Nos. 06-736, 06-750

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

UTILITY AIR REGULATORY GROUP,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS STATE OF NEW YORK, *ET AL.*

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COUNTER STATEMENT OF QUESTION PRESENTED

The Clean Air Act requires that "any physical change" to a "stationary source" of air pollution that increases emissions from the source undergo the "New Source Review" permitting process. The question presented is whether the Environmental Protection Agency (EPA) can exempt from this process substantial replacements of plant equipment that produce large, non-*de minimis* emissions increases.

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STATEMENT OF THE CASE

Respondents are thirteen states, the District of Columbia, various municipalities and environmental organizations that filed petitions for review of a rule (the "Rule") that EPA promulgated in 2003 under the new source review (NSR) provisions of the Clean Air Act. NSR is a permitting process that applies to a plant "modification," which includes "any physical change" that increases emissions. The Rule interprets "modification" to exclude from the NSR requirements substantial equipment replacement projects that produce large, non-*de minimis* emission increases. In a unanimous decision, the United States Court of Appeals for the District of Columbia Circuit vacated the Rule as contrary to the plain language of the statute. *State of New York v. U.S. Environmental Protection Agency*, 443 F.3d 880 (D.C. Cir. 2006).

The NSR Program

Congress enacted the 1970 amendments to the Clean Air Act "to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 1 (1970). Because of insufficient progress toward clean air, Congress added the NSR provisions in 1977 to govern the construction and "modification" of existing major sources. 42 U.S.C. §§ 7479(2)(C) and 7501(4).[1] To obtain a permit, a

[1] NSR consists of two programs: one for areas "in attainment" with the national ambient air quality standards (NAAQS) and one for nonattainment areas. In attainment areas, a new or modified source must comply with prevention of significant deterioration (PSD) requirements designed to prevent air quality from deteriorating significantly. *See* 42 U.S.C. § 7475. In nonattainment areas, new or modified sources must comply with nonattainment NSR requirements that are designed to ensure reasonable progress toward attainment of the NAAQS. *See* 42 U.S.C. § 7503; Pet. App. 3a n.1.

source must satisfy specified air-quality-based and technology-based requirements. *See* Pet. App. 3a n.1.

A "modification" that triggers NSR requirements is defined in the statute as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *See* 42 U.S.C. §§ 7479(2)(C) and 7501(4) (referencing definition of "modification" found in 42 U.S.C. § 7411(a)(4)). Regulations adopted in 1980 limit the scope of the modification provision to "significant" emission increases. *See* 40 CFR § 52.21(b)(2)(i) and (b)(23). In addition, the EPA's implementing regulations have always included a regulatory exemption for "routine maintenance, repair and replacement," which EPA consistently has viewed as limited to *de minimis* circumstances. *See* 70 Fed. Reg. 33,841/1 (acknowledging that, before the present rulemaking, EPA "generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances").

The Rule at Issue

In issuing the Rule, EPA abandoned its longstanding interpretation of the statutory definition of modification as encompassing the replacement of equipment.[2] The Rule

[2] *See, e.g.*, 57 Fed. Reg. 32,316/2 (1992) (EPA "has always recognized that the definition of physical or operational change in section 111(a)(4) could, standing alone, encompass the most mundane activities at an industrial facility (even the repair or *replacement of a single leaky pipe*, or a change in the way that pipe is utilized).") (italics supplied); *In re: Tennessee Valley Authority*, 9 E.A.D. 357, 390 (Env. App. Bd. 2000) (hereafter "*In re TVA*") (EPA's Environmental Appeals Board (EAB) concluded that "TVA's replacement of various boiler components and elements clearly constituted physical changes"), *reversed on jurisdictional grounds*, *Tennessee Valley Authority v. Whitman*, 336 F. 3d 1236 (4th Cir. 2003).

expands the routine maintenance exemption to encompass activities that EPA concedes cannot be characterized as *de minimis*. 68 Fed. Reg. 61,272/3. It exempts "equipment replacement" activities that cost up to 20 percent of the entire process unit's replacement cost, as long as the new component "serve[s] the same purpose" as the replaced component, does not change the unit's "basic design parameters," and does not exceed otherwise applicable limitations on the unit's emissions.[3] 40 C.F.R. §§ 52.21(b)(56) and 52.21(cc) (2005). *See* Pet. App. 41a, 171a-175a. The Rule would allow a plant to use the exemption repeatedly, with each component replacement judged independently against the 20 percent threshold. *See* 40 C.F.R. § 52.21(cc)(1) (2005). *See* Pet. App. 172a.

