ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

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

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, Administrator, United States Environmental Protection Agency
Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

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AMICUS CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and *amici* appearing in this case are listed in the brief for Respondents Environmental Protection Agency (EPA) and Regina A. McCarthy, EPA Administrator.

References to the rulings under review and related cases also appear in Respondents' brief.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), *amici* Professor Richard J. Lazarus and Professor Jody Freeman state that they are aware of only one other planned *amicus* brief in support of Respondents in this case. Separate briefing is necessary because the other *amicus* brief, to be filed by CalPine Corporation, will address only the business arguments raised by *amici* trade associations in support of Petitioner on which the law professor *amici* take no position. The separate briefing will not burden this Court's resources, because the attached brief does not use all of the 7,000 words permitted an *amicus* brief, *see* Fed. R. App. P. 29(d), and the *amicus* brief filed by CalPine will use the balance of the words up to that 7,000 word limit.

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

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INTEREST OF *AMICI CURIAE*

Law professor *amici* are Clean Air Act scholars and professors of environmental and administrative law who have participated significantly in Clean Air Act administrative rulemaking and litigation. Should this Court reach the merits of Petitioner's arguments, law professor *amici* suggest applying the *Chevron* framework and well-established cannons of statutory interpretation to settle the interpretative issues raised by the parties.

SUMMARY OF ARGUMENT

The Environmental Protection Agency (EPA) has proposed carbon pollution standards for existing power plants under section 111(d) of the Clean Air Act (Act). Petitioner presents this Court with a highly unusual request – to vacate these *proposed* air quality standards before they are finalized. As explained by Respondents, any challenge to proposed regulations is clearly premature and for that reason alone this petition should be dismissed.

But if this Court decides to reach the underlying issues, the petition should be dismissed as well because it lacks any merit. The purpose of this *amicus* submission is to address the substance of Petitioner's argument notwithstanding its prematurity, and demonstrate its failure to hold water. To be sure, the case offers a novel twist on statutory construction – the kind more likely to show up in one of our law school exam hypotheticals than in a case before this Court. We cannot

recall another situation where a federal agency had to construe a statutory provision subject to two distinct amendments that were enacted simultaneously to modify the same language. Yet the novelty of this situation does not justify Petitioner's unique approach to statutory interpretation. Nothing more than the application of traditional canons of statutory construction is required to construe section 111(d) and resolve this case in EPA's favor. In support of this contention, the brief makes four key points.

First, the rules for judicial review of agency statutory construction apply despite the unusual genesis of the language in section 111(d). Under *Chevron*, if the statute's meaning is plain, that meaning controls. If the simultaneous amendments create a statutory ambiguity, EPA – the agency charged by Congress with the statute's interpretation – is entitled to deference so long as the agency's interpretation is reasonable. Moreover, when an agency's interpretation is reasonable, the reviewing court may decide not to address whether that interpretation is also compelled by the statute's plain meaning.

Second, Petitioner has failed to meet the burden for an extraordinary writ. To vacate EPA's proposal, Petitioner must establish that *its* interpretation of section 111(d) is compelled by the plain language. But Petitioner's interpretation ignores the amendment originating in the Senate, on the grounds that the House Office of Law Revision Counsel (OLRC) omitted that language from the U.S.

Code. It is well settled that the Statutes at Large trump inconsistent text in the U.S. Code. Because the Senate amendment undoubtedly supports EPA's authority, Petitioner's plain language argument to the contrary fails.

Nor can Petitioner's interpretation of the House-originating amendment otherwise establish the plain meaning necessary to support Petitioner's request for an extraordinary writ. Plain meaning cannot be maintained where Petitioner's interpretation would nullify the Senate amendment and, in a manner wholly inconsistent with the structure of the Act, strip EPA of its long-standing authority to regulate all harmful pollutants from existing stationary sources of pollution.

Third, EPA's proposed interpretation is at the very least reasonable. Due to the premature nature of Petitioner's filing, EPA has not definitively interpreted section 111(d) here pursuant to its congressionally-delegated lawmaking authority. But EPA's proposed interpretation tracks the clear meaning of the Senate amendment and meshes with contemporaneous amendments and the broader statutory scheme. Moreover, it reflects the Agency's long-standing understanding of its authority under section 111(d).

