Attachment 1

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

CITY OF NEW YORK, et al.

Intervenors.

Petition for Review of Settlement Agreement of the
United States Environmental Protection Agency

FINAL BRIEF FOR PETITIONERS

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CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Petitioners state as follows:

(A) Parties, Intervenors, and Amici:

The parties in this case are the State of West Virginia (Petitioner); the State of Alabama (Petitioner); the State of Indiana (Petitioner); the State of Kansas (Petitioner); the Commonwealth of Kentucky (Petitioner); the State of Louisiana (Petitioner); the State of Nebraska (Petitioner); the State of Ohio (Petitioner); the State of Oklahoma (Petitioner); the State of South Carolina (Petitioner); the State of South Dakota (Petitioner); the State of Wyoming (Petitioner); the United States Environmental Protection Agency (Respondent); the City of New York (Intervenor); the Commonwealth of Massachusetts (Intervenor); the District of Columbia (Intervenor); Environmental Defense Fund (Intervenor); Natural Resources Defense Council (Intervenor); Sierra Club (Intervenor); the State of California (Intervenor); the State of Connecticut (Intervenor); the State of Delaware (Intervenor); the State of Maine (Intervenor); the State of New Mexico (Intervenor); the State of New York (Intervenor); the State of Oregon (Intervenor); the State of Rhode Island (Intervenor); the State of Vermont (Intervenor); and the State of Washington (Intervenor); American Chemistry Council (Amicus for Petitioner); American Coatings Association, Inc. (Amicus for Petitioner); American Fuel and Petro (Amicus for Petitioner); American Iron and Steel Institute (Amicus for Petitioner); Chamber

of Commerce of the United States of America (Amicus for Petitioner); Council of Industrial Boiler Owners (Amicus for Petitioner); Independent Petroleum Association of America (Amicus for Petitioner); Metals Service Center Institute (Amicus for Petitioner); National Association of Manufacturers (Amicus for Petitioner); Pacific Legal Foundation (Amicus for Petitioner); and, Institute for Policy Integrity at New York University School of Law (Amicus for Respondent).

(B) Rulings Under Review:

Under review in this case is a settlement agreement between EPA and the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, the City of New York, Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund. The settlement was finalized by EPA on March 2, 2011 and modified on June 13, 2011. *See* EPA-HQ-OGC-2010-1057-0002.

(C) Related Cases:

Related cases include *In re: Murray Energy Corporation*, No. 14-1112; and *Murray Energy Corporation v. Environmental Protection Agency and Regina A. McCarthy*, No. 14-1151. The related cases were consolidated on November 13, 2014. *See* Per Curiam Order, Case No. 14-1151, ECF 1522086.

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GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
HAP	hazardous air pollutant

INTRODUCTION

This case concerns a now-unlawful settlement agreement in which EPA committed to regulate carbon dioxide emissions from existing power plants under Section 111(d) of the Clean Air Act ("CAA"). Although EPA has repeatedly admitted that the "literal" terms of the law now prohibit such regulation because it decided to regulate those power plants under Section 112 of the Act, the agency nonetheless has announced (and begun to act upon) its legal conclusion that it may regulate those plants under both Section 111(d) and Section 112. EPA is mistaken.

Section 111(d) is a narrow, rarely used provision that authorizes EPA to require States to create state plans that set emission standards for existing sources *in limited circumstances*. 42 U.S.C. § 7411(d). One significant limitation is the provision's Section 112 Exclusion, which prohibits EPA from regulating under Section 111(d) the emission of "any air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." Under Section 112, EPA imposes onerous national regulations on a great many sources. Congress enacted the Section 112 Exclusion because it concluded that existing sources—which have sunk costs and on-going operations—should not have to comply with both severe national regulations under Section 112 and the state program under Section 111(d). EPA has acknowledged that the "literal" terms of the Section 112 Exclusion bar it from regulating existing power plants under Section 111(d) because, in 2012, it is-

sued a rule that regulates power plants under Section 112 to the tune of $9 billion a year.

Ignoring its own admissions, EPA has pushed forward with a proposed Section 111(d) rule in compliance with the settlement agreement, concluding in a lengthy Legal Memorandum in June 2014 that it has the authority to rewrite the U.S. Code. The agency has determined that a clerical error in the 1990 Amendments to the CAA—which was excluded from the U.S. Code—creates an ambiguity that EPA is permitted to resolve. The clerical error is nothing more than a common legislative glitch that is routinely ignored, consistent with uniform legislative practice and binding case law, but EPA has used it here to justify expanded powers under Section 111(d) and a proposed rule that will require revolutionizing States' entire energy sectors. States are expending thousands of state employee hours to design state plans to comply with the requirements of a proposed rule that is unlawful in its entirety (no matter how EPA ultimately finalizes it).

The Court should put this wasted effort to an end. EPA's illegal actions are taken pursuant to a settlement agreement, which is unquestionably reviewable final agency action. Petitioners urge this Court to end EPA's lawless attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate," in order to "bring about an enormous . . . expansion in EPA's regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp. v. EPA*, 134 S.

Ct. 2427, 2445-46 (2014) ("*UARG*"). By declaring unlawful the Section 111(d) portion of the settlement, this Court can end the ongoing waste of public resources, and permit EPA to redirect its energies to lawful pursuits.

JURISDICTIONAL STATEMENT

This case is before the Court on a petition for review of a final settlement agreement that EPA finalized on March 2, 2011, under Section 113(g), 42 U.S.C. § 7413(g). JA 22. This Court has jurisdiction under CAA Section 307(b)(1), 42 U.S.C § 7607(b)(1).

STATEMENT OF ISSUES

1. Whether EPA's binding commitment in the settlement agreement to propose and then to finalize a rule regulating existing power plants under CAA Section 111(d), 42 U.S.C. § 7411(d), is now unlawful because EPA has regulated the same power plants under CAA Section 112, 42 U.S.C. § 7412.

2. Whether this Court has jurisdiction to determine the legality of a settlement agreement that EPA finalized under CAA Section 113(g).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The text of the relevant statutes and regulations is set forth in the Addendum.

STATEMENT OF THE CASE AND FACTS

I. Statutory Overview

A. Section 111 Of The Clean Air Act

In 1970, Congress enacted Section 111 of the CAA, entitled "standards of performance for new stationary sources." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676, 1683. As its name suggests, the primary focus of Section 111 is the regulation of emissions from *new* sources. Under Section 111(b), EPA is permitted to establish emission standards for "categor[ies] of sources," under certain circumstances. Section 111(b) is a robust program, which EPA has employed "for more than 70 source categories and subcategories . . . [including] fossil fuel-fired boilers, incinerators, sulfuric acid plants . . . ." 73 Fed. Reg. 44,354, 44,486-87 nn.239 & 242 (July 30, 2008).

Although the principal focus of Section 111 is national regulation of "new source[s]," Section 111(d) provides a more limited program for State-based regulation of emissions from certain existing sources. If EPA has issued a federal new-source standard under Section 111(b) for a category of sources, Section 111(d) authorizes EPA in some situations to issue guidelines for States to develop existing-standards for the same category of sources. 42 U.S.C. § 7411(d). As relevant here, Section 111(d) includes a provision that prohibits EPA from requiring States to develop an existing source performance standard for "any air pollutant . . . emitted

from a source category which is regulated under [Section 112 of the CAA]." *Id.* (hereinafter "Section 112 Exclusion"). Both Section 112 and the Section 112 Exclusion are discussed below. *See infra*, at 6-11.

EPA has successfully invoked Section 111(d) only a few times and in limited circumstances. "Over the last forty years, under CAA section 111(d), [EPA] has regulated four pollutants from five source categories." 79 Fed. Reg. 34,830, 34,844 (June 18, 2014).[1] In each case, the regulations were directed at pollutants emitted by specialized industries, such as acid mist emitted from sulfuric acid plants. *See* 79 Fed. Reg. at 34,844 n.43. As EPA itself has explained, Section 111(d) is designed to address unique, industry-specific pollution problems, where pollutants are "highly localized and thus an extensive procedure, such as the SIPs require, is not justified." JA 46 (40 Fed. Reg. 53,340, 53,342 (Nov. 17, 1975)). Under Section 111(d), "the number of designated facilities per State should be few," and the required state plans will be "much less complex than the SIPs" that regulate criteria pollutants under CAA Section 110. *Id.* at 49.

[1] *See* 42 Fed. Reg. 12,022 (Mar. 1, 1977), 42 Fed. Reg. 55,796 (Oct. 18, 1977); 44 Fed. Reg. 29,828 (May 22, 1979); 45 Fed. Reg. 26,294 (Apr. 17, 1980); 61 Fed. Reg. 9,905 (Mar. 12, 1996).

B. Section 112 Of The Clean Air Act

In 1970, Congress also adopted Section 112 of the CAA. Pub. L. No. 91-604, § 112, 84 Stat. at 1685-86. As originally enacted, Section 112 required EPA to list and then regulate hazardous air pollutants ("HAPs"). HAPs were defined narrowly as pollutants that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible[] or incapacitating reversible[] illness." *Id.*

In 1990, Congress undertook a comprehensive expansion of the reach and severity of Section 112. The new Section 112 established a preliminary list of 189 HAPs to be regulated. It also permitted EPA to add more HAPs to this list when EPA determines that a pollutant may present "a threat of adverse human health effects" "through inhalation or other routes of exposure" or "adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise." 42 U.S.C. § 7412(b).

Furthermore, Congress required EPA to publish a list of "source categories" that emit HAPs. *Id.* § 7412(c). Whether a source category is listed under Section 112, or removed after being listed, depends upon a variety of factors. *Id.* For each listed source category under Section 112, Congress required EPA to "impose[] specific, strict pollution control requirements on both new and existing sources of HAPs," reflecting "the . . . 'best available control technology.'" *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008) (quoting S. Rep. No. 101-228, at 133

(1989)). As EPA has explained, "the entire concept of 'source categories' in [S]ection 112 was new in 1990." JA 192 (Final Brief, EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494, at n.40 (D.C. Cir. July 23, 2007) ("2007 EPA Brief")).

The 1990 Amendments provided special treatment under Section 112 for the category of sources known as "electric utility steam generating units," commonly referred to as power plants. Congress required EPA to study the "hazards to public health reasonably anticipated to occur as a result of" HAPs emitted from power plants *before* EPA determined whether to list them under Section 112. 42 U.S.C. § 7412(n)(1)(A). EPA was then to determine, based on that study, whether it is "appropriate and necessary" to regulate power plants under Section 112. *Id.*

C. Section 112 Exclusion

The Section 112 Exclusion is a statutory limitation on EPA's Section 111(d) authority, which Congress changed when it revised and strengthened Section 112 in 1990. Before the 1990 Amendments, the Section 112 Exclusion barred EPA from requiring States to regulate under Section 111(d) the emission from existing sources of "any air pollutant . . . included on a list published under section [112](b)(1)(A)." *See* Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). At the time, that was the list of pollutants deemed by EPA to be HAPs under the narrow

pre-1990 criteria. JA 137 (70 Fed. Reg. 15,994, 16,030 (Mar. 29, 2005)); *supra*, at 6.

In 1990, Congress fundamentally changed the Section 112 Exclusion, in light of its decisions to significantly expand the scope of what constitutes a HAP and to require regulation under Section 112 by "source category." Specifically, Congress amended the Exclusion to prohibit EPA from requiring States to regulate under Section 111(d) the emission of "any air pollutant . . . emitted from a source category which is regulated under section [112]." Pub. L. No. 101-549, § 108, 104 Stat. 2399 (codified at 42 U.S.C. § 7411(d)(1)). As EPA has consistently conceded, "a literal reading" of this language means "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." JA 138; *accord id.* at 397 (EPA, Legal Memorandum (June 2014) ("2014 Legal Memo")).

According to EPA itself, the legislative history of the 1990 Amendments shows that the revision of the Section 112 Exclusion to "shift [its] focus to source categories" from air pollutants was "no accident." JA 173. The House of Representatives—where the 1990 revision to the Section 112 Exclusion originated—"sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." JA 138. This policy change reflected the House's

judgment that EPA should not be permitted to require state-by-state regulation of an existing source category under Section 111(d), when that category already had to comply with the more stringent national emission standards being introduced by amendment into Section 112. JA 138. This "desire . . . to avoid duplicative regulation" of *existing* source categories makes sense, given that it may not be feasible for already up-and-running facilities to comply with Section 112's stringent requirement and also regulation imposed by States under Section 111(d). JA 139. EPA has noted that Congress seemed especially concerned about "duplicative or otherwise inefficient regulation" of existing power plants, JA 106, and that the change of the Section 112 Exclusion from pollutants to "source categories" was intended to work in tandem with EPA's obligation to study power plants under Section 112(n). Congress wanted to make EPA choose between regulating HAP emissions from existing power plants under the national standards of Section 112, or all emissions from those power plants under the state-by-state standards of Section 111(d). JA 106, 139.

This Court and the Supreme Court have discussed the Section 112 Exclusion on two important occasions:

First, in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), this Court struck down EPA's attempt to require under Section 111(d) that the States regulate the emission of mercury from existing power plants. 70 Fed. Reg. 28,606 (May

18, 2005). The critical issue was that EPA had previously determined under Section 112(n) to regulate power plants under Section 112. JA 101. To avoid the Section 112 Exclusion, EPA sought to reverse that prior determination, *id.*, but this Court would not allow it. This Court held that if EPA wanted to undo Section 112 regulation of power plants, the agency had to follow the procedures for de-listing a source category under Section 112(c)(9). *New Jersey*, 517 F.3d at 582. Because EPA had not followed those procedures, power plants remained regulated under Section 112, and thus were prohibited by the Section 112 Exclusion from being regulated under Section 111(d). *Id.* at 583.

Second, in 2011, the Supreme Court confronted Section 111(d) in *American Electrical Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). In *AEP*, the Court held that there was no action for federal common law public nuisance to abate carbon dioxide emissions from power plants. *Id.* at 2537. The Court explained that Congress has granted EPA the authority to require States to regulate carbon dioxide emissions under Section 111(d), and that the mere existence of this authority preempts any federal abatement cause of action, regardless of whether EPA has exercised that authority. *Id.* at 2537-38. The Court noted, however, that there are statutory "exception[s]" to EPA's authority under Section 111(d). *Id.* at 2537 n.7. As relevant here, "EPA may not employ [Section 111(d)]

if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *Id.*

II. Background

A. EPA Reaches A Final Settlement Agreement That Commits The Agency To Propose And Then To Finalize Regulations Of Existing Power Plants Under Section 111(d)

In 2006, a group of States and environmental groups—the vast majority of whom are intervenors here[2]—filed petitions for review in this Court, arguing that EPA must regulate carbon dioxide emissions from new power plants under Section 111(b) and existing power plants under Section 111(d). Petition for Review, *New York v. EPA*, No. 06-1322, ECF 991299. Following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court ordered a remand to permit EPA to further consider issues related to EPA's regulation of carbon dioxide emissions. JA 316 (75 Fed. Reg. 82,392, 82,392 (Dec. 30, 2010)).

Over the next few years, the State and NGO Intervenors pressured EPA to regulate carbon dioxide emissions from power plants under Sections 111(b) and 111(d), including by threatening further litigation. JA 316. The State Intervenors

[2] The intervenors in the present case are the States of California, Connecticut, Delaware, Maine, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the Commonwealth of Massachusetts, the City of New York, the District of Columbia ("State Intervenors"), and the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club ("NGO Intervenors").

submitted letters to EPA in 2008 and 2009, "stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111." *Id.* The NGO Intervenors submitted a letter to EPA in 2010, "seeking commitments" to rulemaking on carbon dioxide emissions under Sections 111(b) and 111(d), "as a means of avoiding further litigation." *Id.*

EPA, the NGO Intervenors, and the State Intervenors eventually reached a settlement agreement "intended to resolve threatened litigation over the EPA's failure to respond to . . . [the] remand in State of New York, et al. v. EPA, No. 06-1322." JA 316. In accordance with the procedures of CAA Section 113(g), 42 U.S.C. § 7413(g), the agency submitted the settlement agreement for public notice and comment. *Id.* On March 2, 2011, EPA finalized the settlement agreement. JA 22.

In the settlement, EPA committed that it "will" propose and then finalize rules regulating carbon dioxide emissions from new and existing power plants under Section 111(b) and Section 111(d). JA 3-4. Relevant here are EPA's contractual promises for the regulation of existing power plants under Section 111(d), by which the agency expressly "inten[ded] to be bound." *Id.* Specifically, EPA committed that it "will" issue a "proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide]," and "will sign" and "transmit . . . a final rule that takes action with respect to" existing power plants under Section

111(d). *Id.* The agreement included compliance dates for EPA, *id*., which the parties later modified. *Id*. at 24.

As sole consideration for EPA's commitment, the State and NGO Intervenors gave up the right to further litigation. Intervenors agreed to "a full and final release of any claims" they may have "under any provision of law to compel EPA" to respond to this Court's remand in *New York v. EPA*. JA 4. Intervenors' only obligation was not to "file any motion or petition" to "compel EPA action" in this respect, "unless" EPA violated the settlement. *Id.* at 4-5.

On the day EPA announced the settlement, the policy director for the Natural Resources Defense Council (an NGO Intervenor), David Doniger, emailed Regina A. McCarthy, then-assistant administrator for EPA's Office of Air and Radiation, to congratulate her, calling the settlement "a major achievement." Email from David Doniger to Regina A. McCarthy (Dec. 23, 2010, 6:30 PM EST) (Exh. I). Responding less than two hours later, McCarthy returned the compliment, saying, "[t]his success is yours as much as mine." Email from Regina A. McCarthy to David Doniger (Dec. 23, 2010, 8:19 PM EST) (Exh. I).

On June 13, 2011, EPA and Intervenors agreed to modify the settlement, extending the agreement's compliance dates. JA 26. EPA again confirmed that the settlement "resolved [Intervenors'] potential claims" and "became final" on March 2, 2011. *Id.* at 24. After these modified dates lapsed, the State and NGO Interve-

nors continued to perform their only obligation under the settlement by not "filing any motion or petition" to "compel EPA action." JA 4-5.

B. EPA Regulates Power Plants Under Section 112

On February 16, 2012, EPA finalized a national emission standard for new and existing power plants under Section 112. 77 Fed. Reg. 9,304 (Feb. 16, 2012). In this rule, EPA reaffirmed the agency's 2000 decision that it is "necessary and appropriate" for power plants to be listed as a "source category" under Section 112, and proceeded to impose on those plants significant regulations, which will cost over $9 billion per year. *See* 77 Fed. Reg. at 9,365-75; EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 1-3–3-13 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131. EPA explained that one of the "co-benefits" of the stringent regulations was a reduction in carbon dioxide emissions from power plants. 77 Fed. Reg. at 9,428. This Court upheld the rule earlier this year, and the Supreme Court will now review that decision. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (D.C. Cir. 2014), *cert. granted*, No. 14-46, 2014 WL 3509008 (U.S. Nov. 25, 2014); *see infra*, at 59 n.12.

By issuing the Section 112 rule, EPA seemed to have determined to breach the Section 111(d) portion of the settlement agreement. As noted above, the Supreme Court had just confirmed in *AEP*, in 2011, that the Section 112 Exclusion prohibits the regulation of a source category under Section 111(d) that is already

regulated under Section 112. EPA's decision in 2012 to regulate power plants under Section 112 thus signaled the agency's apparent intent to legally disable itself from regulating existing power plants under Section 111(d).

C. EPA Abides By The Settlement Agreement By Proposing To Regulate Existing Power Plants Under Section 111(d)

On June 2, 2014, EPA issued a Legal Memorandum claiming that it can still regulate power plants under Section 111(d). JA 372. Specifically, EPA "conclude[d]" that it has discretion to rewrite the "literal" terms of the Section 112 Exclusion, *id.* at 397, because the 1990 Amendments to the CAA contained "drafting errors," *id.* at 392, that create an "ambiguity" with respect to the Exclusion, *id.* at 383. The drafting error is another amendment that, according to EPA, would have left the Section 112 Exclusion unchanged from the pre-1990 version and still focused on pollutants rather than source categories. *Id.* at 395-96. EPA argued that this "ambiguity" permits the agency to adopt a new version of the Section 112 Exclusion, which is actually a narrower limitation than *either* the version of the Exclusion currently in the U.S. Code *or* the pre-1990 version: "Where a source category is regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP listed under section 112(b) that may be emitted from that particular source category." *Id.* at 397.

On June 18, 2014, EPA published a proposed rule regulating carbon dioxide emission from existing power plants under Section 111(d), just as it had committed to doing in the settlement agreement. 79 Fed. Reg. 34,830. Twelve days earlier, Petitioner West Virginia had alerted EPA that the reasoning in the Legal Memo was erroneous, *see* ECF 1510480, Exh. B, but EPA nonetheless pressed forward. In the proposed Section 111(d) Rule, EPA stated that it intended to finalize the rule in June 2015. 79 Fed. Reg. at 34,838. The finalization would satisfy the last of EPA's Section 111(d) obligations under the settlement agreement.

D. EPA's Proposed Section 111(d) Rule Harms States

The proposed Section 111(d) Rule—issued to satisfy EPA's commitment under the settlement agreement—requires States to submit a plan to EPA that revolutionizes the States' entire energy sectors. Under the proposed rule, each State must submit a plan ("State Plan") that would lead to a cut in carbon dioxide emissions by an average of 30% nationwide from 2005 levels by 2030. 79 Fed. Reg. at 34,832-33. Absent special circumstances, States are required to submit their State Plans to EPA by June 2016. *Id.* at 34,838.

To reach the aggressive emission targets, EPA used a combination of four "building blocks": (1) requiring changes to power plants that increase efficiency in converting fossil-fuel energy into electricity; (2) increasing natural gas-fired power plants, which EPA assumes will be sufficient to offset significant generation; (3)

substituting low or zero-carbon generation, including the preservation or increase of existing nuclear capacity and increasing renewable sources, like wind and solar energy; and, (4) mandating more efficient use of energy by consumers. *Id.* at 34,836, 34,859, 34,862-63, 34,866-68, 34,870-71. Only the first of these "building blocks" takes place at the site of the affected power plant, while the remaining "building blocks" require wide-ranging energy policy changes "beyond the fence" of the power plants EPA seeks to regulate. *Id.* at 34,871.

As a result, the State Plans will be an extraordinarily complicated, unprecedented endeavor. *See* 79 Fed. Reg. at 34,835-39; *see, e.g.*, Ala. Decl. ¶ 3 (State's response "will be the most complex air pollution rulemaking undertaken by [Alabama] in the last 40 years.") (Exh. A); Ky. Decl. ¶ 3 (State's plan will be "particularly complicated" because it has power plants "part of larger companies, spanning over several states" and "single municipalities.") (Exh. B); Ohio Decl. ¶¶ 4-5 (Exh. H). Although States are not bound to follow the building blocks, States cannot achieve the emissions targets without employing multiple blocks. *See, e.g.*, Ind. Decl. ¶ 3 (State cannot meet targets through building block one alone.) (Exh. C); W. Va. Decl. ¶ 7 (same) (Exh. D); Kan. Decl. ¶ 3 (same) (Exh. E). The rule thus effectively requires overhaul of each State's energy economy. Instead of asking States to merely strengthen environmental controls on power plants, the proposal forces States to rely more heavily on natural gas, nuclear power, renewable energy

sources, and even to press changes in their citizens' energy usage. *See* 79 Fed. Reg. at 34,836.

States will have to first undertake a comprehensive study to determine which measures each will implement. *See, e.g.*, S.D. Decl. ¶ 10 (feasibility of wind resources unknown given wind development already in existence) (Exh. F). States will be faced with difficult policy choices. *See, e.g.*, S.D. Decl. ¶ 12 ("[M]ajor fundamental grants of new power to a state agency or agencies," of "matters that have traditionally been determined . . . by the marketplace" will be "a matter of significant debate before the South Dakota Legislature.") (Exh. F); Kan. Decl. ¶ 4 (Implementation of a renewable portfolio and demand-side controls "will require significant policy shifts in the Kansas legislature and by other policymakers.") (Exh. E). For example, States must decide how they can feasibly include more natural gas, nuclear, and renewable energy sources in its energy mixes. *See, e.g.*, Kan. Decl. ¶ 3 (Exh. E); W. Va. Decl. ¶ 5 (Exh. D). To fully consider the consequences of each choice, States will need to collect and review significant input from citizens, stakeholders, and local regulators. *See, e.g.*, Kan. Decl. ¶ 4 (Exh. E); Ky. Decl. ¶ 4 (Exh. B); Wyo. Decl. ¶¶ 5-6 (Exh. G).

Then, States will have to engage their political processes to overhaul their legal and regulatory structures necessary to implement the new energy program. *See, e.g.*, Ind. Decl. ¶¶ 3-4 (Exh. C); Kan. Decl. ¶ 6 (Exh. E). In many cases,

States will be forced to establish entirely new institutions and regulatory structures. *See, e.g.*, S.D. Decl. ¶ 5 ("[S]tate legislative grants of authority . . . are not sufficient to meet the requirements of a Section 111(d) Plan.") (Exh. F); W. Va. Decl. ¶ 7 (No state agency "has the authority to implement these building blocks in the measureable and enforceable fashion required by the Rule.") (Exh. D); Wyo. Decl. ¶ 8 ("[C]reating a plan that conforms to the 111(d) Rule will require the Wyoming legislature to act.") (Exh. G). These may require unprecedented changes to state statutes, constitutions, and regulations, or possibly the installation of a centralized resource planning structure. *See, e.g.*, Kan. ¶ 5 ("statutory and regulatory changes") (Exh. E). As even EPA admits, these types of changes will take far more time than provided by the proposal. 79 Fed. Reg. at 34,914 ("[S]tate administrative procedures can be lengthy, some states may need new legislative authority, and states planning to join in a multi-state plan will likely need more than thirteen months to get necessary elements in place."); *see, e.g.*, Wyo. Decl. ¶ 8 ("Absent immediate efforts from the Department, obtaining the legislative authorization necessary to develop a plan that complies with the EPA's rule on the EPA's proposed timeline will be practically impossible.") (Exh. G).

Given the mismatch between the steps described above and the short timeframe EPA has proposed for submission of State Plans, States have had no choice but to begin expending significant public resources. *Compare* 79 Fed. Reg.

at 34,838 (States must submit their State Plan to EPA by June 30, 2016, absent special circumstances.) *with* West Virginia Decl. ¶ 3 (Creating a state plan "will take 3 years or more.") (Exh. D), Indiana Decl. ¶ 3 (same) (Exh. C), and Kansas Decl. ¶ 3 (will take 3-5 years to create plan) (Exh. E). Even EPA foresaw this need. *See* Regina A. McCarthy, Remarks Announcing Clean Power Plan (June 2, 2014) ("[u]nder our proposal, states have to design plans now, . . . so they're on a trajectory to meet their final goals in 2030").[3] State expenditures so far include the following:

- **Alabama**: Two full time State employees, as well as time from fifteen other employees. Ala. Decl. ¶¶ 5-6 (Exh. A).
- **Indiana**: State officials spending time "coordinating among state agencies and [regional transmission organizations]," and "participating in external modeling and cost analyses." Ind. Decl. ¶ 5 (Exh. C).
- **Kansas**: The State has expended resources including "significant staff time to date." Kan. Decl. ¶ 4 (Exh. E).

[3] The source is available at http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/c45baade030b640785257ceb003f3ac3!opendocument.

- **Kentucky**: State officials meeting "with every [power plant] in the Commonwealth," and top agency officials have "testified before legislative committees." Ky. Decl. ¶ 5 (Exh. B).
- **South Dakota**: Two full-time employees dedicated to "determining what changes need to be made to South Dakota's laws and regulations to implement the Proposed Rule." S.D. Decl. ¶ 17 (Exh. F).
- **West Virginia**: State officials "holding meetings with power plant owners/operators, the [State's Department of Energy] and [Public Service Commission]," among other things, which "detracts from efforts to implement other requirements of the CAA." W. Va. Decl. ¶ 9 (Exh. D).
- **Wyoming**: More than 10% of the State's air quality employees and other employees devoting a total of 1,108 hours, including 152 hours by the agency director and 138 hours by the administrator of the air quality division. Wyo. Decl. ¶ 11 (Exh. G); *see also id.* ¶¶ 12-13.

