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Subcommittee on Energy and Power

**EPA’S PROPOSED 111(d) RULE FOR EXISTING POWER PLANTS:
LEGAL AND COST ISSUES**

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EXECUTIVE SUMMARY

The Environmental Protection Agency's "Clean Power Plan" would command every State by the year 2016 to develop a package of EPA-approved laws requiring coal-fired power plants to shut down or reduce operations, consumers and businesses to use less electricity and pay more for it, and utilities to shift from coal to other energy sources – a total overhaul of each State's way of life. Noncomplying States would face sanctions, including the potential loss of federal highway funds, and the takeover of their energy sectors by an inflexible federal plan of uncertain scope that would inflict significant economic damage.

EPA lacks the statutory and constitutional authority to adopt its plan. The obscure section of the Clean Air Act that EPA invokes to support its breathtaking exercise of power in fact authorizes only regulating individual plants and, far from giving EPA the green light it claims, actually forbids what it seeks to do. Even if the Act could be stretched to usurp state sovereignty and confiscate business investments the EPA had previously encouraged and in some cases mandated, as this plan does, the duty to avoid clashing with the Tenth and Fifth Amendments would prohibit such stretching.

EPA possesses only the authority granted to it by Congress. It lacks "implied" or "inherent" powers. Its gambit here raises serious questions under the separation of powers, Article I, and Article III, because EPA is attempting to exercise lawmaking power that belongs to Congress and judicial power that belongs to the federal courts. The absence of EPA legal authority in this case makes the Clean Power Plan, quite literally, a "power grab."

EPA is attempting an unconstitutional trifecta: usurping the prerogatives of the States, Congress and the Federal Courts – all at once. Burning the Constitution should not become part of our national energy policy.

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INTRODUCTION

I appreciate the opportunity to appear before the Committee to present my legal views regarding EPA's proposed carbon dioxide (CO₂) regulations of power plants, which the agency calls its "Clean Power Plan." In its oversight role, Congress ordinarily focuses on questions of policy and wisdom, but of course Congress is necessarily concerned as well with questions of legality. When a federal agency that a Committee of Congress is charged with overseeing proposes a novel course of action, a particularly important question for Congress – a question anterior even to the issue of whether that course of action is a good or bad idea – is whether the action is consistent with the power Congress entrusted to the agency by statute and, even more fundamentally, with the Constitution of the United States.

I want to make clear at the outset that my testimony addresses only the lawfulness of what EPA proposes to do; I claim no expertise in, nor will I be testifying about, the pros and cons of EPA's plan as a response to the issues posed by climate change. My conclusion as a legal scholar and student of the Constitution is that EPA's proposal not only exceeds the agency's statutory and legal authority but also directly violates limits enacted by Congress to restrict EPA's power and raises serious constitutional questions. I believe that a court, and ultimately the United States Supreme Court, would so hold. In my considered view, EPA is off on a constitutionally reckless mission. Resources that it expends pursuing the Clean Power Plan are resources that could be devoted to unquestionably legal options. At its core, the issue the Clean Power Plan presents is whether EPA is bound by the rule of law and must operate within the framework established by the United States Constitution.

A. Interpreting the Clean Air Act To Authorize EPA's Plan Would Raise Constitutional Questions So Serious That Such An Interpretation Should Be Rejected.

There should be no mistake about how radical EPA's proposal to phase out the use of coal to generate electrical power actually is. Secretary of State John Kerry described U.S. policy regarding coal-fired power plants: "We're going to take a bunch of them out of commission."² But that is just the tip of the proverbial iceberg. EPA's plan represents an unprecedented attempt to change how electricity is generated, transmitted, and consumed throughout the United States. EPA has set a carbon dioxide emission target for every State in the Union. The agency would command each State, within 13 months, to come up with a package of laws to meet that target. Under other far less ambitious Clean Air Act programs involving much simpler issues, States are typically afforded up to three years to submit plans to EPA. Under this program, however, EPA threatens to effectively dictate the energy mix used in each State by determining the "state goal" for emissions. If EPA approves the plan a State must submit within just over a year,³ the State will then have to impose the laws included in that plan on electric utilities and the public.

This submissive role for the States confounds the political accountability that the Tenth Amendment is meant to protect. EPA's plan will force States to adopt policies that will raise energy costs and prove deeply unpopular, while cloaking those policies in the Emperor's garb of state "choice" – even though in fact the policies are compelled by EPA. Such sleight-of-hand offends democratic principles by avoiding political transparency and accountability. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the

² Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. Times (Dec. 11, 2014), available at http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=3.

³ *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. at 34,583 (to be codified at 40 C.F.R. § 60.21).

brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”⁴ As Justice Alito recently observed, “[l]iberty requires accountability.”⁵ “When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.”⁶ Accordingly, EPA’s gambit would mean citizens surrendering their right to be represented by an accountable and responsive government that accords with the postulates of federalism.⁷

Alternatively, if a State plan does *not* meet with EPA’s approval, EPA claims the power to impose severe sanctions, including the loss of highway and Clean Air Act funds, as well as the imposition of a centrally planned and administered federal scheme that could harm not simply the State but also its citizens and economy. As noted by Jody Freeman, the former senior counselor for energy policy in the White House, the prospect of a federal plan “would put states at a huge disadvantage if they choose not to file a plan,” because “EPA may not have the best plan for each state.”⁸ That admission essentially concedes that EPA’s proposal puts a gun to every State’s head.

In this respect, the federalism principles at issue here are strikingly similar to those that arose in the Affordable Care Act case of *King v. Burwell*, argued in the Supreme Court on March 4. There, Justice Kennedy, among others, noted the “serious constitutional problem” that would

⁴ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (citation omitted).

⁵ *Dep’t of Transp. v. Assn. of Am. R.Rs*, No. 13-1080, slip. op. at 1 (U.S. Mar. 9, 2015) (Alito, J., concurring).

⁶ *Id.*

⁷ See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (suggesting that Spending Clause may not be used to infringe rights of third parties).

⁸ *McConnell Urges States to Defy U.S. Plan to Cut Greenhouse Gases*, N.Y. Times, March 5, 2015, at A12.

result if a federal statute were interpreted as threatening the citizens of a State with significant injury unless the State agreed to follow federal policies.⁹ This case involves the same pressures on States to knuckle under to the Federal Government, and the same lack of clear notice. EPA's plan confronts the States with an unforeseeable choice and essentially remakes the agreement between them and the Federal Government that has existed since the Clean Air Act was enacted in 1970. States could not have expected, when they adopted costly implementation plans to regulate conventional pollutants like NO₂, SO₂, and particulates from sources like power plants, that EPA would also seek to phase out those plants altogether by dictating sweeping rules to regulate CO₂, which is produced by every human activity. No State could have anticipated this bait-and-switch when the Clean Air Act was enacted in 1970 or last revised in 1990. The Supreme Court has explained that the "legitimacy of Congress's exercise of the spending power" "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"¹⁰ "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."¹¹

EPA's plan spectacularly fails that test, and the rule of law commands us to be consistent. Some people seem to practice "fair weather" federalism, rediscovering States' rights when it allows them to sustain a federal policy they favor, but abandoning the same principles when it suits them. The Constitution demands more than that.

EPA's proposal would comprehensively re-order national electricity policy, allowing the agency to seize the role of National Electricity Czar and to elbow state as well as federal regulators out of the way. For the first time in the agency's history, EPA's proposal contains

⁹ Tr. Oral Arg., No. 14-114, at 16.

¹⁰ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (citation omitted).

¹¹ *Id.*

standards requiring “outside-the-fence” actions – *i.e.*, measures (such as energy conservation programs or renewable energy quotas) that take place entirely outside the physical boundaries of the electrical generating units identified in the Clean Air Act and traditionally subject to EPA jurisdiction. EPA evidently believes it is empowered to regulate *anyone* who might have an effect on CO₂ emissions from power plants, up to and including the retail consumer who uses electricity from a plant to recharge her phone.

The proposal also seeks to regulate renewable energy generators, energy distributors, and large industrial or commercial users of electricity. This sort of “plant to plug” regulation would permit the EPA to regulate any use of electricity as long as it affects CO₂ emissions – a standard that would reach virtually every use of electricity in the United States. There is no limiting principle. The Affordable Care Act may not compel health insurance consumers to eat or buy broccoli, but EPA seeks to interpret the Clean Air Act to allow it to regulate every watt used in growing broccoli and moving it to the market – as well as every watt used for any other activity within a State.

Even assuming that such an ambitious and unprecedented plan was precisely what Congress directed EPA to promulgate (and the statute, as I will show, makes clear that Congress did the opposite), the plan would dramatically violate the Tenth Amendment’s well-established anti-commandeering principle. Indeed, this plan would violate that principle in a remarkably sweeping and novel way, well beyond EPA’s usual mandate. It would require States to base their energy and emissions policies on the needs of other States (and even other nations, such as Canada) with which they are inextricably linked through the power distribution system – the national power grid. And the breathtaking scope of authority asserted by EPA to regulate “outside-the-fence” would give it greater power than Congress has granted even to the Federal

Energy Regulatory Commission (FERC), even though national grid management lies within FERC's mandate rather than EPA's and falls far outside EPA's expertise. Both the extent of federal interference and the degree of coercion are qualitatively different here from those present in any other Clean Air Act program.

One would expect that, if Congress had intended to confer such revolutionary power on EPA to command the States to do the Federal Government's bidding, it would have said so clearly. Indeed, as I will show, core constitutional principles and precedents governing the Federal-State relationship plainly forbid such blatant federal commandeering. The Supreme Court has instructed that Congress does not "hide elephants in mouseholes."¹² If ever there were an elephant in a mousehole, the EPA's plan is it – and it's an unconstitutional elephant to boot.

The Supreme Court has emphasized that federal statutes must be interpreted narrowly whenever broader interpretations would raise serious constitutional questions.¹³ Any court would therefore approach with extreme skepticism EPA's assertion that the Clean Air Act has empowered it to take the steps it has expressly indicated it will take. For if the doctrine of constitutional avoidance has any application to keep an agency from going right off the constitutional cliff (while protecting a court from having to confront a constitutional question needlessly and from attributing unconstitutional aspirations to Congress), it certainly applies here.

There is a second (entirely independent) reason for saying that, in order to avoid attributing a probably unconstitutional scheme to Congress as a co-equal branch of government, a court would demand the clearest possible showing of congressional authority for what EPA

¹² *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

¹³ *See Bond v. United States*, 134 S. Ct. 2077, 2087 (2014).

seeks to do here. That reason is to be found in the Fifth Amendment’s Due Process and Takings Clauses. Accepting EPA’s view that it has ample legislative authority to adopt its plan would push the agency well past those constitutional protections against takings without just compensation and against arbitrary deprivations of property. For, as I will demonstrate, EPA seeks to single out a small number of entities that happen to lie within the agency’s cross-hairs to bear a burden that, in all logic and fairness, ought to be borne by the public as a whole, and it does so in a way that upsets well-settled reliance interests created by the government itself.

