No. 12-1268

In The Supreme Court of the United States

SOUTHEASTERN LEGAL FOUNDATION, INC., 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

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a public interest law firm committed to preserving the principles of limited government, separation of powers, free enterprise, federalism, strict construction of the Constitution and individual rights. Specializing in constitutional litigation and regulatory overreach, Landmark presents herein a unique perspective concerning the legal issues and national implications of the lower court's decision upholding the Environmental Protection Agency's ("EPA") improper piecemeal promulgation of a massive and unprecedented greenhouse gas ("GHG") regulatory scheme.

SUMMARY OF THE ARGUMENT

The United States Supreme Court should grant Petitioners' Southeastern Legal Foundation, et al.'s certiorari petition in order to determine whether there remain any limitations on the authority of a federal agency to expand its power through regulatory

[1] The parties were timely notified prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

fiat. In this case, the EPA has manipulated the Clean Air Act (42 U.S.C. § 7401, et seq.) and the Administrative Procedure Act (5 U.S.C. § 500, et seq.) to create an artificial duty to regulate, to invade the purview of Congress to legislate, and to evade its responsibility to consider the economic consequences of imposed regulations. EPA's misconduct in the regulatory scheme at issue in Petitioners' petition should not be given this Court's imprimatur.

In *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), the United States Court of Appeals for the District of Columbia ("D.C. Circuit" or "lower court") considered a series of challenges to four interdependent regulations pertaining to GHGs. The D.C. Circuit rejected all challenges thereby upholding EPA's authority to regulate vast segments of the economy based on a flawed interpretation of the Clean Air Act ("CAA" or "the Act") and implemented through the improper manipulation of the Administrative Procedure Act.

EPA seeks to establish the extraordinary and unprecedented principle that it can make an Endangerment Finding mandating extensive, but undefined regulation without considering the costs of the inevitable, follow-on regulations. The four regulations at issue represent an enormous and improper appropriation of power that, if upheld, will permit EPA to regulate GHG emissions from millions of stationary sources without considering the costs of such regulation. Initially, EPA issued the "Endangerment Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009), where EPA

found that GHG emissions "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." Id. at 66,499. EPA then issued the "Tailpipe Rule," which established emission standards for light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010). Next, EPA promulgated the "Timing Rule" where EPA determined that a pollutant becomes "subject to regulation" under the Clean Air Act ("Act") once a regulation requiring control of that pollutant takes effect. 75 Fed. Reg. 17,004 (Apr. 2, 2010). Finally, EPA issued the "Tailoring Rule." 75 Fed. Reg. 31,514. EPA's interpretation of the Act purported to necessitate the Tailoring Rule because regulation of GHGs as applied to motor vehicles automatically triggered regulation of GHGs under two stationary source permitting programs – the "Prevention of Significant Deterioration" ("PSD") and the Title V permit program. Id. at 31,521-22.

By EPA's own estimation, however, the Agency's self-imposed duties under Title V and PSD provisions will require EPA regulation of millions of sources. Id. at 31,534-36. Attempting to issue permits under these programs create an "absurd result." Thus, in the "Tailoring Rule" EPA, on its own accord, rewrote the statutory thresholds applicable to GHGs. The statutory threshold of 100 or 250 tons per year ("tpy") under the PSD program and the 100 tpy threshold under Title V were changed by EPA to 75,000 or 100,000 tpy.

Various entities, including businesses, non-profit associations and states challenged these regulations. The D.C. Circuit dismissed or denied these challenges. *Coalition 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. *Coalition for Responsible Regulation, v. EPA*, 2012 U.S. App. LEXIS 25997 (D.C. Cir. 2012). A number of parties have petitioned this Court for a Writ of Certiorari.

Landmark submits this brief in support of Petitioner Southeastern Legal Foundation ("Southeastern") because issues presented by Southeastern best encapsulate the fundamental errors by the lower court. Landmark respectfully requests the Court to consider the unique issues presented herein.

