No. 15A778 (rela ed o Nos. 15A773, 15A776, 15A787, 15A793)

IN THE

Supreme Court of the United States

MURRAY ENERGY CORPORATION,
PEABODY ENERGY CORPORATION, ET AL.,
Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency,
Respondents.

COAL INDUSTRY REPLY IN SUPPORT OF APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING JUDICIAL REVIEW

**DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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REPLY IN SUPPORT OF APPLICATION FOR STAY

Applicants Murray Energy Corporation, Peabody Energy Corporation, National Mining Association, and American Coalition for Clean Coal Electricity ("Coal Industry Applicants") respectfully submit this brief response to certain arguments directed at the Coal Industry Applicants in EPA's Opposition to the Stay Applications (EPA Opp. to Stay).

1. Applicants Have Shown Irreparable Harm.

With respect to irreparable harm, EPA does not deny that its own modeling shows that the Power Plan will cause the closure of 53 coal-fired power plants **in 2016** and another three in 2018, and that such near-term shutdowns represent tens of millions of tons of lost coal production, thousands of lost jobs in the mining industry, and rippling unemployment effects for those dependent on the coal industry. But EPA claims that its own predictions that the Power Plan will lead to closures of coal-fueled plants are "wholly speculative." (EPA Opp. to Stay at 60.) To the contrary: concrete evidence shows many examples of **closures attributable to the Power Plan**, as well as examples of long-term planning by utilities, which are currently making plant shut-down and resource decisions that will be implemented or made permanent **in 2016**:

- On July 9, 2015, Minnesota Power announced it will indefinitely suspend its Taconite Harbor Energy Center plant in third quarter **2016**, and completely retire it in 2020.[1] Minnesota Power blamed the closure on the Power Plan.[2]

[1] Brady Slater, *Coal-Fired Operations to End at Taconite Harbor Energ Center; Plant Will Be Idled in 2016*, DULUTH NEWS TRIBUNE, July 9, 2015, available at

- Ten units at coal-fueled power plants in Michigan are set to retire **in 2016** (and a total of 25 by 2020), with a Michigan utility official explaining that most coal plants will close because "there is no piece of control equipment we can put on to meet carbon rules under the Clean Power Plan."[3]

- In October 2015, Westar Energy announced it would retire two coal-fueled units **in 2016**. The company acknowledged that the Clean Power Plan "played a role in the decision."[4]

- In **January 2016**, Xcel submitted a **2016-2030 resource plan** for approval by state regulators that would close two coal fueled units because "it is the only scenario that is nearly certain to be compliant with the Clean Power Plan."[5]

- **Utilities began making closure plans even in anticipation of the Rule**. For example, in January 2015, Kansas City Power & Light announced it would no longer burn coal at three of its power plants,

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http://www.duluthnewstribune.com/news/3782973-coal-fired-operations-end-taconite-harbor-energy-center-plant-will-be-idled-2016.

[2] *Minnesota Power Plans to Idle Taconite Coal Plant*, ARGUS, July 10, 2015, available at http://www.argusmedia.com/pages/NewsBody.aspx?id=1069256&menu=yes (emphasis added) ("Minnesota Power, … says its move is part of [a] … regulatory shift to less carbon-intensive resources, *particularl as result of the US Environmental Protection Agency's proposed Clean Power Plan to regulate CO_2 from existing power plants*, due to be finalized next month.").

[3] JC Reindl, "25 Michigan Coal Plants Are Set to Retire by 2020, DETROIT FREE PRESS (Oct. 10, 2015), available at http://www.freep.com/story/money/business/michigan/2015/10/10/25-michigan-coal-plants-set-retire-2020/73335550/.

[4] Bob Matyi, "Midwest Utilities Plan Retirements for Coal, Gas, Biomass Power Plants," PLATTS (Oct. 14, 2015), available at http://www.platts.com/latest-news/electric-power/louisville-kentucky/midwest-utilities-plan-retirements-for-coal-gas-21293379; Peter Hancock, "Kansas Faces Stiff Carbon Reduction Target," LAWRENCE JOURNAL-WORLD (Oct. 16, 2015), available at http://www2.ljworld.com/news/2015/oct/16/kansas-faces-stiff-carbon-reduction-target/.

[5] Kirsti Marohn, "Xcel Wants to Close 2 Sherco Coal Units, Add Gas Plant," ST. CLOUD TIMES (Oct. 2, 2015), available at http://www.sctimes.com/story/news/local/2015/10/02/xcel-wants-close-sherco-coal-units-add-gas-plant/73228342/; Supplement to Upper Midwest 2016-2030 Resource Plan, Jan. 2016, p. 5, Docket No. E002/RP-15-21, available at https://www.xcelenergy.com/Company/Rates_&_Regulations/Resource_Plans/Upper_Midwest_2016-2030_Resource_Plan.

> including at two units **in 2016**. The company cited "future environmental regulation compliance" as the reason for its decision.[6]

In sum, the Plan's impact on the coal industry is clear and concrete. As the EPA Administrator admitted, the Rule is really about "investment opportunities," not "pollution control."[7] Forcing closures and shut-downs was the agency's very purpose. Absent a stay, irreversible harm will occur **in 2016** by EPA's design.

