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

In The

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents,

and two related cases.

On Writs of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
TOM DONNELLY
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

March 4, 2015 * Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional, Statutory, and Legislative Provisions

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. We also work to ensure that courts remain faithful to the text, structure, and purpose of key federal statutes like the Clean Air Act and, in turn, protect the authority of the elected branches to provide national solutions to national problems—including the pressing and pervasive problem of air pollution, as argued in CAC's *amicus* briefs last Term in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). CAC accordingly has an interest in this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Air Toxics Rule addresses the risks associated with the emissions of hazardous air pollutants (HAPs) like mercury and arsenic from coal- and oil-fired power plants, referred to in the Clean Air Act

---

[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, all parties have granted blanket consent to the filing of *amicus curiae* briefs in letters on file with the Clerk of the Court.

(CAA) as electric utility steam generating units (EGUs). 77 Fed. Reg. 9304-01 (Feb. 16, 2012) (2012 Final Rule); *see also* Am. Acad. of Pediatrics Resp'ts Br. 4-11 (describing the related legislative and regulatory background and history); Fed. Resp'ts Br. 3-8 (same); Indus. Resp'ts Br. 2-4 (same); State & Local Gov'ts Resp'ts Br. 21-24 (same). These risks include a number of health problems, ranging from birth defects to neurological disorders to cancer. Am. Acad. of Pediatrics Resp'ts Br. 3. Furthermore, HAP emissions cross state lines, therefore hampering state-based efforts to reduce these emissions and, in turn, address the related health and environmental risks. State & Local Gov'ts Resp'ts Br. 11-13.

The continued validity of the Air Toxics Rule now turns on the meaning of a single term—"appropriate." Before EPA may regulate HAP emissions from EGUs, the CAA requires the agency to release a study of "the hazards to public health" associated with EGU HAP emissions. 42 U.S.C. § 7412(n)(1)(A). Once this public health study is complete, EPA must "consider[] [its] results" and then "regulate" EGUs "if the Administrator finds such regulation is appropriate and necessary." *Id.* While EPA interprets the term "appropriate" as directing the agency to weigh the health and environmental risks associated with EGU HAP emissions, 77 Fed. Reg. 9304-01, 9362-9363, 9366 (Feb. 16, 2012) (2012 Final Rule), Petitioners claim that this term carries with it a separate (and specific) congressional command.

In Petitioners' view, this "broad and encompassing" term does not merely permit, but actually "*compel[s]*," EPA to consider compliance costs before making the threshold decision to regulate EGU HAP emissions. Util. Air Regulatory Grp. Pet'rs Br. 23

(emphasis added). While *amicus* rejects Petitioners' argument and agrees in full with Respondents' interpretation of 42 U.S.C. § 7412(n)(1)(A), we write separately to provide an extensive analysis of the meaning of the term "appropriate"—its dictionary definition, its ordinary use, its use in legal sources, and its use in § 7412(n)(1)(A). Based on this analysis, and in light of the deference due to EPA's interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Petitioners' challenge must fail.

The term "appropriate" is defined nowhere in the CAA, and there is nothing inherent in the ordinary meaning of the term that requires the consideration of costs. Instead, as this Court has explained, the term itself is "open-ended," "ambiguous," and "inherently context-dependent," *Sossamon v. Texas*, 131 S. Ct. 1651, 1659 (2011). The same is true of its usage in statutes and in other legal contexts, which is quite varied—sometimes contemplating cost considerations and sometimes not. It is little wonder that, in the legal context, the term "appropriate" is often used to delegate broad discretion to a specified agent—whether through constitutional grants of authority to Congress or statutory grants of authority to specific officers, agencies, or courts.

