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

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rules 21, 33 and 37, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the National Federation of Independent Business Small Business Legal Center, and the National Association of Home Builders respectfully move this Court for leave to submit the attached *amici curiae* brief in support of Petitioners in Case Nos. 14-46, 14-47 and 14-49.* This case involves challenges to the U.S. Environmental Protection Agency's National Emissions Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units (referred to as the "Utility MATS Rule"), which EPA estimated would impose almost $10 billion a year in compliance costs (to say nothing of its other costs), all for little to no benefit to the public health and welfare. Due to its impacts on the power sector, the Utility MATS Rule has broader implications for, among others, the manufacturing and housing industries, small businesses, and the nation's economy as a whole. EPA's decision that regulation of hazardous air pollutant emissions from coal and oil-fired electric generating units under Section 112 of the Clean Air Act, 42 U.S.C. § 7412, is "appropriate" without regard to these substantial costs exemplifies regulatory overreach. *Amici* have a

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* The Chamber participated as *amicus curiae* in the proceedings below before the U.S. Court of Appeals for the District of Columbia Circuit. The Chamber also filed a motion for leave to submit an *amicus* brief in support of certiorari, which was granted by this Court on November 25, 2014.

significant interest in ensuring regulatory action is consistent with Congressional intent and, moreover, is reasonable.

Counsel for *Amici* sought consent from all counsel of record in this case. Responses were not received from all parties prior to filing, and, thus, *Amici* submit this motion for leave. Petitioners the Utility Air Regulatory Group (No. 14-47) and the National Mining Association (No. 14-49) have filed blanket consents for *amicus curiae* briefs. Petitioners the State of Michigan, *et al.* (No. 14-46) and federal Respondent the U.S. Environmental Protection Agency have also provided written consents, which are being submitted to this Court with this motion.

Numerous other parties filed petitions or intervened in the case below, and have appeared before this Court. Counsel for the following respondents filed blanket consents with this Court: American Academy of Pediatrics, *et al.*; Calpine Corporation, Exelon Corporation, National Grid Generation LLC, and Public Service Enterprise Group, Inc.; Edgecomb Genco, LLC and Spurance Genco, LLC; Oak Grove Management Company, LLC; and Respondent States and Local Governments. In addition, counsel for the following parties have provided consent to the filing of this brief: American Public Power Association; White Stallion Energy Center; Wyoming; Missouri; Gulf Coast Lignite Coalition; Kansas City Public Utilities; and ARIPPA. As of the date of this filing, we have not received responses from the remaining counsel of record for respondents before this Court.

INTERESTS OF *AMICI CURIAE*

Amici are trade associations that represent businesses in sectors throughout the economy. They often represent the interests of their members in matters before Congress, the Executive Branch, and the courts. To that end, these associations regularly file *amicus curiae* briefs in cases, such as this one, raising issues of concern to the nation's business community, the manufacturing and housing industries, and the economy as a whole. *Amici* have long promoted reasonable and commonsense decision-making by agencies.

The Utility MATS Rule will have a considerable impact on *Amici's* members. As the most expensive regulation for power plants to date, the Rule is expected to result in shutdowns that will increase the costs of electricity and affect electric reliability, particularly in light of additional regulations being imposed on the power sector. The effects of the Rule will be felt by power consumers throughout the economy. The manufacturing industry will bear a significant part of these costs as a major user of electricity, which will also result in increased costs on consumer goods. EPA, however, declined to weigh the potential costs of the Rule against its very limited benefits with respect to reductions in hazardous air pollutant emissions when determining whether regulation of those pollutants from electric generating units was "appropriate." Because of the broader implications for the economy as a whole, *Amici* have a substantial interest in ensuring that EPA is engaged in reasoned decision-making.

Amici also have an interest in ensuring agencies do not overstep their authority by refusing to consider the costs of regulation. Rather than make a determination whether further reductions of hazardous air pollutants from electric generating units under Section 112 of the Clean Air Act were warranted, EPA found it could regulate so long as it found its regulation would mitigate a public hazard. But, the only "benefits" of the rule that EPA could identify derive almost exclusively from supposed coincidental reductions in fine particulate matter (PM2.5), which is regulated as a criteria pollutant to ensure its emissions are at a level that is requisite to protect public health. The benefits EPA estimated with respect to PM2.5, which themselves are questionable, do not relate to the mercury or the other hazardous air pollutants emissions that Congress sought to be regulated, if "appropriate," and that are purportedly targeted by the regulation at issue here.

Amici believe that they can provide an additional, valuable viewpoint on the issue presented in this case. Specifically, *Amici* explain the broader implications of the D.C. Circuit's ruling beyond the direct effects on utilities.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the National Federation of Independent Business Small Business Legal Center, and the National Association of Home Builders respectfully request that they be granted leave to appear as *amici curiae* in this case and that

the attached brief be submitted for filing with this Court.

January 27, 2015 Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Administrative Materials

Miscellaneous

INTERESTS OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is a nonprofit corporation and the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber often participates as *amicus curiae* in litigation involving agency decisions that do not reflect reasoned agency action, particularly where the agency's regulation has significant ramifications for all sectors of the economy, as is the case with the challenged agency action here—the "Utility MATS Rule."

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that the brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing 350,000 members across the country. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 140,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

This Court has confirmed that EPA *may* consider the costs of rules it proposes and that EPA *may* consider those costs to ensure reasonable regulation.

