Exhibit A35

Scott Pruitt

April 30, 2015 · ·

"The EPA claims its so-called Clean Power Plan gives states flexibility to develop a plan to meet its emissions goal. In reality, it is nothing more than an attempt by the EPA to force states into shuttering coal-fired power plants and eventually other sources of fossil-fuel generated electricity"

AG Scott Pruitt to Testify at U.S. Senate Hearing on EPA Overreach

OKLAHOMA CITY (AP) Attorney General Scott Pruitt will testify Tuesday (May 5) at a U.S. Senate hearing on the EPA's proposed Clean Power Plan. The hearing,...

SCRIPPSMEDIA.COM

Exhibit A36

Scott Pruitt

May 4, 2015 ·

I'm disappointed by the veto of SB 676. This legislation would have "ensured Oklahoma would not be forced to submit a compliance plan to the EPA that violated state or federal law."

Oklahoma Governor Vetoes Bill Expanding Attorney General's Input On Federal Carbon Rules

OKLAHOMA CITY — Just days after issuing an executive order stopping state agencies from developing a plan for federal carbon dioxide regulations, Gov. Mary Fallin on Friday vetoed a bill that would have expanded the role of the attorney general in the debate.

SWTIMES.COM

Exhibit A37

Scott Pruitt

May 4, 2015 ·

I will be testifying before the U.S. Senate Committee on Environment & Public Works tomorrow morning regarding the EPA's proposed Clean Power Plan. You can watch live on C-SPAN starting at 9 AM.

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C-SPAN.ORG

Exhibit A38

Scott Pruitt
@ScottPruittOK

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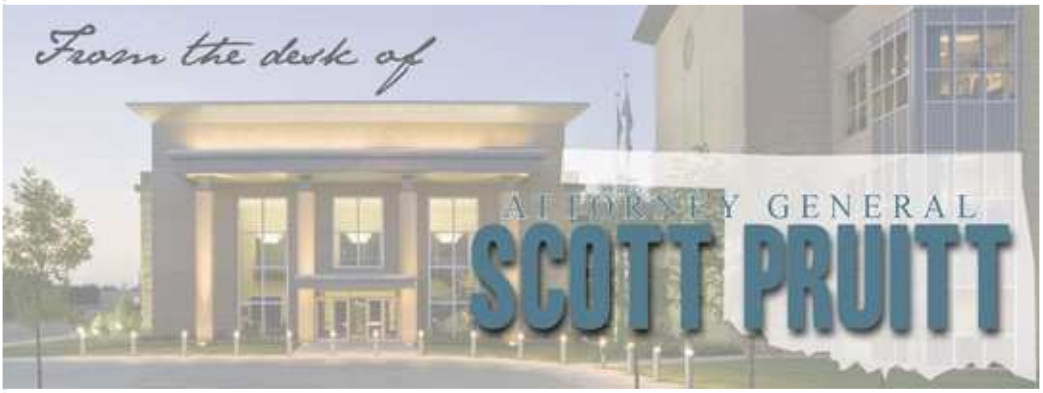
The #CleanPowerPlan is an attempt by the #EPA to force states into shuttering coal-fired power plants. #EPAoverreach bit.ly/1OVfKjH

3:05 PM - 4 May 2015

Exhibit A39

ISSUE NUMBER THIRTY-TWO • May 4, 2015



I'm off to our nation's capitol this evening to continue Oklahoma's fight against the EPA's unlawful overreach. Tomorrow, I will have the opportunity to testify in front of the Senate Environment and Public Works Clean Air and Nuclear Safety Subcommittee. The hearing, entitled "Legal Implications of the Clean Power Plan," is a chance to update some of our nation's leaders on the efforts to fight this egregious example of overreach.

The EPA claims its so-called "Clean Power Plan" gives states flexibility to develop a plan to meet its emissions goal. In reality, it is nothing more than an attempt by the EPA to force states into shuttering coal-fired power plants and eventually other sources of fossil-fuel generated electricity.

My testimony is a direct rebuttal of their claims and is vital to protecting Oklahoma consumers.

Have a blessed week,

P.S. - Watch my testimony before the Senate subcommittee tomorrow morning at 9am CST. The hearing will stream live at www.C-SPAN.org.

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AG Pruitt to Testify about EPA Overreach at U.S. Senate Hearing

Attorney General Scott Pruitt will testify Tuesday (May 5) at a U.S. Senate hearing on the EPA's proposed Clean Power Plan. The hearing, titled "Legal Implications of the Clean Power Plan," is being conducted by the Senate Environment and Public Works Subcommittee on Clean...Read more »

AG Pruitt Comments on U.S. Supreme Court Argument on Lethal Injection Protocol

Attorney General Scott Pruitt on Wednesday released the following comments after the U.S. Supreme Court argument in Glossip v. Gross:

"Before the highest court in the land, Oklahoma made it clear that the state's lethal injection protocol is constitutional. We appreciate the thoughtful questions and comments of the Justices of the U.S. Supreme Court and look forward to their ruling in this matter," Attorney General....Read more »

Tulsa Caretaker Pleads Guilty to Abuse of Elderly Woman

Jasha Delite Meshall Shaw, of Tulsa, pleaded guilty to one count of abuse by caretaker and one count of verbal abuse by caretaker following charges by Attorney General Scott Pruitt.

Shaw, 23, worked as a certified nursing aide at the Ambassador Manor Nursing and Rehabilitation Center in Tulsa. Shaw was assigned to care for ....Read more »

AG Pruitt Files Multiple Charges Targeting the Abuse of Vulnerable Oklahomans

Attorney General Scott Pruitt announced charges filed in three separate cases involving abuse of the elderly and developmentally disabled by their caretaker(s).

“It’s tragic that a few bad actors would violate the trust of Oklahoma families by endangering the wellbeing of their

loved ones for whom they are entrusted to care," Attorney General Pruitt said. "My office takes these offenses with the utmost seriousness, and will work on...Read more »

Oklahoma City Police Department Chief's Prayer Breakfast

AG Pruitt joined Church of the Servant pastor, Dr. Robert Gorrell, OKCPD Chief Bill Citty and OKCPD Captain Charlie Phillips at the annual Chief's Prayer Breakfast on Monday, May 4.

IN THE NEWS

Oklahoman: Oklahoma Attorney General Has Public on His Side in Death Penalty Case

Scott Pruitt goes before the U.S. Supreme Court on Wednesday to argue in defense of the first of three drugs administered during executions in Oklahoma. Pruitt is defending the state's protocol in his job as attorney general but he's also a true believer, not just in....Read more »

Edmond Sun: Fallin, Pruitt Stand Up for Oklahoma

State Representatives David Brumbaugh and Jon Echols issued statements Friday after Gov. Mary Fallin issued an executive order Thursday stating that Oklahoma will not file a State Implementation Plan (SIP) with the U.S. Environmental Protection Agency (EPA) regulating carbon dioxide emissions produced by Oklahoma power plants. The order also requests Oklahoma Attorney...Read more »

DID YOU KNOW?

Taking a look back at important dates in our nation's history...

- May 5, 1961 - Navy Commander Alan Bartlett Shepard Jr. is the first American astronaut to travel into space.
- May 6, 1937 - The Hindenburg explodes in New Jersey.
- May 6, 1940 - John Steinbeck wins a Pulitzer prize for "The Grapes of Wrath."
- May 7, 1789 - George Washington attends an inaugural ball in New York, celebrating the first president of the U.S.

- May 8, 1945 - V-E Day is celebrated in America and Britain, Germans surrender.
- May 10, 1869 - First transcontinental railroad is completed.

For more information about the Oklahoma Attorney General's Office please visit ok.gov/OAG or call (405) 521-3921.

Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105

Exhibit A40

Scott Pruitt

May 5, 2015 ·

REMINDER: I am getting ready to testify before the U.S. Senate Committee on Environment and Public Works. Watch live on C-SPAN to hear my comments on the EPA's proposed Clean Power Plan.

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C-SPAN.ORG

Exhibit A41

Scott Pruitt
@ScottPruittOK

Follow

About to testify before the US Senate regarding the #EPA's proposed #CleanPowerPlan and #EPAoverreach Watch live on c-span.org

6:45 AM - 5 May 2015

Exhibit A42

Scott Pruitt
@ScottPruittOK

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Want to hear my comments on #EPAoverreach and the #EPA's #CleanPowerPlan? Watch live online at the following link: 1.usa.gov/1Idu2bn

7:18 AM - 5 May 2015

Exhibit A43

Testimony before the Senate Environmental and Public Works Subcommittee

on Clean Air and Nuclear Safety

"Legal Implications of the Clean Power Plan"

May 5, 2015

E. Scott Pruitt

Attorney General

State of Oklahoma

Chairwoman Capito, Ranking Member Carper, Chairman Inhofe, and Members of the Subcommittee,

Thank you for the invitation to discuss the legal ramifications of the EPA's proposed Clean Power Plan.

This is an issue of major importance to states like Oklahoma.

Quite simply, Madam Chairwoman, the EPA does not possess the authority under the Clean Air Act to do what it is seeking to accomplish in the so-called Clean Power Plan.

The EPA, under this administration, treats states like a vessel of federal will. The EPA believes the states exist to implement the policies the Administration sees fit, regardless of whether laws like the Clean Air Act permit such action.

In their wisdom, Congress gave states a primary role in emissions regulation, noting in the statement of policy of the Clean Air Act that "air pollution control at its source is the primary responsibility of states and local governments."

That statement respects the constitutional limits on federal regulation of air quality, and the reality that states are best suited to develop and implement such policies.

States are able to engage in a cost-benefit analysis to strike the necessary balance between protecting and preserving the environment, while still creating a regulatory framework that does not stifle job growth and economic activity. The states are partners with the federal government in regulating such matters.

Therefore, the Clean Air Act hinges on "cooperative federalism" by giving states the primary responsibility and role for regulation while providing a federal backstop if the states should fail to act.

When the EPA respects the role of the states, the cooperative relationship works well. When the EPA exceeds the constraints placed upon the agency by Congress, the relationship is thrown out of balance and the rule of law and state sovereignty both suffer.

The Clean Power Plan proposal throws the cooperative relationship between the states and the Federal government off balance.

The EPA claims the proposal gives states flexibility to develop their own plans to meet the national goals of reducing carbon dioxide emissions. In reality, the Clean Power Plan is nothing more than an attempt by the EPA to expand federal bureaucrats' authority over states' energy power generation mixes.

The plan requires each state to submit a plan to cut carbon-dioxide emissions by a nationwide average of 30 percent by 2030.

In Oklahoma, 40.5 percent of energy generation comes from coal-fired power plants while 38.1 percent comes from natural gas. Oklahoma ranks fourth in the nation with 15 percent of power generation coming from wind.

This begs the question, how does the EPA expect states like Oklahoma to meet the goals of the Clean Power Plan? There are only so many ways Oklahoma can achieve the 30 percent reduction demanded by the EPA. The plan, therefore, must be viewed as an attempt by the EPA to force states into shuttering coal-fired power plants and eventually other sources of fossil-fuel-generated electricity.

Additionally, the proposed rule, through its building block four, would require states to use demand-side energy efficiency measures that would reduce the amount of generation required. However, states are limited to emission standards that can actually be achieved by existing industrial sources through source-level, "inside-the-fence-line" measures.

The proposal's attempt to force states to regulate energy consumption and generation throughout their jurisdictions, in the guise of reducing emissions from fossil fuel-fired power plants, violates Section 111(d)'s plain-text requirement that the performance standards established for existing sources by the states must be limited to measures that apply at existing power plants themselves.

EPA's approach converts the obscure, little-used Section 111(d) into a general enabling act, giving EPA power over the entire grid from generation to light switch. By going beyond source-level, "inside-the-fence-line" measures, EPA's proposal would expand 111(d), and specifically the underlying statutory term "best system of emission reduction," into "a whole new regime of regulation": one that regulates not only pollutant emission by sources, but a state's entire resource and energy sectors.

To meet the objectives of the EPA's proposed rule, states will be forced to rework their energy generation market. To account for the loss of coal-fired generation, states will be forced into changing their energy mix in favor of renewables. States would also be forced to alter existing regulatory framework which would threaten energy affordability and reliability for consumers, industry and energy producers.

Finally, there is substantial concern that the EPA – before the Clean Power Plan rule is even finalized – will issue a uniform federal implementation plan that will be forced upon those states that don't acquiesce to the unlawful Clean Power Plan.

Such a move by the EPA would be the proverbial "gun to the head" of the states, demanding the states to act as the EPA sees fit or face punitive financial sanctions.

Madam Chairwoman, I can say with great confidence that if the EPA does in fact move forward with the "uniform FIP," the EPA will be challenged in court by Oklahoma and like-minded states.

Madam Chairwoman, I am not one who believes the EPA has no role. The agency has played an important role historically in addressing water and air quality issues that traverse state lines.

However, with this rule, the agency is now being used to pick winners and losers in the energy context, by elevating renewable power generation at the expense of fossil-fuel fired generation.

No state should comply with the Clean Power Plan if it means surrendering decision-making authority to the EPA, a power that has not been granted to the agency. States should be left to make decisions on the fuel diversity that best meets their power generation needs.

States like Oklahoma care about these issues because we breathe the air, drink the water, and want to preserve the land for future generations.

And we have developed a robust regulatory regime that has successfully struck a balance between maintaining and preserving air and water quality, while still considering the economic impact of such regulations.

Madam Chairwoman, states like Oklahoma are simply opposed to the Clean Power Plan because it is outside the authority granted to the EPA by the law. We only ask that state authority under the Clean Air Act be respected and preserved and that decisions on power generation and how to achieve emissions reductions be made at the local level rather than at the federal level.

I again appreciate the opportunity to discuss these issues with you.

Sincerely,

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

Exhibit A44

Oklahoma Attorney General E. Scott Pruitt

May 5 at 9:41am · Edited ·

#EPAOverreach

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Exhibit A45

Scott Pruitt
@ScottPruittOK

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Did you miss my testimony on the #EPAoverreach of the #CleanPowerPlan? Watch it online- buff.ly/1F4mLdm

11:49 AM - 5 May 2015

Exhibit A46

Scott Pruitt 
@ScottPruittOK

Follow

States should be left to make decisions on fuel diversity that best meet their power generation needs. #EPAoverreach

Oklahoma Attorney General Scott Pruitt vows clean power fight

MAY 6, 2015 - At a hearing in Washington, Scott Pruitt said he will sue over the Obama administration's proposals, but a prominent environmental attorney said pr...

newsok.com

10:10 AM - 6 May 2015

Exhibit A47

Scott Pruitt

May 8, 2015 ·

The EPA's Clean Power Plan is "nothing more than an attempt by the EPA to expand federal bureaucrats' authority over states' energy power generation mixes."

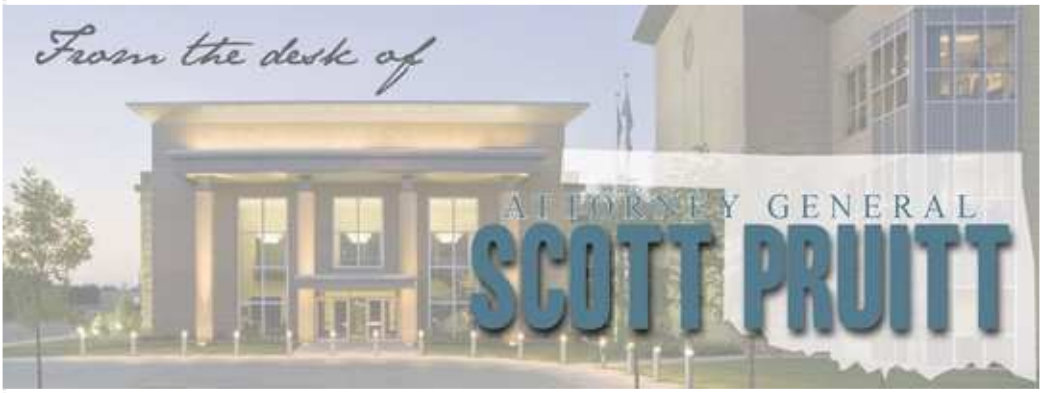
States preview arguments against Obama's climate rule

Attorneys general from states challenging the regulation testified Tuesday.

THEHILL.COM

Exhibit A48

ISSUE NUMBER THIRTY-THREE • May 11, 2015



Good Monday Oklahoma!

Oklahoma continues to lead the charge against EPA overreach and last week I had the privilege of testifying before members of the U.S. Senate Environmental and Public Works Committee about the EPA's so-called Clean Power Plan. The committee is chaired by Oklahoma's EPW champion, Sen. Jim Inhofe, who was gracious to extend me an invitation to talk about the legal implications of the Clean Power Plan.

The goal of reducing carbon dioxide emissions is worthwhile, but the process by which we do it makes a difference. The EPA's approach through the Clean Power Plan is unlawful and a classic example of an executive agency attempting to impose the president's anti-fossil fuels agenda via rule and regulation after it failed to pass through Congress. The EPA doesn't have the authority under the Clean Air Act to do what it's seeking to accomplish. As Attorney General of Oklahoma, I will continue to challenge the EPA's unlawful rule that threatens energy affordability and reliability for consumers and industry. You can read some of the press coverage of my testimony below in the newsletter.