Other States are expending additional resources driven by the proposed rule. These expenditures will continue unless and until this Court concludes that EPA lacks authority to regulate power plants under Section 111(d). *See, e.g.*, Ind. Decl. ¶ 6 (Exh. C); Kan. Decl. ¶ 6 (Exh. E); W. Va. Decl. ¶ 10 (Exh. D); Wyo. Decl. ¶ 14 (Exh. G).

E. Petitioners Challenge The Settlement Agreement

On August 1, 2014, the States filed the instant petition for review under CAA Section 307(b)(1), challenging EPA's Section 111(d) commitments in the settlement agreement as unlawful and in violation of the Section 112 Exclusion. On November 13, 2014, this Court ordered that this case be argued on the same day and before the same panel as two related cases that also concern EPA's proposed Section 111(d) rule—*In re: Murray Energy Corporation*, No. 14-1112, and *Murray Energy Corporation v. EPA and Regina A. McCarthy*, No. 14-1151.

SUMMARY OF ARGUMENT

I. The settlement agreement must be vacated because it commits EPA to take action that is now illegal: regulate power plants under Section 111(d). In 2012, EPA issued extensive regulations on power plants under Section 112. In light of these regulations, the Section 112 Exclusion now prohibits EPA from regulating a source category under Section 111(d) if EPA has already regulated that source category under Section 112.

A. It is clear from the plain text and the legislative history that the Section 112 Exclusion prohibits the double regulation of a source category under both Section 112 and Section 111(d). As EPA itself has repeatedly admitted, a "literal" reading of the text of the Section 112 Exclusion in the U.S. Code 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." JA 138. The Supreme Court has read the text the same way, *see AEP*, 131 S. Ct. at 2537 n.7, and the legislative history is consistent, as well, *see* JA 138.

B. EPA's attempt to rewrite the literal terms of the Section 112 Exclusion is meritless. The agency argues that a "conforming amendment" in the 1990 Amendments to the CAA—which is *not* reflected in the text of the Section 112 Exclusion in the U.S. Code—creates an ambiguity as to the meaning of the Exclusion. But under uniform legislative practice and binding case law, this extraneous conforming amendment was properly excluded from the U.S. Code as a common clerical error and should simply be ignored.

C. Even if EPA were correct that the extraneous conforming amendment must be given substantive meaning, that would not save the legality of the settlement agreement. Under basic principles of statutory construction, which require that "every word" be "give[n] effect," EPA's approach should simply result in a Section 112 Exclusion that incorporates *both* the text currently in the U.S. Code and the additional text from the conforming amendment. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Such an Exclusion would still prohibit EPA from requiring States to issue under Section 111(d) "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).

II. This Court has jurisdiction to review the settlement agreement because the agreement is final agency action, the challenge is ripe for review, and the case presents a live controversy.

A. The settlement agreement is a reviewable “final action” under CAA Section 307(b). Section 307(b) provides jurisdiction to review essentially any action by EPA, so long as it is final. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). The settlement agreement is final—and thus reviewable under Section 307(b)—for at least two independently sufficient reasons. *First*, EPA followed all of the procedures required for “final[izing]” a settlement under Section 113(g). *Second*, the agreement satisfies the two-pronged finality inquiry under *Bennett v. Spear*, 520 U.S. 154 (1997).

B. The challenge raised by the States also satisfies the test for ripeness. The only substantive “issue[]” in this lawsuit—the scope of the Section 112 Exclusion—is fit for review because it “is purely one of statutory interpretation.” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 479 (2001) (quotation omitted). In addition, States will suffer great “hardship” if this Court refuses consideration, *id.*, as they are currently and will continue expending substantial resources designing State Plans to comply with the proposed rule.

C. Finally, this case presents a live controversy because the settlement remains binding on EPA—committing it to take action that the law precludes it from taking. Under hornbook law, EPA remains bound by the terms of the agreement, and so it is pressing ahead with regulating action under Section 111(d). *See* 13 Williston on Contracts § 39:31 (4th ed.).

STANDARD OF REVIEW

Because the CAA does not specify a standard of review for an action arising under Section 307(b)(1), the "familiar default standard of the Administrative Procedure Act" applies. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496 (2004). That standard requires this Court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A settlement agreement is contrary to law if it commits the agency to violate a federal statute. *See generally Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013).

EPA's interpretation of the CAA is subject to review. "Where the statute speaks to the direct question at issue, [this Court] afford[s] no deference to the agency's interpretation of it and 'must give effect to the unambiguously expressed intent of Congress.'" *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). And even where deference is due to an agency's "permissible con-

struction of the statute," *Chevron*, 467 U.S. at 843, ordinary principles of statutory construction require that a statute be interpreted to "give effect, if possible, to every word Congress used," *Reiter*, 442 U.S. at 339.

STANDING

Petitioners have standing to challenge the settlement agreement. They have suffered at least two injuries-in-fact that are fairly traceable to the settlement agreement and that would be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, to the extent there is any doubt, sovereign States are "entitled to special solicitude in . . . standing analysis." *Massachusetts*, 549 U.S. at 518, 520.

1. With this brief, States have submitted declarations that demonstrate injury-in-fact resulting from the proposal of the Section 111(d) rule. States have expended substantial state resources as a direct result of the proposal, including thousands of hours of employee time. *See supra*, at 20-21. Such "concrete drains on . . . time and resources," *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28-29 (D.C. Cir. 1990), far exceed the "identifiable trifle" needed to satisfy the injury-in-fact requirement, *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988).

This injury is "fairly traceable" to the settlement agreement, as "mere indirectness of causation is no barrier to standing," so long as there are "plausib[le]" links in the chain of causation. *See id.* at 705. *First*, it is more than plausible that

the settlement agreement was at least a "substantial factor" that "motivated" EPA to issue the proposed rule. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001). After all, the settlement agreement is legally binding and provides unequivocally that EPA "will" issue a "proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide]." JA 3.[4] *Second*, the States' declarations make clear that EPA's proposal is, in turn, the cause of the expended resources. *See supra*, at 17-21. As EPA Administrator McCarthy has admitted, it is a practical necessity that States begin "to design plans *now*, . . . so they're on a trajectory to meet their final goals in 2030." *See supra*, at 20 (emphasis added).

Finally, this injury will be redressed by a favorable decision. The States seek a decision from this Court that the Section 111(d) portion of the settlement agreement is now unlawful and ask for equitable relief prohibiting EPA from continuing to comply with the agreement in that respect. ECF 1505986 at 4-5. If this Court grants such relief, the Section 111(d) rulemaking is likely to stop, which will

[4] *See Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) (presumption that settlement agreements are binding and enforceable); *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982) (settlement agreements "may not be unilaterally rescinded"); *see also Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 247 n.4 (3d Cir. 2011) (challenged agency document "directly result[ed]" from the settlement agreement that required issuance of the document).

allow the States to halt their efforts to comply. *See, e.g.*, Ind. Decl. ¶ 6 (Exh. C); Kan. Decl. ¶ 7 (Exh. E); W. Va. Decl. ¶ 10 (Exh. D); Wyo. Decl. ¶ 14 (Exh. G).

2. The States have a second and independent injury-in-fact resulting from their "certainly impending" obligation to submit a State Plan after the Section 111(d) rule is final. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quotations omitted). A State suffers an injury-in-fact when it must revise or create a state plan under the CAA. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). Any final rule that regulates emissions under Section 111(d) will inflict precisely such an injury, since the core mandate of Section 111(d) is the submission to EPA of State Plans.

Although EPA has self-servingly claimed that it might still withdraw the proposed rule, ECF 1520381 at 9, it is plain that finalization of the rule is "certainly impending" and not mere speculation. *Clapper*, 133 S. Ct. at 1147. In the proposed rule itself, EPA has committed to issuing the final rule by June 2015. 79 Fed. Reg. at 34,838.[5] EPA has also admitted in this litigation that it believes itself bound by President Obama's directive, *see* ECF 1513050, at 6, which requires EPA to issue a rule regulating power plants under Section 111(d) by June 2015.[6]

[5] *See also* JA 526 (Unified Agenda, EPA, Fall 2014 Statement of Priorities ("We plan to finalize standards for both new and existing plants in 2015.")).
[6] *See* JA 370.

And finally, if EPA were actually to attempt to avoid issuing under Section 111(d) a final carbon emissions regulation of existing power plants, the NGO and State Intervenors would surely sue to force such a regulation, as contemplated by the settlement. The final rule and the resulting injury to the States are, "if not certain, definitely likely." *Biggerstaff v. FCC*, 511 F.3d 178, 183-84 (D.C. Cir. 2007).

This impending injury is also fairly traceable to the settlement agreement and will be redressed by a favorable decision. As discussed earlier, traceability requires only plausible links in causation, and it is more than plausible that the settlement agreement is at least a "substantial factor" that is "motivating" EPA to finalize the rule. *Tozzi*, 271 F.3d at 308. The plain text of the settlement provides that EPA "will sign" and "transmit . . . a final rule that takes action with respect to" Section 111(d). JA 4. As for redressability, the Section 111(d) rulemaking will likely stop if this Court grants the relief that the States request, which would eliminate the obligation to submit a State Plan and therefore redress the injury.

ARGUMENT

I. The Section 112 Exclusion Renders The Settlement Agreement's Section 111(d) Provisions Unlawful

The settlement agreement must be vacated because it "agree[s] to take action that conflicts with or violates" the Section 112 Exclusion. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986); *see, e.g.*,

Conservation Nw. v. Sherman, 715 F.3d 1181, 1185 (9th Cir. 2013). In 2011, EPA agreed to "propose" and then "finalize" a rule under Section 111(d) requiring States to issue standards of performance for carbon dioxide emitted from existing power plants. JA 3-4. Then, in a rule that EPA issued in 2012, the agency determined to list power plants under Section 112 and imposed significant Section 112 regulations on those plants. *See* 77 Fed. Reg. at 9,310-76. As shown below, the Section 112 Exclusion prohibits EPA from requiring States to regulate under Section 111(d) a source category that EPA already regulated under Section 112.

A. The Section 112 Exclusion—As It Appears In The U.S. Code—Unambiguously Prohibits EPA From Regulating A Source Category Under Section 111(d) That Is Already Regulated Under Section 112

1. The text of the Section 112 Exclusion in the U.S. Code is clear. It provides 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). None of the terms is ambiguous. "[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzalez*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Accordingly, "any air pollutant" includes both HAPs and non-HAPs. "Source category" is a term of art under the Clean Air Act that includes power plants. *See* 70 Fed. Reg.

37,819, 37,822 tbl.1 (June 30, 2005); *see generally* 40 C.F.R. pt. 63; 42 U.S.C. § 7412(n)(1)(A). And "[r]egulated" means "[g]overned by rule, properly controlled or directed, adjusted to some standard, etc." 13 Oxford English Dictionary 524 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

As EPA itself has explained in detailed analyses in 2004, 2005, 2007, and 2014, "a literal reading" of the text of the Section 112 Exclusion in the U.S. Code 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." JA 138; *accord id.* at 397 ("[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."); *id.* 173 ("[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.").

The Supreme Court has read the language in the same way as EPA. In its *AEP* decision, the Court noted the statutory "exception[s]" to EPA's authority under Section 111(d). 131 S. Ct. at 2537 n.7. As relevant here, "EPA may not em-

ploy [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *Id.*

2. This literal reading of the text of the Section 112 Exclusion in the U.S. Code is bolstered by the legislative history of the 1990 Amendments to the CAA. As EPA has explained, the text that appears in the U.S. Code originated in the House of Representatives. The House, EPA notes, specifically "sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." JA 138. With the expansion of federal regulation under Section 112 to include far more pollutants as HAPs and to require severe regulation of sources regulated under Section 112, the House was concerned about the effect on existing sources of "duplicative or overlapping regulation" imposed by the States under Section 111(d). *Id.* Existing—as opposed to new—sources have sunk costs and ongoing operations that make it especially difficult to comply with regulation by different sovereigns under both Section 112 and Section 111(d).

In fact, the House seemed particularly concerned about "duplicative or otherwise inefficient regulation" of existing power plants. JA 106. It had also drafted a new provision that—like the provision now codified at Section 112(n)(1)—gave EPA authority to decline to regulate power plants under Section 112. JA 138. As EPA has explained, the House specifically revised the Section 112 Exclusion to

work in tandem with this new provision, so that EPA had a choice between regulating HAPs emitted from existing power plants under the national standards of Section 112 or all emissions from those power plants under the state-by-state standards of Section 111(d). JA 138. The pre-1990 version of the Section 112 Exclusion, which focused solely on pollutants and not on source categories, no longer made sense if EPA was being given *categorical* discretion over power plants.

To be sure, the new Section 112 Exclusion created a minor regulatory gap between Section 112 and Section 111(d): EPA has no authority to regulate non-HAP pollutants emitted from an existing source regulated under Section 112. But the record in 1990 amply explains why the House would propose—and the Senate would ratify—such a change. By 1990, twenty years since the enactment of the CAA, EPA had employed Section 111(d) only *four times*, all for pollutants in specialized industries like acid mist emitted from sulfuric acid plants. Indeed, EPA had not issued a single Section 111(d) rule in the decade leading up to the 1990 Amendments. 79 Fed. Reg. at 34,844 n.43. And once Congress determined to broaden the reach of Section 112 in 1990, the role that Section 111(d) needed to play shrank even further. Congress well understood that few, if any, pollutants of concern would not be captured by the new Section 112 definition of a HAP: pollutants "which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects

whether through ambient concentrations, bioaccumulation, deposition, or otherwise." 42 U.S.C. § 7412(b)(2). Moreover, in the case of power plants, EPA was given the specific discretion under Section 112(n)(1)(A) to forgo national regulation of HAPs under Section 112 in exchange for state-by-state regulation of *both* HAPs and non-HAPs under Section 111(d).

Thus, the "gap" in EPA's authority that Congress created by revising the Section 112 Exclusion was small, and certainly insubstantial compared to the important policy concerns that animated the new Section 112 Exclusion: the rigorous nature of the new Section 112 regime, the sunk costs and ongoing operations that are a feature of all existing sources, and the problems arising from dual regulation of the existing sources by different sovereigns. Indeed, in the twenty-four years since the 1990 Amendments, EPA has finalized only two rules under Section 111(d), one of which this Court vacated under the Section 112 Exclusion in *New Jersey v. EPA*. *See* 70 Fed. Reg. 28,606 (May 18, 2005) (vacated); 61 Fed. Reg. 9,905 (Mar. 12, 1996) (municipal solid waste landfill gases).

3. In an attempt to escape the unambiguous text of the Section 112 Exclusion in the U.S. Code, and *EPA's own repeated concession about the "literal" meaning of those words*, EPA and Intervenors have recently imagined five other interpretations of the language. EPA Response Brief at 28–30, *In re Murray Energy Corp.*, No 14-1112 (D.C. Cir. Nov. 3, 2014), ECF 1520381 ("EPA Brief");

Amicus Brief of NRDC, et al., at 9–10 & n.18, *In re Murray Energy Corp.*, No 14-1112 (D.C. Cir. Nov. 17, 2014), ECF 1522612 ("NGO Brief"); Amicus Brief of the State of New York, et al., at 14–15, *In Re: Murray Energy Corp.*, No. 14-1112 (D.C. Cir. Nov. 10, 2014), ECF 1521617 ("NY Brief"). But as shown below, EPA and Intervenors seek to "create ambiguity where none exists." *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1556 (D.C. Cir. 1991). This attempt to torture ambiguity out of the plain statutory language—and EPA's sudden about-face—does not withstand scrutiny. *Cf. Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (refusing to find language ambiguous where "statute is awkward, and even ungrammatical").

First, EPA points out that Section 111(d) includes "three exclusionary clauses," only one of which is the Section 112 Exclusion.[7] EPA Brief at 28-29, ECF 1520381. Because these exclusionary clauses are "separated from each other by 'or,'" the agency now asserts that it can regulate under Section 111(d) so long as one of the three clauses is not satisfied. *Id.* at 28, 30. Noting that one of the clauses is in fact not satisfied—air quality criteria have not been issued for carbon diox-

[7] The other two exclusionary clauses prohibit Section 111(d) regulation of "any air pollutant": (1) "for which air quality criteria have not been issued"; or (2) "which is not included on a list published under [Section 108(a)]." 42 U.S.C. § 7411(d)(1)(A)(i).

ide—EPA argues that it is "irrelevant" that the Section 112 Exclusion *is* satisfied. *Id.* at 29.

But this argument—which EPA has never made before—fails even the most basic scrutiny. Simple logic dictates that 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 married, the landlord does not want a tenant who meets *any*—not just *one*—of those criteria. Thus, in *New Jersey v. EPA*, this Court vacated EPA's Section 111(d) rule regulating the emission of mercury from power plants because it violated the Section 112 Exclusion, even though it did not violate the other exclusionary clauses. 517 F.3d at 583.

Second, EPA asserts that it is ambiguous whether the Section 112 Exclusion is even an exclusion at all, but rather might be read to affirmatively *permit* regulation under Section 111(d) of any source categories regulated under Section 112. EPA Brief at 29-30, ECF 1520381. This assertion of ambiguity—which EPA has also never before suggested and even now does not embrace, *id.* at 30—is belied by EPA's own reference to the Section 112 Exclusion as "the third exclusionary clause," *id.* at 29; *see also id.* at 28 (referring to "three exclusionary clauses"). It is

quite clear to EPA that the language in question is an exclusionary, and not an inclusionary, clause. This interpretation is also contrary to *New Jersey v. EPA*, in which this Court treated the Section 112 Exclusion as an exclusionary clause. And finally, this interpretation would render the Section 112 Exclusion superfluous, since Section 111(d) would affirmatively permit the regulation of "any existing source" even without the Exclusion's text.

Third, the NGO Intervenors argue that the text of the Section 112 Exclusion can be read to have effectuated no change from the pre-1990 Amendment text—in other words, the Exclusion still prohibits only the regulation of HAPs under Section 111(d) regardless of whether the source category is regulated under Section 112. *See* NGO Brief at 9, ECF 1522612. EPA has repeatedly explained why this long-discredited argument has no merit. JA 137-38; *id.* at 143. The most significant flaw is that it renders the statutory phrase "emitted from a source category" entirely meaningless. *See Reiter*, 442 U.S. at 339 ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). It is also inconsistent with the legislative history.

Fourth, the NGO Intervenors claim that the word "regulated"—in the phrase "emitted from a source category which is *regulated* under section [112]"—is somehow ambiguous. NGO Brief at 9-10, ECF 1522612. They assert, in effect, that the Section 112 Exclusion could be read as follows: 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], *where the air pollutant in question is regulated under Section 112*." *See id.* But the NGO Intervenors do not explain the ambiguity in the word "regulated," which has a plain and ordinary meaning. *See* 13 Oxford English Dictionary 524 ("Regulated" means "[g]overned by rule"). What NGO Intervenors are really attempting is to insert into the Section 112 Exclusion language that is not there. That violates long-standing rules of statutory interpretation. *See, e.g., Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress . . . to rewrite the statute.").

Fifth, the State Intervenors argue that "the phrase 'which is regulated under section [112]' could be read as modifying both 'any air pollutant' and 'source category.'" NY Brief at 14-15, ECF 1521617. The State Intervenors would thus read the Exclusion as follows: EPA may not require States to issue "standards of performance for any existing source for any air pollutant . . . *which is regulated under section [112] . . . where that pollutant is* emitted from a source category which is regulated under section [112]." *See id.* Again, however, this is simply wholesale and impermissible rewriting of the law. *Blount*, 400 U.S. at 419.

4. EPA and Intervenors also attempt to cast doubt on the Supreme Court's plain reading of the Section 112 Exclusion in *AEP*, but these arguments similarly fail. Pointing to the Supreme Court's use of the phrase "the pollutant in

question," they first contend that the Court understood the Exclusion to apply only where a pollutant *and* a source category are regulated under Section 112. *See* ECF 1513050, at 17 n.7; NGO Brief at 10 n.18, ECF 2533612. But that is simply not what the Court said. It said: "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *AEP*, 131 S. Ct. at 2537 n.7. The object of the verb phrase "are regulated under . . . [Section 112]" is the noun phrase "existing stationary sources." There is no suggestion that "the pollutant in question"—which refers to the pollutant for which Section 111(d) regulation is contemplated—must also be regulated under Section 112 for the Exclusion to apply.

EPA further asserts that it is fundamentally incompatible with *AEP*'s other reasoning to read the Court's statement as recognizing a blanket prohibition on Section 111(d) regulation of source categories already regulated under Section 112. *See* ECF 1513050, at 17 n.7; NGO Brief at 10 n.18, ECF 1522612. This, too, lacks merit. What the Court held in *AEP* "is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." *AEP*, 131 S. Ct. at 2538. That is fully consistent with the Section 112 Exclusion, which reflects that EPA was given the choice between imposing federal standards on HAPs emitted from power plants under Section 112, or requiring state-by-state regulation of all emissions from existing power plants under Section 111(d).

B. The Extraneous Conforming Amendment Was Properly Excluded From The U.S. Code Under Uniform Legislative Practice And Binding Caselaw

Recognizing the weakness of their argument against the "literal" meaning of the Section 112 Exclusion as it appears in the U.S. Code, EPA and Intervenors rely primarily on an alleged ambiguity in the Statutes at Large. Congress has provided that the U.S. Code, which is prepared by the Office of Law Revision Counsel of the U.S. House of Representatives, *see* 2 U.S.C. §§ 285a-285g, "shall . . . establish prima facie the laws of the United States," 1 U.S.C. § 204(b). Accordingly, the U.S. Code is deemed to be an accurate recounting of the "laws of the United States" unless it can be shown that the Office of Law Revision Counsel made an error, such that the Code is "inconsistent" with the Statutes at Large. *Stephan v. United States*, 319 U.S. 423, 426 (1943).

As shown below, EPA and Intervenors' reliance on the Statutes of Large is mistaken because there is no inconsistency with the U.S. Code. The Statutes at Large reflect that, in 1990, Congress passed two amendments to Section 111(d)—a substantive amendment and an extraneous conforming amendment. Consistent with uniform legislative practice and binding precedent of this Court, the Office of the Legislative Counsel properly excluded the extraneous conforming amendment from the U.S. Code as a common clerical error. *See infra*, at 41-44. EPA and In-

tervenors' argument that this conforming amendment nevertheless creates an "ambiguity" in the Section 112 Exclusion is without merit.

1. Congress's official legislative drafting guides, which courts regularly consult in interpreting statutes, set forth well understood and accepted conventions for drafting a bill that makes amendments to an existing law. *See, e.g.*, *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-61 (2004) (analyzing the official legislative drafting manuals to interpreted a statute); *United States v. O'Brien*, 560 U.S. 218, 233-34 (2010) (same); *accord Frederick v. Shinseki*, 684 F.3d 1263, 1270 (Fed. Cir. 2012) (same); *Perry v. First Nat'l Bank*, 459 F.3d 816, 820 (7th Cir. 2006) (same). As the Senate Legislative Drafting Manual ("Senate Manual") provides, "substantive amendments"—those amendments making substantive changes to the law—"should appear first in numerical sequence of the Act amended or be organized by subject matter." JA 77.[8] A bill should then list "[c]onforming [a]mendment[s]," which are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." *Id*. Conforming amendments thus make clerical adjustments to an existing law, such as changes to "tables of contents" and corrections to pre-existing cross-references,

[8] This source is available at http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf.

after the "substantive amendments" are executed. *Id.*; *accord* JA 64 (House Legal Manual on Drafting Style § 332(b) (1995) ("House Manual")).

Consistent with these drafting guides, the Office of the Legislative Counsel follows a consistent practice of first executing substantive amendments, then executing subsequent conforming amendments, all while excluding as clerical errors any conforming amendments rendered unnecessary by previously executed substantive amendments. *See* JA 82, 69. The States' extensive research has revealed that the Office's longstanding and uniform practice is to exclude from the U.S. Code any conforming amendment that conflicts with a prior substantive amendment, and to simply note that the conforming amendment "cannot be executed."[9] Many of the hundreds of examples located were similar to the circumstances here,

[9] *See, e.g.*, Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 290bb–25; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 1395x; Revisor's Note, 42 U.S.C. § 1396a; Revisor's Note, 42 U.S.C. § 1396r; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 42 U.S.C. § 9601; Revisor's Note, 49 U.S.C. § 47115.

where the substantive and conforming amendments appeared in the same bill and purported to amend the same preexisting statutory text.[10] The States have not found a single example of the Office of Law Revision Counsel giving *any* meaning to a conforming amendment that could not be executed as a result of a previously executed substantive amendment.

This Court similarly has recognized that a mistake in conforming an amended statute should be ignored and not treated as "creating an ambiguity." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336 (D.C. Cir. 2013). In *American Petroleum*, this Court confronted a statute where Congress had renumbered a specific provision but failed to also correct, by way of a conforming amendment, a pre-existing cross-reference. *Id.* This Court refused to allow that clerical error to "creat[e] an ambiguity" that might alter the substantive meaning of the statute. *Id.* Instead, this Court recognized that an error in updating a cross-reference "was far more likely the result of a scrivener's error" and should be ignored. *Id.* Such minor errors in conforming a statute that has been substantively amended, this Court observed, are

[10] Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 15 U.S.C. § 2064; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 42 U.S.C. § 1395u; Revisor's Note, 42 U.S.C. § 1395ww; Revisor's Note, 42 U.S.C. § 1396b; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 9875.

quite common in today's "enormous and complex" legislation and should not be elevated in significance. *Id.* at 1336-37; *cf. Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as non-substantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same).

2. Applying this uniform legislative drafting practice and binding case law to the present case makes clear that the text of the Section 112 Exclusion in the U.S. Code properly articulates the law. Faced with two amendments in 1990 to Section 111(d), the Office of the Legislative Counsel correctly excluded the extraneous conforming amendment from the U.S. Code.

The first amendment, which the Office of the Law Revision Counsel included in the U.S. Code, is a substantive amendment to Section 111(d) ("Substantive 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); Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990); *see* JA 137. This meant that if EPA had listed a pollutant as a HAP, the agency could not regulate that pollutant under Section 111(d). *See supra*, at 6. 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 that is actually regulated under section 112," JA 138, the Substantive 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 (1990). This "change [in] focus" is plainly a *substantive* change, and the amendment is accordingly listed among other substantive amendments in the Statutes at Large. *See* JA 192 ("the House version . . . was included with a variety of substantive provisions").

The second amendment appears 107 pages later in the Statutes at Large, among a list of "[c]onforming [a]mendments" that make clerical changes to the CAA ("Conforming Amendment"). *See* JA 192. As noted above, conforming amendments are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." JA 77. Consistent with this description, the Conforming Amendment merely updated the cross-reference in the Section 112 Exclusion. The Conforming Amendment instructs:

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

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

Applying the process required by the official legislative drafting guides, and consistent with this Court's case law, the Office of Law Revision Counsel correctly

found the Conforming Amendment to be extraneous and excluded it from the U.S. Code. The Office first executed the Substantive Amendment, producing the text of the Section 112 Exclusion that appears in the U.S. Code today. It then looked to the Conforming Amendment and determined that it "could not be executed" because the Substantive Amendment had deleted the reference to "[1]12(b)(1)(A)." *See* Revisor's Note, 42 U.S.C. § 7411. This was entirely proper because it was impossible now to "strik[e] '112(b)(1)(A)' and insert[] in lieu thereof '112(b),'" as the Conforming Amendment directed.

3. Although EPA has indicated that it understands the Conforming Amendment is "a drafting error and therefore should not be considered," 70 Fed. Reg. at 16,031, it has inexplicably refused (and continues to refuse) to follow that proper approach. During the rulemaking that led to *New Jersey v. EPA*, the agency declared itself bound to "give effect to both the [Substantive Amendment] and [Conforming Amendment], as they are both part of the current law." JA 138. Confronted then with a puzzle entirely of its own creation, EPA settled upon an entirely unprecedented solution: it would treat each Amendment as independently creating a separate revised version of the Section 112 Exclusion. The first "version" is the version in the U.S. Code, created by executing only the Substantive Amendment. This version, EPA explained, means 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." JA 138. The second "version" would be created by executing only the Conforming Amendment, which in EPA's view would leave the Section 112 Exclusion substantively the same as it was pre-1990. *Id.* Out of these two "versions" of the Section 112 Exclusion, EPA's claim of "ambiguity" was born.

