

NO. 17-170

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In the  
**Supreme Court of the United States**

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DTE ENERGY COMPANY AND  
DETROIT EDISON COMPANY,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Sixth Circuit**

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**BRIEF OF THE ELECTRIC RELIABILITY  
COORDINATING COUNCIL AND UTILITY AIR  
REGULATORY GROUP AS *AMICI CURIAE* IN  
SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

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<sup>1</sup> Pursuant to Rule 37.6, counsel hereby certifies that the brief authored on behalf of *amici curiae* was not authored in whole or in part by counsel for a party, and no party or counsel for a party have made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Each party's counsel has been contacted regarding the submission of this *amici* brief, and counsel for each party has responded and confirmed its client does not object to this *amici* filing.

*Amici* are trade associations that represent the utility sector and provide power to businesses in sectors throughout the economy. They often represent the interests of their members in matters before Congress, the executive branch, and the courts. To that end, these associations regularly file *amicus curiae* briefs in cases, such as this one, raising issues of concern to the nation's business community, the energy and manufacturing industries, and the economy as a whole. *Amici* have long promoted reasonable and commonsense decision-making by agencies.

The Electric Reliability Coordinating Council ("ERCC") is a not-for-profit association of power-generating companies that includes investor-owned utilities and public power providers serving millions of consumers across the United States. Founded in 2001, ERCC has long advocated for sensible environmental policy that balances the need for affordable and reliable electric power with the need to address environmental concerns. ERCC has participated in advocacy related to the U.S. Environmental Protection Agency's ("EPA") New Source Review ("NSR") program since the group first offered witnesses at public hearings addressing NSR clarification and reform sixteen years ago.

The Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations. UARG participates on behalf of certain of its members collectively in Clean Air Act administrative proceedings that affect electric generators and in litigation arising from those

proceedings. The facilities owned and operated by UARG's members represent a substantial majority of the nation's electric generating capacity. These facilities are subject to the NSR program under the Clean Air Act, and many UARG members were the targets of a so-called NSR enforcement initiative that has lingered for more than a decade and a half. UARG has participated in every rulemaking related to the NSR program since its inception in 1977, and has represented the utility industry in virtually every judicial review proceeding related to the NSR regulations.

ERCC's and UARG's members have a substantial interest in ensuring that NSR regulations are interpreted and applied in a manner consistent with their purpose and their plain language, and in a way that does not discourage necessary activities to maintain the reliability, efficiency, and safety of the nation's electric generating facilities.

*Amici* believe that they can provide an additional, valuable viewpoint on the issues raised in this petition for certiorari. Specifically, *amici* explain the broader implications of the U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit")'s ruling beyond its direct effects on the Petitioners.

### **SUMMARY OF ARGUMENT**

It is the intention of this brief to support the Petitioners' petition for certiorari in the instant case by placing in a broader public policy context the question of proper application of NSR evaluation of construction and maintenance activities at existing

facilities, with particular reference to the definition of an emissions increase under the NSR program.

The NSR program under the federal Clean Air Act was intended to ensure that newly constructed facilities meet the most up-to-date technological specifications related to emissions controls. The program is based on the premise that certain economies of scale and efficiencies are achieved when the newest technologies are incorporated *ab initio*, but these economies of scale and efficiencies are not necessarily obtained when retrofitting existing facilities. An exception to this general rule was created for existing facilities that undertake a “major modification” that in turn results in an increase in emissions. Sometimes, NSR is invoked inappropriately, and in those cases the program can create perverse incentives harmful to environmental performance by discouraging maintenance and repair activity essential to efficiency, reliability, and safety.

*Amici* represent a broad swath of the regulated community and *amici* recognize the opportunity that this case presents to provide a measure of clarity to NSR that will have far-reaching implications by addressing a particularly abusive application of the program: one in which enforcement action is premised on an alleged failure to undertake a particular, speculative predictive analysis that demonstrates a hypothetical emissions *increase* related to a project – even when real-world data demonstrates an actual *reduction* in emissions has occurred. By granting the petition for certiorari, the Court can save the NSR program from producing

results that are wholly untethered to real-world outcomes.

