ORAL ARGUMENT HELD APRIL 16, 2015
DECISION ISSUED JUNE 9, 2015

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

No. 14-1112: IN RE: MURRAY ENERGY CORPORATION
Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A. MCCARTHY,

Respondents.

On Petition for Writ of Prohibition and On Petition for Review

JOINT PETITION OF MURRAY ENERGY CORPORATION AND PEABODY ENERGY CORPORATION FOR REHEARING OR REHEARING EN BANC, OR IN THE ALTERNATIVE, MOTION FOR A STAY OF THE MANDATE

Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Tel: (216) 479-8646
geoffrey.barnes@squirepb.com
Counsel for Murray Energy

Tristan L. Duncan
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
Tel: (816) 474-6550
tlduncan@shb.com
Counsel for Peabody Energy Corporation

Laurence H. Tribe
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
Tel: (617) 495-1767
tribe@law.harvard.edu
and
Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
jmassey@masseygail.com
Counsel for Peabody Energy Corporation

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner and Intervenor-Petitioner provide the following disclosures:

Murray Energy Corporation ("Murray Energy") is a corporation organized and existing under the laws of the State of Ohio. No publicly-held corporation holds an ownership interest of 10 percent or more of Murray Energy. Murray Energy Holdings Co. is Murray Energy's parent corporation. Murray Energy is the largest privately-owned coal company in the United States and the fifth largest coal producer in the country, with twelve active coal mining complexes in six States.

Peabody Energy Corp. ("Peabody") is a publicly-traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU." Peabody has no parent corporation and no publicly held corporation owns more than 10% of Peabody's outstanding shares. Peabody is the world's largest private-sector coal company and a global leader in sustainable mining and clean coal solutions. The company serves metallurgical and thermal coal customers in nearly thirty countries on five continents.

CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, Petitioner and Intervenor-Petitioners state as follows:

(A) Parties, Intervenors, and Amici:

The parties in this case are Murray Energy Corporation (Petitioner); U.S. Environmental Protection Agency (Respondent); and Regina A. McCarthy, Administrator, U.S. Environmental Protection Agency (Respondent); the State of West Virginia (Intervenor); the State of Alabama (Intervenor); the State of Alaska (Intervenor); the State of Arkansas (Intervenor); the State of Indiana (Intervenor); the State of Kansas (Intervenor); the Commonwealth of Kentucky (Intervenor); the State of Louisiana (Intervenor); the State of Nebraska (Intervenor); the State of Ohio (Intervenor); the State of Oklahoma (Intervenor); the State of South Dakota (Intervenor); the State of Wisconsin (Intervenor); the State of Wyoming (Intervenor); National Federation of Independent Business (Intervenor); Utility Air Regulatory Group (Intervenor); Peabody Energy Corporation (Intervenor); the City of New York (Intervenor); the Commonwealth of Massachusetts (Intervenor); the District of Columbia (Intervenor); Environmental Defense Fund (Intervenor); Natural Resources Defense Council (Intervenor); Sierra Club (Intervenor); the State of California (Intervenor); the State of Connecticut (Intervenor); the State of Delaware (Intervenor); the State of Maine (Intervenor); the State of Maryland (Intervenor); the State of New Mexico (Intervenor); the State of New York (Intervenor); the State of Oregon

(Intervenor); the State of Rhode Island (Intervenor); the State of Vermont (Intervenor); and the State of Washington (Intervenor). Amici include the State of South Carolina; National Mining Association; American Coalition for Clean Coal Electricity; American Chemistry Council; American Coatings Association, Inc.; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; the State of New Hampshire; Chamber of Commerce of the United States of America; Clean Wisconsin; Council for Industrial Boiler Owners; Michigan Environmental Council; Independent Petroleum Association of America; Ohio Environmental Council; Metals Service Center Institute; Calpine Corporation; National Association of Manufacturers; Jody Freeman; and Richard J. Lazarus.

(B) Rulings Under Review:

Under review in this case are a petition for an extraordinary writ, No. 14-1112, and a petition to review an EPA legal conclusion, No. 14-1151.

(C) Related Cases:

West Virginia v. EPA, No. 14-1146 (petition to review EPA settlement).

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INTRODUCTION AND RULE 35(b)(1) STATEMENT

This proceeding challenges actions by the United States Environmental Protection Agency (EPA) that threaten the survival of an unprecedented number of the nation's coal-fired power plants and that will impose irreparable harm on the workers, communities, consumers, and businesses that depend on them. The Clean Air Act expressly prohibits EPA from issuing mandates under Section 111(d), 42 U.S.C. § 7411(d), for sources such as coal-fired power plants that are subject to national standards under Section 112, 42 U.S.C. § 7412.

Petitioner Murray Energy sought an extraordinary writ to halt EPA's *ultra vires* rulemaking. Petitioner also sought judicial review not of the proposed rule itself, but of the independent final action of EPA – its repeated and unequivocal conclusion that it had legal authority to regulate coal-fired power plants under both Sections 111(d) and 112 notwithstanding the express prohibition found in the Clean Air Act.

In its decision of June 9, 2015, the panel denied both avenues for relief. The panel's decision conflicts with precedents of this Court and the Supreme Court regarding the availability of All Writs Act relief (No. 14-1112) and judicial review of final actions under the Clean Air Act (No. 14-1151).

Murray Energy and Peabody fully endorse and join the Petition for Rehearing Or Rehearing En Banc, Or In The Alternative, Motion For A Stay Of The Mandate, filed by the State of West Virginia and thirteen other States. Rehearing or rehearing en banc is warranted. In the alternative, a stay of the Court's mandate is appropriate.

ARGUMENT

This Joint Petition will not repeat the arguments in the Petition filed by the State of West Virginia and thirteen other States. In addition to the arguments set forth by the States, this Joint Petition stresses four more reasons that rehearing is warranted.

