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United States Court of Appeals for the District of Columbia Circuit

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and REGINA A MCCARTHY, Administrator, United States Environmental Protection Agency,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE STATE OF NEVADA AND CONSUMERS' RESEARCH IN SUPPORT OF PETITIONERS

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February 23, 2016

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amici curiae the State of Nevada and Consumers' Research certify that to the best of their knowledge:

(A) ***Parties and Amici.*** All parties, intervenors, and amici are, to the best of my knowledge, listed in the Opening Brief of Petitioners on Core Legal Issues filed on February 19, 2016, with the exception of amici curiae State of Nevada and Consumer's Research and the following amici curiae in support of Petitioners:

- Amici curiae Scientists in Support of Petitioners, listed at pages *i-iii*, of Brief of Amici Curiae Scientists in Support of Petitioners Supporting Reversal [Doc.# 1600166];
- Amici curiae Former State Public Utility Commissioners, listed at pages 1-2 of Brief of Amici Curiae Former State Public Utility Commissioners [Doc. # 1600328];
- Amici curiae 60Plus Association, Federalism in Action, Hispanic Leadership Fund, Independent Women's Forum, National Taxpayers Union, and Taxpayers Protection Alliance;
- Amicus curiae Landmark Legal Foundation.

(B) ***Rulings Under Review.*** The final rule on review is found at 80 Fed. Reg. 64,662 (October 23, 2015) and is entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units".

(C) ***Related Cases.*** This case was not previously before this Court or any other court, nor are counsel aware of any related cases within the meaning of this Court's Rule 28(a)(1)(C) other than those listed in the petitioners briefs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amici curiae certify that Nevada is a sovereign State of the Union. They further certify that Consumers' Research has no outstanding shares or debt securities in the hands of the public, and has no parent company. No publicly held company has a 10% or greater ownership interest in Consumers' Research.

STATEMENT REGARDING RULE 29(C)(5)

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, amicus curiae Consumers' Research certifies that:

(A) No party's counsel authored this motion or the attached amicus brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting this amicus brief; and

(C) No person—other than amicus curiae Consumers' Research, its members, or counsel—contributed money that was intended to fund preparing or submitting of this amicus brief.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY OF AMICUS CURIAE

This brief as *amicus curie* is brought on behalf of the State of Nevada, a sovereign State of the United States, by and through its Attorney General, Adam Paul Laxalt. While differently situated as compared to the other States participating as petitioners in this litigation, the State of Nevada is still harmed by EPA's unlawful rule, in at least two distinct ways. *First*, EPA's unprecedented regulations harm energy consumers in other States, thus threatening harm to the overall national economy and in turn to Nevada's vital tourism industry. *Second*, EPA's final rule contravenes basic principles of separation of powers and administrative law. It thus opens the door to further rounds of discretionary EPA regulations—regulations that may well aim directly at Nevada utilities, businesses, and consumers. As a State, Nevada may file an amicus brief without the consent of the parties or leave of court, and is not required to join a single brief. *See* D.C. Cir. Rule 29(b), (d).

Founded in 1929, Consumers' Research is an independent educational organization whose mission is to increase the knowledge and understanding of issues, policies, products, and services of concern

to consumers and to promote the freedom to act on that knowledge and understanding. Consumers' Research believes that the cost, quality, availability, and variety of goods and services used or desired by American consumers—from both the private and public sectors—are improved by greater consumer knowledge and freedom. To that end, Consumers' Research pioneered product testing to provide consumers with unbiased, reliable, scientific information. Moreover, to protect consumers, Consumers' Research examines the effects of government programs, laws, and regulations.

The Board of Directors of Consumers' Research has authorized it to join Nevada in this filing in order to highlight the legal and economic harms EPA's final rule poses for consumers—an interest not specifically represented in the large coalition of party petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Air Act unambiguously calls for States to serve as the primary decisionmakers in "establish[ing] standards of performance" for existing stationary sources of pollutant emissions. The EPA rule challenged in this case makes little pretense of trying to comply with this basic requirement of federal law. *See Carbon Pollution Emission*

Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). And even if this statutory assignment of responsibility were less clear, elementary principles of federalism would preclude giving credence or deference to any state-authority-invading regulation contrary to the Act's allocation of delegated authority. Indeed, EPA's final rule is particularly notable in that, while wholly agency-devised, it imposes vast costs on consumers. This is not an instance where an agency has filled up details in a statutory scheme enacted by Congress; it is, rather, agency legislation in purest form. For these reasons and others explained in petitioners' briefing, EPA's final rule oversteps statutory and constitutional bounds and should be vacated in its entirety.

