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

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

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

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

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Amici Br. of Former EPA Officials	Final Brief of Former EPA Administrators William D. Ruckelshaus and William K. Reilly as *Amici Curiae* in Support of Respondents (filed Mar. 31, 2016)
CAA	Clean Air Act (42 U.S.C. § 7410 *et seq.*)
CO_2	Carbon dioxide
Cong. Amici	Brief *Amici Curiae* of Current Members of Congress and Bipartisan Former Members of Congress in Support of Respondents (filed Mar. 31, 2016)
EGU	Electrical Generating Unit
EPA	United States Environmental Protection Agency
EPA Br.	Respondent EPA's Initial Brief (filed Mar. 28, 2016)
FERC	Federal Energy Regulatory Commission
GHGs	Greenhouse Gases
HAP	Hazardous Air Pollutant
Interv.Br.	Initial Brief of Intervenors Dixon Bros., Inc., Nelson Brothers, Inc., Wesco International, Inc., Norfolk Southern Corp., Joy Global Inc., Gulf Coast Lignite Coalition, and Peabody Energy Corp. (filed Feb. 23, 2016)
IPI Br.	Final Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Respondents (filed Apr. 1, 2016)
JA	Joint Appendix

Non-HAP	Non-Hazardous Air Pollutant
Peabody	Peabody Energy Corporation
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Rule	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60).
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State Interv.Br.	Proof Brief for State and Municipal Intervenors in Support of Respondents by the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington; the District of Columbia; the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami; and Broward County, Florida (filed Mar. 29, 2016)

INTRODUCTION AND SUMMARY OF ARGUMENT

EPA argues this case involves "ambiguous" statutory language (EPA Br. 22) and garden-variety application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But this case is not ordinary, as the Supreme Court's unprecedented stay order confirms.

The Rule is outside the zone of routine agency rulemaking:

- The Rule flouts a clear statutory ***prohibition*** on EPA's authority (the Section 112 Exclusion) and violates fundamental constitutional principles, including the separation of powers, federalism, and the Fifth Amendment. The Rule runs roughshod over individual liberties and makes policy judgments reserved for Congress, not a politically unaccountable agency.

- Never before has such a revolutionary regulation been predicated on such a flimsy legislative foundation – a conforming amendment deleting six characters, four of which were parentheses, which could not be executed because it referred to language in a statute that no longer existed.

- Never before has such a sweeping regulation been premised on anything resembling EPA's outlandish suggestion that Congress in 1990 effectively enacted two different versions of Section 111(d), the Office of the Law Revision Counsel

mistakenly codified only one version, and the U.S. Code has published the wrong provision for 26 years.

- Never before has EPA adopted a Section 111(d) rule for a ***source*** (*e.g.*, stationary power plants) ***already regulated*** under Section 112, without first seeking to de-regulate that ***source category*** under Section 112. The Rule contradicts EPA positions under ***both*** Republican and Democratic administrations.

EPA would transform Section 111(d) into a general enabling act, giving the agency authority over the entire electric grid, not to mention the entire American economy. EPA would convert an obscure, little-used provision into the most powerful section of the CAA, rendering much of the remainder surplusage.

EPA does not deny that, under its interpretation of Section 111(d), the Waxman-Markey cap-and-trade bill of 2009 would have been unnecessary. Interv.Br. 18-19. The bill shows that Congress understood that Section 111(d) did not authorize cap-and-trade. Yet a trading regime is the result of the Rule. EPA Br. 19, 23. The Rule, in other words, mandates a policy that Congress believed was not authorized by existing law and refused to enact. The Rule is ***wholesale*** lawmaking by an agency, not ***interstitial*** rule-making—and lawmaking ***already*** rejected by Congress. *Cf. Youngstown Sheet & Tube Co., v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, …").

Appeals to a need to fill supposed "gaps" in EPA's authority and supply meaning to "capacious" statutory language over which EPA supposedly has "discretion[]" (Amici Br. of Former EPA Officials 3-4) are misdirected. The CAA is not a constitution, and EPA is not a legislature (not even a junior-varsity one). It is merely a creature of statute and lacks inherent or reserved powers to make law.

