ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

CITY OF NEW YORK, et al.

Intervenors.

Petition for Review of Settlement Agreement of the
United States Environmental Protection Agency

CORRECTED FINAL REPLY BRIEF FOR PETITIONERS

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GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
HAP	hazardous air pollutant

INTRODUCTION AND SUMMARY OF ARGUMENT

The settlement's legality turns on the meaning of an unambiguous provision: EPA may not regulate under Section 111(d) "any air pollutant . . . emitted from a source category which is regulated under section [112]." Interpreting this phrase just five years after its enactment, the Clinton-era EPA explained that it means what it says: EPA may not regulate under Section 111(d) any source that is already regulated under Section 112. In four detailed analyses in the twenty years since, EPA reaffirmed this "literal reading" of this text as it appears in the U.S. Code.

In light of this history, EPA's argument on the merits here is nothing short of astonishing. What was in June 2014 EPA's "literal reading" of the statutory text is now Petitioners' "convoluted take" on a "grammatical mess." And what EPA once admitted was clear congressional intent to prohibit double regulation of the same existing sources under two entirely different regulatory regimes is now Petitioners' effort to "largely eviscerate" EPA's regulatory authority to protect the public from numerous "dangerous pollutants."

Nor are EPA's threshold arguments any more substantial. EPA first claims that a settlement agreement that EPA made "final" under the Clean Air Act is somehow not reviewable "final action" under that same Act. EPA then makes a series of arguments under ripeness, standing, and mootness—including the remarkable contention that this lawsuit is simultaneously too early and too late.

These fact-dependent threshold arguments fail because, *inter alia*, they each would require this Court to accept EPA's fiction—in the face of overwhelming contrary factual evidence—that the agency may abandon its signature rulemaking.

This Court should not be misled by EPA's convenient, newfound confusion over the Section 112 Exclusion's plain meaning or EPA's self-serving claims that it may abandon the rulemaking. The Exclusion's meaning is now fully briefed in this case, which challenges a settlement that is unquestionably final action. It is time to stop the substantial waste of public resources that EPA's lawless Section 111(d) enterprise is imposing upon States and their citizens.

ARGUMENT

I. The Settlement Agreement's Section 111(d) Provisions Violate The Section 112 Exclusion

A. The "Literal" Terms Of The Section 112 Exclusion Render The Section 111(d) Provisions Of The Settlement Illegal

The text of the Section 112 Exclusion, as it appears in the U.S. Code, conveys a single unambiguous message: EPA may not mandate *any* state-by-state emissions standards under Section 111(d) for an existing source that is already regulated under Section 112. In pertinent part, Section 111(d) provides that EPA can require States to issue "standards of performance for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d)(1). The Section 112 Exclusion, by

its plain terms, carves out from EPA's Section 111(d) authority any standards for any "emi[ssions] from a source category which is regulated under section [112]."

Until this litigation, EPA has *consistently* explained for twenty years that the Exclusion in the U.S. Code has that "literal" meaning. After detailed analyses in 1995, 2004, 2005, 2007, and 2014, EPA repeatedly concluded that "a literal reading" is "that a standard of performance under CAA section 111(d) cannot be established for any air pollutant"—"HAP and non-HAP"—"emitted from a source category regulated under section 112." 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004) ("Mercury Rule Proposal"); *see* Pet. Br. 31; JA 61 (EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, 1-6 (1995) ("1995 EPA Analysis")). This means that "if source category X is 'a source category' regulated under section 112, EPA could not regulate HAP or non-HAP from that source category under section 111(d)." JA 138 (70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005) ("Mercury Rule"))

EPA now tries to downplay these conclusions, asserting that "'[l]iteral' does not mean unambiguous" and "thus EPA's use of 'literal' does not mean that EPA believed that this was the only possible way to read" the Exclusion. Resp. Br. 52 n.35, 35 n.20. But EPA's prior actions speak for themselves. Never in its earlier comprehensive discussions of the Exclusion's text in the U.S. Code did EPA sug-

gest any other reasonable interpretations, much less identify any of the numerous interpretations that it now claims are *all* better ways of reading the language.

Because EPA has regulated existing power plants under Section 112, it is prohibited—under the agency's own understanding of the Exclusion's "literal" text—from regulating those plants under Section 111(d). Pet. Br. 31.

B. EPA's Attempts To Overcome The Exclusion's "Literal Reading" Lack Merit

1. EPA's Appeal To Legislative History And Statutory Context Fails Under Binding Precedent

EPA contends that the Exclusion's literal reading must be ignored because of "legislative history and statutory context," Resp. Br. 35, 45-50, but that argument is foreclosed by *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). In the Tailoring Rule, EPA made an identical argument, attempting to avoid "*a literal reading*" of the Clean Air Act based upon its opinion of "congressional intent," structure, and policy. 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (emphasis added). The Supreme Court rejected the argument, explaining that EPA cannot "revise clear statutory terms." *UARG*, 134 S. Ct. at 2446.