Thus, for example, at a typical 1,000 megawatt power plant with a replacement cost of $800 million, the Rule would exempt the replacement of plant components that cost as much as $160 million. *See* Government Accountability Office, "New Source Review Revisions Could Affect Utility Enforcement Cases and Public Access to Emissions Data" ("GAO Report") at 18 (Joint App. 1280). EPA concedes that the Rule would exempt almost all of the emission-increasing activities at issue in several of its own enforcement cases against power plants. *See* 68 Fed. Reg. 61,258/1 (stating that "we now believe that such activities, if conducted in the future, should be excluded from major NSR").[4]

[3] The limitation of the exemption to activities that do not result in emission increases that exceed otherwise applicable limitations does not prevent substantial emission increases because many plants are not subject to limits on annual emissions and, where such limits exist, they are often well in excess of the plant's actual emissions. *See, e.g., United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 876 (S.D. Oh. 2003) (hourly emission limits in plant's permit did not prevent substantial emission increases resulting from physical changes).

[4] The 20 percent threshold would have exempted 95 to 98 percent of the violations at issue in EPA's NSR enforcement cases (Cont'd)

The Court of Appeals' Decision

In a unanimous decision, the court of appeals vacated the Rule because it would unlawfully exempt from NSR emissions-increasing activities that fall within the plain meaning of the statutory phrase "any physical change." The court applied the test established by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which provides that, when "Congress has directly spoken to the precise question at issue," an agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The court of appeals concluded that the plain language of the statutory definition of "modification" clearly encompasses the replacement of equipment that leads to an emission increase. Pet. App. 5a. The court began its interpretation with the statutory phrase "any physical change." Observing that EPA conceded that the "real-world, common-sense usage" of the term "physical change" includes the replacement of plant equipment, Pet. App. 6a, the court held that Congress intended the statutory definition to cover "any" such change that increases emissions. *Id.* at 7a ("Because Congress used the word 'any,' EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'").

In its ruling, the court of appeals followed precedent established more than a quarter-century earlier when it struck down a similar EPA attempt to limit the scope of NSR. *See Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The court reiterated its determination in *Alabama Power* that the statutory NSR mandate "'is nowhere limited to physical changes exceeding a certain magnitude.'" *Id.* at 9a (quoting

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(Cont'd)
had the Rule been in place at the time. GAO Report, *supra*, at 18-19 (Joint App. 1280-81).

Alabama Power, 636 F.2d at 400). It also noted that although one Senator proposed to limit NSR to "major expansion programs," the court determined in *Alabama Power* that "'the language of the statute clearly did not enact such limit into law.'" *Id.* (quoting *Alabama Power*, 636 F.2d at 400).

The court rejected EPA's argument that because "physical change" is capable of multiple meanings, Congress authorized EPA to exclude some physical changes from the definition, whether or not they increase emissions, and to apply NSR only to "any" of the changes it chooses not to exclude. Pet. App. 6a-7a. The court relied on this Court's prior decisions holding that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* at 7a (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Considering the broad, inclusive meaning of the word "any," the court ruled that Congress need not spell out the types of changes that would trigger NSR requirements with a "phrase such as 'regardless of size, cost, frequency, [or] effect.'" *Id.* at 11a. In other words, said the court, there is "no reason why 'any' should not mean 'any.'" *Id.* at 8a.

The court concluded that "the scope of the definitional phrase is limited only by Congress's determination that such changes be linked to emission increases." *Id.* at 11a-12a. Therefore, the court determined that the Rule was unlawful: "Congress defined 'modification' in terms of emission increases, but the [Rule] would allow equipment replacements resulting in non-*de minimis* emission increases to avoid NSR." *Id.* at 17a.