Finally, the text of § 7412(n)(1)(A) and the CAA's structure confirm that EPA's interpretation of the term "appropriate" is, to echo the D.C. Circuit, "clearly permissible." Nat'l Mining Ass'n Pet'rs App. 25a-26a. Section 7412(n)(1)(A) is silent on the issue of costs, even as the CAA explicitly requires EPA to consider costs before taking many other regulatory actions—perhaps most notably, when setting emissions standards for regulated sources of HAP emissions, including EGUs. Importantly, the CAA also

excludes cost considerations from other key HAP-related regulatory decisions, including (1) the decision to regulate HAP emissions from all sources other than EGUs, 42 U.S.C. § 7412(c)(1), and (2) the decision to remove sources of HAP emissions—*including EGUs*—from the list of regulated sources, *id.* § 7412(c)(9)(B)(i), (ii). Therefore, Petitioners' approach creates an asymmetry, requiring cost considerations when deciding whether to regulate EGUs—even as EPA may *not* take costs into account when determining whether to regulate HAP emissions from other sources or when deciding whether to remove a source of HAP emissions (including EGUs) from the list of regulated sources.

Under *Chevron*, EPA is given broad discretion to interpret ambiguous statutory language. Therefore, this Court must defer to EPA's reasonable interpretation of § 7412(n)(1)(A) unless it concludes that the CAA unambiguously instructed the EPA to consider costs before concluding that it was "appropriate" to regulate EGU HAP emissions. Given the flexibility of the term "appropriate," § 7412(n)(1)(A)'s silence on the issue of costs, and strong contextual evidence supporting EPA's interpretation of this key provision, it was "clearly permissible" for EPA to exclude cost considerations from its threshold decision to regulate EGU HAP emissions.

ARGUMENT

Nothing in the text of § 7412(n)(1)(A) required EPA to consider costs when making its "appropriate and necessary" determination. Nevertheless, Petitioners give decisive weight to the term "appropriate"—arguing that this term required EPA to consider compliance costs when making this threshold de-

termination. The term "appropriate" cannot bear the weight that Petitioners give it.

I. THE ORDINARY MEANING OF THE TERM "APPROPRIATE" DOES NOT REQUIRE THE CONSIDERATION OF COSTS.

Generally speaking, when interpreting statutory text, this Court assigns it the meaning "a reasonable person would gather from the text of the law," Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (1997)—the reading that is "most in accord with context and ordinary usage," *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528-29 (1989) (Scalia, J., concurring in the judgment); *see also* Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 Yale L.J. 1561, 1590 (1994) ("[T]he normal presumption in statutory interpretation [is] . . . that Congress intended the ordinary meaning of the words used."). When Congress amended the CAA in 1990 and added the key provision at issue in this case, the term "appropriate" carried the same ordinary meaning that it does today.

When someone describes someone or something as "appropriate"—then as now—the speaker ordinarily means that the person, object, or action being described is "specially suitable," "fit," or "proper" for a given circumstance. *See* 1 *The Oxford English Dictionary* 586 (2d ed. 1989) (defining "appropriate" as "[s]pecially fitted or suitable, proper"); *Webster's Third New International Dictionary* 106 (1986) (defining "appropriate" as "specially suitable: fit, proper").

Petitioners are, no doubt, correct that the term "appropriate" is sometimes used to describe objects or actions that take costs into account. For instance, a businessperson may speak of taking "decisive action"

to "reduce expenses to *appropriate* levels." Lawrence M. Fisher, *Business People; Businessland Names Chief Operating Officer*, N.Y. Times, Nov. 14, 1990, http://www.nytimes.com/1990/11/14/business/businesspeople-businessland-names-chief-operating-officer.html (emphasis added) (quoting Edward R. Simon Jr., President and Chief Operating Officer of Businessland Inc.). Or, an observer may praise an airline's decision to replace its fleet of large, expensive airplanes with smaller, "more fuel-efficient" models—models that are "more *appropriate*" for servicing a certain market. Agis Salpukas, *Pan Am's Fight to Survive on Its Own*, N.Y. Times, Nov. 13, 1990, http://www.nytimes.com/1990/11/13/business/pan-am-s-fight-to-survive-on-its-own.html (emphasis added). In each case, cost is one of the factors driving the evaluative judgment that a given action is "appropriate" in that set of circumstances. However, the term "appropriate" may also be used in situations that do not involve the weighing of costs.

