *id.* at § 824o(i)(3) (preserving State authority over the "safety, adequacy, and reliability of electric service").

In the Final Rule, however, EPA takes a *coercive* approach that commandeers the States to implement and enforce the agency's policy choices. EPA does so by mandating CO_2 reductions in most States that cannot be achieved by controls on power plants alone and, instead, would require the States to restructure their electricity sectors. In particular, the Final Rule requires States to, among other things, adopt measures that may include fundamentally altering generation, transmission, and consumption of electricity, enacting new state legislation, adopting emissions trading programs, pursuing energy efficiency and

renewable energy mandates, and expending significant State and local governmental resources to achieve compliance. These will not be short-term obligations. The compliance requirements in the Final Rule continue beyond 2030. *See* 80 Fed. Reg. at 64,669 (requiring efforts to achieve 2030 emission mandates and "maintain that level subsequently").

Assertions about "flexibility" in the Final Rule are unconvincing in light of the substantial reductions in CO_2 emissions mandated for each State—for many, reductions greater than 40% compared to 2012 emission levels.[15] In truth, States have few, if any, real options other than implementing the rule on EPA's terms at great cost to the States and their citizens, or foregoing compliance and awaiting imposition of an onerous federal plan. *See* 80 Fed. Reg. 64,966 (Oct. 23, 2015) (proposed federal implementation plan).

Rules of this nature are inherently contrary to the cooperative federalism that Congress intended the CAA to exemplify and, instead, would commandeer State legislatures and regulatory agencies to achieve EPA's mandates, in violation of both the CAA and the Constitution. *See New York v. United States*, 505 U.S. 144, 175, 112 S. Ct. 2408, 2413 (1992) (holding that the Tenth Amendment prohibits the federal government from "commandeer[ing] state governments into the service

[15] *See* Congressional Research Service, *EPA's Clean Power Plan: Highlights of the Final Rule*, at 11 (Aug. 14, 2015) (listing in Table A-1 state-specific emission rate targets and reduction requirements compared to 2012 baselines).

of federal regulatory purposes"). On many fronts, the Final Rule ventures deep into the regulatory domain of the States without a "clear indication"—or, as in this case, *any* indication—"that Congress intended that result." *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172, 121 S. Ct. 675, 683 (2001). An interpretation of a statute that not only encroaches on State authority but also commandeers State legislatures must be set aside. *See id.*

B. EPA Unlawfully Interprets the CAA to Impose Measures That Extend Beyond the Regulated Source.

Regulatory agencies are creatures of the law and, as such, are limited in their powers by the statutes they are authorized to administer. *See Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."). In the Final Rule, EPA imposes measures that affect a wide range of other facilities and activities beyond the regulated source. *Cf. Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts should] greet its announcement with a measure of skepticism.") (citation and quotations omitted). This is directly contrary to the plain language of the Act, which limits EPA's regulatory authority to "sources" of emissions. This is seen throughout the Act, starting with how Congress defines "air pollution prevention"—*i.e.*, with regard to measures designed to reduce or

eliminate "pollutants produced or created *at the source*." 42 U.S.C. § 7401(a)(3) (also referencing "air pollution control *at its source*") (emphasis added).

Likewise, Section 111(d) calls for standards of performance for "any existing source." *Id*. at § 7411(d)(1). When defining "standards of performance" in Section 111(a), Congress answered whether a beyond-the-source approach is permissible in this context. It is not. According to the statutory definition of "standard of performance," the standard must reflect the degree of emission limitation achievable through the "*application of* the best system of emission reduction" that has been "adequately demonstrated." *Id.* at §§ 7411(a)(1) & (d)(1) ("applying a standard of performance *to any particular source*" and allowing consideration of "the remaining useful life of the existing *source to which such standard applies*") (emphases added). Plainly, the term "application" means "the act of applying" an emission reduction system, as in "the act of laying on or of bringing into contact." *Webster's 3d New International Dictionary* 105 (3rd ed. 1993) (defining "application"); *accord* 1 *Oxford English Dictionary* 576 (2d ed. 1989). This would include, for instance, pollution control devices installed at affected "sources"—the word "source" or "sources" is used eight times in Section 111(d) alone. Other key terms relevant to the Section 111(d) analysis do not allow for the kind of regulatory scheme in the Final Rule. *See, e.g.*, *Essex Chem. Corp. v.*

Ruckelshaus, 486 F.2d 427, 433 (D.C. Cir. 1973) (involving a CAA Section 111 case where "achievability" was evaluated with respect to the source).

