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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and REGINA A. MCCARTHY, Administrator,
Respondents.

U.S. Ct. App. D.C. Cir. No. 1563 and consolidated cases

Attached is the brief filed on March 31, 2016 on behalf of Former EPA Administrators William D. Ruckelshaus and William K. Reilly as *amici curiae* in support of the validity of EPA's Clean Power Plan in the above captioned case, now pending before the United States Court of Appeals for the District of Columbia Circuit. The brief was jointly prepared by Professors Jody Freeman and Richard Lazarus. As counsel of record, Professor Lazarus formally filed the brief with that court. Their contact information is set forth below:

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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.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and REGINA A. MCCARTHY, Administrator,
Respondents.

FINAL BRIEF OF FORMER EPA ADMINISTRATORS
WILLIAM D. RUCKELSHAUS AND WILLIAM K. REILLY
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Dated: March 31, 2016

CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1) and Fed. R. App. Pro. 26.1, counsel for *amici curiae* Former EPA Administrators William D. Ruckelshaus and William K. Reilly certify as follows:

A. Parties and *Amici*. All parties, intervenors, and *amici* appearing in this Court are listed or referenced in the Brief for the Respondents United States Environmental Protection Agency (EPA) that Administrator Regina A. McCarthy filed March 28, 2016. EPA's brief references and supplements the list provided in the Brief for the Petitioners filed on February 19, 2016.

B. Rulings Under Review. This case addresses petitions for review of EPA's Final Rule, Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 60 Fed. Reg. 64,662 (October 23, 2015).

C. Related Cases. *Amici* adopt the statement of related cases set forth in the Brief for Respondents EPA and Administrator McCarthy.

Dated: March 31, 2016 Respectfully submitted,

/s/ Richard J. Lazarus_____

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GLOSSARY

Clean Power Plan	U.S. Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
EPA	United States Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
RCRA	Resource Conservation and Recovery Act

STATUTES AND REGULATIONS

Applicable statutory and regulatory provisions are contained in the Brief for Respondent EPA.

SUMMARY OF ARGUMENT AND STATEMENT OF COUNSEL AS TO IDENTITY OF *AMICI CURIAE*, INTERESTS IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The Clean Power Plan represents the very kind of pollution control program that *amici curiae* former EPA Administrators William D. Ruckelshaus and William K. Reilly endorsed during their service at EPA. The Plan is a pragmatic, flexible, and cost-effective pollution control program, which properly respects State sovereignty by affording States substantial authority and latitude to decide whether and how best to administer its provisions. The Clean Power Plan also falls well within the bounds of an Administrator's authority to embrace reasonable interpretations of broadly worded statutory language to address unforeseen problems without the need to resort to congressional amendment of current law. Finally, the Clean Power Plan's careful consideration of the emissions-reduction potential available on the modern interconnected electricity grids, and specifically the Agency's endorsement of fuel switching among other pollution control techniques, falls squarely within EPA's purview as the nation's pollution regulator.

Amici's interest in the case is outlined in their Unopposed Motion for Leave to Participate as *Amici Curiae* filed on December 3, 2015, which was granted by Court order dated December 4, 2015, and is also further described in the Unopposed Joint Motion by *Amici Curiae* Supporting Respondent to Exceed Length Limits in the Federal Rules of Appellate Procedure for Amicus Briefs, which was filed on January 27, 2016 and granted by Court order dated January 28, 2016.[1]

ARGUMENT

William D. Ruckelshaus and William K. Reilly are well familiar with this kind of legal challenge to an EPA rulemaking. As former EPA Administrators, their names headline the caption of many of the nation's most famous environmental law cases, including those handed down by this Court. Appointed by Presidents Richard Nixon and Ronald Reagan, Ruckelshaus served as the first and fifth EPA Administrator. President George H.W. Bush appointed Reilly as EPA's seventh Administrator.

[1] Counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part and that no person, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief, except that the Harvard Law School Environmental Law Program provided funds in support of research assistance by current Harvard Law School law students who assisted in the preparation of this brief.

Amici's shared view is that EPA's Clean Power Plan represents a lawful exercise of EPA's regulatory authority under the Clean Air Act to address the unprecedented challenge of global climate change. The Plan seeks a 32 percent decrease in carbon pollution by 2030 from the power sector by targeting for emissions reductions the nation's largest source of greenhouse gases – fossil fuel-fired power plants. *Amici's* aim is to buttress the parties' arguments in support of the Plan's validity with separate arguments based on their many years of experience as Administrators. During their respective tenures, *amici* responded to similarly consequential regulatory challenges under the Clean Air Act and other federal environmental laws. And they are familiar with, and implemented, many of the Clean Air Act provisions centrally relevant to this case. To that end, this brief is limited to two main points.

