No. 12-1484

IN THE
Supreme Court of the United States

LUMINANT GENERATION CO. LLC,
OAK GROVE MANAGEMENT CO. LLC, BIG BROWN
POWER CO. LLC, & SANDOW POWER CO. LLC,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* UTILITY AIR REGULATORY GROUP, AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, AMERICAN WOOD COUNCIL, FLORIDA SUGAR INDUSTRY, RIO GRANDE VALLEY SUGAR GROWERS, INC. OF TEXAS, NATIONAL ASSOCIATION OF MANUFACTURERS, BRICK INDUSTRY ASSOCIATION, COUNCIL OF INDUSTRIAL BOILER OPERATORS, AND VEGETABLE OIL SSM COALITION IN SUPPORT OF PETITIONERS

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The Utility Air Regulatory Group ("UARG") is a non-profit, unincorporated association of individual electric utilities and of national industry trade associations.[1] The electric utilities and other electric generating companies that are members of UARG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers throughout the country. UARG's purpose is to participate on behalf of its members collectively in rulemakings and other Clean Air Act proceedings that affect the interests of electric generators, and in litigation related to those proceedings.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Petitioner Luminant Generation Co. LLC ("Luminant") is one of UARG's members, but Luminant's counsel did not author this brief in whole or in part, and Luminant and its counsel have not committed funds intended to fund its preparation or submission. The parties' counsel of record received timely notice of the intent to file this brief and consented to its filing. The letters of consent have been filed with the Court.

environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $770 billion enterprise and a key element of the nation's economy.

The American Forest & Paper Association ("AF&PA") is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. Our companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative – *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4.5 percent of the total U.S. manufacturing gross domestic product ("GDP"), manufactures approximately $200 billion in products annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The American Iron and Steel Institute ("AISI") is a non-profit, national trade association headquartered in the District of Columbia. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 26 producer member companies, including integrated and electric furnace steelmakers, and 118 associate and affiliate members who are suppliers to or customers of the

steel industry. AISI represents member companies accounting for more than three quarters of U.S. steelmaking capacity. AISI members own and operate sources that are regulated under state implementation plans ("SIPs") in numerous states, including Texas and other states within the Fifth Circuit. AISI members rely on many of the provisions at issue in this case, and on similar provisions in other SIPs and in federal rules, to ensure that they are not characterized as violating emission limitations (or are not subject to penalties) as a result of unit startup, shutdown, and malfunction or other operating conditions. As a result, AISI members have a direct interest in this case.

The American Wood Council ("AWC") is the voice of North American traditional and engineered wood products, representing over 75 percent of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs over one-third of a million men and women in well-paying jobs. AWC's engineers, technologists, scientists, and building code experts develop state-of-the-art engineering data, technology, and standards on structural wood products for use by design professionals, building officials, and wood products manufacturers to assure the safe and efficient design and use of wood structural components. AWC also provides technical, legal, and economic information on wood design, green building, and manufacturing environmental regulations advocating for balanced government policies that sustain the wood products industry.

The Florida Sugar Industry ("FSI") is comprised of the Sugar Cane Growers Cooperative, the Osceola Farms Company, and U.S. Sugar Company. The FSI is joined in this amici brief by Rio Grande Valley Sugar Growers, Inc. of Texas. These companies process sugarcane to produce sugar and other products.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Brick Industry Association ("BIA") is a national trade association representing small and large brick manufacturers and associated services. Founded in 1934, the BIA is the recognized national authority on clay brick construction, representing approximately 270 manufacturers, distributors, and suppliers that generate approximately $9 billion annually in revenue and provide employment for more than 200,000 Americans.

The Council of Industrial Boiler Operators ("CIBO") is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates with members representing 20 major industrial sectors. CIBO members have facilities in every

region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental equipment, technology, operations, policies, law and regulations affecting industrial boilers. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for industrial boilers. CIBO supports regulatory programs that provide industry with enough flexibility to modernize – effectively and without penalty – the nation's aging energy infrastructure, as modernization is the key to cost-effective environmental protection.

