No. 14-1112

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

In re: Murray Energy Corp.,

Petitioner,

v.

Environmental Protection Agency,

Respondent.

On Petition for Extraordinary Writ to the
U.S. Environmental Protection Agency

AMICUS CURIAE BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT

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November 10, 2014

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MISCELLANEOUS

GLOSSARY

EPA	U.S. Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards

INTEREST OF AMICI

The undersigned states (State Amici) support the Environmental Protection Agency's authority to complete its ongoing rulemaking to limit carbon dioxide emissions from fossil-fueled power plants, the largest source of those emissions. State Amici have a compelling interest in preventing and mitigating climate change harms to people and the environment from such emissions, including increased heat-related deaths, damaged coastal areas, disrupted ecosystems, more severe weather events, and longer and more frequent droughts. *See Massachusetts v. EPA*, 549 U.S. 497, 521 (2007); 74 Fed. Reg. 66,496, 66,523-66,536 (Dec. 15, 2009).

State Amici have fought to reduce greenhouse-gas emissions from existing fossil-fueled power plants. Several State Amici brought the petition that led to *Massachusetts*, 549 U.S. 497, brought public-nuisance claims against the largest owners of fossil-fueled power plants, *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011), and also sued EPA to promptly establish carbon dioxide standards under section 111 of the Clean Air Act, 42 U.S.C. § 7411. *New York v. EPA* (D.C. Cir. No. 06-1322).[1] State Amici have also enacted their own greenhouse-gas emission limitations. *See, e.g.*, Del. Code Ann. tit. 7, § 6043 &

[1] Amici for Petitioner here, West Virginia et al., are also challenging State Amici's and EPA's settlement of the *New York v. EPA* case under the theory that voiding the settlement agreement would block EPA from completing the rulemaking at issue here. State Amici dispute that notion (and the merits of the lawsuit), and have intervened in the case. *See* Doc. #1515118 in *West Virginia v. EPA* (D.C. Cir. No. 14-1146) (granting motion to intervene).

Del. Admin. Code tit. 7, § 1147 (implementing 9-state Regional Greenhouse Gas Initiative); Cal. Code Regs. tit. 17, §§ 95800 et seq.; Wash. Rev. Code § 80.80.040. State Amici thus have a compelling interest in the rulemaking here, which would require *all* states to do their share to reduce power plant greenhouse gas emissions.

SUMMARY OF ARGUMENT

Murray Energy Corp. (Murray), a coal mining company, seeks an extraordinary writ to block EPA from finalizing its proposed rule, which would limit carbon dioxide emissions from fossil-fueled power plants. 79 Fed. Reg. 34,830 (June 18, 2014) (Clean Power Rule). Murray's challenge is both premature and meritless. Murray could seek judicial review of the final rule, and it suffers no injury from EPA's mere consideration of the rule. Accordingly, Murray has not established that this Court has jurisdiction to interfere with a pending rulemaking.

Moreover, nothing in the Clean Air Act clearly and specifically prohibits EPA from considering the Clean Power Rule, as would be required to sustain an extraordinary writ. Murray asserts that the Act unambiguously requires EPA to choose to regulate either hazardous air pollutants (such as mercury) or greenhouse gases emitted from power plants—not both. But Murray's interpretation cannot be reconciled with the language, structure, and history of the statute.

Murray's flawed challenge to EPA's pending rulemaking, if accepted, would harm the environment and the health of State Amici's residents by delaying

critically needed reductions of greenhouse gases from the largest sources of that pollution. The writ should be denied.

ARGUMENT

I. This Court Lacks Jurisdiction and Extraordinary Relief Is Not Available When Petitioner Suffers No Immediate Injury and Could Seek Judicial Review of the Final Rule.

Because the Clean Air Act requires final agency action for judicial review, this Court lacks jurisdiction to issue the requested writ. 42 U.S.C. § 7607(b)(1); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Murray has failed to identify any "uniquely compelling justification" that would permit it to skirt this bedrock jurisdictional rule. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963).