First, petitioners contend that EPA has exceeded the bounds of its congressionally delegated regulatory authority, as expressed by the terms of the Clean Air Act and their reasonable interpretation. *Amici* disagree. Many of the Clean Air Act's central terms are famously capacious precisely because Congress in drafting the law anticipated EPA's need to address environmental issues as they emerged and evolved over time, in ways not specifically identified at the time of enactment. In that light, the current Administrator's interpretation of the Act in support of the Clean Power Plan falls well within her authority under the Act to

make discretionary judgments in adapting its provisions to new challenges. *Amici* and their fellow Administrators faced similar challenges under a host of federal pollution control laws, including the Clean Air Act. Past courts upheld those Administrator interpretations, and this Court should do the same here.

Second, equally unavailing are petitioners' extravagant claims that the Clean Power Plan interferes with essential attributes of State sovereignty. Consistent with rulemakings promulgated during *amici's* own tenures under analogous provisions of the Clean Air Act, the Clean Power Plan carefully respects the independence of State sovereigns and reflects the kind of cooperative federalism *amici* sought to champion. It does not command the States to Act. Nor does the Plan, by regulating pollution from fuel combustion for electricity production, improperly interfere with States' exercise of their regulatory authority over electricity. Petitioners' contrary view is premised on the fiction of a strict divide between pollution control and energy regulation. No such separation exists as a matter of law or policy. To the contrary, environmental and energy regulation overlap out of practical necessity.

The petitions for review should, accordingly, be dismissed.

I. The Clean Power Plan Represents a Lawful Exercise of EPA's Congressionally Delegated Regulatory Authority

Our nation's pollution control laws are sweeping in their scope and ambitious in their reach. They have proven remarkably successful in no small part because of a shared, enduring feature: the deliberate breadth of their language. Congress appreciated that responding to public health and environmental threats would be an ongoing endeavor, but that the precise methods might vary over time, in response to events that could never be anticipated fully at the time of any particular law's enactment. As explained by the Supreme Court in *Massachusetts v. EPA*, Congress "underst[oo]d that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. 549 U.S. 497, 532 (2007). The Act's "broad language" was accordingly "an intentional effort to confer the flexibility necessary to forestall such obsolescence" *Id.*

Like all EPA Administrators, *amici* regularly relied on broadly worded statutory language to fulfill their delegated tasks. As a practical matter, EPA must act promptly to address new threats to public health and welfare if the Agency is to remain faithful to the ambitious goals established in environmental statutes. While it might be ideal for new Congresses to explicitly address each new public health and environmental challenge by passing new legislation, the Congress that enacted the Clean Air Act, and those that amended it subsequently, knew that unanticipated

developments could outpace Congress' ability to act in a timely manner, and accordingly built sufficient flexibility into the law to allow EPA to address such threats without delay.

This is what EPA has done here. EPA's Clean Power Plan relies on the Clean Air Act's broadly inclusive terms to address an unprecedented public health and environmental issue facing not just the nation, but also the global community. Because the Clean Air Act wisely anticipated the need for agency authority to respond in the face of new information and emergent environmental problems, the United States Government already possesses the requisite legal authority to address the risks posed by climate change by reducing greenhouse gas emissions from existing power plants. As described below, moreover, the Clean Power Plan is simply the latest in a long line of instances when EPA has similarly acted to address pressing public health and environmental problems not necessarily fully anticipated at the time of the congressional enactment of the relevant statutory language.

A. EPA Administrators Have Long and Properly Relied on the Deliberately Capacious Language of the Nation's Environmental Protection Laws

Contrary to petitioners' repeated claims, there is nothing remotely unprecedented about the current Administrator's reliance on broad and inclusive statutory language to address a dangerous pollution problem without first securing

from Congress new legislation. Beginning with EPA's first days and extending over the past four decades, the courts have repeatedly and appropriately upheld analogous efforts to use broad statutory language to address serious public health and environmental challenges, or devise new approaches to regulation, although neither the challenges nor the responses may have been specifically contemplated by Congress at the time of the language's passage.

The examples are numerous and wide-ranging. Previous EPA Administrators, including *amici,* banned certain uses of the pesticide DDT based on its "unacceptable" risks (37 Fed. Reg. 13,369-74 (1972)), assessed "adequate margin of safety" for air pollution standards in the absence of discernible thresholds (*see Envtl. Def. Fund v. EPA*, 598 F.2d 62 (D.C. Cir. 1978)), interpreted "solid waste" expansively to ensure that recycling hazardous materials did not escape hazardous waste regulation (*see* 50 Fed. Reg. 614, 617-18 (1985)), responded to the massive *Exxon Valdez* oil spill based on a statutory provision drafted long before such "Supertankers" were envisioned (*see* Press Release, EPA, *Exxon to Pay Record One Billion Dollars in Criminal Fines and Civil Damages in Connection with Alaska Oil Spill* (March 13, 1991)), and construed "contribute significantly" in a flexible and pragmatic manner to consider cost effectiveness in addressing interstate air pollution (*see EPA v. EME City Generation, L.P.*, 123 S. Ct. 1584, 1603-07 (2014)). Finally, in what is undoubtedly the most celebrated

example of all, former Administrators construed the broad term "stationary source" in the Clean Air Act to allow for more flexible and cost-effective compliance with air pollution standards (*see* 46 Fed. Reg. 50,766 (1981)), which the Supreme Court unanimously upheld in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). In none of these instances was there evidence that Congress had specifically anticipated the issue EPA was addressing and the manner of its resolution. But in none did it matter so long as the relevant statutory language was sufficiently broad to sustain the Administrator's judgment.

