No. 16-1168

In the Supreme Court of the United States

AMERICAN MUNICIPAL POWER, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency, in fulfilling its statutory mandate to set "continuous" standards for the emission of hazardous air pollutants that reflect "the maximum degree of reduction * * * achievable," 42 U.S.C. 7602(k), 7412(d)(2), is legally obligated to excuse periods of equipment malfunction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-167) is reported at 830 F.3d 579.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2016. The court granted in part the government's motion for rehearing, denied all other motions for rehearing, and issued an amended judgment on December 23, 2016 (Pet. App. 174-176). The petition for a writ of certiorari was filed on March 23, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, requires the Environmental Protection Agency (EPA) to "promulgate regulations establishing emis-

sion standards for each category or subcategory of major sources * * * of hazardous air pollutants." 42 U.S.C. 7412(d)(1). Congress has identified a substantial number of substances as "hazardous air pollutants," 42 U.S.C. 7412(b)(1), and has tasked the EPA with adding to that list other substances that "may present * * * a threat of adverse health effects * * * or adverse environmental effects," 42 U.S.C. 7412(b)(2). A "major source" of such pollutants includes "any stationary source * * * that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. 7412(a)(1).

The CAA defines an EPA "emissions standard" as a "requirement * * * which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." 42 U.S.C. 7602(k). Congress has directed that the emission standards "applicable to new or existing [major] sources of hazardous air pollutants shall require the maximum degree of reduction in emissions * * * (including a prohibition on such emissions, where achievable) that the [EPA], taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable" for each particular category or subcategory of such sources. 42 U.S.C. 7412(d)(2). More specifically, the hazardous-air-pollutant standard for a new source (*i.e.*, one that is built or rebuilt after the standard is proposed) "shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the [EPA]." 42 U.S.C. 7412(d)(3); see

42 U.S.C. 7412(a)(4). Similarly, the hazardous-air-pollutant standard for an existing source (*i.e.*, one that is already operating or is under construction when the standard is proposed) "shall not be less stringent" than "the average emission limitation achieved" by a set of the "best performing" similar sources. 42 U.S.C. 7412(d)(3)(A); see 42 U.S.C. 7412(a)(10).

In a limited range of circumstances, the EPA "may" regulate the emission of hazardous air pollutants through a "design, equipment, work practice, or operational standard, or combination thereof," rather than through a numeric emission standard. 42 U.S.C. 7412(h)(1). The EPA is authorized to utilize that approach only if it determines that "(A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law"; or "(B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations." 42 U.S.C. 7412(h)(2)(A) and (B); see 42 U.S.C. 7412(h)(1). The EPA must also determine that any nonnumerical standard, such as a standard specifying particular work practices, "is consistent with" Section 7412(d)'s directives about the stringency of numerical emission standards. 42 U.S.C. 7412(h)(1).

2. In 2011, the EPA promulgated national emission standards for hazardous air pollutants emitted by certain types of industrial, commercial, and institutional heating or energy devices (boilers and process heaters) that are major sources of certain types of

those pollutants. See 76 Fed. Reg. 15,608 (Mar. 21, 2011); see also Pet. App. 7-8, 19-25.

As amended in 2013, the rule primarily utilizes numeric emission standards to regulate four types of those pollutants, as emitted by some categories of sources. 78 Fed. Reg. 7142 (Jan. 31, 2013). The methodology for calculating those numeric limits takes into account potential variability in emissions at different times and under different conditions. See Pet. App. 20-21. The types of sources at issue "typically measure emissions" through a "'three-run stack test,'" which consists of "three measurements of the source's emissions taken over a short time period (*i.e.*, no more than a few days) with each one of the three test 'runs' lasting from one hour to four hours." *Id.* at 93-94. Although those "three 'snapshots' of a source's emissions * * * cannot accurately represent the source's full range of emissions over all times and under all conditions," they "will in most cases show *some* of a particular source's variability over the short period of time during which testing was conducted." *Id.* at 94 (citations and internal quotation marks omitted). To determine the performance of the best-performing sources, as the calculation of "achievable" emission limits under Section 7412(d) requires, the EPA applied statistical techniques to the results of numerous stack tests to compute a level of emissions that "the EPA is 99 percent confident is achieved by the average source represented in [the] dataset over a long-term period." *Id.* at 99 (citation and internal quotation marks omitted).

