UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

79 Fed. Reg. 34830 (June 18, 2014)

Docket ID No. EPA-HQ-OAR-2013-0602

COMMENTS OF LAURENCE H. TRIBE AND PEABODY ENERGY CORPORATION

December 1, 2014

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EXECUTIVE SUMMARY

These comments are submitted by Laurence H. Tribe, professor of constitutional law at Harvard Law School and the Carl M. Loeb University Professor at Harvard University,[1] and Peabody Energy Corporation.[2]

The defects in the Proposed Rule transcend political affiliations and policy positions and cut across partisan lines. The central principle at stake is the rule of law – the basic premise that EPA must comply with fundamental statutory and constitutional requirements in carrying out its mission. The Proposed Rule should be withdrawn. It is a remarkable example of executive overreach and an administrative agency's assertion of power beyond its statutory authority. Indeed, the Proposed Rule raises serious constitutional questions.

Both Democrats and Republicans should stand in strong support of the rule of law. And both Democratic and Republican Administrations have promoted the prudent use of domestic coal in order to reduce dependence on imported oil. In contrast, the Proposed Rule will require a dramatic decline in coal-fired generation of electricity, in order to implement EPA's system of state-by-state mandates. In fact, under EPA's plan, the agency envisions that coal generation would be eliminated altogether in 12 states. The Proposed Rule thus reverses policies that reach back to John F. Kennedy. As Hillary Clinton observed in 2007, "I think you have got to admit that coal — of which we have a great and abundant supply in America — is not going away."[3]

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[1] Affiliation provided for identification purposes only. Professor Tribe was retained by Peabody Energy Corporation to provide his independent analysis as a scholar of constitutional law. The opinions expressed in these comments represent his judgments in that capacity, not views that it would be proper to attribute to Harvard Law School or Harvard University.

[2] Peabody Energy Corporation ("Peabody") hereby joins in these comments as a supplement to the comments separately submitted by Peabody in this Docket on December 1, 2014, titled "Comments of Peabody Energy Corporation."

[3] "An interview with Hillary Clinton about her presidential platform on energy and the environment," available at http://grist.org/article/clinton1/.

The Proposed Rule lacks legal basis and represents an improper attempt by EPA unilaterally to remake a vast portion of the American economy on the basis of a hitherto obscure provision of the Clean Air Act, Section 111. This section previously has been used in only a handful of instances. Nothing like the Proposed Rule has ever been premised on Section 111 before. Just last Term, in *Utility Air Regulatory Group v. EPA*,[4] the Supreme Court voiced powerful concerns regarding EPA's unilateral assertions of power that are equally apposite here:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[5]

The Proposed Rule rests on a fatally flawed interpretation of Section 111. According to EPA, in enacting the 1990 amendments to the Clean Air Act, Congress effectively created *two different* versions of Section 111, and the agency should be allowed to pick and choose which version it wishes to enforce. According to EPA, since 1990 the U.S. Code has reflected the wrong version of Section 111, and EPA has discovered a mistake made by the Office of Law Revision Counsel of the House of Representatives – the part of Congress responsible for compiling enacted bills into statutory books. According to EPA, both the D.C. Circuit and the U.S. Supreme Court have previously misinterpreted Section 111. According to EPA, the two different versions of Section 111 have created "ambiguity" triggering deference to the agency's statutory construction under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*[6]

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[4] 134 S. Ct. 2427 (2014).

[5] 134 S. Ct. at 2444.

[6] 467 U.S. 837 (1984).

Every part of this narrative is flawed. The 1990 amendments did not create two different versions of Section 111. The Senate amendment was a substantive amendment, and the House amendment was a conforming one that merely updated a statutory cross-reference. Both were enacted. Once the Senate amendment was made law, the House amendment was rendered moot, as the Office of Law Revision Counsel in the House of Representatives properly concluded. Such a situation – where a substantive amendment moots a conforming one – is a familiar occurrence in the U.S. Code, and EPA's position would call into question dozens if not hundreds of statutory changes throughout the Code. Instead of harmonizing legislation, as Supreme Court precedents instruct, EPA's argument would lead to chaos.

Moreover, EPA's interpretation of Section 111 would raise serious constitutional questions. If there were indeed two versions of Section 111, EPA's claim that it is entitled to pick and choose which version it prefers represents an attempt to seize *lawmaking* power that belongs to Congress. Under Article I, Article II, and the separation of powers, EPA lacks the ability to make law.

Further, the Proposed Rule violates principles of federalism and seeks to commandeer state governments in violation of the Tenth Amendment. It raises serious questions under the Fifth Amendment as well, because it retroactively abrogates the federal government's policy of promoting coal as an energy source. Private companies – and whole communities – reasonably relied on the federal government's commitment to the support of coal.

These constitutional concerns eliminate any deference EPA would otherwise receive under *Chevron*. The Proposed Rule lacks any legal basis and should be withdrawn.

ARGUMENT

I. The Proposed Rule Repudiates a Policy of Prudent Coal Use Shared by Democratic and Republican Administrations for Decades.

The Proposed Rule represents a reversal of decades of a bipartisan federal policy emphasizing increased use of domestic coal to achieve U.S. energy independence, reduce imported foreign oil, and provide the Nation with reliable and affordable electricity. As Hillary Clinton observed in 2007, "I think you have got to admit that coal — of which we have a great and abundant supply in America — is not going away."[7]

Both Democratic and Republican Administrations championed coal throughout the 20th century. John F. Kennedy explained, "It would be the height of folly for this nation to permit its coal mines to be abandoned – to permit the skills of our miners to be scattered throughout the country, in other industries – and to neglect further research and development in this major American industry. … We need intensive research on the development and use of our coal resources."[8]

After the 1973 Oil Embargo and the 1979 oil crisis, both political parties emphasized the responsible development of domestic energy sources. Concerns about energy independence and the importance of oil and gas for residential and industrial uses led Congress to enact legislation prohibiting power plants from relying on petroleum or natural gas as their primary source of

[7] "An interview with Hillary Clinton about her presidential platform on energy and the environment," available at http://grist.org/article/clinton1/.

[8] Senator John F. Kennedy, Campaign Speech at Mercer Cnty. W. Va., (May 9, 1959), http://www.wvculture.org/history/1960presidentialcampaign/newspapers/19590510bluefielddailytelegraph.html.

power.[9] Four years later, Congress restricted construction of new power plants using oil or natural gas as a baseload fuel, encouraging reliance on coal.[10]

As a result, national energy and economic policy led to the construction of a greater number of new coal plants and the conversion of existing plants to coal-fired electricity generation. Federal policy "turned back to coal as an intermediate term (fifty to 100 years) or long-term (more than 100 years) energy source."[11]

Coal has been a central tenet of energy policy for every president since Jimmy Carter, who urged a "shift to plentiful coal" in order to reduce dependence on foreign oil.[12] President Carter promised a certain and consistent policy to provide industry with the confidence necessary to make investments to move the U.S. toward energy independence.[13]

President Carter's plan included shifting industry from natural gas to coal in order to conserve the former for household use, and set a goal for increasing annual coal production by 400 million tons.[14] Legislative price interventions in the oil and natural gas markets were specifically designed to incentivize the energy industry to shift to coal.[15] Indeed, the program pushed for legislation "to assure the greatest possible conversion of utilities and industrial

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[9] Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 2, 88 Stat. 246 (1974) (codified at 15 U.S.C. § 792).

