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.

On Petition for Review of EPA Settlement Agreement

BRIEF OF THE NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND SIERRA CLUB, AS INTERVENORS IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenor environmental organizations state as follows:

A. Parties and Amici

Petitioners' and Respondent's briefs collectively list all parties, intervenors, and amici appearing in this Court.

B. Rulings Under Review

Respondent's brief describes the settlement agreement that petitioners purport to challenge, and the ongoing rulemaking they ask this Court to enjoin.

C. Related Cases

Respondent's brief includes a list of all related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, intervenors Natural Resources Defense Council, Environmental Defense Fund, and Sierra Club state that their organizations are not-for-profit organizations focused on protection of the environment and conservation of natural resources. None of the organizations have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

/s/ Benjamin Longstreth

Dated: February 10, 2015

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GLOSSARY

CO_2	Carbon dioxide
EPA	U.S. Environmental Protection Agency
ERISA	Employment Retirement Income Security Act of 1974
HAP	Hazardous air pollutant
NAAQS	National Ambient Air Quality Standards

INTRODUCTION

The Clean Air Act establishes a comprehensive framework for regulating all dangerous air pollutants emitted from existing industrial sources. Sections 108–110 of the Act were designed to ensure that states meet national ambient air quality standards (NAAQS) for "criteria pollutants" such as particulate matter, through emission controls for existing sources. *See* 42 U.S.C. §§ 7408–10. Section 112 was designed to control existing sources' emissions of hazardous air pollutants (HAPs), including toxins like mercury and arsenic. *See id*. § 7412. Section 111(d) was designed to control existing sources' emissions of all other dangerous pollutants. *Id*. § 7411(d). This structure reflects Congress' intention that "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91-1196, at 20 (1970). *See also* 40 Fed. Reg. 53,340 (Nov. 17, 1975).

EPA has determined that greenhouse gases, including carbon dioxide (CO_2), endanger public health and welfare. 79 Fed. Reg. 34,830, 34,841–43 (Jun. 18, 2014); 74 Fed. Reg. 66,496, 66,523 (Dec. 15, 2009). Because CO_2 is not regulated under the NAAQS or HAP programs, it is precisely the kind of dangerous pollutant for which section 111(d) was designed.

In this case, opponents of federal greenhouse gas regulation ask this Court to disregard fundamental limits on judicial review of agency action. Petitioners

further ask this Court to hold that EPA lacks authority to regulate a source's non-HAP emissions under section 111(d) if the source's HAP emissions have previously been regulated under section 112.

As EPA demonstrates, this lawsuit fails on multiple threshold grounds, *see* EPA Br. 11–31, and petitioners' attack on EPA's statutory authority is meritless, *id*. 32–54. This brief provides additional reasons that petitioners' arguments fail on the merits.[1]

SUMMARY OF ARGUMENT

Petitioners argue that EPA lacks authority to regulate power plants' CO_2 pollution under section 111(d) because the agency has previously regulated power plants' emissions of mercury and other HAPs under section 112. Pet. Br. 23. Nothing in the statute requires this bizarre outcome.

As EPA explains, EPA Br. 4–5, Congress enacted two amendments in 1990 to replace an obsolete cross-reference in section 111(d)(1)(A)(i). As amended by a provision originating in the Senate bill,[2] section 111(d) clearly authorizes EPA to regulate "any existing source for any air pollutant" which is not included on the list of criteria pollutants or HAPs. Because CO_2 is not included on either list, this provision authorizes EPA to regulate CO_2 pollution from existing power plants.

[1] The issues in this case overlap significantly with those in the two Murray Energy case, Nos. 14-1112 and 14-1151. This brief addresses only issues raised by petitioners in this case.

[2] Pub. L. No. 101-549, § 302(a), 104 Stat. 2339, 2467 (1990).