The rule and its preamble specifically address the standards applicable to periods during which the relevant equipment is starting up, shutting down, or mal-

functioning. See 76 Fed. Reg. at 15,613. The rule provides a "separate work practice standard for periods of startup and shutdown," which the EPA determined to be "predictable and routine aspects of a source's operations" whose emissions "it is not technically feasible" to measure. *Ibid.* The EPA further "determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of [hazardous-air-pollutant emission] standards, which, once promulgated, apply at all times." *Ibid.* The EPA explained that a "malfunction" is not "predictable and routine" like startup or shutdown, but is instead "defined as a 'sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner.'" *Ibid.* (quoting 40 C.F.R. 63.2). The EPA found that "nothing in section [7412(d)] or in case law requires that EPA anticipate and account for the innumerable types of potential malfunction events in setting emission standards." *Ibid.*

The EPA explained that "it is reasonable to interpret" Section 7412(d) not to impose such a requirement. 76 Fed. Reg. at 15,613. The EPA observed that Section 7412 "defin[es] * * * the level of stringency that major source standards must meet" by reference to "the concept of 'best performing' sources." *Ibid.* "Applying the concept of 'best performing' to a source that is malfunctioning presents significant difficulties," because the "goal of best performing sources is to operate in such a way as to avoid malfunctions." *Ibid.* "Moreover, even if malfunctions were considered a distinct operating mode," the EPA "believe[d]

it would be impracticable to take malfunctions into account" because "malfunctions are sudden and unexpected events and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category." *Ibid.* The fact that "malfunctions can vary in frequency, degree, and duration[] further complicat[es] standard setting." *Ibid.*

With respect to the possibility of civil liability arising from a malfunction, the EPA stated that, if a source were to exceed emission standards "as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions," as well as consideration of "whether the source's failure to comply with the [emission] standard was, in fact, 'sudden, infrequent, not reasonably preventable' and was not instead 'caused in part by poor maintenance or careless operation.'" 76 Fed. Reg. at 15,613 (quoting 40 C.F.R. 63.2). The EPA "recognize[d] that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause an exceedance of the relevant emission standard." *Ibid.* And it originally included in the rule "an affirmative defense to civil penalties for exceedances of numerical emission limits that are caused by malfunctions." *Ibid.*; see 80 Fed. Reg. 72,797-72,798 (Nov. 20, 2015) (amending rule to remove affirmative defense following D.C. Circuit's vacatur of similar affirmative defense in another emission-standards rule).

The EPA noted that its imposition of "standards * * * that apply at all times," including periods of

malfunction, was "[c]onsistent with" the D.C. Circuit's decision in *Sierra Club* v. *EPA*, 551 F.3d 1019 (2008), cert. denied, 559 U.S. 991 (2010). 76 Fed. Reg. at 15,613. That decision had emphasized the statutory definition of an "emission standard" as a "continuous" limit, and had held that the EPA lacks any general authority to exempt startup, shutdown, and malfunction events from compliance with the emission standards that the EPA must impose on major sources of hazardous air pollutants. *Sierra Club*, 551 F.3d at 1027-1028 (quoting 42 U.S.C. 7412(d)(2) and 7602(k)); see *id.* at 1027 ("When sections [7412] and [7602(k)] are read together, then, Congress has required that there must be continuous section [7412]-compliant standards.").

3. Petitioner, a nonprofit corporation that provides services to communities operating municipal electric systems, joined with other entities in seeking judicial review of the rule. Pet. iv; Pet. App. 6. Their challenge was consolidated with overlapping challenges to two related rules, which regulate hazardous-air-pollutant emissions from similar but lower-emitting systems and from certain solid-waste incinerators. Pet. App. 6-7. The court of appeals denied the petitions for review in part and granted them in part, remanding (without vacatur) some of the rule's numeric standards for recalculation by the EPA. *Id.* at 167, 170.