What is more, EPA's attempt to ignore the Exclusion's literal terms would fail under this Court's case law even absent *UARG*. Before *UARG*, this Court took a less categorical—but still extremely stringent—approach to setting aside "literal" statutory language. Specifically, "to avoid a literal interpretation at *Chevron* step

one," EPA must make an "extraordinarily convincing" "show[ing] either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001) (quotations omitted). EPA's arguments do not meet this standard.

To begin, EPA points to no legislative history that suggests "Congress did not mean what it appears to have said." *Id.* The best EPA can muster is Congress's general purpose in 1990 to "expand EPA's regulatory authority." Resp. Br. 45-46. This is hardly "extraordinarily convincing." *Appalachian Power*, 249 F.3d at 1041. "[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (citation omitted). The 1990 Amendments greatly expanded the reach and severity of the Section 112 program; it was sensible for Congress also to refuse to subject existing sources, operating with sunk costs, to both the revamped Section 112 program under federal control and the Section 111(d) program under state control. That is what the Exclusion's literal terms provide.[1]

[1] EPA also relies on a footnote in a report that, at best, expresses the Congressional Research Service's opinion about the meaning of the Exclusion. *See* Resp. Br. 47. That is not legislative history. Moreover, the Service's opinion—that the Exclu-

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EPA's failure to carry its burden is unsurprising, as the legislative history that does exist entirely supports applying the Exclusion literally. As Petitioners pointed out, EPA itself has previously determined that the "legislative history" demonstrates that the House of Representatives—where the Exclusion's revision originated—"sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." JA 138. So while EPA now claims there is "not a scintilla of evidence in the legislative history supporting Petitioners[,]" Resp. Br. 45, EPA has already conceded as *historical fact* that the House intended the Exclusion to mean what its literal terms say. EPA does not address its prior analysis, let alone explain where it erred.

As to the Senate's intent, the only relevant statement in the legislative history supports Petitioners' position. During the floor discussion of the 1990 Amendments, the Senate Manager specifically "recede[d]" to several substantive changes in Section 108 of the House bill. 136 Cong. Rec. S16895-01 (Oct. 27, 1990), 1990 WL 164490. One was the House's revision of the Exclusion.

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sion, as it now appears in the U.S. Code, has the same meaning as the pre-1990 Exclusion—is not a reading of the statutory text advanced by any party, including EPA. *See* Pet. Br. 38 (explaining the flaws with that view).

Having failed to make the historical case, EPA also falls short of proving "as a matter of logic and statutory structure" that Congress "almost surely could not have meant" what the Exclusion's literal terms provide. *Appalachian Power*, 249 F.3d at 1041. EPA claims that the Exclusion's literal terms are "inconsistent" with Section 112(d)(7), *see* Resp. Br. 50, but as the NGO Intervenors note, this provision only possibly applies when a regulation "established" under another enumerated provision, such as Section 111, *predates* a Section 112 regulation, *see* NGO Br. 7. How Section 112(d)(7) would interact with the Exclusion where a legacy Section 111(d) standard *predates* a Section 112 regulation is not at issue here.[2] The State Intervenors separately suggest that the Exclusion's literal reading "conflicts" with Section 112(c)(1), which merely instructs EPA to keep the source category lists in Sections 112 and 111 "consistent" to the extent practicable. State Intervenors Br. 21. What State Intervenors ignore, however, is that while Section 111(d) cannot be invoked to regulate an existing source already regulated under Section 112, no such restriction applies to new-source standards under Section 111(b), which are the overwhelming focus of Section 111. Pet. Br. 4.

[2] For the same reason, the Institute for Policy Integrity's observations that EPA has continued to administer Section 111(d) standards that *predate* Section 112 regulations of the same sources is irrelevant. NYU Am. Br. 9-15. Relatedly, even if double regulation may be permissible under other Clean Air Act provisions, *see* NGO Br. 6, that does not show Congress "surely" intended it here.

2. EPA's Policy Argument Is Unavailing

EPA claims that applying the Exclusion "literal[ly]" would "largely eviscerate" EPA's authority, leaving "dangerous pollutants" unregulated. Resp. Br. 33-34, 49-50. This argument fails for two reasons. *First*, "[a]ppeals to the design and policy of a statute are unavailing in the face of clear statutory text." *Sierra Club v. EPA*, 536 F.3d 673, 679 (D.C. Cir. 2008). *Second*, as explained below, any gap in authority created by the Exclusion is insubstantial.

