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

In the Supreme Court of the United States

MICHIGAN, ET AL., PETITIONERS
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UTILITY AIR REGULATORY GROUP, PETITIONER
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NATIONAL MINING ASSOCIATION, PETITIONER
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR PETITIONERS STATE OF MICHIGAN, ET AL.

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QUESTION PRESENTED

Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.

PARTIES TO THE PROCEEDING

The Court has consolidated No. 14-46 with Nos. 14-47 and 14-49. Petitioners in No. 14-46, who were petitioners below, are the States of Michigan, Alabama, Alaska, Arizona, Arkansas (ex rel. Leslie Rutledge, Attorney General), Idaho, Indiana, Iowa (Terry E. Branstad, Governor of the State of Iowa on behalf of the People of Iowa), Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming, and the Texas Commission on Environmental Quality, the Texas Public Utility Commission, and the Railroad Commission of Texas.

Petitioner in No. 14-47 is the Utility Air Regulatory Group. Petitioner in No. 14-49 is the National Mining Association.

Respondents who were petitioners in the court of appeals are (by court of appeals case number):

No. 12-1100: White Stallion Energy Center, LLC

No. 12-1102: National Black Chamber of Commerce and Institute for Liberty

No. 12-1170: Eco Power Solutions (USA) Corporation (voluntarily dismissed on December 6, 2012)

No. 12-1172: Midwest Ozone Group

No. 12-1173: American Public Power Association

No. 12-1174: Julander Energy Company

No. 12-1175: Peabody Energy Corporation

No. 12-1176: Deseret Power Electric Cooperative

No. 12-1177: Sunflower Electric Power Corporation

No. 12-1178: Tri-State Generation and Transmission Association, Inc.

No. 12-1180: Tenaska Trailblazer Partners, LLC

No. 12-1181: ARIPPA

No. 12-1182: West Virginia Chamber of Commerce Incorporated; Georgia Association of Manufacturers, Inc.; Indiana Chamber of Commerce, Inc.; Indiana Coal Council, Inc.; Kentucky Chamber of Commerce, Inc.; Kentucky Coal Association, Inc.; North Carolina Chamber; Ohio Chamber of Commerce; Pennsylvania Coal Association; South Carolina Chamber of Commerce; The Virginia Chamber of Commerce; The Virginia Coal Association, Incorporated; West Virginia Coal Association, Inc.; and Wisconsin Industrial Energy Group, Inc.

No. 12-1183: United Mine Workers of America

No. 12-1184: Power4Georgians, LLC

No. 12-1186: The Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas

No. 12-1187: Oak Grove Management Company LLC

No. 12-1188: Gulf Coast Lignite Coalition

No. 12-1189: Puerto Rico Electric Power Authority

No. 12-1191: Chase Power Development, LLC

No. 12-1192: FirstEnergy Generation Corp.

No. 12-1193: Edgecombe Genco, LLC; Spruance Genco, LLC

No. 12-1194: Chesapeake Climate Action Network, Conservation Law Foundation, Environmental Integrity Project, and Sierra Club

No. 12-1195: Wolverine Power Supply Cooperative, Inc.

No. 12-1196: State of Florida, Commonwealths of Pennsylvania and Virginia.

Respondents who were respondents in the court of appeals are the Environmental Protection Agency (the respondent in all of the cases that were consolidated below), and Lisa P. Jackson, Administrator, EPA (who was named as a respondent in Nos. 12-1174, 12-1189, and 12-1191). Ms. Jackson ceased to hold the office of EPA

Administrator on February 15, 2013; that office is currently held by Gina McCarthy.

Respondents who were intervenors in the court of appeals in support of the respondents there are:

No. 12-1100: the Commonwealth of Massachusetts, the States of Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Rhode Island, and Vermont, the District of Columbia, the City of New York, the American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, Waterkeeper Alliance, Calpine Corporation, Exelon Corporation, Public Service Enterprise Group, Inc., the States of California, Minnesota and Oregon, the County of Erie in the State of New York, the City of Baltimore in the State of Maryland, the City of Chicago in the State of Illinois, and the National Association for the Advancement of Colored People

No. 12-1147: the State of North Carolina, National Grid Generation LLC

No. 12-1170: Oak Grove Management Company LLC (also in Nos. 12-1174 and 12-1194)

No. 12-1174: White Stallion Energy Center, LLC; Deseret Power Electric Cooperative; Sunflower Electric Power Corporation; Tri-State Generation and Transmission Association, Inc.; Tenaska Trailblazer Partners, LLC; Power4Georgians, LLC; Peabody Energy Corporation (also in No. 1194)

No. 12-1194: Eco Power Solutions (USA) Corporation, National Black Chamber of Commerce, and Institute for Liberty, Sunflower Electric Power Corporation, Gulf Coast Lignite Coalition, Lignite Energy Council, White Stallion Energy Center, LLC, Chase Power Development, LLC

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The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is included in the appendix to the State Petitioners' petition for a writ of certiorari at 1a–105a and is reported at 748 F.3d 1222.

JURISDICTION

The court of appeals entered its judgment on April 15, 2014. The petitioners filed for writs of certiorari on July 14, 2014, and this Court granted the writs on November 25, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The primary provision of the Clean Air Act, 42 U.S.C. §§ 7401–7671q, at issue in this case is § 7412(n)(1)(A):

> **(n) Other provisions**
>
> **(1) Electric utility steam generating units**
>
> **(A)** The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15,

> 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emission which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

The other pertinent provisions of the Clean Air Act are set forth in the State Petitioners' petition appendix at 106a–108a. The pertinent provisions of EPA's final rule, National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304–9513 (Feb. 16, 2012), are set forth in the State Petitioners' petition appendix at 109a–111a. And the pertinent provisions of EPA's proposed rule are set forth in the State Petitioners' petition appendix at 112a–115a.

INTRODUCTION

Some words, appearing in a vacuum, are ambiguous. But adding a little context can make everything clear. Consider, for example, the word "staple." It could mean a small fastener for paper, or it could mean a main element of one's diet. But if one said, "I found a staple in my vacuum cleaner," possible ambiguities fall away. Context matters.

Here, Congress commanded EPA to decide if it is "appropriate and necessary" to regulate certain electric utilities, after considering the effect their emissions have on public health. EPA contends that the word "appropriate" is ambiguous, leaving EPA free to find it appropriate to regulate without any regard for the regulation's cost. But all relevant context—from 42 U.S.C. § 7412(n)(1)(A)'s textual command, to § 7412's creation of a regime that treats electric utilities different from other sources, to judicial precedent predating § 7412(n)(1)'s enactment that informs how Congress expected § 7412 to be interpreted—confirms that Congress did not intend for EPA to act with deliberate indifference to cost when answering the basic regulatory question whether it is appropriate to regulate.

The phrase "appropriate and necessary" shows that Congress wanted EPA to consider relevant circumstances when deciding whether it is appropriate to regulate electric utilities, and cost is a relevant factor. By refusing to consider costs, and considering only whether hazards exist—a consideration already addressed by EPA's interpretation of "necessary"—EPA adopts an unreasonable interpretation that renders the word "appropriate" surplusage.

EPA's interpretation also disregards § 7412's structure: while other sources automatically trigger regulation if they emit a certain quantity of hazardous air pollutants, there is no automatic trigger for electric utilities. Instead, electric utilities may be regulated only if EPA finds such regulation "appropriate and necessary"; this decision requires EPA to consider relevant factors, necessarily including costs. And EPA's interpretation ignores the background rule that costs are a key factor in regulation. In fact, shortly before Congress passed § 7412(n)(1), the D.C. Circuit held, in a unanimous en banc decision, that EPA is not precluded from considering costs in § 7412 unless Congress expressed a clear intent to preclude consideration of costs. Section 7412(n)(1)(A) passed just three years after that decision by the court that Congress had given exclusive jurisdiction over § 7412's requirements, yet it does not express a clear intent to preclude considering costs. This shows that Congress intended that costs would be *included*.