As an initial matter, the final rule rests on basic misconceptions of EPA's role vis-à-vis the States in establishing "standards of performance" for existing pollution sources. Acknowledging that this case presents issues of first impression, EPA's final rule construes the agency's authority in breathtakingly expansive fashion. In particular, EPA overlooks that "standards of performance" for existing sources are established under a state-driven process for relaxing, on a source-by-

source basis, the stringency of EPA-established federal performance standards applicable to new sources. *See* 42 U.S.C. 7411(b). Critically, States, not EPA, are the entities designated to "establish" and "apply" existing-source performance standards in the first instance.

Beginning with its title, EPA's rulemaking refers repeatedly to EPA-established "emissions guidelines" for "existing stationary sources." And throughout the rule the agency contends that it enjoys authority to substantively implement Section 111(d). *See, e.g.*, 80 Fed. Reg. at 64,707 ("The EPA is establishing emission guidelines for States to use in developing plans to address GHG emissions from existing fossil-fuel fired electric generating units."). But this assertion of substantive regulatory authority stands the Clean Air Act on its head. The Act could hardly be clearer regarding the agency's limited role in the standard-setting process for existing sources under Section 111(d). Under that provision, EPA is to establish, not substantive "emissions guidelines," but "procedures" for States' use in "establish[ing] and "applying" to existing sources the similar performance standards the agency has "establish[ed]" for new sources under Section 111(b). EPA's

bid to freelance its way to a set of substantive and binding existing-source "guidelines" finds no warrant in the Act. (*See* Section I, *infra*.)

Confronted with the Clean Air Act's sharp division of authority between federal administrators and sovereign States, EPA seeks shelter under *Chevron*. But, for one thing, the Clean Air Act unambiguously limits EPA's Section 111(d) role to questions of procedure and review of state submissions, not substantive standard-setting. And for another, EPA's invasion of States' authority fails even more decidedly once structural constitutional considerations and democratic accountability concerns are taken into account. *See*, *e.g.*, *NFIB v. Sebelius*, 132 S.Ct. 2566, 2601-03 (2012); *cf. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001). Opinions like *Sebelius* make plain the constitutionally problematic character of the final rule's attempts to differentially regulate private enterprises depending on whether or not a state government has proved willing to regulate those same enterprises according to EPA's dictates. (*See* Section II, *infra*.)

Finally, EPA's final rule cannot be justified as a mere filling in of the details of a duly enacted delegation of regulatory authority. EPA

has created, in the words of its Administrator, a program about "investments" in nascent technology and "not about pollution control." Remarks of Gina McCarthy before Senate Environmental and Public Works Committee (July 23, 2014), at 1:22:42, *available at* http://www.epw.senate.gov/public/index.cfm/2014/7/full-committee-hearing-entitled-oversight-hearing-epas-proposed-carbon-pollution-standards-for-existing-power-plants. Such assurances, while perhaps soothing, do nothing to diminish the fact that the EPA is not an early-stage investor, but an Executive Branch agency wielding the coercive power of government. EPA's expensive economic experiment, imposed by fiat, will increase electricity prices for consumers and may well compromise the reliability of electric power service. The best estimates of how much prices will rise, performed by the NERA economic consulting group, project increases of as much as 14% per year costing Americans as much as $79 billion in present dollars. These excessive costs underscore the fundamentally legislative character of EPA's final rule. (*See* Section III, *infra*.)

ARGUMENT

The final rule oversteps the bounds of EPA's authority and should be vacated in its entirety.

I. EPA LACKS STATUTORY AUTHORITY TO PROMULGATE STANDARDS OF PERFORMANCE FOR EXISTING SOURCES IN THE FIRST INSTANCE.

The Clean Air Act's division of responsibility for establishing standards of performance under Section 111 follows a framework that has remained substantially intact since its enactment in 1970. With this Rule, EPA seeks to upend that framework, depart from clear statutory text, and invade the regulatory province of the States.