I. Private Parties Are Also Experiencing Irreparable Harm from the Proposed Rule.

States are not alone in experiencing harm now as a result of the proposed rule. EPA's gambit to force States and industry to begin efforts to comply with its Section 111(d) rule even before that proposal is finalized is inflicting irreparable injury on private parties as well, and will continue to do so. Given the multi-year planning horizon of energy suppliers, utilities, and private industry, decisions made in the next few months will determine the U.S. energy mix for the foreseeable future. As confirmed in the declaration submitted in this case on behalf of Peabody Energy, coal companies and their customers make planning decisions on a multi-year horizon. ECF 1529468. A declaration filed by Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC, shows that utilities and grid operators do the same and are already experiencing injury from the proposed rule. ECF 1529709. Decisions being made now by electric utilities to close or curtail the operation of certain generating units in order to comply with the anticipated rule cannot easily be undone, yet utilities have little choice given the multi-year planning horizon and important investment decisions to be made. Moreover, States that begin creating new regulatory structures to implement

EPA's plan will essentially lock in the agency's policy preferences, even if the final rule is ultimately invalidated.

Coal suppliers are not merely "incurring costs" as "prudent organizations and individuals" facing ordinary future rule changes. Op. 9-11. The shuttering of coal-fired units has an immediate and enduring impact on the core business of Petitioner and Intervenor-Petitioner with the permanent loss of those customers. Rehearing is warranted to permit judicial review of EPA's effort to require States and private industry to begin complying with the agency's clearly unlawful Section 111(d) in these extraordinary circumstances.

II. EPA Reportedly Plans To Delay Federal Register Publication, Which May Frustrate Prompt Judicial Review.

Rehearing is also warranted because EPA is reportedly planning to delay Federal Register publication of the final rule,[1] thereby frustrating timely judicial review since this Court has instructed that petitions for review filed prior to publication are premature. *See Verizon v. FCC*, Nos. 11-1014 & 11-1016, 2011 WL 1235523 (D.C. Cir. Apr. 4, 2011).

In its June 9, 2015 decision in this case, this Court explained:

> After EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review. At that time (which will not be very long from now, according to EPA), the Court will have an opportunity to review the legality of the rule.

[1] *See, e.g.*, InsideEPA, EPA Said To Target Early August for ESPS Release (July 13, 2015).

Op. 9. But EPA's strategy of delaying Federal Register publication while simultaneously threatening States and private industry to begin compliance efforts (even prior to finalization of the rule) will only further delay the ability of parties to seek a stay of the rule pending judicial review and will thus hinder this Court from reviewing the final rule in timely fashion.

There can be a significant lag between promulgation of a final rule and its publication in the Federal Register. Even in an ordinary case, the lag can amount to weeks or even months. With respect to significant or lengthy rulemakings, the delay can be much longer. For example, EPA Administrator Gina McCarthy signed a proposed rule to regulate carbon dioxide emissions from new electric generating units, pursuant to section 111(b) of the Clean Air Act, on September 20, 2013, but the proposed rule was not published in the Federal Register until January 8, 2014.[2] Similarly, the 2010 Net Neutrality rule was released by the Federal Communications Commission on December 21, 2010, but was not published in the Federal Register until September 23, 2011.[3]

[2] 79 Fed. Reg. 1430 (Jan. 8, 2014).

[3] *See In the Matter of Preserving the Open Internet, Broadband Industry Practices: Report and Order*, No. 09-919, GN Dkt. No. 09-191, WC Dkt. No. 07-52 (Dec. 21, 2010); *Preserving the Open Internet*, 76 Fed. Reg. 59,192 (Sept. 23, 2011).

Recent news reports indicate that EPA plans to delay Federal Register publication of the final Section 111(d) rule until December 2015, after the international climate agreement negotiations in Paris.[4] Such tactical delay in publication would buttress EPA's strategy of requiring regulated parties to begin compliance efforts immediately, before rules can be reviewed by a court. For example, in response to the Supreme Court's June 2015 decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), which rejected EPA's refusal to consider costs before deciding to impose the Mercury and Air Toxics Standards rule, Janet McCabe, EPA's Acting Assistant Administrator for the Office of Air and Radiation, declared that the decision was not significant because "the majority of power plants are already in compliance or well on their way to compliance."[5] On the eve of the *Michigan* decision, EPA Administrator McCarthy appeared on a national cable TV show to announce that, "even if we don't [win *Michigan v. EPA*], . . .

[4] *See*, *e.g.*, InsideEPA, EPA Said To Target Early August for ESPS Release (July 13, 2015) (reporting that "EPA is planning to release its final power plant greenhouse gas rules before Aug. 10, in the hopes that President Obama can unveil the measures before he departs Washington for a vacation that is slated to run through Labor Day, sources say . . . . [The final rules] are unlikely to appear in the Federal Register—which would start the 60-day clock for filing legal challenges—until after the United Nations climate talks in Paris in December.").

[5] EPA Connect, Official Blog of the EPA Leadership (June 30, 2015), https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/.

[m]ost of them [power plants] are already in compliance [and] investments have been made."[6]

EPA's apparent strategy is to deprive the Court of the effectiveness of judicial review by forcing industry to take steps to comply with aggressive compliance timelines even before this Court has the opportunity to review the final rule. EPA's unmistakable message and approach is: judicial review ultimately does not matter. EPA can induce compliance with threats and exploit lengthy judicial review timelines.

Allowing an agency to manipulate the availability of judicial review raises important due process concerns. It also risks impairment of the judicial function and raises separation of powers concerns, every bit as much as the one-sided restriction on advocacy that the Supreme Court invalidated in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (seeing the case as mainly about separation of powers, Justice Kennedy emphasized the "severe impairment of the judicial function" if procedural devices could

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[6] Timothy Cama & Lydia Wheeler, The Hill, Supreme Court overturns landmark EPA air pollution rule (June 29, 2015), http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule. *See also* "A Rare Loss for Environmentalists at the Supreme Court," The Atlantic (June 29, 2015) ("The agency noted that because the regulation was issued three years ago, industry 'investments have been made and most plants are already well on their way to making emissions reductions.'") (http://www.theatlantic.com/politics/archive/2015/06/a-rare-loss-for-environmentalists-at-the-supreme-court/397196/); "EPA Chief Says She's Not Worried About Supreme Court Mercury Ruling," The Huffington Post (July 7, 2015) ("McCarthy pointed out that the majority of power plants -- 70 percent, according to agency estimates -- have already invested in technology to reduce their emissions. 'We are well on our way…,' said McCarthy.") (http://www.huffingtonpost.com/2015/07/07/gina-mccarthy-supreme-court-mercury_n_7746034.html).

be used to deprive the Court of meaningful judicial review, especially of constitutional issues).

