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

14-1112 & 14-1151

In the United States Court of Appeals for the District of Columbia Circuit

IN RE: MURRAY ENERGY CORPORATION,

Petitioner.

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,

Respondents.

Petition Of National Federation Of Independent Businesses For Panel Rehearing Or, In The Alternative, For Rehearing En Banc

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July 24, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*Authorities upon which Petitioners chiefly rely are marked with an asterisk.

Statutes

Rules

Regulations

Other Authorities

GLOSSARY

CAA	Clean Air Act
EGU(s)	Electric Generating Unit(s)
EPA	United States Environmental Protection Agency
NFIB	National Federation of Independent Businesses
UARG	Utility Air Regulatory Group

RULE 35 STATEMENT

Intervenor National Federation of Independent Businesses ("NFIB") respectfully submits the following petition for rehearing or, in the alternative, for rehearing en banc in these consolidated cases. On June 9, 2015, the panel for these two cases, which were argued together with *West Virginia et al. v. EPA* (No. 14-1146), issued majority and concurring opinions disposing of all three cases. The panel dismissed, for untimeliness and for lack of standing, West Virginia and other states' challenge to a 2011 EPA settlement agreement (No. 14-1146); denied as premature Murray Energy Corporation's petition for review of certain EPA legal conclusions (No. 14-1151); and denied Murray Energy's petition for a writ of prohibition because, the majority held, the requested writ concerned a non-final agency rulemaking that was expected soon to go final (No. 14-1112). This petition concerns only that latter ruling, the panel's decision to deny outright the requested writ of prohibition.

Rehearing by the panel or, in the alternative, rehearing en banc is necessary. As EPA has stated repeatedly, this proceeding involves an issue of exceptional importance; namely, EPA's efforts to regulate carbon emissions associated with the production, transmission, and consumption of electric energy throughout the United States. *See* Fed. R. App. P. 35(b)(2). Moreover, the majority's opinion — which may be read to hold categorically that the Court never enjoys jurisdiction to issue prohibitory writs regarding non-final agency action — conflicts with at least two decisions of the United States Supreme Court, *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16-17

(1963), and *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 377 (2004). *See* Fed. R. App. P. 35(b)(1). Finally and most importantly, the panel failed to address important arguments raised in the briefing.

INTRODUCTION

Both opinions overlook a crucial argument advanced by intervenors NFIB and Utility Air Regulatory Group ("UARG"). The majority opinion can perhaps best be read as holding that the Court's writ jurisdiction is limited by constraints on its ability to exercise direct review of non-final agency action. Op. 9 ("In short, the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules."). In contrast, Judge Henderson's concurrence recognizes the Court's authority to issue writs in aid of its jurisdiction, Concur. 2-4, but concludes, based in large part on understandable misconceptions regarding the precise relief sought, that the case will soon be "moot[]," or rendered "academic" by EPA's impending final rule. *Id.* at 6, 7.

As demonstrated below, both opinions assume incorrectly that the legal merits of EPA's Section 111(d) authority can and should be addressed only when a final rule is available, and that there is little to be gained by addressing the merits of this dispute before then. Op. 9; Concur. 6. These views understandably coincide with the familiar dimensions of courts' roles in ordinary agency review cases. But, as the Supreme Court has recognized more than once, ordinary practices are not determinative in extraordinary cases. Where, as here, sovereign interests are at issue and the legal basis

for invading those interests is categorically unavailable to the agency that threatens them, a prohibitory writ against the agency should issue.

Against this backdrop, the panel overlooked NFIB's essential arguments for a writ of prohibition. *First*, NFIB contended that EPA's sole legal justification for its rule is not only incorrect as a matter of law, but also cast in stone, because no logical outgrowth of the proposed rule could possibly save it from invalidity. *Second*, the harms from EPA's unlawful proposal importantly implicate sovereign and structural constitutional interests. *Third*, these harms, presently occurring, are irreparable and will continue to accrue in the months between now and when this Court can rule on any motion seeking a stay of the final rule EPA is expected to promulgate.

NFIB accordingly requests that the panel grant rehearing; consider the previously unaddressed NFIB arguments; and conclude that an extraordinary writ is indeed "appropriate" to afford the limited, alternative, relief requested by NFIB in the briefing — namely, a mere stay of the effectiveness of EPA's rule and of any compliance deadlines. This quite limited relief will in no way become "moot" once a final rule is issued.