A. The Act Calls for EPA-Established Standards of Performance for New Sources and State-Established Standards of Performance for Existing Sources.

The Clean Air Act contains two key provisions that govern how performance standards are to be established: Section 111(b) and Section 111(d). Section 111(b) authorizes EPA to create "a list of categories of stationary sources" and to "establish[] Federal standards of performance for *new* sources" within those EPA-defined source categories. *See* 42 U.S.C. § 7411(b) (emphasis added). This authority means that the Agency may establish, for a given "category" of new sources of emissions—for example, electric generating units fired by

fossil fuels—a numerical limit on emissions stated in terms of a given amount of pollutant emissions per unit of fuel input or unit of electricity output.

Under the Act, EPA's numerical new-source performance standards must "reflect[] the degree of emission limitation achievable through the application of the best system of emissions reduction which (taking into account the cost of achieving such reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). This baseline is commonly known as the best system of emission reduction ("BSER"). *See* 80 Fed. Reg. at 64,663-64.

The Act makes clear that a BSER serves only as a reference point for establishing numerical new-source performance standards, not as a technology mandate. Specifically, it states, "[N]othing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance." *See* 42 U.S.C.

§ 7411(b)(5). The Act thus ensures that EPA's numerical new-source performance standards do not effectively become a mandate for specific control measures.

In contrast to the Section 111(b) provisions governing EPA's regulations of *new* pollution sources, Section 111(d) relates to *existing* sources. It authorizes EPA to establish a procedure for States to submit plans to establish applicable standards:

> The Administrator shall prescribe regulations which shall establish *a procedure* similar to that provided by [Section 110] of this title under which each state shall submit to the Administrator a plan which **(A)** *establishes* standards of performance for any existing source of any air pollutant **(i)** [that is not otherwise covered by Section 108 or 112] but **(ii)** to which a standard of performance under this section *would apply* if the existing source were a new source; and **(B)** provides for the implementation and enforcement of such standards of performance.

42 U.S.C. § 7411(d)(1) (emphasis added). The statute then states:

> Regulations of the Administrator under this paragraph shall permit the State in *applying* a standard of performance *to any particular source* under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard *applies*.

Id. (emphasis added). This provision contemplates that performance standards for existing sources will be less stringent than the similar

standards for new sources in the same category. Relaxing the stringency of performance standards for the benefit of existing sources is appropriate for the common-sense reason that retrofitting controls part way through a facility's useful life can be so costly that the facility cannot compete and is rendered economically obsolete.

Section 111(d) works much differently from Section 111(b). Once the Agency has established "standards of performance" for *new* stationary sources in a particular category under Section 111(b), it must then "prescribe regulations" under Section 111(d) that "establish," not standards of performance themselves, but rather "a *procedure* . . . under which each *State* shall submit to the Administrator a plan which … establishes standards of performance for any existing source" of the kind EPA has defined in 111(b) (emphases added).

Section 111(d) thus contemplates that States, not EPA, will "establish" performance standards for existing sources; then States, not EPA, will "apply" those performance standards to "particular" existing sources; and that EPA's role is to "prescribe regulations … establish[ing] a procedure" for States' use in submitting State "plans" that "establish" the actual emissions standards, "apply" those standards

to "particular" existing sources, and "provide[] for" their "implementation and enforcement."

In this fashion, Section 111(d) calls for EPA-prescribed "procedures," not EPA-defined "standards of performance" as those contemplated by Section 111(b). Under Section 111(d), it is State plans that "establish" the actual "standards of performance for any existing source" in the first instance. 42 U.S.C. § 7411(d)(1). Only if a State "fails to submit a satisfactory plan" may EPA then "promulgate[] a standard of performance" that applies to existing pollution sources. *Id.* § 7411(d)(2).

History shows the limited role Section 111(d) has played under the Clean Air Act. As early as 1975, EPA opened a door to claims of substantive authority over existing pollution sources under that provision. *See* State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,342-43 (Nov. 17, 1975). But with the exception of a 1990s regulation of landfills, *see* Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9919-20 (Mar. 12, 1996), this claimed authority has long been of scant

practical importance. Between 1980 and now, EPA finalized Section 111(d) regulations only for landfills; it finalized no regulations over any facilities with limited useful lives.

