No.

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF NEW JERSEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Environmental Protection Agency may remove power plants from a list of source categories to be regulated under 42 U.S.C. 7412 when it determines that regulation under that provision is not appropriate or necessary.

PARTIES TO THE PROCEEDING

The petitioner in this Court, who was the respondent in the court of appeals, is the United States Environmental Protection Agency.

The respondents in this Court who were petitioners in the court of appeals are 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; State of Vermont; Commonwealth of Pennsylvania, Department of Environmental Protection; State of Delaware; State of Wisconsin; Chesapeake Bay Foundation, Inc.; Conservation Law Foundation; Waterkeeper Alliance; Environmental Defense; National Wildlife Federation; Sierra Club; Natural Resources Council of Maine; Ohio Environmental Council; U.S. Public Interest Research Group; Natural Resources Defense Council; Ohio Environmental Council; Natural Resources Council of Maine; State of Illinois; State of Minnesota; Mayor and City Council of Baltimore; American Coal for Balanced Mercury Regulation; Alabama Coal Association; Coal Operators & Associates of Kentucky; Maryland Coal Association; Ohio Coal Association; Pennsylvania Coal Association; Virginia Coal Association; West Virginia Coal Association; ARIPPA; Utility Air Regulatory Group; United Mine Workers of America; Commonwealth of Pennsylvania; State of Rhode Island; Michigan Department of Environmental Quality; 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; American Nurses Association; American Public

Health Association; American Academy of Pediatrics; Physicians for Social Responsibility; and Alaska Industrial Development and Export Authority..

The respondents in this Court who were intervenors in the court of appeals are Adirondack Mountain Club; PPL Corp.; PSEG Fossil LLC; NRG Energy Inc.; Florida Power & Light Company; State of Alabama; State of Indiana; State of Nebraska; State of North Dakota; State of South Dakota; Edison Electric Institute; Producers for Electric Reliability; State of Wyoming; Little Traverse Bay Bands of Odawa Indians; Lower Elwha Klallam Tribe; Lummi Nation; Minnesota Chippewa Tribe; Nisqually Tribe; Swinomish Indian Tribe Community; West Associates; National Mining Association; State of Maryland; Duke Energy Indiana; Inc.; Duke Energy Kentucky, Inc.; and Duke Energy Ohio, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Environmental Protection Agency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 517 F.3d 574.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 16a-17a) was entered on February 8, 2008. A petition for rehearing was denied on May 20, 2008 (App., *infra*, 18a-19a). On August 11, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 17, 2008. On Sep-

tember 5, 2008, the Chief Justice further extended the time to October 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions are reproduced in the appendix to this petition. App., *infra*, 203a-214a.

STATEMENT

1. a. In the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, Congress established a list of hazardous air pollutants, and it directed the Environmental Protection Agency (EPA) to review the list periodically and revise it as appropriate. 42 U.S.C. 7412(b). Congress also directed EPA to publish and occasionally revise "a list of all categories and subcategories of major sources" of the listed pollutants. 42 U.S.C. 7412(c)(1). A "major source" is any stationary source or group of stationary sources at a single location and under common control that emits or has the potential to emit 10 tons per year of any single hazardous air pollutant or 25 tons or more per year of any combination of hazardous air pollutants. 42 U.S.C. 7412(a)(1).

The listing of a source category triggers a statutory obligation for EPA to promulgate emission standards for sources within the category. Those standards must "require the maximum degree of reduction in emissions of * * * hazardous air pollutants" that EPA determines is achievable, taking into account factors such as cost, energy requirements, and other health and environmental impacts. 42 U.S.C. 7412(d)(1) and (2). In general, the "maximum degree of reduction in emissions" must be at least as stringent as the average emission limitation achieved by the best-performing 12% of existing sources. 42 U.S.C. 7412(d)(3). Until EPA is-

sues emission standards for a source category, the listing of the category under Section 7412(c) is not a "final agency action subject to judicial review." 42 U.S.C. 7412(e)(4).

