ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

CITY OF NEW YORK, *et al.*,

Intervenors for Respondent.

On Petition for Review of EPA Action

FINAL BRIEF OF AMICI CURIAE TRADE ASSOCIATIONS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), *amici* state that they are aware of no other planned *amicus* briefs in support of petitioners.

Under Federal Rule of Appellate Procedure 29(c), *amici* state that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and *amici* appearing in this Court are listed in the brief for petitioners.

References to the settlement agreement at issue and related cases also appear in the brief for petitioners.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, *amici* state as follows:

1. The Chamber of Commerce of the United States of America (the "Chamber"), the world's largest business federation, represents 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

2. The National Association of Manufacturers (the "NAM") is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 States. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

3. The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is an $812 billion enterprise and a key element of the nation's economy. ACC has no parent corporation, and no publicly held company has 10% or greater ownership in ACC.

4. The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. ACA has no parent corporation, and no publicly held company has 10% or greater ownership in ACA.

5. The American Fuel and Petrochemical Manufacturers ("AFPM") is a national trade association of more than 400 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. AFPM has no parent corporation, and no publicly held company has 10% or greater ownership in AFPM.

6. The American Iron and Steel Institute ("AISI") is a trade association comprised of 20 member companies, including integrated and electric furnace steelmakers, and approximately 125 associate members who are suppliers to or customers of the steel industry. AISI serves as the voice of the North American steel industry in the public policy arena. AISI has no parent corporation, and no publicly held company has 10% or greater ownership in AISI.

7. The Council of Industrial Boiler Owners ("CIBO") is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws,

and regulations. CIBO has no parent corporation, and no publicly held company has 10% or greater ownership in CIBO.

8. The Independent Petroleum Association of America ("IPAA") is a trade association representing more than ten thousand independent oil and natural gas producers and service companies across the United States, serving as a voice for the exploration and production segment of America's oil and natural gas industry. IPAA has no parent corporation, and no publicly held company has 10% or greater ownership in IPAA.

9. The Metals Service Center Institute ("MSCI") is a non-profit trade association serving the industrial metals industry. MSCI's 400 member companies have over 1,500 locations throughout North America. MSCI has no parent corporation, and no publicly held company has 10% or greater ownership in MSCI.

10. Pacific Legal Foundation ("PLF") is a public interest legal foundation that litigates for limited government, private property rights, free enterprise, and individual rights. PLF is a nonprofit, tax-exempt organization formed to litigate cases nationwide in the public interest. It has no parent corporation, and no publicly held company has 10% or greater ownership in PLF.

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GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
HAP	Hazardous Air Pollutant

INTEREST OF *AMICI CURIAE*

In the rule proposed in fulfillment of the settlement agreement challenged by petitioners, the Environmental Protection Agency ("EPA") has sought to regulate and dramatically reduce greenhouse gas emissions. *Amici* are the country's most significant trade associations, representing a diverse array of businesses in all economic sectors, and a leading public interest legal foundation. All have a substantial interest in the proposed rule.

- The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber's members include fuel manufacturers and refiners, electricity customers, and electricity producers, such as the power plant owners and operators directly impacted by the proposed rule.

- The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. Many of its members buy electrical power in enormous quantities; the proposed rule would dramatically increase electricity's cost while mandating obligations that would make electric service less reliable.

- The American Chemistry Council is a trade association representing the leading companies engaged in the chemistry business. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The chemical industry is a major energy consumer, and is distinctive in that it uses energy inputs as both a fuel and a feedstock to make its products. Chemistry is the nation's top export industry, and energy cost and reliability are critical to its ability to compete in the global economy.

- The American Coatings Association is a trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. Collectively, ACA represents companies with greater than 95% of the country's annual production of paints and coatings. ACA's members are among the nation's

largest consumers of electricity; the proposed rule would dramatically increase electricity's cost while mandating obligations that would make electric service less reliable.

- The American Fuel and Petrochemical Manufacturers is a national trade association of more than 400 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. AFPM members are large consumers of electricity that would be adversely impacted by the proposed rule's effects upon electricity prices and reliability rates. In addition, some of AFPM's members refine petroleum later used by power plants to produce electricity. The proposed rule would increase the cost of producing electricity, forcing some of these power plants out of business and thus reducing AFPM's members' sales.

- The American Iron and Steel Institute is a trade association serving as the voice of the North American steel industry. AISI's members represent over three quarters of both U.S. and North American steel capacity. Making steel requires vast quantities of reliable electric power; the proposed rule would dramatically increase electricity's cost while mandating obligations that would make electric service less reliable.

- The Council of Industrial Boiler Owners is a trade association representing industrial boiler owners and related entities. CIBO promotes the exchange of information about issues affecting industrial boilers. Industrial boilers use enormous amounts of electricity; the proposed rule would dramatically increase electricity's cost while mandating obligations that would make electric service less reliable.