B. EPA’s Flawed Attempts To Manufacture Statutory Authority.

Given this doubly-problematic constitutional backdrop, it’s obviously crucial to figure out how in the world EPA purports to “find” congressional authority to take this extreme (and constitutionally dubious) action. EPA relies on Section 111 of the Clean Air Act, which is primarily a provision about regulating *new* sources of emissions, not *existing* sources.

Section 111(b) requires EPA to identify *categories* of such new sources that “cause[] or contribute[] significantly to air pollution reasonably anticipated to endanger public health or welfare,” and then to set emission standards for what the statute calls “source categories.” When a standard is set for a new source category, Section 111(d) requires States, acting on guidelines set by EPA, to develop emission standards (“standards of performance”) for the same air pollutants from “existing sources” within those same source categories, with this absolutely critical caveat: Section 111(d) applies *only* to a pollutant “which is not . . . emitted from a *source category which is regulated under section [112] of this title.*” This crucial provision affirmatively prohibits EPA from invoking Section 111(d) for a source category already

regulated under Section 112 (a program for 188 listed “hazardous” air pollutants).¹⁴ That the provision operates as a prohibition and not merely as a limited grant of power is uncontested. All that is contested is the scope of what is prohibited. My study of the Clean Air Act convinces me, and would convince a reviewing court, that, because the source categories EPA seeks to regulate—coal-fired power plants—are already regulated under Section 112, the express statutory prohibition in Section 111(d) flatly bars EPA’s Clean Power Plan, making that plan, quite literally, a “power grab.”

Faced with this explicit statutory bar to its Clean Power Plan, EPA advances a variety of arguments in an attempt to circumvent the clear statutory text. Its arguments violate the rules of grammar, ignore the history and structure of the Clean Air Act, and would turn Congress’ handiwork upside down.

(1) In a case now pending in the D.C. Circuit,¹⁵ EPA has taken the position that Section 111(d) of the Clean Air Act (even the U.S. Code version of that section which, as we will see shortly, EPA refuses to accept as a correct statement of the current law) “can be read” – those are EPA’s precise words – to mean that EPA may invoke Section 111(d)’s framework to require States to establish standards for an air pollutant so long as (i) national air quality criteria have not been established for *that specific pollutant* under the Clean Air Act (which establishes ambient standards for certain listed “criteria” pollutants, such as SO₂, NO₂, particulates, O₃, lead, and CO, *but not CO₂*), or (ii) *the particular pollutant* is not already being regulated as a “hazardous” air

¹⁴ Originally Congress listed 189 pollutants. Based on new scientific information, EPA removed caprolactam from the list in 1996; thus, the current list includes 188 pollutants. CO₂ is not listed as a “hazardous” air pollutant under Section 112. Indeed, as a benign gas essential for life, it is not a conventional “air pollutant” at all.

¹⁵ *In re Murray Energy Corp.*, Nos. 14-1112, et al. (D.C. Cir.).

pollutant under Section 112.¹⁶ Because CO₂ is not a listed “criteria” pollutant and is, indeed, not a “hazardous” air pollutant at all, EPA says that the law “can be read” to permit it to invoke Section 111(d) to regulate CO₂ from existing power plants, *even though it is already regulating coal-fired electric power plants under Section 112*.¹⁷

EPA’s arguments on this score are little more than *post hoc* rationalizations constructed by creative appellate counsel in pending litigation. In an early agency proceeding under Section 111(d) following the 1990 amendments, EPA recognized that *categories of sources* regulated under Section 112 are all excluded from regulation under Section 111(d).¹⁸ EPA’s newly minted arguments ignore the structure of the Clean Air Act and are indefensible as a matter of grammar and garden-variety principles of statutory construction. They lead EPA to absurd attempts at hair-splitting, like an insistence that CO₂ may be a “dangerous” pollutant, but not a “hazardous” one.¹⁹ As I will show in detail below, these rationalizations simply make no sense.

(2) EPA tries to overcome the weaknesses in its statutory argument by appealing to an imagined power to fill distinct gaps (like holes in the ozone layer) in the Clean Air Act. Perhaps recognizing that agencies enjoy no inherent gap-filling power beyond the powers they are granted by Congress, EPA insists that the 1990 amendments enacted by Congress were themselves intended “to expand EPA’s regulatory authority across the board” and should be read

¹⁶ Brief for Respondent EPA at 36-37, *In re Murray Energy Corp.*, Nos. 14-1112 & 1151 (D.C. Cir. Feb. 12, 2015), ECF No. 1537419 (“EPA Murray Br.”).

¹⁷ Stationary power plants are already a source category regulated under Section 112 of the CAA. EPA categorized coal-fired power plants as part of a “source category” under Section 112 in 2000. In February 2012, EPA promulgated a new national emission standard under Section 112 for 188 congressionally designated “hazardous air pollutants” emitted by power plants, and the D.C. Circuit upheld EPA’s rule in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), cert. granted, Nov. 25, 2014.

¹⁸ See EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021 (1995), available at <http://www.epa.gov/ttn/atw/landfill/bidfl.pdf>.

¹⁹ EPA Murray Br. at 46.

to ensure that the agency can “cover the full range of dangerous emissions from stationary sources.”²⁰

There are a multitude of problems with this line of reasoning. For starters, there is no “gap” in EPA’s authority to regulate stationary sources. It has ample power to regulate coal-fired electric plants and since 2000 has exercised its power to do so under Section 112.²¹ At stake here is duplicative regulation, not a regulatory gap. EPA seeks to regulate *the same source category* under *both* Section 111(d) and Section 112, and its theory of “overlapping” regulation makes little sense textually, historically, or functionally. Indeed, in 1990, EPA officials testified before Congress that imposing double regulation on existing sources, *even for different pollutants*, would be “ridiculous.”²²

EPA errs in imputing to Congress a monolithic intention to ensure that the agency is authorized to regulate every conceivable emission under whatever section of the Clean Air Act the agency chooses, regardless of statutory overlaps and duplications. But the Supreme Court has already rejected that very imputation. It made clear in *Utility Air Regulatory Group v. EPA*²³ that EPA is *not* automatically entitled to regulate *all forms* of greenhouse gas emissions just because the agency has the authority to regulate CO₂ from cars and trucks.²⁴ The Court there noted EPA’s own recognition that applying the permitting requirements of the Clean Air Act to greenhouse gases “would be inconsistent with – in fact, would overthrow – the Act’s structure

²⁰ EPA *Murray Br.* at 41, 42.

²¹ See Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000).

²² Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Cmte. on Energy and Natural Res. 101st Cong. 603 (1990).

²³ 134 S. Ct. 2427 (2014).

²⁴ *Id.* at 2440-41.

and design” and would lead to “calamitous consequences” because 6.1 million sources would require permits.²⁵ The Court instructed that EPA’s authority depends on the particular statutory context involved. Here, the specific statutory context – and the redundancy in source-category regulation under Section 111(d) and Section 112 that EPA’s theory would imply – demonstrates that EPA lacks the authority it claims.

EPA construes the 1990 amendments to favor more regulation above all other concerns. That construction ignores the necessary policy trade-offs that inevitably accompany legislation. As the Supreme Court has instructed, “no legislation pursues its purposes at all costs.”²⁶ “Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”²⁷

More fundamentally, it is critical to keep in mind that administrative agencies lack “implied” or “inherent” powers – powers of the sort that the Supreme Court has been increasingly reluctant to attribute even to Congress itself.²⁸ Agencies are mere creatures of statute and possess only the authority Congress has given them. If there is a gap in the Clean Air Act, it must be filled by Congress, not by an executive body or by an independent agency. Indeed, it makes far more sense to address climate change by legislation than to rely on EPA to try to force a square peg into a round hole. Legislation enacted after careful deliberation and debate is the way Americans usually address major national problems. The limitless range of

²⁵ *Id.* at 2442.

²⁶ *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (internal quotation marks and citation omitted).

²⁷ *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

²⁸ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2585-93 (2012) (opinion of Roberts, C.J.).

potential parties, the inseparable nature of the emissions contributed by various sources, the absence of any direct health effects (no one suggests that CO₂ itself is dangerous to human health in the way that lead is, for example), and the inherently global nature of climatic interactions, all combine to produce a phenomenon that is different in kind from the air pollution that the Clean Air Act was basically designed to address. It is worth recalling that, when the government has confronted other commingled and inseparable atmospheric phenomena, like chlorofluorocarbons, it has sought new legislative authority, rather than trying to rely on an agency to stretch an existing statute to the breaking point.²⁹ However, the Administration was unsuccessful in pushing cap-and-trade legislation through Congress after the 2010 mid-term elections. In essence, EPA is behaving as though it won legislative authority to re-engineer the nation's electric generating system and power grid. It did not.

(3) EPA tries yet a third gambit. In a Legal Memorandum accompanying its proposed Clean Power Plan, EPA advances the remarkable suggestion that in 1990 *Congress essentially adopted two versions of Section 111(d)* and that one version, which EPA calls the “Senate” version, authorizes (and perhaps even requires) EPA to regulate an emission from an existing source under Section 111(d) even though it is *already regulating the same source category under Section 112*. EPA thus relies on the extravagant notion that Congress somehow enacted two versions of Section 111(d) in 1990 and that the EPA is entitled to pick and choose which version it would like to enforce.

²⁹ Although in theory EPA might have attempted to use its authority regarding national air quality standards to regulate chlorofluorocarbons, it recognized that the Clean Air Act as then drafted was not suited for this class of pollutants that have worldwide sources and truly global implications. Thus, Congress added in its 1977 amendments to the Clean Air Act additional, ozone layer-specific authority and again in the 1990 Amendments added Title VI to regulate chlorofluorocarbon emissions. Similarly, Congress amended the Clean Air Act in 1990 to include the Title IV acid rain program specifically to address sulfur dioxide and nitrogen oxides from power plants, despite existing Clean Air Act authority to regulate those substances otherwise under the Act.

It is not easy to know where to start in dismantling this fantasy. To begin with, EPA’s version of history is simply wrong. The 1990 amendments did *not* create two different versions of Section 111(d). Rather, the House adopted a substantive amendment changing Section 111(d) to bar duplicative regulation for any source category already subject to regulation under Section 112 (the version of Section 111(d) now in the U.S. Code), and the Senate amendment was simply a clerical or “conforming” one that updated a statutory cross-reference in the previous version of Section 111(d). The Senate Conferees expressly stated in the Conference Report that they were receding to the House version.³⁰ Although both versions appear in the Statutes at Large, that does *not* mean there were two different substantive versions of Section 111(d). Rather, once the House amendment was made law, the Senate amendment was rendered moot and could not be executed (because it referred to language that no longer existed), as the Office of Law Revision Counsel in the House of Representatives properly concluded.³¹

Such a situation – where a substantive amendment moots a conforming one – has occurred dozens of times in the U.S. Code. It has never before resulted in the remarkable situation where an agency is permitted to act as though *two different laws* had been enacted, and as though the mission of choosing between those different laws to determine which is *truly* the law of the land fell to that agency. Indeed, in every other instance, the substantive amendment simply has been given effect. EPA’s insistence that it has recently discovered a decades-old mistake by the Office of Law Revision Counsel – and a mistake that left *EPA* with an extraordinary power to decide which of two laws is the “real” law that Congress enacted – is not

³⁰ 136 Cong. Rec. 36,065 (1990) (Chafee-Baucus Statement of Senate Managers), reprinted in *A Legislative History of the Clean Air Act Amendments of 1990* (1998), Volume I, Book 2 at 885, excerpts available at <http://docs.house.gov/meetings/IF/IF03/20140619/102346/HHRG-113-IF03-20140619-SD011.pdf>.