EPA's approach, which it continues to press today, is baseless. The only evidence that may rebut the terms of Section 111(d) as expressed in the U.S. Code is the Statutes at Large. *Stephan*, 319 U.S. at 426. But the Statutes at Large simply do not reflect two separate versions of Section 111(d). Rather, they include only the Substantive Amendment and the Conforming Amendment, which—when properly applied one after the other—reveal that the latter is a "drafting error" that should be ignored. Notably, if this Court were to adopt EPA's approach to the amendments, every one of the numerous instances where the Office of Law Revision Counsel has excluded from the U.S. Code an amendment that "could not be executed" would now need to be treated as creating previously unidentified statutes-in-exile. There is no basis in logic, legislative practice, or congressional intent to permit this unprecedented and deeply disruptive result.

C. Even Under EPA's Understanding, The Conforming Amendment Does Not Alter The Unambiguous Prohibition Against Double Regulation Of The Same Source Category Under Both Section 112 and Section 111(d)

Even if this Court were to agree with EPA that the Conforming Amendment created an additional "version" of the Section 112 Exclusion, that would not change or eliminate the "version" created by the Substantive Amendment, which is currently in the U.S. Code. Under EPA's erroneous approach, both "versions" of the Exclusion must be treated as the law of the land, since both amendments were passed by both houses of Congress and signed by the President. And if both "versions" of the Exclusion are the law, then EPA is duty bound to "give effect" to both exclusions. *Reiter*, 442 U.S. at 339.

Although EPA does not acknowledge it, there is an entirely straightforward way to give full "effect" to "every word" of both exclusions that EPA believes Congress enacted. *Id.* Giving effect to the version that appears in the U.S. Code would mean honoring the prohibition that, as EPA has put it, "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." JA 138. Giving effect to the version created by the Conforming Amendment would mean abiding by the pre-1990 prohibition on regulating any HAP under Section 111(d), regardless of whether the source of the HAP is actually regulated under

Section 112. Every word of both exclusions can be given effect by simply applying both prohibitions. EPA cannot require States to regulate existing sources under Section 111(d) where the pollutants in question: (1) are "emitted from a source category which is regulated under section [112]"; *or* (2) are HAPs "included on a list published under section [112]."

In its 2014 Legal Memorandum, EPA refuses to address this comprehensive way to give "effect" to "[e]very word" that EPA believes Congress intentionally used, *Reiter*, 442 U.S. at 339, even though EPA was aware of this interpretation.[11] Instead, EPA asserted that it had the authority to simply rewrite both limitations to prohibit EPA from regulating under Section 111(d) only the emission of "any HAP[s] listed under section 112(b) that may be emitted from [a] particular source category" that "is regulated under section 112." JA 397. EPA's rewrite of the Section 112 Exclusion is narrower than either of the two limitations on EPA's authority that EPA believes Congress enacted. It is narrower than the limitation that appears in the U.S. Code because it permits EPA *some* regulation under Section 111(d) of source categories actually regulated under Section 112—specifically, the regulation of non-HAP emissions from such sources. And it is narrower than the

[11] *See, e.g.*, Letter from Nat'l Ass'n of Mfrs., et al. to EPA 26-27 (June 25, 2012), http://www.americanchemistry.com/Policy/Environment/Environmental-Regulations/Multi-Association-Comments-re-EPAs-Proposed-NSPS-for-GHG-Emissions-for-New-Stationary-Sources.pdf.

alternative limitation purportedly created by the Conforming Amendment, since it permits EPA *some* regulation under Section 111(d) of HAPs—specifically, HAPs emitted from source categories not regulated under Section 112.

EPA's position is remarkable and unprecedented. EPA does not—and could not possibly—claim that anyone in Congress intended to adopt this narrowed version of the Section 112 Exclusion. Yet, EPA claims that the fact that Congress adopted two different limitations on EPA's authority gives EPA the power to reduce the reach of *both* prohibitions.

It is apparent that what is driving EPA's interpretation of the Exclusion is its desire to avoid either "version" of the Exclusion that it believes Congress enacted. EPA understands that under either "version" of the Section 112 Exclusion, the agency will have some gap in its authority, where it will not be able to reach existing-source emissions that are not otherwise regulated under Section 112. Under the version in the U.S. Code, EPA cannot regulate non-HAP emissions from sources already regulated under Section 112. And under the alternative version, EPA cannot reach HAP emissions from sources *not* regulated under Section 112. But EPA's policy preference that there should be absolutely no gap in its authority—no matter how minor—does not give it the power to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446; *see also Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and

other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.").

II. This Court Has Jurisdiction To Review The Settlement Agreement

A. The Settlement Agreement Is A Reviewable Final Action Under Section 307(b) of the CAA

The Supreme Court has made clear that Section 307(b) of the CAA provides jurisdiction to review essentially any action by EPA, so long as it is final. As relevant here, Section 307(b) permits the filing of a petition for review in this Court that challenges "any other nationally applicable regulations promulgated, or final action taken," by EPA. 42 U.S.C. § 7607(b)(1). This catch-all provision for national EPA actions mirrors a similar catch-all provision for local or regional EPA actions that the Supreme Court has construed extremely broadly. *See Harrison*, 446 U.S. at 589. The use of the words "any other," the Court has explained, evinces Congress's intent to allow for review of all final EPA actions. *Id.*

The settlement agreement is a final action by EPA—and thus reviewable under Section 307(b)—for two independently sufficient reasons. To begin, the settlement agreement was entered into under Section 113(g) of the CAA, which expressly sets forth procedures for making such an agreement "final." 42 U.S.C. § 7413(g). Specifically, EPA must go through at least thirty days of notice and comment before a "settlement agreement of any kind under this chapter" may be

"final." *Id.* Where an agency action is "promulgated in [such] a formal manner after notice and evaluation of submitted comments," the Supreme Court has held that there is "no question" that the action is "final." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) (internal quotations omitted).

The agreement is also final under the more generalized two-pronged finality inquiry under *Bennett v. Spear*, 520 U.S. 154 (1997). *See generally United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008) (settlement reviewable as final agency action); *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761 (4th Cir. 1993) (same).

First, the settlement agreement represents the "consummation" of EPA's decisionmaking with respect to how to resolve its dispute with the NGO and State Intervenors. *Id.* at 178 (quotations omitted). The NGO and State Intervenors had threatened to sue EPA to force the agency to regulate carbon dioxide emission from power plants under Section 111, *see supra*, at 11-12, and then EPA and these parties reached a formal settlement agreement to avoid such a lawsuit. The agreement was EPA's final resolution—*i.e.*, "consummation"—of the dispute. *See* JA 23 (EPA Approval Memo) (explaining that EPA "finaliz[ed] this settlement" on March 2, 2011); JA 24 (Settlement Modification) ("the Settlement Agreement became *final* on March 2, 2011").

Second, "legal consequences . . . flow" from the settlement. *Bennett*, 520 U.S. at 178 (quotations omitted). A settlement agreement embodies the final resolution of a dispute by defining the rights and obligations of the parties "in the nature of [a] contract[]." *Makins v. District of Columbia*, 277 F.3d 544, 546 (D.C. Cir. 2002). In the present case, EPA made a legal commitment that it "will" issue a "proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide]," and "will . . . transmit . . . a final rule that takes action with respect to" existing power plants under Section 111(d). JA 3-4. In turn, the NGO and State Intervenors promised to "not file any motion or petition seeking to compel EPA action . . . with respect to . . . emissions from [power plants]," unless EPA failed to comply with certain contractual conditions. *Id.* at 4-5. These legally binding commitments are a paradigmatic case of an agency action that has legal consequences.

B. The Specific Challenge The States Raise Here Is Ripe

A lawsuit becomes ripe when two conditions are satisfied. *First*, the "issues" raised by the lawsuit must be "fit[] . . . for judicial decision." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 479 (2001) (quotation omitted). This requirement is fulfilled where "[t]he question . . . is purely one of statutory interpretation that would not benefit from further factual development of the issues presented," and would not "inappropriately interfere with further administrative ac-

tion." *Id.* (quotation omitted). *Second*, the parties will suffer "hardship" if the court were to "withhold[] . . . consideration." *Id.* This hardship inquiry is a "lower standard" in cases brought under Section 307(b) of the CAA because it is a statute that "specifically provides for preenforcement review." *Id.* at 479-80 (quotations omitted).

Here, the specific challenge the States assert—that the settlement agreement's Section 111(d) provisions are now unlawful as a result of EPA's regulation of power plants under Section 112—became ripe in June 2014. In that month, EPA first announced in the detailed Legal Memorandum the agency's conclusion that it could still issue regulations of existing power plants under Section 111(d), notwithstanding its Section 112 rulemaking in 2012. EPA then issued its proposed Section 111(d) rule that began imposing harms upon the States immediately.

1. The "issue[]" raised by this lawsuit became "fit[] . . . for judicial decision" when EPA issued its Legal Memorandum. *Whitman*, 531 U.S. at 479 (quotations omitted). The *only* substantive issue presented here is whether EPA can lawfully abide by the settlement agreement's Section 111(d) commitments to propose and then finalize a rule regulating existing power plants under Section 111(d), which the Legal Memorandum concludes that the agency can do. This is quintessentially an issue of "pure[] . . . statutory interpretation that would not benefit from further factual development of the issues presented." *Id.* (quotations omitted).

The firm conclusions in the Legal Memorandum and the threshold nature of the question also mean adjudication of this issue at this time will not "*inappropriately* interfere with further administrative action." *Whitman*, 531 U.S. at 479 (emphasis added). In the Legal Memorandum, EPA unequivocally "*conclude[d]*" after seven pages of detailed legal analysis that "section 111(d) authorizes the EPA to establish section 111(d) guidelines for GHG emissions from EGUs," even though "EGUs are a source category that is regulated under CAA section 112." JA 398. Although EPA's ongoing rulemaking may generate a final Section 111(d) Rule that adjusts some of the particulars in the proposed Rule, the analysis in the Legal Memorandum suggests there is no realistic possibility that EPA will change its conclusion that it has the authority under Section 111(d) to issue a rule at all. Moreover, because the answer to the legal question at issue is binary—EPA either can issue under Section 111(d) a rule relating to existing power plants, or it cannot—a decision in this case will not entangle this Court in the administrative process. This Court will either halt an unlawful rulemaking or do nothing if it agrees that EPA is acting within its authority.

2. The States will unquestionably suffer "hardship" if this Court were to "withhold[] . . . consideration." *Whitman*, 531 U.S. at 479. As detailed above, States began expending substantial resources to prepare their State Plans immediately after EPA released its proposed Section 111(d) Rule in June 2014, consistent

with the acknowledgment by EPA's Administrator that state preparations would have to begin "now." *See supra*, at 17-21. These are more than sufficient harms under the "lower standard" applicable to a challenge brought under Section 307(b). *Whitman*, 531 U.S. at 479. After all, the Supreme Court has specifically held that the necessity of "promptly undertak[ing] . . . lengthy and expensive task[s]" constitutes sufficient hardship for purposes of ripeness. *Id*.

In sum, this case is ripe because both prongs of the ripeness inquiry were satisfied in June 2014. The case thus is properly brought now under the provision of Section 307(b)(1) that concerns the "occurrence of an event that ripens a claim," *see Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012), *aff'd in part and vacated in part on other grounds by UARG*, 134 S. Ct. at 2444, and is ripe under general ripeness principles, *see Whitman*, 531 U.S. at 478.

C. Petitioners' Challenge Presents A Live Controversy

In its procedural filings in this case, EPA has erroneously claimed that "Petitioners' challenge is moot given that the deadlines set in the Settlement Agreement have all long passed." ECF 1513050 at 14. "The mootness doctrine, deriving from Article III, limits federal courts to deciding actual, ongoing controversies." *Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc) (quotations omitted). This case is not moot because the settlement agreement commanding Section 111(d) regulation remains in effect.

The settlement agreement is "in the nature of [a] contract[]" and remains in force under basic contract principles. *Makins*, 277 F.3d at 546. Under hornbook contract law, one party's failure to perform an obligation under a contract does not relieve it from its duties under the contract, even if the other party does not seek to enforce the obligation. *See* 13 Williston on Contracts § 39:31 (4th ed.); *accord William W. Bierce, Ltd. v. Hutchins*, 205 U.S. 340, 346 (1907) ("[A party] may keep in force or may avoid a contract after the breach of a condition in his favor."). Here, the NGO and State Intervenors fully knew that EPA missed the settlement agreement's deadlines, but have chosen to maintain the agreement by continuing to uphold their sole obligation not to "file any motion or petition" against EPA "with respect to GHG emissions from EGUs." JA 4-5. Indeed, these parties have specifically intervened in this matter *to defend the vitality of the settlement*. *See* NY Motion to Intervene at 8, ECF 1510244 ("Intervenor States' interest in *avoiding annulment* of the settlement agreement is . . . manifest.") (emphasis added); NGO Motion to Intervene at 8, ECF 1510348 (interested as party to the settlement agreement). The settlement agreement thus remains "in force" today notwithstanding EPA's failures, and the present case is not moot. *William W. Bierce, Ltd.*, 205 U.S. at 346.

CONCLUSION

For the foregoing reasons, this Court should hold "unlawful" and "set aside" the settlement agreement's Section 111(d) provisions. 5 U.S.C. § 706(2)(A). This Court should also enjoin EPA from continuing and finalizing its Section 111(d) rulemaking regarding existing power plants unless and until EPA uses its authority to end the regulation of power plants under Section 112.[12]

[12] EPA has two paths to end the regulation of power plants under Section 112. *First*, the Supreme Court this week granted review of EPA's decision to regulate power plants under Section 112(n), without considering the costs of such regulation. *See supra*, at 14. Should the Court rule against EPA, the agency could decline on remand to regulate power plants under Section 112(n). *Second*, EPA alternatively could delist the regulation of power plants pursuant to Section 112(c)(9). *See New Jersey*, 517 F.3d at 582. Unless and until EPA chooses either of these paths, power plants will continue to be "regulated" under Section 112, and the Section 112 Exclusion will prohibit EPA from complying with the Section 111(d) portions of the settlement.

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 13,791 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Elbert Lin
Elbert Lin

CERTIFICATE OF SERVICE

I certify that on this 4th day of March, 2015, a copy of the foregoing *Final Brief for Petitioners* was served electronically through the Court's CM/ECF system on all registered counsel. I also filed eight (8) paper copies with this Court.

/s/ Elbert Lin
Elbert Lin

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

CITY OF NEW YORK, et al.

Intervenors.

Petition for Review of Settlement Agreement of the
United States Environmental Protection Agency

EXHIBITS TO FINAL BRIEF FOR PETITIONERS

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EXHIBIT A

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

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146

DECLARATION OF RONALD W. GORE

I, Ronald W. Gore, hereby declare as follows:

1. I am the Chief of the Air Division within the Alabama Department of Environmental Management (ADEM). I have been employed by ADEM for 40 years. As part of my duties, I am responsible for the Division's development of State plans to implement federal air quality rules and regulations.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will need to undertake in response to EPA's proposed *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) ("Section 111(d) Rule" or "Rule"), including preparing a State plan consistent with that proposed rule. Under that proposed Rule, the State must submit a plan to the Environmental Protection Agency ("EPA") by June 30, 2016, absent special circumstances.

3. Based on my knowledge and experience, I believe that developing Alabama's response the Section 111(d) Rule will be the most complex air pollution rulemaking undertaken by ADEM in the last 40 years. I have been responsible for and worked on many State plans designed to be submitted to and approved by EPA, including plans for attaining air quality standards, construction and operating permit plans, visibility rules, etc. The Clean Air Act recognizes the time and resources necessary to draft and finalize such plans by providing three to five years, at a minimum, for States to submit them. EPA proposes in the 111(d) Rule that States submit a vastly more complex rule in one to three years.

4. EPA has proposed that GHG reductions can be maximized by viewing the electric utility system in a very broad way, i.e., that States can and should regulate facilities and consumer behavior in ways never before considered to be authorized by the CAA. This broadening of authority means that ADEM will have to seek authorization from the State Legislature to implement EPA's proposal. It is likely that other Alabama agencies will need to participate in enforcing parts of Alabama's plan and broad new State Legislative authority will be needed for them as well. ADEM historically has been the agency solely responsible for air quality compliance in the State. Having several other State agencies closely involved in the development and administration of air quality rules presents a daunting challenge for ADEM.

5. Since EPA proposed the 111(d) rule in June of 2014, ADEM has expended considerable resources in attempting to understand the plan for a State response. Two employees have been assigned full-time to analyzing the proposal, and further man-hours have been expended by other staff members, by management, and by legal counsel. Efforts

through which resources have been spent include, but are not limited to, the following examples:

- Checking EPA's calculations and assumptions on the emissions reduction goals the State should attain
- Generating possible responses to check whether they are achievable in practice
- Meeting with trade groups, EPA, other states, environmental groups, individual utilities, etc. to consider their input and viewpoints
- Traveling to and speaking at EPA Regional Public Hearing
- Traveling to and participating in several national workshops on 111(d)
- Holding many internal meetings to facilitate information flow up and down the management chain

Since June of 2014, I estimate that two man-years of effort, plus travel expenses, have been expended in responding to the 111(d) proposal.

6. In addition to the two full-time staff members mentioned above, I estimate that there fifteen other employees who spend time on 111(d). I estimate that five man-years of effort is being deployed at present responding to the 111(d) proposal.

7. Should the Court rule that EPA has overstepped its authority, ADEM's efforts would cease.

I declare under penalty of perjury that the foregoing is correct. Executed on this 17th day of November 2014, at Montgomery, Alabama.

Ronald W. Gore

EXHIBIT B

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

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146

DECLARATION OF LEONARD K. PETERS

I, Leonard K. Peters, hereby declare as follows:

1. I am the Secretary of the Commonwealth of Kentucky's Energy and Environment Cabinet. I have been employed by the Commonwealth of Kentucky in this capacity for more than six years. As part of my duties, I am responsible for programs related to the implementation of the provisions of the Clean Air Act.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will likely need to undertake in response to EPA's proposed *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830

(June 18, 2014) ("Section 111(d) Rule"), including preparing a state plan consistent with that Rule. Under that Rule, the State must submit a plan to the Environmental Protection Agency ("EPA") by June 30, 2016, absent special circumstances.

3. Based on my work, I have determined that implementing the Section 111(d) Rule presents a complicated endeavor, including creating a plan. Specifically, creating a plan of the type envisioned under the Section 111(d) Rule is a particularly complicated endeavor because every electric generating unit ("EGU") in the Commonwealth of Kentucky is unique. Some facilities are part of larger companies, spanning over several states. Other facilities are single municipalities. Developing a plan that fairly regulates facilities, meets Kentucky's state-specific carbon goal and keeps electricity affordable and reliable will be a significant undertaking. Development of the plan is not all the Commonwealth has to do to demonstrate compliance. Based on the proposed rule, Kentucky will have to monitor progress at each facility to ensure that goals for 2020 and 2030 are met. Therefore, as with all air quality regulations, the Commonwealth will continue to expend resources for the next 15 years to comply with a 111(d) Rule.

4. As a practical matter and in light of the proposed June 30, 2016 deadline, the Commonwealth cannot wait until the Rule is finalized to begin evaluating the Section 111(d) Rule and expending substantial resources to create a plan. The Commonwealth anticipates consulting with stakeholders, citizen groups and other agencies in developing a plan. Plan development will consume staff's time as the specific details of the 111(d) Rule are applied to each EGU and other potentially effected entities.

5. The State has already expended resources as a direct result of the Section 111(d) Rule. This includes meetings with every EGU in the Commonwealth, other governmental agencies, citizen groups, and sources potentially affected by the rule. Executive Staff also testified before legislative committees regarding the proposed rule.

6. The development of the plan associated with this rulemaking will require staff to devote significant time and resources at the expense of other agency functions.

I declare under penalty of perjury that the foregoing is correct. Executed on this 10th day of November, at Frankfort, Kentucky.

Leonard K. Peters

Commonwealth of Kentucky)
)
County of Franklin)

Subscribed and sworn to before me by Leonard K. Peters on this the 10th day of November, 2014.

Suzanne Paul
NOTARY PUBLIC
STATE AT LARGE

My Commission Expires:

01/2015

EXHIBIT C

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

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146

DECLARATION OF SCOTT DELONEY

I, Scott Deloney hereby declare as follows:

1. I am the Branch Chief for the Office of Air Quality's Programs Branch. I have been employed by the Indiana Department of Environmental Management ("IDEM") since 1998. As part of my duties, I am responsible for developing Indiana's State Implementation Plan and incorporating other federal requirements to ensure the state meets the National Ambient Air Quality Standards and other state obligations under the Clean Air Act.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will likely need to undertake in response to EPA's proposed *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) ("Section 111(d) Rule"), including preparing a State Plan consistent with that Rule. Under that Rule as proposed, the State must submit a State Plan to the Environmental Protection Agency ("EPA") by June 30, 2016, absent special circumstances.

3. Based on my work experience, I have determined that implementing the Section 111(d) Rule presents a complicated endeavor, including creating a State Plan, which includes steps that will take 3 or more years. Specifically, creating a plan of the type envisioned under the Section 111(d) Rule is a particularly complicated endeavor because of the Rule's unprecedented reliance on "outside the fence" control measures, including increased utilization of renewable energy and demand-side energy efficiency. The unorthodox control measures contemplated by the Rule thus require a coordination effort across multiple state agencies, including the Indiana Utility Regulatory Commission (IURC), the Office of the Utility Consumer Counselor, and the Indiana Utility Forecasting Group (IUFG). Currently, neither the IDEM nor any other state agency has the authority to implement

these building blocks in the measurable and enforceable fashion required by the Clean Air Act. IDEM has also determined it cannot meet the reduction goals set by the proposed Rule solely through the implementation of heat rate improvements (required under building block 1). Therefore, in order to comply with the Rule, the State would have to take legislative action to ensure the appropriate state agencies have the authority needed to implement any State Plan. Indiana's power supply is also governed by more than one Regional Transmission Organization (RTO), requiring coordination with both the Midcontinent Independent System Operator (MISO) and the Pennsylvania Jersey Maryland Power Pool (PJM), in attempting to find ways to implement the "outside the fence" building blocks. The coordination among state agencies and RTOs, as well as the legislative changes required to implement the Rule, make creating a State Plan extremely difficult, especially in the limited time frame contemplated by the proposed Rule.

4. As a practical matter and in light of the June 30, 2016 deadline, the State cannot wait until the Rule is finalized to begin evaluating the Section 111(d) Rule and expending substantial resources to create a State Plan. This expenditure of resources will likely include coordinating among state agencies and RTOs, seeking input of interested stakeholders, participating in external modeling and cost analyses, and possibly requesting legislative

changes to give IDEM or another state agency the authority needed to implement the "outside the fence" building blocks required by the proposed Rule. Because the statutory rulemaking process takes at least two and a half years to complete, IDEM cannot wait until the proposed Rule is final before expending significant time and resources on formulating a State Plan for meeting the required reductions in emissions.

5. The State has already expended resources and expects to take further steps in the coming months as a direct result of the Section 111(d) Rule. As discussed above, these efforts include coordinating among state agencies and RTOs, seeking input of interested stakeholders, participating in external modeling and cost analyses, and possibly requesting legislative changes to give IDEM or another state agency the authority needed to implement the "outside the fence" building blocks required by the proposed Rule. From a resource perspective, the proposed Rule detracts from efforts to implement other requirements of the Clean Air Act, and provides no additional revenue or resources to the State.

6. If this Court holds that EPA now lacks authority to regulate power plants under Section 111(d) of the Clean Air Act, the State will immediately halt entirely the above-described expenditures.

I declare under penalty of perjury that the foregoing is correct. Executed on this 9th day of September, 2014, at Indianapolis, Indiana.

Scott Deloney

Carolyn M. Koontz

CAROLYN M. KOONTZ
Notary Public, State of Indiana
Boone County
My Commission Expires
May 14, 2016

EXHIBIT D

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

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146

DECLARATION OF LAURA CROWDER

I, LAURA CROWDER, hereby declare as follows:

1. I am the Assistant Director of Planning for the West Virginia Department of Environmental Protection's Division of Air Quality (DAQ). I have been employed by the West Virginia Department of Environmental Protection since 1994. As part of my duties, I am responsible for developing West Virginia's State Implementation Plan (SIP) and incorporating federal requirements to ensure the state meets the National Ambient Air Quality Standards (NAAQS) under the Clean Air Act (CAA), as well as any state plans that are required under Section 111 of the CAA.

2. Based on my position, I have the personal knowledge and experience to understand many of the steps the State will need to undertake in response to EPA's proposed *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 FR 34830, 18 JUN 2014 (Section 111(d) Rule or Rule), including preparing a State Plan consistent with that Rule. Under the Rule as proposed, the State must submit a State Plan to the United States Environmental Protection Agency (EPA) by June 30, 2016, absent special circumstances.

3. Based on my work, I have determined that the State Plan and other measures necessary to implement the Section 111(d) Rule as proposed will be a complicated endeavor. Based on my experience in working on other state plans and SIPs, such the NOx SIP Call, the Clean Air Interstate Rule (CAIR) SIP, the Regional Haze SIP, Ozone Attainment and Maintenance Plans, Fine Particulate Matter (PM2.5) Attainment and Maintenance Plans, a Section 111(d) individual State Plan for West Virginia will take 3 or more years to develop. Specifically, creating a plan of the type envisioned under the proposed Section 111(d) Rule is a particularly complicated endeavor due to the Rule's unprecedented reliance on "outside the fence" control measures, including increased utilization of renewable energy and demand-side energy efficiency. The proposed Rule uses four building blocks to develop the CO2

emissions goals for each state – 1) heat rate improvements, 2) redispatch to existing natural gas combined cycle (NGCC) units, 3) increased renewable energy generation and 4) demand-side energy efficiency measures. Three of these four building blocks would require affected units to achieve CO2 emissions reductions "outside the fence." Building block 2 or redispatch to NGCC units, does not apply in West Virginia since West Virginia does not have any qualifying NGCC units. All three of the applicable building blocks present significant issues where West Virginia's electric generating fleet is concerned.

4. Building block 1, heat rate improvements, sets a goal that is not achievable across the West Virginia coal-fired electric generating fleet. The West Virginia coal-fired fleet is one of the most efficient in the country. Therefore, any boiler upgrade projects which have not already been completed that could potentially achieve significant heat rate improvements would likely trigger a Best Available Control Technology (BACT) review as part of a Prevention of Significant Deterioration (PSD) permit process. Smaller scale heat rate improvement projects that would not trigger a BACT review would be unable to achieve the 6 percent heat rate improvement goal contained in this building block.

5. Building block 3 sets a state goal for expansion of renewable energy generation based on an "average" of the Renewable Portfolio Standards (RPSs) in the "East Central" states with which EPA grouped West Virginia. However, the proposal would not grant emission reduction credit to West Virginia for the zero emission wind energy produced in the state. Instead, the renewable energy credits would follow the electricity to the out-of-state utility with the power purchase agreement. To capture credit for the renewable energy, West Virginia would be forced to participate in some form of interstate program that would include the states in which West Virginia-produced wind energy is sold. Such a program would require new statutory authority, significant groundwork in determining which states would participate, negotiations with those states, resources to develop interstate agreements to create an entity that would administer the interstate program, and time to create parallel regulations in each state to implement a program that would allow West Virginia to receive credit for the zero carbon emissions associated with current and future wind resources.

6. Building block 4 sets a goal for demand-side energy efficiency programs with a cumulative target for West Virginia of 10.1 percent. Developing a regulatory program with hard targets in time to meet the both the interim and final goals contained in the proposed Rule would be an extremely difficult

challenge. Developing the program and having the affected utilities implement the program in time to comply with the interim goal would be an even greater challenge, which I do not believe to be feasible in the amount of time the proposed rule allows.

7. The unorthodox control measures contemplated by the Rule will require a coordination of effort across multiple state agencies, including the West Virginia Department of Environmental Protection (DEP), the West Virginia Division of Energy (DOE) and the West Virginia Public Service Commission (PSC). Currently, neither the DEP nor any other state agency has the authority to implement these building blocks in the measurable and enforceable fashion required by the Rule. DEP has also determined it cannot meet the cumulative reduction goals set by the proposed Rule solely through the implementation of heat rate improvements (required under building block 1). Therefore, in order to comply with the Rule, the State would have to take Legislative action to ensure the appropriate state agencies have the authority needed to implement any State Plan.

