No. 05-848

In the

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORP., ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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The petition demonstrated that the Fourth Circuit violated Section 307(b) by invalidating national CAA regulations that the D.C. Circuit, exercising its "exclusive" review authority under the Act, upheld. See *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (*New York I*). As we also showed (Pet. 12, 22, 25-26), the court's holding conflicts directly with *New York* on a critical issue by construing the CAA unambiguously to *forbid* EPA from using an actual, annual emissions test for PSD emissions increases – the test *New York* construed the Act unambiguously to *require* for PSD.

Neither brief in opposition seriously engages these points, let alone rebuts them. Duke takes the Court on a meandering tour of what it claims to be the regulatory history, the apparent purpose of which is to make the basic issues of statutory construction actually presented seem hopelessly complex, and it tries to redraft a Fourth Circuit ruling that declared the "wording" of the EPA's NSR regulations "largely irrelevant" in the face of an "effectively irrebuttable" rule of statutory construction. See Pet. App. 11a n.3, 18a. Duke nowhere explains why it did not properly raise a challenge based on *Rowan Cos., Inc. v. United States*, 452 U.S. 257 (1981), in the D.C. Circuit, the court with exclusive authority to declare the regulations' validity or invalidity under the Act – nor why its failure to do so should expand the authority of another court.

The United States' brief is remarkable for its studied failure *even to address* what its petition for rehearing en banc acknowledged to be a direct conflict between *New York I* and the Fourth Circuit's decision: the former construes the Act's unambiguous text to command that PSD emissions "increases" be measured by actual (as opposed to potential) emissions, while the latter construes the statute to forbid it. And despite having admitted that the Fourth Circuit's decision poses "serious consequences for EPA's ability to maintain a consistent and fair regulatory scheme," and "undermines critical aspects of the PSD rules," U.S. En Banc Pet., No. 04-1763 at 14, *and* having unsuccessfully sought

rehearing en banc review of *New York I*'s ruling that the Act's plain text requires an actual emissions test for PSD, the government now asserts that the decision below, however wrong, is unworthy of review – because "the agency believes it can address any difficulties caused by the court of appeals' decision through rulemaking." Opp. 9. But EPA's bare proposal to promulgate regulations "to establish a test consistent with" a ruling it regards as a misconstruction of the Act, see 70 Fed. Reg. 61081, 61083 & n.3 (Oct. 20, 2005), only underlines the need for this Court's review. The D.C. Circuit's *New York I* decision and the decision below bind EPA to conflicting mandates on the "actual" versus "potential" measures of emissions, each based on respective courts' readings of the Act's unambiguous terms. EPA cannot satisfy both as a matter of logic, and review by this Court offers the only opportunity to remedy the systematic disarray that the ruling below has caused and, unreviewed, will continue to cause.

1. Although Duke insists that the court of appeals was merely engaged in interpretation of the PSD regulations, the court itself considered "the wording and various interpretations of the PSD regulations" as "largely irrelevant to the proper analysis of this case," Pet. App. 11a n.3, because the Act's "plain language" required that the components of the Act's definition of modification must "be interpreted identically" in EPA's regulations implementing the two programs. Pet. App. 14a, 17a. See Pet. 8, 18-19; U.S. Opp. at 3 & n.1 (acknowledging that the NSPS regulations measure emissions increases by reference to "maximum hourly emissions rates" and the 1980 and 2002 PSD regulations turn on "total annual emissions (tons per year)"). As the United States correctly explained below, "requiring EPA to interpret the PSD regulations to adopt the NSPS test for measuring emissions increases is inconsistent with the plain language of the regulations and thus is not 'interpretation' at all, but rather invalidation." U.S. En Banc Pet., No. 04-1763 at 12. See

