Nos. 14-46, 14-47 and 14-49

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPENING BRIEF OF PETITIONER THE NATIONAL MINING ASSOCIATION

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QUESTION PRESENTED

Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.

RULE 24.1 STATEMENT

The following were parties to the proceedings in the U.S. Court of Appeals for the District of Columbia Circuit:

The National Mining Association, the petitioner on review in No. 14-49, was a petitioner and a respondent-intervenor below.

The respondent herein, which was the respondent below, is the United States Environmental Protection Agency.

Additional petitioners below were the Utility Air Regulatory Group; White Stallion Energy Center, LLC; American Public Power Association; ARIPPA; Chase Power Development, LLC; Edgecombe Genco, LLC; FirstEnergy Generation Corporation; Gulf Coast Lignite Coalition; Institute for Liberty; Julander Energy Company; Kansas City Board of Public Utilities; Midwest Ozone Group; National Black Chamber of Commerce; Oak Grove Management Company, LLC; Peabody Energy Corporation; Puerto Rico Electric Power Authority; Spruance Genco, LLC; State of Alabama; State of Alaska; State of Arizona; State of Arkansas, ex rel. Dustin McDaniel, Attorney General; State of Florida; State of Idaho; State of Indiana; State of Kansas; State of Michigan; State of Mississippi; State of Missouri; State of Nebraska; State of North Dakota; State of Ohio; State of Oklahoma; Commonwealth of Pennsylvania; State of South Carolina; State of Texas; Texas Commission on Environmental Quality; Texas Public Utility Commission; Railroad Commission of Texas; State of Utah; Commonwealth of Virginia; State of West Virginia; State of Wyoming;

Terry E. Branstad, Governor of the State of Iowa on behalf of the People of Iowa; Jack Conway, Attorney General of Kentucky; Tri-State Generation and Transmission Association, Inc.; United Mine Workers of America; West Virginia Chamber of Commerce, Inc.; Georgia Association of Manufacturers, Inc.; Indiana Chamber of Commerce, Inc.; Indiana Coal Council, Inc.; Kentucky Chamber of Commerce, Inc.; Kentucky Coal Association, Inc.; North Carolina Chamber; Ohio Chamber of Commerce; Pennsylvania Coal Association; South Carolina Chamber of Commerce; The Virginia Chamber of Commerce; The Virginia Coal Association, Incorporated; West Virginia Coal Association, Inc.; Wisconsin Industrial Energy Group, Inc.; Wolverine Power Supply Cooperative, Inc.; Chesapeake Climate Action Network; Conservation Law Foundation; Environmental Integrity Project; and Sierra Club.

Respondent-intervenors below (with respect to certain petitions for review) were Commonwealth of Massachusetts; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; City of Baltimore; City of Chicago; City of New York; District of Columbia; County of Erie, New York; Calpine Corporation; Chase Power Development, LLC; Exelon Corporation; National Grid Generation LLC; Public Service Enterprise Group, Inc.; Gulf Coast Lignite Coalition; Institute for Liberty; Lignite Energy Council; National Black Chamber of Commerce; National Mining Association; Oak Grove Management Company, LLC; Peabody Energy Corporation; Sunflower Electric Power

Corporation; Tri-State Generation and Transmission Association, Inc.; Utility Air Regulatory Group; White Stallion Energy Center, LLC; American Academy of Pediatrics; American Lung Association; American Nurses Association; American Public Health Association; Chesapeake Bay Foundation; Citizens for Pennsylvania's Future; Clean Air Council; Conservation Law Foundation; Environment America; Environmental Defense Fund; Izaak Walton League of America; National Association for the Advancement of Colored People; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Physicians for Social Responsibility; Sierra Club; and Waterkeeper Alliance.

A respondent below (with respect to certain petitions for review) was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

RULE 29.6 STATEMENT

The petitioner does not have a parent company, and no publicly-held corporation has a 10% or greater ownership interest in the petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

LEGISLATIVE HISTORY

SECONDARY SOURCES

INTRODUCTION

The Environmental Protection Agency ("EPA" or the "Agency") asserts that Congress empowered it to adopt regulations imposing, per the Agency's own calculations, $9.6 *billion* in costs *annually* on electricity consumers in return for benefits of a mere $4-$6 *million* per year.[1] But the power to adopt regulations with such wildly mismatched costs and benefits cannot be teased out of Congress' simple command, in 42 U.S.C. § 7412(n)(1)(A), for EPA to regulate electric utility hazardous air pollutant (HAP) emissions *only* if "appropriate." No rational person would spend $960 for something worth 40-60 cents. A decision to do so would be decidedly inappropriate under any common understanding of the word.

Perhaps understandably, EPA asserts that it does not have to offer a reason why spending so much for so little is a rational decision. 77 Fed. Reg. at 9,327. According to the Agency, the term "appropriate" is so broad that Congress must have intended that EPA could simply deem regulatory costs irrelevant if it so chose. *Id.* But the *breadth* of the term "appropriate" is precisely the reason that EPA may not unreasonably *narrow* its construction of that term so as to "ignore [the] inconvenient fact[]" that the regulation has such high costs and such low

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[1] 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," also known as the "Mercury and Air Toxics Standards" or "MATS" rule, 77 Fed. Reg. 9,304, 9,306, Table 2 (Feb. 16, 2012).

benefits. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring). "Even under *Chevron's* deferential framework, agencies must operate 'within the bounds of "reasonable interpretation."' *Utility Air Regulatory Grp., v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citing *Arlington v. FCC*, 569 U.S. 1863, 1868 (2013)). See also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Of course, Congress could have commanded EPA to regulate regardless of cost, *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 469 (2001), but it did not do so here. In the view of both the Agency, 77 Fed. Reg. at 9,327, and the divided Panel below, National Mining Association ("NMA") Pet. App. 23a-27a, Congress delegated to EPA the choice of whether to consider costs. Thus, unlike in *Whitman*, here it was EPA that made the decision to ignore costs, not Congress. Indeed, under the logic of EPA's view, Congress' delegation of authority was so broad that the Agency could have adopted regulations costing $1 trillion even if the benefit was a mere $1. But only last term, this Court reiterated that it expects Congress to speak clearly if it wishes to authorize an agency to make decisions of vast "economic and political significance." *Utility Air Regulatory Grp.*, 134 S. Ct. at 2444. Little remains of that principle if an agency can convert a Congressional command to regulate only if "appropriate" into a green light for imposing massive costs for little benefit, while disclaiming the responsibility to consider costs at all.

EPA's decision is so irrational that it can be explained only by the Agency's desire to achieve what

it calls the "co-benefit" of coincidentally reducing other emissions that EPA is not authorized to regulate under Section 7412. 77 Fed. Reg. at 9,305-06. EPA asserted that the value of these co-benefits exceeds the $9.6 billion in costs. *Id.* But, at least for the purpose of defending its rule in court (if not in the court of public opinion[2]), the Agency conceded that, consistent with Section 7412(n)(1)(A), it could not and hence did not consider these asserted non-HAP co-benefits in deciding to regulate. *Id.* 9,320. Unable to bootstrap these asserted co-benefits into a legal rationale, the Agency is left with a rule with massively disproportionate costs and benefits that can be justified only by arguing that Congress left it in EPA's hands to decide whether or not to consider costs, regardless of how high those costs may be. EPA, however, cannot make the case that Congress delegated such enormous power to the Agency.

OPINIONS AND ORDERS BELOW

The opinion of the D.C. Circuit is reported at 748 F.3d 122 and reproduced at NMA Pet. App.. 1a-68a. The opinion of Judge Kavanaugh concurring in part and dissenting in part is reproduced at NMA Pet. App. 68a-98a. The MATS rule is reproduced at NMA Pet. App. 196a-1160a.

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[2] See EPA press release leading with the asserted co-benefits of the rule. http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/bd8b3f37edf5716d8525796d005dd086!OpenDocument (last visited January 16, 2015).

JURISDICTION

The court of appeals rendered its decision on April 15, 2014. On November 25, 2014, the Court granted three petitions for writs of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 7412 is reproduced at NMA Pet. App. 101a-195a.

