ORAL ARGUMENT HELD APRIL 16, 2015
DECISION ISSUED JUNE 9, 2015

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

No. 14-1112: IN RE: MURRAY ENERGY CORPORATION

Petitioner,

No. 14-1151: MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A. MCCARTHY,

Respondents.

On Petition for Writ of Prohibition and On Petition for Review

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PETITION FOR REHEARING OR REHEARING EN BANC, OR IN THE ALTERNATIVE, MOTION FOR A STAY OF THE MANDATE

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CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, Intervenor-Petitioners state as follows:

(A) Parties, Intervenors, and Amici:

The parties in this case are Murray Energy Corporation (Petitioner); Environmental Protection Agency (Respondent); and Regina A. McCarthy, Administrator, U.S. Environmental Protection Agency (Respondent); State of West Virginia (Intervenor); the State of Alabama (Intervenor); State of Alaska (Intervenor); State of Arkansas; the State of Indiana (Intervenor); the State of Kansas (Intervenor); the Commonwealth of Kentucky (Intervenor); the State of Louisiana (Intervenor); the State of Nebraska (Intervenor); the State of Ohio (Intervenor); the State of Oklahoma (Intervenor); the State of South Dakota (Intervenor); the State of Wisconsin (Intervenor); the State of Wyoming (Intervenor); National Federation of Independent Business (Intervenor); Utility Air Regulatory Group (Intervenor); Peabody Energy Corporation (Intervenor); the City of New York (Intervenor); the Commonwealth of Massachusetts (Intervenor); the District of Columbia (Intervenor); Environmental Defense Fund (Intervenor); Natural Resources Defense Council (Intervenor); Sierra Club (Intervenor); the State of California (Intervenor); the State of Connecticut (Intervenor); the State of Delaware (Intervenor); the State of Maine (Intervenor); the State of New Mexico (Intervenor); the State of New York (Intervenor); the State of Oregon (Intervenor); the State of Rhode Island (Intervenor);

and the State of Vermont (Intervenor). Amici include the State of South Carolina; the National Mining Association; the American Coalition for Clean Coal Electricity; American Chemistry Council; American Coatings Association, Inc.; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; State of New Hampshire; Chamber of Commerce of the United States of America; Clean Wisconsin; Council for Industrial Boiler Owners; Michigan Environmental Council; Independent Petroleum Association of America; Ohio Environmental Council; Metals Service Center Institute; Calpine Corporation; National Association of Manufacturers; Jody Freeman; and Richard J. Lazarus.

(B) Rulings Under Review:

Under review in this case are a petition for an extraordinary writ, No. 14-1112, and a petition to review an EPA legal conclusion, No. 14-1151.

(C) Related Cases:

West Virginia v. EPA, No. 14-1146 (petition to review EPA settlement).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

*Authorities upon which Petitioners chiefly rely are marked with an asterisk.

INTRODUCTION AND RULE 35(b)(1) STATEMENT

This case involves EPA's effort to require States to begin complying with the agency's clearly unlawful rule to reduce carbon dioxide emissions before EPA even finalizes that rule. To achieve this pre-compliance goal, EPA's Administrator engaged in an unprecedented course of threatening the States to begin designing state plans under the Rule—which requires shifting away from other sovereign prerogatives—while the rulemaking process is still ongoing. 15 States asked this Court for relief from these irreparable and unlawfully imposed harms.

The panel majority rejected the States' pleas, holding that this Court lacks authority because the Section 111(d) Rule is not yet final. In doing so, the panel majority broadly concluded that this Court may never stop agency misconduct during an ongoing rulemaking—no matter how harmful or plainly illegal.

Judge Henderson issued a decision concurring only in judgment, disagreeing with the panel majority's novel and limited view of this Court's authority under the All Writs Act. Agreeing with the States that this Court can issue an extraordinary writ to stop an ongoing rulemaking, Judge Henderson nevertheless concurred with the panel majority's disposition because she thought the impending finalization of the Rule made the States' need for relief "all but academic."

Rehearing is warranted because the panel majority's decision will have far-reaching consequences for the conduct of agencies in rulemaking, in violation of

precedent from this Court and the Supreme Court. Under the panel majority's decision, an agency can repeatedly threaten regulated parties to make immediate expenditures to comply with an unlawful but not-yet-final rule, and evade legal accountability for this misconduct. And the agency can do so even when such irreparable harms are visited upon sovereign States and their citizens. Absent rehearing, this powerful tool will only further enable agencies to make their policy goals a practical reality before the courts can review their legality—a tactic EPA brazenly touted after losing in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

In the alternative, the States move the panel for a stay of the mandate, to allow the panel the option of vacating its decision as "academic." The States agree with Judge Henderson that, due to the passage of time, the threshold arguments here will soon become "all but academic." While EPA has not acted as quickly as Judge Henderson anticipated, EPA is expected to finalize the Section 111(d) Rule any day now. When EPA thereafter publishes the final Rule in the Federal Register, the panel could vacate its decision and leave for another time the delineation of this Court's authority to stop extreme agency misconduct during a rulemaking. This panel could then promptly adjudicate the legality of the Section 111(d) Rule, serving the interests of both judicial efficiency and the public interest.[1]

[1] EPA and environmental intervenors oppose this alternative motion. Petitioners and intervenors supporting petitioners support this alternative motion.

BACKGROUND

In June 2014, EPA put forward the most far-reaching rule in the agency's history. It proposed to require States, under Section 111(d), 42 U.S.C. § 7411(d), to reduce carbon dioxide emissions within their borders by an average of 30% in just 15 years. The central feature of this plan is the requirement that States entirely reorder their energy sectors to reduce demand for coal-fired power.