2. Applicants Have Shown A Reasonable Probability of Prevailing On The Merits.

(a) EPA reads out of the statute prohibitions on its authority. The Government attempts to avoid the Section 112 Exclusion by advancing a statutory interpretation premised on "Congress's use of the word 'or'" (EPA Opp. to Stay at 23). Yet EPA itself properly rejected that interpretation in the Final Rule because it is "not a reasonable reading of the statute." 80 Fed. Reg. at 64,713. The interpretation would impermissibly obliterate all of the exclusions in Section 111(d). As EPA originally explained, "the result would be that CO2 from power plants could be regulated under … 111(b) because air quality criteria have not been issued for CO2 and therefore whether CO2 *or* power plants are regulated under … section 112 would be irrelevant. This reading, however, is not a reasonable reading of the statute because, among other reasons, it gives little or no meaning to the

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[6] "KCP&L Announces Plans to Cease Burning Coal at Three Power Plants," Jan. 20, 2015, available at http://www.kcpl.com/about-kcpl/media-center/2015/january/kcpl-announces-plans-to-cease-burning-coal-at-three-plants.

[7] U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014).

limitation covering HAPs that are regulated under … section 112." *Id.* (emphasis added).[8]

(b) The "ratification" argument is specious. The Government asserts that Congress has not "ratified" Section 111(d) as it appears in the United States Code. EPA Opp. to Stay. However, there is absolutely no evidence that EPA or any member of Congress disagreed with the United States Code language, after it was first published in the second supplement to the 1988 edition of the United States Code early in 1991, which every member of Congress received and the agency surely reviewed at that time, *see* 1 U.S.C. 211 & 212. *See* Coal Indus. Appl. 17 n.19. This Court cannot simply cast aside the United States Code as maintained by the Law Revision Counsel, given Congress's command in 1 U.S.C. § 204 that "the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States . . . in force." 1 U.S.C. § 204. To give effect to this provision, the Code must be considered to be the authoritative statement of the law unless it is plainly inconsistent with the Statutes at Large or the determinations of the Law Revision Counsel are unreasonable. See *Stephan v. United States*, 319 U.S. 423, 426 (1943); *United States Nat'l Bank of Oregon v. Independent Insurance Agents of Am., Inc.*, 508 U.S. 439 (1993).

[8] Notably, there are only two pollutants on the Section 108(a) list, lead and nitrogen dioxides, because it does not contain "air pollutants . . . for which air quality criteria had not been issued before December 31, 1970." 42 U.S.C. § 7408(a). The Solicitor General's argument would mean that Section 111(d) covers all other criteria pollutants, even though it has universally been understood not to cover any criteria pollutants.

The Government does not deny that EPA inadvertently mistook an unofficial document for the Statutes at Large and then erroneously claimed that there were alternative parentheses containing language from each amendment in the Statutes at Large omitted from the Code. *See* Coal Indus. Appl. 17 n.19. Indeed, it was in reliance on this erroneous assertion that some States at the time agreed with EPA's misinterpretation of an inaccurate and unofficial document prepared by a paralegal. The Government's note recounting that agreement, EPA Opp. to Stay at 25 n.6, leaves out the crucial fact that it resulted from EPA's misrendering of the Statutes at Large in the Federal Register.

(c) The gap-filling argument lacks merit. The Government contends the Section 112 Exclusion would be absurd unless it is pollutant-specific, not source-category-specific, and that it should bar EPA from regulating only pollutants listed as "Hazardous Air Pollutants." EPA Opp. to Stay at 24–29. To support this non-textual reading, the Government claims there are significant emissions from sources regulated under Section 112 that can only be regulated, if at all, under Section 111(d). EPA Opp. to Stay at 24–26. But this argument relies on a Senate Committee Report describing the **pre-1990** Section 112 program, which focused on a highly limited set of pollutants. In 1990, Congress expanded Section 112 dramatically. At stake here is *duplication* (regulation of the same source category under both Section 111(d) and Section 112), not a regulatory "gap." Indeed, EPA has previously used Section 111(d) in only a handful of cases, involving nothing like CO_2.

The Government also argues for its non-textual reading by claiming that "[n]othing in the CAA suggests . . . that Congress expected EPA to evaluate th[e] tradeoff" of choosing Section 112 instead of Section 111(d). EPA Opp. to Stay at 28–29. But if EPA never took the consequences of regulating power plants under Section 112 into account, the fault was the agency's, not Congress', because the legislative history and Section 112(n)(1) make clear that this is precisely what EPA was supposed to consider. Indeed, Congress explicitly directed EPA to consider "alternative control strategies" in Section 112(n)(1), and the legislative history indicates this was intended to refer to the option of using Section 111(d) instead of Section 112 for power plants (and alternatively deferring to State regulation).[9]

CONCLUSION

The Clean Power Plan rule-making process has all of the hallmarks of rule by the fiat of men. Permitting the Rule's implementation to proceed without judicial review at this stage would irreparably cement into our nation's history this searing defeat of the Rule of Law.

The Applications for Stay should be granted.

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[9] EPA has itself explained that the legislative history of Section 112(n)(1) and Section 108(g) are intimately connected. 70 Fed. Reg. 15994, 16030–31 (Mar. 29, 2005). Both of these two amendments first appeared at the same time in the Administration's bill and appeared together in every subsequent bill in which they were contained, because one of the purposes of the Section 108(g) amendment was to give EPA the alternative option of using the more flexible Section 111(d) program to regulate power plants instead of the costly inflexible Section 112 program. See id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 5th day of February, 2016, I caused to be served the above document on the following by overnight commercial carrier and electronic mail where available:

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