The broader public policy issues at play underscore the necessity of action by the Court. *Amici* will demonstrate that the failure to embrace a sensible approach to the emissions-increase question can result in an NSR program that is counterproductive to the very purposes of the Clean Air Act. NSR applied in this fashion can undermine core values such as electric reliability, protection of human health and the environment, energy efficiency, and workplace safety. While the power sector is the subject of the current case, misapplication of NSR can also cause profound negative consequences for manufacturing sectors and the economy as a whole. Last, *amici* will illustrate why the purported environmental benefits that are alleged from an inflexible NSR program are, in fact, illusory.

## ARGUMENT

### **I. Granting Certiorari in this Case Represents a Unique Opportunity to Clarify the New Source Review Program**

As the name implies, the New Source Review program was originally intended to address new sources of air emissions, with application to existing sources being an exception to the general rule. In order for NSR to apply to activities at an existing source, the project undertaken must be a “major modification” defined as a physical or operational change that results in a significant net emissions increase. 40 C.F.R. § 52.21(b)(2). A number of vital activities are excluded from this definition, including

“routine maintenance, repair and replacement” (“RMRR”), increased hours of operation, and increases in production rate. 40 C.F.R. § 52.21(b)(2)(iii)(a)–(k).

The case at bar addresses the definition of emissions increase, which in the past has been estimated pursuant to a reasonable power-plant operator test.<sup>2</sup> In the current case, NSR review was sought based on the argument that the Petitioners’ good faith and expert estimation was different than that of the EPA. Action was pursued even though actual emissions declined after the project was completed – the opposite of what must be shown to trigger NSR.

In the petition for writ of certiorari filed by DTE Energy, *et al.*, the Petitioners argue that certiorari is warranted because the Sixth Circuit’s opinions on NSR are irreconcilable with the Clean Air Act statute, Clean Air Act regulations, and basic due process. Further, the Petitioners explain that the Sixth Circuit decision below “injects uncertainty” into an important and “far-reaching” regulatory program that affects every major industrial development.<sup>3</sup> In addition, the Petitioners correctly note that the Court has “not hesitated to intervene” where, as here, ambiguity has been created by multiple opinions below. *See id.* Finally, the Petitioners rightly assert that a due

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<sup>2</sup> *See, e.g., U.S. v. Cinergy*, 458 F.3d 705, 710 (7th Cir. 2006) (“What is required for determining whether a construction permit must be sought for a planned physical change in the plant is not prescience, but merely a reasonable estimate of the amount of additional emissions that the change will cause.”).

<sup>3</sup> *See* Petition for Writ of Certiorari for Petitioners, *DTE Energy, et al. v. United States* at 20 (2017) (No. 17-170).

process violation has occurred by virtue of the fact that the ambiguity surrounding the proper interpretation of a “major modification” has created a regulatory framework “so standardless” that it encourages seriously discriminatory enforcement. *Id.* at 24. *Amici* agree with the Petitioners’ arguments and seek to provide the Court with additional insight as to why this case warrants U.S. Supreme Court review.

NSR simply cannot be triggered without an actual increase in emissions. NSR enforcement actions “require a permit for a modification . . . only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years.”<sup>4</sup> The statute thus “unambiguously defines ‘increases’ in terms of actual emissions.”<sup>5</sup>

The Court should address this current departure from commonsense interpretation of NSR and use it as a needed opportunity to clarify this area of law. Experts have long maintained that NSR determinations have made the program confusing, complex, unfair, burdensome, and ineffective.<sup>6</sup>

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<sup>4</sup> *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 569 (2007).

<sup>5</sup> *New York v. EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) (*per curiam*).