EPA's attempt to supply a limiting principle to its authority fails. EPA claims it could not compel a "source" to plant a forest to sequester CO_2, for example. EPA Br. 28. Yet that is exactly the upshot of EPA's unbounded reading of the word "system." EPA's expansive interpretation would permit it to impose a "plant-a-tree" mandate within power plant fencelines, which would "result in emission reductions from sources" (*id.*) by offsetting emissions with localized sequestration — an even more direct "emissions reduction" than buying credits from a faraway wind farm. Indeed, on its view of the CAA, EPA could even impose a mandate on power plants to reforest Indonesia!

Regardless of the importance of the global issue EPA seeks to address, it may not usurp lawmaking authority that belongs to Congress or judicial power that belongs to the courts. Nor may it violate the structural divisions of power designed to protect the States as well as individual liberty. The Rule is, quite literally, an EPA "power grab."

ARGUMENT

I. The Rule Violates an Express Statutory Prohibition.

The Section 112 Exclusion unambiguously bars Section 111(d) regulation of emissions from "a source category which is regulated under" Section 112. 42 U.S.C. § 7411(d). *Chevron* deference is inapplicable.

A. The Section 112 Exclusion Is Not Ambiguous.

1. EPA Has Already Rejected Its Own Current "Literal" Reading, Which Is Non-Grammatical and Produces an Absurd Result.

In 2005, EPA recognized that "a literal reading" of Section 111(d) "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." 70 Fed. Reg. at 16,031, JA __. As late as 2014, EPA acknowledged that "a literal" application of Section 111(d) would likely preclude its proposal[1] and that "[a]s presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude" the Rule "because GHGs are emitted from EGUs and EGUs are a source category regulated under section 112."[2]

EPA flip-flops and now argues that, "read literally," Section 111(d) allows (and in fact ***compels***) the agency to regulate every pollutant that is not a "criteria"

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[1] EPA Proposed Rule Legal Memo at 26, JA__.

[2] *Id.* at 22, JA__.

pollutant under Section 108. (EPA Br. 79-80.) In the Rule, EPA itself rejected that interpretation as unreasonable because it would render the Section 112 Exclusion nugatory. 80 Fed. Reg. at 64,713. It would turn the Section 112 Exclusion into a Section 112 Mandate by ***requiring*** EPA to regulate non-criteria pollutants from source categories regulated under Section 112—a view EPA has never followed since 1990.

EPA's "literal" reading was right in 2005 and 2014, and its revised "literal" reading is incorrect today. Section 111(d) provides (with brackets added):

> The Administrator shall prescribe regulations … under which each State shall submit to the Administrator a plan which … establishes standards of performance for any existing source for any air pollutant
>
> [1] for which air quality criteria have not been issued or
>
> [2] which is not
>
> > [a] included on a list published under section 7408(a) of this title or
> >
> > [b] emitted from a source category which is regulated under section [112] of this title.

In clause [2][b], the Section 112 Exclusion plainly bars EPA from using the statute to regulate any "source category" regulated under Section 112. The second "not" is distributed across both clauses [2][a] and [2][b] by the use of the word "or." EPA incorrectly contends there is a missing "and." EPA Br. 79. When a speaker

says "*Not X or Y*," the use of the conjunction "or" *means* that the speaker is saying "*Neither* X *nor Y*." No "*and*" is either necessary or appropriate.

Ultimately, EPA admits that "[a]ll parties agree" that its interpretation "is not what Congress intended." EPA Br. 82. Even for a literalist, that should end the matter. Nevertheless EPA improperly seeks to use its absurd and non-grammatical construction to concoct "ambiguity" in what Congress meant to say. An agency interpretation that leads to an absurd result "fails at *Chevron* step one" and leaves no ambiguity for the agency to resolve. *Arkansas Dairy Co-op Ass'n v. Dep't of Agric.*, 573 F.3d 815, 829 (D.C. Cir. 2009). A court may find an ambiguity only after "[e]mploying traditional tools of statutory construction," *Chevron*, 467 U.S at 843 n.9, such as the statute's plain meaning and the canon against absurd results, which EPA's interpretation violates. *E.g.*, *Forman v. Small*, 271 F.3d 285, 297 (D.C. Cir. 2001).

