No. 16-4270
and consolidated case Nos. 16-4296, 16-4298,
16-4300, 16-4302, 16-4304, 17-1276, 17-1283

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF ARKANSAS, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SCOTT PRUITT, in his official capacity as Administrator of the United States Environmental Protection Agency,

Respondents.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF STATE AND INDUSTRY PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register Notices

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This case presents such an issue. This case is of particular concern to the Chamber and its members because it is one of several recent cases resulting from the U.S. Environmental Protection Agency's ("EPA") regulatory overreach under the Clean Air Act ("CAA") and, in particular, the regional haze program. Through its re-interpretation of the regional haze requirements, EPA is seeking to impose massive expenditures and economic harm on business in Arkansas, but the result would be little if any actual benefit in terms of visibility improvements at the federal Class I areas covered by the program. The Chamber is participating in this case—and has a long track record of participating in other such cases—to provide the Court with a

broader perspective on EPA's overreach and the substantial impact of its new regulatory approach.[1]

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the Chamber certifies that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Chamber has filed a motion seeking leave of court to file this brief.

[1] For example, the Chamber is currently an intervenor in the consolidated petitions for review in the U.S. Court of Appeals for the Fifth Circuit, in which the Court stayed EPA's regional haze rule for Texas and Oklahoma, based on many of the same errors that exist in the rule here. *See Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016). The Chamber also filed an *amicus curiae* brief in the consolidated petitions for review of EPA's regional haze rule for the State of Utah pending before the U.S. Court of Appeals for the Tenth Circuit. *See State of Utah et al. v. EPA, et al.*, No. 16-9541 (10th Cir.).

ARGUMENT

The Chamber of Commerce of the United States of America (the "Chamber") respectfully files this *amicus curiae* brief in support of State and Industry Petitioners challenging the final rule in this case.[2] The economic impact of EPA's final rule[3] is enormous—and drastically out of proportion to the "visibility" benefits that EPA claims will result from the rule. Those costs will not be borne by the regulated community alone, but will also be shared by electricity consumers, including Chamber members that operate in Arkansas. Given this impact, and the many legal flaws in the rule, the Court should vacate the final rule, as requested by Petitioners.

EPA's rule here is one of several recent actions by EPA seeking to expand the scope and reach of the Clean Air Act's ("CAA") regional haze program beyond the clear limitations on EPA's authority in the statute. Indeed, the U.S. Court of Appeals for the Fifth Circuit recently held that EPA's regional haze rule for the States of Texas and Oklahoma was likely unlawful, finding many of the same legal shortcomings that Petitioners argue exist in EPA's Arkansas rule. *See Texas v.* EPA, 829 F.3d 405 (5th

[2] State and Industry Petitioners are: State of Arkansas (Nos. 16-4270 and 17-1276); Arkansas Affordable Energy Coalition (No. 16-4296); Entergy Arkansas, Inc., Entergy Mississippi, Inc., and Entergy Power, LLC (Nos. 16-4298 and 17-1283); Arkansas Electric Cooperative Corporation (Nos. 16-4300 and 17-1283); Domtar, A.W. LLC (No. 16-4302); and Energy and Environmental Alliance of Arkansas (Nos. 16-4304 and 17-1283).

[3] 81 Fed. Reg. 66,332 (Sept. 27, 2016).

Cir. 2016). EPA's Federal Implementation Plan ("FIP") plan for Arkansas is unlawful and should be vacated.

I. EPA's Federal Plan is Unlawful Because EPA Failed to Reasonably Weigh Costs Against Benefits

EPA's failure to conduct a rational cost-benefit analysis renders the rule unlawful. Federal agencies must engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.*

Here, the requirement for a rational cost-benefit assessment by EPA is hard-wired into the statute and regulations. Cost is an explicit factor that EPA must consider, not in isolation, but in comparison to the benefits that would be achieved. The statute directs that "the costs of compliance" be considered in determining "*reasonable*" progress—not progress at any cost. 42 U.S.C. § 7491(g)(1) (emphasis added). In addition, for best available retrofit technology ("BART"), the statute specifically directs that "the degree of improvement in visibility which may reasonably be anticipated" be considered, *id.* § 7491(g)(2), alongside the "costs." *Id.* In addition, EPA's own BART Guidelines echo these statutory requirements and provide that when weighing the BART factors, EPA must consider, not simply the cost effectiveness of a given technology (as EPA did here), but also "the economic effects of requiring the use of a given control technology . . . [including] effects on product

prices, the market share, and profitability of the source." 40 C.F.R. Part 51, App. Y, § IV.E.2.