All of this confirms a basic intuition: Congress did not need to tell EPA that regulating "without any attention to costs" is *not* appropriate—that is, Congress did not need to tell EPA not to regulate in what one member of this Court recently called "a fundamentally silly way." Tr. of Oral Arg. at 13, *EPA* v. *EME Homer City Generation*, *L.P.*, No. 12-1182 (U.S. Dec. 10, 2013). EPA's decision that it is "appropriate" to achieve $4 to $6 *million* in health benefits at a cost of $9.6 *billion* is not reasonable, imposes great expenses on consumers, and threatens to put covered electric utilities out of business.

The decision of the court of appeals should be reversed, and EPA's final rule should be vacated.

STATEMENT OF THE CASE

A. Statutory background

Congress enacted Section 112 of the Clean Air Act in 1970 to limit the emission of hazardous air pollutants (HAPs). 42 U.S.C. § 7412. In its original form, § 7412(a)(1) defined a HAP as an "air pollutant . . . which in the judgment of the [EPA] Administrator may cause or contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." Pub. L. No. 91-604, § 112(a)(1), 84 Stat. 1676, 1685 (1970). The 1970 statute required EPA to publish a list containing "each hazardous air pollutant for which [it] intends to establish an emission standard." *Id.* EPA then had 360 days either to promulgate a risk-based emission standard that "provided an ample margin of safety to protect the public health" or to explain why the particular HAP was not hazardous. *Id.*

Over the next 20 years, EPA promulgated emissions standards for only seven HAPs. H.R. Rep. No. 101-490, pt. 1, at 151 (1990), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 3175. This delay was due, in part, to problems with promulgating risk-based standards. *Id.*

To address these issues, Congress amended § 7412 as part of the 1990 Amendments to the Clean Air Act. Rather than requiring EPA to publish a list of HAPs, Congress itself created a statutory list of 189 HAPs. § 7412(b). And instead of requiring risk-

based emission standards, Congress directed EPA to promulgate technology-based standards. § 7412(d).

When it made these changes, Congress also chose to treat electric-utility steam-generating units (EGUs) differently than other sources of HAPs by establishing fundamentally different criteria for whether HAP emissions from electric utilities should be regulated at all. For sources other than electric utilities (sources such as oil refineries, factories, and chemical manufacturing plants), Congress itself decided when they must be regulated. For electric utilities, in contrast, Congress directed EPA to exercise its judgment and to decide whether such regulation is "appropriate." § 7412(n)(1)(A).

1. Sources other than electric utilities

For sources other than electric utilities, Congress required EPA to regulate "major sources" of hazardous air pollutants based on the quantity of HAPs they emit. A "major source" is defined as any stationary source that emits more than a specific tonnage of HAPs: 10 tons per year or more of any single hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. § 7412(a)(1). EPA is required to publish a list of categories of major sources based solely on whether their HAP emissions exceed those numeric thresholds. § 7412(c)(1). Once EPA lists a source category, Congress directed it to promulgate technology-based emission standards for sources in the listed category under § 7412(d)(1). *Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1079 (D.C. Cir. 2008).

Congress created a two-step process for setting emission standards for listed source categories based on the maximum achievable control technology, or "MACT," for sources in each category. In step one, Congress instructed EPA to set a minimum emissions-reduction level, or "floor," based on the emission reductions that could be achieved by the best controlled sources in that category. § 7412(d)(3). In step two, Congress directed EPA to determine whether a more restrictive standard is achievable (a "beyond-the-floor" reduction standard) based on costs, energy requirements, and other factors. § 7412(d)(2); *Mossville Envtl. Action Now* v. *EPA*, 370 F.3d 1232, 1235–36 (D.C. Cir. 2004).

2. Electric utilities

Congress created a different approach for electric utilities. It directed EPA to decide whether electric utilities should be regulated in light of the other requirements that the 1990 Amendments to the Clean Air Act imposed on electric utilities (but not on other major sources). Those requirements include a new program to address acid rain. 42 U.S.C. § 7651 *et seq*. To meet the requirements of that program, many EGUs installed "scrubbers" that reduce HAP emissions along with the sulfur-dioxide emissions that contribute to acid rain. 70 Fed. Reg. 15,999, 16,003 (Mar. 29, 2005). The purpose of the Acid Rain Program is to reduce the adverse effects of acid deposition by, among other things, lowering emissions of sulfur dioxide from electric utilities by 50% from 1980 levels. 42 U.S.C. § 7651(b); 69 Fed. Reg. 4652, 4697 (Jan. 30, 2004). The centerpiece of the program is a cap-and-trade program designed to

achieve those reductions at the lowest cost. 69 Fed. Reg. at 4697; 63 Fed. Reg. 714, 715 (Jan. 7, 1998).

In light of the other programs already regulating electric utility emissions, Congress did not require regulation of electric utilities if their HAP emissions exceed the 10- or 25-ton thresholds applicable to other major sources. Instead, Congress established two conditions for EPA to satisfy before regulating EGUs. First, EPA must conduct a study—commonly referred to as the Utility Study—of "the hazards to public health reasonably anticipated to occur as a result of emissions" of HAPs from electric utilities "after imposition of the requirements" of the Act. § 7412(n)(1)(A). Second, Congress provided that EPA may regulate electric utilities under § 7412 only "if the Administrator finds such regulation is *appropriate* and necessary after considering the results of the study." *Id*. (emphasis added). Instead of Congress deciding when electric utilities must be regulated and itself striking the balance between costs and benefits, Congress directed EPA to decide to regulate electric utilities only if, after exercising its judgment and discretion, it finds that regulation is "appropriate."

B. EPA's findings in 2000, 2005, and 2012

The regulation at issue in this case has a long and complex history. In just a dozen years, EPA has issued a regulatory finding that it is appropriate and necessary to regulate electric utilities under § 7412, reversed that finding, had its reversal vacated in litigation, and issued an "appropriate" finding yet again.

1. EPA's 2000 finding

On December 20, 2000, EPA issued a finding that regulation of emissions of hazardous air pollutants from electric utilities is appropriate and necessary under § 7412(n)(1)(A). 65 Fed. Reg. 79,825 (Dec. 20, 2000). EPA based its finding on the results of the Utility Study it completed in 1998 that evaluated the hazards to public health from HAPs emitted by EGUs. EPA assessed the hazards and determined that mercury is the HAP of greatest concern. *Id*. at 79,827.

Mercury emitted into the atmosphere from EGUs and other sources "eventually deposits onto land or water bodies." *Id*. After deposition, mercury changes into methylmercury, a form that "biomagnifies in the aquatic food chain" and accumulates in fish. *Id*. When people eat fish with methylmercury, it is absorbed into the blood and transferred to the brain. According to EPA, "the greatest concern is the consumption of mercury contaminated fish by women of childbearing age" because "the developing fetus is the most sensitive to the effects of methylmercury." *Id*. at 79,829. Children born to women exposed to "relatively high levels of methylmercury during pregnancy have exhibited a variety of developmental neurological abnormalities," including delayed developmental milestones. *Id*.