Fourth, other traditional canons of statutory construction support EPA's proposed interpretation and would authorize rulemaking here.

ARGUMENT

I. *Chevron* Analysis Applies to This Dispute.

Section 111(d) offers a novel twist on statutory construction. But despite the unusual genesis of the resulting language, this Court is not required to cover new ground. Normal rules for judicial review of agency statutory construction apply.

"When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). The first is whether Congress has spoken directly to the precise issue in unambiguous terms. If it has, the agency's interpretation must track that clear meaning. *Id.*, at 843. But if the relevant statutory language is "silent or ambiguous with respect to the specific issue," the second question is whether the agency's interpretation of the statute is "reasonable." *Id.* The court must defer to such reasonable agency interpretation. *Id.*

Chevron analysis does not require a court to address the "plain meaning" inquiry. When an agency's interpretation is reasonable, a reviewing court may decide not to address whether that interpretation is compelled as well by the statute's plain meaning. See e.g., *Entergy v. Riverkeeper*, 556 U.S. 208, 218 & n. 4 (2009) (noting "surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.");

Arkansas v. Oklahoma, 503 U.S. 91, 104 (1992) (finding "it is neither necessary nor prudent for us to resolve the first of these questions.").

The *Chevron* doctrine entrusts the expert agency with the first pass at statutory interpretation because that agency has "a full understanding of the force of the statutory policy." *Chevron*, 467 U.S. at 844. "Judges are not experts in the field, and are not part of either political branch of the Government." *Id.*, at 865. By contrast, it is "entirely appropriate" for agencies "to make such policy judgments – resolving the competing interests which Congress either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.*, at 865-66.

That reasoning applies with full force here. Whether "inadvertently" or "intentionally," Congress has created an ambiguity in section 111(d). Respondents note two potential sources – the existence of two amendments enacted simultaneously to modify the same language, and the meaning of the House amendment. EPA Br. 23. EPA is "the agency charged with the administration of the statute" with the responsibility and competence to resolve that ambiguity. These tasks are for the expert agency to resolve, *not* the judiciary. *Chevron*, at 866. This is why Respondents ask for the "first crack" at interpreting section 111(d) in its final rule. EPA Br. 38.

To be sure, neither the Supreme Court nor this Court may have faced previously this type of ambiguity. But the Supreme Court has consistently rejected attempts to create analogous exceptions to *Chevron's* reach. For instance, a majority of the Justices would apply *Chevron* when the ambiguity results from congressional enactment of apparently conflicting statutory language. See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (Kagan, J., op.), (Sotomayor, J., Breyer, J. dissenting). The Court has ruled that *Chevron* is equally applicable when statutory construction concerns the scope of an agency's statutory authority. See *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1871 (2013). This case offers no better reason than those to carve out an exception to *Chevron* deference.

Nothing about the novel circumstances here undermines the policy justifications for deferring to the agency charged by Congress with a statute's administration. Under *Chevron*, EPA should be able to proffer its final interpretation of section 111(d) and have that interpretation upheld so long as reasonable.

II. Petitioner Has Failed to Meet Its Burden For an Extraordinary Writ.

As Respondents note, an extraordinary writ may issue only where the "right to issuance . . . is 'clear and indisputable.'" EPA Br. 34; *In re United States*, 925 F.2d 490, 1991 WL 17225, at *2 (D.C. Cir. Feb. 11, 1991) (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). Where, as here,

Petitioner rests its claim for relief on the statutory language of the Act, Petitioner must demonstrate that the plain meaning of the relevant provision indisputably supports its claim. Petitioner fails to meet this burden.

In 1970, section 111(d) of the Act required EPA and states to set standards "for any existing source for any air pollutant: (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)" once standards were set for new sources of the same type. Pub. L. 91-604, 84 Stat. 1676, 1684 (Dec. 31, 1970). No one disputes that the reference to section 112(b) created an exclusion of certain *pollutants* from section 111(d) coverage. This exclusion reflected the statutory scheme as enacted in 1970 – that programs in the Act would address "'three categories of pollutants emitted from statutory sources': (1) criteria pollutants; (2) hazardous pollutants; and (3) 'pollutants that are (or may be) harmful to public health or welfare but are not' hazardous or criteria pollutants. EPA Br. 3 (quoting 40 Fed. Reg. 53,340 (Nov. 17, 1975)). Section 111(d) was enacted to cover this third category of pollutants from "any existing source".