- The Independent Petroleum Association of America is a trade association representing more than ten thousand independent oil and natural gas producers and service companies across the United States. Independent producers develop 95% of the nation's oil and natural gas wells, produce 54% of domestic oil, and produce 85% of domestic natural gas. Most of IPAA's members are small businesses. Small businesses, in particular, may lack the financial wherewithal to survive the diminished demand for oil and natural gas that the proposed rule would effectuate.

- The Metals Service Center Institute is the broadest-based trade association serving the industrial metals industry. It has 400 member companies with over 1,500 locations throughout North America. MSCI's members' manufacturing processes require enormous amounts of electricity; the proposed rule would

dramatically increase electricity's cost while mandating obligations that would make electric service less reliable.

- Pacific Legal Foundation is the largest and most experienced nonprofit public interest foundation of its kind in the United States. For over 40 years, PLF has represented the interests of thousands of supporters nationwide, litigating in support of a reasonable balance between regulatory efforts to protect the environment and the guarantees of individual freedom and property rights. In particular, PLF's Global Warming Project seeks to ensure that government efforts to address global warming not be used as a pretext to undermine liberty.

In 2011, EPA entered into a settlement agreement with several States and other entities obligating it to propose and finalize a rule regulating greenhouse gas emissions from existing power plants. Pursuant to that agreement, the agency recently proposed a rule directing States to establish performance standards for greenhouse gas emissions from existing fossil-fuel fired electric generating units. 79 FR 34,830 (June 18, 2014). Numerous States not party to the settlement agreement petitioned this Court for review, seeking to invalidate the agreement in part and prevent the agency from finalizing the proposed rule, on the ground that the Clean Air Act ("CAA" or "the Act") prohibits EPA from adopting the proposed rule.[1]

Amici have a strong interest in whether EPA's proposed rule is lawful. *Amici*'s members that own or operate power plants are already heavily regulated, including by a 2012 national emission standard for hazardous air pollutants ("HAPs") that, by EPA's own estimate, imposes costs of $9.6 billion per year. 77 FR 9,304, 9,413 (Feb.

[1] Murray Energy Corp. has also sought to block implementation of the proposed rule; its related legal challenges are assigned to the same panel that will hear this petition for review. *See In re Murray Energy Corp.*, No. 14-1112, Dkt. 1522086 (Nov. 13, 2014).

16, 2012). If EPA may impose yet another set of standards on the same facilities, power plants would face additional billions of dollars in compliance costs, shut-downs, and losses of significant investments. *Amici*'s members that produce or refine petroleum or natural gas will see their sales decline precipitously as power plants cut costs or shut down. In addition, many of *amici*'s members are among the nation's largest purchasers of electricity. EPA's proposed rule would dramatically increase electricity's cost while mandating obligations making electric service less reliable. These burdens would reduce American companies' competitiveness in the global marketplace.

Amici take no position on whether this Court has jurisdiction over petitioners' suit. However, should this Court find jurisdiction and reach the merits, *amici* urge the Court to grant the petition for review and hold that the CAA expressly prohibits EPA's proposed rule.

SUMMARY OF ARGUMENT

EPA's proposed rule would require States to establish performance standards for existing power plants under CAA §111(d), 42 U.S.C. §7411(d). Overall, EPA would direct States to substantially reduce carbon emissions. Section 111(d)(1) of the Act, 42 U.S.C. §7411(d)(1), however, precludes EPA from directing States to "establish[] standards of performance for any existing source for any air pollutant … which is … emitted from a source category which is regulated under section 7412 of this title [*i.e.*, CAA §112]." EPA regulates fossil-fuel fired electric generating units

under CAA §112, 42 U.S.C. §7412. Under §111(d)(1)'s express terms, EPA may not adopt the proposed rule.

EPA tries to manufacture ambiguity from clear statutory text by relying on a conforming amendment inadvertently included in the 1990 amendments to the Act. But EPA itself has repeatedly acknowledged that this amendment was a "drafting error," 70 FR 15,994, 16,031 (Mar. 29, 2005), and the U.S. Code's compilers concluded it was impossible to execute and should not be codified, *see* Revisor's Note, 42 U.S.C. §7411. The Senate included the language now relied on by EPA as a technical housekeeping change in an early draft of the bill; as EPA previously explained, when the Senate later acceded to and passed the House's proposed substantive amendments to the Act, congressional staff seem to have forgotten to remove the conforming amendment. EPA claims it must give effect to both §111(d)(1) as codified and the drafting error, but the appropriate response to a drafting error—especially in a provision Congress itself termed non-substantive—is to disregard it, not to use it to distort admitted congressional intent.

Even were EPA correct that it must give effect to both codified §111(d)(1) and the conforming amendment, its proposed rule would still be illegal. A straightforward way exists to give full effect to both §111(d)(1) as written and the conforming amendment: Follow the instructions of each. This approach would prevent EPA from directing States to establish performance standards for sources regulated under §112 (per §111(d)(1) as written) *or* for pollutants listed in §112(b) (per the conforming

amendment). EPA's interpretation—that §111(d)(1) only forbids it to regulate pollutants listed in §112(b) that are *also* emitted from sources regulated under §112—reads the codified language in §111(d)(1) out of the statute while failing to give even the drafting error full effect.