8. As a practical matter and in light of the June 30, 2016 deadline, the State cannot wait until the Rule is finalized to begin evaluating the Section 111(d) Rule and expending substantial resources to create a State Plan. This expenditure of resources will include: coordinating among state agencies,

the Regional Transmission Organization (RTO) and other potential regulated entities; seeking input of interested stakeholders; coordinating with the WV DOE and PSC regarding renewable portfolio standards and demand-side energy management programs; participating in external modeling and cost analyses; evaluating different compliance strategies that could be implemented to meet the proposed goals; determining the statutory and regulatory changes that would be required for each of the strategies; taking initial steps to develop support across all stakeholders and policy makers for potential compliance strategies; and, possibly requesting legislative changes to give DEP or another state agency the authority needed to implement the "outside the fence" building blocks required by the proposed Rule. Enacting the new statutes necessary to implement the proposed rule will take at least a year. The statutory rulemaking process will take at least a year and a half to complete. Therefore, DEP cannot wait until the proposed Rule is final before expending significant time and resources on formulating a State Plan for meeting the required reductions in emissions.

9. The State has already expended significant resources as a direct result of the proposed Section 111(d) Rule. These efforts include reading the proposed rules and all supporting documentation; reviewing the proposal to determine whether the data and underlying assumptions used in calculating the goal are

correct; holding meetings with power plant owners/operators, the DOE and PSC; educating managers; and participating in legal work, all of which are part of the cost of preparing comments on the Section 111(d) proposal. From a resource perspective, the proposed rule detracts from efforts to implement other requirements of the CAA, and provides no additional revenue or resources to the State.

10. If this Court holds that EPA now lacks authority to regulate power plants under Section 111(d) of the Clean Air Act, the DAQ will immediately halt entirely the above-described expenditures.

I declare under penalty of perjury that the foregoing is correct. Executed on this 6th day of Nov. 2014, at Charleston, West Virginia.

LAURA CROWDER

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
TAMRA L. MOWRER
WV DIVISION OF AIR QUALITY
601 57th STREET, SE
CHARLESTON, WV 25304
My commission expires January 2, 2016

Tamra L. Mowrer

EXHIBIT E

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

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146

DECLARATION OF THOMAS GROSS

I, Thomas Gross, hereby declare as follows:

1. I am the Chief of the Monitoring and Planning Section in the Bureau of Air Quality. I have been employed by the Kansas Department of Health and Environment for 38 years. As part of my duties, I am responsible for managing the group that develops state plans to implement federal air quality rules and regulations.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will need to undertake in response to EPA's proposed *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) ("Section 111(d) Rule" or "Rule"), including preparing a state plan consistent with that Rule. Under that Rule, the State must submit a plan to the Environmental Protection Agency ("EPA") by June 30, 2016, absent special circumstances.

3. Based on my work, I have determined that implementing the Section 111(d) Rule presents a complicated endeavor, including the creation of a state plan. Based on my experience

in working in other state plans and state implementation plans (SIPs) such as mercury, regional haze, ozone and lead, the 111(d) plan will likely take from three to five years, with the longer time frame being required if a multi-state plan is prepared. Specifically, creating a plan of the type envisioned under Section 111(d) is a complicated endeavor for several reasons. First is the large potential for stranded investments in the State of Kansas. The six largest coal fired units in Kansas made significant investments in criteria pollutant emission reduction equipment in the last two to three years to comply with the regional haze program. More than two billion dollars is earmarked for these projects that have recently been completed or are still under construction. Although not new facilities, the investments made in pollution control equipment are significant and should be allowed to be amortized over a greater time period than allowed under the proposal.

The proposed rule uses four building blocks to develop the CO_2 emissions goals for each state. Two of the four building blocks would require affected units to achieve CO_2 emissions reductions off the footprint of the affected unit. Building block number two does not apply in Kansas because Kansas does not have an existing combined cycle natural gas unit. All three of the applicable building blocks have issues where Kansas' electrical generating fleet is concerned.

Building block number one, regarding heat rate improvements, sets a goal that is not achievable across the entire fleet of affected units in Kansas. A major impediment to the type of boiler upgrade projects that could achieve significant heat rate improvements is the fact that they would likely trigger a Best Available Control Technology (BACT) review as part of a Prevention of Significant Deterioration (PSD) permit process. If a plant were not yet equipped with a SCR unit to control NO_x, a heat rate improvement project that might cost $5 million could turn into an SCR project for NO_x reductions with a price tag of $100 million. Smaller scale heat rate

improvement projects that would not trigger a BACT review, would not be able to achieve the 6% goal contained in this building block.

Kansas does not currently have any combined cycle natural gas plants, so building block number two regarding increased dispatch of such units does not currently apply. One Kansas utility has plans to convert a simple cycle turbine to a combined cycle unit in 2015.

In Kansas, the building block with the greatest potential for CO_2 emission reductions is the renewable building block. Building block number three sets a goal for expansion of renewable energy generation based on the Kansas renewable portfolio standard. While Kansas utilities currently meet the requirements of the standard and have plans to meet the 2020 goal, the shortfalls in meeting the goals established in building blocks one and four would have to be made up in building block three. There is a large potential for wind energy development in western Kansas when upgraded transmission lines to out of state markets are completed. Unfortunately, the proposal would not grant any emission reduction credits to Kansas for the zero emissions wind energy produced. In the proposal the renewable energy credits would follow the electricity to the out-of-state utility with the power purchase agreement. To capture credit for the renewable energy credits, Kansas will likely have to participate in some form of interstate program that would include states receiving Kansas wind energy. Such a program would require new statutory authority, significant groundwork in determining which states would participate, resources to develop interstate agreements to create the entity that would administer the trading program, and time to create parallel regulations in each state to implement a program that would allow for Kansas to receive benefit from the zero carbon emissions associated with future wind energy development.

Building block number four establishes a goal for demand side management programs with a cumulative target for Kansas of 9%. The Kansas legislature passed House Bill 2482 in the 2014 session. The new law provides utilities the opportunity for cost recovery for demand side management programs. It is a new voluntary program that is in the initial stages of implementation. It has no compliance provisions that could be adapted into a state 111(d) plan. Transitioning from a voluntary program in its developmental stages to a regulatory program with hard targets in time to meet the interim goals contained in the proposal would be a great challenge. Developing the program and having the affected utilities comply by the interim goals would be an even greater challenge.

4. As a practical matter and in light of the June 30, 2016 deadline, the State cannot wait until the Rule is finalized to begin evaluating the Section 111(d) rule and expending substantial resources to create a SIP. This expenditure of resources has included significant staff time to date and will only expand as we move forward in evaluating the proposal. Activities will include: reviewing the proposal to determine whether the data and underlying assumptions used in calculating the goal are correct; educating the regulated entities and other stakeholders regarding provisions of the proposal; coordinating with the Kansas Corporation Commission ("KCC") regarding renewable energy standards and demand side management programs; evaluating different compliance strategies that could be implemented to meet the proposed goal; determining what statutory and regulatory changes would be needed for each of the strategies; and taking initial steps to develop support across all stakeholders and policy makers for potential compliance strategies. With the limitations described above regarding building blocks number one and four, implementation of a renewable portfolio standard greater than the existing statutory

requirement and change from a voluntary to a mandatory demand side management program will require significant policy shifts in the Kansas legislature and by other policymakers.

5. The State will expend significant resources as a direct result of the proposed Section 111(d) Rule. This includes time to read, absorb, and interpret the several thousand pages of white papers, program design documents, preamble, rule and technical support documents, as well as to attend meetings and conference calls with stakeholders, elected officials and the KCC. The State expects to take further steps in the coming months as a direct result of the Section 111(d) Rule. We may need statutory and regulatory changes, all requiring considerable staff time. Consultation meetings will include additional meetings with the KCC staff, the Southwest Power Pool, the Kansas Municipal Utilities and the Kansas Power Pool. We will present legislative briefings once the Kansas Legislature is in session. The amount of staff effort in analyzing the rule and making comments on it will be replaced by the staff time needed to educate stakeholders and develop a plan. KDHE can expect to spend at least four FTE amongst six to eight staff and managers per year involved in implementing this regulation (including proposing a state plan) over the next several years.

6. If this Court holds that EPA now lacks authority to regulate power plants under Section 111(d) of the Clean Air Act, the State will immediately halt entirely the above-described expenditures.

I declare under penalty of perjury that the foregoing is correct. Executed on this 19th day of November, at Topeka, Kansas.

Thomas Gross

EXHIBIT F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, STATE OF ALABAMA, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF NEBRASKA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, and STATE OF WYOMING, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146 AFFIDAVIT OF BRIAN GUSTAFSON, SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

COMES NOW, Brian Gustafson, and duly sworn upon his oath and under the penalty of perjury, declares and states as follows:

1. I am the Engineering Manager III for the Air Quality Program of the South Dakota Department of Environment and Natural Resources. I have been employed in this position for 14 years. In this position, I am responsible for the development, administration and enforcement of South Dakota's Air Quality Program.

2. South Dakota has received delegation or approval of the following federal air programs from the United States Environmental Protection Agency ("EPA"): South Dakota's State Implementation Plan (Minor air quality construction permit program, Minor air quality operating permit program, Prevention of Significant Deterioration preconstruction permit program, New Source Review preconstruction permit program, Rapid City area fugitive sanding and construction activity program, Ambient Air Monitoring, and Regional Haze air quality program), New Source Performance Standards program, National Emission Standards for Hazardous Air Pollutants program, Title V air quality operating permit program, and the Acid Rain program.
3. I have been involved in the revision and/or development of these delegated or approved regulatory programs, including the development of necessary legislation, drafting and presentation of rules, administration of the programs, and enforcement of the legislation and rules.
4. On June 2, 2014, the EPA proposed a new rule to be incorporated into 40 CFR Part 60 entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units", which was published in the Federal Register at Volume 79, Number 117, page 34830 on June 18, 2014, and which is commonly referred to as the "Section 111(d) Proposed Rule".
5. Based on my position, I have the personal knowledge and experience to understand what steps the State of South Dakota will likely need to

undertake in response to EPA's Section 111(d) Proposed Rule, including preparing a Section 111(d) Plan consistent with that Proposed Rule. Under the Proposed Rule, the State of South Dakota must submit a Section 111(d) Plan to the EPA by June 30, 2016, absent special circumstances. A Section 111(d) Plan is required by the Clean Air Act to include all implementing rules necessary to effectuate the program; state legislative grants of authority over a program are not sufficient to meet the requirements of a Section 111(d) Plan.

6. Based on my work and as described further below, I have determined that implementing the Section 111(d) Proposed Rule presents a complicated endeavor that involves the State's DENR, as well as potentially the State's Public Utilities Commission, and requires, based on my best knowledge, the enactment of new state legislation and new implementing administrative rules. Based on my experience with the State Legislature and the adoption of new administrative rules, I estimate that this endeavor will take several years to complete.

7. The Proposed Rule establishes an Interim Goal and a Final Goal for emissions of carbon dioxide emissions from the power sector in South Dakota. The Interim Goal imposed on South Dakota, to be met between 2020 and 2029 is 800 lbs/MWh; the Final Goal imposed on South Dakota, to be met by 2030, is 741 lbs/MWh. These "goals" are the lowest emission rates in the Great Plains States and reflect close to a

35% decrease in carbon dioxide emission rates from the 2012 baseline emitted by the power sector in the State of South Dakota.

8. The Proposed Rule establishes four "Building Blocks" that States are allowed to use to lower their carbon dioxide emissions. Of these four "Building Blocks", only one is directly in the regulatory control of the State of South Dakota's Air Quality Program: Block 1, Heat Rate Improvements. The Air Quality Program has direct regulatory control over such emissions through its Air Quality Permitting programs.
9. Building Block 2 involves, in South Dakota, the re-dispatching of energy produced from the one coal-fired power plant located in South Dakota to one natural-gas fired combined cycle power plant. These two power plants are not owned by the same entities, do not have common regional transmission operators, and do not have common customer bases. As a result, this alteration may result in some customers of the coal-fired power plant being without a power source. It is my understanding that the State (including the State Public Utilities Commission) does not have regulatory authority to order a coal-fired power plant to cut its production (by approximately 77% of its capacity pursuant to EPA's goal calculations); or to order the natural-gas fired power plant to increase its production (by approximately 69% according to EPA's goal calculations) to a rate for which it was not designed. As a result, utilization of this Building Block will require new state legislation, assuming that such

legislation can be drafted in a manner that does not result in a regulatory taking.

10. Building Block 3 requires that the State of South Dakota achieve 15% renewal energy sources; South Dakota wind energy is currently 24% of its power generation. However, many of these private businesses and individuals who consume the electricity generated by the wind farms in South Dakota are located out of state. The Proposed Rule is not clear that South Dakota will be able to "claim" the electricity generated in South Dakota but consumed by these out-of-state customers. In either case, the State must determine how to further encourage private businesses to develop wind resources in an area that has already been developed, which will require new state legislation.

11. Building Block 4 requires the State of South Dakota achieve an annual 1.5% improvement in energy efficiency. This is a consumer-based issue, the encouragement of the use of smart or utility-controlled technology that automatically adjusts the energy used by consumers based upon demand. This is not an area in which the State of South Dakota has currently existing regulatory authority, and will require new state legislation.

12. These changes being demanded in the Proposed Rule involve the very fundamentals of power supply and development within the State and concern matters that have traditionally been determined not by state government, but by the marketplace. Thus, much of the legislation

required will involve major fundamental grants of new power to a state agency or agencies, and will potentially be a matter of significant debate before the South Dakota Legislature.

13. In order to develop a Section 111(d) Plan as required by the Proposed Rule, the Air Quality Program of DENR cannot wait until the Rule is final, particularly in those areas where new state legislation appears to be required.

14. The Legislature of the State of South Dakota is in session annually for a maximum of 40 legislative days, generally in January through March of each year. All legislation from a state agency must be introduced within 10 or 15 days of the start of each term. Preparation of legislation by state agencies is initiated in the late summer preceding a term, and is required to be fully drafted for executive branch review by October of each year.

15. Agency rules implementing a statute, which will likely be required for the significant programmatic changes necessary to implement Building Blocks 2, 3, and 4, and will be required to be adopted prior to the submission of the Section 111(d) Plan. The rule-making process alone, excluding the drafting procedure, requires approximately 3-6 months to complete and cannot be initiated until after authorizing state legislation has been adopted.

16. As a practical matter, in light of the necessity for state legislation, and the June 30, 2016, Section 111(d) Plan submission deadline, the

State cannot wait until the Proposed Rule is finalized to begin evaluating the Section 111(d) Rule and developing the State's plan to comply with this Rule.

17. As a result, approximately 2 FTEs (Full-Time Equivalents) of the Air Quality Program's 15 FTE staff are currently involved in developing comments on the Proposed Rule, and in determining what changes need to be made to South Dakota's laws and regulations to implement the Proposed Rule. In addition, I and my staff are currently discussing possible methods of implementing the Proposed Rule with the Office of the Attorney General, the South Dakota Public Utilities Commission, Governor's Office, and Governor's Office of Economic Development.

18. I and my staff are also discussing these matters with approximately 16 stakeholders in the power industry and organizations to identify possible programs or methods to reduce carbon emissions from our one coal-fired power plant and one natural gas power plant, and to identify possible programs to encourage development of natural gas, renewables, and reduction of energy demand by consumers.

19. It is impractical, and indeed impossible, to wait until the Proposed Rule becomes final for the South Dakota Air Quality Program to initiate its review and alterations to the South Dakota laws and regulations. The extensive and significant changes to air quality regulation demanded by the Proposed Rule cannot be implemented within the one-year time period projected by EPA between the Final Rule (June 1, 2015) and the

required submission of the Section 111(d) Plan (June 30, 2016), particularly because new state legislation will be required.

20. As a result, the Air Quality Program of DENR has already initiated and expended, and will continue to be expending, substantial resources to determine the methods by which South Dakota will be able to comply with the EPA's mandated Interim and Final Goals, and to create a Section 111(d) Plan. This expenditure of resources includes dedication of scarce Program FTEs to these issues; extensive consultation with the South Dakota Public Utilities Commission and stakeholders; interagency discussions to determine what legislation is necessary, what agencies exercise jurisdiction over those areas (if any), and legal review; discussions with other States regarding interstate issues, including which state is entitled to claim the wind generation currently produced in South Dakota by out-of-state companies; drafting and vetting of state legislation with other agencies and stakeholders; drafting of implementation rules; participation in the agency proposed legislation process; lobbying and testimony in support of proposed legislation; adoption of implementation rules, which cannot occur until appropriate legislation is passed; and, ultimately, preparation of a Section 111(d) Plan.

21. If this Court holds that EPA now lacks authority to regulate power plants under Section 111(d) of the Clean Air Act, the State will immediately halt entirely the above-described expenditures.

Dated this 23 day of October, 2014.

Brian Gustafson

Subscribed and sworn to
Before me this ___ day of
October, 2014.

Sandra Schwellenbach
Notary Public

My Commission Expires:
8-8-2016

EXHIBIT G

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

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146

DECLARATION OF TODD PARFITT

I, Todd Parfitt, hereby declare as follows:

1. I am the Director of the Wyoming Department of Environmental Quality. I received a bachelor of science in natural resources and a master of public administration with an emphasis in environmental policy from The Ohio State University. As part of my duties, I am responsible for overseeing the Department's regulatory programs, including its implementation of federal Clean Air Act regulations.

2. I have been employed by the Wyoming Department of Environmental Quality for twenty years. During that time, I have overseen the implementation of numerous facets of the Department's regulatory

programs. I have served as the Director for two years. I also served as Deputy Director for seven years, Administrator of the Industrial Siting Division for seven years, Interim Administrator of the Abandoned Mine Lands Division two different times, and manager of the Department's Clean Water Act pollution discharge permitting program for seven years. I also spent four years working in the Department's Resource Conservation and Recovery Act programs related to hazardous and solid waste and leaking underground storage tanks. In these positions, I regularly reviewed federal and state regulatory program requirements. I also worked with the Wyoming legislature on multiple matters related to the Department's regulatory programs. As a result of my experience, I am well versed in state implementation of environmental regulatory programs.

3. Based on my professional experience, education, and study of the Environmental Protection Agency's ("EPA") proposed *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) ("Section 111(d) Rule"), and supporting technical documents, I have the personal knowledge to understand what steps Wyoming will likely need to undertake in response to the rule, including preparing a state plan. Under that rule, Wyoming must submit a plan to the EPA by June 30, 2016, absent special circumstances.

4. Based on my evaluations of the EPA's requirements for Wyoming in the Section 111(d) Rule and the associated four "building blocks," I have determined that implementing the rule presents a complicated endeavor necessitating immediate investment of Department resources. Specifically, creating a plan of the type envisioned under the Section 111(d) Rule will require years of effort that will be particularly complicated for at least the following five reasons.

5. First, the 111(d) Rule relies on "outside the fence" control measures, which include increased utilization of renewable energy and natural gas, as well as demand-side conservation. Such "controls" are unlike any other Clean Air Act requirement the Department implements. Implementing and enforcing these unusual control measures will require the Department to coordinate with other agencies, including the Wyoming Public Service Commission, which regulates public utilities in Wyoming, and the Wyoming Game and Fish Department, which, along with federal agencies, manage wildlife in Wyoming's renewable energy development corridors. Preparing a plan to meet the requirements of the 111(d) Rule will require considerable coordination to align the differing missions of these agencies with the EPA's rule. For example, to meet the EPA's goal, Wyoming would almost certainly have to retire coal-fired power plants. To do that, the Department must, at

the very least, consult with the Public Service Commission, to evaluate the financial impacts that plant shutdowns would have on electricity consumers under Wyoming's system of public utility regulation. Plant shut-downs would also warrant the Department's consultation with public utility regulators in other states whose citizens pay for Wyoming-generated electricity.

6. Second, and related to the former, the EPA's 111(d) Rule requires the construction and operation of new renewable electricity projects in Wyoming to meet the State's goal. Specifically, the EPA's rule identifies wind energy as the highest potential renewable resource in Wyoming, and supposes that nearly 42,631 square miles are available in Wyoming to develop new wind energy projects. However, many of these lands are located within greater sage grouse core habitat. As a result, developing a plan to generate more wind energy consistent with the Rule will require intensive coordination with the Wyoming Game and Fish Department, which oversees Wyoming's sage grouse conservation efforts. Pursuant to Wyoming Executive Order, Wyoming agencies must "focus on the maintenance and enhancement of Greater Sage-Grouse habitats," may authorize new development in core habitat "only when it can be demonstrated that the activity will not cause declines in Greater Sage-

Grouse populations," and must consult with the Game and Fish Department before taking any action that could impact sage grouse. Wyo. Exec. Order 2011-5, at ¶¶ 1, 3 (June 2, 2011). The Order expressly provides that wind energy development "is not recommended in sage-grouse core areas[.]" *Id.* at ¶ 5. Deploying enough new wind energy to comply with the EPA's Rule also will require consultation and negotiation with the private parties that own the vast majority of the Wyoming lands suitable for wind energy projects. Lines to transmit wind energy generated by those projects will almost certainly have to cross federal lands, thereby implicating the regulatory interests of federal land managers, and requiring compliance with the National Environmental Policy Act. Coordinating these differing regulatory and private interests quickly enough to develop a state plan on the EPA's proposed timeline could only be possible with an immediate re-allocation of a substantial portion of the Department's resources.

7. Third, Wyoming is a net-exporter of energy from both fossil-fuel and renewable sources. Because Wyoming delivers energy to eleven different states, from California to Minnesota, complying with the Rule will most likely require Wyoming to enter into one, if not several, multi-state or regional agreements with states that consume power generated in Wyoming. Negotiating and executing those agreements in time to submit a plan on the

EPA's timeline will require a significant investment of Department resources. The effort will be complicated by the fact that other states with which Wyoming will likely have to collaborate are located in different EPA regions than Wyoming, which will in turn require plan approvals from different EPA regional offices.

8. Fourth, creating a plan that conforms to the 111(d) Rule will require the Wyoming legislature to act. Neither the Department nor any other Wyoming state agency likely has authority to require the unconventional controls on which the EPA's rule relies. For example, the Department does not have the authority to require the construction and utilization of renewable electricity generating projects, or to mandate that consumers install energy efficient appliances. Wyoming's legislature meets only once per year and for no more than a total of sixty days every two years, unless the Governor calls for a special session. Wyoming's legislative process typically involves multiple hearings and, therefore, does not produce new law overnight. Absent immediate efforts from the Department, obtaining the legislative authorization necessary to develop a plan that complies with the EPA's rule on the EPA's proposed timeline will be practically impossible.

9. Fifth, developing a plan to comply with the 111(d) Rule will require the Department to recruit and hire new employees. In some cases, the rule

implicates subjects outside the Department's normal area of air pollution control expertise, such as demand-side energy conservation. In other cases, the rule will create significant new workloads, for example, negotiating and administering complex multi-state and regional emissions allocation agreements and facilitating interagency coordination. Hiring new staff implicates the Department's budget, which the legislature approves every two years, and may, as a result, also require additional legislative action. In fact, the Department is already in the process of reassigning one full-time employee position to focus on state implementation plan development. To prepare a state plan to comply with the 111(d) Rule on the EPA's timeline, the Department cannot wait to make these human resource decisions until after the EPA finalizes the rule.

10. As a practical matter and in light of the June 30, 2016, deadline, Wyoming cannot wait until the Section 111(d) Rule is finalized to begin expending substantial resources to create a state plan. This expenditure of resources will likely include consultation with Wyoming energy producers and consumers of Wyoming-produced energy, coordination with multiple state agencies and federal land managers, passing new state legislation, and promulgating new regulations.

11. Wyoming has already expended resources as a direct result of the Section 111(d) Rule. As of November 12, 2014, the Department has dedicated 1,398 employee hours to evaluating the EPA's 111(d) Rule and developing ideas on how to craft a compliant state plan. Eight different members of the Department's program-level staff, including more than ten percent of the air quality program employees, have dedicated a total of 1,108 employee hours working on the EPA's 111(d) Rule since its publication. Those staff were pulled from their normal responsibilities, which include implementing the Department's normal Clean Air Act programs, such as Prevention of Significant Deterioration and Title V. I have personally worked a total of 152 hours on the 111(d) Rule, while the Administrator of the Department's Air Quality Division has worked 138 hours on the rule. In sum, the EPA's 111(d) Rule has already consumed considerable limited Department resources that would otherwise be dedicated to other regulatory efforts. These initial investments of Department resources represent only the tip of the iceberg.

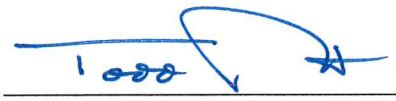
12. Collectively, the Department's efforts have been dedicated to: (1) meeting with Wyoming's elected representatives and other Wyoming regulatory agencies; (2) meeting with regulators from other states, including through the Environmental Council of States, Western Regional Air Partnership, the

Western States Air Resources Council, and the Air & Waste Management Association; (3) participating in webinars hosted by the EPA, the Association of Air Pollution Control Agencies, and the National Association of Clean Air Agencies; (4) travelling to and attending the EPA's public hearings on the rule; and (5) researching and evaluating the rule internally. All of these efforts have been necessary to comprehend the bases for the 111(d) Rule, the prospects for interstate and regional cooperation, and the feasibility of crafting a Wyoming plan to meet the requirements of the rule.

13. The Department expects to take further steps in the coming months as a direct result of the Section 111(d) Rule. The Department will continue to confer with electricity generators, other state agencies, states that receive electricity produced in Wyoming, and to dedicate internal staff resources to creating a state plan to meet the requirements of the rule. Those efforts will require continued investments of Department resources that would otherwise support other priorities.

14. If this Court holds that the EPA now lacks authority to regulate power plants under Section 111(d) of the Clean Air Act, Wyoming will immediately halt entirely the above-described expenditures on the 111(d) Rule.

I declare under penalty of perjury that the foregoing is correct. Executed on this 18th day of November, 2014, at Cheyenne, Wyoming.



Todd Parfitt
Director
Wyoming Department of Environmental Quality

EXHIBIT H

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

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 14-1146

DECLARATION OF ROBERT HODANBOSI

I, Robert Hodanbosi hereby declare as follows:

1. I am employed as the Chief of the Division of Air Pollution Control for the Ohio Environmental Protection Agency. I have served in this capacity for 22 years and am responsible for a statewide staff that encompasses all aspects of Ohio's air pollution control program—compliance monitoring, permit issuance, regulatory enforcement, and administering for Ohio the delegated aspects of the federal program under the Clean Air Act, as well as Ohio's own air pollution control laws and rules. Among my duties are attainment/nonattainment planning, SIP calls, state implementation plan development, regulation development, and other matters as necessary. In this capacity, I am familiar with Ohio's electric

generating units, their generating capacity, and the regulatory and related issues they face, as well as other industrial and commercial sources of air pollution.

2. I am familiar with and have been responsible for overseeing Ohio's role in responding to and commenting upon U.S. EPA's *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34829 (proposed June 18, 2014) ("Section 111(d) Rule"). Ohio EPA will be required to prepare a State Plan consistent with that Section 111(d) Rule.

3. Ohio EPA would be required to submit its 111(d) State Plan by June 30, 2016. Ohio EPA would have to commence activity on its State Plan well in advance of the June 30, 2016 deadline. It will also take a lengthy time for Ohio EPA to draft and finalize this 111(d) State Plan. The proposed existing-source rule is substantial and affects entities well beyond the fence-lines of the power plants themselves. The State Plans will be extremely complex, and U.S. EPA Administrator Gina McCarthy has publicly announced that Ohio and the other states should begin drafting their state plans now, before the rule is even finalized. Drafting the 111(d) State Plan will require extensive stakeholder outreach and inter-agency coordination.

4. There are a number of actions that will be required of Ohio in order to submit a plan 13months after the rules are finalized. The first issue is going to be

whether Ohio develops a rate-based plan or mass-based plan. The proposed rule formulated only rate-based requirements for state plans. U.S. EPA only issued the rate-based to mass-based specifications on November 6, 2014 so it will be necessary to determine which approach provides the more appropriate compliance path for Ohio. This fundamental compliance approach may take months to analyze and decide which path to take.

5. The reductions in U.S. EPA's Clean Power Plan were derived from four separate elements or "building blocks": improve heat rate at power plants, institute emission dispatch for electricity onto the grid, require that renewable resources be built and used, and require more energy efficiency measures. Each of these elements have their own set of regulatory activities that will be needed as part of plan submittal.

