ORAL ARGUMENT NOT YET SCHEDULED

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

Case No. 15-1363 and Consolidated Cases

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

JOINT RESPONSE OF RESPONDENT-INTERVENORS TO PETITIONERS' JOINT MOTION TO ESTABLISH BRIEFING FORMAT AND EXPEDITED BRIEFING SCHEDULE

States, Local Governments, Environmental and Health Organizations, and Advanced Energy Associations (herein "Respondent-Intervenors") that have moved to intervene in support of respondent Environmental Protection Agency ("EPA") respectfully respond to Petitioners' Joint Motion to Establish Briefing Format and Expedited Briefing Schedule ("Joint Mot.").[1]

Respondent-Intervenors believe this case should be briefed and argued expeditiously in one round addressing all issues. There is no merit to Petitioners'

[1] The ten power companies that have moved to intervene in support of EPA will be filing a separate response in opposition to the Joint Motion.

proposal to bifurcate the briefing along artificial lines, a proposal that would likely increase substantially the length of time it takes for this Court to review EPA's Carbon Pollution Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64, 662 (Oct. 23, 2015) ("Rule").

A. Petitioners' Bifurcation Proposal Would Be Inefficient, Unprecedented, and Unwarranted

Petitioners propose to bifurcate judicial review, delaying review of "record-based issues" or "record-based challenges" (Joint Mot. 4) until after briefing, oral argument, and decision of other issues that Petitioners describe with labels such as "fundamental legal authority issues," "common fundamental legal issues," or "fundamental core" issues, *id.* 4, 12.

Petitioners provide no principled basis for bifurcating the issues. A central premise of the bifurcation request appears to be that these yet-to-be defined issues Petitioners claim are "fundamental" are somehow readily separable and abstract or "legal" in nature. Joint Mot. 1, 3-4. Any such dichotomy would be elusive even in the abstract. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (rejecting the proposition that courts should attempt to differentiate between "big, important" agency determinations and more "run-of-the-mill" ones and concluding that "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority"); *Pharmaceutical Research v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015) ("As is often the case, our review here of the FTC's interpretation of its authority under *Chevron* Step Two overlaps with our arbitrary and capricious review under 5

U.S.C. § 706(2)(A).") (citation omitted). And such an artificial bifurcation is particularly ill-suited to this proceeding, which involves a large administrative record and a Clean Air Act framework that requires EPA to engage in "complex balancing" of statutory priorities. *See Am. Elec. Power Co. v. EPA*, 131 S. Ct. 2527, 2539 (2011). Under basic principles of judicial review, the agency's interpretation and application of the statute must be reviewed in the context of the entire record.

Petitioners fail to show any consistent or principled way to separate the issues that they describe as "fundamental" from the extensive factual context of this rulemaking. Indeed, many of Petitioners' enumerated "fundamental" issues belie this artificial division. For example, Petitioners attack EPA's interpretation of the statutory term "standard of performance" and its component "best system of emission reduction." But the lawfulness of EPA's implementation of these statutory terms turns upon EPA's application of statutory criteria (*e.g.*, "best system of emission reduction," "adequately demonstrated," "taking into account cost," etc.) to the vast factual record concerning fossil fuel-fired power plants. Indeed, Petitioners' own "fundamental issue" selection highlights the artificiality of their approach by including a catch-all category "whether the Rule violates the requirements of 42 U.S.C. § 7607(d)," Joint Mot. 15, *i.e.*, the Clean Air Act's rulemaking procedures. Even the "constitutional avoidance" issues Petitioners list, Joint Mot. 14, necessarily turn on the record facts about how the Rule works, the evidence on which it is based, and what it likely will do. Petitioners' notion that the issues they identify are somehow segregable from the "record-based" issues is not credible – and would be the source of endless

confusion and disagreement (as well as challenging questions of law of the case and preclusion generated solely by the artificial two-step process).

Indeed, Petitioners have yet to identify a comprehensive list of issues to be briefed in each of the two rounds, let alone any analytically sound basis for bifurcation. Notably, Petitioners carefully state that the so-called "fundamental legal issues" they intend to brief in the first round "*include*," Joint Mot. 12-13, 15 (emphasis added), those they list at pages 12-15 of their motion, suggesting that there are yet more issues they may unilaterally seek to classify as "fundamental." Similarly, they only offer a "short, illustrative list," *id.* 11, of the "record-based" or "programmatic" issues they wish to address in a second round of briefing. This second group of issues, Petitioners warn, ultimately would require "multiple, lengthy briefs," *id.*, and would be briefed, argued and decided only after this Court's final disposition of the first-round issues, and only if Petitioners lost in round one.

