ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016
No. 15-1363 (and consolidated cases)

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

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,
v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

BRIEF FOR SOUTHEASTERN LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Southeastern Legal Foundation, Inc. ("SLF") is a nonprofit corporation with no publicly owned or traded stock. SLF has no parent companies, and no publicly held corporation has ten percent or greater ownership interest in SLF.

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation, Inc. ("SLF") is a nonprofit public interest law firm and policy center. SLF promotes the public interest by advocating and defending individual liberties, constitutionally limited government, and the free enterprise system, both through participation in court cases and through public discourse.

Since its founding in 1976, SLF has taken an active role in many litigation matters and policy debates to vindicate private property rights and to confirm the proper limits of federal power under the Constitution of the United States. SLF has represented parties and submitted amicus briefs before the courts of appeals and the Supreme Court in numerous cases presenting governmental threats to the property rights of individuals and businesses, including through the overreaching interpretation of federal environmental statutes to impose excessive and imbalanced regulation. SLF prides itself on defending ordinary citizens and small business owners in local communities throughout America who find their freedom and their

[1] No parties have objected to the filing of this amicus brief. Respondents consented to the filing of this amicus brief. Petitioners either consented, noted that they do not object, or took no position on the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no person other than amicus and its counsel has made a monetary contribution to the preparation or submission of this brief.

property under challenge from arbitrary, unconstitutional, and unreasonable bureaucratic power.

The unprecedented regulatory regime at issue in this case poses just such a threat to liberty. The professed effort of the Environmental Protection Agency ("EPA") to transform the power industry by administrative fiat threatens the precious balance of powers enshrined in our Constitution. The resolution of these issues will have a broad impact on the interests of greatest importance to SLF.

SUMMARY OF ARGUMENT

The EPA's "Clean Power Plan" is fraught with constitutional difficulties. The issues at stake do not involve a routine interpretation of ambiguous statutory text or the mere exercise of agency expertise to promulgate technical emissions standards under the Clean Air Act. Rather, this rule purports to enact a previously undreamed of regulatory program whose avowed purpose is to compel the owners of existing power plants to invest in alternative forms of energy generation, and it would achieve this transformation by forcing the States to adopt the necessary implementing legislation and rules. These mandates exceed the proper bounds of administrative authority and trench upon the legislative power reserved to Congress. They also threaten the very foundations of federalism inherent in our Constitution.

Under the established judicial principle of constitutional avoidance and under the Supreme Court's decisions in *King v. Burwell*, 135 S. Ct. 2480 (2015), *Util. Air*

Regulatory Group ("UARG") v. EPA, 134 S. Ct. 2427 (2014), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Clean Power Plan must be struck down unless Congress has granted the EPA clear and unambiguous authorization to embark upon this extraordinary and transformational regulatory program. Far from providing such express authorization, the provisions of the Clean Air Act squarely foreclose the regulatory overreach announced by the EPA. The rule should therefore be invalidated.

ARGUMENT

The Clean Power Plan does not simply define the proper "standards of performance" for coal-, oil-, or gas-fired power plants under the Clean Air Act or require the "best system" of control technology for reducing emissions of pollutants from any existing "category" of stationary sources. *See* 42 U.S.C. §§ 7411(a)(1), 7411(b)(1)(a), 7411(d)(1). EPA's rule is *radically* different. It purports to force the owners of power plants to "shift" their assets and investments *away* from fossil-fuel power generation and into alternative forms of energy production. *See* 80 Fed. Reg. 64,662, 64,728 (Oct. 23, 2015). And it would commandeer the States to enact legislation and enforce regulations to coerce this transformational "shift" from fossil-fuel power to alternative energy sources. *See id.* at 64,726, 64,767-69, 64,675.

In doing so, the EPA's regulatory regime would upend the constitutional balance of powers by arrogating to an executive agency the authority reserved to

Congress to craft wholly new legislative solutions, as well as the awesome power to compel the States to enforce the agency's unprecedented commands. This industry-transforming regulation cannot be sustained in the absence of a clear and unambiguous statutory authorization from Congress, which is nowhere to be found in the Clean Air Act.

I. THE CLEAN POWER PLAN RAISES SERIOUS CONSTITUTIONAL ISSUES

The rule at issue here cannot be squared with the Constitution's separation of powers or with the proper allocation of authorities between the federal and state governments.

A. EPA's Rule Is Inconsistent with Separation of Powers Principles

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the "*Steel Seizure Case*"), the Members of the Supreme Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 594 (Frankfurter, J., concurring). In striking down the President's executive order directing the Secretary of Commerce to seize major steel mills to prevent a labor shutdown during the Korean War, Justice Douglas invoked first principles: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587 (Douglas, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of

the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.* at 629. As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638 (Jackson, J., concurring).