Two examples from EPA's past are especially telling for the Clean Power Plan. In each example, the Administrator at the time, like the Administrator today, faced a massive, potentially catastrophic, environmental challenge that required action before Congress could enact new, comprehensive legislation to address it. In each situation, the Administrator was able to take the necessary action based on a broad grant of authority encompassed in flexible statutory language drafted by prior Congresses – language that no one contended had been drafted with the current problem or solution in mind at the time of its passage. And, finally, on both prior occasions, the courts upheld the Administrator's actions, public health and welfare were safeguarded, and Congress ultimately passed new legislation sooner rather than later as a result of the Administrator's immediate efforts.

1. <u>Water Pollution and the Rivers and Harbors Act of 1899</u>

In December 1970, when *amicus* William Ruckelshaus became EPA's first Administrator, the nation was suffering from the uncontrolled discharges of literally thousands of tons of harmful pollutants by industrial sources across the country into the nation's waterways. Congress, however, had yet to enact comprehensive water pollution control legislation directly aimed at this increasingly urgent public health and environmental problem. Rather than wait for Congress to enact new legislation to address these ongoing, serious harms to public health, safety, and welfare, under Ruckelshaus's leadership, the United States immediately brought enforcement actions based on the capacious language of Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407, 30 Stat. 1152, against industrial dischargers.

On December 9, 1970, only one week after President Nixon created EPA by executive order, and five days after Administrator Ruckelshaus took office, the United States Department of Justice, at EPA's behest, filed suit against ARMCO Steel Corporation, "charging the company with cyanide pollution of the Houston Ship Channel" in violation of the Rivers and Harbors Act. *See* Press Release, U.S. Department of Justice, (Dec. 9, 1970); Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970) (creating EPA). Nine days later, on December 18th, the Department of Justice announced its filing of a similar lawsuit, based on a referral

from Administrator Ruckelshaus against Jones & Laughlin Steel Corporation "for discharging substantial quantities of cyanides into the Cuyahoga River near Cleveland." *See* Press Release, U.S. Department of Justice, (Dec. 18, 1970). During his first two years as Administrator, Ruckelshaus referred 106 civil actions and 169 criminal enforcement actions to the Department of Justice based on massive, nationwide violations of the Rivers and Harbors Act. Environmental Protection Agency, The First Two Years: A Review of EPA's Enforcement Program 8 (1973); *see* Joel A. Mintz, Enforcement at the EPA 22 (2012).

No one at the time, including Administrator Ruckelshaus, contended that Congress in 1899, when enacting the Rivers and Harbors Act, remotely contemplated the use of that Act to address industrial water pollution in this sweeping manner. The primary impetus for the 1899 Act was instead to ensure that the nation's navigable waterways, which were then the primary pathways for commerce, were free from physical obstruction. That is why Congress authorized the U.S. Army Corps of Engineers, which was responsible for the Act's administration, to "permit the deposit of any material above mentioned in navigable waters" upon determining that "anchorage and navigation will not be injured." 33 U.S.C. § 407, 30 Stat. 1152.

EPA's enforcement actions rested on a ruling by the Supreme Court in *United States v. Standard Oil*, 384 U.S. 224 (1966), that rejected industry's view

that application of the Rivers and Harbors Act was limited to the kinds of classic physical obstructions of navigable waterways specifically contemplated by Congress in 1899. Concluding that any such historical evidence of precise congressional motivation should not override the breadth of the statutory language Congress in fact passed, the Court rejected "a narrow, cramped reading of" the Act (*id.* at 226, *quoting*, *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960)), which made unlawful the deposit of "'any refuse matter of any kind or description'" absent a federal permit (*id.*, *quoting* 33 U.S.C. § 407). As stressed by the Court, "more comprehensive language would be difficult to select." *Id.* at 229.

Nor, for that same reason, did it matter to the courts that the threat presented by the unpermitted discharge of a pollutant clearly differed from the kind of physical obstructions to navigation specifically mentioned elsewhere in the Rivers and Harbors Act. All that mattered was that the relevant statutory language was sufficiently capacious — "broad and inclusive" (*id.*) — to extend to such modern industrial water pollution problems. "The word 'refuse'" in Section 13 "includes all foreign substances and pollutants" wholly apart from whether they can fairly be characterized as a physical obstruction to navigation. *Id*. at 230. The Court made clear the relevance of the environmental peril the nation then faced: "This case comes to us at a time in the Nation's history when there is greater concern than

ever over pollution – one of the main threats to our free-flowing rivers and to our lakes as well." *Id.* at 225.