The statute expressly authorizes EPA to delete particular source categories from the list if specified criteria are satisfied. Section 7412(c)(9) provides that EPA "may delete any source category from the list" if, *inter alia*, the agency determines "that emissions from no source in the category or subcategory concerned * * * exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source." 42 U.S.C. 7412(c)(9)(B)(ii).

b. Regulation of one major stationary source of air pollutants—"electric utility steam generating units," *i.e.*, power plants—is addressed separately in 42 U.S.C. 7412(n)(1). Section 7412(n)(1)(A) directs EPA to conduct a study to determine what hazards to public health associated with emissions of hazardous air pollutants from power plants would be reasonably anticipated to occur following imposition of other requirements of the Clean Air Act (Act), 42 U.S.C. 7401 *et seq.* 42 U.S.C. 7412(n)(1)(A). The statute provides that EPA "shall regulate electric utility steam generating units under this section, if [it] finds such regulation is appropriate and necessary after considering the results of the study." *Ibid.*

c. Section 7411 of Title 42 authorizes EPA to establish "standards of performance" for sources of air pollutants. 42 U.S.C. 7411. A "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction,

which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] determines has been adequately demonstrated." 42 U.S.C. 7411(a)(1). In contrast to the "maximum degree of reduction" requirement of Section 7412, EPA has interpreted the term "standard of performance" in Section 7411 to include a cap-and-trade system for limiting emissions. 70 Fed. Reg. 28,616 (2005).[1] EPA's authority to establish standards of performance, however, does not extend to existing sources of air pollutants that are listed and regulated under Section 7412. 42 U.S.C. 7411(d)(1).

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[1] A cap-and-trade system begins by setting "an overall cap, or maximum amount of emissions per compliance period, for all sources under the program." EPA, *Cap and Trade: Essentials* 1 (visited Oct. 16, 2008) <http://www.epa.gov/airmarkets/cap-trade/docs/ctessentials.pdf>. "Authorizations to emit in the form of emission allowances are then allocated to affected sources, and the total number of allowances cannot exceed the cap." *Ibid.* Sources are not required to use any particular approach to reducing their emissions, but they must "report all emissions and then surrender the equivalent number of allowances at the end of the compliance period." *Ibid.* Sources that are able to reduce their emissions below their initial number of allowances may sell their unused allowances to other sources. "Allowance trading enables sources to design their own compliance strategy based on their individual circumstances while still achieving the overall emissions reductions required by the cap." *Ibid.* The approach creates financial incentives for all sources to seek out new ways of lowering their emissions. One example of a cap-and-trade system is that established by Congress for regulating sulfur-dioxide emissions. See 42 U.S.C. 7651-7651*o*; see also EPA, *Fact Sheet: EPA's Clean Air Mercury Rule* (Mar. 15, 2005) <http://www.epa.gov/air/mercuryrule/pdfs/factsheetfinal.pdf> (describing the cap-and-trade system under the Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (2005)).

2. In December 2000, after completing the study required by Section 7412(n)(1)(A), EPA made an initial finding that regulation of coal-fired power plants under Section 7412 was "appropriate and necessary." 65 Fed. Reg. 79,825. Based on that initial finding, EPA added coal- and oil-fired power plants to the list of source categories to be regulated under Section 7412. *Id.* at 79,830. An industry group attempted to challenge the listing, but the District of Columbia Circuit dismissed the petition for review for lack of jurisdiction. *Utility Air Regulatory Group* v. *EPA*, No. 01-1074, 2001 WL 936363 (July 26, 2001). The court explained that, under Section 7412(e)(4), judicial review of EPA's listing decision "is not available until after emission standards are issued." *Ibid.*

Three years after its initial finding, EPA issued a proposed rule that suggested two primary alternative regulatory approaches for coal- and oil-fired power plants. 69 Fed. Reg. 4652 (2004). First, EPA proposed issuing final Section 7412(d) emission standards to regulate mercury emissions from coal-fired power plants and nickel emissions from oil-fired power plants. EPA did not propose issuing final Section 7412(d) emission standards for other hazardous air pollutants. *Id.* at 4660. Alternatively, EPA proposed reversing the December 2000 finding by determining that regulation of coal- and oil-fired power plants under Section 7412 was not "appropriate and necessary." *Id.* at 4689. Under that approach, EPA would instead invoke its authority under Section 7411 to issue standards of performance for mercury and nickel to regulate emissions from such power plants. *Id.* at 4689-4706.

