ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 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.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition For Extraordinary Writ, And Petition To Review Proposed Rule

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CORRECTED BRIEF OF THE NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND SIERRA CLUB, AS INTERVENORS IN SUPPORT OF RESPONDENT, AND CLEAN WISCONSIN, MICHIGAN ENVIRONMENTAL COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL AS *AMICI CURIAE* 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

Respondent's brief lists all parties, intervenors, and *amici* appearing in these consolidated cases.

B. Rulings Under Review

Petitioner challenges a proposed rule, entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Units, 79 Fed. Reg. 34,380 (June 18, 2014).

C. Related Cases

In West Virginia v. EPA, No. 14-1146 (D.C. Cir., filed Aug. 1, 2014), nine States purport to challenge a EPA settlement agreement finalized in 2011, but ask this Court to enjoin the same rulemaking that petitioners challenge here.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 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 12, 2015

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GLOSSARY

HAP	Hazardous air pollutant
EPA	U.S. Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NFIB	Petitioner-Intervenors National Federation for Independent Businesses and Utility Air Regulatory Group
TRADE ASSOCIATIONS	*Amicus curiae* supporting Petitioner, Chamber of Commerce of the United States of America, *et al.*

PRELIMINARY STATEMENT

Respondent-intervenors Natural Resources Defense Council, Environmental Defense Fund, and Sierra Club, and *amici curiae* Clean Wisconsin, Michigan Environmental Council, and Ohio Environmental Council respectfully submit this brief in support of respondent, U.S. Environmental Protection Agency (EPA).[1]

Many of the arguments made by Murray and its supporters are similar, sometimes identical, to those advanced by petitioners and their *amici* in *West Virginia v. EPA*, No. 14-1146. For this reason, portions of this brief closely track arguments that the three environmental intervenor organizations made in that case. In particular, the arguments in Part III of this brief overlap with those in Part I (pp. 4–9) of our *West Virginia* brief.

[1] This joint brief is submitted in conformity with the Court's order of December 17, 2014 (Doc. 1527869), which granted the motion to intervene of Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club; granted the motion to participate as *amici curiae* of Clean Wisconsin, Michigan Environmental Council, and Ohio Environmental Council; and authorized the six organizations to file a joint brief. Pursuant to Federal Rule of Appellate Procedure 29(c), the three *amici* state that no party's counsel, other than counsel for the intervenors who also join this brief, authored this brief in whole or in part, and that no party or its counsel (other than the three intervenors joining this brief and their counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF JURISDICTION

In these consolidated cases, petitioner Murray Energy Corporation seeks to challenge a proposed regulation issued by EPA under section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), that if finalized would establish emissions guidelines for States to follow in developing State plans to address carbon dioxide emissions from existing power plants. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014). Jurisdiction is lacking as to either petition. Petitioners also lack standing and have no ripe claims. *See infra*, Argument, Part I.

STATEMENT OF THE CASE

In the Clean Air Act of 1970, Congress established a comprehensive framework for regulating emissions of dangerous air pollutants from existing industrial sources. Sections 108–110 of the Act established the national ambient air quality standards (NAAQS) program to control emissions of "criteria pollutants" such as ozone and particulate matter from existing industrial sources.[2] Section 112 established a program to control existing sources' emissions of

[2] Pub. L. 91–604, § 4(a), 84 Stat. 1678–83 (1970) (codified as amended at 42 U.S.C. §§ 7408–10).

hazardous air pollutants (HAPs), including toxins like mercury and arsenic.[3] And section 111(d) established a program to control existing sources' emissions of all other dangerous pollutants. Reflecting this seamless framework, the original 1970 version of section 111(d) required EPA to regulate "any existing source for any air pollutant . . . not included on a list published under section 108(a)," the list of criteria pollutants, "or 112(b)(1)(A)," the list of HAPs.[4] These three programs were designed to ensure that the regulatory scheme for existing sources left "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).

In the 1990 Clean Air Act Amendments, Congress restructured section 112 to control HAPs more effectively. Congress listed 189 substances as HAPs and required EPA to list every industrial source category that emits these pollutants and to set source-specific emission standards for each of these source categories.[5] In revising section 112, Congress deleted the provision formerly cross-referenced in section 111(d)—section 112(b)(1)(A).[6] To account for this deletion, both Houses of Congress proposed amendments to section 111(d). The Senate bill struck

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[3] *Id. at* 84 Stat. 1685–86 (1970), (codified as amended at 42 U.S.C. § 7412).

[4] *Id.* at 84 Stat. 1683, (codified as amended at 42 U.S.C. § 7411(d)).