Thus, Congress clearly intended a consideration of whether the costs are reasonable in relation to the expected benefits. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." (emphasis in original)). And EPA may not simply recite the costs and the benefits, but must undertake a reasoned comparison of the two, and decline to regulate where costs clearly outweigh the benefits. *Id.* ("One would not say that it is even rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."); *see also Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 225-26 (2009) ("[W]hether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits; if the only relevant factor was the feasibility of the costs, their reasonableness would be irrelevant.").

It is contrary to any notion of reasoned decisionmaking for EPA to conclude, as it did here, that approximately $2 billion dollars in costs[4] should be incurred for at most only small, imperceptible changes in visibility, as measured in fractions of

[4] *See* Opening Brief of Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy Power, LLC, Arkansas Electric Cooperative Corporation, and Energy and Environmental Alliance of Arkansas at 2 ("The Final FIP establishes emissions limits for SO_2 and NOx at each coal-fired plant, which will require the installation of emission controls that cost over $2 billion.").

"deciviews," a unit of visibility measurement. The human eye can only detect changes in visibility of 1.0 deciview or greater,[5] but EPA's "[e]stimated FIP effect"—that is, the so-called "benefit" from *all* of the controls that EPA's FIP imposes—is only 0.21 deciview at Caney Creek and 0.19 deciview at Upper Buffalo. 80 Fed. Reg. 18,944, 18,998, tbl. 67 (Apr. 8, 2015). In contrast, the costs are massive under any measure. In other words, EPA has co-opted a statutory regime designed to improve visibility to instead impose billions of dollars in costs in exchange for literally *no* perceptible visibility improvements. It is hard to see how such an outcome can be squared with the statute's explicit cost-benefit analysis requirement, and for that reason, EPA's rule should be held unlawful and vacated. *Michigan*, 135 S. Ct. at 2706-07; *Entergy Corp.*, 556 U.S. at 225-26.

II. EPA's Federal Plan is Unlawful Because it Requires More Control than Necessary to Address Visibility Impairment

EPA's FIP is also unlawful because it exceeds EPA's limited statutory authority to address regional haze. EPA is "a creature of statute" and has "only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Here, EPA exceeded its limited statutory authority to address regional haze, and thus its FIP is "plainly contrary to law and cannot stand." *Id.*

[5] *See* 77 Fed. Reg. 30,248, 30,250 (May 22, 2012) ("[E]ach deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.").

In the CAA, Congress placed very clear limits on EPA's authority to address regional haze and visibility impairment, under both the BART and reasonable progress provisions. Under the statutory provision under which EPA asserts authority to act in this case,[6] EPA's federal plan may only "prohibit[]" a source "from emitting any air pollutant *in amounts which will*— . . . (II) interfere with measures required . . . to protect visibility." 42 U.S.C. § 7410(a)(2)(D)(i)(II) (emphasis added); *see also id* § 7491(b)(2) (a regional haze plan contains "measures *as may be necessary* to make reasonable progress toward meeting the national goal" (emphasis added)). Similarly, BART controls are limited to "the purpose of eliminating or reducing any such impairment" to visibility. *Id.* § 7491(b)(2)(A).

This statutory language is not simply aspirational; it defines the limits of EPA's regulatory authority. As the Supreme Court has explained, the "good neighbor" provision, which EPA cites to support its FIP here, means that "EPA cannot require a State to reduce its output of pollution more than is necessary to [protect visibility.]" *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1608 (2014). "If EPA requires [a state] to reduce emissions by more than the amount necessary . . . , the Agency will have overstepped its authority." *Id.*

[6] *See* 81 Fed. Reg. at 66,332-33 ("This FIP fully addresses the deficiencies we identified in our final action on the Arkansas Regional Haze [state implementation plan ("SIP")] with respect to the interstate visibility transport requirement under CAA section 110(a)(2)(D)(i)(II)[.]").