The possibility that fundamentally important agency action might otherwise evade prompt judicial review justifies rehearing. An agency should not be permitted to embark on extraordinary actions that compel compliance by States and industry, cause irreparable injuries, and yet escape meaningful judicial review. The critical role of the judicial function in our tripartite system of government demands otherwise.

III. This Is A Case Of Exceptional Importance.

"This is hardly an ordinary case." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000). Rehearing is warranted to permit judicial review of EPA's breathtaking exercise of power—far in excess of its statutory authority—to remake the country's system for generating, distributing, and consuming electricity. The statutory question at issue here is one of "deep 'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, __ U.S. __, No. 14-114, 2015 WL 2473448, at *8 (June 25, 2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). Indeed, in the 1990 Clean Air Act Amendments where Congress did intend for EPA to address a major question regarding the regulation of power plants, it expressly delegated that authority. *See* 42 U.S.C. § 7412(n)(1)(A).

Further, it is "especially unlikely" that Congress would have delegated the authority EPA is claiming in the Section 111(d) rule to EPA, which has "no expertise"

in regulating electricity production and transmission. *King*, 2015 WL 2473448, at *8 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)). Yet EPA seeks to exercise authority over the intrastate generation, distribution, and consumption of electricity that Congress has denied even to federal energy regulators under the Federal Power Act. 16 U.S.C. § 824(a).

To be sure, in its June 9, 2015 decision, the panel did not reach the merits of the meaning of Section 111(d). However, to the extent the panel was persuaded that the petitions were premature because EPA was entitled to the opportunity to decide what it thinks Section 111(d) means, a theme throughout EPA's briefing and oral argument, the Supreme Court has now made clear that EPA likely would not be entitled to *Chevron* deference in any event. Given that this case is one of the "extraordinary" kinds of cases that Chief Justice Roberts telegraphed in *King v. Burwell* as involving an attempt to transform the American economy with "deep economic and political significance," a corresponding remedy should apply. Rehearing is warranted because an extraordinary writ is appropriate to confine EPA to its lawful jurisdiction.

IV. The Panel's Decision Is Not Consistent With Precedent Regarding Judicial Review of Interpretive Rules.

The panel's decision warrants rehearing for the further reason that it raises serious questions regarding the availability of judicial review for consummated

interpretive rules.[7] EPA's action in this case announcing its unequivocal legal conclusion that the Clean Air Act does not prohibit the agency from mandating standards under Section 111(d) for source categories that are regulated under Section 112 was a final interpretive rule subject to judicial review under the APA. In denying the petition, the panel's decision creates uncertainty regarding judicial review of interpretive rules, as well as apparent conflicts with settled circuit and Supreme Court precedent.

It has long been settled that the Administrative Procedure Act and the Clean Air Act authorize agencies to issue final interpretive rules that have no binding legal effects without notice-and-comment, and entitles those "adversely affected or aggrieved" thereby to judicial review. 5 U.S.C. § 702; 5 U.S.C. § 704. This Court hears petitions for review of any "final action taken, by the Administrator under" the Clean Air Act that has national importance. 42 U.S.C. § 7607(b)(1). An "agency action" includes a "rule," which in turn includes the "whole or a part of an agency statement of general . . . applicability and future effect designed to . . . interpret . . . law." 5 U.S.C. § 551(13); 5 U.S.C. § 551(4).[8] Such interpretive rules "are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1204 (2015) (internal quotations marks and

[7] This section pertains to Murray Energy's petition for review (No. 14-1151), which is a case in which Peabody did not intervene. Therefore, this section of the argument is being presented only by Murray Energy.

[8] The phrase "final action" in the Clean Air Act "bears the same meaning . . . that it does under the Administrative Procedure Act." *Whitman*, 531 U.S. at 478.

citation omitted). Further, an interpretive rule is any "agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties." *NMA v. McCarthy,* 758 F.3d 243, 252 (D.C. Cir. 2014).

When an agency publicly consummates an interpretive rule, judicial review is available for parties with Article III standing. The only limitation on this entitlement to review is that the interpretive rule be "final." 5 U.S.C. § 704; 42 U.S.C. § 7607(b)(1). This requires nothing more than that an interpretive rule "mark the consummation of the agency's decisionmaking process" such that the agency has "rendered its last word on the matter" in question. *Whitman v. American Trucking Assns.*, 531 U.S. 457, 478 (2001). In any case where this requirement is satisfied, the entitlement to immediate judicial review is well settled, as demonstrated by the cases relied upon in Murray Energy's briefs.[9]

The panel held that EPA's statements as to its legal authority did not constitute final agency action subject to judicial review. The panel opined that "[i]n the context of an ongoing rulemaking, an agency's statement about its legal authority to adopt a proposed rule is not the 'consummation' of the agency's decisionmaking process." Op.

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[9] *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980); *Whitman*, 531 U.S. at 478; *Nat'l Automatic Laundry & Cleaning Council v. Shultz,* 443 F.2d 689, 698 (D.C. Cir. 1971); *Her Majesty the Queen v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990); *Natural Res. Def. Council, Inc. v. EPA*, 643 F.3d 311 (D.C. Cir. 2011); Murray Energy Reply at 11 ("EPA also cannot distinguish *Shultz* on the basis that it addressed an 'interpretive ruling[].' . . . Murray Energy's challenge is also to an interpretation — EPA's interpretation of its authority under Section 111(d)." (quoting EPA Br. 21)); *see also Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (reviewing interpretive rule issued by the Attorney General).

