Nos. 08-352 & 08-512

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *Petitioner*,
v.
STATE OF NEW JERSEY, ET AL., *Respondents*.

ENVIRONMENTAL PROTECTION AGENCY, *Petitioner*,
v.
STATE OF NEW JERSEY, ET AL., *Respondents*.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether EPA may delete a category of sources of hazardous air pollutants from the list established under 42 U.S.C. 7412(c) without making the determinations specified in 42 U.S.C. 7412(c)(9) for deleting a category.

CORPORATE DISCLOSURE STATEMENT

The Adirondack Mountain Club is a membership supported, nonprofit organization devoted to the protection and wise recreational use of New York State's forest preserve lands in the Adirondacks and Catskills. The Adirondack Mountain Club has no parent corporation, and no publicly held company owns 10 percent or more of the Adirondack Mountain Club.

American Nurses Association is the only full-service professional organization representing the nation's 2.7 million registered nurses. American Nurses Association has no parent corporation, and no publicly held company owns 10 percent or more of the American Nurses Association.

The American Public Health Association is a nonprofit membership organization existing for the purpose of influencing policy and setting priorities in public health. American Public Health Association has no parent corporation, and no publicly held company owns 10 percent or more of the American Public Health Association.

The American Academy of Pediatrics is a not-for-profit corporation with 60,000 members dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. The American Academy of Pediatrics has no parent corporation, and no publicly held company owns 10 percent or more of the American Academy of Pediatrics.

The Chesapeake Bay Foundation is a nonprofit corporation with 146,000 members, dedicated solely to restoring and protecting the

Chesapeake Bay and its tributary rivers. The Chesapeake Bay Foundation has no parent corporation, and no publicly held company owns 10 percent or more of the Chesapeake Bay Foundation.

Conservation Law Foundation is a nonprofit organization that works to solve environmental problems that threaten New England. Conservation Law Foundation has no parent corporation, and no publicly held company owns 10 percent or more of Conservation Law Foundation.

Environmental Defense is a nonprofit membership corporation of 400,000 members dedicated to protecting the environmental rights of all people. Environmental Defense has no parent corporation, and no publicly held company owns 10 percent or more of Environmental Defense.

National Congress of American Indians is the oldest and largest national organization addressing American Indian interests, representing more than 250 Indian tribes and Alaskan Native villages. National Congress of American Indians has no parent corporation, and no publicly held company owns 10 percent or more of National Congress of American Indians.

National Wildlife Federation, a nonprofit organization with approximately four million members, is America's conservation organization protecting wildlife for our children's future. National Wildlife Federation has no parent corporation, and no publicly held company owns 10 percent or more of National Wildlife Federation.

Natural Resources Council of Maine is a nonprofit membership organization dedicated to

preserving the quality of the air, water, forest and other natural resources of the state of Maine, for the benefit of its people and its environment. Natural Resources Council of Maine has no parent corporation, and no publicly held company owns 10 percent or more of Natural Resources Council of Maine.

Natural Resources Defense Council is a nonprofit representing its 1.2 million members in efforts to restore integrity to air, land and water, defend endangered natural places, establish sustainability and good stewardship of the earth, and protect the long-term welfare of present and future generations by protecting nature. Natural Resources Defense Council has no parent corporation, and no publicly held company owns 10 percent or more of Natural Resources Defense Council.

The Ohio Environmental Council is a nonprofit corporation that works on behalf of its members to inform, unite, and empower Ohio citizens to protect the environment and conserve natural resources. The Ohio Environmental Council has no parent corporation, and no publicly held company owns 10 percent or more of The Ohio Environmental Council.

Physicians for Social Responsibility is a nonprofit corporation that represents 24,000 medical and public health professionals committed to, among other things, the achievement of a sustainable environment by addressing issues such as the proliferation of toxins and pollution. Physicians for Social Responsibility has no parent corporation, and no publicly held company owns 10 percent or more of Physicians for Social Responsibility.

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United States Public Interest Research Group is a nonprofit corporation dedicated to representing its members' interests in delivering persistent, result-oriented, public-interest activism that protects our environment, encourages a fair, sustainable economy, and fosters responsive, democratic government. United States Public Interest Research Group has no parent corporation, and no publicly held company owns 10 percent or more of United States Public Interest Research Group.

Waterkeeper Alliance is a nonprofit corporation that is the international center of a network of nonprofit organizations working to protect their communities, ecosystems, and water quality and promote watershed protection and advocate for their members. Waterkeeper Alliance has no parent corporation, and no publicly held company owns 10 percent or more of Waterkeeper Alliance.

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STATEMENT

The United States Environmental Protection Agency (EPA) and the Utility Air Regulatory Group (UARG) seek review of a decision of the U.S. Court of Appeals for the District of Columbia Circuit on the basis that the lower court misapplied the familiar legal principle that "[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." U.S. Pet. at 11-12 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984)); UARG Pet. at 22. Specifically, they argue that Congress's intent in the relevant statutory provisions of the Clean Air Act (CAA or Act) is not clear and that the EPA's interpretation of those provisions should have prevailed.

The court of appeals' unanimous decision reversed EPA's attempt to delete electric utility steam generating units (EGUs or power plants) from the list of industrial categories for which the Act requires protective air toxics standards. The Act contains only one provision authorizing such "delisting," 42 U.S.C. 7412(c)(9), which provides that EPA "may delete any source category from the list" if it makes specific determinations regarding the health and environmental effects of delisting. 42 U.S.C. 7412(c)(9)(B). Because EPA undisputedly had not made the necessary determinations, the court of appeals vacated the agency's delisting of EGUs as unlawful. U.S. Pet. App. at 2a-3a.