The 1990 Clean Air Act Amendments (1990 Amendments) retained section 111(d) as an affirmative duty to regulate pollutants from existing sources. However, changes to section 112 necessitated an updated to the cross-reference in section 111(d). The House and the Senate amendment, respectively, amended

section 111(d) to "prescribe regulations" to address "any existing source for any pollutant":

> **House**: (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) ~~or 112(b)(1)(A)~~ *or emitted from a source category which is regulated under section 112* … . and/or
>
> **Senate:** (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or ~~112(b)(1)(A)~~ *112(b)* … .

Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (House amendment); Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574 (Senate amendment).

Petitioner interprets the resulting statutory requirement to prohibit EPA from reaching any existing source of carbon pollution, if that source is regulated for *different* pollutants under section 112. Petitioner argues in effect that Congress converted in section 111(d) what had been a limited exclusion from regulation for *pollutants* regulated under section 112 (hazardous air pollutants, or HAPs) into a sweeping exclusion for *sources* that would leave some of their harmful pollutants wholly unregulated. The statutory language falls far short of suggesting that Congress intended such a dramatic shift in air pollution policy. Not only does the language of the Senate amendment standing alone defeat Petitioner's extreme reading, but the House amendment in its statutory context fails to support it.

A. The Senate Amendment Defeats Petitioner's Plain Meaning Argument and Petitioner's Efforts to Read that Amendment Out of Section 111(d) Are Unavailing

The Senate amendment reflects clear Congressional intent to exempt certain *pollutants* from section 111(d) regulation when they are regulated under section 112. The language just as clearly does not exempt *sources* from section 111(d) regulation, thereby permitting them to emit certain harmful pollutants freely and without limit. Because Petitioner's interpretation cannot be squared with this clear congressional intent, petitioner seeks to eliminate it from the statute although it passed both chambers of Congress (1 Env't and Nat. Res. Policy Div., Library of Congress, A Legislative History of the Clean Air Act Amendments of 1990 (1998) ("Legislative History"), at 1443-47 (Oct. 26, 1990) (House approval); *Id*., at 1094-96 (Oct. 27, 1990) (Senate approval)) and was signed by President Bush. Petitioner makes two arguments in support of this extraordinary assertion. Both fail to convince.

1. Petitioner's reliance on the language in the U.S. Code is unavailing because the Statutes at Large contains both amendments to section 111(d) and controls over an inconsistent U.S. Code.

Petitioner relies on the fact that in transcribing the 1990 Amendments into Title 42 of the U.S. Code, the staff in the Office of Law Revision Counsel ("OLRC") added the House amendment to section 111(d) but failed to include the

Senate amendment. 42 U.S.C. § 7411(d)(1)(A)(i) (2012). The U.S. Code is therefore inconsistent with the Statutes at Large.

As Respondents describe at length, the Statutes at Large governs in this dispute. EPA Br. 47-49. The Statutes at Large provides the official version of the law approved by Congress and signed by the President, and constitutes the "legal evidence of laws." 1 U.S.C. § 112.

By contrast, the OLRC's initial transcription of statutory language into the U.S. Code constitutes "non-positive law" which may be used only to "establish prima facie the laws of the United States." 1 U.S.C. § 204(a). The "very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan v. United States*, 319 U.S. 423, 426 (1943); see also *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents*, 508 U.S. 439, 448 (1993) (holding "despite its omission from the Code section 92 remains on the books if the Statutes at Large so dictate"). Congress must vote to approve a title for that part of the Code to become positive law. *Washington-Dulles Transp. Ltd. v. Metro. Washington Airports Auth.*, 263 F.3d 371, 378 n. 2 (4th Cir. 2001). Congress has never approved Title 42 of the U.S. Code; therefore, the Code's omission of the Senate amendment to section 111(d) lacks legal effect and the Statutes at Large controls in this dispute.