³¹ Revisor’s Note, 42 U.S.C. § 7411.

credible. Indeed, EPA's position would call into question dozens and perhaps hundreds of statutory changes throughout the U.S. Code. It would wreak havoc by allowing agencies to make their own law willy-nilly throughout the Code. Instead of harmonizing legislation, as Supreme Court precedents instruct, EPA's argument would lead to chaos.

EPA's claim that there exist two alternative versions of Section 111(d) is therefore unfounded. But even if that two-version claim had some basis in reality, EPA's effort to invoke *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³² as a basis for deferring to the agency's decision about which of two possible congressional enactments to treat as law rests on a complete misunderstanding of *Chevron*. Deference to an agency under *Chevron* is triggered only by a statutory *ambiguity* – that is, by 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. *Chevron* deals only with the degree of deference an agency should receive when it resolves an ambiguity the national legislature has left in the law it has charged the executive agency with enforcing; *Chevron* has no bearing on an agency's entirely different (and illegitimate) power to decide for itself *what law* Congress has enacted.

Chevron apart, if there were indeed two versions of the statute, a mere agency (like EPA) clearly wouldn't have power to pick between them to "say what the law is." That's either a usurpation of Congress's power under Art. I or of the Judiciary's power to say what the law is³³ under Art. III – or both. It's not often that an agency manages to engineer a power grab that simultaneously usurps not just the constitutional authority of the States but also the constitutional authority of both Branches of the Federal Government outside the Executive (while also

³² 467 U.S. 837 (1984).

³³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

violating the Fifth Amendment to boot), but EPA proposes to do exactly that. So, far from helping to rescue the EPA's plan from constitutional infirmity, this peculiar assertion of power to choose a version of the statute more favorable to its position embroils EPA in an even deeper multiple violation of the Constitution.

In short, EPA confronts a pair of constitutional obstacles (in the form of the Tenth and Fifth Amendments) to its reading of a law that it has expressly conceded (as recently as a court filing on February 12, 2015, in the D.C. Circuit)³⁴ is at best ambiguous in giving it the power to commandeer the States and undermine investment-backed expectations as it proposes to do. It thinks it can circumvent the otherwise inexorable operation of the constitutional avoidance principle by reaching for the further power to decree a different version of the law to be in effect. But that doubled-up power grab only gets the EPA deeper into hot water. It's a case of leaping from the frying pan into the fire.

C. There Is A Better Way.

I understand the frustration of those who insist that the Government must take action to address climate change. In fact, there are plenty of alternative policies that the Federal Government could pursue within the bounds of law, and some that it is already pursuing, which would violate neither the Clean Air Act nor the Constitution. For example, the Federal Government has always supported new energy technologies, including cleaner ways of using existing fuels. Today, greenhouse gas emissions from state-of-the-art coal plants are materially (25%) lower than those of traditional power plants, due to improved boilers, increased efficiencies, and other innovations. The United States could also support carbon capture and storage technologies. An "all of the above" energy policy can support all forms of domestic

³⁴ EPA *Murray Br.* at 10, 34-54.

energy production that will minimize carbon emissions, protect consumers and American jobs, and ensure that the U.S. remains independent from unreliable foreign sources of energy. But burning the Constitution is one thing we should *not* do as part of our national energy policy.

FULL ANALYSIS

I. EPA's Proposal Violates Principles Of Federalism By Commandeering State Governments In Violation Of The Tenth Amendment.

EPA's proposal impermissibly trenches on State authority over intrastate energy regulation in a way that is unprecedented under the Clean Air Act and raises serious constitutional questions under the Tenth Amendment and long-settled principles of federalism. Never before has this or indeed any other federal agency attempted such an extensive commandeering of state government or such a sweeping usurpation of state authority. In short, the plan poses the most serious invasion of federalism principles in the history of the Clean Air Act.

A. EPA's Plan Invades State Sovereignty And Usurps State Authority.

The proposal would lock States into a framework where the goals are set by EPA, the means to be used to achieve those goals are set by EPA, and even the 13-month timetable for the enactment and implementation of new legislation is set by EPA. EPA has already arrogated to itself the authority to determine the "best system of emission reduction" ("BSER")³⁵ and refuses to reopen that rulemaking.³⁶ 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

³⁵ State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,346 (Nov. 17, 1975).

³⁶ *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. at 34,852 n.86.

predetermined and cannot be changed: EPA will not reopen the relevant rulemakings.³⁷ If a State fails to formulate a plan, EPA will mandate a federal plan and will likely attempt to impose severe sanctions on a noncomplying State, including loss of highway funds,³⁸ loss of support for pre-existing air pollution planning and control programs,³⁹ and a selective toughening of the regulatory regime applied to the State.⁴⁰

EPA would not simply regulate *emissions*, but would also reach out to oversee electricity production, consumption, and distribution within each State – matters that have always been deemed to be wholly within a State’s powers. Until now, EPA authority has extended only to electric generating plants. Under the Federal Power Act,⁴¹ States have exclusive jurisdiction over intrastate electricity matters. States have always been responsible for setting renewable energy portfolio standards, enacting building codes, establishing energy efficiency standards, dealing with the retail consumer, and the like. Yet EPA now seeks to dictate not only the *end goal* for a State’s energy policy but also the *best way to achieve it*. It seeks to demote the States from their historic role as laboratories of democracy to the bit part of puppets dancing to the tune of a federal puppeteer. Indeed, EPA seeks to dictate to States how they are to reduce demand, to restructure energy policy, and even to develop new rules for how to dispatch electricity. Nothing Congress has said authorizes so breathtaking a power grab. Section 111(d) authorizes EPA *only* to “establish a procedure” for States to establish performance standards that regulate potential emitters of pollution (“stationary sources”), in this case electrical power plants. Under this

³⁷ *Id.* at 34,898 & n.268.

³⁸ 42 U.S.C. § 7509(b)(1).

³⁹ 42 U.S.C. § 7509(a).

⁴⁰ 42 U.S.C. § 7509(b)(2).

⁴¹ 16 U.S.C. § 824(a).

authorization, EPA is twice-removed from any direct regulation of intrastate energy use. Its latest proposal represents extravagant overreaching.

The Committee has already heard many criticisms of EPA's proposal, at a July 29, 2014 hearing attended by all five Members of the Federal Energy Regulatory Commission ("FERC")⁴² and at a September 9, 2014 hearing with State energy and environmental regulators, including regulators from Texas, Montana, Indiana, Arizona, Maryland and Washington.⁴³ FERC Commissioners have warned of potential conflicts between EPA and federal energy regulators, with one predicting a jurisdictional "train wreck."⁴⁴ Some 42 Senators, 15 Governors, and 17 State Attorneys General have signed letters and comments opposing EPA's proposal.⁴⁵ Numerous state regulators have submitted comments to EPA objecting that its proposal impermissibly trenches on state agencies currently exercising authority over electricity

⁴² See *FERC Perspectives: Questions Concerning EPA's Proposed Clean Power Plan and Other Grid Reliability Challenges*, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce, at 47 (Jul. 29, 2014) (statement of Tony Clark, FERC Commissioner) (prelim. transcript available at <http://energycommerce.house.gov/hearing/ferc-perspectives-questions-concerning-epa-s-proposed-clean-power-plan-and-other-grid>).

⁴³ See *State Perspectives: Questions Concerning EPA's Proposed Clean Power Plant*, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce (Sept. 9, 2014) (prelim. transcript available at <http://energycommerce.house.gov/hearing/state-perspectives-questions-concerning-epa-s-proposed-clean-power-plan>).

⁴⁴ *FERC Perspectives: Questions Concerning EPA's Proposed Clean Power Plan and Other Grid Reliability Challenges*, Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce, at 47 (Jul. 29, 2014) (statement of Tony Clark, FERC Commissioner) (prelim. transcript available at <http://energycommerce.house.gov/hearing/ferc-perspectives-questions-concerning-epa-s-proposed-clean-power-plan-and-other-grid>).

⁴⁵ Letter from Senator Mitch McConnell (Kentucky) et al. to President Barack Obama (Jun. 3, 2014), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=ba5b2aa8-f287-4eb7-a460-d7a1aef542af (senators); Letter from Governor Robert J. Bentley (Alabama) et al. to President Barack Obama (Sep. 9, 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-24965> (governors); Attorney General E. Scott Pruitt (Oklahoma) et al., Comment on *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602-23949 (submitted Nov. 24, 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23949> (attorneys general) (signed by Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming).

regulation.⁴⁶ A group of state legislators representing 17 States that are net energy exporters all wrote to oppose EPA’s proposal; according to the most recent reports from the Energy Information Administration, these States represent 43% of the total electricity generation in the United States.⁴⁷ Perhaps most troubling of all, concerns have been expressed regarding the threat posed by EPA’s proposal to electrical reliability, by grid operators representing more than 60% of the electricity produced in the United States.⁴⁸ These expressions are not simply self-interested assertions by jurisdictions eager to maximize their authority; they are serious statements of principled constitutional concern. And the concern is warranted, as the next section demonstrates.

B. The Constitution Forbids Such Federal Commandeering Of The States.

The Supreme Court has drawn a line: “this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.”⁴⁹ When faced with such

⁴⁶ *E.g.* Idaho Governor’s Office of Energy Resources, Comment to *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602 (submitted Nov. 26, 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-31931>; Attorney General Jack Conway (Kentucky), Comment to *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602 (submitted Dec. 1, 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-22815>; Public Utilities Commission of Ohio, Comment to *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602 (submitted Dec. 1, 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-22762>; Pennsylvania Public Utility Commission, Comment to *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602 (submitted Dec. 1, 2014), Comment to *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830 <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-24099>.

⁴⁷ Energy Producing States Coalition, Comment on *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830 (submitted Nov. 26, 2014), No. EPA-HQ-OAR-2013-0602-22696, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-22696>; U.S. Energy Info. Admin., *Electric Power Monthly* 22, Table 1.6.B (Jan.. 2015), http://www.eia.gov/electricity/monthly/current_year/january2015.pdf.

⁴⁸ Christina V. Bigelow (ISO/RTO Council), Comment on *Carbon Emission Guidelines*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602-23206 (submitted Dec. 1, 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23206>.

⁴⁹ *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982).

a command in *New York v. United States*,⁵⁰ 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. Although the statute purported to give a State a choice between those options and the ability to fine-tune the federal mandate, the Court explained that "[n]o matter which path the State chooses, it must follow the direction of [the federal government]."⁵¹ 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.⁵² The Court applied the same "anti-commandeering" principle in *Printz v. United States*,⁵³ invalidating federal legislation that required state law enforcement officers to perform federally mandated background checks on handgun purchasers. And, in so doing, the Court made plain that it was announcing a fundamental structural principle, not simply a value to be "balanced" against competing considerations. The Court opined that "a 'balancing' analysis is inappropriate," because "[i]t is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."⁵⁴

EPA's proposal suffers from a dramatic form of the same defect. It invades state regulatory control in an unprecedented manner under the Clean Air Act. It is an understatement to say that the proposal at the very least raises grave constitutional questions that the Act must be

⁵⁰ 505 U.S. 144 (1992).