A. Heat Rate Improvements at Power Plants – This will require Ohio EPA to begin working with the individual power plants to conduct studies on all appropriate heat rate improvements. Although U.S. EPA has stated heat rate improvements of 4% to 6% are possible, Ohio EPA believes that improvements in the range of 1% are more feasible. Ohio EPA will need to complete individual studies for each plant to determine which heat rate improvements are possible at a plant, what are the expected improvements, the time involved to implement those improvements, whether these improvements will trigger the major source

permitting requirements in the New Source Review program under U.S. EPA regulations, and develop state regulations that mandate that the above items be completed in an appropriate time frame. These actions will take many months to complete and certainly cannot be completed within the 13 months envisioned by U.S. EPA.

B. Implement Emission Dispatch – The second element of the Clean Power Plan obtains reductions, led by states, by implementing the dispatch from higher emitting plants to lower emitting plants. Under the Federal Power Act, the Federal Energy Regulatory Commission oversees the various Regional Transmission Organizations, including PJM Interconnection, LLC ("PJM") which controls the power plants dispatched in Ohio, and requires that the plants are dispatched in an economic manner with the most economic being used first. PJM is responsible for grid management not just in Ohio, but other states also and Ohio receives its power from multiple power plants within the state borders and from neighboring states. Neither Ohio EPA nor the Public Utilities Commission of Ohio has authority to dictate to the multi-state regional transmission organizations, changes in the manner that PJM operates. Since the dispatch of power plants is within the purview of the federal government, it is currently unknown how Ohio can develop a program for emissions dispatch, since the current authority resides

with a multi-state organization that is overseen by the federal government. This element will certainly need longer than 13 months to develop.

C. The third element of reductions derives from instituting renewable energy in the state. Ohio has adopted renewable portfolio standards (RPS) through the Ohio General Assembly. Legislative changes to the RPS are currently being studied. Any legislative and administrative rule changes to the RPS could take years to complete.

D. The fourth element of the Clean Power Plan is to reduce demand for electricity by implementing energy efficiency measures. The scope of the reductions needed go far beyond energy efficiency at the power plant. Ohio EPA must identify where the state can develop energy efficiency measures to the degree demanded by U.S. EPA, which private and governmental entities are affected, and then begin to develop a plan to make energy efficiency measures "federally enforceable. Because Ohio is a deregulated electric utility state, the EGUs are independent of power distribution companies, so Ohio will need to regulate entities that do not own or operate pollution sources. This will represent a particular challenge to Ohio EPA, since the Agency's authority under the Clean Air Act and Ohio Air Pollution Control Act is to regulate air pollution sources, not consumers of electricity. Ohio EPA will need to identify if it can be granted additional authority, what additional authority will be needed, what entities to

regulate, receive approval from the Ohio General Assembly to move forward, and draft, propose and promulgate rules. These efforts could take years to complete.

6. Due to the very tight timeframes proposed by U.S. EPA, it would not be possible to wait until June 2015 for U.S. EPA final rules to begin to work on putting together a plan for submittal in June 2016. Even if Ohio EPA could be granted the authority to develop a multi-phase plan to regulate the entire electric generation and distribution in 13 months, as required by U.S. EPA, there is simply not enough time.

7. U.S. EPA has stated that states may receive a one year extension to submit the plan to U.S. EPA. In order to obtain an extension, states must provide a package with ten separate elements including a commitment by the states to maintain existing measures. Ohio EPA does not have the authority to make a commitment on an action that was completed by the Ohio Legislature. So, the action to apply for an extension would also need legislative action prior to any administrative activity to complete the extension request. This illustrates the degree of action needed not just to develop a plan, but to even request a year extension to the June 30, 2016 deadline.

8. Ohio EPA, like all government agencies, operates on a fixed budget. Therefore, the costs (including the significant employee-hours) that would be dedicated to the preparation of the 111(d) State Plan means that Ohio EPA would

have considerably less resources to dedicate to other mandated U.S. EPA regulatory programs, such as developing State Implementation Plans for revised ambient air quality standards.

9. Furthermore, Ohio EPA's mere announcement of its State Plan could have significant and irreversible economic consequences. Currently, coal-fired power plants account for nearly 70% of Ohio's electricity generation. U.S. EPA's proposed existing-source rule has the potential to compromise the reliability of Ohio's electricity supply as demonstrated by the North American Reliability Council and others, as well as dramatically increase the cost of electricity for Ohio's citizens. Companies may choose not to do business in Ohio due to concerns about the reliability of electricity and increases in electricity costs. Further, coal-fired power plants in Ohio may shut down in anticipation of the State Plan going into effect. If the existing-source rulemaking is ultimately struck down, those companies and power plants that made decisions based on early versions of the State Plan would likely not be in a position to reverse the decisions made in anticipation of the rulemaking.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 26, 2014, in Columbus, Ohio.

Robert Hodanbosi, Chief
Division of Air Pollution Control
Ohio EPA

EXHIBIT I

EPA-5757

Gina McCarthy/DC/USEPA/US
12/23/2010 08:19 PM

To "Doniger, David"
cc
bcc
Subject Re: Happy Holidays

Thanks David. I really appreciate your support and your patience. Enjoy the holiday. This success is yours as much as mine.

From: "Doniger, David" [ddoniger@nrdc.org]
Sent: 12/23/2010 06:30 PM EST
To: Gina McCarthy
Subject: Happy Holidays

Gina,

Thank you for today's announcement. I know how hard you and your team are working to move us forward and keep us on the rails. The announcement is a major achievement. To paraphrase Ben Franklin: "Friends, you have your NSPS, now let's see if you can keep it." We'll be with you at every step in the year ahead.

David

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ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

CITY OF NEW YORK, et al.

Intervenors.

Petition for Review of Settlement Agreement of the
United States Environmental Protection Agency

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TABLE OF AUTHORITIES

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*Authorities upon which Petitioners chiefly rely are marked with an asterisk.

GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
HAP	hazardous air pollutant

INTRODUCTION AND SUMMARY OF ARGUMENT

The settlement's legality turns on the meaning of an unambiguous provision: EPA may not regulate under Section 111(d) "any air pollutant . . . emitted from a source category which is regulated under section [112]." Interpreting this phrase just five years after its enactment, the Clinton-era EPA explained that it means what it says: EPA may not regulate under Section 111(d) any source that is already regulated under Section 112. In four detailed analyses in the twenty years since, EPA reaffirmed this "literal reading" of this text as it appears in the U.S. Code.

In light of this history, EPA's argument on the merits here is nothing short of astonishing. What was in June 2014 EPA's "literal reading" of the statutory text is now Petitioners' "convoluted take" on a "grammatical mess." And what EPA once admitted was clear congressional intent to prohibit double regulation of the same existing sources under two entirely different regulatory regimes is now Petitioners' effort to "largely eviscerate" EPA's regulatory authority to protect the public from numerous "dangerous pollutants."

Nor are EPA's threshold arguments any more substantial. EPA first claims that a settlement agreement that EPA made "final" under the Clean Air Act is somehow not reviewable "final action" under that same Act. EPA then makes a series of arguments under ripeness, standing, and mootness—including the remarkable contention that this lawsuit is simultaneously too early and too late.

These fact-dependent threshold arguments fail because, *inter alia*, they each would require this Court to accept EPA's fiction—in the face of overwhelming contrary factual evidence—that the agency may abandon its signature rulemaking.

This Court should not be misled by EPA's convenient, newfound confusion over the Section 112 Exclusion's plain meaning or EPA's self-serving claims that it may abandon the rulemaking. The Exclusion's meaning is now fully briefed in this case, which challenges a settlement that is unquestionably final action. It is time to stop the substantial waste of public resources that EPA's lawless Section 111(d) enterprise is imposing upon States and their citizens.

ARGUMENT

I. The Settlement Agreement's Section 111(d) Provisions Violate The Section 112 Exclusion

A. The "Literal" Terms Of The Section 112 Exclusion Render The Section 111(d) Provisions Of The Settlement Illegal

The text of the Section 112 Exclusion, as it appears in the U.S. Code, conveys a single unambiguous message: EPA may not mandate *any* state-by-state emissions standards under Section 111(d) for an existing source that is already regulated under Section 112. In pertinent part, Section 111(d) provides that EPA can require States to issue "standards of performance for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d)(1). The Section 112 Exclusion, by

its plain terms, carves out from EPA's Section 111(d) authority any standards for any "emi[ssions] from a source category which is regulated under section [112]."

Until this litigation, EPA has *consistently* explained for twenty years that the Exclusion in the U.S. Code has that "literal" meaning. After detailed analyses in 1995, 2004, 2005, 2007, and 2014, EPA repeatedly concluded that "a literal reading" is "that a standard of performance under CAA section 111(d) cannot be established for any air pollutant"—"HAP and non-HAP"—"emitted from a source category regulated under section 112." 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004) ("Mercury Rule Proposal"); *see* Pet. Br. 31; JA 61 (EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, 1-6 (1995) ("1995 EPA Analysis")). This means that "if source category X is 'a source category' regulated under section 112, EPA could not regulate HAP or non-HAP from that source category under section 111(d)." JA 138 (70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005) ("Mercury Rule"))

EPA now tries to downplay these conclusions, asserting that "'[l]iteral' does not mean unambiguous" and "thus EPA's use of 'literal' does not mean that EPA believed that this was the only possible way to read" the Exclusion. Resp. Br. 52 n.35, 35 n.20. But EPA's prior actions speak for themselves. Never in its earlier comprehensive discussions of the Exclusion's text in the U.S. Code did EPA sug-

gest any other reasonable interpretations, much less identify any of the numerous interpretations that it now claims are *all* better ways of reading the language.

Because EPA has regulated existing power plants under Section 112, it is prohibited—under the agency's own understanding of the Exclusion's "literal" text—from regulating those plants under Section 111(d). Pet. Br. 31.

B. EPA's Attempts To Overcome The Exclusion's "Literal Reading" Lack Merit

1. EPA's Appeal To Legislative History And Statutory Context Fails Under Binding Precedent

EPA contends that the Exclusion's literal reading must be ignored because of "legislative history and statutory context," Resp. Br. 35, 45-50, but that argument is foreclosed by *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). In the Tailoring Rule, EPA made an identical argument, attempting to avoid "*a literal reading*" of the Clean Air Act based upon its opinion of "congressional intent," structure, and policy. 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (emphasis added). The Supreme Court rejected the argument, explaining that EPA cannot "revise clear statutory terms." *UARG*, 134 S. Ct. at 2446.

What is more, EPA's attempt to ignore the Exclusion's literal terms would fail under this Court's case law even absent *UARG*. Before *UARG*, this Court took a less categorical—but still extremely stringent—approach to setting aside "literal" statutory language. Specifically, "to avoid a literal interpretation at *Chevron* step

one," EPA must make an "extraordinarily convincing" "show[ing] either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001) (quotations omitted). EPA's arguments do not meet this standard.

To begin, EPA points to no legislative history that suggests "Congress did not mean what it appears to have said." *Id.* The best EPA can muster is Congress's general purpose in 1990 to "expand EPA's regulatory authority." Resp. Br. 45-46. This is hardly "extraordinarily convincing." *Appalachian Power*, 249 F.3d at 1041. "[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (citation omitted). The 1990 Amendments greatly expanded the reach and severity of the Section 112 program; it was sensible for Congress also to refuse to subject existing sources, operating with sunk costs, to both the revamped Section 112 program under federal control and the Section 111(d) program under state control. That is what the Exclusion's literal terms provide.[1]

[1] EPA also relies on a footnote in a report that, at best, expresses the Congressional Research Service's opinion about the meaning of the Exclusion. *See* Resp. Br. 47. That is not legislative history. Moreover, the Service's opinion—that the Exclu-

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EPA's failure to carry its burden is unsurprising, as the legislative history that does exist entirely supports applying the Exclusion literally. As Petitioners pointed out, EPA itself has previously determined that the "legislative history" demonstrates that the House of Representatives—where the Exclusion's revision originated—"sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." JA 138. So while EPA now claims there is "not a scintilla of evidence in the legislative history supporting Petitioners[,]" Resp. Br. 45, EPA has already conceded as *historical fact* that the House intended the Exclusion to mean what its literal terms say. EPA does not address its prior analysis, let alone explain where it erred.

As to the Senate's intent, the only relevant statement in the legislative history supports Petitioners' position. During the floor discussion of the 1990 Amendments, the Senate Manager specifically "recede[d]" to several substantive changes in Section 108 of the House bill. 136 Cong. Rec. S16895-01 (Oct. 27, 1990), 1990 WL 164490. One was the House's revision of the Exclusion.

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sion, as it now appears in the U.S. Code, has the same meaning as the pre-1990 Exclusion—is not a reading of the statutory text advanced by any party, including EPA. *See* Pet. Br. 38 (explaining the flaws with that view).

Having failed to make the historical case, EPA also falls short of proving "as a matter of logic and statutory structure" that Congress "almost surely could not have meant" what the Exclusion's literal terms provide. *Appalachian Power*, 249 F.3d at 1041. EPA claims that the Exclusion's literal terms are "inconsistent" with Section 112(d)(7), *see* Resp. Br. 50, but as the NGO Intervenors note, this provision only possibly applies when a regulation "established" under another enumerated provision, such as Section 111, *predates* a Section 112 regulation, *see* NGO Br. 7. How Section 112(d)(7) would interact with the Exclusion where a legacy Section 111(d) standard *predates* a Section 112 regulation is not at issue here.[2] The State Intervenors separately suggest that the Exclusion's literal reading "conflicts" with Section 112(c)(1), which merely instructs EPA to keep the source category lists in Sections 112 and 111 "consistent" to the extent practicable. State Intervenors Br. 21. What State Intervenors ignore, however, is that while Section 111(d) cannot be invoked to regulate an existing source already regulated under Section 112, no such restriction applies to new-source standards under Section 111(b), which are the overwhelming focus of Section 111. Pet. Br. 4.

[2] For the same reason, the Institute for Policy Integrity's observations that EPA has continued to administer Section 111(d) standards that *predate* Section 112 regulations of the same sources is irrelevant. NYU Am. Br. 9-15. Relatedly, even if double regulation may be permissible under other Clean Air Act provisions, *see* NGO Br. 6, that does not show Congress "surely" intended it here.

2. EPA's Policy Argument Is Unavailing

EPA claims that applying the Exclusion "literal[ly]" would "largely eviscerate" EPA's authority, leaving "dangerous pollutants" unregulated. Resp. Br. 33-34, 49-50. This argument fails for two reasons. *First*, "[a]ppeals to the design and policy of a statute are unavailing in the face of clear statutory text." *Sierra Club v. EPA*, 536 F.3d 673, 679 (D.C. Cir. 2008). *Second*, as explained below, any gap in authority created by the Exclusion is insubstantial.

Contrary to EPA's claims, the gap not covered by Section 111(d), if any, is virtually nonexistent after the 1990 Amendments. As Petitioners have explained, the 1990 Amendments dramatically expanded Section 112 to cover any pollutant "'which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise.'" Pet. Br. 33-34 (quoting 42 U.S.C. § 7412(b)(2)). This broad definition should be capable of capturing most, if not all, pollutants of concern emitted from a source regulated under Section 112. Section 111(d), in turn, essentially covers any air pollutant (both HAP and non-HAP) emitted from a source not regulated under Section 112. On top of all this, the NAAQS program covers "criteria pollutants." Resp. Br. 3. The gap has thus been reduced to non-criteria pollutants emitted from Section 112 sources that fall outside the now-capacious definition of a HAP. EPA

and its supporters fail to explain how "dangerous" pollutants could slip into that gap.

The claimed gap in authority is also belied by the regulatory history since the 1990 Amendments. In 24 years, EPA has only issued performance standards under Section 111(d) for two source categories, and in both instances EPA took action consistent with the Exclusion. In 1995, EPA imposed a Section 111(d) regulation on landfill gas emitted from municipal solid waste ("MSW") landfills. Addressing the Exclusion, EPA adopted the literal reading that Petitioners urge and acknowledged that the regulation would be barred if MSW landfills were "actually . . . regulated under Section 112." JA 61.[3] But because the "section 112 emission standard for MSW landfills" had not yet been "promulgat[ed]," EPA determined it could proceed with the Section 111(d) rule. *Id.* Next, in 2004, EPA issued the Mercury Rule Proposal, in which EPA sought first to delist power plants under Section 112 and then to regulate them under Section 111(d). This Court rejected EPA's effort to delist power plants under Section 112, then vacated the Section 111(d) rule under the Section 112 Exclusion. *See New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008).

[3] EPA's claim that it has "never adopted Petitioner's interpretation of [the Exclusion]," Resp. Br. 51, is thus simply false.

This history is instructive in two ways. *First*, the expansion of Section 112 has, since 1990, clearly left little for the Section 111(d) program to do. *Second*, any gap in authority created by the Exclusion has never caused EPA, before now, to claim that the Exclusion's literal terms must be ignored in order for EPA to regulate. Consistent with the Exclusion's literal terms, EPA has only invoked Section 111(d) when it was not already regulating the source category under Section 112: where a Section 112 regulation was not yet in place (as with MSW landfills in 1995), or where EPA had delisted the category under Section 112 (as it unsuccessfully sought to do with power plants during the Mercury Rule rulemaking). EPA offers no case law to support the notion that such an insubstantial gap, if it exists, is nevertheless so vital to the public interest that this Court must permit EPA to rewrite statutory text.

3. The Alternative Interpretations Of The Exclusion That EPA And Intervenors Have Tentatively Offered Are Meritless

In what can only be described as spaghetti-against-the-wall statutory construction, EPA and Intervenors suggest a cascade of alternative interpretations of the Exclusion. These attempts to escape the Exclusion's "literal" meaning lack merit.

a. EPA first offers two interpretations—endorsed by no one else—that would nullify the Exclusion: (1) read the Exclusion as a "mandate" to regulate any

source category that is regulated under Section 112, Resp. Br. 37-38; and (2) read the Exclusion "alternative[ly]" with other exclusions in Section 111(d), *id.* at 35. Each is foreclosed by binding precedent, statutory text, and structure.

First, as Petitioners explained, both interpretations directly conflict with this Court's decision in *New Jersey v. EPA*. Pet. Br. 10, 36, 37. EPA does not attempt to distinguish or otherwise explain this authority.

Second, neither reading plausibly construes the text. The "mandate" interpretation ignores the obvious parallel structure of the several exclusion clauses in Section 111(d). *See* Trade Ass'n Am. Br. 14. Moreover, Section 111(d) *already* mandates that EPA "shall" issue performance standards for "any existing source," assuming the equivalent new source is regulated under Section 111(b) and no exclusion applies. As even EPA must admit, the "mandate" interpretation would turn the Exclusion into superfluous "reinforce[ment]," Resp. Br. 38 n.24, in violation of settled principles of statutory interpretation. As for the "alternative" interpretation, it is foreclosed by the proper reading of exclusionary clauses with multiple disjunctive subsections. Pet. Br. 36. EPA responds that the subsections here have their own "internal grammatical structure," Resp Br. 37, but does not explain why that is relevant—because it is not.

Finally, both interpretations would radically expand the Section 111(d) scheme. The statute mandates that EPA "shall" issue performance standards for an

existing source if EPA has regulated equivalent new sources under Section 111(b), unless an exclusion applies. By nullifying the Exclusion, these interpretations would require EPA to issue Section 111(d) standards for every one of the over 70 source categories regulated under Section 111(b). Pet. Br. 4.

b. Intervenors—with EPA's tentative endorsement, Resp. Br. 38-39—propose two other interpretations: (1) read the phrase "which is regulated under Section 112" to modify *both* "source category" *and* "any air pollutant," such that the Exclusion would prohibit "standards of performance for any existing source for any air pollutant *which is regulated under Section 112* . . . emitted from a source category which is regulated under section [112]"; and (2) read the word "regulated" as pollutant-specific, such that the Exclusion would prohibit only "standards of performance for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112] *with respect to that same pollutant*." State Intervenors Br. 13-15; NGO Br. 10-11.

Again, neither of these interpretations is a plausible construction of the text. The first is premised on a notion that, to Petitioners' knowledge, does not exist in the English language. Under the "rule of the last antecedent," a limiting clause—"which is regulated under Section 112"—should "ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (quotations omitted). Here, the last

antecedent is "source category." In special circumstances, a limiting clause may instead modify an earlier noun or phrase, because "the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates." *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 981 (1986). But what Intervenors propose—that a limiting clause simultaneously modifies *two* antecedent phrases—is entirely novel.

The second reading is plainly an attempt to add words that are not in the statute, contrary to long-standing rules of statutory construction. Although no one has ever in 24 years professed confusion over the meaning of the word "regulated" in the Exclusion, Intervenors now propose that a source category could be "regulated under Section 112" only if it is subject to a Section 112 standard for the same pollutant that EPA is seeking to cover under Section 111(d)—here, carbon dioxide. But this would mean that a power plant—which is nevertheless subject to onerous Section 112 standards—would nonsensically be considered "[un]regulated under Section 112" for purposes of the Exclusion.[4] What Intervenors mean is that power

[4] Intervenors' claim that the Supreme Court construed Section 111(d) this way in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) (*"AEP"*), *see* State Intervernors' Br. 19; NGO Br. 12, is a misreading of that case that even EPA does not assert, *see* Pet. Br. 39-40. EPA's attempt to cloud the meaning of that case with statements from counsel, *see* EPA Br. 34 n.19, is also unavailing. These statements are fully consistent with the Exclusion's literal reading because there was no Section 112 rule regulating power plants at the time of

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plants are "[un]regulated under Section 112 *with respect to that same pollutant*," but those latter words cannot be smuggled in through the word "regulated."

Both interpretations are also inconsistent with the legislative history. Rather than accomplishing the congressional aim of "preclud[ing] regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," JA 138, these redrafts would *preserve* EPA's pre-1990 Section 111(d) authority in its entirety, *and also* expand that authority to cover HAPs in certain circumstances. Notably, neither EPA nor the Intevenors cite any legislative history supporting an intent to expand the Section 111(d) program.

4. The Extraneous Conforming Amendment Is Irrelevant And Its Application Here Would Produce The Same Result

EPA's continued effort to create ambiguity from a "drafting error" in the Statutes at Large, *see* Resp. Br. 40-45, is also unpersuasive. Until this litigation, EPA had offered only one basis for avoiding the Exclusion's literal terms: a stray conforming amendment in the 1990 Statutes at Large that EPA claimed created ambiguity as to the Exclusion's meaning. Pet. Br. 46-47. Petitioners have ex-

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AEP. As EPA explained in 1995, Section 111(d) regulations of a source category can be issued so long as Section 112 standards for that category have not been "promulgat[ed]." JA 61.

plained that the conforming amendment is irrelevant for two independent reasons, and EPA offers no meaningful answers.

a. Petitioners first argued that the conforming amendment was merely a clerical change to a cross reference, which became obsolete in light of the substantive amendment to the Exclusion. *Id.* at 41, 45-47. Under Congress's official legislative guides, decades of uniform legislative practice, and binding case law, such a conforming amendment is a meaningless drafting error. *Id.* at 41-44. EPA made this same point when it first addressed the revised Exclusion in 1995, explaining that the conforming amendment should be ignored because it "is a simple substitution of one subsection citation for another, without consideration of other amendments of the section in which it resides." JA 60.

EPA offers no persuasive response to this reasoning. It has no answer at all to Congress's official drafting manuals. Pet. Br. 41-43. And its response to the legislative practice is no better. Of Petitioners' 43 examples of the Office of Law Revision Counsel excluding conforming amendments that conflicted with prior substantive amendments, EPA purports to distinguish four because, *inter alia*, they involved "obvious error[s]" or amendments that were "very different in scope." Resp. Br. 43 n.28. But that is exactly what occurred in 1990. Congress made an "obvious error" by including the conforming amendment, which is "very different in scope" from the substantive amendment. As EPA has explained, the substantive

amendment "*substantively* amended section 111(d)," JA 138 (emphasis added), and was "included with a variety of substantive provisions," *id.* at 192, whereas the conforming amendment was merely a "drafting error," listed with similar clerical changes, *id.* at 138, and sought to make "a simple substitution of one subsection citation for another," *id.* at 60. Neither EPA nor its supporters have identified any example, from any court or agency, giving meaning to a conforming amendment in such circumstances.

EPA falls back on cases holding that a conforming amendment can sometimes have substantive impact, and that the Statutes at Large prevail when they conflict with the U.S. Code. Resp. Br. 5. But these uncontroversial propositions do not justify giving meaning to *this* conforming amendment, which EPA has admitted is a "drafting error" related to updating a cross-reference. Binding case law forecloses giving meaning to such errors. *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

b. EPA also has no good response to Petitioners' alternative argument: assuming the two amendments are equally meaningful, each would need to be given full effect by prohibiting under Section 111(d) regulation both of HAPs (consistent with EPA's erroneous understanding of the conforming amendment) and of sources regulated under Section 112 (consistent with the substantive amendment). Pet. Br. 48-49. Citing *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C.

Cir. 1979), EPA argues that this interpretation is not a "middle course" between the two amendments, and that it deserves deference. Resp. Br. 44. But split-the-difference compromise is not the lesson of *Spencer County*. Rather, that case involved two different statutory deadlines for the same action, and EPA's "middle course" gave "maximum possible effect" to both deadlines. *Id.* at 872. Here, Petitioners' alternative argument is the *only* way to give "maximum effect" to EPA's view of both amendments, which, among other reasons, makes *Chevron* deference inapplicable. *See also* Trade Ass'n Am. Br. 26-27.[5]

II. This Court Has Jurisdiction To Review The Settlement Agreement

A. A Settlement That Is "Final" Under The Clean Air Act Is Necessarily "Any . . . Final Action" Under The Act

EPA contends that the settlement agreement is not reviewable final action, but it fails to squarely confront Petitioners' arguments. Petitioners first argued that

[5] EPA points out that an *amicus* brief filed in the Mercury Rule litigation by Petitioners Alabama, Indiana, Nebraska, North Dakota, South Dakota, and Wyoming—as well as West Virginia's Department of Environmental Protection—included a *single sentence* supporting the rewrite of the Exclusion that EPA advanced. EPA Br. 53. Some context explains what occurred. EPA's Section 111(d) rule in that rulemaking, which sought to regulate a HAP from existing power plants *after* delisting power plants from Section 112, was permissible under the Exclusion's "literal" terms. *See supra*, at 9-10. But EPA had justified the rule based upon its rewriting of the Exclusion. The parties' support for the regulatory outcome there is thus entirely consistent with the position advanced here, but in that litigation they were required to defend EPA on the "grounds upon which [EPA] itself based its action." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

the settlement is reviewable final action under Section 113(g), which sets forth procedures for making "final" a "settlement agreement of any kind under" the Clean Air Act, and Section 307(b), which broadly permits review of "any . . . final action taken" under the Act. Pet. Br. 51-52 (quotations omitted). EPA ignores this straightforward syllogism, focusing instead on the finality or non-finality of the *proposed rule*, Resp. Br. 23-25, which is not at issue here.[6]

EPA likewise does not directly engage Petitioners' alternative argument that—even without the interaction between Sections 113(g) and 307(b)—the settlement would be final under the two-prong test in *Bennett v. Spear*, 520 U.S. 154 (1997). Pet. Br. 52-53. With regard to the "consummation" of agency decision-making, EPA argues that the settlement does not resolve "the final outcome of the rulemaking process." Resp. Br. 23. But the relevant decision that the settlement resolved was *not* the entire Section 111 "rulemaking process"; it was EPA's dispute with Intervenors as to whether EPA would engage in the rulemaking at all. *See* Pet. Br. 52-53. The settlement also satisfies *Bennett*'s "legal consequences"

[6] For that same reason, EPA's citation to *National Environmental Development Associations Clean Air Project v. EPA*, 686 F.3d 803, 809 (D.C. Cir. 2012), does not help it, because that case involved a preamble discussing future rulemakings, not a settlement finalized under statutorily mandated procedures. Similarly unhelpful is *Association of Irritated Residents v. EPA*, 494 F.3d 1027, 1037 (D.C. Cir. 2007), which held that a consent agreement was not a reviewable rule under the APA. Review is sought here under Section 307, which provides for review of "*any* . . . final action taken" under the Clean Air Act, not just final rules.

prong, because it imposes legally binding obligations on both EPA and Intervenors. *Id.* at 54. EPA does not dispute that there were legal consequences, but again offers a non-sequitur, asserting that the settlement has no legal consequences for "non-settlor[s]." Resp. Br. 23. That is irrelevant, of course, and a transparent attempt to conflate the finality inquiry with EPA's (meritless) standing arguments.

