

# SCIALABBA V. CUELLAR DE OSORIO

Brenden Cline\*

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## INTRODUCTION

On June 18, 2014, the U.S. Environmental Protection Agency (“EPA”) published a proposed rulemaking seeking to regulate greenhouse gas emissions from existing power plants under section 111(d) of the Clean Air Act.<sup>1</sup> That same day, Murray Energy Corporation filed a petition claiming that EPA lacks statutory authority for the rule.<sup>2</sup> At issue are two duplicative provisions in the 1990 Amendments to the Clean Air Act. One version of the amended section 111(d) would require EPA to prescribe guidelines for states to set greenhouse gas standards.<sup>3</sup> The alternative version arguably forbids such regulations.<sup>4</sup> Last term, in *Scialabba v. Cuellar de Osorio*,<sup>5</sup> the Supreme Court reviewed a similar instance of an agency interpreting a statute that could be read to impose contradictory commands. This Comment argues that the Court’s fractured decision showcases the diverse and formidable challenges facing any petitioner who tries to invalidate the proposed section 111(d) rule.

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\* J.D. Candidate, Harvard Law School, Class of 2016. Special thanks to Kate Konschnik, Professor Jody Freeman, Zak Accuardi, David Baake, Justin Brooke, Victoria Callaway, Learned Foote, Jack Lienke, Alex Ralph, and the staff of the *Harvard Environmental Law Review*.

<sup>1</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

<sup>2</sup> Petition for Extraordinary Writ at 6, *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir. filed June 18, 2014), ECF No. 1498341.

<sup>3</sup> See *infra* Part II.A.

<sup>4</sup> *Id.*

<sup>5</sup> 134 S. Ct. 2191 (2014).

## I. BACKGROUND

## A. Procedural History

Rosalina Cuellar de Osorio and her family are natives of El Salvador.<sup>6</sup> Ms. Cuellar de Osorio's mother, a U.S. citizen, filed a visa petition for her daughter's family under the Immigration and Nationality Act in 1998.<sup>7</sup> As the married daughter of a citizen, Ms. Cuellar de Osorio was the principal beneficiary of the petition.<sup>8</sup> Her son qualified as a derivative beneficiary because he was the child of a principal beneficiary, unmarried, and under the age of twenty-one.<sup>9</sup>

In 2005, the family finally reached the front of the visa line. By that time, however, Ms. Cuellar de Osorio's son had turned twenty-one years old and was no longer eligible for derivative beneficiary status.<sup>10</sup> The rest of his family immigrated to the United States.<sup>11</sup> Once Ms. Cuellar de Osorio became a lawful permanent resident, she filed a new visa petition for her son with herself as the sponsor.<sup>12</sup> Ms. Cuellar de Osorio requested that her son retain the 1998 priority date of their original visa petition under the Immigration and Nationality Act's automatic conversion provision, which was added by the Child Status Protection Act.<sup>13</sup> That provision, codified at 8 U.S.C. § 1153(h)(3), puts forth obliquely:

If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.<sup>14</sup>

But the U.S. Citizenship and Immigration Services ("USCIS") refused to convert the class of her son's original petition, sending him to the back of the

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<sup>6</sup> Brief for Respondents at 1–2, *Mayorkas v. de Osorio*, 134 S. Ct. 2191 (2014) (No. 12-930), 2013 WL 5835711, at \*1–2.

<sup>7</sup> *de Osorio v. Mayorkas (de Osorio II)*, 695 F.3d 1003, 1010 (9th Cir. 2012). The Immigration and Nationality Act provides five family-sponsored preference categories for visa petitions: F1 (unmarried adult children of U.S. citizens); F2A (spouses and unmarried minor children of lawful permanent residents); F2B (unmarried adult children of lawful permanent residents); F3 (married children of U.S. citizens); and F4 (brothers and sisters of U.S. citizens). *Scialabba*, 134 S. Ct. at 2197; see also 8 U.S.C. § 1153(a)(1)–(4) (2012). The application for Ms. Cuellar de Osorio's family fell in the F3 category. *de Osorio II*, 695 F.3d at 1010.

<sup>8</sup> See *Cuellar de Osorio v. Mayorkas (de Osorio I)*, 656 F.3d 954, 956–57 (9th Cir. 2011).

<sup>9</sup> *Id.*; see also 8 U.S.C. § 1153(d).

<sup>10</sup> *de Osorio I*, 656 F.3d at 958.

<sup>11</sup> *de Osorio II*, 695 F.3d at 1010.

<sup>12</sup> *de Osorio I*, 656 F.3d at 958. The petition for Ms. Cuellar de Osorio's son fell in the F2B category. *Id.*

<sup>13</sup> *de Osorio II*, 695 F.3d at 1010; see also Child Status Protection Act, Pub. L. No. 107-208, § 3, 116 Stat. 927, 928 (codified at 8 U.S.C. § 1153(h)).

<sup>14</sup> 8 U.S.C. § 1153(h)(3). Subsection (d) establishes a principal beneficiary's children as derivative beneficiaries. See *id.* § 1153(d).

visa line.<sup>15</sup> Ms. Cuellar de Osorio and several similarly situated immigrants responded by filing suit.<sup>16</sup>

While the case against USCIS was pending, the Board of Immigration Appeals (“BIA”) published a precedential opinion interpreting § 1153(h)(3).<sup>17</sup> The BIA held that the provision contains an ambiguity because it “does not expressly state which petitions qualify for automatic conversion and retention of priority dates.”<sup>18</sup> To resolve the issue, the BIA first looked to the regulatory context in which Congress enacted § 1153(h)(3).<sup>19</sup> It found that the term “automatic conversion” had long meant that a visa petition changes categories without the need for a new petition.<sup>20</sup> Moreover, the provision’s legislative history gave no indication that Congress intended to expand automatic conversion access to aged-out visa applicants who required a new petition.<sup>21</sup> As a result, the BIA read § 1153(h)(3) such that “only subsequent visa petitions that do not require a change of petitioner may convert automatically to a new category and retain the original petition’s priority date.”<sup>22</sup> This allowed automatic conversion of applications in only one family-sponsored visa category.<sup>23</sup>

The United States District Court for the Central District of California agreed with the BIA’s judgment.<sup>24</sup> Using the familiar two-step inquiry of *Chevron*,<sup>25</sup> the district court first asked whether the statute spoke clearly to the question at hand.<sup>26</sup> Like the BIA, the court found that § 1153(h)(3) was ambiguous regarding whether all visa petitions were entitled to automatic conversion and priority date retention.<sup>27</sup> At *Chevron* Step Two, the court found the BIA’s reading of the provision to be reasonable and deferred to that interpretation.<sup>28</sup> The district court granted summary judgment for USCIS, holding that § 1153(h)(3) did not cover Ms. Cuellar de Osorio’s son because his original petition could not have been converted without a new sponsor.<sup>29</sup>

<sup>15</sup> *de Osorio II*, 695 F.3d at 1010.