First, there is no dispute here that Murray, like every other interested party, has robust opportunities to participate in the ongoing rulemaking,[2] and that judicial review of the final rule is available. 42 U.S.C. § 7607(b)(1). Murray's ability to pursue its arguments through "the statutorily prescribed method of review" forecloses its attempt to evade that prescribed method here. *Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990).

Second, Murray has failed to show that EPA's mere consideration of the Clean Power Rule imposes legal obligations on or otherwise injures Murray's legal

[2] In fact, EPA has specifically solicited comments on the very same issue Murray raises here. *See* 79 Fed. Reg. at 34,853.

rights sufficient to grant this Court jurisdiction. Murray thus cannot rely on *Leedom v. Kyne*, in which the Supreme Court permitted a challenge to a nonfinal action when the agency "did not contest" that its action had "worked injury." 358 U.S. 184, 187 (1958).[3]

Finally, as explained below, Murray cannot identify "a specific prohibition in the Act," *Leedom*, 358 U.S. at 188, that would bar EPA from even considering the Clean Power Rule. Murray has thus failed to identify any "uniquely compelling circumstances" (Pet. at 28) that would support either this Court's jurisdiction or the extraordinary relief that Murray seeks here.

II. The Text, Structure, and History of the Clean Air Act Confirm EPA's Authority to Regulate Carbon Dioxide Emissions from Power Plants Under Section 111(d).

Murray's request for an extraordinary writ is predicated on the claim that section 111(d), 42 U.S.C. § 7411(d), of the Act specifically prohibits regulation of all non-hazardous pollutants from a source category if any hazardous pollutant is already regulated from that source category under section 112. *See* Pet. at 1, 23, 28. That reading effectively nullifies section 111(d), given that section 112 regulates

[3] Nor is an extraordinary writ necessary to save States from "huge amounts of burdensome work now to develop plans," WV Am. Br. at 1. Allowing the mere planning for the anticipated finalization of a federal rule to be the basis for judicial intrusion into an ongoing rulemaking would dramatically expand the extraordinary writ procedure. Even if that were a cognizable injury, which it is not, the proposed Rule would allow States to obtain one- or two-year extensions if necessary to prepare plans in compliance with the Rule's emission limitations. *See* 79 Fed. Reg. at 34,952 (proposed 40 C.F.R. § 60.5755).

emissions of hazardous pollutants from over one hundred source categories. Nothing in the text, structure, or history of section 111(d) supports this radical interpretation. Accordingly, there is no "definite" and undisputed statutory prohibition here that would justify an extraordinary writ. *Leedom*, 328 U.S. at 189 (quotation marks omitted).

A. Murray's Interpretation Fails to Give Effect to Both of the 1990 Amendments to Section 111(d).

Murray's argument is based on the language of section 111(d) as it appears in the U.S. Code. But, as Murray acknowledges (Pet. 18-20), the U.S. Code language does not reflect the fact that two amendments to section 111(d) were enacted into law in 1990—including a Senate amendment that cannot be reconciled with Murray's interpretation.

Understanding the two amendments requires a brief background on section 111(d)'s place in the Clean Air Act's comprehensive scheme. Section 111(d) is one of the Act's three primary avenues to regulate existing stationary sources. The two other avenues—the National Ambient Air Quality Standards (NAAQS) of sections 108 and 110, 42 U.S.C. §§ 7408, 7410; and the hazardous-air-pollutants program of section 112, *id.* § 7412—address emissions of certain listed pollutants. Section 111(d), by contrast, more broadly authorizes EPA to establish standards for any emissions from existing sources that endanger public health or welfare but that are

not regulated under the other two programs.[4] Thus, these provisions collectively "establish[] a comprehensive program for controlling and improving the nation's air quality." *See Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (internal quotation omitted).