Statutory provisions

As originally enacted in 1970, the CAA required EPA to identify hazardous air pollutants (HAPs), *i.e.*, substances that "cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness," and establish source-specific emissions standards for these pollutants. Pub. L. No. 91-604, 84 Stat. 1676, 1685 (1970) (codified as amended at 42 U.S.C. 7412). Between 1970 and 1989, however, "'EPA . . . listed only eight substances as hazardous air pollutants . . . and . . . promulgated emissions standards for seven of them.'" *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000) (quoting H.R. Rep. No. 101-490, pt. 1, at 322 (1990); *see also Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1353 n.1 (D.C. Cir. 1995).

In 1990, Congress responded to the "almost complete failure of [CAA] § 112 to effectively control HAP emissions," Arnold W. Reitze, Jr., Stationary Source Air Pollution Law 139 (2005), by "entirely restructur[ing]" the provision. S. Rep. No. 101-228, at 128 (1989). *See also* Gary C. Bryner, Blue Skies, Green Politics: The Clean Air Act of 1990 and Its Implementation 148-49 (2d ed. 1995). Congress's amendments reflected its desire for a more expeditious and thorough regulation of HAPs by establishing strict deadlines for regulatory action and source compliance, eliminating much of EPA's discretion in the process. *Nat'l Lime Ass'n*, 233 F.3d at 634; *see also Nat'l Mining Ass'n*, 59 F.3d at 1352-53; U.S. Pet. App. 3a.

As evidence of its intent for swift EPA action, Congress specifically listed more than 180 HAPs to be regulated, 42 U.S.C. 7412(b)(1), established tight and mandatory deadlines for agency action including

issuance of emissions standards, 42 U.S.C. 7412(c)(5), (d)(1), (e)(1), required minimum stringency requirements for emissions standards, 42 U.S.C. 7412(d)(2), (d)(3), restricted EPA's discretion on removing sources or chemicals from the lists, 42 U.S.C. 7412(b)(3), (c)(9), and imposed limitations on judicial review, 42 U.S.C. 7412(e)(4).

The "lists" of pollutants and source categories are the central feature of the revamped section 7412; the inclusion of a HAP on the section 7412(b) list or a source category on the section 7412(c) list triggers EPA's statutory obligation to regulate such HAP or source category. 42 U.S.C. 7412(c)(2), (d)(1).

First, to ensure timely and effective regulation of HAP emissions under section 7412, Congress required EPA to list all major and area source categories of HAPs by November 1991, and to publish and revise at least every eight years a list of all categories and subcategories of major sources of the listed HAPs. 42 U.S.C. 7412(c)(1). By defining a "major" source to include any stationary source or group of stationary sources that emits or has the potential to emit 10 tons per year or more of any HAP or 25 tons per year or more of any combination of HAPs, 42 U.S.C. 7412(a)(1), Congress broadly required that the list of source categories include all sources determined to emit in excess of the threshold limits.

For EGUs, Congress required EPA first to conduct "a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units" of HAPs listed under section 7412(b) "after imposition of the requirements of this chapter." 42

U.S.C. 7412(n)(1)(A).[1] In accordance with the other deadlines it established when it amended section 7412, Congress established a deadline – November 15, 1993 – by which this study was to be completed. *Id.* If EPA determined that regulation of EGUs was appropriate and necessary after considering the results of this study, EPA was directed to regulate EGUs under section 7412, *i.e.*, to list EGUs as a source category under section 7412(c) and obey the statutory provisions applicable to listed source categories. *Id.*

Second, in accordance with Congress's desire for expeditious regulation of HAP emissions, Congress required EPA to establish strict emission standards for all listed categories by statutorily-fixed deadlines, which "shall be effective upon promulgation." 42 U.S.C. 7412(c)(2), (c)(5), (d)(1), (d)(2), (d)(3), (d)(10), (e)(1), (e)(5). Congress required EPA to issue emissions standards for at least 40 categories of sources by 1992; for at least 25 percent of listed categories by 1994; for an additional 25 percent by 1997; and for "all categories and subcategories" not later than November 15, 2000. 42 U.S.C. 7412(e)(1).

These emissions standards, known as Maximum Achievable Control Technology or "MACT" standards, must require of all major sources in a source category the maximum degree of reduction of each emitted HAP that is achievable for the category,

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[1] Section 7412(n)(1) also required EPA to conduct a study of mercury emissions from EGUs, and the National Institute of Environmental Health Sciences to conduct a study to determine the threshold for mercury concentrations in fish which may be consumed, including by sensitive populations, without adverse public health effects. 42 U.S.C. 7412(n)(1)(B), (n)(1)(C).

taking into consideration certain factors, including cost and non-air quality health and environmental impacts and energy requirements. 42 U.S.C. 7412(d)(2). New sources – which must comply with MACT immediately – must equal or exceed the emission control achieved in practice by the best-controlled similar source as determined by EPA. 42 U.S.C. 7412(d)(3); 42 U.S.C. 7412(i)(1). Standards for existing sources must be at least as stringent as the average emission limitation achieved by the best performing twelve percent of existing sources. 42 U.S.C. 7412(d)(3). Existing sources must comply with the standards "as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard." 42 U.S.C. 7412(i)(3)(A).