<sup>16</sup> *See* *Zhang v. Napolitano*, 663 F. Supp. 2d 913 (C.D. Cal. 2009).

<sup>17</sup> *de Osorio I*, 656 F.3d at 958.

<sup>18</sup> *Matter of Xiuyi Wang*, 25 I. & N. Dec. 28, 33 (BIA 2009).

<sup>19</sup> *Id.* at 34–36.

<sup>20</sup> *Id.* at 35.

<sup>21</sup> *Id.* at 38.

<sup>22</sup> *de Osorio II*, 695 F.3d 1003, 1009 (9th Cir. 2012).

<sup>23</sup> *Id.* at 1009–10. Only F2A visa petitions may be converted under this reading because these aged-out derivative beneficiaries immediately qualify for F2B petitions filed by the same sponsors. *Id.*

<sup>24</sup> *Zhang v. Napolitano*, 663 F. Supp. 2d 913, 920–21 (C.D. Cal. 2009).

<sup>25</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

<sup>26</sup> *Zhang*, 663 F. Supp. 2d at 919–20. The BIA may receive *Chevron* deference for its interpretations of the immigration statutes. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

<sup>27</sup> *Zhang*, 663 F. Supp. 2d at 919.

<sup>28</sup> *Id.* at 921.

<sup>29</sup> *Id.* at 922. The F3 petition that Ms. Cuellar de Osorio’s mother filed for Ms. Cuellar de Osorio’s son could not have been automatically converted to another family-sponsored preference category as soon as he aged out of derivative eligibility. There is no preference category for the grandchild-

The Court of Appeals for the Ninth Circuit consolidated this case with another and affirmed.<sup>30</sup> Like the court below, the panel found § 1153(h)(3) ambiguous and granted the BIA's construction *Chevron* deference.<sup>31</sup>

On rehearing en banc, the court of appeals reversed and remanded.<sup>32</sup> The majority cited *FDA v. Brown & Williamson Tobacco Corp.*<sup>33</sup> for the idea that the disputed provision could be made clear when placed in its statutory context.<sup>34</sup> The court found that § 1153(h)(3) is triggered by a formula in (h)(1),<sup>35</sup> which in turn is contingent on (h)(2).<sup>36</sup> This latter paragraph explicitly covers all family-sponsored preference categories.<sup>37</sup> As a result, the court held that the BIA's interpretation was not entitled to deference because "the plain language . . . unambiguously grants automatic conversion and priority date retention to [all] aged-out derivative beneficiaries."<sup>38</sup> Ms. Cuellar de Osorio's son could finally join his family in the United States.

### B. Supreme Court Opinion

In a 3–2–1–3 decision, the Supreme Court reversed and remanded.<sup>39</sup> Justice Kagan announced the judgment of the Court and wrote a plurality opinion that was joined by Justices Kennedy and Ginsburg. After thoroughly discussing the mechanics of family-sponsored visa applications,<sup>40</sup> Justice Kagan analyzed the Immigration and Nationality Act's "through and through perplexing"<sup>41</sup> automatic conversion provision using the *Chevron* framework.<sup>42</sup> She noted that judicial restraint is "especially appropriate" in immigration cases because of foreign relations concerns.<sup>43</sup> Yet the plurality opinion did not rely on this heightened deference.

Instead, Justice Kagan concluded that "[t]his is the kind of case *Chevron* was built for."<sup>44</sup> She accepted the Ninth Circuit's broad interpretation that the

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dren of citizens, so Ms. Cuellar de Osorio had to sponsor her son for a new F2B petition. *See de Osorio II*, 695 F.3d 1003, 1018 (9th Cir. 2012).

<sup>30</sup> *de Osorio I*, 656 F.3d 954, 966 (9th Cir. 2011).

<sup>31</sup> *Id.* at 965.

<sup>32</sup> *de Osorio II*, 695 F.3d at 1016.

<sup>33</sup> 529 U.S. 120 (2000).

<sup>34</sup> *de Osorio II*, 695 F.3d at 1012.

<sup>35</sup> "[A] determination of whether an alien satisfies the age requirement . . . shall be made using (A) . . . in the case of a [derivative beneficiary], the date on which an immigrant visa number became available for the alien's parent . . . reduced by (B) the number of days in the period during which the applicable petition described in paragraph [§ 1153(h)](2) was pending." 8 U.S.C. § 1153(h)(1) (2012).

<sup>36</sup> *de Osorio II*, 695 F.3d at 1012. Section 1153(h)(2) states: "The petition described in this paragraph is . . . with respect to an alien child who is a derivative beneficiary . . . a petition filed . . . for classification of the alien's parent under subsection (a), (b), or (c) of [§ 1153]." 8 U.S.C. § 1153(h)(2).

<sup>37</sup> *de Osorio II*, 695 F.3d at 1012; *see also* 8 U.S.C. § 1153(h)(2).

<sup>38</sup> *de Osorio II*, 695 F.3d at 1006.

<sup>39</sup> *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (plurality opinion).

<sup>40</sup> *Id.* at 2197–2202.

<sup>41</sup> *Id.* at 2200.

<sup>42</sup> *Id.* at 2203.

<sup>43</sup> *See id.* (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

<sup>44</sup> *Id.* at 2213.

first clause in § 1153(h)(3)<sup>45</sup> plainly provided relief to every aged-out derivative beneficiary.<sup>46</sup> But she also found the BIA’s narrow reading of the second clause<sup>47</sup>—granting relief only to visa petitions that could be converted without a new sponsor<sup>48</sup>—to be required as a matter of statutory construction.<sup>49</sup> Rather than speak clearly to the question of which petitions qualify for automatic conversion, the “Janus-faced” statute thus seemed to “address[ ] that issue in divergent ways.”<sup>50</sup> Justice Kagan found that no understanding could give each clause full effect.<sup>51</sup> In her view, such “internal tension”<sup>52</sup> demanded deference to the expert agency’s choice of how best to reconcile the “self-contradictory, ambiguous provision in a complex statutory scheme.”<sup>53</sup> This logic was justified by *National Ass’n of Home Builders v. Defenders of Wildlife*,<sup>54</sup> which Justice Kagan understood to mean: “When a statutory scheme contains ‘a fundamental ambiguity’ arising from ‘the differing mandates’ of two provisions, ‘it is appropriate to look to the implementing agency’s expert interpretation’ to determine which ‘must give way.’”<sup>55</sup>

Chief Justice Roberts, joined by Justice Scalia, wrote a separate opinion concurring in the judgment that the BIA’s construction of § 1153(h)(3) was reasonable.<sup>56</sup> However, the Chief Justice departed from the plurality’s approach and recognized no conflict.<sup>57</sup> He cited *Brown & Williamson* to justify viewing the statute “as a symmetrical and coherent regulatory scheme” and “fit[ting], if possible, all parts into a[ ] harmonious whole.”<sup>58</sup> As a result, he rejected the Ninth Circuit’s interpretation and read the first clause as providing a mere con-

<sup>45</sup> “If the age of an alien is determined under paragraph [§ 1153(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of [§ 1153] . . .” 8 U.S.C. § 1153(h)(3) (2012).