Before the 1990 amendments, section 111(d)(1) required that state plans address "any air pollutant which is not included on a list published under Section 7408(a)," *i.e.*, NAAQS, "or 7412(b)(1)(A) of this title," a cross-reference to the previous version of section 112's hazardous-air-pollutants program. *See* 42 U.S.C. § 7411(d) (West 1977). Section 111(d) thus functioned to mandate the regulation of air pollutants from existing stationary sources that were not otherwise covered by the NAAQS or the hazardous-pollutants program. In 1990, after EPA's delays in listing (and thereby regulating) hazardous air pollutants "proved to be disappointing," *Sierra Club v. EPA*, 353 F.3d 976, 979–80 (D.C. Cir. 2004), Congress extensively amended section 112 to change its regulatory approach. Rather than relying on EPA's listing of hazardous air pollutants to trigger their regulation under section 112—something EPA had rarely done—Congress instead listed 189 hazardous air pollutants itself and directed EPA to list categories of major sources and area sources for each of these pollutants and then to establish

[4] Section 111(b) mandates standards for new and modified sources, and section 111(d) mandates standards for existing sources if those standards "would apply if [the existing sources] were a new source." 42 U.S.C. § 7411(b), (d).

emission standards for each source category. 42 U.S.C. § 7412(b)(1), (c)(1), (d)(1).

Congress amended section 111(d)'s preexisting reference to section 112 to conform it to these structural changes. However, different conforming language from the House and Senate bills amending section 111(d) was included in the final legislation without being reconciled in conference. Both amendments were signed into law by the President and appear in the Statutes at Large, but only the House amendment appears in the U.S. Code.

The Senate amendment simply replaces the former cross-reference to § 7412(b)(1)(A), which was eliminated during the 1990 amendments, with a new cross-reference to that section's replacement, § 7412(b): it thus requires section 111(d) standards for existing sources 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 section 112(b)." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990) (amendment underlined). Neither Murray nor its amici dispute that the Senate amendment preserves section 111(d)'s longstanding role to regulate pollutants (such as carbon dioxide) that are not otherwise regulated under the NAAQS or the hazardous-air-pollutants program.

By contrast, the House amendment replaces the section 112 cross-reference with different language: it requires section 111(d) standards for existing sources 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 emitted from a source category which is regulated under section 112 of this title." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990) (amendment underlined). As explained below, see *infra* Point II.C, that language can also be read to preserve section 111(d)'s application to non-NAAQS and non-hazardous air pollutants such as carbon dioxide. But even if the House amendment were interpreted in the way that Murray urges here, that language would not control. Because both amendments were enacted into law, it is necessary to consider the effect of the Senate amendment, which would indisputably authorize the Clean Power Rule. *See* 79 Fed. Reg. at 34,844; *see also Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979) (where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course . . . to give maximum possible effect to both").

Murray and its amici argue instead that EPA was required to *ignore* the Senate amendment because it did not appear in the U.S. Code and was labeled as a "conforming" amendment, while the House amendment was "substantive." Pet. at 20; WV Am. Br. at 7-12. But it is well-established that the text of the Statutes at Large (which contain both amendments enacted by Congress and signed by the President) governs when it is inconsistent with the U.S. Code. *United States Nat'l*

Bank of Oregon v. Indep. Ins. Agents of America, 508 U.S. 439, 448 (1993).[5]

And here there is no basis to treat one amendment as more "substantive" than another. As explained above, the substantive changes Congress made in 1990 were to section 112, not to section 111(d). The amendments at issue here alter section 111(d)'s cross-reference to section 112 in response to the structural changes to section 112. And both amendments appeared under similar catch-all headings in the House Conference Report, adopted by the House and Senate (H.R. Conf. Rep. 101-952, at 70, 122 (1990)): "Conforming Amendments" (Senate) and "Miscellaneous Guidance" (House) (excerpts in *Att. A*). *See* Pub. L. No. 101-549, §§ 108, 302(a), 104 Stat. 2399, 2467, 2574 (1990). Moreover, the legislative history indicates that Congress *intended* the Senate's amendment to section 111(d) to be in the final bill. After the House amended the Senate's bill and deleted the Senate's seven "Conforming Amendments" (including the revision to section 111(d)), the Conference Committee added the Senate's conforming amendments back in to the final bill. *Compare* S. 1630, 101st Cong. (as passed by House, May 23, 1990) *with* Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990).

