No. 14-1112

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

IN RE: MURRAY ENERGY CORPORATION

BRIEF OF THE STATES OF WEST VIRGINIA, ALABAMA, ALASKA, KENTUCKY, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

PATRICK MORRISEY
ATTORNEY GENERAL OF
WEST VIRGINIA

Elbert Lin
Solicitor General
Misha Tseytlin
Deputy Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
Tel. (304) 558-2021
Fax (304) 558-0140

Counsel for Amicus Curiae State of West Virginia

[Additional Counsel Listed On Inside Cover]

LUTHER STRANGE
Attorney General of Alabama
Andrew Brasher
Alabama Solicitor General
501 Washington Ave
Montgomery, AL 36130

MICHAEL C. GERAGHTY
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

JACK CONWAY
Attorney General of Kentucky
700 Capital Avenue, Suite 118
Frankfort, KY 40601

JON BRUNING
Attorney General of Nebraska
David D. Cookson
Chief Deputy Attorney General
Katie Spohn
Deputy Attorney General
2115 State Capitol
Lincoln, NE 68509

MICHAEL DEWINE
Attorney General of Ohio
Eric E. Murphy
State Solicitor
Jennifer L. Pratt
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215

E. SCOTT PRUITT
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
313 N.E. 21st Street
Oklahoma City OK 73105

ALAN WILSON
Attorney General of South Carolina
Robert D. Cook
Solicitor General
PO Box 11549
Columbia, SC 29211

PETER K. MICHAEL
Attorney General of Wyoming
123 State Capitol
Cheyenne, WY 82002

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INTEREST OF *AMICI CURIAE*

Amici States have a fundamental interest in this case because the Environmental Protection Agency ("EPA") has made clear that it *will* finalize the Proposed Rule[1] and *amici* must begin to expend enormous resources to prepare to comply. The President expressly "direct[ed]" EPA to "use [its] authority under section[] . . . 111(d) of the Clean Air Act" to require the States to regulate CO_2 emitted from existing coal-fired power plants,[2] even though Section 111(d) *specifically prohibits* such regulation. EPA thus issued the Proposed Rule under Section 111(d). Despite a letter from West Virginia informing EPA of the illegality of its proposal,[3] EPA published the Proposed Rule and committed to completing the rulemaking by June 2015. EPA's assertion of authority denied it by Congress imposes real harms on the States now: States have to undertake huge amounts of burdensome work now to develop plans to meet the anticipated rule and cannot wait for the final rule and still have any chance of meeting the indicated deadlines. Only this Court's prompt intervention can stop this ongoing harm.

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[1] 79 Fed. Reg. 34,830 (June 18, 2014) ("Proposed Rule").

[2] Memorandum from President Obama to Administrator of the EPA (June 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

[3] Letter from Attorney General Patrick Morrisey to EPA (June 6, 2014), *available at* http://www.wvago.gov/pdf/Letter%20to%20EPA%20on%20section%20111(d)%20authority.pdf.

SUMMARY OF ARGUMENT

What EPA is attempting is nothing short of extraordinary, and warrants relief under the exception recognized in *Leedom v. Kyne*, 358 U.S. 184 (1958). EPA has issued a proposed rule even though it admits that the "literal terms" of the Clean Air Act prohibit the rule. And as described below, EPA's attempted justification for avoiding and rewriting that language is not remotely plausible. It is difficult to imagine a case where an agency's non-final action is more obviously "in excess of [the agency's] delegated powers and contrary to a specific prohibition." *Id.* at 188.

The "specific prohibition" against EPA's proposed rule is in the very statutory provision the agency cites as its authority: Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). That provision grants EPA certain authority to require States to regulate existing-source emissions, but it specifically *excludes* the regulation of any air pollutant emitted from a source category that EPA already regulates under Section 112 of the Act, 42 U.S.C. § 7412. As even EPA concedes, a "literal" application of this carve-out prohibits the proposed regulation because the agency has already regulated coal-fired power plants under Section 112.

