ORAL ARGUMENT NOT SCHEDULED

No. 15-1277 & No. 15-1284

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

IN RE: WEST VIRGINIA, ET AL.,
Petitioners.

IN RE: PEABODY ENERGY CORPORATION,
Petitioner.

On Petition for Extraordinary Writ of Stay

EPA'S CORRECTED RESPONSE IN OPPOSITION

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August 31, 2015

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 28(a)(1) and 21(d), Respondent the United States Environmental Protection Agency states as follows:

Parties:

The parties in these consolidated cases are:

Petitioners: States of West Virginia, Alabama, Arkansas, Florida, Indiana, Kansas, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, South Dakota, Wisconsin, Wyoming, and the Commonwealth of Kentucky;

Movant-Intervenor for Petitioners: State of South Carolina;

Respondent: The United States Environmental Protection Agency; and

Movant-Intervenors for Respondent: Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club.

Rulings under Review:

Petitioners ask this Court to issue a writ staying the deadlines in this final rule: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, signed August 3, 2015; EPA-HQ-OAR-2013-0602; RIN 2060-AR33.

Related Cases:

These consolidated cases are related to two cases already decided by this Court in In re Murray Energy Corp, 788 F.3d 330 (D.C. Cir. 2015), but where petitions for

rehearing en banc are still pending: In re Murray Energy Corporation, No. 14-1112 (consolidated with Murray Energy Corporation v. Environmental Protection Agency, et al., No. 14-1151) (petitions for rehearing en banc, Doc. Nos. 1564350, 1564374, and 1564467), and West Virginia v. Environmental Protection Agency, No. 14-1146 (petition for rehearing en banc, Doc. No. 1564355).

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GLOSSARY

CAA	Clean Air Act
CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FTC	Federal Trade Commission
NAAQS	National Ambient Air Quality Standard
NOAA	National Oceanic and Atmospheric Administration
NO_x	Nitrogen Oxides
Peabody	Peabody Energy Corporation
$PM_{2.5}$	Particulate less than 2.5 micrometers in diameter
Section 111	42 U.S.C. § 7411

INTRODUCTION

Petitioners once again prematurely attack EPA's Clean Power Plan ("the Rule") and attempt to bypass the straightforward, and soon available, judicial review procedures in the Clean Air Act (the "CAA" or the "Act") by invoking the All Writs Act. This Court has already concluded in a decision issued earlier this summer that Petitioners must adhere to those procedures in challenging the Rule. In re Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015) ("Murray"). Those procedures plainly provide that petitions for review of final rules under the Act must be filed "within sixty days from the date notice of . . . promulgation . . . appears in the Federal Register." 42 U.S.C. § 7607(b)(1). Publication in the Federal Register, while shortly forthcoming, has not yet occurred. Thus, both the plain terms of the Act and this Court's binding precedent compel dismissal of these petitions.

Even if the All Writs Act authorized judicial review, the requested extraordinary relief is wholly unwarranted. Petitioners can point to no harm that they will suffer in the brief period before the Rule[1] is published in the Federal Register, which should occur within a period of less than two months and after which they will have a full and fair opportunity for judicial review. The Rule is not legally effective until 60 days after it is published, and it does not contain imminent deadlines. Far from it. The carbon pollution standards for fossil fuel-fired power plants required by

[1] Available at http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf.

the Rule will not begin to go into effect until at least 2022 – seven years from now. Although the Rule instructs the states to submit plans to implement those standards, and imposes a September 2016 deadline for the submission of a state plan, a state may obtain a two-year extension of that deadline by submitting, by that same date, a minimal initial submittal. Thus the earliest plan-related submissions under the Rule are 12 months away and are not burdensome should the state elect to request the full three years to complete plans. Moreover, a state may elect to have EPA do the work required to implement standards within the state – in which case the state need not make any submission at all. States that submit their own plans pursuant to the Rule have a full three years – until September 2018 – to do so (assuming states pursue an easily obtainable extension). Accordingly, Petitioners do not face any irreparable harm from the deadlines in the Rule, let alone any irreparable harm in the brief period of time before they may file a lawful challenge to the Rule under the CAA. There is absolutely nothing that Petitioners are required to do in this brief period before Rule publication.

Nor are Petitioners clearly and indisputably entitled to relief with respect to the merits of their claims, as required for issuance of an extraordinary writ. EPA has well-established authority under section 111 of the CAA, 42 U.S.C. § 7411, to establish emission guidelines for carbon dioxide (“CO_2”) emissions from power plants. Indeed, the Supreme Court has already specifically concluded that EPA has this authority. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (“AEP”).

The public interest also strongly weighs in favor of denying this second effort to circumvent the CAA's judicial review procedures. The challenged Rule addresses greenhouse gas pollution that poses a monumental threat to the United States by causing long-lasting changes in our climate, resulting in an array of severe negative effects on public health and welfare. The Rule will secure critically important reductions in greenhouse gas emissions from the largest emitters in the United States.[2] Disruption of this important Rule before it has even been published, and before other parties with an equally strong interest in judicial review proceedings have a fair opportunity to participate and be heard, would frustrate the public interest.

In short, these petitions should be promptly dismissed.

ISSUES PRESENTED

1. The CAA provides that final rules under section 111 may be challenged in this Court within a period of sixty days from the date notice of promulgation appears in the Federal Register. Can Petitioners invoke the All Writs Act to avoid the jurisdictional limitations in the CAA?

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[2] Climate change is already occurring. Nineteen of the twenty warmest years on record have all occurred in the past twenty years. NOAA, Global Temperature Recap, available at https://www.climate.gov/news-features/videos/2014-global-temperature-recap. The last month, July 2015, was the warmest month ever recorded. NOAA, Global Summary Information, available at http://www.ncdc.noaa.gov/sotc. Because CO_2 in the atmosphere is long-lived, regulatory choices made today matter in determining impacts experienced not just over the next few decades, but in the coming centuries and millennia. Rule at 102.

2. The Rule is not effective until after it is published; the emission limitations required by the Rule do not go into effect until 2022; and states can have until September 2018 to submit plans for controlling emissions. Do Petitioners face any irreparable harm from having to wait a short period until the Rule is published to pursue judicial review?

3. To obtain an extraordinary writ, Petitioners must demonstrate that they are clearly and indisputably entitled to relief. Are the complex statutory interpretation issues raised by Petitioners disputable?