EPA claims deference for its interpretation. But courts defer only when, after applying traditional tools of statutory interpretation, statutory text is unclear. Here, that text is perfectly clear, especially after applying traditional interpretive canons. Furthermore, this Court has expressly held that deference is inappropriate to an agency's interpretation of statutory ambiguity created by a scrivener's error. More fundamentally, EPA deserves no deference as to what law Congress intended to have effect. That is an issue to be decided solely by this Court.

For these reasons, if the Court reaches the merits of the petition for review, it should hold the proposed rule beyond the agency's authority.

ARGUMENT

In 2012, EPA finalized a national emission standard for fossil-fuel fired generating units under CAA §112, 42 U.S.C. §7412. 77 FR 9,304 (Feb. 16, 2012) ("Mercury Rule").[2] Section 112 gives EPA authority to impose strict emissions controls on certain HAPs. The Mercury Rule seeks to reduce emissions of mercury

[2] On November 25, 2014, the United States Supreme Court granted certiorari to review challenges to the Mercury Rule. *Michigan v. EPA*, 2014 WL 3509008 (U.S. Nov. 25, 2014) (No. 14-46) (mem.).

and other air pollutants from fossil-fuel fired generating units by imposing national emissions standards "reflecting the application of the maximum achievable control technology." *Id.* at 9,304.

On June 18, 2014, EPA proposed a rule setting "emission guidelines for states to follow in developing plans to address greenhouse gas … emissions from existing fossil fuel-fired" power plants. 79 FR at 34,832. The notice of proposed rulemaking ("the Notice") invokes the authority of CAA §111(d), 42 U.S.C. §7411(d). *Id.* EPA would direct States to implement plans adopting performance standards for existing fossil-fuel-fired generating units that substantially reduce carbon emissions from these power plants. *Id.* at 34,830, 34,834. By EPA's own admission, the proposed rule will impose enormous and escalating costs on American power producers (and through them on the American public). *Id.* at 34,942-43 (estimating annual compliance costs reaching $5.5 to $7.5 billion in 2020 and $7.3 to $8.8 billion in 2030).

EPA's attempt to regulate existing power plants under both CAA §112 *and* §111(d) contradicts the statute's plain text. Congress expressly precluded the agency from regulating any source category, including fossil-fuel fired power plants, simultaneously under both provisions.

I. EPA'S PROPOSED RULE CONTRADICTS THE ACT'S PLAIN LANGUAGE.

A. Section 111(d)(1) Expressly Precludes EPA's Proposed Rule.

1. Section 111(d)(1) forbids EPA from regulating the same source category under both §112 and §111(d). As codified, §111(d)(1) reads in relevant part:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance *for any existing source for any air pollutant* (i) for which air quality criteria have not been issued or *which is not* included on a list published under section 7408(a) of this title or *emitted from a source category which is regulated under section 7412 of this title* but (ii) to which a standard of performance under this section would apply if such existing source were a new source….

42 U.S.C. §7411(d)(1) (emphases added). The statutory text could not be clearer: EPA may direct States to establish performance standards for air pollutants from existing sources only if, *inter alia*, they are not "emitted from a source category which is regulated under section 7412." *Id.* The Mercury Rule, issued under §112, regulates the same existing sources as EPA's proposed rule. By the terms of the statute, existing sources regulated under §112 cannot be regulated under §111(d).

Both the Supreme Court and EPA have read the statute in exactly this way. In *American Electric Power Co. v. Connecticut*, the Supreme Court stated that "EPA may not employ §7411(d) if existing stationary sources of the pollutant in question are regulated under the … 'hazardous air pollutants' program, §7412. See §7411(d)(1)." 131 S. Ct. 2527, 2537 n.7 (2011). Until this rulemaking, EPA similarly did not doubt §111(d)(1)'s plain meaning. Shortly after the current version of §111(d)(1) was

enacted in the 1990 amendments to the Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990), EPA read that provision as preventing regulation of "air pollutant[s] … emitted from a source category regulated under section 112," and explained that §111(d)(1) did not bar regulation of landfill gas under §111(d) because it "is not emitted from a source category that is actually being regulated under section 112." EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, 1-6 (1995) ("Air Emissions Standards"). In a later final rule, the agency explained that "a literal reading of [§111(d)(1)] is that a standard of performance under section 111(d) cannot be established for any air pollutant—[hazardous] and [non-hazardous]—emitted from a source category regulated under section 112." 70 FR at 16,031[3]; *see also id.* ("[U]nder our interpretation, if source category X is 'a source category' regulated under section 112, EPA could not regulate HAP or non-HAP from that source category under section 111(d)").