Administrator Ruckelshaus's application of the Rivers and Harbors Act served as the catalyst for congressional action. Two years later, Congress passed the comprehensive Federal Water Pollution Control Act Amendments of 1972. *See* Pub. L. No. 92-500, 86 Stat. 816. Once EPA had successfully invoked the Rivers and Harbors Act to fill the gap, it was possible to develop a consensus in favor of a new statute more systematically crafted to modern pollution risks than a law crafted in 1899.

2. Hazardous Waste Management and the Resource Conservation and Recovery Act

EPA faced another pollution crisis in the late 1970s and early 1980s, which similarly required an immediate Agency response before Congress enacted comprehensive legislation targeting the problem: abandoned hazardous waste sites across the nation, which threatened public health and welfare. Just as the Agency had done with water pollution in 1970, EPA identified existing statutory authority to pursue lawsuits seeking corrective action, at the same time that it sought new legislation.

Ironically, the problem EPA faced partly stemmed from a law Congress passed to prevent just such a crisis, the Resource Conservation and Recovery Act

(RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), which promised "cradle to grave" regulation of hazardous wastes, from their initial generation, through their transportation, treatment, and storage, to their disposal. *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994). RCRA, implementation proved exceedingly difficult, however, because of the sheer complexity of the many scientific, technological, economic, and policy determinations necessary in deciding when a material is "waste," when it is "hazardous," and how to transport, treat, store, and dispose of hazardous waste as necessary to protect public health and the environment. It took the Agency four years to promulgate its first final RCRA regulations. *See* 45 Fed. Reg. 33,290 (1980).

Because, moreover, RCRA was designed to regulate hazardous waste management prospectively, the new regulations did not purport to regulate the serious health and environmental problems caused by *past*, unregulated disposal. Perversely, to avoid such regulation, many generators rushed to dump hazardous wastes before the new rules became effective. *See* Michael Knight, *Toxic Wastes Hurriedly Dumped Before New Law Goes Into Effect*, N.Y. Times, Nov. 16, 1980, at A1. As a result, by November 1980, when EPA's first RCRA regulations became legally effective, the nation faced a major public health and environmental crisis; there were as many as 50,000 hazardous waste sites around the country, several thousand of which were abandoned and presented imminent threats to

public health and safety. *See* Press Release, EPA, *EPA's Hazardous Waste Regulations Effective November 19, 1980* (Nov. 19, 1980); Philip Shabecoff, *House Unit Attacks Lag on Toxic Waste,* N.Y. Times, Oct. 14, 1979, at A1.

EPA Administrators did not respond to these threats by declining to act unless and until Congress passed a new law, which could have taken years. Relying on broad language in a previously untapped provision of RCRA, Section 7003, literally designated a "Miscellaneous Provision" (*see* Pub. L. No. 94-580, 90 Stat. 2795, 2824, 2826), EPA worked with the Justice Department to launch lawsuits across the country against parties that the Administrator deemed legally responsible for creating the abandoned sites. *See* Philip Taubman, *U.S. Prepares to Sue Hooker Corp. on Dumping of Hazardous Wastes*, N.Y. Times, May 21, 1979, at A1; *Justice Dept. Organizes Unit on Hazardous Waste*, N.Y.Times, Nov. 4, 1979, at A25.

Section 7003 broadly authorized lawsuits by the Administrator to address imminent and substantial endangerments wholly apart from any distinct violation of the Act's other requirements:

> Section 7003. Notwithstanding any other provision of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person for contributing to the alleged disposal to stop such handling,

> storage, treatment or disposal or to take such other action as may be necessary.

90 Stat. 2826. According to the Administrator, the plain import of Section 7003, notwithstanding its nominal "miscellaneous" label, was that either under Section 7003 itself or at least in combination with the federal common law of nuisance, the Administrator could sue any party who had "contributed" to an imminent and substantial endangerment caused by hazardous waste, without showing it had violated any extant provision of RCRA. *See, e.g., United States v. Solvents Recovery Serv. of New England*, 496 F. Supp. 1127, 1131-35 (D. Conn. 1980).

The government did not claim that Congress in enacting Section 7003 had specifically contemplated either the scope of the problem the nation now confronted, or the sweeping use of the provision the government now asserted. The only issue was whether the language enacted by Congress was sufficiently broad and inclusive to sustain the government's theory, which would allow the Agency to address this compelling public emergency without further congressional authorization. The courts agreed, and relying on Section 7003 at least for jurisdictional purposes, they issued orders and approved settlements requiring immediate cleanups of hazardous waste sites based on strict, joint and several liability retroactively applied to past and present owners and operators, and those who initially generated the waste. *See, e.g.*, *United States v. Ne. Pharm. & Chemical Corp.*, 810 F.2d 726, 737–42 (8th Cir. 1986) ("[T]he intention of the

94th Congress in enacting the RCRA in 1976 had been to impose liability upon past non-negligent off-site generators and transporters of hazardous waste."); *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337–42 (S.D. Ind. 1982); *Solvents Recovery of New England*, 496 F. Supp. at 1132–42; *United States v. Midwest Solvent Recovery*, 484 F. Supp. 138, 142-45 (N.D. Ind. 1980).