BACKGROUND

I. The Clean Air Act and Section 111 Standards of Performance

The CAA was enacted in 1970 and establishes a comprehensive and detailed program for air pollution control through a system of shared federal and state responsibility. Its comprehensive scheme for air pollution control addresses three general categories of pollutants emitted from stationary sources: (1) criteria pollutants; (2) hazardous pollutants; and (3) pollutants that are neither hazardous nor criteria pollutants. Pollutants such as greenhouse gases that fall into the last of these categories are regulated under the "standard of performance" program set forth at section 111 of the Act, 42 U.S.C. § 7411. The Supreme Court, examining section 111, found it "plain that the Act 'speaks directly' to emissions of carbon dioxide from [fossil fuel-fired] plants." AEP, 131 S. Ct. at 2538.

In regulating under section 111, EPA must first establish a list of stationary source categories that the Administrator has determined "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). EPA must then set federal standards of performance for new sources within each listed source category. Id. § 7411(b)(1)(B). A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements), the [EPA] Administrator determines has been adequately demonstrated." Id. § 7411(a)(1).

Section 111 empowers EPA to establish emission standards not only for new sources, but also existing sources of pollutants that satisfy certain criteria. Id. § 7411(d). Specifically, under section 111(d), EPA promulgates regulations, referred to as "emission guidelines" (see 40 C.F.R. Part 60, Subpart B), directing states to establish standards of performance for existing sources that are consistent with the emission guidelines, through a process that requires state rulemaking action followed by review and approval of state plans by EPA. 42 U.S.C. § 7411(d). If a state elects not to submit a plan or does not submit an approvable plan, EPA then has the authority to promulgate a federal plan implementing standards of performance for existing sources within that state. Id. § 7411(d)(2).

II. The Clean Power Plan

In June 2013, President Obama released a Climate Action Plan[3] to address the far-reaching harmful consequences and real economic costs of climate change. The President's Climate Action Plan details a broad array of actions, to be taken over an extended period of time, to reduce greenhouse gas emissions, of which CO_2 emissions are the most significant. Among these, the President directed EPA to work expeditiously to utilize its authority under section 111 of the Act to complete carbon pollution standards for both new and existing fossil fuel-fired power plants. These power plants emit enormous amounts of greenhouse gases, generating approximately 37 percent of all anthropogenic CO_2 emissions in the United States, which is almost three times as much as the next ten source categories combined.[4]

In accordance with the President's directive, on January 8, 2014, EPA proposed performance standards under section 111(b) for CO_2 emissions from new power plants. 79 Fed. Reg. 1430. On June 18, 2014, EPA proposed emission guidelines under section 111(d) for CO_2 emissions from existing power plants.[5] 79 Fed. Reg.

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[3] Available at http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

[4] Rule at 134-35; Table ES-2 "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2013," Report EPA 430-R-15-004, United States Environmental Protection Agency, April 15, 2015, cited in Rule at 134 n.51.

[5] EPA also proposed standards for modified and reconstructed sources on this date. Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, Proposed Rule, 79 Fed. Reg. 34,960 (June 18, 2014).

34,830. EPA solicited comment on all aspects of the proposed rules and received almost seven million public comments. EPA considered these comments and made numerous improvements to the proposed rules based on them.

On August 3, 2015, the EPA Administrator signed two final rules. The first rule establishes CO_2 standards of performance under section 111(b) for new, modified, and reconstructed power plants.[6] The second, the Rule at issue here, establishes section 111(d) emission guidelines for states to follow in developing state plans to limit CO_2 emissions from existing power plants.

The Rule's emission guidelines include emission performance rates to be achieved by two subcategories of electricity generating sources: steam units (which are primarily coal-fired) and combustion turbines (which are primarily natural gas-fired). The performance rates are based on EPA's determination and application of the "best system of emission reduction . . . adequately demonstrated," 42 U.S.C. 7411(a)(1), for these sources. EPA determined that the best system of emission reduction adequately demonstrated includes a combination of three sets of measures, or "building blocks": (1) improving heat rate at coal-fired plants, (2) substituting increased generation from lower-emitting existing natural gas combined cycle plants for generation from higher-emitting steam plants, and (3) substituting generation from new zero-emitting renewable sources for generation from fossil fuel-fired plants. Rule at 230.

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[6] Available at http://www.epa.gov/airquality/cpp/cps-final-rule.pdf.

Beyond setting specific emission performance rates for particular subcategories of sources, EPA's guidelines translate those performance rates into equivalent statewide emission goals, expressed both in terms of the rate of emissions per unit of energy production and in terms of the total mass of emissions. The provision of equivalent statewide goals provides considerable flexibility to states, which have the option of submitting plans that apply the subcategory-specific performance rates, or that meet either the equivalent statewide rate-based goals or mass-based goals. States and sources also have the flexibility under the guidelines to choose from a wide range of measures for reducing emissions. They are not limited to applying the specific measures considered by EPA to constitute the best system of emission reduction. The guidelines additionally encourage states to establish trading-based emission programs and compliance strategies, which significantly enhance flexibility and cost-effectiveness for regulated sources.

The Rule will be phased in over an extended period of time. Under the Rule, no emission reductions are required from regulated sources until 2022 at the earliest,[7] and the performance rates or equivalent state goals need not be fully met until 2030. Rule at 11. The Rule provides states up to three years to submit their plans. Id. at 38. The Rule directs states to provide an initial submission in September 2016. Id. at 37.

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[7] In fact, states may opt to delay emission controls until 2023, or, for most states, 2024, and still meet the Rule's requirements. Rule at 641.

That initial submission – through which states may request and obtain an extension until September 2018 to complete plans – need only include minimal information concerning the status of the state's planning efforts, specifically: (a) an identification of the various plan approaches under consideration, including any progress to date, (b) an appropriate explanation for why the state requires additional time to complete its plan, and (c) a description of opportunities for public input during development of the plan. Id. at 1001-1024.

States also may elect to decline to prepare and submit their own plans, in which case EPA will promulgate a federal plan for the affected power plants in that state. Id. at 1005.[8] EPA does not have authority to impose sanctions on a state for failure to submit a state plan. Rule at 1145. States that do decline to prepare and submit plans by the established deadlines could still choose, at any later point in time, to adopt a state plan: even after EPA promulgates a federal plan, a state retains the ability to supplant it by submitting an approvable plan of its own. Rule at 857, n. 769.

The Rule as signed has been posted on EPA's website. Consistent with the Agency's customary practice, EPA is in the process of conducting a final review and correcting any textual errors prior to transmitting the Rule to the Office of the Federal Register ("the Federal Register") for publication. See Exhibit A, Declaration of Joel

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[8] At least one state, Oklahoma, has already announced that it intends to make that election. Oklahoma Executive Order 2015-22 (Apr. 28, 2015), available at https://www.sos.ok.gov/gov/execorders.aspx.

