Nos. 16-8068, 16-8069

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF COLORADO; INDEPENDENT PETROLEUM ASSOCIATION; and WESTERN ENERGY ALLIANCE,
Petitioners-Appellees,

and

STATE OF NORTH DAKOTA;
STATE OF UTAH; and UTE INDIAN TRIBE,
Intervenors-Appellees,

v.

S.M.R. JEWELL; NEIL KORNZE; U.S. DEPARTMENT OF THE INTERIOR; and U.S. BUREAU OF LAND MANAGEMENT,
Respondents-Appellants,

and

SIERRA CLUB; EARTH WORKS; WESTERN RESOURCE ADVOCATES; WILDERNESS SOCIETY; CONSERVATION COLORADO EDUCATION FUND; and SOUTHERN UTAH WILDERNESS ALLIANCE,
Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Wyoming, Nos. 15-CV-41/43,
Honorable Scott W. Skavdahl, District Judge

BRIEF OF PACIFIC LEGAL FOUNDATION AND WYOMING LIBERTY GROUP AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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GLOSSARY

EPA	Environmental Protection Agency
PLF	Pacific Legal Foundation
WOTUS	Waters of the United States

STATEMENT OF INTEREST[1]

PLF is the oldest donor-supported public interest law foundation of its kind. Founded in 1973, PLF provides a voice in the courts for those who believe in limited government, private property rights, balanced environmental regulation, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide. PLF has represented parties in numerous cases involving questions of environmental and constitutional law, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, No. 14-4151 (10th Cir. argued Sept. 28, 2015). PLF has also regularly appeared as amicus, including *Utility Air Regulatory Group v. E.P.A.,* 134 S. Ct. 2427 (2014); *Chamber of Commerce of United States v. U.S. Environmental Protection Agency*,

[1] All parties, through their attorneys, have consented to the filing of this brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than Amici Curiae PLF, Wyoming Liberty Group, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

Nos. 16-5038 & 16-1539 (10th Cir. filed July 7, 2016); *Trout Unlimited v. U.S. Department of Agriculture*, 441 F.3d 1214 (10th Cir. 2006).

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they provide this Court with the chance to protect these fundamental rights through a reaffirmation of constitutional principles of limited and enumerated powers and federalism.

STATEMENT OF THE CASE

It is axiomatic that federal agencies have no power unless Congress delegates it to them. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). They do not have free-roaming power to regulate anything not expressly forbidden them. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009). Instead, the touchstone courts use when evaluating an agency's assertion of rulemaking power is congressional intent—(1) did Congress intend for the agency to resolve the problem or issue addressed by the regulation; and (2) is the agency's resolution reasonable in light of Congress' overall statutory scheme? *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013). This focus on congressional intent also controls how courts interpret apparently broad statutory provisions that confer general rulemaking authority. These provisions are interpreted narrowly when necessary to prevent an agency from regulating where Congress has specifically forbidden regulation under a statute more specifically directed at an issue. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

In this case, the Bureau of Land Management defends a regulation that restricts fracking in order to protect underground drinking water

sources. 80 Fed. Reg. 16,128 (Mar. 26, 2015). Yet Congress, in the Energy Policy Act of 2005, Pub. L. No. 109-58, § 322, 119 Stat. 594, forbade the Environmental Protection Agency (EPA) from regulating fracking to protect these sources under the Safe Drinking Water Act, which is specifically aimed at that purpose. And none of the general land use statutes that the Bureau implements are directed to the protection of underground drinking water. The Bureau nonetheless denies that the Energy Policy Act undermines its claim of authority, because the statute doesn't expressly prohibit it from adopting this regulation. In effect, the Bureau views Congress' effort to restrict agency power as a game of whac-a-mole; if Congress blocks a lead agency's overreaching in a particular area, any other agency—with a novel claim of authority that Congress may not have foreseen—can rise up in its place until Congress knocks it down too. The Bureau's argument is contrary to *Brown & Williamson* and the basic premise underlying administrative law—that agencies only have power if Congress gives it to them—and should thus be rejected.