EPA had several reasons to want States to start work immediately. Recognizing the "substantial direct compliance costs" on States, EPA understood that States could not possibly design and implement such an energy revolution—a process that in many States requires working with a part-time legislature—in the timeframes set forth in the proposal. 79 Fed. Reg. 34,830, 34,947 (June 18, 2014). Further, as evidenced by EPA's candid statements in other rulemakings, one of the agency's overarching goals appears to be to make its rules a practical *fait accompli* before judicial review can run its course. For example, in response to the Supreme Court's decision in *Michigan v. EPA*, EPA assured supporters that "the majority of power plants are already in compliance or well on their way to compliance."[2]

[2] Janet McCabe, *In Perspective: The Supreme Court's Mercury and Air Toxics Rule Decision*, EPA Connect (June 30, 2015), https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/. Similarly, on the eve of the *Michigan* decision, EPA's Administrator boasted that "even if we don't [win], it was three years ago. Most of them are already in compliance, investments have been made." Timothy Cama &

(Continued)

Accordingly, the agency's head engaged in an unprecedented campaign of threatening States to begin complying with the not-yet-final Rule. On the day EPA's Administrator announced the proposed Rule, she explained that the proposal contemplated States beginning to "design plans *now*" to meet the carbon dioxide targets. ECF 1540535, at 20 (emphasis added). The Administrator then issued a series of unequivocal statements, declaring that the Agency had definitively concluded it had authority and an obligation to enact the Rule, and warning States against "put[ting] their heads in the sand, and pretend[ing] like EPA isn't going to regulate." ECF 1543330 at 1; *see also* EPA Legal Mem. 27 (June 2014); ECF 1547449 at 2 ("[The Section 111(d) Rule] is going to happen."); ECF 1549150 at 1 ("We are on track for mid-summer [to finalize the Section 111(d) rule] and we made that clear to everybody. . . . [The States] know that we are serious.").

These threats by EPA's Administrator have imposed ongoing and substantial harms upon the sovereign States. As shown in eight detailed declarations filed in this Court, EPA's threats had caused the States to redirect *thousands* of hours of resources from other sovereign prerogatives as of November 2014. *See* No. 14-

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Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, The Hill (June 29, 2015), http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule.

1146, ECF 1540535, Exhs. A-H. Since then, EPA's continued threats have forced States to spend even more resources.

In summer 2014, the States and industry actors brought three actions, seeking relief from these harms. The States and industry sought a writ of prohibition under the All Writs Act, 28 U.S.C. § 1651, asking this Court to stop EPA's rulemaking. *See* No. 14-1112, ECF 1541126; No. 14-1112, ECF 1541358. The States and industry also filed a Petition for Review, arguing that EPA's conclusive statements regarding its legal authority and obligation to regulate under Section 111(d) constituted final agency action. *See* No. 14-1112, ECF 1541126. Finally, the States filed a Petition for Review of a final settlement agreement between EPA and certain environmental and sovereign actors, which required EPA to launch the Section 111(d) rulemaking. *See* No. 14-1146, ECF 1540535.

The substantive basis for all three requests was that the Section 112 Exclusion prohibits EPA from issuing *any* rule regulating power plants under Section 111(d)—no matter how the proposal might change by finalization. *See id*. at 29-51. The parties and *amici* submitted over 300 pages of briefing on that issue.

On June 9, 2015, a panel majority held that this Court lacks authority to remedy the States' injuries largely because the Rule is not yet final. *First*, the majority refused to issue a writ of prohibition because "the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review pro-

posed agency rules." Op. 9. *Second*, while agreeing that EPA had "repeatedly and unequivocally asserted that it has authority [to act] under Section 111(d)," the panel found the statements non-final because they were made in the rulemaking context. *Id.* at 7-8. *Third*, the panel held that the States lacked standing to challenge the settlement because it "did not obligate EPA to issue a final rule." *Id*. at 11-12.

Judge Henderson concurred only in the judgment, writing separately to "distance [herself]" from the majority's "cramped view of [this Court's] extraordinary writ authority." Concur. 1. In her view, "because this Court would have authority to review the agency's final decision," the All Writs Act authorizes this Court to halt a proposed rule "in the interim." *Id.* at 2 (quotation omitted). But relying on EPA's "represent[ation] that it will promulgate a final rule *before* th[e] opinion issue[d]," Judge Henderson refused the writ, finding that "the passage of time ha[d] rendered the issuance all but academic." *Id*. at 6-7 (emphasis in original).

ARGUMENT

I. Rehearing Is Warranted Because The Panel's Decision Renders A Broad Category Of Agency Misconduct Judicially Unreviewable, In Violation Of D.C. Circuit And Supreme Court Precedent.

The panel's sweeping refusal to review EPA's extreme actions, in the face of three different potential vehicles, is contrary to controlling case law. By holding unequivocally that this Court has no authority in any of the cases, the panel majori-

ty has rendered all agency misconduct during rulemaking immune from judicial review—no matter how harmful or unlawful.

A. Writ of Prohibition.

This case presents a set of uniquely compelling circumstances, which justify judicial intervention in an ongoing agency rulemaking under the All Writs Act. *First*, the agency has engaged in an unprecedented pattern of promising that it will finalize some form of the rule at issue, regardless of what comments it receives on its threshold authority to do so. *Second*, the agency's unequivocal threats have been aimed at requiring sovereign States to redirect substantial public resources before the rule is finalized. *Third*, the States have raised a powerful argument that the rule is unlawful, no matter what its final form.

In denying the requested writ, the panel majority announced a sweeping new limitation on this Court's authority: "the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules." Op. 9. The panel majority did not rely on a conclusion that the petitioners failed to present sufficiently exceptional circumstances to justify a writ. Rather, the import of the holding is that this Court can never issue a writ prohibiting a proposed rule, no matter how egregious or harmful the agency misconduct.