Contrary to EPA's claims, the gap not covered by Section 111(d), if any, is virtually nonexistent after the 1990 Amendments. As Petitioners have explained, the 1990 Amendments dramatically expanded Section 112 to cover any pollutant "'which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise.'" Pet. Br. 33-34 (quoting 42 U.S.C. § 7412(b)(2)). This broad definition should be capable of capturing most, if not all, pollutants of concern emitted from a source regulated under Section 112. Section 111(d), in turn, essentially covers any air pollutant (both HAP and non-HAP) emitted from a source not regulated under Section 112. On top of all this, the NAAQS program covers "criteria pollutants." Resp. Br. 3. The gap has thus been reduced to non-criteria pollutants emitted from Section 112 sources that fall outside the now-capacious definition of a HAP. EPA

and its supporters fail to explain how "dangerous" pollutants could slip into that gap.

The claimed gap in authority is also belied by the regulatory history since the 1990 Amendments. In 24 years, EPA has only issued performance standards under Section 111(d) for two source categories, and in both instances EPA took action consistent with the Exclusion. In 1995, EPA imposed a Section 111(d) regulation on landfill gas emitted from municipal solid waste ("MSW") landfills. Addressing the Exclusion, EPA adopted the literal reading that Petitioners urge and acknowledged that the regulation would be barred if MSW landfills were "actually . . . regulated under Section 112." JA 61.[3] But because the "section 112 emission standard for MSW landfills" had not yet been "promulgat[ed]," EPA determined it could proceed with the Section 111(d) rule. *Id.* Next, in 2004, EPA issued the Mercury Rule Proposal, in which EPA sought first to delist power plants under Section 112 and then to regulate them under Section 111(d). This Court rejected EPA's effort to delist power plants under Section 112, then vacated the Section 111(d) rule under the Section 112 Exclusion. *See New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008).

[3] EPA's claim that it has "never adopted Petitioner's interpretation of [the Exclusion]," Resp. Br. 51, is thus simply false.

This history is instructive in two ways. *First*, the expansion of Section 112 has, since 1990, clearly left little for the Section 111(d) program to do. *Second*, any gap in authority created by the Exclusion has never caused EPA, before now, to claim that the Exclusion's literal terms must be ignored in order for EPA to regulate. Consistent with the Exclusion's literal terms, EPA has only invoked Section 111(d) when it was not already regulating the source category under Section 112: where a Section 112 regulation was not yet in place (as with MSW landfills in 1995), or where EPA had delisted the category under Section 112 (as it unsuccessfully sought to do with power plants during the Mercury Rule rulemaking). EPA offers no case law to support the notion that such an insubstantial gap, if it exists, is nevertheless so vital to the public interest that this Court must permit EPA to rewrite statutory text.

3. The Alternative Interpretations Of The Exclusion That EPA And Intervenors Have Tentatively Offered Are Meritless

In what can only be described as spaghetti-against-the-wall statutory construction, EPA and Intervenors suggest a cascade of alternative interpretations of the Exclusion. These attempts to escape the Exclusion's "literal" meaning lack merit.

a. EPA first offers two interpretations—endorsed by no one else—that would nullify the Exclusion: (1) read the Exclusion as a "mandate" to regulate any

source category that is regulated under Section 112, Resp. Br. 37-38; and (2) read the Exclusion "alternative[ly]" with other exclusions in Section 111(d), *id.* at 35. Each is foreclosed by binding precedent, statutory text, and structure.

First, as Petitioners explained, both interpretations directly conflict with this Court's decision in *New Jersey v. EPA*. Pet. Br. 10, 36, 37. EPA does not attempt to distinguish or otherwise explain this authority.

Second, neither reading plausibly construes the text. The "mandate" interpretation ignores the obvious parallel structure of the several exclusion clauses in Section 111(d). *See* Trade Ass'n Am. Br. 14. Moreover, Section 111(d) *already* mandates that EPA "shall" issue performance standards for "any existing source," assuming the equivalent new source is regulated under Section 111(b) and no exclusion applies. As even EPA must admit, the "mandate" interpretation would turn the Exclusion into superfluous "reinforce[ment]," Resp. Br. 38 n.24, in violation of settled principles of statutory interpretation. As for the "alternative" interpretation, it is foreclosed by the proper reading of exclusionary clauses with multiple disjunctive subsections. Pet. Br. 36. EPA responds that the subsections here have their own "internal grammatical structure," Resp Br. 37, but does not explain why that is relevant—because it is not.

