Nos. 12-1272, 12-1146, 12-1248,
12-1254, 12-1268, 12-1269

In The
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

STEVEN J. LECHNER
Counsel of Record
JAIMIE N. CAVANAUGH
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jcavanaugh@mountainstateslegal.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Environmental Protection Agency ("EPA") permissibly determined that its regulation of greenhouse gas ("GHG") emissions from new motor vehicles triggered permitting requirements under the Clean Air Act ("CAA") for stationary sources that emit greenhouse gases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3(a), Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and a limited and ethical government.

MSLF has members residing or doing business in every state. Federal regulation of greenhouse gas emissions has an adverse effect on all individuals, businesses, and industries in the United States. Since

[1] The parties have consented to the filing of this amicus curiae brief by filing blanket consents with the Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

its creation in 1977, MSLF and its attorneys have worked to ensure that federal agencies do not act outside the scope of their congressionally granted powers, in order to safeguard a limited and ethical government. In the instant case, the D.C. Circuit's ruling sanctions a serious and unprecedented expansion of federal agency power and conflicts with established precedent from this Court. Accordingly, MSLF respectfully submits this amicus curiae brief in support of Petitioners.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Clean Air Act.

Congress passed the CAA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Because air pollutants come from many different sources, Congress was unable to enact a one-size-fits-all solution to adequately protect and enhance air quality nationwide. Instead, Congress decided to create multiple programs under the CAA, each of which confers limited powers upon the EPA, and all of which target particular types of air pollution and any direct effects caused thereby. For example, Title II of the CAA provides emission standards for mobile sources including cars and aircraft. *Id.* §§ 7521-54,

7571-74, 7581-90. Under Title II, if the EPA determines that an emission from a mobile source "may reasonably be anticipated to endanger public health or welfare," it must promulgate regulations to limit the emissions of that pollutant from that source. *Id.* § 7521; *Massachusetts v. E.P.A.,* 549 U.S. 497, 533 (2007) ("*Massachusetts*") ("If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutants from new motor vehicles.").

Under Title I, part A of the CAA, the EPA is charged with creating and enforcing National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. §§ 7401-31. NAAQS presently exist for six criteria pollutants: (1) carbon monoxide; (2) lead; (3) nitrogen dioxide; (4) ozone; (5) particulate matter; and (6) sulfur dioxide. *See* Environmental Protection Agency, "National Ambient Air Quality Standards (NAAQS)," http://www.epa.gov/air/criteria.html; *see also Whitman v. Am. Trucking Ass'n,* 531 U.S. 457, 462-63 (2001). Adverse human health effects result from direct exposure to any of these criteria pollutants. *See* Environmental Protection Agency, "National Ambient Air Quality Standards (NAAQS)," http://www.epa.gov/air/criteria.html; *see also* Gary E. Marchant, *Genetic Susceptibilities: The Future Driver of Ambient Air Quality Standards?*, 43 ARIZ. ST. L.J. 791, 792-94 (2011). The NAAQS Program requires states to create State Implementation Plans ("SIPs"). 42 U.S.C.

§ 7410(a)(1). SIPs establish the methods and procedures utilized by each state to ensure compliance with the NAAQS. *Id.* § 7410(2).

To further ensure that each state complies with the NAAQS program, Congress created the Prevention of Significant Deterioration of Air Quality Program ("PSD Program"). *Id.* §§ 7470-79. The principal purposes of the PSD Program are "to protect public health and welfare . . . notwithstanding attainment and maintenance of all national ambient air quality standards"; and "to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other States." *Id.* § 7470(1), (4). To ensure that States continue to control NAAQS emissions, even when they are in compliance with their SIPs, the PSD Program requires States to issue pre-construction permits for any stationary sources having the potential to emit more than 100 tons annually or 250 tons annually of criteria air pollutants. *Id.* § 7475(1). The provisions found in Title V of the CAA govern state-issued operating permits for facilities that emit certain amounts of criteria pollutants annually. *Id.* §§ 7661-61f.