In Oklahoma, my office continues to defend school choice and filed a brief defending the Lindsey Nicole Henry scholarship program. The program established a scholarship fund for parents of disabled children to receive scholarship money to send their children to a private K-12 school. I will continue to defend this constitutional scholarship program that empowers parents of students with disabilities to seek educational opportunities to help their children learn and succeed.

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Have a blessed week,

AG Pruitt Testifies in front of U.S. Senate committee on so-called "Clean Power Plan"

Oklahoman: Oklahoma Attorney General Scott Pruitt vows clean power fight

Oklahoma Attorney General Scott Pruitt vowed Tuesday to continue fighting proposed climate change rules in court, as he and other conservatives accused the Obama administration of pushing environmental requirements on states far beyond traditional boundaries...Read more »

AP: Energy-Producing States Blast Obama Climate Change Plan

The Obama administration's far-reaching plan to address climate change would cause job losses and lead to higher electricity prices and even power outages, attorneys general from two energy-producing states said Tuesday.

West Virginia Attorney General Patrick Morrisey and Oklahoma Attorney General Scott Pruitt...Read more »

National Journal: Obama Climate Rules Face New Attacks From Republicans

Senate Republicans are preparing new legislation to upend the tentpole of the Obama administration's climate action plan, but they're also cracking the law books for an offensive playbook.

Sen. Shelley Moore Capito of West Virginia said she will introduce a bill next week challenging the EPA rules limiting greenhouse-gas emissions from existing power plants. Speaking after a Tuesday hearing on the EPA rules...Read more »

AG Pruitt Files Brief in Lindsey Nicole Henry Scholarship Case

Attorney General Scott Pruitt on Tuesday announced the filing of a brief in the Oklahoma Supreme Court defending the Lindsey Nicole Henry scholarship fund.

The Lindsey Nicole Henry Act established a scholarship fund for parents of disabled children...Read more »

IN OTHER NEWS

Oklahoman: Lawsuit against Oklahoma scholarship program defies logic

We hope the individuals challenging an Oklahoma scholarship program for children with special needs are double-jointed. If not, all the contortions they're going through to justify their lawsuit could do permanent damage...Read more »

AP: Oklahoma AG warns of scammers following tornadoes, flooding

Attorney General Scott Pruitt is warning Oklahomans to beware of scammers who offer cleanup and repair services following tornadoes and flooding in parts of the state.

Pruitt says Oklahomans should be cautious, patient and wary of criminals known as "travelers" who go from one tornado-damaged community to the next to take advantage of those cleaning up after tornadoes, floods and other storm damage...Read more »

DID YOU KNOW?

Taking a look back at important dates in history...

- May 11, 1934 - A massive dust storm sweeps from the Great Plains to the Easter States as far as Atlanta, New York and Boston.
- May 12, 1780 - Americans suffered the worst defeat of the Revolution in Charleston, South Carolina.
- May 13, 1607 - Some 100 English colonists, the Jamestown settlers, arrive in America.
- May 14, 1804 - Lewis and Clark depart on their expedition of the Louisiana Purchase.
- May 15, 1918 - U.S. Airmail service began.
- May 16, 1929 - The first Academy Awards were handed out by the Academy of Motion Picture Arts and Sciences.

313 NE 21st Street
Oklahoma City, OK 73105

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Exhibit A49

Print Article

Press Release

Wednesday, July 1, 2015

AG Pruitt Sues EPA for Unlawful Clean Power Plan Rule

Rule threatens Oklahoma power reliability, affordability

OKLAHOMA CITY – Attorney General Scott Pruitt has filed a lawsuit against the Environmental Protection Agency alleging its proposed Clean Power Plan forces Oklahoma into fundamentally restructuring the generation, transmission, and regulation of electricity in such a manner that would threaten the reliability and affordability of power in the state.

The lawsuit alleges the EPA proposal is in contradiction to at least three separate statutory bars and two constitutional limitations on federal power.

"The EPA does not possess the authority under the Clean Air Act to accomplish what it proposes in the unlawful Clean Power Plan. The EPA is ignoring the authority granted by Congress to states to regulate power plant emissions at their source. The Clean Power Plan is an unlawful attempt to expand federal bureaucrats' authority over states' energy economies in order to shutter coal-fired power plants and eventually other sources of fossil-fuel generated electricity. This would substantially threaten energy affordability and reliability for consumers, industry and energy producers in Oklahoma. Oklahomans care about issues of air quality and our state policy makers are best-suited and specifically granted the authority by federal law to regulate these issues. We are filing this lawsuit in order to ensure decisions on power generation and how to achieve emissions reductions are made at the local level rather than at the federal level," Attorney General Pruitt said.

Click here for a copy of the lawsuit.

Exhibit A50

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,

and

(2) OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v.

(1) GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency,

and

(2) U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. 15-CV-369-CVE-FHM

COMPLAINT

1. This is an action for declaratory judgment and injunctive relief against the *ultra vires* actions of a government officer and agency that are currently inflicting substantial irreparable injury on the State of Oklahoma. Not only do Defendants United States Environmental Protection Agency and Administrator Gina McCarthy claim authority to compel state governments to reorganize their energy economies—in contravention of at least three separate statutory bars and two constitutional

limitations on federal power—but they are already acting to exercise that bogus authority. By "proposing" that states will be required to fundamentally restructure the generation, transmission, and regulation of electricity, and do so at a breakneck pace, Defendants have left states no choice but to begin carrying out EPA's commands at this time, well before any court has an opportunity to review their "final" rule. The entire point of this unprecedented approach is to evade judicial review by forcing states to take burdensome and expensive actions that will be difficult or impossible to reverse even when Defendants' assertion of authority is ultimately rejected—as it inevitably will be. Unless this Court intervenes, Oklahoma will have no meaningful or adequate remedy to enforce the limitations that the Clean Air Act and the Constitution place on the authority of the United States Environmental Protection Agency and its Administrator and to avoid injury to its sovereign, quasi-sovereign, fiscal, and economic interests.

PARTIES

2. The State of Oklahoma is a State of the United States of America with all rights, powers, and immunities of a State, including the sovereign power over individuals and entities within its jurisdiction and the power to create and enforce legal codes, statutes, and constitutional provisions, and to act pursuant to its police powers. The State of Oklahoma has exercised these powers to create a comprehensive energy regulatory scheme that is administered across several governmental components. By exercising its regulatory authority, the State of Oklahoma has acted to secure for itself and its citizens affordable and reliable generation and transmission of electricity. Coal-fired generation contributes 38 percent of electricity generation in the State.

3. Scott Pruitt, in his official capacity as Attorney General, brings this action on behalf of the State of Oklahoma as chief law officer for the State of Oklahoma. In that capacity, he has a statutory duty to prosecute and defend all

actions and proceedings in any federal court in which the State, including any of its components, is interested as a party. *See* 74 O.S. § 18b(A)(2).

4. The Oklahoma Department of Environmental Quality ("ODEQ") is the State of Oklahoma's primary environmental regulator, responsible for formulating and enforcing air and water quality standards, among other laws, within the State.

5. The State of Oklahoma has an interest in contesting the *ultra vires* actions taken by Defendant McCarthy purportedly under her office as Administrator of the U.S. Environmental Protection Agency because these actions harm the State of Oklahoma's interests by, *inter alia*, requiring the restructuring of the State's energy sector, impairing the functioning of the statutory and regulatory system that ensures Oklahoma's citizens have access to a reliable electric system, undermining the State of Oklahoma's exercise of its police powers in reliance on reliable electric power, compelling the state to expend substantial administrative and bureaucratic resources, compromising investment and tax revenue, and threatening the health and welfare of Oklahoma's citizens by undermining electric reliability and affordability.

6. Defendant Gina McCarthy is Administrator of the U.S. Environmental Protection Agency ("EPA") and is responsible for administering the Clean Air Act ("CAA" or the "Act"). All actions challenged in this case were taken pursuant to McCarthy's direct or indirect orders and under the color of her office.

7. Defendant U.S. Environmental Protection Agency is a federal regulatory agency administered by Defendant McCarthy. "EPA" refers to both the U.S. Environmental Protection Agency and Administrator McCarthy in her official capacity.

JURISDICTION AND VENUE

8. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because Defendants' actions undertaken in asserted reliance on federal law exceed their delegated authority, contravene specific statutory and constitutional

prohibitions, involve enormous waste of governmental resources, purport to require the complete restructuring of the energy industry within the State of Oklahoma, and are currently inflicting substantial irreparable injuries on the State of Oklahoma, for which the State has no other adequate prospect of relief. *See generally Leedom v. Kyne*, 358 U.S. 184 (1958); *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549 (2d Cir. 1978).

9. The State of Oklahoma and other parties attempted to obtain relief from the EPA Power Plan by filing All Writs Act petitions in the D.C. Circuit pursuant to that Court's decision in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). The D.C. Circuit dismissed those petitions, holding that the EPA Power Plan was not "final action" pursuant to Clean Air Act Section 307(b), 42 U.S.C. § 7607(b), and that it therefore lacked jurisdiction to consider them. *In re Murray Energy Corp.*, __ F.3d __, Nos. 14-1112, 14-1151, 14-1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015). That decision denying statutory jurisdiction under the Clean Air Act supports this Court's exercise of residual Section 1331 jurisdiction pursuant to *Leedom*. See 358 U.S. at 190–91.

10. CAA § 307, 42 U.S.C. § 7607, does not displace or limit the Court's jurisdiction under 28 U.S.C. § 1331.

11. Venue is proper under 28 U.S.C. § 1391(e)(1).

BACKGROUND

A. CAA Section 111(d)

12. The Clean Air Act is founded on the principle of cooperative federalism, with states retaining the primary authority to regulate emissions from sources in their territories. The Act specifically recognizes that "air pollution control at its source is the primary responsibility of States and local governments." CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3).

13. CAA § 111(d), 42 U.S.C. § 7411(d), concerns the application of standards of performance to certain existing sources within categories of sources of air pollution that are also subject to new source performance standards under CAA § 111(b).

14. A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1).

15. In Section 111(d), Congress charged states with establishing standards of performance for certain minor categories of sources for which new source performance standards had already been promulgated, but which are not subject to regulation under Section 112 of the Act and which emit pollutants that are not listed under Section 108 of the Act. Congress expressly authorized states, when establishing these standards and applying them to particular sources, to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."

16. EPA's role under Section 111(d) is limited to creating regulations to establish a "procedure" under which states submit their Section 111(d) implementation plans, disapproving plan submissions that are unsatisfactory, and promulgating federal plans for states that do not submit satisfactory plans.

17. Section 111(d) is subject to a statutory limitation on EPA's authority to call for states to submit Section 111(d) plans. In relevant limitation, that part provides that EPA may not mandate that states establish standards for performance for existing sources that are part of "a source category which is regulated under section [112 of the CAA]."

B. EPA's Regulation of Coal-Fired Power Plants Under Section 112

18. Section 112 of the Act, 42 U.S.C. § 7412, establishes a program regulating emissions of certain "hazardous air pollutants" from certain categories of sources that are included in the Section 112(c) list of source categories.

19. Although Section 112 permits EPA to list categories of major and area sources of listed hazardous air pollutants, it specifically precludes regulation of "electric utility steam generating units" (i.e., fossil-fuel-fired power plants) unless and until "the Administrator finds such regulation is appropriate and necessary." CAA § 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A).

20. On December 20, 2000, EPA published a notice of its finding that regulation of electric utility steam generating units was appropriate and necessary, adding electric utility steam generating units to the list of regulated source categories under CAA § 112. 65 Fed. Reg. 79,825. EPA's attempt to reconsider that finding was vacated by the D.C. Circuit in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

21. On February 16, 2012, EPA promulgated a rule pursuant to Section 112 establishing national emissions standards for power plants. 77 Fed. Reg. 9,304. The lawfulness of EPA's "appropriate and necessary" finding that triggered regulation under Section 112 was affirmed by the D.C. Circuit in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). Subsequently, the Supreme Court held that EPA unlawfully failed to consider costs when deciding whether to regulate under Section 112 and remanded the matter to the D.C. Circuit without vacating the rule. *Michigan v. EPA*, __ U.S. __, No. 14-46, 2015 WL 2473453 (June 29, 2015).

22. Upon exercising its asserted discretion to list electric utility steam generating units as a regulated source category under Section 112 of the Clean Air Act, EPA by operation of law lost authority under Section 111(d) to mandate that states establish standards of performance for existing sources in that category.

C. The EPA Power Plan

23. On June 18, 2014, EPA proposed a rule to regulate greenhouse gas emissions from existing fossil-fuel-fired power plants pursuant to CAA § 111(d) (the "EPA Power Plan"). 79 Fed. Reg. 34,830. The EPA Power Plan is intended to extend federal authority over all aspects of the production, distribution, and use of electricity, with an aim of reducing carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels. *Id.* at 34,832. It aims to achieve that goal by requiring states to overhaul their "production, distribution and use of electricity."

24. EPA describes its Power Plan as a "plant to plug" approach that comprehensively addresses all aspects of energy production and consumption based on "the interconnected nature of the power sector." EPA Fact Sheet (June 2, 2014), *available at* http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-plan-flexibilty.pdf; 79 Fed. Reg. at 34,845. EPA stated its position that "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111. 79 Fed. Reg. at 34,886.

25. The EPA Power Plan identified four means of reducing carbon-dioxide emissions from the power sector, which it calls "building blocks." These building blocks recognize that, to implement the "best system of emission reduction," states will have to (1) require power plants to make changes to increase their efficiency in converting fuel into energy, (2) replace coal-fired generation capacity with increased use of natural gas, (3) replace fossil-fuel-fired generation with nuclear and renewable sources, such as wind and solar, and (4) mandate more efficient use of energy by consumers.

26. The EPA Power Plan specifies numerical "emission rate-based CO_2 goals" for each state. 79 Fed. Reg. at 34,833. These rate-based goals are based on

projected emissions reductions that EPA believes can be achieved through the combination of the four "building blocks" that it says represent a baseline "best system of emission reduction." Accordingly, the "goals" differ from state to state.

27. The EPA Power Plan requires states to submit state plans to achieve interim and final goals that EPA has specified for each state.

28. The EPA Power Plan's "building blocks," in one combination or another, are the only ways that a state could reorganize its electric generating capacity to achieve the targets set by EPA.

29. The EPA Power Plan relies almost entirely on "beyond-the-fenceline" measures—that is, regulation of things other than the categories or subcategories of sources that it has listed for regulation under Section 111(d). States have no choice but to undertake such "beyond-the-fenceline" measures to achieve the targets set by EPA.

30. EPA recognizes that states will be required to undertake such "beyond-the-fenceline" measures. In testimony before Congress, Administrator McCarthy stated that EPA's plan is "really . . . an investment opportunity. *This is not about pollution control.* . . . It's about investments in renewables and clean energy."

31. EPA and Administrator McCarthy have determined that they possess the legal authority to regulate in the manner laid out in the EPA Power Plan and that such regulation is appropriate. They have determined to promulgate a final rule that maintains the goal of reducing carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels; that maintains the "building block" approach and the specific "building blocks"; and that requires states to submit state plans to achieve state-specific goals based on the "building blocks."

32. These determinations are reflected in the rule that EPA delivered to the Office of Management and Budget on June 3, 2015.

33. EPA has stated that it intends to take official final action on its Power Plan in late August. In reality, EPA's action already imposes substantial obligations on regulated entities—the states.

D. The EPA Power Plan Requires Oklahoma To Restructure Its Energy Sector

34. Although states are, in principle, free to achieve the goals established by the EPA Power Plan in any manner, or to decline to submit a state plan and allow EPA to promulgate a federal implementation plan, achieving the goals without plunging the states' electric supply system into chaos and threatening continuity of electric service will require wholesale restructuring of states' electricity sectors. This is true of Oklahoma, which will suffer all of the following burdens.

35. An electric system consists of numerous sources of electricity connected to consumers through a transmission grid. To ensure that electric service is reliable, the supply of electricity across all electricity generating sources must exceed the highest possible demand among all consumers. In order to maintain reliability and to provide electricity at a low cost to consumers, state regulation controls the order in which particular sources are "dispatched" to meet demand. In general, large coal-fired facilities, which provide affordable and reliable power, operate 24 hours per day year-round, barring maintenance outages, to satisfy "base load" demand. Smaller, more-expensive generators (often powered by natural gas) operate on a fairly regular schedule to meet cyclical demand and are often called "cycling" units. Older and less efficient coal- and gas-fired units operate during times of particularly high demand, such as hot summer days, to satisfy "peaking" demand. The order in which sources are dispatched generally depends on such factors as cost, transmission capacity, and the characteristics of local generating units. The percentage of a generation source's total capacity that is actually used over a period of time is its "utilization rate."

36. States will be required to revise statutory and regulatory systems that govern dispatch among power plants to reduce the use of coal-fired power plants, even though these plants typically supply base load power in state energy systems. That change, in turn, will require additional state actions to ensure that customers in areas relying on coal-fired plants are not left without power or forced to bear unreasonable costs. It will also require substantial changes to utility regulation systems that put cost and reliability first in dispatch determinations.