Third, to prevent serial legal challenges from delaying the regulatory process, Congress specified that the listing of a category or subcategory is "not final agency action subject to judicial review." 42 U.S.C. 7412(e)(4). Instead, section 7412(e)(4) permits judicial review of EPA's decision to list a source category for regulation under section 7412 after EPA develops and then issues MACT standards for that listed source category or subcategory. *Id.*

Fourth, further reflecting Congress's desire for stringent and thorough regulation of HAP emissions, Congress authorized EPA to remove "any" source category from the section 7412(c) list only after EPA first makes specific, risk-based findings. 42 U.S.C. 7412(c)(9). For HAPs that may cause cancer, EPA must determine that "no source in the category . . . emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed . . . ." 42 U.S.C.

7412(c)(9)(B)(i). For HAPs that do not have the potential to cause cancer, the agency must determine 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).

EPA's Listing of EGUs

Although EPA was required to complete the congressionally mandated study by November 15, 1993, 42 U.S.C. 7412(n)(1)(A), EPA failed to do so. EPA settled a lawsuit filed by environmental groups to compel the agency to comply with the law, agreeing to specific dates by which to complete the required study and propose regulations if EPA determined that regulation of EGUs under section 7412 was appropriate and necessary. Settlement Agreement, *Natural Res. Def. Council v. EPA*, No. 92-1415 (D.C. Cir. Oct. 26, 1994). In a 1998 modification to the settlement agreement, EPA agreed to make the required determination by December 15, 2000. Stipulation for Modification of Settlement Agreement, *Natural Res. Def. Council v. EPA*, No. 92-1415 (D.C. Cir. Nov. 16, 1998).

In 1998, EPA transmitted its Final Report to Congress (RTC) after public notice and scientific peer review. 63 Fed. Reg. 10,378 (1998) (EPA's Electric Utility Hazardous Air Pollutant Study); *see also* 60 Fed. Reg. 35,394 (1995) (notice and comment for Draft Report). The report found that EGUs emitted numerous HAPs of concern, including mercury, which is toxic and poses a particular risk of mercury exposure to neurological development in fetuses and children (RTC at 7-16 to -18); lead and cadmium,

both heavy metals that tend to bio-accumulate and are toxic when inhaled or ingested (RTC at 8-16); arsenic, due to its carcinogenic effects (RTC at 10-34 to -35); dioxins, which tend to accumulate in the environment and are extremely toxic to humans and wildlife even in small amounts (RTC at 11-4, 11-27 to -28); hydrogen chloride, which has both acute and chronic effects on humans (RTC at 12-1, E-11 to -12); and hydrogen fluoride, which adversely impacts human health and wildlife (RTC at 3-15, 12-4 to -5, E-12 to -13).

The RTC was followed by a proposed information collection request (ICR) seeking further data bearing on whether EGUs should be regulated under section 7412, 63 Fed. Reg. 17,406 (1998), and numerous public comment opportunities, 65 Fed. Reg. 10,783 (2000) (February notice seeking additional information for its forthcoming section 7412(n) determination); 65 Fed. Reg. 18,992 (2000) (April notice of public meeting on whether EGUs should be regulated under section 7412, a determination which EPA noted that it was obliged to make on or before December 15, 2000).

On December 14, 2000, EPA issued its determination that regulation of HAP emissions from coal- and oil-fired EGUs under section 7412 was appropriate and necessary and added these sources to the section 7412(c) list. 65 Fed. Reg. 79,825 (2000); 67 Fed. Reg. 6,521 (2002). EPA's determination and listing were based on a fully developed administrative record that included its RTC, which was completed after public comment and scientific peer review, public submissions in response to the ICR, a National Academy of Sciences (NAS) study on EGU mercury emissions prepared for EPA,

a multi-agency study of various emissions control technologies, and comments received in response to its February and April 2000 Federal Register notices. 65 Fed. Reg. at 79,826.

Among other things, EPA found that the utility industry emitted approximately 46 tons of mercury in 1990 and was projected to emit approximately 60 tons in 2010 from 1,026 units at 426 coal-fired plants. *Id.* at 79,828. EPA concluded that mercury, which can change into methylmercury once deposited, is highly toxic to humans – especially to developing fetuses and children – and wildlife, is persistent, and bio-accumulates in the food chain. *Id.* at 79,829-30.

EPA also found that EGUs emitted a significant number of the 188 HAPs on the section 7412(b) list and are the leading anthropogenic sources of mercury emissions in the nation. *Id.* at 79,827-28. In 1990, EGUs were found to have emitted approximately 66 tons of arsenic, 86 tons of lead, 5 tons of cadmium, 146,000 tons of hydrogen chloride, and 19,500 tons of hydrogen fluoride. *Id.* at 79,828. EPA further determined that the estimated growth of the utility industry between 1990 and 2010 would result in an overall increase in HAP emissions. *Id.* at 79,829.

Accordingly, due to the public health and environmental concerns posed by mercury emissions and the link between coal consumption and mercury emissions, EPA determined that section 7412 regulation of EGUs was appropriate and necessary and listed EGUs under section 7412(c). *Id.* at 79,830. The agency found that regulation of power plants under section 7412 was appropriate because EGUs were the largest domestic source of mercury

emissions, mercury presented significant public health hazards, and there were various control options that would effectively reduce HAP emissions from EGUs. *Id.* The agency further found that regulation under section 7412 was necessary because the implementation of other CAA requirements would not adequately address the serious public health and environmental hazards arising from HAPs emitted by EGUs, as identified in the RTC and confirmed by the NAS study, that section 7412 was intended to address. *Id.*

With these findings, EPA added EGUs to the section 7412(c) list of source categories. *Id.*[2] EPA explained that EPA would be developing emissions standards under section 7412(d). *Id.* EPA also noted that pursuant to section 7412(e)(4), "today's finding is not subject to judicial review" and that "[a]s specified by [CAA] section 112(e)(4), judicial review would be available on both the listing decision and the subsequent regulation at the time that such final regulation is promulgated." *Id.* at 79,831.