BACKGROUND

NFIB and UARG's Intervenor Briefs contain three core contentions coupled to a limited request for relief, none of which were addressed in the panel's opinions. *First*, NFIB argued that EPA's decision to regulate Electric Generating Units ("EGUs") under Clean Air Act Section 112 deprived the Agency of all authority to

regulate those same emissions sources under Section 111(d), which is EPA's sole and exclusive basis for regulating carbon emissions from EGUs. NFIB Br. 9, 26-27. NFIB explained that EPA could not shift its legal rationale for the rulemaking and still fashion lawful regulations limiting greenhouse gas emissions from existing EGUs because "any final rule regulating sources other than EGUs under Section 111(d), or regulating EGU emissions under a CAA provision other than Section 111(d) would not be a 'logical outgrowth' of EPA's proposed rule." NFIB Br. 27.

Second, NFIB highlighted the significant, ongoing harms to sovereign and structural constitutional interests caused by EPA's mere proposal of its unlawful rule. EPA's proposed rule has a novel structure that, unlike normal Section 111(d) rules that focus on emissions from narrowly defined source categories, requires states to meet state-wide emission targets and submit plans to do so on accelerated timeframes. NFIB Br. 30. States thus have no choice but to mobilize extensive legal and analytical resources to meet these ambitious targets. *Id.* at 31. In this fashion, NFIB contended, EPA's facially unlawful proposal obscures "lines of democratic accountability," because it "skew[s] on-going debates over environmental and energy policy … in each of 50 state capitols," thus rendering impossible, after a final rule's invalidation, "efforts to disentangle which state laws and regulations were proximately caused by EPA's unlawful federal intrusions into state regulatory domains." NFIB Reply Br. 15 (citing *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601-03 (2012)).

Third, NFIB explained that these harms to state sovereignty and constitutional accountability, both those that have occurred and those that will occur unless a prohibitory writ issues, are effectively irremediable. NFIB Reply Br. 17. NFIB contended the soonest a traditional stay motion could redress these injuries would be only after a final rule is signed, published in the *Federal Register*, and then litigated during some period allowing for expedited briefing and the court's deliberations on such a motion. *Id.* at 18. In recognition of the harms that will continue to accrue from now through the signing of a final rule, its publication, and a ruling on a motion to stay, NFIB requested the following alternative relief: that the Court should, "at a minimum, issue a writ prohibiting any final rule from going into effect, including the commencement of any compliance period, until the culmination of judicial review, including review by the Supreme Court." *Id.*

Notwithstanding these contentions and a narrow request for relief, the majority held, in a brief discussion on pages 8-9 of the opinion, that a prohibitory writ is "not necessary or appropriate to aid the Court's jurisdiction" because "[t]he All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules." Op. 9. Judge Henderson's concurrence, while questioning the majority's "cramped view of [the Court's] extraordinary writ authority," Concur. 1, similarly concluded that a writ would not be "appropriate" because "the imminent issuance of a final rule … moots the requested relief," Concur. 6, and "the passage of time has rendered the issuance [of a writ] all but academic," Concur 7.

ARGUMENT

Neither of the two opinions addressed NFIB's narrow request for relief or the contentions on which it rests. To be sure, the opinions acknowledged that costs are now being incurred as a result of the proposed rule. Op. 9, Concur. 6. But the opinions went on to describe these costs as "routinely incur[red] in preparing for anticipated final rules … [by] prudent organizations," Op. 9, and part and parcel of the "inconvenien[ce] and cost[]" of "waiting to challenge the final rule," Concur. 6. So far as they go, NFIB has no quarrel with these statements. The fact remains, however, that they fail to engage the core of NFIB's arguments regarding the sovereign and constitutional nature of the ongoing harms at issue or the narrow relief available to redress those harms.

I. The Panel Should Grant Rehearing And Address For The First Time NFIB's Narrow Request For A Writ Of Prohibition.

NFIB submits that arguments the panel overlooked demonstrate that a prohibitory writ should issue that stays the effectiveness of EPA's yet-to-be-issued final rule until, at the very least, petitions for review of that rule have been filed and a motion to stay the rule has been fully briefed, argued, and decided by this Court.