Beauvais, EPA Associate Administrator (addressing status and process for Federal Register publication). EPA intends to complete this final review process and transmit the Rule to the Federal Register no later than September 4. Id. ¶ 14. EPA has informed the Federal Register that EPA will be requesting that the Federal Register expedite publication of the Rule. Id. ¶ 16. While the Office of the Federal Register is a separate agency and EPA does not control the timing of publication, EPA expects, based on past experience with other large rules, that the final rule will be published in the Federal Register by late October. Id. ¶ 17. Under the CAA's judicial review provision, petitions for review of the Rule can be filed in this Court "within 60 days from the date" of Federal Register publication. 42 U.S.C. § 7607(b)(1).

III. Litigation Challenging EPA's Proposed Rule

Most of these same Petitioners previously pursued a set of premature challenges to the Clean Power Plan in the cases decided in Murray.[9] In those cases, Petitioners (1) intervened in support of a petition for an extraordinary writ blocking any final rule under the All Writs Act, (2) intervened in support of a petition for review of the rulemaking proposal, and (3) petitioned for review of a 2011 settlement agreement requiring a rulemaking. See Murray, 788 F.3d at 335-36.

In Murray, this Court rejected Petitioners' attempts to secure judicial review of EPA's Clean Power Plan prior to publication of a final rule. The Court held that "the

[9] Petitioners Florida and Michigan did not participate in the previous suits.

All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules." Id. at 335. The Court explained that an extraordinary writ is neither necessary nor appropriate to aid the Court's jurisdiction where the CAA's judicial review provision enables the Court to review the legality of the rule following promulgation and publication in the Federal Register. See id. at 334-36. The Court concluded the "All Writs Act 'does not authorize' courts 'to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.'" Id. at 335 (quoting Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985)).[10] The Court entered judgment in favor of EPA in Murray on June 9, 2015. Per Curiam Judgment, Nos. 14-1112 & 14-1146, Doc. #1556369 (D.C. Cir. June 9, 2015). Petitioners have requested rehearing, but the Court has taken no action on those requests.

[10] This Court also held that West Virginia and the other state petitioners lacked standing to bring their challenge to the 2011 settlement agreement because that settlement agreement only set a timeline for the agency to act without "dictating the content of that action." Id. at 336.

ARGUMENT

Notwithstanding that they will soon be able to challenge the Rule under the procedures provided in the CAA, and notwithstanding that the Rule requires nothing of them in the interim, Petitioners seek extraordinary relief under the All Writs Act to stay a Rule that has not yet even become effective. The Court has previously held that the All Writs Act does not authorize such relief; that holding is controlling here; and, in any event, Petitioners would not satisfy the prerequisites for such relief even if it were potentially available. They cannot show that they will be irreparably harmed in the estimated period of less than two months before the Rule is published and subject to challenge under the CAA, and even if they could, they cannot show any clear and indisputable flaw in the EPA's exercise of its authority under section 111(d). There is, in short, no basis for allowing Petitioners to create an unprecedented mechanism for subverting the procedures prescribed by Congress, rushing this Court's judicial review, and subjecting agency rules to hurried, unnecessary, and premature attack.

I. The All Writs Act Remains Unavailable to Petitioners.

Two months ago, this Court held that the All Writs Act, 28 U.S.C. § 1651(a), does not authorize early review of EPA's Clean Power Plan. Murray, 788 F.3d at 334-36. Petitioners have nonetheless renewed their reliance on that statute, arguing that because the EPA Administrator recently signed the Rule, the Court should now issue an extraordinary writ staying certain deadlines set forth therein – even though the Rule has not yet been published, and thus is not yet effective.

As this Court recognized in Murray, an extraordinary writ is just that: extraordinary. A writ cannot be granted where there is any other means of challenging the action at issue, and it cannot confer jurisdiction where it is otherwise lacking. In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004); Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 755 (D.C. Cir. 1991), vacated on other grounds, 498 U.S. 1117 (1991). Here, the CAA prescribes a particular time period for challenges to final rules (the sixty days following publication in the Federal Register) and a particular procedural mechanism (a petition for review). That statutory window for review should open in less than two months, but it has not opened yet. The Court consequently lacks jurisdiction and the writ is unavailable. Indeed, were this Court to issue an extraordinary writ here, it would be breaking new ground and opening the floodgates for pre-publication challenges to any number of future agency actions.

As this Court explained in Murray, the All Writs Act "is not to be used as a substitute" for the normal, statutorily-prescribed process for challenging EPA action. 788 F.3d at 335. Here, the CAA sets forth an orderly and well-established process for challenging final EPA rules of nationwide scope and effect, including an "action of the Administrator in promulgating . . . any . . . requirement under section 7411 of this title," which may be challenged by filing a petition for review "within sixty days from the date notice of such promulgation . . . appears in the Federal Register." 42 U.S.C. § 7607(b)(1).

It is beyond dispute that the word "within" establishes a filing window that opens on the date of Federal Register publication. Horsehead Res. Dev. Co. v. EPA, 130 F.3d 1090, 1092-93 (D.C. Cir. 1997) (interpreting very similar language in the judicial review provision of the Resource Conservation and Recovery Act); see also States' Pet. at 10 (conceding that, under Horsehead, a petition for review cannot be filed until the Rule is published). Because the Rule will not be published in the Federal Register for an estimated period of less than two months, the applicable filing window for petitions for review has not yet opened, and the Court lacks jurisdiction. See Horsehead, 130 F.3d at 1092-93 (dismissing for lack of jurisdiction); W. Union Tel. Co. v. FCC, 773 F.2d 375, 378 (D.C. Cir. 1985) (challenge to rule filed before publication in Federal Register was jurisdictionally barred). The All Writs Act offers nothing to cure this lack of jurisdiction.[11]

Moreover, even setting the jurisdictional bar aside, a writ is "not available when review by other means is possible." Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 78 (D.C. Cir. 1984) ("TRAC"). Here, review by other means – a petition filed under 42 U.S.C. § 7607(b) – is not only possible, but immediately available upon publication of the Rule. And once they have petitioned for review, Petitioners can

[11] See In re Tennant, 359 F.3d at 527 (All Writs Act "is not itself a grant of jurisdiction"); Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999) (All Writs Act "confines the [court's] authority to the issuance of process 'in aid of' the issuing court's jurisdiction" and "does not enlarge that jurisdiction").

also seek a stay under Fed. R. App. P. 18. Thus, they have "other adequate means to attain the relief [they] desire[,]" In re al-Nashiri, 791 F.3d 71, 78 (D.C. Cir. 2015), and so a writ is unavailable.