10. "Put simply, the consummation of the agency's decisionmaking process with respect to a rule occurs when the agency issues the rule." *Id.* at 10-11. But the opposite is more likely to be true. That an agency promulgates a substantive regulation pursuant to a definitive view of its legal authority announced by interpretive rule *confirms* rather than *undermines* the finality of the interpretive rule.

Moreover, the panel also stated that "[a]s petitioners correctly note, EPA has repeatedly and unequivocally asserted that it has authority under Section 111(d)." *Id.* at 10. Such a finding would seem to satisfy the "consummation" requirement of finality, which the Supreme Court has always construed in a flexible fashion. In *Whitman*, for example, the Court held that an interpretive rule was sufficiently final for judicial review: "Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final." 531 U.S. at 479; *see also Bennett v. Spear*, 520 U.S. 154, 178 (1997) (decision "must not be of a merely tentative or interlocutory nature").

The panel holds that judicial review of an agency action is available only if it imposes "legal obligations or prohibitions on petitioners." Op. at 11. "Any such legal obligations or prohibitions will be established, and any legal consequences for violating those obligations or prohibitions will be imposed, only after EPA finalizes a rule." *Id.* But interpretive rules by definition do not impose legal obligations or prohibitions. *See Perez*, 135 S. Ct. at 1204 ("Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'") (quoting *Shalala v. Guernsey*

Memorial Hospital, 514 U.S. 87, 99 (1995)); *id.* at 1219 n.4 (Thomas, J., concurring in the judgement) (interpretative rule is "[a]n agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties") (quoting *NMA*, 758 F.3d at 252); *Nat'l Med. Enters., Inc. v. Shalala*, 43 F.3d 691, 697 (D.C. Cir. 1995) ("[S]ubstantive rules are those which grant rights, impose obligations, or effect a change in existing policy [while] interpretive rules are those that merely clarify or explain existing laws or regulations.") (citing *Am. Hosp. Assoc. v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (rule was interpretive where it "did not create any new rights or duties"). Accordingly, the panel's decision could be read as foreclosing judicial review of all interpretive rules.

The panel's decision offers that an agency's "position on its legal authority" can be judicially reviewed later, Op. at 11, but only if and when the agency finalizes a legislative rule imposing legal obligations and prohibitions. That is of little help to those "adversely affected or aggrieved by" an interpretive rule at the time it is finalized, and thus does not afford them the judicial review thereof to which they are entitled by the Administrative Procedure Act.

Requiring an agency to issue a legislative rule before a legal interpretation is subject to judicial review would effectively impose a procedural notice-and-comment requirement for APA review of interpretive rules. Yet, the Supreme Court has made clear that agencies may issue interpretive rules without notice-and-comment. *Perez*, 135

S. Ct. at 1203-04; *see* 5 U.S.C. § 553(b)(A); 42 U.S.C. § 7607(d) (exempting "any rule or circumstance referred to in" 5 U.S.C. § 553(b)(A) from notice-and-comment).

EPA's statements as to its legal authority constituted final agency action subject to judicial review. Rehearing is warranted to address the uncertainty created by the panel decision, as well as apparent conflicts with settled circuit and Supreme Court precedent.

CONCLUSION

The Petition for Rehearing Or Rehearing En Banc, Or In The Alternative, Motion For A Stay Of The Mandate, filed by the State of West Virginia and thirteen other States, should be granted.

Dated: July 24, 2015

Respectfully submitted,

/s/ Tristan L. Duncan

Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Tel: (216) 479-8646
geoffrey.barnes@squirepb.com
Counsel for Murray Energy

Tristan L. Duncan
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
Tel: (816) 474-6550
tlduncan@shb.com
Counsel for Peabody Energy Corporation

Laurence H. Tribe
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
Tel: (617) 495-1767
tribe@law.harvard.edu
and
Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
jmassey@masseygail.com
Counsel for Peabody Energy Corporation

CERTIFICATE OF COMPLIANCE

The foregoing complies with Federal Rule of Appellate Procedure 35(b) because it does not exceed 15 pages, excluding the parts of the Petition exempted by Federal Rule of Appellate Procedure 32. This Petition also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Garamond.

/s/ Tristan L. Duncan
Tristan S. Duncan

ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 16, 2015 Decided June 9, 2015

No. 14-1112

IN RE: MURRAY ENERGY CORPORATION,
PETITIONER

Consolidated with 14-1151

On Petition For Writ of Prohibition
and On Petition For Review

No. 14-1146

STATE OF WEST VIRGINIA, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

CITY OF NEW YORK, ET AL.,
INTERVENORS

On Petition for Review of an Order of the
United States Environmental Protection Agency

Elbert Lin, Solicitor General, Office of the Attorney General for the State of West Virginia, argued the cause for Petitioner-Intervenors States. With him on the briefs were *Patrick Morrisey*, Attorney General, *Misha Tseytlin*, General Counsel, *J. Zak Ritchie*, Assistant Attorney General, *Luther Strange*, Attorney General, Office of the Attorney General for the State of Alabama, *Andrew Brasher*, Solicitor General, *Craig W. Richards*, Attorney General, Office of the Attorney General for the State of Alaska, *Steven E. Mulder*, Senior Assistant Attorney General, *Gregory F. Zoeller*, Attorney General, Office of the Attorney for the State of Indiana, *Timothy Junk*, Deputy Attorney General, *Derek Schmidt*, Attorney General, Office of the Attorney General for the State of Kansas, *Jeffrey A. Chanay*, Deputy Attorney General, *Jack Conway*, Attorney General, Office of the Attorney General for the Commonwealth of Kentucky, *Doug Peterson*, Attorney General, Office of the Attorney General for the State of Nebraska, *Blake E. Johnson*, Assistant Attorney General, *Michael DeWine*, Attorney General, Office of the Attorney General for the State of Ohio, *Eric E. Murphy*, State Solicitor, *E. Scott Pruitt*, Attorney General, Office of the Attorney General for the State of Oklahoma, *Patrick R. Wyrick*, Solicitor General, *P. Clayton Eubanks*, Deputy Solicitor General, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *James Emory Smith, Jr.*, Deputy Solicitor General, *Peter K. Michael*, Attorney General, Office of the Attorney General for the State of Wyoming, *James Kaste*, Deputy Attorney General, *Michael J. McGrady*, Senior Assistant Attorney General, *Jeremiah I. Williamson*, Assistant Attorney General, *James D. "Buddy" Caldwell*, Attorney General, Office of the Attorney General for the State of Louisiana, *Megan K. Terrell*, Deputy Director, *Marty J. Jackley*, Attorney General, Office of the Attorney General for the State of South Dakota, and *Roxanne*