In contrast, the interpretation of Section 111(d) that EPA urges here—that a "standard of performance" can be determined following an electricity sector-wide approach rather than being based on measures taken at the specific regulated source—is untenable. Congress does not grant such expansive authority without speaking clearly. In the context of a CAA case, the Supreme Court has explained that, to avoid an unlawful delegation of powers to an agency, Congress "must provide substantial guidance on setting air standards that *affect the entire national economy*." *Am. Trucking Ass'ns*, 531 U.S. at 475, 121 S. Ct. at 913 (emphasis added). Likewise, as this Court explained in *American Bar Association v. FTC*, it is unreasonable to conclude that Congress would have "hidden a rather large elephant in a rather obscure mousehole." 430 F.3d 457, 469 (D.C. Cir. 2005) (overturning a Federal Trade Commission decision that claimed new authority to regulate the practice of law as "financial institutions").

C. The Final Rule Seeks to Establish a CO_2 Cap-and-Trade Program Despite Congress' Repeated Rejection of Such a Program.

The Final Rule seeks to establish state and regional emissions trading programs for CO_2 emissions from the electricity sector. 80 Fed. Reg. at 64,732. This includes detailed provisions related to emissions trading, credits, allowances, monitoring and verification requirements, recordkeeping and reporting, and

"trading-ready" plans. *Id*. at 64,734. This is a crucial part of the regulation, as shown by the fact that the Final Rule employs the word "trading" 530 times. Tellingly, the Final Rule states that "EPA believes that it is reasonable to anticipate that a virtually nationwide emissions trading market for compliance will emerge." *Id*. at 64,732.

Congress has never authorized the creation of a cap-and-trade program to address CO_2 emissions from the electricity sector. In fact, in 2009, the U.S. House of Representatives narrowly approved H.R. 2454, which would have instituted a broad cap-and-trade program for CO_2, but that bill was never brought to a vote in the Senate. Likewise, a cap-and-trade bill introduced in 2009 in the Senate was never put to a vote, due in large part to concerns about impacts on the economy and jobs. *See* Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009).[16]

In contrast, Congress spoke clearly when it intended to authorize the creation of cap-and-trade programs elsewhere in the CAA. Specifically, Congress has authorized a cap-and-trade program to address sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions from power plants. *See* 42 U.S.C. § 7651(b). This "Acid Rain Program" was created by Congress *after* finding that acid rain "from the atmosphere" is a threat to public health and the environment *and* "strategies

[16] *See also* Clean Energy Jobs and American Power Act, Report of the Committee on Environment and Public Works to Accompany S. 1733 together with Additional and Minority Views, S. Rep. No. 111-121 (2010).

and technologies for the control of precursors to acid deposition exist *now* that are *economically feasible*." *Id.* at §§ 7651(a)(1) & (4) (emphasis added). Congress also found that "control measures to reduce precursor emissions from steam-electric generating units [*i.e.*, power plants] should be initiated without delay." *Id.* at § 7651(a)(7).

The Acid Rain Program spans sixteen sections of the Clean Air Act (42 U.S.C. §§ 7651 through 7651o), spelling out precise details and even identifying, by name, the affected power plants with initial emission allowances. *See id.* at § 7651c, Table A. In the course of establishing the Acid Rain Program, Congress made the determination on virtually all key policy questions, leaving few details to be determined by EPA in rulemaking. Meanwhile, nothing in the CAA so much as hints at a similar cap-and-trade system for CO_2 emissions. Accordingly, this Court should reject EPA's argument that, concurrent with creating a detailed trading program for SO_2 and NO_x emissions from power plants in the 1990 Amendments, Congress tucked away in Section 111(d) an even greater power for EPA to create, *sua sponte*, a comprehensive regulatory emissions trading system for CO_2 emissions, all without any conditions, limitations, or instructions from Congress. This simply cannot be. While the CAA does allow for certain cap-and-trade programs to address SO_2 and NO_x emissions, "the Congress did not—and EPA may not, consistent with *Chevron*, create an additional [program] on its own."

Natural Res. Def. Council v. EPA, 489 F.3d 1250, 1259–60 (D.C. Cir. 2007); *see also Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002) (refusing to allow EPA to extend ozone attainment deadlines where Congress gave the agency power to extend such deadlines under other circumstances but not in the context of ozone transport).

During recent floor debates pertaining to S.J. Res. 24, a resolution disapproving the Final Rule that was adopted by the Senate with bipartisan support,[17] Senators expressed concern that EPA is making policy choices that are inherently reserved for Congress. Senator Shelley Moore Capito, for example, explained that "EPA is attempting to impose the same type of cap-and-trade system that Congress rejected."[18] The House of Representatives also adopted this same resolution disapproving the Final Rule on a bipartisan vote.[19]

In short, when it comes to any "question of deep 'economic and political significance' that is central to [a] statutory scheme," if "Congress wished to assign that question to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489. Here, Congress did the opposite. And if anything can be inferred from Congress' repeated rejection of proposed cap-and-trade legislation for CO_2

[17] Roll Vote No. 306, 161 Cong. Rec. S8012 (Nov. 17, 2015).