ARGUMENT

I

OVERREACHING BY ADMINISTRATIVE AGENCIES THREATENS THE SEPARATION OF POWERS

The size and scope of the powers exercised by administrative agencies raise significant constitutional problems. It is no understatement that agencies "wield[] vast power and touch[] almost every aspect of daily life." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). As a consequence, judges and commentators have repeatedly noted that administrative power gives rise to significant constitutional problems, especially if agency bureaucrats are not adequately scrutinized by the political branches and the courts. *See, e.g.*, *City of Arlington*, 133 S. Ct. at 1877-86 (Roberts, J., dissenting) (arguing that excessive deference to federal agencies violates the separation of powers); *Gutierrez-Brizuela v. Lynch*, No. 14-9585, 2016 WL 4436309, at *5 (10th Cir. Aug. 23, 2016) (Gorsuch, J., concurring) (arguing that excessive deference violates the nondelegation doctrine and separation of powers); Philip Hamburger, *Is Administrative Law Unlawful?* (2014) (raising constitutional concerns with the operation of the administrative

state); Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010) (arguing that the expectation of receiving deference leads agencies to behave unlawfully and irresponsibly).

That this accumulation of powers creates constitutional problems should be no surprise. "[T]he administrative state with its reams of regulations would leave [the Constitution's Framers] rubbing their eyes." *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting). Chief among these problems is the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, [which] may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961). The Founders considered the separation of these powers "a vital guard against governmental encroachment on the people's liberties." *Gutierrez-Brizuela*, 2016 WL 4436309, at *5 (Gorsuch, J., concurring).

However, administrative agencies "as a practical matter [] exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulation; and judicial power, by adjudicating enforcement actions and imposing sanctions on

those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, J., dissenting); *see Gutierrez-Brizuela*, 2016 WL 4436309, at *5 (Gorsuch, J., concurring) ("[E]xecutive bureaucracies [] swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."). "The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *City of Arlington*, 133 S. Ct. at 1878 (Roberts, J., dissenting); *see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 524-25 (1989).

In practice, the bureaucrats who hold agency power enjoy significant independence from political oversight, including oversight from the President. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250 (2001) ("[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity."); Stephen Breyer, *Making Our Democracy Work* 110 (2010) ("[T]he president may not have the time or willingness to review

[agency] decisions."). Exemplifying this, President Truman once complained: "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing." *See* Richard P. Nathan, *The Administrative Presidency* 2 (1986). This is because the administrative state consists of more than 2.6 million federal bureaucrats. Office of Personnel Management, *Historical Federal Workforce Tables: Total Government Employment Since 1962*.[2] Even if a president were inclined to spend precious time supervising them, it would prove impossible. There are simply too many.

In light of the vast powers that these bureaucrats wield—and the limits of political oversight—the separation of powers problems that administrative agencies present are more than academic and demand judicial intervention when parties with concrete injuries properly invoke the Court's jurisdiction. This is especially true when Congress' express prohibitions on agency action in a particular field are circumvented by imaginative claims of authority, like those asserted by the Bureau here. *Cf. Nutritional Health All. v. Food & Drug Admin.*, 318 F.3d 92, 104 (2d

[2] *Available at* https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/ (last visited Sept. 22, 2016).

Cir. 2003) (refusing to defer to FDA assertion of authority "where doing so would allow the FDA to circumvent the detailed regulatory scheme, including express constraints, set forth by Congress" in a more specific statute). The separation of powers is most seriously threatened in such circumstances.

II

COURTS MUST SCRUTINIZE AGENCY ACTIONS CLOSELY, TO AVOID EXACERBATING THESE SEPARATION OF POWERS CONCERNS

In light of these constitutional concerns, courts are duty-bound to subject agency actions to close judicial scrutiny in cases and controversies within the Court's Article III power. This has been confirmed by Congress, which has expressly commanded close judicial review of agency actions in the Administrative Procedure Act. That statute tasks courts with "decid[ing] all relevant questions of law," including interpreting statutes. 5 U.S.C. § 706. This includes policing agencies should they attempt to go beyond their statutory authority or if they act unreasonably while exercising proper authority. *See id.*

To be sure, when acting within the authority delegated to them, agencies receive a great deal of deference to their policy judgments. Many

agency assertions of power are analyzed under the familiar framework of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *but see infra* p. 11-14. When applying this framework, courts begin by asking whether Congress has spoken to the issue. 467 U.S. at 842-43. "If the intent of Congress is clear, that is the end of the matter[.]" *Id.* at 842. If Congress intended to delegate the issue to the agency, the question is whether the agency's construction is reasonable. *Id.* at 843. At both steps, congressional intent is preeminent.