In *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 312 F.3d 1166 (D.C. Cir. 2003), for example, this Court held that the Postal Service's interpretation was unreasonable because it "leads to an absurd result." *Id.* at 1176. Deference is improper when the agency's construction "defies the plain language of a statute" or "is utterly unreasonable." *Id.* at 1175; *see also NRDC v. EPA*, 777 F.3d 456, 465-68 (D.C. Cir. 2014) (vacating rule where EPA conceded interpretation would

produce "an absurd result" but "[sought] to achieve precisely the same result" through other means).

2. EPA Cannot Rewrite the Statutory Text.

EPA would rewrite the Section 112 Exclusion to focus on pollutants rather than source categories. EPA Br. 81-82. EPA's revisionism fails. The limiting clause "which is regulated under section [112]" obviously refers to "a source category," *not* to a pollutant, because "source category" is the immediately prior antecedent. "The rule [of the last antecedent] provides that 'a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (citation omitted).

EPA would rewrite the Section 112 Exclusion to say "any existing source for any air pollutant … which is not … ~~emitted from a source category which is~~ regulated under section [112] of this title." EPA's interpretation would erase an entire phrase from the statute.

Further, EPA's new-found interpretation ignores the difference in language used by Congress in the two carve-outs in Section 111(d). In addition to the Section 112 Exclusion, the statute provides that EPA may not use Section 111(d) if the pollutant in question "is included on a list published under section [108](a)" of the

CAA. 42 U.S.C. § 7411(d)(1)(A)(i). The carve-out for Section 108 shows that Congress knows how to write a pollutant-specific exclusion when it wishes to. The Section 112 Exclusion, by contrast, refers to "a source category." EPA improperly conflates the two provisions, in violation of the maxim when two parts of a statute are worded differently, an interpretation should give meaning to that difference. *See NRDC v. EPA*, 489 F.3d 1364, 1373 (D.C. Cir. 2007); *Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998).

Next, EPA contends that the phrase "any air pollutant" refers only to ***hazardous*** air pollutants. EPA Br. 81-82. EPA seeks to add a modifier Congress omitted. There is "no basis in the text for limiting" the term "any." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). Indeed, the phrase "any air pollutant" cannot refer solely to ***hazardous*** air pollutants; given the wording of Section 111(d), it must include (i) non-criteria pollutants, (ii) pollutants listed under Section 108, as well as (iii) Section 112 hazardous air pollutants.

3. EPA Flouts Settled Judicial Interpretations of the Section 112 Exclusion.

In *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (Rogers, J.), this Court opined that, "under EPA's own interpretation of the section, it cannot be used to regulate ***sources listed under section 112***." *Id.* at 583 (emphasis added). Thus, this Court recognized that the Section 112 Exclusion operates on the basis of ***source***

categories rather than individual pollutants. EPA misleadingly states that "[t]he Mercury Rule was vacated on grounds immaterial to the interpretive issue presented here." EPA Br. 34 n.24. To the contrary: the Section 111(d) rule in *New Jersey* was vacated on the basis of the Section 112 Exclusion, under an interpretation that dooms the instant Rule.

Similarly, the Supreme Court opined that EPA may not adopt a Section 111(d) Rule "if existing stationary sources of the pollutant in question are regulated under … the 'hazardous air pollutants' program, § 7412." *American Elec. Power, Inc. v. Connecticut*, 564 U.S. 410, 424 n.7 (2011). EPA argues that *AEP* did not mean what it said in footnote 7 because it elsewhere stated that Section 111 "speaks directly" to emissions of CO_2. *Id.* at 424-25. But there is no conflict between (i) saying that Section 111 "speaks" to CO_2 and (ii) saying that the Section 112 exclusion blocks the Rule because of the way EPA has chosen to regulate stationary sources, as the *AEP* court presaged in n.7. *AEP* made clear that Section 111 "speaks directly" to CO2 *whether or not* a climate rule is actually in place. *Id.* at 424. *AEP* cited *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), to show that a statute "speaks" to an issue even if it does not give an agency unlimited power to address it. *AEP* explained in footnote 7 that EPA does not have carte blanche authority to regulate CO_2 from utilities; EPA ignores that key limitation.