2. This straightforward interpretation accords with §111(d)(1)'s purpose. When amending the CAA, Congress left undecided whether power plants should be regulated under §111(d) or §112. The 1990 CAA amendments required EPA to conduct a study of "the hazards to public health reasonably anticipated to occur as a result of emissions by" power plants "after imposition of the requirements of" the

[3] This Court vacated that rule on other grounds in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

Act and other environmental laws, and instructed EPA to regulate power plants under §112 only if it "finds such regulation is appropriate and necessary after considering the results of the study." 42 U.S.C. §7412(n)(1)(A). EPA has observed that Congress's unique instruction to assess the impact of other sources of regulation before deciding to regulate power plants under §112 "reveals Congress' recognition that [power plants] are a broad, diverse source category that is subject to numerous CAA requirements, … and that such sources should not be subject to duplicative or otherwise inefficient regulation." 70 FR at 15,999; *see also id.* at 16,000 (noting both "Congress's … recognition that [power plants] are subject to numerous CAA provisions and its intent to avoid duplicative and unnecessary regulation"); 136 Cong. Rec. H12911, H12934 (daily ed. Oct. 26, 1990) (statement of Rep. Oxley) (conferees adopted §112(n) in part "because of the emission reductions that will be achieved and the extremely high costs that electric utilities will face under other provisions of the new … amendments").

Amended §111(d) comports with this broader purpose. The CAA amendments for the first time provided for listing source categories (rather than simply air pollutants) under §112. *Compare* 42 U.S.C. §7412 (1988), *with* Pub. L. No. 101-549, 104 Stat. at 2531, §301 (amending same). Congress was concerned about double-regulation of source categories—a concern with special significance for power plants, which Congress recognized "should not be subject to duplicative or otherwise inefficient regulation." 70 FR at 15,999. Because Congress "did not want to subject

[power plants] to duplicative or overlapping regulation," it chose to "change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," thereby preventing double-regulation of existing power plants under both §111(d) and §112. *Id.* at 16,031.

Congress's decision prohibiting double-regulation of existing power plants makes sense. Imposing an additional set of regulations under §111 would make operating power plants much more expensive. This increased cost would be especially difficult for existing power plants to bear, both because of their limited future life expectancy and the high cost of retrofitting already-constructed plants to comply with mandates created after they were designed. (In contrast, because §111(d)(1) applies only to "existing source[s]," it does not restrict EPA's regulation of any new source.) These costs are a heavy price to pay for regulation under §111(d), which, as petitioners demonstrate, was never intended to serve as a broad source of regulatory authority. *See* Pet. Br. 5, 34-35.

Congress's judgment that double-regulation's costs were not worth the benefits is supported by the fact that, as EPA has itself explained, emission controls of hazardous pollutants under §112's strict "maximum achievable control technology" standard has the ancillary effect of reducing emissions of other non-hazardous pollutants that might otherwise be regulated under §111(d). For example, in issuing the Mercury Rule, EPA explained that reducing emissions of hazardous pollutants

from power plants would also reduce emissions of non-hazardous pollutants, including carbon dioxide (the principal greenhouse gas the Notice at issue seeks to regulate, 79 FR at 34,830). 77 FR at 9,428-32. Likewise, when setting §112 standards for cement kilns and certain boilers, EPA has explained that "setting technology-based standards for" one pollutant "will result in significant reductions … of other pollutants." 76 FR 15,608, 15,643 (Mar. 21, 2011).

B. Section 111(d)(1) Is Not Ambiguous.

In the related *Murray Energy* cases pending before this Court, *see supra* n.1, EPA's litigation counsel suggests that §111(d)(1)'s text is facially ambiguous. *See* EPA Prohibition Response Br. in No. 14-1112 at 28-30, Dkt.1520381 (Nov. 3, 2014). This made-for-litigation position should be rejected for two related reasons.

1. First, EPA's counsel's new position is contrary to the agency's stated views. Less than a decade ago, EPA concluded that the "literal reading" of §111(d)(1) "is that a standard of performance under section 111(d) cannot be established for any air pollutant … emitted from a source category regulated under section 112." 70 FR at 16,031. In the legal memorandum accompanying the *very Notice at issue*, EPA stated that §111(d)(1) "appears by its terms to preclude from section 111(d) any pollutant if it is emitted from a source category that is regulated under section 112."[4] EPA may

[4] EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* 22 (2014) ("Legal Memorandum"), http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf. Although EPA's memorandum argued that §111(d)(1) is

"'not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the [agency] itself'" in its rulemaking. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 714 n.1 (2001).

The Supreme Court has endorsed this "literal" reading of §111(d). In *American Electric Power*, the Court interpreted §111(d)(1) as creating "an exception" that forbade "EPA [to] employ §7411(d) if existing stationary sources of the pollutant in question are regulated under the … 'hazardous air pollutants' program, §7412." 131 S. Ct. at 2537 n.7. The Supreme Court found no ambiguity in §111(d)(1).

2. Second, there is good reason for EPA's failure to suggest the interpretation of §111(d) its lawyers now articulate: that interpretation is grammatically flawed. EPA's new interpretation divides §111(d)(1) into three clauses:

> [EPA may require states to submit plans establishing standards for] any air pollutant [1] for which air quality criteria have **not** been issued, or [2] which is **not** included on a list published under section 7408(a) of this title or [3] emitted from a source category which is regulated under section 7412 of this title….