Giedd, Deputy Attorney General at the time the brief was filed. *C. Joseph Cordi Jr.*, Senior Assistant Attorney General, Office of the Attorney General for the State of Arkansas, *Steven R. Blair*, Assistant Attorney General, Office of the Attorney General for the State of South Dakota, *Steven B. Jones*, Assistant Attorney General, Office of the Attorney General for the State of Louisiana, *Daniel P. Lennington*, Assistant Attorney General, Office of the Attorney General for the State of Wisconsin, and *Katherine Jean Spohn*, Deputy Attorney General, Office of the Attorney General for the State of Nebraska, entered appearances.

Geoffrey K. Barnes argued the cause for Petitioner Murray Energy Corporation. With him on the briefs were *J. Van Carson*, *Wendlene M. Lavey*, *John D. Lazzaretti*, and *Robert D. Cheren*. *Rebecca A. Worthington* entered an appearance.

Laurence H. Tribe argued the case for Petitioner-Intervenor Peabody Energy Corporation. With him on the briefs were *Jonathan S. Massey*, *Tristan L. Duncan*, and *Thomas J. Grever*.

Robert R. Gasaway, *Dominic E. Draye*, *Allison D. Wood*, *Tauna M. Szymanski*, *C. Boyden Gray*, and *Adam Gustafson* were on the briefs for Intervenor-Petitioners National Federation of Independent Business and Utility Air Regulatory Group.

Peter D. Keisler, *Roger R. Martella, Jr.*, *C. Frederick Beckner III*, *Paul J. Ray*, *Joshua Thompson*, *Leslie A. Hulse*, *Linda E. Kelly*, *Quentin Riegel*, *Steven P. Lehotsky*, *Sheldon Gilbert*, and *Richard Moskowitz* were on the briefs for *amici curiae* Trade Associations and Pacific Legal Foundation in support of petitioners.

Peter S. Glaser and *Carroll W. McGuffey* were on the brief for *amici curiae* the National Mining Association and the American Coalition for Clean Coal Electricity.

Brian H. Lynk and *Amanda Shafer Berman*, Attorneys, U.S. Department of Justice, argued the causes for respondents. With them on the briefs were *John C. Cruden*, Assistant Attorney General, and *Elliott Zenick* and *Scott Jordan*, Attorneys, U.S. Environmental Protection Agency.

Morgan A. Costello, Assistant Attorney General, Office of the Attorney General for the State of New York, argued the cause for Respondent-Intervenors States. With her on the briefs were *Eric T. Schneiderman*, Attorney General, Office of the Attorney General for the State of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, *Michael J. Myers* and *Brian Lusignan*, Assistant Attorneys General, *Kamala D. Harris*, Attorney General, Office of the Attorney General for the State of California, *David A. Zonana*, Acting Supervising Deputy Attorney General, *M. Elaine Meckenstock*, *Elizabeth B. Rumsey*, *Timothy E. Sullivan*, and *Raissa Lerner*, Deputy Attorneys General, *George Jepsen*, Attorney General, Office of the Attorney General for the State of Connecticut, *Kimberly P. Massicotte* and *Scott N. Koschwitz*, Assistant Attorneys General, *Matthew P. Denn*, Attorney General, Office of the Attorney General for the State of Delaware, *Valerie M. Edge*, Deputy Attorney General, *Maura Healey*, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, *Melissa A. Hoffer* and *Turner Smith*, Assistant Attorneys General, *Janet T. Mills*, Attorney General, Office of the Attorney General for the State of Maine, *Gerald D. Reid*, Natural Resources Division Chief, *Douglas F. Gansler*, Attorney General at the time the brief

was filed, Office of the Attorney General for the State of Maryland, *Mary Raivel*, Assistant Attorney General, *Hector Balderas*, Attorney General, Office of the Attorney General for the State of New Mexico, *Tannis Fox*, Assistant Attorney General, *Ellen F. Rosenblum*, Attorney General, Office of the Attorney General for the State of Oregon, *Paul Garrahan*, Acting Attorney-in-Charge, *Peter Kilmartin*, Attorney General, Rhode Island Department of Attorney General, *Gregory S. Schultz*, Assistant Attorney General, *William H. Sorrell*, Attorney General, Office of the Attorney General for the State of Vermont, *Thea Schwartz*, Assistant Attorney General, *Robert W. Ferguson*, Attorney General, Office of the Attorney General for the State of Washington, *Leslie R. Seffern*, Assistant Attorney General, *Karl A. Racine*, Attorney General, Office of the Attorney General for the District of Columbia, *Amy McDonnell*, General Counsel, and *Carrie Noteboom*. *Carol A. Iancu*, Assistant Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, and *Christopher G. King*, entered appearances.

Sean H. Donahue argued the cause for Respondent-Intervenors NGOs. With him on the briefs were *David Doniger*, *Benjamin Longstreth*, *Tomás Carbonell*, *Vickie Patton*, *Joanne Spalding*, *Andres Restrepo*, and *Ann Brewster Weeks*. *Megan Ceronsky* entered an appearance.