[10] Power Plant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (1978) (codified at 42 U.S.C. § 8301 et seq.).

[11] A. Dan Tarlock, *Western Coal in Context*, 53 U. COLO. L. REV. 315, 318 (1982).

[12] Jimmy Carter, Fact Sheet for Address on National Energy Plan Delivered Before a Joint Session of Congress (April 20, 1977), *available at* http://www.presidency.ucsb.edu/ws/?pid=7373.

[13] *Id.* ("We can protect ourselves from uncertain supplies by reducing our demand for oil, making the most of our abundant resources such as coal, and developing a strategic petroleum reserve. … Government policies must be predictable and certain. Both consumers and producers need policies they can depend on so they can plan ahead.").

[14] *Id.*

[15] *Id.*

installations to coal."[16] In addition, the plan "under[took] a major expansion of the Government's coal research and development program. The program will focus primarily on meeting environmental requirements more effectively and economically, and will seek to expand the substitution of coal for gas and petroleum products."[17]

Over the next few months, the federal government created the Department of Energy (in August 1977) and took further steps to encourage coal production.[18] Coal was a key component of the plan to "encourage production of energy here in the United States."[19]

During this period, the Democratic Party praised coal. The 1980 Democratic Party platform stated:

> The Democratic Party regards coal as our nation's greatest energy resource. It must play a decisive role in America's energy future. We must increase our use of coal …. We must make clean coal conversion a reality. To this end, we will assist utilities that are large enough to permit coal conversion while maintaining or improving air quality. Coal conversion … can and must increase the use of coal, reduce the demand for oil, and provide employment where jobs are needed the most.[20]

A bipartisan network of programs, spanning several decades, has fostered investments in coal. For example:

- In 1984, President Reagan established a $750 million "Clean Coal Technology Reserve" in the Treasury intended for distribution through the DOE.[21] The Clean Coal Technology Demonstration Program (CCTDP), under the DOE, was created to disburse these funds.[22]

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[16] *Id.*

[17] *Id.*

[18] *See* President Jimmy Carter, Address to the Nation on Energy delivered on Election Day (Nov. 8, 1977), *available at* http://millercenter.org/president/carter/speeches/speech-3400.

[19] *Id.*

[20] 1980 Democratic Platform (August 11, 1980), *available at* https://patriotpost.us/documents/490.

[21] FY1985 Appropriations, Pub. L. 98-473, 98 Stat. 1860, 1874 (42 U.S.C. §§ 5901, 8721).

[22] U.S. DEPT. OF ENERGY, MAJOR DEMONSTRATION PROGRAMS: PROGRAM UPDATE 2013, CLEAN COAL TECHNOLOGY, A-2 (Sept. 2013), *available at* http://seca.doe.gov/technologies/coalpower/cctc/resources/pdfsprog/cctupdat/DemoPrograms_CCTUpdate2013.pdf.

After a separate appropriation ($400 million) in 1985,[23] the CCTDP began ongoing long-term investments in developing coal technology.

- President Reagan established a panel to advise the Administration on coal technology, the Innovative Control Technology Advisory Panel.[24]
- The CCTDP matured as it cooperated with EPA on the Clean Air Act Amendments of 1990. [25] It has responded to shifting environmental priorities, including decreasing GHG levels.[26]
- This activity was soon followed by President Bush's comprehensive Energy Policy Act of 1992,[27] which addressed an entire title to coal, including research and development, refinement to reduce emissions, and waste utilization.[28] The Act devoted specific provisions to international cooperation on coal technologies.[29]
- Through this period, the CCTDP expanded its funding, including over $2 billion between 1989 and 1992.[30] After funding 33 successful programs, the CCTDP gave way to the Power Plant Improvement Initiative (PPII) in 2000 in response to widespread brownouts and blackouts of the consumer electric grid, and the Clean Coal Power Initiative (CCPI) in 2002.[31] Through 2009, approximately $1.7 billion has been appropriated for the CCPI.[32]
- Funds from the American Recovery and Reinvestment Act of 2009 (ARRA) allowed DOE to develop further programs to research, develop, and demonstrate coal technologies. In 2010, FutureGen 2.0 ($1 billion) began a long-term project to create an emission-free coal-fired power plant in Meredosia, Illinois.[33] Compared to the specific focus of FutureGen 2.0, the Industrial Carbon Capture and Storage (ICCS) initiative is a $1.5 billion broad-based effort to reduce emissions through both specific projects and research, development, and demonstration activities.[34]

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[23] Pub. L. 99-190; 99 Stat. 1251 (42 U.S.C. § 5903d).

[24] U.S. DEPT. OF ENERGY, MAJOR DEMONSTRATION PROGRAMS: PROGRAM UPDATE 2013, CLEAN COAL TECHNOLOGY, at A-2.

[25] *Id.*

[26] *Id.* at A-1 to A-2.

[27] Pub. L. 102-486, 106 Stat. 2776 *et seq.*

[28] §§ 1301-13 (106 Stat. 2970-76).

[29] §§ 1321, 1331-41 (106 Stat. 2976-93).

[30] U.S. Dept. of Energy, *Major Demonstration Programs: Program Update 2013*, *Clean Coal Technology*, at A-2.

[31] *Id.* at ES-1 to ES-2, 1-3.

[32] *Id.* at 2-1.

[33] *Id.* at 1-5.

[34] *Id.*

U.S. policy—including under the current Administration—has always strongly favored advanced coal technologies. The President voiced his continued support for clean coal technology in his 2010 State of the Union Address.[35] EPA has acknowledged that "[c]lean coal is an important part of our energy future."[36] Indeed, EPA has included advanced coal technologies among its environmental initiatives, and DOE's research on such technologies is listed in EPA's *Catalog of Environmental Programs 2012*.[37] The Federal Government's investment in pursuing clean-coal technologies has been substantial. The National Energy Technology Laboratory (NETL), under the auspices of the DOE, has funded research into clean-coal technology, including demonstrations of its viability as one important energy source, for over 25 years.[38] NETL has funded over 1,800 projects totaling over $9 billion, plus a further $5 billion in cost-sharing with industry.[39]

In short, coal has been a bedrock component of our economy and energy policy for decades. The Proposed Rule, which manifestly proceeds on the opposite premise, thus represents a dramatic change in directions from previous Democratic and Republican administrations.