A. The Panel Failed to Address the Core Contentions Supporting NFIB's Narrow Request for Relief.

The panel's opinions did not consider key contentions that should properly guide any assessment of whether a writ should issue in these exceptional circumstances: (i) EPA's complete lack of authority to undertake this rulemaking, (ii) the sover-

eign character of the present harms being inflicted by the agency's proposals, and (iii) the irreparable nature of these present harms.

EPA's irremediable legal error. The Court did not consider NFIB's contention that EPA's committed a pure and irremediable legal error by basing its proposed rule solely on a legally switched-off Section 111(d). As a matter of law, no logical outgrowth from the proposal could lawfully reach existing EGUs' greenhouse gas emissions. NFIB Br. 5-6, 27; NFIB Reply Br. 13-14. The specifics of this legal error have been briefed extensively and do not bear repetition. What is important is NFIB's unrebutted showing that there is no viable outgrowth from the proposed rule that can withstand review—which the panel did not address.

Tellingly, EPA emphasized that a final rule "may alter" the Agency's initial legal analysis. EPA Br. 28. But the important point is that it is not open to EPA to alter its analysis in any relevant respect. Any shift away from Section 111(d) is not legally available, NFIB Br. 27; NFIB Reply Br. 13-14, for Section 111(d) is EPA's sole stated authority for regulating carbon dioxide emissions from EGUs, NFIB Br. 5-6 (citing 79 Fed. Reg. 34,830, 34832, APP 16 ("Under the authority of the Clean Air Action (CAA) Section 111(d), the EPA is proposing emissions guidelines ….")). Hence, "any final rule regulating sources other than EGUs under Section 111(d), or regulating EGU emissions under a CAA provision other than Section 111(d) would not be a 'logical outgrowth' of EPA's proposed rule." NFIB Br. 27 (citing *Kennecott Greens Creek Mining. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 950 (D.C. Cir. 2007)).

EPA's error is both plain and irremediable: the final rule will either exceed the Agency's authority because it is grounded in an unlawful invocation of Section 111(d), or it will exceed that authority because it invokes a different, previously undisclosed legal justification that falls beyond the bounds of the original agency proposal.

Sovereign harms. Although both panel opinions acknowledge that parties were incurring pre-compliance costs, Op. 9; Concur. 6, neither recognizes, as NFIB's briefing highlighted, that EPA's pure legal error was imposing harms on sovereign states. *See* NFIB Br. 28-31; NFIB Reply Br. 14-15. Two Supreme Court cases establish with particular emphasis that writs are necessary and appropriate to resolve purely legal and jurisdictional issues when sovereign interests, like those of the Petitioner-Intervenor states, are at stake. In *McCulloch v. Sociedad Nacional*, the Supreme Court enjoined a union election that the NLRB had ordered, because conducting the election was beyond the Board's jurisdiction and implicated the sovereign interests of Honduras—even though the election's ultimate outcome would have been reviewable, and, depending on that outcome, the entire dispute might have been mooted. *See* 372 U.S. 10, 15-17, 22 (1963) *cited in* NFIB Reply Br. 16. The Supreme Court exercised its writ jurisdiction in *McCulloch* because of "the presence of public questions particularly high in the scale of our national interest" that justified a "prompt judicial resolution of the controversy over the Board's power." *Id.* at 16-17 *cited in* NFIB Reply Br. 15-16.

The Supreme Court also issued a writ in *Cheney*, notwithstanding this Court's earlier conclusion in that same case that it lacked authority to issue a writ of manda-

mus regarding a discovery order addressed to the Vice President, because a "separation of powers conflict" between the judiciary and Vice President "remain[ed] hypothetical." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 377 (2004) *cited in* Concur. 6. The Supreme Court vacated this Court's erroneous holding, stating that its writ jurisdiction was "broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at 382. *McCullough* and *Cheney* together establish that sovereign interests (like the states') and structural constitutional considerations (like federalism) are essential elements in any analysis of whether a writ is appropriate.