See EPA v. EME Homer City Generation, LP, 134 S. Ct. 1584, 1607 (2014); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). Yet here EPA declined to consider costs in determining whether regulation of hazardous air pollutant ("HAPs") emissions from electric generating units ("EGUs") was "appropriate and necessary" under Section 112 of the Clean Air Act. 42 U.S.C. § 7412(n)(1)(A). EPA considered benefits, but found little to no benefits from further reducing HAP emissions; instead, EPA touted the rule's so-called "co-benefits," which is a controversial and legally dubious accounting method that counts as "benefits" the ancillary emissions reductions that are not the target of the rule itself. Although EPA contends it did not rely on these co-benefits in its decision to regulate, it nevertheless imposed substantial costs on the regulated industry without establishing the rulemaking was warranted to regulate the HAP emissions Congress sought to address under Section 112. The Chamber, NAM, NFIB Legal Center and NAHB (collectively, "*Amici*") have an interest in ensuring reasoned decision-making by EPA that is consistent with congressional intent and its statutory authority.

Amici also have a substantial interest in this case where, by EPA's own analysis, the Utility MATS Rule will impose direct compliance costs in excess of $9.6 billion annually—the most expensive regulations to date for power plants. These EPA-estimated compliance costs are probably low, and do not reflect the substantial upfront capital investment that will be needed. They also do not include the indirect costs of the rule that will be imposed on consumers of electricity, including

manufacturers, businesses, and residential and commercial buildings. The rule's effects will be felt by power consumers throughout the country, but will be felt more acutely in some regions, due to closure of EGUs that will increase electricity costs and endanger reliability. The manufacturing sector will bear the brunt of these costs, "[a]s consumers of more than 28 percent of electricity production." NDP Consulting, *A Critical Review of the Benefits and Costs of EPA Regulations on the U.S. Economy* at 3 (2012) (hereinafter "NAM Report").[2] All of these costs will be felt throughout the economy.

Despite the statutory requirement that regulation of EGU HAP emissions be "appropriate" and notwithstanding the impact of such regulation on the economy as a whole, the U.S. Court of Appeals for the D.C. Circuit determined that EPA permissibly refused to consider costs in this case. Under the panel majority's decision, EPA can choose to ignore costs whenever it wants, to expand its authority and impose overly stringent requirements on industry. *Amici* submit this brief to underscore the broader implications of the D.C. Circuit's decision.

SUMMARY OF ARGUMENT

In amending Section 112 of the Clean Air Act in 1990, Congress showed a clear interest in ensuring regulation of HAPs from industrial sources. As Petitioners explain, it is also clear that Congress treated EGUs differently from other sources and

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[2] *Available at* http://documents.nam.org/ERP/NAM_PHAM.pdf.

intended careful consideration of regulation of HAPs from EGUs, which are already subject to numerous regulatory requirements. This makes sense because such regulation creates energy-reliability and cost concerns that have implications for all sectors of the economy.

Under Section 112(n)(1)(A), EPA was first required to study "the hazards to public health reasonably anticipated to occur as a result of [EGU HAP emissions] after imposition of the requirements" of the Act. 42 U.S.C. § 7412(n)(1)(A). EPA then was to report the study's results to Congress, along with alternative control strategies for emissions "which may warrant regulation" under Section 112. *Id.* "[A]fter considering the results of the study," EPA was to regulate EGUs under Section 112 only if it found "such regulation is appropriate and necessary." *Id.* EPA purportedly considered the HAP emissions from EGUs that may remain after other regulations under the Act were imposed. In finding such emissions could remain, it determined emission standards under Section 112(d) were appropriate, imposing regulation that EPA found would cost the industry almost $10 billion a year just in compliance expenses, even though it did not show—and in fact refused to consider—whether such costly regulation could be justified in light of the minimal benefits to the public with respect to HAP emissions. Rather, in post hoc defense of its unreasonable rule, EPA pointed to the co-benefits of such regulation in reducing *non-HAP* emissions.

Despite recognizing the discretion Congress gave to EPA to *decline to regulate* when regulation is *not appropriate*, EPA imposed costly and needless

regulation on the power sector. It refused to consider the costs of regulation, citing the requirements in Section 112(c) that Congress expressly overrode for EGUs in Section 112(n)(1)(A), which requires EPA to consider whether other regulations or alternative controls exist to address any hazards identified from EGU HAP emissions. Rather than consider whether these other regulations or alternative controls were more efficient, EPA contended, and the majority of the D.C. Circuit panel agreed, that if Congress intended it to consider costs it would have said so expressly. That ignores the clear intent of Congress to ensure "appropriate" regulation, which required consideration of costs.

ARGUMENT

I. EPA'S REFUSAL TO CONSIDER COSTS IN DETERMINING WHETHER REGULATION OF HAP EMISSIONS FROM EGUS WAS "APPROPRIATE" IS UNLAWFUL.

As Petitioners explain, EPA estimated the cost of compliance with the Rule to be $9.6 billion annually. *See, e.g.,* Opening Br. for Pet'r Utility Air Regulatory Group ("UARG Br.") at 19. Although EPA's estimate renders the Rule the costliest to date for the utility sector, industry estimates that annual compliance costs will be closer to $12 billion a year. NAM Report at 12. Substantial upfront capital costs also will be needed to come into compliance. *Id.* EPA found the upfront capital spending would be $35 billion, but the U.S. electricity sector is estimated to need over $94.5 billion of capital to comply with the Utility MATS Rule. *Id.* at 19-20. Of course, these expenses do not even address the potential costs on the rest of

industry and society as a whole, which depend on the power sector.

