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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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GLOSSARY

Agency	United States Environmental Protection Agency
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
EGU(s)	Electric Generating Unit(s)
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).

INTRODUCTION

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 In addition, EPA asserts that it enjoys discretion to give effect to the Senate's superseded 1990 conforming amendment to Section 111(d), which was mistakenly included in the Statutes at Large.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, JA ___. 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. Chaffee-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), JA ___. 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), JA __. 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. 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, JA __.

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). 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), JA ___. 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), JA ___.

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) (agency "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.

February 26, 2015

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.

Dated: February 26, 2015

/s/ Dominic E. Draye
Dominic E. Draye

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 3467 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: February 26, 2015

/s/ Dominic E. Draye
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CERTIFICATE OF SERVICE

I hereby certify that on this day, February 26, 2015, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case. I further certify that, pursuant to Circuit Rule 31(b), the original and five copies of the brief were hand-delivered to the Court.

/s/ Dominic E. Draye
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