On June 30, 2006, the court of appeals unanimously denied EPA's petition for rehearing, Pet. App. 18a-19a, and petition for rehearing *en banc*, with no judge seeking a vote. UARG Pet. App. 191a-192a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS A ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION

The decision below is an unexceptional, case-specific application of the statutory interpretation principles articulated by this Court in *Chevron*. Contrary to EPA's contention, the court of appeals did not create a new exemption from those principles. Nor did it depart from this Court's precedent regarding the meaning of the word "any." Simply put, the court's interpretation of the statutory text does not break any new ground and does not merit the Court's review.

A. EPA's Claim That the Court of Appeals Created a New Rule of Statutory Construction Is Incorrect.

Recognizing the absence of any conflict among the courts of appeals, EPA tries to manufacture a question deserving of this Court's review by claiming that the court of appeals "announced a sweeping rule of construction that would operate to deprive administrative agencies of discretion to construe ambiguous statutory terms whenever those terms are preceded by the word 'any'." EPA Pet. 9. EPA is incorrect because the court of appeals' decision is nothing more than a routine application of *Chevron*. Rather than departing from the precedent of this Court, the court correctly applied *Chevron*, finding, under *Chevron*'s first step,[5] that Congress

[5] *Chevron* requires a court, applying "traditional tools of statutory construction," first to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 843 n.9. If Congress has spoken, then "that is the end of the matter," and both agencies and courts must give effect to Congress's (Cont'd)

clearly intended the definition of modification to encompass equipment replacement activities that cause more than a *de minimis* increase in emissions. Pet. App. 5a-12a.

In its petition, EPA attempts to create a conflict with *Chevron* by conflating *Chevron*'s separate questions. Thus, EPA attempts to explain away this Court's prior decisions interpreting the word "any" expansively, arguing that these cases "generally involved the Court's own determination of the best meaning of the language at issue, not the clearly distinct question presented in the *Chevron* context, namely whether an agency interpretation of statutory text is reasonable." EPA Pet. at 12. But EPA is wrong because *Chevron* step one, which is what applies here, entails *judicial* determination of a statute's meaning. In this inquiry, the court, not the agency, has the last word:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 476 U.S. at 843 n.9 (citations omitted).[6]

(Cont'd)
intent. *Id.* at 842. If, applying traditional tools of statutory construction, a court is unable to determine Congressional intent, then, under Chevron's second step, the court must determine whether the agency's conclusion is based on a permissible construction of the statute. *Id.* at 842-43.

[6] Petitioners' contrary approach to statutory construction is itself at odds with *Chevron's* principle that courts have the primary role in (Cont'd)

EPA also mischaracterizes the decision below in claiming that the court relied solely on the word "any" in finding the "modification" definition to be unambiguous, without considering the statutory context. EPA Pet. at 9. Thus, in attempting to distinguish this Court's decision in *Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 130-31 (2002), EPA states "that the Court expressly relied on a combination of factors – not merely the word "any" alone – to support its conclusion. . . ." EPA Pet. at 12. But here too, the court of appeals relied on a combination of factors, and not solely on the meaning of the word "any." Instead, noting that "the sort of ambiguity giving rise to *Chevron* deference 'is a creature not of definitional possibilities, but of statutory context,'" *id.* at 5a-6a (internal quote from *Brown v. Gardner*, 513 U.S. 115, 118 (1994)), the court of appeals found that the context and purpose of the Act's NSR provisions establish that Congress "intended NSR to apply to any type of physical change that increases emissions." *Id.* at 8a. In particular, the court pointed to Congress's evident intent to regulate all changes that increase emissions, including the replacement of equipment:

> After using the word "any" to indicate that "physical change" covered all such activities, and was not left to agency interpretation, Congress limited the scope of "any physical change" to changes that "increase [] the amount of any air pollutant emitted by such source or which result [] in the emission of any air pollutant not previously emitted."

(Cont'd)
interpreting statutes and, if accepted, would effect a substantial transfer of policy-making authority from Congress to administrative agencies. *See* Pet. App. 11a ("Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view.").

Pet. App. 11a-12a (quoting from 42 U.S.C. § 7411(a)(4)). This one express limitation indicated to the court that Congress intended no others, and that "any" therefore encompasses *all* physical changes that increase emissions.

