NOS. 14-46, 14-47 AND 14-49

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS,
v.
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.

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

REPLY BRIEF OF PETITIONER THE NATIONAL MINING ASSOCIATION

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RULE 29.6 STATEMENT

The petitioner does not have a parent company, and no publicly-held corporation has a 10% or greater ownership interest in the petitioner.

INTRODUCTION

Despite hundreds of pages of briefing, Respondents and their supporting amici fail to provide a convincing and reasonable explanation for adopting a rule with annual compliance costs of $9.6 billion and annual benefits of only $4-$6 million. They could have at least attempted to justify this result by arguing that Congress prevented EPA from considering the rule's cost, but they did not do so. Instead, they took the position that Congress left the choice of whether to consider costs in EPA's hands. Nor did they contend that EPA rationally concluded that unquantified benefits and co-benefits tip the cost-benefit analysis in favor of regulation. Despite all their words about those benefits, Respondents were forced to concede that EPA, because it decided to ignore costs, did not weigh costs and benefits in making the appropriateness determination.

Respondents were thus left with the unenviable task of defending the rationality of EPA's position that it could determine whether regulation is "appropriate" without even considering the cost of that regulation. But EPA's position is indefensible either as a matter of statutory construction under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or as a matter of rational decisionmaking under *Motor Vehicle*

Manufacturers Ass'n, Inc. v. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983). Congress did not delegate to EPA the immense power of adopting regulations that are so costly that they are transforming the electric power sector without requiring the Agency to at least consider the impact of its decision. And even if Congress did delegate that authority, no rational person, faced with evidence that the costs of a decision far outweigh its benefits, decides to simply ignore the costs and proceed anyway.

Acid gas regulation proves the point. Regulating acid gases will cost over $5 billion per year yet produce no health benefit (as EPA concedes) and will create only the vaguest of environmental benefits in possibly reducing water-body acidification. None of the Respondents, however, offered a satisfactory explanation of how a Congress that adopted an entire Title devoted to cost-effectively addressing the electric sector's contribution to water-body acidification could have simultaneously intended that EPA would adopt hugely expensive supplemental regulations to achieve virtually no benefit at all.

ARGUMENT

I. Respondents' Statutory Analysis Is Unavailing.

A. Respondents Misread the Plain Text of Section 7412(n)(1)(A).

Respondents' statutory analysis begins with a misreading of what Section 7412(n)(1)(A) actually

says. In Respondents' reading, Congress directed EPA to determine whether it is appropriate and necessary to include electric generators on the Section 7412(c) list. *E.g.,* EPA Br. 17. Because, for other source categories, costs are not a relevant factor in a listing decision, Respondents reason that costs should also not be a factor in a Section 7412(n)(1)(A) appropriate and necessary determination. *Id*. at 24-25. They buttress their analysis by claiming that, under Section 7412 and other Clean Air Act ("CAA") provisions, costs are relevant only later in the regulatory process, when EPA sets standards. *Id.* at 25; State Resp. Br. 28; Brief of American Academy of Pediatrics, et al. ("Env. Resp. Br.") 31.

But Section 7412(n)(1)(A) does not say that EPA shall assess whether *listing* is appropriate and necessary. It directs EPA to determine whether "such regulation"—that is, regulation "under this section [7412]"—is appropriate and necessary. Since, as Respondents state, Congress made costs relevant (either implicitly or explicitly) when EPA sets Section 7412 regulatory standards, EPA must consider costs in making a Section 7412(n)(1)(A) determination of whether regulation under Section 7412 is "appropriate and necessary." Thus, the very fact that EPA must consider costs in adopting Section 7412 regulations proves *Petitioners'* point that EPA must consider costs in the appropriate and necessary finding—and disproves Respondents' point that EPA may ignore costs in making that finding.

B. Respondents' Context Arguments Ignore the Most Basic Statutory Context of All—that Congress Intended a Different Regulatory Approach for Electric Generators.