also NPCA Amicus Br. 4-11.[1] The PSD regulations, which nowhere mention maximum hourly rates, cannot be "interpreted" to provide for the NSPS-style potential emissions test; and even if their plain language did not rule it out, such a move would directly contravene the D.C. Circuit's insistence that the Act precludes a test based on potential emissions. *New York*, 413 F.3d at 38-40; *Alabama Power v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979). See also *New York v. EPA*, 2006 WL 662746, *6 (D.C. Cir. March 17, 2006) ("*New York II*") (in striking down EPA's 2003 Equipment Replacement Rule, observing that "[t]o the extent industry intervenors [including Duke, and represented by Duke's counsel here] rely on the NSPS regime to reargue their position that 'modifications' require an increase in maximum emissions rates, that issue was resolved in *New York I*, 413 F.3d at 19-20, 40; see also *New York v. EPA*, 431 F.3d 801, 802-803 (D.C. Cir. 2005) (Williams, J., concurring in denial of rehearing)") .

Having called the Fourth Circuit's action what it plainly was – "invalidation" of national CAA regulations in an enforcement action – and having foreseen "disarray" as a result, U.S. En Banc Pet., No. 04-1763 at 15, the United

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[1] Straining to resist Duke's diversionary exercise in serial bamboozlement, we pause to note that its account of the 1980 regulations (Opp. 7-8) willfully conflates the separate "emissions increase" and "physical change" prongs of the modification test. See 40 C.F.R. 51.166(b)(2) (1987); see also *New York II*, 2006 WL 662746, *6. The "increased hours of operation" exemption provides that increased hours alone do not constitute a physical change – not that where there *has* been a physical change, increases in actual emissions resulting from more hours of operation can be ignored, in violation of the D.C. Circuit's repeated holdings that increased actual emissions *cannot* be ignored by PSD, see *New York I*, 413 F.3d at 38-40; see also *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 916 n.11 (7th Cir. 1990); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 913-16 (1st Cir. 1990). As Duke concedes (Opp. 4), an hourly rate test "automatically" ignores emissions from increased hours. The hourly rate test imposed by the Fourth Circuit would deprive the exemption of any meaning

States now says review is not warranted because of the figleaf-shaped footnote, App. 15a n.7, in which the court *claimed* to respect the limit on its jurisdiction. (The United States ignores the court's other, figleaf-removing footnote, App. 11a n.3.) But as this Court recognized in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978), Section 307(b)'s strictures are not limited to acknowledged usurpations, and a footnoted ipse dixit does not alter the "disarray" that necessarily attends invalidation-in-deed of national CAA rules upheld by the D.C. Circuit. States that must administer complex pollution control programs in conformity EPA's regulations depend on the rules' stability and predictability. See States' Amicus Br. at 12-15.[2]

2. In *New York I*, the court rejected the argument that EPA's 1980 and 2002 PSD/NNSR regulations violated the Act by diverging from pre-1977 NSPS regulations that allegedly used a "maximum hourly emissions" test. 413 F.3d at 19-20. Thus, in a Section 307(b) "exclusive" review proceeding, the D.C. Circuit upheld the same regulations the court below struck down as contrary to the CAA.[3]

Respondents are left to point out that the D.C. Circuit did

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[2] The conflict between the Fourth Circuit and the D.C. Circuit's rulings is already causing enormous confusion among regulators and regulated alike. This confusion extends to the 2002 PSD regulations governing current operations and planning, as well as the 1980 and 1992 regulations applicable to the class of massive enforcement cases like this one, because all use an actual, annual test, rather than the potential, hourly emissions standard the Fourth Circuit required. See *infra* at 10; U.S. Opp. 3 n.1.