EPA Prohibition Response Br. in No. 14-1112 at 29, Dkt.1520381 (quoting and altering §111(d)(1)). The statute is ambiguous, EPA's lawyers argue, because the first two clauses include the word "not," but the third fails to include that word, and it is therefore purportedly unclear whether the word "not" from the second clause should carry over to the third clause.

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ambiguous, it did so on the basis of the scrivener's error discussed *infra* pp.16-21, not because the text of §111(d)(1) as codified is ambiguous. *See* Legal Memorandum, *supra*, 23.

This interpretation fails to respect the parallel structure Congress created in §111(d). On the proposed reading, two of §111(d)(1)'s three clauses are introduced by the relative pronoun "which" ("for which air quality criteria have not been issued" and "which is not included on a list published under section 7408(a)"), but the third clause ("emitted from a source category which is regulated under section 7412 of this title") oddly lacks its pronoun. If Congress intended this interpretation, surely it would have written "*which is* emitted from a source category which is regulated under section 7412 of this title." By contrast, the reading adopted by the Supreme Court—and by EPA until this litigation—preserves Congress's parallel structure, because §111(d)(1)'s second relative pronoun "which" serves as the subject of both the two verb phrases that follow it ("is not included" and "is not … emitted"). *See, e.g.*, *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 (D.C. Cir. 2004) (finding support in "[t]he parallel structure" of the statute).

Moreover, no plausible policy basis exists for the strained reading EPA's lawyers now proffer. In fact, the newly-minted interpretation contradicts the purpose EPA has found animated Congress's amendment of §111(d)(1). As EPA has explained, the 1990 amendment prevents double-regulation of power plants by precluding "regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." 70 FR at 16,031. Counsel's alternative reading, however, transforms §111(d)(1) into an affirmative *mandate* to EPA to regulate pollutants under §111(d) precisely *because* they are also regulated

under §112. EPA's proposed gloss would transform the statute into a means of *guaranteeing* duplicative regulation—a mandate without any valid policy justification and exactly the opposite of what EPA previously found to be Congress's goal.

EPA's counsel also bizarrely suggests that EPA is prohibited from regulating a pollutant under §111(d) only if the pollutant (1) is subject to air quality criteria, *and* (2) is included on a list under §108, *and* (3) is emitted from a source category regulated under §112. EPA Prohibition Response Br. in No. 14-1112 at 28-29, Dkt.1520381. *See also* Amicus Br. of NRDC et al. in No. 14-1112 at 8, Dkt.1522612 (Nov. 17, 2014). This reading permits EPA to double-regulate sources already subject to extensive regulation under two of §111(d)(1)'s three categories simply because they are not regulated under the third. EPA's counsel does not explain why Congress might have wished such a strange result, and the agency has previously read the statute in the opposite way. Air Emissions Standards, *supra*, 1-6 (landfill gas not subject to §111(d)(1) because it "is not a pollutant which satisfies *any* of these criteria" (emphasis added)). In fact, this Court, relying on the interpretation EPA has consistently adopted, found a regulation beyond EPA's §111(d) power simply because the source category was regulated under §112, without inquiring whether 111(d)(1)'s other two criteria were satisfied. *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008).

In any event, purported ambiguity as to whether all three statutory conditions must be satisfied does not support EPA's completely unrelated gloss (*i.e.*, that EPA is prohibited only from regulating pollutants listed under §112(b) emitted from sources

regulated under §112). "It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'" *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment).[5]

II. EPA CANNOT RELY ON AN UNCODIFIED DRAFTING ERROR TO ALTER §111(d)(1)'s PLAIN MEANING.

In its Legal Memorandum accompanying the Notice, EPA found §111(d)(1) ambiguous due to an anomalous conforming amendment buried deep in the 1990 CAA amendments. Legal Memorandum, *supra*, 23. But as EPA has acknowledged on multiple occasions, this conforming amendment is a "drafting error," *see infra* p.21, such as this Court has previously ruled fails to create statutory ambiguity, *see Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). Accordingly, the Court should disregard the conforming amendment and follow Congress's clear intent as expressed in §111(d) as codified. Alternatively, the Court should give meaning to both codified §111(d) and the conforming amendment by forbidding EPA from

[5] Some of EPA's *amici* argue that §111(d)(1) can be read "to preclude EPA from establishing emission guidelines for a given pollutant only when the emitting source category is 'regulated under section 112' for the *pollutant in question*, *i.e.*, the pollutant that is the candidate for regulation under section 111(d)." Amicus Br. of NRDC et al. in No. 14-1112 at 9-10, Dkt.1522612. But §111(d)(1) forbids EPA to regulate "*any* air pollutant … emitted from a source category which is regulated under section 7412." §111(d)(1) (emphasis added). EPA has properly rejected reading §111(d)(1)'s plain text to limit the scope of the term "any." *See* 70 FR at 16,031; *see also New Jersey*, 517 F.3d at 582 ("In the context of the CAA, 'the word "any" has an expansive meaning.'").

regulating sources regulated under §112 (per codified §111(d)(1)) *or* pollutants listed under §112(b) (per the conforming amendment).