⁵¹ *Id.* at 177.

⁵² *Id.* at 176-77.

⁵³ 521 U.S. 898, 926 (1997).

⁵⁴ *Id.* at 932.

construed to avoid. If States seek to comply with the proposal, many will need to enact new legislation and develop completely new regulatory schemes within the thirteen-month timetable. EPA goes to great lengths to appear as though it gives States some degree of freedom, but in truth it offers only Potemkin choices. The State may not alter either an EPA-set state goal or the BSER. All of the important decisions have already been made by EPA, depriving each State of its prerogative to set its own policies. By controlling each State's goal and the BSER, EPA maintains control over the implementation of the plan, reserving to the State the trivial ability (at most) to fine-tune a few details.

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,⁵⁵ which purports to provide additional information about the Proposed Rule and to solicit additional comments. But, far from clarifying matters, EPA's NODA actually introduces substantial amounts of uncertainty into the Proposed Rule and further confuses the options available to States. For example, the NODA raises the possibility that a State's compliance might be measured *regionally* rather than merely statewide.⁵⁶ The Proposed Rule itself was quite clear that emissions would be measured (and compliance was required) on a *statewide* basis, and many comments reflected that certainty by arguing that requiring compliance on a statewide basis was a fatal flaw in that Proposed Rule.⁵⁷ Such last-

⁵⁵ EPA, Notice of Data Availability, *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602; FRL-9918-53-OAR; RIN 2060-AR33 (Oct. 28, 2014), <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-notice-data-availability>.

⁵⁶ *Id.* at 36.

⁵⁷ *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. at 34,853 ("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."). See National Federation of Independent Business, Comment on *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602-22962, at 20

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, in combination with their neighbors. Indeed, the NODA acknowledges this dilemma and explains with admirable candor that *EPA has no good answer* for the problem of States isolated outside of regional pacts.⁵⁸ EPA solicits comments on how the BSER is calculated for each State, tacitly acknowledging that its numbers were calculated badly,⁵⁹ but remains notably silent on the mandatory nature of the BSER. Now state goals are left uncertain until the final rule is promulgated – at which point they will be set in stone. In short, the NODA introduces even more uncertainty – but fails to address the core problem: ultimately, States are left with no control over their regulatory programs and no choice to select any option other than EPA’s.⁶⁰

At bottom, EPA’s proposal 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 Emperor’s garb of state “choice” – even though in fact the policies 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

(submitted Dec. 1, 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-22962> [hereinafter NFIB Cmt.] (arguing that § 111(d) requires the regulation of sources rather than states).

⁵⁸ See NODA at 49 (soliciting comments on the subject).

⁵⁹ *Id.* at 51-58.

⁶⁰ See National Ass’n of Manufacturers, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generation Units, Proposed Rule, Docket ID No. EPA-HQ-OAR-2013-0602; FRL-9910-86-OAR, 79 Fed. Reg. 34,830 (June 18, 2014), Dkt. No. EPA-HQ-OAR-2013-0602-27341, at 42 (submitted Dec. 1, 2014), online at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-27341> (“As a result, if the proposal were finalized, EPA would be effectively establishing the standard of performance for each State, leaving the States with no role other than to implement the standard that EPA has already established.”).

program may remain insulated from the electoral ramifications of their decision.”⁶¹ 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.

C. The Fallback Option Of An Unspecified Federal Plan Is Not A Solution Here.

In *NFIB v. Sebelius*,⁶² the Supreme Court applied principles of federalism to strike down the Affordable Care Act’s (largely federally-funded) expansion of Medicaid eligibility, explaining that the “legitimacy of Congress’s exercise of the spending power” “rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”⁶³ “Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”⁶⁴ When conditions on federal grants to States “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.”⁶⁵

The same reasoning is applicable here, and it demonstrates that the “option” of a possible federal plan is no solution at all under these circumstances but a mere optical illusion. If a State

⁶¹ *New York v. United States*, 505 U.S. 144, 169 (1992); see also *Printz v. United States*, 521 U.S. 898, 922–23 (1997) (citing need for “accountability” as a reason to prohibit federal government from forcing state officials to implement federal policy); *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014); *Bond v. United States*, 131 S. Ct. 2355, 2364–65 (2011).

⁶² 132 S. Ct. 2566, 2601–2605 (2012).

⁶³ *Id.* at 2602 (citation omitted).

⁶⁴ *Id.*

⁶⁵ *Id.* at 2604.

fails to adopt an EPA-approved plan, the agency could attempt to impose Draconian sanctions including loss of highway funds,⁶⁶ loss of support for air pollution planning and control programs,⁶⁷ 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 – the so-called “offset penalty.”⁶⁸ These sanctions closely resemble those found impermissible in *NFIB v. Sebelius*, as leading commentators have already noted.⁶⁹

⁶⁶ 42 U.S.C. § 7509(b)(1) (2012).

⁶⁷ *Id.* § 7509(a).

⁶⁸ *Id.* § 7509(b)(2).

⁶⁹ A permitting program under the Clean Air Act has already been subject to a coercion challenge in the wake of *NFIB v. Sebelius*, although the D.C. Circuit rejected it on the basis of the specific factual context presented. *Texas v. EPA*, 726 F.3d 180, 197 (D.C. Cir. 2013) (“Even assuming a temporary construction delay of up to twelve months for new major emitting facilities is significant, State petitioners make no effort to demonstrate this delay is of the same magnitude and nature as the Medicaid expansion provision that would strip ‘over 10 percent of a State’s overall budget.’ Unlike the Medicaid provision, which was held unconstitutional because it threatened to withhold all existing Medicaid funds from States unwilling to carry out the expansion, EPA assumed authority over only the greenhouse gas portion of PSD permits and left the rest of the States’ SIPs and permitting authority in place”) (citations omitted). The EPA’s Clean Power Plan is a much more intrusive and coercive proposal. See also Jonathan H. Adler, *Could the Health Care Decision Hobble the Clean Air Act?* PERC Blog (July 23, 2012) available at <http://perc.org/blog/could-health-care-decision-hobble-clean-air-act> (“The Clean Air Act would appear potentially vulnerable on several grounds. First, the Clean Air Act conditions the receipt of money for one program (highway construction) on compliance with conditions tied to a separate program (air pollution control). This may be problematic because a majority of the Court thought Congress was trying to leverage State reliance on funding for one program (traditional Medicaid) to induce participation in another program (the Medicaid expansion). While the money at stake under the Clean Air Act is far less – most states receive substantially less in highway funds than in Medicaid funds – highway funding is less directly related to air pollution control (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion.”); 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*); David B. Rivkin et. al, *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2011-2012 Cato Sup. Ct. Rev. 31, 65 (2012) (explaining that “[t]he Clean Air Act may be among the most vulnerable”); Damien M. Schiff, *NFIB v. Sebelius, Coercion, and the Unconstitutional Conditions Doctrine*, SCOTUSReport, (Aug. 6, 2012), <http://www.scotusreport.com/2012/08/06/nfib-v-sebelius-coercion-and-the-unconstitutional-conditions-doctrine/> (“[T]here may be an *NFIB*-coercion argument here. For example, the Clean Air Act empowers EPA to impose ‘sanctions’ on a state that doesn’t appropriately update its implementation plan, and those sanctions include loss of federal transportation funds. Depending on the amount of those funds and their importance to a state budget, such a condition could amount to financial coercion akin to that imposed by the Affordable Care Act.”); Eric Turner, *Protecting from Endless Harm: A Roadmap for Coercion Challenges After N.F.I.B. v. Sebelius*, 89 Chi.-Kent L. Rev. 503, 532 (2014) (noting implications of *NFIB* for Clean Air Act and arguing that the latter “may well be an example of the federal government using its leverage on a state to get it to implement policies against its will”).

Further, this case involves the same lack of clear notice as *NFIB v. Sebelius*. EPA's plan confronts the States with an unforeseeable choice and essentially remakes the agreement between them and the Federal Government that has existed since the Clean Air Act was enacted in 1970. States could not have expected, when they adopted costly implementation plans to regulate conventional pollutants like NO₂, SO₂, and particulates from sources like power plants, that EPA would also seek to phase out those plants altogether by dictating sweeping rules to regulate CO₂, which is produced by every human activity. Commentators have noted the "shifting Clean Air Act requirements that alter states' responsibilities" in unpredictable ways.⁷⁰ "The recent inclusion of greenhouse gases as pollutants subject to regulation under the Act has radically altered states' obligations, such that states will now have to do many things they could not have anticipated when the Clean Air Act was last revised in 1990."⁷¹ Hence, both the extent of federal interference and the degree of coercion make EPA's current proposal qualitatively different from other Clean Air Act programs, such as the ambient air standards of Sections 108-110.

There is a further aggravating factor in the context of the Clean Power Plan: if a State fails to submit its own plan, it faces the possibility of an unspecified but clearly much less favorable "federal" plan. In the words of Jody Freeman, the former senior counselor in the White House for energy policy and one of the most important *amici* supporters of EPA in the pending D.C. Circuit litigation, "[i]t would put states at a huge disadvantage if they choose not to file a plan."⁷² "It gives EPA the option of implementing their own plan themselves, but the EPA

⁷⁰ David B. Rivkin et. al, *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2011-2012 Cato Sup. Ct. Rev. 31, 65 (2012).

⁷¹ Jonathan H. Adler, *Could the Health Care Decision Hobble the Clean Air Act?* PERC Blog (July 23, 2012) available at <http://perc.org/blog/could-health-care-decision-hobble-clean-air-act>.

⁷² *McConnell Urges States to Defy U.S. Plan to Cut Greenhouse Gases*, N.Y. Times, March 5, 2015, at A12.

may not have the best plan for each state.”⁷³ That admission essentially concedes that EPA’s proposal puts a gun to every State’s head. Even apart from confronting any reluctant State with loss of federal highway funds and other aid, the gun consists of subjecting non-complying States to a kind of Russian roulette in which they run the risk of being hit with a centrally planned and administered federal scheme, a plan whose details are as yet unknown, but one that threatens significant disadvantage to them and their citizens, both in absolute terms and vis-à-vis other States, if they decline to submit their own plans to EPA.

Indeed, the uncertainties surrounding a federal plan create risks that put even more pressure on non-complying States. The very feasibility of a federal implementation plan is open to question, because EPA has not announced a model and obviously lacks sufficient resources to operate in every State utility regulatory programs, energy efficiency programs, or any of the other programs that would be necessary to implement a “federal” plan. A poorly administered federal plan or one plagued with jurisdictional uncertainties and litigation⁷⁴ could paralyze a State’s energy sector, damage its economy, and inflict serious hardship on its citizens.

In short, the unprecedentedly extreme nature of EPA’s proposal raises federalism and Tenth Amendment issues that have never been presented by previous EPA rules under the Clean Air Act. EPA’s latest proposal is different in kind from anything it has sought to execute before.