[3] Industry petitioners including Duke Energy unsuccessfully sought rehearing in *New York I* on the basis that that "the reasoning and analysis" of the Fourth Circuit's decision "compel" that the D.C. Circuit strike down the 1980 and 2002 regulations. Utility Air Regulatory Group En Banc Pet., No. 02-1387 at 1; *New York II*, 2006 WL 662746, *6 (rejecting industry intervenors' (including Duke's) effort to "reargue" their NSPS-based argument). Duke's plea for more "percolating" (Opp. 22) must be understood as a euphemism for using enforcement proceedings to try to bamboozle *other* courts into disregarding the D.C. Circuit's role under Section 307(b) and its repeated holdings on what the Act's PSD provisions unambiguously require

not address the argument based on *Rowan* because that argument had been waived. Yet even they cannot deny that the D.C. Circuit reached its opposite and irreconcilable result construing the exact same statutory text construed by the Fourth Circuit. Under Section 307(b), the D.C. Circuit's unqualified upholding of the 1980 and 2002 regulations on PSD emissions increases is the definitive word on their validity (absent review by this Court, for which the time has now expired). The result is a very real conflict: national regulations held valid by the D.C. Circuit were held invalid in another circuit, on broad statutory grounds that apply to every vintage of PSD regulations. As the United States noted below (U.S. En Banc Pet. 11), these conflicting rulings are "precisely" what Section 307(b) was "enacted to prevent."

3. Respondents have *no answer* to the direct conflict (see Pet. 8, 22, 25-26) between *New York I*'s square holding that the statute requires use of an "actual emissions" standard for PSD, and the Fourth Circuit's ruling that the same statutory text forbids that test, or indeed any standard not identical to the NSPS "potential" hourly emissions test. The Fourth Circuit's holding that EPA must use the NSPS maximum hourly rate measure for the PSD program – based on that court's view that "'Congress has directly spoken to the precise question at issue," App. 10a & App. 11a n.3 (quoting *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984)) – is directly inconsistent with the D.C. Circuit's holding in *New York*, *also* based on "*Chevron* Step 1," "that the CAA unambiguously defines 'increases' in terms of actual emissions." 413 F.3d at 39. See also *id.* at 40 ("the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions"). Accord *Alabama Power*, 636 F.2d at 400.[4] The NSPS "maximum hourly rate"

[4] Contrary to Duke's claim (Br. 19) the D.C. Circuit's ruling in *Alabama Power* that the term "source," which occurs in both the NSPS and PSD modification definitions, must be interpreted differently for PSD than

standard is a test of *potential* emissions, whereas the "actual, annual" PSD test invalidated here is a test of actual emissions, and the choice between them has enormous implications, in many cases determining whether the PSD program will even apply. See *New York I*, 413 F.3d at 14-15; 45 Fed. Reg. at 52680 (contrasting annual "'actual emissions'" and hourly "potential to emit" standards); U.S. Opp. Br. 3 & n.1, 7 n.3.

Indeed, the two courts' divergent answers to how Congress meant EPA to measure PSD emissions increases – both *"Chevron I"* rulings based on the Act's "unambiguous" language – led the United States, in seeking rehearing en banc in this case, to observe that the Fourth Circuit had held that the Act "mandates" that EPA use the same test of emissions increases in PSD regulations as it uses for NSPS, while the D.C. Circuit held that the Act "mandates a contrary interpretation." U.S. En Banc Pet., No. 04-1763 at 10-11; *id.* at 11 (quoting *New York I*'s holding that "'the CAA unambiguously defines emissions increases in terms of actual emissions"). EPA's 2005 notice likewise acknowledges, albeit less directly, the clash between the two courts' rulings.[5]

NSPS did not turn on different language in the statutory definitions. In fact, the court held, in conflict with the Fourth Circuit here, that, although the statutory definition of "stationary source" applicable under PSD is the same as the NSPS statutory definition found in 42 U.S.C. 7411(a)(3), EPA could employ different regulatory definitions due to "differences in the purpose and structure of the two programs." 636 F.2d at 401-02. Although Duke trumpets (Br. 22) that the Petitioners have "not found a single case that allows an agency to interpret 'identical statutory definitions'" differently, it needs look no further that *Alabama Power*, which did so with respect to the very statutory definitions at issue. See also *New York*, 413 F.3d at 19, 39-40; U.S. Opp. 8.