[5] *See* Pub. L. 101–549, § 301, 104 Stat. 2531 (1990).

[6] *See id.*

"112(b)(1)(A)" and replaced it with "112(b)," the section now containing the list of HAPs designated by Congress.[7] The House bill struck "or 112(b)(1)(A)" and replaced it with the phrase "or emitted from a source category which is regulated under section 112."[8] Neither amendment was discussed in committee hearings, in floor debates, or in conference throughout the extensive legislative history of the 1990 Amendments. The conference committee failed to reconcile the two amendments, and included *both* in the final bill passed by Congress and signed into law by President George H. W. Bush.[9]

The Proposed Rule

The proposed rule that petitioners challenge, commonly known as the "Clean Power Plan," would establish emission guidelines under section 111(d) to control carbon dioxide pollution from existing fossil fuel–fired power plants. *See* 79 Fed. Reg. at 34,830). As proposed, these emission guidelines would take the form of State-specific emission goals that reflect the potential within each State to deploy demonstrated and cost-effective measures for reducing carbon pollution.

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[7] S. 1630, as passed by Senate on April 3, 1990, § 305(a), *reprinted in* 3 LEG. HIST. OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 4534 (1993) (hereinafter Leg. Hist.).

[8] S. 1630, as passed by the House of Representatives on May 23, 1990, § 108(f), *reprinted in* 2 Leg. Hist. 1979.

[9] Pub. L. 101–549, § 108(g), 104 Stat. 2467 (House amendment); Pub. L. 101–549, § 302(a), 104 Stat. 2574 (Senate amendment).

Consistent with the framework described in section 111(d) and in EPA's 1975 implementing regulations, *see* 40 C.F.R. §§ 60.20–60.29, the Clean Power Plan would require States to submit plans that establish standards of performance for existing power plants and that are at least as stringent as the emission guidelines. Each State would have substantial flexibility in the design of its plan, so long as the plan met the State's emission target. EPA's analysis of the proposed rule projects that it would yield significant emission reductions during the ten-year period (2020–2030) covered by the State targets—with public health and environmental benefits greatly exceeding costs.[10]

EPA has taken comment on all aspects of the proposed emission guidelines, and, as is the case in many major rulemakings, the final rule will likely differ from the proposal based on those comments. EPA has not yet taken final action. The public comment period ended on December 2, 2014, and EPA is reviewing what it

[10] According to EPA's Regulatory Impact Assessment, carbon dioxide emissions from the power sector are expected to decline to 30 percent below 2005 levels by the time the rule is fully implemented in 2030. *See* Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants, EPA-452/R-14-002, at 3 20 (June 2014), *available at* http://www2.epa.gov/sites/production/files/2014-06/documents/20140602ria-clean-power-plan.pdf (last visited February 12, 2015). These reductions will translate into annual public health benefits of $24 to 62 billion by 2030, in addition to $31 billion in climate benefits—a total of approximately six to eleven dollars in benefits for every dollar spent on compliance. *Id*. at ES-23.

estimates to be more than two million comments. The agency announced in January that it will take final action this summer.[11]

SUMMARY OF ARGUMENT

These petitions suffer from multiple jurisdictional defects, each one sufficient to require dismissal. As EPA demonstrates, the petitions seek to block completion of an ongoing rulemaking, where the agency has yet to take final action. Neither the Clean Air Act nor any other law gives this Court jurisdiction to review a proposed rule or tentative legal positions upon which EPA is seeking comment. Petitioners have failed to demonstrate any injury from the proposed rule, and thus lack standing. And petitioners fail to advance any ripe claim.

Petitioners' substantive claim—that the statute unambiguously denies EPA authority to regulation carbon dioxide emissions from power plants under section 111(d)—is also entirely without merit. The Supreme Court has concluded that section 111 of the Clean Air Act authorizes EPA "to regulate carbon-dioxide emissions from power plants," and that section 111(d) "'speaks directly' to emissions of carbon dioxide from [existing] power plants." *American Electric Power Co. (AEP) v. Connecticut*, 131 S. Ct. 2527, 2531, 2537

[11] *See* EPA, Fact Sheet: Clean Power Plan & Carbon Pollution Standards Key Dates, http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-carbon-pollution-standards-key-dates (last visited Feb. 12, 2015).

(2011). Nonetheless, petitioners argue that section 111(d) unambiguously *prohibits* EPA from regulating these emissions if EPA has previously regulated an entirely different set of air pollutants from power plants under a separate provision of the Clean Air Act.