[18] 161 Cong. Rec. S7980 (Nov. 17, 2015) (statement of Sen. Capito).

[19] Roll Vote No. 650, 161 Cong. Rec. H8837 (Dec. 1, 2015).

emissions, it is that Congress had no intention of conferring upon EPA the very authority that the agency now claims to wield as a central part of the Final Rule.

D. The Final Rule Reflects Policy Decisions That Are Inherently Reserved for Congress.

While EPA is authorized to implement the CAA, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 526, 107 S. Ct. 1391, 1393 (1987). In the Final Rule, EPA usurps this essential policy-setting role of Congress by determining, on its own, to impose significant economic burdens on States and the nation to address climate change in EPA's prescribed way without achieving measurably significant climate benefits. This is not a policy choice that EPA is allowed to make. "No regulation is 'appropriate' if it does significantly more harm than good." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

A report accompanying the joint resolution passed by the House and Senate disapproving of the Final Rule identifies estimates of "annual compliance costs averaging $29 billion to $39 billion" and projections that "losses to U.S. consumers [could] range from $64 billion to $79 billion," and that electricity ratepayers in most states could experience "double digit rate increases." H.R. Rep.

No. 114-349, at 4 (2015).[20] Likewise, testimony received by Congress reflects that American workers and their families will suffer job losses and other hardships resulting from plant shutdowns and other impacts.[21]

Even though the costs that would be imposed on American ratepayers would be in the billions of dollars, EPA does not project that the Final Rule will produce any meaningful impact on global greenhouse gas emissions. H.R. Rep. No. 114-349, at 4 (2015). In fact, in the United States, energy-related CO_2 emissions already have significantly declined, and according to the Energy Information Administration, even in the absence of the rule, U.S. energy-related CO_2 emissions will remain below 2005 levels through 2040. *Id.* The U.S. share of worldwide emissions will continue to decline over that period, whereas CO_2 energy-related emissions in the developing world are projected to grow substantially. *Id.*

Moreover, EPA did not quantify benefits accruing to the United States and its citizens from the Section 111(d) rulemaking in terms of global temperatures, sea

[20] This report accompanied H.J. Res. 72, which is identical to S.J. Res. 24, a resolution passed by the Senate and the House on November 17 and December 1, 2015, respectively.

[21] *See, e.g.*, *EPA's Proposed 111(d) Rule for Existing Power Plants and Ratepayer Protection Act: Hearing Before the House Committee on Energy & Commerce*, 114th Cong. 12–13 (2015) (statement of Lisa D. Johnson, Seminole Electric Cooperative, Inc., on behalf of the National Rural Electric Cooperative Association) (discussing job loss concerns associated with EPA's rule); *id.* at 3–5 (statement of Eugene M. Trisko, American Coalition for Clean Coal Electricity) (citing "[l]arge electricity price increases" and income declines that will result from the implementation of the Clean Power Plan), available at https://energycommerce.house.gov/hearings-and-votes/hearings/epa-s-proposed-111d-rule-existing-power-plants-and-hr-ratepayer.

levels, or other climate-related concerns that are the rationale for the Final Rule.[22] Nonetheless, EPA made a unilateral policy choice, contrary to any authority given to it by Congress, to impose unprecedented environmental compliance burdens on the nation.

CONCLUSION

For the reasons set forth above, the Final Rule is not authorized by law and should be vacated in its entirety by this Court.

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[22] H.R. Rep. No., 114-171, at 3 n.7 ("In response to an Additional Question for the Record (QFR) following the June 19, 2014 hearing, EPA Acting Assistant Administrator McCabe stated that EPA did not model the impacts of the proposed rule on global temperatures or sea rise levels."); *see also* EPA, Clean Power Plan Final Rule – Regulatory Impact Analysis, at Table 4-1, available at http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis ("Table 4-1 summarizes the quantified and unquantified climate benefits in this analysis" but shows no data that quantifies "improved environment" or "reduced climate effects" from CO_2 emissions reductions).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, glossary, and certificates of service and length, but including footnotes) contains 6,100 words as determined by the word-counting feature of Microsoft Word.

Respectfully submitted,

/s/ Ed R. Haden
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

Pursuant to D.C. Cir. Rule 25(c), I hereby certify that, on this the 23rd day of February, 2016, I caused the foregoing document to be electronically filed with the Clerk of Court via the CM/ECF system, which shall effect service upon all counsel of record who are registered CM/ECF users.

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