As amended by a provision originating in the House bill,[3] section 111(d) requires EPA to regulate any non-criteria air pollutant that is not "emitted from a source category which is regulated under section 112." Read in context, this language prevents EPA from using section 111(d) to regulate a source's emissions of a particular air pollutant only if there is a section 112 emission standard covering emissions of that pollutant from that source category. Because petitioners' theory is contradicted by the unambiguous meaning of the Senate-originated provision and the most sensible, contextual reading of the House-originated provision, it fails as a matter of textual interpretation.

Moreover, petitioners' interpretation "would be inconsistent with—in fact, would overthrow—the Act's structure and design," *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2443 (2014). Petitioners' theory would eviscerate section 111(d), since virtually every large industrial source category is regulated under section 112 with respect to its HAP emissions, as required by the statute. EPA would be effectively stripped of authority to protect the public from dangerous air pollutants not addressed by the NAAQS or HAP programs. Petitioners point to no evidence that Congress intended this arbitrary and dangerous outcome.

Nor is there any foundation for petitioners' claim that Congress intended to prevent "double regulation" of the same source when it amended section 111(d) in

[3] Pub. L. No. 101-549, § 108(g), 104 Stat. 2339, 2574 (1990).

1990. Petitioners' arbitrary rule would block EPA from regulating one dangerous air pollutant from a source solely because it had regulated another pollutant from the source. Nothing in the Act's text, structure, or history suggests that sources that emit multiple dangerous air pollutants cannot be regulated under multiple statutory programs that address these distinct dangers. To the contrary, the Act establishes a comprehensive regulatory framework designed to control all emissions from existing industrial sources that endanger public health or welfare. Furthermore, even on petitioners' reading of the statute, EPA could regulate power plants under both sections 111(d) and 112 as long as it established the section 111(d) standards first. *See* 42 U.S.C. § 7412(d)(7).

I. PETITIONERS' ARGUMENTS WOULD OVERTHROW THE ACT'S STRUCTURE AND DESIGN.

The core function of section 111(d) is to close a "gap," *i.e.*, to protect the public from the pollutants that are not controlled by the NAAQS or HAP programs, but that nonetheless pose "significant danger to public health or welfare." S. Rep. No. 91-1196, at 20. Section 111(d) is "the only provision of the Act" that requires regulation of existing sources' emissions of a class of pollutants that are "harmful to public health and welfare," thus preventing "a gaping loophole in a statutory scheme otherwise designed to force meaningful action." 40 Fed. Reg. 53,340, 53,343 (1975).

Petitioners argue that Congress abandoned this comprehensive approach in 1990, prohibiting EPA from using section 111(d) to control a source's emissions of dangerous pollutants such as CO_2 if the agency had previously regulated the same source's HAP emissions under section 112. Petitioners' argument is unfounded.

A. Petitioners' "Double Regulation" Theory Fails.

Petitioners produce no evidence that Congress intended to undo the gap-filling function of section 111(d) in favor of what EPA aptly calls a "pick-your-poison" approach. *See* EPA Br. 32. Instead, petitioners simply assert that Congress adopted that approach in order to prevent "double regulation of a source category under both Section 112 and Section 111(d)." Pet. Br. 23.

Petitioners' theory fails. It is not "double regulation" to control *different* pollutants from a source under separate regulatory programs. *See* EPA Br. 48–49. The Act's multi-program regime for stationary sources recognizes that different pollutants produce different harms and that (as is true for HAPs and CO_2) the best control regime for one pollutant will not necessarily abate emissions of another. Petitioners' peculiar concept of "double regulation" makes no sense in light of the Act's broad purpose to protect public health and welfare; it is like saying that if a car has good tires, it has no need for good brakes.