⁷³ *Id.*

⁷⁴ For example, EPA lacks statutory jurisdiction to impose a federal plan containing outside-the-fence measures, such as directing the State’s utilities to acquire more renewable energy or implement consumer conservation programs. Under Section 111(d), EPA is expressly limited to promulgating performance standards that are “emission limitations,” and the outside-the-fence measures manifestly do not fall into that category. Not even FERC or the Cabinet-level Department of Energy, much less EPA, has been delegated authority by Congress to adopt such measures.

II. EPA's Proposal Raises Serious Fifth Amendment Questions As Well.

EPA's plan 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. It is worth repeating Secretary of State John Kerry's candid description of U.S. policy regarding coal-fired power plants: "We're going to take a bunch of them out of commission."⁷⁵ Daniel P. Schrag of the President's Council of Advisers on Science and Technology explained: "The one thing the president really needs to do now is to begin the process of shutting down the conventional coal plants."⁷⁶

EPA's proposal thus represents a shift in federal policy that obviously upsets settled, long-standing investment-backed expectations, and it does so with no accompanying attempt by EPA to quantify the climate or environmental benefits the Clean Power Plan would supposedly achieve. When EPA Acting Assistant Administrator for Air and Radiation Janet McCabe testified before this Committee on June 19, 2014, she was unable to provide any quantified assessment of an environmental benefit. She was questioned regarding the impact of the rule on specific climate indicators but was not able to provide specific information. 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.*"⁷⁷ The Regulatory

⁷⁵ Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. Times (Dec. 11, 2014), available at http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=3.

⁷⁶ Aaron Blake, *Obama Science Adviser Calls for 'War on Coal'*, N.Y. Times, June 25, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/25/obama-science-adviser-calls-for-war-on-coal/> (internal quotation marks omitted).

⁷⁷ U.S. House. Energy & Commerce Cmte. 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->

Impact Analysis (RIA) for the Proposed Rule states that the impact of “reduced climate effects” has been “monetized” but not “quantified.”⁷⁸ The mismatch and lack of social benefit distinguish the Proposed Rule from other actions by EPA under the Clean Air Act. But even if the benefits were large and quantifiable and exceeded the costs the Proposed Rule would inflict on a select few, a central point of the Fifth Amendment’s combined requirements of Due Process and Just Compensation is that, except when phasing out intrinsically harmful activity that injures identifiable individuals or businesses, the Government is not free simply to pick those whose investment-backed expectations are to be eliminated for the greater good. When regulating an entity out of existence generates diffuse benefits for the public at large that exceed the targeted costs imposed on the unlucky few, the Fifth Amendment’s basic teaching is that the few should be justly compensated by the many. The point is not that the Government is bound by a constitutional duty not to change course – no constitutional principle freezes the Government in its tracks. But when the Government’s change in course drastically undercuts investment-backed expectations that amount to property interests, the Government is bound by a constitutional duty to pay, whether under the rubric of just compensation or under the rubric of due process.

To be sure, measures abating the source of a hazardous pollutant that would otherwise inflict injury on neighbors or other identifiable victims are viewed deferentially by courts. The Fifth Amendment is not the engine of destruction for regulatory measures that it was many decades ago. But this is not a traditional “air pollution” case in which government targets emissions that are in themselves harmful to those exposed to them. CO₂ simply is not a pollutant

release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight (emphasis added).

⁷⁸ U.S. EPA, Regulatory Impact Analysis, *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. 34,830, No. EPA-HQ-OAR-2013-0602-0391, at ES-11 (table ES-5), 4-2 (table 4-1) (June 2014), www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-0391.

in the conventional sense. Nobody doubts that it is a benign gas essential for life. Any injuries associated with climate change stem only from the overall worldwide concentration of carbon dioxide, irrespective of source. As the Supreme Court has observed, “we each emit carbon dioxide merely by breathing,”⁷⁹ and “greenhouse gases permeate the world’s atmosphere rather than a limited area near the earth’s surface.”⁸⁰ As one of my colleagues (who argued for the petitioning States in *Massachusetts v. EPA*⁸¹) has explained, the relationship between carbon emissions and climate change “does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution.”⁸² There is simply no cause-and-effect relationship between the actions of any individual emitter and any specific harm.

As a result, climate change has a uniquely and inescapably global and systemic character. All of us are emitters, and all of our contributions are commingled.⁸³ The power plants that are the targets of EPA’s rule represent a fraction of emitters, and other sectors of the economy produce substantial greenhouse-gas emissions as well. EPA has noted that “important sources”

⁷⁹ *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011).

⁸⁰ *Massachusetts v. EPA*, 549 U.S. 497, 529 n.26 (2007).

⁸¹ 549 U.S. 497 (2007). In that case, the Supreme Court upheld EPA’s authority to regulate greenhouse gas emissions from cars, but that authority involved a different part of the Clean Air Act and does not give the agency carte blanche to adopt whatever rules it wants regarding power plants, as the Court later made clear in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

⁸² Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 Cornell L. Rev. 1153, 1164 (2009).

⁸³ President Ronald Reagan garbled the science when he once remarked that “[t]rees cause more pollution than automobiles do.” Tim Radford, “Do Trees Pollute the Atmosphere?” *The Guardian* (May 13, 2004), online at <http://www.theguardian.com/science/2004/may/13/thisweekssciencequestions3>. This prompted hecklers at a campaign stop to hang a sign from a tree saying “Stop Me Before I Kill Again.” Gerald F. Seib, “Doubts About Perry Echo Those Faced By Reagan,” *Wall Street Journal* (Sep. 13, 2011), online at <http://www.wsj.com/articles/SB10001424053111903532804576566503132048630>.

of such emissions include motor vehicles, “industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management.”⁸⁴

This is precisely the kind of situation in which government bears a constitutional obligation of compensation, to avoid “forc[ing] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁸⁵ But this is precisely the point of EPA’s proposal: forcing the United States’ power plants and energy industry to bear the global burden of lessening CO₂ emissions.

In doing so, EPA is guilty of a series of bait-and-switches that upend the well-settled reliance interests of coal plants and coal producers, as well as the employees and communities that rely on them. For example, after requiring coal-fired power plants to install very costly maximum control technology under Section 112, the agency now seeks to turn around and tell the very same sources to shut down or significantly curtail their operations, after they have already invested in such expensive technology. After long encouraging extensive investments in responsible coal production, and after receiving billions of dollars in royalties in exchange,⁸⁶ the

⁸⁴ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,519 (Jun. 3, 2010) (codified at 40 C.F.R. pts. 51 et al.), <http://www.gpo.gov/fdsys/pkg/FR-2010-06-03/pdf/2010-11974.pdf>.

⁸⁵ *Eastern Enters. v. Apfel*, 524 U.S. 498, 522-23 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

⁸⁶ 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 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. States received nearly \$2.1 billion from oil, gas, coal and other energy royalties in FY2012, according to ONRR. 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. This coal generated more than \$875.8 million in royalty revenue. The federal government has collected more than \$6.8 billion in royalties between FY2003 and FY2012

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>.

federal government will now change course. EPA's plan will increase electricity rates, reduce the reliability of the electric grid, and impose hardship on consumers. Seniors, the poor, and others of limited means will bear the brunt of the burden. Further, the EPA plan will pit coal-using regions of the country, like the Midwest, against the coasts and other parts of the country that are less reliant on coal, creating a disparate impact and regional frictions. Under the circumstances, it ill-behooves the Government to strand so much of the investment it has encouraged and to deny compensation to those from whom it has profited. The courts have repeatedly recognized that such a bait-and-switch policies trigger the obligation to pay compensation.⁸⁷

EPA's plan vividly demonstrates the risk of allowing an unaccountable administrative agency to make its own law and attempt through such law 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 drastically curtailing their use of their property is exactly the type of overreaching the Fifth Amendment seeks to prevent. As Justice Jackson warned,

That 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 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

⁸⁷ For example, when EPA initially promised confidential treatment to pesticide makers who submitted proprietary data in their registration applications, and then subsequently reversed course and publicly disclosed the data, the Supreme Court had no trouble finding that the manufacturers could bring a claim for a compensable taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-13 (1984). The Court found that the possibility that the data retained some modicum of value for other purposes did not preclude a taking claim. *Id.* at 1012 ("That the data retain usefulness for Monsanto even after they are disclosed — for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries — is irrelevant . . ."). Similarly, when the federal government encouraged banks to take over failing savings and loan associations by promising that they could take advantage of a special accounting treatment, and then later changed its mind and disallowed the accounting treatment, the Supreme Court held that the banks could sue for breach of contract. *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

principle that ours is a government of laws, not men, and that we submit ourselves to rulers only if under rules.⁸⁸

EPA's proposal represents a unilateral end-run by the agency around the democratic political process. Legislation enacted after careful deliberation and debate is usually the way Americans address national problems and confront difficult trade-offs. Here, an unelected, unaccountable agency seeks to aggrandize its authority to make quintessentially political judgments in the course of re-engineering the nation's electric generating system. Such a power-grab raises serious questions of what I have called "structural due process"⁸⁹ because it would allow an unelected agency not meaningfully answerable to the American people to make fundamentally legislative choices – and to avoid political accountability for doing so. In *Hampton v. Mow Sun Wong*,⁹⁰ for example, the Supreme Court invalidated a Civil Service Commission regulation denying federal employment to non-citizens because, even though the agency was not found to have acted beyond its statutory mandate, the decision to bar aliens from federal employment was not a decision that administrative officials were competent to make.⁹¹

Similarly, EPA should not be permitted to behave as though it were a junior-varsity legislature.

III. EPA Lacks Statutory Authority To Adopt Its Proposal.

Given the serious constitutional questions raised by EPA's plan and the massive disruption in the American economy that it will entail, one would expect EPA to be able to point

⁸⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

⁸⁹ Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* 1673-1687 (2d ed. 1988).

⁹⁰ 426 U.S. 88, 116 (1976).

⁹¹ See *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341-42 (1974) (opining that "constitutional problems" would arise if statute were construed as vesting administrative agency with the discretionary authority to impose a tax).

to a clear congressional directive authorizing its unprecedented proposal. Instead, the opposite is true. Indeed, this situation presents perhaps the highest ratio of any agency rule in recent memory between (i) the costs entailed by the agency's ambition, and (ii) the degree of statutory authority identified by the agency.

Certainly, in light of the constitutional problems raised by the Clean Power Plan, EPA is not entitled to the "benefit of the doubt." It is surely not entitled to deference under the *Chevron* principle.⁹² The Supreme Court has instructed that deference to an agency's interpretation is not appropriate where that interpretation would raise a serious constitutional issue.⁹³ Statutes and regulations must instead be construed to avoid serious constitutional doubt.⁹⁴ "[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions."⁹⁵ EPA is entitled to no deference under this standard, and the courts would give it none.

A. The Plain Language of Section 111(d) Prohibits EPA's Proposal.

⁹² *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁹³ See *Edward J. DeBartolo Corp. v. Florida Gulf Construction 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 Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (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").

⁹⁴ 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, *id.* at 2094 (Scalia, J., concurring))); *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); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (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).

⁹⁵ *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (1999), *cert. denied*, 530 U.S. 1213 (2000).