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ARGUMENT

I. EPA IMPROPERLY INSULATED THE ENDANGERMENT FINDING FROM COST-BENEFIT SCRUTINY BY CHARACTERIZING THE FINDING AS "STAND-ALONE" ACTION AND ISOLATING IT FROM INEVITABLE (AND COST LADEN) REGULATORY IMPLICATIONS.

Declaring that the Finding does not specifically regulate any pollutant, EPA improperly excused itself from performing the statutorily mandated cost-benefit

analyses.[2] EPA characterized the Finding as a "stand-alone" action and noted that it "does not contain any regulatory requirements." 74 Fed. Reg. at 66,515. According to EPA, this removed any duty to "assess the impacts of any future regulation." Id.

In particular, EPA maintained, "[b]ecause these Findings do not impose any requirements, the Administrator certifies that this action will not have a significant economic impact on a substantial number of small entities. This action does not impose any requirements on small entities." Id. at 66,545. So long as the "endangerment and cause or contribute findings do not in-and-of themselves impose any new requirements," EPA claimed it need not analyze the obvious regulatory consequences of its "determination on whether [GHGs] in the atmosphere may reasonably be anticipated to endanger public health or welfare." Id.

In responding to public comments, EPA distinguished authorities requiring it to perform meaningful cost-benefit analysis as addressing only concrete or quantitative standards or regulations, not the

[2] In addition to the cost consideration mandate contained in 42 U.S.C. § 7521(a)(2) (section 202(a)(2) of the Act), EPA is obligated to consider costs under 42 U.S.C. § 7617 (requirement that EPA perform an economic impact analysis); minimize the rule's impact on small entities as prescribed in 5 U.S.C. §§ 601-612; and adhere to Executive Order 12,866 (where agencies must assess the costs and benefits of each proposed regulation and its alternatives).

isolated "initial question of whether a statutory precondition to setting standards has been met, such as determining whether the air pollution (not the ensuing regulations) endanger public health." EPA's Response to Public Comments, Response to Comment 11-8 (available at http://www.epa.gov/climatechange/endangerment/comments/volume11.html11-8). Revealing its reason for separating the Finding from all subsequent regulation, EPA asserted that none of the authorities required the Agency to "consider the full range of possible impacts of future regulation" that would follow upon a finding of endangerment that was issued separately from any mitigating regulation. Id.

Indeed, EPA stated that the Finding is "not the appropriate place to consider the economic impacts of mitigation measures that may follow a positive endangerment finding." Id., Response to Comment 11-10 (available at 11-10). Rather, EPA insisted that, with a sweeping and unexamined Endangerment Finding in place and not subject to repetitive judicial review, EPA could simply "provide an analysis of costs, economic impacts, and benefits in conjunction with proposed regulatory standards under the CAA." Id.

Thus, EPA seeks to establish the extraordinary and unprecedented principle that it can make a Finding that mandates intensive regulation without considering the costs of those inevitable regulations. In the instant case, EPA has artificially and improperly severed the Finding from the massive new scheme of GHG regulations that have followed.

Agreeing with EPA's arguments, the lower court analyzes the Finding in isolation as a strictly scientific conclusion. Claims that the Finding fails to consider costs "muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question." *Coalition for Responsible Regulation*, 684 F.3d at 322 *quoting* 74 Fed. Reg. at 66,515. Despite noting that the statutory section immediately following section 202(a)(1) "requires that EPA address limited questions about the cost of compliance with new emissions standards and the availability of technology for meeting those standards . . . " the lower court excuses EPA's failure to conduct said analysis. It states, "The statute speaks in terms of endangerment, not in terms of policy, and EPA has complied with the statute." *Id*.

To the contrary, the plain language of the CAA section 202(a) shows that a finding of endangerment should be integrated into the substantive rule, rather than standing apart:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1).

This language indicates that a positive finding of endangerment should be made within an action regulating emissions from motor vehicles. Nothing in this authorizing provision contemplates issuing a separate finding of endangerment. EPA's unprecedented effort to divorce the Finding from the substantive rule (Tailpipe Rule) allows EPA to avoid considering the full cost effects of the entire regulatory scheme.