EPA next argues that the *AEP* "understood the regulatory bar to be pollutant-specific" because it used the phrase "of the pollutant in question." EPA Br. 94. But that phrase identifies and qualifies the stationary sources to which the statute refers. It does *not* refer to the regulatory bar. If the Court had meant to refer to the pollutant rather than to the source category, it would have said "if the pollutant in question from existing … sources ***is*** regulated …."

EPA maintains that if *AEP* meant to refer to the source category rather than pollutants in n.7, "it is at least half wrong" because of its reference to pollutants on a Section 108 list. EPA Br. 94. The Court was ***not*** "half wrong." It nowhere indicated that the Section 108 carve-out "function[s] identically" (EPA Br. 94) to the Section 112 Exclusion. EPA is putting words in the Supreme Court's mouth.

B. EPA Is Not Entitled to *Chevron* Deference Under *King v. Burwell*.

Chevron deference is inapplicable for a further reason: *King v. Burwell*, 135 S. Ct. 2480 (2015). The Rule is no traditional air pollution regulation. Instead, it is an exercise at re-engineering the electrical grid – what EPA calls "generation-shifting," but what is more accurately described as "market-shifting." EPA denies that it has "assumed any impermissible 'central planning role' for the power sector." EPA Br. 53. But that is exactly what market-shifting from coal to wind or solar entails. Its Administrator told Congress: "The great thing about this [Power Plan]

proposal is that it really is an investment opportunity. ***This is not about pollution control.***" Interv.Br. 19-20 (emphasis added).[3] EPA lacks both expertise and experience regarding that task. In *King*, the IRS had no experience administering the Affordable Care Act, and there was "reason to hesitate before concluding that Congress has intended such an implicit delegation." *King*, 135 S. Ct. at 2488-89 (internal quotation marks and citation omitted). By the same token, EPA lacks any congressionally delegated role over the questions of energy policy implicated by the Rule, which are of "deep 'economic and political significance.'" *Id*. at 2489 (citation omitted).

C. EPA's Resort to Non-Textual Arguments Fails.

Because the text is clear, there is no basis for considering EPA's remaining arguments. Even so, they lack merit.

1. EPA Ignores the Structure and Purpose of the Statute.

EPA incorrectly insists that Petitioners' interpretation would "practically nullify the Section 111(d) program." EPA Br. 83.

First, the structure and purpose of the 1990 Amendments support Petitioners, not EPA. EPA does not dispute our showing (Interv.Br. 28-30) that applying the

[3] In No. 15-1381, EPA's CO_2 Endangerment Finding (a predicate to the 111(b) rule) is being challenged.

Section 112 Exclusion on a source-category basis is a natural consequence of Congress's 1990 decision to rewrite Section 111(d) to mirror the "source category" structure of the newly amended Section 112. EPA does not deny its own Section 111(b) rule for new power plants confirms the source-category focus of Section 111. Interv.Br. 29 n.32.

Second, it is not credible to contend that Petitioners' position would "nullify" Section 111(d). Petitioners' interpretation is consistent with the ***only*** two EPA attempts post-1990 to invoke Section 111(d). Interv.Br. 6-7. The Clinton-era EPA adopted Petitioners' interpretation of Section 111(d) and concluded it could regulate landfill gas under Section 111(d) because "landfill gas is not emitted from a source category that is actually being regulated under section 112."[4] Similarly, EPA recognized in *New Jersey* it could not simultaneously regulate coal- and oil-fired power plants under both Section 111(d) and Section 112, and consequently sought

[4] EPA, *Municipal Solid Waste* at 1-6, JA __. EPA's comment that "some components of landfill gas are not hazardous air pollutants" (*id.*) does not mean EPA construed the Section 112 Exclusion as pollutant-specific. Otherwise, EPA would not have needed to analyze whether landfills were "actively being regulated" as a Section 112 source category. An amicus cites EPA approval of § 111(d) state plans for landfill gas after adoption of the § 112 standard, IPI Br. 28, but state plans are not a Section 111(d) rule. That amicus concedes that "EPA did rely in part on the fact that landfills had not yet been regulated under § 112 to support its position that regulation under § 111(d) was appropriate." *Id.* at 26.

to "delist" those plants under Section 112. 517 F. 3d at 583.[5]

2. EPA's "Gap-Filling" Argument Is Wrong and Defeats the Purpose of 111(d).

EPA contends that Section 111(d) was enacted to fill "gaps" in EPA's power. EPA Br. 84 & n.63 (citing S. Rep. No. 91-1196, at 20). Not so. First, the cited Senate Report from 1970 is irrelevant to interpreting the 1990 Amendments, which changed the focus of the provision from pollutant-specific to source-category-specific.