The Vegetable Oil SSM Coalition is an unincorporated *ad hoc* coalition of trade associations and an individual business organization devoted to advancing the interests of the agricultural products industry in assuring sound implementation of regulatory programs under the Clean Air Act. The Coalition's members consist of the Corn Refiners Association, the National Cotton Council, the National Cottonseed Products Association, the National Oilseed Processors Association, and Sessions Peanut Company. The Coalition represents businesses that own and operate sources regulated under SIPs in numerous states, including Texas, Louisiana, and Mississippi.

Amici member companies own and operate sources that are regulated under SIPs in place across the country, including in Texas and other states

within the Fifth Circuit. *Amici* member companies rely on many of the provisions at issue in this case, and on similar provisions in other SIPs and in federal rules, to ensure that they are not characterized as violating emission limitations (or are not subject to penalties) as a result of unit startup, shutdown, and malfunction or other operating conditions. As a result, *Amici* member companies have a direct interest in this case.

All parties have consented to the filing of this Brief.

STATEMENT OF THE CASE

Amici curiae file this brief in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Luminant Generation Co. LLC* v. *U.S. Environmental Protection Agency*, 714 F.3d 841 (5th Cir. 2013), *petition for cert. filed* June 24, 2013 (No. 12-1484), filed by Luminant, *et. al.*

The Fifth Circuit wrongly decided a question of national importance by misinterpreting the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.* ("CAA" or "the Act") to provide that the U.S. Environmental Protection Agency ("EPA" or "the Agency") may disapprove a SIP without having to find any conflict between the SIP and an "applicable requirement" identified in CAA § 110(a)(2), 42 U.S.C. § 7410(a)(2). Further, the decision below would authorize the imposition of penalties for conduct that is "unavoidable," a result that violates basic constitutional protections guaranteed by the Eighth Amendment and substantive due process grounds.

The nationwide importance of this case is underscored by the fact that the Fifth Circuit's affirmation of EPA's action with respect to the Texas SIP is cited by the Agency in a notice of proposed rulemaking, published in the *Federal Register* earlier this year. Among other things, EPA proposes to make findings of "substantial inadequacy" under CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5) – *i.e.*, a proposed "SIP call" – with respect to startup, shutdown, and malfunction provisions contained in the SIPs of some 36 states. Thus, the action of the Fifth Circuit, allowing EPA to disapprove provisions of the Texas SIP, is being relied upon by the Agency in its proposal to disapprove similar regulatory provisions contained in the SIPs of some 70 percent of the rest of the states. *See* 78 Fed. Reg. 12,460 (Feb. 22, 2013).

THIS CASE IS OF NATIONAL IMPORTANCE

In this case, EPA *approved* Texas' affirmative defense for *unplanned* maintenance, startup, and shutdown. Allowing for the use of an affirmative defense in such circumstances was, according to EPA, consistent with states' authority under CAA § 110 to define what constitutes an enforceable emission limitation and did not undermine a court's authority to assess penalties under CAA § 113, 42 U.S.C. § 7413. EPA *disapproved* Texas' affirmative defense for *planned* maintenance based on a finding that the state had *no* CAA authority to define what constitutes an enforceable emission limitation during those periods of time. According to EPA, allowing an affirmative defense to penalties for excursions during planned maintenance would "undermine the enforceability, as well as the attainment,

requirements" of the CAA. *See* 75 Fed. Reg. 68,989, 68,994 (Nov. 10, 2010).

EPA's disapproval with respect to planned maintenance was based on "concerns" that the provision would be inconsistent with the enforceability requirement of CAA § 110 if it meant that penalties are not available for avoidable violations. Assuming all excursions during planned maintenance are avoidable, EPA explained: "[p]enalties cannot deter unavoidable excess emissions, but are necessary to deter avoidable violations." Br. of Resp't EPA at 45, *Luminant Generation Co., LLC* v. *EPA*, No. 10-60934 (5th Cir. July 12, 2011).