As relevant here, the court of appeals rejected the contention that the EPA was required "to take malfunctions into account" in setting emission standards. Pet. App. 37; see *id.* at 37-43. Petitioner and other challengers argued that the EPA was required either to adjust the numeric emission standards to account

for the possibility of malfunction-related emissions or to promulgate work-practice standards to govern malfunction events. Pet. C.A. Br. 34-44. The court considered those arguments "under the two-part framework established" in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires the court to "defer to the EPA's interpretation" of the CAA when "the statute is 'silent or ambiguous with respect to the specific issue'" and the EPA has relied on "'a permissible construction'" of the statute. Pet. App. 35-36 (quoting *Chevron*, 467 U.S. at 843); see *id.* at 40.

The court of appeals held that the EPA's approach to malfunctions "reflects a permissible reading" of the relevant statutory language. Pet. App. 40. The court observed that the "relevant statute requires only that the EPA set 'achievable' standards, * * * and it defines achievability to be no less 'than the emission control that is achieved in practice by the best controlled similar source.'" *Ibid.* (quoting 42 U.S.C. 7412(d)(2) and (3)). "The 'best controlled similar source,'" the court explained, "is unlikely to be a malfunctioning source, and the EPA is bound to enact a standard in keeping with emission limits achieved by that 'best controlled similar source.'" *Id.* at 40-41 (quoting 42 U.S.C. 7412(d)(3)). "At the very least," the court held, "the language permits the EPA to ignore malfunctions in its standard-setting and account for them instead through its regulatory discretion." *Id.* at 41; see *ibid.* (finding "confirm[ation]" in the court's decision in *Sierra Club*); see also *ibid.* ("If anything, * * * the statutory language on its face prevents the EPA from taking into account the effect of potential malfunctions when setting [the relevant] emission standards.")

The court of appeals additionally held that the EPA was not required to set work-practice standards, as opposed to numeric emission standards, for periods of malfunction. Pet. App. 41-42. First, "the statute makes clear that [work-practice] standards are to be set at the discretion of the EPA, so it would be difficult to interpret the statute consistently with its text while holding that the text's *permissive* language in fact sets out a *requirement* that the Agency set work-practice * * * standards." *Id.* at 41. Second, the challengers had "not demonstrated and the EPA d[id] not concede that setting work-practice * * * standards would even be feasible for periods of malfunction." *Id.* at 42. In order to set a work-practice standard, "the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor technical defects." *Ibid.* "Any possible standard," the court reasoned, "is likely to be hopelessly generic to govern such a wide array of circumstances." *Ibid.*

In upholding the rule's approach, the court of appeals addressed concerns that a regulated entity might be subject to liability if a malfunction caused it to exceed the rule's emission limitations. Pet. App. 42. The court recognized that, even if the EPA declined to bring an enforcement action in such a circumstance, a private party might file its own enforcement action under the EPA's citizen-suit provision. *Ibid.* (citing 42 U.S.C. 7604(a)). Although the rule had originally provided an affirmative defense to such private suits, see 76 Fed. Reg. at 15,613, circuit law postdating the rule had held that the creation of such a defense is an exclusively judicial function. See Pet. App. 41-43

(citing *Natural Res. Def. Council* v. *EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014)). The court observed, however, that courts adjudicating citizen suits under the CAA can "determine, on a case-by-case basis, whether civil penalties are 'appropriate.'" *Id.* at 43 (internal quotation marks omitted) (quoting *Natural Res. Def. Council*, 749 F.3d at 1063). Any operator that is sued by private plaintiffs can "argue that penalties should not be assessed because of an unavoidable malfunction," can bolster such arguments by pointing to its compliance history and good faith, and can receive the support of the EPA as an intervenor or amicus. *Ibid.* The court of appeals stated that "[c]ourts should not hesitate to exercise their judicial authority to craft appropriate civil remedies in the case of emissions exceedances caused by unavoidable malfunctions." *Ibid.*