Finally, both interpretations would radically expand the Section 111(d) scheme. The statute mandates that EPA "shall" issue performance standards for an

existing source if EPA has regulated equivalent new sources under Section 111(b), unless an exclusion applies. By nullifying the Exclusion, these interpretations would require EPA to issue Section 111(d) standards for every one of the over 70 source categories regulated under Section 111(b). Pet. Br. 4.

b. Intervenors—with EPA's tentative endorsement, Resp. Br. 38-39—propose two other interpretations: (1) read the phrase "which is regulated under Section 112" to modify *both* "source category" *and* "any air pollutant," such that the Exclusion would prohibit "standards of performance for any existing source for any air pollutant *which is regulated under Section 112* . . . emitted from a source category which is regulated under section [112]"; and (2) read the word "regulated" as pollutant-specific, such that the Exclusion would prohibit only "standards of performance for any existing source for any air pollutant . . . emitted from a source category which is regulated under section [112] *with respect to that same pollutant*." State Intervenors Br. 13-15; NGO Br. 10-11.

Again, neither of these interpretations is a plausible construction of the text. The first is premised on a notion that, to Petitioners' knowledge, does not exist in the English language. Under the "rule of the last antecedent," a limiting clause—"which is regulated under Section 112"—should "ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (quotations omitted). Here, the last

antecedent is "source category." In special circumstances, a limiting clause may instead modify an earlier noun or phrase, because "the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates." *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 981 (1986). But what Intervenors propose—that a limiting clause simultaneously modifies *two* antecedent phrases—is entirely novel.

The second reading is plainly an attempt to add words that are not in the statute, contrary to long-standing rules of statutory construction. Although no one has ever in 24 years professed confusion over the meaning of the word "regulated" in the Exclusion, Intervenors now propose that a source category could be "regulated under Section 112" only if it is subject to a Section 112 standard for the same pollutant that EPA is seeking to cover under Section 111(d)—here, carbon dioxide. But this would mean that a power plant—which is nevertheless subject to onerous Section 112 standards—would nonsensically be considered "[un]regulated under Section 112" for purposes of the Exclusion.[4] What Intervenors mean is that power

[4] Intervenors' claim that the Supreme Court construed Section 111(d) this way in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) (*"AEP"*), *see* State Intervernors' Br. 19; NGO Br. 12, is a misreading of that case that even EPA does not assert, *see* Pet. Br. 39-40. EPA's attempt to cloud the meaning of that case with statements from counsel, *see* EPA Br. 34 n.19, is also unavailing. These statements are fully consistent with the Exclusion's literal reading because there was no Section 112 rule regulating power plants at the time of

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plants are "[un]regulated under Section 112 *with respect to that same pollutant*," but those latter words cannot be smuggled in through the word "regulated."

Both interpretations are also inconsistent with the legislative history. Rather than accomplishing the congressional aim of "preclud[ing] regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," JA 138, these redrafts would *preserve* EPA's pre-1990 Section 111(d) authority in its entirety, *and also* expand that authority to cover HAPs in certain circumstances. Notably, neither EPA nor the Intevenors cite any legislative history supporting an intent to expand the Section 111(d) program.

4. The Extraneous Conforming Amendment Is Irrelevant And Its Application Here Would Produce The Same Result

EPA's continued effort to create ambiguity from a "drafting error" in the Statutes at Large, *see* Resp. Br. 40-45, is also unpersuasive. Until this litigation, EPA had offered only one basis for avoiding the Exclusion's literal terms: a stray conforming amendment in the 1990 Statutes at Large that EPA claimed created ambiguity as to the Exclusion's meaning. Pet. Br. 46-47. Petitioners have ex-

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AEP. As EPA explained in 1995, Section 111(d) regulations of a source category can be issued so long as Section 112 standards for that category have not been "promulgat[ed]." JA 61.

plained that the conforming amendment is irrelevant for two independent reasons, and EPA offers no meaningful answers.

a. Petitioners first argued that the conforming amendment was merely a clerical change to a cross reference, which became obsolete in light of the substantive amendment to the Exclusion. *Id.* at 41, 45-47. Under Congress's official legislative guides, decades of uniform legislative practice, and binding case law, such a conforming amendment is a meaningless drafting error. *Id.* at 41-44. EPA made this same point when it first addressed the revised Exclusion in 1995, explaining that the conforming amendment should be ignored because it "is a simple substitution of one subsection citation for another, without consideration of other amendments of the section in which it resides." JA 60.