But deference should not be stretched so far as to be an abdication of the court's role in interpreting the law and enforcing it against a recalcitrant bureaucracy. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Deference does not, for instance, require courts to allow agencies to do anything not expressly forbidden by Congress. "[T]o think executive agencies have plenary power to regulate whatever they want, unless and until Congress affirmatively preempts them . . . is a profoundly misguided understanding of administrative law." *Oregon Restaurant and Lodging Association v. Perez*, No. 13-35765, 2016 WL 4608148, at *5 (9th Cir. Sept. 6, 2016) (O'Scannlain, J., dissenting from

denial of rehearing); *see Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 659 (D.C. Cir. 1994) (en banc) ("[T]he Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power. This comes close to saying the Board has the power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible."); Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1518-21. Courts should never lose sight of the principle that agencies *only* have the power Congress chooses to give them. *La. Pub. Serv. Comm'n*, 476 U.S. at 374.

Notwithstanding the deference that agencies ordinarily receive under *Chevron*, courts have regularly ruled against agency assertions of power. For instance, agencies do not receive deference for "decisions of vast 'economic and political significance'" unless Congress clearly and explicitly authorizes them to make those decisions. *Utility Air Regulatory Group*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160). This is because courts will not blithely assume that Congress would silently give unelected, unaccountable bureaucrats such power. *Utility Air Regulatory*

Group, 134 S. Ct. at 2444 ("We expect Congress to speak clearly if it withes to assign to an agency decisions of vast 'economic and political significance.'" (quoting *Brown & Williamson*, 529 U.S. at 160)). Consequently, Congress is presumed to have resolved major questions, leaving agencies the task of filling in gaps. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (refusing to give *Chevron* deference to an agency regarding a statute's "key reforms"); *see also Brown & Williamson*, 529 U.S. at 159 (*Chevron* assumes that Congress intends for agencies "to fill in the statutory gaps").

Relatedly, when an agency claims some previously unexercised power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159, in a long-extant statute, courts should "typically greet its announcement with a measure of skepticism." *Utility Air Regulatory Grp.*, 134 S. Ct. at 2444. Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In such situations, it's likely that the agency has gone beyond faithfully pursuing congressional intent, and is instead seeking to expand its own power.

Most relevant here, courts refuse to permit agencies to use broad, general grants of rulemaking authority to do what would be forbidden under a statute more directly addressed at an issue. In *Brown & Williamson*, FDA asserted the authority to regulate cigarettes as a drug delivery device under the Food, Drug, and Cosmetic Act. 529 U.S. at 125. In reviewing the agency's assertion, the Supreme Court did not limit its analysis to the statute's admittedly broad language. *See id.* at 132 ("[A] reviewing court should not confine itself to examining a particular statutory provision in isolation."); *see id.* at 132-33 (explaining that statutes must be interpreted in light of others, to insure that the overall coherency of the law is maintained). Instead, the Court took account of the fact that Congress had directly addressed the issue of tobacco's health effects in a series of statutes giving several other agencies power to regulate. *Id.* at 143. The Court found particularly relevant that those statutes were enacted against a backdrop of FDA not regulating cigarettes. *Id.* at 144. In light of these more directly applicable statutes, the Court refused to interpret the general rulemaking powers that FDA relied upon to reach tobacco regulation. As it explained, "a specific policy embodied in a later federal statute should control our construction of the [earlier]

statute, even though it ha[s] not been expressly amended." *Id.* at 143 (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)).