Finally, as with the Rivers and Harbors Act, EPA's actions prompted congressional passage of new laws. The first, the Comprehensive Environmental Response, Compensation, and Liability Act, enacted in December 1980, Pub. L. No. 96-510, §§ 106-107, 94 Stat. 2767, 2780-85 ("Superfund"), directly addressed the problem of abandoned hazardous waste sites and built upon Section 7003's liability framework. The second, the Hazardous and Solid Waste Act Amendments of 1984, Pub. L. No. 98-616, § 402, 98 Stat. 3221, 33271, further clarified and confirmed the scope of Section 7003 liability.

B. EPA's Clean Power Plan Is a Similarly Valid Exercise of EPA's Regulatory Authority Under the Clean Air Act's Capacious Language

EPA's Clean Power Plan is likewise a lawful exercise of EPA's statutory authority to address a compelling problem. Petitioners raise many issues but the linchpin of their challenge turns on the question whether, in determining the "best system of emissions reduction achievable" by any single category of electric generating units, the word "system" in Section 111(a) of the Clean Air Act is broad

enough to allow EPA to consider the potential for shifting generation from units with higher greenhouse gas emissions to those with lower emissions. *See* 42 U.S.C. § 7411(a)(1). For the reasons more fully set forth in the briefs filed by EPA and their supporting intervenors, *amici* believe the ordinary meaning of "system" provides EPA with the flexibility necessary to support such a reasonable interpretation. *Amici's* further point is that EPA possesses the requisite authority even if Congress may not have specifically contemplated this particular technique of reducing emissions in 1970, when the relevant language first was enacted.

Congress did not anticipate in 1970 the extraordinary opportunities for emissions control on the modern electricity grid—which would become available only with technological advances—any more than Congress anticipated many other solutions to pressing environmental problems, which emerged only long after a particular statute was originally enacted. EPA did not have to wait for passage of the Federal Water Pollution Control Act Amendments to address uncontrolled industrial discharges of pollutants into the nation's waters. EPA could rely on the broadly worded provisions of the Rivers and Harbors Act. And, EPA did not have to wait for passage of the Comprehensive Environmental Response, Compensation, and Liability Act to secure immediate cleanup of abandoned hazardous waste sites across the nation. EPA could rely immediately on the broadly worded provision of a so-called "miscellaneous" provision of RCRA.

Nor must EPA wait for congressional passage of comprehensive climate legislation to address what is the 21st century's most important environmental challenge. What constitutes the "best *system* for emissions reduction" turns not on what systems existed in 1970, but on what systems exist today. And the word "system" is plainly capacious enough to support EPA's reliance, in its effort to address climate change, on the unquestionably pragmatic and cost effective carbon emission reduction opportunities offered by the modern grid.

II. The Clean Power Plan Respects State Sovereignty

Petitioners also argue that the Clean Power Plan is unlawful because it unconstitutionally intrudes upon State sovereign authority by commandeering the States and by interfering with State sovereign authority to ensure the reliable provision of electricity in their States. Neither of these arguments has merit.

A. Federal Environmental Statutes, Including the Clean Air Act, Embrace a "Cooperative Federalism" Model of Regulation that Promotes Rather than Undermines Constitutional Federalism

Congress deliberately crafted environmental statutes, including the Clean Air Act, to incorporate a deliberate balance of federal and state power, known as "cooperative federalism." *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1172, 1174-75

(1995). In this design, Congress delegated to the federal government the authority and responsibility to set public health and environmental standards, while relying on the States to take the lead in their implementation, subject to federal oversight to ensure federal goals are met. This architecture accomplished two things. First, it reflected Congress' conclusion that public health and environmental problems cross state boundaries, and are national in scope, which requires a coordinated federal response. Second, the cooperative federalism structure was intended to take advantage of the relative strengths and respective capacities of each of the two sovereigns: while the federal government was deemed best positioned to specify the goals of regulation, the States were seen as best placed to tailor implementation schemes to conform to their local needs, and to incubate innovative solutions to public health and environmental problems.

In choosing this approach then, Congress sought to harness the powers of both levels of government. This unique model, one of the signature innovations of environmental law, created a healthy tension between the two sovereigns that has been refined over time, and which, over the years, has resulted in remarkable public health and environmental progress.

Congress settled on the innovative structure of cooperative federalism only after experimenting with a lesser federal role and being disappointed consistently by the results. Initially, Congress tried to assist and incentivize the States to

address persistent air, water and land-based pollution, which posed increasingly dangerous public health and environmental risks for the American people. When that approach fell short, Congress concluded that a stronger federal role was necessary. *See Train v. NRDC*, 421 U.S. 60, 63-65 (1975).

The modern compendium of environmental laws, passed by Congress beginning in the 1970s, generally empowers the federal government to determine the requisite level of public health and environmental protection, yet preserves State primacy by relying on the States to manage the majority of the day-to-day work of implementation. States typically implement federal standards using plans they themselves devise; manage federal permit programs that afford them significant discretion; and play the lead role in enforcement subject to federal oversight. *See, e.g.*, Clean Water Act, § 402(b), 33 U.S.C. § 1342(b) (authorizing delegation of permitting to the States); Surface Mining Control and Reclamation Act, § 503, 30 U.S.C. § 1253 (same).