UARG petitioned for review of EPA's December 2000 action. Acknowledging that section 7412(e)(4) expressly provides that listing decisions under section 7412(c) may not be reviewed until the promulgation of an associated emission standard, UARG asserted that it was not challenging a section 7412(c) listing decision, but rather EPA action taken under section 7412(n).

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[2] On February 12, 2002, pursuant to section 7412(c)(1), EPA included EGUs in its notice periodically updating the section 7412(c) list of source categories, stating that EGUs had been "[a]dded to [the CAA] 112(c) list [on] 12/20/2000." 67 Fed. Reg. 6,521.

A panel of the D.C. Circuit rejected UARG's jurisdictional argument, instead agreeing with EPA that listing of utility sources was subject to section 7412(e)(4)'s rule precluding review of listing decisions. The court therefore dismissed the petition. UARG Pet. App. at 233a-234a. UARG did not seek rehearing or review in this Court of the panel's July 26, 2001 Order.

In 2001, EPA assembled a Federal Advisory Committee Act working group, which included agency personnel, scientists, state and local agency representatives, industry, and environmentalists, to craft the required section 7412 MACT standard for EGUs. After holding numerous meetings between August 2001 and March 2003, EPA disbanded the task force without formal notice or explanation. Office of Inspector General, Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities, Rep. No. 2005-P-0003, at 6, 27-30, 37-38 (Feb. 3, 2005) (Ct. of Appeals App. (CA App.), at 1530).

Proposed Rule

Nine months after EPA abandoned the MACT standard working group, EPA proposed removing EGUs from the list of section 7412 source categories by "revising" its December 2000 "appropriate and necessary" determination instead of by following the section 7412(c)(9) delisting procedure. 69 Fed. Reg. 4,652 (2004). EPA cited no new scientific or public health studies of the public health hazards posed by EGU HAP emissions to support its proposed revision. *Id.* at 4,683-89.

EPA also proposed to adopt a mercury pollution emissions trading scheme under section 7411, which

requires EPA to promulgate "standards of performance" for new sources within categories of stationary sources that cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. 7411(b). The latter proposal – later denominated the Clean Air Mercury Rule (CAMR) – would establish an initial "cap" on aggregate EGU mercury emissions in 2010 and a lower limit in 2018 and authorize individual EGUs to trade pollution allowances. 69 Fed. Reg. at 4,686, 4698-99.

In its draft rule, EPA expressly recognized that the only reductions in EGU mercury emissions during the 2010-2017 timeframe of the CAMR would be those obtained as a side or "co" benefit of another regulatory proposal to control emissions of sulfur dioxide and nitrogen oxides. 69 Fed. Reg. at 4,687, 4,698. This other program became known as the Clean Air Interstate Rule (CAIR), a regional program promulgated under section 7410 designed to reduce interstate transport of criteria pollutants contributing to ozone and particulate exceedances in the eastern states. 70 Fed. Reg. 25,162 (2005). The CAIR was recently declared unlawful by the court of appeals and remanded to the agency.[3]

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[3] The court of appeals initially vacated the CAIR because it found the rule to be "fundamentally flawed." *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). EPA petitioned for panel rehearing and rehearing *en banc*, seeking, among other things, the court's reconsideration of the vacatur due to the adverse impacts that would result. On December 23, 2008, the panel issued an order "remand[ing] these cases to EPA without vacatur of CAIR so that EPA may remedy CAIR's flaws in accord with [the court's] July 11, 2008 opinion[.]" *North Carolina v. EPA*, No. 05-1244, 2008 U.S. App. LEXIS 26084, at

Final Rules

In its 2005 final "Delisting Rule," EPA announced that it would not be issuing emissions standards for EGUs under section 7412(d) because, contrary to the 2000 determination, it had now concluded that regulation of EGUs under section 7412 was neither "appropriate" nor "necessary." 70 Fed. Reg. 15,994 (2005). In particular, EPA explained that reductions expected to result from the CAIR and the CAMR had obviated the need for section 7412 regulation. *Id.* at 16,004-16,005.

Based solely on this revised determination, EPA stated that it had removed coal- and oil-fired EGUs from the section 7412(c) source list. *Id.* at 16,032-33. The agency did not assert any new scientific understanding of EGU HAPs and their public health or environmental impact, nor did it claim that it had satisfied the delisting criteria set out in section 7412(c)(9). The agency instead maintained that it was not required to do so because it had lawfully determined the December 2000 finding "lacked foundation." *Id.* at 16,033. It also asserted that it had "inherent authority" to revise a finding that was not itself final agency action for judicial review purposes. *Id.*

Shortly after EPA published its Delisting Rule, EPA finalized its CAMR under section 7411 of the CAA. 70 Fed. Reg. 28,606 (2005). In lieu of MACT standards, the CAMR established mercury performance standards for new sources and a two-phase cap-and-trade program for existing EGUs.

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*5-6 (D.C. Cir. Dec. 23, 2008).