These cases arose because agencies attempted to push the boundaries of their power—and to convert *Chevron* deference into a blank check. In fact, when bureaucrats believe that they will receive deference, they interpret their power more aggressively. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1063 (2015) (In a survey of agency rule drafters, 80% strongly agreed or somewhat agreed "that a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference . . . applies."). Agencies attempt to justify their actions by offering an interpretation of *Chevron* that flips on its head the basic premise of administrative law—that agencies only have power to the extent that Congress delegates it to them. Instead, the agencies argue that they may do anything not expressly forbidden by Congress. *See, e.g.*, *Oregon Restaurant and Lodging Association*, 2016 WL 4608148, at *4 (O'Scannlain, J., dissenting from denial of rehearing). When they do, it is imperative that the courts reject their extreme interpretations.

III

THE BUREAU'S INTERPRETATION OF ITS STATUTORY AUTHORITY CANNOT BE SQUARED WITH THE ENERGY POLICY ACT

This is one of those cases calling for the Court to reject an agency's overreaching by subjecting it to the scrutiny required under *Utility Air Regulatory Group* and *Brown & Williamson*. The Bureau claims the authority to pervasively regulate fracking operations under long-extant statutes, expanding far beyond its historical use of these powers.[3] And it does so in the context of a practice that has a vast economic effect, which Congress has expressly recognized. Fracking's economic and political significance is particularly vast in Western and Plains states, including the states that are challenging the Bureau's rule here. *See* Pub. L. No. 109-58, 119 Stat. 594 (2005) (titled "An Act To ensure jobs for our future with secure, affordable, and reliable energy"); *see also* Fred Dews, *The economic benefits of fracking*, Brookings Institution Blog (Mar. 23, 2015) (reporting

[3] Although the Bureau has generally regulated surface-disturbing activities on the lands it regulates, it has previously argued that it has no authority to regulate fracking's potential impacts unrelated to surface disturbance. *See Center for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1156 (N.D. Cal. 2013). This fact also counsels against the agency's position here, as FDA's history of denying its authority to regulate cigarettes weighed against its flip-flop in *Brown & Williamson*, 529 U.S. at 144.

that the economic benefits of fracking have been substantial and widely distributed among energy users nationwide).[4] Under *Utility Air Regulatory Group*, these circumstances call for "a measure of skepticism" from the Court. 134 S. Ct. at 2444.

That skepticism is well-founded here. The Bureau's regulation targets fracking based on potential impacts to underground drinking water sources. For support, it relies on statutes that make no mention of drinking water. 80 Fed. Reg. at 16,129; *see* Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, *et seq*.; Mineral Leasing Act of 1920, 30 U.S.C. § 181, *et seq*. As in *Brown & Williamson*, Congress has adopted a statute specifically directed to this problem. Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. § 300f, *et seq*.). The Bureau admits that the Safe Drinking Water Act—and not any of the statutes it administers—is "the primary federal law that ensures the quality of American's drinking water." *See* 80 Fed. Reg. at 16,142.

[4] *Available at* https://www.brookings.edu/blog/brookings-now/2015/03/23/the-economic-benefits-of-fracking/.

When Congress passed the Safe Drinking Water Act, it chose to empower EPA, not the Bureau, to regulate impacts to underground drinking water sources. 42 U.S.C. §§ 300h through 300h-8. Not until the 2000s did EPA begin to regulate fracking under this statute. When it did, Congress swiftly responded by passing the Energy Policy Act of 2005, which forbade EPA from regulating fracking under the Safe Drinking Water Act. 42 U.S.C. § 300h(d). In doing so, Congress provided that the states—and not federal bureaucrats—would decide how fracking should be regulated. *See* Paul J. Larkin, Jr. & Nicolas D. Loris, *The Regulation of Hydraulic Fracturing on Federal and Indian Land:* Wyoming v. Department of Interior, Heritage Foundation Legal Memorandum No. 188 (Sept. 9, 2016), at 4 ("[T]he Energy Policy Act singled out hydraulic fracturing for special treatment and assigned to the states the responsibility to protect drinking water from any danger that hydraulic fracturing might pose.").[5]

With the goal of preventing federal regulation of fracking to protect underground drinking water sources, Congress sensibly focused on EPA and its power under the Safe Drinking Water Act. As the Bureau

[5] *Available at* http://thf-reports.s3.amazonaws.com/2016/LM-188.pdf.

acknowledges, that statute is "the primary federal law" regulating impacts to these sources. *See* 80 Fed. Reg. at 16,142. Consistent with that understanding, EPA was the only federal agency asserting the authority to regulate fracking based on these impacts when the Energy Policy Act was passed. Thus, Congress had no reason to expect that other agencies would develop novel interpretations of other statutes to reach this issue.