For instance, the Anima Christi may be an "appropriate" prayer for an occasion of "great solemnity." *See* 1 *The Oxford English Dictionary*, *supra*, at 586. Red wine may be an "appropriate" pairing for a hearty steak. *See* Definition of Appropriate, *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/appropriate (last visited Mar. 3, 2015). A romantic movie may be an "appropriate" selection for a Valentine's Day date. *See id.* And a sprinkle of cinnamon may be an "appropriate" additive for a warm drink on a cold evening. *See* Definition of Appropriate, *Oxford Dictionaries*, http://www.oxforddictionaries.com/us/definition/american_english/appropriate (last visited Mar. 3, 2015).

In the end, the term "appropriate" is quite adaptable and may be used to describe anything from

a tennis star's timing to a cabaret singer's gestures. *See* Robin Finn, *Sabatini Receives a Scare but Stays Tough at the Finish*, N.Y. Times, Nov. 15, 1990, http://www.nytimes.com/1990/11/15/sports/sabatini-receives-a-scare-but-stays-tough-at-the-finish.html ("[A]lthough she wasn't overjoyed with her serve, the 16-year-old Yugoslav chose *appropriate* moments—at set point in the first set and match point in the second—to launch her aces.") (emphasis added); Eleanor Blau, *Lisa Kirk, Cabaret Performer, 62; Featured in Broadway Musicals*, N.Y. Times, Nov. 13, 1990, http://www.nytimes.com/1990/11/13/obituaries/lisa-kirk-cabaret-performer-62-featured-in-broadway-musicals.html ("I practiced a song before a mirror and framed it in what I considered *appropriate* gestures.") (emphasis added). There is nothing inherent in the ordinary meaning of the term "appropriate" that requires cost considerations. Instead, when an ordinary speaker determines that something or someone is "appropriate," that determination is driven by factors relevant to that set of circumstances and that speaker's own sense of what is most important—whether that is cost, flavor, gravity, style, or something else entirely.

II. THERE IS NOTHING IN THE VARIED USES OF THE TERM "APPROPRIATE" IN LEGAL CONTEXTS THAT REQUIRES COST CONSIDERATIONS, EITHER.

The term "appropriate" is familiar to both Congress and the courts. Congress has used it in numerous statutes—including in several provisions of the CAA—and, of course, the term "appropriate" also appears in the U.S. Constitution. Use of this term in legal sources generally matches its use in ordinary conversation. Namely, its meaning is varied and contextual. Indeed, given its multifaceted use in the

U.S. Code and the U.S. Constitution, it is little wonder that, when either Congress or the Constitution delegates authority to a given agent, the term "appropriate" sometimes contemplates cost considerations and sometimes not. Most notably, the term itself traditionally signals delegation of broad discretion to a designated agent—whether that is Congress, the courts, a specific officer, or an expert agency.

This Court recently examined the meaning of the term "appropriate" in detail. In *Sossamon v. Texas*, 131 S. Ct. 1651 (2011), the question was whether the States, by accepting federal funds, consented to waive their sovereign immunity to damage suits under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. The key statutory provision at issue included the term "appropriate": "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain *appropriate* relief against a government." 42 U.S.C. § 2000cc-2(a) (emphasis added).

In rejecting the argument that the States had waived immunity to damage suits based on the acceptance of federal funds and the text of this provision, this Court stressed the flexibility of the term "appropriate." Relying on dictionary definitions similar to those examined in Part I, *supra*, this Court unsurprisingly concluded that the term "appropriate" is "open-ended," "ambiguous," and "inherently context-dependent." *Sossamon*, 131 S. Ct. at 1659. Therefore, this Court held that "the phrase 'appropriate relief' . . . is not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their

sovereign immunity to suits for damages." *Id.* at 1660.[2]

Reinforcing the flexibility of the term "appropriate" in the legal context, Congress has used the specific phrase "appropriate and necessary"—the very formulation used in § 7412(n)(1)(A)—in a variety of contexts, ranging from the Secretary of Agriculture's decision to permit concession sales at the National Arboretum, 20 U.S.C. § 196(a)(2), to the Secretary of Health and Human Services' findings supporting new performance standards for devices, 21 U.S.C. § 360d(b)(1)(B)(i), to the information that various cabinet secretaries must provide the President about "significant foreign narcotics traffickers," 21 U.S.C. § 1903(a). These statutory provisions are often structured in such a way that the phrase "appropriate and necessary" is oriented toward a certain goal—often phrased as "appropriate and necessary to X." *See*, *e.g.*, 21 U.S.C. § 360d(b)(1)(B)(i) ("A notice of proposed rulemaking for the establishment . . . of a performance standard for a device shall . . . set forth a finding with supporting justification that the performance standard is *appropriate and necessary to* provide reasonable assurance of the safety and effectiveness of the device.") (emphasis added); 21 U.S.C. § 2223(d)(2)(A) ("[T]he Secretary shall designate high-risk foods for which . . . additional recordkeeping