Petitioners' theory is rooted in the implausible premise that Congress—even as it comprehensively strengthened the Clean Air Act in 1990—implicitly repealed EPA's authority to regulate an entire class of dangerous air pollutants from their largest industrial sources. Petitioners' theory is also contradicted by the most reasonable reading of the House-originated amendment to section 111(d), the unambiguous meaning of the Senate-originated amendment to this provision, the structure and design of the Clean Air Act, and the legislative and regulatory history of section 111(d). This petition would fail on the merits even if it were properly before the Court.

ARGUMENT

I. THE COURT SHOULD DISMISS THESE REPETITIVE, PREMATURE CHALLENGES FOR LACK OF JURISDICTION.

In *American Electric Power*, the Supreme Court held that section 111 of the Clean Air Act "delegate[s] to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." 131 S. Ct. 2527, 2531 (2011). According to the Court, EPA should be "the first decider" whether to regulate

these emissions under the Act's "prescribed order of decisionmaking." *Id.* at 2539. The "recourse under federal law" for any party "dissatisfied with the outcome of EPA's [section 111] rulemaking" is the right of review provided by section 307 of the Act. *Id.* Section 307 does not provide either a grant of jurisdiction or a cause of action for challenges to *proposed* section 111 rules. *See* 42 U.S.C. § 7607(b)(1) (providing jurisdiction for review of actions "in promulgating . . . any standard of performance or requirement under section 7411 of this title," or other "final action[s]" of the Administrator).

Despite the clarity of the statutory scheme for judicial review and the Supreme Court's guidance in *AEP*, there have been (including these petitions) *five* premature challenges in three years to EPA's proposed rulemakings concerning power plants' carbon dioxide emissions. In *Las Brisas Energy Ctr., LLC, v. EPA*, No. 12-1248, 2012 WL 10939210 (D.C. Cir., Dec. 13, 2012), this Court dismissed a premature challenge to EPA's proposed carbon pollution standard for new power plants. The district court in Omaha dismissed a similar challenge in *Nebraska v. EPA*, 4:14-cv-3006, 2014 WL 4983678 (D. Neb. Oct. 6, 2014) ("Nebraska's attempt to short-circuit the administrative rulemaking process runs contrary to basic, well-understood administrative law."). The two Murray petitions

consolidated here, and the companion West Virginia case,[12] merely extend this pattern of redundant, jurisdictionally defective litigation.

Jurisdiction is lacking for either Murray petition. In No. 14-1112, Murray invokes the All Writs Act, 28 U.S.C. § 1651(a), and asks the Court to issue a writ of prohibition halting EPA's ongoing rulemaking. In No. 14-1151, Murray filed a petition seeking review of the Proposed Rule under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1). The All Writs Act is "not itself a grant of jurisdiction." *In Re: Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004); *see* 28 U.S.C. § 1651(a). And as this Court held in *Las Brisas*, section 307(b)(1) gives the Court no jurisdiction over a proposed rulemaking.

Murray has also failed to establish that these petitions are justiciable. Specifically, Murray has failed to establish its Article III standing in either case, *see* EPA Br. 10–16, and has failed to establish that its challenges to EPA's proposed interpretation of the Clean Air Act are ripe in the absence of a final agency decision, *see id.* at 18.

These cases keenly illustrate the reasons for the rules against premature litigation. The challengers attack tentative legal positions before EPA has had the opportunity to consider comments and make a final determination. They misrepresent agency statements from prior rulemakings as binding commitments

[12] West Virginia v. EPA, No. 14-1146 (set for argument before the same panel as the Murray cases).

that the agency may not reconsider. They ask the Court to prematurely decide interpretive issues that, at the proper time, would be reviewed under the *Chevron* framework with the benefit of the agency's definitive statutory construction and its final reasoning. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). And they fail to demonstrate any cognizable injury from the mere proposal of standards.

For all these reasons, the Court should not countenance the latest attempt by Murray and its supporters to upset the Clean Air Act's "prescribed order of decisionmaking" by asking this Court to act as the "first decider" on "whether . . . to regulate carbon-dioxide emissions from power plants." *AEP*, 131 S. Ct. at 2531, 2539. This pattern of improper, premature litigation is a drag on the time and resources of the Court and the agency. Petitioners will have their day in court when EPA completes the rulemaking. The petitions should be dismissed, with admonitions against further premature litigation.

II. EPA MUST REGULATE CARBON DIOXIDE POLLUTION FROM EXISTING POWER PLANTS UNDER SECTION 111(D) BECAUSE CARBON DIOXIDE ENDANGERS PUBLIC HEALTH AND WELFARE BUT IS NOT CONTROLLED UNDER THE NAAQS OR HAP PROGRAMS.