In determining whether the Rule was "appropriate," however, EPA interpreted Section 112 to exclude any consideration of economic costs, so long as it "identified a hazard to public health and the environment" from EGU HAP emissions. 77 Fed. Reg. 9304, 9327 (Feb. 16, 2012). But, Congress clearly sought to avoid such burdensome regulation. Even if the statute were silent as to consideration of costs in this case, which it was not, such exorbitant costs, in light of such little benefit, fails the test of reasonableness.

A. Congress' Use of the Term "Appropriate" In Section 112(n)(1)(A) Required Consideration of Costs.

The panel majority in the D.C. Circuit concluded there was "no indication that Congress did *not* intend EPA to regulate EGUs if and when their public health hazards were confirmed by the study," and deferred to EPA's "permissible" construction of the statute as excluding consideration of costs in deciding whether regulation was "appropriate." Pet. App. 28a (emphasis in original).[3] In so holding, the panel majority relied on *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 467 (2001), for the proposition that EPA is prohibited from considering costs unless Congress has expressly instructed the agency to consider costs. *Id.* at 27a-28a.

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[3] Citations are to the Petition Appendix filed by State of Michigan *et al.* in Case No. 14-46, noted as Pet. App. __.

The D.C. Circuit's application of *Whitman* here is mistaken, as this Court elucidated just last Term in *EPA v. EME Homer City Generation, L.P.* In the provision at issue in *Whitman*—Section 109(b) of the Clean Air Act, 42 U.S.C. § 7409(b)—Congress expressly provided the criteria by which EPA was to regulate. By providing "express criteria by which EPA is to [regulate]," Congress implicitly precluded EPA from considering additional criterion under Section 109(b), including cost. *EME Homer City Generation*, 134 S. Ct. at 1607 n.21.

That is not the situation here. Unlike Section 109(b), Section 112(n)(1)(A) of the Act provides no specific criteria for regulation. But it does dictate that EPA shall regulate HAP emission from EGUs only if it is both "appropriate" and "necessary." Even if EPA finds EGU HAP emissions result in some identifiable public-health hazard, it still has discretion to conclude regulation is not "appropriate." *See Int'l Swaps & Derivatives Ass'n v. CFTC*, 887 F. Supp. 2d 259, 277-78 (D.D.C. 2012), *appeal dismissed*, 2013 WL 5975224 (D.C. Cir. Nov. 6, 2013) (recognizing use of "as appropriate" to modify "shall" regulate means the agency has discretion not to regulate). Indeed, EPA previously read the term "appropriate" as used in Section 112(n)(1)(A) to vest it with discretion to decline to regulate:

> It cannot be disputed that Congress under section 112(n)(1)(A) entrusted EPA to exercise judgment by evaluating whether regulation of Utility Units under section 112 is, in fact, 'appropriate,' … including any special

> circumstances that may lead us to determine that regulation of Utility Units under CAA section 112 is not appropriate.

70 Fed. Reg. 15,994, 16,001 (Mar. 29, 2005); *see also id.* at 16,000-16,001 ("[I]t might not be appropriate to regulate the remaining utility HAP emissions under section 112 if the health benefits expected as the result of such regulation are marginal and the cost of such regulation is significant and therefore substantially outweighs the benefits.").

The use of the word "appropriate" indicates that Congress wanted EPA to make a determination, not just whether some hazard may be identified, but whether regulation of that hazard was warranted. This Court has previously recognized that when Congress uses terms such as "appropriate" and "necessary" to guide regulatory decision-making, it contemplates consideration of economic and technological feasibility; that is, consideration of costs. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 n.31 (1981) (noting "any standard that was not economically or technologically feasible would *a fortiori* not be 'reasonably necessary or appropriate' under [OSHA]") (citing *Industrial Union Dept. v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974)); *see also Entergy Corp.*, 556 U.S. at 218 (finding, based on "common parlance," that "'best technology' may also describe the technology that *most efficiently* produces some good") (emphasis in original). A determination of whether regulation is "appropriate" inherently involves a balancing of costs and benefits.

Although the panel majority below mistakenly fixated on whether Section 112(n)(1)(A) expressly included the word "costs," Congress was not silent as to whether EPA should consider costs in adopting HAP emission limits for EGUs. The overall statutory scheme illustrates that Congress required EPA to exercise its discretion to determine if further regulation of power plants under Section 112—*i.e.*, the imposition of additional controls *and costs*—was warranted. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (finding agencies must account for "both 'the specific context in which ... language is used' and 'the broader context of the statute as a whole'") (citations omitted). Congress required EPA to consider the hazards "reasonably anticipated to occur" as a result of HAP emissions from EGUs "after imposition of [other Clean Air Act requirements]" and to review "alternative control strategies for emissions which may warrant regulation." 42 U.S.C. § 7412(n)(1)(A). After these considerations, EPA then was required to regulate only if it found that regulation was "appropriate and necessary." *Id.* Although the statute requires EPA to consider remaining emissions and their potential hazards, EPA acknowledged that Congress also understood that EGUs were subject to numerous requirements and "that such sources should not be subject to duplicative or otherwise inefficient regulation." 70 Fed. Reg. at 15,999 (citation omitted); *see also id.* at 16,000. The identification and consideration of more-effective, available alternatives to reducing HAP emissions necessarily involves weighing of competing options and, thereby, costs. These considerations indicate that Congress

required EPA to conduct a balancing test in determining whether regulation was "appropriate."[4]

