No. 12-1272

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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.2(b), Mountain States Legal Foundation ("MSLF") respectfully moves for leave to file the accompanying amicus curiae brief in support of Petitioners.

In support of this motion, MSLF declares that it has requested consent to the filing of an amicus curiae brief from counsel to each of the 126 parties to this case. MSLF also notified counsel for each party of its intent to file an amicus curiae brief as required by Supreme Court Rule 37.2(a). As of May 23, 2013, MSLF has received consent to file an amicus curiae brief from 112 parties.[1] Due to the large number of

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[1] Chamber of Commerce of the United States of America, State of Alaska, American Farm Bureau, Environmental Protection Agency, Alliance of Automobile Manufacturers, Alpha Natural Resources, Inc., Association of Global Automakers, American Chemistry Council, American Frozen Food Institute, American Fuel and Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, Brick Industry Association, Center for Biological Diversity, City of New York, Clean Air Implementation Project, Coalition for Responsible Regulation, Inc., Collins Industries, Inc., Collins Trucking Co., Commonwealth of Kentucky, Commonwealth of Massachusetts, Commonwealth of Virginia, Competitive Enterprise Institute, Conservation Law Foundation, Corn Refiners Association, Environmental Defense Fund, Freedom Works, Georgia Agribusiness Council, Inc., Georgia ForestWatch, Georgia Motor Trucking Association, Glass Association of North America, Glass Packaging Institute, Great Northern Project Development, L.P., Independent Petroleum Association of America, Indiana Cast Metals Association, Indiana Wildlife Federation, J&M Tank Lines, Inc., Kennesaw Transportation, Inc., Langdale Chevrolet-Pontiac,

(Continued on following page)

Inc., The Langdale Company, Langdale Farms, LLC, Langdale Ford Co., Langdale Fuel Co., Langboard, Inc. – MDF, Langboard, Inc. – OSB, Louisiana Department of Environmental Quality, Michigan Environmental Council, Michigan Manufacturers Association, Mississippi Manufacturers Association, Missouri Joint Municipal Electric Utility Commission, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Federation of Independent Business, National Mining Association, National Oilseed Processors Association, National Wildlife Federation, Natural Resources Council of Maine, Natural Resources Defense Council, North American Die Casting Association, Ohio Environmental Council, Pacific Legal Foundation, Peabody Energy Co., Portland Cement Association, The Science and Environmental Policy Project, Sierra Club, South Coast Air Quality Management District, Southeast Trailer Mart, Inc., Southwestern Legal Foundation, Inc., Specialty Steel Industry of North America, State of Alabama, State of California, State of Connecticut, State of Delaware, State of Florida, State of Illinois, State of Iowa, State of Maine, State of Maryland, State of Michigan, State of Minnesota, State of Nebraska, State of New Hampshire, State of New Mexico, State of New York, State of North Carolina, State of North Dakota, State of Oklahoma, State of Oregon, State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Vermont, State of Washington, Tennessee Chamber of Commerce and Industry, United States Representative Michele Bachmann, United States Representative Kevin Brady, United States Representative Paul Broun, United States Representative Phil Gingrey, United States Representative Steven King, United States Representative Jack Kingston, United States Representative Tom Price, United States Representative Dana Rohrabacher, United States Representative John Shimkus, United States Representative Lynn Westmoreland, Utility Air Regulatory Group, Wetlands Watch, Wild Virginia, Western States Petroleum Association, West Virginia Manufacturers Association, Wisconsin Manufacturers and Commerce.

parties involved in this case, MSLF has not received consent from each party; however, no party has explicitly withheld consent.

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to the defense and preservation of individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF and its members have a keen interest in this case because of the widespread economic consequences that result from the Environmental Protection Agency's ("EPA") regulation of greenhouse gas emissions. Based upon that interest, MSLF also participated as an amicus curiae in the proceedings below.

In the instant case, the EPA abused its authority by choosing to regulate greenhouse gas emissions under the Clean Air Act ("CAA"), even though the EPA admitted absurd results would flow from its decision. In so doing, the EPA conferred upon itself unlimited power over the Nation's industries and, as a result, the Nation's economy. To make matters worse, the D.C. Circuit upheld the EPA's seizure of power by misconstruing this Court's decision in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007).

MSLF urges this Court to grant the Petition to ensure that separation of powers are preserved. This Court should also grant the Petition to review the ruling of the D.C. Circuit, which allows agencies to unilaterally expand their powers and re-write statutory

limitations without an express grant of authority from Congress.

WHEREFORE, MSLF respectfully requests that this Court grant it leave to participate as amicus curiae and to file the accompanying amicus curiae brief in support of Petitioners.

DATED this 24th day of May 2013.