EPA's claim that finding finality here will "subject[] the federal courts to a flood of collateral litigation challenging" "*every* rulemaking settlement," Resp. Br. 24 n.13, is baseless hyperbole. While every settlement that EPA finalizes under Section 113(g) is necessarily reviewable "final" action, threshold issues like ripeness and differences in EPA's underlying substantive authority will prevent challenges to most settlements. For example, the settlement's Section 111(d) portions are vulnerable given EPA's lack of authority, but the Section 111(b) portions are on different substantive footing.

B. EPA's Contradictory Arguments That Petitioners Filed This Lawsuit Both Too Early And Too Late Are Meritless

As Petitioners explained, this lawsuit ripened in June 2014, when both prongs of the ripeness inquiry were satisfied. For a case to be ripe, the issues must be "fit" for "judicial decision," and there must be "hardship to the parties of withholding court consideration." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 479 (2001) (quotation omitted). It was in June 2014, with the issuance of the Legal Memorandum, that the purely legal issue here became "fit" for resolution when

EPA first crystallized its view that it would honor the settlement by issuing a Section 111(d) rule regulating existing power plants, notwithstanding the Section 112 rule. Pet. Br. 54-55. And it was also in June 2014 that Petitioners began suffering hardships. *Id.* at 55.

EPA launches a confused attack on this analysis, criticizing Petitioners for seeking review both too early, Resp. Br. 28-31, and too late, *id.* at 27-28. This is yet another example of EPA's see-what-sticks approach to this litigation. In fact, the lawsuit is precisely on time, having been filed within 60 days of ripening in June 2014, just as the Clean Air Act requires. 42 U.S.C. § 7607(b)(1).

1. EPA's "too early" argument focuses solely on the first ripeness prong. EPA cannot and does not dispute that this case presents a "pure[]" issue of "statutory interpretation," which is typically "fit" for judicial resolution. *Whitman*, 531 U.S. at 479. Instead, EPA argues that review is presently improper because this issue "may be mooted by the outcome of a pending notice and comment rulemaking process." Resp. Br. 31.

While EPA might be right in most cases that involve a pending rulemaking, ripeness is a case-by-case inquiry, and this case is unique. In June 2014, EPA "concluded" that it has Section 111(d) authority to regulate existing power plants, *see* JA 398, and then declared it will issue the final rule by June 2015, *see* 79 Fed. Reg. 34,380, 34,838 (June 18, 2014); Pet. Br. 27. Since that time, EPA's leader-

ship has repeated this unequivocal commitment in congressional committee rooms, (JA 479-80, 487), on the public airways (*id*. at 521), and in official agendas (*id*. at 526). The Obama Administration's proposed budget for 2016 declares that the Section 111(d) rule "*will* be finalized this summer," and provides a $4 billion "incentive fund" for States that exceed the requirements of the rule. JA 538.

Moreover, if there are any "doubts about the fitness of the issue for judicial resolution," this Court must "balance . . . the hardship[s] to the parties," which are significant and undisputed. *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003) (quotations omitted). As demonstrated through detailed declarations, "withholding court consideration" *will* subject States to "hardship[s]," *Whitman*, 531 U.S. at 479 (quotations omitted), including the expenditure of thousands of employee hours paid for out of the public fisc, Pet. Br. 16-21, 55-56. Any "institutional interests in postponing review" are vastly outweighed by this ongoing waste of massive public resources, especially considering that the issue involves pure statutory construction of a single statutory clause, which has now been fully briefed and would simply be back before this Court in identical form next term. *Fowler*, 324 F.3d at 756 (citation omitted).

The cases cited by EPA are not to the contrary. For example, *Atlantic States Legal Foundation v. EPA*, 325 F.3d 281 (D.C. Cir. 2003), involved no showing of harm from delay and a regulation that would only become effective upon further

third-party actions that could alter the legal challenge. *Id.* at 284-85. Here, in contrast, EPA has repeatedly committed to adopt the Section 111(d) rule, the legal issue will not be affected by the particulars of the final rule, and delay will impose substantial harm on the public fisc. Similarly unavailing is *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), which was a challenge to an issue set to be eliminated by a proposed rule and thus could "go[] away without the need for judicial review" if nothing changed. *Id.* at 388. The facts here are the exact opposite; if the status quo persists, this issue will be back before this Court unaltered.

At bottom, EPA would have this Court conflate ripeness and finality, as revealed by its entirely inapposite reliance on *Las Brisas Energy Ctr., LLC v. EPA*, Nos. 12-1248 et al., 2012 WL 10939210 (Dec. 13, 2012). Whether the Section 111(d) rule has been consummated is not the question in this case. Here, the issue need only be "fit" for review in light of the hardship that would result from withholding judicial review. That became true in June 2014.

2. Fresh from arguing that the issue here is too tentative for review, EPA alternatively contends that Petitioners filed too late because the dispute "crystallized" in April 2012. Resp. Br. 27-28. Again, EPA is wrong under both ripeness prongs. With regard to fitness, it was far from clear in April 2012 that EPA intended to abide by the Section 111(d) portion of the settlement, given the existence

of the Section 112 rule. At that time, the most recent authoritative statements about the Exclusion's meaning were the Supreme Court's explanation in *AEP*, and EPA's 1995 explanation in the MSW landfill rulemaking (all subsequent statements by EPA had been vacated in *New Jersey v. EPA*, 517 F.3d at 578). *Both* mirror Petitioners' reading. *See supra*, at 9-10; Pet. Br. 31. Under those circumstances, there was little reason to think then that EPA believed that it could lawfully abide by the Section 111(d) portion of the settlement, and there was accordingly no dispute "fit" for resolution. For that same reason, there would have been no hardship to anyone from withholding review.

C. This Case Presents An Actual And Live Controversy

1. Petitioners Have Demonstrated Standing

EPA and its supporters argue that Petitioners lack standing to challenge the settlement because Petitioners are "not parties to the settlement agreement, and have not alleged they are intended third-party beneficiaries." State Intervenors Br. 6; *see also* Resp. Br. 14-15. But as the very authority cited by the State Intervenors explains, "persons injured by the contract" "of course . . . can challenge" the contract. *In re Vic Supply Co., Inc.*, 227 F.3d 928, 930-31 (7th Cir 2000). Here, Petitioners have demonstrated two injuries that are fairly traceable to the settlement, each of which will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

a. EPA fails to rebut that the settlement subjects Petitioners to the "certainly impending" injury of being forced to submit state plans in response to a final Section 111(d) rule. Pet. Br. 28. EPA acknowledges that the required submission of plans would satisfy standing requirements under *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). Resp. Br. 20. Instead, EPA offers two narrower arguments: (1) this injury is not "certainly impending" because EPA may never finalize the Section 111(d) rule; and (2) finalization would not be "fairly traceable" to the settlement. Resp. Br. 12-13, 18-19. Both arguments are wrong.

First, the undisputed facts show that the injury is "certainly impending." The inquiry is a practical one, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013), and injuries that are "definitely likely" satisfy this standard, *Biggerstaff v. FCC*, 511 F.3d 178, 183-84 (D.C. Cir. 2007). In light of EPA's repeated assurances that it *will* finalize a Section 111(d) rule regulating power plants in summer 2015—which will necessarily require the submission of state plans—this standard has been easily satisfied. *See supra*, at 21-22. EPA does not even attempt to address these statements. Resp. Br. 18-19.

Second, this harm is "fairly traceable" to the settlement. As *AEP* explained, "[p]ursuant to [the] settlement . . . , EPA has committed to issuing . . . a final rule" for power plants under Section 111(d). 131 S. Ct. at 2533. That final rule could take one of two forms: a regulation of power plants, or a "final rule declining to

take action." *Id.* at 2539. If EPA does not take either path, Intervenors can sue. JA 4-5. There can be little dispute that, whichever path EPA were to choose, the settlement must be considered a "substantial factor" that "motivated" EPA's decision and therefore a "fairly traceable" cause. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308-09 (D.C. Cir. 2001) (quotations omitted). Because the harm to Petitioners of having to submit state plans follows inexorably from the first path—which EPA has firmly committed to taking, *see supra*, at 21-22—that harm is no less traceable to the settlement.[7]

b. In their opening brief, Petitioners also set forth a second independent basis for standing: as a result of the proposed rule that EPA issued in compliance with the settlement, States have *already* been forced to expend thousands of employee hours. Pet. Br. 26. EPA focuses the vast majority of its argument on this basis for standing, but the agency misses the mark here, as well.

EPA first argues that Petitioners' expenditures are "self-inflicted," and thus cannot satisfy the traditional *Lujan* requirements. Resp. Br. 19. But EPA's Administrator specifically warned States "to design plans *now*," or be at risk of violat-

[7] Consider the following hypothetical. A debtor enters a contract under which he agrees to scout a museum, and then make one of two choices. He can either steal a particular jewel for the creditor and have his debts forgiven, or not steal the jewel and still owe the creditor. *Cf.* Ocean's Twelve (Warner Brothers Pictures 2004). Surely the museum would have standing to challenge the contract as void for public policy, especially after the debtor declares that he is taking the former option.

ing the rule. Pet. Br. 20, 27 (emphasis added). The contents and timeframe in the proposed rule confirm the Administrator's warning. 79 Fed. Reg. at 34,838-39. So while EPA shrugs off the Administrator's statement as mere "encourag[ement]," Resp. Br. 19, an agency cannot threaten parties with substantial consequences if they do not expend resources immediately, publicly provide a timeframe that makes such immediate expenditures unavoidable, and then argue in litigation that those expenditures were "self-inflicted." *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) ("credible threat of prosecution" can create standing).

EPA next argues that this Court in *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013), created a *per se* rule—superseding the traditional *Lujan* analysis—that no party ever has standing to challenge a settlement that requires an agency to initiate a rulemaking. Resp. Br. 14-18. In *Perciasepe*, the consent decree required the agency to engage in a rulemaking over certain dates, and the challengers claimed that these dates would provide too little time for notice and comment. 714 F.3d at 1321-23. This Court held—after a typical *Lujan* analysis—that the challengers had no standing because they had expended no resources and thus had suffered no injury-in-fact. *Id.* at 1324-26.

Petitioners' position here is entirely different from that of the *Perciasepe* challengers in at least three significant ways. *First*, EPA has already taken action

pursuant to the settlement agreement, and Petitioners have expended thousands of hours in response, Pet. Br. 16-21, establishing the injury-in-fact missing in *Perciasepe*.[8] *Second*, the legal issue in *Perciasepe* was whether the proposed rulemaking schedule was too strict, but the issue here is whether the entire rulemaking enterprise to which the settlement committed EPA is illegal. Nothing in *Perciasepe* holds that a settlement that launches an unlawful regulatory effort against a party is never subject to challenge by the party. *Finally*, Petitioners here have an independent basis for standing that was not at issue in *Perciasepe*. *See supra*, at 24-25.[9]

c. EPA also argues that the States have not established redressability because the agency's timeframe for the rulemaking is not "derived from" the settlement. Resp. Br. 22. But redressability concerns only "whether the relief sought . . . will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc'y. v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996). If this Court

[8] The only monetary harm claimed in *Perciasepe* was from a questionnaire sent out by EPA to the challengers *before* the consent decree. *Id.* at 1326.

[9] EPA's other cited cases are similarly not on point. For example, *In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d 972, 977 (D.C. Cir. 2013), turned uniquely on whether the challenged agreement violated certain procedural rights under the Endangered Species Act. And *Alternative Research v. Veneman*, 262 F.3d 406 (D.C. Cir. 2001) (*per curiam*), did not address Article III standing at all, but only whether would-be intervenors were entitled to intervene as a matter of right. *Id.* at 411.

grants Petitioners' requested remedy and halts the rulemaking, States will be relieved from incurring any more expenses, alleviating their harm. Pet. Br. 29.

2. This Case Is Not Moot

Finally, EPA asserts that this case is moot because any harm caused by the settlement has ceased. It is wrong.

First, EPA contends that the settlement's deadlines have passed, which has released EPA from any obligations in the settlement. Resp. Br. 26. But EPA's failure to meet the deadlines did not terminate the agreement under hornbook contract law, because Intervenors continue to uphold their obligation. Pet. Br. 57. EPA does not dispute that this is a proper statement of contract law.

Second, EPA incorrectly asserts that the settlement is no longer causing harm because the agency has proposed a Section 111(d) rule. Resp. Br. 26. As a threshold matter, EPA's compliance with the settlement's proposal requirement is imposing *continuing* harms upon Petitioners, Pet. Br. 16-21, which can still be remedied by ordering EPA to halt the rulemaking. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Furthermore, the proposal is *not* EPA's only obligation under the Section 111(d) portion of the settlement. EPA has also committed to "issuing . . . a final rule" for existing power plants under Section 111(d), after it finalizes regulations for new power plants under Section 111(b). *See* JA 4. This Court can still afford Petitioners relief from that obligation, especially since EPA has

committed to finalize this summer a substantive regulation that will force Petitioners to prepare state plans.

CONCLUSION

For the foregoing reasons, this Court should grant the requested relief.

Dated: March 9, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 6,914 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Elbert Lin
Elbert Lin

CERTIFICATE OF SERVICE

I certify that on this 9th day of March, 2015, a copy of the foregoing *Corrected Final Reply Brief for Petitioners* was served electronically through the Court's CM/ECF system on all registered counsel. I also filed eight (8) paper copies with this Court.

/s/ Elbert Lin
Elbert Lin

Attachment 2

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

14-1112 & 14-1151

In the United States Court of Appeals for the District of Columbia Circuit

IN RE: MURRAY ENERGY CORPORATION,
Petitioner.

MURRAY ENERGY CORPORATION,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,
Respondents.

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December 30, 2014
Final Form: March 9, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and *Amici*. Because these consolidated cases involve direct review of agency action, the requirement to furnish a list of parties, intervenors, and amici that appeared below is inapplicable. These cases involve the following parties:

Petitioner: The petitioner in Case No. 14-1112 and Case No. 14-1151 is Murray Energy Corporation.

Respondents: The respondents in Case No. 14-1112 and Case No. 14-1151 are the United States Environmental Protection Agency and Regina A. McCarthy, Administrator of the U.S. Environmental Protection Agency.

Intervenor-Petitioners: The intervenor-petitioners in Case No. 14-1112 are the State of Alabama, State of Alaska, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Dakota, State of West Virginia, State of Wyoming, State of Arkansas, the National Federation of Independent Business, the Utility Air Regulatory Group, and Peabody Energy Corporation.

The intervenor-petitioners in Case No. 14-1151 are the State of Indiana, the State of Kansas, the State of Louisiana, the State of South Dakota, and the State of Arkansas.

Intervenor-Respondents: The intervenor-respondents in Case No. 14-1112 are the State of California, State of Connecticut, State of Delaware, Commonwealth of Massachusetts, State of Maine, State of Maryland, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, the District of Columbia, the City of New York, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club. There are no intervenor-respondents in Case No. 14-1151.

***Amici Curiae* for Petitioner:** The amici curiae for petitioner in Case No. 14-1112 are the State of South Carolina, the National Mining Association, the American Coalition for Clean Coal Electricity, the American Chemistry Council, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, the American Coatings Association, Inc., the American Iron and Steel Institute; the Council of Industrial Boiler Owners; the Independent Petroleum Association of

America; and the Metals Service Center Institute. There are no amici curiae for petitioner in Case No. 14-1151.

***Amici Curiae* for Respondents:** The amici curiae for respondents in Case No. 14-1112 are the State of New Hampshire, Clean Wisconsin, Michigan Environmental Council, Ohio Environmental Council, Calpine Corporation, Jody Freeman, and Richard J. Lazarus. There are no amici curiae for respondents in Case No. 14-1151.

Movant *Amici Curiae* for Petitioners: The following parties are movant amici curiae for petitioners in Case No. 14-1151: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Chemistry Council; American Fuel & Petrochemical Manufacturers; American Coatings Association, Inc.; American Iron and Steel Institute; Council of Industrial Boiler Owners; Independent Petroleum Association of America; and Metals Service Center Institute.

Movant *Amicus Curiae* for Respondents: Calpine Corporation is a movant *amicus curiae* for respondents in Case No. 14-1151.

B. Rulings Under Review. The Petitions relate to EPA's final determination that it has authority to regulate electric generating units

under Section 111(d) of the Clean Air Act when those units are already regulated under Section 112 and to EPA's proposed rulemaking styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

C. Related Cases. This case is related to *West Virginia v. EPA*, No. 14-1146, which this Court has ordered to be argued on the same day and before the same panel as the present case.

Dated: March 9, 2015

/s/ Allison D. Wood
Allison D. Wood

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenors provide the following disclosure:

The National Federation of Independent Business ("NFIB") is a 501(c)(6) non-profit mutual benefit corporation. NFIB is the nation's leading association of small businesses, representing 350,000 member businesses. No publicly-held company has 10% or greater ownership of NFIB.

The Utility Air Regulatory Group ("UARG") is an ad hoc, unincorporated association of individual electric generating companies and industry groups that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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GLOSSARY

CAA	Clean Air Act
EGU(s)	Electric Generating Unit(s)
EPA	United States Environmental Protection Agency
NFIB	National Federation of Independent Business
UARG	Utility Air Regulatory Group

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In the extraordinary circumstance where a federal agency bases a proposed regulation on a single statutory provision that entirely prohibits the type of regulation proposed by the agency, should a writ of prohibition issue to halt the rulemaking proceedings where the agency's erroneous determination that it has authority to initiate the rulemaking raises serious constitutional concerns and the proceedings themselves are imposing tangible, demonstrable harms on the States that must implement the regulations and the parties targeted for regulation and their customers?

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the brief for petitioner Murray Energy Corporation ("Murray").

INTRODUCTION

As explained by petitioner Murray, the proposed Environmental Protection Agency ("EPA") rule at issue contemplates regulation of electric generating unit ("EGU") emissions on the authority of Section 111(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d), even though EPA lacks any authority to regulate these sources under that provision. As Murray further explains, both the Agency itself and this Court have previously construed the CAA to say the opposite of the Agency's current Section 111(d) interpretation. Because Section 111(d) is the only basis for the proposed rule cited by the Agency in the rulemaking at issue; because Section 111(d) forecloses any regulation under its auspices of the EGUs targeted by EPA, which are already regulated under Section 112; because EPA's misinterpretation of Section 111(d) raises serious constitutional concerns; and because the very pendency of this rulemaking is imposing current, tangible, demonstrable harms on utilities and their customers, this Court should issue an extraordinary writ of prohibition to prevent the Agency from continuing its rulemaking proceeding.

STANDARD OF REVIEW

Courts reviewing agency action shall "hold unlawful and set aside agency action" that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2); *see also* 42 U.S.C. § 7607(d)(9). This standard applies to petitions for review of agency action. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004). In the context of a writ of prohibition, the petitioner must also establish a "clear and indisputable" right to relief. *In re Wolf*, 842 F.2d 464, 465 (D.C. Cir. 1988) (per curiam) (internal quotation omitted). Review of non-final rules adds another step of analysis—the petitioner must establish that it has "no other adequate forum in which to seek relief." *Sierra Club v. Whitman*, 285 F.3d 63, 69 (D.C. Cir. 2002).

SUMMARY OF ARGUMENT

A writ of prohibition is uncommon relief, but this EPA rulemaking is uncommonly unlawful.

In this rulemaking, the Agency has announced its definitive legal conclusion that it enjoys authority to regulate existing EGUs based on a provision of the CAA—Section 111(d)—that entirely precludes EPA from regulating those sources. The text of Section 111(d), EPA's own interpretations of the provision, the precedent of this Court, and legislative history all confirm that sources that are regulated under Section 112, like the EGUs at issue here, may not be further regulated under Section 111(d). *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("[U]nder EPA's own interpretation of the section [111(d)], it cannot be used to regulate sources listed under section 112."). *See* Section I *infra*.

In this extraordinary and rare case, an extraordinary writ of prohibition should issue. EPA bases its rulemaking proceeding solely on a statutory provision that entirely prohibits the contemplated regulation—and then mistakenly justifies its proposal on interpretive grounds that give rise to violations of separation-of-powers principles and the nondelegation doctrine. Moreover, the mere pendency of the proposed rule is already imposing substantial costs on States, utilities, and their customers. Accordingly, the

Court should reach the merits of Murray Energy's challenge now and issue the requested extraordinary relief as a proportionate response to the Agency's extraordinary transgression of the bounds on its authority. *See* Section II *infra*.

STANDING

Intervenor-Petitioners have standing to challenge EPA's rulemaking.

The National Federation of Independent Business ("NFIB") includes numerous businesses that purchase electricity from the grid. *See* Decl. of K. Harned (Attachment A). Increases in the cost of electricity disproportionately impact small businesses, and EPA itself concedes that its contemplated rule will increase energy costs. 79 Fed. Reg. at 34,934, APP14, APP118 ("average nationwide retail electricity prices are projected to increase by roughly 6 to 7 percent in 2020 relative to the base case, and by roughly 3 percent in 2030"). NFIB's own research confirms that these costs are a major concern of its members. *See* Decl. of K. Harned at 2. Because one or more of NFIB's member organizations would have standing to participate in this case, and the issue presented for review is germane to

Intervenor's purpose, NFIB enjoys standing under this Court's organizational standing doctrine. *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013).

The members of the Utility Air Regulatory Group ("UARG") are electric generating companies and trade associations that are the target of the regulation at issue. UARG's standing under *Teamsters* is therefore self-evident. If more were needed, however, it is clear that electric generating companies are already suffering actual injury in fact from EPA's mere promulgation of the proposed regulation. *See* Decl. of W. Penrod (Attachment B).

Finally, Intervenor-Petitioners note that EPA is challenging Murray's standing to bring this case. NFIB and UARG contend that Murray enjoys standing. Should Murray be found to lack standing, however, the standing of the Intervenor-Petitioner States, NFIB, and UARG would allow the case to proceed. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Bryant v. Yellen*, 447 U.S. 352, 366, 368 (1980).

ARGUMENT

I. The Clean Air Act Prohibits EPA's Proposed Rule.

EPA rests its proposed rule on a single statutory foundation—"the authority of Clean Air Act (CAA) section 111(d)." 79 Fed. Reg.

at 34,832, APP16. But as petitioner Murray explains, the statute in fact precludes EPA from regulating under Section 111(d) the sources targeted by the Agency's proposal. Indeed, EPA's efforts to obscure the clarity of Section 111, and the related provisions of CAA Section 112, are not only unpersuasive; they give rise to violations of the Constitution's nondelegation and separation-of-powers doctrines. As explained below, these constitutional infirmities are avoidable simply by interpreting and applying the statute as written.

A. EPA Is Precluded from Regulating Under Section 111(d) Sources Already Regulated Under Section 112.

This Court's precedent, the Act's legislative history, and EPA's own past administrative practice all confirm that sources regulated under Section 112 are unambiguously exempt from further regulation under Section 111(d).

1. The Plain Language of Section 111(d) Precludes Regulation of Sources Regulated Under Section 112.

Section 111(d) is an obscure, seldom-used CAA provision, employed by EPA only four times between 1970 and 1990 and only once after the 1990 amendments. 42 Fed. Reg. 12,022 (Mar. 1, 1977) (phosphate fertilizer plants); 42 Fed. Reg. 55,796 (Oct. 18, 1977)

(sulfuric acid production facilities); 44 Fed. Reg. 29,828 (May 22, 1979) (Kraft pulp mills); 45 Fed. Reg. 26,294 (Apr. 17, 1980) (primary aluminum plants); 61 Fed. Reg. 9905 (Mar. 12, 1996) (municipal solid waste landfills).

To briefly recap, Section 111(d) requires the Administrator to prescribe regulations for controlling pollution from "any existing source":

> i. for which air quality criteria have not been issued or which is *not* included on a list published under section 7408 (a) of this title *or emitted from a source category which is regulated under section 7412 of this title* but
>
> ii. to which a standard of performance under this section would apply if such existing source were a new source....

42 U.S.C. § 7411(d)(1) (emphases added).

Section 111(d) thus applies by its terms only to sources that are "not ... regulated under section 7412 [*i.e.,* Section 112] of this title." *Id.* The only merits question in this very straightforward case is, accordingly, whether existing EGUs are a source category regulated under Section 112.

Turning to Section 112, the CAA requires the Administrator to identify categories of "major sources" and "area sources," *id.*

§ 7412(c), and to "promulgate regulations establishing emission standards" for those sources in accordance with the statute, *id.* § 7412(d). And consulting the various subsections of Section 112 leaves no doubt that, under appropriate circumstances and based on appropriate EPA showings, existing EGUs may be regulated under that provision. *Id.* § 7412(a)(1) (defining "major source"); *id.* § 7412(a)(2) (defining "area source"); *id.* § 7412(n) (providing the EPA Administrator "shall regulate electric utility steam generating units under this section, if the Administrator finds that such regulation is appropriate and necessary" after considering the results of a mandated study).

As explained in detail by petitioner Murray, EPA has in fact invoked its Section 112(n) authority to regulate emissions from existing EGUs. Br. for Petitioner at 3-5; *see also* 77 Fed. Reg. 9304 (Feb. 16, 2012) (the "MATS rule") ("Pursuant to CAA section 112, the EPA is establishing NESHAP that will require coal- and oil-fired EGUs to meet hazardous air pollutant (HAP) standards reflecting the application of the maximum achievable control technology.").

Because EPA has adopted the MATS rule for existing EGUs under Section 112, it is crystal clear that EPA may not simultaneously regulate existing EGUs under Section 111(d). As the Supreme Court recently affirmed, "traditional rules of statutory interpretation" do not "change because an agency is involved." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). Given that EPA is currently regulating existing EGUs under Section 112, the carve-out from Section 111(d) unambiguously withholds authority for EPA to layer on additional Section 111(d) regulations of those same sources. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011) ("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.") (citing 42 U.S.C. § 7411(d)(1)). Regardless of what EPA might do to tweak, tailor, or trim back its proposed regulatory program in light of rulemaking comments, the plain terms of the CAA render unlawful *any* regulation under Section 111(d) of existing EGUs already being regulated under Section 112.

2. Legislative History Confirms that Section 111(d) Precludes Regulation of Sources Regulated Under Section 112.

Although the statutory text needs no reinforcement, the history underlying Section 111(d)'s enactment confirms what the text establishes and *American Electric Power* recognizes.

For the first two decades of its existence, the exclusion in Section 111(d) applied to "any existing source for any air pollutant ... not included on a list published under section 108(a) or 112(b)(1)(A)...." Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1684 (1970). The Clean Air Act amendments of 1990 then amended the exclusion to focus on source categories as well as pollutants:

> "any existing source for any air pollutant ... not included on a list published under section 7408(a) of this title *or emitted from a source category which is regulated under section 7412 of this title*...."

42 U.S.C. § 7411(d)(1) (emphasis added). Accordingly, both before and after the 1990 amendments, the exclusion based on Section 108 (the NAAQS regime) focused on the pollutant at issue—that is, the Section 108 exclusion turned on whether the pollutant was already covered by a NAAQS. The exclusion for Section 112 pivoted, however, from focusing on *pollutants* regulated under Section 112(b)

to asking whether particular *source categories* were subject to Section 112 regulation—regardless of whether or not the pollutant in question was limited by those Section 112 regulations.

This shift in focus emerged from a drafting process in which the Senate and House of Representatives initially passed different language amending Section 111(d). The House bill provided the language currently found in 42 U.S.C. § 7411(d). *See* Pub. L. No. 101-549, § 108, 104 Stat. 2399, 2467 (1990). The Senate, which first passed its bill two months before the House adopted its substantive change to Section 111(d), initially adopted a simple clerical change to Section 111(d), one that merely updated a cross-reference from "112(b)(1)(A)" to "112(b)." *See id.* § 302, 104 Stat. 2574. S. 1630 (containing the ministerial cross-reference) passed on April 3, 1990, while H.R. 3030 (containing the substantive provision) passed on May 23, 1990. *See* H.R. Rep. No. 101-490, at 454 (1990), APP401, *reprinted in* 2 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 ("LEG. HISTORY"), at 3021, 3478 (1993) (report to accompany H.R. 3030); S. 1630, 101st Cong. § 305(a) (as passed by Senate, Apr. 3, 1990), APP353, *reprinted in* 3 LEG. HISTORY, at 4119,

4534. Although the Senate's technical amendment had a role to play prior to the House's substantive amendment, once the House amendment was adopted, inclusion of the earlier technical amendment in the Statutes at Large was simply a "drafting error," as EPA has previously and properly recognized. 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). Hence, while the Statutes at Large do include both amendments, those amendments' codification in the United States Code rightly embodies the House's later, substantive amendment in total preference to the Senate's earlier, conforming amendment.

