Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272

IN THE
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

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

BRIEF OF FIVE U.S. SENATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The Senators participating as *amici* are:

SENATOR JAMES M. INHOFE OF OKLAHOMA
former Chairman and former Ranking Member of the Environment and Public Works Committee, current Ranking Member of the Armed Services Committee

SENATOR ROY BLUNT OF MISSOURI
Member of the Appropriations Committee, and its Interior, Environment, and Related Agencies Subcommittee, and the Commerce, Science, and Transportation Committee, former Member of the House Energy and Commerce Committee

SENATOR DEB FISCHER OF NEBRASKA
Member of the Environment and Public Works Committee and the Commerce, Science, and Transportation Committee

SENATOR JERRY MORAN OF KANSAS
Member of the Appropriations Committee, former Member of the House of Representatives

SENATOR PAT ROBERTS OF KANSAS
Ranking Member of the Agriculture Committee, former Chairman of the Senate Select Intelligence Committee, and former Chairman of the House Agriculture Committee

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are five U.S. Senators.[2] All agree that the Environmental Protection Agency (EPA) impermissibly and incorrectly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered requirements for stationary sources that emit greenhouse gases to obtain permits under the Clean Air Act (CAA or the Act).

At issue in this case is a set of EPA regulations imposing permitting requirements regarding greenhouse gas emissions of stationary sources. These regulations represent the most sweeping regulatory expansion of EPA's authority in the agency's history. This vast new regulatory regime was not authorized or approved by Congress, but rather was based on EPA's unilateral and incorrect interpretation of the Act. We urge the Court to reject EPA's interpretation of the Act – which is both inconsistent with Congressional intent and leads to what EPA itself admits are "absurd results" – and to reject EPA's attempt to require stationary sources to obtain CAA permits based on their greenhouse gas emissions.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or its counsel made a monetary contribution intended to fund the preparation of this brief. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

[2] A complete list of the *amici* appears on the inside cover.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should hold that EPA improperly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered requirements for stationary sources that emit greenhouse gases to obtain permits under the Act.

This brief demonstrates that the legislative activity of Congress since the most recent amendments to the Act in 1990 supports the conclusion that EPA's interpretation of the Act is both contrary to Congressional intent and impermissible. Members of Congress have introduced a large number of bills proposing to regulate greenhouse gas emissions from stationary sources in a wide variety of ways, yet none of these bills contemplated regulation of stationary sources through traditional Prevention of Significant Deterioration (PSD) permits. The complete absence of any legislative proposals to regulate greenhouse gas emissions of stationary sources through the PSD program, in the context of a legislative environment where hundreds of bills have been proposed to address such emissions, supports the conclusion that requirements for stationary sources that emit greenhouse gases to obtain CAA permits are *not* triggered based on EPA's regulation of greenhouse gas emissions from new motor vehicles. It also supports the conclusion that EPA's interpretation of the Act is contrary to Congressional intent.

ARGUMENT

I. Stationary Sources That Emit Greenhouse Gases Are *Not* Required to Obtain CAA Permits Based on EPA's Regulation of Greenhouse Gas Emissions from New Motor Vehicles.

EPA's conclusion that its regulation of greenhouse gas emissions from new motor vehicles triggered requirements that stationary sources obtain permits based on their greenhouse gas emissions rests on at least two incorrect interpretations of the Act.

First, EPA failed to recognize that PSD permitting requirements only apply to stationary sources "in any area to which this part applies." 42 U.S.C. § 7475(a). PSD only "applies" to designated pollutants for which National Ambient Air Quality Standards (NAAQS) have been developed. *See* 42 U.S.C. § 7408(a) (setting forth the procedure for designating NAAQS pollutants). Greenhouse gases have not been designated as such a pollutant, so the PSD requirements do not apply to stationary sources based on their emissions of greenhouse gases.

Second, the stationary source permitting requirements only apply to "major emitting facilities," which are those facilities which emit more than a specified amount of "any air pollutant." 42 U.S.C. § 7479(1). This language should be interpreted as referring to "any *NAAQS* air pollutant," not as any pollutant regulated by any part of the Act, which is the interpretation EPA has adopted despite its admittedly absurd results.

These arguments have been ably set forth by the Petitioners and will not be repeated here.

II. The Complete Absence of Legislative Proposals to Grant EPA Authority to Require Stationary Sources to Obtain PSD Permits Based on Greenhouse Gas Emissions Demonstrates That EPA's Interpretation of the Act is Contrary to Congressional Intent.

The most recent major amendments to the Clean Air Act were the addition of the Title V permitting provisions in 1990. In drafting the 1990 amendments, "Congress considered — and *expressly rejected* — proposals authorizing EPA to regulate [greenhouse gasses] under the CAA." *Coalition for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322 et al., 2012 WL 6621785, at *5 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from denial of rehearing *en banc*).