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[35] President Barack Obama State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

[36] (Then) Administrator, U.S. Environmental Protection Agency Lisa Jackson, Statement on the Issuance of Further Guidance on Mountaintop Mining, (Apr. 1, 2010), *available at* http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/7bcedbd7dd6e34ec852576f800630fcf!opendocument.

[37] U.S. ENVIRONMENTAL PROTECTION AGENCY, CATALOG OF ENVIRONMENTAL PROGRAMS 2012*,* (2012), *available at* http://www.epa.gov/oig/catalog/programs/22.html.

[38] NETL, "Coal," *available at* http://www.netl.doe.gov/research/coal/. *See also* Office of Fossil Energy, Dep't of Energy, *Major Demonstration Programs: Program Update 2013* (Sep. 2013) ("DOE Program Update 2013") (outlining the current status of the major programs funded by DOE), online at http://www.netl.doe.gov/File%20Library/Research/Coal/Reference%20Shelf/DemoPrograms-CCTUpdate2013.pdf.

[39] NETL, "Mission/Overview," *available* online at http://www.netl.doe.gov/about/mission-and-overview (last viewed Oct. 15, 2014).

II. The EPA Power Plan Violates Fifth Amendment Due Process and the Takings Clause by Threatening to Upset Well-Settled Investment-Backed Expectations Developed in Reliance on Long-Standing Federal Policy and by Singling Out a Few to Bear Burdens that in Fairness Should Be Borne by Society as a Whole.

This proceeding is a perfect illustration of the dangers inherent in permitting an unelected agency to restructure the U.S. economy on its own and the palpable unfairness of imposing all the costs on a small subset of entities within the agency's cross-hairs. The Proposed Rule represents a radical shift in federal policy that upsets settled, investment-backed expectations, with no attempt by EPA to quantify the climate or environmental benefits from the Proposed Rule. As EPA Administrator Gina McCarthy testified before the Senate Environment and Public Works Committee on July 23, 2014: "The great thing about this [EPA Power Plan] proposal is that it really is an investment opportunity. *This is not about pollution control.*"[40] The Regulatory Impact Analysis (RIA) for the Proposed Rule states that the impact of "reduced climate effects" has been "monetized" but not "quantified."[41] In other words, EPA does not claim that the Proposed Rule would affect the climate. The mismatch and lack of social benefit distinguish the Proposed Rule from other actions by EPA under the Clean Air Act.

As noted in Part I, *supra*, the federal government has long encouraged responsible coal production, while being fully aware of the potential risks now cited by EPA. In exchange, the federal government has profited enormously from coal and has received billions of dollars in royalties from its production. Royalty revenue collected by the U.S. Department of the Interior is an important part of both federal and state budgets. Under the Mineral Leasing Act of 1920, the federal government collects royalties on every ton of coal that is mined on federal lands. The

[40] U.S. House. Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014), available at http://energycommerce.house.gov/press-release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight (emphasis added).

[41] U.S. EPA, Regulatory Impact Analysis at ES-11 (table ES-5), 4-2 (table 4-1).

Department's Office of Natural Resources Revenue (ONRR) subsequently forwards approximately half of these royalty revenues to states, which in turn distribute the money toward road construction, schools, universities, communities affected by energy development and general funds.[42] States received nearly $2.1 billion from oil, gas, coal and other energy royalties in FY2012, according to ONRR.[43] More than 460.3 million tons of coal mined on federal lands was sold in FY2012, with a total sales value of $8.1 billion. [44] This coal generated more than $875.8 million in royalty revenue. [45] The federal government collected more than $6.8 billion in royalties between FY2003 and FY2012.[46]

The Fifth Amendment's Due Process and Takings Clauses aim "to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Eastern Enters. v. Apfel*, 524 U.S. 498, 522-23 (1998); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960). But this is precisely the purpose of the Proposed Rule: forcing the United States' power plants and energy industry to bear the global burden of lessening CO_2 emissions. The Proposed Rule demonstrates the risk of allowing an unaccountable administrative agency to "make" law and attempt to impose the burden of global climate change on an unlucky and unfortunate few. EPA's singling out of a mere handful of emitters and limiting (or curtailing) their property is exactly the type of overreaching the Fifth Amendment seeks to prevent. As Justice Jackson warned,

> The authority [vested by the Constitution in a federal branch] must be matched against words of the Fifth Amendment that "No person shall be …deprived of

[42] *See* Ron Wyden Senator for Oregon, *Fact Sheet: Federal Coal Royalties and their Impact on Western States*, (last viewed Oct. 9, 2014), *available at* http://www.wyden.senate.gov/download/coal-royalty-fact-sheet.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

> life, liberty, or property, without due process of law." . . . One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not men, and that we submit ourselves to rulers only if under rules.[47]

Because the Proposed Rule would reverse decades of federal policy *after* private industry has already committed to its investments, it operates in retroactive fashion to strand the very investments the federal government has encouraged and raises grave constitutional concern under *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 107 (1978), and *Eastern Enters. v. Apfel*, 524 U.S. 498, 522—23 (1998) (a regulation "may so frustrate distinct investment-backed expectations as to amount to a 'taking'"). That the proposed rule is open to comment does not dispel or otherwise lessen the constitutional concern. *See* Bentzion S. Turin, *Eastern Philosophy: A Constitutional Argument for Full Stranded Cost Recovery by Deregulated Electric Utilities*, 36 HOUS. L. REV. 1411, 1453 (Winter 1999) ("Although it is certainly true that the government … will often open its decision-making process for comment, in the final analysis, regulation by sovereignty proceeds unilaterally, with the government imposing its will on the regulated party, with or without the latter's consent.").

In *Eastern Enters*, a plurality of the Supreme Court distilled from prior case law three factors of "particular significance" to the Fifth Amendment inquiry: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[48] The remaining Justices applied similar reasoning, although they

[47] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

[48] *Eastern Enters. v. Apfel*, 524 U.S. at 523—24.

would have framed the inquiry in terms of the Fifth Amendment's Due Process Clause rather than its Takings Clause.[49]

EPA's Proposed Rule raises serious concerns under all three factors:

First, the economic impact is severe. The Proposed Rule is unquestionably designed to drastically cut and eventually eliminate the use of coal. The economic impact of the rules on consumers, communities, and businesses that rely on coal would be substantial. The impact would also be discriminatory. It would fall harshly on the Midwestern United States and on other selected regions throughout the country, while largely bypassing the coastal areas. In fact, the Proposed Rule would not affect Vermont and Washington, D.C. at all.