To escape that prohibition, EPA nonsensically asserts that the "literal" terms of Section 111(d) are called into question by what the agency itself characterizes as an erroneous clerical entry in the 1990 Amendments to the Clean Air Act, which

appears in the Statutes at Large but was excluded from the U.S. Code. That entry, EPA has acknowledged, was clearly a "drafting error" because it sought to make a clerical correction to Section 111(d) rendered unnecessary by a superseding substantive amendment. *See* 70 Fed. Reg. 15,994, 16,031 (March 29, 2005). EPA nevertheless contends that the "drafting error" must be given meaning and therefore casts doubt on the "literal" terms of Section 111(d). *Id*. This claim is unprecedented and entirely meritless. Under this Court's controlling case law and well-established practice, an obvious clerical error—a relatively common occurrence in modern, complex legislation—must be disregarded.

Furthermore, even if EPA's novel claim that it must give "effect" to a mistaken clerical entry were correct, the clerical error does not excise the substantive prohibition and the Proposed Rule would still be illegal. EPA would read Section 111(d) in a way that conflicts both with the text of the amendment that was codified in the U.S. Code and with the clerical error—but that would conveniently permit the Proposed Rule. This is unlawful under well-established principles of statutory construction; the same principles that the Supreme Court reaffirmed this week when it rejected another attempt by EPA to rewrite the Clean Air Act in order to "bring about an enormous . . . expansion in EPA's regulatory authority without clear congressional authorization." *Utility Air Reg. Grp. v. EPA*, 2014 WL 2807314, at *11, 573 U. S. ___ (June 23, 2014).

ARGUMENT

I. EPA Has Conceded That The Proposed Rule Violates A "Specific Prohibition" Found In The "Literal" Terms Of The Clean Air Act

In its legal memorandum accompanying the Proposed Rule,[4] EPA explains that it is acting pursuant to Section 111(d) of the Clean Air Act—consistent with the President's directive. Mem. 11-12. That provision requires EPA under narrow circumstances to "prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which establishes standards of performance" for certain existing sources and certain air pollutants. 42 U.S.C. § 7411(d)(1). By EPA's own admission, this rarely used provision has been invoked in only five instances in forty years. Mem. 9-10.

As it appears in the U.S. Code, Section 111(d) *specifically excludes* from EPA's authority the power to regulate "standards of performance for any existing source for any air pollutant . . . emitted from a source category which is regulated under section 7412 of this title. . . . ." 42 U.S.C. § 7411(d)(1). "[A] literal reading of that language," EPA itself admits, means that the agency "c[an] not regulate *any* air pollutant from a source category regulated under section 112" of the Clean Air Act. Mem. 26 (emphasis added). Or, as the Supreme Court has observed, "EPA

[4] *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* ("Legal Memorandum" or "Mem."), *available at* http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, § 7412." *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011).

This prohibition against double-regulation of existing sources is part of a coherent approach to regulating air pollutants from new and existing stationary sources. *First*, Section 112 concerns national emissions standards for hazardous air pollutants emitted from any number of new and existing sources. *See* 42 U.S.C. § 7412. The inclusion of a source category under Section 112 generally depends upon several considerations, *id.* at § 7412(c); for power plants in particular, the relevant test is whether the Administrator finds such inclusion to be "appropriate and necessary," *id.* § 7412(n)(1)(A). *Second*, Section 111(d) addresses air pollutants emitted from *existing* sources *not* regulated under Section 112. When EPA has chosen not to include a source category in Section 112's national scheme, emissions from existing sources within that category must be subject instead to state-by-state standards under Section 111(d), assuming certain predicates have been satisfied. *Finally*, the rest of Section 111 concerns national standards for air pollutants emitted from *new* sources and is not restricted by the scope of Section 112. Allowing double-regulation of only new sources, as opposed to existing sources, makes sense given the special questions of reliance and fairness raised by the imposition of additional regulation on existing sources.