37. States will be required to revise statutory and regulatory systems that govern dispatch among power plants to increase the utilization rates of natural gas-fired power plants, even though maintaining what appears to be "excess" capacity is essential to integrating renewable energy sources into the grid.

38. States will be required to develop or incentive zero-emissions generation, which will require authorizing legislation and expenditures. Developing sources of alternative energy will also require that state regulators take action to integrate those sources into the grid. It will also inevitably implicate other environmental requirements, such as endangered-species protection, that states must address at considerable burden and expense.

39. States must address how increased renewable-energy capacity, which may fluctuate, fits into the transmission system and dispatch, as well as how such capacity will be compensated. In states where it is not feasible to add renewable capacity, or that do not receive credit for such capacity that is exported, other measures will be required, such as participation in interstate programs for the purchase and sale of energy, typically requiring new statutory authority, significant groundwork in negotiating compacts between and among states, creation of a multi-state entity to administer the program, and time to accomplish all of this.

40. States must enact programs to reduce electricity demand in an enforceable fashion, requiring legislative and regulatory action. States with

deregulated or partially deregulated electricity markets will face particular challenges because power plants may be independent of power distribution companies.

41. Achieving the goals of the EPA Power Plan will also require direct regulation of consumers of electricity, which will be a new mission for state environmental and utility regulators.

42. Inevitably, states will be required to force the owners of coal-fired power plants to retire those units, resulting in substantial challenges to maintaining electric service for all customers, ensuring that plant operators are appropriately compensated, and ensuring that the financial impact on electricity consumers is acceptable.

43. In sum, the EPA Power Plan will require states to overhaul their regulation of electricity and public utilities and to take numerous regulatory and other actions to comply with and accommodate the Proposed Rule while maintaining electric service, let alone affordability and reliability.

44. And that will be the case even for states that take no direct action and become subject to a federal plan, due to states' pervasive regulation of state power systems, transmission, and utilities.

45. EPA lacks the authority to undertake regulation of state power systems, transmission, and utilities, even though carrying out its Power Plan will require the exercise of such regulatory authority. Accordingly, the EPA Power Plan will require states to exercise such regulatory authority, whether or not they submit state plans.

E. The EPA Power Plan Is Currently Causing Oklahoma Irreparable Harm

46. Planning for power plants, transmission, and other aspects of electric generation and transmission is an intensive, years-long process. It can take six years or more from the time that the need for a new transmission project has been

identified to the time that it is placed into service. Likewise, power plants take years to plan, construct, and integrate into the grid.

47. Such planning is undertaken by the State of Oklahoma in conjunction with utilities, the Southwest Power Pool, and other entities.

48. Energy regulation in the State of Oklahoma is primarily the responsibility of the Oklahoma Corporation Commission ("OCC"), an independent regulatory agency created in 1907 that regulates rates charged and services provided by investor-owned electric utilities and reviews triennial integrated resource plans that the utilities submit. The Commission also regulates the exploration, production, storage, distribution, and intrastate transportation of oil and gas. The Oklahoma Municipal Power Authority regulates utilities operated by local governments within the State. The Oklahoma Department of Environmental Quality ("ODEQ") is charged with implementing and enforcing the State's various environmental regulatory programs, including those relating to the Clean Air Act. The Secretary of Energy and Environment is responsible for oversight and coordination of the state's energy and environmental authorities and for assisting in the development of the state's overall energy and resource policy. Finally, the Energy Office within the state's Department of Commerce promotes renewable energy and energy efficiency. Within the limits of the authorization of the Oklahoma Legislature, these governmental entities administer a comprehensive regulatory scheme for Oklahoma's power sector.

49. According to the U.S. Energy Information Administration, coal-fired facilities located within Oklahoma generated 29,301,758 megawatt hours of power in 2012. That accounts for more than 37 percent of all power generated within the State in 2012.

50. The EPA Power Plan sets a goal of 35.5 percent reduction in power-plant greenhouse gas emissions for Oklahoma by 2030. It also sets an "interim goal" of 33 percent by 2020.

51. Nowhere near a 33-percent, much less a 35.5-percent, reduction in emissions can be achieved through "inside-the-fenceline" emission-control measures that are achievable at those units.

52. The only way that a 33-percent reduction in emissions could occur by 2020 would be through the mass retirement of coal-fired plants.

53. Even EPA recognizes that "inside-the-fenceline" efficiency improvements are insufficient to achieve the goals it set for the State of Oklahoma. EPA projects that improvements in coal-plant efficiency will be able to yield only negligible reductions in carbon-dioxide emissions. Accordingly, EPA recognizes that shuttering coal plants and/or "beyond-the-fenceline" measures will be required for Oklahoma to achieve EPA's goals.

54. Even with "beyond-the-fenceline" measures that may somewhat ease the need for retirements, EPA projects that the EPA Power Plan will cause an increase of approximately 200 percent in retiring generating capacity in and around Oklahoma relative to current expectations. In other words, even if the State of Oklahoma accedes to EPA's coercion and commandeering and agrees to regulate its own citizens in the manner that EPA has specified, the State will still see substantial reductions in generating capacity that require it to take further regulatory measures to ensure electric reliability.

55. Whether the State of Oklahoma adopts a state plan to meet EPA's goals or EPA promulgates a federal implementation plan, the EPA Power Plan forces the State of Oklahoma to undertake substantial legislative, regulatory, planning, and other activities.

56. The State of Oklahoma's regulatory agencies lack statutory authority to carry out the second, third, and fourth of EPA's "building blocks." Doing so therefore requires legislative authorization and then implementing regulations.

57. Integrating new renewable energy sources into the grid will require substantial State effort, over a period of years, regarding planning, permitting, and construction.

58. Increasing the dispatch of natural gas-fired power plants will also require extensive planning and regulatory activities, as well as permitting and construction of new facilities, over a period of years. Current excess capacity in Oklahoma's existing natural gas plants is required to accommodate the variable nature of renewable sources like wind and solar.

59. Likewise, adding additional renewable sources will also require planning, permitting, and constructing additional natural gas or other traditional sources to account for variable production.

60. In sum, due to the EPA Power Plan, simply maintaining electric service across the State of Oklahoma requires substantial expenditures of time, effort, and money by the Oklahoma Legislature, OCC, ODEQ, and other state actors, as well as private utilities. These expenditures cannot be recouped. If the State does nothing while EPA implements anything like a 35.5-percent reduction in carbon-dioxide emissions from Oklahoma's coal-fired power plants, the lights will go out in many Oklahoma communities, impacting State governmental operations, as well as the health and welfare of citizens. The same is true of the 33 percent "interim goal" set by EPA and would be true of even a substantially smaller goal, on the order of 15 or 20 percent.

61. These activities cannot be undertaken in anything like the EPA Power Plan's timeline, which allows states only five years or less to meet "interim goals." At a minimum, the State of Oklahoma will require eight years to undertake the

activities that are required to maintain electric service. Accordingly, carrying out the EPA Power Plan requires that state officials engage in planning, regulatory, and other activities in advance of a nominally final rule.

62. Many of these activities are irreversible and/or cause the State of Oklahoma irreparable injury. For example, devoting administrative manpower to activities required by the EPA Power Plan prevents the State from undertaking other activities in its sovereign capacity. Being forced by the federal government to change its own laws and to exercise aspects of its police power subjects the State of Oklahoma to *per se* sovereign injury. Actions taken now and decisions made now—for example, committing to new projects necessary to maintain electric service—will cost the State of Oklahoma money and manpower in the years ahead.

63. Once the EPA Power Plan is finalized—but not until it is finalized—Oklahoma will have recourse to challenge it in the D.C. Circuit by means of a petition for review of EPA's final action under Section 307 of the Clean Air Act. Oklahoma can reasonably expect that it will take, at minimum, nine months from the time the petition is filed to the time the D.C. Circuit will issue a final decision invalidating the Proposed Rule. It may take much longer.

64. Even if Oklahoma is able to obtain a stay of the EPA Power Plan in the D.C. Circuit, that is still likely to take months.

65. By that time, Oklahoma will have either implemented or taken irreversible steps towards implementing most, if not all, of the changes described above, meaning that they will be implemented even though the EPA Power Plan is certain to be invalidated.

66. The ordinary petition process under Section 307 is not an adequate means of obtaining the relief required if Oklahoma is to maintain its power sector in anything like the form it exists today and if it is to forgo the massive expenditure of resources required to accommodate the EPA Power Plan. The EPA Power Plan will

result in the complete restructuring of Oklahoma's power sector even though it has no chance of surviving eventual judicial scrutiny.

F. The EPA Power Plan Is Plainly *Ultra Vires*

67. The EPA Power Plan plainly exceeds EPA's authority under the Clean Air Act and the authority of the Federal Government under the United States Constitution in at least five separate respects.

68. First, the EPA Power Plan violates the provision of Section 111(d) that precludes EPA from requiring states to establish existing source standards of performance for sources that are part of "a source category which is regulated under section [112 of the CAA]" because EPA has already acted to regulate coal-fired power plants under Section 112.

69. Second, the EPA Power Plan's "building block" approach is not a permissible "best system of emission reduction" under Section 111, particularly due to the serious constitutional doubt caused by EPA's interpretation of that term.

70. Third, the EPA Power Plan's rigid numerical goals for each state, based on its existing sources, violates Section 111(d)'s mandate that EPA allow states to "take into consideration . . . the remaining useful life of the existing source to which such standard applies."

71. Fourth, as described above, the EPA Power Plan unlawfully commandeers the states, in excess of Congress's Article I authority and in violation of the Tenth Amendment to the U.S. Constitution.

72. Fifth, the EPA Power Plan unlawfully coerces the states, in excess of Congress's Article I authority and in violation of the Tenth Amendment to the U.S. Constitution, by threatening to withhold states' highway funding, to impose substantial injuries on states' citizens, and to severely impair states' exercise of their police powers if they do not comply with EPA's demands.

CLAIMS FOR RELIEF

COUNT I: DECLARATORY RELIEF

73. Paragraphs 1 through 72 are incorporated herein by reference as if set forth in full.

74. An actual controversy exists between Defendants and the State of Oklahoma regarding the lawfulness of the EPA Power Plan under the Clean Air Act and United States Constitution.

75. The State of Oklahoma is entitled to a declaration of its rights under the Clean Air Act and United States Constitution pursuant to 28 U.S.C. §§ 2201 and 2202.

COUNT II: INJUNCTIVE RELIEF

76. Paragraphs 1 through 72 are incorporated herein by reference as if set forth in full.

77. The State of Oklahoma has a strong likelihood of success on the merits of this case because Defendants' action is plainly unlawful and the State lacks any meaningful and adequate opportunity for judicial review in light of the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry, as well as other injuries, caused by Defendants' action.

78. The State of Oklahoma is suffering irreparable injury as a result of Defendants' unlawful actions. Defendants' interference with state statutes, violation of the State's constitutional rights through commandeering and coercion, and interference with the exercise of the State's police power all constitute *per se* irreparable harm. The State is also injured by the substantial expenditure of state resources, injuries to its citizens and economy, and abrogation of its legitimate policymaking discretion for years into the future.

79. Defendants will suffer no injury at all if they are enjoined.

80. An injunction would serve the public interest, by preventing violation of the United States Constitution and abrogation of state sovereignty and avoiding substantial economic injury and job loss.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court grant them the following relief:

A. A declaration that the EPA Power Plan violates the Clean Air Act, that Defendants lack authority to regulate coal-fired power plants under Section 111(d) of the Clean Air Act, that Defendants lack authority to directly or indirectly prescribe "outside-the-fenceline" measures under Section 111(d), and that the EPA Power Plan exceeds Congress's Article I authority and violates the Tenth Amendment to the U.S. Constitution;

B. A preliminary injunction forbidding Defendants from regulating coal-fired power plants under Section 111(d) of the Clean Air Act and from taking any action to enforce the EPA Power Plan;

C. A permanent injunction forbidding Defendants from regulating coal-fired power plants under Section 111(d) of the Clean Air Act and from taking any action to enforce the EPA Power Plan; and

D. Such other relief as the Court deems just and proper.

Respectfully submitted,

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Exhibit A51

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,
and

(2) OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v.

(1) GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency,
and

(2) U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. 15-CV-369-CVE-FHM

Brief in Support of
Plaintiffs' Motion for a Preliminary Injunction

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Introduction

The Clean Air Act does not empower Defendants U.S. Environmental Protection Agency and EPA Administrator Gina McCarthy to compel states to fundamentally restructure the generation, transmission, and regulation of electricity within their borders. To the contrary, it specifically denies them that authority, as does the U.S. Constitution's bar on federal commandeering and coercion of the states. Nonetheless, Defendants are now acting, under the purported authority of the Clean Air Act, to force states to phase out coal-fired generation in favor of natural gas, renewables, and enforceable restrictions on electricity consumption. By "proposing" that states carry out these mandates at breakneck pace, Defendants' "EPA Power Plan" has left states no choice but to begin work now on the necessary changes to their laws and programs governing electricity, well before any court has an opportunity to review a "final" rule. The whole point of their rush is to create irreversible facts on the ground so that no court "will be able to unscramble this particular omelet"—the epitome of irreparable injury.[1]

But the courts are not impotent in the face of *ultra vires* agency action, even when recourse at law may be lacking. Relying on equity, a long line of cases holds that "a district court appropriately 'interrupts' agency action on the ground that the agency is acting outside its statutory authority." *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549, 555 (2d Cir. 1978). *See also Leedom v. Kyne*, 358 U.S. 184 (1958). This Court should interrupt Defendants' blatantly unlawful actions so as to enforce the clear requirements of federal law and to relieve the State of Oklahoma from substantial ongoing injury to its sovereign, quasi-sovereign, and fiscal interests. To those ends, the Court should enter the requested preliminary injunction.

[1] Prof. Michael Greve, Library of Law & Liberty, June 11, 2015, http://www.libertylawsite.org/2015/06/11/dream-weaver-in-chief/.

Background

A. Statutory Background

In 2009, the Obama Administration pushed Congress to enact legislation capping carbon-dioxide emissions by fossil-fuel-fired power plants. The effort ultimately failed, which was recognized at the time as a major defeat for the President's policy agenda. Now the Administration, through Defendants, is attempting to achieve the same goal via the exercise of purported authority under Section 111(d) of the Clean Air Act that, if it actually existed, would have rendered the 2009 legislation completely superfluous.

Section 111(d), 42 U.S.C. § 7411(d), charges states to establish and apply "standards of performance" for certain existing stationary sources of air pollutants. A "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." § 7411(a)(1). Under Section 111(d), EPA "establish[es] a procedure" for states to submit plans establishing such standards and providing for their implementation and enforcement. EPA's procedure must allow states "to take into consideration, among other factors, the remaining useful life" of a source. Only if a state fails to submit a compliant plan may EPA step in and promulgate a federal plan to regulate sources within a state directly. § 7411(d)(2).

The statutory text contains three express limitations on the coverage of Section 111(d), one of which is relevant here: EPA may not mandate that states establish standards of performance for existing sources that are part of "a source category which is regulated under section [112, 42 U.S.C. § 7412]." Section 112 is a more recent Clean Air Act program regulating emissions of "hazardous air pollutants" that has generally supplanted the need for new Section 111(d) standards.

B. EPA Promulgates Section 112 Standards for Power Plants

On February 16, 2012, EPA promulgated Section 112 emission standards for power plants. 77 Fed. Reg. 9,304. That rule—one of the most expensive regulations in the history of the United States—was upheld in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). In particular, the D.C. Circuit upheld EPA's determination that it was "appropriate" to regulate power plants under Section 112, rather than rely on other programs to achieve reductions of power plant emissions. *Id.* at 1243–46. Subsequently, the Supreme Court held that EPA unlawfully failed to consider costs when deciding whether to regulate under Section 112 and remanded the matter to the D.C. Circuit without vacating the rule. *Michigan v. EPA*, __ U.S. __, No. 14-46, 2015 WL 2473453 (June 29, 2015). EPA projects that its Section 112 rule will result in the retirement of 4,700 megawatts of coal-fired generating capacity and require tens of billions of dollars in investments for the remaining facilities to achieve compliance by the April 16, 2016 deadline. EPA, MATS Rule RIA 6A-8, ES-2 (2011).[2]

C. The EPA Power Plan Compels the State of Oklahoma To Reorganize Its Energy Economy

At the same time that utilities are making final decisions whether to upgrade or retire coal-fired facilities in response to the Section 112 rule, Defendants are moving forward with a rule to regulate greenhouse gas emissions from existing fossil-fuel-fired power plants pursuant to Section 111(d) (the "EPA Power Plan"). 79 Fed. Reg. 34,830 (June 18, 2014). The EPA Power Plan aims to reduce carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels, by requiring states to overhaul their "production, distribution and use of electricity." *Id.* at 34,832/3. Under what EPA calls a "plant to plug

[2] *Available at* http://www.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf.

approach,"[3] "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111. 79 Fed. Reg. at 34,886/1.