B. EPA Has Promulgated Standards of Performance For Existing Sources in the First Instance.

With the final rule, EPA has claimed power to promulgate substantive standards of performance for existing pollution sources in the first instance. The rule unblinkingly announces that EPA "is establishing CO_2 emission guidelines for existing fossil fuel-fired electric generating units." 80 Fed. Reg. at 64,663. It purports to "establish[] state-specific rate-based and mass-based goals that reflect the subcategory-specific CO_2 emission performance rates and each State's mix of affected EGUs." *Id.* at 64,664.

The rule sets forth a laborious analysis of a "best system of emission reduction" to apply exclusively to existing Electric Generating Units, not new units. *See generally id.* at 64,717 (Section V discussing "The Best System of Emissions Reduction"). The rule thus devises an elaborate three-building block Section 111(d) "best system of emissions reduction" ("BSER") that differs from the much different BSER that the agency contemporaneously established for existing sources under

Section 111(b). *Compare* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,512-13 (Oct. 23, 2015) (EPA-determined BSER for new sources) *with* 80 Fed. Reg at 64,667 (EPA-determined BSER for existing sources). Defending its decision to undertake such an analysis, EPA states that the Clean Air Act "authorize[s] the EPA to determine the BSER for the affected sources and, based on the BSER, to establish emission guidelines that identify the minimum amount of emission limitation that a state, in its state plan, must impose on its sources through standards of performance." *Id.* at 64,719.

In keeping with this asserted authority, and as a result of its labored analysis, the final rule purports to impose a nationwide limit on carbon emissions from existing coal-fired plants at 1,305 lb. CO2/MW-hour and a nationwide emissions limit of 771 lb. CO2/MW-hour on existing natural gas plants. *Id.* at 64,667. In contrast, the similar limits on new coal-fired and natural gas plants are significantly less stringent: 1,400 lb. CO2/MW-hour and 1,000 lb. CO2/MW-hour, respectively. *See* 80 Fed. Reg. at 64,512.

EPA's final rule thus perversely subjects existing sources to more stringent emissions limits than those applicable to new sources, as shown in the table below.

	New Sources	**Existing Sources**
Coal	1,400 lb. CO_2/MW hr	1,305 lb. CO_2/MW hr
Natural Gas	1,000 lb. CO_2/MW hr	771 lb. CO_2/MW hr

See 80 Fed. Reg. at 64,512-13.

C. EPA's "Emissions Guidelines" Are Substantive Standards of Performance Unlawfully Promulgated to Apply in the First Instance to Existing Pollution Sources.

EPA's emissions guidelines unlawfully disregard Section 111's statutorily prescribed allocation of roles as between the agency and the States. Specifically, EPA inverts and contradicts Section 111(d)'s statutory logic by subjecting existing units to more stringent performance standards and then justifying these more stringent standards based on a conceptual jumble centered around agency-devised "emission guidelines." As explained below, EPA's interpretive approach contradicts Section 111's plain text and legislative history in multiple ways.

First, EPA's interpretation fails to give effect to the unmistakable contrast in statutory language between Section 111(b), which provides that EPA shall "establish[] federal standards of performance for new sources," 42 U.S.C. § 7411(b)(1)(B), and Section 111(d), which provides that States shall "establish[] standards of performance for any existing source." 42 U.S.C. § 7411(d)(1).

Second, EPA's interpretation overlooks that Section 111(d) delegates the Agency authority only over **(i)** "prescrib[ing] regulations which shall establish a *procedure,*" 42 U.S.C. § 7411(d)(1) (emphasis added), and **(ii)** prescribing plans for States that "fail[] to submit" a "satisfactory" implementation plan. 42 U.S.C. § 7411(d)(2). Section 111(d) nowhere refers to any substantive EPA authority to define binding, substantive, nationwide emissions limitation requirements in advance of State plan submissions.

