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 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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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Landmark Legal Foundation ("Landmark"), is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the decisions by the Federal Government.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the Executive Branch's attempt through procedural manipulation and administrative fiat to create sweeping new regulatory powers over the American economy. Discarding clear limitations established by Congress in the Clean Air Act ("CAA" or "the Act"), the Environmental Protection Agency ("EPA" or "the Agency") has fundamentally transformed two permitting programs designed decades ago and

[1] 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.

limited in application to large industrial sources that emit air pollutants. 42 U.S.C. § 7401 *et seq*. These programs, known as the Prevention of Significant Deterioration ("PSD") and Title V, were designed to mitigate certain pollutants emitted only from large, stationary sources such as pulp mills and industrial boilers – designated under the act as "major stationary sources." 42 U.S.C. §§ 7479(1), 7661(2)(B), 7602(j). EPA now unilaterally seeks to expand these programs to include any source of greenhouse gas ("GHG") emission. *See* 75 Fed. Reg. 17,004 ("Timing Rule").

Congress designed the PSD program to apply to sources emitting a particular class of pollutants in excess of a designated amount, which, where met, requires EPA permission prior to construction. To obtain permission to begin construction, applicants are required to demonstrate that the source will incorporate the Best Available Control Technology ("BACT") to mitigate the amount of pollutants it will emit. 42 U.S.C. § 7475(a)(4).

Title V is a permitting program that requires states to develop and implement operating permit programs for the same class of emission producing sources. To obtain these permits, large, stationary sources such as coal-burning utility boilers are required, among other things, to submit emissions reports to authorizing state and to pay fees based on the amount of pollutants that are emitted. EPA Office of Air Quality Planning And Standards, *Air Pollution Operating Permit Program, Key Features And Benefits*, February 1998.

Congress set clear and unambiguous pollutant emission thresholds before a stationary source is subject to PSD and Title V regulation. Without any delegated authority from Congress, and in contravention of the Constitution's separation of powers doctrine, EPA has flat-out rewritten the law. *See* 75 Fed. Reg. 31,514 *et seq.* ("Tailoring Rule").

EPA admits that its application of the PSD and Title V permitting programs to stationary sources emitting GHGs creates absurd results – hundreds of thousands, if not millions of sources emit GHGs in excess of the emission thresholds. Moreover, EPA acknowledges that literal applicability of its self-styled PSD "would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program." 75 Fed. Reg. 31,533. The Agency feigns compulsion to act under this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). However, EPA's litany of absurdities makes the opposite case, demonstrating the inapplicability of the CAA's stationary source permitting programs to GHGs and the illegitimacy of EPA's power grab.

With its new self-appointed power, EPA asserts authority to regulate hundreds of thousands of small sources emitting GHGs – substances never classified by Congress as pollutants. As explained by Petitioners, EPA had the option of interpreting the CAA in such a manner to avoid these absurdities. Instead, the Agency uses a spurious rationale to justify extreme and unconstitutional actions whereby the Agency has,

essentially, rewritten the Act. The new standard promulgated by EPA is a gross deviation from the current applicability thresholds. EPA's invocation of "absurd results," "administrative necessity," and "one-step-at-a-time" theories does not justify an arbitrary and capricious deviation from the unambiguous language of the Act. *See* 75 Fed. Reg. 31,541.

The Agency's actions run counter to this Court's dictate that "[r]egardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Food and Drug Administration v. Brown & Williamson Tobacco*, 529 U.S. 120, 125 (2000) (citing, in part, *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

If regulating light-duty motor vehicles automatically triggers permitting requirements under the PSD and Title V programs as EPA claims, the extent to which EPA has transformed the Act to conform to this purported statutory obligation must be examined.[2] If the Court determines that triggering these programs requires EPA to regulate stationary sources emitting GHGs, it should then look to the Agency's other

[2] *Amicus* does not concede that regulating light-duty motor vehicles triggers permitting requirements under PSD and Title V. Rather, *Amicus* presents these arguments to show: (1) EPA improperly engaged in a legislative act when it rewrote the applicability thresholds and; (2) PSD and Title V are not designed nor even intended to regulate sources emitting GHGs.

regulatory obligations applicable to GHGs. These obligations are clear. Adhering to them, however, triggers absurdities. EPA is now purportedly required to issue PSD permits to hundreds of thousands of stationary sources emitting GHGs in excess of the Act's thresholds. This interpretation runs contrary to the PSD and Title V's purpose – regulating major stationary sources that emit pollutants.

