No. 08-

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

STATE OF NEW JERSEY, ET AL.,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Air Act ("CAA") authorizes the U.S. Environmental Protection Agency to regulate hazardous air pollutant emissions from electric generating units ("EGUs") under CAA § 112 *only* where EPA determines, pursuant to CAA § 112(n), that "such regulation is appropriate and necessary." In December 2000, without notice-and-comment, the then-EPA Administrator issued a finding that regulation of EGUs was "appropriate and necessary" and added them to the list of source categories to be regulated pursuant to CAA § 112(c) and (d). In March 2005, EPA determined following rulemaking that the December 2000 finding "lacked foundation," concluded that regulation of EGUs was *neither* "appropriate" *nor* "necessary," and removed them from the CAA § 112(c) list of source categories. The D.C. Circuit held that EPA's 2005 "delisting" action was unlawful under the "plain language" of CAA § 112(c), and that EPA must proceed to regulate EGUs.

1. Whether the D.C. Circuit acted contrary to *Chevron* by focusing solely on the supposed meaning of CAA § 112(c) to find that EPA must regulate EGUs under CAA § 112(d), even though EPA determined under CAA § 112(n) that such regulation was neither "appropriate" nor "necessary."

2. Whether an outgoing EPA Administrator may, without notice-and-comment, require a subsequent Administrator to regulate EGUs under CAA § 112(d), despite the subsequent Administrator's determination after rulemaking that such regulation is not "appropriate and necessary."

PARTIES TO THE PROCEEDINGS

1. The following were petitioners in the consolidated proceeding, the judgment in which review is sought.

In No. 05-1097, the State of New Jersey, State of California, State of Connecticut, State of Maine, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New York, and State of Vermont.

In No. 05-1104, the Commonwealth of Pennsylvania, Department of Environmental Protection.

In No. 05-1116, the State of Delaware.

In No. 05-1118, the State of Wisconsin.

In No. 05-1158, the Chesapeake Bay Foundation, Inc., Conservation Law Foundation, and Waterkeeper Alliance.

In No. 05-1159, Environmental Defense, National Wildlife Federation, and Sierra Club.

In. No. 05-1160, the Natural Resources Council of Maine, Ohio Environmental Council, and U.S. Public Interest Research Group.

In No. 05-1162, the State of New Jersey, State of California, State of Connecticut, State of Maine, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of New York, Commonwealth of Pennsylvania, State of Vermont, and State of Wisconsin.

In No. 05-1163, the Natural Resources Defense Council.

In No. 05-1164, the Ohio Environmental Council, Natural Resources Council of Maine, and U.S. Public Interest Research Group.

In No. 05-1167, the Natural Resources Defense Council.

In No. 05-1174, the State of Illinois.

In No. 05-1175, the State of Minnesota.

In No. 05-1176, the State of Minnesota.

In No. 05-1183, the State of Delaware.

In No. 05-1189, the State of Illinois.

In No. 05-1263, the Mayor and City Council of Baltimore.

In No. 05-1267, the Chesapeake Bay Foundation, Inc., Environmental Defense, National Wildlife Federation, Sierra Club, and Waterkeeper Alliance.

In No. 05-1270, American Coal for Balanced Mercury Regulation, Alabama Coal Association, Coal Operators & Associates, Inc., Maryland Coal Association, Ohio Coal Association, Pennsylvania Coal Association, Virginia Coal Association, and West Virginia.

In No. 05-1271, ARIPPA.

In No. 05-1275, the Utility Air Regulatory Group.

In No. 05-1277, the United Mine Workers of America.

In No. 06-1211, the State of New Jersey, State of California, State of Connecticut, State of Delaware, State of Illinois, State of Maine, Commonwealth of Massachusetts, State of Minnesota, State of New Hampshire, State of New Mexico, State of New York, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, State of Wisconsin, and Michigan Department of Environmental Quality.

In No. 06-1220, the National Congress of American Indians, Little River Band of Ottawa Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Jamestown S'Klallam Tribe, Lac Courte Oreilles Bank of Lake Superior

Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Lower Elwha Klallam Tribe, Lummi Nation, Minnesota Chippewa Tribe, Nisqually Tribe, and Swinomish Indian Tribe Community.

In No. 06-1231, the American Nurses Association, the American Public Health Association, American Academy of Pediatrics, Chesapeake Bay Foundation, Inc., Conservation Law Foundation, Environmental Defense, National Wildlife Federation, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, U.S. Public Interest Research Group, and WaterKeeper Alliance.

In No. 06-1287, the Mayor and City Council of Baltimore.

In No. 06-1291, American Coal for Balanced Mercury Regulation, Alabama Coal Association, Coal Operators and Associates of Kentucky, Maryland Coal Association, Ohio Coal Association, Pennsylvania Coal Association, Virginia Coal Association, and West Virginia Coal Association.

In No. 06-1293, ARIPPA.

In No. 6-1294, The Alaska Industrial Development and Export Authority.

2. The following was respondent in the consolidated proceeding, the judgment in which review is sought.

United States Environmental Protection Agency.

3. The following was intervenor in support of respondent in the consolidated proceeding, the

judgment in which review is sought, and who files this petition.

The Utility Air Regulatory Group.

4. The following were intervenors in support of respondent in the consolidated proceeding, the judgment in which review is sought, and who do not join in this petition.

Duke Energy Indiana, Incorporated
Duke Energy Kentucky, Incorporated
Duke Energy Ohio, Incorporated
Edison Electric Institute
Florida Power & Light Company
National Mining Association
NRG Energy, Inc.
PPL Corp.
Producers for Electric Reliability
PSEG Fossil LLC
State of Alabama
State of Indiana
State of Nebraska
State of North Dakota
State of South Dakota
State of Wyoming
West Associates

5. The following was intervernor in support of petitioners in the consolidated proceeding, the judgment in which review is sought.

Adirondack Mountain Club
American Academy of Pediatrics

American Nurses Association
The American Public Health Association
Bay Mills Indian Community
City of Baltimore
Greater Traverse Band of Ottawa and Chippewa Indians
Jamestown S'Klallam Tribe
Lac Courte Oreilles Band of Lake Superior Chippewa Indians
Little River Band of Ottawa Indians
Little Traverse Bay Bands of Odawa Indians
Lower Elwha Klallam Tribe
Lummi Tribe
Michigan Department of Environmental Quality
Minnesota Chippewa Tribe
National Congress of American Indians
Nisqually Tribe
Physicians for Social Responsibility
State of Maryland
State of Rhode Island
Swinomish Indian Tribe Community

6. The following appeared as *amici* in support of respondent in the consolidated proceeding, the judgment in which review is sought.