STATEMENT OF THE CASE

1. As part of the comprehensive 1990 Clean Air Act ("CAA") Amendments, Congress rewrote how EPA should regulate HAPs. 42 U.S.C. § 7412. See *New Jersey v. EPA*, 517 F.3d 574, 581-83 (D.C. Cir. 2008). Congress listed 189 HAPs, 42 U.S.C. § 7412(b), and directed EPA to create a list of categories of sources that emit those HAPs above statutorily-defined thresholds. 42 U.S.C. § 7412(a) & (c). Congress further directed EPA to establish HAP control standards for each of the source categories that EPA listed. 42 U.S.C. § 7412(d).

Congress, however, adopted a different regulatory scheme for HAPs emitted by electric generating units. In 42 U.S.C. § 7412(n)(1)(A), Congress required EPA to perform a study of the "hazards to public health" that electric generator HAP emissions may pose "after imposition of [other] requirements of" the CAA. Congress directed that the study also include a report on "alternative control

strategies for emissions which may warrant regulation under this section." *Id.* Congress instructed EPA to regulate electric generator HAP emissions only if, considering the results of that study, the Agency "finds such regulation is *appropriate and necessary*." *Id.* (emphasis added).

Congress treated electric generators differently from other source categories of HAP emissions because, as EPA has reported, the 1990 CAA Amendments contained a number of other programs which would have the effect of reducing electric generator HAP emissions. See 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, 15,999 (Mar. 29, 2005). These programs, while targeted at non-HAP emissions, would require utilities to install pollution controls that would also remove HAPs. *Id.* at 16,003 (citing Utility Study and other evidence to show that technologies used to control sulfur dioxide ("SO_2"), nitrogen oxide ("NO_x") and particulate matter also control HAPs).

Chief among these programs were those addressing electric generator emissions that lead to acid deposition. 42 U.S.C. §§ 7651-7651o. Concerned about the highly publicized problem of "acid rain," Congress in the 1990 amendments adopted the groundbreaking Title IV Acid Deposition Control program. S. Rep. No. 101-228 ("Senate Report") at 261-337 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3645-3720 (explaining purposes and requirements of program). The program built on ten years of analysis

initiated with enactment of the Acid Precipitation Act of 1980, P.L. 96-294, which authorized the National Acid Precipitation Assessment Program and provided for a twelve-agency process for assessing the acid rain issue.

In Title IV of the CAA, Congress addressed what it considered to be the principal cause of environmental acidification, electric utility emissions of both SO_2 and, to a lesser extent, NO_x. Senate Report at 261. SO_2 can convert in the atmosphere to fine particle sulfate, which, when interacting with water (fogs, clouds, mist, rain or surface moisture), can convert to sulfuric acid. *Id.* at 261-62. Similarly, NO_x can convert in the atmosphere to fine particle nitrate, which, when interacting with water, can create nitric acid. *Id.* at 262-63. Electric generators are the nation's largest source of SO_2 emissions and one of the largest sources of NO_x emissions. *Id.* at 282. Title IV established an innovative cap-and-trade system for electric generator SO_2 and NO_x emissions as a way of cost-effectively and efficiently reducing those emissions. *Id.* at 320.

Congress also made numerous changes to CAA Title I to address utility emissions that may result in acid rain and which may cause other health or environmental impacts. First, because acid deposition results from air pollutants that, in the process of being transported downwind, can change their chemical properties in the atmosphere, Congress changed the CAA definition of "welfare" – and thus extended the reach of the National Ambient Air Quality Standards ("NAAQS") program – to address effects caused by "transform[ed]" and "convert[ed]" pollutants. 42 U.S.C. § 7602(h)

(defining public "welfare") and Senate Report at 76 (explaining the need to expand the definition of "welfare"); see also 42 U.S.C. § 7409(b)(2) (secondary NAAQS to be set at a level protective of the "public welfare"). Second, Congress further strengthened the "good neighbor" provision of the CAA by authorizing EPA to invoke that provision where transported pollution "significantly contributes" to downwind nonattainment of a NAAQS, rather than only where an individual upwind source actually causes a downwind NAAQS violation. 42 U.S.C. § 110(a)(2)(D)(i)(I); *EPA v. EME Homer City Generation, L.P.,* 134 S. Ct. 1584, 1595 (2014); Senate Report at 75-76 (explaining reason for amending "good neighbor" provision). Finally, Congress adopted a provision to allow EPA to regionalize its approach to visibility impairment, recognizing that the same pollutants that cause water-body acidification also impair visibility. 42 U.S.C. § 7492; Senate Report at 275.

These 1990 CAA Amendment provisions built on a Title I regulatory structure that already had long focused on restricting emissions from electric utility units that use coal as a fuel. See*, e.g.*, Bruce A. Ackerman and William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 Yale L.J. 1466 (1979-1980). Thus, numerous other CAA programs, such as those requiring new and modified sources to install pollution control equipment, could be expected to reduce coal generation emissions. See, *e.g.,* 42 U.S.C. § 7411 (new source performance standards for new and modified facilities), *id.*, § 7475 (preconstruction permit requirements for new and modified facilities located in attainment areas), and *id.*, § 7503 (preconstruction permit requirements for

new and modified facilities located in nonattainment areas).

Given the effect these programs were expected to have in reducing HAP emissions, Congress believed both that electric generator HAP standards might not be warranted and that excessive regulation might overburden the electric utility industry (and therefore consumers). See 136 Cong. Rec. H12911, 12934 (daily ed. Oct. 26, 1990) (statement of Congressman Oxley that the conferees adopted section 7412(n)(1)(A) "because of the logic of basing any decision to regulate on the results of scientific study and because of the emission reductions that will be achieved and the extremely high costs that electric utilities will face under other provisions of the new Clean Air Act amendments.").

2. EPA completed the study called for by Section 7412(n)(1)(A) ("Utility Study") in 1998. The study concluded that "mercury from coal-fired utilities is the HAP of greatest potential concern." Joint. App. 110. The study examined two acid gases that are directly emitted by electric generators, hydrogen chloride and hydrogen fluoride, and found no health impacts. Joint App. 105. EPA noted that these acid gas emissions "may" contribute to environmental harms but recognized that these impacts could also be addressed through other provisions of the Act. *Id.*

Following the Utility Study, EPA in 2000, without rulemaking and without providing notice or taking comment, issued a non-final "notice of regulatory finding" that it was "appropriate and necessary" to regulate electric generator HAP

emissions. Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000). EPA's finding was based on the hazards to public health that EPA perceived from mercury emissions from coal-fired electric generators and, to a lesser extent, the effects of nickel emissions from oil-fired electric generators. *Id.* at 79,827, 79,828, Table 1. EPA made no findings as to acid gas emissions other than to briefly note that these emissions are of "potential concern and may be evaluated further during the regulatory development process." *Id.* at 79,827. EPA then listed electric generators for regulation under Section 7412(c) but deferred establishing control standards. National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. 6,521 (Feb. 12, 2002).

3. In 2004, EPA undertook rulemaking for the first time to evaluate whether regulating electric generator HAP emissions under Section 7412(n)(1)(A) was "appropriate and necessary." Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4,652 (Jan. 30, 2004). After analyzing the language and legislative history of Section 7412(n)(1)(A) in depth, EPA concluded that compliance costs should be considered in determining whether regulation is "appropriate." 70 Fed. Reg. at 16,000-01. As a result, EPA determined that "it might not be appropriate" to regulate electric generator HAP emissions "if the health benefits expected as the result of such regulation are marginal

and the cost of such regulation is significant and therefore substantially outweighs the benefits." *Id.* EPA further concluded that because Congress provided that the predicate Section 7412(n)(1)(A) Utility Study must address possible health effects but made no mention of environmental effects, EPA should base its "appropriate and necessary" finding on the need to protect public health and not the environment as well. *Id.* at 15,998.

Based on its analysis of Section 7412(n)(1)(A) and the record before it, EPA determined that it was not "appropriate and necessary" to regulate electric generator HAP emissions. Although the Agency said that it could consider costs in making this determination, in the end it did not do so because it found that none of the HAPs emitted by electric generators pose a material health risk. As to acid gases, EPA stated that it had done further modeling of the acid gases that the Utility Study identified as a possible concern (hydrogen chloride and hydrogen fluoride), as well as chlorine, and this "modeling indicates that individuals are not exposed to acid gas emissions from Utility Units at concentrations which pose hazards to public health." *Id.* at 16,007. EPA similarly found an absence of health concern for electric generator dioxin and trace metal emissions. *Id.* at 16,007. For electric generator mercury emissions, EPA decided to regulate those emissions under a different CAA program and determined that any remaining health impacts would be insignificant. *Id.* at 16,002. Having thus determined that it was not "appropriate and necessary" to regulate any electric generator HAP emissions, EPA removed electric generators from the Section 7412(c) list. *Id.* at 15,994.