B. EPA Should Have Considered Costs, and Its Refusal to Do So Here was Unreasonable.

The panel majority below concluded that the word "appropriate" is "open-ended," "ambiguous," and "inherently context-dependent." Pet. App. 26a (citation omitted). Believing Congress was "silent" as to the consideration of costs, the panel majority looked at whether EPA's interpretation of the statute was "permissible" and concluded that it was reasonable for the agency to decline to consider costs. Pet. App. 27a-28a. Rather than require EPA to justify its reasons for regulation, the panel's holding gives EPA a significant amount of discretion in choosing what factors it can consider in deciding to regulate.

But the discretion imbued by the word "appropriate" is not limitless. To be sure, the words "appropriate" and "necessary" are "very broad terms." 77 Fed. Reg. at 9323. Their breadth does not mean, however, that EPA may exclude factors, such as cost, that are integral to the decision of whether regulation is appropriate. As Judge Kavanaugh noted in dissent below, where the "only statutory

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[4] In response, EPA refers to the listing provisions for other sources under Section 112(c), 42 U.S.C. § 7412(c). But as EPA previously acknowledged, Congress "imposed special threshold conditions on any EPA regulation of power plants under section 112 that it did not apply to any other source category." Final Br. of Resp't EPA, *New Jersey v. EPA*, No. 05-1097, at 20 (D.C. Cir. July 23, 2007).

discretion is to decide whether it is 'appropriate' to go forward with the regulation ... common sense and sound government practice" warrant consideration of both costs and benefits. Pet. App. 73a-74a. At a minimum, EPA must consider costs with a view towards determining whether regulation is reasonably appropriate.

Indeed, a "primary goal" of environmental statutes such as the Clean Air Act is to "encourage or otherwise promote *reasonable* Federal, State, and local governmental actions" for pollution prevention. 42 U.S.C. § 7401(c) (emphasis added); *see also Entergy Corp.*, 556 U.S. at 234 (Breyer, J., concurring in part and dissenting in part) (noting, in considering Section 316(b) of the Clean Water Act, that a "test of reasonableness" would not compel EPA "to impose massive costs far in excess of any benefit"). Moreover, balancing of costs and benefits has long been part of the regular administrative rulemaking process. Executive Order No. 13,563, reaffirming Executive Order No. 12,866 (1993),[5] recognizes that "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011). Other regulatory and statutory provisions, if not inconsistent with other statutory authority, require an agency to consider alternative regulatory options that would reduce compliance costs and burdens. *See*

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[5] Executive Orders addressing regulatory impact analysis date back to 1981 when President Ronald Reagan issued Executive Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

77 Fed. Reg. at 9433-9440. Where Congress grants broad discretion to an agency, therefore, it does so on the background assumption that an agency will exercise that discretion reasonably.

Ensuring reasonableness then can *require* the consideration of costs. Where, as here, a regulation would produce billions of dollars of costs and yield negligible benefits, it is not only proper for EPA to consider those costs, it is plainly unreasonable for it to refuse to consider them in determining whether regulation is appropriate.

Even if not *required* by the Clean Air Act itself, EPA's refusal to consider costs here is contrary to its prior determinations, and fails to ensure reasoned decision-making. EPA previously considered costs when it determined in 2005 that regulation of HAP emissions from EGUs under Section 112(n)(1)(A) was not appropriate. *See* Br. for Pet'rs State of Michigan, *et al.* at 8-14. The agency's about-face on its view of what factors it must consider should prompt skepticism from this Court. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

EPA's assertion that it no longer interprets the term "appropriate" to allow the consideration of costs, 77 Fed. Reg. at 9327, is in tension with its position in *EPA v. EME Homer City Generation, L.P.*, where the agency argued that it should be able to consider costs "in order to allow the agency to

identify the most efficient and least burdensome mechanisms to achieve a statutory goal." U.S. Pet. for Cert., No. 12-1182, at 25 (S. Ct. Mar. 29, 2013) (citing *Entergy Corp., Inc.*, 556 U.S. at 218). This Court in *EME Homer City* agreed with EPA that using costs in the calculus "also makes good sense." 134 S. Ct. at 1607.

And, indeed, it does. So much so that EPA has properly considered costs in determining whether to regulate under other provisions of Section 112. *See Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 673-74 (D.C. Cir. 2013) (affirming consideration of costs in determining whether to revise emissions standards under 42 U.S.C. § 7412(d)(6)); *Natural Res. Def. Council v. EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008) (affirming consideration of costs in determining whether to establish residual risk standards under 42 U.S.C. § 7412(f)(2)(B)). As a whole, Section 112 provides EPA with flexibility to avoid inefficient regulation and unnecessary costs. Thus, the rest of Section 112 (as interpreted by EPA) further supports the conclusion that Congress clearly empowered EPA to consider costs in determining whether regulation is appropriate in the first instance. *See Ass'n of Battery Recyclers, Inc.*, 716 F.3d at 673-74 (noting that even though Section 112(d)(6) "itself makes no reference to cost," Section 112 "expressly authorizes cost consideration in other aspects of the standard-setting process," thus satisfying *Whitman*'s clear-statement requirement).