The text, structure, design, and history of the Clean Air Act demonstrate that EPA is required to regulate carbon dioxide pollution from existing power plants under section 111(d) because carbon dioxide is a dangerous air pollutant that is not

controlled under the NAAQS or HAP programs. This is true whether or not EPA has regulated power plants' HAP emissions under section 112, 42 U.S.C. § 7412.

Text and Statutory Context. In 1990, Congress enacted two amendments to section 111(d)(1)(A)(i) to replace an obsolete cross-reference to the list of HAPs. As the Congressional Research Service observed shortly thereafter, these amendments "appear to be duplicative; both, in different language, change the reference to section 112."[13] Under either amendment, EPA is required to regulate emissions of carbon dioxide from any existing source once the agency has regulated these emissions from new sources in the same source category.

Senate-Originated Amendment. As amended by section 302(a) of the 1990 Clean Air Act Amendments (the provision that originated in the Senate bill),[14] section 111(d) requires EPA to regulate "any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or *112(b)* . . . ." EPA has determined that

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[13] 1 Leg. Hist. 46 n.1. Although the 1990 Amendments included two separate amendments to the same section 111(d)(1)(A)(i), only the amendment originating in the House bill was codified in Title 42 of the U.S. Code. Because Title 42 has not been enacted into positive law, this codification choice is entitled to "no weight." *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ; *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993)). The Statutes at Large—reflecting the text approved by Congress and signed by the President—contains both amendments, and it controls.

[14] Pub. L. 101-549, § 302(a) (1990104 Stat. 2574.

greenhouse gases, including carbon dioxide, endanger public health and welfare. *See* 79 Fed. Reg. 34,830, 34,841–43 (June 18, 2014)); 74 Fed. Reg. 66,496, 66,523 (Dec. 15, 2009). Because EPA has not issued air quality criteria for carbon dioxide or listed it under section 108(a) or 112(b), the statutory text requires EPA to regulate existing sources' carbon dioxide pollution.

House-Originated Language. As amended by section 108(g) of the 1990 Amendments (the provision that originated in the House bill),[15] section 111(d) requires EPA to regulate "any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) *or emitted from a source category which is regulated under section 112* . . . ." Because EPA has not issued air quality criteria for carbon dioxide or listed it under section 108(a), the House-originated language requires EPA to regulate existing sources' emissions of carbon dioxide under section 111(d) unless carbon dioxide qualifies as an "air pollutant . . . emitted from a source category which is regulated under section 112."

The House-originated language does not preclude the regulation of existing sources' emissions of carbon dioxide under section 111(d). In construing this provision, it is necessary to consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

[15] Pub. L. 101-549, § 108(g) (1990), 104 Stat. 2467.

Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). Considered by itself, the House language is ambiguous. One key source of ambiguity is the meaning of the phrase "regulated under section 112." To determine whether section 112 "regulate[s]" existing sources of carbon dioxide, it is necessary to parse the "what" of the term "regulate[s]." *Cf. Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002) (to determine whether a law "regulates insurance," it is necessary to "pars[e] . . . the 'what'" of the term "regulates"). Although the House language could be read to exempt an existing source of carbon dioxide from regulation under section 111(d) when the source is subject to *any* requirement under section 112, it can also be read to exempt such a source only if it is subject to a requirement under section 112 *with respect to its carbon dioxide emissions*. *Cf. Rush Prudential*, 536 U.S. at 366 (a law does not "regulate[s] insurance" unless "insurers are regulated *with respect to their insurance practices*") (emphasis added). On this reading, EPA is authorized to regulate power plants' carbon dioxide emissions under section 111(d), since power plants' carbon dioxide emissions are not regulated under section 112.

The textual ambiguity is resolved when the House-originated language is read in light of "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Reading the House-originated language to bar section 111(d) regulation of non-HAPs from any

source category regulated under section 112 does not make sense in the immediate context in which the 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 excludes a set of air pollutants, not a set of sources.[16]

The same conclusion follows from consideration of the broader statutory context. The Senate-originated amendment, Pub. L. 101-549, § 302(a, unambiguously exempts only HAPs from regulation under section 111(d). The natural inference is that the House-originated amendment performs a similar or identical function, since the simplest explanation for the conferees' failure to reconcile the two amendments is that, in the absence of any substantive difference between the position of the two chambers, the conferees failed even to notice the presence of two amendments to the same clause.