Here, the panel opinions failed to afford adequate weight to the sovereign and structural federalism interests implicated by EPA's proposals. Those proposals enlist the States in unprecedented efforts to implement a sweeping federal regulatory program. As noted in declarations submitted by West Virginia, EPA's proposal contemplates most states will need to pass new legislation and/or promulgate new regulations, and in some instances be forced to negotiate interstate transmission agreements—all to meet ambitious federal emissions targets on an ambitious federal timeline. WV Br. Exs. A-H (14-1146) [Doc. 1540535]. (*See*, *e.g.*, Ind. Decl. ¶ 3; W.Va. Decl. ¶ 8; Kan. Decl. ¶ 4; Ohio Decl. ¶ 6.) EPA's indirect regulation through state governments imposes federal mandates on what would otherwise be state policy domains. NFIB Reply Br. 14-15. As ongoing debates occur in 50 states over energy and environmental policy, this federal intrusion in matters otherwise within state authority

obscures lines of democratic accountability as citizens are at pains to disentangle which state laws and regulations are a product of uncoerced choices of state officials and which are imposed or unduly influenced by EPA's policy preferences. NFIB Reply Br. 14-15 (citing *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601-03 (2012)).

Further, the majority's opinion relies exclusively on cases that cannot support a broad holding that writs are not "appropriate" in these exceptional circumstances. In *Schlagenhauf v. Holder*, the Supreme Court *granted* a writ directing lower court action because the petitioner's question was purely legal, presented was an issue of first impression, and was easily resolved based on the Rule's text. 379 U.S. 104, 108-10 (1964). And in *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, the Supreme Court "le[ft] open" the question whether a writ could be issued, but denied the request before it because the *habeas corpus ad testificandum* relief at issue was "specifically provided for by statute." 474 U.S. 34, 41, 43 (1985). Here, by contrast, no other avenue of relief is available to remedy the mounting irreparable sovereign harms documented by the state petitioners and discussed in the Intervenors' briefs.

Irreparable harm. The opinions also give inadequate weight to the fact that the ongoing sovereign and structural harms are not readily susceptible to full relief upon eventual review of a final rule. NFIB Reply Br. 17. States are now debating how to generate compliance plans within the expected federal deadlines. Both opinions contend that the states (and private parties) can seek effective relief once a final rule issues. Op. 9; Concur. 6. But the harm caused by this proposed regulation, in-

cluding EPA's inducements for early compliance, cannot be fully remedied, even if this Court were eventually to stay and then vacate the final rule. By then, the policy baseline in many states will have further shifted to some incalculable degree in an EPA-favored direction.

B. Under Applicable Legal Standards, the Narrowly Tailored Relief NFIB has Requested is "Appropriate."

The legal standard for issuing the writ NFIB requests, which appears to be undisputed, has been met here. *See* Concur 5 (citing *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 1998)). *First*, there is no other adequate means to attain relief from the irreparable harms being incurred by states. *Second*, for reasons addressed extensively in the briefing, EPA clearly and indisputably rested its entire rulemaking on an unavailable section of the Clean Air Act. *Third*, a writ is appropriate in these exceptional circumstances, where EPA has committed error that is strictly legal, dispositive of important sovereign rights, and otherwise incurable.

Additional considerations buttress this request for a prohibitory writ. Significantly, EPA recently shrugged off the Supreme Court's rejection of a different EPA Clean Air Act rule in *Michigan v. EPA*, No. 14-46, --- U.S. ---- (2015), because, in the agency's words, "investments have been made and most plants are already well on their way to compliance…." *See, e.g.*, Lawrence Hurley, Reuters, *U.S. top court rules against Obama administration over air pollution rule*, http://www.reuters.com/article/2015/06/29/usa-court-pollution-idUSL2N0ZF11Y20150629. Here too, EPA touts

on a website that "[s]tates, cities and businesses are already taking action," in response to this proposal. *See* http://www2.epa.gov/cleanpowerplan.

In summary, there is no legal, equitable, or practical reason to delay issuing a writ staying the effectiveness of EPA's yet-to-be-issued final rule. Contrary to the panel's apparent assumption, the Court need not go all the way at this juncture and stop the rulemaking altogether. As alternative relief, NFIB specifically requested that the Court merely stay the effectiveness of the ultimate final rule, together with any compliance deadlines, pending full judicial review—or, at the very least, until petitions for review of EPA's Final Rule have been submitted and motions for a stay of that review have been considered and decided. NFIB Reply Br. 18; *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (describing "the traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction"); *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 543 F.2d 356, 358 (D.C. Cir. 1976) (issuing writ to enjoin agency action before this Court had review jurisdiction). The panel should grant rehearing and address, for the first time, the availability of such narrowly tailored relief.