Even if the Court determines that GHGs are subject to the PSD and Title V permitting programs, *Amicus Curiae* Landmark Legal Foundation urges the Court not to undermine the Separation of Powers Doctrine by allowing EPA to seize for itself the legislative branch's power to enact laws. EPA's three justifications of "absurd results," "administrative necessity," and "one-step-at-a-time" regulation simply do not justify such a radical shift in constitutional authority.

ARGUMENT

I. THE PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V PROGRAMS ARE NOT APPLICABLE TO GHGs.

The thresholds for the PSD and Title V programs are clearly delineated in the Act. The PSD program applies to construction and modification of "major emitting facilities." 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* of any air pollutant. 42 U.S.C. § 7479(1) (emphasis added).

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) (emphasis added).

These standards are clear. There is no ambiguity in their meaning. Congress clearly intended these programs to apply to sources emitting, or with the potential to emit, 100/250 tons per year ("tpy"). When Congressional intent is clear, an agency must follow the intent. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). An agency may fashion a reasonable interpretation of a given directive only when the intent of a provision is unclear. Id. at 842. EPA does not have discretion to deviate from the standards set forth in the Act.[3]

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[3] Congress was even more forceful in § 502(a) of the Act where it expressly precluded EPA from exempting major sources from the Title V thresholds. 42 U.S.C. § 7661a(a) ("The Administrator may . . . promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements [of Title V] if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator *may not exempt* any major source from such requirements.")

EPA cannot dismiss the clear mandate established in the statute and assert authority to rewrite the Act by arbitrarily and capriciously ignoring *Chevron*'s initial directive and justifying its action on limited legal doctrines of "absurd results," "administrative necessity," and "one-step-at-a-time." 75 Fed. Reg. 31,533.

EPA engaged in an improper and unconstitutional legislative function when it changed the applicability thresholds specified in the PSD and Title V sections of the Act in the June 3, 2010 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule. 75 Fed. Reg. 31,514 *et seq*. Additionally, EPA improperly amended 40 C.F.R. § 51.166 to include a new definition of the statutory term "subject to regulation." This amendment exempts GHG sources from "major emitting facilities" subject to PSD if those sources emit GHGs in amounts less than a newly proscribed threshold (100,000 tpy). Sources emitting less than 100,000 tpy of GHGs are not considered "major emitting facilities." 75 Fed. Reg. 31,525.

Beginning on July 1, 2011, GHG emissions alone triggers PSD permitting requirements. Sources that "emit, or have the potential to emit, at least 100,000 tpy of CO_2e will become subject to the PSD and [T]itle V requirements." 75 Fed. Reg. 31,516. Additionally, "sources that emit or have the potential to emit at least 100,000 tpy of CO_2e and that undertake a modification that increases net emissions of GHGs by at least 75,000 tpy CO_2e will also be subject to PSD requirements." 75 Fed. Reg. 31,516.

Further, EPA commits "to explore streamlining techniques that may well make the permitting programs much more efficient to administer for GHGs, and that therefore may allow their expansion to smaller sources." 75 Fed. Reg. 31,516.

A. Permitting EPA To Deviate From The Clear Mandates Of The Act Impermissibly Empowers Agency Officials With Legislative Powers.

The clear and unambiguous language in the Act does not permit EPA to alter the statutory thresholds. Article I, § 1 of the Constitution vests "all legislative Powers herein granted . . . in a Congress of the United States." This express grant, "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). When Congress authorizes an agency to establish rules "Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Am. Trucking Ass'ns*, 531 U.S. at 472 (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

The legislative power rests solely within Congress under our constitutional system. This principle is central to the separation of powers. "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving v. United States*, 517 U.S. 748, 757 (1996). Thus, "Article I's

precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." Id. at 757-758. Accordingly, "Ill suited to the task [of lawmaking] are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control." Id. at 758. This assignment of powers "allows the citizen to know who may be called to answer for making, or not making those delicate and necessary decisions essential to governance." Id.