Petitioner and its supporters suggest a novel exception to this well-established rule. They argue that amendments to the U.S. Code "may only be questioned when they are *objectively* inconsistent" with the Statutes, a new standard which appears to turns on Petitioner's subjective characterization of the relative weight of different amendments. See, e.g., Pet. Writ, at 20; W. Virginia Am. Br. 7-8. Neither Congress nor the Supreme Court, however, has qualified the rule that the Statutes at Large trump an inconsistent U.S. Code provision.

Moreover, to the extent Petitioner's argument would have this Court rely on a functionary's editorial decision over the legal text approved by Congress and signed by the President, this argument violates the Bicameral and Presentment Clauses of the U.S. Constitution. U.S. Const. Art. I, § 7, cl. 2; *I.N.S. v. Chadha*, 462 U.S. 919, 956-958 (1983); see also U.S. Const. Art. I, §, cl. 1.

2. Petitioner's arguments about headings and non-textual history cannot undermine plain text.

Similarly unavailing is Petitioner's argument that the Senate language can be ignored because it is labeled as a "Conforming Amendment" and is therefore non-substantive. Pet. Br. 20. However, "the heading of a section cannot limit the plain meaning of the text." *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008); see also *United States v. R.L.C.*, 503 U.S. 291, 305 n.5 (1992) ("a statute is a statute, whatever its label"). Moreover, the "conforming" label does not strip a provision of substance; to the contrary, the Supreme Court has treated

"conforming" amendments explicitly as substantive. See *CBS, Inc. v. Fed. Commc'n Comm'n*, 433 U.S. 367, 381 (1981); see also *Burgess v. U.S.*, 553 U.S. 124, 134-35 (2008) (a "conforming amendment" does not mean that Congress "disavow[ed] any intent to make substantive changes"). Nor does *Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) suggest a different result. The Court held a conforming amendment was non-substantive only because it assumed Congress would not have wrought major changes to a statutory scheme *sub silentio*. That reasoning is inapposite here; the Senate amendment would maintain the structure of the prior scheme. Both amendments conform section 111(d) to a change in section 112. This says nothing about their interpretation or relative weight.

Chamber *amici* also cite a document describing conference negotiations to suggest that Senate conferees waived their amendment in favor of the House amendment. Chamber Am., at 10 (citing H.R. Rep. No. 101-952, at 1 (1990) (Conf. Rep.)). The conferees, however, never reviewed nor approved that document, which this Court previously concluded is "probative of congressional intent . . . but cannot undermine the statute's language." See *EDF v. EPA*, 82 F.3d 451, 460 n. 11 (D.C. Cir.) amended by 92 F.3d 1209 (D.C. Cir. 1996). The document has particularly low probative value for the present dispute, as EPA

describes in its brief. EPA Br. 50-51. Such inconclusive history is no match for the text of the Statutes at Large, where the Senate amendment remains.

Finally, West Virginia *amici* note EPA's reference to the Senate amendment as a "drafting error" in a 2005 rulemaking. W.V. Am. Br. 2-3. An agency interpretation may not conflict with the text of a statute. *Chevron*, 467 U.S. 837 (1984); *Utility Air Reg. Grp. v. EPA*, 134 S.Ct. 2427 (2014). Nor does the statement constitute an interpretation. In the 2005 rule, EPA ultimately reached the same conclusion it has held consistently over time; that section 111(d) authorizes regulation of harmful pollutants that are neither criteria pollutants nor HAPs. See Brief for Am. IPI in Case No. 14-1146 at 16-19. EPA referenced that interpretation in this proposed rulemaking. See Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units (Legal Memorandum), at 26.

B. The House Amendment Language Does Not Provide the Plain Meaning Support for Petitioner's Assertion of a Sweeping Source Exemption from Section 111(d).

Petitioner reads the House amendment's reference to "source category" to mean that Congress intended to create a blanket exemption from section 111(d) for nearly all stationary sources. Petitioner's interpretation would end this provision's long-standing role of regulating these sources for pollutants not otherwise regulated under the Act. This reading neither reflects the statute's plain meaning,

as necessary for Petitioner to prevail in this extraordinary challenge, nor is it even reasonable.

Petitioner's reading is not supported by plain meaning for two fundamental reasons. First, its reading would nullify the Senate amendment, which clearly requires section 111(d) to address those pollutants not covered by section 112 and section 108 of the Act. That conflict suggests sufficient ambiguity to defeat Petitioner's claim of plain meaning.