EPA's 2008 "delisting" decision, however, was vacated by the D.C. Circuit in *New Jersey v. EPA*, 517 F.3d at 581-83, on the ground that EPA had not made the delisting findings required by Section 7412(c)(9).

4. On remand of *New Jersey*, EPA promulgated the MATS rule at issue here. Reversing course, EPA determined that it was "appropriate and necessary" to regulate electric generator HAP emissions. The Agency concluded that its original 2000 "appropriate and necessary" finding was valid when made, 77 Fed. Reg. at 9,320, and that new information further and independently justified that finding, *id.* at 9,362-64. Based on its "appropriate and necessary" finding, EPA promulgated Section 7412(d)(3) Maximum Achievable Technology ("MACT") standards for electric generator emissions of mercury, trace metals, and acid gases, 77 Fed. Reg. at 9,367-68, Tables 3 & 4, and Section 7412(h) work practice standards for emissions of dioxin and furan, *id.* at 9,369.

In examining the appropriateness and necessity of regulating electric generator HAP emissions, EPA analyzed various sources of information as to the impact these substances may have both on public health and the environment. The other petitioner briefs address the analysis EPA undertook as to mercury and trace metals. In contrast to these other HAPs, where EPA produced some additional studies following its 2005 rulemaking, EPA did not conduct any further analysis of the potential impact of electric generator acid gas emissions. EPA conceded that electric generator acid gas emissions do not pose a significant

health risk. 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, 76 Fed. Reg. 24,976, 25,016, (May 3, 2011). It claimed, however, that "acid gas HAP pose a hazard to the environment because they contribute to aquatic acidification." 77 Fed. Reg. at 9,310. The Agency, however, did not provide any analysis of why acid gas emissions, in the amount emitted by electric generators, pose a meaningful acidification risk, particularly given the significant emission reductions already achieved via the CAA Title IV Acid Deposition Control and other CAA programs. The only empirical evidence that EPA cited of potential environmental harm was a study of acid deposition in the United Kingdom, which obviously did not examine whether the electric generators that will be subject to the rule here emit acid gases in sufficient quantity to create a significant environmental impact. 77 Fed. Reg. at 9,361-62.

To justify regulating acid gas emissions, EPA made two key interpretations of Section 7412(n)(1)(A). First, EPA reversed its previous position that Congress' reference to health but not environmental effects in Section 7412(n)(1)(A) meant that the "appropriate and necessary" determination should be restricted to health impacts. 70 Fed. Reg. at 15,998. EPA now decided that it could determine that regulation was "appropriate and necessary" based solely on environmental impact. 77 Fed. Reg. at 9,324-25. In addition, perhaps in recognition of

the weakness of its evidence that acid gases cause environmental harm, EPA concluded that it only had to make an "appropriate and necessary" finding for one HAP in order to regulate all HAPs that electric generators emit. *Id.* at 9,325-26.

EPA estimated that the annual compliance cost of the MATS rule would be $9.6 billion, 77 Fed. Reg. at 9,306, Table 2, making it "among the most expensive rules that EPA has ever promulgated." NMA Pet. App.78a (Kavanaugh, J., concurring in part and dissenting in part and quoting JAMES E. MCCARTHY, CONGRESSIONAL RESEARCH SERVICE, R42144, EPA'S UTILITY MACT: WILL THE LIGHTS GO OUT? 1 (2012)). More than half of these control costs results from the need to install or upgrade expensive SO_2 control equipment to reduce acid gas emissions.[3] EPA found that the same technology that is used to control SO_2 emissions (flue gas desulphurization equipment) is equally and perhaps even more effective in removing acid gases as well. 76 Fed. Reg. at 25,014. Given the effectiveness of SO_2 control equipment in preventing acid gas emissions, the final rule provided that generators could comply with the rule by meeting an SO_2 emission standard rather than meeting an acid gas-based standard. 77 Fed. Reg. at 9,368.[4]

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[3] See NMA Pet. App. 512a and Joint App 807-10 (comments of Utility Air Regulatory Group).

[4] It is not clear exactly which acid gases the final rule regulates. The rule states that generators can meet a standard for either SO_2 or hydrogen chloride as a surrogate for other unnamed acid gases. 77 Fed. Reg. at 9,367-68. In the proposed rule, EPA refers to acid gases as "includ[ing]" hydrogen chloride, hydrogen fluoride, chlorine, and hydrogen cyanide. 76 Fed. Reg. at 25,004.

In contrast to the rule's $9.6 billion annual cost, EPA estimated that the rule would produce only $4-$6 million annually in monetized benefits in reducing HAP emissions. *Id.* All of this asserted benefit comes from reducing mercury emissions; none comes from reducing acid gas emissions. 77 Fed. Reg. at 9,306, Table 2.

For comparison purposes, EPA estimates that the annual cost of the Title IV acid rain SO_2 trading program is $1.0-$1.4 billion. Joint App. 926. The trading program capped electric generator SO_2 emissions in 1990 at 8.95 million tons, about half of their 1990 level of 17.3 million tons,[5] In contrast, the acid gases addressed by the MATS program amount to only a few hundred thousand tons per year, 76 Fed. Reg. at 25,005, Table 4, and represent only a minuscule percentage of emissions that have the potential to create acidification impacts.[6] Yet, as noted, the controls that utilities will install to address those emissions constitute about one-half of the cost of the $9.6 billion MATS program. See supra at n. 3.

Given the cost of MATS, numerous energy and financial analysis institutions predicted that the rule

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[5] Lauraine G. Chestnut and David M. Mills, "A fresh look at the benefits and costs of the US acid rain program," Journal of Environmental Management 77 EJENMG 3 252-266 (November 2005).

[6] Table 4 of the proposed rule, 76 Fed. Reg. at 25,005, shows that the predominate electric generator acid gas emissions is hydrogen chloride. But electric generator hydrogen chloride emissions and indeed all domestic hydrogen chloride emissions represent less than one percent of the acidifying potential of all emissions in the United States. Comments of the Electric Power Research Institute, Joint App. 413-14, 419-22.

would lead to a wave of retirements of coal-fueled electric generators. Joint App. 182-83 (comments of the National Mining Association) For instance, the Energy Information Administration ("EIA"), the agency within the Department of Energy responsible for energy analysis, predicted 45-73 gigawatts of retirements from a fleet of 317 gigawatts. *Id.* The North American Electric Reliability Council, the entity chartered by the Federal Energy Regulatory Commission to ensure the reliability of the national grid, 16 U.S.C. § 824o, predicted 33-77 gigawatts of retirements. *Id.* At the end of 2013, EIA's comprehensive annual assessment projected that by 2016, when MATS is fully implemented,[7] 54 gigawatts of coal-fueled electric generation will not install control equipment to comply with the rule but will instead retire.[8]

EPA deemed the imbalance between costs and benefits of the rule to be irrelevant to its analysis.

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[7] The rule provides for a three-year compliance period from April 2012, with the possibility of a one-year extension. 77 Fed. Reg. at 9,407, 9,418.

[8] EIA, Today in Energy, AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 Than Have Been Scheduled (Feb. 14, 2014), http://www.eia.gov/todayinenergy/detail.cfm?id=15031. EPA's own recent modeling projects that of the total fleet of 317 gigawatts of coal-fueled generators in 2010 (pre-MATS), only 244 gigawatts will remain in 2016 (post-MATS), a decline of nearly one-quarter. Compare EPA's estimate of the 2010 coal fleet in the MATS Regulatory Impact Analysis at Table 3-8, with EPA's updated modeling in connection with its recently proposed Clean Power Plan showing its current estimate of the fleet in 2016, see the spreadsheet Proposed Clean Power Plan_Base Case_ssr.xlsx, EPA Analysis of the Proposed Clean Power Plan, IPM Run Files, http://www.epa.gov/airmarkets/powersectormodeling/cleanpowerplan.html.