Landmark has not found a single instance where EPA separated a finding of endangerment from a proposed regulation. Nor did EPA identify any in defending its approach. The procedural device EPA has chosen represents an unexplained departure from consistent prior practice – itself a tell-tale sign of arbitrary and capricious decision making. *Motor Vehicle Mfrs. Auto. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

A. The Lower Court Erred In Upholding EPA's Arbitrary And Capricious Characterization Of The Endangerment Finding As "Stand-Alone."

EPA and the lower Court are correct that the Endangerment Finding does not by itself impose any emissions limitations or other requirements on the conduct of outside entities. But that is only because EPA sliced one part of Section 202(a) apart from the rest – and from the rest of the CAA regulatory structure that the Finding sets in motion. Indeed, EPA

made clear that it knew what it was doing; it was well aware that "the Prevention of Significant Deterioration (PSD) permitting program for major stationary sources . . . is triggered by a CAA section 202(a) standard." 74 Fed. Reg. at 66,515. In responding to comments observing that the extreme "costs associated with using the inflexible structure of the CAA will harm public health and welfare" – because "once EPA makes an endangerment finding under the CAA section 202(a), it will be forced to regulate greenhouse gases under a number of other sections of the CAA, resulting in regulatory chaos" (id.) – EPA did not deny that the "inflexible regulatory structure of the CAA" in fact would result in a proliferation of GHG regulations that would have significant adverse economic effects. EPA insisted, "[what] these comments object to is that Congress has already made some decisions about next steps after a finding of endangerment." Id.

That is, for its own regulatory fiat excesses, EPA blamed a 1970 Congress that had no idea that it was authorizing an agency to regulate the products of human respiration and "everything [else] airborne, from Frisbees to flatulence." *Massachusetts v. EPA*, 549 U.S. 497, 558 n.2 (2007) (Scalia, J., dissenting). It is EPA's procedural trickery of separating the Finding from its regulatory consequences – and not the design of the CAA – that has set in motion the improper regulatory process requiring this Court's review. It is imperative that EPA satisfy its duty to seriously inquire into whether the greater threat to human

health and welfare comes from GHGs or from the adverse economic consequences of command-and-control regulation of carbon dioxide.

The lower court also failed in its duty to interpret Section 202(a) "as a symmetrical and coherent regulatory scheme," and to ensure the directive to consider costs "fit, if possible, all parts into a harmonious whole." *See Food and Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (*citing Gustafson v. Alloyd Co*., 513 U.S. 561, 569 (1995) and *FTC v. Mandel Brothers, Inc*., 359 U.S. 385, 389 (1959). Again, EPA's decision to extract the endangerment finding from the larger regulatory scheme to avoid considering the costs of regulating millions of new stationary sources under the PSD and Title V permitting programs should not and cannot receive judicial imprimatur.

B. The Regulatory Scheme Improperly Insulates EPA From Conducting A Complete Cost-Benefit Analysis That Accurately Gauges The Economic Impact Of GHG Regulation.

Divorcing the Finding from the larger regulatory framework allows EPA to avoid its statutory obligation to "[give] appropriate consideration to the cost of compliance." 42 U.S.C. § 7521(a)(2). The lower court erred in permitting EPA to avoid considering the enormous costs of implementation of the GHG regulatory scheme. By issuing a stand-alone Endangerment

Finding and the other three nominally separate, but legally interconnected rules, EPA avoided conducting any type of cost-benefit analysis measuring the full economic impact GHG regulation will have on millions of stationary sources. Because the Endangerment Finding does not impose costs and, according to EPA and the lower court, is a "scientific judgment," it does not necessitate any type of cost-benefit analysis. The Finding, however, is the touchstone to the larger regulatory framework and is a necessary antecedent to the Tailpipe Rule. Issuing the Tailpipe Rule, by EPA's own interpretation of the Clean Air Act, "triggered" regulation under PSD and Title V permitting programs, thus necessitating the Tailoring Rule. These regulations are interconnected and therefore, EPA should have integrated the costs of regulating GHGs under the PSD and Title V permitting programs into the Finding.