B. EPA's Greenhouse Gas Emission Regulations.

In *Massachusetts*, this Court directed the EPA to either regulate greenhouse gas emissions from new motor vehicles, or provide a "reasonable explanation

as to why it cannot or will not exercise its discretion[.]" 549 U.S. at 501. Faced with this choice, the EPA promulgated an Endangerment Finding, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding") regarding greenhouse gas emissions, followed by four separate rules attempting to regulate such emissions. Such a result was not required by this Court's decision in *Massachusetts.* Indeed, this Court made it clear that it was not deciding whether the EPA was required to issue an endangerment finding regarding greenhouse gases; its only command was that the "EPA must ground its reasons for action or inaction in the [CAA]." *Massachusetts,* 549 U.S. at 535.

By issuing the Endangerment Finding, the EPA was asserting its belief that emissions of carbon dioxide and other greenhouse gases are "reasonably anticipated to endanger public health and welfare." 74 Fed. Reg. at 66,499. Consequently, the EPA turned its attention to the regulation of mobile source emissions of greenhouse gases. Five months later, the EPA promulgated what has come to be known as the "Tailpipe Rule." *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule,* 75 Fed. Reg. 25,324 (May 7, 2010). The Tailpipe Rule imposes greenhouse gas emission standards on new cars and light trucks. *Id.*

Neither this Court's decision in *Massachusetts* nor the CAA itself impose an affirmative duty on the EPA to regulate greenhouse gas emissions from stationary sources after it issues an endangerment finding. However, the EPA further decided that because issuing the Endangerment Finding created a duty to regulate greenhouse gas emissions from mobile sources under the CAA, the agency was also obligated to regulate greenhouse gas emissions from stationary sources under the PSD Program and under Title V of the CAA. Thus, on June 3, 2010, EPA issued a rule addressing greenhouse gas emissions from stationary sources. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,* 75 Fed. Reg. 31,514 (June 3, 2010). Because greenhouse gas emissions are vastly different than the six existing criteria pollutants regulated under the PSD program, the EPA admitted that regulating greenhouse gas emissions under this program would lead to "absurd results." 75 Fed. Reg. at 31,517; *id.* at 31,547 (regulating greenhouse gases from stationary sources undermines the congressional intent behind creating the CAA); *id.* at 31,555 ("Congress intended that PSD be limited to a relatively small number of large industrial sources."); *id.* at 31,557 (the number of permit applications resulting from applying the PSD Program to greenhouse gas emissions would "overwhelm permitting authorities and slow their ability to process permit applications to a crawl.").

In an attempt to mitigate the absurd results, the EPA issued the Timing and Tailoring Rules, which

altered the carefully crafted statutory framework of the CAA in a feeble attempt to support its new greenhouse gas emissions regulations. Importantly, this was done without first seeking authority from Congress. First, the Timing Rule delayed regulation of any major stationary emitter of greenhouses gases until January 2, 2011. *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs,* 75 Fed. Reg. 17,004, 17,019 (Apr. 2, 2010). Second, the Tailoring Rule raised the emitting thresholds for stationary sources from between 100 and 250 tons annually to 75,000 or 100,000 tons annually. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,* 75 Fed. Reg. at 31,523-24. The EPA stated that this shift was necessary because greenhouse gases are emitted in such large quantities. *Id.* at 31,535. Thus:

> The reason for the extraordinary increase in PSD applicability lies simply in the fact that it takes a relatively large source to generate emissions of conventional pollutants in the amounts of 100/250 [tons per year] or more, but many sources combust fossil fuels for heat or electricity, and the combustion process for even small quantities of fossil fuel produces quantities of [greenhouse gases] that are far in excess of the sources' quantities of conventional pollutants and that, for even small sources, equal or exceed the 100/250 [tons per year] levels.

Id.