Reversing its prior determination that it should consider costs in determining whether regulation is "appropriate," 70 Fed. Reg. at 16,000-01, EPA now concluded that Congress left it up to the Agency to decide whether or not to consider control costs, 77 Fed. Reg. at 9,327 ("nothing about the definition [of 'appropriate'] compels a consideration of costs.").[9] The Agency justified its decision to ignore costs by asserting that doing so was reasonable given what it viewed as Congress' overriding intent to regulate HAP emissions as quickly as possible and no matter the costs involved. *Id.*

Although it maintained that weighing the costs and benefits of the rule was irrelevant, EPA produced an analysis purporting to show that, overall, the regulation will create $33-$90 billion in benefits. 77 Fed. Reg. at 9,306, Table 2, n. b. Virtually all of this amount consists of reducing non-HAP emissions, particularly SO_2 emissions, as a "co-benefit" of reducing HAP emissions.[10] *Id.* As noted, SO_2 emissions can convert to fine particle ("$PM_{2.5}$") sulfate in the atmosphere. *Id.* EPA believes that inhalation of air with elevated $PM_{2.5}$ concentrations can cause

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[9] In the proposed rule, EPA took the position that Congress barred it from considering costs. 76 Fed. Reg. at 24,989 ("the better reading of the term 'appropriate' is that it does not allow for the consideration of costs").

[10] As shown on Table 2, 77 Fed. Reg. at 9,306, only $4-$6 million of the benefits of the rule is from reducing HAP emissions. Of the benefits from reducing non-HAP emissions, a small amount comes from reducing carbon dioxide emissions; the rest comes from reducing atmospheric $PM_{2.5}$ concentrations. Virtually all of the benefit of reducing atmospheric $PM_{2.5}$ concentrations results from reducing electric generator SO_2 emissions; only about 5 percent results from reducing electric generator direct emissions of $PM_{2.5}$. Joint. App. 928 (EPA Regulatory Impact Analysis).

increased mortality and morbidity. *Id.* at 9,428-9,432. However, because SO_2 and fine particles are not HAPs, EPA states that it cannot and did not rely on these asserted co-benefits in determining that the regulation of electric generator HAP is "appropriate and necessary." *Id.* at 9,320.

5. In the decision below, a divided panel of the D.C. Circuit denied petitions to review the MATS rule. NMA Pet. App. 1a-68a. The Panel found that Section 7412(n)(1)(A) gives EPA discretion either to consider or not consider costs in determining whether it is "appropriate and necessary" to regulate electric generator HAP emissions. NMA Pet. App. 23a-25a. The Panel determined that EPA had reasonably exercised that discretion in determining not to consider costs. *Id.* Judge Kavanaugh dissented, arguing that either EPA had unreasonably read the statute as giving it discretion to ignore costs or it had unreasonably exercised the discretion that Congress gave it by choosing to ignore costs. *Id.* at 1259-67.

SUMMARY OF ARGUMENT

The EPA unreasonably ignored costs in determining that regulating HAP emissions from electric generators is "appropriate." Although Congress could have delegated authority to EPA to ignore costs, it did not do so here. Congress thus did not authorize the extreme mismatch of costs and benefits that occurred here. EPA, unreasonably, chose that path.

The Panel's contextual analysis erred in failing to examine Section 7412(n)(1)(A) within the framework of the CAA as a whole. The CAA contains

numerous regulatory programs, in particular the Title IV acid deposition program, which required electric generators to install pollution control technology which were expected to significantly reduce HAP emissions. Section 7412(n)(1)(A) gave EPA limited authority to promulgate additional regulation if "appropriate and necessary" "after imposition" of those other requirements. Congress did not intend to authorize EPA to ignore costs in adopting a far-reaching regulatory program that would be much more costly than the other programs it was intended merely to supplement.

The Panel also misconstrued Section 7412(n)(1)(A) within the limited context of Section 7412. Contrary to the Panel's analysis, the differences between Section 7412(n)(1)(A) and the rest of Section 7412 emphasize, rather than undermine, the relevance of cost in a Section 7412(n)(1)(A) "appropriateness" finding.

Finally, regardless of the validity of EPA's "appropriateness" finding for other HAPs, EPA's "appropriateness" finding for acid gases was unreasonable. Moreover, EPA regulation of other HAPs does not, in and of itself, make it "appropriate" for EPA to regulate acid gases.

ARGUMENT

I. On Its Face, EPA's Decision to Ignore the $9.6 Billion Annual Cost of the Rule Was Unreasonable.

EPA acted in a patently unreasonable manner in choosing to ignore compliance costs. In

authorizing only "appropriate and necessary" regulation, Congress cannot have intended to delegate to EPA the power to choose, as a matter of agency discretion, the wildly disproportionate result that occurred here, where consumers will be forced to bear $9.6 *billion* in costs *every year* for only $4-$6 *million* in annual benefit. See *MCI Telcomms. Corp.* v. *AT&T Co.,* 512 U.S. 218, 231 (1994) (disapproving agency statutory interpretation as leading to a "highly unlikely" outcome); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid … unreasonable results whenever possible."). Spending so much money for so little return is not a reasonable exchange. As Judge Kavanaugh cogently observed, $9.6 billion can be put to considerably more beneficial public health uses than the regulation EPA chose here. NMA Pet. App. 78a.

Indeed, the utter irrationality of EPA's decision is shown by the fact that, under the Agency's logic, it could have ignored the cost of the rule even if that cost was $1 trillion and the benefit $1. As this Court reiterated last term, however, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regulatory Grp.*, 134 S. Ct. at 2444 (citing *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000)). A direction to regulate if "appropriate" is hardly a clearly spoken congressional command to regulate regardless of the mismatch between costs and benefits.

The dictionary defines "appropriate" as "especially suitable or compatible" or "fitting." MERRIAM-WEBSTER ONLINE DICTIONARY,

http://www.merriam-webster.com/dictionary/appropriate (last visited January 16, 2015). A regulatory scheme that produces costs that are about 20,000 times its benefits is not one that is "especially suitable," "compatible" or "fitting" under any common understanding of those terms. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("we construe a statutory term in accordance with its ordinary or natural meaning" unless Congress has otherwise specified).

Of course, Congress could have required EPA to ignore costs in determining whether it is appropriate to regulate, just it has instructed EPA to be cost-blind in setting NAAQS. See *Whitman*, 531 U.S. at 469. But neither the Panel nor EPA interpreted the term "appropriate" as barring the Agency from considering costs. In their view, Congress gave EPA the choice to either consider or not consider costs. NMA Pet. App. 23a-25a. EPA, thus, must take full ownership of the irrational outcome here. Moreover, as Judge Kavanaugh observed, even to the extent EPA somehow *could* have devised a rational explanation to justify the extreme divergence of costs and benefits that occurred here, EPA did not do so; it simply refused to consider costs at all. *Id.* at 1263.[11]

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[11] For instance, although EPA claims that the rule will produce unquantified benefits, 77 Fed. Reg. at 9,306, Table 2, it did not try to make the case that those benefits make it appropriate to regulate. Indeed, it is revealing that, rather than venturing to explain why $9.6 billion should be spent every year for unquantifiable benefits, EPA chose to reverse its prior determination that costs should be considered in a Section 7412(n)(1)(A) determination and instead rested its entire case for regulation on the notion that all costs (quantified and unquantified) are irrelevant.

As the Panel found, by using the broad term "appropriate," Congress, granted EPA discretion. *Id.* at 1237. ("appropriate" is "open-ended" and "ambiguous"). But a Congressional grant of discretionary power is not unbounded. *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442 ("[e]ven under *Chevron's* deferential framework, agencies must operate 'within the bounds of 'reasonable interpretation'" (citing *Arlington v. FCC*, 569 U.S. at 1867 (2013) (slip op. at 5)). As the D.C. Circuit itself has said, "the range of permissible interpretations of a statute is limited by the extent of its ambiguity;" an agency cannot "put forth a reading that diverges from any realistic meaning of the statute." *Massachusetts v. United States DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996). See also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in *reasonable* fashion.") (emphasis added). EPA thus cannot treat Congress' delegation of power to regulate if "appropriate" as a blank check to ignore relevant factors. The extraordinary cost of these regulations may be an "inconvenient fact[]," but it is also an obviously important fact that EPA may not ignore under any common understanding of the term "appropriate." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring).