---

[2] In other contexts, this Court has provided similar readings of the term "appropriate." *See, e.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) ("It is difficult to draw any meaningful guidance from [the provision's] use of the word '*appropriate*,' which means only 'specially suitable: fit, proper.'") (emphasis added) (quoting *Webster's Third International Dictionary*); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (declining the invitation to decide whether the phrase "reasonably necessary and appropriate" generally *required* the use of cost-benefit analysis).

requirements . . . are *appropriate and necessary to* protect the public health.") (emphasis added).

As with the ordinary use of the term "appropriate," sometimes these provisions contemplate cost considerations. For instance, one such provision calls on the Department of Defense's Board of Actuaries to "review valuations of the Department['s] Military Retirement Fund . . . and submit . . . a report on the status of that Fund, including such recommendations for modifications to the funding or amortization . . . as the Board considers *appropriate and necessary* to maintain that Fund on a sound actuarial basis." 10 U.S.C. § 183(c)(1) (emphasis added). However, at other times, congressional use of the phrase "appropriate and necessary" plainly does not contemplate cost considerations. For instance, Congress used the phrase "appropriate and necessary" in the context of flight safety, permitting "the Under Secretary [of Transportation for Security]" to "authorize members of [a] flight deck crew on any aircraft providing air transportation . . . to carry a less-than-lethal weapon" if she "determines . . . that it is *appropriate and necessary* and would effectively serve the public interest in avoiding air piracy." 49 U.S.C. § 44903(i)(1) (emphasis added). In the end, these examples confirm that, as with ordinary use of the term "appropriate," its use in statutory materials is, as this Court explained, similarly "open-ended" and "context-dependent."[3]

---

[3] The U.S. Code also contains several provisions using the phrase "necessary and appropriate." *See* Fed. Resp'ts Br. 43 (noting that there are hundreds of provisions in the U.S. Code that use the phrase "appropriate and necessary" or "necessary and appropriate"). Much like the phrase "appropriate and necessary," this phrase is used in a variety of contexts, many of which do not contemplate cost considerations. *See, e.g.*, 7 U.S.C.

Finally, given this flexibility, this Court has often interpreted the term "appropriate" as delegating broad authority to a designated agent—whether that is Congress, the courts, an officer, or an expert agency. *See, e.g.*, *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 n.12, 374-75 (2007) (reading a provision that provides bankruptcy courts with the authority to "issue any order, process, or judgment that is *necessary or appropriate*" (quoting 11 U.S.C. § 105(a)) as granting such courts "broad authority") (emphasis added); *Edmond v. United States*, 520 U.S. 651, 656 (1997) (construing a provision that gives the Secretary of Transportation the power to "promulgate such regulations and orders as he deems *appropriate*" (quoting 14 U.S.C. § 633) as providing the Secretary with "broad authority over the Coast Guard") (emphasis added); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662 (1993) (reading a provision that gives the Secretary of Transportation the authority to "prescribe, as necessary, *appropriate* rules, regulations, orders, and standards for all areas of railroad safety"

---

§ 6918(c)(3) (authorizing the Secretary of Agriculture to "delegate to the Assistant Secretary . . . responsibility for . . . ensuring that necessary and appropriate civil rights components are properly incorporated into all strategic planning initiatives"); 14 U.S.C. § 182(a) (instructing the Secretary to "take such action as may be necessary and appropriate to insure that female individuals shall be eligible for appointment and admission to the Coast Guard Academy"); 16 U.S.C. § 410jj-4(b)(4) (authorizing the Secretary to "stabilize and rehabilitate structures" at the Kalaupapa National Historical Park "only to the extent necessary and appropriate to interpret adequately the nationally significant historical features and events of the [Kalaupapa] settlement for the benefit of the public"); 18 U.S.C. § 39A(d) (permitting the "Attorney General, in consultation with the Secretary of Transportation" to create such exceptions to the crime of aiming a laser pointer at an aircraft "by regulation, . . . as may be necessary and appropriate").