Respectfully submitted,

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QUESTIONS PRESENTED

The EPA promulgated a series of four broad-ranging and interconnected rules to control emissions of greenhouse gases. In proposing the last rule in the sequence, EPA acknowledged that it would create a result "so contrary to what Congress had in mind – and that in fact so undermines what Congress attempted to accomplish with the [statute's] requirements – that it should be avoided under the 'absurd results' doctrine." *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency,* 2012 WL 6621785, *15 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (citing 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009)). EPA nonetheless finalized the rule and then, in an attempt to cure the absurdity, rewrote codified limitations in the CAA.

The questions presented are:

1. Whether, once an agency has identified absurd results produced by its construction of a complex statutory scheme as a whole, the agency may deem the identified absurdity irrelevant to the construction of some individual provisions within the scheme and a justification for rewriting others.

2. Whether EPA's determination that greenhouse gases "may reasonably be anticipated to endanger public health or welfare" and otherwise are regulable under section 202(a)(1) of the CAA, 42 U.S.C. § 7521(a)(1), was "not in accordance with law" or was "arbitrary, capricious, [and] an abuse of discretion." *Id*. § 7607(d)(9)(A).

QUESTIONS PRESENTED – Continued

3. Whether EPA incorrectly determined that all "air pollutants" regulated by the agency under the CAA's motor vehicle emissions provision, 42 U.S.C. § 7421(a)(1), must also be regulated under the Act's Prevention of Significant Deterioration of Air Quality ("PSD") and Title V Programs when emitted from stationary sources.

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

Pursuant to Supreme Court Rule 37.2, 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,

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief. MSLF has received consent to file an amicus curiae brief from 112 of the 126 parties. No party has explicitly withheld consent. The undersigned further 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.

businesses, and industries in the United States. Since 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 ensure a limited and ethical government. The D.C. Circuit's decision in this case allows a serious and unprecedented expansion of federal agency power and conflicts with this Court's rulings. 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 air pollution and any direct effects caused thereby. For example, subchapter II provides emission standards for moving sources including cars and aircraft. *Id.* §§ 7521-54, 7571-74, 7581-90. Under this

program, 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. *Id.* § 7521; *Massachusetts v. E.P.A.,* 549 U.S. 497, 533 (2007) ("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 subchapter I of the CAA, the EPA is charged with creating and enforcing National Ambient Air Quality Standards ("NAAQS"). *Id.* § 7409. NAAQS presently exist for six criteria pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. *See* United States 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 the 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 ("SIP"). 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 enacted the PSD Program. *Id.* §§ 7470-79. The purposes of the PSD Program, amongst others, 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 and individual facilities 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 various air pollutants. *Id.* § 7479(1). The provisions found in subchapter V of the CAA, which have come to be known as Title V requirements, further require state-issued operating permits for facilities that emit certain amounts of criteria pollutants annually. *Id.* § 7661.

Because of the immense amount of power conferred to the agency, Congress also enacted administrative and judicial review provisions within the CAA. *Id.* § 7607. Importantly, courts may reverse EPA actions deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7607(d)(9)(A).

B. EPA's Greenhouse Gas Regulations.

In *Massachusetts*, this Court directed the EPA to 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. The EPA in turn promulgated an endangerment finding regarding greenhouse gas emissions and four rules attempting to regulate such emissions. *Coalition for Responsible Regulation, Inc. v. E.P.A.,* 684 F.3d 102, 114-16 (2012) ("*Coalition I*"). 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 must 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.

On December 15, 2009, the EPA issued its Endangerment Finding, asserting that emissions of carbon dioxide and other greenhouse gases pose a danger to human health and welfare. *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) ("Endangerment Finding"). 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 any duty on the EPA to regulate greenhouse gas emissions from stationary sources after it issues an endangerment finding. However, the EPA decided that because issuing the Endangerment Finding created an affirmative duty to regulate greenhouse gas emissions from mobile sources, it was also obligated to regulate greenhouse gas emissions from stationary sources under the PSD Program and the Title V Program. 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 other six criteria pollutants, the EPA admitted that regulating greenhouse gas emissions under the existing statutory scheme would lead to "absurd results." 75 Fed. Reg. at 31,517.

During this time, the EPA also issued the Timing and Tailoring Rules, which altered the carefully crafted statutory framework of the CAA in such a way as 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. 75 Fed. Reg. at 31,523-24. This shift was necessary because greenhouse gases are emitted in such large quantities. *Id.* at 31,535 ("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.") Without the Tailoring Rule, individual homes and small businesses, which were never intended to be regulated under the CAA, would fall under the jurisdiction of the statute. The EPA also granted itself the authority to reduce these thresholds over time, if necessary, forewarning of the devastating effects of its actions. *Id.* 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 non-profit organizations. The court consolidated all of the challenges and ultimately upheld the EPA's unprecedented actions. *See Coalition I,* 684 F.3d 102. Specifically, the D.C. Circuit held that: (1) the EPA's assertion that greenhouse gas emissions threaten public health and welfare was rational; (2) the Endangerment Finding was not arbitrary and capricious; (3) all petitioners lacked standing to challenge the Timing and Tailoring Rules; and (4) regulating mobile sources of greenhouse gas emissions triggered a duty to regulate stationary sources of greenhouse gas emissions. *Id.* at 122-24, 136.