As EPA acknowledges, the Proposed Rule violates the unambiguous terms of Section 111(d) as it appears in the U.S. Code because the proposal seeks to impose impermissible double regulation on existing coal-fired power plants. EPA categorized power plants as part of a "source category" under Section 112 in 2000, *see* 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000), and this Court in 2008 rejected EPA's attempt to withdraw that finding, *see New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Then, in 2012, EPA imposed significant Section 112 restrictions on coal-fired power plants, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012), which this Court recently upheld, *see White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). Under the "literal" reading of Section 111(d), *see* Mem. 26, the listing of power plants under Section 112 and the 2012 restrictions both independently prohibit EPA from invoking Section 111(d) to adopt the Proposed Rule. The proposal clearly violates a "specific prohibition" against double-regulation of existing sources and relief is warranted. *Leedom*, 358 U.S. at 188.

II. A Clerical "Drafting Error" In The 1990 Clean Air Act Amendments Does Not Displace The "Literal" Terms Of Section 111(d)

To escape the clear terms of Section 111(d) in the U.S. Code, EPA asserts that Section 111(d) is actually "ambiguous" and therefore subject to the agency's "reasonable" interpretation. Mem. 8, 26. Drawn from a 2005 EPA analysis—which was part of a rule under Section 111(d) that this Court vacated in *New Jersey v. EPA*, 517 F.3d 574—the agency's argument turns on a one-sentence

clerical entry in the 1990 Amendments to the Clean Air Act that was not codified in the U.S. Code. The 1990 Amendments included two entries relevant to Section 111(d). Both appear in the Statutes at Large, but only the first was incorporated into the U.S. Code. EPA argues that the existence of the second entry creates an ambiguity that casts doubt on the language of Section 111(d) in the U.S. Code.

EPA's claim of an ambiguity is baseless. Congress has determined that the "Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States . . . ." 1 U.S.C. § 204(a). The U.S. Code is displaced only where it is "inconsistent" with the Statutes at Large. *Stephan v. United States*, 319 U.S. 423, 426 (1943). There is no inconsistency here.

The first entry appears in the Statutes at Large among a list of other entries making *substantive* amendments to Section 111. Prior to these amendments in 1990, Section 111(d) had prohibited EPA from regulating under that Section "any air pollutant" "included on a list published under . . . 112(b)(1)(A)." 42 U.S.C. § 7411(d) (1987). Put another way, the pre-1990 prohibition on EPA's Section 111(d) authority focused on whether the pollutant *could* be regulated under Section 112, not whether EPA had actually regulated the source of that pollutant under Section 112. The substantive amendment made a significant change to this prohibition by replacing the cross-reference to "112(b)(1)(A)" with the language that now appears in the U.S. Code—EPA may not regulate the "emission" of "any

pollutant" from "a source category which is regulated under section 112." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). The amendment changed the restriction in Section 111(d) from one triggered by *hazardous air pollutants* to one triggered instead by *source categories* actually regulated under Section 112.

The second entry appears much later in the Statutes at Large among a list of purely *clerical* changes made in 1990—entitled "Conforming Amendments." Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990). "Conforming Amendment[s]" are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." Senate Legislative Drafting Manual § 126(b)(2)(A). They effectuate the sorts of ministerial changes required to clean up a statute *after* it has been substantively amended. *Id.* These "include[] amendments, such as amendments to the table of contents, that formerly may have been designated as clerical amendments." *Id.*; *cf. Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as non-substantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same).

Consistent with its description as a conforming amendment, this clerical entry sought simply to bring up to date Section 111(d)'s cross-reference to Section 112(b)(1)(A). Other substantive amendments to the Clean Air Act in 1990 had eliminated Section 112(b)(1)(A) and replaced it with Sections 112(b)(1), 112(b)(2), and 112(b)(3). This conforming entry was ostensibly "necessitated by th[ose]

substantive amendments," Senate Legislative Drafting Manual § 126(b)(2)(A), and sought merely to account for those changes by "striking '[112](b)(1)(A)' and inserting in lieu thereof '[112](b),'" Pub. L. No. 101-549, § 302(a).