When it made its finding in December 2000, EPA did not interpret the term "appropriate." Instead, it found it was appropriate to regulate HAP emissions from coal- and oil-fired electric utilities because EGUs "are the largest domestic source of mercury emissions, and mercury in the environment presents

significant hazards to public health and environment." *Id.* at 79,830. EPA also found that "it is appropriate to regulate HAP emissions from such units because EPA has identified a number of control options which EPA anticipates will effectively reduce HAP emissions from such units." *Id.* In light of its finding that it was appropriate to regulate, EPA added coal- and oil-fired EGUs to the list of regulated source categories under § 7412(c). *Id.*

2. EPA's 2005 finding

In 2005, EPA reached the opposite conclusion. It revised its earlier finding and concluded it is neither appropriate nor necessary to regulate electric utilities under § 7412. 70 Fed. Reg. 15,994 (Mar. 29, 2005). In light of its revised finding, EPA removed coal- and oil-fired EGUs from the § 7412(c) list. *Id.*

EPA noted that, in deciding whether it is "appropriate" to regulate electric utilities, Congress directed the agency to consider the results of the study of health hazards reasonably anticipated to occur "after imposition of the requirements" of the Act. EPA interpreted the phrase "after imposition of the requirements" of the Act to include both requirements already in effect and those that EPA "reasonably anticipates will be implemented and will result in reductions of utility HAP emissions." *Id.* at 15,999. Because EPA was also promulgating a new rule requiring reductions in mercury emissions from electric utilities under a different section of the Act (§ 7411), it concluded it was not appropriate to regulate EGUs under § 7412. *Id.* at 16,004. EPA concluded that this new rule, the Clean Air Mercury Rule, "will result in levels of utility [mercury]

emissions that do not result in hazards to public health." *Id.*

In addition, EPA provided for the first time an interpretation of the term "appropriate." Quoting Webster's dictionary, it noted that "appropriate" means "especially suitable or compatible" and that "[d]etermining whether something is 'especially suitable or compatible' in a particular situation requires consideration of different factors." *Id.* at 16,000. Although the "paramount factor" is the hazards to public health from EGU HAP emissions remaining after imposition of the requirements of Act, EPA recognized there may be other relevant factors that would lead it to conclude that it is not "especially suitable" or appropriate to regulate EGUs even if such hazards existed. For example, "it might not be appropriate to regulate remaining utility HAP emissions under [§ 7412] 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*." *Id.* at 16,000–01 (emphasis added).

Further, EPA emphasized that Congress "entrusted EPA to exercise judgment by evaluating whether regulation of [EGUs] under [§ 7412] is, in fact, 'appropriate' " and that, in making that judgment, the agency is to consider "all relevant facts and circumstances," including costs. *Id.* at 16,001. And although § 7412(n)(1)(A) requires that EPA only "consider" the results of the Utility Study on health hazards, EPA noted that this "mild direction" contrasts with the "considerable discretion" Congress directed the agency to exercise

in deciding whether regulation is "appropriate." *Id*. at 15,998.

In 2008, the U.S. Court of Appeals for the D.C. Circuit vacated EPA's removal of electric utilities from the § 7412(c) list of regulated source categories. *New Jersey* v. *EPA*, 517 F.3d 574 (D.C. Cir. 2008). The court of appeals concluded that Congress established specific requirements in § 7412(c)(9) for removing any source category from the § 7412(c) list and that EPA had not satisfied those requirements. *Id*. at 581–82.

3. EPA's 2012 finding

In 2012, EPA issued the final rule being challenged in this case: National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012). When proposing the rule, the agency rejected its 2005 position that it could consider all relevant factors, including costs, in deciding whether regulation of electric utilities was "appropriate." Instead, EPA determined it "*must* find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities *poses a hazard* to public health or the environment." 76 Fed. Reg. 24,976, 24,988 (May 3, 2011) (emphasis added). EPA also interpreted "appropriate" to preclude any consideration of costs: "We further interpret the term 'appropriate' to not allow for the consideration of costs in assessing whether HAP emissions from EGUs pose a hazard to public health or the environment." *Id*.

In the final rule, the agency explained that it viewed its "appropriate and necessary" finding under § 7412(n)(1)(A) to regulate electric utilities as analogous to its listing decisions for other source categories under § 7412(c)—listing decisions that turn solely on whether a source's HAP emissions exceed the 10- and 25-tons per year thresholds. According to EPA, "nothing in the statute required us to consider costs" when listing source categories other than electric utilities under § 7412(c). 77 Fed. Reg. at 9327. EPA concluded that "it is reasonable to make the listing decision [for electric utilities], including the appropriate determination, without considering costs." *Id.* In other words, no matter how slight the hazard or how high the costs, such regulation was "appropriate."

Although EPA refused to consider costs when making its appropriate finding, it estimated the costs and benefits of the final rule pursuant to Executive Order 13563, "Improving Regulation and Regulatory Review." 77 Fed. Reg. at 9305–06. EPA was unable to quantify all the costs and benefits. But for those costs it was able to calculate, it determined that the "annual social costs" (i.e., the compliance costs for electric utilities that will be borne by consumers) are $9.6 billion. *Id.* It also calculated that the annual benefits from lower HAP emissions (that is, the health benefits from reducing mercury in fish) to be only $4 to $6 million. *Id.* In other words, the ratio of costs to benefits from reducing HAP emissions is between 2,400 to 1 and 1,600 to 1. But because EPA interpreted "appropriate" to mean it *must* regulate electric utilities if it determines one HAP poses a hazard to public health or the environment, the

agency refused to consider the fact that the costs of the rule are wholly disproportionate to the health benefits.

C. The D.C. Circuit's ruling

Michigan, 22 other States, and one governor filed petitions for review in the D.C. Circuit, challenging the final rule and, more specifically, EPA's refusal to consider costs when deciding whether it is "appropriate" to regulate HAP emissions from electric utilities under § 7412(n)(1)(A).

The D.C. Circuit, in a divided opinion, denied the petitions. Applying the standard of review set forth in *Chevron*, *U.S.A.*, *Inc.* v. *Natural Resources Defense Council*, *Inc.*, 467 U.S. 837 (1984), the court of appeals determined that the term "appropriate" was ambiguous, that Congress did not explicitly require EPA to consider costs, and that EPA reasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.

In addition, the court of appeals determined that Congress accounted for costs by directing EPA to consider costs under § 7412(d)(2) when setting "beyond-the-floor" emission-reduction standards for listed source categories that are subject to regulation. According to the majority, EPA's decision to focus its "appropriate" determination on factors related to public health and to refuse to consider costs when deciding whether to regulate electric utilities at all "properly puts the horse before the cart[.]" Mich. Pet. App. 31a. Under this approach, EPA could find it appropriate to regulate an industry

even if it may impose billions in costs to achieve minimal public-health benefits.

Judge Kavanaugh dissented. In his view, "whether one calls it an impermissible interpretation of the term 'appropriate' at *Chevron* step one, or an unreasonable interpretation or application of the term 'appropriate' at *Chevron* step two, or an unreasonable exercise of agency discretion under *State Farm*," it was "entirely unreasonable for EPA to exclude consideration of costs[.]" Mich. Pet. App. 78a–79a. Cost, he explained, is an "essential factor" in deciding whether it is appropriate to regulate, and "consideration of costs is a central and well-established part of the regulatory decisionmaking process." Mich. Pet. App. 80a, n.5, 83a. And, although the costs of EPA's rule are, as the State Petitioners emphasized, wholly disproportionate to the health benefits produced, under EPA's unreasonable interpretation of "appropriate," it is "*irrelevant how large the costs are or whether the benefits outweigh the costs*." Mich. Pet. App. 84a.

In addition, Judge Kavanaugh viewed as "a red herring" the majority's reliance on costs being considered when setting beyond-the-floor standards. Mich. Pet. App. 85a**.** If EPA does not take costs into account when finding it is appropriate to regulate electric utilities, then it will also not take costs into account "at the *first*, 'setting the floor' stage of the MACT program. And meeting that floor will be prohibitively expensive, particularly for many coal-fired electric utilities, regardless of whether EPA decides to go further and set a 'beyond-the-floor' standard." Mich. Pet. App. 85a. The real world

consequence of complying with the minimum stringency standards of the MACT floor is to require enormous expenditures of electric utilities and "will likely knock a bunch of coal-fired electric utilities out of business." Mich. Pet. App. 85a.

Moreover, Judge Kavanaugh noted that if Congress had intended for EPA to consider costs only when setting beyond-the-floor standards (and not when making the threshold finding of whether it is appropriate to regulate electric utilities at all), "it would have done one of two things: It would have either automatically regulated electric utilities under the MACT program, as it did with other sources, or provided that regulation under the program would be automatic if the three-year study found that these sources indeed emitted hazardous air pollutants." Mich. Pet. App. 86a. The fact that Congress chose neither of these options and instead directed EPA to regulate electric utilities only if it finds regulation is appropriate, "reinforces the conclusion that Congress intended EPA to consider costs in deciding whether to regulate electric utilities at the threshold, and not simply at the second beyond-the-floor stage of the MACT program." Mich. Pet. App. 86a.