Third, EPA fails to respect the fact that "standards of performance" for existing pollution sources are supposed to result from a state-driven process for relaxing, on a source-by-source basis, the stringency of EPA's new-source performance standards. EPA overlooks that the States, not EPA, are to substantively "establish" and "apply"

performance standards for existing sources in the first instance. And it overlooks that the Act nowhere authorizes the ratcheting down of existing-source standards to levels more stringent than those applicable to new sources.

Fourth, EPA has effectively "promulgated" performance standards without auditing and reviewing the state plan submissions called for by the Act. *See* 42 U.S.C. § 7411(d)(2). The agency has done so by pre-establishing "emissions guidelines"—a term foreign to the Act—and pre-announcing that, if necessary, it will impose a plan based on these "guidelines" on every single EGU in a recalcitrant State. 80 Fed. Reg. at 64,664, 64,840. Critically, these "guidelines" are anything but mere helpful advice. They are binding regulatory requirements calculated according to a formula based on "the weighted aggregate of the emission performance rates for the State's EGUs." *Id.* at 66,664. EPA's "guidelines" thus embody the type of substantive emissions limitations that EPA lacks authority to impose in the first instance.

Fifth, EPA misreads the lessons to be drawn from legislative history. *See*, *e.g.*, EPA Legal Memorandum Accompanying Clean Power Plan for Certain Issues (undated), at 18 & n.33, EPA-HQ-OAR-2013-

0602-36872. Prior to 1970, States were responsible for establishing "standards of performance" for both new *and* existing sources. *See* HR No. 91-1146, P.L. 91-604, Clean Air Act Amendments of 1970, 1970 U.S.C.C.A.N. 5356, 5358 (June 3, 1970) (noting that "at present emission standards for stationary sources are established exclusively by the states"). The 1970 amendments to the Act modified this arrangement with respect to *new* sources. *See id.* ("promulgation of federal emission standards for *new* sources … will preclude efforts on the part of the states to compete with each other in trying to attract new plants and facilities without assuring adequate control of extra-hazardous or large-scale emissions therefrom") (emphasis added). But the amendments left in place States' authority over performance standards applicable to *existing* sources. *See* P.L. 91-604, § 111(d)(1), 84 Stat. 1684 (Dec. 31, 1970). Now that further amendments, in 1990, have reduced 111(d)'s role to a point where it is almost never used, EPA has no grounds for ignoring the stark contrast in its standard-setting authority over new sources vis-à-vis existing sources—much less for resurrecting a forgotten Section 111(d) as grounds for the most sweeping regulatory initiative in its history.

Finally, the agency conflates the statutory concepts of "standards of performance" and "best system of emissions reduction." The statute provides that EPA will establish standards of performance for "sources within" an EPA-defined category and that States will establish and apply on a case-by-case basis relaxed standards applicable to sources "to which a standard of performance under this section would apply if such existing source were a new source." 42 U.S.C. § 7411(d)(1). It is true, as EPA notes, that Congress defined the phrase "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which … *the Administrator determines* has been adequately demonstrated". 80 Fed. Reg. at 64,719 (quoting 42 U.S.C. § 7411(a)(1) (emphasis added)). But the Act does not contemplate what occurred here; namely, "the Administrator determin[ing]" two different BSERs for the same source category—one for new sources and another for existing sources.

In summary, EPA's "guidelines for the states to incorporate" in employing their supposed "broad discretion" to devise plans under Section 111(d), 80 Fed. Reg. at 64,719, are entirely unlawful. As

explained, EPA's final rule establishes levels of emissions limitations for existing sources **(i)** based on EPA's own authority; **(ii)** on a nationwide basis; **(iii)** at levels more stringent than those applicable to new sources. In so doing, the Rule diverges from the statutory scheme, which contemplates emissions limitations for existing sources **(i)** established by States; **(ii)** on a source-by-source basis; **(iii)** at levels reflecting an appropriate relaxation of the parallel standards applicable to new sources.