State Petitioners argue that they should not have to wait and avail themselves of the normal statutory procedures for challenging the Rule because it imposes set deadlines (the first of which is over a year away), and states must expend resources now to meet those deadlines.[12] States' Pet. at 2. As a threshold matter, and as explained further in Section II, Petitioners do not identify any meaningful expenditure that they will incur before late October, when the Rule is expected to be published and become ripe for judicial review. Nor do Petitioners account for the fact that, by September 2016, states need only provide preliminary submissions that in effect simply confirm that they are working on plans, and that with a readily-obtainable extension, their actual plans are not due until September 2018.

In any event, the Court held in Murray that the "All Writs Act 'does not authorize' courts 'to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.'" 788 F.3d at 335 (quoting Pa.

[12] Petitioner Peabody Energy ("Peabody") does not even attempt to explain why it believes an extraordinary writ would be an appropriate mechanism for this Court to employ to stay the rule. Its only explication of the Court's writ authority is the one-line statement that "[t]his Court outlined the standards for an extraordinary writ in Murray Energy." Peabody Pet. at 8. The Court indeed did so, but then explained why Petitioners do not meet those standards, as discussed in the text above.

Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. at 43). And the Court also rejected the idea that Petitioners' claims of "hardship [that] may result from delay" – i.e., the claim that states must expend resources now to meet the deadlines set in the Rule – are sufficient to justify bypassing the normal statutory procedures for obtaining judicial review. Id. Petitioner Peabody argues that "no purpose is now served by withholding prompt judicial review," Peabody Pet. at 4, but the question properly before the Court in an extraordinary writ petition is not whether there is sufficient reason to hold off, but whether the drastic and extraordinary step of bypassing the review procedures mandated by statute is justified. Petitioners will soon be able to file for review of the Clean Power Plan. Thus, as this Court just concluded in Murray, "a writ is not necessary or appropriate to aid the Court's jurisdiction" over the rulemaking. 788 F.3d at 335.

Congress necessarily contemplated, by enacting section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), and providing for judicial review only upon final rule publication, that there could be a gap between signature of the final agency action and the start of judicial review. This Court cannot now thwart that Congressional policy by writ. See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30 (1943) ("Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy").

Staying the Clean Power Plan prior to publication would also be a novel and inappropriate use of the All Writs Act. As discussed at length in response to Petitioners' prior writ application, an extraordinary writ has been found to be available only in three narrow categories of circumstances:

(1) to compel a lower court to act or to prohibit it from acting unlawfully;[13]

(2) to "forestall future error in trial courts" by addressing important issues that may otherwise be "lost to appellate review";[14] and

(3) to compel agency action that is "unreasonably delayed."[15]

Petitioners' request for the Court to stay the Clean Power Plan fits into none of these categories. While their petitions address agency action, Petitioners do not seek to require EPA to act more quickly; rather, they want the opposite – a judicial halt to the rulemaking process, in the form of a pre-publication stay of the Rule. And while they argue that the Rule is unlawful and raises important issues, no issue raised would otherwise be lost to appellate review; rather, Petitioners will soon have the opportunity to petition this Court for review of the Rule under 42 U.S.C. § 7607(b), and can then request a stay pending review.

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[13] See Interstate Commerce Comm'n v. United States ex rel. Campbell, 289 U.S. 385, 394 (1933) ("Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal.").

[14] Colonial Times v. Gasch, 509 F.2d 517, 524-26 (D.C. Cir. 1975).

[15] See TRAC, 750 F.2d at 76 (asserting jurisdiction over a petition for a writ alleging unduly lengthy delay by the FCC in responding to a complaint).

Petitioners' arguments here are also squarely foreclosed by Murray. In Murray, the Court reasoned that the All Writs Act does not give it authority to "jump into the fray" in advance of the routine judicial review afforded by these authorities where doing so would allow the All Writs Act "to be used as a substitute" for normal appellate review, id. at 334, or would authorize courts "to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate," id. at 335. Accordingly, the Court concluded that "a writ is not necessary or appropriate to aid the Court's jurisdiction" over the final rule because "[a]fter EPA issues a final rule," it will be subject to challenge and "the Court will have an opportunity to review the legality of the rule." Id. at 335.

Petitioners argue that their new petitions are consistent with the Court's ruling in Murray because the Court's decision rested on the fact that the "Section 111(d) Rule was then 'just a proposal,'" States' Pet. at 10 (quoting Murray, 788 F.3d at 334), and "[t]he Rule is now not just a proposal." Id.; see Peabody Pet. at 1. While the Administrator's signature of the rule has changed that aspect of Petitioners' claims, the forthcoming availability of traditional judicial review was essential to the Court's holding. See Abdelfattah v. U.S. Dep't of Homeland Sec., 787 F.3d 524 (D.C. Cir. 2015) (elements "essential to the decision" are "therefore part of our holding").

In rejecting the original petitions, the Murray Court specifically detailed the authorities that give it jurisdiction to review an agency's final action, including statutory authority under the CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Murray,

788 F.3d at 334. As discussed supra, finality is not the only prerequisite for judicial review; where Congress has provided clear statutory procedures for, or limits on, judicial review, these procedures are mandatory and supplant more general review under the Administrative Procedure Act or in equity. See Abbott Labs. v. Gardner, 387 U.S. 136, 149-52 (1967); Murray, 788 F.3d at 334 (citing Abbott). Accordingly, Murray's conclusion that a writ allowing early review was not "necessary or appropriate to aid the Court's jurisdiction" because the Court would have an "opportunity to review the legality of the [final] rule" under its traditional authorities – here CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1) – id. at 335, is binding precedent that bars the relief sought in these petitions.[16]

Attempting to avoid the binding force of Murray, Petitioners rely on American Public Gas Association v. Federal Power Commission, 543 F.2d 356 (D.C. Cir. 1976),

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[16] While the Court need not decide this question, the petitions may be similarly barred by the doctrine of issue preclusion. That doctrine bars "'successive litigation of an issue of fact or law actually litigated and resolved' that was 'essential to the prior judgment, even if the issue recurs in the context of a different claim.'" Nat'l Ass'n of Home Builders v. EPA, 786 F.3d 34, 41 (D.C. Cir. 2015) (quoting Taylor v. Sturgell, 553 U.S. 880, 892 & n.5 (2008)). This includes "threshold jurisdictional issue[s]." Id. at 41 (citing Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706 (1982)). All Petitioners in this matter were also petitioners or intervenors in the Murray proceeding, with the exception of the States of Florida and Michigan. However, both Florida and Michigan are acting in concert with the other petitioners and signed Petitioners' filing seeking consolidation of this petition with the original petition – demonstrating their consent to be bound by the Court's judgment in that matter. See Taylor, 553 U.S. at 893 (noting that issue preclusion applies to a party who was not party to the original suit where the party "agrees to be bound by the determination" in the original proceeding).

for the proposition that staying the Rule is an appropriate use of the All Writs Act. States' Pet. at 9-10. But there was a critical difference in the status of the agency order at issue there: it was already effective. Judicial review was unavailable only because the statutory rehearing process was ongoing. In holding that an equitable writ was appropriate, the Court focused on the fact that the Commission's order not only established gas rates that had to be paid immediately, but did not include any "provision . . . for refund of rates charged if [the order is] subsequently held unlawful." Am. Public Gas, 543 F.2d at 357. The relief granted was accordingly very narrow; the Court enjoined only "[t]he charging of [] new rates . . . without a refund," leaving the order (and the rates set therein) otherwise in effect. Id. at 359.