SUMMARY OF ARGUMENT

When Congress wrote § 7412(n)(1)(A), it created a two-step process. The first step requires EPA to conduct a study of the public-health hazards; the second step requires EPA to decide whether regulation under § 7412 "is appropriate and necessary" after considering the results of the study. This two-step process cannot reasonably be read, as EPA does, to exclude all consideration of the costs of

regulation. The study required by the first step focuses on the benefits side of the cost-benefits balance, because it examines the health benefits that regulation could produce. But EPA has fully accounted for these benefits through its interpretation of the term "necessary"—EPA concludes that regulation is "necessary" if regulating would produce public-health benefits. 77 Fed. Reg. at 9363 ("HAP emissions from U.S. EGUs are reasonably anticipated to pose hazards to public health; therefore, it is necessary to regulate EGUs under CAA."). EPA's interpretation thus leaves the word "appropriate" with nothing to do. E.g., 76 Fed. Reg. at 24,987 ("[W]e interpret the statute to *require* the Agency to find it is appropriate to regulate EGUs under [§ 7412] if the Agency determines that the emissions of one or more HAP emitted from EGUs pose an identified or potential hazard to public health or the environment at the time the finding is made.") (emphasis added). Depriving a statutory word of all meaning is not a reasonable interpretation of the statute.

EPA's approach cannot be reconciled with Congress's decision to use the broad term "appropriate." The word "appropriate" by definition covers relevant circumstances, and costs are a relevant circumstance for a decision whether it is "appropriate" to regulate. Indeed, the very next subsection of the statute requires EPA to conduct a second study and to report to Congress on "the costs" of technologies that can control "mercury emissions from electric utility steam generating units." § 7412(n)(1)(B). Looking at § 7412(n)(1) as a whole, Congress made it clear that EPA must look not just

at the benefits of regulating electric utilities, but also at whether it is appropriate to do so, which means looking at the costs too.

Other context confirms this. In 1987, the D.C. Circuit held, in a unanimous en banc opinion interpreting § 7412, that EPA is allowed to consider costs unless the statute expresses a clear congressional intent to preclude consideration of costs. *Natural Res. Def. Council, Inc.* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc). Thus, when Congress enacted § 7412(n)(1) just three years later, in 1990, it was against the backdrop of this controlling precedent by the court to which Congress itself gave exclusive jurisdiction over the requirements of § 7412. In this context, the fact that Congress did not expressly *preclude* consideration of costs in § 7412(n)(1) shows that Congress intended EPA to consider costs when deciding whether it was appropriate to regulate. And this background principle is consistent with ordinary principles of regulation, which recognize that costs are a relevant consideration.

The structure of § 7412 also confirms that costs are relevant to § 7412(n)(1)'s "appropriate" finding. Congress created one regime, under subsection (c)(1), for sources *other than* electric utilities—sources including petroleum refineries and other major industrial sources of hazardous air pollutants. Under the (c)(1) regime, Congress itself decided when regulation is appropriate—when it is worth the costs—by imposing quantitative thresholds for regulation. Specifically, if sources other than electric utilities emit more than a certain number of tons of

emissions, then EPA must regulate them. But Congress created a separate regime in subsection (n)(1) for electric utilities, and in the (n)(1) regime it directed EPA to decide whether regulation is appropriate. This separate regime shows that Congress expected EPA to exercise judgment in deciding whether it is appropriate to regulate, not simply to automatically regulate if regulating could produce any benefit, regardless of the cost.

EPA's interpretation is an unreasonable, impermissible interpretation of § 7412(n)(1). It deprives Congress's command that EPA decide whether regulation is appropriate of any meaning and instead allows EPA to impose costs that are wholly disproportionate to their benefits—to impose $9.6 billion in costs on Americans who consume electricity for a benefit of only $4 to $6 million worth of HAP emission reductions. EPA's rule, which threatens to drive a number of coal-fired electric utilities out of business, should be vacated.

ARGUMENT

I. By construing the word "appropriate" to allow it to completely disregard the costs of regulating, EPA adopted an unreasonable interpretation of § 7412(n)(1).

Under the *Chevron* doctrine, EPA is entrusted with a large measure of discretion as to how it interprets the statutes it administers. But that discretion is not unlimited. If Congress has "directly spoken to the precise question at issue," then the agency, like the courts, "must give effect to the unambiguously expressed intent of Congress."

Chevron, 467 U.S. at 842–43. And even if "the statute is silent or ambiguous with respect to the specific issue," the agency may only adopt "a permissible construction of the statute." *Id.*

Thus, "[e]ven under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.' " *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *City of Arlington, Tex.* v. *FCC*, 133 S. Ct. 1863, 1868 (2013)). "[A]n agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' does not merit deference." *Id.* (citation omitted); see also *Nat'l R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole.").

Here, EPA's interpretation is unreasonable because it is inconsistent both with § 7412(n)(1)'s text and with § 7412's structure as a whole. Congress instructed EPA in § 7412(n)(1)(A) to determine whether it is "appropriate" to regulate hazardous air pollutants emitted by electric utilities, and it is not reasonable to interpret that instruction to allow that determination to be made with deliberate indifference to the regulation's cost.

A. The text of § 7412(n)(1) requires EPA to weigh both costs and benefits when deciding whether it is "appropriate" to regulate electric utilities.

Section 7412(n)(1)(A) requires EPA to take two distinct steps before it may regulate hazardous air pollutants emitted by steam-generating electric utilities. Congress instructed EPA *first* to evaluate the benefits of regulating—i.e., the public-health hazards that could be reduced—and *then* to use its judgment to decide whether it is "appropriate and necessary" to regulate. It is unreasonable to distill this two-step process into solely a consideration of the benefits of regulating, when Congress told EPA to look not just at the hazards that could be reduced, but also at whether it is "appropriate and necessary" to regulate—terms that cover both the costs and benefits of regulating. It is unreasonable to interpret EPA's obligation to determine whether it is "appropriate" to regulate as precluding EPA from considering a fundamental regulatory factor: the cost of regulation.

In the first step, Congress directed EPA to study health hazards relating to EGU emissions:

> [EPA] shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of [the Act]. [§ 7412(n)(1)(A).]

In other words, this first step requires EPA to identify the public-health hazards that exist because of these HAP emissions—hazards that would remain if EPA were to do nothing. In short, this step focuses on the consequences of *not* regulating, or, to put it affirmatively, on the benefits that regulating to reduce those risks could provide.

If all Congress had cared about was the potential public-health benefits of regulating, it would have stopped there. But it did not. Instead, it required EPA to take a second step before regulating:

> [EPA] shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph. [§ 7412(n)(1)(A).]

To begin with the word "necessary," EPA has read this term to be satisfied by the fact that the Utility Study *did* identify public-health hazards. The study, remember, examined "the hazards to public health reasonably anticipated to occur as a result of emissions by electric steam generating utilities of [HAP emissions] after imposition of the requirements of this chapter." § 7412(n)(1)(A). EPA's explanation for why it concluded that regulation is "necessary" parallels that language: "HAP emissions from U.S. EGUs are reasonably anticipated to pose hazards to public health; therefore, it is necessary to regulate EGUs under CAA." 77 Fed. Reg. at 9363; see also 76 Fed. Reg. at 24,987. Thus, EPA has concluded that regulation is always "necessary" if hazards to public health exist.

