No. 14-49

In the Supreme Court of the United States

NATIONAL MINING ASSOCIATION, PETITIONER
v.
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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

REPLY BRIEF FOR PETITIONERS

CARROLL W. MCGUFFEY III
JUSTIN WONG
TROUTMAN SANDERS LLP
600 PEACHTREE STREET, NE
SUITE 5200
ATLANTA, GA 30308-2216

PETER S. GLASER
(*Counsel of Record*)
TROUTMAN SANDERS LLP
401 NINTH STREET N.W.
SUITE 1000
WASHINGTON, D.C. 20004
202-274-2998
Peter.glaser@
troutmansanders.com

Counsel for Petitioner

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RULE 29.6 DISCLOSURE STATEMENT

The National Mining Association is a nonprofit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

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Reply

The National Mining Association ("NMA") respectfully submits this reply to the Brief for the Federal Respondents in Opposition ("Fed. Br.") and the other briefs[1] that were filed in response to NMA's Petition for Writ of Certiorari.

Several points are clear:

1. Although the Environmental Protection Agency ("EPA") and its supporters continue to highlight the asserted "co-benefits" of the rule in their briefs, they also concede that these benefits were legally irrelevant to EPA's determination that it was "appropriate and necessary" to regulate. *See, e.g.*, Fed. Br. at 12.[2]

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[1] Brief in Opposition by California, et al., Brief in Opposition of Respondents American Academy of Pediatrics, et al., Brief in Opposition of Respondents Calpine Corporation, et. al.

[2] The MATS Rule is not the only example of a rule where EPA has relied on co-benefits from reducing a pollutant already regulated under the NAAQS program. A review of the Regulatory Impact Analyses for 57 recent Clean Air Act rules showed that either all or the majority of the benefits on which EPA has relied for most of the 57 rules were PM2.5 co-benefits. Anne E. Smith, Ph.D., NERA Economic Consulting, An Evaluation of the PM2.5 Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations at 7-9 (Dec. 31, 2011), available at http://www.nera.com/publications/archive/2011/an-evaluation-of-the-pm25-health-benefits-estimates-in-regulato.html; see also Anne E. Smith, Ph.D., NERA Economic Consulting, Technical Comments on the Regulatory Impact Analysis Supporting EPA's Proposed Rule for Utility MACT and Revised NSPS at 20-21 (Aug. 3, 2011), Attachment 13 to UARG Comments on Proposed MATS Rule (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17785 (discussing problem of "double counting" PM2.5 co-benefits).

2. As EPA found, therefore, the total monetized benefits of the rule are $4-6 *million* per year and the total cost of the rule is $9.6 *billion* per year. 77 Fed. Reg. 9,304, 9,362 Feb. 16, 2012), Table 2, Pet. App. 208a.

3. EPA's statement that "it remains certain that the benefits of this rule * * * are substantial and far outweigh the costs," Fed. Br. at 13 (citing 77 Fed. Reg. at 9,306), refers to both the $4-6 million in direct benefits and to the legally irrelevant co-benefits. *See* 77 Fed. Reg. at 9,306, Pet. App., particularly Table 2 on that page and the paragraph immediately preceding the paragraph the Federal Respondents cite. EPA, therefore, did not conclude that the legally relevant benefits of the rule outweigh the costs. Far from it.

3. As to the four possible additional unquantifiable benefits that Federal Respondents cite, Fed. Br. at 12-13, the first three pertain to mercury. Of the benefits claimed in item (4) (reduced cancer risk and reduced water-body acidification), the only acid gas benefit is reduced acidification, since EPA has conceded that acid gases do not pose a cancer risk. 76 Fed. Reg. 24,976, 25,016 (May 3, 2011), Pet. App. 1161a, 1342a, 76 Fed. Reg. at 25,011-12, Pet. App. 1317a-1323a.

