No. 12-1146

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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

RESPONSE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF THE UTILITY AIR REGULATORY GROUP

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RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for the National Mining Association ("NMA"), certifies that the NMA is an 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION AND INTEREST OF THE NATIONAL MINING ASSOCIATION

The Utility Air Regulatory Group ("UARG") has petitioned this Court for a writ of certiorari in the captioned docket seeking review of certain aspects of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). UARG's Petition applies to the portions of the Court of Appeals' decision dismissing UARG's petitions to review two rules of the Environmental Protection Agency ("EPA"), the "Timing Rule," 75 Fed. Reg. 17,004 (Apr. 2, 2010), and the "Tailoring Rule," 75 Fed. Reg. 31,514 (Jun. 3, 2010). As described in UARG's Petition for a Writ of Certiorari, the Timing Rule and Tailoring Rule set forth the terms under which greenhouse gas ("GHG") emissions will be regulated under EPA's Title V operating permit program and EPA's "Prevention of Significant Deterioration," or "PSD," preconstruction permit program under the Clean Air Act. UARG Petition at 1.

Pursuant to Rule 12.6 of the Rules of the Supreme Court, the National Mining Association ("NMA") responds in support of UARG's Petition. NMA was a petitioner below in the consolidated petitions for review of EPA's Tailoring and Timing Rules and is therefore a respondent here under Rule 12.6.

NMA is a national trade organization that represents the interests of mining before Congress, the administration, federal agencies, the judiciary and the media. NMA has a membership of more than 300 corporations and organizations involved in various aspects of mining. NMA's membership includes the producers, transporters and consumers of coal. NMA's member companies mine more than 75 percent of U.S.

coal produced annually from operations located in 26 states. Most of the coal produced by NMA members is used for the production of electricity. The balance is used as an industrial fuel. NMA's members also include producers of metals and industrial and agricultural minerals.

Noting "the expansive regulation that the rules at issue here would compel," UARG's Petition argues persuasively that the issue on which UARG seeks certiorari is "of great importance to the Nation." UARG Petition at 18. NMA agrees and adds that EPA regulation of GHGs under the PSD preconstruction permit program—regulation never intended by Congress, as EPA admits—would severely undermine the ability of the power sector to use coal. Because coal traditionally has been the country's dominant fuel for electric generation, and because electricity is so fundamental to all aspects of modern life, phasing out the use of coal will cause grave consequences for society.

ARGUMENT

As UARG shows, the PSD program applies to facilities that have the potential to emit at least 100 or 250 tons per year of any air pollutant depending on the type of facility. UARG Petition at 11; 42 U.S.C. § 7479(1). Facilities that utilize coal as a fuel have long been subject to the PSD program because they are typically electric generating or other large industrial facilities that potentially emit more than 100 tons per year of traditional pollutants. Thus, virtually any new coal-burning facility or existing major coal-burning facility that undergoes a major modification is required to obtain a PSD permit and, as a part of that permit, to install Best Available

Control Technology ("BACT") to reduce emissions. *See* 42 U.S.C. §§ 7475, 7475(a)(4).

The BACT requirements of the PSD program, while imposing significant costs on coal-burning facilities, have not heretofore limited the use of coal in the nation's economy. Historically, coal fueled around 50 percent of the nation's electric generation, with that number dipping somewhat in response to the current extraordinarily low natural gas prices.[1] Still, coal remains the leading fuel for electric generation,[2] and the Energy Information Agency ("EIA") projects rising coal-based electric generation in the future. According to EIA, the power sector generated 1,730 billion kilowatt hours ("KWh") of coal-based electricity in 201, and this figure is expected to grow to 1,829 billion KWh in 2035.[3]

GHG regulation under the PSD program, however, threatens to severely diminish the ability of power generators to use coal, and indeed that result may be the point of such regulation. Strategies that were used to meet BACT requirements for traditional pollutants, including switching to coals with a lower sulfur content or installation of "end-of-the-pipe" emission-reduction technologies are not available for reducing GHG emissions. The carbon content of coal does not vary widely among different types of coal, and even EPA recognizes that carbon capture and

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[1] EIA, *Electric Power Monthly* (Mar. 23, 2013), Table 1.1, *available at* http://www.eia.gov/electricity/monthly/index.cfm.