<sup>46</sup> *Scialabba*, 134 S. Ct. at 2203.

<sup>47</sup> “[T]he alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.” 8 U.S.C. § 1153(h)(3).

<sup>48</sup> See *supra* text accompanying note 22.

<sup>49</sup> *Scialabba*, 134 S. Ct. at 2203–04.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2207.

<sup>52</sup> *Id.* at 2203.

<sup>53</sup> *Id.* at 2213.

<sup>54</sup> 551 U.S. 644 (2007). *Home Builders* involved EPA reconciling the requirements of two different statutes. *Id.* at 661. The first provision, from the Clean Water Act (“CWA”), commanded that EPA “shall approve” an application to transfer National Pollution Discharge Elimination System permitting power to a state as long as the proposed program meets nine enumerated criteria. See *id.*; see also 33 U.S.C. § 1342(b) (2012). A later provision from the Endangered Species Act (“ESA”) commanded that “[e]ach Federal agency shall . . . insure” that their actions are “not likely to jeopardize” endangered species. *Home Builders*, 551 U.S. at 662; see also 16 U.S.C. § 1536(a)(2) (2012). Applied “literally,” the ESA would effectively add a tenth criterion to the CWA’s list of nine exclusive criteria. *Home Builders*, 551 U.S. at 663. EPA “cannot simultaneously obey the differing mandates.” *Id.* at 666. Therefore, the Court deferred to the Agency’s judgment “as to which command must give way.” *Id.* Note that Justice Kennedy joined the majority in *Home Builders* while Justice Ginsburg joined the dissent. *Id.* at 648. Justice Kagan was not yet on the Court at that time. See *id.*

<sup>55</sup> *Scialabba*, 134 S. Ct. at 2207 (quoting *Home Builders*, 551 U.S. at 666).

<sup>56</sup> *Id.* at 2214–16 (Roberts, C.J., concurring in the judgment).

<sup>57</sup> *Id.* at 2214.

<sup>58</sup> *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

dition for relief rather than granting relief itself.<sup>59</sup> He agreed with the BIA that the second clause was ambiguous and warranted deference.<sup>60</sup> But even if this tension could not have been resolved, Chief Justice Roberts disagreed with the plurality and argued that “[d]irect conflict is not ambiguity.”<sup>61</sup> Congress does not delegate decision-making power to an agency by simultaneously requiring and forbidding an option.<sup>62</sup> As Chief Justice Roberts saw it, “the resolution of such a conflict is not statutory construction but legislative choice.”<sup>63</sup> While the Chief Justice did not explain how agencies and courts should handle these problems, he warned that “*Chevron* is not a license for an agency to repair a statute that does not make sense.”<sup>64</sup> He also distinguished *Home Builders*, writing that the Court deferred to the Agency’s “harmoniz[ation]” of two different statutes in that case “in large part because of our strong presumption that one statute does not impliedly repeal another.”<sup>65</sup> That logic would not apply to divergent demands within the same statute.<sup>66</sup>

Next, Justice Alito filed a brief dissent.<sup>67</sup> Unlike the plurality and concurrence, he was not persuaded by the BIA’s narrow reading that “automatic” conversion applies only if a visa petition could instantaneously change categories without a new sponsor.<sup>68</sup> Instead, he would have affirmed the judgment of the court of appeals and required USCIS to convert each aged-out derivative beneficiary’s application *as soon as* a new sponsor filed an updated petition in the appropriate category.<sup>69</sup> Though Justice Alito would have resolved this case at *Chevron* Step One, he agreed with the Chief Justice’s contention that “[d]irect conflict is not ambiguity.”<sup>70</sup>

Justice Sotomayor wrote the main dissent, which was joined by Justice Breyer in full and by Justice Thomas except as to an important footnote.<sup>71</sup> Like the Chief Justice, she argued that statutory tension should be resolved at *Chevron* Step One by following *Brown & Williamson’s* instruction to view the statute as a coherent regulatory scheme, although she would not have done so by accepting the BIA’s interpretation.<sup>72</sup> Justice Sotomayor identified two alternative constructions of § 1153(h)(3) that would have made each clause clear and

<sup>59</sup> *Id.* at 2214–15. Chief Justice Roberts also disagreed with the plurality’s belief that the BIA’s reading of the second clause was necessary; it was just one reasonable construction of the provision’s ambiguity. *Id.* at 2215.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2214 n.1. Chief Justice Roberts and Justice Scalia joined the majority in *Home Builders. Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 647 (2007).

<sup>66</sup> *Scialabba*, 134 S. Ct. at 2214.

<sup>67</sup> *Id.* at 2216 (Alito, J., dissenting).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* Interestingly, Justice Alito made no reference to *Home Builders*, yet he wrote the majority opinion in that case. *See id.*

<sup>71</sup> *Id.* at 2216–28 (Sotomayor, J., dissenting).

<sup>72</sup> *Id.* at 2217.

avoided conflict.<sup>73</sup> First, she posited that the “automatic conversion” and “priority date retention” remedies<sup>74</sup> are independent forms of relief because they are joined by the conjunction “and.”<sup>75</sup> Second, she echoed Justice Alito by insisting that “automatic” conversion could take place once another sponsor filed a new petition for an aged-out derivative beneficiary.<sup>76</sup> Justice Sotomayor also took aim at the plurality’s “special pocket of *Chevron* jurisprudence.”<sup>77</sup> While the typical *Chevron* case locates ambiguity in a text’s lack of specificity, the plurality discovered ambiguity here in Congress speaking “clearly on the issue in diametrically opposing ways.”<sup>78</sup> In a footnote joined by Justice Breyer, but not by Justice Thomas, Justice Sotomayor examined *Home Builders* to explain “the kind of conflict that can make deference appropriate to an agency’s decision to override unambiguous statutory text.”<sup>79</sup> In her view, statutory friction indicated delegation in that case because the Agency faced two incompatible categorical commands: to consider only nine criteria and also to consider a tenth.<sup>80</sup> The Agency received deference to determine “which command must give way” because it could not “simultaneously obey” both instructions.<sup>81</sup>

## II. ANALYSIS

*Scialabba v. Cuellar de Osorio* was a Rorschach test for the Justices’ comfort with an outer edge of the *Chevron* doctrine. Part II.A describes the conflicting amendments to section 111(d) of the Clean Air Act, on which EPA’s proposed regulation of greenhouse gases from existing stationary sources is based. Part II.B applies the Justices’ logic in *Scialabba* to the section 111(d) dispute. To resolve the Clean Air Act’s statutory tension, a court following *Scialabba* could allow no judicial or administrative reconciliation of the amendments at *Chevron* Step Zero, strain to read away the conflict at *Chevron* Step One, or admit the ambiguity and defer to EPA at *Chevron* Step Two. At each stage, the threads of jurisprudence in *Scialabba* overwhelmingly support EPA’s statutory authority to promulgate guidelines for greenhouse gas standards under section 111(d).