In 2005, EPA promulgated two final rules that largely adopted the second approach. In the Clean Air Mer-

cury Rule (CAMR), 70 Fed. Reg. 28,606, EPA established standards of performance under Section 7411 for existing coal-fired power plants that, when fully implemented, will reduce nationwide annual coal-fired power-plant emissions of mercury from a 1999 baseline of 48 tons to 15 tons. *Id.* at 28,619.[2] The CAMR takes a two-phase approach to achieving mercury emission reductions. A first-phase nationwide emissions cap of 38 tons per year becomes effective in 2010, and a second-phase cap of 15 tons per year becomes effective in 2018. *Id.* at 28,618. The rule sets emission reduction budgets by apportioning emission budgets among the 50 States, two Tribes, and the District of Columbia. *Id.* at 28,623-28,624. The rule gives States and Tribes the option of either joining a nationwide emissions trading program as a means of implementing required reductions, or achieving reductions through another method. *Id.* at 28,621. States that elect to participate in the national cap-and-trade program may allocate emission allowances to individual plants, with total allocated allowances equaling States' emission budgets. *Id.* at 28,616. Individual plants must then hold allowances equal to their annual mercury emissions each year. *Ibid.* Those with allowances in excess of their emissions may sell the excess to other plants or bank the allowances for future use. *Id.* at 28,616, 28,629.

In a separate rule accompanying the CAMR, EPA reversed the December 2000 "appropriate and necessary" determination and removed power plants from the list of source categories to be regulated under Section 7412. App., *infra*, 20a-202a. EPA's decision was based

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[2] EPA decided not to issue final standards of performance for nickel emissions from oil-fired units. 70 Fed. Reg. at 28,611.

in part on the agency's conclusion that the December 2000 finding was "erroneous" at the time it was made. *Id.* at 56a-57a. In that regard, EPA concluded that the 2000 finding had improperly relied on anticipated environmental effects other than those related to public health. *Id.* at 60a-61a. Reconsidering the question in 2005, EPA found the prior approach to be inconsistent with the text of Section 7412(n)(1)(A), under which "the condition precedent for regulation * * * is public health hazards, not environmental effects." *Id.* at 60a. EPA also determined that its earlier "appropriate and necessary" finding had failed to "account[] for the utility [mercury] reductions that it should have reasonably anticipated would result from implementation of" Title I of the Act, including a national ambient air quality standard for ozone that EPA had issued in 1997. *Id.* at 63a.

EPA further concluded that "new information obtained since the [December 2000] finding * * * confirms that it is not appropriate and necessary to regulate coal- and oil-fired Utility Units" under Section 7412. App., *infra*, 57a. The agency explained that regulation of power-plant emissions under Section 7412 is not "appropriate" because two post-2000 regulatory initiatives—the CAMR and the Clean Air Interstate Rule (CAIR)—will result in levels of mercury emissions that are not reasonably anticipated to cause hazards to public health. *Id.* at 147a-148a.[3] EPA likewise determined that

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[3] EPA promulgated the CAIR, 70 Fed. Reg. 25,162 (2005), under 42 U.S.C. 7410(a)(2)(D) to address the interstate transport of pollutants that significantly contribute to nonattainment and interfere with maintenance of national ambient air quality standards for ozone and fine particulate matter. EPA determined that 26 States contribute significantly to downwind nonattainment of the fine particulate matter national ambient air quality standards through emissions of sulfur dioxide and

the levels of emissions of other hazardous air pollutants from power plants are not reasonably anticipated to cause hazards to public health. *Id.* at 75a. EPA additionally concluded that regulation of power plants under Section 7412 is not "necessary" because the exercise of other available authorities under the Act, such as Section 7411, could effectively address hazardous air pollutant emissions from power plants. *Id.* at 72a-73a.

3. Several parties petitioned for review of the rule delisting power plants in the District of Columbia Circuit. The court of appeals granted the petitions and vacated the rule, holding that EPA's rule "violated the [Act's] plain text and must be rejected under step one of *Chevron*." App., *infra*, 11a.