But this clerical entry was clearly included by mistake and cannot possibly cast any doubt on the plain terms of Section 111(d) in the U.S. Code. When this conforming amendment is applied after *all* the substantive amendments, as is required by basic legislative drafting rules, it is no longer necessary. The cross-reference to subsection 112(b)(1)(A) that this second, non-substantive entry is designed to conform has already been removed by the first, substantive entry—and replaced, as discussed above, by the language that now appears in the U.S. Code. That is why the U.S. Code includes the notation that the clerical entry here "could not be executed." Revisor's Note, 42 U.S.C. § 7411.

EPA has correctly recognized as much—noting in 2005, for example, that the clerical entry "is a drafting error and therefore should not be considered"—but the agency has also wrongly determined that it nevertheless "must attempt to give effect to both the [substantive] and [clerical] [entries], as they are both part of the current law." 70 Fed. Reg. at 16,031. According to EPA, the two amendments create two separate versions of Section 111(d) if they are each *independently* implemented into the pre-1990 statutory text, and EPA must make sense of those two "versions." Mem. 24-25. The first "version" incorporates only the substantive

amendment and is what currently appears in the U.S. Code. This "version" *materially changes* Section 111(d)'s restriction to one focused on source categories regulated under Section 112. The second "version" incorporates only the clerical "drafting error" and therefore *makes no substantive change* to Section 111(d). It retains the pre-1990 focus on preventing regulation of hazardous air pollutants under Section 111(d), regardless of whether the source category emitting those hazardous air pollutants is actually regulated under Section 112. Mem. 24-25.

EPA's entire argument is based upon a fallacy. The only evidence that may rebut the plain terms of Section 111(d) as expressed in the U.S. Code is the Statutes at Large, *see Stephan*, 319 U.S. at 426, but *the Statutes at Large simply do not reflect two separate versions of Section 111(d)*.[5] Rather, there are simply a substantive and a clerical amendment that, when properly applied one after the other, reveal that the mistaken clerical entry cannot be executed. And as this Court recently explained in *American Petroleum Institute v. SEC*, where a mistake in renumbering a statute and correcting a cross-reference conflicts with substantive

[5] The false premise that the Statutes at Large contain two versions of Section 111(d) may stem from a staffer's report that EPA previously mischaracterized as appearing in the Statutes at Large. 69 Fed. Reg. 4652, 4685 (Jan. 30, 2004). That report includes both "versions" of Section 111(d)—set off by brackets—but it is not a part of the U.S. Code or Statutes at Large, and is thus irrelevant. While EPA seems now to have realized its mistake and has made no reference to the report in its Legal Memorandum, EPA retains the report on its website and mischaracterizes the report as "Clean Air Act," thus causing some confusion among commentators. *See* http://www.epa.gov/ttn/caaa/gen/caa-pdf.pdf, at p.46.

provisions of that statute, the mistake should be considered most likely "the result of a scrivener's error[]" and should not be treated as "creating an ambiguity." 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). This reasoning applies with particular force here, where basic rules of legislative drafting make clear that a scrivener's error occurred. EPA was thus correct when it originally concluded that the clerical entry simply "should not be considered," and wrong when it nonetheless treated that entry independently and on par with the substantive one. 70 Fed. Reg. at 16,031.