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<sup>73</sup> *Id.* at 2220–26.

<sup>74</sup> “[T]he alien’s petition shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date issued upon receipt of the original petition.” 8 U.S.C. § 1153(h)(3) (2012) (emphasis added).

<sup>75</sup> *Scialabba*, 134 S. Ct. at 2221.

<sup>76</sup> *Id.* at 2223.

<sup>77</sup> *Id.* at 2219.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 2219 n.3. *See also supra* note 54. Justice Thomas joined the majority in *Home Builders*, while Justice Breyer joined the dissent and filed his own dissent. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 647 (2007). Justice Sotomayor was not yet on the Court at that time. *See id.*

<sup>80</sup> *Scialabba*, 134 S. Ct. at 2220 n.3.

<sup>81</sup> *Id.* (quoting *Home Builders*, 551 U.S. at 666).

A. *The Competing Amendments to Clean Air Act Section 111(d)*

Congress enacted section 111 as part of the 1970 Clean Air Act Amendments.<sup>82</sup> The provision was adopted as a “gap filler,” designed to complement control of criteria air pollutants under section 110 and hazardous air pollutants under section 112 by covering all other air pollutants that stationary sources emit.<sup>83</sup> The 1977 Clean Air Act Amendments made some changes to section 111, but left this broad scope intact.<sup>84</sup>

After a decade of contested proposals and debates, the 101st Congress spent its full term revising the Clean Air Act.<sup>85</sup> The 1990 Amendments were one of the most comprehensive pieces of federal environmental legislation; the final act was nearly ten times as long as the 1970 Amendments and required EPA to promulgate more than 175 new regulations.<sup>86</sup> Although the House Office of Legislative Council had computer software that could have checked for overlapping and incompatible amendments, it did not have enough time to run the program before the last day for legislative action in the term.<sup>87</sup> Consequently, the 1990 Clean Air Act Amendments are riddled with “numerous errors, internal inconsistencies, and bad cross-references.”<sup>88</sup>

One mistake attributed to this “ticking legislative time-clock”<sup>89</sup> is the Act’s inclusion of two unreconciled amendments to the same cross-reference in section 111(d). Prior to the 1990 Amendments, section 111(d) stated:

The Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section [108](a) or [112](b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . . .<sup>90</sup>

<sup>82</sup> EPA Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 1 (2014) [hereinafter EPA Legal Memorandum], <http://perma.cc/7LP6-8VDP>.

<sup>83</sup> *Id.* at 4–5; see also Leon G. Billings, *The Obscure 1970 Compromise that Made Obama’s Climate Rules Possible*, POLITICO MAG. (June 2, 2014), <http://perma.cc/XG9D-RTWR>.

<sup>84</sup> EPA Legal Memorandum, *supra* note 82, at 6–7.

<sup>85</sup> Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1733 (1991).

<sup>86</sup> See 1 WILLIAM H. RODGERS, JR., RODGERS’ ENVIRONMENTAL LAW § 3:1A at A (2014), available at Westlaw 1 Envtl. L. (West) § 3:1A.

<sup>87</sup> Env’tl. Law Inst., *Section 111(d): A Historical Perspective*, YOUTUBE (July 17, 2014), <http://youtu.be/adWz4iBFrbU?t=10m57s>.

<sup>88</sup> RODGERS, *supra* note 86, at § 3:1A at B.2 n.58 (quoting 1 Clean Air Rep. (Inside Wash.) No. 16 (Dec. 6, 1990)).

<sup>89</sup> *Id.* at § 3:1A at B.2 n.59 (quoting 1 Clean Air Rep. (Inside Wash.) No. 14 (Special Supplement), at 1 (Nov. 8, 1990)).

<sup>90</sup> 42 U.S.C. § 7411(d)(1) (1988) (emphasis added).



The 1990 Amendments rewrote section 112 without subsection (b)(1)(A).<sup>91</sup> To match this change, the Senate bill would have updated this cross-reference in section 111(d) (the “section 112 exclusion”) by striking out “112(b)(1)(A)” and inserting “112(b).”<sup>92</sup> Incongruously, and without explanation, the House bill would have struck “or 112(b)(1)(A)” and replaced it with “or emitted from a source category which is regulated under Section 112.”<sup>93</sup> The conference committee did not reconcile these competing amendments. Instead, both appear in the final bill that both houses approved and the President signed into law.<sup>94</sup>

EPA has successfully developed new emissions guidelines using its section 111(d) authority alone only once after the 1990 Amendments.<sup>95</sup> In total, EPA has promulgated eleven active section 111(d) regulations.<sup>96</sup> Six of those guidelines were issued in conjunction with section 129.<sup>97</sup> Of the five independent section 111(d) guidelines, two were codified in the Code of Federal Regulations,<sup>98</sup> while three were never codified.<sup>99</sup> Thus, not including the standards for solid waste incinerators mandated by section 129,<sup>100</sup> five sources<sup>101</sup> of four air pollutants<sup>102</sup> are currently subject to section 111(d) regulations.<sup>103</sup> EPA likely stopped pursuing section 111(d) guidelines because the amended section 112—which listed 189 hazardous air pollutants<sup>104</sup> for stringent “maximum available

<sup>91</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 301, 104 Stat. 2399, 2531–35 (1990).

<sup>92</sup> S. 1630, 101st Cong. § 305(a) (as reported in Senate, Dec. 20, 1989).

<sup>93</sup> S. 1630, 101st Cong. § 108(f) (as Engrossed Amendment in House, May 23, 1990).

<sup>94</sup> See Clean Air Act Amendments of 1990 §§ 108, 302.

<sup>95</sup> Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9905 (Mar. 12, 1996) (codified at 40 C.F.R. pts. 51–52, 60); see *infra* notes 98–99.