[5] West Virginia's suggestion that the Office of Law Revision Counsel's entry into the U.S. Code of only the House amendment shows *Congress*'s intent that the Senate amendment be discarded, WV Am. Br. at 11–12 n.6, is erroneous. The fact that the Revisor was unable to execute the Senate amendment because the House amendment, which appeared earlier in the legislation, had already resulted in striking the same text, does not change the longstanding principle of law that the Statutes of Large, not the U.S. Code, controls when the text of the two differs.

B. Public Policy, EPA's Longstanding Practice, and Other Provisions of the Act Undermine Murray's Interpretation.

Murray's interpretation of section 111(d) also has far-reaching consequences that cannot be reconciled with the Clean Air Act's broad protective purposes. Sources that emit hazardous air pollutants, and that thus could be regulated under section 112, also emit a broad range of other pollutants, including carbon dioxide. Under Murray's reading of section 111(d), EPA would have to choose *either* section 112 to address dangers associated with hazardous air pollutants like mercury, *or* section 111(d) to address the "serious and well recognized" climate-change harms caused by carbon dioxide emissions from power plants, as well as the harms from emissions of other harmful pollutants such as sulfuric acid mist and fluoride compounds. *See Massachusetts*, 549 U.S. at 521; 79 Fed. Reg. at 34,833. But it cannot choose both, according to Murray.

It makes no sense that Congress would have directed EPA to make such a choice in a statute designed to protect public health and welfare. The Act's principal purpose to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1), would hardly be served if EPA were limited to regulating only one set of dangerous pollutants, but not another, from the most significant polluters in the country. In particular, Murray would exclude the largest sources of carbon dioxide from regulation under section 111(d) by virtue of the fact that those sources—such as power plants, petroleum refineries, and cement

plants—are already regulated under section 112 due to their emission of hazardous air pollutants. This new gap in regulation would undermine an obvious function of section 111(d) that the Supreme Court recognized in *AEP v. Connecticut*: namely, to "provide[] a means to seek limits on emissions of carbon dioxide from domestic power plants."[6] 131 S. Ct. at 2537-38.

Nothing in the legislative history of the 1990 amendments suggests that Congress intended such a radical result when it replaced section 111(d)'s cross-reference to the hazardous-air-pollutant program.[7] In both the House and the Senate, these minor changes to section 111(d) were made without any debate or discussion, strongly suggesting that the purpose of both amendments was to preserve section 111(d)'s role to fill the gap where emissions are unregulated under the other programs. Silence in legislative history accompanying a subtle legislative change indicates that Congress did not intend to alter significantly the preexisting scheme. *See United States v. Neville*, 82 F.3d 1101, 1105 (D.C. Cir. 1996). As the Supreme Court has stated, Congress "does not . . . hide elephants in mouseholes."

[6] West Virginia's claim here that a footnote in *AEP* supports its reading of section 111(d), WV Am. Br. at 4-5, is unfounded. Neither the meaning of section 111(d)(1)(A) nor the two 1990 amendments were at issue before the Court.

[7] Indeed, in compiling the legislative history of the 1990 amendments, the Congressional Research Service transcribed the Clean Air Act, as amended, by including both the House and Senate versions of the amendments to section 111(d) with the notation that the amendments are "duplicative" and simply use "different language [to] change the reference to section 112." *A Legislative History of the Clean Air Act Amendments of 1990*, Vol. 1, at 46 & n.1 (1993) (excerpt in *Att. A*).

Whitman, 531 U.S. at 468. This Court should thus reject the "anomalous effect" of Murray's reading of section 111(d), which would force EPA to select only one set of harmful pollutants to regulate based "simply on the fortuity that [these pollutants] share [] a source." *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524, 527-28 (D.C. Cir. 2012).

Murray's interpretation is also inconsistent with EPA's longstanding regulation (both before and after the 1990 amendments) of source categories under section 111(d) and section 112.[8] EPA's practice is supported by the plain language of other provisions of section 112 as amended in 1990, which further evidence Congress's understanding that different emissions from the same source categories could be regulated under both sections 111 and 112.[9] For example, Congress directed EPA to keep its lists of source categories "consistent" between sections

[8] *See, e.g.*, 61 Fed. Reg. 9,905 (Mar. 12, 1996) & 40 C.F.R. pt. 63, subpt. AAAA (regulating landfills under section 111(d) for methane and non-methane organic compounds and under section 112 for vinyl chloride, ethyl benzene, toluene, and benzene); 42 Fed. Reg. 12,022 (Mar. 1, 1977) & 40 C.F.R. pt. 63, subpt. BB (regulating fluorides from phosphate fertilizer plants under section 111(d) and regulating hydrogen fluoride and other pollutants under section 112).