The structure of the Clean Air Act contradicts petitioners' theory. The Act establishes a set of stationary source programs, implemented through separate

titles, sections, and subsections, to address the full range of dangerous air pollutants emitted by industrial sources, without gaps. Consequently, it is common for a source that emits multiple air pollutants to be regulated under multiple provisions.[4] Indeed, the Act sometimes regulates a source's emissions of *a single pollutant* under multiple programs to address different health or environmental impacts.[5] No stationary source is statutorily entitled to be regulated under only one section of the Act. Instead, the overriding principle is comprehensive protection of public health and welfare.[6]

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[4] For example, fossil fuel–fired power plants are currently regulated under at least six different provisions: the NAAQS program, 42 U.S.C. § 7410, the New Source Performance Standards program, *id.* § 7411(b), the HAP program, *id.* § 7412, the Prevention of Significant Deterioration program, *id.* §§ 7470 *et seq.*, the Visibility Protection program, *id.* §§ 7491 *et seq.*, the Nonattainment New Source Review program, §§ 7501a *et seq.*, and the Acid Rain program, *id.* §§ 7651a *et seq.* States are expressly allowed to establish "any" more stringent standard. *Id.* § 7416.

[5] For example, existing power plants' emissions of sulfur dioxide are regulated under the NAAQS program, 42 U.S.C. § 7410, the Visibility Protection program, §§ 7491 *et seq.*, and the Acid Rain program, *id.* §§ 7651a *et seq.*

[6] *See* 42 U.S.C. § 7401(b)(1) (the purposes of Title I of the Act include "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare"). Petitioners (Br. 9–10, 33–34) invoke section 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A), but that provision only highlights Congress's concern with seamless protection of public health. Enacted in 1990 along with the power plant-specific Acid Rain Program, section 112(n)(1)(A) commanded EPA to regulate power plants' HAP emissions under section 112 if the Administrator found such regulation "appropriate and necessary" after considering the dangers to public health from power plants' HAP emissions. Section 112(n)(1)(A) illustrates that Congress was unwilling to create categorical exemptions from the Act's comprehensive regulatory scheme, even for sources

Finally, petitioners' rule would not even function as advertised. Even on petitioners' reading, EPA would have authority to regulate a source under both sections 111(d) and 112 as long as it established the section 111(d) standards first. Indeed, Congress explicitly protected this type of "double regulation," providing that a section 112 standard could not be "interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section [1]11" or "other authority of [the Clean Air Act]."[7] Since the 1990 amendments were adopted, municipal solid waste landfills and kraft pulp mills have been regulated simultaneously under section 111(d) and section 112 in this manner. *See* Inst. for Policy Integrity *Amicus* Br. 13, 14.

Congress did not deviate in 1990 from the Act's signal theme: comprehensive protection of public health and welfare. It did not silently open up a "gaping loophole" for dangerous pollutants. *Cf.* 40 Fed. Reg. at 53,343.

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subject to stringent regulation with respect to one type of pollutant. And nothing in this provision authorizes any exemption from regulation under any other provision of the Act.

[7] 42 U.S.C. § 7412(d)(7). Two additional points deserve mention. First, section 112(d)(7) by its terms is not limited to protecting regulations adopted before 1990; indeed, Congress enacted a separate provision to save standards established prior to 1990. *See* 42 U.S.C. § 7412(q). Second, EPA is entitled to resolve any ambiguity concerning the meaning of section 112(d)(7) under the *Chevron* framework. *See NRDC v. EPA*, 749 F.3d 1055, 1059–60 (D.C. Cir. 2014).

B. Petitioners' Interpretation Would Have Radically Disruptive Consequences That Congress Did Not Intend.

Petitioners' theory would "largely eviscerate" section 111(d). *See* EPA Br. 33–34. By congressional design, virtually every category of large industrial sources is subject to regulation under section 112 for its HAP emissions. *See* 67 Fed. Reg. 6,521 (Feb. 12, 2002) (listing 146 source categories subject to regulation under section 112); *see also* 42 U.S.C. § 7412(c)(1). Petitioners' theory would create a regulatory no-man's land: for all these sources, emissions of pollutants that are dangerous but not classified as criteria pollutants or HAPs (such as CO_2, methane, and landfill gas) would be immune from regulation.