The Washington Legal Foundation

The State of West Virginia, Department of Environmental Protection

DISCLOSURE STATEMENT

The Utility Air Regulatory Group ("UARG") is a non-profit, unincorporated organization of individual electric utilities and national trade associations. UARG has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

The Utility Air Regulatory Group ("UARG") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *New Jersey v. U.S. Environmental Protection Agency*, 517 F.3d 574 (D.C. Cir. 2008).

OPINION BELOW

The opinion of the D.C. Circuit is reported at 517 F.3d 574, 380 U.S. App. D.C. 134, and is reproduced in the Appendix ("App.") at pages 1a-19a. The orders on the petitions for panel and *en banc* rehearing, as well as the judgment of the D.C. Circuit, are included in the Appendix at pages 223a-224a, 225a-226a, and 227a-228a.

JURISDICTION

The D.C. Circuit entered its judgment on February 8, 2008. Timely petitions for panel and *en banc* rehearing were denied by orders entered on May 20, 2008. On August 14, 2008, this Court extended the deadline for the filing of the instant petition to and including September 17, 2008. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

This case involves portions of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7412; CAA § 112 (App. 235a-238a); the U.S. Environmental Protection Agency's December 2000 Regulatory Finding, 65 Fed.

Reg. 79,825 *et seq.* (Dec. 20, 2000) (App. 20a-43a); and the now-vacated Revision of December 2000 Regulatory Finding (the so-called "Delisting Rule"), 70 Fed. Reg. 15,994 *et seq.*, (March 29, 2005) (App. 44a-222a).

STATEMENT OF THE CASE

On February 8, 2008, the U.S. Court of Appeals for the D.C. Circuit struck down a final rule of the U.S. Environmental Protection Agency ("EPA" or "the Agency") that (i) removed electric generating units ("EGUs") from the list of source categories whose hazardous air pollutant ("HAP") emissions are to be regulated under CAA § 112(d); and (ii) established stringent requirements limiting EGU emissions of mercury under CAA § 111 of the Act. *New Jersey v. U.S. Environmental Protection Agency*, 517 F.3d 574 (D.C. Cir. 2008). The D.C. Circuit's decision ignores Congress' *explicit direction* to EPA *in CAA § 112(n)* that it regulate EGUs under CAA § 112 *only if* regulation is "appropriate" and "necessary" under that section, and EPA's express conclusion reached after extensive rulemaking that it had neither a legal nor a factual basis for regulating EGUs under CAA § 112.

Instead, the Court required EPA to proceed with a CAA § 112(d) rulemaking that the Agency had expressly found it lacked the authority to conduct. As Judge Tatel observed during oral argument, "maybe that's what Congress intended," *i.e.*, for EPA "to go through a standard setting process that the Agency itself admits is wrong." Oral Argument Transcript at 40, App. 232a.

Under this view of CAA § 112, Congress required promulgation of unlawful standards so that the Court could "invalidate . . . [them] under the statute" once promulgated. Oral Argument Transcript at 37, App.

230a. The decision is contrary to the requirements of the CAA and violates fundamental principles of administrative law and of statutory interpretation, as laid out by this Court in *Chevron v. NRDC*, 467 U.S. 837 (1984).

When Congress overhauled the CAA in 1990, it had a clear vision for controlling HAP emissions from EGUs and from other sources. In general, Congress provided that CAA § 112 regulation begins with identifying source categories which have at least one "major" source, then rulemakings to set stringent technology-based standards for those major source categories, and then further rulemakings to address any unacceptable residual risk from those source categories.

In contrast, Congress concluded that this general framework did not make sense for EGUs. Congress knew that other parts of the 1990 CAA Amendments, notably the Acid Rain program, would impose substantial emission reduction requirements on EGUs that would reduce indirectly EGU HAP emissions. As a result, the public-health implications of any remaining HAP emissions, as well as the efficacy and costs of additional control, required further study.

Consequently, Congress did not apply the new HAP-control framework to EGUs. Rather, it directed EPA in CAA § 112(n)(1)(A) to study EGU HAP emissions and to determine if further regulation of those emissions under CAA § 112 is "appropriate and necessary." At issue here is how EPA carried out this broad delegation of authority under CAA § 112(n)(1)(A).

In December 2000, in the closing hours of the Clinton Administration and *without notice and comment rulemaking*, EPA's Administrator announced that regulation of EGUs under CAA § 112 was appropriate

and necessary, and added EGUs to the list of source categories for regulation under CAA § 112. In that "notice of finding" under CAA § 112(n), EPA promised the public an opportunity for comment in the context of the CAA § 112(n) rulemaking required under CAA § 307(d)(1)(C) to establish emission standards for EGUs under CAA § 112.

EPA subsequently undertook that rulemaking, proposing to regulate EGUs under either CAA § 111 or CAA § 112 depending on its review of the December 2000 "notice of finding" under CAA § 112(n). At the end of this rulemaking, EPA found that the December 2000 finding "lacked foundation" and that regulation of EGUs under CAA § 112 was neither "appropriate" nor "necessary." The Agency nevertheless promulgated stringent emission reduction requirements under CAA § 111.

Without addressing the merits of EPA's CAA § 112(n) rulemaking determination, a panel of the D.C. Circuit found that the December 2000 "notice of finding" precluded subsequent EPA Administrators from any course of action other than one that would involve unlawful regulation of EGUs under CAA § 112(d) – *i.e.*, unlawful due to the absence of a CAA § 112(n) "appropriate and necessary" finding. As the statute and the long history of EPA's efforts to implement CAA § 112(n)(1)(A) show, however, the December 2000 finding could have no such effect. The D.C. Circuit erred in ignoring CAA § 112(n)'s threshold requirements and focusing exclusively on another provision of the statute (*i.e.*, CAA § 112(c)(9)) to require, under the guise of a *Chevron* step one analysis, future EPA Administrators to proceed with *unlawful* rulemaking.