Moreover, EPA illogically assumed that the *breadth* of the term "appropriate" gives EPA discretion to *narrow* the factors the Agency can consider in an "appropriateness" finding. 76 Fed. Reg. at 24,988 (describing the term "appropriate" as

"extremely broad"). But Congress' use of "broad language" in the CAA does not demonstrate "ambiguity"; it "demonstrates breadth." *Massachusetts*, 549 U.S. at 532. Congress' use of a broad term like "appropriate" in authorizing EPA to decide in a particular case whether to regulate conveys Congress' intent that EPA consider all possibly relevant factors, not an intent to permit EPA to exclude such an obviously relevant factor as cost. NMA Pet. App. 83a-85a. See also *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012) ("broad" statutory term should not be given an unreasonably limited construction); *Harrison* v. *PPG Industries, Inc.,* 446 U.S. 578, 588-89 (1980) (Congress' use of "expansive language" contradicts a more limited reading of a statutory term).

For this reason, the Panel's reliance on *Whitman,* NMA Pet. App. 26a, was misplaced. In *Whitman*, this Court found that, as a matter of *Chevron* step one analysis, the statutory standard for setting NAAQS – "requisite to protect the public health" – is crystal clear that only health effects are relevant in promulgating a NAAQS. *Whitman*, 531 U.S. at 471 (Section 7409(b)(1) "unambiguously bars" EPA from considering costs); see also *Chevron*, 467 U.S. at 842-43 (1984). Providing for regulation to the extent "appropriate" is obviously a much more encompassing grant of authority than regulating as "requisite to protect the public health," one that is not facially limited to public health concerns. See also *EME Homer City Generation,* 134 S. Ct. at 1607, n. 21, where the Court, in construing another broad term, distinguished *Whitman* and affirmed EPA's consideration of costs in determining whether upwind

emissions "significantly contribute" to downwind air pollution.

The distinction between Section 7409(b)(1) and Section 7412(n)(1)(A), moreover, is not just linguistic; it is conceptual. In Section 7409(b)(1), Congress asks EPA to make the *scientific* determination, what level of air pollution is "requisite to protect the public health"? In contrast, in Section 7412(n)(1)(A), Congress asks EPA to make a *policy* judgment, should electric generator HAPs be regulated? Although costs are not relevant in scientifically determining the level of pollution in the air that is "requisite to protect the public health," they are indisputably relevant and indeed critical in determining "appropriate" regulatory policy. NMA Pet. App. 78a (Kavanaugh dissent).

In sum, as Judge Kavanaugh wrote, the result in this case does not depend on whether EPA's authority is examined under *Chevron* step one or two. NMA Pet. App. 73a. "In this case, whether one calls it an impermissible interpretation of the term 'appropriate' at *Chevron* step one, or an unreasonable interpretation or application of the term "appropriate" at *Chevron* step two, or an unreasonable exercise of agency discretion under *State Farm*, the key point is the same: It is entirely unreasonable for EPA to exclude consideration of costs in determining whether it is 'appropriate' to regulate electric utilities under the MACT program." *Id.*

II. The Panel's Contextual Statutory Analysis Cannot Save the Rule.

The Panel relied on an analysis of Section 7412(n)(1)(A) within the context of Section 7412 in finding that EPA's decision to ignore costs was reasonable. NMA Pet. App. 23a-25a. No doubt, statutory terms must be construed in their proper context. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, *LTD,* 484 U.S. 365, 371 (1988). But the Panel's contextual analysis contradicts the basic principle of construing a statute as a whole. Moreover, even focused just on Section 7412, the Panel misconstrued Congress' intent.

A. The Panel Failed to Examine Section 7412(n)(1)(A) Within the Context of the CAA as a Whole.

In seeking Congress' purpose in Section 7412(n)(1)(A), the Panel's contextual analysis employed an overly narrow lens, focusing only on Section 7412 and not on the statute "as a whole." *United States v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007). The maxim that statues should be construed as a coherent whole is particularly on point here, given that Section 7412(n)(1)(A) expressly states that the Utility Study should examine the health impacts of electric generator HAP emissions remaining "after imposition of the requirements of *this Chapter*." (Emphasis added.) "This Chapter" refers to Chapter 85 of Title 42 of the U.S. Code; in other words, the entire CAA as amended by the 1990 Amendments. Viewing Section 7412(n)(1)(A) through the wide lens of the CAA as a whole confirms the unreasonableness of excluding costs in determining

whether regulating electric generator HAP emissions is "appropriate."

Acid gases provide perhaps the best example of how the Panel's failure to look more broadly at the statute as a whole blinkered its analysis. As stated, much of the $9.6 billion in regulatory costs yet none of the $4-$6 million in regulatory benefits results from controlling those emissions. See supra at n. 10. EPA concedes that acid gases emitted by electric generators produce no significant health risk. 76 Fed. Reg. at 25,016 (acid gases do not pose a cancer risk) & *id.* ("our case studies did not identify significant chronic non-cancer risks from acid gas emissions"). EPA's entire case for regulating electric generator acid gas emissions rests on possible environmental impacts, specifically the possibility that acid gases could "contribute" to ecosystem acidification. *Id.* See also 77 Fed. Reg. at 9,310. But the notion that Congress in Section 7412(n)(1)(A) authorized EPA to ignore costs in addressing acidification overlooks Congress' concurrent adoption of a separate Title, the much-heralded and innovative Title IV program, to address acidification in a cost-effective way.[12]

Ten years in the making following the 1980 congressional authorization of the National Acid Precipitation Assessment Program, P.L. 96-294, the

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[12] See generally Thomas W. Merrill, Symposium: *Innovations in Environmental Policy: Explaining Market Mechanisms*, 2000 U. Ill. L. Rev. 275; Dennis D. Hirsch, *The National Symposium on Second Generation Environmental Policy and the Law: Symposium Introduction: Second Generation Policy and the New Economy,* 29 Cap. U.L. Rev. 1 (2001).

Title IV program was seen as a landmark in environmental regulation, creating a market-based cap-and-trade program to address acid deposition in a least-cost manner. As the Senate Report containing Title IV as enacted stated, "the allowance system is intended to maximize the economic efficiency of the program both to *minimize costs* and to create incentives for aggressive and innovative efforts to control pollution." Senate Report at 320 (emphasis added). Title IV represented a rejection of traditional top-down, command-and-control programs, which were seen as inefficient, in favor of a market-driven approach that would achieve the desired emission reductions at reasonable costs. *Id.* As President Bush stated in his signing statement, "[t]he innovative use of market incentives in the bill represents the turning of a new page in our approach to environmental problems in this country…. By employing a system that generates *the most environmental protection for every dollar spent*, the trading system lays the groundwork for a new era of smarter government regulation; one that is more compatible with economic growth than using only the command and control approaches of the past." Statement by President George Bush Upon Signing S.1360, reprinted in 1990 U.S.C.C.A.N. at 3387-1 (emphasis added).

Having promulgated the Title IV cap-and-trade program to address acid deposition specifically in a cost-effective manner, it is unlikely in the extreme that Congress would have simultaneously authorized EPA to ignore costs in addressing possible remaining deposition impacts after Title IV was implemented. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (statues must be interpreted "'as a

symmetrical and coherent regulatory scheme,'" quoting *Gustafson* v. *Alloyd Co., Incorporated,* 513 U.S. 561, 569, (1995)). Congress knew that the acid deposition program not only would reduce SO_2 and NO_x emissions, it would reduce HAP emissions as well. 76 Fed. Reg. at 24,990 ("It was known at the time of the 1990 Amendments that the controls used to reduce emissions of SO_2, primarily scrubbers, had the co-benefit of controlling HAP emissions, including Hg emissions".). Moreover, unlike electric generator SO_2 and NO_x emissions, electric generator acid gas emissions are not a meaningful contributor to acidification; they represent less than one percent of total emissions that contribute to acidification. Comments of the Electric Power Research Institute ("EPRI"), Joint App. at 413-14, 419-22. The fact that the acid deposition program that *the Agency* wants to impose under Section 7412(n)(1)(A) achieves little yet costs several times more than *Congress'* Title IV acid deposition program, supra at 14 – and unlike Congress' program is forcing numerous plants into retirement, supra at 14-15 – further emphasizes EPA's unreasonable statutory interpretation. Under the Panel's interpretation, Section 7412(n)(1)(A) would become "a tail that would not only wag the dog, but would continue to wag after the dog died," or, in this case, long after the Title IV program was fully implemented. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010) (Kennedy, J. concurring).[13]