It is surpassingly unlikely that, as part of landmark 1990 amendments designed to comprehensively strengthen the Clean Air Act, Congress quietly effected a major, gap-*creating* change in section 111(d), contradicting the provision's central gap-*filling* role. "It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176 (1993). At a minimum, such a departure would have been "mentioned somewhere in the legislative history." *Taylor v. United States*, 495 U.S. 575, 601 (1990). No such statement exists. Rather, the legislative history of the 1990 amendments "consistently expressed [Congress'] desire to expand EPA's authority" to regulate dangerous air emissions. EPA Br. 45.

Petitioners acknowledge that their interpretation would create a "regulatory gap," but contend that it would only be a "minor" one, urging that section 111(d) itself should be regarded as minor. Pet. Br. 34. This assertion is meritless. Congress designed section 111(d) to assure complete coverage of all dangerous air pollutants. The provision exists to curb existing sources' emissions of harmful air pollutants that are not controlled under the NAAQS program or the HAP program. Even if relatively few pollutants were regulated under section 111(d) prior to 1990, the program serves the structurally important role of ensuring that the statute's regulatory scheme has "no gaps." S. Rep. No. 91-1196, at 20. The role of section 111(d) in addressing emissions of CO_2—as well as other pollutants that endanger public health and welfare, *e.g.*, 61 Fed. Reg. 9,905 (Mar. 12, 1996)—illustrates the importance of this provision to the fabric of the Act.

In short, petitioners' interpretation of section 111(d) "would be inconsistent with—in fact, would overthrow—the Act's structure and design," *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

II. PETITIONERS' TEXTUAL ARGUMENTS ARE MERITLESS.

In 1990, Congress enacted two amendments to replace an obsolete cross-reference in section 111(d)(1)(A)(i). As the Congressional Research Service observed shortly thereafter, the amendments "appear to be duplicative; both, in different language, change the reference to section 112." 3 Legislative History of

the Clean Air Act Amendments of 1990, at 46 n.1 (1993). Under either amendment, EPA is required to regulate CO_2 emissions power plants in the circumstances of this case.[8]

A. The House-Originated Language Is Best Read To Authorize EPA To Regulate Any Existing Source For Any Air Pollutant Not Controlled Under The NAAQS Or HAP Programs.

Petitioners insist that the House-originated version of section 111(d) unambiguously prohibits EPA from regulating a source's emissions of any air pollutant if that source is subject to a HAP standard under section 112. Pet. Br. 31. As EPA demonstrates, petitioners' claim to have discovered a single "literal meaning" of the House language fails badly. EPA Br. 35–38. The House-originated language is not a model of clarity, and it certainly does not mandate petitioners' construction. Taking into account the statutory text, context, and structure, the House language is most naturally read to preserve EPA's authority under section 111(d) to regulate "any existing source for any air pollutant" that is not regulated under the NAAQS or HAP programs.

As EPA and others have demonstrated, multiple readings of the House language lead to the conclusion that Congress limited EPA's section 111(d) obligations only with respect to pollutants addressed by the NAAQS and HAP

[8] Indeed, as *amicus* Institute for Policy Integrity explains, every presidential administration since 1990 has interpreted section 111(d) to authorize regulation of air pollutants like CO_2 that are not regulated under the NAAQS program or the HAP program. Inst. for Policy Integrity *Amicus* Br. at 8–22.

programs. *See* EPA Br. 33–40; New York, *et al.* Br. 13–16. For example, the Supreme Court has explained that the term "regulate[]" "'require[s] interpretation, for [its] meaning is not 'plain.'" *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 363 (1999). Resolving this ambiguity requires "parsing . . . the 'what'" of the term "regulate." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002). This parsing "must be informed by the legislative intent" and statutory "context." *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 217 (2004) (internal citation omitted); *UNUM Life Ins. Co.*, 526 U.S. at 363.

Employing this contextual approach, the Court has concluded that state laws can only be said to "regulate[] insurance" for purposes of the ERISA savings clause "when insurers are regulated *with respect to their insurance practices.*" *Rush Prudential*, 536 U.S. at 366 (emphasis added). Similarly, EPA could reasonably conclude that existing sources of CO_2 are not "regulated under section 112" because they are not subject to controls with respect to their CO_2 emissions. *See also* New York, *et al.* Br. 14 ("the phrase 'which is regulated under section 7412' could reasonably be read to modify both 'any air pollutant' and 'a source category.'") (citation omitted).