The sheer depth of impact and harshness of the Proposed Rule is significant. *See Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 538 (2005) ("inquiry turns in large part … upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."). The unprecedented scope of the Proposed Rule raises Fifth Amendment "regulatory takings" concerns, in that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Second, the Proposed Rule would interfere with reasonable investment-backed expectations. To be sure, the federal government in the past has provided financial support to various kinds of energy sources. But the Proposed Rule is qualitatively different from previous policies. Rather than simply encouraging alternative sources of energy, the EPA Power Plan is aimed squarely at stamping out coal.

[49] *See* 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 556-58 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

The phase-out of coal use intended by the Proposed Rule would injure not only coal companies, but their employees, customers, and communities. The Proposed Rule unduly penalizes them for following the government's past directive and encouragement to invest in coal. This about-face in policy punishes those who relied upon the government, in the same way as the regulation held to be an impermissible taking in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (finding a constitutional infringement when the government frustrated statutorily created expectations that trade secrets submitted to the government would be kept confidential). Government policies shape business decisions and help determine the reasonableness of investment-backed expectations. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Tahoe-Sierra Preservation Counsel Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, (2002). Here, the Proposed Rule represents a 180-degree turn in energy policy.

Third, the Proposed Rule is highly discriminatory. It forces a select set of victims – including coal-reliant consumers, communities, regions, businesses and utilities – to bear a substantial share of the economic burden for a worldwide public policy objective. The stated objective of the Proposed Rule is global in nature. Forcing a narrowly selected set of victims to make the proposed reductions in CO_2 emissions would have an imperceptible effect on worldwide greenhouse gas levels but at an inordinate cost to those of whom the most would be demanded.

The Proposed Rule thus raises serious constitutional questions under the Fifth Amendment.

III. The Proposed Rule Raises Serious Constitutional Questions Under the Separation of Powers, Article I, Article II, and Principles of Federalism.

A. A Presidential Speech Cannot Provide EPA with the Authority to Adopt the Proposed Rule.

Constitutional questions aside, the Proposed Rule is also beyond EPA's *statutory* authority to adopt. The Proposed Rule is part of EPA's attempt to implement a June 2013 speech by President Obama in which he announced the Administration's "Climate Action Plan."[50] But this speech cannot provide EPA with the authority to promulgate the Proposed Rule. Presidential speeches do not have the force of law; indeed, the Supreme Court has dismissed them even as aids to statutory interpretation.[51] A President's public speech "is an insufficient basis for the exercise of lawful authority by executive agencies."[52]

B. The Proposed Rule is Invalid Under Section 111(d) of the Clean Air Act.

On its face, the Proposed Rule violates Section 111 of the Clean Air Act, 42 U.S.C. § 7411, because the statute expressly forbids the regulation of any air pollutant emitted from a source category that EPA already regulates under Section 112 of the Clean Air Act, 42 U.S.C. § 7412. Section 111(d) (1) provides:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which
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> (A) establishes standards of performance for any existing source for any air pollutant
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> (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408 (a) of this title or *emitted from a source category which is regulated under section 7412 of this title* ….[53]

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[50] See http://www.whitehouse.gov/climate-change.

[51] *See Horne v. Flores*, 557 U.S. 433, 459 n.8 (2009).

[52] *American Fed'n of Gov't Emps., AFL–CIO v. Freeman*, 498 F.Supp. 651, 658 (D.D.C.1980).

[53] 42 U.S.C. § 7411(d) (emphasis added). Section 111(d) contains an additional limitation. Section 111(d) permits regulations for existing sources only if there already exist corresponding regulations for subsection (b) "new" sources. There must be a "standard of performance under [§ 7411 that] would apply if such existing source

Stationary power plants are already a source category regulated under Section 112 of the CAA. EPA categorized power plants as part of a "source category" under Section 112 in 2000.[54] In February 2012, EPA promulgated a new national emission standard for power plants under Section 112.[55] Earlier this year, the D.C. Circuit upheld EPA's rule under Section 112.[56]

Accordingly, the plain text of Section 111(d) flatly and unambiguously prohibits the Proposed Rule. As the Supreme Court opined in *Am. Elec. Power Co. v. Connecticut*: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408-7410, or the 'hazardous air pollutants' program, § 7412."[57]

C. EPA's Asserted "Ambiguity" Creates a Serious Constitutional Question.

EPA acknowledges that a "literal" application of Section 111(d) would preclude the Proposed Rule.[58] Its Legal Memorandum explains:

> As presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from section 111(d) any pollutant if it is emitted from a source category that is regulated under section 112. The U.S. Code version of 111(d) can be read

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were a new source." 42 U.S.C. § 7411(d)(1)(A)(ii). Currently, *there is no 111(b) regulation applicable to "new" stationary sources of CO_2 that would correspond to the proposed 111(d) regulations*. EPA acknowledges that 111(b) regulations for CO_2 are a necessary prerequisite and has stated that it intends to complete at least one of two Section 111(b) regulations concerning CO_2 emissions from new fossil fuel-fired EGUs before it finalizes the current 111(d) rulemaking, in order to satisfy what it acknowledges is a "requisite predicate for" the 111(d) rules. Legal Memo (rev. 2) at 6.

[54] *See* 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000).

[55] *See* National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012).

[56] *See White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).

[57] 131 S. Ct. 2527, 2537 n.7 (2011).

[58] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units ("Legal Memorandum"), at 26 available at http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum.

> to provide that the provision would not cover GHGs because GHGs are emitted from EGUs and EGUs are a source category regulated under section 112.[59]

Given that the plain reading of Section 111(d) prohibits the Proposed Rule, EPA relies on what it calls "an ambiguity in the provisions of Section 111(d)(1)(A)(i), arising from Congress' simultaneous enactment of two separate versions of this provision."[60] EPA thereby seeks to trigger the interpretative deference described in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984).

Importantly, EPA makes no effort to identify anything that would normally be described as an "ambiguity" – namely, the existence of *more than one possible meaning* in the language that appears in a statutory provision enacted by Congress, a provision that all accept as the starting point for analysis. Rather, EPA employs the concept of "ambiguity" in an entirely novel way, one not found in any decision applying *Chevron* deference. According to EPA, "[t]he confusion arises because two different amendments to Section 111(d) were enacted in the 1990 CAA Amendments," and "the U.S. Code does not accurately reflect what was enacted – it presents only one of the two amendments."[61] Thus, EPA contends that there are effectively *two versions* of Section 111(d), one in the U.S. Code and the other the Statutes at Large. According to EPA, the enactment of "two versions" of Section 111 allows the agency to pick which one it wishes to enforce.[62] This altogether novel use of the "ambiguity" prerequisite for *Chevron* deference is flawed for numerous reasons and raises grave constitutional questions.

Because of these constitutional questions, EPA is not entitled to deference under *Chevron*. The Supreme Court has instructed that deference to an agency's interpretation is not

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[59] Legal Memorandum at 21.

[60] Legal Memo (rev. 2) at 5.

[61] *Id*.