(quoting 45 U.S.C. § 431(a)) as delegating to the Secretary "broad powers") (emphasis added); *Sch. Comm. of the Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985) (interpreting a provision that directs the relevant court to "grant such relief as [it] determines is *appropriate*" (quoting 20 U.S.C. § 1415) as "confer[ring] broad discretion on th[at] court") (emphasis added); *see also Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229 (D.C. Cir. 2007) (construing the EPA Administrator's discretion under CAA § 231(a)(3) to "issue regulations" pertaining to aircraft fuel "with such modifications as he deems *appropriate*" (quoting 42 U.S.C. § 7571(a)(3)) as "both explicit and extraordinarily broad") (emphasis added).

Perhaps most notably, this Court has long interpreted the term "appropriate" as granting Congress considerable discretion under several provisions of the U.S. Constitution. One such example is found in the three Amendments ratified in the wake of the Civil War, each of which contains an Enforcement Clause providing Congress with the explicit authority to "enforce" each Amendment "by appropriate legislation." U.S. Const. amend. XIII § 2; U.S. Const. amend. XIV § 5; U.S. Const. amend. XV § 2.

This Court has long interpreted these Clauses as providing Congress with the same broad discretion that it has to carry out other provisions of the Constitution under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) ("By including s 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause . . . ."); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (granting defer-

ence to Congress's use of the Fifteenth Amendment's Enforcement Clause); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1869) (declaring that "[i]t must be taken then as finally settled . . . that the words" of the Necessary and Proper Clause are "equivalent" to the term "appropriate"), *overruled in part by Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

Under this authority, Congress has broad latitude to employ legislative means naturally related to the lawful objects or ends of the federal government—policy judgments to which this Court has said deference must be given. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.") (emphasis added); *see also* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 53 (2014) ("[T]he phrase 'necessary and proper' constitutes the kind of 'empty standard' one usually associates with delegation.").

Because the term "appropriate" is "open-ended" and "inherently context-dependent," the use of that term in § 7412(n)(1)(A) cannot, by itself, require EPA to consider costs when determining whether to subject EGU emissions to regulation under the CAA's HAP regime. It rather calls for consideration of the statutory context which, as demonstrated in Part III, *infra*, firmly supports EPA's decision to exclude cost considerations from its "appropriate and necessary" determination.

III. EPA'S DECISION TO EXCLUDE COMPLIANCE COSTS FROM ITS "APPROPRIATE AND NECESSARY" DETERMINATION IS REINFORCED BY THE CAA'S TEXT AND STRUCTURE.

The ordinary meaning of the term "appropriate" does not require the consideration of costs. However, statutory terms "cannot be construed in a vacuum." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). As this Court has long recognized, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also* John F. Manning, *What Divides Textualists from Purposivists*, 106 Colum. L. Rev. 70, 75 (2006) ("[T]he meaning of statutory language (like all language) depends wholly on context.").

Here, not only is EPA's interpretation of § 7412(n)(1)(A) consistent with the ordinary meaning of the term "appropriate," but it is also reinforced by the CAA's text and structure. At the very least, EPA's interpretation of this critical provision is, as the D.C. Circuit concluded, "clearly permissible."

Under *Chevron*, the relevant question is always whether EPA's reading is "a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); *see also EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) (noting that this Court "routinely accord[s] dispositive effect to an agency's reasonable interpretation of ambiguous statutory language"). In challenging EPA's interpretation here, Petitioners deviate from this well-established princi-

ple, seeking to "transfer[] . . . interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term . . . —from an agenc[y] that administer[s] the statute[] to [a] federal court." *City of Arlington v. FEC*, 133 S. Ct. 1863, 1873 (2013) (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). Nothing in the CAA's text and structure requires this Court to take up Petitioners' invitation.

A. The Term "Appropriate," When Read In The Context Of § 7412(n)(1)(A), Does Not Require EPA To Consider Compliance Costs When Making Its "Appropriate And Necessary" Determination.

