NO. 12-1146

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, ET AL.,

Petitioners,

V.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF REVERSAL

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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 CAA for stationary sources that emit greenhouse gases.

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INTEREST OF *AMICUS CURIAE*

Founded in 1977, the Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C. with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly participates as *amicus curiae* in this Court and lower federal and state courts in cases concerning environmental issues to address the harmful effects that frivolous environmental litigation has on the business community.

In particular, WLF filed an *amicus* brief in support of the petition for a writ of certiorari in this case. WLF also filed an *amicus* brief in *Massachusetts v. EPA*, 549 U.S. 497 (2007), arguing that Congress did not authorize the Environmental Protection Agency (EPA or Agency), under the Clean Air Act (CAA), to regulate greenhouse gas (GHG) emissions for climate-change purposes. WLF further filed *amicus* briefs in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), arguing that any attempt to impose global warming nuisance liability under the federal common law is unworkable.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for any party authored any part of this brief, and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. All parties have consented to the filing of this brief; the consents have been lodged with the Clerk.

STATEMENT OF THE CASE

On remand of *Massachusetts*, EPA adopted four rules that are the first steps in a broader EPA program of regulating GHGs as "air pollutants" under the CAA. EPA first issued the "Endangerment Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009), in which it found that GHG emissions from light-duty vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger the public health and welfare. In the "Auto Rule," 75 Fed. Reg. 25,324 (May 7, 2010), EPA promulgated GHG emission standards for light-duty vehicles. In the "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010), EPA explained that, as it interpreted the CAA, regulating vehicle GHG emissions automatically made GHGs subject to regulation under two stationary source permitting programs, the "Prevention of Significant Deterioration," or "PSD," preconstruction permit program and the Title V operating permit program. *Id.* at 31,521-22.

EPA concluded that regulating GHGs under these programs would produce an absurd result because applying the statutory thresholds for obtaining a permit to GHG-emitting sources would result in so many sources requiring permits as to overwhelm the programs. *Id.* at 31,516. As a result, EPA unilaterally increased the statutory thresholds, as applied to GHGs but not to other air pollutants, from 100 or 250 tons per year under the PSD program (depending on the type of facility) to 75,000 or 100,000 tons per year (depending on when the facility applied for the permit and whether it was a new or modified facility) and under the Title V program from 100 tons per year to 100,000 tons per year. *Id.* And in the "Timing Rule," 75 Fed. Reg. 17,004 (Apr. 2, 2010), EPA determined that GHGs would become

subject to regulation under the two programs as of January 2, 2011.

A very large number of states, businesses, and business associations from across the economic spectrum petitioned for review of these rules. A panel of the United States Court of Appeals for the D.C. Circuit either dismissed or denied all of the petitions. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). On December 20, 2012, the D.C. Circuit denied rehearing en banc, with Judges Kavanaugh and Brown dissenting.

Following the filing of numerous petitions for a writ of certiorari, the Court granted six and consolidated the cases for briefing and argument limited to the question set forth above.

The rules at issue in this case are only EPA's first foray into GHG regulation. As explained more fully in WLF's earlier amicus brief in support of certiorari, EPA has embarked on a much broader program of GHG regulation that will eventually touch virtually all sectors of the economy.

SUMMARY OF ARGUMENT

A "*non sequitur*"—that is how the petitioners in *Massachusetts v. EPA* characterized EPA's contention that Congress could not have intended GHGs to be CAA "air pollutants" because regulating GHGs under a key CAA Title I program would produce absurd results. Brief for the Petitioner at 9, *Massachusetts v. EPA*, No. 05-1120 (U.S. Aug. 31, 2006). In determining that GHGs are "air pollutants" for purposes of motor vehicle regulation under CAA Title II, they said, the Court need not concern itself with the consequences that would ensue under "an entirely separate program." *Id*. at 28.

