

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

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14-1112 & 14-1151

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In the United States Court of Appeals  
for the District of Columbia Circuit

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IN RE: MURRAY ENERGY CORPORATION,  
*Petitioner*

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MURRAY ENERGY CORPORATION,  
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A.  
McCARTHY, ADMINISTRATOR,  
*Respondents.*

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**REPLY BRIEF FOR INTERVENOR  
PEABODY ENERGY CORPORATION IN SUPPORT OF  
PETITIONER MURRAY ENERGY CORPORATION**

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**February 26, 2015**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED  
CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

**A. Parties and *Amici*.** All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioner, Murray Energy Corporation.

**B. Rulings Under Review.** The Petition relates to EPA's proposed rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

**C. Related Cases:** *West Virginia v. EPA*, No. 14-1146 (D.C. Cir.) (petition to review EPA settlement).

Dated: February 26, 2015

/s/ Tristan L. Duncan

**RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Peabody provides the following disclosure:

Peabody Energy Corp. (“Peabody”) is a publicly-traded company on the New York Stock Exchange (“NYSE”) under the symbol “BTU.” Peabody Energy Corp. has no parent corporation and no publicly held corporation owns more than 10% of Peabody Energy Corporation’s outstanding shares.

Dated: February 26, 2015

/s/Tristan L. Duncan

**CERTIFICATE OF COUNSEL PURSUANT TO LOCAL RULE  
28(D)(4)  
REGARDING SEPARATE BRIEFING**

Pursuant to D.C. Cir. Rule 28(a)(4), counsel states that a separate reply brief is necessary because this case presents a wide range of statutory, constitutional, and prudential questions. By Order of February 12, 2015, the Court granted Peabody's motion for leave to intervene in support of petitioner or in the alternative to participate as amicus curiae, and directed the clerk to file Peabody's separate Intervenor brief. Peabody seeks leave to file this separate reply brief for the same reasons as it sought to file its principal brief.

The joint intervenor brief filed by NFIB and UARG addresses many of the questions presented by the EPA rulemaking at issue. The instant reply brief by Peabody Energy Corp., represented by Professor Laurence Tribe and other undersigned counsel, is distinctive because it addresses only the constitutional questions. Peabody and Professor Tribe submitted administrative comments to the EPA focusing exclusively on the constitutional questions raised by the proposed rule, *see* Comments of Laurence H. Tribe and Peabody Energy Corporation, *Carbon Pollution Emission Guidelines for Existing Stationary Sources:*

*Electric Utility Generating Units*, Docket ID No. EPA-HQ-OAR-2013-0602-23587 (Dec. 1, 2014),<sup>1</sup> and likewise this separate reply brief focuses solely on those constitutional questions.

Separate briefing will not burden the Court. Undersigned counsel for Peabody has conferred at length with counsel for Intervenors UARG and NFIB, and they have agreed to allocate 875 words of the 4,375 word limit for the Intervenors' reply brief to Peabody. Accordingly, this brief will not add to the total briefing submitted to the Court.

Therefore, Peabody respectfully requests leave to file a separate reply brief in this case.

Dated: February 26, 2015

/s/ Tristan L. Duncan

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<sup>1</sup> In addition to the joint comments with Professor Tribe, Peabody also submitted a set of comments on its own. Comments of Peabody Energy Corporation, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Docket ID No. EPA-HQ-OAR-2013-0602 (Dec. 1, 2014).

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## GLOSSARY

EPA	United States Environmental Protection Agency
GHGs	Greenhouse gases
Law Profs. Br.	Brief of Amici Law Professors Supporting EPA
NRDC	Natural Resources Defense Council
Peabody	Peabody Energy Corp.

## **REPLY BRIEF FOR INTERVENOR PEABODY ENERGY CORP.**

### **I. Peabody Has Standing.**

EPA denies that harm to investor perceptions of Peabody (only one of Peabody's concrete injuries) confers standing. EPA Br. 17 n.6. But harm to reputation qualifies as Article III injury. *Meese v. Keene*, 481 U.S. 465, 474-75 (1987); *Foretich v. United States*, 351 F.3d 1198, 1210-12 (D.C. Cir. 2003); *cf. Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962 (D.C. Cir. 1980) (corporate "stigma"). The cases cited by EPA are inapposite. *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013), has nothing to do with reputational harm. *General Elec. Co. v. Jackson*, 610 F.3d 110, 120-21 (D.C. Cir. 2010), involved protectable interests under Fifth Amendment procedural due process and did not deny that reputational harms count as Article III injuries. If anything, the Court must have concluded that they did count, or else it would have dismissed GE's due process claim for lack of standing rather than addressing it on the merits.