Respondents' contextual analysis misses an obvious point. On the one hand, they place a great deal of weight on what they call Congress' consistent practice in Section 7412 and throughout the CAA generally of barring EPA from considering costs in making a threshold decision of whether to regulate. EPA Br. 38-41. On the other hand, they are forced to concede that Congress did not follow this practice under Section 7412(n)(1)(A). In their view, under that provision, Congress left it in EPA's hands to make the decision to either consider or not consider costs, unlike any other program they cite. *Id*. at 22-23, State Resp. Br. 18. And so, by Respondents' own admission, a contextual analysis of Section 7412(n)(1)(A) must begin with the recognition that Congress intended a *different* regulatory approach for electric generator hazardous air pollutant ("HAP") emissions than it did for other source categories.[1] *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another … it is generally presumed that Congress acts intentionally

[1] For this reason, Respondents cannot find support in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 469 (2001), where, unlike Respondents' position here, the Court found that the statute unambiguously barred EPA from considering costs.

and purposely in the disparate inclusion or exclusion.").

Respondents maintain nevertheless that because Congress barred EPA from considering costs in making a threshold decision to list sources for regulation under these other programs, EPA must be seen as acting reasonably here by adopting the same regulatory approach. EPA Br. 24-25. Respondents' argument, however, ignores the Section 7412 regulatory structure that Respondents rely on in justifying EPA's approach. As Respondents state, because all of the HAPs that the rule regulates are listed under Section 7412(b), Congress has already deemed that these substances, if emitted in amounts exceeding the Section 7412(c) thresholds, "pose[] an inherent risk warranting regulation." *Id.* at 25. Thus, if Congress' intent was as limited as Respondents claim, it had no need to require EPA to do a health study and make an appropriate and necessary finding. To ensure that electric generator HAP emissions would be regulated if warranted, it could either have not adopted Section 7412(n)(1)(A) at all and left in place a regime under which EPA would be required to regulate those emissions if EPA determined that they exceeded the statutory thresholds. Or, if there was concern that the language of Section 7412(c) was not broad enough for EPA to project forward whether generator emissions following implementation of other CAA programs exceeded the Section 7412(c) tons-per-year criteria for

listing, Congress could have simply instructed EPA to make the necessary forward projection.[2]

Congress did have a purpose for the health effects study and the appropriate and necessary finding, however. The Panel got close to Congress' purpose when it stated that EPA was required to consider the results of the health effects study in determining whether regulation would be appropriate "based on its assessment of the existence and severity" of any health hazards. NMA App. 28a. But the Panel never considered why information about the existence and severity of impacts would be relevant to a Congress that had already determined that HAPs emitted beyond defined threshold amounts create a significant enough health concern to warrant regulation. The only possible explanation is that Congress, in contrast to its otherwise applicable approach, and because of its concern about the multiple, costly regulations which it had adopted for the power sector, wanted EPA to exercise policy judgment as to whether the severity of the impacts warrant the type of regulation "under this section" that EPA has undertaken. That judgment necessarily involves weighing costs and benefits. NMA Br. 35-37. As this Court has said, "[e]very real choice requires a decisionmaker to weigh advantages against disadvantages…." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009).

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[2] The Section 7412(n)(1)(A) health study and appropriate and necessary finding would be similarly unnecessary for facilities emitting below the statutory thresholds. Because these facilities are "area sources," EPA was already required to regulate those sources' emissions if it found they imperil public health or the environment. 42 U.S.C. § 7412(c)(3).

C. The (At Best) Merely Implicit Consideration of Costs Allowed in Setting "MACT-Floor" Standards Proves Rather than Disproves the Relevance of Costs in Determining Whether Regulation Is Appropriate.

Respondents also trip themselves up by arguing that EPA properly ignored costs in making the appropriateness finding because, in line with other CAA programs, EPA would consider costs in fashioning regulatory standards. EPA Br. 25. But EPA did not consider costs in setting standards for electric generators because virtually all of the standards it adopted were based on the "MACT-floor" methodology, NMA Br. 34, which, as EPA has conceded, 77 Fed. Reg. 9,304, 9,323 (Feb. 16, 2012), precludes the consideration of costs.

The best Respondents can do is to argue that costs are implicitly considered in setting MACT-floor standards in that those standards, by definition, have been achieved by some currently operating units. EPA Br. 25-26.[3] Although Respondents recognize that setting standards in this fashion can result in extremely high compliance costs for the large majority of other units and can lead to plant closures, they argue that result is simply the scheme Congress intended. *Id.* at 26. But that claim is directly inconsistent with Respondents' admission that it is

[3] Actually, by definition, they have been achieved by only a very small number of facilities. Under Section 7412(d)(3)(A), MACT-floor standards are based on the average performance of the 12 percent lowest-emitting units, meaning 88 percent (or even 94 percent) of units may not meet the standard.