<sup>96</sup> Am. Coll. of Envtl. Lawyers, Memorandum for ECOS Concerning Clean Air Act 111(d) Issues 5 (2014) [hereinafter ACOEL Memorandum], <http://perma.cc/3QZP-TTEF>.

<sup>97</sup> *Id.* at 5–8. The 1990 Amendments added section 129 to compel EPA to regulate solid waste incinerator units under section 111. *Id.* at 5.

<sup>98</sup> CONG. RESEARCH SERV., R43572, EPA’S PROPOSED GREENHOUSE GAS REGULATIONS FOR EXISTING POWER PLANTS: FREQUENTLY ASKED QUESTIONS 6 (2014). One regulation covers municipal solid waste landfills’ emissions of non-methane organic compounds and methane. 40 C.F.R. §§ 60.30c–60.36c (2014). The other rule applies to acid mist emissions from sulfuric acid plants. *Id.* §§ 60.30d–60.32d.

<sup>99</sup> ACOEL Memorandum, *supra* note 96, at 10. Federal Register notices reference these guidelines as separate documents obtainable from EPA. See Phosphate Fertilizer Plants, Final Guideline Document Availability, 42 Fed. Reg. 12,022, 12,022 (Mar. 1, 1977) (atmospheric fluorides); Kraft Pulp Mills; Final Guideline Document; Availability, 44 Fed. Reg. 29,828, 29,828 (May 22, 1979) (total reduced sulfur); Primary Aluminum Plants; Availability of Final Guideline Document, 45 Fed. Reg. 26,294, 26,294 (Apr. 17, 1980) (atmospheric fluorides).

<sup>100</sup> ACOEL Memorandum, *supra* note 96, at 5.

<sup>101</sup> Municipal solid waste landfills, sulfuric acid plants, phosphate fertilizer plants, kraft pulp mills, and primary aluminum plants. See *supra* notes 98–99.

<sup>102</sup> Atmospheric fluorides, acid mist, total reduced solids, and landfill gases (non-methane organic compounds and methane). See *supra* notes 98–99.

<sup>103</sup> See *supra* notes 98–99; accord EPA Legal Memorandum, *supra* note 82, at 9.

<sup>104</sup> See *The Clean Air Act Amendments of 1990 List of Hazardous Air Pollutants*, EPA, <http://perma.cc/56Q9-HKMB>.

control technology” regulation<sup>105</sup>—shrunk the gap of unregulated air pollutants and imposed stricter requirements on regulated sources.<sup>106</sup>

But on June 2, 2014, EPA announced a proposed rulemaking dubbed the “Clean Power Plan” that would use section 111(d) to regulate greenhouse gas emissions from existing power plants.<sup>107</sup> In a legal memorandum accompanying the notice of proposed rulemaking, EPA explained that it reads the competing amendments to section 111(d) as creating an ambiguity.<sup>108</sup> The Senate amendment would have required section 111(d) guidelines once new sources of greenhouse gases were regulated by section 111(b) because greenhouse gases are not listed as criteria or hazardous air pollutants. Conversely, the House amendment could be understood to foreclose this regulation because fossil fuel-fired power plants are “regulated under Section 112.”<sup>109</sup> EPA resolves the ambiguous section 112 exclusion in its favor by reading the clashing commands to mean: “Where a source category is regulated under Section 112, a Section 111(d) standard of performance cannot be established to address *any [hazardous air pollutant]* listed under Section 112(b) that may be emitted from that particular source category.”<sup>110</sup>

*B. From Two-Step to Waltz: Scialabba’s Three Possible Resolutions of the Section 111(d) Issue*

*1. Chevron Step Zero: Section 111(d) Contains “Direct Conflict” but “Direct Conflict is Not Ambiguity”*

Unlike the Immigration and Nationality Act, 8 U.S.C. § 1153(h)(3), Clean Air Act section 111(d) need not be studied closely to reveal that it is a case of “Schrödinger’s legislation.”<sup>111</sup> This conflict is based not on imprecise language but on duplicative text. The two clauses in § 1153(h)(3) are arguably “Janus-

<sup>105</sup> See 42 U.S.C. § 7412(d)(1)–(3) (2012).

<sup>106</sup> See Robert J. Martineau Jr. & Michael K. Stagg, *New Source Performance Standards*, in *THE CLEAN AIR ACT HANDBOOK* 321, 324–25, 331 (Julie R. Domike & Alec C. Zacroli eds., 3d ed. 2011).

<sup>107</sup> See *EPA Proposes First Guidelines to Cut Carbon Pollution from Existing Power Plants*, EPA (June 2, 2014), <http://perma.cc/88VR-ZRCW>. The proposal aims to cut these emissions thirty percent from 2005 levels by 2030. *Id.*

<sup>108</sup> EPA Legal Memorandum, *supra* note 82, at 12.

<sup>109</sup> These power plants have been regulated under section 112 for their mercury emissions since 2012. See National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304, 9304 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60, 63).

<sup>110</sup> EPA Legal Memorandum, *supra* note 82, at 26 (emphasis added). See also Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005) (codified at 40 C.F.R. pt. 63) [hereinafter *Delisting Rule*].

<sup>111</sup> Josiah Neeley, *How a Drafting Error Could Doom Obama’s Carbon Regulations*, *THE WEEK* (July 30, 2014), <http://perma.cc/MM9C-UL5F>.

faced,” looking toward both broad and narrow relief.<sup>112</sup> In contrast, the amendments to section 111(d) plainly command striking the section 112 exclusion twice and inserting redundant revisions.<sup>113</sup>

Yet, even if section 111(d) contains “direct conflict” and Chief Justice Roberts is correct that “[d]irect conflict is not ambiguity,”<sup>114</sup> EPA should still be authorized to issue the Clean Power Plan. In *Scialabba*, the Chief Justice asserted that the resolution of “[d]irect conflict . . . is not statutory construction but legislative choice.”<sup>115</sup> Implicit in this argument is the nondelegation doctrine’s restriction on Congress’s ability to transfer legislative power to executive agencies—and to courts.<sup>116</sup> Complete incongruity would indicate that Congress did not intend to delegate interpretive authority over the provision to the Agency, preventing the *Chevron* framework from applying in an inquiry that scholars call *Chevron* Step Zero.<sup>117</sup>

A reviewing court following the Chief Justice’s approach should therefore revoke the two competing amendments.<sup>118</sup> This invalidation would revert the section 112 exclusion to its pre-1990 Amendments version,<sup>119</sup> rendering it a nullity because there is no longer a section 112(b)(1)(A) in the Act.<sup>120</sup> However, a court could conclude that Congress’s failure to properly update this cross-reference was a scrivener’s error that may be read to refer to the list of hazardous air pollutants in section 112(b).<sup>121</sup> Thus, the Chief Justice’s implied nondelegation doctrine challenge does not threaten EPA’s authority to regulate greenhouse gases under section 111(d).