To build the case for their unusual proposal, Petitioners feel the need to present a tendentious account of the Clean Power Plan, Joint Mot. 2-4, and arguments that resemble those in their stay motions. A briefing format proposal should not require that the Court accept the movants' arguments on the merits, and Petitioners' arguments are, in any event, overwrought and wrong. *See*, *e.g.*, State and Municipal Respondent-Intervenors Stay Opp. 2-11 (ECF No. 1587450); Environmental Respondent-Intervenors' Stay Opp. 1-5 (ECF No. 1587490).

Petitioners point to no case in which this Court has broken judicial review of an integrated final rule in two in this way and they provide no compelling reason for such a departure here. The orders they cite, Joint Mot. 17, are inapposite. In *White*

Stallion, the petitions for review covered two independent rulemakings, and the Court severed two issues applicable to the Utility New Source Performance Standards, which were based on different statutory authority and a different record than the consolidated Mercury Air Toxics Standards. Order, *White Stallion Energy Ctr, LLC v. EPA*, No. 12-1100 (D.C. Cir. June 28, 2012) (ECF No. 1381112). In *NRDC v. EPA*, the Court held in abeyance discrete issues that were subject to pending petitions for administrative reconsideration. *NRDC v. EPA*, No. 06-1045 (D.C. Cir. June 19, 2006) (ECF No. 975173).[2] Here, in contrast, the consolidated cases pertain to a single rulemaking and a single administrative record under a single statutory provision, and the issues to be "bifurcated" are neither clearly defined nor logically separable.

Petitioners' proposal would substantially prolong the judicial review process, and greatly increase the workload for the Court and the parties alike. Besides creating a gratuitous source of confusion, Petitioners' bifurcation proposal would not deliver on its core promise of prompt resolution of the case. To the contrary, it would mean that even when all of Petitioners' "fundamental" claims are rejected, the judicial review process for the Rule will just be getting started. For Petitioners who claim to be concerned about regulatory uncertainty and trumpet the need for swift judicial review, that is a strange approach indeed. *See N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) ("Agencies, no less than private litigants, have

[2] Petitioners raise the possibility that issues subject to administrative reconsideration petitions may not be ripe for review until EPA decides the petitions. Joint Mot. 12; *see* 42 U.S.C. § 7607(d)(7)(B). But that possibility does not support Petitioners' unprecedented bifurcation proposal, which would defer to a second round a host of fact- and record-related issues that are *not* subject to administrative reconsideration.

interests in finality and certainty. Finality of regulations serves the public interest insofar as people cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack.") (citations omitted). The additional year (or more) of uncertainty would be harmful to the Power Company and Advanced Energy Association Respondent-Intervenors and their members, for whom prolonged uncertainty impairs planning and discourages investment.

Petitioners are seeking multiple bites at the judicial-review apple, asking for the opportunity to file 55,125 words' worth of briefing in round one, Joint Mot. 16-17, while reserving the right to file "multiple, lengthy briefs," *id.* 11, in a second round if their arguments prove unpersuasive. This proposal is the exact opposite of "fair and efficient management" and "judicial economy." *Id.* 4.

Respondent-Intervenors urge that the briefing format and schedule should facilitate prompt judicial review of the Rule in one round that resolves the whole case. While Petitioners appear to believe that briefing this case in the normal, unitary manner would require a longer briefing schedule and significantly larger word allocations than they propose for their initial round, we believe the entire case can readily be briefed in time for oral argument to be held no later than September 2016.[3] That would allow for holding oral argument addressing the whole case at most a few months after Petitioners' proposed "first-stage" oral argument on a mere subset of

[3] Respondent-Intervenors believe the case could be fully and adequately briefed by late spring or early summer, enabling the scheduling of oral argument at the start of the Court's September calendar or over the summer. *See* D.C. Cir. Handbook of Practice and Internal Procedures 46 (rev. July 2015).

issues.[4] An approach that provides for prompt briefing and argument of the whole case would best serve the substantial public interest in the timely and final disposition of these petitions for review.

B. Petitioners' Proposed Word Allocations for Intervenor Briefs are Unreasonable and Inequitable

Petitioners filed their unilateral briefing proposal before all of the parties to the case have even been identified, and did not consult with any of the Respondent-Intervenors before doing so. A briefing schedule that emerges from consultation among all the parties is more likely to identify all the relevant considerations and produce a workable and fair outcome, even if some issues remain to be resolved by the Court.[5] Petitioners' failure to propose any such process here is an additional reason why their motion should be denied.