EPA did not find that Texas' affirmative defense for planned maintenance, startup, or shutdown was "inconsistent with [CAA § 113]." *Luminant Generation Co.*, 714 F.3d at 857. Its disapproval was based on the enforceability requirement of CAA § 110(a)(2). Nevertheless, the Fifth Circuit upheld EPA's disapproval of this provision based on an interpretation of CAA § 113 to which the Fifth Circuit deferred after erroneously attributing the interpretation to EPA.

The Fifth Circuit's interpretation of CAA § 113 to prohibit an affirmative defense to penalties for emission excursions during planned maintenance subscribes to CAA § 113 authority it does not grant. As was explained by Judge Jones, in her dissent from the denial of rehearing en banc, the penalty assessment criteria in CAA § 113 articulate no "applicable requirement" of the Act and provide no basis for disapproving a SIP. If CAA § 113 did create

applicable requirements, as she wrote, it would "seem applicable to nearly any disapproval of a SIP that EPA might conjure. . . ." App. 121a-122a.[2] Section 110(a)(2) – not CAA § 113 – provides the beginning and the end of what is an adequate SIP.

EPA has in its proposed SIP call solicited comment on whether the Agency should interpret CAA § 110 (*not* CAA § 113) as prohibiting affirmative defenses for startup and shutdown. The legal principles at play here – including the role of CAA § 110(a)(2) versus CAA § 113 in defining the contours of an approvable SIP, and the authority of the government to impose sanctions for conduct that is beyond the control of an operator – are, therefore, important from a broader standpoint.

I. CAA § 110(a)(2) – AND NOT CAA § 113 – DEFINES THE CONTOURS OF AN APPROVABLE SIP.

Under the CAA, EPA is responsible for identifying air pollutants and establishing National Ambient Air Quality Standards ("NAAQS"), CAA §§ 108-109, 42 U.S.C. §§ 7408-7409. States are then responsible for developing and submitting to EPA for approval SIPs that provide for the "implementation, maintenance, and enforcement" of NAAQS by setting "emission limitations and other control measures," CAA § 110(a)(1), (2)(A), 42 U.S.C. § 7410(a)(1), (2)(A), and for implementation of other applicable

[2] References to "App." herein are to the appendix filed with Luminant Generation Company LLC *et al.*'s petition for a writ of certiorari in case No. 12-1484.

requirements of the Act. *Id.* § 110(a)(2)(B)-(M), 42 U.S.C. § 7410(a)(2)(B)-(M). States must periodically revise their SIPs in order to ensure continuing compliance with the NAAQS and other applicable requirements. CAA § 110(a)(2)(H), 42 U.S.C. § 7410(a)(2)(H) These are the requirements of the Act that each SIP "shall . . . include." CAA § 110(a)(2).

If a SIP revision satisfies all of the applicable CAA § 110(a)(2) requirements, EPA *must* approve it. CAA § 110(k)(3), 42 U.S.C. § 7410(k)(3) ("[T]he Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this [Act]."). At the same time, EPA shall disapprove a SIP revision only if "the revision would interfere with any applicable requirement concerning attainment" of the NAAQS "or any other applicable requirement" of the CAA. CAA § 110(*l*), 42 U.S.C. § 7410(*l*).

The "applicable requirements" set forth in CAA § 110(a)(2) – the minimum elements that a SIP must include to be approvable – include enforceable emission limitations and other control measures; provisions for monitoring, compiling, and analyzing data on ambient air quality; a program for enforcement of emission limitations and control measures, including preconstruction permit programs for prevention of significant deterioration in attainment areas and for sources in nonattainment areas; provisions that prohibit emissions activities within the state from "contribut[ing] significantly" to nonattainment in, or "interfer[ing] with maintenance" by any other state; provisions that ensure that the state has adequate

resources to carry out the SIP under state and/or local laws; requirements for monitoring and periodic reporting of emissions by stationary sources; certain emergency powers and contingency plans for addressing emissions of pollutants that present an imminent and substantial danger; provisions that provide for the plan's own revision, as necessary; provisions to satisfy the requirements of Part D of Title I of the Act, related to nonattainment areas; requirements for air quality modeling; requirements that source owner/operators pay permit fees; and requirements for consultation with local political subdivisions affected by the plan. CAA § 110(a)(2)(A)-(M), 42 U.S.C. § 7410(2)(A)-(M). While revised in 1977 and again in 1990, the elements of CAA § 110(a)(2) have always been understood, since the CAA was first enacted in 1970, to identify the totality of the "applicable requirements" of the CAA that must be included in a SIP. *See Virginia* v. *EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir. 1997).