Separation of powers prevents accumulation of power and encroachments upon liberty. "The accumulation of powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison) (C. Rossiter ed., 1961). Consequently, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." Id. (quoting Charles D. Montesquieu, *The Spirit of the Laws* (Cohler, Miller & Stone eds., 1989)).

As noted by U.S. Circuit Court Judge David S. Tatel in public remarks, "The legislative process set out in the Constitution with its bicameralism and veto provisions, is designed to make it difficult to alter the legal status quo. By contrast, agencies, staffed by appointment and somewhat insulated from political accountability, can exercise such power with one

bureaucratic pen stroke." The Honorable David S. Tatel, *The Administrative Process And The Rule Of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 2 (2010).

Of course, there is a constitutionally permissible role for administrative rulemaking. *Amicus* acknowledges there are instances where a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 120-121 (1976). Further, separation of powers, "does not mean that [the three branches] ought to have no partial agency in, or no control over the acts of each other." As the Court has acknowledged, Congress is the only body that "can make a rule of prospective force." *Loving v. United States*, 517 U.S. at 758. "To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." Id.

There are limits to the agency's authority however. In *Field v. Clark*, the Court stated, "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." The Court then distinguished the actions, "[t]he first cannot be done; to the latter no valid objection can be made." *Field v. Clark*, 143 U.S. 649, 693-692 (1892) (quoting *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)). Thus, "[t]he legislature

cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things which the law makes, or intends to make, its own action depend." *Field v. Clark*, 143 U.S. at 694.

"EPA may not 'avoid Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) (quoting, in part, *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)). Further, EPA cannot "set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications." *Friends of the Earth, Inc. v. EPA*, 446 F.3d at 145. Commenting publicly on EPA's actions in *Friends of the Earth*, Judge Tatel stated, "EPA's decision to ignore the statute's plain words rather than returning to Congress for authority to pursue its preferred policy still baffles me." The Honorable David S. Tatel, *The Administrative Process And The Rule Of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 3-4 (2010).

In light of these clear constitutional edicts, EPA's decision to rewrite the statutory thresholds is baffling and illegal.

B. EPA Engaged In An Unconstitutional Law Making Function When It Arbitrarily Rewrote The Applicability Thresholds For PSD And Title V Permitting Programs.

The commands of *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* require an examination of "whether Congress has directly spoken on the precise question at issue." *Chevron U.S.A. Inc. v. National Resources Defense Council*, *Inc.*, 467 U.S. 837, 842 (1984). If Congress has done so, a court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. When a statute is clear, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

When "Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible." *Food and Drug Administration v. Brown & Williamson Tobacco*, 529 U.S. 120, 132 (2000). Judge Tatel put it succinctly when he noted ambiguous language obligates "courts, acting pursuant to the Supreme Court's *Chevron* decision, interpret as a delegation of authority to the agency to fill in the gaps." The Honorable David S. Tatel, *The Administrative Process And The Rule Of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 4 (2010).

Congress, however, has not delegated any authority to EPA to determine the thresholds for PSD and Title V applicability. On the contrary, Congress specified the numeric thresholds whereby stationary sources are subject to these programs. Section 165 of the Act defines a major emitting facility 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]." 42 U.S.C. § 7479(1). Title V's application to major sources includes, "A stationary 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).

Contrast the clear statutory dictates of the PSD and Title V provisions with the delegation conferred by Congress in *Whitman v. Am. Trucking Ass'ns*. There the Court determined that Congress, in § 109(b)(1) of the Act, had properly delegated to EPA, the discretion to set uniform national standards "at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). "Requisite" the Court concluded, "[is] not lower or higher than is necessary – to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent." Id. at 475-476. The statute must provide an "intelligible principle to which the person or body authorized to [act] is directed to conform." Id. at 472.