If the Court decides to establish a merits briefing format in response to the present motion, it should, in addition to rejecting "bifurcation," also reject the word

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[4] If there were a September argument and the Court issued a merits decision approximately six months later, *i.e.*, by March 2017, states would still have 18 months to further develop and finalize their state plans before the September 2018 date for final submittals. Thus, even States that chose to defer most work on their plans until after a merits decision would be able to finalize their plans in time to submit them by September 2018. *See*, *e.g.*, State Respondent-Intervenors' Stay Opp. at 15 & n. 13.

[5] In the case involving EPA's companion rule addressing carbon dioxide emissions from new, modified and reconstructed power plants, 80 Fed. Reg. 64,509 (Oct. 23, 2015), proposed briefing formats are due on January 11, 2015. *See* Order, *North Dakota v. EPA*, Nos. 15-1381 (D.C. Cir. Dec. 1, 2015) (ECF No. 1586106). The Court's order in that case follows the Court's customary approach by "strongly urg[ing] the parties to submit a joint proposal." *Id.* It makes sense to follow the same familiar procedure here, so that the parties may endeavor to find common ground and at least narrow the issues for resolution by this Court.

allocations Petitioners propose for the intervenors on both sides. First, the motion proposes to give a separate brief of 8,750 words to Petitioner-Intervenors Peabody Energy, *et al.*, that had every chance to file their own petitions for review and have failed to identify any interest that sets them apart from many similarly situated Petitioners. A separate word allocation for them is unwarranted; this Court's recent practice has frequently been to group Petitioner-Intervenors with Petitioners for purposes of briefing, as was done in the cases challenging EPA's initial suite of greenhouse gas regulations, *Coalition for Responsible Regulation v. EPA*, Order, No. 09-1322, *et al.* (D.C. Cir March 22, 2011) (ECF No. 1299368); Order, No. 10-1073 (D.C. Cir. March 21, 2011) (ECF No. 1299257); Order, Nos. 10-1092 (D.C. Cir. March 22, 2011) (ECF No. 1299440). Petitioners offer no reason why Petitioner-Intervenors (coal companies and related businesses) cannot brief together with Petitioners, which include other coal companies, a coal industry association, and other entities with closely aligned interests.

Most importantly, the proposed format deprives Respondent-Intervenors of a fair opportunity to brief the case. While assigning themselves 36,750 words for their "first round" opening briefs, Petitioners and Petitioner-Intervenors propose to allot only 8,750 words to all Respondent-Intervenors. Respondent-Intervenors include four distinct groups: 18 states and 7 local governments; 17 environmental and public health groups; 10 power companies regulated by the Rule; and 3 major advanced energy associations representing thousands of companies. Petitioners give no reason such a broad and diverse array of governmental, nonprofit, and business entities supporting the Rule should be so restricted in their briefing.

We submit that the appropriate approach would be to include Petitioner-Intervenors in the word allocation for Petitioners, and to provide Respondent-Intervenors a combined word allocation amounting to 62.5 percent of the aggregate word limit for principal briefs, based upon the ratio in D.C. Cir. Rule 32(e)(2)(B)(i).[6]

Conclusion

The Court should deny the Joint Motion and direct the parties to confer with one another regarding the briefing schedule and attempt to submit a joint proposal (or, if necessary, separate proposals as to any disputed issues) for briefing the entire case.

[6] We note that Petitioners' proposal does not address briefing by amici. Some amici (including former EPA Administrators Ruckelshaus and Reilly and the Institute for Policy Integrity) have already been granted leave to participate. We have been informed that a motion for leave to participate as amici in support of EPA will be filed within the coming days on behalf of the National League of Cities, the U.S. Conference of Mayors, and individual municipalities, and that other amicus motions are likely to follow. Any briefing schedule ultimately adopted should incorporate briefing due dates and word allocations for amici.

Respectfully submitted,

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* Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this brief.

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I certify that on December 21, 2015, I filed the foregoing Joint Response of Respondent-Intervenors to Petitioners' Joint Motion to Establish Briefing Format and Expedited Briefing Schedule throught the Court's ECF System, which will provide an electronic copy to all registered counsel. In addition, I sent copies of said Joint Response to the following unregistered counsel by first-class United States mail, postage prepaid:

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