A second important piece of contextual evidence is section 112(d)(7), also enacted in 1990. Section 112(d)(7) provides that "[n]o emission standard or other requirement promulgated under [section 112] shall be interpreted . . . to diminish

[16] A similar conclusion follows if the phrase "which is regulated under section 112" is "read as modifying both 'any air pollutant' and 'source category.'" New York, *et al.*, Br. 12–14 (Doc. 1528937). This reading of section 111(d)(1)(A)(i) is readily permissible, since "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. Community Nutrition Inst.*, 476 U.S. 974, 980 (1986).

or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section [111]" or "other authority of [the Clean Air Act]." 42 U.S.C. § 7412(d)(7). This provision is clear evidence that Congress did not intend regulation of a source's HAP emissions under section 112 to displace regulation of that source's other emissions under section 111(d).[17]

Structure and Design. Section 111(d) must be interpreted in a manner that is consistent with the Clean Air Act's "structure and design." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014). The structure and design of the Clean Air Act indicate that section 111(d)(1)(A)(i) exempts criteria pollutants and HAPs from EPA's jurisdiction under section 111(d), while preserving the agency's authority to regulate existing sources' emissions of other dangerous air pollutants, such as carbon dioxide.

[17] When Congress decided to exempt a source category from concurrent regulation under sections 111(d) and 112, it did so clearly and explicitly. At the same time as it was revamping section 112, Congress crafted section 129, a special provision to address pollution from municipal waste combustors. Section 129 instructs EPA to regulate all dangerous emissions of municipal waste combustors—including criteria pollutants, HAPs, and other dangerous pollutants—under section 111(d), while exempting these sources from regulation under section 112 with respect to their HAP emissions. 42 U.S.C. § 7429(a)(4), (b)(1), (h)(2). Together with section 112(d)(7), 42 U.S.C. § 7412(d)(7), this provision illustrates that Congress intended concurrent regulation of source categories under sections 111(d) and 112 as a general rule, and spoke unambiguously when it intended to depart from this general rule. Further, even when Congress desired different treatment of a particular source category, it provided a specialized regulatory alternative that preserved the "no gaps" policy of the law.

As noted in the Statement of the Case, *supra* pp. 6–7, Section 111(d) is one of three major regulatory programs that Congress enacted in 1970 to control air pollution from existing industrial sources. *See* 40 Fed. Reg. 55,240 (Nov. 17, 1975). Each program—the NAAQS program, the HAP program, and section 111(d)—was designed to regulate a specific class of air pollutants. *See id.* Together, these three programs were designed to provide a comprehensive regulatory scheme for existing sources with "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) .

Any interpretation of section 111(d)'s exemptions must account for the program's function in the Act's comprehensive regulatory scheme. If section 111(d)(1)(A)(i) is construed to exempt a source's pollutants when they are regulated under the NAAQS or HAP programs, section 111(d)'s role in the statutory scheme is preserved, since EPA would retain the authority under section 111(d) to address any dangerous air pollutant that is not regulated under these other programs. By contrast, section 111(d) would be largely eviscerated if section 111(d)(1)(A)(i) were construed to exempt *all emissions* (HAP and non-HAP alike) from any source subject to regulation under section 112 with respect to its HAP emissions, since as Congress intended, every large industrial source category is subject to regulation under section 112 for its HAP emissions. *See* 42 U.S.C. §

7412(c)(1) (requiring the listing of "all categories and subcategories of major sources and area sources" of HAPs); *id.* § 7412(c)(2) (requiring emissions standards for all listed categories and subcategories). *See also* 67 Fed. Reg. 6,521 (Feb. 12, 2002) (listing 146 source categories subject to regulation under section 112). As a consequence, EPA would largely be deprived of its authority to regulate existing sources' emissions of dangerous air pollutants not addressed by the NAAQS or HAP programs, such as carbon dioxide, methane, landfill gas, and total reduced sulfur. EPA is certainly not required to construe section 111(d)'s exclusions to "overthrow . . . the Act's structure and design" in this manner. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

History. The legislative and regulatory history of section 111(d) confirm that this provision obligates EPA to regulate existing sources' emissions of dangerous pollutants such as carbon dioxide if these pollutants have not been regulated under the NAAQS or HAP programs. The legislative history indicates that Congress enacted section 111(d) in 1970 to cover any air dangerous pollutant not already controlled by the two other programs, to ensure that there would be "no gaps" in the Act's coverage of dangerous air pollutants. S. Rep. No. 91-1196, at 20 (1970) .; *see* 40 Fed. Reg. 55,240 (Nov. 17, 1975). There is no evidence that Congress intended to abandon this seamless regulatory framework in 1990. To the contrary, the legislative history of the 1990 amendments "reflects Congress' desire

to require EPA to regulate more substances," not fewer. 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005).