By construing the phrase "any physical change" in the full statutory context, instead of adopting EPA's narrow focus on the meaning of the single word "change," the court of appeals correctly concluded that Congress made its intentions clear in the statute, and thus followed this Court's decision in *Chevron*. EPA may disagree with how the court interpreted the statutory language, but that disagreement is not a basis for this Court to hear this case.

B. The Court of Appeals' Decision is Consistent With this Court's Precedent Regarding the Meaning of the Word "Any."

EPA also errs in claiming that the court of appeals' decision is contrary to this Court's precedent regarding the meaning of the word "any." EPA Pet. at 12-13. To the contrary, the court of appeals' treatment of the word "any" in the statutory definition is consistent with decisions of this Court holding that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *see also Norfolk S. Rwy. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004); *Rucker*, 535 U.S. at 130-31. The court of appeals appropriately relied on these precedents in determining that Congress's use of the word "any" establishes that Congress denied EPA discretion to limit the scope of the modification provisions to just some types of physical changes. *See, e.g., Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980) (in another case construing the 1977 amendments to the Act, this Court held that Congress made clear that the term "any final action" reviewable in the U.S. courts of appeals could not be limited to certain types of final actions).

See Pet. App. 7a. Accordingly, the court below adhered to this Court's precedent in holding that the phrase "any physical change" refers "indiscriminately" to any of the various physical changes, "of whatever kind," that may be undertaken at an industrial facility, as long as they increase emissions. *See Gonzales*, 520 U.S. at 5.

The cases EPA cites in support of its restrictive interpretation of the language following "any" involve statutes where contextual factors not present here supported a narrower construction. For example, in *Small v. United States*, 544 U.S. 385 (2005), a broad interpretation of "any court" to include foreign courts would have been inconsistent with traditional principles of sovereignty. *Id.* at 388-90. Likewise, the broad reading of "any sum" advocated by the taxpayer in *Flora v. United States*, 362 U.S. 145 (1960), would have abrogated the traditional principle allowing taxpayer suits for refunds only if the disputed tax had been paid. *Id.* at 157-58.[7] In contrast, the statutory context here establishes Congress's concern with the effect of increased emissions and supports the natural reading of the statute as applying to any type of physical change that increases emissions.

EPA's attempt to show that the court of appeals' decision is contrary to the Court's construction of another Clean Air Act provision in *Chevron* itself (EPA Pet. at 14) is also

[7] The Alliance of Automobile Manufacturers, *et al.*'s reliance, in their brief supporting the petition, on this Court's recent decision in *BP America Production Co. v. Burton*, No. 05-669, slip op. (U.S. Dec. 11, 2006), is likewise misplaced. In that case, this Court held that the general six-year statute of limitations for government contract actions does not apply to administrative pay orders issued by the Minerals Management Service. It held that the language of the statute of limitations clearly did not refer to administrative actions, and therefore had no occasion to defer to the agency's construction of the statutory term "any contract."

unfounded. In *Chevron*, the Court considered the definition of "stationary source," which the Act defines as including "any building, structure, facility or installation which emits or may emit any pollutant." *See id.*, 467 U.S. at 846. *Chevron* did not concern EPA's authority to construe the "stationary source" definition to exclude buildings or facilities falling within the usual scope of the statutory language. Instead, the question before the Court was whether the statutory language specified how EPA must treat a facility that consists of multiple buildings: as one source (because it is one "facility") or as multiple sources (because the facility consists of multiple "buildings"). The Court concluded that the definition of "stationary source" was not designed to answer that question, explaining that "the terms [any building, structure, facility or installation] are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation." *Id.* at 862. Here, in contrast, Congress plainly intended for section 111(a)(4) to answer the question of what types of physical changes constitute a modification: those that increase emissions.