Under these principles, any action by which one branch of the federal government presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to liberty. "In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966). *See* The Federalist Nos. 47-51 (J. Madison) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). *See id.* at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

The EPA's Clean Power Plan conflicts with these principles because it would constitute a bald invasion of Congress's legislative province. The EPA is purporting to fashion a vast new regime mandating the complete transformation of the power industry, and this regime has no precedent in the technical "standards of performance" or "best system[s] of emission reduction" contemplated by the provisions of the Clean Air Act.

The current administration and the present leadership of the EPA believe that climate change poses a serious environmental threat that justifies the enactment of an aggressive new legislative program by Congress. And they undoubtedly believe that Congress's consistent refusal to enact such a program creates a pressing national challenge that requires action. But "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse" than any such policy challenge. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 3157 (2010) (internal quotation marks, alterations, and citations omitted). "Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient," *Steel Seizure Case*, 343 U.S. at 629 (Douglas, J., concurring), but the Framers of the Constitution intended as much, and the difficulties of persuading Congress to enact broad new legislation cannot excuse an unconstitutional overreach by the executive branch. *See Clinton*,

524 U.S. at 449 (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment.").

B. EPA's Rule Threatens to Undermine the Constitutional Framework of Federalism

The EPA's effort to commandeer the States to enforce its bold new regime for shifting power generation from fossil fuels to alternative forms of energy also runs afoul of core federalism limitations. "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. . . . 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 564 U.S. 211, 131 S. Ct. 2355, 2364 (2011) (citation omitted). The federal government may not coerce the States into implementing federal regulatory programs. *See Printz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 176-77 (1992); *see also NFIB v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2602 (2012) (states may not be coerced into carrying out federal policy through the guise of a contractual federal-state program).

The rule at issue threatens just such unconstitutional commandeering and coercion of state governments by purporting to require the States to enact and enforce regulatory mandates that go far beyond anything the States could have foreseen under the terms and history of the Clean Air Act.

II. THE RULE MUST BE INVALIDATED BECAUSE IT LACKS CLEAR AND EXPRESS AUTHORIZATION FROM CONGRESS

The EPA's Clean Power Plan is *not* entitled to the deference ordinarily accorded an agency's interpretation of ambiguous statutory language under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Instead, this rule can survive only if clearly and expressly authorized by the plain language of the Clean Air Act. And under that standard, the rule must fall.

The serious constitutional principles put at peril by the EPA's rule require application of the judicial doctrine of constitutional avoidance. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (recognizing that the avoidance of serious constitutional issues wherever possible is a "cardinal principle" of statutory interpretation that "has for so long been applied by this Court that is it beyond debate"); *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (internal citations omitted) ("If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [the Court is] obligated to construe the statute to avoid such problems."). In *Solid Waste Agency of No. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Supreme Court applied the avoidance canon to strike down the Army Corps of Engineers' effort to read "navigable waters" under the Clean Water Act to permit the Corps to exercise unprecedented jurisdiction over isolated patches of wholly intrastate wetlands that

bore no substantial relationship to interstate commerce. *See id.* at 172-73. The present case requires a similar result.

In addition, the unprecedented breadth, extraordinary burden, and transformational nature of the Clean Power Plan demands a clear and unambiguous grant of authority from Congress. *See King v. Burwell*, 135 S. Ct. at 2489 (holding that courts should not presume that Congress would delegate "question[s] of deep 'economic and political significance'" to administrative agencies without a clear statement of intent to do so); *UARG v. EPA*, 134 S. Ct. at 2444 (rejecting the EPA's "greenhouse gas" permitting rule because it would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization"); *FDA v. Brown & Williamson*, 529 U.S. at 160 (overturning the FDA's unprecedented attempt to regulate tobacco products under the Food, Drug, and Cosmetic Act in the absence of "clear" authorization from Congress).

Here, there is no clear statement in the provisions of the Clean Air Act even hinting that Congress ever contemplated anything resembling the industry-shifting regime fashioned by the EPA, much less that Congress has unambiguously authorized it. Indeed, the rule promulgated by the EPA is flatly *contrary* to the plain language of the very statutory provision on which it purportedly rests, 42 U.S.C. § 7411(d), which expressly *excludes* from its reach any "source categor[ies]" separately "regulated under section 7412." Fossil-fuel-fired power plants are

regulated under 42 U.S.C. § 7412, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012), and thus may not be subjected to double regulation under the EPA's Clean Power Plan regime. That regime cannot stand.

CONCLUSION

For the foregoing reasons, amicus Southeastern Legal Foundation respectfully urges this Court to grant the Petitions for Review and to vacate the EPA's unlawful Clean Power Plan.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. Rule 32(e)(2) because this brief contains 2,182 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count function of Microsoft Word.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Kimberly S. Hermann

CERTIFICATE OF SERVICE

I hereby certify that on this day, February 22, 2016, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/ Kimberly S. Hermann