Evidently, the *Massachusetts v. EPA* petitioners were laying a cunning trap because it turns out that not only is absurd Title I regulation as a consequence of regulating GHGs under Title II *not* a *non sequitur*, it is the direct and necessary result of doing so, at least in the view of the court below. According to the appeals court, this Court's holding in *Massachusetts v. EPA* that GHGs are CAA "air pollutants" under the Title II motor vehicle program compels the conclusion that GHGs are also "air pollutants" under the Title I Prevention of Significant Deterioration (PSD) preconstruction permit program, as well as the Title V operating permit program. *Coal. for Responsible Regulation*, 684 F.3d at 132-144. And, according to the appeals court, the fact that regulating GHGs under the PSD program produces consequences that EPA itself recognizes as absurd does not justify construing *Massachusetts v. EPA* in line with the limited position taken by the *Massachusetts v. EPA* petitioners when that case was before this Court—that the case concerned Title II only. Instead, the D.C. Circuit rejected industry petitioners' arguments that EPA could not interpret the statute in a way that created absurdity and then rewrite the statute to accommodate GHG regulation, on the ground that *Massachusetts v. EPA* permitted no other result. *Coal. for Responsible Regulation*, 684 F.3d at 134-135.

The proper interpretation of *Massachusetts v. EPA* thus is central to the question this Court asks in the present case: did EPA permissibly determine that its regulation of motor vehicle GHG emissions trigger permitting requirements for stationary source GHG emissions? The D.C. Circuit answered this question in the affirmative even though the existence of the trigger produces absurd results and requires

administrative "tailoring" of numerical statutory permitting thresholds. Petitioners argue for an alternative statutory construction which produces no absurd results and requires no statutory rewriting but does require interpreting the term "air pollutant" as used in the statutory PSD and Title V programs as not including GHGs, *Massachusetts v. EPA* notwithstanding.

Petitioners' approach is plainly right. This Court in *Massachusetts v. EPA* never envisioned that its decision would be used by EPA as authority for an administrative "tailoring" of the Clean Air Act. To the contrary, it was specifically told that it need only decide whether GHGs were regulated under Title II. As between an interpretation of *Massachusetts v. EPA* that limits the decision to its express terms—regulating motor vehicles GHG emissions—and an alternative interpretation that produces absurdity and confers power on EPA to administratively amend the CAA, the Court must choose the first alternative.

ARGUMENT

I. The Court Below Misread *Massachusetts v. EPA* and Interpreted the Case in a Way that Is Directly Contrary to What the *Massachusetts v. EPA* Petitioners Argued.

A central tenet of EPA's decision to deny the rulemaking petition that ultimately led to *Massachusetts v. EPA* is that key CAA programs are "fundamentally ill-suited" to regulating GHGs. *See* Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003). EPA focused on the National Ambient Air Quality Standards (NAAQS) program, a system under which EPA sets air quality standards based on safe levels of pollutants in the atmosphere and

requires states to adopt plans to meet those standards. *Id.* As EPA explained, because GHGs are emitted by an extremely large number of sources worldwide and are well-mixed in the global atmosphere, individual states can do nothing to ensure that GHG levels in their states meet a GHG NAAQS. *Id.* As EPA explained, "[a] NAAQS for CO_2, unlike any pollutant for which a NAAQS has been established, could not be attained by any area of the U.S. until such a standard were attained by the entire world as a result of emission controls implemented in countries around the world." *Id.* The fact that such a central Title I program—"the engine that drives nearly all of Title I . . . ," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)—is so obviously incompatible with GHG regulation helped convince EPA that Congress could not have intended that GHG are CAA "air pollutants." *Id.* at 52,928.

EPA took the same position before this Court in *Massachusetts v. EPA*. A section of EPA's merits brief is entitled "Key Provisions of the CAA Cannot Coherently Be Applied to Greenhouse Gas Emissions." Brief for the Federal Respondent at 23, *Massachusetts v. EPA*, No. 05-1120 (U.S. Oct. 24, 2006). EPA reiterated that it had "appropriately considered whether a principal CAA mechanism for controlling pervasive air pollutants—the NAAQS system, see 42 U.S.C. 7408-7410—could feasibly be used to address carbon dioxide emissions." *Id.* EPA thus argued to this Court that the inability to fit CO_2 within the NAAQS program of regulation shows that CO_2 does not fall within the substances that may properly be characterized as CAA "air pollutants." *Id.* at 23-24.

Of course, implicit within EPA's argument was the supposition that an "air pollutant" under one

CAA provision was necessarily an "air pollutant" under any other CAA provision. As EPA noted in responding to the regulatory petition that led to *Massachusetts v. EPA,* that petition argued that EPA must regulate motor vehicle GHGs because the general CAA definition of "air pollutant," applicable whenever that term is used in the CAA, is broad enough to encompass GHGs. 68 Fed. Reg. at 52,923, citing CAA Section 302(g), 42 U.S.C. § 7602(g). EPA thus properly reasoned that by granting that petition it would open the door to GHG regulation throughout the CAA, including to absurd regulation never intended by Congress in the NAAQS program. *Id*. at 52,927.