The panel majority's "cramped" understanding of this Court's authority is contrary to case law from this Court and the Supreme Court. Concur. 4. The All

Writs Act gives this Court the authority to issue "*all* writs necessary or appropriate in aid of [its] . . . jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). As Judge Henderson explained in her concurrence, case law makes clear that the availability of the writ turns on only two factors, both of which are present. *First*, "the agency has initiated 'a proceeding of *some* kind,'" in a circumstance where this Court "'would have authority to review the agency's final decision.'" Concur. 1 (quoting *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (Roberts, J.)); *accord In re al-Nashiri*, 2015 WL 3851966, at *3 (D.C. Cir. June 23, 2015). Here, this Court will have the authority to review the final Section 111(d) Rule under 42 U.S.C. § 7607(b)(1). *Second*, Congress has not provided "*explicit* direction" withdrawing the availability of a writ. Concur. 3 (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 608 (1966)) (emphasis in original). There need not be final agency action, as the panel majority held.[3]

The panel majority's holding is particularly problematic because this case involves ongoing harms to sovereign States. In *Cheney v. U.S. District Court*, the Supreme Court reversed this Court's holding that it had "'no authority,'" under the All Writs Act, to stop a discovery order directed at the Vice President. 542 U.S.

[3] Courts have issued orders stopping agency misconduct, even absent final agency action. *See, e.g., Leedom v. Kyne*, 358 U.S. 184, 191 (1958); *In re Aiken Cnty.*, 725 F.3d 255, 257 (D.C. Cir. 2013); *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 543 F.2d 356, 358 (D.C. Cir. 1976).

367, 380 (2004) (quoting *In re Cheney*, 334 F.3d 1096, 1105 (D.C. Cir. 2003)). The Supreme Court primarily faulted this Court for overlooking the significant separation-of-powers issue. *Id.* at 381-82; *accord McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17-18 (1963) (reviewing non-final agency action because the issue had "aroused vigorous protests from foreign governments," raising "public questions particularly high in the scale of our national interest"). The panel majority's failure even to acknowledge the federalism implications here repeats the same categorical error that animated the Supreme Court's decision in *Cheney*.

The cases relied upon by the panel majority—*Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34 (1985), and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964)—do not support the holding that this Court lacks any authority to stop agency rulemakings. *See* Op. 9. In *Pennsylvania*, the Supreme Court explicitly "le[ft] open the question of the availability of the All Writs Act to authorize [an order of the type at issue there,] where exceptional circumstances require it." 474 U.S. at 43. And in *Schlagenhauf*, the Court recognized that the writ is available to correct a "clear abuse of discretion." 379 U.S. at 110. The panel majority's holding, in contrast, closed the door to the issuance of a writ during a rulemaking, no matter how exceptional or clear the agency's abuse of power.

The majority's bright-line rule may well have sweeping consequences for agency conduct. Agencies proposing questionable and even clearly unlawful rules

now have a new, easy-to-execute blueprint to get parties—including sovereign States—to begin compliance efforts before the courts have any say. Include impossibly tight deadlines in the proposal, and then issue unequivocal threats to future regulated parties that the rule *will* issue and that pre-finalization compliance measures are therefore necessary. Parties facing such threats will have no practical choice but to comply, since they cannot seek relief from the courts.

2. Petition For Review Of Final Agency Action.

Relying on the two-pronged finality test from *Bennett v. Spear*, 520 U.S. 154 (1997), the panel narrowed the category of agency actions eligible for judicial review. The petitioners presented a compelling case that EPA's repeated statements about its authority and obligation to regulate power plants under Section 111(d), notwithstanding the Section 112 Exclusion, were of such a definitive character that they constituted "any . . . final action" under 42 U.S.C. § 7607(b)(1). *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). These unequivocal statements started in the Legal Memorandum supporting the proposed Rule, and have continued month after month since. *See supra* p. 4. While the panel agreed that EPA made "repeated[] and unequivocal[]" assertions of authority, it wrongly concluded that the statements were not "final" under Section 7607(b)(1). Op. 10.

With regard to the first *Bennett* prong, the panel's decision contravenes case law from this Court and the Supreme Court that has held that "the consummation

of the agency's decisionmaking" can take *any* form. 520 U.S. at 178. It makes no difference "whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by ouija board." *Teva Pharmaceuticals USA v. Sebelius*, 595 F.3d 1303, 1312 (D.C. Cir. 2010); *see, e.g.*, *Whitman v. Am. Trucking Ass'ns*, Inc., 531 U.S. 457, 479 (2001) (interpretive rule in regulatory preamble constitutes final agency action); *Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1530-32 (D.C. Cir. 1990) (letter written by agency personnel constitutes final agency action). Here, that consummation took the form of repeated, unequivocal statements from the agency's Administrator. But the panel broadly concluded that "[i]n the context of an ongoing rulemaking, an agency's statement about its legal authority to adopt a proposed rule is not the 'consummation' of the agency's decisionmaking process." Op. 10. This bright-line approach is incompatible with the practical inquiry previously applied by this Court and the Supreme Court.

As to the second *Bennett* prong—that the action is one by which "rights or obligations have been determined, or from which legal consequences will flow," (520 U.S. at 178)—the panel was also mistaken. As a threshold matter, this prong does not apply to petitions for review under the "comprehensive[]" terms of Section 7607(b)(1). *See Whitman*, 531 U.S. at 478-79 (citing *Bennett* and applying only consummation inquiry). In any event, EPA concluded not only that it had the legal authority to issue a rule under Section 111(d), but also the "responsibility" to

do it. ECF 1547449 at 1. This determination of EPA's legal *responsibility* would satisfy the "rights or obligations" prong of *Bennett*, if it were applicable.

3. Petition For Review Of A Final Settlement Agreement.

The States also asked this Court to address the Section 112 Exclusion issue in the context of a final settlement agreement between EPA and certain environmental and sovereign actors, which required EPA to launch and then consider finalizing the Section 111(d) Rule. The States argued that they had standing because, *inter alia*, EPA's public commitment to issuing a final Section 111(d) Rule caused certainly impending harm to the States that is fairly traceable to the settlement agreement. *See* No. 14-1146, ECF 1540535; No. 14-1146, ECF 1540538.

In holding that the States lack standing, the panel majority relied on an inappropriately broad reading of *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013). The majority interpreted that decision to hold that a party never has standing to challenge a "settlement agreement that does nothing more than set a timeline for agency action, without dictating the content of that action." Op. 11.