The Clean Air Act

Section 112 was added to the CAA in 1970. The 1970 Act required EPA to make a risk-based determination in order to regulate substances as HAPs: EPA could regulate substances "reasonably . . . anticipated to result in an increase in mortality or an increase in serious . . . illness," to a level that protects public health with an "ample margin of safety." CAA § 112(a)(1) (1970). Under this provision, EPA regulated a number of HAPs emitted from industrial source categories other than EGUs. *See* 40 CFR Part 63.

As for EGUs, EPA found that the combustion of fossil fuels produces extremely small releases of a broad variety of substances that are present in trace amounts in fuels and that are removed from the gas stream by control equipment installed to satisfy other CAA requirements. EPA found that these HAP releases did not pose hazards to public health. *See* 48 Fed. Reg. 15,076, 15,085 (1983). In the case of mercury specifically, EPA found that "coal-fired power plants . . . do not emit mercury in such quantities that they are likely to cause the ambient mercury concentration to exceed" a level that "will protect the public health with an ample margin of safety." 40 Fed. Reg. 48,297-98 (1975) (mercury); 52 Fed. Reg. 8,725 (1987) (reaffirming mercury conclusion).

In 1990, Congress expressed general concern that the risk-based approach to HAP regulation of the 1970 CAA was time-consuming and expensive to implement for non-EGUs. *See* S.Rep. No. 101-228, at 131-33 (1989), 1990 U.S. Code Cong. & Admin. News at 3385, 3516-18. Congress therefore designated 189 chemicals as HAPs under CAA § 112(b) and instructed EPA in CAA § 112(c) to list categories of "major" stationary sources of HAP emissions for the

development of control technology-based emission standards under CAA § 112(d). These technology-based standards are referred to as "maximum achievable control technology" or "MACT" standards and are based on the emission reductions achieved by the best controlled similar sources. CAA § 112(d).

To remove a category or subcategory of major sources from this technology-based program for a non-carcinogen (such as mercury), EPA must make a risk-based determination that "no source in the category . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result." CAA § 112(c)(9). For major source categories other than EGUs, therefore, the 1990 CAA Amendments changed the risk-based determination from a threshold for HAP regulation to a criterion for "de-listing" a major source category.

By contrast, in CAA § 112(n)(1)(A), Congress specifically directed that EPA shall regulate EGU HAP emissions under CAA § 112 *only after* completion of a study of the "hazards" to public health "reasonably anticipated to occur" as a result of EGU HAP emissions, and *only after* the Agency had considered the impact of "imposition of the requirements of this Act" on those emissions. As part of that evaluation, Congress directed EPA to "develop and describe" "alternative control strategies" for any HAP emissions that "may warrant regulation under this section." Finally, Congress provided that EPA shall regulate HAP emissions from EGUs under CAA § 112 only to the extent it found, *after rulemaking*, that regulation was "appropriate and necessary after considering the results of the study" required by CAA § 112(n)(1)(A).

In implementing provisions such as CAA § 112, CAA § 307(d) provides rulemaking procedures that

apply in lieu of the Administrative Procedures Act rulemaking requirements. In CAA § 307(d)(1)(C), Congress directed that these rulemaking procedures "appl[y] to . . . any regulation under section 112 . . . (n)."

In sum, Congress recognized that EGUs are specifically and extensively regulated under various CAA programs. It therefore treated EGUs differently from other source categories under CAA § 112 by providing that EPA can regulate EGU HAP emissions under CAA § 112 only if it determines after rulemaking, and after considering the impact of other CAA requirements, that regulation of specific HAP emissions is "appropriate and necessary" to avoid "hazards" to "public health."

Mercury

Mercury is a naturally occurring element in the Earth's crust that is released into the environment as a result of both natural processes such as volcanoes, oceans, and soils, and manmade processes such as gold and ore mining, municipal and medical waste incineration, fossil fuel combustion, and chlorine manufacturing. EPA has estimated that total global emissions of mercury are about 5,000 tons per year: 1,000 tons from natural sources, 2,000 tons from manmade sources and 2,000 tons from release of mercury into ambient air that has been deposited on soil or in water. 69 Fed. Reg. 4,658 (2004). Mercury is a global pollutant. Much of the mercury emitted enters the global pool where it circulates in the atmosphere for up to one year before depositing on soil or in water.

EPA estimates that U.S. coal-fired EGUs emit about 45 tons of mercury annually, or about 1% of

worldwide mercury emissions. Furthermore, EPA estimates that only about 30% of EGU mercury emissions (13.5 tons) deposits in the U.S. (By comparison, about 75% of the mercury that deposits in the U.S. originates from sources outside the U.S.) As a result, U.S. coal-fired EGUs contribute only about 8% of the total annual mercury deposited across the U.S. *See* 70 Fed. Reg. 16,019, App. 155a.

In nature, mercury is found in elemental, organic (methylmercury) and inorganic forms. 69 Fed. Reg. 4657. The primary route of human exposure to mercury is by consumption of methylmercury in fish. 69 Fed. Reg. 4,658. Methylmercury is principally formed by microbial action in the top layers of sediment in water bodies, after mercury has precipitated from the air and deposited into those waters. Once formed, methylmercury bioaccumulates in the aquatic food chain, ultimately reaching large predator fish consumed by humans. *See* Utility Study, p. 7-1.

Fossil fuel combustion by EGUs produces trace amounts of three forms of mercury: elemental, particulate, and gaseous ionic. 70 Fed. Reg. 16,011, App. 120a. EGUs do not produce or emit organic forms of mercury, like methylmercury. As a result, the mercury deposited in the U.S. as a result of EGU emissions must be transformed in the environment into methylmercury before it can enter the food chain and contribute to human exposure. As EPA recognizes, only a fraction of the EGU mercury emissions deposited in the U.S. actually enters water bodies, and only a fraction of that deposition is transformed into methylmercury. *Id.* at 16,020, App. 157a.