[5] Compare 70 Fed. Reg. at 61100 (*New York I* "held that the language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions, instead of potential or allowable emissions.") and *id.* at 61098 (Fourth Circuit ruled CAA "mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification' * * * * [and that] for purposes of the PSD program, emissions increases must be determined by comparing the pre- and post-change maximum hourly emissions.").

Rather than trying to refute our demonstration (Pet. 8, 22, 25-26), or recanting its own portrayal of *New York* and the decision below as establishing diametrically opposed statutorily-required "mandates" on how to measure emissions increases, the United States now deems it the better part of valor to *omit all mention* of that conflict. But its silence should not obscure the enormous significance of the conflicting judicial mandates on how EPA is to measure emissions increases: the choice between them determines whether PSD applies to projects that increase actual emissions by thousands of tons per year (the actual annual test), or exempts them (the maximum hourly rate test). See *New York I*, 413 F.3d at 15 (discussing *Puerto Rican Cement*, 889 F.2d at 293, 296-99); Pet. 9-10, 26-27; Pet App. 88a-89a (stipulation that Duke's Plant Modernization Program would not cause emissions increase under maximum hourly rate test); U.S. Opp 3 & n.1. Because the conflicting D.C. Circuit and Fourth Circuit tests are based upon the respective courts' understanding of the Act's unambiguous commands, EPA lacks discretion, whatever its "belief," to depart from either based on policy concerns. See *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, 2700 (2005) (agencies' discretion to re-interpret statute limited when prior court decision "holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

4. EPA's "belief" in its ability to handle "any difficulties" by rulemaking, U.S. Opp. at 9, further emphasizes why this Court's review is warranted. In both this case and in *New York I*, EPA pleaded for discretion to define emissions "increases"; but both courts rejected that plea and endorsed directly opposite tests based on unambiguous statutory language. That even EPA cannot square the circle perhaps explains the United States' choice to ignore the conflicting judicial mandates on actual versus potential emissions, but it also defeats any argument for administrative cure.

Logic prevents EPA's proposal from *complying* with both

the Fourth Circuit's and D.C. Circuit's readings of the Act, but EPA's proposal manages to *violate* both. First, EPA's proposal would manifestly fail the Fourth Circuit's textually mandated rule that the NSR and NSPS tests for emissions increases must – because of the shared statutory definitions – be "identical" and "the same." See 70 Fed. Reg. at 61081 (noting that "there are differences in the two programs that prevent a wholesale adoption of the NSPS modification definition into the major NSR provisions" – the very rationale that the Fourth Circuit rejected here, App. 16a-17a). Second, and more significantly given the D.C. Circuit's place under Section 307, EPA's proposal to transplant a slightly altered version of NSPS "maximum hourly rate" standard into PSD is directly inconsistent with the D.C. Circuit's repeated insistence that the Act demands a test based on "actual emissions instead of potential or allowable emissions." *New York I*, 413 F.3d at 40. If EPA wanted to challenge the D.C. Circuit's construction of the Act, it needed to petition for certiorari in *New York I* (which it did not).

Because the Fourth and D.C. Circuits' decisions are both *"Chevron I"* rulings, EPA has no discretion to depart from either based on policy considerations, such as EPA's newfound distaste for the PSD program (70 Fed. Reg. at 61093-95) as administered "to date," *id.* at 61089, *i.e.*, for more than a generation. The United States' unsuccessful petition for rehearing en banc in *New York I* recognized just this point, urging that the D.C. Circuit "Panel's holding that the statute allows only tests based on actual emissions thus restricts EPA's ability to further reform the NSR program." See U.S. En Banc Pet., No 02-1387 at 2. However eager for "reform" an agency may be, unambiguous congressional intent (as determined by federal courts exercising lawful jurisdiction) remains a constraint. See *New York II*, 2006 WL 662746, *4 (invalidating as contrary to CAA's text, and as based on "Humpty Dumpty" approach to statutory construction, EPA proposal that would have substantially narrowed scope of PSD/NSR program).