Rather than considering the economic consequences of the entire regulatory framework, the lower court permitted each regulatory component to be considered individually and in so doing, allowed EPA to abstain from considering the cascading cost effect of the entire regulatory framework. "This opinion proceeds in several steps. Part II explains why the Endangerment Finding was neither arbitrary or capricious, while Part III does the same for the Tailpipe Rule. Part IV examines whether any petitioners may timely challenge EPA's longstanding interpretation of the PSD statute." The lower court continues, "Part V . . . explains why EPA's interpretation of the

[Clean Air Act] was compelled by the statute. Next, Part VI explains why petitioners lack standing to challenge the Timing and Tailoring Rules themselves." *See Coalition for Responsible Regulation*, 684 F.3d at 116.

All four regulations, however, must be considered as a complete entity in order to be reviewed in the proper perspective. The complex interdependence of these regulations demands analyzing them for what they are – one massive regulation – not four separate and distinct rules. In fact, the entire GHG regulatory scheme relies on each individual regulation. EPA and the lower court should have recognized that the statutory command to give "appropriate consideration to the cost of compliance" in the Act's Section 202(a) required it to do what any rational administrative agency would do when proposing to issue a finding that would trigger a massive regulatory program.

C. The Lower Court Erred In Upholding EPA's Failure To Justify And Consider Cost Implications Of EPA's Conclusion That The Tailpipe Rule Triggers Stationary Source Regulation Under The PSD And Title V.

The lower court dismissed contentions that EPA failed to consider the larger costs incurred by the implementation of the Tailpipe Rule. EPA only considered the direct costs associated with implementation of the Tailpipe Rule, i.e., EPA analyzed the costs imposed upon auto manufacturers for complying with

the rule. EPA did not focus on the larger costs associated with implementing the Tailpipe Rule – the costs associated with millions of sources now under the regulatory auspices of the PSD and Title V programs.

The lower court relies on a previous decision, *Motor & Equipment Manufacturer's Association v. EPA*, as justification for limiting cost analysis only to "the cost to the motor-vehicle industry to come into compliance with the new emission standards, and does not mandate consideration of costs to other entities not directly subject to the proposed standards." *Coalition for Responsible Regulation*, 684 F.3d at 128, *citing Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979).

Reliance on this decision is flawed in that when it was decided in 1979, the Circuit Court in *Motor & Equipment Manufacturer's Association* did not address or consider the larger, timing and triggering implications associated with the Act's relationship with the PSD and Title V permitting programs. Indeed, as EPA notes in the Timing Rule, the Court's decision in *Massachusetts v. EPA* spurred then-Administrator Johnson's interpretation that the phrase "subject to regulation" to include pollutants "subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant. . . ." See 75 Fed. Reg., at 17,004. As the Court is aware, EPA formally adopted this position with the finalization of the Timing Rule. Circumstances and statutory interpretations have significantly changed. The recent

adoption of EPA's position as elucidated in the Timing Rule demands a new examination of whether it is consistent with the purpose of 202(a)(2) for EPA to consider costs that are inevitability incurred with the finalization of a regulation such as the Tailpipe Rule.

Even assuming, as the lower court does, that EPA does not have the statutory discretion to "defer issuance of motor-vehicle emission standards on the basis of stationary-source costs" such a contention should not insulate the Agency from analyzing and categorizing those costs. When a finalization of a regulation such as the Tailpipe Rule will automatically trigger application of two costly regulatory programs for millions of sources, the rule should analyze and incorporate those costs. This is consistent with a strict interpretation of the clear language of 202(a)(2). Clever regulatory tap dancing should not excuse EPA from accounting for the massive attendant costs of the Finding and the Tailpipe Rule.

II. EPA'S ADOPTION OF THE "SKY IS FALLING" PRECAUTIONARY PRINCIPLE DOES NOT EXCUSE ITS FAILURE TO CONDUCT ANY COST-BENEFIT ANALYSIS.

EPA maintains that, rather than weighing the balance of costs and benefits to determine whether an air pollutant endangers public health, it may use a sliding scale version of the precautionary principle:

> [In] exercising her judgment the Administrator balances the likelihood and severity of effects. This balance involves a sliding scale; on one end the severity of the effects may be of great concern, but the likelihood low, while on the other end other severity may be less, but the likelihood high. Under either scenario, the Administrator is permitted to find endangerment. 74 Fed. Reg. at 66,505.