The EPA Power Plan specifies numerical "emission rate-based CO_2 goals" for each state. 79 Fed. Reg. at 34,833/1. These goals are based on projected emissions reductions that EPA believes can be achieved through the combination of four "building blocks" that it says represent a baseline "best system of emission reduction": (1) require power plants to make changes to increase their efficiency in converting fuel into energy, (2) replace coal-fired generation capacity with increased use of natural gas, (3) replace fossil-fuel-fired generation with nuclear and renewable sources, such as wind and solar, and (4) mandate more efficient use of energy by consumers. 79 Fed. Reg. at 34,836/1. In other words, the EPA Power Plan requires states to transition away from coal-fired generation and take all steps that are necessary to integrate other generating sources and to maintain electric service. EPA, however, lacks the authority to carry out all but the first of these building blocks itself, as well as supporting actions necessary to reorganize the production, regulation, and delivery of electricity.

Yet EPA recognizes that such "beyond-the-fenceline" measures, or simply shuttering coal-fired plants, will be required for Oklahoma to comply with the EPA Power Plan. Coal accounts for over 35 percent of electricity generated within Oklahoma, and the EPA Power Plan requires Oklahoma facilities to slash utility emissions by 33 percent in 2020 and 35.5 percent in 2030. EPA acknowledges that "inside-the-fenceline" efficiency improvements are incapable of achieving anywhere near that magnitude of reductions. 79 Fed. Reg. at 34,861/1 (assuming that efficiency measures could reduce emissions by 6 percent). Accordingly, whether Oklahoma adopts a state plan to meet these targets or EPA promulgates a federal

[3] EPA Fact Sheet (June 2, 2014), *available at* http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-plan-flexibilty.pdf.

plan, the EPA Power Plan forces the State of Oklahoma to undertake "beyond-the-fenceline" measures, as well as substantial legislative, regulatory, planning, and other activities to accommodate the changes required by the EPA Power Plan and to maintain electric service throughout the State. *See* Declaration of Brandy Wreath, Director, Public Utility Division, Oklahoma Corporation Commission, at ¶¶ 2–14 ("Wreath Decl."). For example, EPA projects that the EPA Power Plan will cause an increase of approximately 200 percent in retirements of generating capacity in and around Oklahoma relative to current expectations,[4] and Oklahoma agencies are undertaking planning and other regulatory activities to obtain replacement capacity and integrate it into the State's electric system. Wreath Decl. ¶¶ 3, 5–6, 12–15.

Because the EPA Power Plan requires its goals to be met at a breakneck pace, and constructing and integrating new capacity is a years-long process, states have no choice but to begin carrying out EPA's commands at this time. Wreath Decl. ¶¶ 12–15. The Oklahoma Corporation Commission, the State's chief utility regulator, is currently hard at work to ensure that the EPA Power Plan does not cause interruptions of electric service in Oklahoma or unacceptably undermine reliability or affordability. Wreath Decl. ¶¶ 2, 13–14. The Oklahoma Municipal Power Authority, Secretary of Energy and Environment, and Energy Office within the state's Department of Commerce are also currently laboring to carry out the Plan's dictates. Wreath Decl. ¶ 3. In short, due to the EPA Power Plan, simply maintaining electric service across the State of Oklahoma—which the State requires to exercise its police power and other core functions and which is essential to the health and welfare of its citizens—is forcing the State to make substantial expenditures of time, effort, money, and resources. Wreath Decl. ¶ 2. These are outlays that it will never be able to recoup.

[4] Southwest Power Pool, SPP's Reliability Impact Assessment of the EPA's Proposed Clean Power Plan 2 (2014) (discussing EPA projections), *available at* http://goo.gl/jLBeXz.

Argument

I. Oklahoma Is Likely To Succeed on the Merits Because the EPA Power Plan Plainly Violates the Clean Air Act and U.S. Constitution

By attempting to contort an obscure Clean Air Act program to fulfill a major regulatory role for which it was never intended, Defendants' actions under Section 111(d) fundamentally clash with the statutory text. This is so even if Defendants substantially alter the details of their actions, short of a wholesale abandonment of their goal of restructuring state electricity systems along the lines they favor. The statutory text must be given its plain meaning, both to carry out Congress's intentions and to avoid violation of the anti-commandeering and anti-coercion principles of the U.S. Constitution.

A. The EPA Power Plan Violates the Section 112 Exclusion

Congress could not have stated more clearly that EPA may not require states to issue "standards of performance for any existing source for any air pollutant…emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d)(1)(A)(i). EPA promulgated Section 112 regulations for electric utility generating units—that is, power plants—in 2012. Defendants therefore lack authority to require emissions standards for power plants—full stop.

The Supreme Court recognized the plain meaning of the Section 112 exclusion in *AEP v. Connecticut*, 131 S. Ct. 2527 (2011), which specifically concerned power plants' greenhouse gas emissions. It stated: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the 'hazardous air pollutants' program, § 7412. *See* § 7411(d)(1)." *Id.* at 2537 n.7. The statutory text, the court saw, is unambiguous on this point.

EPA likewise has recognized for years, until quite recently, that "a literal reading" of this statutory language codified at 42 U.S.C. § 7411(d)(1) mandates "that a standard of

performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112."[5] 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). *Accord* EPA, Air Emissions From Municipal Solid Waste Landfills – Background Information For Final Standards And Guidelines 1-6 (1995)[6] (explaining that the Section 112 exclusion applies "if the designated air pollutant is…emitted from a source category regulated under section 112"); Final Brief of Respondent at 105, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097) ("[A] literal reading of this provision could bar section 111 standards for any pollutant, hazardous or not, emitted from a source category that is regulated under section 112."); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004) ("A literal reading…is that a standard of performance under CAA section 111(d) cannot be established for any air pollutant that is emitted from a source category regulated under section 112."); EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 26 (2014)[7] ("[A] literal reading of that language would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112."). *See also id.* at 22 ("[T]he 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.").

Of course, where the "literal reading" of the text is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984). And that should be the end of the matter here: the statute unambiguously bars EPA from requiring states to establish performance standards for a source category, like power plants, that is already regulated under Section 112.

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[5] "HAP" refers to "hazardous air pollutant," the type of emissions regulated under Section 112.

[6] *Available at* http://www.epa.gov/ttn/atw/landfill/bidfl.pdf.

[7] *Available at* http://goo.gl/SpwI32.

The statutory text plainly precluding their regulatory aims, Defendants attempt to manufacture ambiguity, so as to give themselves interpretative discretion to do as they please. Before the D.C. Circuit, EPA argued, first, that it could interpret Section 111(d)(1)(A)(i)[8] as requiring the agency to regulate so long as at least one of its three exclusionary clauses is not satisfied. EPA Brief at 36–37, *In re Murray Energy Corp.*, No. 14-112 (D.C. Cir. filed Mar. 9, 2015), ECF No. 1541205 ("EPA *Murray* Brief"). "In other words, the literal language of section 7411(d) provides that the Administrator may require states to establish standards for an air pollutant so long as *either* air quality criteria have not been established for that pollutant, or one of the remaining criteria is met." *Id.* But that's absurd: there are no pollutants that wouldn't satisfy that standard,[9] meaning that EPA has an affirmative statutory obligation (ignored up to the present) to mandate state-by-state standards under Section 111(d) for every pollutant for every source category subject to Section 111(b) new source performance standards. This interpretation also fails as a matter of standard English usage. When an "exclusion clause" contains multiple "disjunctive subsections," "the exclusion applies if any one of the [multiple] conditions is met." *Mt. Hawley Ins. Co. v. Dania Distrib. Ctr.*, 763 F. Supp. 2d 1359, 1365 (S.D. Fla. 2011). *Accord Allstate Ins. Co. v. Brown*, 16 F.3d 222, 225 (7th Cir. 1994). For example, if a landlord advertises for a tenant who is "not a smoker or pet owner or drug user," the landlord does not want a tenant who meets any—not just one—of those criteria. Indeed, the D.C. Circuit vacated EPA's Section 111(d) rule regulating the emission of mercury from power plants

[8] EPA may require states to "establish[] standards of performance for any existing source for any air pollutant (i) [1] for which air quality criteria have not been issued or [2] which is not included on a list published under section 7408(a) of this title or [3] emitted from a source category which is regulated under section 7412 of this title." 42 U.S.C. § 7411(d)(1)(A) (bracketed text added to identify the three "exclusionary clauses").

[9] The first restriction is that the pollutant be one "for which air quality criteria have not been issued." The second is that the pollutant not be included on a list of pollutants "for which air quality criteria had not been issued before December 31, 1970." 42 U.S.C. § 7408(a). Taken together, that's the full universe of pollutants.

because it violated the Section 112 exclusion, even though it did not violate the other exclusionary clauses. *New Jersey*, 517 F. 3d at 583.

Second, EPA argued that it could interpret Section 111(d)(1)(A)(i) as affirmatively obligating it to regulate source categories that are already subject to Section 112 regulation, based on "the lack of a negative before the third clause." EPA *Murray* Brief at 37. Again, this is absurd: why would Congress specifically *require* EPA to impose still more regulation on sources already subject to the Act's most stringent and burdensome program? Certainly EPA has never recognized that obligation. In any case, this interpretation can be confidently rejected because it would render the exclusionary language regarding Section 112 completely superfluous; after all, Section 111(d) requires the regulation of "any existing source" even without that language. *See Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (statutes must be interpreted "so as to avoid rendering superfluous any parts thereof").[10]

Finally, EPA made much of an alleged ambiguity in the Statutes at Large based on purportedly inconsistent amendments to Section 111(d)(1)(A)(i) (the exclusion provision) contained in the Clean Air Act Amendments. The first is a substantive amendment to Section 111(d) (the "House Amendment"). Before 1990, the Section 112 exclusion prohibited EPA from requiring States to regulate under Section 111(d) any air pollutant "included on a list published under…112(b)(1)(A)." 42 U.S.C. § 7411(d) (1989). This meant that if EPA had listed a pollutant under Section 112, the agency could not regulate that pollutant under Section 111(d). In order "to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category

[10] EPA also argued that the phrase "source category which is regulated under section [112]" is also somehow ambiguous, because "an agency must consider *what* is being regulated," and because "which" might not actually modify "source category." EPA *Murray* Brief at 37–38. Plaintiffs believe these arguments require no response other than to suggest that they reflect EPA's desperation to conjure up agency-empowering ambiguity.

that is actually regulated under section 112," 70 Fed. Reg. at 16,031, the House Amendment instructs:

> strik[e] "or 112(b)(1)(A)" and insert[] "or emitted from a source category which is regulated under section 112."

Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).

The second amendment (the "Senate Amendment") appears in a list of "Conforming Amendments" that make clerical changes to the Act. Conforming amendments are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." Legislative Drafting Manual, Office of the Legislative Counsel, United States Senate 28 (1997) ("Senate Manual"). Consistent with this description, the Senate Amendment merely updated the cross-reference in the Section 112 exclusion. It instructs:

> strik[e] "112(b)(1)(A)" and insert[] in lieu thereof "112(b)".

Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This clerical update was necessitated by the fact that substantive amendments expanding the Section 112 regime—broadening the definition of "hazardous air pollutant" and changing the program's focus to source categories—had renumbered and restructured Section 112(b).

As an initial matter, there is no true conflict between the amendments. Amendments are to be executed in the order of their appearance, House Legislative Counsel, Manual on Drafting Style 42 (1995); Senate Manual 33,[11] and the House Amendment appears first in the 1990 Act, striking the reference to "112(b)(1)(A)." Accordingly, the Senate Amendment simply fails to have any effect, because it is no longer necessary to "strik[e] '112(b)(1)(A)'" to

[11] *See also* Donald Hirsch, Drafting Federal Law § 2.2.3, p.13 (U.S. House Office of Legislative Counsel, 2d ed. 1989); Lawrence E. Filson & Sandra L. Strokoff, The Legislative Drafter's Desk Reference § 14.4, p.191 (CQ Press, 2d ed. 2008). The Supreme Court recognizes these treatises as authoritative on legislative drafting. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–61 n.4 (2004); *id.* at 71 (Scalia, J., dissenting).

conform the Section 112 exclusion to the revised Section 112.[12] *See* Revisor's Note, 42 U.S.C. § 7411. The U.S. Code provision, in other words, fully enacts both amendments.

In any case, the U.S. Code provision is also consistent with Congress's intent in enacting both amendments, which address somewhat different aspects of the scope of EPA's authority. The House Amendment added a limitation to the scope of Section 111(d): where a category of sources is regulated under Section 112, Section 111(d) cannot be used to impose additional performance standards on that source category. The purpose was to ensure that existing source categories regulated under Section 112—which the 1990 Act substantially revised to focus on source categories rather than pollutants—would not face the prospect of additional costly regulation under Section 111. *See* 70 Fed. Reg. at 16,031 (EPA discussion of legislative history concluding that the House Amendment sought to avoid "duplicative or overlapping regulation").

The Senate Amendment had a different focus, seeking to maintain the pre-1990 prohibition on using Section 111(d) to regulate emissions from existing sources of hazardous air pollutants regulated under Section 112. Failure to retain that limitation would have allowed EPA to undo Congress's considered decision to regulate only certain sources of hazardous air pollutants: the 1990 Act requires EPA to regulate all major sources of hazardous air pollutants, but only those area sources representing 90 percent of area source emissions, thereby exempting many smaller sources and sparing them the burden of the stringent Section 112 regime.[13] 42 U.S.C. § 7412(c)(3). In other words, the Senate

[12] The failure of a subsequent amendment to have any effect, due to changes made by an earlier amendment in the same legislation, is not at all unusual. Plaintiffs are aware of more than 30 other instances—including dozens in Title 42 alone—in which an amendment to the U.S. Code failed to have any effect due to an earlier amendment. Petitioner's Opening Brief at 31–32 n.9, *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. filed Mar. 9, 2015), ECF #1541126.

[13] "Major" sources emit or have the potential to emit above a statutorily prescribed threshold of hazardous air pollutants; "area" sources are those that fall below this threshold. 42 U.S.C. § 7412(a)(1)–(2).

Amendment serves to restrain EPA from circumventing this limitation by simultaneously regulating the same emissions under both Section 112 and 111(d) and thereby burdening all sources, even the ones Congress sought to exempt from regulation.

Thus, by blocking both double regulation and circumvention of the Section 112(c)(3) area source limitation, the U.S. Code provision achieves Congress's intent underlying both amendments.

EPA's interpretation does not. In the agency's view, the existence of the two amendments somehow renders the provision ambiguous—to the point that it can ignore the House Amendment entirely. In a legal memorandum released contemporaneously with the EPA Power Plan, it concluded that "section 111(d) authorizes the EPA to establish section 111(d) guidelines for [greenhouse gas] emissions from [power plants]" because greenhouse gases "are not a HAP regulated under section 112." EPA, Legal Memorandum 27. This reasoning, of course, solely reflects the Senate Amendment—that is, the exclusion applies on a pollutant-by-pollutant basis—and inexplicably discards the text and purpose of the substantive House Amendment.[14] But no case has ever held that a regulatory agency has license to pick and choose which provisions of the statutory law it will follow, and EPA's contention to the contrary seriously misapprehends the constitutional limitations on its interpretative authority. *See Whitman v. Am. Trucking Ass'ns*, 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."). *Chevron* deference could not, and does not, extend anywhere near so far. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity.").[15] Instead, an agency or court "must read [allegedly conflicting] statutes to give

[14] This is despite the fact that EPA has actually recognized that inclusion of the conforming *Senate* Amendment was "a drafting error." 70 Fed. Reg. at 16,031.

[15] The two-step *Chevron* framework would not apply here even if the statutory question were one involving statutory silence or ambiguity. First, the statutory question is one "of deep

effect to each if [it] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Thus, even assuming *arguendo* that there is a potential conflict between the amendments, EPA's self-serving interpretation must be rejected because it deprives the House Amendment of any effect.

In sum, an administrative agency cannot manufacture ambiguity to expand its interpretative license and ability to pursue its policy goals. The Section 112 exclusion is an express limitation on EPA's regulatory authority, and the agency should not be permitted to read it out of the statute. The statute means what it says, EPA cannot require states to issue performance standards for source categories already subject to Section 112 regulation, and any attempt by EPA to subject power plants to Section 112 regulation is therefore *ultra vires*.

B. The EPA Power Plan's Beyond-the-Fenceline "Building Block" Approach Is Not a Permissible "Best System of Emission Reduction"

The EPA Power Plan is also unlawful because it relies on "beyond-the-fenceline" measures that do not concern the emissions performance of individual sources and are therefore outside the regulatory scope of Section 111(d). In EPA's view, "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111. 79 Fed. Reg. at 34,886/1. But while the first "building block"—reducing emissions by improving sources' efficiency—may be lawful to

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'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, __ U.S. __, No. 14-114, 2015 WL 2473448, at *8 (June 25, 2015) (quoting *Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). Indeed, in the one instance where Congress did intend for EPA to exercise discretion on a major question regarding the regulation of power plants, it did say so expressly. *See* 42 U.S.C. § 7412(n)(1)(A). Second, it is "especially unlikely" that Congress would have delegated that question to EPA, which has "no expertise" in regulating electricity production and transmission. *King*, 2015 WL 2473448, at *8 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)). To the limited extent that such questions are addressed at all by federal law, Congress has assigned them to the agency with expertise in the field, the Federal Energy Regulatory Commission. *Compare FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155–57 (2000).

the extent that it is "achievable,"[16] measures that involve reducing the utilization of coal-fired power plants in favor of other generation sources or reducing energy consumption are not permissible components of the "best system of emission reduction" that underlies a Section 111 standard. 42 U.S.C. § 7411(a)(1).