This expansive reading of *Perciasepe* warrants reconsideration. *Perciasepe* involved a proposed consent decree that required the agency to conduct a rulemaking over a specific timeframe, and a third party sought to intervene to object that the timeframe provided insufficient time for notice-and-comment. This Court held that the party lacked standing because it could not *at that time* demonstrate any in-

jury-in-fact. *See* 714 F.3d at 1321-26. The panel majority has expanded *Percia-sepe* beyond that unremarkable holding to render all settlements that involve time-lines for rulemaking *per se* unreviewable, even where the petitioner demonstrates that it has suffered severe harm fairly traceable to a settlement. That reading can-not be reconciled with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).[4]

II. In The Alternative, The Panel Should Stay The Mandate Until The Fi-nal Rule Is Published In The Federal Register

Rather than reconsidering the threshold issues, the panel could stay the man-date in these related cases—Nos. 14-1112, 14-1146, 11-1151—until the final rule is published in the Federal Register, which would permit this Court simply to leave for another day the question of this Court's authority to stop agency misconduct during a rulemaking. Judge Henderson is correct that the threshold issues ad-dressed in the majority's decision will be "all but academic" in the near future when EPA publishes its final Section 111(d) Rule. Concur. 7. Due to the passage of time, there is now "good cause," under Circuit Rule 41(a)(2), for this Court to consider in the alternative a stay of the mandate. *See, e.g., Chamber of Commerce*

[4] The panel also indicated that the States had not timely challenged the settlement within 60 days "after EPA published notice" in the Federal Register. Op. 12. But the opinion did not address the States' argument that the case did not become ripe, under the exception for after-arising ripeness, until EPA committed to adopt the Section 111(d) Rule in June 2014. *See* No. 14-1146, ECF 1540535, at 53-56.

v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006); *U.S. Telecom Ass'n v. FCC*, No. 00-1012, 2002 WL 31039663, at *1 (D.C. Cir. Sept. 4, 2002).

First, a stay of the mandate would provide an avenue for addressing the concerns raised by the States in this Petition. Under the panel majority's opinion, this Court now lacks authority to stop unlawful agency conduct during a rulemaking process, no matter how egregious or unlawful the agency misconduct. *See supra* pp. 6-12. With a stay of the mandate until the final Rule is published in the Federal Register, the panel could vacate these holdings as "academic" and decide the merits of the fully briefed Section 112 Exclusion issue, as discussed below.

Second, because the panel could promptly decide the merits of the Section 112 Exclusion issue, a stay of the mandate could also save this Court and the parties substantial resources. As soon as EPA publishes the final Section 111(d) Rule in the Federal Register, the States will file a Petition For Review, for which they will indisputably have standing. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). The States will seek to consolidate that Petition with the present cases, as raising "essentially . . . the same, similar, or related issues" and involving "essentially the same parties." D.C. Cir. Handbook 23 (2015). While the States expect that the Petition from the final Rule will raise a wide range of legal issues, one central issue could render the remaining legal problems moot: the argument that the Section 112 Exclusion prohibits the Section 111(d) Rule entirely. Over 300

pages have been briefed on that issue in the present cases, and it was discussed in detail at oral argument. A stay of the mandate would allow the panel to grant consolidation and rely on the full vetting already presented in these cases.[5]

Third, following this procedure would also lead to a more prompt decision on the merits, which is in the public's interest. In light of the enormous dislocation that the Section 111(d) Rule has imposed upon the States, and will impose in the future, all would benefit from a speedy disposition of the Section 112 Exclusion issue. And given the panel's extensive experience with the Section 112 Exclusion, there could be no doubt that this panel is best situated to expeditiously decide this threshold question of EPA's authority.[6]

CONCLUSION

For the foregoing reasons, the States respectfully request that this Court grant this petition for rehearing or rehearing *en banc*. In the alternative, the States respectfully move that this Court stay the mandate until the final Rule is published.

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[5] *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not change the analysis contained in the briefing because, as EPA said the day after that decision, "[f]rom the moment [EPA] learned of this decision, [EPA was] committed to ensuring [the Section 112] standards remain in place." Janet McCabe, *In Perspective*, *supra* p. 3.

[6] Publication of the Rule in the Federal Register may take several months after EPA signs the final Rule. InsideEPA, EPA Said To Target Early August for ESPS Release (July 13, 2015) ("EPA is planning to release [the final Section 111(d) Rule] before Aug. 10 . . . . [The Rule] are unlikely to appear in the Federal Register . . . until . . . climate talks in Paris in December."). The States reserve the right to seek emergency relief from this Court when EPA signs the final Rule.

Dated: July 24, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 35(b) because it does not exceed 15 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Elbert Lin

CERTIFICATE OF SERVICE

I certify that on this 24th day of July, 2015, a copy of the foregoing *Petition For Rehearing And Rehearing En Banc, Or, In The Alternative, Motion To Stay The Mandate* was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elbert Lin
Elbert Lin

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 16, 2015 Decided June 9, 2015

No. 14-1112

IN RE: MURRAY ENERGY CORPORATION,
PETITIONER

Consolidated with 14-1151

On Petition For Writ of Prohibition
and On Petition For Review

No. 14-1146

STATE OF WEST VIRGINIA, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

CITY OF NEW YORK, ET AL.,
INTERVENORS

On Petition for Review of an Order of the
United States Environmental Protection Agency