In light of Congress' decision to first vest EPA and then solely the states with the authority to regulate fracking's potential impacts to underground drinking water sources, the Bureau's interpretation of its authority must be rejected. Although the Energy Policy Act doesn't expressly forbid the Bureau from regulating fracking's potential impacts to groundwater under the general land use statutes it administers, "a specific policy embodied in a later federal statute should control [the] construction of the [earlier] statute, even though it ha[s] not been expressly amended." *Brown & Williamson*, 529 U.S. at 143 (quoting *United States v. Estate of Romani*, 523 U.S. at 530-31).

The logical explanation for why Congress didn't go further in the Energy Policy Act—by, for instance, forbidding any federal regulation of fracking—is that it wanted to preserve federal regulation of fracking for

reasons unrelated to its potential impacts to underground drinking water sources. For instance, it may have wanted to preserve the Bureau's authority to regulate surface disturbances on federal lands resulting from drilling. *See* 43 C.F.R. § 3162.3-1. Similarly, it may have wanted to preserve the U.S. Fish and Wildlife Service's ability to regulate the placement of fracking operations based on impacts to protected species. *Cf. Defenders of Wildlife v. Jewell*, 815 F.3d 1, 5 (D.C. Cir. 2016) (discussing the proposed listing of a endangered species based on impacts of oil-and-gas development).

But that decision doesn't extend to these circumstances, where a federal agency is explicitly regulating fracking in pursuit of the purposes underlying the Safe Drinking Water Act. *See* 80 Fed. Reg. at 16,142. To conclude otherwise would frustrate Congress' overall scheme to have states, not federal agencies, decide how to regulate fracking's potential impacts to groundwater. Tellingly, many of the challengers in this case are states which have taken Congress' invitation to regulate fracking for themselves and now fear that the Bureau's regulation will frustrate their efforts.

The Bureau attempts to downplay the Energy Policy Act's significance to this case. The Bureau argues that its authority is distinguishable from EPA's under the Safe Drinking Water Act because EPA regulates on a nationwide basis whereas the Bureau regulates government-owned land. Although this is a distinction, it doesn't work as a defense to this regulation. The reach of the regulation's protection for underground drinking water sources is not defined by whether the water is owned by the federal government. Instead, it applies to "underground sources of drinking water," as that phrase is defined by EPA regulations implementing the Safe Drinking Water Act. *See* 80 Fed. Reg. at 16,142. *Chevron* deference is particularly inappropriate here, since the Bureau is interpreting and applying the standards of the Safe Drinking Water Act—a statute which it is not charged with implementing. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649-50 (1990).

By explicitly incorporating the standards of the Safe Drinking Water Act into its regulation, the Bureau is bootstrapping its authority to regulate federal lands to exercise the authority forbidden to EPA under the Energy Policy Act. "[I]t is fundamental 'that an agency may not bootstrap

itself into an area in which it has no jurisdiction.'" *Adams Fruit Co.*, 494 U.S. at 650 (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). The Bureau does so here, even though it "agrees that regulation of groundwater quality is not within the [Bureau's] authority." 80 Fed. Reg. at 16,143; *see id.* at 16,186 ("The [Bureau] agrees that . . . the regulation of groundwater under the SDWA are the duties of EPA and states and tribes.").

Moreover, the Bureau's arguments would invite other agencies to use their authorities as a bootstrap to adopting regulations for which Congress has already indicated its disfavor. *Cf. Nutritional Health All.*, 318 F.3d at 104.[6] If the Bureau can use its power over federal lands to regulate fracking to protect groundwater, notwithstanding the Energy Policy Act, why can't other agencies?