Unlike MACT standards, which would have required the maximum achievable degree of reduction of each of the HAPs that power plants emit, 42 U.S.C. 7412(d)(1); *see Nat'l Lime Ass'n*, 233 F.3d at 633-634, the CAMR did not address the significant amounts of lead, arsenic, and other non-mercury HAPs emitted by power plants. The CAMR required no mercury specific reductions until 2018, and was projected to reduce mercury to only approximately 24 tons by 2020, despite the "cap" of 15 tons by 2018. 70 Fed. Reg. at 28,618-19.

On reconsideration, EPA made only two changes to the CAMR not relevant here and otherwise reaffirmed both rules. 71 Fed. Reg. 33,388 (2006).

Legal Challenge and Decision Below

Respondents, which include 17 States, 11 Tribes and the National Congress of American Indians, a city, and various public health and environmental groups, petitioned for review of both EPA's final rule purporting to remove EGUs from the section 7412(c) list and also the CAMR. Respondents maintained that EPA violated its statutory authority by delisting EGUs without making the findings required by section 7412(c)(9) as a precondition for deleting any source category from the section 7412(c) list. Respondents also argued that both the delisting decision and the CAMR were unlawful for other independent reasons. A unanimous panel of the D.C. Circuit agreed with the first argument, which obviated the need to address the other arguments, and vacated both rules. U.S. Pet. App. at 2a-3a.

The court of appeals concluded that because it was undisputed that EGUs were in fact listed sources under section 7412, EPA was required to

make the specific findings mandated by section 7412(c)(9) before removing these sources from the list of source categories. *Id.* Because EPA conceded that it had failed to make the requisite determinations, the court determined that EGUs remained a listed source and that EPA's de-listing rule was invalid. *Id.* at 10a-11a.

The court acknowledged the general principle that agencies may revisit prior policy decisions, but stated that Congress "undoubtedly can limit an agency's discretion to reverse itself, and in [CAA] section 112(c)(9) Congress did just that, unambiguously limiting EPA's discretion to remove sources, including EGUs, from the section 112(c)(1) list once they have been added to it." *Id.* at 12a-13a. "'EPA may not,'" the court explained, "'construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.'" *Id.* at 13a (quoting *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001)).

The court of appeals rejected EPA's argument that section 7412(n)(1)'s provisions authorizing EPA to determine whether regulation of power plants under section 7412 was "appropriate and necessary" rendered section 7412(c)(9)'s delisting mandate ambiguous. *Id.* at 11a. The court reasoned that section 7412(n)(1) "governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs, and the plain text of [CAA] section 112(c)(9) specifies that it applies to the delisting of 'any source.'" *Id.*

The court of appeals denied EPA's and UARG's petitions for rehearing *en banc* with no member of the court requesting a vote. *Id.* at 18a-19a.

REASONS WHY THE PETITIONS SHOULD BE DENIED

A. This Case Presents No Issue of Legal or Extraordinary Significance Warranting This Court's Review.

As petitioners recognize, EPA's statutory authority to delist EGUs is governed by familiar rules of statutory construction. Under *Chevron*, a court reviewing an agency's construction of the statute must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If 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." *Id.* at 842-43. The ruling below follows this well-settled principle and therefore, does not conflict with any decision of this Court or any other, whether in its specific result or its general approach to statutory construction.

Here, as the court of appeals determined, Congress has "spoken directly" to the "precise question" of how EPA may delete a source category from the section 7412(c) list: by following the delisting procedures in section 7412(c)(9). Section 7412(c)(9) prescribes that EPA "may delete any source category from the list under this subsection . . . whenever the Administrator makes . . . [specified] determinations." 42 U.S.C. 7412(c)(9)(B). By its plain terms, section 7412(c)(9) applies to "any source category." *Id.* EGUs are a source category on the section 7412(c) list. 65 Fed. Reg. 79,825; 67 Fed. Reg. 6,521. Therefore, the express language of section 7412(c)(9) required EPA to make the

specified findings prior to removing EGUs from the section 7412(c) list.

Moreover, "where Congress wished to exempt EGUs from specific requirements of [CAA] section 112, it said so explicitly." U.S. Pet. App. 11a. For example, section 7412(c)(6), as the court of appeals noted, "expressly exempts EGUs from the strict deadlines imposed on other sources of certain pollutants." *Id.* And as the court of appeals further noted, EPA recognized in 2002 that EGUs were subject to the requirements of section 7412 when EPA published its list of source categories, and has "provide[d] no persuasive rationale for why the comprehensive delisting process of [CAA] section 112(c)(9) does not also apply" to EGUs. U.S. Pet. App. 11a-12a (citing 67 Fed. Reg. at 6521, 6524, 6535 n.b).

Given the specific statutory language and context at issue, the decision below has no general legal or practical importance to agency decision-making. Section 7412(c) authorized EPA to delete "any source category" from the section 7412(c) list only after EPA makes the findings specified in the provision. 42 U.S.C. 7412(c)(9). Congress, therefore, did not leave EPA an inherent and "temporally unlimited" authority, U.S. Pet. at 12-13, 17, but rather, specifically limited EPA's discretion. This limitation established in section 7412(c)(9) is consistent with the highly rules-oriented statute governing regulation of HAP emissions. The general authority of administrative agencies to reverse course on policy matters is not implicated here, therefore, because the specific statutory language plainly provides otherwise.

Neither EPA nor UARG makes a viable case that the court of appeals committed error in finding that Congress has directly spoken on the issue of how any source category may be delisted.