EPA's suggestion that the situation here is "unusual"—and for that reason should be treated as creating an ambiguity—is demonstrably false. 70 Fed. Reg. at 16,030. *Amici*'s research has revealed *hundreds* of clerical errors that have been excluded from the U.S. Code because they "could not be executed," exactly as occurred here. Of these hundreds of errors, *numerous examples* involved the precise "drafting error" that occurred here: a clerical amendment rendered moot by substantive amendments, and in each case the clerical amendment was excluded because it "could not be executed."[6] As this Court observed in *American*

[6] *See, e.g.*, Revisor's Note, 5 U.S.C. app. 3 § 12; Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 8 U.S.C. § 1324b; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1074a; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 1060; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 18 U.S.C. § 1956; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C.

Petroleum, these sorts of obvious "scrivener's errors" are common in modern, complex legislation. 714 F.3d at 1336-37. *Amici* are not aware of a single case giving substantive meaning to these sorts of clerical "drafting errors." But if EPA's novel argument here is accepted, numerous provisions of the U.S. Code would be called into doubt, as clerical errors that have been long excluded from the Code would now be creatively read as grievous ambiguities.

III. EPA's Interpretation Would Be Impermissible Even Giving Effect To The Clerical Error, For Congress Still Has Instructed That EPA May Not Extend Its Section 111(d) Regulation To Pollutants "Emitted From A Source Category Which Is Regulated Under Section 112"

Even accepting EPA's view that the Statutes at Large contain two "versions" of Section 111(d) that must be given effect, the Proposed Rule would still be patently illegal. As discussed above, EPA believes that the two entries in the Statutes at Large evidence Congress's intent to enact two different limitations on Section 111(d). The first limitation—embodied in the substantive amendment—prohibits regulation under Section 111(d) of any emissions from any source

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§ 4014; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 22 U.S.C. § 2577; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 613A; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 26 U.S.C. § 6427; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 39 U.S.C. § 410; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 49 U.S.C. § 47115.

categories regulated under Section 112. The second limitation—which, according to EPA, follows from the conforming amendment—prohibits regulation under Section 111(d) of any hazardous air pollutants, regardless of the pollutant's source.

Even if these two versions are deemed to exist, the Proposed Rule fails under basic principles of statutory construction. Courts and agencies must "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Here, that canon would require an interpretation that gives effect to "every word" of both limitations, which is not only "possible" but known to EPA. *Id.* As regulated parties have pointed out to the agency, the two limitations can straightforwardly be read together to prohibit EPA from regulating under Section 111(d) *both* any pollutant emitted from any source category already regulating under Section 112 *and* any hazardous air pollutant regardless of its source.[7] If EPA's erroneous view of the Statues at Large is accepted, that would be the only proper interpretation and the Proposed Rule would still be unlawful.

EPA rejects this approach in favor of a new "interpretation" of Section 111(d), which improperly seeks to cut back on each limitation so that the sum of the two constraints miraculously is less than the explicit effect that either would have on its own. EPA asserts that Section 111(d) should be read to prohibit

[7] *See, e.g.*, Letter from National Association of Manufacturers *et al.* to EPA 26-27 (July 25, 2012), *available at* http://www.nam.org/~/media/53e86e050c7a495a9cc84f9778ba1f10/association_ghg_nsps_comments_june_25_2012.pdf.

regulation of "any [hazardous air pollutant]s listed under section 112(b) that may be emitted from [a] particular source category" that "is regulated under section 112." Mem. 26. Contrary to the substantive amendment—which would prevent *any* regulation under Section 111(d) of *any* existing sources already regulated under Section 112—EPA's interpretation would allow such regulation if it concerns air pollutants not covered by Section 112 (such as CO_2). And contrary to the limitation EPA believes was embodied by the clerical amendment—which would not allow regulation under Section 111(d) of *any* hazardous air pollutant—EPA's reading would permit such regulation if the hazardous air pollutant is emitted from an existing source not regulated by Section 112.