Second, the Report itself refutes EPA's gap-filling argument. The Report describes the 1970 predecessor of Section 111(d) as dealing with localized pollutants emitted from distinctive sources, rather than ubiquitous substances like CO_2. It was not a catch-all provision:

> The third category of pollution agents includes those agents which are ***not emitted*** in **such quantities … as to be widely present or readily detectable … in the ambient air**. The presence of these agents is **generally confined … to the area of the emission source**.

S. Rep. No. 91-1196, at 18, JA __ (emphasis added). CO_2 is, of course, "widely present" and "readily detectible in the ambient air" – the opposite of the emissions described as covered by Section 111(d). Thus, the Report supports

[5] Intervenors point to subsequent Section 112 regulation of sulfuric acid mist and fluoride compounds, State Interv. Br. 31, but do not deny that, ***when*** Section 111(d) rules were adopted, there was no corresponding Section 112 regulation.

Petitioners, ***not EPA***, regarding 111(d)'s purpose—a limited provision targeting a handful of localized pollutants, not a "gap-filling" provision for ***all*** emissions (Interv.Br. 26-27).

Petitioners' interpretation creates no "gap" in EPA's authority. EPA acknowledges that Congress has made power plants subject to at least four different CAA programs. EPA Br. 87 & n.67.

These ***congressionally enacted*** CAA programs undermine EPA's argument. When government confronted new kinds of pollution, it sought new legislative authority rather than conjuring an *ultra vires* administrative solution. Congress expressly created trading regimes in other CAA contexts, such as acid rain. The absence of trading programs in Section 111(d) is telling. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, (1983), *quoted in Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997) (Henderson, J.). The ***express grant*** of power in a different provision of the same statute refutes EPA.

3. EPA's Legislative History Arguments Are Wrong.

EPA contends that Petitioners lack legislative history support for their Section 111(d) interpretation. EPA Br. 85. Actually, in 2005, EPA itself acknowledged 1990 Amendments' legislative history supports Petitioners' interpretation:

> [W]e believe that the House sought to ***change the focus of section 111(d)*** by seeking to preclude regulation of those pollutants that are emitted from a particular ***source category that is actually regulated under section 112***. … ***[T]he House did not want to subject Utility Units to duplicative or overlapping regulation***.

70 Fed. Reg. at 16,031, JA __ (emphasis added); Interv.Br. 24.

EPA's Congressional Amici argue Congress made no "express mention" in 1990 of the Section 112 Exclusion. Cong. Amici 25. But the impact was self-evident. As amici themselves admit, "when Congress amended the Act in 1990, it redrafted the provision governing the § [112] program." *Id.* at 22. By giving Section 112 a source-category structure and correspondingly revising the Section 112 Exclusion, Congress plainly transformed the Section 112 Exclusion to operate on a source-category basis and to avoid duplicative regulation of those sources.

4. EPA Gains Nothing By Arguing that It Could Adopt a Section 111(d) Rule First, and a Section 112 Rule Second.

EPA contends it would be "absurd[]" if the agency could enact a Section 111(d) rule first, followed by Section 112 regulation. EPA Br. 87.[6] Not so. In 1995, EPA itself recognized the significance of the order in which rules were adopted.[7] Moreover, if a Section 111(d) rule were adopted first, EPA would have to undertake an analysis of whether Section 112 regulation remained "appropriate and necessary" under Section 112(n)(1)(A) and to weigh the costs and benefits of the two rules. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707-11 (2015). The sequence by which rules are enacted is itself a check on EPA authority.

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

1. The Senate Conforming Amendment Was Not a Separate "Version" of Section 111(d).

EPA incorrectly contends that "the Senate's amendment plainly permits CO_2 regulation." EPA Br. 88. EPA's brief fails to quote the Senate Amendment in full:

> **SEC. 302. CONFORMING AMENDMENTS.**
>
> (a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

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[6] This case does not present EPA's sequencing question, nor do Intervenors concede EPA's interpretation.