The Clean Air Act, which was the nation's first comprehensive pollution control law when signed into law on December 31, 1970 (*see* Pub. L. No. 91-604, 84 Stat. 1676), launched this model, which was subsequently adopted in numerous other environmental statutes and has become the customary approach. Under Sections 108 and 109 of the Act, the federal government first establishes uniform ambient air quality standards for the entire nation. *See* 42 U.S.C. §§ 7408-7409.

Under Section 110 of the Act, each State has the primary authority for developing and administering its own plan for meeting those standards. *Id.* § 7410. Although EPA retains authority to ensure the adequacy of each State plan, and to promulgate a federal plan if a State plan is deficient, "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emissions limitations if they are part of a plan which satisfies the standards of [Section 110]." *Train*, 421 U.S. at 79.

The federal courts have also long made clear that cooperative federalism promotes rather than transgresses constitutional federalism concerns. *See, e.g., Hodel v. Va Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288-93 (1981); *City of Abilene v. EPA*, 325 F.3d 657, 662-63 (5th Cir. 2003). And the Supreme Court has singled out this very kind of "arrangement, which has been termed 'a program of cooperative federalism'" as "a method of influencing a State's policy choices" that Congress can adopt without infringing upon constitutional federalism. *See New York v. United States*, 505 U.S. 144, 166-67 (1992) (quoting *Hodel*, 452 U.S. at 289).

B. The Clean Power Plan Does Not Commandeer the States

Petitioners argue that the Clean Power Plan commandeers States in violation of the Tenth Amendment because it "leaves States no choice but to alter their laws and programs governing electricity generation to accord with and carry out federal policy," and is unconstitutionally coercive because it "threaten[s] to

disrupt the electricity systems of States that do not carry out federal policy" (Pet. Opening Br. Core Legal Issues 78-79, 84-86). Neither claim is tenable.

First, the claim of unconstitutional commandeering is contradicted by the Clean Power Plan's plain terms. Most simply put, the Plan does not command the States to do anything at all. And, unlike other Clean Air Act provisions, it imposes no sanction on any State for failing to take action under the Clean Power Plan.

The Clean Power Plan instead works with the States in a manner completely consistent with the traditional concept of cooperative federalism in general and the Clean Air Act's model in particular. Under the Plan, EPA establishes emission performance rates for greenhouse gases applicable to all large existing coal- and natural gas-fired power plants in the country. *See* 40 C.F.R. §§ 60.5740-60.5750, 60.5760, 60.5770-60.5825, 60.5860. EPA does not dictate to any State how it must do so, and requires only that a State plan provide the necessary assurances that the mix of controls it proposes will enable the regulated power plants to meet their required performance targets. Moreover, should a State's plan fall short, or should a State decide not to issue a plan, the Clean Power Plan imposes no sanction or any other means of forcing the State to act. The federal government instead assumes responsibility for developing and administering the plan directly against the power plants, shouldering that burden itself. *See* 40 C.F.R § 60.5720; *see generally* EPA, The Clean Power Plan Factsheet -- *The Role of States – States Decide How to Meet*

their Goals, https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-states-decide.pdf.

As Administrators, both *amici* implemented the Clean Air Act's cooperative federalism regime in a similarly balanced and obliging manner, respecting State sovereignty by not questioning States' plans so long as they were adequate, and developing and administering federal plans only if a State declined to adopt an adequate plan or any plan at all. *See, e.g.*, 49 Fed. Reg. 18,833-35 (1984) (Administrator Ruckelshaus approval of Kentucky state implementation plan); 55 Fed. Reg. 29,200-03 (1990) (Administrator Reilly approval of Illinois state implementation plan); 55 Fed. Reg. 36,458, 36,500-39 (1990) (Administrator Reilly proposal of federal implementation plan for the South Coast Air Basin).

EPA's current Administrator followed just this model in promulgating the Clean Power Plan under Section 111(d)(1) of the Clean Air Act, which expressly provides that the Administrator "shall establish a procedure similar to that provided by section [110]" of the Act. 42 U.S.C. § 7411(d)(1). Just as former Administrators have done consistently in implementing Section 110, here the Administrator likewise offered the States primary authority for implementing the federal performance rates for power plants, while commanding nothing of the States themselves.

Indeed, intervenors' claim that because of the Clean Power Plan, "the States are dragooned as foot soldiers in EPA's revolution" (Intervenors Dixon Bros. Opening Br. 36), has the process exactly backwards. The *States* can choose to facilitate or impede federal implementation of the Clean Power Plan with the policy tools at their disposal. EPA cannot and does not order State regulators to do anything at all. Petitioners' and intervenors' contrary characterization of the Clean Power Plan's operation is wholly fictional.