<sup>112</sup> *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion).

<sup>113</sup> See *supra* Part II.A.

<sup>114</sup> *Scialabba*, 134 S. Ct. at 2214 (Roberts, C.J., concurring in the judgment).

<sup>115</sup> *Id.*

<sup>116</sup> See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.”); see also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (Article I “permits no delegation of [legislative] powers”).

<sup>117</sup> See Cass R. Sunstein, *Chevron* Step Zero, 92 VA. L. REV. 187, 191 (2006). A similar *Chevron* Step Zero restriction could prevent EPA from receiving deference to resolve a “major question.” The Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). But see *City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013) (“[W]e have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee,” including cases involving questions “of vast ‘economic and political magnitude.’” (quoting *Brown & Williamson*, 529 U.S. at 133)). But as Part II.B.2 demonstrates, a reviewing court could find clear congressional intent authorizing the Clean Power Plan.

<sup>118</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 189 (2012) (“[I]f a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect.”).

<sup>119</sup> 42 U.S.C. § 7411(d)(1) (1988) (“any air pollutant . . . which is not included on a list published under section . . . [112](b)(1)(A)”).

<sup>120</sup> See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 301, 104 Stat. 2399, 2531–35 (1990).

<sup>121</sup> See *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1044 (D.C. Cir. 2001) (holding that Clean Air Act section 126’s cross-reference to section 110(a)(2)(D)(ii) was a scrivener’s error that EPA may permissibly interpret to refer to section 110(a)(2)(D)(i)).

2. *Chevron Step One: Section 111(d) Does Not Contain “Direct Conflict” and Can Be Judicially “Harmonized”*

The Court of Appeals for the D.C. Circuit and the Supreme Court may be tempted by Chief Justice Roberts’s, Justice Alito’s, and Justice Sotomayor’s opinions in *Scialabba* to resolve the section 111(d) dispute themselves at *Chevron* Step One. But as these Justices’ opposing positions in *Scialabba* demonstrate, this focus on court-led statutory interpretation does not guarantee a single result. There are four arduous approaches a court could employ to conclude that Congress’s intent for section 111(d) was clear: the dueling limitations could both apply in their entirety; the terms of the constraints could be read to erase conflict; both restrictions could yield somewhat; or one of the amendments could yield completely.

The first solution, suggested by the National Association of Manufacturers in a letter to EPA, would simply add the two amendments’ limitations.<sup>122</sup> This reading would prohibit EPA from “regulating under Section 111(d) *both* any pollutant emitted from any source category already regulat[ed] under Section 112 *and* any hazardous air pollutant regardless of its source.”<sup>123</sup> Unsurprisingly, this interpretation would block the Clean Power Plan.

But even if it were reasonable to harmonize competing exceptions by adding them,<sup>124</sup> any interpretation that gives the House amendment full effect would undermine the Clean Air Act’s regulatory scheme by rendering section 111(d) a “dead-letter.”<sup>125</sup> The House amendment would preempt all four air pollutants<sup>126</sup> independently regulated by section 111(d) because they are undoubtedly emitted by some of the 170 other source categories<sup>127</sup> listed for regulation under section 112.<sup>128</sup> Significantly, EPA did not create this problem. Nearly all of these source categories were listed pursuant to Congress’s directions.<sup>129</sup>

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<sup>122</sup> Brief of the States of West Virginia et al. as *Amici Curiae* in Support of the Petitioner at 13 n.7, In re: Murray Energy Corp., No. 14-1112 (D.C. Cir. filed June 25, 2014), ECF No. 1499435.

<sup>123</sup> *Id.* at 13.

<sup>124</sup> Adding the limitations would expand the section 112 exclusion beyond the scope of either amendment and let the exception swallow the rule. It would make more sense to permit EPA to regulate any source of any air pollutant that does not fall under *both* versions of the exclusion.

<sup>125</sup> See Adam Kushner & Judith Coleman, *Lessons from Mercury: Ensuring Legal Certainty for New GHG Performance Standards from Existing Fossil Fuel Plants*, EE News 6 (Oct. 24, 2013), <http://perma.cc/P2W-3FSG>.

<sup>126</sup> Atmospheric fluorides, landfill gases, sulfuric acid mist, and total reduced sulfur. See *supra* notes 98–99.

<sup>127</sup> See National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. 6521, 6521–22 (Feb. 12, 2002).

<sup>128</sup> See EPA Legal Memorandum, *supra* note 82, at 22; accord Kushner & Coleman, *supra* note 125, at 6.

<sup>129</sup> See 42 U.S.C. § 7412(c)(1) (2012); see also National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. at 6521.

In addition, four of the five source categories regulated by section 111(d) were subsequently listed as section 112 source categories.<sup>130</sup> The House amendment would summarily prohibit these section 111(d) standards even though section 112(d)(7) explicitly provides that no section 112 emission limitation may displace a more stringent section 111(d) standard.<sup>131</sup> The House amendment thus requires a limiting construction if a court is to avoid reading a ministerial amendment to effect an implied repeal of sections 111(d) and 112(d)(7), which would rip a hole into the “symmetrical and coherent regulatory scheme.”<sup>132</sup>

More sensibly, the amendments could be made congruent by flexibly reading their terms. Justices Alito and Sotomayor took this path in *Scialabba* by creatively interpreting “automatic” and the word “and.”<sup>133</sup> Indeed, EPA recently offered such an approach in its response to a petition to block the Clean Power Plan.<sup>134</sup> EPA’s brief pointed out that the literal meaning of the House amendment converts the section 112 exclusion from a negative to an affirmative condition.<sup>135</sup> Although the limiting phrase “which is not” certainly applied to the original cross-reference to section 112(b)(1)(A),<sup>136</sup> it arguably does not carry over to the adjective phrase that replaced this section number.<sup>137</sup> The House amendment can therefore be understood to require that EPA prescribe state standards for “any air pollutant . . . emitted from a source category which is regulated under section [112].”<sup>138</sup> This reading would invert the section 112 exclusion and save section 111(d) by potentially excluding no pollutants rather than all of them.<sup>139</sup>

States supporting EPA filed an amicus brief that dissected the phrase “which is regulated under section [112].”<sup>140</sup> This dangling modifier could refer to both “any air pollutant” and “source category.”<sup>141</sup> According to this reading, the section 112 exclusion would only prevent section 111(d) from regulating emissions of hazardous air pollutants listed under section 112 from sources already regulated by that section.<sup>142</sup> This interpretation aligns with EPA’s construction of the competing amendments.<sup>143</sup> But because this view of the House

<sup>130</sup> Primary aluminum plants, municipal solid waste landfills, phosphate fertilizer plants, and pulp and paper plants. *See id.* at 6524, 6526, 6531, 6534.