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[13] Indeed, EPA's interpretation of Section 112(n)(1)(A) renders Title IV a virtual nullity. Title IV is based on a carefully crafted and complicated system of allowance allocations that permit some units to "over-control" so that they can sell excess allowances to units which, by purchasing allowances, do not have to control at all. JULIE R. DOMIKE AND ALEC C. ZACAROLI, THE CLEAN AIR HANDBOOK, American Bar Association Section of

Title IV, moreover, was not the only program that Congress adopted, both in the 1990 CAA Amendments and in previous iterations of the CAA, that were intended to and did result in significant reductions in electric generator emissions of all types, including HAPs.[14] For instance, NAAQS attainment programs were expected to reduce HAP emissions. 70 Fed. Reg. at 16,003 (noting the conclusion of the Utility Study that compliance with the NAAQS for ozone and particulate matter would require utilities to install control equipment that would also reduce HAP emissions). Moreover, the original CAA of 1970 required all new and modified electric generators to install modern pollution-control equipment for SO_2, NO_x, and particulate matter emissions as a condition to obtaining necessary preconstruction permits. 42

Environment, Energy and Resources 2001, Ch. 12 (3d ed. 2011). Reflecting cost concerns, the program was implemented in two phases, phase one beginning in 1995 and phase two in 2000. *Id.* at 449. Yet under EPA's interpretation, not just some units but *every* unit must control emissions to meet EPA's acid gas or alternative SO_2 emissions standards. And, under EPA's interpretation, had the Agency implemented Section 112(n)(1)(A) on the timetable Congress intended, with EPA completing the required health effects and control technologies study within three years of 1990, every unit would have been required under EPA's HAP program to control SO_2 emissions long before the now extraneous Title IV phase two program even began.

[14] As is the case with SO_2 control equipment, which also controls acid gas emissions (as well as mercury), control equipment for the other two principal air pollutants that electric generators emit, NO_x and particulate matter, also reduces mercury and trace metal emissions. See 70 Fed. Reg. at 16,003 (citing Utility Study and other evidence to show that technologies used to control SO_2, NO_x, and particulate matter also control HAPs, including mercury).

U.S.C. §§ 7475 and 7503 (permit requirements under, respectively, the Prevention of Significant Deterioration and New Source Review programs). In addition, new and modified generators must install modern pollution equipment to meet New Source Performance Standards (NSPS) that EPA established under Section 7411. 40 C.F.R. Part 60, Subparts D & Da. See 70 Fed. Reg. at 16,004 (installation of NO_x controls to meet NSPS for NO_x will reduce mercury emissions).

Congress intensified electric generator regulation in the 1990 CAA Amendments. In addition to Title IV, Congress also changed the definition of public "welfare" to encompass transform[ed]" and "convert[ed]" air pollution so that EPA could also address acid deposition through the NAAQS program. 42 U.S.C. § 7602(h); Senate Report at 76. EPA undertook rulemaking to determine whether the secondary NAAQS for SO_2 and NO_x should be strengthened to address this problem given that, as described above, those gases can convert to sulfuric acid and nitric acid, respectively. EPA determined that, although it believes that those standards should be strengthened, more study is needed to establish the appropriate level. See Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur, 77 Fed. Reg. 20,218, 20,263 (Apr. 3, 2012); *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079 (D.C. Cir. 2014).

Similarly, Congress revised the CAA "good neighbor" program to further expand EPA's ability to reduce transported air pollution. EPA has now adopted three iterations of successively more stringent programs under this provision to reduce

electric generator emissions of SO_2 and NO_x in the eastern part of the country. *EME Homer City Generation*, 134 U.S. at 1595-96. The latest iteration of this program, the Cross State Air Pollution Standards ("CSAPR") program, reviewed by this Court in *EME Homer City Generation*, will reduce the electric sector's SO_2 emissions from the post-Title IV 2005 amount of 8.8 million tons to the post-CSAPR amount of 2.4 million tons. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,215, Table III (Aug. 8, 2011). CSAPR will also reduce NOx emissions from 2.6 million tons in 2005 to 1.4 million tons. *Id.* In adopting the rule, EPA noted the positive result in reducing acid deposition. *Id.* at 48,218. See also 70 Fed. Reg. at 16,004 (explaining that controls that utilities would install under the Clean Air Interstate Rule (the predecessor program to CSAPR) would also reduce HAP emissions).

Congress also changed the statutory visibility-impairment program by adding 42 U.S.C. § 7492 in order to refocus EPA from a source-specific approach under 42 U.S.C. § 7491 to a regional approach capable of addressing multiple and multi-state sources of impairment. See *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 4-5 (D.C. Cir. 2002). Congress made electric utility emissions a particular focus of the visibility program. 42 U.S.C. § 7491(b)(2)(B) (requiring large electric generators to follow mandatory EPA guidelines). EPA has targeted large and small electric generator emissions of SO_2 and NO_x, which may impair visibility when they convert in the atmosphere to fine particle nitrates and sulfates. Senate Report at 275. EPA so far has

undertaken rulemaking to impose electric generator SO_2 and NO_x restrictions in at least 12 States[15] located outside the 28-state region of the country that is subject to CSAPR. For the CSAPR region, EPA has determined that CSAPR emission reductions are sufficient, in the near-term, to address electric generator contributions to impaired visibility. Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 77 Fed. Reg. 33,641 (Jun. 7, 2012).

Congress' creation of this extensive regulatory apparatus for controlling electric generator emissions indicates that Section 7412(n)(1)(A)'s role was far more limited than EPA and the Panel would have it. Rather than being the dominant and most expensive driver of electric generator emission reductions, Section 7412(n)(1)(A) allowed EPA to layer on additional regulation only if "appropriate and necessary" to address public health effects of utility HAPs that might remain "after imposition of the requirements" of these other programs. Given Congress' concern about the cost of these programs, and given Congress' expectation that these other programs would reduce HAP emissions as well, 136

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[15] 77 Fed. Reg. 72,512 (Dec. 5, 2012); 78 Fed. Reg. 46,142, (July 30, 2013) (Arizona); 77 Fed. Reg. 14,604 (Mar. 12, 2012) (Arkansas); 77 Fed. Reg. 39,425 (July 3, 2012) (Louisiana); 77 Fed. Reg. 71,533 (Dec. 3, 2012) (Michigan); 78 Fed. Reg. 8,706 (Feb. 6, 2013) (Minnesota and Michigan); 77 Fed. Reg. 40,150 (July 6, 2012) (Nebraska); 77 Fed. Reg. 50,936 (Aug. 23, 2012) (Nevada); 76 Fed. Reg. 52,388 (Aug. 22, 2011) (New Mexico); 77 Fed. Reg. 20,894 (Apr. 6, 2012) (North Dakota); 76 Fed. Reg. 81,728 (Dec. 28, 2011) (Oklahoma); 77 Fed. Reg. 74,355 (Dec. 14, 2012) (Utah); 79 Fed. Reg. 5,032 (Jan. 30, 2014) (Wyoming).

Cong. Rec. H12911, 12934 (daily ed. Oct. 26, 1990) (statement of Representative Oxley), Congress cannot reasonably be understood to have handed EPA a free pass to regulate regardless of costs.

B. The Panel Misread Section 7412(n)(1)(A) Within Its Context in Section 7412.

The Panel's contextual analysis was limited to evaluating the role of Section 7412(n)(1)(A) within Section 7412, but here too the Panel faltered. The Panel gave controlling weight to the fact that other subsections of Section 7412 provide for the consideration of costs, while Section 7412(n)(1)(A) supposedly does not. NMA Pet. App. 23a-27a. But at the heart of the Panel's reasoning lies a fatal contradiction. In parsing the provisions of Section 7412 that do or do not explicitly refer to costs, the Panel relied most heavily on the language differences between Sections 7412(n)(1)(A) and 7412(n)(1)(B). As the Panel pointed out, Congress did not explicitly direct that the Section 7412(n)(1)(A) Utility Study should consider control costs, but it did explicitly direct that the separate Section 7412(n)(1)(B) study of mercury impacts should consider costs. *Id.* at 1237. But later in its opinion, the Panel found that, even though Section 7412(n)(1)(A) does not refer to environmental effects, EPA could consider those effects in its "appropriate and necessary" finding precisely because Congress provided that the Section 7412(n)(1)(B) study should examine both health and environmental effects. *Id.* at 1242. Having allowed EPA to borrow from Section 7412(n)(1)(B) to supply the missing authority in Section 7412(n)(1)(A) to consider environmental effects, the Panel was

logically inconsistent in relying on the difference between those two provisions in justifying EPA's decision to exclude costs under Section 7412(n)(1)(A). *Cf. Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 222 (2008) (statutory terms should be construed to be "coherent and consistent").