II. EPA'S FINAL RULE INFRINGES STATES' REGULATORY AUTHORITY AND UNDERMINES DEMOCRATIC ACCOUNTABILITY.

It is "axiomatic" that agencies may not promulgate regulations without authority from Congress. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Although this principle may frustrate agencies from time to time, especially when they perceive "gaps" in their authority, this does not mean that agencies may unilaterally amend their authorizing statutes to conform to their views about the regulatory demands of the times. While failures of regulation may indeed be "a pressing national problem," a judiciary that would license "extraconstitutional government" with each such issue would, "in the

long run, be far worse." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) (quotation marks, alterations, and citations omitted). No matter "how serious" the problem that an agency "seeks to address," *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002), agencies require congressionally delegated authority for their actions.

Here, EPA's final rule is not only unsupported by statutory text, it infringes structural constitutional interests and undermines democratic accountability. As noted in petitioners' briefing, the rule embraces a novel structure that imposes substantive emissions limitations—called "guidelines"—that realistically can be met, if at all, only in instances where States, or EPA under a federal plan, chooses to meet state-wide emission targets through emissions trading among existing sources. *See* Pet. Br. (Record Issues) at 17-49; *see also* Pet. Br. (Legal Issues) at 74-78.

Many States thus have no practical option except to mobilize extensive legislative, regulatory, legal, and technical resources to meet the EPA-devised guidelines, or, alternatively, to leave EGUs within their boundaries to the tender mercies of the treatment they will receive

under a federal plan. As declarations submitted by various States in support of their stay applications make clear, meeting these substantive requirements means, in many States, passing new legislation, promulgating new regulations, negotiating new interstate transmission agreements, and the like. WV *et al.* Mot. for Stay, W. Durham Decl. ¶ 8 at 367-68/559; T. Easterly Decl. ¶¶ 2, 3, 9 at 370, 371, 376/559; R. Gore Decl. ¶ 4 at 378/559; T. Gross Decl. ¶ 5 at 382-84/559.

Given the backdrop of ongoing debates over energy and environmental policy in all States, genuine democratic accountability will be more hope than reality if EPA's rulemaking is allowed to take effect. Under such circumstances, citizens will be at pains to disentangle which state laws and regulatory decisions to attribute wholly to state officials; which to chalk up in part to state officials and in substantial part to EPA; and which to attribute to a State wholly caving in and determining simply to make the best implementation possible of EPA's unwelcome policy demands. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2601-03 (2012); *see also New York v. United States*, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both State and federal officials is

diminished."). EPA's final rule irretrievably obscures lines of sovereign authority and democratic accountability.

EPA responds that its final rule "fully respects" principles of state sovereignty, because it provides an "initial opportunity" for States "to submit a satisfactory State plan," with "no consequences to states in their sovereign capacity should they decline to participate." EPA Legal Memorandum at 47. If a State declines to regulate in line with EPA's dictates, the only consequence, says EPA, is that "affected EGUs" will "instead be subject to a federal plan that satisfies statutory requirements." *Id.*

This response assumes (wrongly) that EPA enjoys authority to promulgate stringent "emissions guidelines" in the first instance. Furthermore, it overlooks the facility-specific and highly discretionary nature of Section 111(d) standard-setting for existing sources. As explained above, States are expected to take retrofit costs and useful-life horizons into account under the Act and to relax federal new-source performance standards, on a case-by-case basis, to ensure that older facilities are not subject to unfair cost disadvantages as compared to newly constructed ones. A federal plan specifying stringent EPA-

prescribed controls is a far cry from an apples-for-apples substitute for this statutorily prescribed process for protecting existing facilities' economic viability.

Most troubling of all, EPA forgets that "[C]onstitutional rights would be of little value if they could be . . . indirectly denied." *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1867 (1995). The Constitution nullifies "sophisticated as well as simple-minded modes of infringing on constitutional protections." *Id.* EPA's theory maintains, in essence, that the agency may differentially regulate local enterprises depending on whether the State with authority over those enterprises has chosen to deploy its own regulatory authority in EPA-approved fashion. EPA's theory holds further that it may take the broadest possible view of its statutory authority to impose such differential regulation on affected enterprises. Although cooperative federalism frameworks are commonplace in environmental statutes and elsewhere, they are constitutionally unproblematic only where the relevant federal authority is carefully cabined and not unduly coercive from the perspective of States. Absent a narrow construction of Section 111(d), "cooperative federalism" becomes an Orwellian catchphrase for

achieving the same skewing and clouding of state decisionmaking processes that the Supreme Court disapproved in *Sebelius*.