[9] Petitioner misconstrues the holding of *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), as deciding that when a source is listed under section 112, EPA has no authority to regulate that source under section 111(d). Pet. at 7. The *New Jersey* court did not reach that question at all. Instead, because it determined that EPA's delisting of power plants from section 112 was improper, and "under EPA's own interpretation" it could not use section 111(d) to regulate mercury (a section 112-listed hazardous air pollutant) from this section 112-listed source category, the section 111(d) rule was invalid. 517 F.3d at 583.

111 and 112. 42 U.S.C. § 7412(c)(1); *see also id.* § 7412(d)(7) ("No emission standard or other requirement promulgated under this section shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411").

Murray nonetheless insists that its interpretation should prevail because of congressional intent to avoid "double regulation." But Congress' intent to avoid "double regulation" is maintained by precluding use of section 111(d) to regulate emissions from existing sources if those same emissions are being regulated under section 112. Murray cannot demonstrate that Congress intended to sacrifice comprehensive public health protections by forgoing regulation of harmful but *non-hazardous* air pollutants from source categories that happen to also emit a *hazardous* air pollutant.

C. Murray's Interpretation Is Not Compelled by the Language of the House Amendment.

In any event, the premise of Murray's argument—that the House amendment supports its exclusive interpretation of section 111(d)—is flawed. As stated above, for sources subject to regulation under section 111(b), the House amendment revises section 111(d)(1)(A) by requiring performance 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 emitted from a source category which is regulated under section 112 [*i.e.*, the hazardous-air-pollutants program].

Murray reads the underlined language to preclude section 111(d) standards for *non-hazardous* air pollutants that are emitted from a source regulated under section 112. But as the United States explains, the literal text of House amendment is susceptible to multiple readings, defeating Murray's contention that the language specifically prohibits regulation of carbon dioxide. *See* U.S. Resp. at 28-30.

In addition, the House amendment could be reasonably interpreted as simply preserving section 111(d)'s role to regulate emissions not regulated by the NAAQS or the hazardous-air-pollutants program. For example, the phrase "which is regulated under section 7412" could be read as modifying both "any air pollutant" and "source category," thus referring to those emissions that are actually subject to section 112 emissions standards because (a) the *pollutant* is "regulated under section 7412"—i.e., listed as a hazardous air pollutant, *and* (b) the *source category* for that pollutant is "regulated under section 7412"—i.e., listed as a source category subject to section 112 regulation. Read this way, the House amendment is a shorthand way of cross-referencing section 112 to clarify that section 111(d) only precludes regulation of a pollutant from a specific source category (*e.g.*, mercury from power plants) if those emissions are actually regulated under section 112—thus providing no prohibition on standards for non-hazardous air pollutants such as carbon dioxide that are not subject to section 112 emission standards. Indeed, under this reading, the House amendment would also authorize section 111(d)

standards for listed hazardous air pollutants as well, so long as they are emitted from *sources* that are not regulated under section 112 for those pollutants.

In contrast to Murray's interpretation, this interpretation of the House amendment would preserve section 111(d)'s role in the Act's comprehensive scheme by authorizing standards for emissions not otherwise regulated under the Act. And under this reading of the House amendment, there would be no bar to EPA's promulgation of carbon-dioxide standards under section 111(d). Because the House amendment thus does not compel Murray's position here, its argument would fail even if the Senate amendment were not considered.

CONCLUSION

For the foregoing reasons, Petitioners' writ is both improperly before this Court and meritless. The writ must be denied.

Dated: November 10, 2014

Respectfully submitted,

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[10] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Curiae Brief of States in Support of Respondent was filed on November 10, 2014 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Michael J. Myers
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