CAA § 112(n)(1)(A) Rule

Shortly after enactment of the 1990 CAA Amendments, EPA began updating information on the types and amounts of HAPs emitted from the combustion of coal, oil and gas by EGUs. EPA also collected information on the health effects of those HAPs, and conducted modeling to determine how those emissions may affect public health. The products of these efforts were reported in the Mercury Study and the Utility Study, published in December 1997 and February 1998, respectively. The Utility Study did not contain a CAA § 112(n)(1)(A) regulatory determination whether regulation of certain HAPs under CAA § 112 was "appropriate and necessary." Utility Study, ES-1. Instead, EPA stated that it "believes that mercury from coal-fired utilities is the HAP of greatest potential concern and merits additional research and monitoring" to inform a regulatory determination. Utility Study, p. ES-27.

Following issuance of the Utility Study, EPA undertook several efforts to advance its understanding of mercury health effects and of the quantity and form of mercury emissions from coal-fired EGUs. At Congress' direction, EPA asked the National Academy of Sciences ("NAS") to review the toxicological effects of methylmercury and to make recommendations regarding an appropriate reference dose ("RfD"). The NAS National Research Council panel found that EPA's current RfD for methylmercury was "scientifically justified." EPA also issued two information collection requests to EGUs. The first required all coal-fired EGUs to collect coal samples throughout 1999 and to analyze those samples for mercury content. The second required approximately 80 EGUs to

conduct stack sampling of their mercury emissions over a three-day period.

On December 14, 2000, days before the Clinton Administration left office and well before EPA could complete the data collection and research it had previously said was necessary to make a CAA § 112(n)(1)(A) determination, then-departing EPA Administrator Browner published, without any rulemaking under CAA § 307(d)(1)(C), a "notice of regulatory finding." This "notice" announced her "conclusion" that regulation of mercury emissions from coal-fired EGUs was "appropriate and necessary" under CAA § 112. 65 Fed. Reg. 79,825 (Dec. 20, 2000), App. 20a. Because necessary research had not been completed, the notice neither described the increment of emissions whose control was "necessary and appropriate" under CAA § 112, nor the "alternative control strategies warranted to address those emissions under this section." Indeed, Administrator Browner acknowledged that EPA could not at that time quantify the amount of methylmercury (the form of mercury of health concern) in U.S. fish attributable to mercury emissions from domestic coal-fired EGUs. 65 Fed. Reg. 79,827, App. 27a-28a.

Administrator Browner explained that it was "unnecessary to solicit additional public comment on today's finding [because] . . . [t]he regulation developed subsequent to the finding will be subject to public review and comment." 65 Fed. Reg. at 79,831, App. 42a-43a; *cf. National Asphalt Pavement Ass'n v. Train,* 539 F. 2d 775, 779 nn. 1 & 2 (D.C. Cir. 1976) ("The preliminary action of the Administrator in listing a particular source category is action taken in the course of promulgating final standards. . . . [S]ince the Administrator can propose regulations only for a source category on his list . . . we think the Clean Air

Act requires an opportunity for comment on the designation issue."). In that future rulemaking, she represented, EPA would also consider the "effectiveness and costs of controls" for mercury, and alternative control strategies, including "economic incentives such as emissions trading." 65 Fed. Reg. 79,830, App. 39a, 41a. As EPA explained, "judicial review would be available on both the listing decision and the subsequent regulation" at the end of that rulemaking. *Id.* at 79,831, App. 42a.

Immediately following its publication, UARG sought review of the December 2000 notice in the D.C. Circuit. UARG intended to argue that Administrator Browner's "appropriate and necessary" finding was not factually justified and that EPA had violated CAA §§ 112(n)(1)(A), and 307(d) by issuing the finding and by purporting to list EGUs under CAA § 112(c) as a "major" source category based on that finding. In response, EPA filed a motion to dismiss and advised the court that "[b]ecause the decision to add coal and oil fired electric utility steam generating units to the source category list is *not yet final agency action*, it will be among the matters subject to further comment in the subsequent rulemaking." EPA's Motion to Dismiss (April 9, 2001) at 9 (emphasis added). On July 26, 2001, the D.C. Circuit granted EPA's motion to dismiss. Order, App. 233a-234a.

Following the December 2000 notice, EPA conducted the comprehensive CAA rulemaking it had promised, addressing former Administrator Browner's "appropriate and necessary" finding, the CAA § 112(c) listing decision, and regulatory options. Regulatory options considered by EPA in that rulemaking included: (1) no further regulation of EGU mercury emissions, *or* (2) adoption of legislative rules regulating EGU mercury emissions under the MACT pro-

visions of CAA § 112(d), *or* (3) adoption of legislative rules under CAA § 112(n) addressing any EGU emissions that are "appropriate and necessary" to regulate, *or* (4) adoption of legislative rules under other sections of the Act (e.g., CAA § 111) that make further controls inappropriate and unnecessary under CAA § 112.

EPA also completed extensive scientific and technical studies to address the areas of research need identified in the Utility Study. Commentors submitted detailed technical information on EGU mercury emissions and on the health consequences of those emissions. This process resulted in a rulemaking record that is the most detailed technical record ever developed by EPA under CAA § 112.

In particular, EPA conducted extensive modeling to analyze how changes in mercury emissions from coal-fired EGUs would affect U.S. mercury deposition and methylmercury levels in fish for a range of cases. EPA's analyses included an alternative scenario assuming zero mercury emissions from all EGUs. The modeling showed that total mercury deposition in the U.S. is not significantly affected by mercury deposition from EGUs, and that EGUs contribute a "relatively small percentage" to fish tissue methylmercury levels in the U.S. 70 Fed. Reg. 16,020, App. 158a. More importantly, the modeling showed that, quite apart from any CAA § 112 regulation, the implementation of other requirements of the Act (including CAA § 110 state implementation plans, the CAA § 111 new source performed standards, and the Title IV Acid Rain Program) produces the vast majority of the reductions in U.S. mercury deposition and in U.S. methylmercury levels in fish tissue that can be achieved by controlling mercury emissions from coal-fired EGUs.

Thus, EPA concluded that "the December 2000 'appropriate' finding lacked foundation because it was not based on the level of utility Hg emissions remaining 'after imposition of the requirements of th[e] Act.'" 70 Fed. Reg. 16,004, App. 91a. EPA explained that because "we now recognize the availability of these other statutory provisions . . . we further conclude today that it is not necessary to regulate" EGUs under CAA § 112. *Id.* at 16,005, App. 97a. At the conclusion of this rulemaking, EPA removed EGUs from the CAA § 112(c) list because regulation under CAA § 112 was neither "appropriate" nor "necessary" and therefore the December 2000 notice "lacked [legal] foundation." *Id.* at 15,994, App. 44a.

