No. 12-1272 (consolidated with Nos. 12-1146, 12-1248, 12-1254, 12-1268 and 12-1269)

In the

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The Center advances that mission through participation in the litigation of cases of constitutional significance, including cases such as this in which the core principle that the Constitution vests the lawmaking power of the federal government in the Congress is at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

Responding to the question, "How many legs does a dog have if you call the tail a leg," Abraham Lincoln is reputed to have responded: "Four. Calling a tail a leg doesn't make it a leg."

The rulemaking by the Environmental Protection Agency at issue in this case bears a striking resemblance to the interrogatory part of that apocryphal story. "How much additional power to regulate

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

'air pollutants' can we claim for ourselves if we define 'air pollutant' to include the carbon dioxide in the air exhaled every second of every day by every human being alive?" Unfortunately, to date, the response one can imagine Lincoln would have made—"None; calling carbon dioxide an 'air pollutant' doesn't make it one"—is found only in dissent.

Although the panel of the Court of Appeals below believes that the EPA's interpretation of the Clean Air Act as mandating the regulation of millions of new stationary sources of . . . air! . . . is compelled by this Court's ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the consequences of that interpretation are so patently absurd that even the EPA itself has been forced to acknowledge that its interpretation leads to results "so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish" that the statute's language should not be followed. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009).

The EPA's position, ratified by the Court below, misconstrues the absurdity doctrine. Instead of providing a minor adjustment to the statute's language on the front end to avoid the absurdity—as a proper application of this Court's absurdity doctrine requires—the EPA's rulemaking has used the absurdity doctrine as a hook to expand its own regulatory authority in a way that would allow it "to rule the world," as Judge Brown noted below in her dissent from denial of en banc review.

More fundamentally, the EPA's position violates some of the most basic precepts of our constitutional system of government. "All legislative powers"

granted by the Constitution "shall be vested in a Congress of the United States," for example, not in an un-elected agency such as the EPA, yet the EPA readily acknowledges that it has embarked upon a regulatory regime that was never even contemplated, much less adopted, by the Congress. Additionally, "major questions" of policy are presumptively for Congress to address, and the courts are not to assume that Congress intended to defer questions of great significance to unelected agencies, yet the sheer breadth of the consequences that will flow from "this unprecedented expansion of regulatory control, this epic overreach" of regulatory authority by the EPA, guarantee that "major questions" of monumental importance will be resolved without a peep out of Congress. Finally, the scope of the discretion claimed by EPA as it re-writes other parts of the Clean Air Act in an attempt to mitigate the absurd consequences it has created virtually assures that the rules it does adopt, or chooses to enforce, will not be based on any "intelligible principle" adopted by Congress but on the preferences and agendas of unelected officials.

Perhaps this looming train wreck was set in motion by this Court's own decision in *Massachusetts v. EPA*; if so, then that decision should be revisited. But at the very least, *Massachusetts* should be confined to its precise contours, with "air pollutant" being expansively interpreted to include carbon dioxide and other "greenhouse" gases only where that definition does not require the distortion of other parts of the carefully honed statute actually adopted by Congress, or wreak havoc on the economy in ways never envisioned by Congress, the only legislative authority established by the Constitution.

ARGUMENT

I. The EPA's Version of the Absurdity Doctrine Is Both Erroneous and Power-Enhancing.

The EPA believes it is bound to accept the raw textual claim that because carbon dioxide and other ordinary components of the atmosphere have been deemed to be "air pollutants," they must be regulated across all aspects of the multi-faceted Clean Air Act once the EPA determines that they contribute to "global warming" and are therefore a long-term risk to health and public safety. The two programs at issue here, the Prevention of Significant Deterioration ("PSD") Program of Title I, part C (42 U.S.C. §§ 7470 et seq.), and the permitting provisions of Title V (42 U.S.C. §§ 7661 et seq.), "require stationary sources to obtain construction and operating permits, respectively," the EPA asserts, "if they have the potential to emit '*any air pollutant*' over an established threshold," textual language that in the EPA's eyes admits of no exception. EPA Brief for Respondents at 7 (C.A.D.C. No. 10-1073, Doc. # 1347529 (Dec. 14, 2011)), citing 42 U.S.C. §§7475(a), 7479(1), 7661a, 7602(j) (emphasis added). This mandate, the EPA asserts, is also compelled by this Court's holding in *Massachusetts v. EPA* that carbon dioxide and other greenhouse gases are "air pollutants" for purposes of the vehicle emission provisions of the CAA.