<sup>6</sup> Dana J. Gattuso, *Why the New Source Review Program Needs Reform: A Primer on NSR*, HERITAGE FOUNDATION, at 7 (2002) (“In addition to confusing industry, the NSR program had gained the reputation of being excessively burdensome, complex, unfair, and ineffective.”); Steven E. Hayward, *Making Sense of ‘New Source Review,’* AMER. ENTERPRISE INST. ENVTL. POL. OUTLOOK at 3 (July-Aug. 2003) (“Going through an NSR review on a case-by-case basis can involve cumbersome and costly engineering

Without a clear interpretation, NSR imposes extraordinary costs<sup>7</sup> and delay<sup>8</sup> that often render the projects uneconomical. Such delays can “severely hurt industries and restrict competition, particularly among those with time-sensitive products.”<sup>9</sup>

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reviews by the EPA ... Plant managers rightly see the NSR process as the environmental equivalent of an IRS audit.”); *Electric Utilities and New Source Review*, EDISON ELECTRIC INSTITUTE (“EEI”) at 8 (2001) (citing June 22, 2001 press release in which EPA “recognizes that the NSR process is complex and burdensome both for affected companies and for state and local agencies responsible for implementing the program”).

<sup>7</sup> Howard K. Gruenspecht and Robert N. Stavins, *New Source Review Under the Clean Air Act: Ripe for Reform*, RESOURCES NO. 147 at 21 (2002) (“NSR creates a highly uncertain environment with high transaction costs for business.”); Art Fraas, John D. Graham, and Jeff Holmstead, *EPA’s New Source Review Program: Time for Reform?*, 47 ENVTL. LAW REP. 10026, 10030 (2017) (“The NSR process imposes direct costs in terms of the time and resources required to prepare the permit application and to provide responses to questions and issues that arise in the permitting process. The uncertainty and delay that attend the permitting process may impose additional costs, including financial costs and penalties. The opportunity costs associated with delays or cancellation of projects include the additional production forgone and, in some cases, forgone emissions reductions from retrofitted facilities. In addition, the potential for long delays and the uncertainty that attends the NSR process could lead to suboptimal decisions in upgrading existing capacity and installing new capacity.”).

<sup>8</sup> *Id.* (“Sources generally invest years in engineering, design and assessment studies before submitting a permit application for a major source. Even under optimistic conditions, it can take at least two years from the beginning of the frontend engineering work until public notice of the draft permit is published.”) (internal quotation marks omitted).

<sup>9</sup> Gattuso, *supra* note 3, at 7.

## II. Bringing Clarity to the NSR Program is a Matter of Profound National Importance

### A. Electric Reliability

It has long been recognized that an approach to NSR that too easily blurs the distinction between major modification that can trigger review and routine maintenance “discourages companies from maintaining their existing facilities. Plant owners contemplating maintenance activities must weigh the possible loss of considerable regulatory advantage if the work crosses a murky line between upkeep and improvement.” Gruenspecht and Stavins, *supra* note 7, at 21. More recently, a raft of analyses has supported the conclusion that misapplied NSR actions are at loggerheads with prudent maintenance necessary for electric reliability. In August 2017, the U.S. Department of Energy completed an exhaustive report on electricity markets and reliability which called for “a comprehensive strategy for long-term reliability and resilience.”<sup>10</sup> The Department of Energy, citing commentary from EPA, found that, “As applied to existing power plants and refineries, . . . the NSR program has impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency and safety of existing energy capacity.” *Id.* at 44.

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<sup>10</sup> *Staff Report to the Secretary on Electricity Markets and Reliability*, U.S. DEPARTMENT OF ENERGY, at 14 (2017).

*Amicus* ERCC recently explained to EPA the importance of existing plants to electric reliability and the harm inflicted by overuse of NSR in this context:

Existing power facilities are critical to the stable supply of electricity generation in the United States. Under the current program, facilities are forced into the problematical choice of conducting routine maintenance, and potentially triggering costly NSR permitting requirements, or allowing power plant performance to degrade – or to install outdated equipment that is less efficient and environmentally beneficial. Some plants might have to be shut down altogether, well before the end of their predicted useful lives. Considering the widespread difficulties in siting new facilities and the time it would take to bring new facilities on-line, power shortages and substantial price increases are the likely result.<sup>11</sup>

Electric reliability is matter of substantial national importance. The independent, non-profit Regional Transmission Organization for New England emphasized the point in no uncertain terms:

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<sup>11</sup> *Comments on Identification of Regulations that are Unduly Burdensome to the Power Generation Sector*, ELECTRIC RELIABILITY COORDINATING COUNCIL, (May 15, 2017), Docket No. EPA-HQ-OA-2017-0190.