A. The Conforming Amendment May Not Be Enforced.

1. The Conforming Amendment Is A Scrivener's Error.

The pre-1990 version of the CAA instructed EPA to direct States to establish existing-source performance standards "for any air pollutant … for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or 7412(b)(1)(A)." 42 U.S.C. §7411(d)(1)(A)(i) (1988). The last cross-referenced subsection, §7412(b)(1)(A), required EPA to list "each hazardous air pollutant for which [it] intends to establish an emission standard under this section."

The 1990 CAA amendments replaced old §7412(b)(1)(A) with new §7412(b)(1) (setting out a list of hazardous air pollutants) and §7412(b)(2)-(4) (describing the process for modifying new §7412(b)(1)'s list). Because the cross-reference to old §7412(b)(1)(A) was no longer valid, the Senate included in its draft of the 1990 amendments, under the heading "Conforming Amendments," a provision stating as follows: "Section 111(d)(1) of the Clean Air Act is amended by striking '112(b)(1)(A)' and inserting in lieu thereof '112(b).'" Pub. L. No. 101-549, 104 Stat. at 2574, §302(a). As the Senate Legislative Drafting Manual explains, a "conforming amendment is a provision of law that is necessitated by the substantive amendments or provisions of the bill," and includes "amendments, such as amendments to the table of contents, that formerly may have been designated as clerical amendments." U.S. Senate,

Legislative Drafting Manual §126(b)(2)(A) (Feb. 1997). Thus, the Senate amendment was intended solely to maintain the *status quo* by updating the cross-reference to §112 to reflect the substantive changes occurring elsewhere in the statute.

In contrast, as EPA has recognized, the House adopted an amendment that "*substantively* amended section 111(d)." 70 FR at 16,031 (emphasis added). Although the pre-1990 version of §111(d) referenced a list of specific pollutants under old §7412(b)(1)(A), the House amendment prohibited EPA from using §111(d) to regulate any pollutant "emitted from a source category which is regulated under section 112." Pub. L. No. 101-549, 104 Stat. at 2467, §108(g). This formulation appeared in the final bill passed by the House—in a substantive provision rather than a conforming amendment. 136 Cong. Rec. H2771-03 (daily ed. May 23, 1990); *see also* 70 FR at 16,031 ("the House amendment is not a conforming amendment"). As EPA has previously explained, "the House sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," because "the House did not want to subject [power plants] to duplicative or overlapping regulation." 70 FR at 16,031.

At conference, which lasted all night,[6] the House position—that EPA may only regulate a source category under §111(d) if the source is not regulated under §112—

[6] *See The Clear Skies Initiative: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 108th Cong. (2003) (remarks of Rep. Tauzin).

prevailed over the Senate's proposal to maintain the *status quo*. *See* H.R. Rep. No. 101-952, at 1 (1990) (Conf. Rep.); 70 FR at 16,030-31. The revised bill, which later became law, included the substantive House amendment to §111(d). However, the conferees neglected to delete the Senate amendment—hardly surprising, as that provision was buried in a section entitled "Conforming Amendments" along with numerous other clerical amendments. *See* H.R. Rep. No. 101-952, at 182-83; S. 1630, 101st Cong. §305 (1990). Congressional staff editing the bill apparently did not realize the Senate amendment had been made irrelevant by the House amendment now incorporated into the bill. *See* Air Emissions Standards, *supra*, at 1-5 (Senate amendment "is a simple substitution of one subsection citation for another, without consideration of other amendments of the section in which it resides"). Due to this drafting error, the final bill approved by both houses of Congress and signed by the President contained both the House's substantive amendment and the Senate's conforming amendment.

As EPA has acknowledged, the Senate amendment's continued inclusion as a conforming amendment was an oversight: By amending the same text the Senate amendment purported to change in a different manner, the prevailing House amendment rendered the Senate amendment both unnecessary and impossible to execute. 70 FR at 16,031; *see also* Revisor's Note, 42 U.S.C. §7411 (Senate amendment "could not be executed, because of the prior amendment"). EPA has also recognized that the House amendment, not the Senate amendment, accords with the 1990

changes giving EPA power to list source categories, not just air pollutants. Air Emissions Standards, *supra*, 1-5.