Elbert Lin, Solicitor General, Office of the Attorney General for the State of West Virginia, argued the cause for Petitioner-Intervenors States. With him on the briefs were *Patrick Morrisey*, Attorney General, *Misha Tseytlin*, General Counsel, *J. Zak Ritchie*, Assistant Attorney General, *Luther Strange*, Attorney General, Office of the Attorney General for the State of Alabama, *Andrew Brasher*, Solicitor General, *Craig W. Richards*, Attorney General, Office of the Attorney General for the State of Alaska, *Steven E. Mulder*, Senior Assistant Attorney General, *Gregory F. Zoeller*, Attorney General, Office of the Attorney for the State of Indiana, *Timothy Junk*, Deputy Attorney General, *Derek Schmidt*, Attorney General, Office of the Attorney General for the State of Kansas, *Jeffrey A. Chanay*, Deputy Attorney General, *Jack Conway*, Attorney General, Office of the Attorney General for the Commonwealth of Kentucky, *Doug Peterson*, Attorney General, Office of the Attorney General for the State of Nebraska, *Blake E. Johnson*, Assistant Attorney General, *Michael DeWine*, Attorney General, Office of the Attorney General for the State of Ohio, *Eric E. Murphy*, State Solicitor, *E. Scott Pruitt*, Attorney General, Office of the Attorney General for the State of Oklahoma, *Patrick R. Wyrick*, Solicitor General, *P. Clayton Eubanks*, Deputy Solicitor General, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *James Emory Smith, Jr.*, Deputy Solicitor General, *Peter K. Michael*, Attorney General, Office of the Attorney General for the State of Wyoming, *James Kaste*, Deputy Attorney General, *Michael J. McGrady*, Senior Assistant Attorney General, *Jeremiah I. Williamson*, Assistant Attorney General, *James D. "Buddy" Caldwell*, Attorney General, Office of the Attorney General for the State of Louisiana, *Megan K. Terrell*, Deputy Director, *Marty J. Jackley*, Attorney General, Office of the Attorney General for the State of South Dakota, and *Roxanne*

Giedd, Deputy Attorney General at the time the brief was filed. *C. Joseph Cordi Jr.*, Senior Assistant Attorney General, Office of the Attorney General for the State of Arkansas, *Steven R. Blair*, Assistant Attorney General, Office of the Attorney General for the State of South Dakota, *Steven B. Jones*, Assistant Attorney General, Office of the Attorney General for the State of Louisiana, *Daniel P. Lennington*, Assistant Attorney General, Office of the Attorney General for the State of Wisconsin, and *Katherine Jean Spohn*, Deputy Attorney General, Office of the Attorney General for the State of Nebraska, entered appearances.

Geoffrey K. Barnes argued the cause for Petitioner Murray Energy Corporation. With him on the briefs were *J. Van Carson*, *Wendlene M. Lavey*, *John D. Lazzaretti*, and *Robert D. Cheren*. *Rebecca A. Worthington* entered an appearance.

Laurence H. Tribe argued the case for Petitioner-Intervenor Peabody Energy Corporation. With him on the briefs were *Jonathan S. Massey*, *Tristan L. Duncan*, and *Thomas J. Grever*.

Robert R. Gasaway, *Dominic E. Draye*, *Allison D. Wood*, *Tauna M. Szymanski*, *C. Boyden Gray*, and *Adam Gustafson* were on the briefs for Intervenor-Petitioners National Federation of Independent Business and Utility Air Regulatory Group.

Peter D. Keisler, *Roger R. Martella, Jr.*, *C. Frederick Beckner III*, *Paul J. Ray*, *Joshua Thompson*, *Leslie A. Hulse*, *Linda E. Kelly*, *Quentin Riegel*, *Steven P. Lehotsky*, *Sheldon Gilbert*, and *Richard Moskowitz* were on the briefs for *amici curiae* Trade Associations and Pacific Legal Foundation in support of petitioners.

Peter S. Glaser and *Carroll W. McGuffey* were on the brief for *amici curiae* the National Mining Association and the American Coalition for Clean Coal Electricity.

Brian H. Lynk and *Amanda Shafer Berman*, Attorneys, U.S. Department of Justice, argued the causes for respondents. With them on the briefs were *John C. Cruden*, Assistant Attorney General, and *Elliott Zenick* and *Scott Jordan*, Attorneys, U.S. Environmental Protection Agency.

Morgan A. Costello, Assistant Attorney General, Office of the Attorney General for the State of New York, argued the cause for Respondent-Intervenors States. With her on the briefs were *Eric T. Schneiderman*, Attorney General, Office of the Attorney General for the State of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, *Michael J. Myers* and *Brian Lusignan*, Assistant Attorneys General, *Kamala D. Harris*, Attorney General, Office of the Attorney General for the State of California, *David A. Zonana*, Acting Supervising Deputy Attorney General, *M. Elaine Meckenstock*, *Elizabeth B. Rumsey*, *Timothy E. Sullivan*, and *Raissa Lerner*, Deputy Attorneys General, *George Jepsen*, Attorney General, Office of the Attorney General for the State of Connecticut, *Kimberly P. Massicotte* and *Scott N. Koschwitz*, Assistant Attorneys General, *Matthew P. Denn*, Attorney General, Office of the Attorney General for the State of Delaware, *Valerie M. Edge*, Deputy Attorney General, *Maura Healey*, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, *Melissa A. Hoffer* and *Turner Smith*, Assistant Attorneys General, *Janet T. Mills*, Attorney General, Office of the Attorney General for the State of Maine, *Gerald D. Reid*, Natural Resources Division Chief, *Douglas F. Gansler*, Attorney General at the time the brief

was filed, Office of the Attorney General for the State of Maryland, *Mary Raivel*, Assistant Attorney General, *Hector Balderas*, Attorney General, Office of the Attorney General for the State of New Mexico, *Tannis Fox*, Assistant Attorney General, *Ellen F. Rosenblum*, Attorney General, Office of the Attorney General for the State of Oregon, *Paul Garrahan*, Acting Attorney-in-Charge, *Peter Kilmartin*, Attorney General, Rhode Island Department of Attorney General, *Gregory S. Schultz*, Assistant Attorney General, *William H. Sorrell*, Attorney General, Office of the Attorney General for the State of Vermont, *Thea Schwartz*, Assistant Attorney General, *Robert W. Ferguson*, Attorney General, Office of the Attorney General for the State of Washington, *Leslie R. Seffern*, Assistant Attorney General, *Karl A. Racine*, Attorney General, Office of the Attorney General for the District of Columbia, *Amy McDonnell*, General Counsel, and *Carrie Noteboom*. *Carol A. Iancu*, Assistant Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, and *Christopher G. King*, entered appearances.