EPA offers no persuasive response to this reasoning. It has no answer at all to Congress's official drafting manuals. Pet. Br. 41-43. And its response to the legislative practice is no better. Of Petitioners' 43 examples of the Office of Law Revision Counsel excluding conforming amendments that conflicted with prior substantive amendments, EPA purports to distinguish four because, *inter alia*, they involved "obvious error[s]" or amendments that were "very different in scope." Resp. Br. 43 n.28. But that is exactly what occurred in 1990. Congress made an "obvious error" by including the conforming amendment, which is "very different in scope" from the substantive amendment. As EPA has explained, the substantive

amendment "*substantively* amended section 111(d)," JA 138 (emphasis added), and was "included with a variety of substantive provisions," *id.* at 192, whereas the conforming amendment was merely a "drafting error," listed with similar clerical changes, *id.* at 138, and sought to make "a simple substitution of one subsection citation for another," *id.* at 60. Neither EPA nor its supporters have identified any example, from any court or agency, giving meaning to a conforming amendment in such circumstances.

EPA falls back on cases holding that a conforming amendment can sometimes have substantive impact, and that the Statutes at Large prevail when they conflict with the U.S. Code. Resp. Br. 5. But these uncontroversial propositions do not justify giving meaning to *this* conforming amendment, which EPA has admitted is a "drafting error" related to updating a cross-reference. Binding case law forecloses giving meaning to such errors. *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

b. EPA also has no good response to Petitioners' alternative argument: assuming the two amendments are equally meaningful, each would need to be given full effect by prohibiting under Section 111(d) regulation both of HAPs (consistent with EPA's erroneous understanding of the conforming amendment) and of sources regulated under Section 112 (consistent with the substantive amendment). Pet. Br. 48-49. Citing *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C.

Cir. 1979), EPA argues that this interpretation is not a "middle course" between the two amendments, and that it deserves deference. Resp. Br. 44. But split-the-difference compromise is not the lesson of *Spencer County*. Rather, that case involved two different statutory deadlines for the same action, and EPA's "middle course" gave "maximum possible effect" to both deadlines. *Id.* at 872. Here, Petitioners' alternative argument is the *only* way to give "maximum effect" to EPA's view of both amendments, which, among other reasons, makes *Chevron* deference inapplicable. *See also* Trade Ass'n Am. Br. 26-27.[5]

II. This Court Has Jurisdiction To Review The Settlement Agreement

A. A Settlement That Is "Final" Under The Clean Air Act Is Necessarily "Any . . . Final Action" Under The Act

EPA contends that the settlement agreement is not reviewable final action, but it fails to squarely confront Petitioners' arguments. Petitioners first argued that

[5] EPA points out that an *amicus* brief filed in the Mercury Rule litigation by Petitioners Alabama, Indiana, Nebraska, North Dakota, South Dakota, and Wyoming—as well as West Virginia's Department of Environmental Protection—included a *single sentence* supporting the rewrite of the Exclusion that EPA advanced. EPA Br. 53. Some context explains what occurred. EPA's Section 111(d) rule in that rulemaking, which sought to regulate a HAP from existing power plants *after* delisting power plants from Section 112, was permissible under the Exclusion's "literal" terms. *See supra*, at 9-10. But EPA had justified the rule based upon its rewriting of the Exclusion. The parties' support for the regulatory outcome there is thus entirely consistent with the position advanced here, but in that litigation they were required to defend EPA on the "grounds upon which [EPA] itself based its action." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

the settlement is reviewable final action under Section 113(g), which sets forth procedures for making "final" a "settlement agreement of any kind under" the Clean Air Act, and Section 307(b), which broadly permits review of "any . . . final action taken" under the Act. Pet. Br. 51-52 (quotations omitted). EPA ignores this straightforward syllogism, focusing instead on the finality or non-finality of the *proposed rule*, Resp. Br. 23-25, which is not at issue here.[6]

EPA likewise does not directly engage Petitioners' alternative argument that—even without the interaction between Sections 113(g) and 307(b)—the settlement would be final under the two-prong test in *Bennett v. Spear*, 520 U.S. 154 (1997). Pet. Br. 52-53. With regard to the "consummation" of agency decision-making, EPA argues that the settlement does not resolve "the final outcome of the rulemaking process." Resp. Br. 23. But the relevant decision that the settlement resolved was *not* the entire Section 111 "rulemaking process"; it was EPA's dispute with Intervenors as to whether EPA would engage in the rulemaking at all. *See* Pet. Br. 52-53. The settlement also satisfies *Bennett*'s "legal consequences"

[6] For that same reason, EPA's citation to *National Environmental Development Associations Clean Air Project v. EPA*, 686 F.3d 803, 809 (D.C. Cir. 2012), does not help it, because that case involved a preamble discussing future rulemakings, not a settlement finalized under statutorily mandated procedures. Similarly unhelpful is *Association of Irritated Residents v. EPA*, 494 F.3d 1027, 1037 (D.C. Cir. 2007), which held that a consent agreement was not a reviewable rule under the APA. Review is sought here under Section 307, which provides for review of "*any* . . . final action taken" under the Clean Air Act, not just final rules.

prong, because it imposes legally binding obligations on both EPA and Intervenors. *Id.* at 54. EPA does not dispute that there were legal consequences, but again offers a non-sequitur, asserting that the settlement has no legal consequences for "non-settlor[s]." Resp. Br. 23. That is irrelevant, of course, and a transparent attempt to conflate the finality inquiry with EPA's (meritless) standing arguments.