Without the Tailoring Rule, individual homes and small businesses, which Congress never intended to be regulated under the CAA, would fall under the jurisdiction of the statute, costing millions of dollars in compliance costs. *See* 75 Fed. Reg. at 31,555. By the EPA's own estimate, regulating stationary sources of greenhouse gas emissions from stationary sources would cost the nation over $1.1 billion in compliance and administrative costs. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292, 55,339 (Oct. 27, 2009). The EPA later provided that if applied to stationary sources, "the PSD program would expand . . . from the current 280 sources per year to almost 82,000 sources, virtually all of which would be smaller than the sources currently in the PSD program and most of which would be small commercial and residential sources." 75 Fed. Reg. at 31,556. The EPA also granted itself the authority to reduce its improperly created greenhouse gas emissions thresholds over time if necessary, forewarning of the devastating effects of its actions. 75 Fed. Reg. at 31,524-25.

II. PROCEDURAL BACKGROUND.

In response to the EPA's greenhouse gas regulations, over 90 challenges to the rulemakings were raised before the D.C. Circuit. Many of these challenges were brought by various states, industry groups, legal foundations, and environmental nonprofit organizations. The court consolidated the

challenges and ultimately upheld the EPA's unprecedented actions. *See Coalition for Responsible Regulation, Inc. v. E.P.A.,* 684 F.3d 102 (D.C. Cir. 2012) ("*Coalition I*").

Rehearing en banc was timely sought, but the court denied those petitions, leaving the EPA's greenhouse gas emission regulations in place. *Coalition for Responsible Regulation, Inc. v. E.P.A.,* 2012 WL 6621785 (D.C. Cir. 2012) ("*Coalition II*"). In so doing, the D.C. Circuit ignored the precedent limiting the regulatory authority of the EPA, erroneously noting that "[t]he underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance. The legal issues presented, however, are straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent." *Id.* at *3.

Judge Brown and Judge Kavanaugh both wrote separate dissents expressing their beliefs that the D.C. Circuit erred in denying the petitions for rehearing en banc. Both dissenting opinions expressed strong concerns that the panel opinion sanctioned an unprecedented expansion of agency power. Judge Brown's dissent explains that neither the CAA, nor this Court's holding in *Massachusetts* compel the EPA to regulate the greenhouse gas emissions of stationary sources under the PSD or Title V Programs. *Id.* at **3-4. She noted that the panel "read *Massachusetts* to its illogical ends and it is American industry that will have to pay." *Id.* at *13. Judge Kavanaugh "conclude[d] that EPA has exceeded its statutory authority" and

warned that it is the duty of the court to "carefully but firmly enforce the statutory boundaries." *Id.* at *14, *23.

Nine separate petitions for a writ of certiorari were filed. This Court granted six of those petitions and has agreed to decide whether, by regulating mobile sources of greenhouse gas emissions, the EPA triggered an affirmative duty to regulate stationary sources of greenhouse gas emissions as well.

SUMMARY OF ARGUMENT

This Court should reverse the D.C. Circuit's erroneous reading of the CAA. The structure of the CAA precludes EPA's determination that it must regulate greenhouse gas emissions from stationary sources. Therefore, the EPA lacks authority to regulate greenhouse gas emissions under the PSD Program and Title V of the CAA. Regulating greenhouse gas emissions despite the fact that greenhouse gases are not "criteria pollutants" under the NAAQS Program, is illogical, defies the intent of Congress, and leads to admitted absurd results. The EPA's decision to regulate greenhouse gas emissions from stationary sources further conflicts with this Court's decision in *Environmental Defense v. Duke Energy Corporation*, 549 U.S. 561 (2007) (holding that the meaning of a statutory term in the CAA may vary based on the particular program at issue). The D.C. Circuit's

support for the EPA's unprecedented actions necessitates reversal by this Court.

ARGUMENT

I. REGULATING GHG EMISSIONS FROM MOBILE SOURCES UNDER TITLE II OF THE CAA DOES NOT TRIGGER A DUTY TO REGULATE GHG EMISSIONS FROM STATIONARY SOURCES.