Here, not only has the Rule not yet been published, it does not become effective until sixty days after publication. Rule at 2. And while State Petitioners complain that they must begin work now on their plan submissions – which, in any event, are not due until a full three years from now, and will not require any meaningful expenditure of resources between now and late October – the fact that "prudent organizations and individuals may alter their behavior (and thereby incur costs) . . . has never been a justification for allowing" premature review. Murray, 788 F.3d at 335. The possible behavior and costs that are claimed here are not analogous

to the immediately-effective and non-refundable rate raises at issue in American Public Gas.[17]

In short, Petitioners are again asking the Court "to do something . . . never done before," Murray, 788 F.3d at 333, and thereby expand the application of the All Writs Act to a new category of circumstances. This is neither permissible under the relevant case law, nor advisable as a matter of judicial administration given the implications it would have for future rulemakings under the CAA – or any other statute. These extraordinary writ petitions should accordingly meet the same fate as Petitioners' previous attempts to bypass the normal judicial review process.

II. Petitioners Have Not Demonstrated Irreparable Harm.

Even if the All Writs Act authorized judicial review, extraordinary relief would still be wholly unwarranted here because Petitioners cannot show that they will suffer any irreparable harm by following the congressionally prescribed course and challenging the Rule once it is published an estimated less than two months from

[17] State Petitioners also cite FTC v. Dean Foods Co., 384 U.S. 597 (1966). States' Pet. at 9-10. But there, the Supreme Court held only that an appeals court had "limited judicial power to preserve [its] jurisdiction" via a "temporary" injunction under the All Writs Act where consummation of the merger at issue would have otherwise "deprive[d] the court of its appellate jurisdiction." Dean Foods, 384 U.S. at 604. In other words, the merger at issue, once consummated, was a bell that could not be un-rung through judicial review, rendering later appellate review effectively meaningless. Awaiting publication of the Clean Power Plan has no similar effect. In fact, the Rule will still not be effective for sixty days thereafter. And most critically, the Court will have full opportunity to review the legality of the Rule immediately upon publication.

now. A writ "'is an extraordinary remedy that may be invoked only if the statutorily prescribed remedy' is 'clearly inadequate.'" Reynolds Metals Co. v. FERC, 777 F.2d 760, 762 (D.C. Cir. 1985) (quoting In re GTE Serv. Corp., 762 F.2d 1024, 1027 (D.C. Cir. 1985)). To obtain such relief, Petitioners "must . . . satisfy the normal requirements . . . for all extraordinary relief, i.e., the well established requirements that [the Court] routinely appl[ies] to motions for stay pending appeal, among which is the likelihood of irreparable harm." Reynolds Metals, 777 F.2d at 762.

Even when it becomes effective following publication, the deadlines that the Rule imposes are years away. The emission limits do not begin to take effect until 2022, and states will have until 2018 to submit their plans. In order to justify the extraordinary relief they seek, Petitioners would have to show that the pending publication of the Rule causes them harm in the short window – estimated at less than two months – between now and the time of publication, at which point judicial review under the CAA will indisputably be available.

Petitioners have not only failed to make such a demonstration, they have not even attempted one. In fact, Petitioners have failed to demonstrate irreparable harm even if the relevant period was the entire period of judicial review after publication.

A. State Petitioners Have Not Established Irreparable Harm.

State Petitioners' sole basis for asserting irreparable harm is the alleged economic harm they will suffer by devoting staff to the preparation of state implementation plans instead of performing other functions. States' Pet. at 11-16.

Whether considered for just the period before publication or the period of judicial review after publication, this claim is flawed for several reasons. First, Petitioners overstate what is required both for the September 2016 submission (as discussed below, states have the option of providing EPA with a minimally burdensome "initial submittal," Rule at 38) and the September 2018 state plan. Indeed, a state can elect not to develop a plan at all and instead allow EPA to do so in the first instance. Second, states have considerable flexibility in how to implement the rule, and thus flexibility in the amount of resources devoted to it. Third, even assuming some significant compliance efforts were required now, Petitioners identify no case in which a court has held that the mere fact that state employees will be carrying out responsibilities to implement the CAA constitutes irreparable harm, and such a holding would open the door to treating virtually any agency action requiring state implementation as causing irreparable harm.

State Petitioners' claim that the Rule requires an extraordinary effort in too limited a time, and thus an allegedly massive effort during the period of judicial review, States' Pet. at 14-15, is meritless. As an initial matter, no such effort is required before publication – a period in which the Rule is not yet even effective. In any event, the fact that states will have to devote staff time to develop a plan to implement CAA requirements pursuant to an EPA rule before judicial review is complete is neither an exceptional nor an extraordinary circumstance, but rather is integral to the cooperative federalism structure of the Act. A number of CAA

provisions require or authorize the preparation of state plans following action by EPA. Of particular significance here, section 110(a) of the Act, 42 U.S.C. § 7410(a), requires states to prepare a state implementation plan within three years of the promulgation of a National Ambient Air Quality Standard ("NAAQS") – a process that in many cases is as equally if not more complicated as the one required by the Rule.[18] Because judicial review will take place during that same period pursuant to 42 U.S.C. § 7607(b), the CAA clearly contemplates that states would be required to develop plans during the period of judicial review. If that fact alone constituted irreparable harm, it would not only subvert the principle that a stay of the action of an administrative agency is an extraordinary remedy, but it would also severely disrupt the entire statutory scheme for the promulgation, implementation, and achievement of air quality standards.[19]

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[18] Preparation of a state implementation plan for a nonattainment area after promulgation or revision of a NAAQS often requires the state to determine the amount of emission reductions, sometimes of multiple pollutants, needed to achieve the NAAQS; to develop a regulatory plan covering a wide range of mobile and stationary sources to achieve the needed level of emission reductions; to conduct air quality modeling to verify that the planned reductions will achieve the desired level of air quality; and to make the plan requirements enforceable. In contrast, the state plans required by the Rule address a well-defined group of sources that are already subject to extensive regulation by the states and a defined level of emission reductions.