The fact that EPA equates the "necessary" finding with the results of the public-health study is significant. If both the study and the "necessary" finding depend solely on one factor—the existence of public-health hazards—then the word "appropriate" must direct EPA to look at some factor *other than public health*. Otherwise, the term "appropriate" would be superfluous. See *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous") (internal quotation marks omitted). In short, if, as EPA contends, the word "appropriate" hinges solely on whether there are public-health hazards that could be reduced—just as it says the word "necessary" does—then the word "appropriate" would be mere surplusage. But see *United States* v. *Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

Congress included the word "appropriate" for a reason: to direct EPA to exercise its judgment, based on relevant factors beyond public health, when deciding whether to regulate electric utilities further—that is, beyond the many requirements the Clean Air Act already imposes on them. And Congress chose a broad term to guide the decision to regulate: "appropriate." § 7412(n)(1)(A); see also 76 Fed. Reg. at 24,988 (EPA stating that "the term 'appropriate' is extremely broad").

On its face, the term "appropriate" directs EPA to determine whether regulation is " 'suitable or proper *under the circumstances*.' " New Oxford American Dictionary 76 (2d ed. 2005) (emphasis

added). This common meaning of the word—one EPA accepts, 77 Fed. Reg. at 9327—shows that Congress wanted EPA to consider the circumstances that would normally inform the decision whether or not to regulate. And when deciding whether it is appropriate to impose regulation, a reasonable person would consider both the pros and cons—in other words, the benefits and costs—of regulation.

In fact, the very next subsection of (n)(1) confirms that Congress thought costs were relevant to this specific issue—that is, to regulating steam-generating electric utilities. Section 7412(n)(1)(B) requires EPA to study "the costs of [control] technologies" that could be used to reduce mercury emissions from electric utilities. Specifically, it directs EPA to conduct "a study of mercury emissions from electric utility steam generating units . . . and other sources," including "technologies which are available to control such emissions[] and the *costs* of such technologies." § 7412(n)(1)(B) (emphasis added). And while (n)(1)(B) gives EPA an additional year to complete this mercury study (compared to the time allotted for the public-health-hazards study in subsection (A)), it is a specific directive requiring EPA to study "the costs" that regulatory controls would impose on electric utilities.

This context further confirms that Congress expected EPA to consider the costs, not to intentionally ignore them. Indeed, if EPA were correct in its conclusion that § 7412(n)(1) can reasonably be read as meaning that costs are *irrelevant* to whether it is appropriate to regulate electric utilities, it would be hard to understand why

Congress would require this study into the costs of control technologies.

All of this goes to show that Congress was not silent on whether EPA should consider costs when deciding whether regulating electric utilities is appropriate. And while Congress did not explicitly use the word "costs" in § 7412(n)(1)(A), it might well have thought that it was not necessary to spell out the background principle that costs are a relevant factor that agencies must consider when deciding whether it is "appropriate" to regulate. Put another way, Congress might have thought it did not need to expressly remind EPA not to regulate " 'in a fundamentally silly way,' " by regulating " 'without any attention to costs.' " Mich. Pet. App. 80a (quoting Justice Kagan in Tr. of Oral Argument at 13, *EPA* v. *EME Homer City Generation*, *L.P.*, No. 12-1182 (U.S. Dec. 10, 2013)). And in any event, Congress's use of the word "costs" in § 7412(n)(1)(B), confirms that Congress thought costs were relevant and part of the calculus in determining whether regulation is "appropriate."

The two-step process set out in subsection (n)(1)(A) and the directive to study costs in subsection (n)(1)(B) show that Congress intended EPA to consider costs when deciding whether it is "appropriate" to regulate electric utilities under § 7412(n)(1). Taken together, this shows a clear "textual commitment of authority to the EPA to consider costs[.]" See *Whitman* v. *American Trucking Ass'n*, 531 US. 457, 468 (2001).

This broad language is quite different from the language this Court addressed in *Whitman*. There

the Court, finding no authorization in the relevant text, held that EPA could not consider costs when setting national ambient air quality standards under § 7409(b)(1). 531 U.S. at 471. The statutory provision directed EPA to set standards "requisite to protect the public health" with an "adequate margin of safety." *Id.* at 465. The Court concluded that these statutory phrases do not "leave room" for EPA to consider costs when setting the standards. 531 U.S. at 468. Because costs are "*both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects," Congress surely would have expressly mentioned costs if they were to be considered. *Id.* at 469. The Court, therefore, determined that § 7409(b)(1) neither explicitly nor implicitly allowed EPA to evaluate costs when setting the air quality standards. *Id.* at 467–69.

In the statutory language at issue in *Whitman*, Congress limited EPA's discretion in § 7409(b)(1) by requiring standards "requisite to protect the public health" with an "ample margin of safety," phrases that both focus solely on the *benefits* side of the cost-benefit balance. By contrast, the statutory criterion Congress used in § 7412(n)(1)(A)—"appropriate"—covers *both* sides of the cost-benefit balance. In other words, when Congress identifies only benefits for EPA to consider, like protecting public health, it presumably intends to preclude consideration of costs that would cut directly against protecting public health. *See id.*; s*ee also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 (1976) (when Congress directs EPA to consider eight specific criteria when deciding whether to approve state implementation

plans under the Clean Air Act, EPA may not consider other factors—such as cost—that Congress did not identify). But when Congress instructs EPA to decide whether regulation is "appropriate," without enumerating any factors to limit EPA's judgment and discretion, it intends for EPA to consider costs too.

B. When Congress drafted § 7412(n)(1), controlling caselaw provided that costs should be considered under § 7412 unless Congress expressly directs otherwise.

As Judge Kavanaugh explained in his dissent, "consideration of cost is commonly understood to be a central component of ordinary regulatory analysis, particularly in the context of health, safety, and environmental regulation." Mich. Pet. App. 79a. "Congress legislated against the backdrop of that common understanding when it enacted this statute in 1990." *Id*.

But this understanding was more than a background principle. Before the 1990 enactment of § 7412(n)(1), the en banc D.C. Circuit—the court of appeals to which Congress gave exclusive jurisdiction over any petition addressing a "requirement under section 7412," 42 U.S.C. § 7607—had held that EPA is allowed to consider costs under § 7412 unless there is clear congressional intent to preclude consideration of costs. *Natural Res. Def. Council, Inc.* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc).

When interpreting statutes, courts "presume that Congress is aware of existing law when it passes legislation." *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) (internal quotation marks omitted). This presumption includes the assumption that Congress " 'is aware of relevant judicial precedent.' " *Ryan* v. *Gonzales*, 133 S. Ct. 696, 703 (2013) (quoting *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1795 (2010)). And that presumption applies to the precedents of lower federal courts. E.g., *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696 & n. 21 (1979) (referring to decisions by the Fifth Circuit and by district courts); *Merck & Co.*, 559 U.S. at 647–48 (referring to decisions by the courts of appeals).

That presumption is particularly applicable in this case for an additional reason: in 1970, Congress gave the D.C. Circuit exclusive jurisdiction over multiple components of the Clean Air Act. And as is specifically relevant here, Congress specified that a "petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 . . . may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607.

In 1987 (three years before Congress enacted § 7412(n)(1) into law), the en banc D.C. Circuit unanimously held that EPA may consider costs under § 7412 so long as there is no clear statement in the statute precluding consideration of costs. *Natural Res. Def. Council, Inc.* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc) ("Since we cannot discern clear congressional intent to preclude consideration

of cost and technological feasibility in setting emission standards under section 112, we necessarily find that the Administrator may consider these factors."); see also *Michigan* v. *EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) ("It is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs.") (quoting *NRDC*, 824 F.2d at 1163).

Putting these pieces together, Congress knew (or is presumed to know) that controlling judicial precedent—unanimous en banc precedent, no less, from the court with exclusive jurisdiction over the relevant issue—meant that Congress would have to clearly express an intent in § 7412(n)(1) to *preclude* EPA from considering costs if it wanted that outcome.

Congress did not do that. It did not clearly express any intent to preclude the consideration of costs. Quite the opposite, Congress directed EPA to consider whether it is "appropriate" to regulate electric utilities, using a broad term to require EPA to consider relevant factors. Moreover, Congress knew that one relevant factor (indeed, a key factor) is the cost of regulation. Given this specific context about how Congress expected courts to read § 7412, Congress's decision not to expressly preclude the consideration of costs in § 7412(n)(1) shows that Congress intended EPA to consider costs under § 7412(n)(1) when deciding whether it is appropriate to regulate.