The CAA is a lengthy, comprehensive statutory scheme, created to regulate numerous types of air emissions from various sources. The CAA is organized into six separate titles, each with a different regulatory focus. While Title II controls the emissions standards from all moving sources, 42 U.S.C. §§ 7521-90, Title I, part C contains the regulations for the PSD Program, 42 U.S.C. §§ 7470-79, 7491-92, and Title V further regulates emissions from stationary sources, 42 U.S.C. §§ 7661-61f. Based solely upon the CAA's construction, it is illogical to read a requirement promulgated under one Title of the CAA to necessarily compel action under another unrelated Title.

Indeed, the PSD Program exists to ensure the success of the NAAQS Program. NAAQS exist for the six criteria pollutants and are required "to protect the public health." 42 U.S.C. § 7409(b). The EPA has always interpreted this section of the statute as requiring the agency to consider adverse effects on

human health that result from direct human exposure to air pollutants. Marchant, *Genetic Susceptibilities*, 43 ARIZ. ST. L.J. at 792-94. Although the CAA already requires States to ensure that they meet the NAAQS for each criteria pollutant, the PSD Program serves as an additional safeguard against increases in the emissions of the criteria pollutants by requiring major emitters to seek permits before constructing or operating certain types of facilities. 42 U.S.C. § 7475. The provisions governing the PSD Program state clearly that pre-construction permits are required for any "major emitting facility . . . in any area *to which this part applies*." 42 U.S.C. § 7475(a) (emphasis added). Because the NAAQS Program is meant to further ensure compliance with the six NAAQS, the term "any area to which this part applies" necessarily refers only to areas already being regulated directly under the NAAQS provisions. *Id.*

Further, as this Court has recognized, words found within statutes "'may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.'" *Duke Energy,* 549 U.S. at 574 (quoting *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932)). In *Duke Energy*, after carefully considering the structure of the CAA, this Court concluded that "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." 549 U.S. at 574. Therefore, just because the EPA determined that

greenhouse gases met the definition of air pollutant under Title II of the CAA, does not mean that they must automatically be considered air pollutants under all six Titles of the CAA.

Relying on this Court's decision in *Duke Energy*, Judge Kavanaugh explained that regulating greenhouse gases under the PSD Program "would be both counterintuitive and extreme"; especially because this Court has already clarified that different statutory objectives under the CAA call for "different implementation strategies." *Coalition II*, 2012 WL 6621785, *20 (Kavanaugh, J., dissenting from denial of rehearing en banc) (citing *Duke Energy*, 549 U.S. at 574). The decision to limit greenhouse gas emissions from automobiles in no way necessitates regulation of greenhouse gas emissions from stationary sources.

The EPA cast a blind eye toward *Duke Energy* and mistakenly decided that regulating greenhouse gas emissions from mobile sources compelled regulation of greenhouse gas emissions from stationary sources. *See* Brief of Petitioners American Chemistry Council, *et al.,* No. 12-1248, at 7-10 (Dec. 9, 2013); *see also Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans,* 45 Fed. Reg. 52,676, 52,710-12 (Aug. 7, 1980). Instead of considering an alternate construction of the PSD Program, EPA blindly followed a regulation that led to results completely contrary to what Congress had intended in enacting the CAA. *Id.* Again, the structure of the CAA demonstrates that requirements under one title of the CAA should not be extrapolated and applied to every Title within the

Act. Indeed, the language found within one subpart of the statute cannot be assumed to control the execution of the entire statute. Therefore, this Court should reverse the D.C. Circuit's decision and correct this error.

II. AFTER DETERMINING REGULATION OF GHG EMISSIONS FROM STATIONARY SOURCES WOULD PRODUCE ABSURD RESULTS, THE EPA SHOULD HAVE DECLINED TO REGULATE GHG EMISSIONS UNDER THE PSD PROGRAM AND TITLE V OF THE CAA.