First, EPA argues that the use of "may" in section 7412(c)(9)(B) leaves EPA discretion to allow the agency to delist in circumstances other than those specified. U.S. Pet. at 14. But that argument strains ordinary English usage and overlooks the statutory context. As section 7412(c)(9) makes clear, the use of "may" in section 7412(c)(9)(B) is permissive only, and merely grants EPA the discretion to decide whether to delete sources after the agency has made the specified "determinations." No reasonable reading of the provision confers discretion to delete sources for reasons different from those specified by Congress.

EPA's argument is particularly implausible in light of the demanding health and environmental findings specified by Congress in that subsection before removal of "any" source category. The strict requirements that "no source" emit pollutants that pose a risk and that there be an "ample margin of safety" – which apply equally to EGUs as to any other major or area source category listed under section 7412(c) – would be rendered practically meaningless if EPA retained discretion to delist a source category or subcategory on other grounds. *See Am. Trucking Ass'ns*, 531 U.S. at 485 (EPA may not interpret the Act "in a way that completely nullifies textually applicable provisions meant to limit its discretion").

Second, EPA's suggestion that Congress implicitly left EPA discretion to remove sources from the section 7412(c) list – by declaring the finding

that added them to the list void *ab initio* – conflicts with the overall structure of section 7412. The listing of pollutants and source categories has decisive significance throughout the section 7412 scheme; the respective lists identify what pollutants and sources must be regulated, establish obligations to promulgate standards, trigger numerous deadlines, and may be added to and deleted from according to specific standards and procedures. *See supra* pp. 2-6. EPA's attribution to Congress of an intent to allow EPA to remove sources from the list without following the express statutory provisions for delisting is inconsistent with this carefully wrought scheme.

Although EPA tries to bolster its case with the settled background principle that agencies may revisit past decisions, U.S. Pet. at 12, this has little import in construing a provision -- section 7412(c)(9) – that was clearly intended to limit that power.

Moreover, EPA is not seeking to merely correct an "error." With its Delisting Rule, EPA not only disagreed with the December 2000 finding, but concluded that its finding was invalid *when made* and therefore ineffective to have subjected EGUs (and EPA) to the provisions of section 7412. 70 Fed. Reg. at 16,003-16,005; U.S. Pet. at 6-7. EPA's reversal of its December 2000 determination and listing, in other words, was an attempt to reverse and expunge a rule, which is little more than retroactive rulemaking. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) (stating that courts should be "reluctant" to find retroactive rulemaking authority "absent an express statutory grant").

Indeed, EPA did not offer any scientific or public health studies refuting the public health hazards posed by EGU HAP emissions to support its retroactive rulemaking. Instead, EPA sought to justify its reversal by relying upon two rules – the CAIR and the CAMR – which could not have been predicted in 2000 when EPA listed EGUs after determining that section 7412 regulation was appropriate and necessary. EPA's argument that the listing was void *ab initio* because EPA in 2000 did not consider rules that were proposed in 2004 therefore defies logic (even putting aside the later rules' legal flaws, *see infra* pp. 25-28).

Although EPA professes uncertainty as to why Congress would limit the agency's ability to "delist" EGUs, U.S. Pet. at 15, the answer is not elusive. As evident from the foregoing, section 7412(c)(9) is part of a statutory section replete with tight deadlines – one of which was included in section 7412(n)(1)(A) – and rigorous textual limits on EPA's discretion, which was intended to avoid a repeat of the lengthy delays and implementation failures of section 7412 during the 1970-1990 period. Those same concerns are implicated by EPA's attempt to substitute section 7412 regulation of EGUs, by delisting EGUs as a source category without following section 7412(c)(9), with the less stringent regulation that section 7411 provides.

Third, EPA argues that because the statute prohibits judicial review of listing decisions until standards are promulgated, its listing was only an "initial" decision that EPA is free to reconsider. U.S. Pet. at 11. Congress, however, has broad authority to impose limits on judicial review – which is what Congress did here, by providing that listing a source

category is not "final agency action *subject to* judicial review." 42 U.S.C. 7412(e)(4) (emphasis added). *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672-73 (1986) (stating that the presumption of judicial review may be overcome by specific statutory language).

This limitation on judicial review, however, did not alter the effect of listing according to the plain terms of the statute, *e.g.*, to promulgate emissions standards, 42 U.S.C. 7412(d)(1), at which point judicial review of the listing may be had. 42 U.S.C. 7412(e)(4). Instead, the judicial review provision further reflects Congress's intent to facilitate and expedite the regulatory process established by the amended section 7412. *See* U.S. Pet. App. at 13a-14a (Congress was concerned with EPA's failure "for decades to regulate HAPs sufficiently."). *Cf. NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 131-32 (1987) (finding that judicial review is allowed only as provided for in the statute to prevent "lengthy judicial proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary").

UARG similarly argues, without basis, that the 2000 listing determination was "preliminary" and "announced without rulemaking" and therefore, the case presents an issue about the limits of one Administration's power to bind its successors to rulemaking. UARG Pet. at 28-29. Not only is the factual basis for UARG's claim incorrect, *see supra* pp.6-8, but in section 7412(c)(9), Congress prescribed the method by which any Administrator – whether the "listing" Administrator, or a successor – may delete a source category from the list of source categories. UARG's claim, therefore, lacks merit.

UARG also fails to show that the court of appeals' decision conflicts with any decision of this Court or any other. UARG's central argument is that this Court should intervene to exercise its "supervisory power" to discipline the D.C. Circuit for its "new approach" to statutory construction that overemphasizes small snippets of statutory text. UARG Pet. at 18, 20.