Recognizing that its position produces results that are completely "contrary to what Congress had in mind" when it adopted the Clean Air Act, 74 Fed.

Reg. 55,292, 55,310 (Oct. 27, 2009), the EPA then, under the guise of this Court's absurdity doctrine, proceeded to re-write other parts of the statute—that is, ignore other parts of the text—in order to mitigate, at least for now, the absurd consequences that flow from its overly strict adherence to the initial text.

That is not the way the absurdity doctrine is supposed to work. Rather, application of the absurdity doctrine requires a two-step process. First, the statute should be interpreted to avoid any absurdity if such an interpretation is possible.[2] *See infra*, section I.A. Second, if the statute is so unambiguous as not to permit a narrowing interpretation that would avoid absurdity, minor modifications to the unambiguous text should be made to prevent the absurd results, or the particular absurd application of the statute should be deemed outside the statute's coverage altogether. *Infra*, section I.B.

A. The EPA and the panel below should have accepted as a plausible interpretation that the phrase "any air pollutant" in the PSD and Title V provisions of the Clean Air Act do not to reach greenhouse gases, in order to avoid absurd results.

As a preliminary matter, Judges Brown and Kavanaugh both make cogent cases in their respective dissents from denial of rehearing en banc in the court below that there is sufficient ambiguity in the statutory text, particularly when considered in context, to permit a more reasonable interpretation of

[2] This step is actually not part of the absurdity doctrine's analysis at all, but a precursor to it.

the statute, one which does not produce the absurd results at all. *See* Joint Appendix ("JA") 154-56 (Brown, J., dissenting from denial of reh'g en banc) (noting that, even if CO_2 is an "air pollutant," the statute requires a finding that it "reasonably be anticipated to endanger public health or welfare" before an endangerment finding is appropriate under the statute, something not present here, in her view, when the risks to public health and welfare are so speculative and indirect); JA 172 (Kavanaugh, J., dissenting from denial of reh'g en banc) (contending that limiting "air pollutant" in the PSD portions of the statute to pollutants regulated by EPA in setting National Ambient Air Quality Standards is the better of "two plausible interpretations" of the statute because the broader interpretation offered by the EPA "would not mesh with other provisions of the statute and would lead to absurd results").

If either of those interpretations of the statutory text is plausible—and your *amicus* thinks both are—it should have been adopted by the EPA and the panel below, given the absurd results that the EPA itself admits will follow from the extremely broad interpretation it adopted. As this Court has noted, statutes should be interpreted where possible so that "no absurdity arises in the first place." *Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012).

B. Even if the EPA's broad interpretation is compelled by unambiguous statutory text, the absurdity doctrine permits minor—and only minor—adjustments to the text to avoid absurd results.

The panel below rejected the argument that the statutory text was ambiguous enough that a narrow

interpretation could be adopted that would avoid absurd results. JA245; JA255. The three judges who comprised the panel reiterated that point in their joint opinion concurring in the denial of rehearing en banc, stating that "the panel's interpretation of the statute is the only plausible one." JA144. But both opinions stop short of the point where the absurdity doctrine begins. JA205; JA144. The doctrine operates not as an interpretive tool to be deployed when choosing which of two or more plausible interpretations of an *ambiguous* statute should be adopted, but rather to permit minor modification of *unambiguous* text when necessary to avoid absurd results. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242-43 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Thus, even if this Court views the statutory text as unambiguously embracing the EPA's broad reading that "air pollutant" includes CO_2 and other greenhouse gases in *all* of the myriad Clean Air Act programs, the fact that a literal application of an unambiguous text would lead to patently absurd results is what triggers the absurdity doctrine. *See, e.g., United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892); *United States v. Brown*, 333 U.S. 18, 27 (1948); *United States v. Katz*, 271 U.S. 354, 362 (1926); *Hawaii v. Mankichi*, 190 U.S. 197, 213-14 (1903).

That doctrine has its roots at least as far back as Blackstone, who contended that "[i]f there arise out of [statutes] . . . any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void."

1 William Blackstone, COMMENTARIES *91 (1765); *see also id.*, at *61 (attributing same doctrine to Cicero and Grotius). It dictates that courts should modify statutory text in order to avoid an absurd result that most certainly was not envisioned by Congress. Moreover, "Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . . ." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 455 (1989). To do otherwise is "to make a fortress out of the dictionary," as Judge Learned Hand one noted, sacrificing the statute's actual purpose for some unintended literal application. *Cabell v. Markham*, 148 F.2d 737, 739 (CA2), *aff'd*, 326 U.S. 404 (1945).