EPA's claim that finding finality here will "subject[] the federal courts to a flood of collateral litigation challenging" "*every* rulemaking settlement," Resp. Br. 24 n.13, is baseless hyperbole. While every settlement that EPA finalizes under Section 113(g) is necessarily reviewable "final" action, threshold issues like ripeness and differences in EPA's underlying substantive authority will prevent challenges to most settlements. For example, the settlement's Section 111(d) portions are vulnerable given EPA's lack of authority, but the Section 111(b) portions are on different substantive footing.

B. EPA's Contradictory Arguments That Petitioners Filed This Lawsuit Both Too Early And Too Late Are Meritless

As Petitioners explained, this lawsuit ripened in June 2014, when both prongs of the ripeness inquiry were satisfied. For a case to be ripe, the issues must be "fit" for "judicial decision," and there must be "hardship to the parties of withholding court consideration." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 479 (2001) (quotation omitted). It was in June 2014, with the issuance of the Legal Memorandum, that the purely legal issue here became "fit" for resolution when

EPA first crystallized its view that it would honor the settlement by issuing a Section 111(d) rule regulating existing power plants, notwithstanding the Section 112 rule. Pet. Br. 54-55. And it was also in June 2014 that Petitioners began suffering hardships. *Id.* at 55.

EPA launches a confused attack on this analysis, criticizing Petitioners for seeking review both too early, Resp. Br. 28-31, and too late, *id.* at 27-28. This is yet another example of EPA's see-what-sticks approach to this litigation. In fact, the lawsuit is precisely on time, having been filed within 60 days of ripening in June 2014, just as the Clean Air Act requires. 42 U.S.C. § 7607(b)(1).

1. EPA's "too early" argument focuses solely on the first ripeness prong. EPA cannot and does not dispute that this case presents a "pure[]" issue of "statutory interpretation," which is typically "fit" for judicial resolution. *Whitman*, 531 U.S. at 479. Instead, EPA argues that review is presently improper because this issue "may be mooted by the outcome of a pending notice and comment rulemaking process." Resp. Br. 31.

While EPA might be right in most cases that involve a pending rulemaking, ripeness is a case-by-case inquiry, and this case is unique. In June 2014, EPA "concluded" that it has Section 111(d) authority to regulate existing power plants, *see* JA 398, and then declared it will issue the final rule by June 2015, *see* 79 Fed. Reg. 34,380, 34,838 (June 18, 2014); Pet. Br. 27. Since that time, EPA's leader-

ship has repeated this unequivocal commitment in congressional committee rooms, (JA 479-80, 487), on the public airways (*id*. at 521), and in official agendas (*id*. at 526). The Obama Administration's proposed budget for 2016 declares that the Section 111(d) rule "*will* be finalized this summer," and provides a $4 billion "incentive fund" for States that exceed the requirements of the rule. JA 538.

Moreover, if there are any "doubts about the fitness of the issue for judicial resolution," this Court must "balance . . . the hardship[s] to the parties," which are significant and undisputed. *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003) (quotations omitted). As demonstrated through detailed declarations, "withholding court consideration" *will* subject States to "hardship[s]," *Whitman*, 531 U.S. at 479 (quotations omitted), including the expenditure of thousands of employee hours paid for out of the public fisc, Pet. Br. 16-21, 55-56. Any "institutional interests in postponing review" are vastly outweighed by this ongoing waste of massive public resources, especially considering that the issue involves pure statutory construction of a single statutory clause, which has now been fully briefed and would simply be back before this Court in identical form next term. *Fowler*, 324 F.3d at 756 (citation omitted).

The cases cited by EPA are not to the contrary. For example, *Atlantic States Legal Foundation v. EPA*, 325 F.3d 281 (D.C. Cir. 2003), involved no showing of harm from delay and a regulation that would only become effective upon further

third-party actions that could alter the legal challenge. *Id.* at 284-85. Here, in contrast, EPA has repeatedly committed to adopt the Section 111(d) rule, the legal issue will not be affected by the particulars of the final rule, and delay will impose substantial harm on the public fisc. Similarly unavailing is *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), which was a challenge to an issue set to be eliminated by a proposed rule and thus could "go[] away without the need for judicial review" if nothing changed. *Id.* at 388. The facts here are the exact opposite; if the status quo persists, this issue will be back before this Court unaltered.