Massachusetts and its allies, however, in briefing before this Court, pooh-poohed EPA's absurd results concern and maintained that the regulatory consequences under Title I of setting GHG standards under Title II were not relevant to the Court's decision. The Massachusetts brief devoted two pages to the argument that "[n]othing in the Act suggests that regulation under the mobile source program must stand or fall with regulation under the NAAQS program." Brief for the Petitioners at 27-29, *Massachusetts,* No. 05-1120. According to the brief, "[t]he federal program for controlling air pollution from motor vehicles was first created in 1965, five years before the 1970 Act created the NAAQS program." *Id.* at 28. "The programs were not merged, and they retain significant independent status." *Id.* Indeed, "[o]rganizationally, mobile sources are regulated under Title II of the Act, which is separate from Title I." *Id.* For these and similar reasons, the Massachusetts brief concluded that "to say, as EPA has, that air pollutants associated with climate change may not be regulated under the

mobile source program because they may not be appropriate for regulation under the separate… (NAAQS) program is to utter a *non sequitur*." *Id.* at 9.

This Court, in its *Massachusetts v. EPA* decision, did not address whether the unsuitability of regulating GHGs under the NAAQS program meant that GHGs should not be construed as CAA "air pollutants." Nevertheless, the Court made abundantly clear that although it construed GHGs as "air pollutants" under the Section 302(g) general definition, its holding was only "that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles." *Massachusetts,* 549 U.S. at 532. Indeed, the Court held even more narrowly that EPA had not properly justified its decision to deny the rulemaking petition and for that reason "[w]e hold only that EPA must ground its reasons for action or inaction in the statute." *Id.* at 535.

Thus, perhaps in response to Massachusetts' contention that the issue was irrelevant, *Massachusetts v. EPA* left open the question of what impact the decision would have in mandating GHG regulation under "entirely separate" CAA programs. Yet the court below in the present case found *Massachusetts v. EPA* not only relevant but dispositive. Indeed, according to the court, the consequences of Title II GHG regulation for Title I GHG regulation were very much more direct than EPA had feared in denying the Title II GHG regulatory petition that led to *Massachusetts v. EPA*. In denying that petition, the agency was concerned that defining GHGs as air pollutants for purposes of Title II could be construed as compelling EPA to adopt a GHG NAAQS and call on states to submit

GHG NAAQS implementation plans. 68 Fed. Reg. at 52,927. First, however, EPA would have to make certain discreet findings unique to the NAAQS program, including an endangerment finding under CAA Section 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A), and a finding under CAA Section 108(a)(1)(B), 42 U.S.C. § 7408(a)(1)(B), that the presence of GHGs in the ambient air "results from numerous or diverse mobile or stationary sources."

In contrast, in adopting the regulations that led to *Coalition for Responsible Regulation v. EPA*, EPA found, and the court below agreed, that *without any further EPA action at all and as a matter of law*, EPA Title II GHG regulation immediately subjected a multitude of buildings and facilities across the country to absurd permitting requirements both under the Title I PSD program and the Title V permit program. *Coal. for Responsible Regulation*, 684 F.3d at 134-135. What is more, both EPA and the court maintained this result is mandated by *Massachusetts v. EPA*. According to the court, in *Massachusetts v. EPA*, "the Court determined that the CAA's overarching definition of 'air pollutant' in Section 302(g)—which applies to all provisions of the Act, including the PSD program—unambiguously includes greenhouse gases." *Id.* at 134. The court ruled that "[t]hus, we are faced with a statutory term—"air pollutant"—that the Supreme Court has determined unambiguously encompasses greenhouse gases … given both the statute's plain meaning and the Supreme Court's decision in *Massachusetts v. EPA*, we have little trouble concluding that the phrase 'any air pollutant' [in the PSD section of the Act] includes *all* regulated air pollutants', including greenhouse gases." *Id.* (emphasis in original). Indeed, the court went so far as to say that the *Massachusetts v. EPA*

decision considered and therefore presumably decided the question of whether defining GHGs as CAA "air pollutants" would reverberate beyond Title II and into stationary source regulation regardless of the consequences. *See Coal. for Responsible Regulation v. EPA,* No. 09-1322, slip op. at 1 (D.C. Cir. Dec. 20, 2012) (Panel Statement concurring in the denials of rehearing en banc) ("the briefs before the [*Massachusetts v. EPA*] Court explicitly raised the argument that interpreting "'air pollutant'" to include greenhouse gases could have tremendous consequences for stationary-source regulation.").