UARG, however, fails to show more than that UARG simply disagrees with a selection of cases in which the court of appeals found EPA's actions inconsistent with statutory text.[4] A reading of those decisions, like the one at issue here, reveals that the appeals court instead employed a conventional approach to statutory construction consistent with *Chevron*. Those decisions, like the decision in this case, were all unanimous. In none of the cases was a vote for rehearing en banc recorded, or certiorari granted.

Finally, the specific statutory provision that both petitioners erroneously rely upon to attack the decision below – section 7412(n)(1)(A) – is a unique subsection that does not authorize an alternative delisting path for EGUs. Within the careful structure of section 7412, which tightly constrains agency discretion in favor of timely and stringent regulation of HAPs, subsection (n) served only one function: to mandate that EPA decide whether to

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[4] *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), *cert denied*, 127 S. Ct. 2127 (2007), *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), *amended on denial of rehearing*, 489 F.3d 1245 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1065 (2008), *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1121 (2007), *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008).

regulate power plants under section 7412 after considering the results of the study required by that subsection to be completed by November 15, 1993.

In accordance with section 7412(n)(1)(A)'s mandate, EPA conducted public health and other studies and considered alternative control strategies for emissions which may warrant regulation under section 7412. And after completion of the necessary studies and following extensive opportunity for public comment, EPA determined that regulation was appropriate and necessary and added EGUs to the section 7412(c) list. 65 Fed. Reg. 79,825; 67 Fed. Reg. 6,521. Once EGUs were listed, EPA was obliged to promulgate MACT standards for new and existing EGUs, and removal of such source category was limited to the standards and procedure in section 7412(c)(9).

In short, once EPA determined that regulation of EGUs under section 7412 was appropriate and necessary and placed power plants on the section 7412(c) list, section 7412(n)'s function was at an end; it no more governed delisting than it governed the content of regulation for power plants, the schedule for regulating them, or any other aspect of the regulatory process that Congress unambiguously addressed in other subsections.

EPA argues that the use of the terms "regulate" and "regulation" should be read to mean that EPA retained authority to withdraw a "necessary and appropriate" finding until standards are promulgated for EGUs. U.S. Pet. at 13. EPA's argument ignores that the agency not only determined that regulation of power plants under section 7412 was necessary and appropriate, but added them to the section 7412(c) list, which

triggered specific obligations under section 7412. Nothing in section 7412(n) mentions deletion of power plants from the section 7412(c) list or suggests that delisting may be done without meeting the specific requirements for delisting in section 7412(c)(9).

EPA's claim that it has "*continuing*, temporally unbounded" authority to simply reverse the appropriate and necessary determination is similarly incorrect. U.S. Pet. at 17. Subsection (n) required EPA to decide on the basis of a scientific study to be completed no later than November 1993 whether "regulation under [section 7412]" is appropriate and necessary. 42 U.S.C. 7412(n)(1)(A).

EPA's position that Congress vested EPA with unlimited authority in section 7412(n), therefore, is inconsistent with Congress's decision to impose a 1993 deadline for the precise study that was to form the basis for EPA's decision. Unlike the other subsections of section 7412 that expressly call upon EPA periodically to revisit specified issues, section 7412(n)(1) contemplates a single determination based upon this study. Therefore, as the court of appeals correctly concluded, EPA's power to delist EGUs was governed by the provisions expressly addressing delisting – not by an "interpretation" of section 7412(n).

UARG attempts to impugn EPA's motives when it made the 2000 "appropriate and necessary" determination by asserting that the determination was issued "in the closing hours of the Clinton Administration" and "[36] days before the Clinton administration left office." UARG Pet. at 3, 10. But the timing was not surprising; as the agency made clear in its notices leading up to its decision listing

EGUs, the action coincided with the December 15, 2000, deadline that EPA had agreed to in its settlement agreement executed years before. *See supra* pp. 6-7.

Finally, UARG asserts without any basis that it is "undisputed" that the 2000 finding was flawed because, UARG contends, EPA issued the notice of the 2000 determination and listing without rulemaking, completion by the agency of the necessary studies, or consideration of the required factors. UARG Pet. at 28. To the contrary, EPA's action was based on extensive scientific study and extensive public input and its validity may be challenged pursuant to section 7412(e)(4) after EPA promulgates emissions standards as required by section 7412(d). 65 Fed. Reg. 79,825 (describing the basis for EPA's finding and listing).[5] UARG's effort to portray EPA's determination as a hurried decision ignores the extensive, multi-year, public process, in which UARG participated, leading up to the determination, including review of comprehensive EPA and NAS studies on the effects of hazardous pollutants emitted by EGUs. *See supra* pp. 6-9.

In sum, EPA and UARG fail to show that Congress, in subsection (n), altered the fundamental details of the section 7412 regulatory scheme such that this Court's review is warranted. *See Am.*

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[5] For example, EPA found that EGUs are "the largest source of mercury emissions in the U.S., estimated to emit about 30 percent of current anthropogenic emissions. " 65 Fed. Reg. at 79,827. EPA found "a plausible link between emissions of mercury from anthropogenic sources (including coal-fired electric steam generating units) and methylmercury in fish" and therefore found EGU mercury emissions "a threat to public health and the environment." *Id.*

Trucking Ass'ns, 531 U.S. at 468 (stating that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").