At bottom, EPA would have this Court conflate ripeness and finality, as revealed by its entirely inapposite reliance on *Las Brisas Energy Ctr., LLC v. EPA*, Nos. 12-1248 et al., 2012 WL 10939210 (Dec. 13, 2012). Whether the Section 111(d) rule has been consummated is not the question in this case. Here, the issue need only be "fit" for review in light of the hardship that would result from withholding judicial review. That became true in June 2014.

2. Fresh from arguing that the issue here is too tentative for review, EPA alternatively contends that Petitioners filed too late because the dispute "crystallized" in April 2012. Resp. Br. 27-28. Again, EPA is wrong under both ripeness prongs. With regard to fitness, it was far from clear in April 2012 that EPA intended to abide by the Section 111(d) portion of the settlement, given the existence

of the Section 112 rule. At that time, the most recent authoritative statements about the Exclusion's meaning were the Supreme Court's explanation in *AEP*, and EPA's 1995 explanation in the MSW landfill rulemaking (all subsequent statements by EPA had been vacated in *New Jersey v. EPA*, 517 F.3d at 578). *Both* mirror Petitioners' reading. *See supra*, at 9-10; Pet. Br. 31. Under those circumstances, there was little reason to think then that EPA believed that it could lawfully abide by the Section 111(d) portion of the settlement, and there was accordingly no dispute "fit" for resolution. For that same reason, there would have been no hardship to anyone from withholding review.

C. This Case Presents An Actual And Live Controversy

1. Petitioners Have Demonstrated Standing

EPA and its supporters argue that Petitioners lack standing to challenge the settlement because Petitioners are "not parties to the settlement agreement, and have not alleged they are intended third-party beneficiaries." State Intervenors Br. 6; *see also* Resp. Br. 14-15. But as the very authority cited by the State Intervenors explains, "persons injured by the contract" "of course . . . can challenge" the contract. *In re Vic Supply Co., Inc.*, 227 F.3d 928, 930-31 (7th Cir 2000). Here, Petitioners have demonstrated two injuries that are fairly traceable to the settlement, each of which will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

a. EPA fails to rebut that the settlement subjects Petitioners to the "certainly impending" injury of being forced to submit state plans in response to a final Section 111(d) rule. Pet. Br. 28. EPA acknowledges that the required submission of plans would satisfy standing requirements under *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). Resp. Br. 20. Instead, EPA offers two narrower arguments: (1) this injury is not "certainly impending" because EPA may never finalize the Section 111(d) rule; and (2) finalization would not be "fairly traceable" to the settlement. Resp. Br. 12-13, 18-19. Both arguments are wrong.

First, the undisputed facts show that the injury is "certainly impending." The inquiry is a practical one, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013), and injuries that are "definitely likely" satisfy this standard, *Biggerstaff v. FCC*, 511 F.3d 178, 183-84 (D.C. Cir. 2007). In light of EPA's repeated assurances that it *will* finalize a Section 111(d) rule regulating power plants in summer 2015—which will necessarily require the submission of state plans—this standard has been easily satisfied. *See supra*, at 21-22. EPA does not even attempt to address these statements. Resp. Br. 18-19.

Second, this harm is "fairly traceable" to the settlement. As *AEP* explained, "[p]ursuant to [the] settlement . . . , EPA has committed to issuing . . . a final rule" for power plants under Section 111(d). 131 S. Ct. at 2533. That final rule could take one of two forms: a regulation of power plants, or a "final rule declining to

take action." *Id.* at 2539. If EPA does not take either path, Intervenors can sue. JA 4-5. There can be little dispute that, whichever path EPA were to choose, the settlement must be considered a "substantial factor" that "motivated" EPA's decision and therefore a "fairly traceable" cause. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308-09 (D.C. Cir. 2001) (quotations omitted). Because the harm to Petitioners of having to submit state plans follows inexorably from the first path—which EPA has firmly committed to taking, *see supra*, at 21-22—that harm is no less traceable to the settlement.[7]

b. In their opening brief, Petitioners also set forth a second independent basis for standing: as a result of the proposed rule that EPA issued in compliance with the settlement, States have *already* been forced to expend thousands of employee hours. Pet. Br. 26. EPA focuses the vast majority of its argument on this basis for standing, but the agency misses the mark here, as well.