To be sure, the Statutes at Large would control in the event this codification decision were ever determined to be in error. *See Stephan v. United States*, 319 U.S. 423, 426 (1943). But as to these provisions, the decision of the codifier and the text of the United States Code are entirely correct.

In its first action under Section 111(d) following the 1990 amendments, EPA recognized the legal necessity and logical persuasiveness of conforming the exclusion in amended Section 111(d) to align with the amended version of Section 112. EPA, Air Emissions from Municipal Solid Waste Landfills—Background

Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, at 1-5 to 1-6 (1995), *available at* http://www.epa.gov/ttn/atw/landfill/bidfl.pdf, APP463-64 ("EPA also believes that [the House amendment] is the correct amendment because the Clean Air Act amendments revised section 112 to include regulation of source categories in addition to regulation of listed hazardous air pollutants, and [the House amendment] thus conforms to other amendments of section 112.").

Moreover, as EPA previously maintained before this Court—again correctly—the Senate's conforming amendment, which was rendered unnecessary by the later, substantive House amendment, was a mere "drafting error." *See* 70 Fed. Reg. at 16,031. Accordingly, as this Court stated, "under EPA's own interpretation of the section [111(d)], it cannot be used to regulate sources listed under section 112." *New Jersey*, 517 F.3d at 583; *see also Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013) (courts should disregard drafting errors in interpreting statutes). Accordingly, EPA has repeatedly conceded that a "literal" reading of the Code precludes the Agency from regulating a source category

under both Section 112 and Section 111(d). 70 Fed. Reg. at 16,031; *accord* Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units ("Legal Memorandum") at 26, APP161 ("[A] literal reading ... would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112."); Br. of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 at 105 (D.C. Cir. July 23, 2007), APP491 ("[A] literal reading ... could bar section 111 standards for any air pollutant, hazardous or not, emitted from a source category that is regulated under section 112."); 69 Fed. Reg. 4652, 4685 (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.").

After decades of correctly interpreting the statute, however, EPA now describes Section 111(d) as an "ambiguous provision[]" and argues that the Agency is free to disregard the controlling House Amendment. *See* Legal Memorandum at 21, APP156. As an initial matter, this view represents a reversal of EPA's past practice

without providing a legitimate reason for the change. *See Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."). EPA has provided no legitimate reason for changing its position at this juncture and inaugurating duplicative Section 111(d) and Section 112 regulation of the same sources. Indeed, EPA claims that the MATS rule will reduce carbon dioxide emissions from EGUs, the exact focus of the proposed Section 111(d) rule. 77 Fed. Reg. at 9428.

More fundamentally, however, the relevant legislative history confirms that the codification appearing in the United States Code correctly reflects the law enacted by Congress.

The 1990 Clean Air Act amendments significantly widened Section 112's regulatory ambit, in part by shifting the focus of that provision from risk-based regulation of individual hazardous pollutants to control technology-based regulation of categories of major sources emitting hazardous pollutants. *See* EPA, "Summary of the Clean Air Act," http://www2.epa.gov/laws-regulations/summary-clean-air-act, APP531-32; H.R. Rep. No. 101-

490, at 151 (1990), APP356, *reprinted in* 2 LEG. HISTORY, at 3175; S. Rep. No. 101-228, at 148 (1989), APP253, *reprinted in* 5 LEG. HISTORY at 8338, 8488.

But just as the focus of Section 112 regulation changed from risk-based regulation of pollutants to control technology-based regulation of source categories, so too did the focus of the Section 111(d) carve-out. In the wake of the 1990 amendments, Section 111(d) now operates unambiguously to forbid simultaneous regulation of the same sources under Sections 111(d) and 112—both of which now authorize control technology-based regulations. Significantly, the White House proposed precisely this shift in Section 111(d), which was ultimately passed by the House, accepted by the Senate, and codified into law. *See* White House Message at 112, APP239 ("(d) Regulation of Existing Sources. — Section 111(d)(1)(A)(i) of the Clean Air Act is amended by striking 'or 112(b)(1)(A)' and inserting 'or emitted from a source category which is regulated under section 112'."). The White House proposal thus embodied both transformative changes to (and a vast expansion of) regulation under Section 112 in tandem with the elimination of the

authority to regulate simultaneously the same source categories under both Sections 111(d) and 112.

Although the Senate initially passed a non-substantive conforming amendment (described above), the managers of the Senate bill stated *expressly* in their conference report reconciling alternate versions of the 1990 amendments that they were deferring or "receding" to the substantive House amendment:

> Conference agreement. *The Senate recedes to the House* except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate, and with respect to transportation planning, the House recedes to the Senate with certain modifications.

S. 1630, 101st Cong., § 108 (Oct. 27, 1990), APP418, *reprinted in* 1 LEG. HISTORY at 885 (1993) (Chafee-Baucus Statement of Senate Managers) (emphasis added). Both Houses of Congress thus announced their understanding that the 1990 amendments would do away with the outdated pollutant-based exclusion appearing in the pre-1990 version of Section 111(d) and replace it with a source category-based exclusion aligned with the newly amended, and now control technology-based, provisions of Section 112. Congress

wanted to avoid costly, onerous, duplicative regulation of source categories under both Sections 111(d) and 112.

Nonetheless, in an unexplained reversal of its prior position, EPA now relies on its own divination of congressional purposes, rather than employing traditional tools for reading statutes in light of statutory text, structure, and legislative history. *E.g.,* Legal Memorandum at 26, APP161. But these arguments based on "advancing 'the purpose of the Act'" are mistaken. *Rapanos v. United States*, 547 U.S. 715, 752 (2006) ("[N]o law pursues its purpose at all costs, and ... the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations."); *see also United States v. Rodriquez*, 553 U.S. 377, 385 (2008) (rejecting an "argument based on [the statute's] 'manifest purpose'").

Furthermore, EPA's current legal analysis overlooks that the Senate passed only a "conforming amendment[]," a fact it has previously conceded. Pub. L. No. 101-549, § 302, 104 Stat. 2574; 70 Fed. Reg. 16,030 (conceding Senate Amendment was a "conforming amendment"). Hence, even assuming an examination of "general purposes" were appropriate (and it is not), the one and only purpose

of the Senate amendment was to conform Section 111(d) to the newly amended provisions of Section 112. And, as explained by petitioner Murray, this goal is fully and fairly accomplished simply by giving effect to the House amendment.

In the alternative, however, even assuming EPA now wishes to depart from its previously established and correct view that inclusion of the Senate amendment in the Statutes at Large was a mere drafting error, its new Section 111(d) interpretation remains fatally flawed. Any such change in agency position—even if such an alternative interpretation were permissible—would still have to give effect to each individual clause appearing in the Statutes at Large. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981). Hence, under such an alternative construction, the House amendment would remain operative and would still prohibit EPA from regulating any emissions from a *source category* (in this case, the EGU source category) regulated under Section 112, while the Senate amendment would, under this scenario, further prohibit EPA from regulating any *pollutant* covered by Section 112. Under such an alternative construction, then, the provisions would operate in parallel and

would together prohibit EPA from establishing standards of performance under Section 111(d) if *either* the source category *or* the pollutant in question were regulated under Section 112. Embracing an alternative construction giving substantive effect to the Senate's amendment, even assuming such a construction were permissible, thus serves only to further *restrict* EPA's authority. Such a construction does nothing to broaden the Agency's authority under the Act.

B. EPA's Statutory Interpretation Violates Separation of Powers Principles and the Nondelegation Doctrine.

EPA's principal response to the unambiguous terms of Section 111(d) is to rely on what it describes as a newly discovered "ambiguity" in the statutory text. Specifically, EPA posits that "ambiguities" resulted from the "drafting errors that occurred during enactment of the 1990 CAA amendments." Legal Memorandum at 21, APP156. As a result, the Agency maintains, "two different amendments to section 111(d) were enacted." *Id.* According to the Agency, these two amendments "conflict with each other," and this

"conflict" empowers EPA to construe Section 111(d) to allow regulation of sources covered by Section 112. *Id.* at 23, APP158.

Of course, the "drafting errors" cited by EPA are none other than the all-too-familiar differences between the House amendment and the Senate's ultimately unnecessary conforming amendment, which EPA has been aware of for years. Accordingly, the whole premise of EPA's interpretation is mistaken.

But beyond mistaken, EPA's interpretation is unconstitutional. The Constitution vests "[a]ll legislative powers" granted to the federal government "in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. 1, § 1. The Constitution further provides that "[e]very bill," in order to "become a Law," must pass both the House of Representatives and the Senate and either be approved by "the President of the United States" or be "approved by two thirds" of both Houses, thus overriding the President's veto. *Id.* art. 1, § 7, cl. 2.

Because the Constitution vests *all* federal legislative powers in Congress, and because Congress can enact laws only by following the constitutional requirements of bicameralism and presentment to the

President, the Constitution does not allow agencies to pick and choose between supposedly conflicting legislative enactments. Rather, "[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). As the Supreme Court has explained, among the possible forms that unconstitutional delegation may assume is a delegation by Congress to an agency of a choice between competing versions of a statute. *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.") (emphasis original). Accordingly, where Congress enacts a law and contemplates that it will be carried into execution by an executive officer or agency, Congress itself (not the officer or agency) must articulate a constitutionally adequate "intelligible principle" to guide the executive action. *Id.* at 472.

As Professor Laurence Tribe aptly observes, EPA's interpretive approach in this rulemaking violates these fundamental precepts by seeking to license the Agency "to operate as a junior-varsity

unicameral legislature." Comments of Laurence H. Tribe and Peabody Energy Corporation, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, at 29 (Dec. 1, 2014), Docket ID No. EPA-HQ-OAR-2013-0602-23587, APP200. As Professor Tribe felicitously puts it, "not even Congress is authorized to legislate by tossing two substantively different versions of a law into the air and empowering an executive agency to decide which one to catch and run with." *Id.* at 28, APP199; *see also id.* at 5 ("EPA's claim that it is entitled to pick and choose which version [of section 111(d)] it prefers represents an attempt to seize *lawmaking* power that belongs to Congress.") (emphasis original).

EPA nonetheless reads Section 111(d) in a manner that maintains that no single statutory text empowers the Agency to act, and no single intelligible principle, or set of intelligible principles, channels the Agency's exercise of discretion under the law. Instead of a single enacted law, the Agency posits "two conflicting amendments." Legal Memorandum at 25, APP160. EPA then goes on to maintain that the Agency may reconcile this purported conflict—in what is itself an act of discretion—by curtailing the

reach of substantive provisions of law that the House framed, the Senate accepted, and the President signed. *Id.*; *see also id.* at 26, APP161 ("[I]t is not reasonable to give full effect to the House language").

EPA's whole underlying premise—that two 1990 amendments were enacted, each containing a competing "intelligible principle"—thus acknowledges that the Agency's interpretation reflects precisely the sort of agency "choice" regarding "which portion of [statutory] power to exercise" that *Whitman* rejects as "*itself* ... an exercise of the forbidden legislative authority." 531 U.S. at 473 (emphasis original).

Finally, EPA asserts that its statutory interpretation is "entitled to deference." Legal Memorandum at 12, APP154. But EPA's new interpretation is entitled to no deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), nor under any other doctrine governing judicial deference to administrative interpretations of law. At the first step of *Chevron*'s two-step analysis, an Agency must deploy all traditional canons of statutory construction to determine whether Congress's intent with

respect to a specific question is unambiguous. *See Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). But, as discussed above, the carve-out from Section 111(d) for pollution "emitted from a source category which is regulated under section 7412 of this title" contains no ambiguity. 42 U.S.C. § 7411(d)(1)(A)(i). And even if such ambiguity existed, resort to legislative history and past agency practice confirms that the Agency's novel, constitutionally problematic interpretation is not permissible. *See supra* Section I.A.

EPA engages none of this analysis and instead discovers ambiguity in what it describes as contradictory amendments. Legal Memorandum at 23, APP158. But even if two lawfully enacted provisions of law are irreconcilable, "*Chevron* is not a license for an agency to repair a statute that does not make sense." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring). In other words, "*[d]irect conflict is not ambiguity*, and the resolution of such a conflict is not statutory construction but legislative choice." *Id.* (emphasis added). Here, the Agency endeavors to "concoct ambiguity" for purposes of invoking *Chevron*. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 108 (D.C. Cir. 2005).

But as in *Shays*, so too here the Court should reject this effort, especially in view of the serious constitutional questions that would otherwise result. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576-77 (1988) (rejecting agency's interpretation in light of constitutional difficulties).

II. A Writ of Prohibition Should Issue.

EPA's proposed rulemaking gives rise to extraordinary circumstances that justify a writ of prohibition.

A. This Case Presents a Rare Circumstance in Which the Sole Stated Basis for EPA's Proposed Rule Is a Provision Under Which EPA Has No Authority to Regulate.

A writ of prohibition is an extraordinary remedy authorized by the All Writs Act, 28 U.S.C. § 1651. *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985). To warrant issuance of the writ, petitioners must establish that they enjoy a "clear and indisputable" right to relief, *In re Wolf*, 842 F.2d at 465 (quotation marks and citation omitted), and that no other avenue of relief would be adequate, *Sierra Club*, 285 F.3d at 69; *In re Sealed Case*, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (explaining that the grounds for issuing writs of prohibition and mandamus are "'virtually identical'"

and hence the writs can be employed interchangeably). This standard is demanding, but not insurmountable.

Here, EPA's very initiation of this rulemaking represents a remarkable lapse in the Agency's adherence to law—one that greatly and immediately prejudices utility customers (like NFIB's members), utility suppliers (like Murray), utility regulators (like those represented by various state intervenors), and utilities themselves (like UARG's members). As explained above, the Agency's stated legal basis for this rulemaking offers no possibility that the Agency might promulgate a lawful final rule within the scope of its proposal. Any final rule regulating EGUs on authority of Section 111(d) would be plainly unlawful. And any final rule regulating sources other than EGUs under Section 111(d), or regulating EGU emissions under a CAA provision other than Section 111(d) would not be a "logical outgrowth" of EPA's proposed rule. *Kennecott Greens Creek Mining. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 950 (D.C. Cir. 2007). In these highly unusual circumstances, EPA has only one lawful course of action—to withdraw its proposal in its entirety.

This Court's decision in *In re Sealed Case* is instructive. That decision identifies a "category of cases for which mandamus is appropriate" based on the Supreme Court decision in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). *In re Sealed Case*, 151 F.3d at 1066. In *Schlagenhauf*, a district court construed Federal Rule of Civil Procedure 35 to order a civil defendant to undergo a physical examination, 379 U.S. at 108-09, even though the plain text of the Rule precluded this construction. Because the *Schlagenhauf* petitioner's question was purely legal, presented an issue of first impression, and was easily resolved based on the Rule's text, the Supreme Court held that the question was properly decided on mandamus. *Id.* at 110.

In the wake of *Schlagenhauf*, this Court has held that petitioners demonstrate a "clear and indisputable" right to relief in cases where an agency or lower court decides an "important" legal question in plain violation of the law. *In re Sealed Case*, 151 F.3d at 1066-67. Here, the legal question at the heart of this case is at least as important and straightforward as the questions at issue in *Schlagenhauf* and *In re Sealed Case*. For reasons explained in

Section I *supra*, provided EGUs are regulated under Section 112, which they are, EPA cannot deploy Section 111(d) in any way to regulate those same EGUs. Moreover, any question regarding the importance of EPA's statute-stretching effort to regulate greenhouse gas emissions was resolved by the Supreme Court earlier this year, when the Court pointedly rebuked EPA's claims to "unheralded power to regulate 'a significant portion of the American economy.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). This Court has likewise recognized separation-of-powers concerns as worthy of protection via extraordinary writ. *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013) ("[O]ur constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law...."). Accordingly, *Schlagenhauf* applies with full force, and "under these unusual circumstances and in light of the authorities," an extraordinary writ is appropriate. 379 U.S. at 110.

B. The Proposed Rule Is Already Inflicting Costs on States and Energy Producers and Consumers.

Although still a proposed rulemaking, EPA's action is already ripe for review. The proposed rule is imposing costs on States, utility customers, and electric generators, which have commenced efforts now to meet the deadlines the Agency has announced. The issues in this case are therefore appropriately postured for review.

Standing. The structure of the CAA aims to promote "cooperative activities" between EPA and the States. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1594 (2014). Section 111(d) serves this goal through a system by which EPA identifies the "best system of emission reduction" and States then develop implementation plans for the sources within their borders. 42 U.S.C. § 7411(a), (d). Under normal conditions, state plans target a specific pollutant and impose burdens on a small subset of the local economy. EPA's current rulemaking, however, departs from this model. Instead of identifying a specific "best system of emission reduction," it announces emissions targets at the state level, leaving to the States the massive task of altering the entire network of electricity production to meet those targets. *See, e.g.*, 79 Fed. Reg. at 34,925,

APP109 ("Instead, the EPA is proposing to establish state emission performance goals for the *collective group* of affected EGUs in a state...." (emphasis added)); *id.* at 34,833, APP17 ("this proposal lays out state-specific CO_2 goals").

Because of the massive task bearing down on them, States have no choice but to begin preparing now so they can reorganize their energy markets to comply with EPA's proposed rule in accordance with EPA's announced timeframes. Absent special circumstances, the proposed rule requires States to submit their plans to EPA by June 30, 2016. *Id.* at 34,915, APP99. With such a compressed timeframe in which to plan for such a major alteration to their economies, States have no choice but to begin modeling and designing their state plans and standards of performance now. Alabama, Indiana, Kansas, Kentucky, South Dakota, West Virginia, and Wyoming have filed declarations in the related *West Virginia v. EPA* case, No. 14-1146, attesting to the costs they have incurred from EPA's determination that it enjoys authority to regulate EGUs under both Section 112 and Section 111(d).

Moreover, this Court has held that "it makes no difference to the 'injury' inquiry whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by ouija board; provided *the projected sequence of events is sufficiently certain*, the prospective injury flows from what the agency is *going to do*...." *Teva Pharms USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312 (D.C. Cir. 2010) (emphasis added and omitted). Given EPA's assertion of authority under Section 111(d), the States face a "realistic threat" that the chain of events already in motion will end in mandates that contradict the terms of the CAA.

Beyond the States' standing, private parties like petitioner Murray and Intervenors NFIB and UARG also have standing to challenge EPA's action in excess of its statutory authority. When a labor organization subject to regulation by the National Labor Relations Board challenged that body's certification of a bargaining unit, the Supreme Court held that review was available to resolve the union's claim that the Board transgressed "a definite statutory prohibition." *Leedom v. Kyne*, 358 U.S. 184, 189 (1958). This outcome prevailed despite the absence of a statutory right to bring

such suits. *Id.* at 187-88. Here, too, a "definite statutory prohibition" compels the conclusion that EPA may not force utilities and their customers to bear the cost of complying with an unlawful rule by announcing that requirements are coming such that a prudent agent would begin incurring compliance costs even before the regulation is finalized. *Id.* at 189.

Notwithstanding the CAA's "definite statutory prohibition," owners and operators of EGUs are, right now, prudently and reasonably expending significant money, time, and resources to prepare to comply. For example, Sunflower Electric Power Corporation in Kansas is actively considering projects that could achieve EPA's recommended 6 percent heat rate efficiency improvement for existing coal-fired EGUs. Decl. of W. Penrod ¶¶ 5-6. Some of these projects would necessarily involve long-term capital improvement projects that necessitate expensive and time-consuming engineering design studies. *Id.* ¶ 6. Because EPA would require compliance beginning in 2020, many of these projects must commence immediately and as a result design costs are already being incurred. *Id.* ¶ 7. Of course, these costs must be passed on to

electricity customers, including NFIB's members, in the form of higher electricity rates. *Id.* ¶¶ 12-13.

Justiciability. Whatever changes the Agency might adopt as a result of the ongoing notice-and-comment process, the statutory violation at the heart of the rule is effectively final. EPA's rulemaking notice repeatedly cites Section 111(d) as the sole basis for this Agency rulemaking. *See, e.g.*, 79 Fed. Reg. at 34,852-54, 34,950, APP36-38, APP134. Moreover, to bolster its analysis, the Agency issued a separate Legal Memorandum explaining its theory of how Section 111(d) is "ambiguous" and thus provides EPA with authority to regulate. *See* Legal Memorandum at 20-27, APP155-162; *see also* 79 Fed. Reg. at 34,853, APP37 (incorporating the Legal Memorandum).

EPA's lengthy discussion of Section 111(d) and the absence of any alternative statutory foundation make the lawfulness of the rulemaking's legal foundations ripe for review. This Court will not "'entangl[e]'" itself in cases based on a mere "speculative possibility" that a controversy might arise. *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1206 (D.C. Cir. 2013). Here, however, the disagree-

ment between EPA and Intervenor-Petitioners is based on much more than speculation. The Agency has articulated its legal position in both the rulemaking and an accompanying Legal Memorandum and has identified no alternative grounds to which it could retreat after the notice-and-comment process exposes the flaws in that position. Indeed, the Legal Memorandum demonstrates that the Agency has already eschewed its prior position regarding the relationship between Sections 111(d) and 112. *See* Legal Memorandum at 20-27, APP155-62.

Although not yet final, the proposed rule is properly subject to judicial review via issuance of a writ of prohibition. The only alternative to a writ of prohibition—waiting and petitioning for review of a final agency rule—is wholly inadequate to redress the injuries that States, utility customers, utility suppliers, and utilities themselves are already experiencing in light of the significant costs States and utilities are now incurring to prepare to implement the proposed rule. Forcing Intervenors to wait until the rule becomes final before permitting them to bring a challenge will cause irreparable injury. The unlawful proposal in question covers nearly

every producer and nearly every consumer of electricity and is already forcing utilities and their customers to incur compliance costs.

C. Granting the Writ in This Rare Case Poses No Risk of Opening the Floodgates.

As the Supreme Court noted in *Schlagenhauf*, it is only in "unusual circumstances" that the controlling text of a governing legal provision completely bars a challenged action. 379 U.S. at 110. There is little risk, then, that issuing an appropriate writ in this case will open broad new byways around the traditional avenues of judicial review. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989) (granting writ of mandamus while cautioning that "mandamus remains an extraordinary remedy").

Section 111(d) has been used to regulate only five source categories in the past 40 years. 79 Fed. Reg. at 34,844, APP28. The provision is obscure, and the issue before the Court is unique to the rarely used Section 111(d).

Given these highly unusual circumstances, this Court need not fear that issuing the writ in this case will open a door to myriad similar petitions. The type of gross and enormously consequential

legal error committed by EPA in this case is extraordinarily uncommon—it is as if EPA were proposing to regulate commercial aircraft engines under the CAA provisions authorizing regulation of emissions from "[n]onroad engines and vehicles" (like all-terrain vehicles and snowmobiles), 42 U.S.C. § 7547, while entirely overlooking the statutory provision that expressly authorizes aircraft emission standards, *id.* § 7571. Here, the Agency's mistake is similar but far more extreme—it arises, not from mere inadvertence, but from well-considered interpretive errors of constitutional dimension. And here, EPA is inflicting current harms based on this unconstitutional, categorically mistaken position, as it invokes an entirely inapplicable provision as the sole basis for some of the most far-reaching rules in its history. In these unusual circumstances, immediate relief is warranted.

III. The Appropriate Remedy Is A Writ Prohibiting EPA's Rulemaking.

There is no doubt that EGUs are being regulated by EPA under Section 112. Accordingly, EPA enjoys no authority to proceed with a duplicative layer of regulation under Section 111(d). Indeed, this Court has been clear in insisting on formal de-listing before the

Agency can maintain that a certain source is not covered by Section 112. *New Jersey*, 517 F.3d at 581, 583 ("[O]nce the Administrator determined in 2000 that EGUs should be regulated under Section 112 and listed them under section 112(c)(1), EPA had no authority to delist them without taking the steps required under section 112(c)(9)," and "EPA … concedes that if EGUs remain listed under section 112, … then the [Section 111(d)] regulations for existing sources must fall."). The only remedy for this *ultra vires* rulemaking is a writ prohibiting EPA from proceeding with the rulemaking.

CONCLUSION

For the foregoing reasons, this Court should grant Murray's Petitions and issue a writ of prohibition barring EPA from proceeding with its unlawful proposal to regulate EGUs under Section 111(d) of the Clean Air Act.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 32(a)(2)(C), I hereby certify that this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

Dated: March 9, 2015

/s/ Allison D. Wood
Allison D. Wood

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March 2015, I filed the above final form document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/ Allison D. Wood
Allison D. Wood

Attachment A

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

In re: Murray Energy Corporation	*	**No. 14-1112**

DECLARATION OF KAREN R. HARNED

I, Karen R. Harned, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am the Executive Director of the National Federation of Independent Business ("NFIB") Small Business Legal Center.

2. I am submitting this Declaration in support of the NFIB's Intervenor's Brief in the above-captioned case.

3. NFIB represents approximately 350,000 small business owners across the United States.

4. In the course of performing my job responsibilities, I frequently interact with NFIB members. Despite these frequent interactions, I do not know of any members that produce their own electricity or otherwise do not purchase electricity from the grid in order to conduct their business. Indeed, if a significant number of such members exist at all, which I doubt, they surely would constitute only a fraction of one percent of NFIB's overall membership.

5. According to the NFIB Research Foundation report entitled *2012 Small Business Problems and Priorities*, the cost of electricity ranked number 12 out of 75 problems facing small businesses, ahead of major financial challenges like poor earnings performance.

6. According to NFIB's Energy Consumption poll, energy costs overall are one of the top three business expenses in 35% of small businesses. Moreover, increases in energy costs impose a disproportionate burden on small businesses, which are unable to negotiate favorable rates with electricity providers.

7. Many NFIB members have made substantial investments in plant, equipment, and business processes in reliance on continued supplies of affordable electricity.

8. As States begin implementing the proposed rulemaking at issue in this case, NFIB members suffer immediate costs and must alter their business plans to account for significant increases in the cost of electricity.

I make this Declaration under penalties for perjury pursuant to 28 U.S.C. § 1746, and I state that the facts set forth herein are true.

Karen R. Harned

Karen R. Harned

Dated: December 29, 2014

Attachment B

DECLARATION OF WAYNE E. PENROD

BEFORE ME, the undersigned authority, personally appeared Mr. Wayne E. Penrod, who after being duly sworn states as follows:

1. I am the Executive Manager, Environmental Policy, for Sunflower Electric Power Corporation (Sunflower) and serve in a similar capacity for Mid-Kansas Electric Company, LLC (Mid-Kansas), both of which are located in western Kansas. Sunflower is a member of the National Rural Electric Cooperative Association, which is a member of the Utility Air Regulatory Group. Sunflower and Mid-Kansas are not-for-profit electric generation and transmission cooperative corporations owned and operated by the rural electric distribution cooperatives to which they supply electricity. These distribution cooperatives, in turn, are owned by their members who are electric consumers—families, farms, and other businesses. These electric consumers select their distribution cooperative board members through democratic elections, and those board members in turn appoint the board members of Sunflower and Mid-Kansas.

2. Sunflower is a rural electric generating and transmission cooperative (G&T) that owns and operates facilities to provide essential electricity to its six member-owner distribution cooperatives in central and western Kansas. Sunflower is owned by members Lane-Scott Electric Cooperative, Inc., Dighton, Kansas; Prairie Land Electric Cooperative, Inc., Norton, Kansas; Pioneer Electric Cooperative, Inc., Ulysses, Kansas; The

Victory Electric Cooperative Association, Inc., Dodge City, Kansas; Western Cooperative Electric Association, Inc., WaKeeney, Kansas; and Wheatland Electric Cooperative, Inc., Scott City, Kansas. Sunflower owns and operates electricity generating resources and transmission resources for the express benefit of these members, including one affected electricity generating unit (EGU) in EPA's proposed rule regarding regulation of existing EGUs under section 111(d) of the Clean Air Act, which EPA calls the Clean Power Plan (Proposed Rule).

3. Mid-Kansas Electric Company, LLC, (Mid-Kansas) is a coalition of five rural electric cooperatives and one wholly-owned subsidiary company of a rural electric cooperative that owns facilities to provide essential electricity to its six member-owners in central and western Kansas. Mid-Kansas is owned by Lane-Scott Electric Cooperative, Inc., Dighton, Kansas; Prairie Land Electric Cooperative, Inc., Norton, Kansas; Southern Pioneer Electric Company, Ulysses, Kansas; The Victory Electric Cooperative Association, Inc., Dodge City, Kansas; Western Cooperative Electric Association, Inc., WaKeeney, Kansas; and Wheatland Electric Cooperative, Inc., Scott City, Kansas. Sunflower operates the Mid- Kansas facilities, including one affected EGU in the Proposed Rule, for their benefit.