C. Issuing a Prohibitory Writ Would Neither Be "Academic" Nor Revolutionary.

The passage of time and the imminence of a final rule will not "moot[] the requested relief" or make "the issuance [of a writ] all but academic." Concur. 6, 7. Practically speaking, the writ would grant concrete (not merely "academic") relief by

preserving the status quo and stopping the accumulation of irreparable sovereign harms described above. And legally speaking, the question whether to grant a writ will not become "moot" when a final rule is signed or published. Rather, unlike the jurisdiction of a district court or an agency, which typically is ousted upon this Court's attaining review jurisdiction, this Court's previously issued writs are not extinguished when the Court attains jurisdiction to address the merits of, or stay the effectiveness of, a final agency action. Otherwise, the benefits of a writ staying agency proceedings would evaporate when this Court gained appellate jurisdiction. *See Lindstrom v. Graber*, 203 F.3d 470, 474-76 (7th Cir. 2000) (holding that the All Writs Act permits a court to stay extradition pending appeal of habeas corpus petition); *Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995) (holding that the All Writs Act permits federal Court of Appeals to stay a deportation order pending review of its legality). At a minimum this Court undoubtedly enjoys authority to prohibit EPA's ultimate rule from taking effect before petitions for review and motions to stay have been submitted, considered, and decided.

Finally, as NFIB has explained at length, there is little to no danger that issuing a writ here would open floodgates to future requests for extraordinary writs in other agency rulemakings. NFIB Br. 36-37; NFIB Reply Br. 16-17. The gross, enormously consequential, legal error EPA committed here is quite unusual — on the order of attempting to regulate commercial aircraft engines (which are covered under 42 U.S.C. § 7571) as "[n]onroad vehicles" like snowmobilies (which are covered under 42 U.S.C.

§ 7547). *See* NFIB Br. 36-37. Rarely will an agency, as here, use a categorically unavailable statutory provision as the sole basis for one of the most far-reaching rules in history. Rarely will an agency seek to induce states to comply with such a rule even before it goes final.

II. In The Alternative, The Court Should Grant West Virginia's Petition For Rehearing.

If the court does not grant rehearing and the relief requested above, NFIB respectfully requests in the alternative that the full Court grant West Virginia's petition for rehearing en banc for reasons set forth in that petition.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Court should grant panel rehearing, and calendar expedited argument to consider these arguments previously advanced, but not reached or decided, in its original decision. If panel rehearing is not granted, the Court should grant rehearing *en banc* as requested by West Virginia.

July 24, 2015

Respectfully submitted,

/s/ Robert R. Gasaway

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35(b), I hereby certify that this brief does not exceed 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief 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/ Robert R. Gasaway
Robert R. Gasaway

ADDENDUM

Addendum
Panel Opinion

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.

Addendum
Certificate of Parties

CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties, Intervenors, and Amici:

The parties in this case are Murray Energy Corporation (Petitioner); Environmental Protection Agency (Respondent); and Regina A. McCarthy, Administrator, U.S. Environmental Protection Agency (Respondent); State of West Virginia (Intervenor); the State of Alabama (Intervenor); State of Alaska (Intervenor); State of Arkansas; 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 New Mexico (Intervenor); the State of New York (Intervenor); the State of Oregon (Intervenor); the State of Rhode Island (Intervenor); and the State of Vermont (Intervenor). Amici include the State of South Carolina; the National Mining Association; the

American Coalition for Clean Coal Electricity; American Chemistry Council; American Coatings Association, Inc.; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; 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) Ruling Under Review:

Under review in the Court's ruling on the petition for an extraordinary writ requested in No. 14-1112, which was consolidated with *Murray Energy Corporation v. EPA et al.*, No. 14-1151, which sought a petition to review an EPA legal conclusion.

(C) Related Cases:

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

Addendum
Disclosure Statement

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenors provide the following disclosure:

The National Federation of Independent Business ("NFIB") is a 501(c)(6) non-profit mutual benefit corporation. NFIB is the nation's leading association of small businesses, representing 350,000 member businesses. No publicly-held company has 10% or greater ownership of NFIB.

Addendum
Certificate of Service

CERTIFICATE OF SERVICE

I certify that on this day of July 24, 2015, I filed the above final form document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/Robert R. Gasaway
Robert R. Gasaway