[62] Legal Memorandum at 23.

appropriate where it would raise a serious constitutional issue.[63] Statutes and regulations must be construed to avoid serious constitutional doubt.[64] "[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions."[65] EPA is not entitled to deference under this standard.

1. EPA's Interpretation Ignores Basic Principles of Statutory Construction.

At the outset, EPA's interpretation runs headlong into a fundamental rule of statutory interpretation: agencies must attempt to reconcile or harmonize statutory provisions, rather than asserting the power to decide which provision they would prefer to enforce.[66]

The history of the 1990 amendments shows that it is very easy to harmonize the House and Senate provisions. Prior to 1990, Section 111(d) prohibited EPA from regulating under that Section "any air pollutant" "not included on a list published under . . . 112(b)(1)(A)."[67] In other words, the pre-1990 prohibition on EPA's Section 111(d) authority focused on whether the

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[63] *See Edward J. DeBartolo Corp. v. Fla. Gulf Constr. Trades Council*, 485 U.S. 568, 574-75 (1988) (noting that a "statutory interpretation by the Board would normally be entitled to deference" under *Chevron* but not deferring to the Board's interpretation because it would raise a serious constitutional issue that could be avoided through an alternative interpretation); *see also Solid Waste Agency of N. Cook Cnty v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (choosing to "read the statute as written to avoid the significant constitutional and federalism questions raised by [the Army Corps of Engineers'] interpretation, and therefore [to] reject the request for administrative deference").

[64] *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (rejecting the government's interpretation of a criminal statute, because the Court concluded that giving the statute the sweeping construction sought by the prosecutor would have triggered serious constitutional questions (indeed, the concurring Justices would have declared the statute unconstitutional outright)); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565-71 (2013) (Thomas, J., concurring) (recasting the entire majority holding as compelled by constitutional avoidance); *Ariz. v. Inter Tribal Council of Ariz., Inc*., 133 S. Ct. 2247, 2257-59 (2013) (extending avoidance canon to find that "validly conferred discretionary executive authority is properly exercised ... to avoid serious constitutional doubt"); *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2130-40 (2012) (avoiding constitutional dilemma by interpreting Civil Service Reform Act to require exclusive judicial review through the Federal Circuit, including constitutional challenges to statute); *Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (adopting limiting construction of honest-services statute in order to avoid due process problems).

[65] *U.S. WEST, Inc. v. FCC*, 182 F.3d 1224, 1231 (1999), *cert. denied*, 530 U.S. 1213 (2000).

[66] *See POM Wonderful LLC v. Coca-Cola Co*., 134 S. Ct. 2228, 2237 (2014); *Branch v. Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

[67] 42 U.S.C. § 7411(d) (1987).

pollutant was *amenable* to regulation (not listed under Section 112), as opposed to whether EPA had *actually* regulated the *source* of the pollutant under Section 112.

In 1990, the House-Senate Conference Committee included two separate changes to Section 111(d)(1) — one from the Senate bill, and the other from the House bill — in the final version of the legislation, which was subsequently passed by both chambers of Congress and signed by the President.

The House Amendment made a substantive change to Section 111(d) by replacing the cross-reference to "112(b)(1)(A)" with the language that now appears in the U.S. Code—the language providing that EPA may not regulate the "emission" of "any pollutant" from "a source category which is regulated under section 112."[68] The amendment changed the restriction in Section 111(d) from one triggered by *hazardous air pollutants amenable to regulation* to one triggered instead by *source categories actually being regulated under Section 112*.

The second amendment (which originated in the Senate) operated by "striking '[112](b)(1)(A)' and inserting in lieu thereof '[112](b).'"[69] The Senate Amendment appears much later in the Statutes at Large among a list of purely clerical changes made in 1990, entitled "Conforming Amendments."[70] "Conforming Amendment[s]" are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill."[71] They effectuate the sorts of ministerial changes required to clean up a statute after it has been

[68] Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990).

[69] Pub. L. No. 101-549, § 302(a).

[70] Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990).

[71] Senate Legislative Drafting Manual § 126(b)(2)(A).

substantively amended.[72] These "include[] amendments, such as amendments to the table of contents, that formerly may have been designated as clerical amendments."[73]

Consistent with its description as merely a conforming amendment, the Senate Amendment sought simply to bring up to date Section 111(d)'s cross-reference to Section 112(b)(1)(A). Other substantive amendments to the Clean Air Act in 1990 had already eliminated Section 112(b)(1)(A) and replaced it with Sections 112(b)(1), 112(b)(2), and 112(b)(3). The conforming amendment was ostensibly necessitated by those substantive amendments and therefore sought merely to account for those changes by "striking '[112](b)(1)(A)' and inserting in lieu thereof '[112](b).'"[74]

The Senate conforming amendment cannot reasonably be interpreted as casting any doubt on the plain terms of Section 111(d) in the U.S. Code. Once Section 111(d) had been substantively amended by the House Amendment (which was included in the conference legislation and enacted into law), the conforming Senate Amendment was no longer necessary. That is why the U.S. Code includes the notation that the clerical entry here "could not be executed."[75] Indeed, in 2005 EPA itself expressly recognized that the second, clerical amendment was "a drafting error and therefore should not be considered."[76]

The net result of the amendments is the statute now in the U.S. Code. The original statute permitted regulation of "any air pollutant" "not included on a list published under . . . [7412](b)(1)(A)."[77] In 1990, "[7412](b)(1)(A)" was replaced with "or emitted from a source

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[72] *Id.*

[73] *Id.*

[74] Pub. L. No. 101-549, § 302(a).

[75] Revisor's Note, 42 U.S.C. § 7411.

[76] 70 Fed. Reg. at 16,031.

[77] 84 Stat. at 164.

category which is regulated under section [7412]."[78] Those amendments are accurately reflected in the U.S. Code:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title.[79]

Importantly, this approach does not "negate" or ignore the Senate amendment. It simply recognizes that the cross-reference to subsection 112(b)(1)(A) that the Senate (conforming) amendment sought to make *had already been removed* by the first, substantive amendment—and had been replaced by the language that now appears in the U.S. Code. Such a situation is relatively unremarkable. In fact, this phenomenon is common in complex legislative schemes. The U.S. Code contains numerous examples of the precise "error" that occurs here: a clerical amendment rendered moot by substantive amendments, and in each case the clerical amendment was excluded because it "could not be executed."[80]

Even under EPA's reading, the limitations in the House and Senate amendments are entirely compatible with each other. The House amendment prohibits EPA from regulating,

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[78] 104 Stat. at 2467.

[79] 42 U.S.C. § 7411(d)(1).