Thus, the circle was squared. *Massachusetts v. EPA* was issued in response to arguments that the absurdity that would result in "an entirely separate program" under Title I need not concern the Court because only Title II regulation was at stake. But now that decision is relied on as *compelling* absurd Title I and Title V regulation—and if EPA has to "tailor" the statue to work around the absurd results, so be it.

II. *Massachusetts v. EPA* Does Not Compel Title I and Title V GHG Regulation Regardless of the Absurd Consequences, Nor Does It Authorize EPA to Rewrite the Statute.

Given the firmly-stated arguments by the petitioners in *Massachusetts v. EPA* that absurd Title I regulation was not at issue, this Court may be surprised that its decision has been construed as compelling absurd regulation unless EPA rewrites the statute. But as shown above, the Court's holding was very much more limited and applied only to regulation of motor vehicle GHG emissions.

The argument that the Court's decision must be interpreted as defining GHGs as "air pollutants" under all CAA programs that use that term regardless of absurd consequences does not fly. The *Massachusetts v. EPA* opinion does not contain even the barest hint that its decision be read expansively to require an interpretation of the statute that leads to absurd results and to sanction administrative "tailoring" of statutory text as a result. To the contrary, the decision is based on enforcing what the Court saw as the plain language of the statute. *See Massachusetts,* 549 U.S. at 528 ("The statutory text forecloses EPA's reading."); *Massachusetts,* 549 U.S. at 529 (applying the statute "[o]n its face"); *id.* ("The statute is unambiguous."). But the statute is even more unambiguous on the question of PSD permitting thresholds; the thresholds are 100/250 tons per year depending on the type of facility. It would be ironic indeed if a decision that so explicitly relies on plain statutory text were used to justify "EPA's decidedly extra-textual Tailoring Rule," *Coal. for Responsible Regulation v. EPA,* No. 09-1322, slip op at 18 (D.C. Cir. Dec. 20, 2012) (Brown, J. dissenting).

And certainly the Court in *Massachusetts v. EPA* could not have anticipated that its decision would be used to rationalize such a gross abuse of the absurd results canon. "Absurd results" is a last-resort doctrine to be applied only in the highly unusual case where Congress wrote something other than what it must have meant. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (emphasizing that the absurdity doctrine applies in "rare" cases). Thus, every effort must be made to find a statutory construction under which "no absurdity arises in the first place." *See Kloeckner v. Solis*, 133 S. Ct. 596,

607 (2012). This maxim conforms to basic Separation-of-Powers principles that only Congress may write laws. "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). *See also Coal. for Responsible Regulation*, No. 09-1322, slip op at 13 (Brown, J. dissenting) ("Permitting a statute 'to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not express the "unambiguously expressed intent of Congress,"' but it does not grant the agency 'a license to rewrite the statute.'") As Judge Kavanaugh stated in his dissent from the denial of rehearing en banc below, EPA's "is a very strange way to interpret a statute. When an agency is faced with two initially plausible readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out." *Coal. for Responsible Regulation*, No. 09-1322, slip op at 5 (Kavanaugh, J. dissenting).

Furthermore, the appeals court's "an-air-pollutant-is-an-air-pollutant" statutory construction ignores the fact that EPA has long eschewed too literal a reading of that term in the PSD program. Section 169A of the CAA, 42 U.S.C. § 7475, defines "major emitting facility," for purposes of the PSD program, as any stationary source emitting or potentially emitting certain amounts of "any pollutant." But EPA's implementing regulations, first adopted in 1978, defined "any air pollutant" as "any air pollutant regulated under the [CAA]," *see* Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of

Significant Air Quality Deterioration, 43 Fed. Reg. 26,380, 26,382 (June 19, 1978).