Katherine E. Konschnik was on the brief for *amicus curiae* Law Professors in support of respondents.

Kevin Poloncarz was on the brief for *amicus curiae* Calpine Association in support of respondents.

Richard L. Revesz and *Denise A. Grab* were on the brief for *amicus curiae* Institute for Policy Integrity at New York University School of Law in support of respondent.

Before: HENDERSON, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, with whom *Circuit Judge* GRIFFITH joins.

Opinion concurring in the judgment filed by *Circuit Judge* HENDERSON.

KAVANAUGH, *Circuit Judge*: Petitioners are champing at the bit to challenge EPA's anticipated rule restricting carbon dioxide emissions from existing power plants. But EPA has not yet issued a final rule. It has issued only a proposed rule. Petitioners nonetheless ask the Court to jump into the fray now. They want us to do something that they candidly acknowledge we have never done before: review the legality of a *proposed* rule. But a proposed rule is just a proposal. In justiciable cases, this Court has authority to review the legality of final agency rules. We do not have authority to review proposed agency rules. In short, we deny the petitions for review and the petition for a writ of prohibition because the complained-of agency action is not final.

* * *

On June 18, 2014, as part of the Executive Branch's efforts to tackle global warming, EPA proposed a rule to restrict carbon dioxide emissions from existing coal-fired and natural gas-fired power plants. *See* 79 Fed. Reg. 34,830, 34,830 (June 18, 2014). In the preamble to the proposed rule and in other statements about the proposed rule, EPA has

explained that Section 111(d) of the Clean Air Act supplies legal authority for EPA to restrict those emissions. *See, e.g.*, *id.* at 34,852-53; *see also* 42 U.S.C. § 7411(d) (codifying Section 111(d) of the Clean Air Act).

EPA published the proposed rule in the Federal Register and invited "further input through public comment on all aspects of this proposal." *Id.* at 34,835. The comment period has now closed, and EPA has received over two million comments. EPA has not yet issued a final rule but intends to do so this summer.

Petitioners here are Murray Energy Corporation, which is a coal company whose business would be negatively affected by a restriction on carbon dioxide emissions from coal-fired power plants, and the States of West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming. Shortly after EPA issued its proposed rule, petitioners filed suit. According to petitioners, Section 111(d) of the Clean Air Act does not grant EPA authority to limit carbon dioxide emissions from existing power plants. For that reason, petitioners ask the Court to enjoin EPA from issuing a final rule limiting those carbon dioxide emissions.

In effect, petitioners are asking us to review the legality of a proposed EPA rule so as to prevent EPA from issuing a final rule. But as this Court has stated, a proposed EPA rule "is not final agency action subject to judicial review." *Las Brisas Energy Center, LLC v. EPA*, No. 12-1248, 2012 WL 10939210 (D.C. Cir. 2012). We may review final agency rules. *See generally Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-52 (1967). But we do not have authority to review proposed rules. *See* 42 U.S.C. § 7607(b)(1) (Clean Air Act) ("A petition for review of action of the Administrator in

promulgating . . . any standard of performance or requirement under section 7411 of this title . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed . . . ."); *cf.* 5 U.S.C. § 704 (Administrative Procedure Act) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

Proposed rules meet neither of the two requirements for final agency action: (i) They are not the "consummation of the agency's decisionmaking process," and (ii) they do not determine "rights or obligations," or impose "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted); *see also American Portland Cement Alliance v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996) ("a proposed regulation is still in flux," so "review is premature") (internal quotation marks omitted); *Action on Smoking and Health v. Department of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994) ("Agency action is final when it imposes an obligation, denies a right, or fixes some legal relationship," and an agency's "proposed rulemaking generates no such consequences.") (internal quotation marks omitted).

In an attempt to clear this hurdle to their suit, petitioners advance three different arguments. None is persuasive.

First, petitioners contend that this Court has authority under the All Writs Act to consider their challenge now, even before EPA issues a final rule. The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Although "the All Writs Act authorizes employment of extraordinary writs, it confines the

authority to the issuance" of writs "in aid of the issuing court's jurisdiction." *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (internal quotation marks omitted).

In this case, a writ is not necessary or appropriate to aid the Court's jurisdiction. After EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review. At that time (which will not be very long from now, according to EPA), the Court will have an opportunity to review the legality of the rule.

Petitioners contend, however, that we should consider their challenge now because they are already incurring costs in preparing for the anticipated final rule. And petitioners say that the Court will not be able to fully remedy that injury if we do not hear the case at this time. But courts have never reviewed *proposed* rules, notwithstanding the costs that parties may routinely incur in preparing for anticipated final rules. We recognize that prudent organizations and individuals may alter their behavior (and thereby incur costs) based on what they think is likely to come in the form of new regulations. But that reality has never been a justification for allowing courts to review proposed agency rules. We see no persuasive reason to blaze a new trail here.

In short, the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules. *See Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 43 (1985) (All Writs Act "does not authorize" courts "to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate"); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) ("It is, of course, well settled" that a

writ "is not to be used as a substitute for appeal, even though hardship may result from delay.") (internal citation omitted).

Second, petitioners argue that EPA's public statements about its legal authority to regulate carbon dioxide emissions constitute final agency action subject to judicial review. As petitioners correctly note, EPA has repeatedly and unequivocally asserted that it has authority under Section 111(d) to restrict carbon dioxide emissions from existing power plants. EPA has made such statements in the preamble to the proposed rule, in a legal memorandum accompanying the proposed rule, and in other public remarks discussing the proposed rule. *See, e.g.*, 79 Fed. Reg. at 34,853.

But those EPA statements are not final agency action. As noted above, to be final an agency action must meet two requirements. First, the agency action must constitute "the consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78 (internal quotation marks omitted). Second, the agency action must be one "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (internal quotation marks omitted).

Here, neither of those standard finality requirements is met.