The court of appeals explained that, "once [EPA] determined in 2000 that [power plants] should be regu-

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nitrogen oxides, and that 26 States contribute significantly to downwind States' nonattainment of an ozone standard through emissions of nitrogen oxides. 70 Fed. Reg. at 25,167; 71 Fed. Reg. 25,289 (2006). The CAIR requires upwind States to reduce their emissions of sulfur dioxide and nitrogen oxides. Although upwind States may independently determine which emission sources to control and which control measures to adopt in order to achieve the required reductions, EPA predicted that most States will choose to regulate power plants, and that power plants will comply with state requirements by installing controls that will have the effect of reducing mercury emissions as well as emissions of sulfur dioxide and nitrogen oxides. App., *infra*, 93a-96a. The first-phase cap on mercury reductions established by the CAMR is consistent with reductions in mercury that were expected to be achieved as a co-benefit of the controls required by the CAIR. The State of North Carolina and various industry petitioners challenged the CAIR, and on July 11, 2008, the District of Columbia Circuit issued an opinion vacating the CAIR. *North Carolina* v. *EPA*, 531 F.3d 896. On September 24, 2008, EPA and other parties filed petitions for rehearing or rehearing en banc, and those petitions are currently pending in the court of appeals.

lated" under Section 7412, the agency "had no authority to delist them without taking the steps required under" Section 7412(c)(9). App., *infra*, 10a. The court found that, because Section 7412(c)(9) "governs the removal of '*any* source category' * * * from the section [7412(c)(1)] list, * * * the only way EPA could remove [power plants] from the section [7412(c)(1)] list was by satisfying section [7412(c)(9)'s] requirements." *Ibid.* Because EPA acknowledged that it had not made the findings specified in Section 7412(c)(9), the court concluded that EPA's delisting of power plants violated the "plain text" of the statute. *Id.* at 11a.

The court of appeals rejected EPA's contention that the delisting of power plants is governed by the "appropriate and necessary" standard of Section 7412(n)(1)(A) rather than by the generally applicable delisting criteria set forth in Section 7412(c)(9). App., *infra*, 11a. The court reasoned that Section 7412(n)(1) "governs how [EPA] decides whether to list [power plants]; it says nothing about delisting [power plants], and the plain text of section [7412(c)(9)] specifies that it applies to the delisting of 'any source.'" *Ibid.* The court acknowledged that "[a]n agency can normally change its position and reverse a decision," *id.* at 12a, but it construed Section 7412(c)(9) as "unambiguously limiting EPA's discretion to remove sources, including [power plants], from the section [7412(c)(1)] list once they have been added to it," *id.* at 13a.

The court of appeals further held that its vacatur of EPA's delisting decision required that the CAMR be vacated as well. App., *infra*, 14a-15a. The court explained that, as applied to both new and existing power plants, the CAMR regulations were premised on the assumption that power-plant emissions would not be regu-

lated under Section 7412. *Id.* at 14a. Because the court's vacatur of EPA's delisting decision would cause that assumption to be inaccurate, the court vacated CAMR's performance standards for existing and new sources. *Id.* at 14a-15a.

4. The court of appeals denied rehearing en banc, with Judges Ginsburg, Henderson, Randolph, Garland, and Kavanaugh not participating. App., *infra*, 18a-19a.

REASONS FOR GRANTING THE PETITION

Congress instructed EPA to regulate emissions of hazardous air pollutants from power plants under 42 U.S.C. 7412 when the agency finds that such regulation is "appropriate and necessary." That standard confers broad discretion on the agency to determine whether power-plant emissions are best regulated under Section 7412's emission-standard regime or under other provisions of the statute. In the rulemaking under review, EPA concluded, following extensive analysis, that it is neither appropriate nor necessary to regulate power plants under Section 7412 because power-plant emissions of hazardous air pollutants will not present a public health hazard once other requirements of the Clean Air Act are implemented. That conclusion was based in part on EPA's determination that the prior listing decision was seriously flawed at the time it was made, and in part on the intervening development of additional regulatory mechanisms that EPA views as superior to regulation of power-plant emissions under Section 7412.

The decision of the court of appeals reads out of the Act an important regulatory tool granted by Congress. The decision effectively divests EPA of the discretion that Congress conferred on the agency to consider alternative regulatory approaches to combating air pollution

from power plants. Indeed, the decision compels EPA to regulate power plants under Section 7412 even after EPA has determined that such regulation is *in*appropriate and *un*necessary. Because the District of Columbia Circuit is the only court of appeals that has authority to entertain the question presented, the decision in this case once and for all divests the agency of the authority to pursue a different regulatory track—including economic-based solutions such as cap-and-trade—for reducing air pollution from power plants.