Therefore, the court below broke no new ground in construing the Act, and its decision is consistent with decisions of this Court interpreting the word "any." Indeed, the court's reading of "any" follows the approach repeatedly urged on this Court by the Solicitor General himself. For example, in 2003, the United States submitted an *amicus* brief in *South Florida Water Management District v. Miccosukee Tribe*, S.Ct. No. 02-626 (Sept. 2003), regarding the proper construction of 33 U.S.C. § 1362(12), which governs "any addition of any pollutant to navigable waters from any point source." In that brief, the United States contended that Congress's "use of the modifier 'any' with reference to 'addition,' 'pollutant,' and 'point source' expresses Congress's understanding that the *various types* of additions, pollutants, and point sources are all within the

Clean Water Act's regulatory reach." *Id.*, Brief of United States as *Amicus Curiae* Supporting Petitioner, 2003 WL 22137034, at 19 (italics supplied).[8] In the same way, the "various types" of physical changes are covered by the statute here, as long as they result in increased emissions. The court of appeals' straightforward application of this Court's caselaw regarding "any" does not present a question warranting this Court's review.

C. The Court of Appeals' Decision Does Not Conflict With This Court's Decisions Regarding Congressional Ratification of Regulatory Interpretations.

In an effort to circumvent the plain language of the statute, EPA claims now, for the first time, that Congress "ratified" the preexisting exclusion of some activities that might otherwise have fallen within the broad definition of "modification" under the distinct new source performance standards (NSPS) program when it enacted the NSR provisions in 1977. EPA Pet. at 16-20. In its brief in the court of appeals and in its regulatory decision, however, EPA "explicitly disclaimed" any "ratification" argument. *See* EPA Brief in *New York v. EPA* (January 10, 2006), at 19 ("EPA does not contend that . . . Congress 'ratified' [the routine maintenance] exclusion; in fact, EPA has explicitly disclaimed any such argument"); 70 Fed. Reg. 33,841/2 ("we do not believe Congress intended to ratify the then-existing interpretation"). EPA cannot now credibly claim that

[8] *Accord*, Brief for the United States as *Amicus Curiae* Supporting Reversal *in Engine Mfrs. Assn. v. South Coast Air Quality Management District*, S. Ct. Case No. 02-1343 (Aug. 2003), 2003 WL 22068761, at 13-15 (concerning a Clean Air Act provision encompassing "any standard," the United States argued: "Congress did not define the term 'standard' for purposes of Section 209(a), but it also expressed no intent in Section 209(a) to limit that provision's preemptive effect to particular types of standards").

the court of appeals committed egregious error by eschewing an approach that the agency itself disclaimed.

To the contrary, this Court's own ratification jurisprudence demonstrates that the error lies in EPA's eleventh-hour ratification argument, not the court of appeal's decision. To show ratification, petitioners must demonstrate that Congress was aware of, and intended to incorporate, the preexisting regulatory exemptions. *SEC v. Sloan*, 436 U.S. 103, 120-21 (1978).[9] Indeed, in its petition, EPA acknowledges that mere Congressional "silence" does not constitute ratification. EPA Pet. at 16 (citing *TWA*, 432 U.S. at 76 n.11). But in this case, silence is all that EPA has; there is no evidence that Congress was even aware of the preexisting exemptions, let alone that it approved them.

Petitioners cite nothing in the language of the statute or the legislative history to support their claim that "Congress in 1977 had before it EPA's preexisting PSD rules, and Congress reviewed those rules provision-by-provision, adopting some elements and changing others," Petition of Utility Air Regulatory Group (UARG) at 16. EPA cites only the savings clause of 42 U.S.C. § 7478(a), in which Congress provided that existing regulations will remain in place until states submit their plans to implement the new statutory program. *See* EPA Pet. at 19. But this provision refutes, rather than supports, petitioners' ratification argument. Specifically, § 7478(a) states that EPA's preexisting PSD regulations were to apply only "[u]ntil such time as an applicable implementation plan is in effect for any area," and

[9] The cases that EPA relies upon are distinguishable because they involve agency interpretations that are "expressly accepted" by Congress. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 382 (1969); *see also TWA v. Hardison*, 432 U.S. 63, 73-74 (1977) (incorporating much of the agency guidance verbatim, including concepts of "reasonable accomodat[ion]" and "undue hardship").