[19] Petitioners incorrectly assert that it is "unusual[]" for EPA to require state submissions based on a fixed date, instead of based on the uncertain date of publication in the Federal Register. States' Pet. at 1. On the contrary, EPA requires state submissions based on a fixed date routinely in implementing section 110(a) and related provisions of the Act. For example, after EPA revises a NAAQS, EPA
(footnote continued . . .)

Moreover, states have considerable flexibility in both the timing and extent of their planning effort under the Rule. First, the effort required for states that choose to make an initial submittal in September 2016 (and request an extension until September 2018 to complete plans) is not burdensome. Contrary to Petitioners' mischaracterization, this initial submission is not a "State plan[]." States' Pet. at 1. The initial submittal requires only that a state generally identify: (a) the various plan approaches under consideration, including any progress to date, (b) an appropriate explanation for why the state requires additional time to complete its plan, and (c) a description of opportunities for public input during development of the plan. See Rule at 1001-1024. Thus, if a state believes it appropriate to do so, it could defer

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generally determines the deadlines for states to submit recommended designations identifying the boundaries of areas as meeting or not meeting the revised standard, and to submit "infrastructure" state implementation plans with reference to the fixed date of signature of the revised NAAQS rulemaking, e.g., one year (for designation recommendations) and three years (for "infrastructure" state implementation plans) after such date of signature. See CAA section 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A) (designation recommendations due "not later than 1 year after promulgation of … revised NAAQS"); section 110(a)(1), id. § 7410(a)(1) (state implementation plan submissions due "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a [NAAQS] (or any revision thereof"); 73 Fed. Reg. 66,964, 67,031, 67,034, 67,045 (Nov. 12, 2008) (EPA signed revised lead NAAQS on October 15, 2008, and required states to submit (i) designation recommendations "no later than October 15, 2009," and (ii) "infrastructure" state implementation plans "within three years of the promulgation"); 78 Fed. Reg. 12961, 12962 (Feb. 26, 2013) (noting that the deadline for "infrastructure" state implementation plans for revised lead NAAQS was "October 15, 2011"); 78 Fed. Reg. 3086, 3250-51 (Jan. 15, 2013) (similar schedule for designations and "infrastructure" state implementation plans after EPA signed a revision to the $PM_{2.5}$ NAAQS).

much of the planning effort until judicial review is complete. The initial submittal requires substantially less than a state plan.

Finally, states have considerable overall flexibility in designing their state plans (due in September 2018 with an easily-obtainable extension), and those choices directly determine the level of resources the state must devote to them. At the extreme, a state can elect not to prepare a plan at all, the consequence of which is that EPA will develop and implement a federal plan for that state.[20] At least one petitioner State, Oklahoma, has made clear that it intends to pursue that path.[21] States can also simply require covered facilities to meet the specified performance rates, leaving to the facilities the decisions about how to meet those limits. Rule at 886-88. Alternatively, states can develop more detailed plans to meet the equivalent rate- or mass-based targets on a state-wide basis, which can involve a range of options to facilitate the achievement of the Rule's emission limits, including the possibility of intrastate or interstate trading. Id. at 887-907. These different options require different levels of resource commitment by state governments, and thus give the states considerable control over both the level and timing of the effort to create state plans. EPA has also proposed both model mass-based and rate-based emission

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[20] However, even the election not to prepare a plan does not forfeit the state's opportunity to develop a state plan, which it may do at any time to replace an existing federal plan. Rule at 857, n. 769.

[21] Oklahoma Executive Order 2015-22 (Apr. 28, 2015), available at https://www.sos.ok.gov/gov/execorders.aspx.

trading programs that states may adopt for purposes of state plans, a streamlined process that would require far less effort on the state's part. Id. at 885-86.

In any event, even assuming the states would be required to undertake some significant compliance efforts in the weeks before the Rule is published and becomes properly subject to judicial review, none of the caselaw cited by the State Petitioners supports their claim that state employees carrying out their responsibilities to implement the CAA constitutes irreparable harm. The one case Petitioners cite, see States' Pet. at 11, concerning alleged harm to a state, Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001), involved a dispute over whether the State or an Indian tribe exercised jurisdiction over a particular piece of property, which created an immediate question of whether the State or the Tribe could exercise authority over the area. It is not analogous to the circumstances here. And unlike this case, all of the cases cited by the State Petitioners in which the alleged injury was economic involved payments or lost sales by private parties that were the direct target of government action and not a State's decision to allocate employees to one task rather than another. See States' Pet. at 12. As discussed supra, American Public Gas concerned the payment of rates charged by pipelines for the transmission of natural gas that would not be refundable even if subsequently found to be unlawful. 543 F.2d at 356. Odebrecht Construction, Inc. v. Florida Department of Transportation involved a company's loss of potential construction business due to a statutory provision that prevented it from bidding on public contracts. 715 F.3d 1268 (11th

Cir. 2013). Iowa Utilities Board v. FCC concerned rates charged for local telephone service, 109 F.3d 418 (8th Cir. 1996), and Nalco Co. v. EPA involved an order prohibiting the sale of a pesticide product, 786 F. Supp. 2d 177 (D.D.C. 2011).[22]

In short, State Petitioners are not obligated to expend any resources in the weeks before the Rule is published; and, indeed, like Petitioner Oklahoma, they are not obligated to expend any on developing a plan once the Rule is published. They consequently are unable to show irreparable harm.

B. Peabody Has Not Established Irreparable Harm.

Petitioner Peabody is a coal mining company that claims that its business will be reduced because the Rule will result in a reduction in the amount of electricity being generated by the burning of coal. Peabody Pet. at 22-26. However, emission reductions required by the Rule are not required until 2022 at the earliest, well after the completion of judicial review.[23] In fact, judicial review should be completed well before most state plans are even submitted to EPA for approval. Accordingly,

[22] The remaining cases cited by State Petitioners involve neither states nor economic loss. Al-Nashiri, 791 F.3d 71, involved military tribunals at Guantanamo; Cheney v. U.S. District Court for Dist. of Columbia, 542 U.S. 367 (2004), involved discovery against the Vice President and other Executive Branch officials; and Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), involved inspections at mines.

[23] In fact, the Rule is sufficiently flexible that states may meet their requirements even if they do not require their sources to make any emission reductions until starting in 2023 or, for most states, 2024. Rule at 641.

Peabody will not suffer irreparable harm prior to the conclusion of judicial review, and thus has no grounds for a stay.