[2] *Id.*

[3] EIA, *Annual Energy Outlook 2013*, *available at* http://www.eia.gov/forecasts/aeo/er/index.cfm.

storage systems for large industrial facilities are a long way from economic feasibility.[4]

Coal is highly disadvantaged by GHG regulation under the PSD program because, among all of the hydrocarbon (fossil) fuels, coal has the highest proportion of carbon. Generating electricity with natural gas produces, on a per KWh basis, about one-half of the carbon dioxide emissions as generating electricity with coal.[5] Hence, over time, requiring GHG emission reductions under the PSD program may significantly reduce coal usage by favoring other types of less carbon-intensive but more costly fuels.

This outcome will produce dramatic economic consequences. Electricity is now so ubiquitous that it is easy to forget how central it is to every aspect of American life. Electricity is so important that the National Academy of Engineers named widespread electrification as the greatest engineering accomplishment of the 20th Century.[6] Regulatory policies that result in the phasing out of the dominant fuel for electric generation thus cannot help but have serious consequences. Coal has been America's fuel of choice for electric generation for a reason: it has proved

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[4] *Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units*, 77 Fed. Reg. 22,392, 22,415 (Apr. 13, 2012) (proposed rule) (carbon capture adds 80 percent to the cost of building and operating a coal facility).

[5] *Id.* at 22,392, 22,406 (EPA estimates that a new gas-fired generator emits 1,000 lbs. of CO_2 per megawatt hour, while a new coal-fired generator emits 1,800 lbs. of CO_2 per megawatt hour).

[6] National Academy of Engineers, *Greatest Engineering Achievements of the 20th Century*, *available at* http://www.greatachievements.org/.

over time to be the lowest cost, most reliable fuel, one on which the United States does not need to depend on foreign nations to obtain. Coal is by far America's most abundant energy resource—making up 92 percent of U.S. fossil energy reserves on a BTU basis.[7] At current consumption rates, the U.S. has more than 230 years of remaining coal reserves.[8] By the simple law of supply and demand, curtailing the country's use of the dominant fuel for electric generation will cause the price of electricity to rise, and because electricity usage affects virtually everything, the American economy will suffer as a result.

Reducing coal usage will also affect coal mining jobs and the spinoff benefits those jobs create. According to a study produced by NMA, coal mining generated nearly $40 billion in sales and paid $20.2 billion in direct wages and salaries in 2010. Coal mining accounted for 766,350 jobs, $49.5 billion in labor income, and $90 billion in contribution to GDP in 2010. And these benefits are particularly significant in states that produce coal. For instance, in West Virginia and Wyoming, approximately 13 percent of all employment comes from direct coal mining jobs and indirect jobs that result from coal mining. More than 20 percent of GDP in those states is derived directly and indirectly from coal mining.[9]

Some may argue that reducing GHGs is of such national importance that coal usage should be reduced in favor of less carbon-intensive fuels despite the economic effects of doing so. Others, however,

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[7] NMA, Coal: America's Power, *available at* http://www.nma.org/pdf/fact_sheets/cap.pdf.

[8] *Id.*

[9] *Id.*

may argue that because the use of coal and the production of GHG emissions by developing country is projected to far outstrip coal usage and GHG emissions in the United States,[10] any policy of reducing coal usage in the United States will have no meaningful effect on global atmospheric GHG concentrations but will severely undermine U.S. competitiveness. But an administrative agency like EPA obviously lacks the authority to make a policy decision of such consequences absent a clear Congressional delegation of such authority. As UARG shows, that delegation is absent here because Congress intended that the PSD program address traditional types of air pollution that deteriorate local air quality, not substances like carbon dioxide and other GHGs that circulate and are integrated uniformly throughout the global atmosphere. In sum, given the widespread effects GHG regulation could have on coal in particular and the Nation's economy in general, resolution of the extent of EPA's authority to regulate GHGs under the PSD program presents a question of exceptional importance.

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[10] According to the International Energy Agency ("IEA"), "Coal has met nearly half of the rise in global energy demand over the last decade, growing faster even than total renewables…. The policy decisions carrying the most weight for the global coal balance will be taken in Beijing and New Delhi – China and India account for almost three-quarters of projected non-OECD coal demand growth (OECD coal use declines)." The IEA goes on to say that, "*The growth in China's electricity demand over the period to 2035 is greater than total current electricity demand in the United States and Japan.* China's coal-fired output increases almost as much as its generation from nuclear, wind and hydropower combined." International Energy Agency, *World Energy Outlook 2012*, Executive Summary at 5, 6 (emphasis added), *available at* http://www.iea.org/publications/freepublications/publication/English.pdf.

CONCLUSION

For the foregoing reasons, NMA respectfully requests that UARG's petition for writ of certiorari be granted.

Respectfully submitted,

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