Second, Petitioner's plain meaning claim is defeated by its extreme nature and by "the 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441 (2014). A text's meaning cannot both be plain and "inconsistent with the statutory scheme." *Id.*, at 14. Nor can it compel EPA to regulate or not to regulate "in any way that would be 'extreme,' 'counterintuitive,' or contrary to 'common sense.'" *Cf. id.*, *quoting Massachusetts v. EPA*, 549 U.S. 497, 531. Petitioner's claimed plain meaning interpretation of section 111(d) fails on all these grounds by effectively vitiating section 111(d).

Congress required EPA in section 112 to list and regulate every major source and most area sources of HAPs in the country. 42 U.S.C. § 7412(c)(1), (c)(3). This list covers virtually all major stationary sources of any air pollutant,

including source categories regulated before 1990 under section 111(d). See, e.g., 57 Fed. Reg. 31,576, (July 16, 1992); 40 CFR Pt. 63, Subpts. F–Hhhhhhh. Therefore, under Petitioner's reading of the House amendment and section 111(d), most sources of air pollution are exempted from this provision. Indeed, EPA says *all* major stationary sources of pollution save gas-fired power plants are listed and regulated under section 112. See EPA Br. 35. Petitioner creates an anomaly in the statute when it argues that EPA may only ever control carbon pollution from natural gas plants, while leaving that pollutant uncontrolled at every other existing source. Finally, Petitioner's reading strands the sources that were regulated under 111(d) before 1990. There is no evidence of this intent; to the contrary, as noted infra at 18-19, in 1990, Congress was aware that these sources were regulated under section 111(d) and would likely be regulated as well under section 112.

An interpretation fails if it would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981) (quoting *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973). Here, section 111(d) is written as an affirmative obligation to address pollutants from existing sources of pollution. Reading the House amendment to strip EPA of virtually any authority to meet this obligation is both unsupported by the text's plain meaning and unreasonable.

Finally, as detailed below, Petitioner's interpretation violates the structure of the Act. The statute does not regulate existing stationary source emissions under a single catch-all statutory provision, but under several provisions based on the target pollutant. EPA Br. 3-5. When Congress restructured section 112 in 1990, it made clear the program would not displace other requirements. While sources remained subject to multiple programs, Congress crafted pollutant-specific carve-outs to prevent duplicative regulation of HAPs. Against the weight of this coherent, comprehensive statutory framework, Petitioner's reading of the House amendment to exempt entire categories of sources from section 111(d) coverage leave some harmful pollution unregulated makes no sense.

III. EPA's Proposed Interpretation is at the Very Least a Reasonable Reading of the Statute.

The absence of plain meaning support for Petitioner's reading of the section 111(d) is sufficient to dismiss its petition. Further challenge to EPA's reading of section 111(d) should await promulgation of the final rule. However, because Petitioner asks this Court to reject EPA's proposed reading, we address EPA's interpretation here to demonstrate its reasonableness.

EPA proposes to reconcile any ambiguity existing in section 111(d) by reading the provision to cover carbon pollution and other non-HAPs emitted from power plants. Legal Memorandum, at 26; see also EPA Br. 10. This proposed interpretation is reasonable in light of the two amendments to section 111(d).

The Senate amendment clearly maintains the pre-1990 exclusion of HAPs from section 111(d) regulation. This exclusion mirrors other pollutant-specific carve-outs created by Congress in 1990, and reflects the Act's intent to regulate stationary sources for different pollutants under multiple programs. As amended by the Senate amendment, section 111(d) requires EPA action to address carbon dioxide from power plants because this pollutant is not addressed under section 112 or listed under section 108.

When read in isolation, the House amendment has several plausible meanings. However, its language is "clarified by the remainder of the statutory scheme". *Utility Air Reg. Grp. v. EPA*, 134 S.Ct. at 2442. EPA has proposed several readings for the House amendment that would achieve, in combination with the Senate amendment, an eminently reasonable interpretation of section 111(d) "that is compatible with the rest of the law." *Id.*

A. The Senate Amendment Authorizes EPA Action, and Comports with the Structure of Section 111(d) and the Act.

As noted, the amendments to section 111(d) were prompted by changes to section 112. Historically, section 112 required EPA to set strict health-based standards for each HAP. Pub. L. 91-604, 84 Stat. at 1685. To avoid triggering overly onerous standards, EPA listed only eight HAPs in twenty years. Legislative History, at 859-61.