In the context of an ongoing rulemaking, an agency's statement about its legal authority to adopt a proposed rule is not the "consummation" of the agency's decisionmaking process. Formally speaking, such a statement is a proposed view of the law. Indeed, EPA recognized as much in this instance when it asked for "further input through public comment on *all* aspects" of the agency's proposal. 79 Fed. Reg. at 34,835 (emphasis added). Put simply, the

consummation of the agency's decisionmaking process with respect to a rule occurs when the agency issues the rule.

Moreover, even if EPA's position on its legal authority is set in stone, the agency's statements about its legal authority – unconnected to any final rule or other final agency action – do not impose any legal obligations or prohibitions on petitioners. Any such legal obligations or prohibitions will be established, and any legal consequences for violating those obligations or prohibitions will be imposed, only after EPA finalizes a rule.

In short, EPA's statements about its legal authority under Section 111(d) meet neither of the requirements for final agency action.

Third, no doubt recognizing the problems with their attempt to challenge a proposed rule (including the lack of precedent supporting judicial review of a proposed rule), the State petitioners separately challenge a 2011 settlement agreement that EPA reached with several other States and environmental groups. By challenging that settlement agreement, the State petitioners hope to obtain a backdoor ruling from the Court that EPA lacks legal authority under Section 111(d) to regulate carbon dioxide emissions from existing power plants. But the settlement agreement did not obligate EPA to issue a final rule restricting carbon dioxide emissions from existing power plants. It simply set a timeline for EPA to decide *whether* to do so. As our precedent makes clear, a settlement agreement that does nothing more than set a timeline for agency action, without dictating the content of that action, does not impose an injury in fact on entities that are not parties to the settlement agreement. *See Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324-25 (D.C. Cir. 2013). State petitioners therefore lack standing to challenge

the settlement agreement. Moreover, State petitioners' challenge to the settlement agreement is untimely. They had to file suit within 60 days after EPA published notice of the settlement agreement in the Federal Register. *See* 42 U.S.C. § 7607(b)(1). They did not file suit until 2014, more than two years after publication.

* * *

We deny the petitions for review and the petition for a writ of prohibition.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in the judgment: I agree that the petitioners in No. 14-1146 do not have standing to challenge the settlement agreement. I also agree that we do not have jurisdiction to hear the petition for review in No. 14-1151 because the proposed rule that the petitioners challenge is non-final agency action. And while I too would deny the application for a writ of prohibition in No. 14-1112, I write separately to distance myself from my colleagues' cramped view of our extraordinary writ authority.

The All Writs Act gives this Court the power to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act confines the power to grant writs "to the issuance of process 'in aid of' the issuing court's jurisdiction. The Act does not enlarge that jurisdiction." *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (Roberts, J.) (alterations omitted). The Act's language means that this Court may grant a writ in "those cases which are within [the] court's appellate jurisdiction although no appeal has been perfected." *Id*. at 528 (alteration omitted). In other words, once an agency has initiated "a proceeding of *some* kind" that may result in an appeal to this Court, that matter is "within our appellate jurisdiction—however prospective or potential that jurisdiction might be." *Id*. at 529 (quotation mark and alteration omitted). Jurisdiction to issue a writ therefore lies "in the court that would have authority to review the agency's final decision." *Id*. at 531.

We have jurisdiction here to issue a writ of prohibition. The EPA initiated a rulemaking by publishing a proposed rule. *See generally* 79 Fed. Reg. 34,830 (June 18, 2014). This proceeding will result in a final rule that may be challenged on direct review in this Court. *See id.* at 34,838 ("[T]he EPA expects to finalize this rulemaking by June 1, 2015."); 42 U.S.C. § 7607(b)(1) ("A petition for review of . . . any standard of performance or requirement under section

7411 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia." (footnote omitted)). Consequently, because this Court "would have authority to review the agency's final decision," we have authority to issue a writ of prohibition in the interim. *Tennant*, 359 F.3d at 531; *see also FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (authority to grant writ "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected").

We retain jurisdiction to issue writs despite the Clean Air Act's limitation on judicial review. *See* 42 U.S.C. § 7607(e). "The All Writs Act invests a court with a power essentially equitable." *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). Subject to constitutional limitations, the Congress may strip federal courts of their equitable authority under the All Writs Act. *See United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1197 (D.C. Cir. 2005) (court should not "expand upon our equitable jurisdiction if . . . we are restricted by the statutory language"); *Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (courts "possess the full range of remedial powers" unless statute "restrict[s] their exercise"). But to properly restrict a court's equitable power, a statute must do so plainly and unequivocally. *See Weinberger v. Romero-Barcleo*, 456 U.S. 305, 313 (1982) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (courts retain equitable powers "[a]bsent the clearest command to the contrary from Congress"); *Dean Foods Co.*, 384 U.S. at 608 (courts retain authority under All Writs Act "[i]n the absence of *explicit* direction from Congress" (emphasis added)).

The Clean Air Act provides that "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. § 7607(e). This language falls far short of an "explicit direction" to limit our authority under the All Writs Act. *Dean Foods Co.*, 384 U.S. at 608. Section 7607(e) mentions neither writ authority nor our traditional equitable powers. The failure to include mandamus relief or a phrase of similar ilk is critical. In *Ganem v. Heckler*, 746 F.2d 844 (D.C. Cir. 1984), we held that the relevant statute's failure to "mention . . . the uncodified mandamus jurisdiction of the District of Columbia courts" counseled *against* the conclusion that mandamus jurisdiction was lacking. *Id.* at 851. Without an explicit command that jurisdiction under the All Writs Act had been withdrawn, we found it implausible that the court's equitable powers had been restricted. *See id.* And although we did not say so explicitly, the conclusion is supported by the basic canon of statutory construction that "we do not lightly assume that Congress meant to restrict the equitable powers of the federal courts." *Miller v. French*, 530 U.S. 327, 336 (2000).