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[6] *Nutritional Health* is very similar to this case. There, an agency asserted authority to impose packaging requirements aimed at avoiding accidental iron poisoning under a broad grant of general rulemaking power. *Nutritional Health*, 318 F.3d at 98-99. The Second Circuit rejected the agency's argument because (1) Congress had adopted a specific statute directed at accidental poisonings, including a regime to regulate packaging, *id.* at 102; and (2) Congress subsequently reassigned that authority from the agency to another, *id.* at 104. Likewise, here Congress adopted a specific statute directed at protecting underground drinking water sources; assigned that authority to EPA, not the Bureau; and then reassigned that authority from EPA to the states.

The Army Corps of Engineers regulates, through the Clean Water Act, any activity in "waters of the United States"—a controversial phrase which the Corps has broadly interpreted. *See Sackett v. EPA*, 132 S. Ct. at 1375-76 (Alito, J., concurring). May it leverage this power to regulate the impacts of fracking on underground drinking water sources—which are not subject to the Clean Water Act—whenever the fracking operation coincidentally requires a Clean Water Act permit? The Corps' recently adopted "WOTUS Rule" potentially reaches most areas of the country, meaning that it could use its power to effectively circumvent the Energy Policy Act. *Cf.* Christine Souza, *'Waters' rule takes effect in California*, AgAlert (Sept. 2, 2015)[7] (reporting that the WOTUS Rule could reach 95% of California's surface area).

Under the Endangered Species Act, the Fish and Wildlife Service regulates any activity which may cause the take—another controversial and broadly interpreted term—of any endangered or threatened species,

[7] *Available at* http://www.agalert.com/story/?id=8709.

including land use activities that adversely modify habitat. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Can it leverage this power to regulate fracking's potential impacts to underground drinking water sources any time fracking takes place in any endangered or threatened species' habitat, even if the species and its habitat have no connection to the water source? Since critical habitat is designated across broad swaths of the United States, the Service too would be able to effectively circumvent the Energy Policy Act. *Cf.* U.S. Fish & Wildlife Service, *Critical Habitat for Threatened & Endangered Species* (2016)[8] (map of some, though not all, of the designated critical habitat areas in the United States).

These are but two examples of the dozens of federal agencies that, like the Bureau, could attempt to bootstrap their poorly defined authorities to circumvent the Energy Policy Act—and any other congressional effort to limit the power of unelected bureaucrats. There are many more. Consequently, the Court must reject the Bureau's contention that it may

[8] *Available at* https://www.arcgis.com/home/webmap/viewer.html?webmap=9d8de5e265ad4fe09893cf75b8dbfb77 (last visited Sept. 22, 2016).

stretch its rulemaking powers under the land use statutes as much as it pleases until Congress expressly forbids it. This argument is "a caricature of *Chevron*. Indeed, the notion is entirely alien to our system of laws." *Oregon Restaurant and Lodging Ass'n*, 2016 WL 4608148, at *4 (O'Scannlain, J., dissenting from denial of rehearing); *Ry. Labor Execs. Ass'n*, 29 F.3d at 659. Agency power is not "an expansive body of water, covering everything until it bumps up against a wall erected by Congress[.]" *Id*. at *6; *see Chamber of Commerce of United States v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) ("[W]e do not presume a delegation of power simply from the absence of an express withholding of power[.]").

CONCLUSION

Congress has made clear that states, not federal bureaucrats, should decide how to regulate fracking's potential impacts to underground drinking water sources. The Bureau's regulation clearly conflicts with Congress' decision and should be rejected. Embracing the Bureau's expansive view of agency power, and weak judicial scrutiny of its exercise,

is not only contrary to precedent, but would raise significant separation of powers problems. Therefore, the decision below should be affirmed.

DATED: September 23, 2016.

Respectfully submitted,

M. REED HOPPER
JONATHAN WOOD

By s/ Jonathan Wood
JONATHAN WOOD

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 4,670 words.

s/ Jonathan Wood
JONATHAN WOOD

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) the ECF submission is an exact copy of this document;

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s/ Jonathan Wood
JONATHAN WOOD

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I hereby certify that on September 23, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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s/ Jonathan Wood
JONATHAN WOOD