[7] EPA, *Municipal Solid Waste* 1-5 to 1-6, JA__ (emphasis added).

Pub. L. 101–549, § 302(a), 104 Stat. 2,574 (1990).

After the 1990 amendments, there was no longer any reference to "112(b)(1)(A)" in Section 111(d)(1) and therefore no way to execute the Senate Amendment, as Law Revision Counsel properly concluded. The Clinton EPA agreed the substantive amendment was "the correct amendment" to codify and follow because it tracked the "revised section 112 to include regulation of source categories," while the conforming amendment "is a simple substitution of one subsection citation for another."[8] In 2005, EPA concluded that "it appears that the Senate amendment to section 111(d) is a drafting error and therefore should not be considered." 70 Fed. Reg. at 16,030-31, JA __.

EPA suggests that the Senate Amendment somehow re-enacted the entirety of the pre-1990 version of the Section 111(d), with an updated cross-reference. EPA Br. 87. It did not. It deleted six characters, four of which were parentheses, and could not be executed after the 1990 substantive changes to Section 111(d), because it referred to language in Section 111(d) that no longer existed.

EPA contends the U.S. Code cannot prevail over the Statutes at Large when the two are inconsistent. EPA Br. 88. But there is no inconsistency here. There is a conforming amendment mooted by a substantive amendment.

[8] EPA, *Municipal Solid Waste* 1-5, JA__ .

This situation is commonplace in the U.S. Code. The Senate conforming amendment was "trivial" because it was mooted by the substantive House one. EPA fails to cite a single example where its position has been accepted. Interv.Br. 10.

EPA contends that both Amendments were "conforming." EPA Br. 89-90. Not so. Only the Senate Amendment was labeled "conforming." It was placed in a grab-bag section of eight clerical changes to six different parts of the CAA. In contrast, the House Amendment was located 107 pages ***earlier***, as part of a five-page substantive provision rewriting Section 111 to mirror the new source-category structure of Section 112. Pub. L. 101–549, § 108, 104 Stat. at 2,465-2,469 (1990).

EPA dismisses (EPA Br. 85 n.64) the statement of Senate Managers receding to the House Amendment. 136 Cong. Rec. 36067 (Oct. 27, 1990). But EPA ignores the explanatory language, which states the Senate receded regarding the very provisions amending Section 111(d): "[T]he House amendment contains provisions … for amending section 111 of the Clean Air Act relating to … existing stationary sources …. ***The Senate recedes to the House*** …." *Id.* (emphasis added).

2. EPA's Gambit Raises Serious Separation-of-Powers Questions.

EPA's attempt to give effect to the Senate Amendment is lawmaking, not resolving an ambiguity under *Chevron*.

EPA cites *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013) (EPA Br. 93), but that case undermines EPA: "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *Id.* at 1874. EPA was never (nor could it constitutionally have been) delegated lawmaking authority to pick which "version" of Section 111(d) was the law of the land.

Intervenors' objection is executive overreach by EPA, not improper delegation by Congress. *Contra* EPA Br. 93 n.74. EPA ignores *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001): an agency's choice of which provision to enforce "would itself be an exercise of the forbidden legislative authority."

EPA also misstates *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014). The plurality spoke for only three Justices. The Chief Justice and Justice Scalia, who supplied the key votes (and whose views form the narrowest basis of the holding) specifically rejected the proposition that "direct conflict" between two statutory provisions triggers *Chevron*. *Id.* at 2214-15 (opinion concurring in the judgment).

3. Even If the Senate Amendment Were a Separate "Version," the Duty to Harmonize the Amendments Would Still Bar the Rule.

Applying the House and Senate amendments together produces two prohibitions (one pollutant-specific, one source-category-specific), foreclosing the Rule. EPA argues that "Section 111(d) is framed as an affirmative mandate." EPA Br. 92. But this case involves not the ***affirmative*** aspect of Section 111(d), but the ***prohibitory*** aspect of the Section 112 Exclusion.