Moreover, the court's error is particularly problematic in the context of this case, because it prevents EPA from reconsidering a listing decision that, under the plain terms of the Act, is not yet a "final agency action subject to judicial review." 42 U.S.C. 7412(e)(4). The result of the decision is the vacatur of a significant EPA regulatory program that, in the expert agency's view, would cost-effectively control mercury emissions from coal-fired power plants. If left unreviewed, the court's ruling will also require EPA to devote considerable resources to the formulation of emission standards that will be rendered superfluous if the initial 2000 listing decision—a decision that the agency itself has since concluded was flawed at the time it was issued—is ultimately overturned on judicial review. This Court's review is warranted to correct the court of appeals' fundamental legal errors and to prevent those substantial practical harms.

A. The Court Of Appeals Erred In Failing To Defer To EPA's Reasonable Interpretation Of Section 7412

As the court of appeals recognized, challenges to EPA's interpretation of the Act are governed by the familiar principles set forth in *Chevron U.S.A. Inc.* v.

NRDC, 467 U.S. 837 (1984). See App., *infra*, 9a-10a. Under those principles, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. If the intent of Congress is not "unambiguously expressed," however, this Court's decision in *Chevron* "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (*Brand X*).

It is also a fundamental principle of administrative law that "[r]egulatory agencies" are not required to "establish rules of conduct to last forever." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (brackets in original) (quoting *American Trucking Ass'ns* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967)). To the contrary, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." *Id.* at 57 (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)). Far from being locked into one position for all time, an agency has an obligation to reconsider "the wisdom of its policy on a continuing basis." *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-864).

The court of appeals acknowledged that, as a general rule, "[a]n agency can normally change its position and reverse a decision." App., *infra*, 12a. The court concluded, however, that in Section 7412(c)(9), Congress had "unambiguously limit[ed] EPA's discretion to re-

move sources, including [power plants], from the section [7412(c)(1)] list once they have been added to it." *Id.* at 13a. The court rejected EPA's contention that Section 7412(n)(1)(A) authorized the delisting decision in this case, holding that Section 7412(n)(1)(A) addresses only the initial listing determination and "says nothing about delisting" power plants. *Id.* at 11a. The court's analysis reflects a fundamental misunderstanding of the statutory scheme and misreading of the pertinent statutory provisions.

1. The court of appeals' principal error lay in its dismissive treatment of the statutory provision—Section 7412(n)(1)—that specifically governs EPA's regulation of power-plant emissions. Section 7412(n)(1)(A) directs EPA to "regulate" power-plant emissions under Section 7412 "if [EPA] finds such regulation is appropriate and necessary." The court of appeals found that provision to be inapplicable to the present context, stating that Section 7412(n)(1) "says nothing about delisting" power plants but instead addresses only the initial listing decision. App., *infra*, 11a.

Contrary to the court's apparent conclusion, the statutory terms "regulate" and "regulation" are most naturally read to encompass not only the initial decision to *list* power plants, but also the continued presence of power plants on the list of source categories for which emission standards must be promulgated. Under any usual understanding of the statutory term, EPA "regulate[s]" power plants under Section 7412 not only at the moment when it lists them as a covered source category, but on an ongoing basis thereafter for so long as power plants are subject to the requirements and prohibitions that Section 7412 imposes. If EPA determines at any point that "regulation" of power plants under Section

7412 is no longer "appropriate and necessary," Section 7412(n)(1)(A) authorizes the agency to remove them from the list of source categories. The decision to remove a source from the list is no less regulatory than the decision to list it in the first place.

2. Nothing in Section 7412(c)(9) compels EPA to reject the most natural reading of Section 7412(n)(1). Most significantly, Section 7412(c)(9) applies to the delisting of source categories generally but does not address the special concerns posed by power plants. Cf. *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two."). By its terms, moreover, Section 7412(c)(9)(B) is a *grant* of authority to EPA rather than a *limitation* on the powers the agency would otherwise possess. Section 7412(c)(9)(B) states that EPA "may delete any source category from the list under" Section 7412(c) whenever the agency makes specified determinations. Because "[t]he word 'may' customarily connotes discretion," *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005), Section 7412(c)(9)(B) is not naturally construed to *prohibit* the delisting of a source category in any circumstance where delisting would otherwise be appropriate. And, at a minimum, it does not unambiguously call for that result.