4. Petitioner filed a rehearing petition, which was not joined by other parties challenging the rule, in which it argued for the first time that the EPA should have addressed malfunctions through a "*de minimis*" exception to the emission standards. Pet. for Reh'g 12-14. It also argued for the first time that the rule's approach to malfunctions conflicted with 42 U.S.C. 7412(r), which addresses "accidental release[s]" of "extremely hazardous substance[s]," a set of substances that is not identical to the set of "hazardous air pollutants" that the EPA is required to regulate under Section 7512(d). See, *e.g.*, 42 U.S.C. 7512(r)(3). The court of appeals denied that rehearing petition. Pet. App. 174-176.

ARGUMENT

The court of appeals correctly held that the rule's approach to malfunctions reflects a permissible interpretation of 42 U.S.C. 7412's directive to limit emis-

sions of hazardous pollutants from major sources. The decision below does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner does not dispute that the CAA required the EPA to "promulgate regulations establishing [hazardous-air-pollutant] emission standards" for the sources at issue here. 42 U.S.C. 7412(d)(1). Petitioner also does not dispute that judicial review of those regulations is governed by "the two-part framework established in" *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 35; see *id.* at 35-36, 40; see also *Chevron*, 467 U.S. at 839-840, 842-843 (applying framework to EPA interpretation of CAA). Under that framework, a reviewing court first considers "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If the statute is silent or ambiguous with respect to the disputed question, the court will defer to the agency's interpretation so long as it "is based on a permissible construction of the statute." *Id.* at 843; see, *e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) (observing, in CAA case, that this Court "routinely accord[s] dispositive effect to an agency's reasonable interpretation of ambiguous statutory language").

Here, the rule's treatment of malfunctions is, at a minimum, permissible under the CAA. Consistent with the Act's definition of "emissions standard" as a limitation that applies "on a continuous basis," 42 U.S.C. 7602(k), the rule "has established standards * * * that apply at all times," 76 Fed. Reg. at 15,613. As required by the statute, those standards are at least as "stringent" as the emission control demonstrably

"achieved" by the "best performing" sources. 42 U.S.C. 7412(d)(3). Due to practical limitations of testing methodology (and finite time within which to collect the necessary data), it was "impossible" for the EPA to determine with "absolute certainty" the emissions levels "achieved by the best performing sources at all times" and under all conditions. Pet. App. 99. But the EPA aggregated available data and employed reliable statistical methods—which petitioner itself has never challenged—to model those sources' long-term performance. See *id.* at 97-100. The resulting limits thus "reflect[] a reasonable estimate of the emissions achieved in practice by the best-performing sources." *Id.* at 107 (citation omitted).

The EPA correctly concluded that "it is reasonable to interpret section [7412(d)] as not requiring EPA to account for malfunctions in setting emissions standards." 76 Fed. Reg. at 15,613. Malfunctions are not "predictable and routine aspects of a source's operations," but are instead, by definition, "'sudden'" and "'infrequent'" occurrences. *Ibid.* (quoting 40 C.F.R. 63.2). To be sure, it is statistically probable that, given a large enough set of sources and a long enough period of time, some subset of sources will experience some type of malfunction. See, *e.g.*, *ibid.* (recognizing "that even equipment that is properly designed and maintained can sometimes fail"). But the EPA may permissibly view the "best performing" sources, whose emissions levels set the floor for "achievable" reductions, 42 U.S.C. 7412(d)(3), to be sources that are not malfunctioning. See Pet. App. 40 ("The 'best controlled similar source' * * * is unlikely to be a malfunctioning source."); 76 Fed. Reg. at 15,613 ("The goal of best performing sources is to operate in such a

way as to avoid malfunctions of their units."). When a source malfunctions, it ceases "to operate in a normal or usual manner," 40 C.F.R. 63.2, and need not be treated as exhibiting the "best perform[ance]," 42 U.S.C. 7412(d)(3), that the statute requires the EPA to measure. See 79 Fed. Reg. 48,080 (Aug. 15, 2014) (preamble to rule setting emission standards for flexible polyurethane foam production).