In 1990, Congress amended section 112 to enable EPA to set different HAP standards for each category of sources, based on what was "achievable" for the category. Congress created HAP-specific definitions of "major source" and "area source" for section 112, 42 U.S.C. § 7412(a)(1), (a)(3), and directed EPA to list all source categories of HAPs for section 112 regulation. 42 U.S.C. § 7412(c)(1), (c)(3). Congress then listed189 HAPs, to expand the program's reach. 42 U.S.C. § 7412(b)(1).

These changes required an update to the section 112 cross-reference in section 111(d). As noted, the Senate amendment achieves this update and otherwise maintains the pre-1990 scope of section 111(d) over non-criteria, non-hazardous pollutants.

The Senate amendment's pollutant-specific exclusion tracks two categories of ancillary changes made to section 112 in 1990. The first category contemplates regulating the same *sources* under both sections 111 and 112. "[T]o the extent practicable," Congress instructed EPA to list section 112 source categories (and subcategories) "consistent with" the categories regulated under section 111. 42 U.S.C. § 7412(c)(1). Members argued consistency would ease compliance with both programs; the example they used repeatedly was of a source already regulated under section 111(d). Legislative History, at 1030, 1038-39, and 1226 (exhorting EPA to list the same subcategories for primary aluminum plants under section 112

that it had used to regulate new and existing aluminum plants under section 111). Congress also stated explicitly that "[n]o emission standards or other requirement promulgated" under section 112:

> shall be interpreted, construed, or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 111 … ."

42 U.S.C. § 7412(d)(7). The Senate amendment tracks this savings clause. It would not cause section 112 regulation to "diminish or replace" section 111(d) but envisions both provisions operating simultaneously to reach different pollutants.

The second category of ancillary changes made to section 112 created carve-outs to avoid unnecessary regulation of the same *pollutant* under multiple programs. See 42 U.S.C. § 7412(b)(2) (barring listing of criteria pollutants, and limiting listing of chemicals regulated under Title VI, as HAPs under section 112); 42 U.S.C. § 7412(b)(7) (barring listing of one criteria pollutant, lead, as a HAP); 42 U.S.C. § 7412(i)(6) (exempting sources from HAP standards for five years, where HAPs are indirectly controlled by equipment installed to comply with other Clean Air Act programs).

Petitioner points to section 112(n) as "evidence" that Congress intended to make EPA choose between regulating power plants under section 112 or section 111(d). Pet. Br. 26. But section 112(n) provides only conditional relief and turns on whether hazardous *pollutants* from those sources are squarely addressed by

other programs. See 42 U.S.C. § 7412(n)(1)(A). Section 112(n) offers no exception to the coherent and consistent strategy of the Act, to subject sources to multiple programs while sometimes limiting duplicative regulation of pollutants. See also 42 U.S.C. § 7470 et seq. (establishing the Prevention of Significant Deterioration Program (PSD) to address pollution from sources already regulated under the Act) but see 42 U.S.C. § 7412(b)(6) (exempting HAPs from PSD permitting requirements). Section 111(d) as amended by the Senate amendment fits this pattern precisely. It requires regulation of sources that may also be regulated under section 112, but for different pollutants.

B. The House Amendment Is No Bar to EPA Action When Read in Statutory Context.

The House amendment is less straightforward. Viewed in isolation, it is susceptible to numerous interpretations, as suggested by parties and *amici* to this litigation, and in academic literature, see e.g., Robert R. Nordhaus, Avi Zevin, *Historical Perspectives on § 111(d) of the Clean Air Act*, 44 ENVIRONMENTAL LAW REPORTER 11096 (Dec. 2014). But the plain meaning of statutory language is not determined in a vacuum. "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (quoted by *Fed. Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 132-33 (2000)). Once the House amendment is read in context, a reading consistent with EPA's proposed interpretation "produces a substantive effect that is compatible with the rest of the

law." *Utility Air Reg. Grp. v. EPA*, 134 S.Ct. at 2442; see also *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997).