The Clean Air Mercury Rule

On the same day EPA issued its CAA § 112(n)(1)(A) rule and removed EGUs from the list of major source categories under CAA § 112, the Agency decided instead to regulate mercury emissions from coal-fired EGUs under CAA § 111. 70 Fed. Reg. 28,606 (May 18, 2005). EPA interpreted the term "standard of performance" in CAA § 111(a) to include emission trading systems and determined that the "best system of [mercury] emission reduction" for existing EGUs was a national cap-and-trade program that ensured that (i) mercury emissions were limited in accordance with the "best system" of emissions control, and (ii) that mercury emissions from coal-fired EGUs – both existing and new – were capped so total emissions could never increase in the future as new facilities were built to meet increased electricity demand. 70 Fed. Reg. 28,616, 28,617. The result was the Clean Air Mercury Rule ("CAMR").

CAMR set output-based emission limits for new EGUs and established a nationwide cap-and-trade program for mercury emissions from all coal-fired EGUs. Total mercury emissions from all EGUs were capped at 38 tons per year ("tons/yr") in 2010 and 15 tons/yr beginning in 2018. CAMR's cap-and-trade program is implemented through state plans developed under CAA § 111(d). Based on the extensive analyses performed for the CAA § 112(n)(1)(A) regulatory determination, EPA found that the additional mercury controls required by CAMR would result in "relatively small" additional reductions in mercury deposition in the United States when compared to the imposition of other CAA requirements, and that going beyond CAMR to zero emissions would produce little or no health benefits. 70 Fed. Reg. 16,019-20, App. 156a.

Petitions for Reconsideration

After EPA published its CAA § 112(n)(1)(A) rule and CAMR, several parties filed petitions seeking reconsideration of both CAMR and EPA's CAA § 112(n)(1)(A) rule. On October 28, 2005, EPA agreed to reconsider these decisions. EPA requested additional comment on several aspects of its CAA § 112(n)(1)(A) rule, including its legal interpretation of CAA § 112(n)(1)(A), and the detailed technical and scientific analyses of the impact of EGU mercury emissions on public health. 70 Fed. Reg. 62,200.

After considering the petitions, EPA produced a detailed 306-page response to comments. Based on the petitions and the additional comments, EPA found no reason to make any substantive revisions to its CAA § 112(n)(1)(A) rule or to CAMR and therefore reaf-

firmed its rulemaking determination. 71 Fed. Reg. 33,388 (June 9, 2006).

The D.C. Circuit's Decision

In vacating both the Delisting Rule and CAMR, the D.C. Circuit never questioned EPA's March 2005 rulemaking determination (i) that the December 2000 notice of regulatory finding, made without rulemaking, "lacked foundation," and (ii) that regulation of EGUs under CAA § 112 is neither "appropriate" nor "necessary." Instead, the court focused exclusively on another CAA provision, CAA § 112(c)(9), that deals with the "delisting" of lawfully listed source categories.

Section 112(c)(9) provides that once listed "the Administration may delete any source category from this list under this subsection" if he makes a specific risk-based determination. In the case of non-carcinogens (such as mercury), this determination involves a showing that "no source in the category . . . [will] exceed a level which is adequate to protect public health with an ample margin of safety."

According to the D.C. Circuit, this statutory language establishes, as a *Chevron* step one matter, that Administrator Browner's eleventh-hour CAA § 112(n) "notice of regulatory finding," made without the rulemaking required under CAA § 307(d)(1)(C), had a legally binding effect on all future actions by EPA. According to the court, this "finding" precluded the Agency from adopting a different position in the subsequent rulemaking promised by Administrator Browner and required by the CAA. According to the court, "[s]ection 112(n)(1) governs how the Administrator decides whether to list EGUs," but "says nothing about delisting EGUs." 517 F.3d at 582, App. 16a.

By contrast, because "section 112(c)(9) governs the removal of '*any* source category' from the section 112(c)(1) list," the court found that once the December 2000 "notice of regulatory finding" was issued, "the only way EPA could remove EGUs from the . . . list was by satisfying section 112(c)(9)'s requirements." 517 F.3d at 582, App. 15a (emphasis in original). As a result, as Judge Tatel observed during oral argument, the Agency, "can't correct its own mistake" in the rulemaking that follows its "notice of regulatory finding," undertaken to address regulatory options. Oral Argument Transcript at 36, App. 229a. Rather, it must promulgate *unlawful* rules so that the *court* (not the Agency) can correct "the errors in a challenge to th[ose] emission standards." *Id.*

REASONS FOR GRANTING THE PETITION

By its express terms, the CAA states that EPA shall regulate HAP emissions from EGUs under CAA § 112 *only after* the Agency has determined that "such regulation is appropriate and necessary." On March 29, 2005, the Agency concluded following notice-and-comment rulemaking that regulation of EGUs under CAA § 112 was *not* "appropriate and necessary." EPA therefore removed EGUs from the list of major source categories to be regulated under CAA § 112, and instead issued a stringent CAA § 111 regulatory program for EGUs.

In its decision, the D.C. Circuit invoked *Chevron* step one to conclude that EPA's March 29, 2005 rulemaking decision to remove EGUs from the CAA § 112(c) list, based on the Agency's CAA § 112(n) determination that regulation of EGUs under CAA § 112 was neither "appropriate" nor "necessary," was unlawful under the "plain text and structure of sec-

tion 112."[1] 517 F.3d at 583, App. 19a. According to the court, three words in CAA § 112(c)(9) – "any source category" – compel to EPA to adopt a standard under CAA § 112(d) that is not authorized under CAA § 112(n), a standard that would therefore have to be vacated on subsequent review by the D.C. Circuit.

This case is but the latest and perhaps most striking example of recent decisions by appellate courts, and by the D.C. Circuit in particular, under which specific meaning is given to fragments of statutory language in order to find an unambiguous congressional intent that could not be discerned if traditional canons of statutory construction were applied to the statutory provision as a whole. This results-oriented approach to statutory construction using *Chevron* step one allows the court to conclude that the "plain language" of the CAA compels a policy result that Congress could have never imagined, much less intended the Agency to pursue.