On its face, Section 111 of the Clean Air Act prohibits EPA's proposal, because EPA already regulates coal-fired electric power plants as a source category under Section 112.

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

(A) establishes standards of performance for any existing source for any air pollutant

(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*⁹⁶

The "section 7412" to which Section 111(d) refers is Section 112 of the Clean Air Act, which establishes programs for protecting the public health and environment from exposure to 188 listed toxic air pollutants. The 1990 Amendments to the Clean Air Act revamped its architecture by (i) overhauling the then-20-year-old National Emissions Standards for Hazardous Air Pollutants (NESHAP) program for regulating stationary-source emissions of "hazardous air

⁹⁶ 42 U.S.C. § 7411(d) (2012) (emphases 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 [Section 7411 that] would apply if such existing source were a new source." *Id.* § 7411(d)(1)(A)(ii). Currently, *there is no Section 111(b) regulation applicable to "new" stationary sources of CO₂ that would correspond to the proposed Section 111(d) regulations.* EPA acknowledges that Section 111(b) regulations for CO₂ are a necessary prerequisite and has stated that it intends to complete at least one of two Section 111(b) regulations concerning CO₂ emissions from new fossil fuel-fired EGUs before it finalizes the current Section 111(d) rulemaking, in order to satisfy what it acknowledges is a "requisite predicate for" the Section 111(d) rules. Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, at 13, <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum>.

Moreover, in order to regulate a pollutant under Section 111(b), EPA must make a so-called "endangerment finding" regarding that pollutant. EPA has not issued such a finding with respect to CO₂ from coal-fired power plants. Instead, the agency is seeking *sub silentio* to bootstrap its 2009 endangerment finding for motor and mobile sources. However, EPA is wrong. Before it can assert regulatory jurisdiction under Section 111, EPA must make an endangerment finding with respect to CO₂ *from the specific source category being regulated* (in this case, existing coal-fuel fired generating plans). The plain language of Section 111(b)(1)(A) requires EPA to make an endangerment determination that is source-category-specific and includes a threshold significance finding for the air pollutant EPA wishes to regulate. EPA cannot simply read these unique provisions out of the statute by pointing to an endangerment determination from another section that applies a different standard.

pollutants” that EPA was to regulate, (ii) shifting from EPA discretion to come up with a list of hazardous air pollutants to a congressionally enumerated list of those pollutants, for each of which EPA was directed to set health-based emission standards meeting congressionally established criteria, and (iii) directing EPA to publish and revise “a list of all categories and subcategories of major sources” of those listed pollutants.⁹⁷

Section 112 pollutants range from acetaldehyde to xylenes, but of course they exclude carbon dioxide, which is not a “hazardous air pollutant” either in ordinary parlance or within the meaning of the Clean Air Act. Under Section 112(f), the statute requires EPA to report to Congress on the significance of the risks associated with these pollutants and recommend appropriate legislation. If Congress does not legislate in response to EPA’s recommendations, then EPA is required to issue standards for categories of sources of hazardous air pollutants as necessary to protect the public health with “an ample margin of safety” or to prevent “an adverse environmental effect.” Under the other major change to Section 112 in 1990, Section 112(c)(1), EPA maintains a list of all categories of sources governed by Section 112, and then sets regulations on a source-category basis (e.g., chemical plants, steel plants, etc.) based on control methods demonstrated to be “achievable” for that industry or source category.

Congress plainly anticipated that EPA could and presumably would regulate electric power plants under Section 112. Section 112(n)(1), enacted as part of the 1990 amendments, specifically directed EPA to evaluate regulation of those plants under Section 112 within three

⁹⁷ The Clean Air Act also contains another program under which EPA sets National Ambient Air Quality Standards (“NAAQS”) for six principal pollutants, which are called “criteria” pollutants: sulfur dioxide (SO₂), particulate matter (PM_{2.5} and PM₁₀), nitrogen dioxide (NO₂), carbon monoxide (CO), ozone, and lead (but not CO₂). Section 109 of the Act requires EPA to establish NAAQS, based on findings of harm to public health and welfare, with an adequate margin of safety. Under Section 110 of the Act, the States adopt plans, known as State Implementation Plans (“SIPs”), and submit them to EPA to administer the NAAQS. Otherwise, EPA can impose a federal plan.

years after the 1990 legislation. In 2000, EPA included coal-fired electric generating plants as part of a “source category” under Section 112, and it has regulated those plants under Section 112 ever since.⁹⁸ Further, in February 2012, EPA promulgated a new national emission standard for those plants under Section 112.⁹⁹

Accordingly, the plain text of Section 111(d) flatly and unambiguously prohibits EPA’s proposal. EPA has taken the view that CO₂ (despite its naturally occurring role in respiration) is an “air pollutant” within the meaning of the Clean Air Act. But, under Section 111(d), EPA lacks the power to establish an emissions standard “for any air pollutant” – which under EPA’s own view includes CO₂ – “emitted from a source category which is regulated under” Section 112. That should be the end of the matter.

B. EPA’s Attempts To Rewrite Section 111(d) Fail.

To avoid that conclusion, EPA has attempted to rewrite Section 111(d) so as to authorize its Clean Power Plan. These efforts fail.

1. EPA’s Focus On Pollutants For Which “Air Quality Criteria Have Not Been Issued” Is Unavailing.

EPA has pointed to a part of Section 111(d) authorizing regulation of pollutants for which “air quality criteria have not been issued.” EPA argues this clause is sufficient to authorize its proposal because air quality criteria have not been issued for CO₂. But the statutory context disproves EPA’s theory. In context, the clause applies to pollutants that are listed on a schedule under Section 108(a) for which no air quality criteria have – as yet – been issued. This condition

⁹⁸ See Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000).

⁹⁹ 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) (codified at 40 C.F.R. pt. 63).

occurs every time a new pollutant is listed under Section 108, between the time of the pollutant's listing and the subsequent publication of air quality criteria. Read in context, the clause refers only to the five 1970 criteria pollutants plus other pollutants that have since been listed under Section 108 but for which air-quality criteria "have not been issued." It does not afford regulatory carte blanche. The special circumstances in which it applies – after a listing but before a criteria publication – are absent in this case.

2. EPA's Argument That It May Regulate Under Section 111(d) So Long As The *Specific Pollutant* Is Not Regulated Under Section 112 Is Even Less Credible.

Next, EPA posits an absurd, hair-splitting distinction between "dangerous" and "hazardous" pollutants,¹⁰⁰ and suggests that Section 111(d) precludes only new emissions standards for *hazardous* air pollutants already regulated under Section 112. That suggestion cannot be squared with the text and structure of the provision. Section 111(d) precludes EPA from establishing emissions standards for "*any*" air pollutant emitted from a source category regulated under Section 112. To say that the clause "which is regulated under section [112]" modifies "air pollutant" requires attributing a terrible sense of grammar to Congress. The only natural reading is that the clause "which is regulated under section [112]" modifies the phrase "source category" because it *immediately follows that phrase in the sentence*.¹⁰¹

Such a reading is fortified by the structure of Section 112, which operates according to source categories established by EPA. Moreover, the phrase "any air pollutant" *cannot* refer

¹⁰⁰ EPA *Murray Br.* at 46.

¹⁰¹ The full provision reads: "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* 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" 42 U.S.C. § 7411(d)(1) (emphasis added).

solely to *hazardous* air pollutants because that same phrase is also modified by the words “for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title.” “[A]ny air pollutant” *must* be broader than “hazardous air pollutants” because it must also include these other two categories, which overlap but are not coextensive.

In the end, even EPA acknowledges that “a literal” application of Section 111(d) would likely preclude its proposal.¹⁰² In a Legal Memorandum accompanying its proposal, EPA 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 to provide that the provision would not cover GHGs because GHGs are emitted from EGUs and EGUs are a source category regulated under section 112.¹⁰³

In its first action under Section 111(d) following the 1990 amendments, EPA recognized that categories of sources regulated under Section 112 are excluded from regulation under Section 111(d).¹⁰⁴ EPA adhered to the same view before the D.C. Circuit in *New Jersey v. EPA*.¹⁰⁵ In that case, the D.C. Circuit vacated EPA’s invocation of Section 111(d) for existing power plants because such plants were listed for regulation under Section 112. It did so even though EPA had not yet issued actual standards for power plants under Section 112, and even

¹⁰² 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>. By contrast, EPA finds Section 111(d) ambiguous when read with other interpretive tools such as legislative history and statutory structure.

¹⁰³ Legal Memorandum at 22 (emphasis added).

¹⁰⁴ See EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021 (1995), available at <http://www.epa.gov/ttn/atw/landfill/bidfl.pdf> (“EPA also believes that [the House amendment] is the correct amendment because the Clean Air Act amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and [the House amendment] thus conforms to other amendments of section 112.”).

¹⁰⁵ 517 F.3d 574, 583 (D.C. Cir. 2008).

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. The D.C. Circuit explained that “under EPA’s own interpretation of the section, it cannot be used to regulate sources listed under section 112; EPA thus concedes that if [electric generating units] remain listed under section 112, as we hold, then the [Section 111(d)] regulations for existing sources must fall.”¹⁰⁶

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.”¹⁰⁷ EPA’s interpretation of Section 111(d) thus runs directly counter to its own prior views and to the decisions of both the U.S. Supreme Court and of the D.C. Circuit.¹⁰⁸

C. EPA’s Claim That There Are “Two Versions” Of Section 111(d) Creates An Even More Profound Constitutional Question.

The plain language of Section 111 ought to be the end of the matter. But in another gambit to locate a firmer statutory basis for its proposed rule, EPA attempts an ambitious and far-fetched reinterpretation of Section 111’s history. EPA contends that there are effectively *two versions* of Section 111(d), and that its version supports its claim to statutory authority more strongly than does the version courts have long assumed to be the law. According to EPA, this

¹⁰⁶ *Id.*

¹⁰⁷ *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011).

¹⁰⁸ EPA has suggested that the Supreme Court actually understood the prohibition to be pollutant-specific rather than source-category-specific. EPA Murray Br. 40. But that suggestion ignores the Court’s reference to “stationary sources of the pollutant” that “*are* regulated” under Section 112. *Am. Elec. Power*, 131 S. Ct. at 2537 n.7. If the Court had meant to refer to the pollutant rather than the source category, it would have used the verb “is” rather than “are.” EPA’s fallback argument is that if the Supreme Court in fact meant to refer to existing sources, “then it is at least half wrong” because of its reference to regulation of existing stationary sources under Sections 108-110. EPA Murray Br. 40. Yet the Supreme Court was not wrong at all – an existing source could not be regulated under Section 111(d) if there already was regulation under Sections 108-110. 42 U.S.C. § 7411(d)(1)(A)(i) (prohibiting regulation under Section 111 of pollutants on a list “published under section [108](a)”).

curious state of affairs “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.”¹⁰⁹ Thus, EPA asserts that Section 111(d) is actually “ambiguous” and therefore subject to the agency’s “reasonabl[e]” interpretation.¹¹⁰

EPA’s argument is a creative one, but it cannot withstand scrutiny.