But the absurdity doctrine provides only a narrow exception to the requirement that the text normally governs. *See, e.g.*, *Ron Pair Enterprises*, 489 U.S., at 242 ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters'" (alteration in original) (quoting *Griffin*, 458 U.S., at 571)). It allows for *minor* modifications to statutory text in order to avoid absurdity. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in judgment); *see also* Blackstone, 1 Commentaries at *62 ("on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all laws, and leave the decision of every question entirely in the breast of the judge"). It manifestly does not deputize an unelected agency to become a roving commission rewriting every other

part of the statute in order to mitigate the absurd results that its own strict adherence to the threshold text has produced. In other words, the absurdity doctrine does not turn the agency into the legislature with authority to "rule the world." *See* JA156 (Brown, J., dissenting).

II. The EPA's Misuse of the Absurdity Doctrine Enhances Its Own Power at the Expense of Core Constitutional Principles.

The absurdity doctrine is rooted in the view that, because language is imprecise and all possible permutations of a statutory mandate hard to address in advance, a faithful adherence to legislative intent can only be achieved in some cases by rejecting a too literal application of the statute. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2400 (2003) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *62 (noting that "in laws all cases cannot be foreseen or expressed"); THE FEDERALIST No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) (discussing the inherent problem of linguistic indeterminacy)). Congress' intent is the touchstone. *Public Citizen*, 491 U.S., at 455; Manning, *The Absurdity Doctrine*, at 2400 (citing Richard A. Posner, *Statutory Interpretation - in the Classroom and in the Courtroom*, 50 U. CHI. L. REV 800, 817 (1983)). As Justice Kennedy put it: "When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way." *Public Citizen*, 491 U.S., at 470 (Kennedy, J., concurring in the judgment).

The EPA has used the absurdity doctrine, however, not to further congressional intent but in admitted violation of it. 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009) (noting that the expansive scope of the PSD program that results from its interpretation of the statute is "contrary to what Congress had in mind" and "undermines what Congress attempted to accomplish"); *see also* PSD and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31,514, 31,533 (Jun. 3, 2010) (noting that the "extraordinary increases in the scope of the [PSD and Title V] permitting programs [mandated by a literal application of the statutory thresholds] would mean that the programs would become several hundred-fold larger than what Congress appeared to contemplate").

Instead of the minor adjustment to the threshold statutory text that a faithful application of the absurdity doctrine would suggest, the EPA has claimed for itself a vast authority to re-write other portions of the statute to mitigate, at least for now, the absurd consequences of its position. That misuse of the doctrine has, as the dissenters from denial of rehearing en banc below both recognized, greatly enhanced the EPA's own power at the expense of core constitutional principles. *See* JA158 (Brown, J., dissenting) (noting that the EPA is abusing the absurdity doctrine "to preempt legislative prerogatives"); JA174 n.1 (Kavanaugh, J., dissenting) (noting that the EPA's assertion "exacerbates . . . separation of powers concerns"); JA175 (Kavanaugh) ("Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process"). Those principles include

the following: 1) the lawmaking powers conferred on the federal government by the Constitution are vested in Congress; 2) even accepting that Congress can delegate large amounts of authority to unelected executive agencies, major policy judgments must still presumptively be made by Congress; and 3) regulatory discretion unguided by any intelligible principle is not "law" but the arbitrary exercise of power.

A. The EPA's position undermines the fundamental constitutional tenet that the legislative powers granted to the national government by the Constitution are to be exercised only by Congress.

When confronted with an unprecedented assertion of power, it is always helpful to recur to first principles. One of the first first principles set out in the Constitution is that "*[a]ll* legislative powers" granted to the national government are "vested in" the Congress. U.S. Const. Art. I, § 1 (emphasis added). As this Court has recognized, "the Constitution is neither silent nor equivocal about" this. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

The EPA's acknowledgement that its expansion of the PDS program from a relatively few major emitters of NAAQS pollutants to potentially millions of stationary sources of CO_2 and other greenhouse gases is "contrary to what Congress had in mind" and "undermines what Congress attempted to accomplish" highlights just how significantly this core constitutional principle is being breached in this case. Indeed, as Judge Brown pointed out below, the massive regulation of greenhouse gases that the

EPA has now embarked upon was specifically considered and rejected by Congress in 1989, and Congress has not adopted any of the more than 400 bills concerning greenhouse gases that have been proposed in the two decades since. JA151 (citing S. Rep. No. 101- 228, at 377 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3760); JA152 (citing Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference As A Doctrine of Non-interference (or Why* Massachusetts v. EPA *Got It Wrong*), 60 ADMIN. L. REV. 593, 636-37 (2008)).