The legislative history also confirms that Congress intended EPA to consider costs. Under the Senate proposal, electric utilities would have been

regulated like other major sources; they would have been listed as major sources if their emissions exceeded the 10- and 25-ton thresholds, and EPA would then be required to promulgate MACT emission standards. See 3 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 4119, 4418–34 (1993). The House of Representatives, however, modified the Senate bill to include what became § 7412(n)(1)(A), and based regulation on the Utility Study and EPA's subsequent determination that regulation was "appropriate" and necessary. See 2 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 2148–49.

In the Conference Committee, the House version prevailed. During the House debate on the conference report, Congressman Oxley, sponsor of the House version Congress enacted, explained that the goal of § 7412(n)(1)(A) was to provide "protection of the public health *while avoiding the imposition of excessive and unnecessary costs on residential, industrial, and commercial consumers of electricity*." 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 1417 (emphasis added). In other words, Congress intended that, when deciding whether regulation is appropriate, EPA is to consider *both* public health *and* the costs of regulation. EPA's refusal to consider costs is contrary to that clear congressional intent.

The common-sense principle that ignoring costs is an irrational way to regulate is one that this Court has also recently affirmed. In *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208 (2009), this Court noted that, although Congress did not explicitly

require EPA to perform a formal balancing of costs and benefits when setting standards, it may be unreasonable and irrational for EPA not to consider costs at all. In *Entergy*, EPA used a cost-benefit analysis when setting standards that reflect the "best technology available" for minimizing adverse environmental impacts from cooling water intake structures used by large power plants. The Court concluded that EPA reasonably interpreted "best technology available" to allow it to consider the relationship between the technology's costs and the environmental benefits produced. Although EPA did not engage in a strict balancing of costs and benefits and adopted standards whose costs were greater than their benefits, the Court noted that for more than 30 years EPA had determined it was "*not reasonable* to 'interpret the [best technology available standard] as requiring use of technology whose cost is *wholly disproportionate* to the environmental benefit to be gained.'" *Id*. at 225–26 (quoting *In re Public Service Co. of New Hampshire*, 1 E.A.D. 332, 340 (1977) (emphasis added)).

Justice Breyer, in his concurring opinion, emphasized that an "absolute prohibition" on cost-benefit comparisons "would bring about irrational results." *Id*. at 232. "[I]t would make no sense to require plants to 'spend billions to save one more fish or plankton' " even if they could afford it. *Id*. at 232–33 (quoting brief for Respondents Riverkeeper, Inc. et al). EPA's approach of generally evaluating costs and benefits (without attempting to monetize everything) allowed it to "prevent results that are absurd or unreasonable in light of extreme disparities between costs and benefits." *Id*. at 235.

In addition to the other jurists and scholars cited by Judge Kavanaugh, Mich. Pet. App. 80a–82a, EPA's own chain-of-command also expects it to consider costs when regulating. As Judge Kavanaugh pointed out, "[e]very presidential administration for more than three decades"—in other words, stretching back before the 1990 enactment of § 7412(n)(1)—"has likewise made analysis of costs an integral part of the internal Executive Branch regulatory process." *Id*. at 82a. This background provides further confirmation that Congress in 1990 would expect EPA to consider costs if given the discretion to decide whether it is "appropriate" to regulate.

In the instant case, EPA's refusal to consider costs resulted in a rule whose costs are wholly disproportionate to its benefits. According to EPA's own calculations, the benefits attributable to lower HAP emissions are $4 to $6 million each year, while the annual costs—costs that will be borne by consumers of electricity across the nation (i.e., almost every American citizen)—are $9.6 billion. 77 Fed. Reg. at 9306. That extreme disparity between costs and benefits is precisely the kind of unreasonable and irrational result that Congress wanted to avoid when it instructed EPA to regulate only if it determined that regulation is "appropriate." Congress intended that EPA look at both the costs and benefits of any further regulation of electric utilities, and did so by providing a clear statement of that intent in the language, structure, and legislative history of § 7412(n)(1)(A).

C. EPA's interpretation that it is reasonable to ignore costs renders the term "appropriate" meaningless.

Despite all this, EPA argues that "it is reasonable to make the listing decision [for electric utilities], including the appropriate determination, without considering costs." 77 Fed. Reg. at 9327. EPA's position is *not* that regulating electric utilities is, in its judgment, worth the cost; rather, it contends it is reasonable to think that costs are irrelevant to whether it is appropriate to regulate electric utilities. 76 Fed. Reg. at 24,989 ("It is reasonable to conclude that *costs may not be considered* in determining whether to regulate EGUs under [§ 7412] when hazards to public health and the environment are at issue.") (emphasis added). EPA believes that Congress, by using the ambiguous word "appropriate," intended to give EPA the freedom to decide that costs do not matter to this decision at all.

But EPA's interpretation, as noted above, fails to give "appropriate" any meaning: it replaces the broad question Congress asked EPA to answer (whether it is "appropriate" to regulate) with a different, narrow question (whether there is any hazard to public health or the environment from HAP emission by electric utilities). See also 76 Fed. Reg. at 24,987 ("[W]e interpret the statute to *require* the Agency to find it is appropriate to regulate EGUs under [§ 7412] if the Agency determines that the emissions of one or more HAP emitted from EGUs pose an identified or potential hazard to public health or the environment at the time the finding is made.") (emphasis added); 76 Fed. Reg. at 24,988 ("EPA *must* find that it is appropriate to regulate EGUs if it

determines that *any single HAP* emitted by utilities poses a hazard to public health or the environment.") (emphasis added). And given that EPA's interpretation of the word "necessary" already answers that narrow question, EPA's interpretation leaves the term "appropriate" with no work to do.

1. EPA's reliance on the existence or severity of public-health hazards did not give "appropriate" meaning.

In response to this problem with EPA's interpretation, the court of appeals' majority argued that EPA gave the term "appropriate" some meaning because EPA could "apply its judgment in evaluating the results of the study" and assess "the *existence* and *severity* of such health hazards." Mich. Pet. Cert. App. 30a (emphasis added). That conclusion is wrong for three reasons.

First, EPA already accounted for the *existence* of health hazards through its finding that regulation was "necessary." 77 Fed. Reg. at 9363 ("HAP emissions from U.S. EGUs are reasonably anticipated to pose hazards to public health; therefore, it is necessary to regulate EGUs under CAA."); see also 76 Fed. Reg. at 24,987. Interpreting the term "appropriate" to depend on the same factor that "necessary" depends on would render "appropriate" superfluous.

Second, EPA did not state that it was basing its appropriate finding on the *severity* of any health hazards. To the contrary, it disclaimed any interest in evaluating the severity of any health hazard by stating that the mere existence of a health hazard

was sufficient: in its view, it "must find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities *poses a hazard*"—any hazard, regardless of how severe—"to public health or the environment." 76 Fed. Reg. at 24,988; see also *id*. at 24,987 ("[W]e interpret the statute to require the Agency to find it appropriate to regulate EGUs under CAA section 112 if the Agency determines that the emissions of one or more HAP emitted from EGUs *pose an identified or potential hazard* to public health or the environment at the time the finding is made.") (emphasis added). And the fact that EPA did not rely on the severity of the identified public-health hazards as a basis for its "appropriate" finding means that a court cannot rely on that ground either: "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 50 (1983).

Third (and most importantly), even if EPA had analyzed the severity of health hazards in making its appropriate finding, § 7412(n)(1)(A) requires EPA to do more than assess health hazards. If EPA determines that some hazards exist, it still must make a judgment about whether regulating HAPs emitted from electric utilities is "appropriate." This second step cannot merely repeat the first step. If "appropriate" is to be something more than surplusage, the "appropriate" finding must be based on relevant factors beyond health hazards alone. By confining its analysis to health hazards, EPA ignored factors that are not only relevant but *central* to making a judgment of whether regulation is

appropriate: weighing the costs of reducing emissions against the benefits to public health from such reductions. As Judge Kavanaugh emphasized in his dissent, "cost is an essential factor in deciding whether it is 'appropriate' to regulate." Mich. Pet. App. 80a, n. 5. When EPA refused to consider costs, it "entirely failed to consider an important aspect of the problem," and thereby failed to reasonably interpret § 7412(n)(1)(A). *State Farm*, 463 U.S. at 43.