Years ago, this Court found it necessary to admonish the D.C. Circuit that the "fundamental policy questions appropriately resolved in Congress . . . are *not* subject to re-examination in the federal courts under the guise judicial review of agency action." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (emphasis in original). "Administrative decisions," the Court said, should not be set

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[1] The D.C. Circuit expressly declined even to "reach [the] contention that . . . EPA was arbitrary and capricious in reversing its determination that regulating EGUs under section 112 was 'appropriate and necessary.'" *See* 517 F.3d at 581, App. 13a.

aside "simply because the [reviewing] court is unhappy with the result reached." *Id.*

Seemingly, a reminder of these principles is today in order. In vacating the Delisting Rule and CAMR, the D.C. Circuit has so far departed from the accepted and usual course of judicial proceedings under *Chevron* that it calls for the exercise of this Court's supervisory power.

The D.C. Circuit is afforded *exclusive jurisdiction* to review the validity of legislative rules promulgated by EPA to implement the CAA, *see* CAA § 307(b), as well as rules, orders and actions by other federal agencies under many other federal statutes.[2] This imposes on this Court the responsibility to give heightened scrutiny to the D.C. Circuit's exercise of its judicial review function, recognizing that the D.C. Circuit's views as to the meaning of authorizing statutes – because that court's word is final absent review by this Court – will necessarily have an enormous impact on the shape and direction of many regulatory initiatives. Certiorari is needed to ensure that the respective roles of agencies and reviewing courts in our constitutional system are respected.

Finally, certiorari is needed to address whether a non-final notice and finding that regulation is au-

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[2] *See, e.g.*, 47 U.S.C. § 402(b) (Federal Communications Commission orders); 42 U.S.C. § 300j-7(a) (EPA regulations under the Safe Drinking Water Act); 42 U.S.C. § 6976(a)(1) (EPA regulations under the Resource Conservation and Recovery Act): 42 U.S.C. § 9613(a) (EPA regulations under the Comprehensive Environmental Response, Compensation, and Liability Act); 15 U.S.C. § 766(c) (Federal Energy Regulatory Commission regulations).

thorized, issued by an outgoing administration without rulemaking, can compel a new administration to adopt a regulatory program found to be unauthorized following notice and comment rulemaking. A fundamental principle of administrative law is that an agency can only bind itself in the future through legislative rulemaking. Equally fundamental is the principle that an agency is required to correct a legal error where a rulemaking record establishes that an agency's preliminary findings were unsupported. Both principles were ignored by the D.C. Circuit.

As a consequence, the court's decision deprives UARG of a timely opportunity to have the legal deficiencies of EPA's December 2000 notice of finding and listing judicially reviewed. When UARG sought review of EPA's December 2000 actions in February 2001, the court dismissed UARG's petition after EPA averred that its December 2000 notice and listing were not final agency action, and that they would be the subject of comment during subsequent rulemaking. After UARG convinced EPA that its December 2000 CAA § 112(n) finding was legally and factually in error, the D.C. Circuit again refused to resolve the issue of the legal adequacy of EPA's December 2000 notice of finding, but nevertheless found that that notice compelled future EPA action to adopt an *invalid* CAA § 112(d) MACT standard for EGUs. The court's decision requires UARG to participate in many more years of unnecessary rulemaking activities simply because the court has refused to address EPA's authority to list EGUs in the first place.

I. CERTIORARI IS NEEDED TO ADDRESS THE D.C. CIRCUIT'S NEW APPROACH TO STATUTORY CONSTRUCTION, WHICH CONFLICTS WITH *CHEVRON*.

Under CAA § 112(n)(1)(A), EPA may regulate EGUs under CAA § 112 *only if* the Agency finds that such regulation is "appropriate and necessary." Notwithstanding EPA's having determined under CAA § 112(n)(1)(A) that it had no legal or factual basis for regulating EGUs under CAA § 112, the D.C. Circuit held that the words "any source category" in CAA § 112(c)(9) required the completion of the very MACT standard-setting rulemaking under CAA § 112(d) that the Agency had expressly found was neither "appropriate" nor "necessary." As Judge Tatel observed during oral argument, Congress used these three words to mandate that EPA "go through a standard setting process that the Agency itself admits is wrong," leaving it to the court later to "invalidate" the resulting unlawful MACT standard that Congress supposedly directed EPA to develop. Oral Argument Transcript at 40, App.232a.

This case is the latest in a series of recent appellate decisions under which specific meaning is given to fragments of statutory language in order to find an unambiguous congressional intent that could not be discerned from the statutory provision as a whole. For example, in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), the D.C. Circuit found that "the word 'any' before a phrase with several common meanings" eliminates the agency's discretion to interpret that phrase to select among those meanings, regardless of the statutory definition "taken as a whole." 443 F.3d at 885 and 888 n.4 (D.C. Cir. 2006). In *South Coast Air Quality Management District v. EPA*, 472 F.3d

882 (D.C. Cir. 2006), the D.C. Circuit found that the word "control" unambiguously requires EPA to include in the definition of that term not only pollution control requirements, but "penalties, rate-of-progress milestone, [and] contingency plans." 472 F.3d at 900. In *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006), the D.C. Circuit found that the word "daily" must be interpreted by EPA as a 24-hour measurement of effluent discharges as opposed to other measures of "daily" discharges. 446 F.3d at 142. Most recently, in *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008), two judges on a D.C. Circuit panel rejected EPA's interpretation of the CAA based on the conclusion that the words "each permit" evinced an unambiguous command. 536 F.3d at 678. The dissenting judge also employed a *Chevron* step one analysis to cite other broader provisions in the CAA that he believed supported EPA's action. 536 F.3d at 680-82. That Congress could so often convey unambiguous intent on such complex subjects through isolated words or fragments of phrases defies credulity.

Similarly, in this case, the entirety of the D.C. Circuit's decision boils down to a fragment of a phrase: "because Section 112(c)(9) governs the removal of '*any* source category' from the section 112(c)(1) list," once the Administrator listed them under section 112(c)(1)" in December 2000, EPA "had no authority to delist them without taking the steps required under section 112(c)(9)." *See* 517 F.3d at 582, 581, App. 15a, 14a (emphasis in original). As a result, even though EPA found after rulemaking that the December 2000 notice of regulatory finding and listing "lacked foundation" and that regulation of EGUs under CAA § 112 was neither "appropriate" nor "necessary," the Agency's "purported removal of EGUs from the sec-

tion 112(c)(1) list" without making the CAA § 112(c)(9) findings for delisting, according to the court, "violated the CAA's plain text and must be rejected under step one of *Chevron*." *Id.* at 582, App. 15a.