<sup>131</sup> 42 U.S.C. § 7412(d)(7).

<sup>132</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

<sup>133</sup> *See supra* text accompanying notes 67–69, 73–76.

<sup>134</sup> *See* Response to Petition at 29–30, In re: Murray Energy Corp., No. 14-1112 (D.C. Cir. filed Nov. 3, 2014), ECF No. 1520381.

<sup>135</sup> *Id.*

<sup>136</sup> EPA shall regulate under section 111(d) “any air pollutant . . . which is not included on a list published under section [108](a) or [112](b)(1)(A).” 42 U.S.C. § 7411(d)(1) (1988).

<sup>137</sup> Response to Petition, *supra* note 134, at 29–30.

<sup>138</sup> *See id.* (quoting 42 U.S.C. § 7411(d)(1) (2012)).

<sup>139</sup> *Cf.* Kushner & Coleman, *supra* note 125, at 6.

<sup>140</sup> *See* Amicus Curiae Brief of the States of New York et al. in Support of Respondent at 14–15, In re: Murray Energy Corp., No. 14-1112 (D.C. Cir. filed Nov. 10, 2014), ECF No. 1521617.

<sup>141</sup> *Id.* at 14.

<sup>142</sup> *Id.*

<sup>143</sup> “Where a source category is regulated under section 112, a section 111(d) standard of performance cannot be established to address any [hazardous air pollutant] listed under section 112(b)

amendment would cover a subset of the Senate amendment's scope—which excludes all hazardous air pollutant emissions regardless of source—the two versions could instead be merged to reach the full extent of the Senate amendment. This incorporation would authorize the Clean Power Plan.

Environmental organizations advanced a similar argument in their amicus brief. Rather than focusing on what “regulated” refers to, these groups stressed its purpose.<sup>144</sup> The groups noted that source categories are regulated for particular pollutants.<sup>145</sup> The term could therefore be read to preclude EPA from requiring state standards for an air pollutant “only when the emitting source category is ‘regulated under section 112’ for the *pollutant in question*.”<sup>146</sup> This too would produce EPA's harmonization of the two amendments, which could likewise be subsumed into the Senate amendment's section 112 exclusion.

Third, a court could adopt EPA's view to “give some effect to both amendments.”<sup>147</sup> Originally offered in 2005, EPA's interpretation would take the section 112 exclusion to mean: “Where a source category is regulated under Section 112, a Section 111(d) standard of performance cannot be established to address any [hazardous air pollutant] listed under Section 112(b) that may be emitted from that particular source category.”<sup>148</sup> Nine states, led by West Virginia, filed an amicus brief joining the petition to prohibit the Clean Power Plan.<sup>149</sup> These amici argued that EPA's reading is impermissible because it would contravene the statute by allowing “double-regulation of existing sources.”<sup>150</sup> Whatever the merits of such a regulatory scheme, it was not the one Congress selected. Instead, the 1990 Amendments include section 112(d)(7), which explicitly prevents section 112 regulations from supplanting section 111(d) standards.<sup>151</sup> This provision demonstrates that Congress anticipated, and indeed intended, some “double-regulation” of the same sources under sections 111(d) and 112. And the West Virginia amici's position, explained below, suffers from more serious weaknesses.

The fourth option available to a reviewing court is nullifying one of the competing amendments. As both Chief Justice Roberts and Justice Sotomayor mentioned in *Scialabba*, judges must “fit, *if possible*, all parts into a[ ] harmonious whole.”<sup>152</sup> Justice Sotomayor similarly quoted a longstanding principle of statutory construction that a court must “give effect, *if possible*, to every clause

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that may be emitted from that particular source category.” EPA Legal Memorandum, *supra* note 82, at 26.

<sup>144</sup> See Brief of Natural Res. Def. Council et al. as *Amici Curiae* in Support of Respondent at 9–10, In re: Murray Energy Corp., No. 14-1112 (D.C. Cir. filed Nov. 10, 2014), ECF No. 1521669.

<sup>145</sup> *Id.* at 9.

<sup>146</sup> *Id.* at 9–10.

<sup>147</sup> EPA Legal Memorandum, *supra* note 82, at 26.

<sup>148</sup> *Id.* See also Delisting Rule, *supra* note 110, at 16,031.

<sup>149</sup> Brief of the States of West Virginia et al. as *Amici Curiae* in Support of the Petitioner, *supra* note 122.

<sup>150</sup> *Id.* at 6.

<sup>151</sup> 42 U.S.C. § 7412(d)(7) (2012).

<sup>152</sup> *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring in the judgment) (emphasis added) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); *id.* at 2217, 2220 (Sotomayor, J., dissenting) (emphasis added).

and word of a statute.”<sup>153</sup> It follows that the two amendments need not stand if their coexistence is not “possible.” EPA has also argued previously that this canon of construction is not controlling when amendments to the same provision conflict.<sup>154</sup> A court may thus hold that one of the amendments must give way to the other, though the aforementioned approaches identified four viable harmonious interpretations and EPA offered no rationale for distinguishing between competing provisions and competing amendments.

In its amicus brief opposing the Clean Power Plan, West Virginia argued that the Senate amendment should yield.<sup>155</sup> The House amendment appears in the Statutes at Large under the heading “Miscellaneous Guidance” while the Senate amendment is located within “Conforming Amendments.”<sup>156</sup> West Virginia maintained that these headers reflect legislative intent for the House amendment to effect a “substantive” change and the Senate amendment to make only a “clerical” change.<sup>157</sup> Such a “clerical” amendment would take place after substantive amendments and would therefore be excluded as a scrivener’s error.<sup>158</sup> Although it would neuter section 111(d) and subvert the Clean Air Act’s comprehensive statutory scheme,<sup>159</sup> the House amendment could prevail in this way if one invents a new canon of construction that gives primacy to the headers in the Statutes at Large. But this is not the rule. Instead, the location of a section in a statute does not control.<sup>160</sup> At most “section headings . . . may be another helpful resource to interpret an ambiguous statute,”<sup>161</sup> but if the statute is ambiguous then EPA receives deference at *Chevron* Step Two.

Last, the conflict could be resolved by reading the House amendment to yield. Indeed, if a court ignores the canon saying that a section’s location within a statute does not control, then it should revoke the House amendment, not the Senate amendment. “The established rule is that if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control.”<sup>162</sup> The House amendment is on page 2467 of the Statutes at Large while the Senate amendment is on page 2574.<sup>163</sup> Moreover, the House amendment to the section 112 exclusion is properly understood as “a vestige of earlier

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<sup>153</sup> *Scialabba*, 134 S. Ct. at 2227 (emphasis added) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

<sup>154</sup> Delisting Rule, *supra* note 110, at 16,031.