emphasized that the implementation plan must "*meet[] the requirements of this part* to prevent significant deterioration of air quality with respect to any air pollutant." *Id.* (emphasis added). Thus, as the court of appeals held in rejecting a similar EPA argument in *New York v. EPA* ("*New York I*"), 413 F.3d 3 (D.C. Cir.), *reh. denied*, 431 F.3d 801 (D.C. Cir. 2005), Congress adopted EPA's preexisting regulation "only *provisionally*," indicating that it saw that interpretation "not as necessarily complying with the new statute but as merely filling a gap that would have existed before its implementation." 431 F.3d at 802-03 (emphasis in original) (rejecting EPA's argument that § 129(a)(1) of the 1977 Amendments approved EPA's pre-1977 nonattainment NSR regulation).[10]

Nor can EPA persuasively argue that even if Congress did not expressly approve the pre-1977 regulatory exemptions from the NSPS definition of "modification," when Congress "elects to use statutory language that has already been given an interpretive gloss by the administering agency, it should ordinarily be presumed to intend to allow the agency to continue to employ that regulatory gloss." EPA Pet. at 16. The argument fails here, because "[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Brown*, 513 U.S. at 121 (internal quotation and citation omitted); *Sloan*, 436 U.S. at 121. Thus, whatever was EPA's pre-1977 interpretation of "modification" in the NSPS regulations, that interpretation cannot justify an NSR exemption that contravenes the plain statutory language defining "modification" to include "any physical change" that increases emissions.

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[10] In *New York I*, the D.C. Circuit rejected UARG's argument that Congress incorporated the regulatory definition of modification from the NSPS program when it cross-referenced the statutory definition of modification in the NSR provisions. *Id.*, 413 F.3d at 36-39. No party petitioned for certiorari of that decision and it cannot be challenged in this case.

Finally, even if Congress had ratified the pre-1977 exclusion of routine maintenance from the definition of "modification," that would not authorize EPA to carve out the far broader exemption at issue here. 68 Fed. Reg. 61270/3 (acknowledging that the Rule expands the routine maintenance exemption).[11] While EPA "generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances," 70 Fed. Reg. 33,841/1, the Rule would allow multimillion dollar activities – in the case of power plants, activities costing over $100 million – to evade NSR review even if they increase emissions by thousands of tons a year, well in excess of any *de minimis* threshold. Therefore, the language of the pre-1977 exemption did not clearly signal to Congress that EPA intended to exempt "physical changes" producing larger-than-*de minimis* emissions increases.

As for the other three pre-1977 exemptions, *see* EPA Pet. at 16-17, they construed statutory language not at issue here, and thus could not have alerted the 1977 Congress to EPA's reading of "physical change." *See* 39 Fed. Reg. 42,514 (expressing EPA's view that an "increase in the production rate" or in "hours of operation" or the "use of an alternative fuel or raw material," "shall not be considered *a change in the method of operation.*" (emphasis added)).[12] In short, petitioners fall far short of demonstrating the congressional awareness necessary to show ratification. *See Sloan*, 436 U.S. at 121.

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[11] In fact, if EPA is now correct that Congress intended to ratify the routine maintenance exemption, such ratification would, to use EPA's own words, "congeal" the routine maintenance exclusion, 70 Fed. Reg. 33841/2, thereby barring EPA from promulgating the substantially broader exclusion at issue here.

[12] Because these activities are not changes in the *method* of operation – and would not be covered by the definition of modification regardless of the resulting emission increases – it does not matter whether the resulting emission increases would not, in all cases, be *de minimis*. *See* EPA Pet. at 17.

II. THE DECISION BELOW DOES NOT HAVE THE ADVERSE CONSEQUENCES CLAIMED BY THE PETITIONERS

As explained above, the court of appeals' decision is a routine, case-specific interpretation of a statute, and therefore does not implicate any important questions of federal law. For that reason, the petitions should be denied, and petitioners' policy arguments should be disregarded. Even if those policy arguments are considered, however, they are factually incorrect.

A. The Decision of the Court Below Does Not Prevent EPA From Administering the NSR Program in a Way That Promotes Its Policy Goals.

Contrary to petitioners' suggestions, the court of appeals' decision does not place EPA in a "regulatory straitjacket," depriving it of the ability to tailor the NSR program to "changing conditions and policies." EPA Pet. at 21-22; *see also* UARG Pet. at 21. Instead, the court of appeals' decision simply recognizes that EPA lacks authority to exempt physical changes that increase emissions by non-*de minimis* amounts. EPA's authority otherwise to structure the NSR program to effectuate its policy goals is unaffected by the decision.