In *Chevron*, this Court enunciated the now-familiar approach to judicial review of an agency's interpretation of a statute it is responsible for implementing: "First, always, is the question whether Congress has spoken to the precise question at issue." 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter," for the reviewing court, like the agency before it, "must give effect to the unambiguously expressed intent of Congress." *Id.* If, however, "Congress has not directly addressed the precise question at issue" – because the statute is "silent or ambiguous with respect to the specific issue" – the "question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* In the latter case, "federal judges . . . have a duty to respect legitimate policy choices" made by the agency. *Id.* at 866.

The judiciary is the "final authority on issues of statutory construction." 467 U.S. at 843 n.9. Exercising this authority with care is particularly important for the D.C. Circuit, because it is charged with exclusive jurisdiction to review many of the legislative rules issued by EPA and other agencies. In exercising this authority, this Court has made clear that the "court . . . employ[s] traditional tools of statutory construction . . . [to] ascertain[] whether . . . Congress had an intention on the precise question at issue." *Id.* at 843 n.9 (emphasis added).

Application of "traditional tools of statutory construction" requires a court to examine both the statutory context and the history of a word or phrase. In

particular, the "meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate . . . the true meaning." 467 U.S. at 861. For that reason, a reviewing court "should not confine itself to examining a particular statutory provision in isolation." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *see also Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). In other words, "[s]tatutory construction" is a "holistic endeavor," *United Savings Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988), a characterization that reflects the "cardinal rule" that a "statute is to be read as a whole," since the "meaning of statutory language, plain or not, depends on context." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted).

In this case, the court's gaze never deviated from three words – "any source category" – as the basis for its holding that EPA's decision "violated the CAA's plain test and must be rejected under step one of *Chevron*." 517 F.2d at 582, App. 15a. Had the court read CAA § 112 "as a whole," it could not have concluded that, even after determining in March 2005 that regulation of EGUs under CAA § 112 was not "appropriate and necessary," the Agency was nevertheless precluded from removing EGUs from the CAA § 112(c) source list.

To begin with, the D.C. Circuit's holding ignores the plain language of CAA § 112(n)(1)(A), which clearly and unambiguously communicates Congress's intent that EPA is to regulate EGUs under CAA § 112 only if the Agency "finds such regulation is appropriate

and necessary." Notably, the D.C. Circuit did not take issue with EPA's decision, as part of its March 2005 Delisting Rule, that former Administrator Browner's December 2000 regulatory notice "lacked foundation," and that EPA had subsequently determined that regulation of EGUs under CAA § 112 was not "appropriate and necessary." Indeed, the court expressly declined to reach the petitioners' challenge to that aspect of the Delisting Rule.

Instead, the panel reasoned that CAA § 112(n)(1)(A) "governs how the Administrator decides whether to list EGUs," and that it "says nothing about delisting EGUs." *See* 517 F.3d at 582, App. 16a. But this is no answer. As the language of CAA § 112(n)(1)(A) makes clear, the "appropriate and necessary" finding is the prerequisite for EPA's regulating EGUs "under this section" – *i.e.* under CAA § 112 itself. Under the plain language of the CAA, EGUs cannot simultaneously be listed under CAA § 112(c) – and, thus, subject to regulation under CAA § 112(d) – and at the same time have been found by EPA not to warrant regulation under CAA § 112, based on the Agency's determination that regulation of EGUs is not "appropriate and necessary." Yet that anomalous situation is precisely what the D.C. Circuit's decision has created. *Chevron* step one does not allow that result, much less, as the court found, compel it.

Second, even when read in isolation, CAA § 112(c)(9)(B), does not say what the D.C. Circuit believed it to say. The court read subparagraph (9)(B) as if it provides that EPA "may delete any source category from the list" under subsection (c) ***only*** where either of the criteria set forth in clauses (i) or (ii) is satisfied. But, by its plain terms, subparagraph (9)(B) says no such thing, nor can the provision be plausibly construed in such a fashion. To the con-

trary, subparagraph (b)(9)(B) addresses the situation where a source category *otherwise properly listed* under subsection (c) may nevertheless be removed from the list applying a risk-based test – and thereby avoid being subject to a MACT standard established under subsection (d).

In other words, the provisions of subparagraph (9)(B) have nothing whatsoever to do with EPA's authority to police the inclusion and deletion of major sources that may or may not be properly listed under subsection (c). Rather, CAA § 112(c)(9)(B) reflects Congress's intent that an "off-ramp," as it were, be afforded for those categories of major sources for which establishment of a MACT standard under subsection (d) would not be warranted, based on a determination by EPA that the sources within the category do not present a significant risk to public health or to the environment. The D.C. Circuit's contrary conclusion that the provisions of subparagraph (c)(9)(B) represent a "comprehensive delisting process"[3] that serve as the *only* means by which EPA is authorized to remove major sources from the subsection (c) list is itself contrary to the plain language of the state.

For example, what of the situation where EPA determines that a category initially listed under CAA § 112(c) should be deleted from this list due to the Agency's having subsequently learned that, in fact, the category in question contains no "major sources" warranting its listing? Nothing on the face of CAA § 112(c)(9)(B) speaks to that situation, but Congress could not have intended to restrain EPA's authority to

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[3] *See* 517 F.3d at 582, App. 16a.

revise the source category listing in the face of later-developed information indicating that the initial listing of a particular category was incorrect. To the contrary, other language in subsection (c) makes it perfectly clear that EPA has such authority.

Specifically, CAA § 112(c)(1) provides that EPA "shall publish, and shall from time to time, if appropriate, *revise, in response to public comment or new information*, a list of all categories and subcategories of major sources and area sources." (emphasis added). It is hard to imagine a clearer indication that Congress expected that EPA would and should periodically revise the subsection (c) source category list as "appropriate," based on "public comment or new information," but the D.C. Circuit steadfastly ignored this language even as it was purporting to ferret out "unambiguously expressed" congressional intent on the face of CAA § 112.