C. The Clean Power Plan Neither Violates State Sovereign Authority Over Electricity Provision, Nor Unconstitutionally Coerces the States by Threatening the Reliability of Their Electric Systems

Petitioners further argue (Pet. Opening Br. Core Legal Issues 84-86) that the Clean Power Plan violates State sovereignty by targeting existing power plants for regulation in a manner that will affect how electricity is produced within a State's borders, and threatening the reliability of the State's electric power system. Here too, petitioners' claims lack merit.

First, petitioners' claim that the Plan violates State sovereignty rests on a false premise: that federal environmental regulation cannot influence the way that power plants within a State, which are subject to state regulation, produce electricity. Federal pollution control requirements not only can exert such influence, but must do so to be effective. Their whole purpose is to ensure that

demand for electricity is satisfied in a manner that imposes fewer adverse public health and environmental impacts. The Clean Power Plan is no different.

Pollution rules that apply to the electricity production supply chain — which seek to mitigate the negative impacts of mining, transportation, refining, or combusting fossil fuels to produce electricity — invariably indirectly influence the manner in which electricity is produced. By accounting for these adverse impacts, environmental protection laws may affect the cost of those activities and their market price, just as doing so would similarly affect any regulated activity. The inevitable result is that some methods of producing electricity could naturally become more or less expensive compared to others, and market demand for certain inputs into production, such as fuels, may rise or fall accordingly.

Environmental regulation and energy regulation are thus not hermetically sealed domains as petitioners suggest, but instead are deeply interconnected. For example, the need to comply with Clean Water Act regulations governing existing power plants can indirectly affect the cost of electricity production. *See, e.g., Entergy v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (Clean Water Act regulation of power plant cooling water intake structures). Likewise, rules promulgated under the Resource Conservation and Recovery Act, to address the handling, transport, treatment and storage of waste, might also raise the costs of electricity production. *See, e.g.*, 80 Fed. Reg. 21,302 (2015) (EPA RCRA regulation of management of

coal combustion residuals). Power plants must comply with such public health and environmental standards, which might lead them to install pollution control equipment, switch fuels, make other process changes, or in some cases retire old high-polluting units. It is entirely within EPA's purview as the nation's public health and environmental regulator to issue rules with consequences for the electricity sector—indeed the Agency is legally obligated to do so.

Of course, the very first federal pollution control law to address the harmful public health and environmental impacts of power plants was the Clean Air Act. As EPA's first Administrator, *amicus* Ruckelshaus listed power plants as a category of stationary sources warranting regulation under Section 111. *See* 36 Fed. Reg. 5,931 (1971). Later, *amicus* Reilly administered the Agency's most ambitious effort to regulate emissions from existing power plants, following congressional passage of Title IV of the Clean Air Act Amendments of 1990. Title IV imposed sharp limits on sulfur dioxide and nitrogen oxide pollution from existing power plants to address the public outcry over interstate and international acid deposition, known as "acid rain." *See* Pub. L. No. 101-549, 104 Stat. 2399, 2584-2634 (codified at 42 U.S.C. §§ 7651-7651*o*). In administering the program, *amicus* Reilly followed the statute by providing existing power plants various compliance alternatives for meeting nationally prescribed caps on emissions, including switching to lower-polluting fuels, installing pollution control

equipment, investing in energy efficient technologies, or acquiring allowances from other electric generators. *See* 58 Fed. Reg. 3,590 (1993).

Experience with the acid rain program showed that State regulators, including public utility commissions, could affect compliance by making it easier for the utilities that own coal-fired power plants to recover costs, or by pre-approving particular compliance options. *See* Ron Lile and Dallas Burtraw, *State-Level Policies and Regulatory Guidance for Compliance in the Early Years of the* SO_2 *Emission Allowance Trading Program*, 7 (Resources for the Future Discussion Paper 98-35, May 1998). But nothing in the acid rain program, as is true with the Clean Power Plan, required States to adopt any particular policies. State regulators were free to, and did, use their legal authority and policy tools in differing ways—in some cases to facilitate and in others to constrain compliance by the power plants in their jurisdiction. *Id.* at 10-50.

Federal air pollution rules have long been *one input* into the complex multi-factored process of State-level energy regulation. Notwithstanding the significant impact of past federal regulations on electricity production, no court has ever suggested, let alone ruled, that by promulgating them as required by numerous environmental statutes, EPA was violating State sovereignty related to electricity provision. And for good reason: indirect market effects on power plants as a

consequence of public health and environmental regulation are not the legal equivalent of direct federal regulation of state resource-planning decisions.

The Clean Power Plan is equally, and deliberately, respectful of State sovereignty. Meeting the federal performance rates established under the Plan may make some means of generating electricity more expensive than others, and give lower-polluting fuels a comparative market advantage. The Plan may also affect how power plants choose to produce electricity, including whether they decide to switch to alternative fuels or contract with other sources on the grid to meet electricity demand they previously had met themselves. And the Plan may influence the mix of controls adopted by States that choose to take full advantage of the flexibility afforded them to develop implementation plans that would facilitate compliance by the power plants within their jurisdiction. But none of these compliance decisions, which are driven by market considerations, intrudes upon State authority over electricity sector regulation.