Indeed, considering Section 7412(n)(1)(A) and Section 7412(n)(1)(B) together, it makes far more sense to find that EPA, under Section 7412(n)(1)(A), should consider costs but may not consider environmental effects rather than the other way around. While Section 7412(n)(1)(A) does not explicitly refer to costs, the Panel, NMA Pet. App. 29a, is wrong that that provision contains "no signal" that costs should be considered. Section 7412(n)(1)(A) requires that EPA study *both* health effects *and* "alternative control strategies for emissions which may warrant regulation." A study of control technologies logically entails considering the cost of those technologies, as EPA concluded in the Utility Study. Joint App. 105 (summarizing the "degree of feasibility, cost and effectiveness" of potential control strategies).

The Panel also concluded that EPA reasonably decided it could ignore costs in deciding whether it is "appropriate" to regulate because EPA can consider costs later in the regulatory process in setting Section 7412(d) standards. NMA Pet. App. 26a-29a. As the Panel explained, Section 7412(d) standard-setting is a two-step process. *Id.* at 1240. EPA first sets a "MACT floor" standard based on a formula that does not consider costs. See Section 7412(d)(3) (standards must reflect the emissions control performance achieved by the average of the top 12 percent

performing sources within the regulated source category). EPA may then set a "beyond-the-floor" standard based on a number of factors, including costs. See Section 7412(d)(2).[16]

The Panel's attribution of significance to the possibility that EPA may consider costs in setting "beyond-the-floor" standards misses the point that the formula-driven "MACT floor" standards are themselves extremely costly. This case proves that point – with one limited exception for a small subcategory of electric generators, EPA did not establish "beyond-the-floor" standards,[17] yet EPA still calculated the control costs to be $9.6 billion per year. Thus, because EPA did not consider costs either in determining regulation to be "appropriate" or in setting the "MACT floor" standards, EPA imposed these extremely large costs on the electric generation

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[16] Although EPA took the view that "Congress expressly precluded consideration of costs when setting MACT floors," 77 Fed. Reg. at 9,323, the Panel stated that costs are "to some extent" implicitly considered in setting the MACT floor in that the floor is based on the emissions that the best-performing units in a source category achieve. NMA Pet. App. 29a. The Panel's observation of the role of costs in setting the "MACT floor," however, contradicts a decision of the D.C. Circuit rendered soon after *White Stallion*, which held that costs are relevant under Section 7412(d) only in setting "beyond-the-floor" standards. *NRDC v. EPA,* 749 F.3d 1055, 1060 (D.C. Cir. 2014). Moreover, even to the extent cost is implicitly considered in the MACT floor, it cannot be assumed that all units in a large, "broad, [and] diverse source category," like electric generators, 70 Fed. Reg. at 15,999, can bear the cost of new controls simply because a limited percentage of newer units may be capable of doing so.

[17] EPA established beyond-the-floor" standards only for mercury emissions from generators using low rank virgin coal (coal with a very low heat content). 77 Fed. Reg. at 9,369.

industry without ever taking costs into account. As Judge Kavanaugh wrote, "[t]elling someone that costs will be considered in a regulatory step that occurs *after* they have already had to pay an exorbitant amount and may already have been put out of business is not especially reassuring." Pet. App. 79a.

Finally, the Panel found that EPA's decision not to consider costs was consistent with Congress' overall purpose in its 1990 redesign of Section 7412 to "spur EPA to action" in regulating HAPs. NMA Pet. App. 25a-26a. Given this purpose, the Panel read Section 7412(n)(1)(A) as serving no function other than providing EPA with a "three-year pass" to "confirm the nature of public health hazards from EGU [electric generator] emissions," after which regulation becomes mandatory. *Id.* at 26a.

Apart from undermining the Panels' conclusion that environmental impacts are relevant under Section 7412(n)(1)(A), the Panel's reading does not give full effect to the fundamental differences in the respective regulatory regimes that Congress created for electric generator and non-electric generator HAP emissions. Had Congress intended nothing more than that the normal statutory regulatory process would be triggered if EPA found that electric generator HAPs create a health hazard, it would have been a simple matter to direct EPA, upon making a health hazard finding, to list generators under Section 7412(c) and then set standards under Section 7412(d). Congress, however, did not do so. Instead, it asked EPA to consider the results of the study and then make the policy judgment of whether regulation is "appropriate and necessary." *Rusello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress

includes particular language in one section of a statute but omits it in another … it is generally presumed that Congress acted purposely in the disparate inclusion or exclusion.").

Indeed, by listing specific HAPs under Section 7412(b) and requiring EPA to regulate sources that emit those HAPs in quantities exceeding a statutorily defined amount, Congress presumably had already determined that sources that emit listed HAPs above the threshold warrant regulation. Thus, if, as the Panel posits, Congress' only concern in Section 7412(n)(1)(A) was to confirm that electric generator HAP emissions create health impacts, Congress could have made EPA's task under Section 7412(n)(1)(A) much simpler. Instead of requiring a full-blown, complex health effects and control technologies study that ultimately took eight years to complete, Congress could have simply instructed EPA to determine whether electric generators, after other CAA regulation, emit HAPs above the statutory threshold. *Whitfield v. United States*, 543 U.S. 209, 215 (2005) ("Had Congress intended to create the scheme petitioners envision, it would have done so in clearer terms.").

The fact that, for electric generators, Congress wanted a health-effects and control-technology study, and directed regulation only where "appropriate and necessary," indicates that Congress wanted EPA to do something more than determine whether electric generator HAP emissions create health effects. See *Roberts v. Sea-Land Servs.*, 132 S. Ct. 1350, 1357 (2012) (Differences in parallel statutory schemes demonstrate a different congressional intent for each). The something "more" that Congress wanted

is dictated by Congress' use of the word "appropriate." Congress wanted EPA to understand *the extent* of any health effects and, based on that understanding, to make a value judgment: given the health effects, is regulation justified? That judgment necessarily involves considering costs as well as benefits. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009) ("Every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs.").

III. Alternatively, Regardless of EPA's Treatment of Other HAPs, EPA's Refusal to Consider Costs in Deciding to Regulate Acid Gases Was Unreasonable and Makes EPA's Acid Gas Regulation Unlawful.

Petitioner submits that, for the reasons stated above, EPA's decision to ignore costs in deciding to regulate electric generator HAPs was unreasonable and renders the MATS rule as a whole unlawful. The particular irrationality of EPA's determination that it is "appropriate and necessary" to regulate acid gases under Section 7412(n)(1)(A), however, provides an independent reason to find that EPA has unlawfully regulated those gases. As to acid gases specifically, EPA is attempting to regulate emissions that it cannot show are a significant risk to the public health or environment in order to accomplish an objective that Congress did not authorize, while asserting a legal theory that would justify regulation for no reason.

A. Failing to Consider Costs in Deeming It Appropriate to Regulate Acid Gases Is Not Remotely Defensible.

As noted above, although the Panel concluded that the purpose of Section 7412(n)(1)(a) was to allow EPA to "confirm the nature of public health hazards from EGU [electric generator] emissions," NMA Pet. App. 29a., neither the Utility Study, Joint App. 105, nor the only study that EPA subsequently performed of the health risks of electric generator acid gas emissions, 70 Fed. Reg. at 16,007, found any such risks. Rather, as noted, EPA conceded that acid gases do not create a significant health risk. 76 Fed. Reg. at 25,016. The best EPA could do in the regulatory preamble as to health impacts was to express "concern[]" that acid gases in general are known to "contribute to chronic non-cancer toxicity," without making any finding that acid gases in the quantities emitted by electric generators pose a meaningful risk of doing so. *Id*. The only actual analysis EPA performed to determine whether acid gas emissions from electric generators create a health concern concluded that "individuals are not exposed to acid gas emissions from Utility Units at concentrations which pose hazards to public health." 70 Fed. Reg. at 16,007.