The EPA's interpretation of the statute is informed by the "practical agency expertise" that provides "one of the principal justifications behind *Chevron* deference," *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 651-652 (1990). As the EPA has explained, "[a]pplying the concept of 'best performing' to a source that is malfunctioning presents significant difficulties." 76 Fed. Reg. at 15,613. "[E]ven if malfunctions were considered a distinct operating mode," it is "impracticable to take malfunctions into account in setting [Section 7412(d)] standards for boilers and process heaters." *Ibid.* Because "malfunctions are sudden and unexpected events," it "would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category." *Ibid.* "Moreover, malfunctions can vary in frequency, degree, and duration, further complicating standard setting." *Ibid.*

2. Petitioner contends (Pet. 21-29) that the rule's approach to malfunctions was foreclosed by the text of the CAA. That argument lacks merit.

a. Petitioner primarily argues (Pet. 1-2, 21-22) that the rule's standards "require impossible perfect performance," and therefore cannot constitute a permissible "determin[ation]" of the "maximum degree of reduction in emissions of * * * hazardous air pollu-

tants" that is "achievable," 42 U.S.C. 7412(d)(2). The premise of that argument—that compliance with the rule is "impossible"—is unsupported.

None of the authorities on which petitioner relies (Pet. 21) supports the proposition that any particular source, or even a substantial number of sources, will be unable to comply with the rule's emission standards. They instead all simply reflect that, across the set of *all* sources, *some* malfunctions will almost certainly occur at *some* sources. See Pet. App. 38 (citing EPA statement that malfunctions "sometimes" occur); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 398 (D.C. Cir. 1973) (citing "concern" of private parties in another context about "device malfunction"), cert. denied, 417 U.S. 921 (1974); 76 Fed. Reg. at 15,613 (recognizing "that even equipment that is properly designed and maintained can sometimes fail"); 37 Fed. Reg. 17,214 (Aug. 25, 1972) (acknowledging that "there could on occasion occur malfunctions or other events * * * during which emissions might temporarily exceed the standards").

The CAA does not dictate that emission standards for hazardous air pollutants must incorporate the abnormal level of emissions emitted by a malfunctioning source. The CAA requires hazardous-air-pollutant standards to "not be less stringent" (and permits them to be more stringent) than the emissions reductions achieved by the "best performing" sources. 42 U.S.C. 7412(d)(3). The EPA's methodology for determining the appropriate emission limits here took predictable degrees of variability into account by extrapolating the performance of the best-performing sources over time. See p. 4, *supra*. Petitioner does not identify any means by which the EPA could or should have feasibly

modified that measurement of actual best performance to account for malfunctions whose occurrence, timing, and nature are inherently unpredictable. See 76 Fed. Reg. at 15,613 (noting inherent difficulty of such an approach). And nothing in the CAA compelled the EPA to do so.

b. Petitioner does not expressly renew the argument—raised and rejected below, see Pet. App. 41-42—that the EPA was required to adopt a work-practice standard, rather than a numeric emission standard, for periods of malfunction. Even if that argument has not been abandoned, it lacks merit.

As a textual matter, the EPA's "*permissive*" authority to set work-practice standards cannot reasonably be construed as a "*requirement*" that the EPA must set such standards for periods of malfunction. Pet. App. 41; see 42 U.S.C. 7412(h)(1) (providing that the EPA "may" promulgate work-practice standards when certain criteria are met). In addition, petitioner has "not demonstrated * * * that setting work-practice * * * standards would even be feasible for periods of malfunction," as "[a]ny possible standard is likely to be hopelessly generic to govern * * * a wide array of circumstances" that would "rang[e] from an explosion to minor mechanical defects." Pet. App. 42.