Although EPA may try to distinguish consideration of costs in setting the standards themselves, the distinction is immaterial where Congress required the agency to make a reasoned

determination whether "such regulation" is appropriate in the first instance. "[G]ood sense" supports the conclusion that is was unreasonable for EPA to refuse to consider the billions of dollars of costs inflicted by the Rule, which far outweighed the potential reductions in HAP emissions sought, and that those costs rendered the Rule inappropriate within the meaning of the Act.[6]

II. EPA'S COSTLY RULE DOES NOT ADDRESS HAZARDS ATTRIBUTABLE TO THE CONTROL OF HAP EMISSIONS FROM EGUS WITH WHICH CONGRESS WAS CONCERNED.

The panel majority below dismissed Judge Kavanaugh's concerns about the high costs of the Utility MATS Rule by referencing EPA's finding of annualized co-benefits of $37 to $90 billion, which "outweigh its costs by between 3 to 1 or 9 to 1." Pet. App. 32a-33a. But these are not benefits associated with HAP emissions reductions. And none of the claimed benefits associated with reduction in HAP emissions comes close to approaching the costs of the rule. *See* Prepared Statement of Anne E. Smith, Ph.D., Hearing on The American Energy Initiative:

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[6] EPA's ever-changing interpretation of Section 112(n)(1)(A) and its inconsistency in consideration of costs in other cases exemplify EPA's history of picking and choosing what factors it *may* consider to further its own agenda. While Congress granted EPA discretion in this case, it did not intend to grant it unfettered discretion. The majority panel decision below, however, has allowed EPA to ignore costs to broaden its authority and regulate beyond HAP emissions as intended by Congress. Agencies, however, must exercise the authority granted to it by Congress, not their broader policy agenda. *EME Homer City*, 134 S. Ct. at 1610 (Scalia, J., dissenting).

A Focus on What EPA's Utility MACT Rule Will Cost U.S. Consumers, Subcommittee on Energy and Power, U.S. House Energy and Commerce Committee, Feb. 8, 2012, at 6 (hereinafter "Smith Testimony").[7] In declining to consider whether the study's confirmed public health effects in light of those costs made regulation under Section 112 "appropriate," it is abundantly clear that the true reason EPA decided to regulate EGUs under Section 112 was not because the Rule was appropriate to achieve beneficial reductions in HAP emissions from EGUs, but instead because EPA could indirectly require further reductions in PM2.5 emissions from power plants that EPA would be unable to require directly.

A. EPA Has Not Identified Current Hazards to Public Health From HAP Emissions From EGUs That Justify Its Costly Regulation Under Section 112.

EPA must consider what benefits the reduction of HAP emissions by this regulation would provide. The only monetized benefits EPA estimated with respect to HAP reductions from the Rule relate to mercury emissions, which EPA identified to be the HAP of "greatest concern" from EGUs.[8] 65 Fed. Reg.

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[7] *Available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_Smith_Testimony_ECC_0212.pdf.

[8] EPA recognized that the science regarding the health effects of mercury from air pollution are inconclusive and limited, and, thus, focused its assessment on neurological development effects from digestion of mercury-contaminated fish and seafood by women during their pregnancy. 77 Fed. Reg. at 9426-9428.

79,825, 79,827 (Dec. 20, 2000). But total direct benefits from reductions in mercury emissions under the Rule were estimated at only $4 to $6 million per year (using a 3 percent discount rate). 77 Fed. Reg. at 9428. Using a 7 percent discount rate, these benefits are reduced to $500,000 to $1 million. *Id.* at 9306. And still these benefits may be significantly overstated, because EPA assumed all the reductions, and hence benefits, would occur instantaneously, rather than over time as would more likely be the case. *Id.* at 9428 n.371; *see also* NERA Economic Consulting, Technical Comments on the Regulatory Impact Analysis Supporting EPA's Proposed Rule for Utility MACT and Revised NSPS, at 5 (Aug. 3, 2011) (EPA-HQ-OAR-2009-0234-17775, Attach. 13) (hereinafter "NERA RIA Comments").[9]

Although EPA contends that this is a "small subset of the benefits of reducing [mercury] emissions," it has not identified any other HAP-related benefits that may be realized as a result of the Rule. 77 Fed. Reg. at 9428. EPA was required to list categories and subcategories of sources accounting for not less than 90 percent of the aggregate mercury emissions and to regulate those categories and subcategories of mercury under Section 112(d)—except for EGUs. 42 U.S.C. § 7412(c)(6). EPA has met this requirement. 79 Fed. Reg. 74,656 (Dec. 16, 2014). Rather than explain how further reduction in mercury emissions from EGUs will benefit the public, EPA simply asserts that there will continue to be mercury emissions and summarizes the potential effects of mercury

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[9] *Available at* www.regulations.gov.

exposure. 77 Fed. Reg. at 9426-9427. EPA also purports that the Rule has "non-monetized benefits," but these non-monetized benefits go beyond risks associated with HAPs, and are still largely related to reductions in non-HAP emissions. *Id.* at 9306; EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, at ES-10-ES-13 (Dec. 2011) ("RIA").[10]