[80] See, e.g., Revisor's Note, 5 U.S.C. app. 3 § 12; Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 8 U.S.C. § 1324b; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1074a; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 1060; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 18 U.S.C. § 1956; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 22 U.S.C. § 2577; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 613A; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 26 U.S.C. § 6427; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 39 U.S.C. § 410; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 49 U.S.C. § 47115.

under § 111(d), any pollutants emitted from sources in a source category already regulated under § 112; the Senate amendment forbids EPA from regulating, under § 111(d), any hazardous air pollutants, regardless of whether they are emitted from a source in a category regulated under § 112. Both restrictions on EPA's authority can be applied together, with no conflict. EPA may give effect to both restrictions by construing the two amendments as jointly prohibiting EPA from regulating under § 111(d) *any hazardous air pollutants already regulated under § 112*, as well as *any emissions of any pollutants from a source in "a source category which is regulated under § 112*."

2. EPA's Interpretation is Contrary to Settled Judicial Constructions of the Statute.

No court since 1990 has endorsed EPA's interpretation of Section 111. For example, the D.C. Circuit rejected EPA's interpretation in *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). In that case, the D.C. Circuit vacated a *state-by-state standard* mandate under Section 111(d) for existing power plants because such plants were listed for regulation under the Act's Section 112 *national* emission standard program, and did so even though EPA had not yet issued actual standards for power plants under Section 112 and even though neither the listing decision nor the decision to regulate power plants using national standards rather than by mandating state-by-state standards had yet been subject to judicial review.[81]

Three years later, the Supreme Court similarly opined that Section 111(d) forbids EPA from adopting a rule "if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, § 7412."[82] EPA's interpretation of Section

[81] *New Jersey v. EPA*, 517 F.3d at 583. ("EPA promulgated the CAMR regulations for existing EGUs under section 111(d), but under EPA's own interpretation of the section, it cannot be used to regulate sources listed under section 112; EPA thus concedes that if EGUs remain listed under section 112, as we hold, then the CAMR regulations for existing sources must fall.").

[82] *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011).

111(d) thus runs directly counter to the decisions of the U.S. Supreme Court and of the D.C. Circuit.

The Supreme Court's recent holding in *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)("*UARG*"), voiced powerful concerns regarding EPA's unilateral assertions of power. The Court held that EPA lacks authority to "tailor" the CAA's unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its GHG-inclusive interpretation of the triggers permitting it to set limits (despite the practical arguments made by the four partial dissenters).[83] The Court said that "[a]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[84] "We are not willing to stand on the dock and wave goodbye as EPA embarks on a multiyear voyage of discovery"[85] about how it wants to regulate greenhouse gases. It was "patently unreasonable — not to say outrageous — for EPA to insist on seizing expansive power that it admits the statute is not designed to grant."[86] The Court accused the agency of "laying claim to extravagant statutory power over the national economy."[87]

The concerns expressed in *UARG* are equally relevant here. The power asserted by EPA to choose between two versions of Section 111(d) – and to pick the one that the U.S. Code has not codified since 1990 – represents an extravagant and impermissible overreach by the agency.

[83] *Id.* at 2445.

[84] *Id.* at 2446.

[85] *Id.*

[86] *Id.* at 2444.

[87] *Id.*

3. EPA's Interpretation Raises Grave Separation of Powers Issues by Allowing it to Second-Guess the U.S. Code's Codification.

Under EPA's approach, the statute would lead to an administrative nightmare that would raise serious constitutional questions. First, EPA's approach would raise separation of powers concerns by according no weight to the judgment of the Office of Law Revision Counsel as to how the 1990 amendments should be construed when using the U.S. Code.

The Office of Law Revision Counsel, operating under the authority of the Speaker of the House of Representatives, is responsible for translating enactments from the Statutes at Large into the U.S. Code. "After laws are passed by Congress and signed by the President, they are published in chronological order in the Statutes at Large, which serve as 'legal evidence' of the law. But 'because that chronological arrangement isn't efficient for researchers,' the statutes are arranged by subject matter for publication in the U.S. Code."[88] Broadly speaking, the Statutes at Large collect enacted laws in chronological order, and then the United States Code transforms them into subject-based titles.

The determinations of the Office of Law Revision Counsel may be questioned only where they are objectively inconsistent with the contents of the Statutes at Large.[89] Here, the standard for second-guessing the U.S. Code version of Section 111(d) cannot be met. EPA is wrong to suggest that the two amendments create an inconsistency or even any genuine ambiguity. The Statutes at Large do not reflect two separate versions of Section 111(d), and the U.S. Code cannot (and does not) override that clarity. Rather, the Statutes at Large simply disclose a substantive amendment and a conforming (or clerical) amendment that, when properly

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[88] *Gonzalez v. Vill. of West Milwaukee*, 671 F.3d 649, 661 n.6 (7th Cir. 2012) (citations and internal brackets omitted).

[89] *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); *Stephan v. United States*, 319 U.S. 423, 426 (1943); *Warner v. Goltra*, 293 U.S. 155, 160 (1934). *See generally* Mary Whisner, *The United States Code,* Prima Facie *Evidence, and Positive Law*, 101 Law Libr. J. 545, 546-47 (2009).

applied one after the other, reveal that the clerical entry cannot be executed. The U.S. Code properly reflects the first (substantive) amendment but not the second (clerical) amendment, which "could not be executed" because of the substantive amendment.[90] Such a degree of statutory clarity should end the matter.

EPA wishes to engage the deferential second step of the *Chevron* analysis in order to *create* an ambiguity at the first step that otherwise would not exist. Such a rearrangement of the *Chevron* steps ignores the fact that "[i]t is emphatically the province and duty of the judicial department" – not an administrative agency – " to say what the law is."[91] For this reason, "If the intent of Congress is clear, that is the end of the matter." *Chevron,* 467 U.S. at 842-43. Even pre-*Chevron*, when the Internal Revenue Service promulgated a regulation based on a version of the U.S. Code that contained a paragraph that Congress had deleted in conference, the Third Circuit had no problem whatsoever finding the authoritative reading in the Statutes at Large and invalidating the regulation as unauthorized by law.[92] The Statutes at Large, properly applied according to the Revisor's Notes, are unambiguous, leaving no room for *Chevron* step-two deference for a rewriting of the U.S. Code (which is likewise unambiguous).

To allow EPA to use the deferential *Chevron* standard to override or second-guess the ordered process of the Office of Law Revision Counsel would raise serious separation of powers concerns. The Supreme Court has steadfastly refused to look behind the evidence of an enrolled bill to inquire whether the journals of Congress support the enactment: The enrolled bill is

[90] Revisor's Note, 42 U.S.C. § 7411.