<sup>155</sup> See Brief of the States of West Virginia et al. as *Amici Curiae* in Support of the Petitioner, *supra* note 122.

<sup>156</sup> See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 108, § 302, 104 Stat. 2399, 2467, 2574 (1990).

<sup>157</sup> Brief of the States of West Virginia et al. as *Amici Curiae* in support of the Petitioner, *supra* note 122, at 7–8.

<sup>158</sup> *Id.* at 10–11.

<sup>159</sup> See *supra* text accompanying notes 124–32.

<sup>160</sup> 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 28:12 (7th ed. 2007).

<sup>161</sup> 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:14 (7th ed. 2007).

<sup>162</sup> *Lodge* 1858, Am. Fed’n of Gov’t Emps. v. Webb, 580 F.2d 496, 510 (D.C. Cir. 1978).

<sup>163</sup> See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 108, § 302, 104 Stat. 2399, 2467, 2574 (1990).

drafting efforts.”<sup>164</sup> “[I]t is indisputable that the House version of the amendment to Section 111(d) was born as part of a proposed regulatory scheme” that was not adopted.<sup>165</sup> To avoid undermining the statutory scheme that Congress enacted, a court could rationally read away this legacy amendment. This conclusion would support EPA’s statutory authority to regulate greenhouse gases under section 111(d).

All together, these four approaches produce five outcomes that would reasonably authorize the Clean Power Plan and two paths that lead to unreasonable dead ends. Remember, however, that the goal of this inquiry was to find a single permissible meaning of the provision. Contrary to Justice Sotomayor’s assertion in *Scialabba*,<sup>166</sup> a statute is ambiguous if multiple reasonable constructions are possible.

### 3. *Chevron Step Two: Section 111(d) is Ambiguous Because of “Direct Conflict” or Multiple Reasonable Constructions*

EPA’s Clean Power Plan will also survive if a reviewing court is unable to interpret section 111(d) as a clear expression of Congress’s intent. While any reader can appreciate the various feasible ways to harmonize the amendments, five members of the Supreme Court—Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan—are already expected to read section 111(d) to create a “direct conflict” ambiguity based on *Scialabba*.<sup>167</sup>

From Justice Kagan’s perspective, EPA should easily receive deference. The expert agency, not the Court, is assigned interpretive authority over this “self-contradictory, ambiguous provision in a complex statutory scheme.”<sup>168</sup> Following *Home Builders*, “‘it is appropriate to look to the implementing agency’s expert interpretation’ to determine which [command] ‘must give way.’”<sup>169</sup> Justices Kennedy and Ginsburg joined in this judgment.

Though Justices Sotomayor and Breyer disagreed with Justice Kagan’s application of *Chevron* in *Scialabba*, they would support deference to EPA’s construction of section 111(d). This outcome depends on the footnote to Justice Sotomayor’s dissent that Justice Thomas did not join. The note read *Home Builders* to hold that statutory inconsistencies trigger *Chevron* only when an agency cannot “simultaneously obey” two categorical commands.<sup>170</sup> Justices

<sup>164</sup> Kate Konschnik, *EPA’s 111(d) Authority—Follow Homer and Avoid the Sirens*, INSIGHT AND ANALYSIS: ENVIRONMENTAL LAW AND POLICY (May 28, 2014), <http://perma.cc/LQ2V-NP6L>.

<sup>165</sup> Final Brief of Respondent U.S. EPA at 116–17, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097).

<sup>166</sup> Justice Sotomayor argued against the plurality’s grant of *Chevron* deference in part because the plurality ignored two “straightforward *interpretations* of § 1153(h)(3) that allow it to function as a coherent whole.” *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2228 (2014) (Sotomayor, J., dissenting) (emphasis added).

<sup>167</sup> See Jeremy P. Jacobs, *Supreme Court’s Handling of Visa Case May Be Harbinger for EPA Rule*, GREENWIRE (July 24, 2014), <http://perma.cc/Q4KG-C3JM>.

<sup>168</sup> *Scialabba*, 134 S. Ct. at 2213 (plurality opinion) (quoting Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007)).

<sup>169</sup> *Id.* at 2207.

<sup>170</sup> *Id.* at 2219 n.3 (Sotomayor, J., dissenting) (quoting *Home Builders*, 551 U.S. at 666).



Sotomayor and Breyer did not think that § 1153(h)(3) of the Immigration and Nationality Act was manifestly irreconcilable,<sup>171</sup> but the Clean Air Act section 111(d) amendments are plainly contradictory.

Chief Justice Roberts gave voice to the minority of the Court that would withhold *Chevron* deference by tersely writing that “[d]irect conflict is not ambiguity.”<sup>172</sup> Justice Scalia joined this concurring opinion, Justice Alito quoted the opinion approvingly, and Justice Thomas did not join Justice Sotomayor’s affirmative pronouncement of *Chevron* presumably because he read the doctrine more narrowly as well. But the Chief Justice’s reading of *Home Builders* nudges toward accepting EPA’s interpretation of the section 111(d) amendments. He believed deference to EPA was warranted in *Home Builders* “in large part because of our strong presumption that one statute does not impliedly repeal another.”<sup>173</sup> *Scialabba* did not involve a risk of implied repeal, but the section 111(d) error does; any construction giving the House amendment full effect would cause an implied repeal of Clean Air Act sections 111(d) and 112(d)(7).<sup>174</sup> The Chief Justice therefore may concur with the majority by recognizing a delegation of interpretive authority to EPA through the presumption against implied repeals rather than through direct statutory conflict.

#### CONCLUSION

Although the Supreme Court was divided in *Scialabba*, it should unite to uphold EPA’s statutory authority to issue the Clean Power Plan. Challengers of the proposed rule have three strikes against them. If the competing amendments to section 111(d) can only be reconciled through a legislative choice, then they are invalid and greenhouse gas regulation of existing stationary sources is required. The only constructions of the statute that respect its regulatory scheme and avoid implied repeals compel such a rule. And EPA’s reasonable interpretation of the conflicting amendments as mandating a greenhouse gas rule deserves deference. The Justices’ differing views of *Chevron* should not threaten this outcome.

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<sup>171</sup> *Id.* at 2220.

<sup>172</sup> *Id.* at 2214 (Roberts, C.J., concurring in the judgment).

<sup>173</sup> *Id.* at 2214 n.1.

<sup>174</sup> See *supra* text accompanying notes 124–32.