The regulatory history of section 111(d) is in accord. EPA has historically used section 111(d) to regulate non-HAP emissions from sources that were simultaneously regulated with respect to their HAP emissions under section 112. *See* 70 Fed. Reg. at 16,032; *see also Amicus* Br. of Inst. For Policy Integrity, in *West Virginia v. EPA*, No. 14-1146 (D.C Cir. filed Aug. 1, 2014), at 10–11 (Doc. 1535277) (discussing municipal solid waste landfills). Moreover, in the four presidential administrations since the 1990 Amendments, EPA has consistently interpreted section 111(d) to authorize and require the regulation of any air pollutant not regulated under the NAAQS or HAP program. *See id.* at 8–22; *see also* Memorandum of EPA General Counsel Jonathan Z. Cannon, to EPA Administrator Carol M. Browner, Re: EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources 3 n.2 (Apr. 10, 1998) (stating that EPA's duty to regulate under section 111(d) extends to any dangerous air pollutant "except criteria pollutants or hazardous air pollutants") (JAXX).

III. MURRAY'S THEORY WOULD OVERTHROW THE CLEAN AIR ACT'S STRUCTURE AND DESIGN.

As noted, 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 these pollutants. 40 Fed. Reg. 53,340, 53,343 (Nov. 17, 1975). Murray asserts that, in 1990, Congress abandoned the gap-filling role of section 111(d) in order to "protect[] against inconsistent and unaffordable double regulation of existing sources" under section 111(d) and section 112. Pet. Br. 15, 19. Murray's theory fails.

First, it is not "double regulation" to control *different* pollutants from a source under separate regulatory programs. The Act's multi-program regime for stationary sources recognizes that different pollutants produce different harms and that (as is true for HAPs and carbon dioxide) the best control regime for one pollutant will not necessarily abate emissions of another. Murray's 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 further contradicts Murray's 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.[18] Indeed, the Act sometimes regulates a source's emissions of *a single pollutant* under multiple programs to address different health or environmental impacts.[19] 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.[20]

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[18] For example, fossil fuel–fired power plants are currently regulated under at least seven 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, §§ 7501 *et seq*., and the Acid Rain program, *id.* §§ 7651 *et seq.* States are expressly allowed to establish "any" more stringent standard. *Id.* § 7416.

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

[20] *See* 42 U.S.C. § 7401(b)(1) (explaining 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"). Murray (Pet. Br. 16) invokes section 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A), but that provision only highlights Congress' 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 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.

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]." 42 U.S.C. § 7412(d)(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 Amicus* Br. of Inst. For Policy Integrity, in *West Virginia v. EPA*, No. 14-1146 (Doc. 1535277), at 13–15. Intervenor NFIB is thus flatly mistaken that this proposed rulemaking would "inaugurat[e] duplicative Section 111(d) and Section 112 regulation of the same sources." NFIB Br. 15.

While Murray's theory would not advance a coherent policy goal, it would have the consequence of effectively eviscerating section 111(d). As noted above, virtually every industrial source category is already listed and regulated under section 112 for their HAP emissions by congressional design. *See supra* p. 22. 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 "reflects Congress' desire to require EPA to regulate more substances," not fewer. 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005).

In short, Murray's 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. Contrary to Murray's assertion, Congress did not deviate in 1990 from the Act's signal theme, comprehensive protection of public health and welfare, by silently opening up a "gaping loophole" through which dangerous pollutants could escape. *Cf.* 40 Fed. Reg. at 53,343.

IV. PETITIONERS' OTHER ARGUMENTS LACK MERIT

A. *American Electric Power v. Connecticut* Strongly Supports EPA's Authority Under Section 111(d) And In No Way Supports Petitioners' Reading.

Murray cites a footnote in *American Electric Power* that it asserts supports its reading of the statute. *See* Pet. Br. 17–18. In fact, this footnote—and the Court's *holding*—flatly contradicts petitioners' reading.