In short, the contours of an "approvable" SIP are defined by the requirements set forth in CAA § 110(a). Purporting to "defer" to an interpretation of the Act that EPA, in fact, never advanced, the Fifth Circuit upheld the Agency's disapproval of the Texas SIP revision, holding that the "portion of the SIP revision providing an affirmative defense for planned SSM [*i.e.*, startup, shutdown, and maintenance/malfunction] activity is inconsistent with *section 7413 of the Act*." *Luminant Generation Co.*, 714 F.3d at 859 (emphasis added).

In so holding, the Fifth Circuit plainly erred. Section 113 identifies criteria used in "determining the *amount* of any penalty to be assessed," *if* a

penalty is to be assessed. CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (emphasis added). Where, as was the case here, the SIP defines conduct that does not give rise to any monetary penalty, and the defendant meets its burden to prove that conduct, then the CAA § 113 criteria for determining the amount of penalty are irrelevant, because the SIP provides that no penalty is to be assessed.

As Judge Jones noted in her dissent from the denial of rehearing en banc, "SIP violations will always involve potential penalties, and variations in SIPs that EPA doesn't like can always be said to affect the amount of penalties." App. 122a. But under the CAA, EPA is under a "statutory *duty* to allow states to fashion their own SIPs," *id.* (emphasis in original), and the Agency must approve those SIPs unless the plan or plan revision submitted would "interfere with any applicable requirement concerning attainment" or "any other applicable requirement" of the Act. CAA § 110(*l*). The Fifth Circuit's action here, based as it is on the fundamentally flawed conclusion that the criteria of CAA § 113 can and do constitute the sort of "applicable requirement" to which CAA § 110 refers, needs correction.

II. STATES MUST HAVE AUTHORITY TO EXCLUDE UNAVOIDABLE EXCURSIONS THAT OCCUR DURING SCHEDULED MAINTENANCE FROM APPLICATION OF EMISSION STANDARDS.

Quite apart from the important principles established by CAA § 110 (*i.e.*, that states have authority to define what constitutes an enforceable

emission limitation), the United States Constitution prohibits the punishment of persons for conduct over which they have no control. This important constitutional principle is implicated by the Fifth Circuit's decision and is another reason why the court erred.

Maintenance activity, both scheduled ("planned") and unscheduled ("unplanned"), is critical to the continued safe and efficient operation of any industrial facility, including electric generating units. One cannot do away with scheduled maintenance; and, depending on the nature of the work, unavoidable excursions will occur during such maintenance. Until recently, EPA has recognized that planned maintenance can give rise to unavoidable excess emissions that should not be subject to sanctions. The 1982 Bennett memorandum (which EPA relied on below) addresses planned maintenance and states that "excess emissions during periods of scheduled maintenance should [not] be treated as a violation [if] a source can demonstrate that such emissions *could not have been avoided*…."[3] This principle was re-affirmed by EPA in later guidance.[4] Consistent with these earlier

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[3] Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise & Radiation, to Reg'l Adm'rs, Regions I-IX, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," attach. at 3 (Sept. 28, 1982) (emphasis added).

[4] Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise & Radiation, to Reg'l Adm'rs, Regions I–X, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," attach. at 2-3 (Feb. 15, 1983); Memorandum (continued …)

EPA statements, the Texas affirmative defense only excuses exceedances that cannot be avoided.