EPA also made no attempt to quantify the public-health benefits from reducing non-mercury HAPs. *See* Smith Testimony at 12-14. The Regulatory Impact Analysis devotes only 6.5 out of 510 pages to discussion of the risks from non-mercury HAPs. RIA at 73-79. Such limited discussion is glaring given EPA's assertion that non-mercury HAP emissions pose a hazard to public health. 77 Fed. Reg. at 9358. EPA's analysis, and its reliance on Section 112(c) to assert it *must* regulate EGUs, focused on chromium and nickel compounds as the "key drivers" of cancer risk from EGU emissions. *Id.* at 9317. Yet the final rule provides no estimated reductions of these HAPs as a result of the rule. *Id.* at 9424. EPA simply states that "[s]tudies have determined a relationship between exposure to certain of these HAP and the onset of cancer; however, the Agency is unable to provide a monetized estimate of the HAP benefits at this time." *Id.* at 9439. That EPA's discussion of the regulatory impacts does not address how these risks will be addressed by the Utility MATS Rule is telling. Weighing against the zero benefits estimated for reductions in emissions of non-mercury metals

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[10] *Available at* http://www.epa.gov/mats/pdfs/20111221MATSfinalRIA.pdf.

are an estimated $1 billion in compliance costs. Smith Testimony at 6.

Regarding emissions of HAP acid gases from EGUs—whence the bulk ($5 billion) of the costs of the rule stem, Smith Testimony at 6—EPA does not identify any public health hazard associated with emissions of HAP acid gases from EGUs. Although none of the acid gases is listed as carcinogenic, hydrogen chloride (HCl) is the most significant in EPA's analysis. *See* NERA RIA Comments at 9. Previously, EPA concluded that HCl had an established health threshold (interpreted as the Reference Concentration (RfC) for chronic effects). 76 Fed. Reg. 24,976, 25,050 (May 3, 2011). The highest HCl exposure that EPA found from EGUs was only 5 percent of the level EPA considers safe.[11] *See* Smith Testimony at 12-13. Instead of explaining why regulation of these HAPs under Section 112 is nonetheless "appropriate," EPA simply contends that it is required to regulate all HAPs once a source category is added to the Section 112 list. 77 Fed. Reg. at 9361.

On the other hand, in the aggregate the costs of the Rule are quantifiable and substantial—at least $9.6 billion a year in compliance costs alone. The

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[11] EPA used a chronic RfC for inhalation of HCl of 20 micrograms per cubic meter ($\mu g/m^3$). 76 Fed. Reg. at 25,050. "An RfC is defined as an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime." *Id.* The hazard index EPA identified for EGUs ranged from 0.05 to 0.005. *Id.* at 25,051 n.170.

economic burdens imposed by EPA will be passed through to industrial and commercial consumers of electricity, affecting prices. These effects will likely vary by region. EPA estimated that the rule will increase average nationwide retail electricity prices by 3.1 percent in 2015. 77 Fed. Reg. at 9425. After accounting for regional differences based on the locations of the plants requiring retrofitting or retirements, estimated price increases are in the range of 12-24 percent. NAM Report at 16. Higher energy prices ultimately will be reflected in increased prices for consumer goods and services. It will also have significant adverse impacts on jobs, where recent assessments show job losses in the range of 180,000-215,000 in 2015 alone due to the Utility MATS Rule and 50,000-85,000 in later years. *See* U.S. Chamber of Commerce and NERA Economic Consulting, *Estimating Employment Impacts of Regulations: A Review of EPA's Methods for Its Air Rules*, at 29 (Feb. 2013).[12] It simply does not promote public health or public welfare to impose such high costs that will permeate throughout the economy and force shut downs and job losses, while providing little benefit with respect to HAP emissions.

B. The Rule's Purported "Co-Benefits" From Reducing Certain Particulate Matter Emissions Also Cannot Justify the Costs of the Rule.

In amending Section 112 in 1990, Congress sought to improve regulation of HAPs generally. *See generally Sierra Club v. EPA*, 353 F.3d 976, 979-80

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[12] *Available at* http://www.nera.com/67_8015.htm.

(D.C. Cir. 2004). Unlike other source categories of HAP emissions, however, Section 112(n)(1)(A) directs EPA to determine whether it is "appropriate" to regulate EGUs under Section 112 in light of the "imposition of [other] requirements of this Act" on EGUs. That is, before EPA adopts additional regulation under Section 112 to further reduce HAP emissions from EGUs, it must first consider what HAP reductions already have been achieved by virtue of other regulations. The decision below turns this statutory mandate on its head by allowing regulation of EGUs under Section 112 to achieve collateral reductions in non-HAP emissions that EPA otherwise lacks authority to compel.

Over the past decade, the majority of rules promulgated by EPA under the Clean Air Act have asserted benefits (known as "co-benefits") associated with collateral reductions in PM2.5 emissions.[13] The Office of Management and Budget ("OMB") found "the large estimated benefits of EPA rules issued pursuant to the Clean Air Act are mostly attributable to the reduction in public exposure to a single air pollutant: *fine particulate matter*." OMB, *2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities*, at 15 (2013)

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[13] *See, e.g.,* Letter from Rep. Harris, MD, Chairman, Energy and Environment Subcommittee, and Rep. Broun, MD, Chairman, Investigations and Oversight Subcommittee, U.S. House Committee on Science, Space, and Technology, to Administrator Sunstein, Office of Information and Regulatory Affairs, Office of Management and Budget, Nov. 15, 2011, *available at* http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Sunstein%20Letter.pdf.