EPA that chose to ignore costs here, not Congress. Moreover, Respondents' argument still leaves Congress without a reason for requiring a study of the existence and severity of any health impacts of electric generator HAP emissions and for directing EPA to make an appropriate and necessary finding. Under Respondents' view, EPA does not weigh the severity of impacts against the cost of regulation when EPA makes the appropriate and necessary determination, and, given that MACT-floor standards are formulaic, it also does not do so when it sets regulatory standards.

D. Other Section 7412 Context Supports Congress' Intent that EPA Consider Costs under Section 7412(n)(1)(A).

First, although focused on the health study that Section 7412(n)(1)(A) authorizes, Respondents recognize that the study must also include an examination of alternative control technologies. EPA Br. 28, n.6. Respondents argue improbably that a study of alternative control strategies does not include the cost of those technologies. *Id*. However, the notion that Congress was interested in knowing only whether control technologies were technically feasible, not whether they were economically feasible, is not credible. Many things are technically feasible but completely infeasible as a practical matter because of their cost. Respondents pooh-pooh NMA's point that, under their reading of the statute, EPA could proceed with regulation even if the cost of the controls was $1 trillion, EPA Br. 43, n.13, but that is the implication of their view that only the technical

feasibility of controls was relevant for study, not the cost of those controls.

Second, Respondents recognize the contradiction of relying on Section 7412(n)(1)(B)'s reference to environmental effects to justify consideration of those effects under Section 7412(n)(1)(A), while ignoring costs under Section 7412(n)(1)(A) even though costs are also referred to in Section 7412(n)(1)(B). Indus. Resp. Br. 21, n.9. Respondents argue that EPA's discretion is broad enough under Section 7412(n)(1)(A) to either consider or not consider environmental impacts and to either consider or not consider environmental costs. *Id.* But this argument cuts against Respondents' principal contention that EPA reasonably ignored costs because of Section 7412(n)(1)(A)'s focus on health impacts. Env. Resp. Br. 16; State Resp. Br. 18. This is particularly so given that EPA chose to consider environmental impacts because it wanted to extend its appropriateness finding to acid gases, which, in the amounts emitted by electric generators, do not, as the Agency conceded, create public health impacts. *See* Argument III *infra*. Given that acid gas regulation drives more than half of the cost of the rule, NMA Br. 13, choosing to regulate based on possible environmental concerns, while ignoring the resulting cost impacts, is hardly reasonable.

Third, Respondents argue that ignoring costs in making the appropriateness finding harmonizes with the fact that costs are not considered in delisting a source category under Section 7412(c)(9). EPA Br. 32-34. But the high hurdles for undoing an EPA listing decision further emphasize why Congress

would want to ensure that EPA considered all relevant factors, including costs, before EPA listed generators for regulation under Section 7412.

II. Respondents Provide No Valid Reason for Ignoring Costs Given the Rule's Extraordinarily Unbalanced Regulatory Costs and Benefits.

Even if Congress gave EPA the choice to either consider or not consider costs in determining whether "such regulation" under Section 112 is appropriate, EPA must provide a reasoned explanation for the choice it made. *State Farm Mutual Auto. Insurance Co.*, 463 U.S. at 43-44. Respondents' principal rationale for EPA's decision to ignore the $9.6 billion cost of the rule was that, however extreme the cost-benefit imbalance might be, it cannot be unreasonable because the same imbalance could occur with regulation of other source categories under Section 7412. EPA Br. 19. This explanation, however, suffers from the same problem as EPA's statutory interpretation. No doubt, if Congress had not adopted Section 7412(n)(1)(A) and subjected EPA to the otherwise applicable Section 7412 regulatory structure, this imbalance would have occurred. But Congress did adopt Section 7412(n)(1)(A) and directed EPA to regulate only if "such regulation" was "appropriate." EPA thus must do more to justify the appropriateness of the hugely disproportionate costs and benefits that occurred here than to pretend that Congress never instructed it to determine whether regulation with such consequences is appropriate in the first place.

Respondents seek to justify the enormous costs of the rule by arguing that the costs must be affordable because some facilities have already complied with the standards. State Resp. Br. 2. Given that the initial three-year compliance period expires this April (with many units obtaining a one-year extension to next April), 77 Fed. Reg. at 9,407, it is not surprising that some units have already complied. At the same time, it is no use pretending that $9.6 billion per year is not a steep price simply because facilities are being forced to pay it.