Sean H. Donahue argued the cause for Respondent-Intervenors NGOs. With him on the briefs were *David Doniger*, *Benjamin Longstreth*, *Tomás Carbonell*, *Vickie Patton*, *Joanne Spalding*, *Andres Restrepo*, and *Ann Brewster Weeks*. *Megan Ceronsky* entered an appearance.

Katherine E. Konschnik was on the brief for *amicus curiae* Law Professors in support of respondents.

Kevin Poloncarz was on the brief for *amicus curiae* Calpine Association in support of respondents.

Richard L. Revesz and *Denise A. Grab* were on the brief for *amicus curiae* Institute for Policy Integrity at New York University School of Law in support of respondent.

Before: HENDERSON, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, with whom *Circuit Judge* GRIFFITH joins.

Opinion concurring in the judgment filed by *Circuit Judge* HENDERSON.

KAVANAUGH, *Circuit Judge*: Petitioners are champing at the bit to challenge EPA's anticipated rule restricting carbon dioxide emissions from existing power plants. But EPA has not yet issued a final rule. It has issued only a proposed rule. Petitioners nonetheless ask the Court to jump into the fray now. They want us to do something that they candidly acknowledge we have never done before: review the legality of a *proposed* rule. But a proposed rule is just a proposal. In justiciable cases, this Court has authority to review the legality of final agency rules. We do not have authority to review proposed agency rules. In short, we deny the petitions for review and the petition for a writ of prohibition because the complained-of agency action is not final.

* * *

On June 18, 2014, as part of the Executive Branch's efforts to tackle global warming, EPA proposed a rule to restrict carbon dioxide emissions from existing coal-fired and natural gas-fired power plants. *See* 79 Fed. Reg. 34,830, 34,830 (June 18, 2014). In the preamble to the proposed rule and in other statements about the proposed rule, EPA has

explained that Section 111(d) of the Clean Air Act supplies legal authority for EPA to restrict those emissions. *See, e.g.*, *id.* at 34,852-53; *see also* 42 U.S.C. § 7411(d) (codifying Section 111(d) of the Clean Air Act).

EPA published the proposed rule in the Federal Register and invited "further input through public comment on all aspects of this proposal." *Id.* at 34,835. The comment period has now closed, and EPA has received over two million comments. EPA has not yet issued a final rule but intends to do so this summer.

Petitioners here are Murray Energy Corporation, which is a coal company whose business would be negatively affected by a restriction on carbon dioxide emissions from coal-fired power plants, and the States of West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming. Shortly after EPA issued its proposed rule, petitioners filed suit. According to petitioners, Section 111(d) of the Clean Air Act does not grant EPA authority to limit carbon dioxide emissions from existing power plants. For that reason, petitioners ask the Court to enjoin EPA from issuing a final rule limiting those carbon dioxide emissions.

In effect, petitioners are asking us to review the legality of a proposed EPA rule so as to prevent EPA from issuing a final rule. But as this Court has stated, a proposed EPA rule "is not final agency action subject to judicial review." *Las Brisas Energy Center, LLC v. EPA*, No. 12-1248, 2012 WL 10939210 (D.C. Cir. 2012). We may review final agency rules. *See generally Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-52 (1967). But we do not have authority to review proposed rules. *See* 42 U.S.C. § 7607(b)(1) (Clean Air Act) ("A petition for review of action of the Administrator in

promulgating . . . any standard of performance or requirement under section 7411 of this title . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed . . . ."); *cf.* 5 U.S.C. § 704 (Administrative Procedure Act) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

Proposed rules meet neither of the two requirements for final agency action: (i) They are not the "consummation of the agency's decisionmaking process," and (ii) they do not determine "rights or obligations," or impose "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted); *see also American Portland Cement Alliance v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996) ("a proposed regulation is still in flux," so "review is premature") (internal quotation marks omitted); *Action on Smoking and Health v. Department of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994) ("Agency action is final when it imposes an obligation, denies a right, or fixes some legal relationship," and an agency's "proposed rulemaking generates no such consequences.") (internal quotation marks omitted).

In an attempt to clear this hurdle to their suit, petitioners advance three different arguments. None is persuasive.

First, petitioners contend that this Court has authority under the All Writs Act to consider their challenge now, even before EPA issues a final rule. The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Although "the All Writs Act authorizes employment of extraordinary writs, it confines the

authority to the issuance" of writs "in aid of the issuing court's jurisdiction." *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (internal quotation marks omitted).

In this case, a writ is not necessary or appropriate to aid the Court's jurisdiction. After EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review. At that time (which will not be very long from now, according to EPA), the Court will have an opportunity to review the legality of the rule.

Petitioners contend, however, that we should consider their challenge now because they are already incurring costs in preparing for the anticipated final rule. And petitioners say that the Court will not be able to fully remedy that injury if we do not hear the case at this time. But courts have never reviewed *proposed* rules, notwithstanding the costs that parties may routinely incur in preparing for anticipated final rules. We recognize that prudent organizations and individuals may alter their behavior (and thereby incur costs) based on what they think is likely to come in the form of new regulations. But that reality has never been a justification for allowing courts to review proposed agency rules. We see no persuasive reason to blaze a new trail here.

In short, the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules. *See Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 43 (1985) (All Writs Act "does not authorize" courts "to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate"); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) ("It is, of course, well settled" that a

writ "is not to be used as a substitute for appeal, even though hardship may result from delay.") (internal citation omitted).

Second, petitioners argue that EPA's public statements about its legal authority to regulate carbon dioxide emissions constitute final agency action subject to judicial review. As petitioners correctly note, EPA has repeatedly and unequivocally asserted that it has authority under Section 111(d) to restrict carbon dioxide emissions from existing power plants. EPA has made such statements in the preamble to the proposed rule, in a legal memorandum accompanying the proposed rule, and in other public remarks discussing the proposed rule. *See, e.g.*, 79 Fed. Reg. at 34,853.

But those EPA statements are not final agency action. As noted above, to be final an agency action must meet two requirements. First, the agency action must constitute "the consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78 (internal quotation marks omitted). Second, the agency action must be one "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (internal quotation marks omitted).