(emphasis in original).[14] In several instances, many of which address standards under Section 112 and 129 allegedly aimed at reducing HAP emissions, PM2.5 co-benefits are the only benefits EPA was able to quantify. *See* Smith Testimony at 15. Even if Congress intended that EPA may consider co-benefits—a concept found nowhere in the statute—in setting technology-based standards, Congress certainly did not dictate that the purported co-benefits may force regulation of HAPs under Section 112(n)(1)(A) where the reductions of the HAPs themselves provide no relative benefits in comparison to the substantial costs of regulation.

Without the artificial consideration of these purported co-benefits, the Rule's costs vastly eclipse its benefits.[15] Analysis of EPA's own data showed "co-benefits" attributed to mercury reduction of about $1-2 billion (versus costs of $3 billion). *See* Smith Testimony at 6. Co-benefits attributed to non-mercury metals also were estimated at $1-2 billion,

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[14] *Available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf. This same finding is in the 2014 Draft Report to Congress. Even the assessments related to PM2.5 co-benefits are riddled with uncertainties and incorrect assumptions. *See, e.g.,* Comments of the Chamber of Commerce of the United States on Draft 2013 Report to Congress (July 31, 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/comments/chamber_costa_and_benefits_of_regulations-final.pdf.

[15] Even the alleged co-benefits from PM2.5 reductions are based on questionable assumptions and are likely overstated. *See* NERA RIA Comments at 6-7, 13-20; Smith Testimony at 16-17, 20-21.

with costs of about $1 billion. *Id.* Even considering the co-benefits estimated by EPA, therefore, the cost/benefit ratio remains negative for mercury, and a wash for non-mercury metals. By contrast, the regulation for acid gases constitutes the bulk of the costs for the Rule (about $5 billion), and is also the substance to which EPA attributes most of the purported PM2.5 "co-benefits" ($32-87 billion annually). *Id.* The fact that most of the "co-benefits" are associated with acid gases is especially problematic, as EPA can identify no direct public health benefits from acid gas reductions. Given these facts, it makes little sense to conclude that regulation of HAP emissions is, nonetheless, "appropriate."[16]

This result is even more troubling given that the Clean Air Act includes numerous other provisions to address particulate matter, including treating it as a criteria pollutant for which National Ambient Air Quality Standards ("NAAQS") are required. *See, e.g.,* 42 U.S.C. §§ 7408, 7409. To set the NAAQS, review by the Clean Air Scientific Advisory Committee is necessary, and EPA must make a determination as to the level requisite to protect public health with an adequate margin of safety. *Id.* § 7409. States then must implement a plan for meeting the NAAQS, which, if necessary, would target the emissions at issue here. *Id.* § 7410. EPA followed none of these processes here, choosing instead to place a significant regulatory burden on the utility sector for further PM2.5 reductions beyond those required under other Clean Air Act programs. Indeed,

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[16] These numbers are illustrated in the table attached as an Appendix to this brief.

national trends in particulate matter levels are already below the current NAAQS set by EPA.[17]

In fact, the estimated reductions in exposure levels for PM2.5 (which are the source of the bulk of EPA's co-benefits) are very small. NERA RIA Comments at 2. These purported benefits are associated with PM2.5 concentrations well below the current PM2.5 NAAQS. Although EPA revised the PM2.5 NAAQS in 2013, 78 Fed. Reg. 3086 (Jan. 15, 2013), the co-benefits calculated by EPA still are associated with PM2.5 concentrations below the revised standard. *See* Smith Testimony at 19. Thus, EPA has imposed regulations, based on statistical associations not reviewed by the Clean Air Scientific Advisory Committee, with exorbitant costs for little or no benefit, where it simply otherwise would have no authority to do so.

Although EPA may claim that these assessments were not part of its decision on whether regulation of HAP emissions from EGUs is "appropriate," it plainly has used these benefits to justify the Utility MATS Rule, 77 Fed. Reg. at 9305-9306,[18] even indicating in its opposition to certiorari here that it would likely find regulation appropriate based on its

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[17] *See* EPA, *Air Trends: Particulate Matter*, http://www.epa.gov/airtrends/pm.html (last updated Oct. 16, 2014).

[18] *See also* EPA Fact Sheet, *Benefits and Costs of Cleaning Up Toxic Air Pollution From Power Plants*, at 1 (2011) (claiming Utility MATS Rule provides "[p]ractical, cost-effective, and protective standards"), *available at* http://www.epa.gov/airquality/powerplanttoxics/pdfs/20111221MATSimpactsfs.pdf.

analysis of PM2.5 reductions. Br. for the Fed'l Resp'ts in Opp'n at 28 (filed Oct. 15, 2014). EPA also touts the Utility MATS Rule as a "Regulatory Action[] Related to PM."[19] EPA's reliance on co-benefits to justify regulation under Section 112(n)(1)(A), while refusing to consider costs, impermissibly enables it to expand its authority to conduct additional PM2.5 regulation without following the proper procedures of imposing such restrictions upon the country.

III. EPA'S PROPER TREATMENT OF REGULATORY COSTS AND BENEFITS IN CONSIDERING THE UTILITY MATS RULE IS VITAL FOR THE ECONOMY.