[91] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[92] *Royer's, Inc. v. United States*, 265 F.2d 615, 618 (3d Cir. 1959). *See also Loving v. I.R.S.*, 742 F.3d 1013, 1022 (D.C. Cir. 2014) ("In our judgment, the traditional tools of statutory interpretation—including the statute's text, history, structure, and context—foreclose and render unreasonable the IRS's interpretation of Section 330. Put in *Chevron* parlance, the IRS's interpretation fails at *Chevron* step 1 because it is foreclosed by the statute.").

sufficient proof in itself.[93] The Court warned of the uncertainty and instability that would result if every person were "required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate, and approved by the governor, is a statute or not."[94] Such an intrusion into the legislative process is well outside the authority of the judicial branch, extending far beyond the *Marbury* charge. Here, EPA demands that the Court look past not only the clear wording of the U.S. Code and the Statutes at Large, but into a clerical amendment which the Revisor of the Code specifically said "could not be executed."[95] Revisor's notes traditionally guide interpretation of statutes.[96] There is no authority supporting EPA's view that Section 111(d) is ambiguous; a demand that a court create such an ambiguity in service to administrative goals violates the separation of powers.

4. EPA's Interpretation Raises Grave Questions Under Article I and Article II.

If EPA were permitted to choose which of the two versions of Section 111 it preferred to enforce, the agency would move beyond its proper role of ensuring that the law is faithfully *executed* and instead assume *lawmaking* power. EPA seeks to rely on what it calls "the flexibilities inherent in CAA section 111(d),"[97] but any flexibilities in the statute cut against EPA. If Section 111(d) really contained two separate versions of the Section 112 Exclusion, and if EPA were free to pick and choose which version it wanted to enforce, then EPA would be going well beyond its duty to execute the law duly enacted by Congress and instead fabricating

[93] *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-80 (1892) (holding that federal courts will not inquire into whether an enrolled bill was the bill actually passed by Congress).

[94] *Id*. at 677 (citation omitted).

[95] Revisor's Note, 42 U.S.C. § 7411.

[96] *See Muniz v. Hoffman*, 422 U.S. 454, 469-72 & nn. 9-11 (1975).

[97] 79 Fed. Reg. 34,833 (June 18, 2014).

an impermissibly broad delegation of authority and then acting on it —in effect, asserting the power to "make law."

As the Supreme Court stated in *UARG*:

> Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.[98]

"Agencies exercise discretion only in the interstices created by statutory silence or ambiguity . . . ."[99]

Hence, if Congress had indeed enacted two different versions of Section 111(d) in 1990, *Chevron* would confirm in EPA a wholly extra-constitutional latitude to choose between them. *Chevron* allows an agency to fill interstitial gaps in a statutory scheme, or to resolve ambiguities in the terms of a statute, not to choose which of two competing versions of a statute the agency wishes to make legally operative. The latter task is the exclusive responsibility of the legislature, subject to judicial interpretation by the courts. By choosing to execute what it describes as the "Senate" version of Section 111(d), EPA is choosing to effectively repeal or to nullify the "House" version. Needless to say, not even Congress is authorized to legislate by tossing two substantively different versions of a law into the air and empowering an executive agency to decide which one to catch and run with.

Under Article I and the separation of powers, "the lawmaking function belongs to Congress" and may not be handed off to or appropriated by "another branch or entity."[100]

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[98] 134 S. Ct. at 2446.

[99] *Id.*

[100] *Loving v. United States*, 517 U.S. 748, 758 (1996).

"Legislative power is nondelegable. Congress can no more delegate some of its Article I power to the Executive than it could delegate some to one of its committees. What Congress does is to *assign responsibilities* to the Executive . . . ."[101] The distinction is between impermissible delegation of *lawmaking* functions and permissible delegations of responsibility to *execute* or *administer* the laws:

> The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[102]

This bedrock principle, one familiar to anyone who has taken an elementary civics class in any halfway adequate high school, has particular relevance when administrative agencies seek to expand their statutory mandates via *Chevron* deference. Here, EPA is flagrantly refusing to execute the House version of Section 111(d) and is instead seeking to operate as a junior-varsity unicameral legislature. As Justice Kennedy has opined, "[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances. To that end the Constitution requires that Congress' delegation of lawmaking power to an agency must be 'specific and detailed.'"[103] The requirement of "specific and detailed" delegations is sometimes applied loosely, and broad delegations have become increasingly common. But it would be a category error of the first order to confuse a broad delegation of power to carry into effect a law Congress has enacted with a wholly different

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[101] *Id.* at 777 (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original).

[102] *Loving*, 517 U.S. at 758-59 (quoting *Marshall Field Co. v. Clark*, 143 U.S. 649, 693-94 (1892)).

[103] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (concurring in part and concurring in the judgment) (quoting *Mistretta v. United States*, 488 U.S. 361, 374 (1989)).

species of being – a "delegation" of completely unfettered power simply to select *which of two laws* to carry into effect.

EPA insists that in 1990 Congress enacted two different versions of Section 111(d) and that it is up to EPA to decide which one it wishes to execute. EPA may not arrogate to itself the authority to choose between two different versions of a statutory provision—each of which (according to the agency) is legally operative. The Constitution would not even permit Congress to delegate to the EPA the kind of law-selecting authority EPA is claiming for itself here; *a fortiori*, the EPA cannot claim such authority where Congress has not purported to make such an unconstitutional delegation.

IV. The Proposed Rule Violates Structural Limits on EPA Authority and Principles of Federalism.

The comments of numerous states and governmental entities demonstrate that the Proposed Rule also impermissibly trenches on state agencies currently exercising authority over electricity regulation. The Proposed Rule conflicts with the Clean Air Act and would raise serious constitutional questions under the Tenth Amendment and principles of federalism.

The Proposed Rule specifies state goals and implementation strategies. It effectively dictates the fuel mix each state must adopt, by determining the "state goal" for emissions, the target the states must meet.[104] It requires states to mandate that coal plants significantly reduce generation or even shut down completely, supposedly as a "system of emission reduction" within the meaning of Section 111(a). EPA has already arrogated to itself the authority to determine the "best system of emission reduction" ("BSER"),[105] and refuses to reopen that rulemaking.[106]

[104] 79 Fed. Reg. 34853.

[105] "State Plans for the Control of Certain Pollutants From Existing Facilities," 40 Fed. Reg. 53340, 53346 (Nov. 17, 1975)

[106] 79 Fed. Reg. at 34852 n.86

States may comment on the proposed BSER, but the methodology for computing the state's goals, the body of underlying data, and the resulting BSER are all predetermined and cannot be changed: EPA will not reopen the relevant rulemakings.[107] The only procedure resembling an appeal that a state may invoke is to petition for discretionary reconsideration.[108] The reason? Quite simple: EPA is confident that "states will be able to achieve their final CO_2 emission performance goals and that no special provision for state adjustment of goals outside the normal notice-and comment rulemaking process is warranted."[109] To the extent plans may be modified, there is an explicit "no backsliding" mandate.[110] The Proposed Rule also gives states a mere 13-month timeline until the submission of state plans.[111]

The Proposed Rule goes to great lengths to appear as though it permits states some degree of freedom, but in truth it offers only Potemkin choices. The state may convert an EPA-set state goal into a rate- or mass-based goal,[112] but may not alter the number. The state is given leeway to "assign[] the emission performance obligations to its affected EGUs," but only "as long as, again, the required emission performance level is met."[113] All of the important decisions have already been made by EPA, depriving the State of its prerogative to set its own policies. By controlling the state goal and the BSER, EPA maintains control over the implementation of the plan, allocating to the State solely the ability (at most) to fine-tune a few details.