2. EPA's reference to the availability of controls is also immaterial to its interpretation of "appropriate."

EPA also argues, and the court of appeals' majority agreed, that EPA did not "focus exclusively on health hazards" because EPA stated in the final rule that it is appropriate to regulate EGUs based on "the availability of controls to reduce HAP emissions from EGUs." Mich. Pet. App. 30a (citing 77 Fed. Reg. at 9311).

But the availability of controls made no difference to EPA's finding that regulation is appropriate, as shown by the statements that have already been quoted—that EPA concluded it "must" regulate "if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment" and that EPA interpreted § 7412(n)(1)(A) "to require" EPA to find that it is appropriate to regulate "if the Agency determines that the emissions of one or more HAP emitted from EGUs pose an identified or potential hazard to public health or the environment[.]" 76 Fed. Reg. at 24,987–88. Once it determined any such hazard existed, EPA believed regulation was *automatically* required; the

availability of controls therefore had no effect on whether regulation was appropriate. Thus, EPA's articulation of when it is appropriate to regulate shows that the availability of controls is irrelevant. *State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). Moreover, that extraneous statement does not change the conclusion that EPA unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.

II. EPA's interpretation unreasonably disregards the structure of § 7412, which creates distinct regimes that treat electric utilities differently than other sources.

Stepping back to examine the overall structure of § 7412 confirms that Congress wanted EPA to consider costs when regulating steam-generating electric utilities. Congress created a distinct regime under § 7412(n)(1) for deciding whether to regulate electric utilities, and that regime is different from the regime that governs whether to designate other sources for regulation by listing them under § 7412(c). These two regimes impose different criteria on the decision of when a source must be regulated. To regulate electric utilities covered by subsection (n)(1), EPA must determine that regulation is "appropriate," a determination that, as already explained, requires considering costs. But deciding whether to list other sources under subsection (c) for regulation simply requires EPA to determine whether a quantitative threshold (a certain tonnage of emissions) has been met. The fact that Congress granted EPA broad discretion under

the (n)(1) regime but no discretion under the (c)(1) regime confirms that these regimes take distinct approaches to determining whether to regulate. Thus EPA's reliance on components of the § 7412(c) regime is misplaced.

A. Congress's decision to tie listing decisions under § 7412(c) to emission quantities does not make costs irrelevant under § 7412(n)(1).

The structure of § 7412 reveals that Congress knows how to regulate sources based on only their emissions of hazardous air pollutants and the health hazards they cause. Indeed, that is precisely the approach Congress employed under subsection (c) for sources of hazardous air pollutants other than electric utilities—sources ranging from petroleum refineries to chemical manufacturing plants to industrial factories to hazardous-waste-incineration facilities. Under the subsection (c) regime, Congress first identified more than 180 air pollutants it deemed to be hazardous and listed them in § 7412(b). See § 7412(a)(6) (defining "hazardous air pollutant" as "any air pollutant listed pursuant to subsection (b) of this section."). Then, Congress required EPA to publish a list of categories of "major sources" other than electric utilities, § 7412(c)(1), and to promulgate emission standards for each listed category, § 7412(c)(2).

In subsection (c), Congress thus *made the judgment itself* as to when those sources must be regulated: they must be regulated if they emit more than the 10- and 25-ton amounts Congress established for "major sources" of such pollutants.

§ 7412(c)(1) (requiring EPA to list major and area sources); see also § 7412(a)(1) (defining major sources based on tons of emissions), (b)(1) (listing HAPs). Rather than granting broad discretion to EPA, Congress told EPA to look at one factor and only one factor for its listing decision: emissions quantities.

If Congress had intended EPA to regulate electric utilities based solely on one factor (health hazards), as EPA contends, and wanted to preclude EPA from considering costs, then there would have been no need to create a separate regime in § 7412(n)(1). Congress could have instead regulated electric utilities the same way it decided to regulate petroleum refineries and other sources: by mandating regulation if their emissions exceed certain tonnage thresholds. Or, Congress would have limited EPA's discretion in § 7412(n)(1)(A) by ordering the agency to regulate based on health hazards and the benefits of emission reductions alone, without asking EPA to exercise its judgment as to whether regulation was "appropriate." Congress chose neither of those options.

Instead, Congress adopted a distinct approach for electric utilities—and only for electric utilities—in § 7412(n)(1). It instructed EPA to "consider" health hazards from electric utility HAP emissions and then to exercise its judgment by deciding whether regulation is appropriate. And the key criterion Congress chose in § 7412(n)(1)(A)—whether regulating electric utilities is "appropriate"—includes relevant factors on both sides of the cost-benefit balance, including the health benefits of regulating electric utilities and the costs of doing so. Congress

therefore directed EPA to exercise its judgment based on the relevant factors in addition to any health hazards the study revealed—including a review of both costs and benefits.

EPA argues that the fact that § 7412(c) does not *allow* EPA to consider costs shows that costs may not be considered under § 7412(n)(1) either. For example, EPA observes that "[s]ection 7412(c) generally deprives the EPA of any discretion to consider costs when deciding whether to include a source category in the list of those subject to regulation." Fed. Respondents' Br. in Opp. 18. That is true, but it simply highlights the two separate regimes Congress created. Under § 7412(c), Congress itself decided it was appropriate to regulate those sources based solely on their emission tonnages, without regard to costs.

In short, EPA's observation does not support EPA's assertion that "this context" allowed it to "reasonably conclude[] that Congress did not intend to require consideration of costs as part of the determination whether to regulate power plants under Section 7412(n)(1)(A)." Fed. Respondents' Br. in Opp. 24; see also 77 Fed. Reg. at 9327. Instead, this context underscores the contrast between the approach Congress dictated for electric utilities under subsection (n)(1) and the approach it dictated for other sources under subsection (c).

B. The fact that other provisions of § 7412 expressly require consideration of costs does not render EPA's interpretation of § 7412(n)(1) reasonable.

The D.C. Circuit and EPA both overlook the fact that Congress created two distinct regimes—the subsection (c) regime, which requires listing sources for regulation based on emissions quantities, and the subsection (n)(1) regime for electric utilities, which gives EPA discretion whether to regulate. Because they overlook § 7412's overall structure, they compare parts of § 7412 that are not comparable.

For example, EPA and the D.C. Circuit rely on the fact that Congress affirmatively directed EPA to consider costs in a number of different subsections of § 7412—in (d)(2), (d)(8), (f)(1), (f)(2)(A), (n)(1)(B), and (s)(2)—but that Congress did not expressly direct EPA to consider costs in § 7412(n)(1). Fed. Respondents' Br. in Opp. 23 & n.10; Mich. Pet. App. 26a. They contend that it was reasonable for EPA to "decline[] to find in an ambiguous section what in so many other CAA sections Congress has mentioned expressly." Mich. Pet. App. 27a (citing *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001)); Fed. Respondents' Br. in Opp. 23 (same). In short, they base this argument on the statutory-interpretation canon that "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 578 (2006); see also *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 section of the same Act, it is

generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion.").

But the negative-implication canon depends on context, and it "can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.' " *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)); see also A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (Thompson-West 2012) ("Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context."). And here, the context already discussed provides two contrary indications that overcome the canon's application.