A pollutant-specific reading of "regulated under section 112" comports with "the specific context in which that language is used." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Reading the House-originated language to exclude any

source category regulated under section 112 does not make sense in the immediate context in which this language appears. The House language modifies the phrase "any air pollutant"—not the phrase "any existing source"—and appears alongside two other subclauses that exclude certain air pollutants from regulation under section 111(d). The natural inference is that the House language also excludes a set of air pollutants.

A pollutant-specific reading of "regulated under section 112" also comports with the Supreme Court's reading of section 111(d) in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). In *AEP*, the Court wrote that "EPA may not employ [section 111(d)] if existing stationary sources of *the pollutant in question* are regulated under the [NAAQS] program . . . or the [HAP] program." 131 S. Ct. at 2538 n.7 (emphasis added). The Court understood the relevant question to be whether existing sources are regulated with respect to the "pollutant in question" under the NAAQS or HAP programs.

Crucially, the Court treated the NAAQS exclusion and the HAP exclusion as parallel limits on EPA's authority. The NAAQS exclusion clearly excludes a class of pollutants, not sources, from regulation under section 111(d). *See* 42 U.S.C. § 7411(d)(1)(A)(i) (providing that EPA may regulate "any air pollutant . . . which is

not included on a list published under section [108(a)]").[9] The Court's syntax indicates that it understood the HAP exclusion to establish a parallel, pollutant-based exclusion. Thus, the Court's footnote is properly read to provide that "EPA may not employ [section 111(d)] if existing stationary sources of the pollutant in question are regulated" *with respect to that pollutant* under the NAAQS program or HAP program.

This understanding of the *AEP* footnote is confirmed by the case's holding. The Court held that section 111 "speaks directly to emissions of carbon dioxide from the defendants' plants," displacing any federal common law remedy that might otherwise exist to address these emissions. *Id*. at 2537 (internal formatting omitted); *see also id.* at 2530 (describing section 111(d) as being "most relevant here"). The Court delivered this holding *after* EPA had already proposed section 112 standards for power plants, and after counsel for industry petitioners had represented to the Court that EPA had "authority" to issue standards for those plants' CO_2 emission under section 111(d). *See* EPA Br. 34 n. 19 (citation omitted). It is implausible that the Court believed the statutory authority

[9] The *AEP* Court certainly understood the NAAQS exclusion to be pollutant-specific; otherwise, a key premise of its unanimous merits holding—EPA's authority to regulate power plants' under section 111(d)—would have been negated *ab initio*, since power plants' emissions of criteria pollutants have been regulated since the 1970s.

underlying its displacement analysis would disappear within months if EPA finalized the section 112 emission standards that it had already proposed.

B. The Senate-Originated Language Unambiguously Requires EPA To Regulate Any Existing Source For Any Air Pollutant Not Controlled Under The NAAQS Or HAP Programs.

EPA's duty to curb CO_2 pollution under section 111(d) is confirmed by the Senate-originated amendment to section 111(d). That provision unambiguously requires EPA to regulate existing sources' emissions of any dangerous air pollutant that is not listed as a criteria pollutant or a HAP. Congress' enactment of this provision refutes petitioners' argument that section 111(d) unambiguously forbids EPA's proposed rule. *See* EPA Br. 40–45.

Petitioners and *amici* ask this Court to excise the Senate-originated provision from the statute. *See* Pet. Br. 44; Trade Ass'ns *Amici* Br. 17–20. But as petitioners themselves note, "it is for Congress," not the Courts, "to rewrite [a] statute." Pet. Br. 39 (citing *Blount v. Rizzi*, 400 U.S. 410, 419 (1971)). Petitioners cite no cases holding that a provision in the Statutes at Large can be disregarded in this way.