3. This Court has frequently admonished that "a reviewing court should not confine itself to examining a particular statutory provision in isolation," because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). EPA's reading of Section 7412(n)(1) makes far more sense of Section 7412 as a

whole than does the court of appeals' approach. With respect to the initial listing decision, Section 7412(n)(1)(A)'s "appropriate and necessary" standard is clearly intended to give EPA greater discretion with respect to power plants than EPA possesses in determining whether to list other source categories under Section 7412(c)(1). The court of appeals identified no reason—much less an unambiguous statutory basis for concluding—that Congress would have chosen to give EPA enhanced discretion to decide whether power plants should be listed as an initial matter, while denying the agency comparable discretion to delist if EPA concludes, based either on re-examination of the original agency record or on changed circumstances, that continued regulation under Section 7412 is not "appropriate and necessary." And, to the extent that the statutory scheme taken as a whole is ambiguous, the court of appeals should have deferred under *Chevron* to the agency's reasonable reconciliation of Section 7412's different subsections. See p. 12, *supra*.

Indeed, taken to its logical conclusion, the court of appeals' approach would render Section 7412(n)(1)(A) a practical nullity. Just as Section 7412(c)(9)(B) refers to the deletion of "*any* source category," Section 7412(c)(1) uses comparably inclusive language in directing EPA to list "*all* categories and subcategories of major sources." And just as Section 7412(n)(1)(A) does not specifically refer to the "delisting" or "deletion" of source categories, it does not specifically refer to initial "listing" either, using instead the terms "regulate" and "regulation." The court of appeals' mode of analysis thus logically suggests that Section 7412(c)(1) requires EPA to list power plants as major source categories if they satisfy the generally applicable statutory criteria, whether

or not EPA regards regulation of power plants under Section 7412 as "appropriate and necessary." The court disclaimed that conclusion, recognizing that Section 7412(n)(1) "governs how [EPA] decides whether to list [power plants]." App., *infra*, 11a. But the logical implications of the court's analysis underscore the inconsistency between that analysis and the overall statutory scheme and the text of the provision at issue.

4. For similar reasons, the court of appeals' interpretation frustrates Congress's purpose in establishing distinct criteria for regulation of power plants under Section 7412. Section 7412(c)(9)'s delisting criteria are designed to prevent the delisting of any source that poses a hazard. That approach makes sense for most sources of hazardous air pollutants, which must be listed solely because of their emission levels. Its application to power plants, however, would undercut Congress's determination, expressly embodied in Section 7412(n)(1)(A), that EPA should have discretion to use strategies other than regulation under Section 7412 for controlling power-plant emissions.

Nor does EPA's inability to make the findings described in Section 7412(c)(9) cast doubt on the agency's determination that regulation of power plants under Section 7412 is not "appropriate and necessary." Section 7412(c)(9)(B)(ii) requires a determination that emissions from no individual source in the entire category or subcategory exceed a level that is adequate to protect public health with an ample of margin of safety, as well as a determination that there will be no adverse environmental effect from emissions from any individual source in the category or subcategory. By contrast, Section 7412(n)(1)(A) focuses solely on public health and requires EPA to evaluate whether power-plant emissions

remaining *after* imposition of *other* statutory requirements are reasonably anticipated to pose a hazard to public health.

5. The court of appeals' decision is especially misguided because the court held that EPA is effectively bound by a listing decision that was not "final" under the express terms of the Act. Under Section 7412(e)(4), EPA's decision to list a particular source category is not a "final agency action subject to judicial review" until the agency promulgates emission standards for the particular source category involved. See *Utility Air Regulatory Group* v. *EPA*, *supra*. Although EPA listed power plants as a source category in 2000, it ultimately rescinded that decision (in the rule currently under review) without ever promulgating emission standards applicable to power plants. For the reasons stated above, Section 7412(n)(1)(A) is properly understood to vest EPA with *continuing*, temporally unbounded discretion to determine, based either on new data or on re-examination of previously considered evidence, whether regulation of power plants under Section 7412 is "appropriate and necessary." But even assuming, *arguendo*, that there is some point in time at which the initial listing decision becomes locked in, so that power plants can be delisted only under the standards set forth in Section 7412(c)(9), that consequence should not attach to a listing decision that never became "final."

B. The Question Presented Is Important And Warrants This Court's Review At This Time

The court of appeals' erroneous decision deprives EPA of authority—expressly granted by Congress—to pursue alternative regulatory measures in combating air pollution by power plants. In this case, moreover, the

decision prevents EPA from implementing a significant rulemaking—the CAMR—that would achieve substantial, cost-effective reductions in mercury emissions from power plants. The court's decision also compels EPA and the regulated community to expend substantial resources to develop and promulgate Section 7412 emission standards that the agency regards as inappropriate and unnecessary, and that will serve no useful purpose if a reviewing court ultimately concludes (as EPA now believes) that the 2000 listing decision was erroneous at the time it was made. The need to prevent those harms warrants this Court's review.