Although EPA has never disputed that the Senate amendment is a scrivener's error, several of its *amici* in the related *Murray Energy* proceedings do.[7] For instance, some *amici* argue the Senate amendment is not a scrivener's error because it does not leave §111(d) with "'no plausible interpretation.'" Amicus Br. of NRDC et al. in No. 14-1112 at 7, Dkt.1522612. But "no plausible interpretation" can replace the same language in §111(d)(1) with both the House amendment's substantive language and the Senate amendment's conforming language. Furthermore, EPA itself has opined that, in light of Congress's purpose of avoiding double-regulation of power plants, "it is hard to conceive that Congress would have … retained the Senate amendment." 70 FR at 16,031. In any event, this Court does not demand that a statute present "no plausible interpretation" before it will find a scrivener's error. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1042 (D.C. Cir. 2001) (per curiam) ("theory [that contested statutory language was] scrivener's error [and should be ignored] constituted 'best reading' of statute notwithstanding that statute as written could be coherently explained").[8]

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[7] Because EPA does not contest that the Senate amendment's inclusion in the final bill was a drafting error, *amici*'s argument to the contrary is waived, and this Court need not consider it. *See New York v. Reilly*, 969 F.2d 1147, 1154 n.11 (D.C. Cir. 1992).

[8] Other *amici* argue that the House amendment is no more substantive than the Senate amendment because the House amendment appears under the caption "Miscellaneous

2. No Weight Can Be Given To The Scrivener's Error.

EPA has at least three times recognized that the Senate amendment's inclusion in the 1990 CAA amendments is merely a "drafting error," 70 FR at 16,031; Legal Memorandum, *supra*, 21, and that the House provision is "the correct amendment," Air Emissions Standards, *supra*, 1-5. It has even acknowledged such a "drafting error" ordinarily "should not be considered." 70 FR at 16,031. But instead of disregarding the scrivener's error and complying with the substantive House amendment, the EPA has "attempt[ed] to give effect to both the House and Senate amendments, as they are both part of the current law." *Id.*

EPA misunderstands the scrivener's error doctrine. Where a drafting error is identified, a court or agency *must* give effect to the "intention of the drafters, rather than the [statutory] language." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). This Court has acknowledged the unfortunate but indisputable fact that, "in such matters as the revision and recodification of earlier legislation, … some errors will inevitably creep" in, and has explained that it "need not and ought not translate what is essentially a clerical oversight into a congressional intention." *United States v. Wallace & Tiernan, Inc.*, 349 F.2d 222, 226 (D.C. Cir. 1965). This Court has routinely disregarded drafting errors, and in particular has done so in the context of erroneous

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Guidance." Amicus Br. of State of N.Y. et al. in No. 14-1112 at 9, Dkt.1521617 (Nov. 10, 2014). But the fact that an amendment is "miscellaneous" does not bear on whether it is substantive or conforming. If the House amendment were a conforming amendment, it would have been so classified, like the Senate amendment.

cross-references. *See Appalachian Power*, 249 F.3d at 1041, 1043-44. Accordingly, EPA should have disregarded the Senate amendment and given effect solely to the House amendment.

That the Senate amendment is merely a conforming amendment makes this conclusion all the more compelling. This Court has recognized that Congress is unlikely to make a "radical alteration" to a statutory scheme in a conforming amendment. *Boorda v. Subversive Activities Control Bd.*, 421 F.2d 1142, 1145 n.11 (D.C. Cir. 1969); *see also Dir. of Revenue v. COBANK ACB*, 531 U.S. 316, 324 (2001) (declining to infer that Congress made a "radical … change" to statutory scheme in ""technical and conforming amendments"").[9] Giving effect to the Senate conforming amendment rather than the House substantive amendment, thereby vitiating Congress's admitted intent to "change the focus of section 111(d)," 70 FR at 16,031, would work precisely such a "radical alteration." *Boorda*, 421 F.2d at 1145 n.11.

In *Murray Energy*, EPA's counsel urges the Court to ignore that Congress designated the Senate amendment merely a conforming provision, and criticizes reliance on "heading[s]." EPA Prohibition Response Br. in No. 14-1112 at 27, Dkt.1520381. But the Supreme Court has relied on headings demonstrating that a particular provision is merely a conforming amendment. *See COBANK*, 531 U.S. at

[9] The Office of Law Revision Counsel, an office within the Legislative Branch, routinely disregards conforming amendments that cannot be executed. Pet. Br. 43-44 & nn.9-10.

324. The Supreme Court has also made clear that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text." *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991). Thus, even if the Senate amendment could make §111(d) ambiguous (which it cannot), the amendment's heading would resolve that ambiguity by demonstrating the amendment is merely a conforming provision and therefore unlikely to make the "radical alteration" EPA urges. *Boorda*, 421 F.2d at 1145 n.11.

B. The House Amendment Must Be Given Effect Because The Two Amendments Can Be Reconciled.

Even if EPA were correct that the Senate amendment must be given effect, the proposed rule would still be impermissible. That is because the House and Senate amendments can *both* be given effect by proscribing §111(d)(1) regulation of *either* source categories regulated under §112 (per the House amendment) *or* air pollutants listed under §112(b) (per the Senate amendment).

"When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Here, assuming for the sake of argument the Senate's amendment is good law, EPA must give full effect to both the House and Senate amendments because they "are capable of co-existence." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The House amendment prohibits EPA from regulating any pollutant—whether hazardous or non-hazardous—from a source regulated under §112, while the Senate amendment

prohibits EPA from regulating any hazardous air pollutant listed in §112(b). These two amendments can be fully reconciled by prohibiting EPA from regulating under §111(d) hazardous pollutants from any existing source *and* non-hazardous pollutants from source categories regulated under §112.