4. Sunflower operates the combined Sunflower/Mid-Kansas resources, including 360 MW of coal-based and 710 MW of gas-based EGUs. Further, Sunflower and Mid-Kansas receive energy through power purchase

agreements of up to 400 MW/h, of which up to 225 MW/h is wind-based and 170 MW of which is coal-based. Additionally, Sunflower owns or operates and maintains approximately 2,250 miles of transmission lines at operating level voltages up to and including 345 kV, all located in central and western Kansas. Together our member-owners serve their over 200,000 members at retail, members who rely on affordable and reliable electricity for daily use for their farms, homes, and businesses. Together, the electrical power provided by Sunflower and Mid-Kansas to these distribution cooperatives and more than 25 municipalities within the service area meets the electricity requirements of more than 400,000 people in central and western Kansas. The people served at retail by the distribution cooperatives include more than 64,000 people (16%) above the age of 65 and more than 48,000 people (12%) whose annual household income is below the federal poverty level. Thus, approximately one-fourth of the all the people served face economic challenges. Because Sunflower, Mid-Kansas, and their distribution cooperative members operate on a not-for-profit basis, the cost of compliance with the Proposed Rule flows directly through to our customers.

5. In the Proposed Rule, EPA established four "building blocks" that represent their interpretation of the best system of emission reduction (BSER) to address carbon dioxide (CO_2) emissions from existing EGUs. These include a conclusion that heat rate efficiency improvements of 6% are achievable from existing EGUs (Building Block 1). Despite the fact that the Proposed Rule is

not final, Sunflower and Mid-Kansas are already having to make plans regarding what heat rate efficiency improvements it can make to comply with the proposed state emission goals. For example, Sunflower has evaluated the relevant heat rate improvements for its Holcomb 1 EGU following the general outlines set forth in the Sargent & Lundy Report and the National Energy Technology Laboratory reports cited by EPA as the basis for its conclusions on the heat rate efficiency improvements that can be made at existing coal-fired EGUs. The results of this evaluation identify 12 projects (at an estimated cost of approximately $15.6 million) that could be undertaken to attempt to improve heat rate at Sunflower's Holcomb 1 unit by between 1 and 2%. Sunflower would likely consider undertaking only one or two of these projects in the absence of the Proposed Rule.

6. Sunflower has also identified some possible major long-term capital improvement projects that could be performed to achieve a heat rate reduction. These types of projects are significantly more expensive and complicated from both an engineering and a regulatory perspective, however. For example, Sunflower has identified a major boiler improvement project bundle for which a net heat rate improvement of 1.5% may be realized (at full load) at a cost that might approach $136 million. Sunflower has also identified a major turbine improvement project at a cost of approximately $45 million, that could potentially yield close to a 2% improvement in heat rate. A decision about these projects would undoubtedly be influenced by potential new source review

implications and by scheduling issues identified below. A complicating factor is the fact that the Proposed Rule also contemplates re-dispatched energy production in Building Blocks 2 through 4, which would likely result in Holcomb 1 operating less. This would make the economic investment needed for these heat improvement projects prohibitive unless EPA proposes an alternate means to enable recovery of such investments over the necessary remaining useful life of the EGU.

7. Sunflower is undergoing all of this analysis now, even though the Proposed Rule is not final because the project design, engineering, permitting, vendor selection, manufacture and delivery, and installation of projects to reduce CO_2 emissions through the heat rate improvements contemplated by Building Block 1 of the Proposed Rule generally take anywhere from 18 to 48 months to complete. The Proposed Rule contemplates that these improvements must be complete by 2020, which requires these activities to begin now.

8. Further, the actual scheduled outage of the EGU needed to implement these projects may take up to four months just to complete final tie-in and will need to be coordinated with other utilities and with the Southwest Power Pool (SPP), the regional reliability and transmission organization that dispatches all of Sunflower (and Mid-Kansas) EGUs, to ensure reliability. The nature of utility management for production resources, especially for small utilities, necessarily requires much advance outage and general maintenance planning. Sunflower plans such activities at least three years into the future. For

example, we anticipate a major turbine outage for 2017 and are planning for it now. At the current time, we are having to evaluate how this outage might be impacted by the Proposed Rule. We are also currently evaluating how the Proposed Rule affects our current planning cycle. If we ignore the Proposed Rule, we might find ourselves in a situation necessitating an additional unplanned major turbine outage project 8 to 10 years in advance of the next turbine outage cycle. These are the types of decisions that are having to be made right now in light of the Proposed Rule. These kinds of decisions have immediate influence on our long-range plans.

9. SPP is also having to begin planning now for the major re-dispatch of generating resources to address the Proposed Rule's Building Block 2 and Building Block 3 assumptions regarding re-dispatch to gas-fired EGUs and increased renewable energy generation. As a member of SPP, Sunflower participates actively in the many committees established by the SPP membership to accomplish its purpose, and as such Sunflower is positioned to understand the relevant complexities associated with the dispatch priorities and decisions made by SPP. The Proposed Rule is going to require significant changes in the transmission system to accomplish the re-dispatch anticipated by Building Blocks 2 and 3. The current transmission system was developed over decades to move central station energy to current load centers. Those same transmission resources will NOT, without major revisions, be able to move large quantities of energy from these re-dispatched sources to load centers without major pre-

planned improvements to the transmission system. SPP is having to decide now how to accomplish their mission to retain the current reliability-based transmission improvement process and at the same time begin planning for a new transmission system that can accommodate the Proposed Rule.

10. Sunflower and Mid-Kansas have already been reviewing reliability issues associated with the Proposed Rule. If implemented as written, the Proposed Rule will significantly undermine the reliability of the electricity transmission and distribution system (while substantially increasing the cost of providing electric energy to Sunflower and Mid-Kansas member owner families in central and western Kansas). There is very real risk Sunflower and Mid-Kansas, and other Kansas utilities, will simply not be able to lawfully meet both the needs of their customers and comply with the rule at the same time. Modeling by SPP indicates the Proposed Rule will likely cause severe voltage reductions and even collapse (blackouts) in central and southwest Kansas, a significant part of Sunflower's and Mid-Kansas' service territory. In fact, in the SPP report on system impacts due to the Section 111(d) rule, Sunflower's transmission area is prominently mentioned as being at risk for these conditions in central and western Kansas. Under very predictable scenarios, the resulting low voltage can lead to electricity blackouts. Sunflower and Mid-Kansas are having to evaluate now these important reliability issues.

11. The SPP planning committees, on which Sunflower and Mid-Kansas actively participate, and staff work to ensure reliable operation of the

interconnected electricity transmission system into the future, a process described in Attachment O of the SPP Open Access Transmission Tariff. It utilizes three planning horizons. The Near Term Assessment is conducted annually and generally looks at a time horizon of three to five years. SPP long range transmission planning is conducted over a three-year planning cycle with a 20-year assessment being conducted during the first half of the three year cycle and a 10-year assessment conducted in the second half of the three year cycle. SPP is having to account for the Proposed Rule now in this planning process.

12. Sunflower also has grave concerns about the future price of electricity under the Proposed Rule. As Sunflower noted in its comments to EPA, its analysis of the cost impact of the Proposed Rule indicates the wholesale cost of electricity to Sunflower and Mid-Kansas members would increase by over 65%. Not all economies are the same. Rural agricultural economies are historically fragile, and ill-conceived regulation increasing costs by this amount will harm our members and the citizens they serve; they will suffer lost production and lost business opportunity that cannot be remedied if the Proposed Rule is overturned later after it is finalized.

13. Because, as discussed above, many of the decisions regarding what Sunflower and Mid-Kansas are going to do to comply with the Proposed Rule are occurring now, the possibility of the member-owners (i.e., electricity customers) of Sunflower and Mid-Kansas having to pay significant amounts to comply with the Proposed Rule is a very real risk. This potential might be

illustrated by a real world example that occurred with Sunflower's Holcomb 1 EGU. As originally promulgated, EPA's Cross-State Air Pollution Rule (CSAPR), which was effective on January 1, 2012, imposed immediate (early 2012) near-term requirements for Sunflower to reduce nitrogen oxide (NOx) emissions from Holcomb 1. CSAPR was timely appealed, but delivery of critical materials forced Sunflower's hand to commit to a $20 million low-NOx burner and over-fire air system boiler project in order to secure the necessary emission reductions. Although CSAPR was stayed by the D.C. Circuit on December 31, 2011, the commitments to materials and contractors had already been made, a necessary construction permit under the prevention of significant deterioration program had already been obtained, and contractors began work the first week of January 2012. All of these costs were passed on to Sunflower's member-owners at the time these investments were made. CSAPR was initially vacated by the D.C. Circuit but then was substantially re-instated in a modified form by the Supreme Court. Kansas, other states, Sunflower, and other utilities are appealing certain provisions of the rules that, if successful, may still remove Kansas utilities from CSAPR. If that occurs, the improvements originally required for the Holcomb 1 unit under the original CSAPR might not be required at all, meaning that the member-owners (i.e., electricity customers) of Sunflower will have paid for costly control equipment unnecessarily. Because the decisions to comply with the Proposed Rule are having to be made now for all of the reasons discussed herein, the possibility of customers of Sunflower and Mid-

Kansas having to pay for expensive investments in heat rate improvements and other measures related to the Proposed Rule are very real.

I make this Declaration under penalties for perjury pursuant to 28 U.S.C. § 1746, and I state that the facts set forth herein are true.

Wayne Penrod
Wayne Penrod (Dec 29, 2014)

Wayne E. Penrod

Dated: Dec 29, 2014

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

14-1112 & 14-1151

In the United States Court of Appeals for the District of Columbia Circuit

IN RE: MURRAY ENERGY CORPORATION,
Petitioner.

MURRAY ENERGY CORPORATION,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,
Respondents.

Reply Brief for Intervenor-Petitioners National Federation of Independent Business and Utility Air Regulatory Group

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Additional Counsel Listed on Signature Page

February 26, 2015
Final Form: March 9, 2015

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* Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL STATUTES

LEGISLATIVE HISTORY

FEDERAL REGISTER

MISCELLANEOUS

GLOSSARY

Agency	United States Environmental Protection Agency
CAA	Clean Air Act
EGU(s)	Electric Generating Unit(s)
EPA	United States Environmental Protection Agency
NFIB	National Federation of Independent Business
UARG	Utility Air Regulatory Group

Intervenors National Federation of Independent Business ("NFIB") and Utility Air Regulatory Group ("UARG") hereby submit this reply pursuant to Circuit Rule 28(d)(5).

SUMMARY OF ARGUMENT

The Environmental Protection Agency's ("EPA" or "Agency") response underscores the unlawfulness of its Clean Air Act interpretation and pending rulemaking, confirming that the Court should issue an extraordinary writ "in aid of" its exclusive review jurisdiction under 42 U.S.C. § 7607(b). Issuance of a writ would assure States and electricity generators that they need not undertake additional costly steps to further implement EPA's proposals under a mistaken notion that "the usual presumption of validity," *Chamber of Commerce of the United States v. EPA*, 642 F.3d 192, 208 (D.C. Cir. 2011), attaches to these highly unusual, patently unlawful, agency proceedings.

As explained below, States and electric generating units ("EGUs") are already expending significant resources undertaking implementation efforts pursuant to EPA's unlawful rulemaking. And in the absence of an extraordinary writ, they will continue to do so. Only

by issuing an extraordinary writ before EPA's rule goes final can the Court safeguard its ability to afford full relief to parties that already are, and will otherwise continue to be, injured by EPA's rulemaking.

ARGUMENT

I. Section 111(d) Unambiguously Prohibits EPA from Regulating Existing Sources that Are Already Regulated Under Section 112.

EPA's brief includes never-before-imagined textual arguments for why the Agency may regulate existing sources under Section 111(d) that are already regulated under Section 112. In addition, EPA asserts that it enjoys discretion to give effect to the Senate's superseded 1990 conforming amendment to Section 111(d), which was mistakenly included in the Statutes at Large. Both arguments fail. As demonstrated below, EPA's attempts to manufacture ambiguity from textual clarity are unavailing, and, as demonstrated by Professor Tribe and others, allowing EPA to give substantive effect to a conforming amendment creates insuperable constitutional difficulties.

A. Section 111(d) Is Unambiguous.

EPA's counsel presents a first-time-ever textual analysis of Section 111(d) with a goal of finding enough ambiguity to allow the Agency to proceed with its rulemaking. EPA Br. 34 (citing *Chevron,*

U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)). The plain terms of the statute, however, cannot support this gambit. *Chevron* deference is warranted only after "the ordinary tools of statutory construction" fail to resolve an ambiguity. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013); *Chevron*, 467 U.S. at 842 n.7. Here, there is no ambiguity.

In seeking to sow doubts about the statute's plain meaning, EPA's counsel divides Section 111(d) into three alternative grounds for authorizing regulation. EPA Br. 36. Notably, counsel's partitioning conflicts with the Agency's two-part interpretation of the same text. Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units at 22 (undated), Docket ID No. EPA-HQ-OAR-2013-0602-0419, APP157. Counsel's three-part rendering thus appears to be Plan B, embarked on only after Professor Tribe and others explained the constitutional flaws in the Agency's original justifications. *See generally* NFIB-UARG Br. 20-26.

Counsel's novel gloss is inconsistent with the statutory structure and context. According to counsel, Section 111(d) should be read as follows:

> **The Administrator shall prescribe regulations** ... under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source **for any air pollutant** [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 ….

EPA Br. 36 (emphases and numbering in original). Based on this gloss, counsel contends that Section 111(d) requires regulation "so long as *either* air quality criteria have not been established for that pollutant, *or* one of the remaining criteria is met." *Id.* at 36-37 (emphases in original). But a straightforward reading of the statute, one that considers the full text, confirms that it provides two bases for regulation, with the second comprised of two alternatives:

> The Administrator shall prescribe regulations … under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant [**1**] for which air quality criteria have not been issued or [**2**] which is not [**a**] included on a list published under section 7408(a) of this title or [**b**] emitted from a source category which is regulated under section 7412 of this title ….

42 U.S.C. § 7411(d)(1) (numbering and lowercase lettering added). This reading recognizes that the "not" in Clause 2 carries across the remainder of the sentence. The necessity of reading the statute in this fashion is manifest, once one considers the pre-1990 version: "or which

is *not* included on a list published under section 108(a) or 112(b)(1)(A)." Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1684 (1970) (emphasis added). Before the 1990 amendments expanded Clause 2 to shift the focus from pollutants to source categories (tracking the shift under Section 112 itself), there was no doubt the sentence's "not" applied to both Clause 2 alternatives. And the 1990 amendment, for all its import, did not alter Clause 2's structure. As a matter of elementary logic, the "not," which remains as before in Clause 2, must continue to be distributed down the sentence. Both before and after the amendments, the "not" means that both subsequently-appearing alternatives are excluded; that is, ~(A or B) is the same as (~A and ~B).

While the Supreme Court has noted that "or" ordinarily is used in the "disjunctive," it typically makes this point to avoid reading alternatives as if they were the same. *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks omitted). So long as Section 111(d) is read in the manner outlined above, that concern does not arise.

What remains is Clause 1. That provision addresses pollutants for which "air quality criteria have not been issued." Specifically, it allows EPA to regulate under Section 111(d) pollutants for which air quality criteria had "not been issued" as of Section 111(d)'s enactment in 1970. EPA argues the clause does much more, including authorizing this rulemaking, because "[a]ir quality criteria have not been issued for CO_2." EPA Br. 37. But the statutory text and context make clear that Clause 1 refers at least to the five 1970 criteria pollutants and at most to those five plus other pollutants that have been listed under Section 108, but for which air-quality criteria "have not been issued." Under either reading, Clause 1 plays no role here; much less one of affording a regulatory *carte blanche*.

In sum, appellate counsel's new-found interpretation contradicts EPA's interpretation of the same text and ignores applicable canons of construction. The upshot is not so much a reading of law as an instance of interpretive performance art. Needless to say, Section 111(d) should not be read as a mystery wrapped in a riddle to be unfolded by interpretive gymnastics, but as a straightforward provision of law.

That provision declares that source categories regulated under Section 112 are exempt from further regulation under Section 111(d).

B. Legislative History Confirms that Section 111(d) Is Unambiguous.

The Senate Managers unequivocally announced in an official statement on the 1990 Conference Agreement that "[t]he Senate recedes to the House" with regard to the dueling Section 111 amendments. Chafee-Baucus Statement of Senate Managers, S. 1630, § 108 (Oct. 27, 1990), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 ("LEG. HISTORY") at 885 (1993), APP418. EPA tries to dismiss this statement—one of the few pieces of legislative history directly discussing the 1990 amendments to Section 111(d)—calling it "of limited value" and a "rather mundane legislative history snippet." EPA Br. 50.

But although EPA questions the "value" of this on-point evidence, the Congressional Research Service explains that conference committees often produce statements to accompany and explain conference reports. Christopher M. Davis, Cong. Research Serv., "Conference Reports and Joint Explanatory Statements" at 1 (Nov. 7, 2012), APP506. Such statements, which must be signed by a majority

of conferees, "explain the committee's decisions," *id.*, and "may prove informative as legislative history," *id.* at 2, AP507. Here, the conferees identified the statement as legitimate legislative history, calling it "our best effort to provide the agency and the courts with the guidance that they will need in the course of implementing and interpreting this complex act." 1 LEG. HISTORY at 880, APP413.

Moreover, contrary to EPA's implication that the quoted statement has nothing to do with Section 111, EPA Br. 50, the statement expressly indicates that the Senate is receding to "the House amendment … *for amending section 111 of the Clean Air Act relating to new and existing stationary sources*." 1 LEG. HISTORY at 885 (emphasis added), APP518. EPA mis-cites the Statement, contending that it was "not addressing Title III of the bill, which contained [the Senate] amendment." EPA Br. 50 (citing 1 LEG. HISTORY at 880). But as the legislative history explains (at page 880) the quoted statement was directed to amendments to Titles I, II, V, VI and VII of the *Clean Air Act*; it did not speak in terms of *bill* titles. Section 108 of the Statement, where the "receding" language appears, thus directly

addresses amendments to Sections 108 and 111 of the *Clean Air Act*—that is, the precise section contested in this case.

Finally, EPA quibbles over the meaning of "recede," claiming that "[i]t does not mean one house is deferring to another." EPA Br. 50. But this term of art is well-known in congressional circles to mean "[a] motion by a house to withdraw from its previous position during the process of amendments between the houses." CONGRESSIONAL QUARTERLY'S AMERICAN CONGRESSIONAL DICTIONARY 223 (1993), APP435. Furthermore, EPA's citation to supposedly contrary authority is unavailing. That authority does not even define "recede," but does employ the term to mean what the *American Congressional Dictionary* says it means; namely, one house is deferring to the other on a particular amendment. *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1482 (1992), APP427.

Against this backdrop, when the Senate stated in 1990 that it was "reced[ing] to the House" on the dueling Section 111(d) amendments, the Senate meant precisely that the House amendment should prevail. It was only a scrivener's error that allowed the Senate amendment to appear in the Statutes at Large. That error does not give rise to

"ambiguity," much less afford occasion for invoking *Chevron*. *See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J. and Breyer, J., concurring) (applauding use of "common sense" and legislative history to resolve scrivener's errors and other ambiguities); *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1043-44 (D.C. Cir. 2001).

The House amendment also accords with congressional intent to prioritize Section 112 over Section 111(d). When Section 112 expanded to focus on source categories instead of on particular pollutants, it made sense to concomitantly shift the focus of Section 111(d) to source categories.

Finally, contrary to the suggestion of EPA and its supporters, Section 111(d) has never been a significant program. Used only four times between 1970 and 1990, Congress did not hesitate to restrict the provision even further when it decided to expand the scope of Section 112. Section 111(d) has always been understood by EPA to have limited reach. *See, e.g.*, 40 Fed. Reg. 53,340, 53,345 (Nov. 17, 1975). That reach became even more limited after 1990.

II. Intervenors Have Standing Adequate To Support this Challenge.

The Supreme Court has held that intervenors may pursue challenges independent of petitioners. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Bryant v. Yellen*, 447 U.S. 352, 366, 368 (1980). Hence, even if Murray Energy were found to lack standing, the standing enjoyed by UARG, NFIB, and Intervenor States would allow the case to proceed.

UARG's and NFIB's members are currently being injured and thus Intervenors enjoy organizational standing. *See Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (citation omitted); *see also* NFIB-UARG Br. 32-33. EPA's action targets the EGUs owned by UARG members. EPA's determination that it has authority to promulgate Section 111(d) regulations for existing EGUs, and its decision that it will do so on an aggressive time-line, has forced UARG members to prepare to comply with the rule now—even as significant uncertainty surrounding the legality, parameters, and stringency of state implementation puts the industry's long-term planning in limbo. NFIB-UARG Br. 33-34. Companies are reluctant to enter long-term contracts for power or fuel during the pendency of

EPA's rulemaking and States' planning processes, thus adding costs that, in some cases, are passed along to customers like the members of NFIB. *See* Decl. of W. Penrod (NFIB-UARG Br., Attachment B). That EPA determined and announced that it can, should, and will aggressively regulate EGUs under Section 111(d) in the vehicle of a proposed rule is irrelevant; the fact remains that utilities and utility customers are being injured *now*.

If more were needed, State Intervenors have also "expended substantial state resources as a direct result of the proposal, including thousands of hours of employee time." State Pet'rs' Br. 26, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. Nov. 26, 2014) (citing declarations of state employees). And States are "entitled to special solicitude in ... standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007). Accordingly, the State Intervenors also enjoy standing to bring this challenge.

Finally, EPA argues that UARG and NFIB intervened too late. EPA Br. 16. But UARG and NFIB intervened in the extraordinary writ proceeding, which has no 60-day deadline for intervention; hence, our interventions were brought—and granted—in timely fashion.

III. A Writ of Prohibition Should Issue.

EPA's arguments against writ jurisdiction simply do not fit the case at bar. Crucially, this Court has been designated the exclusive forum for challenges to EPA rulemakings under Section 111. 42 U.S.C. § 7607(b)(1). When the demanding but not insurmountable conditions for writ relief have been met, a proceeding under the All Writs Act falls easily within that jurisdiction in light of the Court's express authority to "issue all writs necessary or appropriate in aid of [its] … jurisdiction[]." 28 U.S.C. § 1651(a).

The Agency contends that the possibility that it might change its proposed rule means that the current proceeding does not "aid" the Court's "exercise of its jurisdiction." EPA Br. 28. But this argument is inconsistent with the facts and posture of this challenge. One reason why writ relief is appropriate is the Agency's unitary basis for asserting authority to issue any rule governing existing coal-fired EGUs. That basis is Section 111(d) alone. NFIB-UARG Br. 27. EPA contends that comments on its statutory authority "may alter" the Agency's "analysis." EPA Br. 28. Even assuming that the Agency will faithfully consider comments on its legal reasoning, nothing it could do, short of

withdrawing the rule, would redress the illegalities challenged here. The fundamental challenge is not a matter of "analysis," but of EPA's authority to issue a rule at all. The contents and stringency of the rule are irrelevant. The only solution is not to "alter" the rule, but to abandon it. Indeed, *nothing* EPA could do in a final rule could address its lack of authority.

Further warranting issuance of a writ is the lack of other "adequate means to attain the relief" sought. *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1063 (D.C. Cir. 1998) (per curiam) (internal quotation marks omitted). Naturally, the Agency points to the fact that Petitioner and Intervenors may sue after EPA's rule becomes final, while attacking Murray's declaration explaining the inadequacy of such review. EPA Br. 29. As discussed *supra*, however, the additional evidence from States, energy producers, and energy consumers, which EPA does not mention, leaves no doubt that delayed review is inadequate under these unusual circumstances.

A pivotal fact here is the Agency's contemplation, not of direct regulation of pollution sources, but of indirect regulation via States' employing their own independent, sovereign, regulatory authority to

revise state laws and regulations governing a matter peculiarly within the State's regulatory domain—the production and distribution of electricity. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-03 (2012) (explaining the Court's aversion to federal interference with state political processes). Unlike rulemaking that directly targets private parties, or that provides minimum CAA standards for States, this challenged rulemaking targets sovereign States and matters within their sovereign authority. EPA's rulemaking is certain to skew the on-going debates over energy and environmental policy—in EPA's favored direction—in each of 50 state capitols. This rulemaking promises to obscure lines of democratic accountability, *id.*, and render impossible all efforts to disentangle which state laws and rules were proximately caused by EPA's unlawful federal intrusions into state regulatory domains. This crucial consideration—specific to rules targeting matters within the States' sovereign authority—is a compelling additional reason for granting relief before the rule goes final.

The Agency posits three species of cases warranting writs and concludes the posture of the instant case falls outside all three. EPA Br. 30-31. But absent from this analysis is any judicial authority

embracing the Agency's three-part taxonomy. Cases like *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975), and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), confirm that an extraordinary writ is appropriate where, as here, an inferior court or agency has committed error that is strictly legal, dispositive of important rights, and otherwise incurable. It is thus immaterial that *Schlagenhauf* concerned "lower court action," EPA Br. 31, rather than the agency action at issue here and in *McCulloch*. Rather, as *McCulloch* illustrates, agency action that is "contrary to a specific prohibition in the Act" and raises "public questions particularly high in the scale of our national interest" justifies "prompt judicial resolution of the controversy over the [agency's] power." *Id.* at 16-17 (internal quotation marks omitted).

Conversely, the fear of "premature" or "piecemeal judicial review," *Power Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 629 (9th Cir. 1985), has no place where, as here, the only contested issues are purely legal and effectively dispositive. Instead, this challenge is ripe under the Supreme Court's longstanding, and notably

functional, approach to ripeness. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977); *see also Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119, 1123 (4th Cir. 1977) (finding ripeness under *Abbott Labs.* in case involving non-final agency action because issues raised were legal in nature).

Absent judicial intervention, EPA and its top officials are certain to finalize some form of burdensome rule, thus perpetuating the ongoing cascade of injuries described above. *See, e.g.*, Anthony Adragna, *EPA Open to Interim Goal Changes in Final Power Plant Rules, McCarthy Says*, BNA ENERGY AND CLIMATE REPORT (Feb. 18, 2015) ("intends to finalize" rules "by mid-summer ...."), *available at* http://www.bna.com/epa-open-interim-n17179923132/ (subscription required). Hence, there is "no benefit in waiting for the agency to develop a record before granting judicial review." *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011). Awaiting a final rule would cause additional irreparable harm to States and private parties.

Finally, a motion to stay the final rule after promulgation would not redress these injuries. Any such stay could be obtained, at the soonest, a year or more in the future—long after State and private resources are expended and the skewing of state policies has become irremediable.

Against this backdrop, the Court should stop EPA's rulemaking in its tracks, or, at a minimum, issue an extraordinary writ prohibiting any final rule from going into effect, including the commencement of any compliance period, until the culmination of judicial review, including review by the Supreme Court. Under the APA, a reviewing court enjoys full power, "to the extent necessary to prevent irreparable injury," to "issue all necessary and appropriate process to postpone the effective date of an agency action ….." 5 U.S.C. § 705; *see also* 28 U.S.C. § 2349(b); *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 42-43, 52-53 (D.D.C. 2011) (issuing stay), *vacated*, 696 F.3d 1205, 1221-22 (D.C. Cir. 2012) (vacating stayed rule as unconstitutional). Courts' ability to block an invalid law before its enforcement derives, after all, from "equity practice with a background of several hundred years." *FTC v. Weyerhauser Co.*, 665 F.2d 1072, 1084 (D.C. Cir. 1981).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of prohibition.

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Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to D.C. Cir. R. 28(d)(4), I hereby certify that Intervenors NFIB and UARG have not filed this brief separately from the brief of Intervenor Peabody Energy Corporation for any unacceptable reason. Rather, the separate reply briefs are for the convenience of the Court and mirror the structure of the Intervenors' opening briefs. At that time, the Court had not granted Peabody Energy's motion to intervene, which necessitated separate briefs. Now, the Intervenors maintain separate briefs so that the Court can easily track the various arguments. The word count for the reply briefs is allocated in the same proportion as the opening briefs.

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/s/ Dominic E. Draye
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 32(a)(2)(C), I hereby certify that this brief contains 3,465 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

Dated: March 9, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this day, March 9, 2015, I filed the above final form document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

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