Rehearing *en banc* was timely sought, but the court denied those petitions, leaving the EPA's greenhouse gas 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 noted 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's dissent questioned whether the "EPA has acted within the authority granted to it by Congress," and warned that it is the duty of the court to "carefully but firmly enforce the statutory boundaries." *Id.* at *14, *23.

SUMMARY OF ARGUMENT

This Court should grant the Petition for several reasons. First, the EPA was fully aware that Congress never intended for it to regulate greenhouse gas emissions under the CAA and that such an attempt would lead to absurd results. Instead of issuing a finding stating that greenhouse gas emissions have no direct adverse effects on human health and declining to regulate greenhouse gas emissions, the EPA blindly forged ahead with the most far-reaching environmental regulations ever created.

Second, the EPA unlawfully promulgated the Endangerment Finding and then imposed broad national greenhouse gas emission regulations based upon that Finding. Promulgation of the greenhouse gas emission regulations by the EPA was arbitrary and capricious because: (1) the EPA failed to consider the factors it was instructed to consider by Congress;

and (2) the EPA failed to ground the Endangerment Finding in science. That the EPA was forced to create the Tailpipe and Tailoring Rules to support its greenhouse gas emission regulations on mobile and stationary sources further demonstrates that the CAA is not an appropriate tool under which to regulate greenhouse gas emissions.

Additionally, the EPA lacked authority to regulate greenhouse gas emissions under the PSD Program. Doing so, despite the fact that greenhouse gases are not "criteria pollutants" regulated under the NAAQS Program, is illogical and defies the intent of Congress. The EPA's decision to regulate greenhouse gas emissions under the PSD Program conflicts with this Court's decision in *Envtl. Defense v. Duke Energy Corp.,* 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 EPA's unprecedented actions necessitate this Court's review.

REASONS FOR GRANTING THE PETITION

I. THE EPA ERRED IN REGULATING GREENHOUSE GAS EMISSIONS UNDER THE CAA BECAUSE OF THE ADMITTED ABSURD RESULTS.

This Court has long acknowledged 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 v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *see also United States v. American 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 when that means the literal words of a statute are not given full effect.

Furthermore, agencies have no powers to unilaterally rewrite threshold, statutory limits that Congress painstakingly crafted. In fact, 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.

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. Because the results of the EPA's actions in the instant case produce an absurd result, the EPA was compelled to "consider whether a reasonable alternative construction would avoid the absurdities and, if so, . . . adopt that interpretation." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). The EPA may not freely 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*, 458 U.S. at 575) ("[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's actions in promulgating the Timing and Tailoring Rules further support the conclusion that regulating greenhouse gas emissions under the CAA produces absurd results. These two rules were necessary to address the utter impossibility of compliance and enforcement of the other greenhouse gas emissions regulations. *See id.* at *11. When faced with the pending absurd results, 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. 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." *Id.*, 2012 WL 6621785, *15. 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. See Friends of Crystal River v. E.P.A., 35 F.3d 1073, 1080 (6th Cir. 1994) ("Agencies are creatures of statutory authority. Thus, they have 'no power to act . . . unless and until Congress confers power upon [them].'" *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 374).

The EPA's failure to avoid the absurd results produced by its greenhouse gas regulations is not trivial in nature. The greenhouse gas regulations have important consequences for the entire national economy because of the prevalence of greenhouse gas emissions. For example, as a result of the stationary source regulations, "[t]ens of thousands of businesses and homeowners would be swept into the Clean Air Act's purview for the first time and hit with permitting costs averaging $60,000, not to mention the additional costs of trying to construct and maintain the facility in compliance with the relevant emissions limits and technological standards." *Coalition II,* 2012 WL 6621785, *20 (Kavanaugh, J., dissenting from rehearing *en banc*) (citing 75 Fed. Reg. 31,514, 31,556 (June 3, 2010)). Instead of attempting to remedy these absurd results with the Timing and Tailoring Rules, the EPA should have declined to regulate greenhouse gas emissions under the CAA. Because the EPA's greenhouse gas regulations produced an absurd result, unintended by Congress, and in direct violation of well-established precedent, this Court should grant this Petition.

II. THE EPA'S ENDANGERMENT FINDING IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND OTHERWISE NOT IN ACCORDANCE WITH LAW BECAUSE THE EPA FAILED TO GROUND THE FINDING IN THE CAA.