First, the express mention of "costs" within the EGU regime—in § 7412(n)(1)(B), which directs EPA to study the costs of controlling emissions from electric utilities—reinforces the conclusion, as already discussed, that costs *are* relevant to that regime. Congress required EPA to look beyond public-health benefits of regulation and to exercise its judgment as to whether it is "appropriate" to regulate based on relevant circumstances, and the specific mention of costs in subsection (n)(1)(B) confirms that Congress thought the costs of regulation are a relevant circumstance. In this context, the comparison is not between (1) a provision that enumerates specific factors but fails to mention costs and (2) a provision that expressly mentions costs. Rather, it is between (1) a provision

that requires, through the use of the word "appropriate," the consideration of all relevant circumstances or factors (which inherently includes costs), § 7412(n)(1)(A), and (2) a provision that reaffirms the relevance of costs, § 7412(n)(1)(B).

Second, the remaining provisions EPA and the D.C. Circuit relied on—(d)(2), (d)(8), (f)(1), (f)(2)(A), and (s)(2), each of which expressly mentions "cost"—also confirm the relevance of cost under subsection (n)(1). Subsection (n)(1) asks a threshold question: whether it is "appropriate" to impose "regulation under this section." § 7412(n)(1)(A). Subsection (n)(1) thus requires EPA to consider the costs that will be imposed if the regulation is to be implemented under § 7412. The provisions on which EPA relies all relate to that implementation stage—to the costs EPA will be imposing if it concludes regulation is appropriate. In other words, when Congress directed EPA to decide the threshold question whether it was "appropriate" to impose "regulation under [§ 7412]," § 7412(n)(1)(A), Congress was directing EPA to look ahead to the costs that would be imposed at the implementation stage by, for example, the emissions standards imposed under subsections (d)(2) and (d)(3).

This approach is quite different from the approach set out in subsection (c)(1). Under (c)(1), the threshold question *whether* to regulate is separate from questions about *how* regulation will be implemented. The threshold determination under subsection (c)(1) focuses on a single, enumerated factor: whether a given source emits a certain number of tons of emissions, thereby automatically

triggering regulation. Unlike § 7412(c)'s automatic trigger approach, in § 7412(n)(1) Congress directed EPA to look ahead to how regulation would be implemented by telling it to regulate "if [EPA] finds such regulation appropriate and necessary." In short, the fact that costs are relevant at the implementation stage, as (d)(2) and the other cited provisions confirm, is consistent with Congress's directive that EPA consider whether it is appropriate to impose those costs on electric utilities by deciding to regulate "under this section"—that is, under § 7412. § 7412(n)(1)(A).

EPA places much emphasis on § 7412(d)(2), noting that Congress required EPA to take costs into account at the implementation stage, when setting beyond-the-floor emissions-reductions standards under § 7412(d)(2) based on the "maximum achievable control technology" (MACT). But that requirement does not negate Congress's intent that EPA must evaluate both costs and benefits at the threshold stage under § 7412(n)(1)(A), when deciding whether it is "appropriate" to regulate electric utilities at all. To the contrary, the fact that costs are relevant at the implementation stage matches up directly with § 7412(n)(1)'s consideration of whether it is appropriate to impose such regulation. The provisions in § 7412(d) that address how EPA must set MACT emission standards thus reinforce the conclusion that Congress required EPA to consider costs when evaluating whether it is appropriate to impose "such regulation" on electric utilities in the first instance, before it sets emissions standards for them.

Similarly, § 7412(f)(1) and (f)(2)(A) apply to risks that remain "after application of standards under subsection (d)." § 7412(f)(1)(A). The fact that costs are relevant to regulating remaining risks confirms that costs are also relevant to deciding whether any regulation of electric utilities is appropriate.

As for the last provision EPA cites, subsection (s)(2) further confirms the basic principle at issue in this case: that Congress cares about the costs of regulating. Subsection (s)(2) requires EPA to include "the costs of compliance" when it provides Congress with "a comprehensive report on the measures taken by the Agency and by the States to implement the provisions of this section." Indeed, this reporting requirement confirms the background principle that costs are an important part of regulatory decision-making.

All of this shows why EPA's argument that Congress accounted for costs in the beyond-the-floor emission-reduction requirements that EPA might impose under § 7412(d)(2) is, as Judge Kavanaugh noted, a "red herring." Mich. Pet. App. 85a. Congress precluded EPA from considering any costs or health benefits when setting "MACT floor" emission standards, the standards that reflect the minimum level of emission reductions Congress mandated. Those minimum standards are based solely on the emissions limitations achieved by the best-performing sources in a listed category. § 7412(d)(3). As Judge Kavanaugh emphasized in his dissent, meeting the MACT floor "will be prohibitively expensive, particularly for many coal-fired electric utilities, regardless of whether EPA decides to go

further and set a 'beyond-the-floor' standard" and "will likely knock a bunch of coal-fired electric utilities out of business." Mich. Pet. App. 85a. Indeed, EPA's calculations in this case demonstrate that the technology-based standards in the final rule are " 'among the most expensive EPA has ever promulgated.' " *Id.* 83a (quoting James E. McCarthy, Congressional Resource Service, R42144, EPA's Utility MACT: Will the Lights Go Out? 1 (2012)).

Although EPA can consider costs at the second, beyond-the-floor stage, EGUs and their customers are already required pay extraordinary costs to achieve only a minimal benefit to public health under EPA's unreasonable interpretation. Congress directed EPA to assess costs and benefits *before* imposing such costs on electric utilities and their customers by requiring, in § 7412(n)(1)(A), that EPA first decide whether regulation is appropriate.

In the end, looking at these specific provisions highlights the importance of costs at the implementation stage and thus confirms that when Congress created a regime that looks ahead to the implementation of "such regulation," it expected EPA to consider implementation costs when deciding whether it is "appropriate" to regulate electric utilities. § 7412(n)(1)(A).

III. EPA's unreasonable interpretation of "appropriate" imposes costs that are wholly disproportionate to the benefits.

EPA estimated that the quantifiable annual costs of compliance under the rule are $9.6 billion while the annual benefits from reduced emissions of

hazardous air pollutants are only $4 to $6 million. That ratio of costs to benefits is between 2,400 to 1 and 1,600 to 1. Although no reasonable person would spend $1,600 (or $2,400) for $1 of benefit, EPA refused even to look at costs due to its unreasonable interpretation of "appropriate."

At the certiorari stage, EPA quibbled over these numbers, asserting that the cost-benefit balance was not so unbalanced. Fed. Respondents' Br. in Opp. 27. But disputing the ratio is inconsistent with EPA's position, which is that the numbers *do not matter*. EPA's position is that it would is reasonable to construe the statute to allow it to not even look at the ratio. In other words, it would be reasonable to construe the statute to allow regulation even if the costs were $9.6 billion per year and the benefits were only $1.

In any event, the other benefits that EPA estimated are irrelevant for the purpose of deciding whether regulation is appropriate. EPA calculated that the final rule will result in fewer emissions of particulate matter smaller than 2.5 micrometers in diameter ($PM_{2.5}$) and sulfur dioxide (a $PM_{2.5}$ precursor). According to the agency, the annual "co-benefits" from reducing $PM_{2.5}$ are between $36 and $89 billion. 77 Fed. Reg. at 9306; *id*. at 9305 ("The great majority of the estimates are attributable to co-benefits from reductions in $PM_{2.5}$-related mortality."); *id*. at 9323 ("the estimated HAP benefits are small in relation to the co-benefits achieved through reductions in non-HAP air pollutants, such as PM and SO2").

The ancillary co-benefits from lower $PM_{2.5}$ emissions are not *relevant* benefits for the purpose of deciding whether it is appropriate to regulate HAP emissions from electric utilities. Congress required EPA to determine whether reducing emissions of hazardous air pollutants (not $PM_{2.5}$) is "appropriate." § 7412(n)(1)(A) (addressing emissions of "pollutants listed under subsection (b) of this section"). EPA's "appropriate" finding is therefore limited to reducing HAP emissions, and co-benefits from lower $PM_{2.5}$ emissions are not part of the analysis. Had EPA made its "appropriate" finding as Congress intended, it would have found that the exceedingly high costs to consumers is wholly disproportionate to the minimal public health benefit and that regulating electric utilities is *not* appropriate.

CONCLUSION

For the foregoing reasons, EPA's final rule should be vacated.

Respectfully submitted,

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