By contrast, EPA's proffered interpretation gives full effect to neither of the two amendments to §111(d). Instead, EPA artificially narrows the restriction on its authority so that §111(d) regulation is permitted unless both the pollutant *and* the source category are subject to regulation under §112. *See* 70 FR at 16,031; Legal Memorandum, *supra*, 26-27. EPA admits its approach "does not give full effect to the House's language." 70 FR at 16,032. In fact, the agency's interpretation does not even "give[] some effect to both amendments," as EPA claims, *id.*, because it effectively reads the House amendment out of the statute. Before 1990, §111(d)(1) forbade EPA to regulate under §111(d) all hazardous pollutants listed in §112. The House intended its amendment to expand §111(d) to "preclude regulation of those pollutants that are emitted from a particular source category … regulated under section 112." *Id.* at 16,031. But under EPA's reading of the amended statute, §111(d)(1)'s relevant language still precludes regulation only of hazardous pollutants listed under §112. The only change is that §111(d)(1)'s preclusive scope, rather than expanding, has *contracted* to forbid regulation only of *some* §112-listed hazardous pollutants (those emitted from a source category also regulated under §112). EPA's reading even fails to give the Senate amendment its intended effect of maintaining the

status quo, because under EPA's approach §111(d)(1) only prohibits regulation of some pollutants listed under §112. EPA therefore reads the 1990 amendments to have somehow *broadened* its authority under §111(d) even though that was concededly the intent of *neither* the Senate nor House amendment.

III. EPA'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE.

In the related *Murray Energy* proceedings, EPA's counsel also suggested that this Court must defer to EPA's interpretation of §111(d)(1) under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). EPA Prohibition Response Br. in 14-1112 at 30, Dkt.1520381. Even putting aside the fact that the arguments being advanced on EPA's behalf in this litigation are inconsistent with EPA's prior reading of the Act, this claim is incorrect: EPA is entitled to no deference as to §111(d)(1)'s meaning.

In the first place, the statutory text plainly forbids EPA's regulation. "If the relevant statutory language is plain but is inconsistent with … regulations, [this Court] must hold the regulations invalid." *Am. Fed'n of Gov't Emps. v. Gates*, 486 F.3d 1316, 1321-22 (D.C. Cir. 2007). For the reasons given above, the statutory text here is clear: §111(d)(1) does not permit EPA to require States to establish existing-source performance standards "for any air pollutant … which is … emitted from a source category which is regulated under section 7412 of this title." The Senate amendment's drafting error does not bring *Chevron* into play. Before affording *Chevron* deference, courts "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *NRDC v. Browner*, 57

F.3d 1122, 1125 (D.C. Cir. 1995). Because application of the traditional scrivener's error doctrine resolves any possible ambiguity and leaves Congress's intent clear, EPA may not receive deference.

More fundamentally, *Chevron* is inapplicable to the question of how to reconcile the Senate amendment's "drafting error" with §111(d)(1) as codified. This Court does "not give an agency alleging a scrivener's error the benefit of *Chevron* step two deference," "[l]est it 'obtain a license to rewrite the statute.'" *Appalachian Power*, 249 F.3d at 1043-44. Instead, "'the agency may deviate no further from the statute than is needed to protect congressional intent.'" *Id.* at 1044. As discussed above, even if Congress could be presumed to have wanted to give effect to both 1990 amendments to §111(d)(1), that would not allow EPA to read out of the statute the House amendment, which sought to "change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category … regulated under section 112." 70 FR at 16,031.

Indeed, *Chevron* has no applicability at all here because any "ambiguity" concerns only *what law* Congress intended to have effect. As this Court has made clear, "'the existence of ambiguity is not enough per se to warrant deference to the agency's interpretation.'" *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 504 (D.C. Cir. 2013). Rather, "[t]he ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *Id.* After all, "[c]ourts defer to an agency's reasonable construction of an

ambiguous statute because [they] presume that Congress intended to assign responsibility to resolve the ambiguity to the agency." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring in the judgment). But "when Congress assigns to an agency the responsibility for deciding whether" a particular source may be regulated, "it does not do so by simultaneously saying that [the source] should and that it should not" be regulated. *Id.* Such conflicting commands are the product of a breakdown in the legislative process, not a legislative decision to delegate. *Id.* Deferring due to Congress's failure to remember an unnecessary technical amendment would give EPA authority Congress never intended it to have.

CONCLUSION

For the foregoing reasons, if the Court reaches the merits of this case, it should hold EPA's proposed rule unlawful.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Garamond Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 6,979 words exclusive of the statement regarding separate briefing, certificate as to parties, rulings, and related cases, Rule 26.1 disclosure statement, table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The undersigned used Microsoft Word 2007 to compute the count.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. I also caused the foregoing to be served via Federal Express on counsel for the following parties at the following addresses:

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