Indeed, when EPA pointed out to the D.C. Circuit that the Agency had in the past revised the source category list to remove certain previously-listed categories upon determining that, in fact, the category contained no sources that emitted at the "major source" thresholds, and that this underscored EPA's authority to remove EGUs from the listed based on its March 2005 determination that the December 2000 "appropriate and necessary" finding "lacked foundation," the court responded that "previous statutory violations cannot excuse the one now before the court." *See* 517 F.3d at 583, App. 18a But this retort is circular nonsense, as the only basis for the D.C. Circuit's assumption that such prior action by EPA constituted a "statutory violation" is the court's own mistaken conclusion, based on its misplaced reading of a snippet of the language of CAA § 112(c), that the

Agency had no such authority to correct mistakes in the CAA § 112(c) list based on "new information."

Finally, the D.C. Circuit's decision fails altogether to address the point that, regardless whether then-Administrator Browner's December 2000 "finding" that regulation of EGUs was "appropriate and necessary" was substantively valid, her purported listing of EGUs under CAA § 112(c) was *per se* unlawful under the plain language of the Act. That is, an affirmative finding under CAA § 112(n)(1)(A) does *not* automatically entail that EGUs must be listed under CAA § 112(c). By its plain terms, CAA § 112(n)(1)(A) merely provides that EGUs are to be regulated "under this section" if such a finding is made; it does not specify that such regulation is to take place, or must take place, pursuant to the source category listing and MACT standard-setting procedures laid out in CAA § 112(c) and (d).

Had the D.C. Circuit employed the "traditional tools of statutory construction" in assessing what Congress intended under CAA § 112 (as *Chevron* directs), read the statute "as a whole," and looked to the "provisions of the whole law, and to its object and policy," it could not have concluded that, once listed, EGUs could only be removed from the CAA § 112(c) list through EPA's making one of the showings described by the provisions of CAA § 112(c)(9)(B). After all, if then-Administrator Browner's purported listing of EGUs was itself unlawful under the CAA, it could not possibly be the case that CAA § 112(c)(9)(B) provides the "only" means by which EPA could "undo" that illegal action.

II. CERTIORARI IS NEEDED TO ADDRESS WHETHER A DEPARTING EPA ADMINISTRATOR CAN COMPEL FUTURE AGENCY REGULATION WITHOUT RULEMAKING.

The Clean Air Act and similar statutes are replete with provisions that condition regulation on specific statutory findings. Rulemaking is the procedure prescribed by Congress either to transform a preliminary finding into the predicate for a binding regulatory program or to abandon that preliminary finding as unsupported. If preliminary findings announced without rulemaking could compel future administrations to establish new regulatory programs, then new regulatory policy could be mandated without any accountability or opportunity for correcting that finding. That is precisely the result reached by the D.C. Circuit here. According to the D.C. Circuit, Administrator Browner in December 2000 successfully compelled the incoming administration to promulgate regulations under CAA § 112(d) merely by issuing, without rulemaking, a "notice of regulatory finding" under CAA § 112(n) and a listing of EGUs under CAA § 112(c).

In this case, there is no dispute that, when EPA issued its December 2000 notice, it had not undertaken rulemaking, it had not completed "necessary" studies, it had not considered all of the specific factors required to be considered by CAA § 112(n)(1)(A), and it had not justified that MACT controls under CAA § 112(c) and (d) were the proper way to address the hazards to public health it had identified as warranting regulation. UARG challenged that notice in early 2001, but, consistent with longstanding D.C. Circuit case law postponing judicial review of listing

decisions until the conclusion of rulemaking on whether to promulgate emission standards,[4] and in response to EPA's representations that the CAA § 112(n) finding would not be final until completion of future notice and comment rulemaking, the D.C. Circuit dismissed UARG's petition to review the December 2000 "notice of regulatory finding."

Following the promised CAA § 112(n) rulemaking, EPA corrected the preliminary, nonfinal finding and listing decision made by Administrator Browner, and announced that regulation of EGUs under CAA § 112 was neither "appropriate" nor "necessary." Under the D.C. Circuit's decision, however, a subsequent Administrator cannot correct an erroneous listing that was based on a preliminary CAA § 112(n) finding subsequently determined to have been unfounded. Instead, the new Administrator must proceed to establish a MACT standard for EGU's under CAA § 112(d), notwithstanding a final CAA § 112(n) finding that will necessarily render those standards a nullity upon subsequent review in the D.C. Circuit.

Whether unreviewable preliminary action taken without notice and comment rulemaking can preclude reconsideration of that action following rulemaking and can compel establishment of a new regulatory program is a question of no small importance to the future of administrative law and executive branch accountability. It is also a question that UARG believed that the D.C. Circuit resolved decades ago in one of Justice Scalia's last opinions on that court.

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[4] *See, e.g., National Asphalt Pavement Ass'n*, 539 F.2d 775; *see also* CAA § 112(e)(4).

In *Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986), the D.C. Circuit addressed whether a letter sent by the EPA Administrator to the Secretary of State in the last days of the Carter Administration, in which the outgoing Administrator concluded that acid deposition was endangering public health in the U.S. and Canada, obligated future EPA Administrators to take regulatory action under CAA § 115. The court found that an agency statement that binds subsequent Administrators is a statement of future effect designed to implement law or policy, and is therefore a "rule." *Id.* at 1446. Because the Administrator had not issued the letter through notice and comment rulemaking, this Court found that it was not a "rule" and, therefore, could have no binding effect. *Id.* at 1447.

Similarly, when EPA has taken action that, when completed, has future regulatory consequences, like "approval" of a State Implementation Plan (which transforms state-adopted regulations into federally enforceable ones), the court of appeals have uniformly held that EPA must do more than simply publish a notice in the *Federal Register*. Instead, EPA must conduct a "notice and comment" rulemaking in order to create enforceable requirements for the future.[5] For the foregoing reasons, this Court should grant certiorari to address whether agency "findings," issued without rulemaking, can be used to bind incom-

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[5] *See, e.g., Duquesne Light Co. v. EPA*, 166 F.3d 606, 611 (3d Cir. 1999) ("Each SIP must be submitted to EPA for review and approval. The [CAA] requires a notice and comment period.").

ing administration's to their predecessor's policy preferences.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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