This is plain on the face of the statute. First, Section 111(d) requires states to "establish[] standards of performance *for any existing source*" that is already subject to a new source performance standard. § 7411(d)(1)(A) (emphasis added). Likewise, Section 111(d) requires EPA to establish "standards of performance *for new sources*" within listed categories. § 7411(b)(1)(B) (emphasis added). These provisions simply do not authorize obligations regarding *other sources*—for example, that application of a performance standard to a coal-fired plant would require increased utilization of some other facility that is not subject to the standard. Confirming as much, Section 111(e) enforces new source performance standards by providing that it is "unlawful for any owner or operator" of a regulated source to violate any such applicable standard. § 7411(e). There is no enforcement provision, however, for owners or operators of other facilities, such as those that EPA would have pick up the slack from decreased utilization of regulated facilities.

Second, a "best system of emission reduction," which is used to determine an emission standard, must be both "achievable" and "adequately demonstrated," but those requirements would be nullified if decreased utilization (which is always an achievable and adequately demonstrated means of reducing emissions) in favor of other sources or reduced output were a permissible basis for a performance standard. § 7411(a)(1). Achievability, the D.C. Circuit has long held, must therefore be demonstrated with respect to the regulated source category itself. *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

[16] Setting aside, for the sake of argument, the Section 112 exclusion and the "remaining useful life" limitation discussed below.

Third, Section 111 expressly regulates sources' emissions "performance," which concerns the rate of emissions at a particular level of production, and not the level of production. In other words, mandating that a high-emissions facility reduce production may reduce emissions, but it has nothing to do with that facility's emissions *performance*.[17] Indeed, in its Section 111 regulations, EPA determines "performance" by measuring "pollutant emission rates" with respect to particular levels of production. 40 C.F.R. § 60.8(e). Similarly, its regulations do not regard "[a]n increase in production rate of an existing facility" as a modification triggering application of new source performance standards. 40 C.F.R. § 60.14(e).

Fourth, Section 111(h) directly contradicts EPA's broad definition of "system." That provision allows EPA to promulgate a work practice or other non-output-based standard if the agency determines that it is "not feasible to prescribe or enforce a standard of performance." § 7411(h). A "standard of performance" is infeasible, that provision provides, when "a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant" or when use of such equipment would be unlawful, § 7411(h)(2)(A)—that is, when *source-based equipment* like emissions controls is infeasible. The characteristics of other facilities that might substitute for the regulated one are irrelevant.

Fifth, Section 111(d) expressly authorizes states applying performance standards to take into consideration "the remaining useful life of the existing source to which such standard applies," again without saying anything about the characteristics of other facilities. § 111(d)(1)(B).

Sixth, it is counterintuitive (to say the least) that a program expressly regulating the emissions of "existing sources" could require the construction of new sources that are, in

[17] Analogously, the "performance" of a mutual fund is its rate of return over time, not its size in terms of assets under management or the number of trades it conducts.

turn, subject to a variety of additional programs regulating new sources. *E.g.*, 42 U.S.C. §§ 7411(b), 7475.

In light of these statutory features, the courts have had no difficultly in recognizing that "best system of emission reduction" refers to "inside-the-fenceline" measures. The Supreme Court, viewing this language, recognized that it refers to "technologically feasible emission controls"—that is, emission-reduction technologies implemented at the source. *Hancock v. Train*, 426 U.S. 167, 193 (1976). *See also Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 869 (3d Cir. 1981) ("system" is something that a source can "install"); *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 636 (5th Cir. 1981) (holding that, prior to an amendment authorizing operational standards, EPA could not "require a use of a certain type of fuel" that would reduce emissions).

EPA's own regulations reflect the same understanding. Its regulations establishing procedures for state plans pursuant to Section 111(d) define compliance in terms of the purchase and construction of "emission control systems" and "emission control equipment," as well as other "on-site" activities. 40 C.F.R. § 60.21(h). They require EPA to publish guidelines "containing information pertinent to control of the designated pollutant form [sic] designated facilities," which in turn refers to "any existing facility which emits a designated pollutant." §§ 60.22(a), 60.21(b) (cross-reference omitted). Likewise, EPA's guidelines must reflect "the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated *for designated facilities*." § 60.22(b)(5) (emphasis added). These citations are just the tip of the iceberg. A complete recitation of all the EPA regulatory actions that treat "best system of emission reduction" as referring to on-site measures would go on for pages. A recent example is the agency's proposed performance standards for new power plants—released less than two weeks after the EPA Power Plan—which reaffirms that Section 111 standards of

performance "apply to sources" and must be "based on the BSER achievable at that source." 79 Fed. Reg. 36,880, 36,885 (June 30, 2014).

The absurdity of EPA's novel interpretation should not be overlooked. If reduced utilization and substituted production are permissible measures, promulgation of a performance standard for greenhouse gas emissions associated with oil refineries could give EPA regulatory authority over all means of transportation in the United States. In the same way that EPA here would have states impose enforceable programs to reduce electricity demand, the agency might order states to mandate that refineries pay people to drive less or take public transportation. *Compare* EPA, Legal Memorandum 14 (EPA may require states to take any measures that "displace, or avoid the need for, generation from the affected [power plants]."). Surely it could require that refineries produce more diesel than gasoline, a less-efficient fuel with respect to emissions, and to cease producing aircraft fuel altogether. And if all that proved insufficient, it might simply require that refineries reduce output in favor of solar-power-vehicle mandates and the like. *See id.* at 51 ("system of emission reduction" "encompasses virtually any 'set of things' that reduce emissions"). Yes, the idea that Congress in Section 111(d) authorized EPA to seize regulatory control of the transportation system is absurd, but no more so than EPA's action here to seize control of the electric system.

C. The EPA Power Plan's Target-Based Approach Violates Oklahoma's Statutory Right To Consider Sources' Remaining Useful Lives

A further indication of the clash between EPA's actions and its statutory authority is that its target-based approach eviscerates Section 111(d)'s clear requirement that the agency must allow states, in applying performance standards, "to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." § 7411(d)(1)(B). By mandating that states achieve EPA-specified reduction targets by certain dates, the EPA Power Plan unlawfully deprives states of the authority to vary the

application of a performance standard to particular sources. Whatever a source's remaining useful life—whether five years or fifty—EPA's targets and deadlines remain unchanged and unalterable. This defect is fundamental, precluding EPA from proceeding with any action that that imposes specific reduction targets on states. The EPA Power Plan's regulatory approach is simply incompatible with the requirements of Section 111(d).

D. The EPA Power Plan Unlawfully Coerces Oklahoma

1. The Power Plan is per se coercive

The EPA Power Plan violates the cardinal constitutional principle that the federal government is one of limited and enumerated powers. If the Plan is allowed to stand, administrative agencies can, under the guise of commerce-based "cooperative federalism," evade limits on the reach of the Commerce Clause. In *NFIB v. Sebelius*, the Court reiterated that, "the power to regulate commerce, though broad indeed, has limits." 132 S. Ct. 2566, 2589 (2012) (opinion of Roberts, C.J.) (quotation marks omitted). When the federal government exceeds its power, it can be viewed either as a violation of the principle of limited and enumerated powers, or as a violation of state sovereignty, since the "two inquiries are mirror images of each other," *New York v. United States*, 505 U.S. 144, 156 (1992). *See also id.* at 159. In this case, the "choice" presented to States under the EPA's Power Plan exceeds the scope of the preemptive authority delegated by Congress in the Clean Air Act ("CAA") and is thus *per se* coercive of States and violative of the principle of federalism.

The preemption power is the basis of all Commerce Clause-based cooperative federalism. In *Hodel v. Virginia Surface Mining and Reclamation Association*, the Court upheld the Surface Mining Control and Reclamation Act, because Congress possessed preemptive power to regulate mining activities that affected interstate commerce. 452 U.S. 264, 289–90 (1981). The Court emphasized, "Congress could constitutionally have enacted a statute

prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290.

Likewise, in *FERC v. Mississippi*, the Court upheld portions of the Public Utilities Regulatory Policies Act ("PURPA") because, "[a]s we read them, [the PURPA provisions] simply establish requirements for continued state activity *in an otherwise pre-emptible field*." 456 U.S. 742, 769 (1982) (emphasis added).

Hodel and *FERC* teach that commerce-based cooperative federalism involves a choice between: (1) regulating according to federal instructions; or (2) federal preemption. As the *FERC* Court put it, because the first choice (regulating according to federal instructions) occurs in the context of "an otherwise pre-emptible field," the choice is not coercive. When the federal government has authority to preempt, it may certainly abstain from exercising this power and offer States the less aggressive option of continued state regulatory primacy, albeit exercised pursuant to federal instructions. *Hodel* and *FERC* also illustrate that the choices posed by a Commerce Clause-based cooperative federalism regime must occupy the same preemptive scope—i.e., federal preemptive authority must encompass the instructions it is encouraging States to follow. If such preemptive harmony exists between choice one (regulate according to federal instructions) and choice two (federal preemption), States have a meaningful, voluntary choice and may, if they wish, simply relinquish their entire regulatory authority and allow the federal government to "take the wheel."

The Clean Air Act unquestionably does not preempt state law in areas *unrelated* to emissions, such as the transmission, distribution, or consumption of energy, nor does EPA claim otherwise. Accordingly, EPA lacks authority under the CAA to regulate beyond-the-fenceline. But this is precisely what EPA is attempting to do: coerce States into regulating areas beyond-the-fenceline, in which EPA itself *has no preemptive authority*.

When the Commerce Clause-based cooperative federalism choices given to States do not occupy the same preemptive scope, a "preemptive mismatch" arises, posing a unique threat to federalism. In a preemptive mismatch, the federal government gives States a choice between: (1) regulating according to federal instructions; or (2) preemption of a *different* field. Such a preemptive mismatch "choice" is inherently coercive. It has never been attempted, much less upheld, as it would allow the federal government to coerce States into altering their laws that do not conflict with federal law and that the federal government, itself, cannot impose via preemption. "The National Government received [from the Constitution] the power to enact its own laws and to enforce those laws over conflicting state legislation. *The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt.*" *FERC*, 456 U.S. at 795 (O'Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Sanctioning such a "choice" under the guise of Commerce Clause-based "cooperative federalism" would grant the federal government a power to accomplish indirectly what it cannot do directly, thereby circumventing the limits of the Commerce Clause, eviscerating the principle of limited and enumerated powers, and coercing the States.

2. The Power Plan is coercive because it imposes a "choice" that is neither knowing nor voluntary

i. The Power Plan's choice is not "knowing"

Cooperative federalism regimes are "in the nature of a contract." *NFIB v. Sebelius*, 132 S. Ct. at 2602 (Roberts, C.J.) (quotation marks omitted); *id.* at 2659 (Scalia, J., dissenting). The constitutionality of cooperative federalism "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 2602 (quotation marks omitted); *id.* at 2660 (Scalia, J., dissenting). To constitute a "knowing" choice, States must understand the nature and consequences of the available choices. *Id.* at 2602 (state choice must be both knowing and voluntary to be non-coercive); *id.* at 2659–60 (Scalia, J., dissenting) (same).

The Power Plan is beyond the reasonable expectation of the States, either at the time the CAA was enacted in 1970, or at the time it was last amended in 1990. States could not have known, when they entered into the CAA's cooperative federalism regime, that EPA could take over the entire field of energy regulation, from plant to plug. At no time during the 45-year history of the Clean Air Act has any prior administration claimed such sweeping power. Indeed, in the Federal Power Act, Congress explicitly declared that regulation of non-emissions matters is a state responsibility. 16 U.S.C. § 792 *et seq.* The federal government's interest extends only to transmission, generation, and sale of electricity "in interstate commerce" and "such Federal regulation, however,…extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).

The EPA's Power Plan is a material deviation from the decades-old cooperative federalism regime that has respected states' authority over beyond-the-fenceline matters such as generation, distribution, and consumption, and thus represents "a shift in kind, not merely degree." *NFIB*, 132 S. Ct. at 2605 (Roberts, C.J.). Cooperative federalism "does not include surprising participating States with post-acceptance or 'retroactive' conditions" that dramatically transform the original expectations of States when they agreed to cooperate. *Id.* at 2606 (quotation marks omitted).

ii. The Power Plan's choice is not "voluntary"

Any "choice" made by States under EPA's Power Plan is not "voluntary." To constitute a "voluntary" choice, States must have a genuine opportunity of "not yielding," *NFIB*, 132 S. Ct. at 2603 (Roberts, C.J.) (quotation marks omitted); *see also id.* at 2661 (Scalia, J., dissenting) ("[T]heoretical voluntariness is not enough.").

If States decline to regulate according to federal instructions, EPA will impose a federal plan. 79 Fed. Reg. at 34,951/2. Because EPA's preemptive authority under the CAA is limited to emissions, the federal plan will be aimed at reducing emissions from coal-fired

facilities. It will force plant retirements and cripple States' existing electricity generation. Consequently, States will be forced to adopt "beyond-the-fenceline" measures to maintain affordable and reliable electric service. These measures are not "'the prerogative of the States,'" *NFIB*, 132 S. Ct. at 2604 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)), but a direct result of EPA's placing a "gun to the [States'] head," forcing them to revamp their regulatory structure to prevent disruption of affordable, reliable electric service. *Id.* To prevent these ineluctable consequences, States have no meaningful choice but to begin carrying out EPA's dictates and regulate beyond-the-fenceline, and are thus being coerced.

E. The EPA Power Plan Unlawfully Commandeers Oklahoma

EPA's Power Plan is remarkably similar to the "choice" struck down in *New York v. United States*, 505 U.S. 144 (1992). In *New York*, the Low-Level Radioactive Waste Policy Act required States to: (1) dispose of low-level radioactive waste; or (2) take title to such waste and be subject to any liability therefor. *Id.* at 153–54. This was unconstitutional because "in this [take title] provision, Congress *has not held out the threat of exercising its spending power or its commerce power*; *it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction*. A choice between two unconstitutionally coercive regulatory options is no choice at all. Either way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, an outcome that has never been understood to be within the authority conferred upon Congress by the Constitution." *Id.* at 176 (emphasis added) (citation and quotation marks omitted). *See also Printz v. United States*, 521 U.S. 898 (1997) (extending the anti-commandeering principle to state executive officials).

In *New York*, the government unsuccessfully argued that the "the latitude given to the States to implement Congress' plan" enabled States "to regulate pursuant to Congress' instructions in any number of different ways," such as by forming regional compacts. *New*

York, 505 U.S. at 176. Such flexibility "only underscore[d] the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, *it must follow the direction of Congress*." *Id.* at 176–77 (emphasis added). EPA's Power Plan likewise commanders States to regulate as directed by the federal government—only it is worse, since Congress has commanded no such thing, giving EPA authority only to regulate emissions, not the entire energy sector. The EPA's Power Plan is designed to force States to obey beyond-the-fenceline regulatory commands that EPA does not possess authority to issue.

If the federal government wants to issue a regulatory command, it must use its proper preemptive power. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 178.

EPA has been remarkably candid that its Power Plan commands state action. It expects that compliance will require state "public utility commission orders." 79 Fed. Reg. at 34,914/3. It recognizes that "affected entities" include any "entity that is regulated by the State, such as an electric distribution utility, or a private or public third-party entity." *Id.* at 34,917/3. It even demands that States "demonstrate… sufficient legal authority" to enforce beyond-the-fenceline measures. *Id.* These things reflect EPA's awareness that the Plan will require far more than just emissions controls; it will require States to revamp their entire energy sector, in conformity with EPA's commands.

Even States that default to EPA's federal plan will still be forced to implement beyond-the-fenceline measures satisfactory to EPA. Because the federal plan will effectively

mandate retirement of many coal-fired plants and reductions in the utilization of others, States must enact measures to meet existing energy needs, including identifying alternative energy sources and devising incentives to reduce demand. The enormous burden and complexity of these duties, as well as the years-long lead-times involved in performing them, is why States like Oklahoma have no choice but to begin work now to carry out EPA's dictates. The EPA Power Plan treats States as "administrative agencies of the Federal Government." *New York*, 505 U.S. at 188. For that reason, the EPA Power Plan commandeers States, as in *New York* and *Printz*, thus exceeding the federal government's power.

F. "Best System of Emission Reduction" Must Be Given Its Plain Meaning To Avoid Serious Constitutional Doubt

Even assuming *arguendo* that the scope of "best system of emission reduction," standing alone, is somewhat ambiguous, EPA's anything-to-reduce-emissions interpretation must still be rejected to avoid serious constitutional doubt with respect to commandeering and coercion of the States. Federal courts must construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Such an acceptable construction is available here: consistent with plain meaning, "best system of emission reduction" must be limited to on-site measures to avoid constitutional infirmity.

II. Oklahoma Is Suffering Irreparable Injury to Its Sovereign and Other Interests Due to Defendants' *Ultra Vires* Actions

Defendants' actions are causing the State of Oklahoma to suffer ongoing irreparable injury to its sovereign and other interests. Unless this Court intervenes to enjoin Defendants' actions, Oklahoma's injuries will soon increase dramatically, as the State is forced to prepare for implementation of the EPA Power Plan and make decisions that will be difficult or impossible to reverse.