Peabody's claim that it will suffer imminent harm because utilities must begin planning for compliance is meritless. Because most state plans will likely not be submitted until September 2018, utilities cannot currently know what specific measures will be required or what compliance options will be offered by those plans. And once they do know, they will have four years to bring themselves into compliance before the emission reductions become effective in 2022. Thus, Peabody has not demonstrated that it will suffer irreparable harm prior to publication of the Rule in the Federal Register or before completion of judicial review.

Peabody's claim that EPA has determined that certain facilities will close, Peabody Pet. at 24, greatly overstates the results of EPA's modeling. To begin with, the modeling that Peabody cites regarding specific plants was based on the proposed rule, and thus is irrelevant. While the separate modeling based on the final rule shows 11 gigawatts of coal-fired generation shutting down in 2016, that modeling is intended merely to illustrate possible effects of the Rule and is not intended to be predictive. The modeling is based on assumptions that each state will adopt a particular type of plan (out of the many choices states have) and that in 2016 plants will already know what state plans will be adopted (an unlikely scenario since most states will presumably take advantage of the readily-obtainable two-year extension). In any event, regulated sources will have no obligations under the Rule until at least 2022,

and Peabody cannot rely on illustrative modeling scenarios to predict specific plant closings in 2016.

Finally, existing plans to close a plant, such as the Taconite Harbor Energy Center (Peabody Pet. at 24) do not support Peabody's claim. Such plans would have been made well before the final Rule was signed and accordingly, such plans for shutdowns are likely part of the general shift, separate and apart from the Rule, of electricity generation away from coal, which has been ongoing for several years because of changes in the technology for producing gas. Rule at 160-64.[24]

III. EPA's Rule is Legally Supported and Petitioners' Merits Arguments Are Not "Indisputable."

Finally, extraordinary relief should be denied for the independent reason that Petitioners' merits arguments fall well short of what would be necessary to justify a writ. A writ is a "drastic" remedy that can only issue where the petitioners have shown that the "right to issuance . . . is clear and indisputable." Al-Nashiri, 791 F.3d at 78. The Court has therefore declined to issue a writ absent "binding" or "on point" precedent. Id. at 86 (citing NetCoalition v. SEC, 715 F.3d 342, 354 (D.C. Cir. 2013); Rep. of Venezuela v. Philip Morris Inc., 287 F.3d 192, 199 (D.C. Cir. 2002)).

Petitioners do not meet that extremely high threshold. They raise two merits arguments: (1) that EPA lacks authority to issue a rule addressing power plant CO_2

[24] See also U.S. Energy Information Administration, Monthly Energy Review August 2015 at 106, available at http://www.eia.gov/totalenergy/data/monthly/.

emissions under section 111(d) because it previously issued a rule addressing power plants' emissions of different (hazardous) air pollutants under section 112;[25] and (2) that EPA lacks authority to conclude that the best system of emission reduction includes replacing high-carbon power generation with lower- or zero-carbon power. Those arguments lack merit; at a minimum, for purposes of disposing of these premature writ petitions, they are far from "indisputable." And insofar as Petitioners claim that their merits arguments raise constitutional questions,[26] not only are such claims meritless,[27] but they weigh against premature adjudication. See Al-Nashiri, 791 F.3d at 81 ("mandamus in this case would conflict with the constitutional avoidance doctrine . . . Nashiri's petition presents two constitutional questions of first impression and courts do not reach out to decide such questions." (internal quotation

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[25] EPA promulgated a final rule establishing hazardous pollutant emission standards for coal- and oil-fired plants in 2012. 77 Fed. Reg. 9304 (Feb. 16, 2012) ("MATS Rule"). The MATS Rule does not regulate CO_2, which is not a listed hazardous air pollutant, and it does not regulate natural gas plants. This Court upheld the MATS Rule, White Stallion Energy Center LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014), but the Supreme Court granted certiorari on one issue and reversed. Michigan v. EPA, 135 S. Ct. 2699 (2015). The Supreme Court remanded to this Court for further proceedings consistent with its opinion.

[26] See States' Pet. at 27-28 (arguing that the Rule violates the Tenth Amendment); Peabody Pet. at 29 (arguing that the Rule violates federalism principles and triggers Fifth Amendment "just compensation" requirements).

[27] See EPA Legal Memorandum Accompanying Clean Power Plant for Certain Issues at 47-51, 57-62, available at http://www2.epa.gov/cleanpowerplan/clean-power-plan-final-rule-technical-documents.

omitted)).[28] Rather, EPA should be permitted to present its substantial counterarguments, which are only briefly outlined below,[29] in full through the normal judicial review process, where other interested parties may also be heard.

A. EPA May Regulate Existing Power Plants' CO_2 Emissions.

Section 111(d) does not clearly or indisputably prohibit EPA from addressing existing power plants' CO_2 emissions thereunder simply because most such power plants are subject to EPA regulation addressing different pollutants.[30] Indeed, to reach that conclusion the Court would have to adopt the non-literal interpretation of section 7411(d) advanced by Petitioners over the EPA's reasonable interpretation of that plainly ambiguous provision.

First, a statute that contains two different amendments to the same text, which may or may not have opposite implications for its meaning, is plainly not "clear" and its meaning not "indisputable." Al-Nashiri, 791 F.3d at 78. Here, when legislating the

[28] See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

[29] These complex issues cannot be thoroughly briefed in the time and space allotted for this response. If the Court declines to dispose of these petitions on jurisdictional grounds or based on the lack of irreparable harm, EPA should be allowed an opportunity to brief these issues fully.

[30] While EPA and others addressed this issue when briefing Petitioners' last round of extraordinary writ petitions in Murray, it must now be assessed in light of EPA's final analysis and interpretation as set forth in detail in the Rule – an analysis that reflects consideration of the comments received on the proposal, and differs in certain respects from the previously-challenged proposed interpretation.

1990 CAA Amendments, Congress enacted two different conforming amendments to 42 U.S.C. § 7411(d). One, passed by the Senate, maintained the pre-1990 scope of section 111(d), and plainly authorizes EPA to regulate emissions of a non-hazardous pollutant such as CO_2 even where EPA is also regulating hazardous pollution from the same source category under section 112. See Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). The other, passed by the House, is considerably more convoluted.[31] Both were included in the Statutes at Large, which supersedes the U.S. Code if there is a conflict. 1 U.S.C. §§ 112 & 204(a); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988).

Petitioners do not dispute that the Senate amendment would allow EPA to regulate power plants' CO_2 emissions under section 111(d); instead, they argue that it should be ignored as a "drafting error," States' Pet. at 21, or "scrivener's provision," id. at 16. But the legislative history of the two amendments suggests otherwise. Rule at 252, n.289 & 255. Moreover, both amendments are conforming in nature,[32] and

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[31] The House amendment replaced a cross-reference to section 112(b)(1)(A), which was eliminated in 1990, with the phrase: "emitted from a source category which is regulated under section 112." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). The Senate amendment, in contrast, simply replaced the obsolete cross-reference with a new cross-reference to the relevant part of section 112(b).