That is, EPA concludes that it has the authority to find endangerment whenever it concludes that the harm to be avoided is sufficiently "catastrophic," even if the likelihood of endangerment is remote. Id. But all the benefits of CAA regulation flow from mitigating or averting endangerment. Costly regulations that address an overstated endangerment finding based on a remote and uncertain harm should never see the light of day, no matter how catastrophic the improbable harm might be. Under EPA's theory, a safety agency could order that all houses, office buildings, and power plants be moved deep underground, lest a neighboring planet leave its orbit and crash into Earth – surely a catastrophic event should it occur, but one so remote as to be meaningless.

A. *Ethyl Corp.* And *Lead Industries Association* Do Not Justify EPA's Avoidance Of Cost-Benefit Analysis.

EPA finds authority to rely on a nearly standardless sliding scale in the D.C. Circuit's decision in *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir.

1976). In *Ethyl*, the circuit court upholds a regulation without having established actual harm. But the rule upheld in *Ethyl* regulated lead levels in gasoline. Similarly, the lower court relied on *Lead Industries Association v. EPA* as obligating EPA to utilize "a precautionary, forward-looking scientific judgment about the risks of a particular air pollutant. . . ." *Coalition for Responsible Regulation*, 684 F.3d. at 122 *citing Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980).

The rules upheld in *Ethyl* and *Lead Industries* involved lead levels in gasoline and National Ambient Air Quality Standards for lead. By contrast with carbon dioxide and other GHGs, the toxicity of lead at low levels was well known and was in fact conceded by the Ethyl petitioners. *See Ethyl Corp*., 541 F.2d at 8. Carbon dioxide, on the other hand, is a natural and plentiful component of clean air that humans and other animals emit when they exhale, and plants absorb in photosynthesis. Carbon dioxide has always been present in the atmosphere, albeit at varying concentrations.

The court in *Ethyl* confined the application of the precautionary principle within "reasonable limits." *Ethyl Corp*., 541 F.2d at 18 n.312. The court in *Lead Industries* notes that EPA's construction of the CAA must be "reasonable." *Lead Indus. Ass'n*, 647 F.2d at 1147. But the application of the precautionary principle here goes far beyond reasonable limits. Rather than addressing an uncertain aspect of a known poison, EPA here speculates about indirect effects of

changing concentrations of common constituents of the atmosphere that are not directly harmful to humans. The lower court erred in permitting EPA to take the precautionary principle too far; its "sliding scale" has no limits.

III. THE STATUTORY THRESHOLDS FOR TRIGGERING APPLICATION OF THE PSD AND TITLE V PROGRAMS ARE CLEAR, THUS NO AGENCY DISCRETION EXISTS TO MODIFY THESE THRESHOLDS.

The applicability thresholds for the PSD and Title V programs are clearly delineated in the CAA. PSD applies to construction and modification of "major emitting facilities." 42 U.S.C. §§ 7475(a), 7479(2)(c). These are defined as:

> [A]ny of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the [28 listed source categories]. Such term also includes any other source with the potential to emit two hundred and fifty tons or more of any air pollutant. 42 U.S.C. § 7479(1).

Title V applies to "major sources" that include:

> [A] stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant. 42 U.S.C. §§ 7661(2)(B), 7602)(j).

These standards are clear and unambiguous. Congress clearly intended these programs to apply to sources emitting or with the potential to emit 100/250 tpy of a given pollutant. As set forth in *Chevron U.S.A. Inc. v. NRDC*, when Congressional intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). An agency may fashion a reasonable interpretation of a given directive only when the intent of a provision is unclear. *Id*. at 842-43. EPA therefore, does not have discretion to deviate from the standards set forth in the CAA. EPA cannot dismiss the clear mandate established by the statute and assert authority to rewrite the CAA by arbitrarily and capriciously ignoring *Chevron's* initial directive and automatically attempting to apply *Chevron's* second test.

CONCLUSION

For the reasons stated herein Landmark respectfully urges the Court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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