Thus EPA asserts that the effect of one limitation on its power is to negative another explicit limitation adopted by Congress and signed by the President. But as the Supreme Court said just this week in rejecting another attempt by EPA to rewrite the Clean Air Act, "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Reg. Grp.*, 2014 WL 2807314, at *13. Regardless of what effect is given to the clerical error, that effect cannot possibly change the fact that the Statutes at Large contain the substantive prohibition that Section 111(d) may not be employed to regulate the emission of *any* air pollutant "emitted from a source category which is regulated under section 112." Pub. L. No. 101-549, § 108(g).

The agency's atextual reading also contravenes even EPA's own understanding of Congress's intent. As EPA admits, one purpose of the 1990 Amendments to the Clean Air Act was "to change the focus of section 111(d) by seeking to preclude [section 111(d)] regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112," so as to preclude "duplicative or overlapping regulation." 70 Fed. Reg. at 16,031. But as the Proposed Rule illustrates, EPA's reading eviscerates that goal. Moreover, according to EPA, another purpose was to "retain the pre-1990 approach of precluding regulation under . . . section 111(d) of any [hazardous air pollutant]." *Id.* Yet, the view EPA now advances would permit such regulation.[8]

CONCLUSION

The petition should be granted.

[8] EPA has previously cited to *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979), to justify "deference" for its rewriting of Section 111(d). Final Brief of Respondent EPA, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), 2007 WL 2155494, at *103. But neither *Citizens to Save Spencer County* nor any other form of deference applies. In *Citizens to Save Spencer County*, EPA faced two conflicting and unquestionably substantive provisions. Here, the so-called conflict is between a substantive amendment and a clerical "drafting error," in which case the substantive amendment simply prevails. In addition, while EPA had no option in *Citizens to Save Spencer County* but to adopt a middle ground between two irreconcilable statutory commands, here the agency has ignored an interpretation that would give "maximum possible effect" to both of the allegedly conflicting provisions. 600 F.2d at 870.

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Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL OF
WEST VIRGINIA

/s/ Elbert Lin

Elbert Lin
Solicitor General
Misha Tseytlin
Deputy Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
Tel. (304) 558-2021
Fax (304) 558-0140

Counsel for Amicus Curiae State of West Virginia

LUTHER STRANGE
Attorney General of Alabama
Andrew Brasher
Alabama Solicitor General
501 Washington Ave
Montgomery, AL 36130

MICHAEL DEWINE
Attorney General of Ohio
Eric E. Murphy
State Solicitor
Jennifer L. Pratt
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215

MICHAEL C. GERAGHTY
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

E. SCOTT PRUITT
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
313 N.E. 21st Street
Oklahoma City OK 73105

JACK CONWAY
Attorney General of Kentucky
700 Capital Avenue, Suite 118
Frankfort, KY 40601

JON BRUNING
Attorney General of Nebraska
David D. Cookson
Chief Deputy Attorney General
Katie Spohn
Deputy Attorney General
2115 State Capitol
Lincoln, NE 68509

ALAN WILSON
Attorney General of South Carolina
Robert D. Cook
Solicitor General
PO Box 11549
Columbia, SC 29211

PETER K. MICHAEL
Attorney General of Wyoming
123 State Capitol
Cheyenne, WY 82002

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 25th day of June, 2014, I electronically filed the foregoing Brief Of The States Of West Virginia, Alabama, Alaska, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina And Wyoming As *Amicus Curiae* In Support Of The Petitioner with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. In addition, I will provide courtesy copies of the Brief, by overnight mail, to:

Regina A. McCarthy, Administrator
United States Environmental Protection Agency
Ariel Rios Building, 1101A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

United States Environmental Protection Agency
Correspondence Control Unit
Office of General Counsel (2344-A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

/s/ Elbert Lin
Counsel for Amicus Curiae State of West Virginia

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(d), that this amicus brief is 15 pages in length—using Microsoft Word 2010 in 14-point Times New Roman font—which is no more than one-half the maximum length authorized for Petitioner's brief under Fed. R. App. P. 21(d).

/s/ Elbert Lin
Counsel for Amicus Curiae State of West Virginia