1. EPA’s Interpretation Ignores Basic Principles Of Statutory Construction.

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.¹¹¹

It is very easy to harmonize the House and Senate provisions of the 1990 Amendments. 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).”¹¹² In other words, the pre-1990 prohibition on EPA’s Section 111(d) authority focused on whether the *pollutant* was *amenable* to regulation (*i.e.*, whether the substance was a pollutant listed under Section 112), as opposed to whether EPA had *actually* regulated the *source category* of the pollutant under Section 112. Indeed, prior to 1990, the concept of “source categories” under Section 112 did not even exist in the Clean Air Act.

In conjunction with the source categories of Section 112, the 1990 amendments to the Clean Air Act shifted the focus of Section 111(d)’s regulatory bar from *pollutants* potentially

¹⁰⁹ *Id.*

¹¹⁰ Legal Memorandum at 8, 26.

¹¹¹ See *Branch v. Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)).

¹¹² 42 U.S.C. § 7411(d) (1987).

subject to regulation under Section 112 to *sources* actually regulated 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.”¹¹³ 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).’”¹¹⁴ The Senate Amendment appears much later in the Statutes at Large among a list of purely clerical changes made in 1990, entitled “Conforming Amendments.”¹¹⁵ According to the Office of the Legislative Counsel’s manual for drafting legislation, a “Conforming Amendment[s]” is an “amendment of a provision of law that is necessitated by the substantive amendments or provisions of the bill.”¹¹⁶ They effectuate the sorts of ministerial changes required to clean up a statute after it has been substantively

¹¹³ Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990).

¹¹⁴ Pub. L. No. 101-549, § 302(a).

¹¹⁵ Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990).

¹¹⁶ United States Senate, Office of the Legislative Counsel, Legislative Drafting Manual § 126(b)(2)(A).

amended.¹¹⁷ These “include[] amendments, such as amendments to the table of contents, that formerly may have been designated as clerical amendments.”¹¹⁸

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).¹¹⁹ The conforming amendment was necessitated by those substantive amendments: it sought merely to account for these changes to Section 112 by “striking ‘[112](b)(1)(A)’ and inserting in lieu thereof ‘[112](b).’”¹²⁰

The legislative history confirms this interpretation. The history shows, first, that the House and Senate Conferees adopted the House-originated statutory language providing that source categories regulated under Section 112 may not be regulated as existing sources under Section 111, and, second, *the Senate expressly receded to the House with respect to these substantive provisions regarding Section 111(d)*. The Statement of Senate Managers explains:

SECTION 108-MISCELLANEOUS PROVISIONS.

Senate bill. In section 103 of the Senate bill revises sections 108(e) and (f) of the Clean Air Act to require the Administrator and the Secretary of Transportation to update air quality/transportation planning guidance and to add to the transportation control measures to be evaluated by the Administrator after consultation, when appropriate, with the Secretary.

House amendment. The House amendment contains a similar provision to the one in the Senate bill regarding amendments to section 108 of the Clean Air Act. In addition, the House amendment contains provisions for a technology clearinghouse to be established by the Administrator, for amending section 111 of the Clean Air Act relating to new and existing stationary sources, for amending

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Pub. L. No. 101-549, § 301.

¹²⁰ Pub. L. No. 101-549, § 302(a).

section 302 of the Clean Air Act which contains definitions, to provide a savings clause, to state that reports that are to be submitted to Congress are not subject to judicial review, and for other purposes.

Conference agreement. *The Senate recedes to the House* except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate, and with respect to transportation planning, the House recedes to the Senate with certain modifications.¹²¹

By receding to the House language, the Conferees effectively removed obsolete references to Section 112(b)(1)(a) from the underlying Clean Air Act. Once the substantive House amendment was adopted, the Senate “conforming amendment” was rendered non-executable because the reference it replaced *no longer existed*. This is why the U.S. Code includes the notation that the clerical entry here “could not be executed.”¹²² Indeed, in 2005 EPA itself expressly recognized that the second, clerical amendment was “a drafting error and therefore should not be considered.”¹²³ The net result of the amendments is the statute now codified in the U.S. Code.

Thus, the Statutes at Large simply do *not* contain “two” *separate* versions of Section 111(d), as EPA contends when it invokes authority for the proposition that the Statutes at Large trump the U.S. Code in cases of conflict. Once the substantive amendment was executed, the conforming amendment was mooted. And it would not matter if the amendments were applied in the reverse order. If the cross-reference to subsection 112(b)(1)(A) in the Senate (conforming) amendment were adopted first, it *still* would be rendered moot by the substantive House

¹²¹ 136 Cong. Rec. 36,065 (1990) (Chafee-Baucus Statement of Senate Managers) (emphasis added), reprinted in *A Legislative History of the Clean Air Act Amendments of 1990* (1998), Volume I, Book 2 at 885 (emphasis added), excerpts available at <http://docs.house.gov/meetings/IF/IF03/20140619/102346/HHRG-113-IF03-20140619-SD011.pdf>.

¹²² Revisor’s Note, 42 U.S.C. § 7411.

¹²³ 70 Fed. Reg. 15994, 16031 (Mar. 29, 2005).

amendment removing the statutory language in question. Either way, the result would be the single version of Section 111(d) that is currently reflected in the U.S. Code.

Importantly, this approach does not “negate” or ignore the Senate amendment. In fact, this is an unremarkable situation which is common in complex legislative schemes and which has never been thought to be problematic. The U.S. Code contains numerous examples of the precise situation occurring here (a clerical amendment rendered moot by substantive amendments), and in each case the clerical amendment was excluded because it “could not be executed.”¹²⁴ This circumstance has never in our history as a nation led a reviewing court to give effect to the conforming amendment over the substantive amendment that rendered it moot.

2. EPA Would Lack Authority Even Under Its Own Interpretation Of The House and Senate Amendments.

Even under EPA’s view of the House and Senate amendments, it would *still* lack statutory authority. For, even if effect were given to *both* the House and Senate amendments, the result would be the same: EPA’s Clean Power Plan would lack statutory basis. The *House* amendment prohibits EPA from regulating, 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

¹²⁴ See, e.g., Revisor’s Note, 5 U.S.C. app. 3 § 12; 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, 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. § 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. § 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, 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, 49 U.S.C. § 47115.

readily be applied together, with no conflict. EPA may give effect to both 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.”* Such an interpretation would result in a two-part statutory prohibition that completely forecloses EPA’s proposal. To the extent one assumes that both the House and Senate amendments are still viable, they can both be implemented according to the plain wording of the statute; there is “no room for agency discretion.”¹²⁵

3. EPA’s Interpretation Improperly Second-Guesses The U.S. Code’s Codification By The Office of Law Revision Counsel.

Under EPA’s approach, the statute would lead to an administrative nightmare that would itself raise serious constitutional questions. EPA seeks to override the judgment of the Office of Law Revision Counsel as to how the 1990 amendments should be construed, even though there is no conflict between the Statutes at Large and U.S. Code. If this approach were allowed, agencies would be able to wreak havoc with the U.S. Code, which contains dozens of situations precisely like this one.

EPA’s approach is premised on the erroneous assumption that the Statutes at Large in this instance reflect two separate versions of Section 111(d). They do not. Rather, the Statutes at Large simply disclose a substantive amendment and a conforming (or clerical) amendment. The U.S. Code properly reflects the first (substantive) amendment and not the second (clerical) amendment, which “could not be executed” because of the substantive amendment.¹²⁶ There is

¹²⁵ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967, 982 (2005).

¹²⁶ Revisor’s Note, 42 U.S.C. § 7411.

no conflict or ambiguity. To the extent there was ever a mistake, it has been cleaned up twice now – once by the congressional Conference Committee and a second time by the Office of Law Revision Counsel (the “Revisor”).¹²⁷

The Revisor operates “under the supervision of the Committee on the Judiciary of the House of Representatives,”¹²⁸ and every individual Member of Congress receives a copy of the Code and its supplement.¹²⁹ In this case, Members of Congress received the second supplement to the 1988 edition of the United States Code, containing the Revisor’s determination, early in 1991. I have been unable to find any evidence that any Member of Congress ever challenged that determination using a question of privilege or by any other means.

In addition, the Revisor assists in the one-time process of repeal and reenactment of the underlying provisions of each title of the Code, referred to as “positive law codification.”¹³⁰ A positive law codification of the Clean Air Act was completed by the Revisor and submitted to Congress in 2013.¹³¹ In relevant part, its text rejects EPA’s interpretation and adheres to the current version of the U.S. Code. The text prohibits Section 111(d) from being invoked for “any air pollutant . . . emitted from a source category that is regulated under section 211112 of this title,”¹³² the renumbered Section 112 hazardous air pollutant program.

¹²⁷ See *Lamson v. United States*, 117 Fed. Cl. 755, 761 (Fed. Cl. 2014) (sustaining the Revisor’s decision not to include certain language from a statutory provision in the U.S. Code).

¹²⁸ 1 U.S.C. § 202.

¹²⁹ 1 U.S.C. §§ 211 & 212.

¹³⁰ 2 U.S.C. § 285b.

¹³¹ Office Of The Law Revision Counsel, United States House Of Representatives, Draft 55 U.S.C. § 211111(d), online at <http://uscode.house.gov/codification/t55/bill.pdf>.

¹³² *Id.*

In preparing a positive law codification, the Revisor “actively seeks input from *Federal agencies*, congressional committees, and others with expertise in the area of law.”¹³³ The Revisor prepared a document detailing changes and corrections that it recommended, but no such change or correction recommendation was identified for Section 111(d).¹³⁴ Thus, after considering all of the relevant input, the Revisor again rejected EPA’s construction.

To allow EPA to draw on the deferential *Chevron* standard to override or second-guess the ordinary process of the Office of Law Revision Counsel would raise the gravest 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 dispositive proof in itself.¹³⁵ The Court warned of the uncertainty and instability that would result if interested persons 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 [executive], is a statute or not.”¹³⁶ Such an intrusion into the legislative process is well outside the authority of the Executive Branch. Nor would it be a proper exercise of the Judicial Power.

Here, EPA creates revisionist history to bypass the clear wording of the U.S. Code and the Statutes at Large and to construe for its own benefit a clerical amendment that the Revisor of

¹³³ Office Of The Law Revision Counsel, United States House Of Representatives, Positive Law Codification In The United States Code at 3 (emphasis added).

¹³⁴ Law Revision Counsel, Discussion Draft, Explanation Of H.R. _____, To Enact Certain Laws Relating To The Environment As Title 55, United States Code, “Environment” (2014), available at <http://uscode.house.gov/codification/t55/exp.pdf>.

¹³⁵ 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).

¹³⁶ *Id.* at 677 (quoting *Weeks v. Smith*, 81 Me. 538, 547 (1889)).

the Code specifically said “could not be executed.”¹³⁷ 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 is no mere matter of etiquette: it 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.”¹³⁸ The Statutes at Large, properly applied according to the Revisor’s Notes, are unambiguous, leaving no room for *Chevron* step-two deference to authorize a rewriting of the U.S. Code (which is likewise unambiguous).¹³⁹

4. EPA’s *Chadha* Argument Lacks Merit.

Nor is there any basis for impeaching the Revisor’s judgment under *I.N.S. v. Chadha*¹⁴⁰ on the spurious ground that the Revisor somehow overrode the legal text approved by Congress and signed by the President. Both bicameralism and presentment were fully satisfied when the President signed the substantive House amendment enacted by both Houses after the Senate receded from its amendment. The Revisor accurately codified the legal texts enacted by Congress. Accordingly, no court has ever found a *Chadha* violation in the dozens of legislative situations that are just like this one.