The EPA was fully aware that its greenhouse gas regulations would lead to absurd results. In fact, it acknowledged that regulating greenhouse gas emissions under the CAA is "inconsistent with – and, indeed, undermine[s] – congressional purposes." 75 Fed. Reg. at 31,547. The EPA freely acknowledged this fact by providing that "Congress intended that PSD be limited to a relatively small number of large industrial sources." *Id.* at 31,555. Furthermore, "[b]eyond this disconnect with congressional expectations, what is most important is that the extraordinarily large number of permit applications would overwhelm permitting authorities and slow their ability to process permit applications to a crawl." *Id.* at 31,557. The EPA continued by providing that it would be "difficult to overstate the impact that applying PSD requirements literally to GHG sources as of January 2, 2011 . . . would have on permitting authorities and on the PSD program, and we are concerned

that this impact could adversely affect national economical development." *Id.* The EPA even described regulation of greenhouse gas emissions under the PSD Program and Title V of the CAA as "un-administrable," increasing the current number of work hours for PSD permits from 150,795 hours to more than 19.5 million work hours. *Id.* at 31,556-57.

As a consequence of the absurd results stemming from regulating greenhouse gas emissions from stationary sources under the CAA, the EPA should have considered an alternative that would have avoided the absurd results. *Holy Trinity Church v. United States,* 143 U.S. 457, 460 (1892) ("if a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."). The EPA cannot simply declare that its regulations will lead to results so contrary to what Congress intended that they are considered absurd, yet still move forward and enact those regulations. Instead, the EPA should have avoided the absurd results altogether. *Coalition II,* 2012 WL 6621785 at *18 (Kavanaugh, J., dissenting from denial of rehearing en banc) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available."). The EPA already clearly expressed the fact that Congress could not have intended the agency to regulate stationary sources of greenhouse gases due to the low emissions thresholds provided for stationary sources in the CAA. Thus, the most reasonable way for the EPA to interpret its duties

under the CAA would have been by declining to regulate greenhouse gases from stationary sources altogether.

The promulgation of the Timing and Tailoring Rules offers additional support for the conclusion that regulating greenhouse gas emissions under the CAA produces absurd results. The EPA stated that these two rules were necessary to address the utter impossibility of compliance and the extreme regulatory burdens that would result from regulating greenhouse gas emissions under the PSD Program and Title V of the CAA. 75 Fed. Reg. at 31,563. When faced with the pending absurd results of regulating greenhouse gas emissions from stationary sources, the EPA took even more egregious actions when, without any authority from Congress, it decided to rewrite statutory thresholds in an effort to reduce the absurdity of its greenhouse gas regulations. For example, the PSD Program's own provisions provide that pre-construction permits are necessary for any facility that has the potential to emit more than 100 tons per year of some pollutants, or 250 tons per year of others. 42 U.S.C. §§ 7475(a)(1), 7479(1). The EPA rejected Congress' carefully crafted emissions thresholds with respect to greenhouse gases and multiplied these thresholds by 400 times to set greenhouse gas emissions thresholds at 100,000 tons per year. 75 Fed. Reg. at 31,516.

It is a well-established principle that absurd or unintended results stemming from legislation should be avoided. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) (It is the responsibility of the agencies, not the

courts, to avoid "mischievous, absurd or otherwise objectionable results."). "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.'" *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242 (1989) (citing *Griffin*, 458 U.S. at 571); *see also United States v. Am. Trucking Ass'ns,* 310 U.S. 534, 543 (1940) (Courts should look to the purpose of an act, instead of the literal words, to avoid absurd results); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("All statutes must be construed in light of their purpose. A literal reading which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."). Together, these cases demonstrate that it is the job of both agencies and courts to ensure that the intended results of the legislature are realized, even if that means a federal agency may not regulate as extensively as it would like to.

Because agencies lack the authority to unilaterally rewrite threshold statutory limits carefully crafted by Congress, the EPA should have declined to regulate greenhouse gas emissions under the PSD Program and Title V of the CAA when it realized that doing so would produce absurd results, unintended by Congress. Indeed, the D.C. Circuit previously held that agencies have "no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits."

Alabama Power Co. v. Costle, 636 F.2d 323, 357-58 (D.C. Cir. 1979). In *Alabama Power,* the EPA attempted to remedy absurd and unreasonable results stemming from the PSD Program of the CAA by "creating a broad exemption," for certain sources of emissions. *Id.* at 354. In reviewing the agency's actions, the D.C. Circuit ruled "the [CAA] does not give the agency a free hand authority to grant broad exemptions." *Id*.; *see Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it. . . . An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."). Ultimately, the D.C. Circuit remanded the EPA's erroneous regulations for "appropriate revision by the agency." *Alabama Power*, 636 F.2d at 355. Therefore, the EPA should have recognized it lacked any congressionally granted authority to change the threshold limitations found within the CAA.