EPA first argues that Petitioners' expenditures are "self-inflicted," and thus cannot satisfy the traditional *Lujan* requirements. Resp. Br. 19. But EPA's Administrator specifically warned States "to design plans *now*," or be at risk of violat-

[7] Consider the following hypothetical. A debtor enters a contract under which he agrees to scout a museum, and then make one of two choices. He can either steal a particular jewel for the creditor and have his debts forgiven, or not steal the jewel and still owe the creditor. *Cf.* Ocean's Twelve (Warner Brothers Pictures 2004). Surely the museum would have standing to challenge the contract as void for public policy, especially after the debtor declares that he is taking the former option.

ing the rule. Pet. Br. 20, 27 (emphasis added). The contents and timeframe in the proposed rule confirm the Administrator's warning. 79 Fed. Reg. at 34,838-39. So while EPA shrugs off the Administrator's statement as mere "encourag[ement]," Resp. Br. 19, an agency cannot threaten parties with substantial consequences if they do not expend resources immediately, publicly provide a timeframe that makes such immediate expenditures unavoidable, and then argue in litigation that those expenditures were "self-inflicted." *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) ("credible threat of prosecution" can create standing).

EPA next argues that this Court in *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013), created a *per se* rule—superseding the traditional *Lujan* analysis—that no party ever has standing to challenge a settlement that requires an agency to initiate a rulemaking. Resp. Br. 14-18. In *Perciasepe*, the consent decree required the agency to engage in a rulemaking over certain dates, and the challengers claimed that these dates would provide too little time for notice and comment. 714 F.3d at 1321-23. This Court held—after a typical *Lujan* analysis—that the challengers had no standing because they had expended no resources and thus had suffered no injury-in-fact. *Id.* at 1324-26.

Petitioners' position here is entirely different from that of the *Perciasepe* challengers in at least three significant ways. *First*, EPA has already taken action

pursuant to the settlement agreement, and Petitioners have expended thousands of hours in response, Pet. Br. 16-21, establishing the injury-in-fact missing in *Perciasepe*.[8] *Second*, the legal issue in *Perciasepe* was whether the proposed rulemaking schedule was too strict, but the issue here is whether the entire rulemaking enterprise to which the settlement committed EPA is illegal. Nothing in *Perciasepe* holds that a settlement that launches an unlawful regulatory effort against a party is never subject to challenge by the party. *Finally*, Petitioners here have an independent basis for standing that was not at issue in *Perciasepe*. *See supra*, at 24-25.[9]

c. EPA also argues that the States have not established redressability because the agency's timeframe for the rulemaking is not "derived from" the settlement. Resp. Br. 22. But redressability concerns only "whether the relief sought . . . will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc'y. v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996). If this Court

[8] The only monetary harm claimed in *Perciasepe* was from a questionnaire sent out by EPA to the challengers *before* the consent decree. *Id.* at 1326.

[9] EPA's other cited cases are similarly not on point. For example, *In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d 972, 977 (D.C. Cir. 2013), turned uniquely on whether the challenged agreement violated certain procedural rights under the Endangered Species Act. And *Alternative Research v. Veneman*, 262 F.3d 406 (D.C. Cir. 2001) (*per curiam*), did not address Article III standing at all, but only whether would-be intervenors were entitled to intervene as a matter of right. *Id.* at 411.

grants Petitioners' requested remedy and halts the rulemaking, States will be relieved from incurring any more expenses, alleviating their harm. Pet. Br. 29.

2. This Case Is Not Moot

Finally, EPA asserts that this case is moot because any harm caused by the settlement has ceased. It is wrong.

First, EPA contends that the settlement's deadlines have passed, which has released EPA from any obligations in the settlement. Resp. Br. 26. But EPA's failure to meet the deadlines did not terminate the agreement under hornbook contract law, because Intervenors continue to uphold their obligation. Pet. Br. 57. EPA does not dispute that this is a proper statement of contract law.

Second, EPA incorrectly asserts that the settlement is no longer causing harm because the agency has proposed a Section 111(d) rule. Resp. Br. 26. As a threshold matter, EPA's compliance with the settlement's proposal requirement is imposing *continuing* harms upon Petitioners, Pet. Br. 16-21, which can still be remedied by ordering EPA to halt the rulemaking. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Furthermore, the proposal is *not* EPA's only obligation under the Section 111(d) portion of the settlement. EPA has also committed to "issuing . . . a final rule" for existing power plants under Section 111(d), after it finalizes regulations for new power plants under Section 111(b). *See* JA 4. This Court can still afford Petitioners relief from that obligation, especially since EPA has

committed to finalize this summer a substantive regulation that will force Petitioners to prepare state plans.

CONCLUSION

For the foregoing reasons, this Court should grant the requested relief.

Dated: March 9, 2015

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1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 6,914 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on this 9th day of March, 2015, a copy of the foregoing *Corrected Final Reply Brief for Petitioners* was served electronically through the Court's CM/ECF system on all registered counsel. I also filed eight (8) paper copies with this Court.

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