When interpreting statutory language, "context is everything." Scalia, *supra*, at 37. And, when the term "appropriate" is read in the context of § 7412(n)(1)(A), EPA's decision to exclude cost considerations from its "appropriate and necessary" determination is perfectly reasonable.

To begin, the text of § 7412(n)(1)(A) offers no explicit guidance to EPA as to which factors it must weigh in making its "appropriate" determination. The term "appropriate" itself is defined nowhere in the statute. And, as discussed in Part II, *supra*, the term itself is "open-ended," "ambiguous," and "inherently context-dependent," *Sossamon*, 131 S. Ct. at 1659—the perfect candidate for judicial deference to an expert agency's judgment under *Chevron*.

Furthermore, the term "costs" does not appear anywhere in § 7412(n)(1)(A) either. And, as EPA was well aware when promulgating its final rule here, 76 Fed. Reg. 24,976-01, 24,989 (May 3, 2011), this Court has been reluctant to read cost *requirements* into congressional silence—at times even prohibiting EPA

from taking compliance costs into account when administering the CAA. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001) (preventing EPA from considering costs when setting national ambient air quality standards); *see also EME Homer City Generation, L.P.*, 134 S. Ct. at 1604 ("Under *Chevron* we read Congress' silence as a delegation of authority to EPA to select from among reasonable options."); *Entergy Corp.*, 556 U.S. at 222 ("It is eminently reasonable to conclude that [congressional] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."); *Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 510-12 (concluding that it was not reasonable for the Secretary of Labor to read broad language—including the term "appropriate"—as importing a cost-benefit test into a regulatory scheme when the relevant statute already included a specific "feasibility"-based standard that would effectively be overridden by a cost-benefit approach).

Finally, the primary contextual evidence in § 7412(n)(1)(A) itself points not toward cost considerations, but instead toward concerns about possible risks to public health. Under the 1990 Amendments, Congress instructed EPA to "perform a study of the hazards to public health reasonably anticipated to occur as a result of [HAP emissions from EGUs]." 42 U.S.C. § 7412(n)(1)(A). From there, Congress provided EPA with the following statutory command: EPA "*shall* regulate [HAP emissions] under this section, if the Administrator finds such regulation is appropriate and necessary *after considering the results of the study required by this subparagraph*." *Id.* (emphases added).

Given the plain meaning of the term "appropriate," it is reasonable to read the challenged provi-

sion as follows: EPA shall regulate HAP emissions under this section if the Administrator finds such regulation is "suitable" (or "fitting") after considering the results of a study examining the public health risks associated with HAP emissions from EGUs. EPA read this language as requiring it to "consider" the results of this statutorily required study and, based on those results, as well as related environmental risks, determine whether regulation of EGU emissions was "appropriate." While the language of § 7412(n)(1)(A) perhaps *could* be read to allow EPA to account for compliance costs when making this threshold determination—and that proposition is surely contestable, given some of the contextual evidence discussed in Section III.B, *infra*—that certainly is not the *only* reasonable interpretation of the statutory text. Furthermore, given the specific congressional directive to conduct a public health study, it was "clearly permissible" for EPA to exclude cost considerations from this initial inquiry. At the very least, this reasonable interpretation of § 7412(n)(1)(A) is entitled to deference under *Chevron*.

B. EPA's Interpretation Of The Term "Appropriate" Is Also Reasonable When Read In The Context Of Other CAA Provisions Addressing HAP Emissions.

While the text of § 7412(n)(1)(A) alone supports EPA's reading of the term "appropriate," this Court "should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132. Instead, it must "account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Importantly, EPA's interpretation of § 7412(n)(1)(A) is bolstered by contextual evidence within other provisions of the CAA addressing HAP emissions, including key provisions that explicitly include cost considerations. *See Am. Trucking Ass'ns*, 531 U.S. at 467 (refusing "to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted"); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

To begin, once EPA determines that it is "appropriate and necessary" to regulate EGU HAP emissions under § 7412(n)(1)(A), the agency must set emissions standards. And this decision turns, in part, on cost considerations—both implicitly and explicitly.