To begin with, Defendants' unconstitutional invasion of Oklahoma's sovereign interests inflicts *per se* irreparable injury on the State. In general, "'[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (alteration in original) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). And in particular, interference with sovereign status is "sufficient to establish irreparable harm." *Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001). *See also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989). Here, the EPA Power Plan unconstitutionally commandeers and coerces the instruments of the State in theory and in fact. As described above, states like Oklahoma have no choice but to begin work now to implement the EPA Power Plan, whether or not they intend to submit a state plan. And as a factual matter, this is what Oklahoma officials are doing right now, because they have to, Wreath Decl. ¶¶ 12–15, despite unified opposition to the policies underlying the EPA Power Plan expressed by the State legislature, Okla. SB No. 676 (enrolled but vetoed bill rejecting EPA Power Plan approach), and its Executive Branch, Okla. Exec. Order No. 2015-22 (Apr. 28, 2015) (prohibiting Dept. of Environmental Quality from preparing state plan). Given the choice, Oklahoma would decline to carry out this perversion of federal law, but the State is being deprived of that

choice, suffering injury and insult to both its sovereignty and rights under the United States Constitution.

In addition, the State also suffers irreparable injury due to the unrecoverable expenditures of effort, manpower, time, and money that the EPA Power Plan is forcing it to undertake. Wreath Decl. ¶¶ 2, 9. "Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010).

Oklahoma will also soon suffer additional injury as it and its utilities are forced to make irreversible decisions affecting future investments in energy resources within the State. Due to the combination of the EPA Power Plan's aggressive deadlines and the long lead-time required to bring new energy infrastructure online, regulatory and investment decisions with long-term impacts are being made now. *See, e.g.*, Wreath Decl. ¶¶ 8, 15. Moreover, states and utilities are making decisions now about the future viability of coal-fired power plants in the face of impending compliance deadlines under EPA's Section 112 rule, and the risk of millions in additional expenditures to comply with the EPA Power Plan will tip the balance for some facilities. Decisions made in the coming months to shutter existing coal-fired facilities, to authorize new natural gas and renewable capacity, and to expand grid capacity to replace lost capacity all involve irreversible aspects. And that is the point of the EPA Power Plan: to change the facts on the ground, irreversibly, before any court has the opportunity to review Defendants' "final" action. The Court should not countenance this blatant attempt to circumvent judicial review to impose long-term burdens on states, utilities, and ultimately electricity consumers.

Finally, it must be observed that this is not the usual challenge to an agency rulemaking. The EPA Power Plan demands that states reorganize their energy economies from top to bottom, forcing them to abandon affordable coal-fired generation in favor of

new renewable capacity, to regulate electricity consumption, and to cede their traditional policymaking authority over electricity markets and utilities to federal regulators. In this instance, "[t]he injury against which a court would protect is not merely the expense to the plaintiff of defending in the administrative proceeding…but…the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.). In such circumstances, when "an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law," injunctive relief is appropriate. *Id.*

III. The Balance of the Equities and Public Interest Require an Injunction

Put plainly, Defendants "do[] not have an interest in enforcing a law that is likely constitutionally infirm." *Edmondson*, 594 F.3d at 771. And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132 (quotation marks omitted). Plaintiffs' likelihood of success on the merits is therefore reason enough to enter a preliminary injunction.

In addition, a preliminary injunction would do little more than preserve the *status quo* that has existed from the dawn of electricity generation in the United States, allowing Oklahoma to continue to exercise its traditional policy discretion over utilities and the State's electric system. The Obama Administration EPA, having waited six years to regulate power plants' greenhouse gas emissions, cannot now claim that there is any particular urgency to its regulatory actions during the few months necessary for this Court to consider and rule on the merits of Plaintiffs' challenge. Indeed, EPA has already allowed its deadlines regarding its Power Plan to slip numerous times, amounting to several years' delay.[18]

Finally, the public has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible," rather than through administrative fiat.

[18] *See* Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to sign Section 111(d) standards by May 26, 2012).

WMATA v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). Absent a stay, Defendants' Power Plan will remain in force, forcing the states to adopt burdensome laws and regulations that cannot be easily repealed, and to make decisions that cannot be reversed, even if the Plan is ultimately vacated. The public should not have to bear that burden. Nor should the public, as citizens of the states, be forced to bear the cost of developing new regulatory regimes that are likely to prove unnecessary or even detrimental.

IV. This Court Has Jurisdiction and Authority To Enjoin Defendants' Plainly *Ultra Vires* Action

"This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom*, 358 U.S. at 190. As required, Plaintiffs' "non-statutory" challenge to Defendants' *ultra vires* actions is supported by ordinary federal question jurisdiction and states a proper claim upon which relief may be granted. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230–31 (10th Cir. 2005). The Court can and should address the merits of this motion.

As for jurisdiction, Oklahoma's allegations that Defendants act in violation of federal law are sufficient because 28 U.S.C. § 1331 supplies jurisdiction over suits presenting federal questions. *See id.* (citing *Bell v. Hood*, 327 U.S. 678, 681–82 (1946)).

The complaint also states a proper cause of action upon which relief may be granted. Federal courts have inherent equitable authority to prevent violations of federal rights. *Id.* at 1231–32. Under *Leedom* and its many progeny, "a plaintiff may secure judicial review when an agency exceeds the scope of its delegated authority or violates a clear statutory mandate." *Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002) (quotation omitted). *See also Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 768 (10th Cir. 1981). Such review is available where a plaintiff lacks "a meaningful and adequate means of vindicating" its federal rights and Congress has not acted to foreclose judicial review. *Bd. of Governors of Fed. Reserve Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 43–44 (1991).

Here, Oklahoma has no other "meaningful and adequate" opportunity for relief. The D.C. Circuit, which has exclusive statutory authority to review "nationally applicable" actions deemed by EPA to be "final," 42 U.S.C. § 7607(b), has already held that neither that statutory authority, nor the All Writs Act, allow it to review the EPA Power Plan because the agency has not deemed it "final." *In re Murray Energy Corp.*, __ F.3d __, Nos. 14–1112, 14–1151, 14–1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015). Although review in that court will be available when EPA ultimately promulgates a "final" action, *Leedom* itself holds that the availability of statutorily provided review in the future is insufficient to foreclose non-statutory review where, as here, such delay would injure the plaintiffs' interests. 358 U.S. at 190 (allowing employees to challenge non-final action allegedly violating federal statutory right, even though review of final action would be available later, where lack of contemporaneous review would sacrifice or obliterate their rights). *See also Friends of Crystal River v. EPA*, 35 F.3d 1073, 1077–79 (6th Cir. 1994) (finding *ultra vires* EPA action reviewable before final agency decision); *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342, 344 (D.C. Cir. 1965) (eventual review insufficient to vindicate claim that consent decree required agency to proceed against plaintiff only by reopening that previous case, not by initiating a new one). *Cf. Norfolk S. Ry. Co. v. Solis*, 915 F. Supp. 2d 32, 45 (D.D.C. 2013) (denying *Leedom* review where plaintiff "has not argued that it would experience irreparable harm" before final review).

The present case finds a close parallel in the reasoning of *PepsiCo*, which challenged a Federal Trade Commission proceeding accusing PepsiCo of hindering competition in the distribution and sale of soft drink syrups and drinks by entering into typical territorial-exclusivity contracts with its bottlers. 472 F.2d at 182. In an opinion by Judge Henry Friendly, the court explained that an agency's "refus[al] to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law" could be challenged where the agency's actions

implicate "enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *Id.* at 187. In that instance, immediate review would be available because targets of such action "should not be placed under that threat in a proceeding that must prove to be a nullity," as they would be if forced to wait for "final" agency action. *Id.* That is exactly the threat that Oklahoma now faces due to Defendants' conduct of a regulatory proceeding that is plainly beyond their legal authority. In fact, even worse than in *PepsiCo*, Defendants' actions are already inflicting serious and irreparable injuries on Oklahoma. In these circumstances, waiting many months for the inevitable ruling that Defendants' actions are unsupported by law is no meaningful or adequate opportunity for relief.

There is also no indication that Congress intended to foreclose judicial review in cases such as this one. "[O]nly upon a showing of 'clear and convincing evidence' of…legislative intent [to rebut 'the basic presumption of judicial review'] should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967). Section 307(e) of the Clean Air Act provides, "Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. § 7607(e). But the Act says nothing about divesting other bases for relief.

Conclusion

The State of Oklahoma respectfully requests that the Court enter a preliminary injunction preventing Defendants from continuing to take actions that plainly violate the Clean Air Act and the U.S. Constitution and irreparably injure the State and the public.

Dated: July 1, 2015

Respectfully submitted,
/s/ E. Scott Pruitt

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Certificate of Service

I hereby certify that on July 2, 2015, I caused the attached motion for a preliminary injunction and brief in support thereof to be served by hand on the following:

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Courtesy copies were also sent by certified mail.

/s/ Patrick Wyrick

Exhibit A52

Scott Pruitt

July 7, 2015 ·

We must continue to push back against an agency that thinks they are above the law.

Stopping EPA Uber Alles

Even when states win in court, they lose. Here is one legal remedy, says an editorial in The Wall Street Journal.

WSJ.COM

Exhibit A53

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*, Plaintiffs, v. GINA MCCARTHY, *et al.*, Defendants.	Case No. 15-CV-369-CVE-FHM

Plaintiffs' Response to Court's Order Regarding Jurisdiction

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Introduction and Summary of Argument

This Court's jurisdiction and ability to enjoin the *ultra vires* assertion of authority by federal officials are secure under well-established principles of law recognized by the United States Supreme Court, the Tenth Circuit, and numerous other federal courts of appeals and district courts. When a federal agency attempts to coerce regulated parties into taking action in violation of limitations on the agency's statutory authority or in violation of the U.S. Constitution, federal district courts are not powerless to put the agency in its place and thereby vindicate the rights of those it has threatened. To the contrary, a court can and should act in those circumstances, particularly when doing so is necessary to alleviate great hardship.

That is the case here. Defendants are engaged in an unprecedented effort to compel the States, at enormous expense, to reorganize their energy economies along the lines preferred by Defendants. That effort is entirely *ultra vires*. It violates specific limitations on Defendants' authority contained in the Clean Air Act, as well as constitutional prohibitions on commandeering and coercion of the States and their officials. Yet the States have no choice but to go along for now, due to the years required to accommodate changes to the production and transmission of electricity. That is the position Oklahoma finds itself in today: its energy regulators are being forced to make substantial, unrecoupable expenditures in terms of time, effort, personnel, and money to accommodate a regulatory action that is entirely beyond Defendants' authority. Prudence demands that Oklahoma officials act to safeguard electric reliability and affordability within the State against all impending threats, but it does not require that Oklahoma abandon its rights and go along willingly.

The law does not leave Oklahoma defenseless. Federal district courts have authority to entertain claims challenging *ultra vires* agency action, whether or not deemed "final" by the agency. This authority is premised on the courts' exercise of their equitable powers within the scope of jurisdiction conferred by Congress in 28 U.S.C. § 1331. In case after case, courts have used this authority to block agencies from proceeding to take actions that evade

limitations on their statutory authority and from violating rights safeguarded by statutory law and the Constitution. Not only does this authority apply to non-final agency actions, but it is specifically tailored to address agency actions that are not subject to statutory review provisions because such review would be premature. Unsurprisingly, a number of decisions have blocked EPA specifically from taking proposed actions that exceed its statutory authority. *See infra* § II.B.1.

Review is appropriate here and requires the Court to do no more, to begin with, than to conduct "a cursory review of the merits" to determine whether the agency acted "clearly beyond the boundaries of its authority." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 234 (4th Cir. 2008) (quotation omitted). That is all that is needed to confirm that the EPA Power Plan is unsustainable as a matter of law because Defendants lack authority to regulate at all. And such review is necessary here because Oklahoma has no other adequate and meaningful prospect for relief. The D.C. Circuit's decision in *Murray Energy* that lack of finality precluded it from granting relief under Section 307 of the Clean Air Act only reinforces the need for review by this Court, without undermining in any way Oklahoma's entitlement to relief, given that Oklahoma's claims do not depend on that review provision. *See infra* § II.B.5.

In sum, this Court has the authority and the responsibility to check Defendants' *ultra vires* actions and thereby relieve Oklahoma's ongoing injuries. Oklahoma respectfully requests nothing more in this suit than that the Court exercise that authority to enforce the Clean Air Act and Constitution and thereby vindicate Oklahoma's legal rights.

Argument

I. This Court Has Jurisdiction Pursuant to 28 U.S.C. § 1331

This Court has jurisdiction over Oklahoma's claims because they are "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Specifically, Oklahoma's claims allege that Defendants' actions to compel States like Oklahoma to reorganize their energy economies violate both the Clean Air Act and the U.S. Constitution's prohibitions on commandeering and coercion of States and their officials. *See* Compl. ¶¶ 73–75 (claim seeking declaratory relief for violation of Clean Air Act and Constitution); *id.* at ¶¶ 76–80 (claim seeking injunctive relief for same).

Nothing more is required to support federal question subject-matter jurisdiction. "[W]here the complaint…is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court…*must* entertain the suit." *Bell v. Hood*, 327 U.S. 678, 681–82 (1946) (emphasis added). *Accord Verizon Md., Inc. v. Pub. Serv. Com'n of Md.*, 535 U.S. 635, 642–43 (2002) ("'[T]he district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'") (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231–32 (10th Cir. 2005) (holding that prisoner's claim "easily meets the basic requirements of federal question jurisdiction" where he alleged deliberate indifference by prison dentists in violation of Eighth Amendment).

Where, as here, a plaintiff has alleged a claim arising under federal law, "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 666 (1974)). In other words, dismissal for lack of jurisdiction is warranted only when "'a

claim is wholly insubstantial and frivolous,'" and cannot be justified merely "'by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.'" *Id.* (quoting *Bell*, *supra*). *See also Planned Parenthood of Kan. and Mid-Mo. v. Moser*, 747 F.3d 814, 832 (10th Cir. 2014) ("jurisdiction required only an arguable, not a valid, cause of action"). *Cf. Bell*, 327 U.S. at 682 ("If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."). Here, Oklahoma's "non-statutory" claims are neither "conclusory" nor "made solely for the purpose of obtaining jurisdiction" over matters that would otherwise be heard in state court, *Gillmor v. Thomas*, 490 F.3d 791, 797 (10th Cir. 2007) (quotation omitted), and they are (as shown below) far stronger than merely "arguable," the minimum required to support jurisdiction. *Planned Parenthood*, *supra*.

Accordingly, the Court's jurisdiction to hear Oklahoma's claims is secure.

II. The Complaint States a Proper Cause of Action Upon Which Relief May Be Granted

Of course, in addition to filing suit in a court of competent jurisdiction, "a plaintiff must also state a claim upon which relief may be granted, what used to be called stating a cause of action." *Simmat*, 413 F.3d at 1231. Oklahoma's complaint does so, relying on this Court's well-recognized inherent equitable authority to prevent violations of constitutional rights and enjoin *ultra vires* actions by federal officials.

A. Relief Is Available for Oklahoma's Constitutional Claims

"Federal courts have long exercised the traditional powers of equity, in cases within their jurisdiction, to prevent violations of constitutional rights." *Id.* (citing cases). As then-Circuit Judge Michael McConnell explained: "Section 1331…provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law. No more specific statutory basis is required" to state a cause of action. *Id.* at 1232. On that basis, plain-

tiffs "may obtain relief in the nature of…injunction" to vindicate their constitutional rights. *Id.* at 1236. *See also Cmty. Action of Laramie Cnty., Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989) ("[F]ederal courts must be prepared to insure that governmental agencies have not surpassed constitutional boundaries in selecting a course of action."); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987) ("[E]ven where agency action is committed to agency discretion by law, review is still available to determine if the Constitution has been violated.") (quotation omitted); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (Alito, J.) ("The power of the federal courts to grant equitable relief for constitutional violations has long been established."). The Supreme Court reaffirmed the availability of such relief just a few months ago in *Armstrong v. Exceptional Child Center, Inc.*: "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. It is a judge-made remedy…." 135 S. Ct. 1378, 1384 (2015) (citation omitted). That remedy is available here and comfortably supports Oklahoma's claims of constitutional violation by Defendants.[1]

B. Relief Is Available for Oklahoma's *Ultra Vires* Claims

Likewise, federal courts have long exercised their traditional equitable powers to check agency action in excess of statutory authority. "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Stark*

[1] While Tenth Circuit law is clear that district courts have authority to enjoin federal actors' constitutional violations, in the usual case involving pre-enforcement or pre-finalization review, doctrines apart from jurisdiction and the availability of relief will often preclude adjudication. These include: standing, ripeness, and traditional equitable considerations, such as the availability of relief in another forum. *See also Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949) (recognizing jurisdiction to adjudicate constitutional claims raised prior to final agency action so long as it is "not transparently frivolous."). *Accord Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973); *S. Ohio Coal Co. v. OSMRE*, 20 F.3d 1418, 1425 (6th Cir. 1994).

v. Wickard, 321 U.S. 288, 310 (1944). And so "'[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.'" *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (quoting *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988)). It is therefore black-letter law that "a plaintiff may secure judicial review when an agency exceeds the scope of its delegated authority or violates a clear statutory mandate." *Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002) (quotation omitted). *See also Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 768 (10th Cir. 1981). Such review is available where a plaintiff lacks "a meaningful and adequate means of vindicating" its federal rights and Congress has not acted to rebut the presumption in favor of judicial review. *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43–44 (1991). Review is available here because: (1) Defendants' actions are plainly in excess of statutory authority, raising a question of pure law; (2) Congress has not clearly expressed its desire to foreclose judicial review; and (3) without immediate judicial review, Oklahoma will be left with no "meaningful" or "adequate" remedy to enforce Congress's limitation on the reach of the agency's authority. *See id.* at 43.