4. As to the possibility that electric generator acid gas emissions contribute to acidification of water bodies, (a) the record contains no evidence that these emissions are actually causing or exacerbating acidification, National Mining Association Petition for Writ of Certiorari ("NMA Pet.") at 23-25; (b) EPA's comprehensive study of the impacts of electric

generator emissions of hazardous air pollutants did not conclude that electric generator acid gas emissions created an acidification concern, *id*. at 24[3]; (c) EPA cited only one study to support its acidification claim, and this study examined emissions in the United Kingdom, 77 Fed. Reg. at 9,362, Pet. App. 457a-458a; and (d) in the end, EPA could assert no more than that "deposition of hydrochloric acid *could* exacerbate" existing water-body acidification, 76 Fed. Reg. at 25,050, Pet. App. 1482a-1483a (emphasis added).[4] The Federal Respondents and their allies do not dispute these facts.

4. Acid gases and other hazardous air pollutants emitted by electric generators are indeed hazardous. That is why Congress listed these substances under Section 7412(b). But Congress did not, by its listing action, command that EPA regulate electric generator hazardous air pollutant emissions. As Federal Respondents concede, Congress directed EPA to study the health hazards actually posed by these emissions—in other words, whether electric generators emit these substances in sufficient quantity as to create a health hazard—and then to regulate only if "appropriate and necessary." Fed. Br. at 5, 21. As indicated in item 3 above, EPA's Utility

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[3] *See* Brief in Opposition by California, et al. at 15 (Section 112(n)(1)(A) "leaves no doubt that Congress intended EPA's consideration of 'hazards to public health' in the Utility Study to be the touchstone informing its decision whether it was 'appropriate and necessary' to regulate power plant hazardous air pollutant emissions.").

[4] The reply brief of the Utility Air Regulatory Group in consolidated docket No. 14-47 will show that the asserted unquantifiable benefits of reducing electric generator emissions of mercury and non-mercury metals are equally flimsy.

Study found no health hazards from electric generator acid gas emissions, and the additional evidence EPA cited indicated, at best, only a generalized basis for health or environmental concern.

5. The pollution controls needed to reduce electric generator acid gas emissions drive much of the $9.6 billion annual overall cost of the regulation, 76 Fed. Reg. at 25,014, Pet. App. 1327a-1331a, a point Federal Respondents and their allies also do not dispute. Not coincidentally, these controls drive virtually all of the co-benefits that EPA supposedly did not rely on in promulgating the rule. NMA Pet. at 4 and 77 Fed. Reg. at 9,306, Table 2, n. b, Pet. App. 208a.

In 42 U.S.C. § 7412(n)(1)(a), Congress barred EPA from regulating electric generator emissions of hazardous air pollutants, including acid gas emissions, unless the agency first made a rational determination that regulation was "appropriate and necessary." NMA submits that no rational person would choose to spend $9.6 billion every year for $4-6 million in return plus some possible additional but unquantifiable benefit. NMA further submits that no rational person would choose to spend much of $9.6 billion every year for *no* quantifiable return in health or environmental benefit and only the flimsiest of potential non-quantifiable benefits.

The stark irrationality of EPA's decision—explainable only by EPA's desire to hijack Section 112(n)(a)(1) to reduce non-hazardous air pollutants—renders this case sufficiently important to justify granting NMA's petition. As this Court has said,

Congress can certainly authorize regulation no matter the cost. *Whitman v. American Trucking Associations*, 531 U.S. 457, 466 (2001). But the corrolary of this ruling is now in jeopardy: where Congress does not bar a regulator from considering costs—and instead authorizes only "appropriate and necessary" regulation—an agency cannot willfully blind itself to the enormous costs it will inflict on the American people.

Respectfully submitted,

CARROLL W. MCGUFFEY III
JUSTIN WONG
TROUTMAN SANDERS LLP
600 PEACHTREE STREET, NE
SUITE 5200
ATLANTA, GA 30308-2216

PETER S. GLASER
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