First, under the statutory definition of modification, as implemented by 1980 regulations not at issue here, not all physical changes trigger NSR, but only those changes that increase actual emissions by amounts exceeding specific *de minimis* thresholds. *See, e.g.*, 40 C.F.R. § 51.166(b)(23)(i); *see also Alabama Power,* 636 F.2d at 400 (EPA possesses authority to exempt from NSR "some emission increases on grounds of *de minimis* or administrative necessity"). Indeed,

under regulatory language added in 2002 and not at issue here, NSR is triggered only if the emissions increase exceeds the highest average level emitted by the source during any two-year period in the previous five years (for electric utilities) or ten years (for non-utilities). *New York I*, 413 F.3d at 22. According to EPA itself, this "lookback" provision "promotes economic growth and administrative efficiency" by "affording sources the flexibility to respond rapidly to market changes" and "focusing limited regulatory resources on changes most likely to harm the environment." *Id.* at 24.

Second, under other regulations upheld by the court of appeals, emissions increases are measured plantwide, thus allowing increases at individual components of a polluting facility to be "offset by contemporaneous *decreases* of pollutants" elsewhere in the facility. *Alabama Power*, 636 F.2d at 400 (emphasis added). "Within the terminology of the Act," changes that do not produce a net increase in any pollutant "are not 'modifications' at all." *Id.* at 401. *Alabama Power* noted that this "bubble" approach "is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement." *Id.* at 402; *see also id.* at 400 (explaining that the operating flexibility provided by the bubble approach and by EPA's *de minimis* authority "will allow for improvement of plants, technological changes, and *replacement* of depreciated capital stock.") (emphasis added).[13]

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[13] In addition, EPA's "plantwide applicability limit" provision, added in 2002 and previously upheld by the court of appeals, creates an alternative mechanism for taking advantage of a plant-wide bubble. *See* 67 Fed. Reg. 80,189/3; *New York I*, 413 F.3d at 37-38 (deferring to EPA's finding that plantwide applicability limits "encourage sources to implement physical or operational changes that improve efficiency and reduce emission rates").

Finally, EPA's contention that the decision below jeopardizes the validity of the existing routine maintenance exemption and other exclusions from the definition of modification is incorrect. EPA Pet. at 23-24. The decision does not affect the validity of the routine maintenance exemption as long as EPA continues to apply it to *de minimis* circumstances, rather than to exempt the massive multimillion-dollar projects exempted by the Rule. Likewise, existing regulations providing that fluctuations in hours of operation or production rate do not constitute changes in the method of operation are unaffected by the decision below. *See supra* at 15.

B. The Rule Vacated by the Court of Appeals Would Not Benefit the Environment.

EPA contends that the Rule would benefit the environment by increasing the efficiency of industrial operations and therefore reducing "the amount of pollution generated per product produced." EPA Pet. at 22-23. *See also* UARG Pet. at 21 (claiming that the court's decision will be "devastating" to the environment). But in enacting the NSR provisions, Congress intended to protect public health and the environment by guarding against increases in total facility emissions, not just emissions "per product produced." To the extent that an activity designed to improve efficiency will not significantly increase a facility's total emissions, that activity is already exempt from NSR. *See* 42 U.S.C. § 7411(a)(4); 40 C.F.R. § 52.21(b)(2)(i) (only changes that increase emissions significantly trigger NSR). Therefore, the sole effect of the Rule is to exempt physical changes that *do* produce significant increases. Allowing facilities to make such emissions-increasing changes without installing up-to-date air pollution controls and without ensuring that ambient

air quality is protected would degrade rather than benefit the environment.[14]

Indeed, the record of EPA's enforcement cases addressing violations of the NSR modification requirements establishes that the large-scale plant refurbishments exempted by the Rule can increase emissions substantially. For example, in an enforcement action against the Tennessee Valley Authority, EPA identified thirteen plant refurbishments that would increase emissions significantly. *See In re TVA*, 9 E.A.D. at 451-52. EPA's Environmental Appeals Board rejected TVA's claim that the projects were simply "routine maintenance," because "TVA's view of the breadth of the exception would . . . swallow the rule that subjects existing sources to the requirement to install modern pollution controls when physical changes that increase emissions are made to these plants." *Id.* at 378. Nevertheless, all but one of these expansive, emission-increasing equipment replacement projects would have been exempt under the Rule. *See* 68 Fed. Reg. 61,257/2.[15]

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[14] Projects that improve efficiency can increase emissions if the modified unit is utilized more afterwards. In that case, NSR requirements remain applicable. *See Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989) (upholding EPA's interpretation that efficiency project triggered NSR because "a firm's decision to introduce new, more efficient machinery may lead the firm to decide to *increase the level of production*, with the result that, despite the new machinery, overall emissions will increase").