### **II. EPA's Action Violates The Separation Of Powers.**

EPA labels Peabody's argument a "non-delegation" objection. EPA Br. 51. That is at best misleading. Peabody's argument bears no resemblance to the usual non-delegation objection, where the claim is

that Congress, in the specific federal statute at issue, has provided an agency with an insufficiently intelligible principle to guide the agency's decisionmaking and to assist the court in reviewing the agency's actions. Here, in contrast, Peabody's argument is that EPA violates the separation of powers when it insists that the agency may choose between two competing candidates for the role of the "real" Section 111(d). This is not an exercise in resolving ambiguities but an ambitious gambit to decide what is the law of the land. EPA effectively seeks to play the role of the congressional Conference Committee reconciling two different versions of a bill. But "the lawmaking function belongs to Congress" and may not be appropriated by "another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996).

EPA erroneously assumes that the Statutes at Large reflect "two" separate versions of Section 111(d) and that in 1990 the Office of Law Revision Counsel (the "Revisor") somehow overlooked the Senate's clerical amendment. That is untrue. Rather, the Revisor properly recognized that the cross-reference that the Senate amendment sought to update was mooted by the substantive House amendment, which replaced the relevant statutory language in Section 111(d) wholesale.

That is why the Revisor explained that the Senate's clerical amendment "could not be executed." Revisor's Note, 42 U.S.C. § 7411.

Such an interplay between clerical and substantive amendments is common in complex legislation. *E.g.*, States Intervenor Br. 11 n.6. EPA's position would wreak havoc by allowing agencies to make their own law throughout the U.S. Code.

EPA's amici cite *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (Law Profs. Br. 11), but no court has ever found a *Chadha* violation in the dozens of legislative situations that are just like this one. Amici are simply wrong that some "functionary's editorial decision" was given effect "over the legal text approved by Congress and signed by the President." *Id.* Both bicameralism and presentment were fully satisfied when the President signed the substantive House amendment enacted by both Houses.

### **III. EPA Is Not Entitled To *Chevron* Deference.**

EPA cannot claim *Chevron* deference to sustain the extraordinary law-choosing role it asserts here, because *Chevron* deals only with the degree of deference an agency should receive when it resolves an ambiguity Congress has left in the law the agency is charged with

enforcing; *Chevron* has no bearing on an agency's entirely different power to decide for itself *what law Congress has enacted*.

Moreover, even if there were statutory ambiguity (and there is not), EPA has failed to show another *Chevron* prerequisite: that Congress even *sought* to delegate to *EPA* the authority to resolve the issue. See *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013) (“[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.”).

#### **IV. EPA's Action Raises Grave Constitutional Questions Which This Court Should Avoid By Construing EPA's Statutory Authority Narrowly.**

EPA's invasion of state sovereignty constitutes irreparable injury, which warrants an extraordinary writ. NRDC Br. 31 contends that EPA's plan is permissible under *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). But *Hodel* involved a program that left states a genuine option whether to participate, leaving “the full regulatory burden [on] the Federal Government,” *id.* at 288, if they chose not to. The states are left no genuine choice here.

NRDC asserts that it would be “improper” for this Court to reach the constitutional objections raised by Peabody (including the Fifth Amendment). NRDC 30. But the only way this Court can *avoid* reaching those objections is to construe EPA’s statutory authority narrowly enough so that EPA’s actions do not raise them. *Edward J. DeBartolo Corp. v. Florida Gulf Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). That is precisely what Peabody urges: this Court should hold that the Clean Air Act prohibits the Proposed Rule.

### **CONCLUSION**

The Petition should be granted and a writ of prohibition issued.

February 26, 2015

Respectfully submitted,

/s/Tristan L. Duncan

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that this brief contains 871 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

/s/Tristan L. Duncan



**CERTIFICATE OF SERVICE**

I hereby certify that on this day, February 26, 2015, 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