Here, neither of those standard finality requirements is met.

In the context of an ongoing rulemaking, an agency's statement about its legal authority to adopt a proposed rule is not the "consummation" of the agency's decisionmaking process. Formally speaking, such a statement is a proposed view of the law. Indeed, EPA recognized as much in this instance when it asked for "further input through public comment on *all* aspects" of the agency's proposal. 79 Fed. Reg. at 34,835 (emphasis added). Put simply, the

consummation of the agency's decisionmaking process with respect to a rule occurs when the agency issues the rule.

Moreover, even if EPA's position on its legal authority is set in stone, the agency's statements about its legal authority – unconnected to any final rule or other final agency action – do not impose any legal obligations or prohibitions on petitioners. Any such legal obligations or prohibitions will be established, and any legal consequences for violating those obligations or prohibitions will be imposed, only after EPA finalizes a rule.

In short, EPA's statements about its legal authority under Section 111(d) meet neither of the requirements for final agency action.

Third, no doubt recognizing the problems with their attempt to challenge a proposed rule (including the lack of precedent supporting judicial review of a proposed rule), the State petitioners separately challenge a 2011 settlement agreement that EPA reached with several other States and environmental groups. By challenging that settlement agreement, the State petitioners hope to obtain a backdoor ruling from the Court that EPA lacks legal authority under Section 111(d) to regulate carbon dioxide emissions from existing power plants. But the settlement agreement did not obligate EPA to issue a final rule restricting carbon dioxide emissions from existing power plants. It simply set a timeline for EPA to decide *whether* to do so. As our precedent makes clear, a settlement agreement that does nothing more than set a timeline for agency action, without dictating the content of that action, does not impose an injury in fact on entities that are not parties to the settlement agreement. *See Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324-25 (D.C. Cir. 2013). State petitioners therefore lack standing to challenge

the settlement agreement. Moreover, State petitioners' challenge to the settlement agreement is untimely. They had to file suit within 60 days after EPA published notice of the settlement agreement in the Federal Register. *See* 42 U.S.C. § 7607(b)(1). They did not file suit until 2014, more than two years after publication.

* * *

We deny the petitions for review and the petition for a writ of prohibition.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in the judgment: I agree that the petitioners in No. 14-1146 do not have standing to challenge the settlement agreement. I also agree that we do not have jurisdiction to hear the petition for review in No. 14-1151 because the proposed rule that the petitioners challenge is non-final agency action. And while I too would deny the application for a writ of prohibition in No. 14-1112, I write separately to distance myself from my colleagues' cramped view of our extraordinary writ authority.

The All Writs Act gives this Court the power to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act confines the power to grant writs "to the issuance of process 'in aid of' the issuing court's jurisdiction. The Act does not enlarge that jurisdiction." *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (Roberts, J.) (alterations omitted). The Act's language means that this Court may grant a writ in "those cases which are within [the] court's appellate jurisdiction although no appeal has been perfected." *Id*. at 528 (alteration omitted). In other words, once an agency has initiated "a proceeding of *some* kind" that may result in an appeal to this Court, that matter is "within our appellate jurisdiction—however prospective or potential that jurisdiction might be." *Id*. at 529 (quotation mark and alteration omitted). Jurisdiction to issue a writ therefore lies "in the court that would have authority to review the agency's final decision." *Id*. at 531.

We have jurisdiction here to issue a writ of prohibition. The EPA initiated a rulemaking by publishing a proposed rule. *See generally* 79 Fed. Reg. 34,830 (June 18, 2014). This proceeding will result in a final rule that may be challenged on direct review in this Court. *See id.* at 34,838 ("[T]he EPA expects to finalize this rulemaking by June 1, 2015."); 42 U.S.C. § 7607(b)(1) ("A petition for review of . . . any standard of performance or requirement under section

7411 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia." (footnote omitted)). Consequently, because this Court "would have authority to review the agency's final decision," we have authority to issue a writ of prohibition in the interim. *Tennant*, 359 F.3d at 531; *see also FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (authority to grant writ "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected").

We retain jurisdiction to issue writs despite the Clean Air Act's limitation on judicial review. *See* 42 U.S.C. § 7607(e). "The All Writs Act invests a court with a power essentially equitable." *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). Subject to constitutional limitations, the Congress may strip federal courts of their equitable authority under the All Writs Act. *See United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1197 (D.C. Cir. 2005) (court should not "expand upon our equitable jurisdiction if . . . we are restricted by the statutory language"); *Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (courts "possess the full range of remedial powers" unless statute "restrict[s] their exercise"). But to properly restrict a court's equitable power, a statute must do so plainly and unequivocally. *See Weinberger v. Romero-Barcleo*, 456 U.S. 305, 313 (1982) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (courts retain equitable powers "[a]bsent the clearest command to the contrary from Congress"); *Dean Foods Co.*, 384 U.S. at 608 (courts retain authority under All Writs Act "[i]n the absence of *explicit* direction from Congress" (emphasis added)).

The Clean Air Act provides that "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. § 7607(e). This language falls far short of an "explicit direction" to limit our authority under the All Writs Act. *Dean Foods Co.*, 384 U.S. at 608. Section 7607(e) mentions neither writ authority nor our traditional equitable powers. The failure to include mandamus relief or a phrase of similar ilk is critical. In *Ganem v. Heckler*, 746 F.2d 844 (D.C. Cir. 1984), we held that the relevant statute's failure to "mention . . . the uncodified mandamus jurisdiction of the District of Columbia courts" counseled *against* the conclusion that mandamus jurisdiction was lacking. *Id.* at 851. Without an explicit command that jurisdiction under the All Writs Act had been withdrawn, we found it implausible that the court's equitable powers had been restricted. *See id.* And although we did not say so explicitly, the conclusion is supported by the basic canon of statutory construction that "we do not lightly assume that Congress meant to restrict the equitable powers of the federal courts." *Miller v. French*, 530 U.S. 327, 336 (2000).