B. This Court Should Not Grant Review Due To The Legal Uncertainty Of EPA's Rules Underlying Its Delisting Decision.

As EPA acknowledges, a recent decision by the court of appeals in another Clean Air Act case declaring the CAIR unlawful casts into doubt the entire foundation upon which EPA relied in promulgating the rules at issue. U.S. Pet. at 19, n.4. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *amended in part on rehearing*, No. 05-1244, 2008 U.S. App. LEXIS 26084 (D.C. Cir. Dec. 23, 2008). Although the CAIR remains in place pending an EPA decision on remand, given the remanded CAIR's "deep" flaws, the content and details of any revised rule are far from certain. *North Carolina*, 531 F.3d at 929-30 (finding the CAIR to be "fundamentally flawed"). The existing regulatory uncertainty of the CAIR upon which EPA heavily relied in advancing both the Delisting Rule and the CAMR strongly militates against review by this Court at this time.

Further, granting certiorari would not have the effect of clearing the way for EPA's preferred cap and trade program as petitioners suggest. EPA supported its delisting decision based upon a new, but flawed, interpretation of section 7412(n) as well as the CAIR and the CAMR. *See, e.g.*, 70 Fed. Reg. at 15,997-16,002, 16010-11. The court of appeals, therefore, would still have to rule upon the other legal deficiencies raised in review petitions below – ones that the court of appeals did not need to reach.

Although EPA devoted significant portions of its petition to the policy merits of its favored "alternative" regulatory track for mercury emissions from EGUs, U.S. Pet. at 18-24, its substitute CAMR-CAIR regulatory regime is not the approach that Congress intended; indeed, it violates the CAA.

EPA justified its delisting decision and its cap and trade program based in part upon incidental reductions in mercury emissions from EGUs that EPA projected would result from implementation of the CAIR. 70 Fed. Reg. at 16,004, 16,010-11. But the court of appeals' recent decision holding the CAIR unlawful on multiple grounds now undermines EPA's justification for its Delisting Rule as well as the CAMR because EPA wholly relied on the CAIR to provide *all* of the reductions in mercury emissions until 2018. *Id.* at 16,010-11; 70 Fed. Reg. at 28,618-19. Indeed, EPA itself stated that "EPA may need to seek a remand to reconsider the CAMR and its section 7412(n)(1)(A) determination." U.S. Pet. at 19, n.4. Given that EPA must now comprehensively revise the CAIR, it seems highly doubtful that EPA could today affirm the 2005 determination EPA seeks to defend in this case – *i.e.*, that regulation of EGUs under section 7412 is not "appropriate and necessary" because of the availability of alternative regulatory mechanisms.

In addition to the CAIR, EPA also relied upon the CAMR to support its "revised" section 7412(n)(1)(A) determination and remove EGUs from the section 7412(c) list. The CAMR, however, was not an acceptable alternative to the stringent, deadline driven program that Congress imposed for HAPs. Although EGUs emit a significant number of the 188 hazardous air pollutants listed under section

7412, 65 Fed. Reg. at 79,827-28, the CAMR required no reductions of any of these other HAP emissions, such as arsenic, lead, and hydrochloric acid. Also, because the CAMR required no significant mercury reductions until 2018 and allowed banking of emissions credits, the CAMR was expected to result in smaller reductions over a much longer period of time. 70 Fed. Reg. at 28,619.

Moreover, the CAMR's emissions trading scheme was based on section 7411 of the Act. Section 7411(d), however, provides for regulation of existing sources only for air pollutants that are *not* "emitted from a source category which is regulated under section 7412." 42 U.S.C. 7411(d)(1). Here, mercury is a listed HAP under section 7412, 42 U.S.C. 7412(b)(1), (c)(6), and is emitted from a number of source categories regulated under section 7412, *see, e.g.*, 71 Fed. Reg. 76,518 (2006) (emissions standards for HAPs including mercury from Portland Cement manufacturers), the CAA appears to expressly bar regulation of mercury under section 7411.

The CAMR itself also was not a proper standard of performance and contained serious flaws. For example, EPA's own data predicted that the CAMR would yield an increase of mercury emissions in 19 states until 2018. Response to Significant Public Comments, at 177-178 (May 31, 2006) (CA App. 3846-47). Also, as a cap and trade program, the CAMR would only reduce emissions at those power plants that do not buy credits, which would leave unprotected communities and areas near and downwind from plants that purchase mercury pollution allowances.

Finally, in addition to the CAIR and the CAMR, EPA also relied upon a flawed interpretation of

section 7412(n) to justify its delisting decision. For example, according to EPA now, it could only regulate EGUs under section 7412 if the power plant mercury emissions remaining after the CAA's other requirements have been implemented, standing alone, are responsible for causing hazards to human health. 70 Fed. Reg. at 15,998, 16,001; U.S. Pet. at 6-7. Section 7412(n), however, did not limit EPA to considering public health impacts arising from EGU emissions in isolation; instead EPA was directed to consider hazards reasonably anticipated to occur "as a result of" HAP emissions from EGUs. 42 U.S.C. 7412(n)(1)(A). And EPA's listing of EGUs followed the completion of the study as Congress directed and EPA's determination in accordance with section 7412(n)(1)(A), *i.e.*, that regulation of EGUs under section 7412 was appropriate and necessary due to the public health hazards reasonably anticipated to occur as a result of HAPs emitted by EGUs based on this and other studies – the breadth and depth of which are discussed *supra* at pages 6-8 – as well as public input.

In sum, further regulatory developments – including a comprehensive agency review of how to address toxics from EGUs – are a certainty, regardless of the outcome of this case. For all of these reasons, the case is not suitable for review by this Court.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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