[32] See Rule at 254 (citing the Senate's Legislative Drafting Manual). Ultimately, the "conforming" label is irrelevant regardless of whether it applies to one or both amendments. A conforming amendment may be substantive or non-substantive, Burgess v. United States, 553 U.S. 124, 135 (2008), and courts give them full effect. See Wash. Hosp. Ctr. v. Bowen, 795 F.2d 139, 149 (D.C. Cir. 1986).

one is no more substantive than the other. There is simply no good reason to ignore the Senate Amendment, which plainly authorizes EPA's regulation.

Furthermore, even if one ignores the Senate's 1990 amendment to section 111(d), the House-amended text is not "clear" and Petitioners' reading of it is far from "indisputable." 791 F.3d at 78. Read literally, the House's text in fact affirmatively authorizes the Rule, permitting regulation of any pollutant (including CO_2) that is not a criteria pollutant. Following the syntax of the provision, the text states that EPA shall regulate air pollutants "**[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 emitted from a source category which is regulated under section 7412." 42 U.S.C. § 7411(d) (emphasis and numbering added). Because (at least) the first of the alternative conditions is satisfied – that is, because "air quality criteria have not been issued" for CO_2 – the literal reading supports EPA's authority to issue the Rule.

While EPA and Petitioners are in agreement that this literal reading is not what Congress intended, see Rule at 259, EPA was not required to adopt Petitioners' preferred resolution of the resulting ambiguity. Under Petitioners' non-literal construction of section 111(d), EPA would be barred from regulating thereunder any pollutant emitted by a source category under section 111(d) once a single hazardous pollutant emitted from that source category was regulated under section 112. As virtually every category of sources emits some hazardous pollutant regulated under section 112, this reading would essentially render section 111(d) meaningless. As

EPA has explained, Rule at 249-51, section 111(d) is one leg of a tripod of CAA programs designed to cover the full range of potentially dangerous emissions from the full range of sources. Petitioners take the view that Congress, without comment, removed this leg from the tripod in 1990, rendering section 111(d) practically moot. There is absolutely no indication in the legislative history or elsewhere that either house of Congress sought to so dramatically reduce the scope of the section 111(d) program in 1990 through a conforming amendment.

Rather, as EPA explained (Rule at 251-279), the most reasonable reading of the House's amendment to section 111(d) is that – like the Senate amendment – it authorizes EPA to regulate emissions of a non-hazardous pollutant like CO_2. This is not only a reasonable reading of an ambiguous text, but it avoids creating a conflict within the statute, consistent with the Supreme Court's admonitions in Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2214 (2014).

Because EPA has substantial arguments that the Senate's amendment to section 111(d) should not be ignored, and that even the House amendment alone is most reasonably read as not barring regulation of a non-hazardous pollutant like CO_2, Petitioners are not "clearly" and "indisputably" entitled to issuance of a writ.

B. EPA Has Authority to Determine the Degree of Emission Limitation Achievable Through the Best System of Emission Reduction.

Similarly, State Petitioners are not clearly and indisputably entitled to any relief with respect to the manner in which EPA determined and applied the "best system of

emission reduction" for purposes of setting achievable emission guidelines. See States' Pet. at 22-29. In the Rule, EPA established appropriate emission guidelines that fully comport with its authority under section 111.

Section 111 specifically provides EPA with the responsibility to determine for categories of sources the "degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. §§ 7411(d), 7411(a)(1). The word "system" is broad in nature. It is defined as "a set of things or parts forming a complex whole." Rule at 296 & n.314 (citing Oxford Dictionary of English (3d ed.) (2010). Applying this plain meaning, a "system of emission reduction" readily encompasses a variety of feasible and cost-effective pollution reduction measures that regulated sources are able to implement in order to achieve the emission limits in the emission guidelines, including those measures considered and applied in the Rule. Contrary to Petitioners' characterization (States' Pet. at 22), EPA's authority under section 111 is not "unmitigated." For example, the best system of emissions reduction must be "achievable" by regulated sources. 42 U.S.C. § 7411(d). It must also be "adequately demonstrated," and must take into consideration, among other things, "costs," "energy requirements," and "nonair quality health and environmental impacts." Id.

In identifying the "best system of emission reduction" for CO_2 for power plants, EPA appropriately took into account a number of salient facts. Of particular note, EPA recognized that unlike other industries where sources make operational

decisions independently, electric generation resources operate in a complex grid system that is physically interconnected and operated on an integrated basis across large regions, and that requires regular cooperation and coordination of different generating units. Rule at 82-89. For this reason, replacing generation from high-emitting power plants with generation from zero- or low-emitting plants is a common, feasible, and well-demonstrated pollution control strategy within the power industry, and such generation-shifting is frequently utilized as a component of EPA regulation of this industry under other provisions of the CAA. Id. at 87-88, 372-75.[33]

Contrary to Petitioners' hyperbole, States' Pet. at 25, EPA has not recently "discovered" authority in section 111 that it lacks. Not only has Section 111 been an integral part of the CAA since 1970, the Supreme Court has already specifically concluded that section 111 is precisely the appropriate vehicle for the regulation of greenhouse gas emissions from power plants. AEP, 131 S. Ct. at 2537-40. As the Supreme Court emphasized in AEP, Congress entrusted and designated EPA as the "expert administrative agency" "best suited to serve as primary regulator of greenhouse gas emissions" and to determine "the appropriate amount of regulation." Id. at 2538-40. Congress, through section 111, directed EPA to engage in the "complex balancing" of weighing environmental benefits with the costs and

[33] Examples include the Title IV Acid Rain Program, EPA's NOx state implementation plan rule, the Cross-State Air Pollution Rule, and the Regional Haze trading programs.

considering "our Nation's energy needs." Id. at 2539. That is precisely what EPA has done in the Rule.

In summary, Petitioners fall far short of demonstrating any entitlement to an extraordinary writ prior to publication of the Rule. The time for the parties to present their merits arguments, and for the Court to consider them, is when Congress determined that the Rule could be challenged – after it is published.

CONCLUSION

The petitions for an extraordinary writ should be dismissed as premature under the judicial review procedures specified in the CAA. Even if the petitions were not so barred, issuance of the requested extraordinary writs would be wholly unwarranted.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I certify that the EPA'S CORRECTED RESPONSE IN OPPOSITION was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, under Circuit Rule 21(d), four paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Brief of Respondent EPA was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners and Intervenors.

<u>/s/ Eric G. Hostetler</u>
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Dated: August 31, 2015