In *AEP*, Connecticut and other States urged the recognition of a federal common law cause of action that would allow States injured by climate change to sue the owners of existing coal-fired power plants, the nation's largest emitters of carbon dioxide. The companies insisted that the nuisance remedy was not available because Congress, by enacting the Clean Air Act, had conferred authority on EPA to regulate carbon dioxide emissions, including from petitioners' power plants. The companies emphasized that the Clean Air Act is a "comprehensive regulatory scheme," and pointed to language from the sponsors of the 1990 amendments who "repeatedly characterized the Act as 'comprehensive,' and commented on its expansive reach." Pet's. Brief, No. 10-174, 42 (internal citations omitted). *See also Amicus* Br. of Edison Elec. Inst., *et al*., in Support of Pet's, No. 10-174, 9 (brief of leading power industry associations, stating: "In the case of air pollutants that are not regulated under certain other provisions of the Clean Air

Act, such as [greenhouse gases], the Act then 'requires the States to determine appropriate control limits for *existing* sources for which there is an NSPS.'") (internal citation omitted).

The petitioners' briefs in *AEP* pointed specifically to EPA's authority to regulate existing power plants under section 111(d), Pet's Br. 6–7, 47, and highlighted the absence of any "'gap' in the statutory system with respect to the particular emissions restrictions plaintiffs seek." Reply Br. 17. Furthermore, at oral argument, when Justice Ginsburg asked counsel for the companies whether EPA could "give th[e] relief" the plaintiffs were seeking as to "existing sources," counsel responded that:

> We believe that the EPA can consider, as it's undertaking to do, regulating existing nonmodified sources under section 111 of the Clean Air Act, and that's the process that's engaged in now. It's announced that it will propose standards in the summer and complete a rulemaking by May. Obviously, at the close of that process there could be [Administrative Procedure Act] challenges on a variety of grounds, but we do believe that they have the authority to consider standards under section 111.

Tr. of Oral Argument, No. 10-174 at 16–17 (Apr. 19, 2011).

The Supreme Court, by an 8-0 vote, adopted industry's argument, holding that section 111(d) "speaks directly to emissions of carbon dioxide from the defendants' power plants," *id*. at 2537, thereby displacing federal common law.

In a footnote, the *AEP* 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)]"). 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.[21]

The section 112(n)(1) rule regulating power plants' HAP emissions (known as the Mercury and Air Toxics Standards) was well advanced during the briefing in *AEP*, and the proposed rule was signed by the Administrator more than a month

[21] 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' carbon dioxide pollution under section 111(d)—would have been negated *ab initio*, since power plants' emissions of criteria pollutants have been regulated since the 1970s.

before the *AEP* oral argument and more than three months before the Court's decision came down. No party suggested in *AEP* that EPA's authority to regulate carbon dioxide would go away with the promulgation of a section 112(n)(1) standard for power plants. And it is highly implausible that the Court believed the statutory authority underlying its displacement analysis would disappear within months if EPA finalized the emission standards for power plants' HAPs emissions that it had already proposed.

B. Petitioners Fail To Demonstrate That The Senate-Originated Amendment Can Be Excised From The Statute.

Murray and other challengers urge this Court that the Senate-originated amendment to section 111(d)(1)(A)(i) should be given "no effect." Pet. Br. 29; NFIB Br. 12; Trade Ass'ns *Amici* Br. 10–12. But challengers fail to cite any cases holding that a provision in the Statutes at Large can be disregarded in this way.

Murray argues that the Senate-originated language can be disregarded because it appears in the Statutes at Large under the heading "Conforming Amendments." Pet. Br. 30–33. This theory is flatly at odds with the Supreme Court's instruction that courts must "give effect, if possible, to every word Congress used" when construing a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Moreover, the Court has admonished litigants against "plac[ing] more weight on the 'Conforming Amendments' caption than it can bear." *Burgess v.*

United States, 553 U.S. 124, 135 (2008). *See also United States v. R.L.C.*, 503 U.S. 291, 305 n.5 (1992) (refusing to disregard the effects of a "technical amendment" because "a statute is a statute, whatever its label").

Amici Trade Associations wrongly argue that the scrivener's error doctrine authorizes the type of statutory rewrite petitioners seek. Trade Ass'ns *Amici* Br. 10–12. 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., Inc.*, 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. The Chafee-Baucus Statement Of Senate Managers Provides No Support For Petitioners' Argument.

Intervenor NFIB suggests that the Chafee-Baucus "Statement of Senate Managers" demonstrates that the Senate-originated amendment can be disregarded as a scrivener's error, because "the managers of the Senate bill stated expressly in their conference report . . . that they were deferring or 'receding' to the substantive House amendment." *See* NFIB Br. 17 (emphasis omitted). They are wrong. This statement by two members of one chamber was not reviewed or approved by all of the Senate conferees, *see* 1 Leg. Hist. 880, let alone by the House conferees. Nor was it reviewed by the members of Congress who voted to adopt the final statutory language or by the President who signed the final statute into law. For these

reasons, this Court has held that the Chafee-Baucus Statement "cannot undermine the statute's language." *Environmental Def. Fund v. EPA*, 82 F.3d 451, 460 n. 10 (D.C. Cir. 1996).