Finally, the CAA authorizes the EPA to adopt a work-practice standard only when certain mandatory prerequisites are satisfied. The CAA permits such a standard in place of a numeric standard only when the EPA determines that "(A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal,

State or local law," or "(B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations." 42 U.S.C. 7412(h)(2)(A) and (B); see 42 U.S.C. 7412(h)(1). Petitioner has not suggested, let alone established, that either condition is satisfied here.

c. Petitioner argues (*e.g.*, Pet. 1, 6-9, 23-24) that the EPA's approach to malfunctions conflicts with Section 7412(r)'s regulation of "accidental release[s]." That argument is not properly before the Court and is in any event unsound.

Petitioner's Section 7412(r) argument is foreclosed by 42 U.S.C. 7607(d)(7)(B), which provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment * * * may be raised during judicial review." That "reasonable specificity" standard "requires something more than a 'general [challenge] to [the] EPA's approach.'" *Mossville Envtl. Action Now* v. *EPA*, 370 F.3d 1232, 1238 (D.C. Cir. 2004) (first pair of brackets in original). "Objections must be prominent and clear enough to place the agency 'on notice,' for EPA is not required to cull through all the letters it receives and answer all of the possible implied arguments." *National Ass'n of Clean Air Agencies* v. *EPA*, 489 F.3d 1221, 1231 (D.C. Cir. 2007) (citation and internal quotation marks omitted).

Petitioner has not identified any comment submitted (by petitioner or anyone else) during the rulemaking process, and the EPA is aware of none, that articulated petitioner's current interpretation of Section 7412(r). Although Section 7607(d)(7)(B)'s presentation requirement is "not 'jurisdictional,'" it is "'mandatory.'" *EME Homer City*, 134 S. Ct. at 1602. The EPA has

timely asserted it here, in the first brief it has had the opportunity to file since petitioner first surfaced the Section 7412(r) argument in its rehearing request below. And, even aside from the statutory bar to judicial review, petitioner's failure to raise the argument earlier, and the consequent absence of any judicial opinion addressing that argument, provides an independent prudential reason for declining to consider it now. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioner's Section 7412(r) argument fails on the merits. Petitioner identifies nothing in Section 7412(r) that unambiguously precludes the EPA's approach to malfunctions in the rule at issue here. Section 7412(r), which is excluded from the general definitional provision that governs the rest of Section 7412, is not directed at the same air pollutants as Section 7412(d). See 42 U.S.C. 7412(a) and (r)(3). It instead prescribes "regulations and programs" concerning "accidental release[s]" of "any substance listed" by the EPA on an independent, and only partially overlapping, list of especially harmful pollutants (or any other substance that may, as a result of short-term exposure, cause death, serious injury, or substantial property damage). 42 U.S.C. 7412(r)(1); see 42 U.S.C. 7412(r)(3); see also S. Rep. No. 228, 101st Cong., 1st Sess. 210-211 (1989) (1989 Senate Report). When Congress added Section 7412(r) to the preexisting requirements for continuous controls of emissions of hazardous air pollutants, the relevant Senate Report distinguished between "accidental" or other releases of substances with long-term effects, which were already "addressed by" Section 7412, and imme-

diately harmful releases of "extremely hazardous substance[s]," which would be addressed by the newly enacted Section 7412(r). 1989 Senate Report 210-211. Given its separate scope and intent, Section 7412(r) does not (at the very least) unambiguously require the EPA to excuse periods of malfunction when setting continuous emission limits for a distinct category of pollutants under Section 7412(d).

d. Petitioner argues (Pet. 25-29) that the EPA should have addressed the possibility of malfunctions by crafting a *de minimis* exception to the rule's emission standards. That argument, like petitioner's Section 7412(r) argument, was not clearly raised in the rulemaking proceedings. Although petitioner states (Pet. 13) that a "commenter asked EPA to create a *de minimis* 'exemption' for malfunctions," the cited comment made no explicit reference to a *de minimis* exemption, but instead requested a conditional exemption for all malfunctions. See Comment from Bruce W. Ramme, Vice President, We Energies, to Lisa P. Jackson, Adm'r, EPA 4 (Feb. 20, 2012), https://www.regulations.gov/document?D=EPA-HQ-OAR-2002-0058-3452. And petitioner first argued for a *de minimis* exception in its rehearing request in the court of appeals.