In allowing for the assessment of penalties for unavoidable exceedances, the Fifth Circuit's decision raises constitutional concerns that were not considered by the court below in construing the CAA. The Eighth Amendment places constitutional limits on fines and punishments, and reads: "'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" *Austin* v. *United States*, 509 U.S. 602, 605 n.2 (1993) (quoting U.S. Const. amend. VIII). The purpose of the latter two clauses, the Excessive Fines Clause and the Cruel and Unusual Punishments Clause, is "to limit the government's power to punish." *Id.* at 609. While criminal concerns clearly underlie the Eighth Amendment, this Court has held that the limits identified in the Amendment may also apply to punishment by the government in a civil context. *Id.* at 610; *see also Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 (1989). In evaluating whether punishment is "excessive," judicial inquiry has centered on whether the punishment is grossly disproportionate to the offense. *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998) (*citing Solem* v. *Helm*, 463 U.S. 277, 288

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from Steven A. Herman, Assistant Adm'r for Enforcement & Compliance Assurance, and Robert Perciasepe, Assistant Adm'r for Air & Radiation, to Reg'l Adm'rs, Regions I–X, "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," at 1 (Sept. 20, 1999) ("reaffirming and supplementing the 1982-83 policy").

(1983)). Where the "offense" is the "unavoidable" exceedance of an emission limitation that is required by law to be achievable, the possible imposition of punishment under CAA § 113, including significant penalties and imprisonment, would not be proportional to the "offense" committed.

The imposition of liability for "unavoidable" and, therefore, innocent conduct also would infringe on substantive due process principles under the Fifth Amendment. Statutory provisions may be cast into doubt where a "fairly high percentage of those engaging in the proscribed conduct would be unlikely to have any evil purpose in mind." 1 Wayne R. LaFave, Substantive Criminal Law § 3.3(c) (2d ed. 2003). In a similar vein, statutes that "make certain acts or omissions criminal without regard to whether the actor intended for the proscribed consequences to occur or knew that they would occur" – so-called "strict liability" offenses – have been cast into constitutional doubt as a matter of due process. *Id.* § 3.3(d).

The imposition of penalties for conduct that is *unavoidable*, therefore, violates basic constitutional protections guaranteed by the Eighth Amendment and substantive due process. And, under a statute like the CAA, where emission limitations cannot be challenged in enforcement proceedings if there was an opportunity to raise the challenge earlier, regulatory agencies establishing or mandating compliance with unachievable emission limitations must address how such constitutional infirmities can be avoided at the rulemaking stage. *See Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 469 n.14 (D.C. Cir. 1983) (concluding that the dilemma presented in *Ex*

Parte Young, 209 U.S. 123, 145-46 (1908), that is, choosing between judicial review and enormous fines and imprisonment, is avoided in the CAA context because a party has the opportunity to present such arguments at the rulemaking stage).

The affirmative defense provision of the Texas SIP is just such a provision. It allowed a source to avoid unjust punishment while at the same time placing on that source the burden of demonstrating that the offense was actually "unavoidable" (and, thus, that punishment would be unjust). As such, the provision represents the sort of minimum protection EPA or a state must provide to avoid infringing on constitutional rights. Indeed, EPA has itself used the provision of a startup, shutdown, and malfunction affirmative defense to defend a challenge to the achievability of a standard set forth in a *federal* implementation plan. *See Mont. Sulphur & Chem. Co.* v. *EPA*, 666 F.3d 1174, 1192-93 (9th Cir.), *cert denied*, 133 S. Ct. 409 (2012) ("EPA acknowledges that violations are likely inevitable, but relies on the provision of an affirmative defense to compensate for the infeasibility problem.").

The Fifth Circuit upheld EPA's disapproval as being a "permissible interpretation of section 7413 of the Act, warranting deference." *Luminant Generation Co.*, 714 F.3d at 857. In so doing, the Fifth Circuit precluded Texas from including in its SIP a provision that it was not only authorized to include, but whose inclusion would seem compelled by fundamental constitutional principles.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit raises issues of national importance.

Respectfully submitted,

July 24, 2013

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