The need to narrowly construe EPA's authority to promulgate substantive "emissions guidelines" is especially great, given that EPA's final rule occupies what have long been state policy domains. States traditionally enjoy authority to manage natural resources, including air resources, within their borders; hence, Clean Air Act Section 101 recognizes "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments…." 42 U.S.C. § 7401(a)(3); *see also Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) (describing how the Federal Power Act provides for similar State authority over retail electricity sales).

As we have emphasized, however, EPA's final rule establishes emission caps for each State at levels more stringent than the parallel federal performance standards for new EGUs. These state-specific caps not only skew state decisionmaking and cloud lines of policy accountability, they invade traditional state policy domains. This

hostile takeover of longstanding state authority is an additional reason for narrowly reading EPA's authority under settled canons of construction. *See*, *e.g.*, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-45 (1994); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991). In order for EPA's rulemaking to pass muster, Section 111 should "manifestly" authorize EPA both to promulgate federal standards of performance for existing EGUs in the first instance and to set standards at levels more stringent than those that apply to new construction. *See BFP*, 511 U.S. at 544-45. Clearly, Section 111 does no such thing.

Confronted with such concerns, EPA asks for deference under *Chevron*. 80 Fed. Reg. at 64,719 n.301. But *Chevron*'s first command is that courts should apply plain statutory text, not rewrite it. *See*, *e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). *Chevron* affords no warrant for EPA—via "interpretation"—to expand its authority to encompass a novel, substantive power of promulgating binding "guidelines" to govern States' regulation of existing sources. As the Supreme Court has frequently reminded agencies in various presidential administrations, *Chevron* ought not be invoked to justify

highly consequential shifts in a statute's basic orientation and functioning. *See UARG v. EPA*, 134 S.Ct., 2427, 2444 (2014), (striking down EPA regulation of greenhouse gases under Clean Air Act's PSD program); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (striking down FDA regulation of cigarettes); *see also Gonzales v. Oregon*, 546 U.S. 243 (2006) (striking down Department of Justice regulation of physician-assisted suicide); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (striking down FCC deregulation of long-distance carriers).

In sum, EPA's final rule requires major shifts nationwide in the generation and consumption of electric power as part of a *de facto* national energy policy. But EPA points to nothing in the text, structure, purposes, or history of the Clean Air Act remotely adequate to establish that Congress delegated EPA authority to promulgate such an unprecedented regulatory scheme. Given the sovereign interests at stake, much clearer statutory authority would be needed for EPA's final rule to withstand review.

III. EPA'S RULE IS ENORMOUSLY CONSEQUENTIAL AND WILL HARM CONSUMERS.

EPA's final rule cannot be justified on grounds that it merely "fills up" the details for a legislatively enacted regulatory regime. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406-07 (1928). The final rule is, rather, both EPA-devised and enormously consequential.

It is worth noting at the outset that the final rule's alleged benefits are in many ways uncertain or illusory. Pet. Br. (Record Issues) at 69-71. Specifically, the emissions reductions EPA projects may not occur (due to "leakage"); the health benefits EPA projects may not be real because they are largely attributable to alleged particulate matter "co-benefits"; and any benefits the final rule does produce are likely to be realized largely or entirely in foreign nations. *Id.* EPA's Administrator is therefore on solid ground in acknowledging that this rule really is "not about pollution control," but is instead about "an investment opportunity . . . [i]t's about investments in renewables and clean energy." Remarks of Gina McCarthy before Senate Environmental and Public Works Committee (July 23, 2014), at 1:22:42, *available at* http://www.epw.senate.gov/public/index.cfm/2014/7/full-

committee-hearing-entitled-oversight-hearing-epas-proposed-carbon-pollution-standards-for-existing-power-plants.

What is real and certain about EPA's rulemaking is that the revenue streams EPA is directing into "renewables and clean energy" will come from the pockets of American consumers. As President Obama has acknowledged, under any plan such as this cap-and-trade scheme, "electricity rates would necessarily skyrocket." Sen. Barack Obama, Interview with San Francisco Chronicle, *available at* https:/www.youtube.com/watch?v=HlTxGHn4sH4. This is so, because once greenhouse-gas emissions are capped, as under this EPA rulemaking, "coal powered plants, natural gas, you name it, whatever the plants were, whatever the industry was, they would have to retrofit their operations," and this "will cost more money." *Id*.