Since the 1990 amendments, Congress has declined to pass a large number of bills that would have authorized EPA to regulate greenhouse gas emissions from stationary sources. *See id.* at *6. These bills proposed a wide variety of approaches to regulating greenhouse gas emissions from stationary sources. *See, e.g.*, Clean Power Act of 2001, S. 556, 107th Cong. (2001) (proposing CO_2 emission caps for power plants); Clean Air Planning Act of 2002, S. 3135, 107th Cong. (2002) (proposing CO_2 emission caps for power plants); Clean Air Planning Act of 2003, H.R. 3093, 108th Cong. (2003) (proposing CO_2 emission caps for power plants); Clean Air Planning Act of 2003, S. 843, 108th Cong. (2003) (proposing

CO_2 emission caps for power plants); Clean Power Act of 2005, S. 150, 109th Cong. (2005) (proposing CO_2 emission caps for power plants); Clean Air Planning Act of 2006, S. 2724, 109th Cong. (2006) (proposing CO_2 emission caps for power plants); Safe Climate Act of 2006, H.R. 5642, 109th Cong. § 705(a) (2006) (proposing to grant EPA authority to promulgate regulations restricting greenhouse gas emissions, including regulations establishing "emissions performance standards, efficiency performance standards, best management practices, technology-based requirements, and other forms of requirements"); Safe Climate Act of 2007, H.R. 1590, 110th Cong. § 705(a) (2007) (same provision); Clean Air/Climate Change Act of 2007, S. 1168, 110th Cong. (2007) (proposing CO_2 emission caps for power plants); Clean Air Planning Act of 2007, S. 1177, 110th Cong. (2007) (proposing CO_2 emission caps for power plants); Clean Power Act of 2007, S. 1201, 110th Cong. (2007) (proposing CO_2 emission caps for power plants); Energy Independence, Clean Air, and Climate Security Act of 2007, S. 1554, 110th Cong. (2007) (proposing CO_2 emission caps for power plants); Lieberman-Warner Climate Security Act of 2007, S. 2191, 110th Cong. (2007) (proposing a cap-and-trade program for certain stationary sources); Investing in Climate Action and Protection Act, H.R. 6186, 110th Cong. (2008) (proposing a cap-and-trade program for certain industrial facilities emitting more than 10,000 tons of CO_2 in a calendar year); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) (proposing a cap-and-trade program for certain stationary sources).

However, none of these bills contemplated requiring stationary sources to obtain PSD permits based on their greenhouse gas emissions.[3] Rather, they proposed a variety of other approaches to address greenhouse gas emissions from stationary sources.

Indeed, a review of over 690 pieces of proposed legislation introduced between 1989 and 2010 addressing greenhouse gases indicates that Congress never proposed to grant EPA authority to regulate greenhouse gas emissions from stationary sources under the PSD program. *See* Marlo Lewis, *EPA Permitting of Greenhouse Gases: What Does Legislative History Reveal about Congressional Intent?* (Dec. 3, 2013),

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[3] One bill would have divested EPA of authority under the Act to impose permitting requirements based on greenhouse gas emissions from stationary sources, in the context of imposing a cap-and-trade program regulating such emissions. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 834 (2009) (provision entitled "New Source Review," providing that "[t]he provisions of part C of title I shall not apply to a major emitting facility that is initially permitted or modified after January 1, 2009, on the basis of its emissions of any greenhouse gas").

However, the committee report accompanying this bill expressly stated that "[t]his language is intended to make clear on a going forward basis that New Source Review does not apply to greenhouse gases. *It is not an expression of congressional intent with respect to the application of New Source Review to greenhouse gases prior to that date*." H.R. Rep. No. 111-137, at 418 (2009) (emphasis added). Accordingly, this proposed bill does not support the proposition that Congress believed EPA possessed authority to impose permitting requirements based on greenhouse gas emissions from stationary sources.

http://www.globalwarming.org/2013/12/03/epa-permitting-of-greenhouse-gases-what-does-legislative-history-reveal-about-congressional-intent/#more-18134 (last visited Dec. 15, 2013). A second review of proposed legislation introduced between 1989 and 2010 containing the term "prevention of significant deterioration" did not reveal a single bill that proposed to regulate greenhouse gases under the Act's PSD provisions. *See* Marlo Lewis, *EPA Permitting of Greenhouse Gases: A Breathtaking Absence of Congressional Intent* (Dec. 11, 2013), http://www.globalwarming.org/2013/12/11/epa-permitting-of-greenhouse-gases-a-breathtaking-absence-of-congressional-intent/ (last visited Dec. 15, 2013).

This complete absence of proposals to grant EPA authority to impose PSD permitting requirements on stationary sources based on greenhouse gas emissions, in the context of a legislative environment where hundreds of bills have been proposed to address such emissions, demonstrates that Congress never intended for EPA to have authority to impose such permitting requirements.[4]

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[4] *Amici* recognize that the Court has held that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress," particularly where such subsequent history is based on "a proposal that does not become law." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

(continued…)

Moreover, this subsequent legislative history underscores what EPA itself has admitted regarding Congressional intent:

> For our authority to take this action, we rely in part on the 'absurd results' doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs.

75 Fed. Reg. 31,514, 31,541-42 (June 3, 2010).

EPA has recognized that its interpretation of the statute is inconsistent with Congressional intent,

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Still, "that does not mean that such subsequent legislative history is wholly irrelevant." *County of Washington v. Gunther*, 452 U.S. 161, 194 n.6 (1981) (Rehnquist, J., dissenting); *see also* Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, at 2 (Dec. 8, 1981) (explaining that subsequent legislative history has at least "some probative value"), *available at* http://www.archives.gov/news/john-roberts/accession-60-88-0498/032-bob-jones/folder032.pdf (last visited Dec. 15, 2013).

Subsequent legislative history should be accorded additional weight where, as here, it consists not of isolated events but rather a consistent Congressional pattern. Further, in this case the subsequent legislative history is consistent with the other lines of evidence demonstrating that EPA's interpretation of the Act is incorrect. *Cf. Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001).

and the subsequent legislative history of the Act provides further confirmation of this conclusion.

CONCLUSION

For the foregoing reasons, the judgment of the District of Columbia Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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