EPA is not following a "middle course" (EPA Br. 91 (citation omitted)), but an extreme approach:

- It ignores the source-category structure enacted in 1990 and reads the source-category structure of the Section 112 Exclusion out of the statute.
- It overrides a clear statutory prohibition enacted via the substantive House Amendment, which has been codified in the U.S. Code for 26 years.

EPA's own authority warns that "to give unlimited license to an agency to devise whatever course it pleased in the case of statutory breach or inconsistency would overreach the bounds of delegation and confer on that agency inordinate power." *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979) (cited in EPA Br. 91).

II. The Rule Violates the Tenth Amendment and Principles of Federalism by Commandeering the States, Even Under a Federal Plan.

EPA concedes the Rule would require States to enact new legislation and develop new regulatory structures. Interv.Br. 32. If States say "no," they must cede control of their electrical grids to EPA but still affirmatively act to ensure reliability and implement the Federal Plan. Neither EPA nor its Intervenors ever identify possible Federal Plan compliance that spares the States from undertaking substantial, affirmative steps. *Id.*; State Interv.Br. 22.

EPA impermissibly narrows *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), to issues of federal funding. EPA Br. 101. Yet *NFIB* more broadly considered whether States had a "legitimate choice" to opt out of federal programs, or instead faced a "gun to the head." *NFIB*, 132 S. Ct. at 2602, 2604. Here, opting out still results in federal commandeering and no genuine choice.

EPA distorts the issue presented by suggesting that Intervenors would condemn federal programs having the slightest influence on state regulatory decisions. EPA Br. 104-06. That is a caricature. The question is whether States have a legitimate opportunity to say "no" to a federal mandate, as made clear in *NFIB*. Here, States do not.

EPA calls the Rule a "textbook example of cooperative federalism." EPA Br. 98. EPA needs a new textbook. "No matter which path the State chooses, it must

follow the direction of [the federal government]." *New York v. United States*, 505 U.S. 144, 177 (1992). This severe Catch-22 raises serious questions under the unconstitutional conditions doctrine, which EPA fails to address substantively. Interv.Br. 38 n.36.

EPA has no response to Intervenors' argument that "structural protections of liberty" bar unlawful complicity as much as coercion. *Printz v. United States*, 521 U.S. 898, 921 (1997). EPA and States cannot evade the Tenth Amendment by ***colluding*** to expand agency authority. Structural divisions protect not just States, but the liberty of each citizen from abusive governmental power. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

III. The Constitutional Avoidance Canon Precludes Reading the CAA as Authorizing the Rule.

An agency interpretation of a statute that creates a class of takings loses *Chevron* deference. *See Bell Atl. Tele. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). *Bell Atlantic* invalidated rules creating takings not authorized – or funded – by Congress. *Bell Atlantic* rejected EPA's argument that parties may pursue compensation in the Court of Claims (Legal Memorandum 58, JA __): "*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, ***would allow agencies to use statutory silence or ambiguity***

to expose the Treasury to liability both massive and unforeseen." *Id.* at 1445 (emphasis added).

Petitioners and Intervenors have submitted hundreds of pages of comments, reports, and declarations demonstrating the Rule will force the complete closure of power plants and mines. Secretary of State John Kerry confirmed the impact on coal-fueled power plants: "We're going to take a bunch of them out of commission." *See Strange Climate Event*, NYT, JA __.

EPA does not deny that a class of potential takings exists here. EPA Br. 106 n.92. EPA has admitted the Rule will cause plant closures, including "11 gigawatts of coal-fired generation ***shutting down*** in 2016." EPA, Corrected Opposition to Petition at 29, JA __ (emphasis added). *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it.").

This objection was not limited to a footnote. *Contra* EPA Br. 106 n. 92. Intervenors addressed at length how structural divisions of power protect property rights against arbitrary deprivations. Interv.Br. 39-43.

The Rule is not entitled to *Chevron* deference. It violates a clear statutory prohibition, exceeds EPA authority, and raises serious constitutional questions.

CONCLUSION

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

Respectfully submitted.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. Rule 32(e)(2) because this brief contains 4,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count function of Microsoft Word 2007.

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/s/ Tristan L. Duncan

CERTIFICATE OF SERVICE

I hereby certify that on this day, April 15, 2016, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/ Tristan L. Duncan