Amici wrongly argue that the scrivener's error doctrine authorizes the type of statutory rewrite petitioners seek. *See* Trade Ass'ns *Amici* Br. 17–20. That doctrine authorizes a reviewing court to disregard spelling, numbering, punctuation, or word choice where necessary to preserve Congress' manifest intent. *See, e.g.*, *U.S. Nat'l. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S.

439, 462 (1993) (a court may "disregard [Congress'] punctuation"); *Burrage v. United States*, 134 S. Ct. 881, 887 n.2 (2014) (substituting "and" for "or"); *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336 (D.C. Cir. 2013) (disregarding "Congress's *failure* to update" statutory cross-reference) (emphasis added); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1042–44 (D.C. Cir. 2001) (substituting "110(a)(2)(D)(*i*)" for "110(a)(2)(D)(*ii*)" in statutory cross-reference) (emphasis added). Intervenors are not aware of any case relying on the scrivener's error doctrine to excise an entire provision from the Statutes at Large. Indeed, it is "beyond [the] province" of a federal court to override drafting decisions of this magnitude. *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004).

Furthermore, petitioners have not demonstrated that the Senate amendment was adopted in error. A scrivener's error is "a mistake made by someone unfamiliar with the law's object and design," *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 462 (1993), which produces language with "no plausible interpretation," *Williams Co. v. FERC*, 345 F.3d 910, 913 n.1 (D.C. Cir. 2003). In contrast, the Senate's eighteen-word amendment makes it clear that substituting "112(b)" for "112(b)(1)(A)" was precise and intentional, not a typographical error. The amendment maintains section 111(d)'s prior function in the Act's comprehensive regulatory scheme and produces a perfectly sensible result. Moreover, as EPA demonstrates, the drafting history of the 1990

amendments indicates that the conferees restored the Senate-originated language to the final bill after it emerged from the House. *See* EPA Br. 42.

C. Trade Associations' Proposed "Reconciliation" Lacks Merit.

Although petitioners' *amici* argue that "no plausible interpretation can replace the same language in §111(d)(1) with" two separate amendments, Trade Ass'ns *Amici* Br. 20, they later suggest that "[t]he [t]wo [a]mendments [c]an [b]e [r]econciled" by treating section 111(d) as if it "proscrib[es] . . . regulation of *either* source categories regulated under §112 . . . *or* air pollutants listed under §112(b) . . . ." *Id.* at 23.

This argument is meritless for three reasons. First, an interpretation that *amici* themselves admit is inconsistent with any "plausible interpretation" of the statutory text certainly cannot be described as unambiguously compelled.[10] Second, because the two amendments are best read to be "duplicative," executing the amendments in seriatim would simply restate the exclusion of HAPs "in different language." *See* 3 Legislative History of the Clean Air Act Amendments of 1990, at 46 n.1 (1993). Finally, even assuming the House and Senate amendments create exclusions of different scope, they should be reconciled by

[10] Relying on Chief Justice Roberts' concurring opinion in *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014), *amici* argue that an agency is not entitled to *Chevron* deference when it seeks to reconcile directly contradictory statutes. Trade Ass'ns *Amici* Br. 27. In fact, the Chief Justice was in the minority on this point. *See Scialabba*, 134 S. Ct. at 2203 (plurality opinion of Kagan, Ginsburg, and Kennedy, JJ.); *id.* at 2220 n.3 (Sotomayor and Breyer, JJ., dissenting).

excluding only the pollutants that are excluded by *both* amendments. Section 111(d) does not prohibit EPA from regulating excluded pollutants, but simply relieves EPA of the *duty* to regulate them. *See* 42 U.S.C. § 7411(d)(1) (EPA "shall" issue regulations, pursuant to which states "shall" regulate "any existing source for any air pollutant" that is not exempted). Thus, EPA can regulate any air pollutant that is not excluded by both amendments.

CONCLUSION

If it is not dismissed on jurisdictional grounds, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point font and, according to the word-count function in Microsoft Office 2010, is 3972 words in length.

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015, the foregoing brief was served upon all registered counsel via the Court's ECF system.

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