Of course, regulated utilities that own power plants subject to the Clean Power Plan may seek to recover, in State ratemaking cases, the costs of their preferred means of compliance, just as they do for the costs of any other regulation. They may also request State public utility commission approval for future investments they propose to make, in part based on compliance with the Clean Power Plan (and based in part on many other factors, including other federal

and state environmental requirements, and market and technological considerations). And they may request approval from State commissions to site new infrastructure. In other words, utilities may ask State regulators to facilitate compliance with the Plan, just as they have in the past with other significant air, water, or hazardous waste pollution rules or any other kind of federal requirement.

The indirect and highly mediated manner in which the Clean Power Plan will affect State-level decisions in no way ties the hands of State regulators from balancing competing considerations and making tradeoffs in particular cases. And it certainly does not amount to a federal takeover of State institutions, as petitioners dramatically claim.[2]

Equally unpersuasive is petitioners' exaggerated assertion that the Clean Power Plan coerces the States "by threatening to disrupt the electric systems of States that do not carry out federal policy" (Pet. Opening Br. Core Legal Issues 84), apparently suggesting that EPA plans to turn out the lights in non-compliant

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[2] For this same reason, equally unavailing is petitioners' intimation that the Clean Power Plan unlawfully usurps the Federal Energy Regulatory Commission's authority over wholesale rates for electricity in interstate commerce. Pet. Opening Br. Core Legal Issues 38. Here again, EPA's authority to regulate pollution resulting from the production of electricity may affect the costs of those activities and those costs may in turn affect wholesale rates, but such indirect regulatory impacts are not the equivalent of direct federal regulation of wholesale rates in interstate commerce and "in no way licenses EPA to shirk its duty to protect the public 'health' and 'welfare.'" *Cf. Massachusetts v. EPA*, 549 U.S. at 501 (rejecting claim that EPA's regulation of motor vehicle greenhouse gas emissions would interfere with Department of Transportation fuel efficiency standards).

States. The allegation of coercion is misplaced, since the Clean Power Plan neither offers funding as an inducement, nor threatens to withdraw from the States any federal funding whatsoever. But in any event, nothing in the Plan requires States to "take regulatory action…or face electricity shortfalls and the associated consequences…" *Id.* at 85. This contention mischaracterizes how the electricity grid actually works.

Petitioners' reference to "every State's electric grid" (*id.* at 6) illustrates their fundamental misconception of the electricity sector. As the Clean Power Plan recognizes, the continental United States' power grid consists of three separate regional grids. Responsibility for the reliability of these grids encompasses multiple organizations, including eight regional entities, which develop, enforce and monitor compliance with reliability standards. *See* 80 Fed. Reg. 64,692-94 (2015). Members of these regional bodies represent every aspect of the electricity industry, including investor-owned utilities, federal power agencies, rural electric cooperatives, state and municipal utilities, and end-use customers, among other entities. *Id.* at 64,694. These regional reliability entities operate under the purview of the National Electric Reliability Corporation (NERC), which, pursuant to the 2005 Energy Policy Act, has been certified by the Federal Energy Regulatory Commission (FERC) as the nation's Electricity Reliability Organization. *Id.* at 64,693-94. NERC develops standards to, among other things, ensure the grid's

reliability. Once FERC approves these standards, they are legally binding, and *all industry participants* must meet them. *Id.* at 64,693.

Grid reliability is thus not an exclusively State-by-State responsibility, but a collective responsibility executed by numerous public and private bodies, which coordinate on a near-constant basis in a process that is overseen, ultimately, by FERC. These entities routinely must adjust to various factors that affect the availability of different generation sources, including, among other things, the price of various fuels, transmission constraints, weather- and maintenance-related downtime, *and* Federal and State pollution rules. The responsible entities have demonstrated their competence to ensure the reliability of the inter-state, regional grids consistently, despite numerous changes over the years to the energy mix. Petitioners' claim of "coercion" accordingly rests on a complete mischaracterization of how this complex, nuanced and dynamic reliability system actually works in practice.

CONCLUSION

The petitions for review should be dismissed.

Dated: March 31, 2016

Respectfully submitted,

s/__Richard J. Lazarus________________

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and this Court's Order dated January 28, 2016, I hereby certify that the foregoing brief is in 14-point, proportionately spaced, Times New Roman typeface and contains 6,954 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word processing software used to prepare this brief was Microsoft Word 2010.

s/__Richard J. Lazarus________________

Richard J. Lazarus

Dated: March 31, 2016

CERTIFICATE OF SERVICE

I certify that the foregoing FINAL BRIEF OF FORMER EPA ADMINISTRATORS WILLIAM D. RUCKELSHAUS and WILLIAM K. REILLY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT ENVIRONMENTAL PROTECTION AGENCY, CERTIFICATE OF COMPLIANCE, AND CERTIFICATE OF PARTIES AND *AMICI CURIAE* were served today on all registered counsel in these consolidated cases via the Court's CM/ECF system.

s/__Richard J. Lazarus_______________

Richard J. Lazarus

Dated: March 31, 2016