The best calculations of precisely how much electricity rates will skyrocket have been performed by the NERA economic consulting firm. NERA estimates that consumer expenditures for electricity service will increase by a total of between $220 and $292 billion in the period from 2022 to 2033, with average annual increases of between $29 and $39 billion per year, measured in 2015 dollars. NERA, Energy and

Consumer Impacts of EPA's Clean Power Plan (Nov. 7, 2015), at 5, *available at* http://www.nera.com/publications/archive/2015/energy-and-consumer-impacts-of-epas-clean-power-plan.html. These costs of incentivizing investment opportunities for renewables and green energy will be borne, necessarily, by American consumers. NERA estimates that average annual electricity rates will increase from 11% to 14% per year and that increased costs to U.S. consumers will range from $64 billion to $79 billion on a present value basis. *Id.*

In contrast, EPA's estimates of electricity price increases are unreasonably low, due to reliance on wishful assumptions about reductions in demand for electricity in the broader economy. *See* EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule, at 3-12-14, 3-43, EPA-452/R-15-003 (Aug. 2015), EPA-HQ-OAR-2013-0602-37105. EPA admits these estimates are based on "various input assumptions for variables whose outcomes are in fact uncertain." *Id.* at 3-43. Further, "EPA recognizes that significant variation exists in these analyses reflecting data and methodological limitations." *Id.*; *see also* Technical Support Document, Incorporating RE and Demand-Side EE Impacts into State Plan Demonstrations, available at

http://www.epa.gov/sites/production/files/2015-11/documents/tsd-cpp-incorporating-re-ee.pdf. These uncertain, yet central, estimates notwithstanding, EPA does not dispute that prices will rise in the near term. EPA's Regulatory Impact Analysis expects near-term electricity-price increases of 2 to 2.7%. RIA at 3-35, 3-40.

Even as electricity prices increase, electric service may well become more unreliable. Coal- and natural gas-fired power plants use proven technologies, together with plentiful, domestically available fuel sources, to provide a consistently reliable source of power for hundreds of millions of Americans. EPA's Rule intentionally shifts power production away from these proven technologies toward less established, less economical, more intermittent energy sources, such as wind and solar power. These technologies, unlike coal and natural gas, can be brought on-line only at a cost in price, reliability, or both. *See* Edison Electric Institute, Comments on Proposed Rule, at 10-11 & App. A at 2, 25, EPA-HQ-OAR-2013-0602 (Dec. 1, 2014).

The upshot, of course, is not to invite this Court to engage in judicial reassessments of EPA's determinations about matters like electricity prices and reliability. It is only to emphasize that EPA has

made enormously consequential substantive decisions for nationwide consumers—without statutory warrant for any substantive decisionmaking at all. It could conceivably be that America's voters believe that sound policy demands that consumer costs should skyrocket, and electricity-service reliability compromises should be tolerated, in the name of creating green-energy investment opportunities. But if this is so, such decisions should be shaped and taken by Congress—not according to expensive, free-lanced, federalism-impinging regulations concocted by the EPA.

* * * *

The Clean Air Act assigns responsibilities as between EPA and States, and this division of authority unambiguously calls for States to serve as primary decision-makers in "establish[ing] standards of performance" for existing sources. Moreover, even if this assignment of roles were ambiguous (and it isn't), this Court would still be bound to give no deference to EPA's accountability-destroying regulation of States' regulation of private enterprises. This is especially so where, as here, EPA's final rule represents, not a filling up of statutory details,

but an agency-devised program that will prove immensely costly to consumers.

CONCLUSION

The petitions for review should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Century Schoolbook typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 5,621 words exclusive of the certificate as to parties, rulings, and related cases, Rule 26.1 disclosure statement, statement regarding Rule 29(c)(5), table of contents, table of authorities, signature lines, and certificates of service and compliance. The undersigned used Microsoft Word 2010 to compute the count.

/s/ *Robert R. Gasaway*
Robert R. Gasaway

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that on this 23rd day of February, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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