EPA's inchoate proposal to establish a maximum hourly rate test "consistent with the Fourth Circuit's holding in *Duke Energy*," 70 Fed. Reg. at 61083, must also be viewed in light of the agency's strenuous arguments below and elsewhere that such a test would eviscerate the effectiveness of the PSD program by exempting projects that increase pollutants by hundreds of tons per year. *E.g.*, EPA Opening Br. in No. 04-1763 at 45; Reh. Pet. at 14. Courts bound to vindicate the enacted will of Congress, see *New York I*, 314 F.3d at 39-40, should not lightly step aside when an agency rushes to embrace what it acknowledges as an incorrect, ultra vires judicial decision that weakens a statutory program.

There are further reasons why the prudential case for "leaving it to the agency" must be at its absolute nadir here. Even where EPA has not been confronted with directly conflicting appellate holdings, proposed rulemakings often languish,[6] and its history of rulemaking in this specific area is particularly unpromising: Long-considered, then dropped, EPA proposals delayed review of the 1980 rules for more than two decades, see *New York I*, 413 F.3d at 14-15, and the last NSR emissions test change took many years. See 61 Fed. Reg. 38,249 (July 23, 1996); 67 Fed. Reg. 80,186 (Dec. 31, 2002). EPA's 2005 Notice is notably undefined, since it contains no actual regulatory language, and would be limited in scope: (1) it would cover Electric Generating Units only, leaving unaffected the larger class of industrial and other non-EGU sources subject to PSD, and (2) would not affect enforcement proceedings (see Pet. 29 n.15) underway or to be

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[6] Compare, *e.g.*, 62 Fed. Reg. 66182 (Dec. 17, 1997) (proposing pretreatment standards for control of certain wastewater pollutants), with 62 Fed. Reg. 66182 (Aug. 18, 1999) (withdrawing proposed rule); 55 Fed. Reg. 30798 (July 27, 1990) (proposing regulations on RCRA corrective action), with 64 FR 54604, 54604 (Oct. 7, 1999) (withdrawing "most provisions" of the 1990 proposal); 52 Fed. Reg. 31162 (Aug. 19, 1987) (EPA's proposing on-board refueling vapor recovery systems); with 57 Fed. Reg. 13220 (April 15, 1992) (final decision not to impose ORVR), *vacated by NRDC v. EPA*, 983 F.2d 259 (D.C. Cir. 1993).

filed under the 1980, 1992 and 2002 rules – *all* of which use an actual emissions PSD test that violates the Fourth Circuit's construction of the statute, see U.S. Opp. 3 n.1, 7 n.3.[7]

5. Indeed, it is outright false to say (U.S. Opp. 7) that the Fourth Circuit's ruling is "of no continuing importance" because it affects only the 1980 regulations. The court's construction of the Act also invalidates the emissions increase test the 1992 PSD regulations, which applied to some of Duke's activities. See U.S. Opp. 3 n.1. And the latest PSD regulations, enacted in 2002, share the precise feature (an actual, annual test for emissions increases that is *not* identical to NSPS) that the Fourth Circuit held contrary to the Act's plain language. Compare *New York I*, 413 F.3d at 19-20 (upholding 1980 *and 2002* regulations against argument that EPA violated the Act by using the actual test for PSD, rather than the potential test used under NSPS). See U.S Opp. at 3 n.1, 4. Because it impugns the 2002 regulations governing current operations and planning, the ruling below is causing widespread confusion concerning the present and future obligations of sources within and outside the Fourth Circuit, and stands as a continuing invitation for collateral attacks on those national, D.C. Circuit-validated rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[7] The states and citizens downwind from the old coal-burning plants involved in these cases, involving millions of tons of pollutants and massive federal and state enforcement resources, have strong interests in ensuring these actions are not undermined by a reading of the CAA the United States recognizes is entirely wrong. See State Amicus Br. 3.

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