Although the D.C. Circuit had already ruled that the CAA does not authorize the agency to take such actions, the EPA ignored the holding from *Alabama Power* and acted outside the scope of its authority. Instead of giving effect to the text of the CAA as drafted by Congress, the EPA changed the statutory scheme by increasing the emissions threshold from "250 tons to 100,000 tons – a 400-fold increase." *Coalition II,* 2012 WL 6621785 at *15 (Kavanaugh, J.,

dissenting from denial of rehearing en banc). This unilateral expansion of agency powers violates foundational separation of powers doctrines and directly conflicts with this Court's opinion in *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 374.

Further exacerbating the EPA's already ultra vires actions is the authority EPA granted itself to continue to decrease the thresholds set forth in the Tailoring Rule. Not only did the EPA act without authority in promulgating the Timing and Tailoring Rules, but the agency further enlarged its own powers by asserting the authority to use a "phase-in" approach to continue to ratchet down the Tailoring Rule. 75 Fed. Reg. at 31,548 ("Under the Tailoring Rule, EPA seeks to include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible, although we recognize that we ultimately may stop the phase-in process short of the statutory threshold levels."). EPA's grant of authority to itself to continue to decrease greenhouse gas emissions thresholds for stationary sources as it sees fit, constitutes an action unauthorized by Congress, invites future litigation, and highlights its lack of authority to regulate greenhouse gas emissions from stationary sources in the first place.

Judge Kavanaugh sums up the clear errors made by the EPA by stating that the "EPA's assertion of such extraordinary discretionary power both exacerbates the separation of powers concerns in this case and underscores the implausibility of EPA's statutory

interpretation." *Coalition II,* 2012 WL 6621785, *15, n. 1 (Kavanaugh, J., dissenting from denial of rehearing en banc). The EPA's failure to avoid the absurd results produced by its flawed reading of the CAA is not trivial in nature. Regulating greenhouse gas emissions from stationary sources has important consequences for the entire national economy. For example, as a result of the stationary source regulations, thousands of businesses and homeowners would be liable to the EPA under the CAA for the first time and would face average permitting costs of $60,000 coupled with the additional expenses necessary to maintain compliance with the newly imposed greenhouse gas emissions limits. 75 Fed. Reg. at 31,556. The EPA has freely admitted the PSD program would be "unadministrable" in regard to greenhouse gases and the total additional costs imposed on the agency would exceed $1.5 billion for the PSD Program alone. *Id.* at 31,557. Individuals, businesses, and industries now face broad uncertainty with regard to greenhouse gas emission regulations, because EPA has granted itself the authority to further alter or lower greenhouse gas emissions thresholds at any time, or for any reason. The EPA's reaction to the absurd results stemming from the possibility of regulating greenhouse gas emissions from stationary sources and the agency's further disregard of its limited authority under the CAA necessitates this Court's review.

CONCLUSION

The regulation of greenhouse gas emissions from mobile sources under Title II of the CAA does not create a mandatory duty for the EPA to regulate greenhouse gas emissions from stationary sources. Instead of attempting to regulate greenhouse gas emissions from stationary sources under a statutory system that simply does not account for the unique properties of greenhouse gases, and instead of attempting to remedy the subsequent absurd results by promulgating the Timing and Tailoring Rules, the EPA should have declined to regulate greenhouse gas emissions from stationary sources under the CAA. Because the EPA lacked authority to regulate greenhouse gas emissions from stationary sources and because such regulation produces an absurd result, unintended by Congress, and in direct violation of well-established precedent, the decision of the D.C. Circuit must be reversed.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
JAIMIE N. CAVANAUGH
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jcavanaugh@mountainstateslegal.com

Counsel for Amicus Curiae