5. EPA’s Interpretation Raises Grave Constitutional Questions Under Article I, Article III, And The Separation Of Powers.

¹³⁷ Revisor’s Note, 42 U.S.C. § 7411.

¹³⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹³⁹ Cases like *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1977), are therefore inapposite. *Citizens to Save Spencer County* involved two provisions that were mutually exclusive – namely, two different statutory dates for a deadline. *Id.* at 860. The court observed that “each of the two sections of the statute at issue is clear, and it is equally clear that their provisions do not coincide.” *Id.* at 870. That was also the upshot of *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2219 n.3 (Sotomayor, J., joined by Breyer, J., dissenting). In contrast, there are no conflicting provisions here, much less mutually exclusive ones.

¹⁴⁰ 462 U.S. 919 (1983).

If EPA were permitted to choose which of the two supposed versions of Section 111(d) it preferred to enforce, the agency would move beyond its proper role of ensuring that the law is faithfully *executed* and would instead assume *lawmaking* power. If there really *were* two different versions of Section 111(d), 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 would be fabricating an impermissibly broad delegation of authority for itself and then acting on it — in effect, bootstrapping itself into the power to “make law.”¹⁴¹

To be clear, this 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 thereunder. Here, in contrast, the point is that EPA violates the separation of powers when it insists that there are two candidates competing to play the role of the “real” Section 111(d) and thus competing for recognition as the law of the land. The constitutional objection therefore is not to a *congressional decision to leave excessive authority to an agency* (in violation of a non-delegation constraint) but to *the agency’s remarkable assertion that it enjoys a free-standing power to choose for itself which statute Congress in fact enacted and which, therefore, the agency will enforce*.

This objection does not rest on an arguably antiquated view that courts or, for that matter, agencies, mechanically and robotically “apply” the law as they find it, exercising no discretion or judgment in the process of interpretation; in a colloquial sense, of course courts and agencies alike “make” law all the time when they interpret a statute one way rather than another. But it is

¹⁴¹ See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 473 (2001) (“The very choice of which portion of the power to exercise . . . would itself be an exercise of the forbidden legislative authority.”).

one thing to exercise judgment in interpreting a statute's words and another thing altogether to determine which of two competing texts is the actual statute under interpretation. The Sarbanes-Oxley Act and the Federal False Statements Act each requires interpretation; but deciding which Act is which is a different kettle of fish.¹⁴²

So too, for an agency to assert the power to decide which statute Congress actually enacted usurps either the role of the Article I lawmaking branch or the role of the Article III judicial branch, or, more likely, both. “[T]he lawmaking function belongs to Congress” and may not be appropriated by “another branch or entity.”¹⁴³ As the Supreme Court stated just last year in *Utility Air Regulatory Group*, “Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, ‘faithfully execute[s]’ them.”¹⁴⁴ The Court added that “[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity.”¹⁴⁵

The Court has denied *Chevron* deference when there was no delegation of authority by Congress to the agency, and it has made clear that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.”¹⁴⁶ Even if

¹⁴² See *Yates v. United States*, No. 13-7451, 2015 WL 773330, *4 n.1 (U.S. Feb. 25, 2015) (holding that tossing out undersized fish to avoid detection for violating federal conservation regulations is not a violation of Sarbanes-Oxley’s ban on destroying, covering up, or concealing any “record, document, or tangible object” to obstruct federal investigation, and opining that 18 USC §1001(a)(2), the statute criminalizing making a false statement to federal law enforcement officers, is “irrelevant to our analysis”).

¹⁴³ *Loving v. United States*, 517 U.S. 748, 758 (1996).

¹⁴⁴ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

¹⁴⁵ *Id.* at 2445.

¹⁴⁶ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2000); see also *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (declining to apply *Chevron* deference to agency guideline where congressional delegation did not include “authority to promulgate rules or regulations” (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976))); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (rejecting application of

there were ambiguity here – and there is not – mere ambiguity in a statute is not evidence of congressional delegation of authority. “[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.”¹⁴⁷

Hence, even if Congress had indeed enacted two different versions of Section 111(d) in 1990 (which it did not), EPA’s reading of *Chevron* would endow it with a wholly extra-constitutional latitude to choose freely between them. *Chevron* allows an agency 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.”¹⁴⁸ “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”¹⁴⁹ The distinction is between

Chevron because “[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority”).

¹⁴⁷ *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

¹⁴⁸ *Loving v. United States*, 517 U.S. 748, 758 (1996).

¹⁴⁹ *Id.* at 777 (Scalia, J., concurring in part and concurring in the judgment).

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.¹⁵⁰

This bedrock principle, familiar to anyone who has taken a basic civics class in 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.’”¹⁵¹

As everyone now knows, 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 species of being – a “delegation” of completely unfettered power simply to select *which of two laws* to carry into effect. If Congress could empower an agency to pick which of *two* measures to treat as law, then it could empower an agency to pick which of *two thousand measures* to make into law. Indeed, come to think of it,

¹⁵⁰ *Id.* at 758-59 (majority opinion) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892)) (alteration in original).

¹⁵¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Mistretta v. United States*, 488 U.S. 361, 374 (1989)).

why not simply empower the agency to write an entirely *new* measure, picking from the infinite range of available options?

The only way to avoid that unthinkable conclusion is to avoid taking the first step down that illegitimate path and to find that 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 permit even Congress to expressly 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 remotely *purported* to make such an unconstitutional delegation.

D. EPA’s “Gap-Filling” Argument Has No Merit: There Is No “Gap” To Fill, But If There Were, Only Congress, Not EPA, Would Have Constitutional Authority To Fix It.

In the end, EPA resorts to arguing that it has implied power to ensure that there are “no gaps” in Clean Air Act regulation. But administrative agencies lack any such “implied” or “inherent” powers; they are creatures of statute and possess only the authority Congress has given them. Moreover, there is no “gap” in authority here. EPA has ample power to regulate electric generating units under the Clean Air Act. It has regulated them pursuant to Section 112 since 2000. In addition, for listed criteria pollutants from national sources, Sections 108-110 authorize EPA to set ambient air standards.

Here, EPA’s approach would license duplicative regulation of source categories under Section 111(d) in direct violation of the language of the 1990 Amendments. It would create the danger of a host of technical, feasibility, and cost concerns. In the case of electric generating plants, duplicative regulation also carries implications for electrical reliability. Accordingly, in 1990 EPA officials testified to Congress that imposing double regulation on existing sources,

even for different pollutants, would be “ridiculous.”¹⁵² When Congress considered redundant regulation in certain limited areas, as for example in the context of whether and how EPA could doubly regulate power plants under both Section 112 for hazardous pollutants and Title IV for sulfur dioxide, there was substantial congressional debate and negotiation.¹⁵³ In contrast, there is no evidence whatsoever that Congress intended duplicative regulation of source categories under Section 111(d) and Section 112.

Moreover, Section 111(d) would be a most peculiar provision to select for serving any such “gap-filling” function. As explained by Sen. David Durenberger, a leading Senate architect of the 1990 Amendments, Section 111(d) was considered to be “some obscure, never-used section of the law.”¹⁵⁴ By EPA’s own count, it has used the section to regulate only four pollutants and five sources (such as methane emissions from municipal landfills)¹⁵⁵ — and none remotely on the scale of CO₂. All of these situations involve unique, localized pollutants, such as sulfuric acid, emitted from distinctive sources, like a sulfuric acid plant. None of them concerns a ubiquitous, benign substance like CO₂ emitted from sources throughout the nation and indeed the globe, rather than from discrete local sources. None of them sought to revolutionize the U.S. energy sector, as EPA’s latest rule does, and none required States to coordinate their energy and emissions policies with each other, as they are inextricably linked through the electric

¹⁵² Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Cmte. on Energy and Natural Res. 101st Cong. 603 (1990).

¹⁵³ See, e.g., Energy Policy Hearing at 7, 234–35, 240–41, 436–37, 483, 485, 492, 570–72, 596, 603 (1990) (hereinafter); Air Pollution — 1970: Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcmte. on Air & Water Pollution of the S. Cmte. on Public Works, 91st Cong. 112–13, 116–17, 131–36, 151–56, 158–59, 164, 388–89, 1487–1533 (1970).

¹⁵⁴ Clean Air Act Amendments of 1987: Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcmte. on Env’t. Prot. of the S. Cmte. on Env’t and Public Works, 100th Cong. 13 (1987).

¹⁵⁵ See *Carbon Pollution Emission Guidelines for Existing Stationary Sources*, 79 Fed. Reg. at 34,844 (“Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories (i.e., sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), Kraft pulp plants (total reduced sulfur), and municipal solid waste landfills (landfill gases)).”).

distribution grid. Indeed, there has only been a single instance of Section 111(d) regulation after the 1990 Amendments, a regulation involving municipal landfills, which had already been subject to regulation prior to 1990. The rule was grandfathered in, so to speak. Hence, the history of Section 111(d) provides no inkling that it could serve as the ambitious, “gap-filling” provision that EPA now maintains.

Past rules issued under Section 111(d) have never contemplated – much less required – interstate compacts or coordination, as EPA’s latest proposal does. It is one thing to direct a State to set limits on landfill emissions. It is quite another to command a State to coordinate its energy and emissions policies with every other State with which it is inextricably linked through the power distribution system. The current proposal entails a completely different level of complexity and interstate interconnectedness than have prior rules – and a level that could never have been contemplated in 1990. There is not a shred of evidence that Congress ever expected Section 111(d) to be applied to impose a reconfiguration of the interstate power network, as opposed to merely requiring augmented pollution controls at a particular source like a landfill or aluminum factory.

The stark disconnect between the obscure nature of Section 111(d) and the revolutionary character of EPA’s proposal is itself telling. Just last Term, in *Utility Air Regulatory Group v. EPA*, the Supreme Court voiced powerful concerns regarding EPA’s attempt to effect a radical expansion of its authority via a minor statutory provision:

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.”¹⁵⁶

The text, structure, and history of Section 111 all demonstrate that EPA’s proposal lacks any statutory basis and indeed flies in the face of an express statutory prohibition. Moreover, EPA’s attempt to generate such a basis by fabricating an “ambiguity” within Section 111 creates serious constitutional questions under the separation of powers, Article I, and Article III.

¹⁵⁶ 134 S. Ct. at 2444.

CONCLUSION

EPA's proposal exceeds its statutory and legal authority and would raise serious constitutional questions that require rejecting its attempt at reconfiguring the nation's energy landscape as an egregious instance of executive overreach. Its plan runs afoul of democratic precepts and rule of law principles. The agency seeks to make "high policy" via an expansive reading of statutory silence and, worse yet, in the face of an express statutory prohibition on its authority. Congress, not an unelected agency, is the proper body to make the value judgments and decide the tradeoffs implicated by EPA's plan.