Moreover, we noted in *Ganem* that the Congress "knows how to withdraw a particular remedy," such as the right to a writ of prohibition, when it wants to do so. 746 F.2d at 852. When a court fails to construe a statute as stripping its jurisdiction to issue writs, the Congress has responded by explicitly eliminating that equitable authority. *See id.* (citing 84 Stat. 790, that "no other official or any court of the United States shall have power or jurisdiction to review any . . . decision by an action *in the nature of mandamus* or otherwise"); *see id.* ("The fact that Congress knows how to withdraw a particular remedy and has not expressly done so is some indication of a congressional intent to preserve that remedy."). Because section 7607(e) does not speak to our

writ or equitable powers, there is no "necessary and inescapable inference" that our power has been circumscribed.[1] *Weinberger*, 456 U.S. at 313. I do not read the majority opinion to suggest otherwise.

Nevertheless, simply because we have *jurisdiction* to grant a writ of prohibition does not mean that it is always

[1] The following is a non-exhaustive list of statutes that take away the court's authority. 5 U.S.C. § 8128(b)(2) ("The action of the Secretary [of Labor] or his designee . . . is not subject to review by another official of the United States or by a court by mandamus or otherwise."); 8 U.S.C. § 1252(a)(2)(A) ("[n]otwithstanding any other provision of law (statutory or nonstatutory) . . . or . . . [the All Writs Act], no court shall have jurisdiction to review" various immigration orders); 38 U.S.C. § 511(a) ("[T]he decision of the Secretary [of Veterans Affairs]. . . shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise."); 42 U.S.C. § 1715 ("The action of the Secretary [of Labor] . . . shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise"). We have assumed that extraordinary relief is available vis-à-vis the EPA in a number of unpublished dispositions. *See New York v. EPA*, No. 02-1387 *et al.*, 2003 WL 22326398, at *1 (D.C. Cir. Sept. 30, 2003) (denying petition for writ of mandamus because EPA's delay was not "so extraordinary as to warrant mandamus relief"); *In re Sierra Club*, No. 01-1141, 2001 WL 799956, at *1 (D.C. Cir. June 8, 2001) (declining to issue writ of prohibition against EPA because petitioners had "other adequate means to obtain the relief requested"); *In re New Mexico*, No. 95-1273, 1995 WL 479797, at *1 (D.C. Cir. July 19, 1995) (declining to issue writ because agency delay was not unreasonable). And relatedly, we declined to issue an injunction against the EPA to compel it to reach a final decision—equitable relief similar to that provided by an extraordinary writ. *Sierra Club v. Thomas*, 828 F.2d 783, 784 (D.C. Cir. 1987).

appropriate to do so. To obtain a writ, a petitioner must satisfy three conditions:

> (1) the mandamus petitioner must have no other adequate means to attain the relief he desires, (2) the mandamus petitioner must show that his right to the issuance of the writ is clear and indisputable, and (3) the court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014) (quotation marks omitted). Although the test is framed in terms of mandamus, it is equally applicable to a writ of prohibition. *See In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (per curiam) ("the grounds for issuing the writs [of mandamus and prohibition] are virtually identical"); *see also In re McCarthey*, 368 F.3d 1266, 1268 (10th Cir. 2004) ("The standards for reviewing petitions for writs of prohibition are similar to the standards for reviewing petitions for writs of mandamus.").

The third factor in the three-part test evaluates whether a writ is appropriate given the circumstances of the case. This factor is grounded in equitable principles: "The common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). Our discretion is relatively unbounded; it is informed only by "those principles which should guide judicial discretion in the use of an extraordinary remedy rather than . . . formal rules rigorously controlling judicial action." *Id.* at 26. We have characterized the appropriateness inquiry as "a relatively broad and amorphous totality of the circumstances consideration." *In re Kellogg*, 756 F.3d at 762. At the same time, appropriateness must take

into account that the power to issue writs is "sparingly exercised." *Parr v. United States*, 351 U.S. 513, 520 (1956).

Granting the writ would be inappropriate in this instance because the EPA has represented that it will promulgate a final rule *before* this opinion issues. In the proposed rule, the EPA stated that it "expects to finalize this rulemaking by June 1, 2015" due to "the urgent need for actions to reduce [greenhouse gas] emissions." 79 Fed. Reg. at 34,838. Counsel for the EPA at oral argument again stated that the proposed rule "might not be [promulgated in] June" but "will be [promulgated] this summer." Oral Arg. Tr. 77–78. Thus, by the time the majority opinion and this concurrence issue—or shortly thereafter—the petitioners will have a final rule that can be challenged as final agency action in this Court. *See Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007) ("final agency actions[] includ[e] an agency's promulgation of a rule"). Assuming at least one petitioner has standing, we will then adjudicate the same questions raised here. Keeping in mind that the common law writs are "drastic and extraordinary remed[ies] reserved for really extraordinary causes," *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quotation marks omitted), the overtaking of these petitions by the imminent issuance of a final rule, in my view, moots the requested relief.

The petitioners believe that a writ of prohibition is appropriate because waiting to challenge the final rule is inconvenient and costly. But that alone does not justify an extraordinary remedy. *See Nat'l Right to Work Legal Defense v. Richey*, 510 F.2d 1239, 1242 (D.C. Cir. 1975) (writ of mandamus not "appropriate" when "review of the . . . question will be fully available on appeal from a final" decision); *U.S. ex rel. Denholm & McKay Co. v. U.S. Bd. of*

Tax Appeals, 125 F.2d 557, 558 (D.C. Cir. 1942) (declining to grant writ of prohibition even though waiting for normal appellate review "may be costlier in effort and money than if the issue of jurisdiction were settled now"); *Noble v. Eicher*, 143 F.2d 1001, 1002 (D.C. Cir. 1944) (declining to grant writ of prohibition even though "there will [be] inconvenience to the petitioners"). These objections therefore cannot carry the day.

In sum, although we have the authority to issue a writ of prohibition, I would decline to do so because the passage of time has rendered the issuance all but academic.

CERTIFICATE OF SERVICE

I certify that on this 24th day of July, 2015, a copy of the foregoing was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Tristan L. Duncan
Tristan S. Duncan