EPA must set standards that "require the maximum degree of reduction in [HAP] emissions" that the agency concludes is "achievable" after weighing several factors, including energy requirements, certain health and environmental effects, and *costs*. 42 U.S.C. § 7412(d)(1), (2). For existing sources, the CAA sets an emissions "floor" based on the average emission reductions achieved by the best-performing 12% of existing sources. *Id.* § 7412(d)(3)(A). These floor standards take compliance costs into consideration implicitly by setting a statutory minimum based upon what existing sources have already been able to achieve under current market conditions. More important, to go beyond this statutory floor—in other

words, to impose more restrictive standards—the CAA explicitly requires EPA to "*tak[e] into consideration the cost* of achieving such emission reduction," *id.* § 7412(d)(2)—an explicit mention of cost found nowhere in § 7412(n)(1)(A). *See also* Fed. Resp'ts Br. 35 n.10 (listing dozens of CAA provisions—both within Section 7412 and elsewhere—that explicitly direct EPA to consider costs when taking a given regulatory action); State & Local Gov'ts Resp'ts Br. 20 (similar).

EPA's treatment of EGUs in the final rule—namely, delaying the consideration of costs until setting emissions standards—is also consistent with other key features of the CAA's regime for addressing HAP emissions. For instance, consider the CAA's framework for deciding which HAPs warrant regulation. In the CAA itself, Congress lists 189 HAPs that EPA must regulate. 42 U.S.C. § 7412(b)(1). Furthermore, Congress directs EPA to "periodically review th[is] list . . . and, where *appropriate*, revise such list by rule, adding pollutants which present, or may present, . . . a threat of adverse human health effects . . . or adverse environmental effects." *Id.* § 7412(b)(2) (emphasis added). Cost plays no role in these listing decisions, even as one of the key provisions uses the term "appropriate."

Or, consider the CAA's requirements for determining which sources of HAP emissions other than EGUs are worthy of regulation. The CAA bases this determination on each source's annual emissions, with those sources emitting either 10 tons per year of any single HAP or 25 tons per year of any combination of HAPs subject to regulation. *Id.* § 7412(a)(1). Again, cost plays no role in this determination.

Finally, consider the CAA's framework for determining whether a source of HAP emissions—*including EGUs*—should be removed from the list of

regulated sources. EPA is to base these decisions on risks to public health and the environment, *not* costs. *Id.* § 7412(c)(9)(B)(i), (ii). For instance, for HAPs associated with cancer risks, EPA may delete sources of such pollutants from the list only if "no source in the category . . . emits such . . . 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 to [such] emissions." *Id.* § 7412(c)(9)(B)(i). For HAPs associated with health risks other than cancer, EPA may delete sources of those pollutants from the list only if "emissions from no source in the category . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source." *Id.* § 7412(c)(9)(B)(ii). Once again, cost plays no role in this determination.

In the end, Petitioners envision a scheme that would strictly regulate all sources of HAP emissions based exclusively on health and environmental risks except for what statutorily required studies have shown are among the largest emitters of those substances—EGUs—which would be exempt from regulation if such regulations were deemed too costly. *See* Am. Acad. of Pediatrics Resp'ts Br. 10 (noting that EGUs account for 50% of total U.S. mercury emissions); State & Local Gov'ts Resp'ts Br. 1 (stating that EGUs are "the largest source of [HAP] pollution in the Nation"); Indus. Resp'ts Br. 1 (explaining that EGUs are "by far the largest source of mercury and certain other hazardous air pollutants"). Neither the ordinary meaning of the term "appropriate" nor the CAA's text and structure require this perverse result. Furthermore, strong contextual evidence—both within § 7412(n)(1)(A) itself and in related CAA provi-

sions—reinforce the D.C. Circuit's conclusion below that EPA's decision to exclude cost considerations when making its initial "appropriate and necessary" determination was reasonable and, therefore, ought to receive deference under *Chevron*.

CONCLUSION

EPA's reading of § 7412(n)(1)(A) is a reasonable and valid interpretation of the CAA, and, therefore, this Court should affirm the lower court's decision upholding EPA's Air Toxics Rule.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
TOM DONNELLY
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

March 4, 2015 * Counsel of Record