1. The court of appeals' decision in this case resolves a threshold matter of significant regulatory importance. Under the court of appeals' interpretation of Section 7412(n)(1)(A), EPA may delist power plants only if it determines that the criteria set forth in Section 7412(c)(9) are satisfied. Absent such a finding, the agency would be required to regulate power-plant emissions under Section 7412 through the promulgation of Section 7412(d) emission standards. By contrast, if this Court holds that delisting as well as initial listing of power plants is governed by Section 7412(n)(1)(A)'s "appropriate and necessary" standard, EPA will be able to consider a much broader range of options—including any alternative regulatory mechanisms that might be developed in the future to replace the CAMR—in determining the best and most cost-effective approach to the regulation of power-plant emissions. The importance of the question presented by this case therefore goes well beyond the particular regulatory initiative (discussed next) giving rise to the EPA's delisting decision.

2. a. The underlying regulatory initiative in this case underscores the importance of the question pre-

sented. The CAMR is one of EPA's most important regulatory initiatives in recent years. Mercury is a toxic, persistent pollutant that bioaccumulates in the food-chain, and it is the hazardous air pollutant of greatest concern from power plants. App., *infra*, 97a; 65 Fed. Reg. at 79,827. Fossil-fuel fired power plants are the largest remaining human-generated domestic source of mercury emissions. *Ibid.* Atmospheric mercury falls to Earth through rain, snow, and dry deposition and enters bodies of water. *Ibid.* Once there, it can transform into methylmercury, and can build up in fish tissue. *Ibid.*

The CAMR is the first-ever national regulation controlling mercury emissions from power plants and would achieve cost-efficient reductions of mercury emissions of nearly 70%.[4] See 70 Fed. Reg. at 28,619. The market-based allowance trading program established by the Rule would provide the highest degree of mercury control possible from power plants, consistent with ensuring the reliability and affordability of the nation's electric supply. *Id.* at 28,621. Under the rule's trading program, emission reductions would be obtained from plants that are relatively more cost-effective to control,

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[4] In establishing mercury emission caps under the CAMR, EPA took into account mercury emission reductions that would be achieved as a co-benefit of controls that would be installed to comply with nitrogen oxide and sulfur dioxide reduction requirements of the CAIR. Thus, if the District of Columbia Circuit's recent ruling vacating the CAIR remains in place (see note 3, *supra*), and if the Court grants certiorari in this case and reverses the court of appeals' judgment, EPA may need to seek a remand to reconsider the CAMR and its Section 7412(n)(1)(A) determination. Even under those circumstances, however, reversal of the court of appeals' erroneous ruling in this case would be of substantial practical benefit to the agency and the regulated community because of the importance of the regulatory issue presented. See p. 17, *supra*.

allowing plants whose emissions are not cost-effective to control to use other compliance mechanisms, such as buying allowances. *Id.* at 28,619. In contrast, Section 7412(d) emission standards would require each plant to meet a specific level of emission control, resulting in less cost-effective pollution abatement for any cumulative level of emission control across the industry.

Moreover, the flexibility of the market-based allowance trading program established by the rule would create financial incentives for power plants to look for new and low-cost ways to reduce emissions and improve the effectiveness of pollution-control equipment. Individual plants would have an incentive to achieve emission reductions beyond their emission budgets in order to bank allowances, which have monetary value and may be sold on the market. 70 Fed. Reg. at 28,630. Thus, market forces would drive advances in pollution-control technology because sources would have a financial incentive to look for new and lower-cost ways to reduce emissions. By contrast, Section 7412(d) emission standards would provide *less* incentive for technological innovation because sources will reap no financial benefit if they further reduce emissions once they have met the required standard.