As Judge Kavanaugh rightly observed, EPA's reliance on co-benefits here while insisting that it cannot consider costs "is no trivial matter." Pet. App. 83a. "Put simply, the Rule is 'among the most expensive rules that EPA has ever promulgated.'" *Id.* (citation omitted).

The electric-power system "as a whole is critical infrastructure that plays a key role in the functioning of all facets of the U.S. economy, and maintaining its stability and reliability is of critical

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[19] EPA, *Particulate Matter: Regulatory Actions*, http://www.epa.gov/airquality/particlepollution/actions.html (last updated Sept. 11, 2014). EPA also lists the Cross-State Air Pollution Rule as a "Regulatory Action[] Related to PM." *Id.* This Court upheld EPA's consideration of costs in that rule, which EPA contended allowed for efficient and equitable regulation under the "Good Neighbor" provision of the Clean Air Act. *EME Homer City*, 134 S. Ct. at 1607.

importance."[20] It is not disputed that the Utility MATS Rule will result in accelerated retirements of coal-fired units. *See, e.g.,* NERC, *2014 Summer Reliability Assessment*, at 4 (May 2014).[21] EPA itself found that 4.7 gigawatts (GW) of coal-fired generation would likely be retired by 2015 as a result of the Utility MATS Rule. 77 Fed. Reg. at 9424. Other analyses show over 50 GW expected to be retired by 2016, and even more when considering the cumulative effects of additional regulation being proposed by EPA. *See* UARG Br. at 21. The loss of these coal-fired generation units is expected to affect the economies of 37 States. *See* Institute for Energy Research, *Impact of EPA's Regulatory Assault on Power Plants: New Regulations to Take More than 72 GW of Electricity Generation Offline and the Plant Closing Announcements Keep Coming*, at 2 (Oct. 2014) ("IER Updated Report").[22] These retirements will require increased investment in new generation to replace those outages, costing the consumer. *Id.* at 4.

Retirements facilitated by the Utility MATS Rule also are expected to have impacts on electric reliability, particularly in certain regions. *See, e.g.,* Midwest Reliability Organization, *MRO's 2014 Long-*

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[20] Presidential Memorandum for the Administrator of the EPA, Dec. 21, 2011, http://www.whitehouse.gov/the-press-office/2011/12/21/presidential-memorandum-flexible-implementation-mercury-and-air-toxics-s.

[21] *Available at* http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/2014SRA.pdf.

[22] *Available at* http://instituteforenergyresearch.org/wp-content/uploads/2014/10/Power-Plant-Updates-Final.pdf.

Term Reliability Assessment (Nov./Dec. 2014).[23] For example, coal is estimated to have provided 92 percent of the incremental electricity needed in January/February 2014 over the same months in 2013. *See* IER Updated Report at 3. Concerns have been raised by PJM, the regional transmission operator for much of the Midwest and mid-Atlantic, that winter 2015-2016 will be a challenge for electricity providers because of forced retirements of coal-fired generation as a result of the Utility MATS Rule. *See* Gavin Bade, *PJM wants to postpone plant retirements to ensure reliability*, Utility Dive, Dec. 23, 2014.[24]

EPA's reading of Section 112(n)(1)(A) has led the agency to stray far into significant energy policy matters simply not contemplated by Congress. Accelerated retirements of coal-fired plants will have "impacts throughout the energy system and the economy." Jeffrey Jones and Michael Leff, *Issues in Focus: Implications of accelerated power plant retirements*, Released Apr. 28, 2014.[25] EPA recognized that the Utility MATS Rule "is likely to have a significant adverse effect on the supply, distribution, or use of energy." 77 Fed. Reg. at 9441.

Aiming regulation at coal-fired plants, with little to no health benefits, creates a distortion in the energy market and increases its vulnerability due to

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[23] *Available at* https://www.midwestreliability.org/MRODocuments/2014%20MRO%20Long%20Term%20Reliability%20Assessment.pdf.

[24] *Available at* http://www.utilitydive.com/news/pjm-wants-to-postpone-plant-retirements-to-ensure-reliability/346929/.

[25] At http://www.eia.gov/forecasts/aeo/power_plant.cfm.

reduced fuel diversity. Given these broader implications for national energy policy and the economy, it is simply implausible that Congress did not expect EPA to weigh the costs of further regulation of HAP emission from EGUs in determining whether such regulation was "appropriate."

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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MACT	Benefits from HAPs reductions (billion/yr)	Co-Benefits from non-HAPs (billions/yr)	Costs (billions/yr)	Net Benefits without co-benefits (billions/yr)	Net Benefits including co-benefits (billions/yr)
Mercury	<$0.1	$1 to $2	$3	**-$3**	**-$2 to -$1**
Acid Gases	$0	$32 to $87	$5	**-$5**	$27 to $82
Non-Hg Metals	$0	$1 to $2	$1	**-$1**	**-$1 to $0**
Total	<$0.1	$33 to $90	$10	**-$10**	$23 to $80

*Ranges are based on using 3% or 7% discount rates. Totals may not add up exactly due to rounding.

Source: Prepared Statement of Anne E. Smith, Ph.D., Hearing on The American Energy Initiative: A Focus on What EPA's Utility MACT Rule Will Cost U.S. Consumers, Subcommittee on Energy and Power, U.S. House Energy and Commerce Committee, Feb. 8, 2012, *available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_Smith_Testimony_ECC_0212.pdf.