Even EPA's findings as to possible environmental impacts of electric generator acid gas emissions lacked a substantive foundation. EPA's "evidence" of the environmental impacts of these emissions consists of EPA's general claim that "[i]n areas where the deposition of acids derived from emissions of sulfur and NO_x are causing aquatic

and/or terrestrial acidification, with accompanying ecological impacts, the deposition of hydrochloric acid *could* exacerbate these impacts." 76 Fed. Reg. at 25,050 (emphasis added). That may be true, but it does not prove – or even lead to an inference – that *electric generators* emit acid gases in sufficient amounts, given EPA's other regulations, to create a material environmental concern. The Utility Study did not conclude that electric generator acid gas emissions resulted in environmental harm, Joint App. 105, and EPA did not conduct any further study of possible environmental impacts of electric generator acid gas emissions.

The only acid gas study that EPA relied on was one study of hydrochloric acid deposition in the United Kingdom, which EPA cites for the proposition that (a) hydrochloric acid is highly mobile in the environment, (b) hydrochloric acid can transport longer distances than previously thought, and (c) hydrochloric acid *can be* a larger driver of acidification than previously thought. 77 Fed. Reg. at 9,362. EPA, however, did not even try to analyze the impact, if any, of *electric generator* emissions of hydrochloric acid in the United States and, as a result, could not point to even a single instance in which domestic electric generator hydrochloric acid emissions have affected acid deposition anywhere or otherwise created an environmental impact. See also Joint App. 414-18 (EPRI's comments discussing why this United Kingdom study is not relevant).

In fact, the "evidence" on which EPA most relied in concluding that acid gases are worthy of regulation is that acid gases are listed under Section 7412(b) and that electric generators emit more

hydrogen chloride and hydrogen fluoride than other source categories. 76 Fed. Reg. at 25,005. But those facts, in and of themselves, are not significant given that those emissions, even when combined with directly emitted acid gas emissions from all other sources, do not represent a meaningful percentage of emissions that have the potential to result in acidification,. Joint App. 413-14, 419-20. Moreover, as also discussed, in contrast with other source categories, the fact that electric generators emit a listed HAP in an amount above the statutorily defined threshold, standing alone, cannot furnish a sufficient basis under Section 7412(n)(1)(A) for EPA to regulate. EPA may regulate only if it makes an "appropriate and necessary" finding.

Again, Congress could have adopted a different regulatory structure to address electric generator acid gas emissions, one that, like the NAAQS system, would require regulation on a bare finding, without considering costs, that those emissions "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a). It is doubtful, even with the deference courts give agencies in making scientific determinations within their areas of expertise, *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983), that EPA would be justified in making that finding for electric generator acid gas emissions given the meager record here. But, of course, Congress adopted a different regulatory scheme in Section 7412(n)(1)(A) and called on EPA both to study health effects and control technologies and to make a policy judgment as to whether regulation is "appropriate." The judgment EPA made as to acid gases is untenable. Ignoring costs, while forcing industry to spend about half of

$9.6 billion every year for no health benefit, for no quantifiable environmental benefit, and to address only the vaguest notion that acid gas emissions could "contribute" in some unknown amount to acid deposition impacts that may remain after compliance with the landmark Title IV program – a program that was founded on the principle that acid deposition regulation should be cost-effective – was not a reasonable decision.

Indeed, EPA's decision is so far-fetched that it can be understood only in light of the Agency's desire to achieve the billions in co-benefits that EPA sees in reducing SO_2 emissions.[18] See 77 Fed. Reg. at 9,305-06. As noted, even if EPA could prove that these benefits actually exist,[19] virtually all of them derive from the controls that utilities must install to meet EPA's acid gas standard (or its surrogate SO_2 standard). See supra at n. 10. Were these co-benefits relevant to the "appropriateness" finding (and if EPA could prove that these benefits actually exist), EPA might have a case to regulate. But the co-benefits are not relevant – the Agency conceded that it cannot and

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[18] See, e.g. EPA's press release announcing the rule, which leads with the co-benefits the rule will supposedly create. http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/bd8b3f37edf5716d8525796d005dd086!OpenDocument (last visited January 16, 2015).

[19] EPA's claim of tens of billions of dollars of health co-benefits from reducing atmospheric $PM_{2.5}$ concentrations is curious because EPA concedes that most of these benefits supposedly result from reducing $PM_{2.5}$ concentrations to below the level that EPA set in its $PM_{2.5}$ NAAQS. 77 Fed. Reg. at 9,431. But EPA set the PM2.5 NAAQS, as it set all of the NAAQS, at a level that is "requisite to protect the public health" with a margin of safety and without considering compliance costs. 42 U.S.C. § 7409(b)(1).

thus did not rely on those co-benefits in providing the legal rationale for its decision. 77 Fed. Reg. at 9,320. As EPA likely recognized, any attempt to rely on these non-HAP benefits would have run afoul of *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 463 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.").

In sum, whatever EPA's true motives are, its decision to regulate electric generator acid gas emissions was manifestly unreasonable unless EPA can persuade that Congress, by directing it to regulate if "appropriate," gave it power to regulate on the barest of records of environmental harm and no matter the costs. That breathtakingly expansive delegation of power is, to say the least, unlikely.

B. EPA's Decision to Regulate Acid Gas Emissions Did Not Become Reasonable Simply Because the Agency Chose to Regulate Other Electric Generator HAPs.

Perhaps recognizing the difficulty of defending its decision to regulate acid gas emissions on a stand-alone basis, the Agency alternatively claimed that the Act does not require it to find that it is "appropriate and necessary" to regulate those emissions in order for EPA to do so. 77 Fed. Reg. at 9,361. Instead, EPA maintained that it can piggyback on an "appropriate and necessary" finding that it makes for another electric generator HAP. *Id.* Citing *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000), EPA stated that once it regulates *any* hazardous air

pollutant emitted by electric generators under Section 7412, it must regulate all such pollutants. *Id.* Thus, EPA's view is that even if it conceded that electric generator acid gas emissions pose *no* threat to the public health or environment *at all*, the Agency could still regulate them – indeed, it must regulate them – if it finds that it is "appropriate and necessary" to regulate one other electric generator HAP. 77 Fed. Reg. at 9,361 ("The EPA concluded that we must find it "appropriate" to regulate EGUs under CAA section 112 if we determine that a single HAP emitted from EGUs poses a hazard to public health or the environment."). The Panel agreed. NMA Pet. App. 37a-41a.

The Panel and EPA, however, failed to account for the different regulatory structure in *National Lime* as compared with Section 7412(n)(1)(A). In *National Lime*, in affirming EPA's regulation of all of the source category's HAP emissions, the court relied on the fact that Congress had listed all the HAPs that EPA regulated. *National Lime*, 233 F.3d at 634 (EPA must set emission standards "for each listed HAP"). As described above, however, for electric generators, the mere listing of a HAP is insufficient to justify regulation. EPA must still make an "appropriate and necessary" finding.

Moreover, regulation under Section 7412(n)(1)(A) is pollutant-specific. The study that Section 7412(n)(1)(A) requires as a precondition to regulation includes reporting on control strategies "for emissions which may warrant regulation under this section." Since Congress directed EPA to regulate based on the results of that study, Congress must have intended that EPA regulate emissions that

warrant regulation and, logically enough, not regulate emissions that do not warrant regulation. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statutory term must be given meaning in the context of the words around it).

Thus, the Panel erred in saying that "[t]he notion that EPA must 'pick and choose' among HAPs in order to regulate only those substances it deems *most harmful* is at odds with the court's precedent." NMA Pet. App. 39a (emphasis added). It is not a question of some substances being more harmful than others; it is a question of whether EPA may regulate electric generator acid gas emissions without having to show that it is "appropriate and necessary" to do so. Surely, given that Congress did not predetermine that these emissions create public health or environmental impacts and instead left that determination to EPA – and given that Congress gave EPA discretion to judge whether it is appropriate and necessary to regulate even if it found a health impact – the Agency cannot regulate unless it can show a meaningful impact. See *Coal. For Responsible Regulation v. EPA*, 684 F.3d 102, 135 (D.C. Cir. 2012) ("[i]t is absurd to think that Congress intended to subject stationary sources to the PSD permitting requirements due to emissions of substances that do not 'endanger the public health or welfare.'").

CONCLUSION

The Court should vacate the MATS rule.

Respectfully submitted,

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