Moreover, we noted in *Ganem* that the Congress "knows how to withdraw a particular remedy," such as the right to a writ of prohibition, when it wants to do so. 746 F.2d at 852. When a court fails to construe a statute as stripping its jurisdiction to issue writs, the Congress has responded by explicitly eliminating that equitable authority. *See id.* (citing 84 Stat. 790, that "no other official or any court of the United States shall have power or jurisdiction to review any . . . decision by an action *in the nature of mandamus* or otherwise"); *see id.* ("The fact that Congress knows how to withdraw a particular remedy and has not expressly done so is some indication of a congressional intent to preserve that remedy."). Because section 7607(e) does not speak to our

writ or equitable powers, there is no "necessary and inescapable inference" that our power has been circumscribed.[1] *Weinberger*, 456 U.S. at 313. I do not read the majority opinion to suggest otherwise.

Nevertheless, simply because we have *jurisdiction* to grant a writ of prohibition does not mean that it is always

[1] The following is a non-exhaustive list of statutes that take away the court's authority. 5 U.S.C. § 8128(b)(2) ("The action of the Secretary [of Labor] or his designee . . . is not subject to review by another official of the United States or by a court by mandamus or otherwise."); 8 U.S.C. § 1252(a)(2)(A) ("[n]otwithstanding any other provision of law (statutory or nonstatutory) . . . or . . . [the All Writs Act], no court shall have jurisdiction to review" various immigration orders); 38 U.S.C. § 511(a) ("[T]he decision of the Secretary [of Veterans Affairs]. . . shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise."); 42 U.S.C. § 1715 ("The action of the Secretary [of Labor] . . . shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise"). We have assumed that extraordinary relief is available vis-à-vis the EPA in a number of unpublished dispositions. *See New York v. EPA*, No. 02-1387 *et al.*, 2003 WL 22326398, at *1 (D.C. Cir. Sept. 30, 2003) (denying petition for writ of mandamus because EPA's delay was not "so extraordinary as to warrant mandamus relief"); *In re Sierra Club*, No. 01-1141, 2001 WL 799956, at *1 (D.C. Cir. June 8, 2001) (declining to issue writ of prohibition against EPA because petitioners had "other adequate means to obtain the relief requested"); *In re New Mexico*, No. 95-1273, 1995 WL 479797, at *1 (D.C. Cir. July 19, 1995) (declining to issue writ because agency delay was not unreasonable). And relatedly, we declined to issue an injunction against the EPA to compel it to reach a final decision—equitable relief similar to that provided by an extraordinary writ. *Sierra Club v. Thomas*, 828 F.2d 783, 784 (D.C. Cir. 1987).

appropriate to do so. To obtain a writ, a petitioner must satisfy three conditions:

> (1) the mandamus petitioner must have no other adequate means to attain the relief he desires, (2) the mandamus petitioner must show that his right to the issuance of the writ is clear and indisputable, and (3) the court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014) (quotation marks omitted). Although the test is framed in terms of mandamus, it is equally applicable to a writ of prohibition. *See In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (per curiam) ("the grounds for issuing the writs [of mandamus and prohibition] are virtually identical"); *see also In re McCarthey*, 368 F.3d 1266, 1268 (10th Cir. 2004) ("The standards for reviewing petitions for writs of prohibition are similar to the standards for reviewing petitions for writs of mandamus.").

The third factor in the three-part test evaluates whether a writ is appropriate given the circumstances of the case. This factor is grounded in equitable principles: "The common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). Our discretion is relatively unbounded; it is informed only by "those principles which should guide judicial discretion in the use of an extraordinary remedy rather than . . . formal rules rigorously controlling judicial action." *Id.* at 26. We have characterized the appropriateness inquiry as "a relatively broad and amorphous totality of the circumstances consideration." *In re Kellogg*, 756 F.3d at 762. At the same time, appropriateness must take

into account that the power to issue writs is "sparingly exercised." *Parr v. United States*, 351 U.S. 513, 520 (1956).

Granting the writ would be inappropriate in this instance because the EPA has represented that it will promulgate a final rule *before* this opinion issues. In the proposed rule, the EPA stated that it "expects to finalize this rulemaking by June 1, 2015" due to "the urgent need for actions to reduce [greenhouse gas] emissions." 79 Fed. Reg. at 34,838. Counsel for the EPA at oral argument again stated that the proposed rule "might not be [promulgated in] June" but "will be [promulgated] this summer." Oral Arg. Tr. 77–78. Thus, by the time the majority opinion and this concurrence issue—or shortly thereafter—the petitioners will have a final rule that can be challenged as final agency action in this Court. *See Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007) ("final agency actions[] includ[e] an agency's promulgation of a rule"). Assuming at least one petitioner has standing, we will then adjudicate the same questions raised here. Keeping in mind that the common law writs are "drastic and extraordinary remed[ies] reserved for really extraordinary causes," *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quotation marks omitted), the overtaking of these petitions by the imminent issuance of a final rule, in my view, moots the requested relief.

The petitioners believe that a writ of prohibition is appropriate because waiting to challenge the final rule is inconvenient and costly. But that alone does not justify an extraordinary remedy. *See Nat'l Right to Work Legal Defense v. Richey*, 510 F.2d 1239, 1242 (D.C. Cir. 1975) (writ of mandamus not "appropriate" when "review of the . . . question will be fully available on appeal from a final" decision); *U.S. ex rel. Denholm & McKay Co. v. U.S. Bd. of*

Tax Appeals, 125 F.2d 557, 558 (D.C. Cir. 1942) (declining to grant writ of prohibition even though waiting for normal appellate review "may be costlier in effort and money than if the issue of jurisdiction were settled now"); *Noble v. Eicher*, 143 F.2d 1001, 1002 (D.C. Cir. 1944) (declining to grant writ of prohibition even though "there will [be] inconvenience to the petitioners"). These objections therefore cannot carry the day.

In sum, although we have the authority to issue a writ of prohibition, I would decline to do so because the passage of time has rendered the issuance all but academic.