In any event, even assuming *arguendo* that the EPA *could* lawfully have established a *de minimis* exception, petitioner identifies no basis for concluding that the agency was *required* to do so. Cf., *e.g.*, *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2449 (2014) (recognizing that the EPA "*may* establish an appropriate *de minimis* threshold below which" particular regulation "is not required for a source's greenhouse-gas emissions") (emphasis added). In addition, petitioner's apparent view that emissions in-

creases caused by malfunctions are small enough to be covered by a *de minimis* exception undercuts its argument that a malfunction would necessarily cause a source to violate the rule's existing emission standards. As previously discussed (see pp. 4, 12, *supra*), those emission standards already account for some variability in the emission rate at different times and under different conditions. Whether and how various types of malfunctions might or might not be captured by the EPA's existing methodology is a factual question that cannot be adjudicated in the absence of the sort of record that timely presentation of this issue during the rulemaking process might have helped to create. Thus, even if the issue of *de minimis* exceptions to rules promulgated under Section 7412(d) might warrant this Court's review in some case, it does not warrant review in this one.

3. Contrary to petitioner's suggestion (Pet. 30-35), the decision below does not create any practical problems that necessitate this Court's intervention. In upholding the relevant portion of the rule, the decision in this case did not break any new legal ground. It instead relied on prior circuit precedent holding that the EPA lacks authority either to except malfunctions altogether from Section 7412(d) emission standards or to create an affirmative defense to a civil suit for violating those emission standards. See Pet. App. 39 (citing *Sierra Club* v. *EPA*, 551 F.3d 1019, 1027-1028 (D.C. Cir. 2008), cert denied, 559 U.S. 991 (2010), and *Natural Res. Def. Council* v. *EPA*, 749 F.3d 1055, 1062-1063 (D.C. Cir. 2014)). Petitioner's predictions about the consequences of the decision below are belied by historical experience under that preexisting law.

Although petitioner asserts (Pet. 30) that the rule here "threaten[s] to unleash a scourge of private citizen suits," neither petitioner nor any of its amici cites a single instance in which a citizen suit (or an EPA enforcement action) has been brought against a source for exceeding hazardous-air-pollutant emission limitations due to a malfunction event. Bringing such a suit would be more difficult than petitioner implies, as the CAA authorizes a citizen suit only for a "repeated" or ongoing violation—not for a one-time past event. 42 U.S.C. 7604(a)(1). And in any such suit (as well as in any EPA enforcement action), the courts must still "determine, on a case-by-case basis, whether civil penalties are 'appropriate,'" and a defendant would be entitled to argue that imposition of penalties for an unpreventable event would be inequitable. Pet. App. 43 (quoting *Natural Res. Def. Council*, 749 F.3d at 1063).

In addition, the question presented in this case affects a much smaller set of sources than petitioner suggests. Although petitioner emphasizes (Pet. 30) that the three rules addressed in the decision below collectively cover approximately 200,000 sources, only a small fraction of those sources are subject to numeric emission standards. See 78 Fed. Reg. at 7155 (12,000 of 14,000 major sources are natural-gas boilers); 76 Fed. Reg. at 15,612 (natural-gas boilers generally are subject to work-practice-only standards); see also 76 Fed. Reg. at 15,584 ("[O]nly about 0.3 percent of [smaller boilers] are subject to emission limits and the testing and monitoring requirements in the final rule.").

It is also significant that petitioner is the only party seeking this Court's review. Challengers below who

represented a much greater number of regulated entities (*e.g.*, the Council of Industrial Boiler Owners) did not join either petitioner's request for rehearing below or the petition for a writ of certiorari. Their absence underscores the relatively limited practical importance of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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