[15] By way of example, the rule would exempt the $23 million equipment replacement project undertaken by TVA at Unit 1 of its coal-fired Cumberland Plant. Schoengold Dec., Att. K (Joint App. 1322) (2.4% of unit's replacement cost). That project, which required a three-month shutdown of the unit, resulted in an emissions increase of 21,187 tons of nitrogen oxides per year, *In re TVA*, 9 E.A.D. at 443, 491 – more than the total annual NOx emissions from all sources in the District of Columbia. *See* www.emissionsonline.org/nei99v3/state/stindex.htm.

C. The Utility Industry's Equitable Arguments Are Legally Irrelevant and Factually Incorrect.

Finally, the Court should reject UARG's reliance on the briefs submitted to this Court in *Environmental Defense v. Duke Energy Corp.*, No. 05-848, to support UARG's claim that the court of appeals' decision will expand the application of NSR requirements and thwart industry reliance on its prior understanding of those requirements. UARG's arguments are irrelevant to this proceeding, which addresses only the definition of "physical change," and does not attempt to define how emissions increases are to be calculated. *See* Pet. App. at 15a (industry's maximum emissions argument "is irrelevant because it does not address what constitutes a 'physical change'").

In any event, UARG's claim of ignorance cannot be supported. As the United States explained in *Duke Energy*, UARG's claim that the utility industry has always understood EPA's emissions increase test under NSR to be identical to the agency's NSPS emissions test is false.[16] Furthermore, the record of the present rulemaking, and of EPA's enforcement cases, establishes that industry understood that replacement of plant equipment in order to extend a plant's life would trigger NSR requirements.[17] *See United States v. S. Ind. Gas*

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[16] Responding to a similar contention made by Duke Energy, the United States pointed out that the utility industry industryhas long understood that EPA's regulatory test for NSR emissions increases – turning on actual emissions – does not restrict NSR coverage to cases in which there is an increase in "capacity" measured by hourly emission rates. *See, e.g.*, United States Reply Br. in No. 05-848 at 14 & n.11 (citing UARG documents); Brief for the United States in No. 05-848 at 32-33 (discussing 1982 settlement agreement requiring EPA to consider substituting an hourly rate test for the actual annual test EPA had adopted in 1980).

[17] For example, the administrative record includes a 1989 power company memorandum reporting on advice provided by UARG that (Cont'd)

and Electric Co., 245 F.Supp. 2d 994, 1018-19 (S.D. Ind. 2003) (noting that defendant utility received notice of the narrow scope of the routine maintenance exemption from, among other things, a 1989 UARG memorandum stating that "'routine' activities include only those that (1) are frequently done at that plant, (2) involve no major equipment, (3) are inexpensive, and (4) do not extend the life of a plant"); *Ohio Edison*, 276 F.Supp. 2d at 888 (finding that language of statute, regulations and preambles made it "ascertainably certain that only *de minimis* activities would serve to trigger the routine maintenance exemption").

(Cont'd)
states: "UARG believes that under the present EPA policy, in order to qualify for the routine maintenance exemption, the activity would have to be: frequent; inexpensive; able to be accomplished at a scheduled outage; will not extend the normal economic life of the unit; [and] be of standard industry design." *See* Comments of New York Attorney General Eliot Spitzer, *et al.*, on Proposed Amendments to Prevention of Significant Deterioration and Non-attainment New Source Review Requirements, Docket No. A-2002-04 (May 2, 2003), Ex. 14, pg. 4 (Joint App. 1077).

CONCLUSION

The petitions for writ of certiorari should be denied.

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Respectfully submitted,

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