1. "Non-Statutory" Equitable Relief Exists To Vindicate Statutory Rights by Enjoining *Ultra Vires* Agency Action

"Non-statutory" review is typically associated with *Leedom v. Kyne*, 358 U.S. 184, 190 (1958), which relied on longstanding authority concerning federal courts' equitable powers[2] to uphold a district court order enjoining non-final action by the National Labor Relations Board ("NLRB") in the absence of any available statutory cause of action. The Board had certified a bargaining unit containing both professional and non-professional workers, in violation of an explicit statutory requirement that nonprofessional employees could be included only upon affirmative vote of the professionals. *Id.* at 185. In a prior decision, *American Fed-*

[2] *See infra* n.3.

eration of Labor v. NLRB, 308 U.S. 401 (1940), the Court had held that a certification order was not a "final order" subject to judicial review under the National Labor Relations Act's statutory cause of action.

But this case was different, the Court concluded, because the plaintiffs alleged *ultra vires* agency action that was specifically prohibited on the face of the statute and Congress had not acted to rebut the presumption that such actions would be subject to judicial review. *Id.* at 188–89. Specifically, the Court held that *ultra vires* claims are not properly characterized as a claim to "review" agency action, but instead, present a claim that tests the legal authority of the agency to act *ab initio*. *Id.* at 188. And when an authorizing statute withholds an exercise of power from an agency, federal courts have a duty to enforce congressional will and may not "ignore[]" or "override[]" Congress's intent to limit an agency's authority but must enforce it using the courts' equitable power. *Id.* at 189. The Court could not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. Under these circumstances—plainly *ultra vires* agency action that falls outside of any statutory provision for judicial review—the district court properly entertained the suit and enjoined the agency. *Id.* at 191.[3]

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[3] *Leedom* broke no new ground, but instead relied on established principles of equity that the Court had applied in previous cases decided prior to enactment of the Administrative Procedure Act. *See* John Preis, In Defense of Implied Injunctive Relief in Constitutional Cases, 22 Wm. & Mary Bill Rts. J. 1, 52–53 (2013) (discussing relationship between *Leedom* and the APA). It discussed three of them. In *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 568 (1930), the Court rejected the contention that a statutorily conferred right to be free from employer coercion was unreviewable merely because no statute provided for its redress, stating that "the courts would encounter no difficulty" in enforcing a statutory prohibition. The Court rejected a similar contention in *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 550–53 (1937), holding that a district court properly exercised its equity powers to compel negotiations between an employer and a labor union when the governing statute provided no remedy for failure to negotiate. And in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 300 (1943), the Court recognized that, in the absence of statutory review, "the general jurisdiction of the federal courts" provides a "remedy to enforce the statutory commands which Congress had

Importantly, equitable power to review an *ultra vires* claim against an agency was available despite that the union could have waited to proceed under the Act's review provisions, which authorize judicial review of "final" NLRB orders in an unfair labor practice proceeding. The Supreme Court agreed with the D.C. Circuit's view that such *ex post* relief was "too remote and conjectural to be viewed as providing an adequate remedy." 249 F.2d 490, 492 (1957). Notwithstanding the availability of statutory review, the Supreme Court recognized that the union and its members had "no other means, within their control, to protect and enforce" the statute's express limitation on agency authority. 358 U.S. at 190 (citation omitted).

Thus, as the Fourth Circuit explained in a decision surveying the applicable case law, *Leedom* recognizes a "non-statutory" cause of action that is an exception to the "finality requirement in cases in which agencies act outside the scope of their delegated powers and contrary to clear and mandatory statutory prohibitions." *Long Term Care Partners*, 516 F.3d at 233 (quotation omitted). Such review is appropriate "where there is a 'strong and clear

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written into the Railway Labor Act." *See also Leedom*, 358 U.S. at 189–90 (discussing the *Switchmen's* case).

And those decisions, as well, were not novel. *See, e.g.*, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109–10 (1902) (enjoining, absent statutory remedy, *ultra vires* refusal of Postmaster General to mail letters); *ICC v. Diffenbaugh*, 222 U.S. 42, 46 (1911) (enjoining, in the absence of statutory review authority, Interstate Commerce Commission actions that rested on the agency's misapprehension of its statutory authority); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562 (1919); *Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n*, 306 U.S. 56, 60 (1939) (regarding threatened agency action, stating: "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity."); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 182–84 (1938) (declaring, although agency determination did not constitute an "order" subject to statutory review, that it was nonetheless subject to judicial review by bill in equity). *See generally Simmat*, 413 F.3d at 1231–33 (discussing the history of district courts' use of equitable powers to enjoin violations of federal law).

demonstration that a clear, specific and mandatory statutory provision has been violated.'" *Id.* at 234 (alteration omitted) (quoting *Newport News Shipbuilding and Dry Dock Co. v. NLRB*, 633 F.2d 1079, 1081 (4th Cir. 1980)). "When a party invokes *Leedom*…, we conduct a 'cursory review of the merits' to determine if the agency acted 'clearly beyond the boundaries of its authority.'" *Id.* (quoting *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 186 (4th Cir. 1988)). *See also Champion Int'l*, 850 F.2d at 186 ("*Leedom v. Kyne* requires that a federal court ascertain whether an administrative agency is acting within its authority…."); Charles Wright et al., 33 Fed. Prac. & Proc., § 8397 ("[A] court must make a cursory review of the merits to determine if the agency clearly acted beyond its authority."). The Tenth Circuit has applied *Leedom* in precisely that manner in cases challenging allegedly *ultra vires* agency action. *See Stipo*, 658 F.2d at 768 (reviewing whether Army Corps district engineer "exceeded his statutory authority" in letter stating that local permit would be required to commence construction, despite that project never applied for, and was never denied, such a permit).

In the years since *Leedom*, the Supreme Court has regularly entertained non-statutory claims challenging *ultra vires* agency action. *See, e.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16–17 (1963) (holding that NLRB exceeded its statutory authority when it claimed "power to determine the representation of foreign seamen aboard vessels under foreign flags"); *Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Emps.*, 380 U.S. 650, 654 (1965) (reviewing whether National Mediation Board failed to perform a statutory duty to "investigate" a representation dispute); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) (deciding pre-enforcement claim for equitable relief concerning agency statutory power and stating, "a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"). In two cases, the Supreme Court allowed judicial review of *ultra vires* claims against local Selective Service Boards, despite the fact that there

had been no final action by the Boards to induct the plaintiffs, and the plaintiffs could have challenged the legality of the Boards' decision by either defying induction and being criminally prosecuted therefore, or by seeking a writ of *habeas corpus* post-induction. *See Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 238 (1968) (finding jurisdiction to consider draft board's statutory authority to deny exemption to theological students on ground that case "involves a clear departure by the Board from its statutory mandate" and no fact questions); *Breen v. Selective Serv. Local Bd. No. 16*, 396 U.S. 460 (1970) (same, regarding power to deny statutorily conferred deferment). The Court explained that when an agency acts in an *ultra vires* "lawless manner," in a "clear departure…from its statutory mandate," waiting for typical agency "finality" is not only inherently unnecessary, but would serve to exacerbate and encourage agency lawlessness. *Oestereich*, 393 U.S. at 237–38.

The courts of appeals also regularly entertain such non-statutory claims, including in cases involving questions of EPA's statutory authority. For example, *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549, 555–56 (2d Cir. 1978), reversed a district court decision declining to consider—well in advance of any final agency action—whether EPA had statutory authority to regulate particular power plants' water discharges. Citing the legal nature of the question and the fact that EPA's proposed permits would cause utilities to incur hundreds of millions of dollars in capital and operating costs, all of which would be passed on to consumers, the court identified the utilities' challenge as "one of the rare cases in which a district court appropriately interrupts agency action on the ground that the agency is acting outside its statutory authority." *Id.* at 555 (quotation omitted). This was so despite a Clean Water Act statutory review provision (analogous to those of the Clean Air Act) placing exclusive jurisdiction over decisions issuing or denying permits in the courts of appeals. The Second Circuit recognized that this provision would only kick in "once the EPA's action has run its full course," rendering earlier review "desirable" to avoid unnecessary "waste and de-

lay": "If an administrative agency conducts proceedings over which it lacks jurisdiction, and the courts ultimately declare the proceedings a nullity, then the loss of time and expense to both the government and the defending party can be substantial." *Id.* at 556–57.[4]

In sum, when an agency runs roughshod over limitations on its statutory authority, federal district courts are not powerless to act; they are, instead, obligated to vindicate the rights of those injured by the agency's actions.

2. Oklahoma's Claims Allege That Defendants' Actions Are *Ultra Vires*, Violating "Clear and Mandatory" Provisions of the Clean Air Act

Oklahoma's statutory claims fit comfortably within the *Leedom* doctrine because they challenge EPA's asserted authority under three specific provisions of the Clean Air Act, without raising questions of fact or challenging matters committed to the agency's discretion.

First, Oklahoma challenges Defendants' *ultra vires* assertion of authority to carry out this regulatory scheme in any form in the face of a specific statutory bar. Congress could not have stated more clearly that EPA may not require States to issue "standards of performance for any existing source for any air pollutant…emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d)(1)(A)(i). EPA promulgated Section 112 regu-

[4] *See also Champion Int'l*, 850 F.2d at 185–86 (finding that the district court had authority "to entertain the suit under *Leedom* to the extent that it properly inquired whether the EPA had exceeded its delegated authority" under the Clean Water Act) (citation omitted); *Friends of Crystal River v. EPA*, 35 F.3d 1073, 1079 (6th Cir. 1994) (upholding injunction of EPA's transfer of permitting authority to a state, prior to "final" issuance of permit, "where the EPA has allegedly abandoned its supervisory role" in violation of statutory requirement). In recent years, the courts of appeals have entertained *Leedom* actions against, among others, the U.S. Postal Service, *Lutherans*, 321 F.3d at 1172–73; the Department of Labor, *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1327–28 (D.C. Cir. 1996); and the Occupational Safety and Health Administration, *Rhode Island Department of Environmental Management v. United States*, 304 F.3d 31, 42–43 (1st Cir. 2002).

lations for electric utility generating units—that is, power plants—in 2012.[5] Defendants therefore lack authority to require emissions standards for power plants. This question of agency authority is no different than those considered in *Central Hudson*, *Stipo*, or *Leedom* itself, in that it concerns the scope of Defendants' authority—as manifest on the face of the statute—rather than how they have chosen to exercise their authority.

Second, Oklahoma challenges Defendants' *ultra vires* assertion of authority to establish emission standards that EPA acknowledges must be achieved on an economy-wide basis, rather than through measures that can be achieved at the regulated facilities whose emissions are the subject of Section 111(d) standards. Defendants assert that "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111 and thereby claim regulatory authority over anything that is connected to a power plant through the electrical grid—in other words, every facility or device that draws electricity. 79 Fed. Reg. 34,830, 34,886/1 (June 18, 2014). That Congress denied Defendants this unbounded power is plain on the face of the statute, which contradicts Defendants' assertion of authority in a half-dozen separate ways, including language that limits Defendants' authority to the "existing sources" subject to regulation and language that specifically references source-based measures. *See* PI Br. at 13–17 (discussing statutory features). Again, the question for the Court is whether Defendants have disregarded plain limitations on the scope of their authority.

Third, Oklahoma challenges Defendants' decision to ignore Section 111(d)'s clear requirement that States, in applying performance standards, have authority "to take into con-

[5] Those regulations remain in force following the Supreme Court's decision in *Michigan v. EPA*, __ S. Ct. __, Nos. 14–49, 14–47, 14–49, 2015 WL 2473453 (June 29, 2015), which remanded the case to the D.C. Circuit rather than vacating the regulations. The D.C. Circuit's usual practice, in similar cases, is to remand a non-fatally defective rule to the agency, to give it an opportunity to cure the defect, while allowing the rule to remain in effect. *E.g.*, *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 746 F.3d 474, 493 (D.C. Cir. 2014).

sideration, among other factors, the remaining useful life of the existing source to which such standard applies." § 7411(d)(1)(B). By mandating the achievement of state-wide reduction targets by certain dates, Defendants' EPA Power Plan unlawfully deprives States of the authority to vary the application of a performance standard to particular sources. Once again, Oklahoma's claims are appropriate for review because they do not challenge the manner in which Defendants have exercised authority, but whether they have authority at all—in contravention of specific statutory language—to deny States the ability to vary the application of standards based on sources' remaining useful lives.

What these statutory issues have in common is that even a "cursory review of the merits," *Long Term Care Partners*, 516 F.3d at 234 (quotation omitted), will suffice to reject the agency's assertion of authority. And certainly such review will have the desirable feature, as in *Central Hudson*, of avoiding substantial waste and delay, not to mention irreparable injury to Oklahoma.

3. Clean Air Act Section 307 Does Not Rebut the Basic Presumption of Judicial Review

There is no indication that Congress intended to foreclose judicial review in cases such as this one. "[O]nly upon a showing of clear and convincing evidence of…legislative intent [to rebut 'the basic presumption of judicial review'] should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 140–41. Notwithstanding Congress's power to "shield[] even the most patent deviation from statutory scheme from judicial redress where the Constitution is in no wise implicated," the "courts have assumed it less likely that Congress intended to prohibit review of a claim that the activities of an agency are facially invalid than of 'the numerous discretionary, factual, and mixed law-fact determinations' normally underlying an agency's decisionmaking process." *Ralpho v. Bell*, 569 F.2d 607, 622 (D.C. Cir. 1977) (quoting *Oestereich*, 393 U.S. at 240 (Harlan, J., concurring)). Because this assumption reflects both a reluctance to license "free-wheeling agencies meting out their own brand of

justice" and "a nice appreciation, presumably shared by Congress, that courts of law possess peculiar expertise in statutory interpretation," a court must look "to see how far Congress desired to muzzle the courts and unleash the agency, and will normally disregard basically lawless agency action only when clearly instructed to do so." *Id.* (quotations omitted). Such review is available "[i]f the wording of a preclusion clause is less than absolute." *Dart*, 848 F.2d at 221.

In this regard, when Congress has sought to preclude such review, it "has spoken clearly and directly: '[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [agency] notice or order under this section.'" *MCorp*, 502 U.S. at 44 (quoting review-preclusion language in Financial Institutions Supervisory Act) (distinguishing *Leedom* on that basis). By contrast, the Supreme Court has specifically rejected the argument "that a statutory provision that provide[s] for judicial review implie[s], by its silence, a preclusion of review of the contested determination." *Id.* (distinguishing *Leedom* on that basis). *See also Abbott Labs.*, 387 U.S. at 141 ("The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.") (quotation and citation omitted); *Verizon*, 535 U.S. at 643–44; *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 674 (1986).

Section 307 is nowhere near so absolute as to rebut the presumption that judicial review remains available. Section 307(b)(1), 42 U.S.C. § 7607(b)(1), provides for review of certain "final" actions in the D.C. Circuit, but is silent on a court's inherent equitable authority to decide cases or controversies under the Act that are not final actions—just like the review provisions cited in *Central Hudson* and *Leedom* itself.

Section 307(e)'s provision that "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section," 42 U.S.C. § 7607(e), limits only express or implied rights of action

under the Clean Air Act, not preexisting grants of equitable power as have always been recognized under 28 U.S.C. § 1331. In this regard, Section 307(e) precludes litigants from using Section 304 citizen suits (provided elsewhere in the chapter, at Section 304) to circumvent the Section 307(b) review process, but does not purport to limit non-statutory challenges—which are never "authorize[d]" by statute—in any fashion.[6]

In sum, nothing in Section 307 evinces any intention on the part of Congress to preclude non-statutory review.