The EPA's expansive assertion of power well beyond any delegation actually contemplated by Congress is so palpably a violation of core separation-of-powers principles that it should not be countenanced by this Court.

B. Even absent a vibrant non-delegation doctrine, this Court has recognized that major policy issues are presumptively still to be addressed by Congress in the first instance.

The non-delegation doctrine has been less than vibrant for some time, of course. *See*, *e.g.*, *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("Except for two 1935 cases, the Court has never enforced its frequently announced prohibition on congressional delegation of legislative power" (quoting L. Davis & R. Pierce, ADMINISTRATIVE LAW TREATISE § 2.6, p. 66 (3d ed. 1994))); *see also id.*, at 477 (Thomas, J., concurring) (suggesting that the Court's "delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers"). But even in its

dormancy, this Court has presumed that major policy questions are to be addressed in the first instance *by Congress*. *See, e.g., Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (quoting S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986), for the proposition that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").

In *MCI Telecommunications Corporation v. AT&T Co.*, 512 U.S. 218 (1994), this Court rejected an attempt by the Federal Communications Commission to make basic and fundamental changes in the telecommunications rate-making scheme created by the Federal Communications Act despite the FCC's explicit statutory to "modify any requirement" in the Act. "It is highly unlikely," the Court noted, "that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to "modify" rate-filing requirements." *Id.*, at 231.

So too here. If it was "highly unlikely" that Congress intended FCC to decide on its own whether to exempt non-dominant long distance telephone carriers from tariff filing requirements of the Federal Communications Act, it is darn near impossible that Congress would leave to the EPA alone the determination of whether millions of small businesses and even large residences will be subject to the costly permitting regime established for large emitters of

NAAQS air pollutants, and even more unlikely that it would achieve that through the mere possibility that this Court might one day interpret the statutory term "air pollutant" to include such a basic and ordinary component of air as carbon dioxide, as it did in *Massachusetts v. EPA*. The major questions doctrine has no meaning if it does not cover the circumstances of this case.

C. The unfettered discretion claimed by the EPA to establish thresholds for the emission of CO_2 and other greenhouse gases is the antitheses of law.

Finally, it is important to note, as Judge Kavanaugh did below, that although the EPA has on its own created higher thresholds for greenhouse gases than the statute requires (once those gases had been deemed to fall within the statute's coverage) before the permitting requirements of the PDS program and Title V are triggered, the EPA has not disavowed the authority to re-impose whenever it chooses the absurdly low thresholds actually mandated by the statute (as interpreted by the EPA) or any other threshold it chooses to adopt. *See* JA174 n.1 ("EPA reserved the right to ratchet the trigger all the way back down to 250 tons, thereby bringing more and more facilities under the program at EPA's unilateral discretion").

Such unfettered discretion by an executive agency is the antithesis of the rule of law, and an invitation to abuse. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (holding Chicago anti-loitering ordinance unconstitutional because it gave "too much discretion to the police"). Although *Morales* involved a criminal statute rather than a regulatory

one, the fact that the EPA has unilaterally claimed unfettered for itself rather than having it bestowed by the relevant legislative authority makes this case more problematic than *Morales*, not less. The interpretation of the Clean Air Act that has spawned such unfettered discretion should be rejected.

CONCLUSION

The EPA and the panel below believed that the expansive interpretation given to the Clean Air Act by the EPA is compelled by this Court's own decision in *Massachusetts v. EPA*. If it is, then that decision should be revisited. But because this Court in *Massachusetts* did not confront the absurd consequences that will now flow from the extension of that decision to the distinct and very different contexts at issue in this case, *Massachusetts* can be distinguished—confined to its precise contours, with "air pollutant" being expansively interpreted to include carbon dioxide and other "greenhouse" gases only where that definition does not require the distortion of other parts of the carefully honed statute actually adopted by Congress, or wreak havoc on the economy in ways never envisioned by Congress.

The panel decision to the contrary should be reversed.

Respectfully submitted,

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