Respondents' brief describes several possible readings of the House amendment that would support EPA's proposed interpretation of section 111(d). EPA Br. 36-38. We address just one to illustrate its reasonableness.

EPA notes that "the term 'regulated' … is inherently ambiguous," because "the Supreme Court has explained, when interpreting that term, an agency must consider *what* is being regulated." EPA Br. 37 (citations omitted). Thus, EPA could read "regulated under section 112" to mean regulated "*with respect to that same pollutant*." EPA Br. 38. The fact that Congress amended section 112 to create HAP-specific source definitions and require EPA to list sources of HAPs for regulation under that section provides strong textual support for this reading. Further, section 112 standards require the "maximum degree of reduction in emissions *of the hazardous air pollutants subject to this section*." 42 U.S.C. § 7412(d)(2) (emphasis added). Therefore, a source "regulated under 112" is understood most naturally to mean a source *regulated for its HAP pollution*.

This reading avoids nullifying the Senate amendment, tracks the provision's pre-1990 scope and ongoing carve-out for section 108 pollutants, mirrors the pollutant-specific carve-outs in section 112, and authorizes EPA rulemaking here.

C. EPA's Proposed Interpretation of the Resulting Section 111(d) is Consistent with Proposed Amendments to Section 112.

EPA's proposed interpretation of section 111(d) is further supported by proposed and rejected amendments to section 112. A Clean Air Act bill filed in January 1989 proposed amending section 112 to read: "Any air pollutant which is included on the list under section 108(a), or which is regulated for a source category under section 111(d) may not be added to the list." Sec. 112(b)(2)(B)(i), H.R. 4 (1989). The provision clearly contained two pollutant-based exclusions. In subsequent legislation (H.R. 3030), that provision was struck and the House amendment to section 111(d) appeared. Sec. 111(b), H.R. 3030 (1989). The House amendment resembles the proposal in H.R. 4 and appears to be its successor.

The wording changed slightly, giving rise to the dispute here. However, the new wording was introduced alongside language that would have limited EPA's use of section 112. See Sec. 112(c)(3), H.R. 3030, Legislative History at 3932-33 (EPA could "decide not to list a source category or subcategory" under section 112 if the source was "adequately controlled" by another program); Sec. 301, H.R. 3030, Legislative History at 3937 (directing EPA to regulate just half of the listed sources under section 112). Next to these proposals, the House amendment operated to expand EPA authority under section 111(d) to cover non-HAPs *and* HAPs from sources not regulated under section 112. The proposals giving EPA discretion to regulate under section 112 were removed without comment. See, e.g.,

Legislative History at 3106. In this light, the House language is a vestige of earlier drafts, rather than a clearly expressed intent to vitiate section 111(d). EPA's reasonable interpretation of section 111(d) puts no more weight on this amendment than it can bear.

IV. Traditional Rules of Statutory Interpretation Support EPA Authority.

Other long-standing rules of statutory interpretation would settle this interpretative dispute as well: the canon that statutory text should be reconciled to the maximum extent possible; the presumption against implied repeals; voiding of the text where there is irreconcilable conflict; and the canon that, if no other basis exists for eliminating the conflict, the last provision enacted should control over clashing, prior provisions. Each rule would authorize EPA action here.

A. The Amendments can be Reconciled to Authorize EPA Action.

Absent a "clearly expressed congressional intention to the contrary," courts read potentially conflicting provisions to give meaning to both. *Morton v. Mancari*, 417 U.S. 535, 550 (1974). This Court and others have approved or used this method directly to determine when a new Clean Air Act program was to become effective, *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979), whether a civil service employee could appeal a downgrade in pay; *Atwell v. Merit Systems Protection Bd.*, 670 F.2d 272 (D.C. Cir. 1981), and

how heavy a sentence could be levied in a probation revocation proceeding. *United States v. Gordon*, 961 F.2d 426, 431 (3d Cir. 1992).

In *Spencer County*, this Court reviewed a conflict in the 1977 Clean Air Act Amendments. Section 165 prohibited construction of a major stationary source after August 7, 1977 without adherence to new permitting requirements. Section 168 delayed implementation of the requirements until approval of a state implementation plan. There, as here, the two amendments "were conceived in separate Houses and … never reconciled when the Act as a whole was given birth in Conference." *Spencer County*, 600 F.2d at 866. Yet both amendments pointed to eventual implementation of the requirements. *Id.*, at 872. The Court therefore approved of EPA's effort to reconcile the amendments by establishing an "interim" effective date for the new requirements. "[I]t was the greater wisdom for the agency to devise a middle course between inconsistent statutes so as to give maximum possible effect to both." *Id.*, at 870.