When confronted with this distinction, the court below recognized that EPA's narrowing of the statutory term "air pollutant" was logical to avoid the "absurd" result of requiring sources to obtain permits for emitting air pollutants that have not been determined to endanger the public health or welfare and so have not been regulated. *Coal. for Responsible Regulation,* 684 F.3d at 338-39. Yet although the appeals court agreed with this EPA departure from the literal statutory text to give the term "air pollutant" its "only plausible reading" in "context," *id.*, it nevertheless felt obliged by *Massachusetts v. EPA* to deem "air pollutants" under Title II to be the same as "air pollutants" under Titles I and V regardless of the absurd consequence of doing so. But on the same day as this Court issued *Massachusetts v. EPA*, it issued *Environmental Def. v. Duke Energy*, 549 U.S. 561, 574 (2007), in which, in the context of interpreting EPA's PSD regulations, the Court ruled that the "presumption that identical words used in different parts of the same act have the same meaning" is rebuttable, because "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." So too here, where the term "air pollutants" is susceptible to different meanings under Titles I and V than under Title II.

In sum, the court below put considerably more weight on *Massachusetts v. EPA* than that case can bear. The Court's holding that EPA must regulate motor vehicle GHG emissions if it makes an endangerment finding cannot be transformed into a justification for EPA to rewrite the CAA.

III. The Decision Below Sets a Dangerous Precedent that this Court Should Avoid.

As set forth in WLF's earlier amicus brief in support of certiorari, the EPA regulations at issue here are just the first step in an overall program of GHG regulation that will eventually touch all sectors of the economy. As WLF showed, because the economy runs on fossil fuels, and because CO_2 is the inevitable byproduct of combusting fossil fuels, the power to regulate CO_2 emissions is the power to regulate virtually everything. *See also* EPA, Regulating Greenhouse Gas Emissions under the Clean Air Act; Advance Notice of Proposed Rulemaking, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) ("[t]he potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land."). Thus, a decision to affirm the court below and to sanction EPA's rewriting of plain statutory text would give EPA unprecedented discretion to regulate the entire economy according to its own conception of how to do so rather than Congress'. WLF Amicus Brief at 5-10. Worse, given the holding of the court below that no party had standing to challenge the Tailoring Rule, this unprecedented discretion would not be judicially reviewable. Such an outcome should be avoided at all costs.

The most immediate danger that the D.C. Circuit decision poses is in the PSD program that is at issue here. Consider the basic question, who should be required to obtain a PSD permit to construct a facility that emits GHGs? Assuming GHGs are "air pollutants" under the PSD program, Congress has already answered the question: any facility emitting

or potentially emitting at least 100 or 250 tons per year, depending on the type of facility. EPA, however, has a different answer: any facility that we think in our own unreviewable discretion can sensibly be regulated. Under the Tailoring Rule, EPA concluded that, for starters, regulated facilities would be limited to those emitting or potentially emitting at least 75,000 or 100,000 tons per year (depending on when the facility applied for the permit and whether it was a new or modified facility). 75 Fed. Reg. at 31,516. But the Tailoring Rule holds out the possibility that EPA will lower the permitting thresholds in the future, although it does not commit to ever lower the thresholds to the statutory levels. EPA merely states that it will develop permitting "streamlining techniques" and that states will "ramp up resources in response to the additional demands placed upon them" under EPA's "tailored" requirements, and that it will "address expanding the PSD program in a step-by-step fashion to include more sources over time." 75 Fed. Reg. at 31,559. Thus, EPA may decide to defer indefinitely compliance with Congress' permitting thresholds, in which case GHG regulation would always be at odds with the statutory PSD and Title V thresholds.[2] Or EPA will comply with Congress' requirements, in which case a myriad of small sources that Congress never intended to be subject to these programs will be required to obtain permits. Either way, the choice of which of these buildings and facilities will be

[2] Although the Tailoring Rule stated that EPA would consider reducing the permitting thresholds in a "step 3," EPA recently adopted "step 3" rules in which it left the thresholds unchanged. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits, 77 Fed. Reg. 41,051 (July 12, 2012).

required to obtain permits, when they will be required to do so, and how much burden they and permitting authorities will be required to bear will have been made by EPA, not Congress. Such an outcome simply cannot be squared with the PSD and Title V programs that Congress enacted.