When this Court issued its opinion in *Massachusetts* it did not command the EPA to regulate greenhouse gas emissions. Instead, this Court only directed the EPA to "ground its reasons for action or inaction in the [CAA]." *Massachusetts*, 549 U.S. at 535; *see also*, 42 U.S.C. § 7607(d)(9)(A); 5 U.S.C. § 706(A)(2) (a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). Agency actions are arbitrary and capricious when the agency relies on factors that Congress did not intend for them to consider. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) ("*State Farm*") (Agency rules are arbitrary and capricious when an agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the produce of agency expertise."); *see also Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 278 (1989) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971)) (holding agency actions may be arbitrary

or capricious when there "has been a clear error of judgment.").

Despite the clear instructions from this Court in *Massachusetts*, the EPA did not ground its greenhouse gas regulations in the text of the CAA. The CAA charges the EPA with protecting and promoting human health and welfare, 42 U.S.C. § 7401; yet, the EPA freely acknowledged "that there is no evidence that greenhouse gases directly cause health effects." 74 Fed. Reg. at 66,526 (citing 74 Fed. Reg. 18,886, 18,901 (Apr. 24, 2009)). Notwithstanding this acknowledgment, the EPA moved forward and promulgated the Endangerment Finding. As its name suggests, the Endangerment Finding represents the EPA's purported belief that greenhouse gas emissions "may reasonably be anticipated to endanger public health or welfare"; however, the EPA failed to explain its belief or base its belief in science, as the CAA requires. 42 U.S.C. § 7421(a)(1).

Congress further instructed the EPA on what factors to consider when contemplating whether certain emissions are harmful to human welfare. Namely, it instructed the EPA to consider "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation. . . ." 42 U.S.C. § 7602(h). Instead of considering this list of factors, the EPA focused on "numerous and far-ranging risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure and

settlements, and ecosystems and wildlife." 74 Fed. Reg. at 66,498. Because the EPA "relied on factors which Congress has not intended it to consider" in promulgating the Endangerment Finding, the Finding is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Finally, the EPA's Timing and Tailoring Rules drastically alter the CAA as enacted by Congress. The fact that the EPA found it necessary to, sua sponte, raise the emissions thresholds carefully chosen by Congress shows that the agency's greenhouse gas regulations are "so implausible that [they can] not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. The EPA cannot argue that Congress intended it to use the terms of the CAA to regulate greenhouse gases, when the terms of the greenhouse gas regulations in no way fit amongst the existing provisions of the CAA. Taken together, the EPA's actions represent "a clear error of judgment." *Marsh,* 490 U.S. at 378. The EPA failed to exercise its expertise and instead promulgated greenhouse gas regulations that do not function within the scope of the CAA. This drastic departure from the EPA's statutory authority renders its actions unlawful.

Judge Kavanaugh sums up the errors made by the EPA most eloquently 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*). Therefore, this Court should grant the Petition.

III. THE EPA LACKS AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS UNDER THE PSD PROGRAM.

The CAA is a lengthy, comprehensive statutory scheme, created to regulate numerous types of emitters. The CAA includes seven separate subchapters. Each of these subchapters has a different regulatory focus. Because the CAA is comprised of so many parts, it is not plausible that the requirements under the motor vehicle emissions provisions also trigger a duty to regulate air pollutants under the PSD Program. In fact, the PSD Program exists to ensure the success of the NAAQS Program. 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)). This Court, in *Duke Energy*, also provided that "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Duke Energy*, 549 U.S. at 574.

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 them to consider adverse effects on human health that result from direct human exposure to air pollutants. Gary E. Marchant, *Genetic Susceptibilities: The Future Driver of Ambient Air Quality Standards?*, 43 ARIZ. ST. L.J. 791, 792-794 (2011). 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 emission of the criteria pollutants by requiring major emitters to seek permits before constructing or operating certain 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*." *Id.* § 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.*

Judge Kavanaugh properly interpreted the CAA in this way. 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 explained 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*) (quoting *Duke Energy*, 549 U.S. at 574).

The EPA cast a blind eye toward *Duke Energy* and brazenly decided that it must apply the PSD Program to any pollutant regulated under any section of the CAA, including greenhouse gases. As demonstrated above, the results produced by the EPA's crabbed interpretation are so absurd that they could not have been intended by Congress. Again, the CAA is a complex and lengthy piece of legislation created to minimize human health impacts from certain airborne emissions. Congress could not have intended the results produced by the EPA here because: (1) the EPA freely admits that exposure to greenhouse gas emissions does not cause any direct adverse human health impacts; and (2) the language found within one part and subpart of the statute cannot be assumed to control the execution of the entire statute. The Court should grant the Petition to correct this error.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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