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[107] 79 Fed. Reg. 34898 & n.268.

[108] 79 Fed. Reg. 34898 n.269 ("In the event that a state becomes concerned about its ability to meet the goal that EPA promulgates for it, the state may submit to EPA a petition for reconsideration, if that petition is based on relevant information not available during the comment period. See CAA section 307(d)(7)(B).").

[109] 79 Fed. Reg. 34898.

[110] 79 Fed. Reg. 34917.

[111] 79 Fed. Reg. 34915.

[112] 79 Fed. Reg. at 34837.

[113] 79 Fed. Reg. at 34853.

Many states will need to enact new legislation and develop completely new regulatory schemes in order to comply with the Proposed Rule. The Proposed Rule would lock states into a framework in which the goals are set by EPA, the means to be used to achieve those goals are set by EPA, and even the timetable for the enactment and implementation of new legislation is set by EPA. If a state fails to formulate a state plan at all, EPA will mandate a federal plan and impose sanctions on the State. The net effect is that EPA ultimately sets the policy, and the only question is whether the State enjoys a few cosmetic degrees of freedom or suffers coercive penalties.

The Proposed Rule invades state regulatory control in an unprecedented manner under the Clean Air Act and raises grave constitutional questions. It seeks to commandeer state agencies in violation of core structural principles of federalism and the Tenth Amendment. The Supreme Court has drawn a line: "[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."[114] When faced with such a command in *New York v. United States*,[115] the Supreme Court struck it down, holding that the federal government could not put a state to the Hobson's choice of either taking title to nuclear waste or enacting particular state waste regulations. The option of taking title was a daunting one, because it would force states to assume liability for the damages caused by nuclear generators, and thus "would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents."[116] The potential liability exposure made any real "choice" meaningless. Further, although the statute purported to give a state the ability to fine-tune the federal mandate, the Court explained that "[n]o matter which path the State chooses, it

[114] *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982).

[115] 505 U.S. 144 (1992).

[116] *Id.* at 176.

must follow the direction of [the federal government]."[117] The Court found that the purported "latitude given to the States to implement Congress' plan" and the supposed options "to regulate pursuant to Congress' instructions in any number of different ways," did not offer any genuine ability to exercise discretion or choice.[118] The Court applied the "anti-commandeering" principle in *Printz v. United States*,[119] invalidating federal legislation that required state law enforcement officers to perform federally mandated background checks on handgun purchasers.

And in *Nat'l Fed'n Indep. Bus. v. Sebelius*,[120] the Court extended principles of federalism to strike down the Affordable Care Act's expansion of Medicaid, on the ground it would coerce states either to accept the expansion or risk losing existing Medicaid funding. While conditions on grants to states are permitted when related to the subject of the grant, "[w]hen … such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[121]

The same reasoning is applicable here. In the instant context, a state that failed to adopt an EPA-approved plan would face Draconian sanctions including loss of highway funds,[122] loss of support for air pollution planning and control programs,[123] and a selective toughening of the regulatory regime applied to a state, in the form of a 2:1 ratio of emission reductions to increases

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[117] *Id.* at 177.

[118] *Id.*

[119] 521 U.S. 898, 926 (1997).

[120] 132 S. Ct. 2566, 2601-2605 (2012).

[121] *NFIB*, 132 S. Ct. at 2604.

[122] 42 U.S.C. § 7509(b)(1).

[123] 42 U.S.C. § 7509(a).

-- the so-called "offset penalty."[124] These sanctions resemble those found impermissible in *NFIB v. Sebelius,* as commentators have already noted.[125]

Moreover, EPA has frustrated any ability of states to make an informed choice in response to the Proposed Rule. On October 28, 2014, EPA released a Notice of Data Availability (NODA) for the Proposed Rule (Docket No. EPA-HQ-OAR-2013-0602; FRL-9918-53-OAR; RIN 2060-AR33), which introduces substantial amounts of uncertainty into the Proposed Rule. The press release accompanying the document states that such notices "do not change a proposal."[126] Even so, the NODA opens up the possibility of measuring attainment regionally rather than statewide.[127] The Proposed Rule itself was quite clear that emissions would be measured statewide.[128] Such last-minute shifts only worsen the situation for states, which cannot even plan ahead to know whether they will be measured on their own or, for example, combined with their neighbors. Indeed, the NODA acknowledges this dilemma and explains that *EPA has no good answer* for the problem of states isolated by regional pacts.[129] EPA solicits comments on how the BSER is calculated for each state, tacitly acknowledging that its numbers were calculated badly,[130] but remains notably silent on the mandatory nature of the BSER. Now state

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[124] 42 U.S.C. § 7509(b)(2).

[125] *See also* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 Geo. L.J. 861, 916-20 (2013) (noting the vulnerability of the Clean Air Act sanction provisions to the anti-coercion analysis applied in *NFIB*).

[126] EPA, "EPA Provides Additional Information on Clean Power Plan/Agency Requests Public Comment on Additional Information and Proposes Carbon Goals for Areas in Indian Country and U.S. Territories" (Oct. 28, 2014), online at http://yosemite.epa.gov/opa/admpress.nsf/596e17d7cac720848525781f0043629e/bd4d43b1c0fc593285257d7f005dd563!OpenDocument.

[127] EPA, Notice of Data Availability, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 36 (Oct. 28, 2014) ("NODA").

[128] 79 Fed. Reg. at 34853 ("It should be noted that an important aspect of the BSER for affected EGUs is that the EPA is proposing to apply it on a statewide basis.").

[129] *See* NODA at 49 (soliciting comments on the subject).

[130] *Id.* at 51-58.

goals are left uncertain until the final rule is promulgated – at which point they will be set in stone. The NODA introduces even more uncertainty, but fails to address the core problem: Ultimately, states have no control over their regulatory programs and no choice to select any option other than EPA's.

At bottom, the Proposed Rule hides political choices and frustrates accountability. It forces states to adopt policies that will raise energy costs and prove deeply unpopular, while cloaking those policies in the garb of state "choice" – even though in fact the polices are compelled by EPA. The Supreme Court has strongly condemned such arrangements, because "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York v. United States*, 505 U.S. at 169; *see also Printz v. United States*, 521 U.S. at 923 (citing need for "accountability" as a reason to prohibit federal government from forcing state officials to implement federal policy). The EPA thumbs its nose at democratic principles by confusing the chain of decision-making between federal and state regulators to avoid political transparency and accountability.

CONCLUSION

The Proposed Rule should be withdrawn.

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