The problem is not limited to the PSD program, however. It extends to the even broader NAAQS program where GHG regulation would be entirely unworkable. In contrast to the NAAQS program that Congress created in the CAA, where some areas are in attainment and others in nonattainment depending on local air pollution levels, CAA Section 107, 42 U.S.C. § 7407, a GHG NAAQS would render the entire country in attainment or nonattainment (depending on the level at which EPA set the NAAQS) because there are no local GHG levels, only global levels. And because foreign GHG emissions are growing rapidly while domestic emissions have fallen,[3] individual states—or all states together—would be powerless to eliminate GHG nonattainment, if EPA set the NAAQS below current atmospheric levels, or to maintain attainment, if EPA set the NAAQS slightly above current atmospheric levels. Indeed, because EPA's Endangerment Rule found

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[3] Global GHG emissions are projected to increase by 50% by 2050, "primarily due to a 70% growth in energy-related CO_2 emissions." *Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction*, http://www.oecd.org/env/indicators-modelling-outlooks/climatechangechapteroftheoecdenvironmentaloutlookto2050theconsequencesofinaction.htm (last visited Dec. 3, 2013). On the other hand, domestic energy-related CO_2 emissions are projected to remain below 2005 levels through 2040. U.S. Energy Information Administration, *Annual Energy Outlook 2013 Early Release Overview* at 3, http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2013).pdf (last visited Dec. 3, 2013).

that *current* global concentrations of GHGs endanger public health,[4] EPA might conclude that it is locked into setting a primary GHG NAAQS at a level below current global concentration levels, transforming the entire country into a nonattainment area. The consequences of such a result would be economically devastating, given the highly restrictive nonattainment area obligations to which states would become subject, 42 U.S.C. §§ 7501-7509a, including a ban on constructing new GHG-emitting sources unless they obtain more than one ton of GHG offsets for every ton of GHG they emit. 42 U.S.C. § 7503(a). *See also* 73 Fed. Reg. at 44,481 (discussing problematic nature of GHG NAAQS regulation).

As absurd as this potential regulation may be, EPA has had before it since December 2009 a petition demanding that EPA establish a GHG NAAQS.[5] The Petition seeks "deep and rapid greenhouse emissions reductions—on the order of 45% or more below 1990 levels by 2020." Petition at i. Like the PSD and Title V programs, EPA's correct course on regulating GHGs under the NAAQS program would be to decide

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[4] *See* EPA's statement of its Endangerment Rule finding on its website: "Endangerment Finding: The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases … in the atmosphere threaten the public health and welfare of current and future generations." EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* http://www.epa.gov/climatechange/endangerment/#findings (last visited Dec. 3, 2013).

[5] *See* Center for Biological Diversity and 350.org, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (Dec. 2, 2009), http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf (last visited Dec. 3, 2013).

that Congress did not intend that regulation. But the appeals court's conclusion below—that GHGs are "air pollutants" under any CAA program—would seemingly rule out that sensible course. Instead, the court's decision seems to compel EPA to adopt a GHG NAAQS and open the way for EPA to "tailor" the statutory NAAQS requirements to create regulation that EPA thinks is sensible according to its own lights, as opposed to the regulation that Congress legislated.

The problem extends even beyond the NAAQS program. As explained more fully in WLF's amicus brief in support of certiorari, EPA has adopted and intends to adopt further vehicle GHG regulations; is in the process of adopting powerplant GHG regulations under the CAA New Source Performance Standards program; has promised to regulate petroleum refinery GHG emissions under the same program; has deferred regulating airplane GHG emissions pending disposition of this case; has deferred for the time being regulating GHG emissions from coal mines, ocean-going vessels, and nonroad engines; and has not yet acted on petitions for it to regulate GHG emissions from locomotives, farms, and all major categories of industrial sources, to establish cap-and-trade programs to address transportation fuels and GHG emission effects on stratospheric ozone, and to compel states to submit plans to address the effect of domestic GHG emissions internationally. WLF Amicus Brief at 10-23. In all of these regulatory programs, to the extent EPA finds that its desired course of regulation produces absurd results given the unique nature of GHGs, the decision below would sanction EPA's rewriting the portions of the statute that it believes can be improved.

Such an outcome cannot possibly conform to the fundamental separation-of-powers principles underlying our system of government. It is certainly not the outcome this Court's holding in *Massachusetts v. EPA* compels.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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