4. Without Immediate Review, Oklahoma Will Have No Meaningful or Adequate Remedy To Enforce the Limitations Congress Placed on Defendants' Authority

Oklahoma brought this suit because Defendants' actions are seriously and irreparably injuring it and it has no other prospect for relief. In Oklahoma's view, there can be no serious argument that Defendants' EPA Power Plan is authorized by the Clean Air Act; instead, the whole point is to force States and utilities to make irreversible decisions that advance Defendants' policy preferences, *irrespective of the lawfulness of doing so*. This is why non-statutory review is both necessary and sufficient: even a mere "cursory review of the merits" should be enough for the Court to see that Defendants' actions are "basically lawless" and put a stop to them. Unless and until the Court does so, the State of Oklahoma will continue to suffer ongoing irreparable injury, as described in detail in Oklahoma's preliminary injunction brief (at 3–5, 25–27). *See also* Declaration of Brandy Wreath, Director, Public Utility Divi-

[6] The legislative history confirms as much. Prior to the Clean Air Act Amendments of 1977, the Administrative Conference of the United States recognized that "non-statutory review action[s]" could be brought challenging actions under the Clean Air Act and suggested that Congress require such suits to comply with the notice requirement applicable to citizen suits—a suggestion that Congress did not follow. Administrative Conference of the U.S., Recommendation 76-4, at 3, 5 (adopted Dec. 9–10, 1976), 21 Legislative History of the Clean Air Act Amendments of 1977, at 4230, 4232–33 (Arnold & Porter 1977–1980), *also available at* https://www.acus.gov/sites/default/files/documents/76-4-ss.pdf.

sion, Oklahoma Corporation Commission, at ¶¶ 2–15 (describing burdens on State and State officials). Worse, Oklahoma's injuries will balloon when Defendants issue a final rule, which they have committed to do in August, as utilities and other parties begin finalizing investment decisions that will affect the State for decades into the future.

The eventual availability of review of that final action pursuant to Section 307(b) offers Oklahoma no prospect for relief of the injuries—including expenditures of taxpayer dollars and officials' time and effort—that it is suffering now and will continue to suffer for the foreseeable future. By way of comparison, consider the timeline for review of EPA's Section 112 "Mercury Rule," which was recently held to be unlawful by the Supreme Court. *Michigan v. EPA*, __ S. Ct. __, Nos. 14–46, 14–47, 14–49, 2015 WL 2473453 (June 29, 2015). That rule—targeting the same community of sources—was signed by Defendant McCarthy's predecessor and posted on the agency's website on December 16, 2011.[7] It was published in the *Federal Register* 62 days later, on February 16, 2012. 77 Fed. Reg. 9,304 (Feb. 16, 2012). That publication made the rule "final," triggering Section 307(b) judicial review. Numerous parties filed petitions for review, which were consolidated by the D.C. Circuit. After months of procedural wrangling with EPA and its supporting intervenors—including seemingly endless disputes over the timing and format for briefing—the court granted the petitioners' motion to expedite their challenges on June 28, 2012. "Expedite," of course, is a relative term, and the briefing schedule stretched into October 2012. Oral argument followed on December 10, 2013—about two years after the rule was issued—and the court filed an opinion in the case (denying all relief) on April 15, 2014—some 851 days after the rule was issued. It took another 15 months for the Supreme Court to reverse that decision. *Michigan*, *supra*.

[7] *See* EPA, Fact Sheet: Mercury and Air Toxics Standards for Power Plants, *available at* http://www.epa.gov/mats/pdfs/20111221MATSsummaryfs.pdf.

If one assumes—perhaps optimistically—that the D.C. Circuit could undertake expedited stay proceedings in one-third of the time (a mere 280 or so days), then Oklahoma's ongoing injuries will continue for another 330 days (50 days until the rule is signed, plus the 280 days for the D.C. Circuit to act). In other words, absent non-statutory review, Oklahoma has no prospect of obtaining any relief for about a year and will continue to accrue *per se* irreparable injury during that time. Meanwhile, it will be forced to invest additional time and money to challenge Defendants' actions in the D.C. Circuit. A substantial portion of Oklahoma's injuries can be avoided now, but only if this Court exercises its jurisdiction to review Defendants' *ultra vires* actions.

In that respect, the present case finds a close parallel in the reasoning of two court of appeals decisions, *Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970), and *PepsiCo, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972). In *Jewel Companies,* the plaintiff sought to enjoin the FTC from conducting proceedings against it pursuant to the Clayton Act, alleging that the FTC was acting *ultra vires.* 432 F.2d at 1157. Although the FTC Act vests jurisdiction to review final FTC orders in the federal court of appeals, the Seventh Circuit ruled that the district court had jurisdiction to adjudicate plaintiff's *ultra vires* claims against FTC's non-final, ongoing Clayton Act proceedings. *Id.* at 1158. Specifically, the Seventh Circuit concluded that the inherently legal nature of *ultra vires* claims rendered postponement of their consideration until "final" agency action inappropriate because the legal authority of an agency "can be determined by the courts without delay" and thus "the proper approach is to allow such inherently legal attacks prior to an agency's final order." *Id.* at 1159. This rationale echoes the efficiency justification for *Leedom* review articulated by the Second Circuit in *Central Hudson*, 587 F.2d at 556 ("If an administrative agency conducts proceedings over which it lacks jurisdiction, and the courts ultimately declare the proceedings a nullity, then the loss of time and expense to both the government and the defending party can be substantial. Thus, it may be

desirable, at least where the proceedings are expected to be lengthy and the jurisdictional dispute is substantial, to have some form of judicial review of the jurisdictional issue at an early stage of the proceedings.").

Similarly, in *PepsiCo*, the plaintiffs challenged a Federal Trade Commission proceeding accusing PepsiCo of hindering competition in the distribution and sale of soft drink syrups and drinks by entering into typical territorial-exclusivity contracts with its bottlers. 472 F.2d at 182. In an opinion by Judge Henry Friendly, the court explained that an agency's "refus[al] to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law" could be challenged where the agency's actions implicate "enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *Id.* at 187. In that instance, immediate review would be available because targets of such action "should not be placed under that threat in a proceeding that must prove to be a nullity," as they would be if forced to wait for "final" agency action. *Id.*

That is exactly the threat that Oklahoma now faces due to Defendants' conduct of a regulatory proceeding that is plainly beyond their legal authority. In fact, even worse than in *PepsiCo*, Defendants' actions are already inflicting serious and irreparable injuries on Oklahoma. In these circumstances, waiting many months for the inevitable ruling that Defendants' actions are unsupported by law is no meaningful or adequate opportunity for relief. If Oklahoma is forced to wait for Defendants to finalize their EPA Power Plan and then wait for the D.C. Circuit to act on petitions to review, it will suffer additional and increasing harm with each passing day. The most efficient and equitable path is to stop the EPA's *ultra vires* assertion of authority in its tracks now, before it becomes a final rule and Plaintiffs are required to spend many more months and tax dollars to accommodate the EPA's unlawful demands.

5. *Murray Energy* Supports Review by This Court

The D.C. Circuit's decision in Murray Energy confirms the availability of relief in this Court, rather than casting its jurisdiction or remedial power in doubt. The D.C. Circuit has exclusive statutory authority to review "nationally applicable" "final action" under the Clean Air Act. 42 U.S.C. § 7607(b). In *Murray Energy*, it held that neither that statutory authority, nor the All Writs Act, allow it to review the EPA Power Plan because the agency has not deemed it "final." *In re Murray Energy Corp.*, __ F.3d __, Nos. 14–1112, 14–1151, 14–1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015). Notably, the court did not grant EPA's motion to dismiss for lack of jurisdiction, but instead denied the petitions on the merits, *see id.* at *1, 4, consistent with the view that finality is not a jurisdictional matter. *See Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (discussing Section 307 and citing cases). Instead, the court held that the lack of finality precluded the court from granting relief under Section 307 or the All Writs Act.

Had the D.C. Circuit decided otherwise, Oklahoma would have had an opportunity for adequate relief in the D.C. Circuit at this time, undermining the basis for this Court's exercise of its equitable authority within its Section 1331 jurisdiction. But the D.C. Circuit's denial of the *Murray Energy* petitions for lack of final agency action means that Oklahoma lacks any other adequate opportunity for relief from Defendants' *ultra vires* actions, rendering this Court's review appropriate.

III. Defendants Have No Claim to Sovereign Immunity

Sovereign immunity is no bar to the relief that Oklahoma seeks in this suit. The "*ultra vires* doctrine" has long permitted "suits for prospective relief when government officials act beyond the limits of statutory authority or when the statute from which government officials derive their authority is itself unconstitutional." *Simmat*, 413 F.3d at 1233 (discussing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)). But were there any doubt, Congress in 1976 acted to waive sovereign immunity for nonmonetary claims like Oklahoma's

alleging "that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. As the Tenth Circuit has held, this provides "a general waiver of the government's sovereign immunity from injunctive relief." *United States v. Murdock Mach. & Eng'g Co.*, 81 F.3d 922, 929 n.8 (10th Cir. 1996). *See also Gilmore v. Weatherford*, 694 F.3d 1160, 1166 n.1 (10th Cir. 2012).

IV. Oklahoma's Claims Are Ripe

Judicial review at this time is appropriate based on "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149.[8] *Accord Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 741 (10th Cir. 1982) (applying *Abbott's* two-part test).

"In determining whether an issue is fit for judicial review, the central focus is on 'whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (quoting Charles Wright et al., 13B Federal Prac. & Proc., § 3532). Per *Abbott*, a question is fit for judicial decision when it "is a purely legal one," without recourse to factual terms that might vary in yet-to-conclude proceedings. 387 U.S. at 149. The issues presented here are purely legal, concerning Defendants' determination that they possess the authority under Section 111(d) of the Clean Air Act to regulate power plants' greenhouse gas emissions by setting enforceable statewide targets for reduction, notwithstanding the statutory and constitutional bars described above to doing so. And this matter is in no way contingent, as the conflict between EPA's interpretation of Section 111(d) and what Congress actually legislated precludes EPA from promulgating a valid final order, and

[8] *Abbott* is the Supreme Court's "leading discussion of the doctrine" of ripeness as applied to judicial review of administrative action. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

public statements of Defendant McCarthy evidence her prejudgment that EPA will promulgate an "outside-the-fenceline" program that commandeers and coerces states.[9] Thus, Oklahoma is not challenging the particulars of Defendants' regulatory scheme, but Defendants' authority to proceed at all—just like in *Central Hudson*, *Leedom*, and other non-statutory challenges to agency authority.

In addition, any "ripeness challenge fails here because the Plaintiffs' alleged injury is already occurring." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006). *Walker* rebuffed a ripeness challenge to a supermajority requirement for wildlife initiatives on the ground that the very existence of the requirement, even though the plaintiffs had not yet participated in a ballot initiative drive, chilled their exercise of their rights. *Id.* The same logic applies with even greater force here, given the concrete injuries, described above, that Defendants' actions currently inflict on the State of Oklahoma.

The hardship to Oklahoma of withholding consideration is equally apparent, because Defendants' actions have "a direct and immediate impact" on Oklahoma, requiring its officials to act and the expenditure of substantial resources to accommodate the reorganization of its energy economy. *Rocky Mountain Oil*, 696 F.2d at 741. Moreover, the Supreme Court has recognized that hardship may be presumed with respect to administrative actions like Defendants' that affect utility-sector investments. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201–02 (1983) ("[F]or the utilities to proceed in hopes that, when the time for certification came, either the required findings would be made or the law would be struck down, requires the expenditures of millions of dollars over a number of years, without any certainty of recovery if certification were denied. The construction of new

[9] *See, e.g.*, The Fiscal Year 2016 EPA Budget: Hearing Before the H. Comm. on Energy & Commerce at 2:04:45–2:06:20 (Feb. 25, 2015), *available at* http://www.c-span.org/video/?324543-1/administrator-gina-mccarthy-testimony-epa-fiscal-year-2016-budget.

nuclear facilities requires considerable advance planning—on the order of 12 to 14 years. Thus, as in the *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1975), 'decisions to be made now or in the short future may be affected' by whether we act.") (footnotes omitted). This is precisely the kind of hardship that Oklahoma faces: the State and its utilities are forced to make investment and planning decisions now that will affect the State's energy markets, as well as the State's regulatory responsibilities, for decades into the future.

"Once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act." *ANR Pipeline Co. v. Corp. Comm'n of State of Okla.*, 860 F.2d 1571, 1578 (10th Cir. 1988). At base, Oklahoma's suit is ripe because it seeks to protect the State from further certain harm.

Conclusion

Oklahoma's claims are proper ones for this Court to decide. Defendants' actions to advance their EPA Power Plan are legally unsupportable, violating at least three specific limitations on Defendants' statutory authority as well as Oklahoma's constitutional rights. The concerns of equity and the interests of justice require that the Defendants be enjoined from continuing in their scheme to achieve by force what is denied to them by law, and this Court has the necessary authority to provide that relief.

Dated: July 8, 2015

Respectfully submitted,

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I hereby certify that on July 8, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Oklahoma by using the Court's ECF system. Service was accomplished on the following by the ECF system:

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Exhibit A54

Scott Pruitt

July 25, 2015 ·

"The EPA is unlawfully coercing Oklahoma and other states into complying with the Clean Power Plan before the rule is even finalized"

State's attorney general files appeals over Clean Power Plan

State governments, including Oklahoma, contend the EPA's yet-to-be-finalized Clean Power Plan could deplete state resources while driving energy bills higher.

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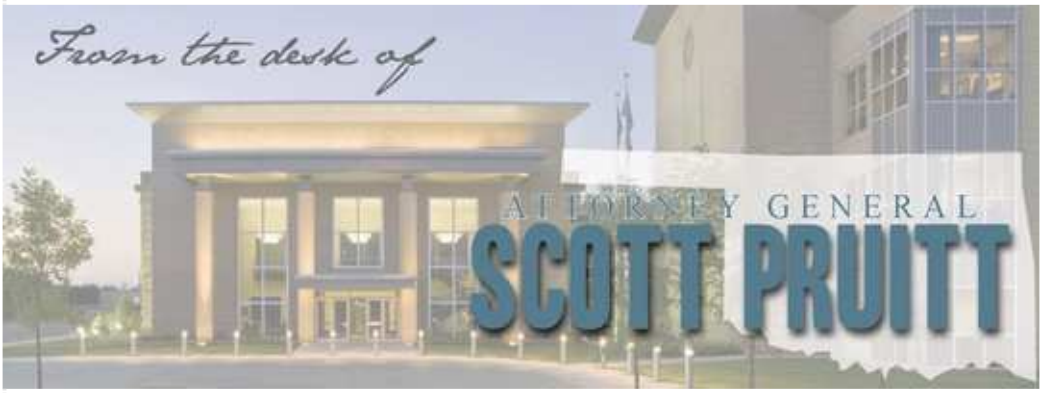
Exhibit A55

ISSUE NUMBER FORTY-THREE • July 27, 2015



Last week I filed an appeal asking a federal court to take up Oklahoma's lawsuit against the EPA's Clean Power Plan. I remain firm in believing the proposed plan forces our state into fundamentally restructuring the generation, transmission and regulation of electricity in a way that will threaten the reliability and affordability of power in the state. An article from the Oklahoman is included in this newsletter and goes into detail on why I believe it is crucial the court takes this case up now, before the Clean Power Plan goes into effect.

Also below, you'll find a picture of an award I received from the Oklahoma Cattlemen's Association. I want to thank the OCA for honoring me with the Distinguished Service Award. This is a group of ranchers who know first-hand the consequences of an overreaching EPA. I am thankful for their continued support and look forward to working with them as we work to protect the private property of Oklahomans as part of our lawsuit against the EPA's Waters of the U.S. plan.

Have a blessed week,

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Cattlemen's Association Recognizes AG Pruitt with Service Award

This weekend, the Oklahoma Cattlemen's Association recognized AG Pruitt with the Distinguished Service Award.

Read more from the Lawton Constitution

Attorney General Pruitt Files Medicaid Fraud Charges Against Health Care Provider

Attorney General Scott Pruitt announced Tuesday Medicaid fraud charges against a Tulsa woman for billing for services that were never provided.

Mavis Floydneka Owens, 33, was employed through the Consumer Directed Personal Assistance Services and Supports (CD-PASS) program as an in-home health care provider for an elderly stroke victim. ...Read more »

Attorney General Pruitt Charges Rehab Specialist for Medicaid Fraud, Identity Theft

Attorney General Scott Pruitt on Friday filed one felony count of each Medicaid fraud and identity theft against an Oklahoma City behavioral health specialist.

Timothy Nickalas Traylor, 35, of Oklahoma City, allegedly billed the Oklahoma Health Care Authority for 56 phony sessions between October 2011 and October 2013 while working for Pennington Creek....Read more »

IN THE NEWS:

The Oklahoman | State's attorney general files appeals over Clean Power Plan

Oklahoma Attorney General Scott Pruitt isn't taking no for an answer when it comes to the state's legal cases against the yet-to-finalized Clean Power Plan for electric generating plants.

Judges at the appellate level and the district court level have tossed out Pruitt's lawsuits against the...Read more »

Marine Corps Times | Lawmakers call on military high court to hear religious freedom case

Battle lines are forming over whether a Marine veteran's appeal for her religious freedom should be heard by the nation's highest military court.

In mid-July, 42 members of Congress called for the Court of Appeals for the Armed Forces to hear former Lance Cpl. Monifa Sterling's argument that her February 2014 court-martial should be overturned....Read more »

Pauls Valley Democrat | Religion, water, really big issues

Protecting religious freedom and water rights clearly has the attention of an Oklahoma state official making Garvin County visits this week.

Making stops in Pauls Valley and Maysville on Thursday, Oklahoma Attorney General Scott Pruitt says the recent Oklahoma Supreme Court decision...Read more »

Muskogee Phoenix | State AG's office charges roofing contractor in Muskogee County

Oklahoma Attorney General E. Scott Pruitt's office filed four felony counts of embezzlement and one felony count of pattern of criminal offenses against a man allegedly bilking people out of money by contracting to do...Read more »

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