A reliable supply of electricity is a foundation of our prosperity and quality of life. Without it, our world literally grinds to a halt – businesses cannot plan and operate productively, hospitals and schools cannot provide their essential services, and residents cannot depend on the electricity they need simply to live their daily lives. Without reliable electricity, the financial and societal costs would be enormous.<sup>12</sup>

According to the Centers for Disease Control, the question of adequate electric reliability likewise is “essential for food safety, safe drinking water, and protection against health consequences of extreme heat and cold.”<sup>13</sup> Indeed, electric reliability represents a significant concern that, if compromised, could yield effects felt on a national scale.

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<sup>12</sup> Energy Consumers Relief Act: Legislative Hearing before the Committee on Energy and Commerce, Subcommittee on Energy and Power, U.S. House of Representatives, 113th Cong. at 181 (April 12, 2013) (statement of the Electric Reliability Coordinating Council) [hereinafter “ECRA Hearing”] (ERCC statement citing ISO-New England and independently concluding, “The downside impacts of reduced electric reliability are substantial and must be taken into account in any responsible analysis” of environmental policy).

<sup>13</sup> Letter from Hon. Andrew P. Harris, MD, Member of Congress, *et al.*, to Gina McCarthy, Administrator, U.S. Env'tl. Prot. Agency at 2-3 (Mar. 11, 2014) [hereinafter “Harris Letter”].

## **B. Protection of Human Health and the Environment**

Misapplication of NSR has negative consequences for protection of human health and the environment in two critical ways. First, the manner in which NSR discourages routine maintenance by blurring the definition of emissions increase retards environmental progress. NSR applied in this fashion undermines technological innovation and improvement, which are essential to reducing emissions.<sup>14</sup>

Second, the costs associated with applying NSR also increase the cost of energy and threaten economic dislocation and unemployment. These economic impacts themselves result in increased hospital visits, illnesses, premature deaths, and undermining of children's health and family well-being.<sup>15</sup>

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<sup>14</sup> Gattuso, *supra* note 6, at 19 (“Ironically, a far-reaching NSR program would also have a devastating impact on the environment because it would apply to projects that improve efficiency, including those that utilize new technology--the very activities that are likely to reduce industrial and greenhouse gas emissions. By discouraging greater efficiency and improved methods, the EPA impedes the replacement of dirty, outdated technologies with cleaner methods of operation.”); Gruenspecht and Stavins, *supra* note 7, at 20 (“[E]xperience over the past 25 years has shown that this [NSR] approach is both excessively costly and environmentally counterproductive. The reason for this is that companies are motivated to keep old (and dirty) plants operating and to hold back on investments in new (and cleaner) power generation technologies.”).

<sup>15</sup> Harris Letter, *supra* note 13, at 2 (letter signed by eleven physicians serving in U.S. Congress found that, “If EPA were to succeed in forcing coal out of the marketplace by confiscatory

### C. Energy Efficiency

The National Coal Council (“NCC”), a federal advisory committee to the U.S. Secretary of Energy, reported on the signal importance of improving efficiency of existing power plants: “Improving the efficiency of existing power plants plays an important role in meeting economic and environmental objectives. Improving thermal efficiency can provide two important benefits that lower operating costs: the reduction of fuel consumption and the reduction of emissions.”<sup>16</sup> NCC has found that “the very uncertainty” created by misapplication of NSR “works as a powerful disincentive for utilities . . . to conduct research necessary to develop additional efficiency innovations.” *Id.* NCC concluded:

Achieving the most significant improvements in efficiency may be deterred by concern that the required equipment modifications and improvements will be characterized a “major modification” under NSR regulations, and result in additional

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regulations—certainly the objective of some in the activist community demanding stronger action—the result would be a loss of some 600,000 jobs, loss of manufacturing base, aggregated loss of some \$2.23 trillion in gross domestic product, and a loss of family income of some \$1,200 per household per year . . . [the economic consequence of this action] increases the likelihood of hospital visits, illnesses, [and] premature deaths in communities due to joblessness. Raises health care costs. Hurts children’s health and family well-being.”).