In any case, the Chafee-Baucus Statement provides no support for petitioner-intervenor's position. The statement says nothing to suggest that Congress had any intent to create a gap in the pre-existing comprehensive coverage of all dangerous air pollutants. The most plausible explanation for this silence is that Chafee and Baucus saw no difference in meaning between the Senate and House provisions and believed them consistent with the "no gaps" policy in place since 1970.

D. *New Jersey v. EPA* Does Not Support Petitioners' Reading.

Intervenors mischaracterize this Court's opinion in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), as endorsing their interpretation of section 111(d). *See* NFIB Br. 3, 38. The Court there held that industrial sources (in that case certain kinds of power plants) could be removed from the list of sources subject to section 112 only if EPA followed the requirements of section 112(c)(9). *New Jersey*, 517 F.3d at 582–83. Having determined that the power plants had not been properly removed from the section 112(c) list, the Court simply applied "EPA's own interpretation" of section 111(d), 517 F.3d at 583, namely that EPA could not use section 111(d) to regulate HAP emissions from a source category listed under section 112(c). The case did not address EPA's section 111(d)

authority over *non*-HAP emissions—from power plants or any other listed industry. In any event, the Supreme Court subsequently ruled in *American Electric Power* that EPA may use section 111(d) to regulate carbon dioxide emissions from power plants—a source listed under section 112(c). *See AEP*, 131 S. Ct. at 2537.

E. Peabody's Constitutional Arguments Are Baseless.

Intervenor Peabody hints at a host of constitutional concerns with the Clean Power Plan. Peabody Br. 10–15. As an initial matter, the fundamental jurisdictional problem with these cases—the absence of any final agency decision to review—would make it all the more improper to address *constitutional* arguments now, even if those claims were advanced as serious arguments.

Moreover, Peabody's constitutional claims are wholly meritless. For example, Peabody claims that EPA's failure to adopt Murray's construction of the House-amended version of section 111(d), and the agency's failure to ignore the Senate-amended version, constitute unconstitutional agency lawmaking. Peabody Br. 10–11. But Murray's construction is not required by the statute, and disregarding the completed product of the Article I legislative process is hardly required by Article I of the Constitution.

Peabody's other arguments fare no better. The Supreme Court has repeatedly rejected Tenth Amendment challenges to statutes structured like the

Clean Air Act, which give States the first opportunity to implement federal requirements (such as industrial pollution limits), and provide for direct federal implementation if a State does not act. *See, e.g.*, *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288–89 & n.30 (1981) (rejecting a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act; noting with approval that this statute "resemble[d] a number of other federal statutes that have survived Tenth Amendment challenges in lower federal courts" including the Clean Air Act); *see also New York v. United States*, 505 U.S. 144, 167–68 (1992).

Nor is there any basis in existing law for Peabody's suggestions that the public needs to pay polluters if it wants to abate emissions found to endanger public health and welfare, or that the government may not regulate the largest pollution sources unless it simultaneously regulates all the others. Peabody Br. 14–15.

F. NFIB's Proposed "Reconciliation" Lacks Merit.

NFIB argues that if EPA is not required to disregard the Senate-originated amendment as a drafting error, then "[i]n the alternative," the agency must "give effect to each individual clause appearing in the Statutes at Large." NFIB Br. 19 (citing *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). NFIB further suggests that, if both the House and the Senate amendments are given effect, "the provisions would

operate in parallel and would together prohibit EPA from establish standards of performance under Section 111(d) if *either* the source category *or* the pollutant in question were regulated under Section 112." NFIB Br. 19–20 (emphasis in original). *See also* Trade Ass'ns *Amici* Br. 12.

This argument is meritless. Because the two amendments to section 111(d) are best read to be "duplicative," executing the amendments sequentially would simply restate the exclusion of HAPs "in different language." *See* 1 Leg. Hist. 46 n.1. Moreover, even assuming the House and Senate amendments create exclusions of different scope, they should be reconciled by excluding only the pollutants that are excluded by *both* amendments. Section 111(d) does not prohibit EPA from regulating the excluded pollutants, but simply relieves EPA of the *duty* to regulate them. *See* 42 U.S.C. § 7411(d) (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

The petitions should be dismissed or 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 7,591 words in length.

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2015, the foregoing Corrected brief was served upon all registered counsel via the Court's ECF system.

Respectfully submitted,

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Dated: February 18, 2015