Respondents similarly argue that the rule's costs must be reasonable because the Section 7412 program, in their view, has been successfully implemented for other industries. Env. Resp. Br. 39. But none of those industries have experienced the extraordinary regulatory costs that EPA has imposed on the power sector under the MATS rule, and none has seen the wave of plant closures that is occurring here. Most important, because none are subject to nearly the same level of regulation under other CAA programs, Congress did not specify that EPA must make an appropriateness finding for these other industries before regulating under Section 7412.

Respondents also argue that the costs must be affordable because some states have adopted even more stringent standards, State Resp. Br. 9-11, and some companies have complied with these standards, Indus. Resp. Br. 29. But the States supporting EPA that have adopted these standards (like California and the northeastern states) are typically located far from the country's coal fields and have little coal generation. Similarly, the companies supporting

EPA historically are not large coal users. These companies and these States stand to gain a competitive advantage under the rule, but that does not prove that the compliance costs are reasonable.

In the end, as EPA intended, the rule is having a transformative effect on the electric power sector, with projected retirements of one-sixth to one-quarter of all coal-fired electric generation, NMA Br. 15, which only a few years ago supplied half of the country's electric power. Energy Information Administration, http://www.eia.gov/electricity/capacity/. Congress cannot be seen as having authorized regulation of such "vast economic and political significance," *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014), by instructing EPA to regulate only if "appropriate."

III. NMA's Acid Gas Argument Is Within the Scope of the Issue on Which This Court Granted the Petitions for Writ of Certiorari.

NMA's third argument in its opening brief addressed EPA's alternative justifications for regulating acid gases—first, that regulating acid gases is appropriate and necessary because they contribute to water-body acidification and second, that EPA is compelled to regulate acid gases even if they pose no health or environmental threat if EPA determines that it is appropriate and necessary to regulate any other electric generator HAP. NMA Br. 37-44. Respondents claim that NMA's response to this second justification is not within the scope of the issue this Court set for briefing. EPA Br. 52-53.

Respondents are incorrect. The Court asked the parties to brief whether EPA unreasonably ignored costs. EPA argues alternatively that it could reasonably ignore the benefits and costs of acid gas regulation because those benefits and costs became irrelevant when EPA determined that it was appropriate and necessary to regulate other electric generator HAP emissions. 77 Fed. Reg. at 9,361. NMA maintains that the costs and benefits of acid gas regulation did not become irrelevant when EPA made that determination. NMA Br. 42-44. Given the interplay between Sections 7412(n)(1)(A) and 7412(d), NMA maintains that Congress did not intend that EPA would regulate electric generator emissions that EPA had determined did not "warrant regulation." *Id.* Respondents and NMA dispute this point, but EPA's reasons for ignoring the cost of acid gas regulation are unquestionably relevant to the overall issue of the reasonableness of EPA's decision to ignore the cost of HAP regulation as a whole.

Respondents barely engage the merits of the acid-gas arguments that NMA made. They claim that EPA did find that acid gases harm the public health. Env. Resp. Br. 42, n.7. But their citation is to 76 Fed. Reg. 24,976, 25,050-51 (May 3, 2011), where EPA discusses the health effects of acid gases if inhaled in sufficient amounts. In contrast, they ignore EPA's conclusion in the same Federal Register notice that acid gases in the amount emitted by electric generators (and dispersed over very wide areas) do not pose a cancer risk and that "our case studies did not identify significant chronic non-cancer risks from acid gas emissions." *Id*. at 25,016.

As to environmental impacts, Respondents argument that the study of acidification in the United Kingdom supports EPA's position, Indus. Resp. Br. 42, misses the point that the United Kingdom study obviously does not show that electric generators in the United States emit acid gases in sufficient amounts to affect the acidification levels in domestic water bodies. The fact remains that EPA chose to force the domestic power sector to spend over $5 billion per year to reduce emissions of a substance that EPA concedes does not present a significant health risk and that it cannot provide any concrete evidence is causing material acidification anywhere. It did so even though Congress adopted a separate program that was intended to cost-effectively ameliorate the power sector's contribution to acidification. NMA Br. 25-27. Given the paucity of evidence of any continuing impact that power sector acid gas emissions might be having on acidification, and given the huge costs that EPA's acid gas regulations imposed, EPA's refusal to consider the cost of those regulations was unreasonable.

CONCLUSION

The Court should vacate the rule.

Respectfully submitted,

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