<sup>16</sup> *The Burdens of New Source Review*, NATIONAL COAL COUNCIL at 1 (2017) [hereinafter “NCC”].

environmental requirements that would be costly and reduce the efficiency gains.<sup>17</sup>

Former EPA Administrator Christine Whitman also observed that a more reasonable approach to applying NSR “will promote energy efficiency, plant safety, and modernization at refineries, power plants, and other industrial facilities across the country.”<sup>18</sup>

#### **D. Workplace Safety**

Observers have noted that a blurred distinction between RMRR and the type of major modification that triggers NSR would discourage maintenance and that “continued operation in lieu of repair needs would threaten worker safety.”<sup>19</sup> While utilities and manufacturers take workplace safety very seriously, there is still the strong possibility that “NSR puts the safety of workers in affected industries at risk.” *Id.*

### **III. NSR is Problematic for the Entire Economy, Not Just the Power Sector**

Commencing with a November 3, 1999 announcement, the power sector has been subject to years of enforcement litigation in which a series of largely routine projects were subject to NSR enforcement actions in what even EPA and the U.S. Department of Justice termed an “unprecedented

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<sup>17</sup> *Id.* at 2.

<sup>18</sup> Hayward, *supra* note 6, at 1.

<sup>19</sup> Gattuso, *supra* note 6, at 19.

action.”<sup>20</sup> However, misapplication of NSR has an even broader implication for the economy as a whole. Former Office of Management and Budget and EPA officials recently have written that NSR enforcement “affects virtually every major manufacturing facility and power plant in the United States” and “has become a significant impediment to the growth and modernization of the U.S. manufacturing sector.”<sup>21</sup>

The example of the refining industry is particularly troubling. In the United States, no new refineries have been constructed since the 1970s and some aging refineries have closed in recent years. As a result, existing refining stock must respond to variations in consumer demand or short supply related to unanticipated refinery closures. Responding to increased demand attributable to emergency closures elsewhere could “trigger NSR modification rule requirements” that make emergency response potentially “crippled by regulation” in a manner that “directly threatens America’s energy supply.”<sup>22</sup>

#### **IV. NSR is Not a Necessary Element for Effective Emissions Reductions**

Activist organizations have at times argued that rigorous use of NSR is necessary to extract

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<sup>20</sup> For a useful review of the NSR enforcement actions, see Margaret C. Campbell and Angela J. Levin, *Ten Years of New Source Review Enforcement Litigation*, 24 NAT. RES. & ENV’T 16 (Spring 2010).

<sup>21</sup> Fraas, *et al.*, *supra* note 7, at 10026.

<sup>22</sup> Gattuso, *supra* note 6, at 20-21.

commitments for emissions reductions from the regulated community. However, recent EPA Clean Air Trends reports have shown a marked decline in emissions from the power sector irrespective of NSR enforcement trends. Substantial declines were in evidence decades before the launch of the NSR enforcement initiative in 1999 and have continued in a predictable decline.<sup>23</sup> The lack of a clear relationship between NSR enforcement and emissions reductions should not be surprising. The National Academy of Public Administration found that NSR “falls short of its environmental goals” perhaps because the program “has not been very successful in linking environmental improvements to on-going capital investments . . .”<sup>24</sup> Therefore, air emissions reductions are likely to continue apace due to market forces and other regulatory programs,<sup>25</sup> and “there is every reason to believe that this trend will continue, regardless of” NSR enforcement efforts. *Id.* at 2.

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<sup>23</sup> See, e.g., *Our Nation’s Air*, U.S. ENVTL. PROT. AGENCY (2017) (air status and trends through 2016).

<sup>24</sup> Hayward, *supra* note 6, at 2.

<sup>25</sup> EEI, *supra* note 6, at 1 (“All electric utilities — regardless of age — are regulated under a wide range of federal and state air quality programs.”).

**CONCLUSION**

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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