As in *Spencer County*, the amendments originated in different chambers but point in the same direction – that "EPA *shall* prescribe regulations" under section 111(d) in certain circumstances. An interpretation that would effectively vitiate the provision by prohibiting regulation of virtually every source of air pollution cannot survive judicial scrutiny.

B. Under the Presumption against Implied Repeal, an Interpretation May not Vitiate Section 111(d) Without Clear and Manifest Intent.

Courts apply a presumption against the implied repeal of prior laws. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. Borden Co.*, 308 U.S. 188 (1939) (noting "repeals by implication are not favored"); 1A Sutherland Statutory Construction § 23:10 (7th ed.). Congressional intent to repeal an earlier statute must be "clear and manifest". *Radzanower*, 462 U.S. at 154 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

Far from being "clear and manifest", the record is void of Congressional intent to cripple EPA's pre-1990 mandate under section 111(d). No concern was expressed about the inherent scope of authority under section 111(d) or EPA's use this provision in committee reports, floor debates, or conference reports for the 1990 Amendments. The House amendment was introduced with language that would have expanded section 111(d) coverage to include HAPs where EPA had discretion not to regulate a source under section 112. And contemporaneous amendments subjected the same sources to regulation under sections 111 and 112, while providing pollution-specific exemptions. These facts cannot support an interpretation of section 111(d) that would repeal its pre-1990 scope and strip EPA of authority under the provision.

C. If Irreconcilable Conflict Exists, Rules of Statutory Interpretation Still Support EPA's Proposed Interpretation.

Petitioner's interpretation of the House amendment could pose an irreconcilable conflict with the Senate amendment. Finding irreconcilable conflict is unlikely – there must be "a positive repugnancy between" the two provisions, or a finding that "they cannot mutually coexist." *Radzanower*, 426 U.S. at 155. But even if that standard were met, two rules of statutory interpretation would nonetheless support EPA's proposed interpretation of section 111(d).

First, "[i]f a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect." See Antonin Scalia, Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXT (2012), at 56-58; 2A Sutherland Statutory Construction § 23:18 (7th ed.); see also *Reno v. American-Arab Anti-Discrimination Comm'n*, 525 U.S. 471, 509 and note 3 (1999) (Souter, J. dissent); 89 C.J.S. Trial § 992 at 603 (2001) (applying the rule to "irreconcilably inconsistent" special verdicts). Under this rule, section 111(d) would revert to its pre-1990 text, which clearly authorizes EPA action.

Second, "[i]f conflict between provisions in the same act is resolvable no other way, the last provision in point of arrangement within the text of the act is given effect." 2A Sutherland Statutory Construction § 46:5 (7th ed.). This Court has applied the "last in order" rule after exhausting attempts to avoid the conflict.

See, e.g., *Edwards v. Carter*, 580 F.2d 1055, 1080 n. 16 (D.C. Cir. 1978); *Lodge 1858, Am. Fed'n of Gov't Emp. v. Webb*, 580 F.2d 496, 510 and n. 31 (D.C. Cir. 1978). The Senate amendment followed the House amendment in the Statutes at Large and so would be given effect. As described herein, the Senate amendment clearly authorizes EPA's proposed rulemaking.

CONCLUSION

For the foregoing reasons, Petitioner has failed to meet its burden for issuance of an extraordinary writ.

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Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Times Roman typeface and is double-spaced (excepts for headings, footnotes, and quotations more than two lines long).

The undersigned further certifies that the brief is proportionally spaced and contains 5,951 words exclusive of the statement regarding separate briefing, certificate as to parties, rulings, and related cases, table of contents, tables of authorities, signature lines, and certificates of service and compliance. The undersigned used Word to compute the word count.

/s/
Katherine E. Konschnik

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/EDF System, which will send notice of such filing to all registered CM/ECF users. I also caused the foregoing to be served via Federal Express on counsel for the following parties at the following addresses:

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