But that is exactly what EPA did here in its Arkansas FIP. EPA failed to respect the statutory and regulatory boundaries on its authority under the regional haze program. In enacting the regional haze program, Congress "declare[d] as a national *goal* the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1) (emphasis added). In reaching for this "goal," Congress provided for an incremental approach to visibility improvement. In other words, visibility impairment was not intended to be eliminated completely at the outset of the program. Instead, as reflected in EPA's implementing regulations, the target date for achieving "natural" visibility conditions at Class I areas was established as 2064, and plans to progress toward that goal are to be prepared and implemented every ten years. *See* 40 C.F.R. § 51.308(d)(1)(i)(B) (2016). In this way, economic considerations, changes in technology, and improvements in visibility would be considered and taken into account before imposing the costs of regulation on select individual sources.

Instead of respecting this incremental approach, EPA's FIP seeks to front-load emissions reductions on just a few sources in the first regulatory planning period. But it is undisputed here that the Class I areas at issue here—Caney Creek and Upper Buffalo—are well on their way to meeting the 2064 goal and are progressing faster than necessary to get there—*without* the costly controls imposed in EPA's FIP. 81 Fed. Reg. at 66,360-61. Nevertheless, EPA claims the authority to require more. *Id.*

But "EPA cannot require a State to reduce its output of pollution by more than is necessary," and, if it does so, "the Agency will have overstepped its authority." *EME Homer City Generation, L.P.*, 134 S. Ct. at 1608.

Further, EPA acted outside of its authority by imposing controls that could only be implemented outside of the first regional haze regulatory planning period (2008-2018). For example, EPA concedes that sulfur dioxide ("SO_2") controls at Independence cannot by fully implemented until 2021, well outside of the first planning period. 81 Fed. Reg. at 66,416-20. But the plain language of EPA's own regulations prohibits this. As required by the regulations, regional haze plans only consider "the emission reduction measures needed to achieve [reasonable progress] *for the period covered by the implementation plan*." 40 C.F.R. § 51.308(d)(1)(i)(B) (2016) (emphasis added). Here, that "period" is established by the binding regulations as 2008-2018. *Id.* § 51.308(b), (f) (2016). And, by regulation, it is not until the state prepares its plan for the second 10-year period (2008-2018) that a state (and thus EPA) may "evaluate" controls for that period. *Id.* § 51.308(f) (2016).[7]

[7] Outside of this case, EPA has consistently confirmed that the planning periods provide substantive limits on the extent of the emission controls to be considered. Indeed, in issuing its regulations implementing the regional haze program, EPA explained: "[T]he final rule requires control strategies to cover an initial implementation period extending to the year 2018, with a reassessment and revision of those strategies, as appropriate, every 10 years." 64 Fed. Reg. 35,714, 35,734 (July 1, 1999); *see also* 77 Fed. Reg. at 30,251 ("The [long-term strategy] is the compilation of all control measures a state will use *during the implementation period of the specific SIP submittal* to meet applicable RPGs." (emphasis added)).

In this way, too, EPA exceeded its statutory authority. EPA cannot, in a FIP, exercise regulatory authority beyond the state's authority in originally developing its own SIP. The CAA defines a federal implementation plan as "a plan . . . promulgated by the Administrator *to fill all or a portion of a gap* . . . in a State implementation plan[.]" 42 U.S.C. § 7602(y) (emphasis added). Thus, because Arkansas's 2008-2018 plan was limited to "the emission reduction measures needed to achieve [goals] for the period covered by the implementation plan," 40 C.F.R. § 51.308(d)(1)(i)(B) (2016), so too is EPA's FIP. *See Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016) (granting stay of EPA's FIP for Texas because petitioners would likely succeed in showing that "EPA exceeded its statutory authority by imposing emissions controls that go into effect years after the period of time covered by the current round of implementation plans").

CONCLUSION

For these reasons, the Chamber requests that the Court vacate EPA's final rule.

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) because it contains 2,448 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Garamond font. The foregoing document has been scanned for viruses and is virus free pursuant to Circuit Rule 28A(h).

Dated: February 24, 2017

s/ P. Stephen Gidiere III
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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 24th day of February, 2017.

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