In addition, under the CAMR's market-based allowance trading program, mercury emissions are subject to a permanent nationwide cap. That cap cannot be exceeded, regardless of future growth in the energy sector. By contrast, emission standards set under Section 7412(d) would not prevent increases in overall emissions attributable to the utility industry as a whole. Although standards for new sources would be set at the level of the performance of the best performing source, there would be no restriction on total emissions from the in-

dustry, because the number of new power plants is not subject to any statutory limit.

b. The benefits of the CAMR are particularly great in the context of power plants. EPA's modeling of the power sector reflects that most of the emission reductions are projected to result from larger units installing controls, so that substantial cost savings will be realized from economies of scale. App., *infra*, 71a. Thus, the cap-and-trade system will be especially cost-effective for power plants. In addition, as Congress was presumably aware when it authorized EPA to consider alternative regulatory paths in regulating emissions from power plants, the American power sector is a unique industry because, in order to meet electricity demand, emitting sources owned by different companies in different States are interconnected. Power production—and accompanying emissions—therefore can be shifted on an ongoing basis from source to source and from State to State. See *New York* v. *FERC*, 535 U.S. 1, 7-8 (2002). Utilities are also restricted by state regulation in ways that many other industries are not, including constraints on passing costs through to customers, the timing of operation of their units, and the construction of new units. Given those unusual constraints, they have a greater need for flexibility in controlling emissions than other industries, so as to be able to effectively manage their costs.

By enacting Section 7412(n)(1), Congress allowed EPA to take account of the distinctive attributes of power plants in determining the best and most cost-effective way of regulating power-plant emissions. The practical benefits of that congressional decision can be fully realized, however, only if EPA possesses *continuing* discretion to re-examine prior agency decisions, and

to consider newly available information, in fashioning an appropriate regulatory scheme. Under the court of appeals' decision, EPA's prior listing decision precludes the agency from considering the unique characteristics of power plants in determining whether regulation under Section 7412 is "appropriate and necessary."

3. The decision below will also lead to a substantial waste of governmental, judicial, and private resources. The ruling will compel EPA to promulgate inappropriate and unnecessary standards not only for mercury, but also for every other hazardous air pollutant emitted by power plants. EPA must prepare and issue those standards, moreover, before its 2000 listing decision can be treated as a "final agency action subject to judicial review." 42 U.S.C. 7412(e)(4); see pp. 2-3, *supra*. And members of the regulated community will be required to participate in the agency proceedings used to develop such standards in order to protect their right to judicial review. The emission standards ultimately promulgated, however, will be of no practical consequence if a reviewing court ultimately concludes (as EPA currently believes) that the 2000 listing decision was erroneous. It is a fundamental principle of administrative law that agencies may correct their own errors prior to judicial review. See *McKart* v. *United States*, 395 U.S. 185, 195 (1969) ("[N]otions of administrative autonomy require that [an] agency be given a chance to discover and correct its own errors."). But under the court of appeals' flawed statutory interpretation, EPA is unable to do so.

In addition, power-plant operators will incur significant unnecessary regulatory burdens and uncertainty before judicial review of the original listing determination. Those burdens will flow from the fact that, as a result of the court of appeals' ruling, power plants are

once again listed as a Section 7412 source category, thus rendering the requirements of Section 7412(g) applicable to new or reconstructed power plants. Under Section 7412(g), until EPA has established national emission standards based on maximum achievable control technology (MACT), no person may begin actual construction or reconstruction of a major source of hazardous air pollutants unless the permitting authority determines on a case-by-case basis that new source MACT requirements will be met. That requirement imposes a significant burden on EPA and state permitting authorities, who must, in the absence of national standards, calculate case-by-case MACT limitations for any new power plant that intends to begin construction or reconstruction. Calculation of such case-by-case MACT requirements would be required not just for mercury, but for every other hazardous air pollutant emitted by power plants, notwithstanding EPA's finding that such emissions do not cause a hazard to public health. Power plants would then have to expend considerable resources to comply with such standards. At the same time, power plants will face significant regulatory uncertainty concerning applicable emission requirements, delays in approval to begin construction, and potential lawsuits concerning the sufficiency of case-by-case MACT requirements and associated permit terms and conditions.

4. The District of Columbia Circuit has exclusive jurisdiction over decisions to delist source categories under Section 7412. See 42 U.S.C. 7607(b). There is consequently no possibility that a circuit conflict will develop on the important question presented by this case. Granting review in this case is therefore the only way to correct the serious legal errors of the court of appeals and avoid the adverse practical consequences that will

otherwise result from its ruling. Likewise, unless this Court grants review and reverses the decision below, EPA will once and for all be deprived of an important regulatory tool granted by Congress—not only with respect to CAMR, but with respect to any future situation in which EPA determines that an alternative regulatory approach is warranted for combating emissions from power plants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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