Courts therefore, "do not ask the hard-to-manage question whether the legislature has exceeded the permissible level of distraction. . . ." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 338 (2000). Instead, courts examine "the far more manageable question whether the agency has been given discretion to decide something that (under the appropriate canon) only legislatures may decide." Id.

The sections of the Act at issue provide no intelligible principle whereby EPA may permissibly establish its own thresholds. In short, there is no legislative delegation from Congress permitting EPA to establish new standards. The language is clear and "absent an extraordinarily convincing justification," EPA cannot change the text. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). The justifications provided by EPA do not rise to this level.

1. The Doctrine Of "Absurd Results" Does Not Support EPA's Arbitrary And Capricious Deviation From The Standards Established In The Act.

Despite the clarity of the threshold provisions of the Act, EPA insists on asserting authority to alter these provisions based on a *Chevron* step two analysis. 75 Fed. Reg. 31,533. EPA falsely believes that three doctrines, "absurd results," "administrative necessity," and "one-step-at-a-time" fit "into the *Chevron* framework for statutory construction because each of the three is designed to effectuate congressional intent."

75 Fed. Reg. 31,533. As applied in the Tailoring Rule, however, these doctrines do not support EPA's appropriation of legislative authority.

EPA relies on a number of cases that establish the "absurd results" doctrine. 75 Fed. Reg. 31,542. The cases, however, are inapplicable. *United States v. Ron Pair* involves an interpretation of a statute pertaining to bankruptcy proceedings. At no point in *Ron Pair* does the Court contemplate – or even discuss in any fashion – the doctrine of absurd results. Further, the Court provides no guidance of whether, and in what fashion, an agency may depart from the legislative directive to avoid a purported absurd result. In fact, "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

In the present case, the Act is a "coherent and consistent" statute that has existed and functioned for over thirty (30) years. There is no authority to inquire beyond its clear terms.

Moreover, the list of cases EPA relies upon involve limited instances that are relatively minor, commonsense deviations from statute or the literal meaning of a given rule. Such deviations are clearly consistent with the rationale of the underlying statutory provision or rule.

For example, in *Environmental Defense Fund v. EPA*, the D.C. Circuit Court permitted a limited divergence from the language of the Act. *Environmental Defense Fund v. EPA*, 82 F.3d 451 (D.C. Cir. 1996). Here, the circuit court upheld an EPA rule permitting a deviation from the Act's requirement that state implementation plans ("SIP") (relating to implementation, maintenance and enforcement of national ambient air quality standards) must be examined and approved by the EPA before any federal agency could provide support to the state. Id. at 468-469. EPA's regulation authorized federal agencies to approve state activities (and provide financial support) prior to examination and approval of the SIP so long as the state complied "with certain safeguards intended to ensure that [the SIP] would be revised." Id. at 468. This deviation was permissible only in narrow instances where the federal government received assurances that the SIP would be revised as well as receiving a specific commitment from the state's governor that the SIP would conform to federal requirements. The court upheld EPA's departure because the regulation was "reasonable, narrowly drawn, [and] consistent with the [CAA]." Id. at 469.

In re Nofziger involved attorney's fees awarded in the context of an independent counsel investigation. *In re Nofziger*, 925 F.2d 428 (D.C. Cir. 1991). The independent counsel statute provided an award of attorney fees for an individual who was subject to investigation but not indicted. Although Mr. Nofziger

was indicted, the D.C. Circuit held he was still eligible for attorney's fees because of the impropriety of the indictment. The court concluded, "it would be absurd to construe the statute as intending to treat an invalid indictment the same as a valid indictment . . . we construe this [prohibition] as being limited to instances in which 'no [valid] indictment is brought.'" Id. at 434.

In *Logan v. United States*, the Court notes that it has "interpreted" statutory terms "against their literal meaning where the words 'could not conceivably have been intended to apply' to the case at hand." *Logan v. United States*, 552 U.S. 23, 36 (2007) (citing *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)). Interpretation presumes ambiguity in the statute. As stated repeatedly, the applicability thresholds for PSD and Title V are clear – they are not subject to any interpretation. Even if the Court were to assume EPA does have the authority to "interpret" these terms, it is inconceivable how these clearly delineated thresholds can be subject to any new interpretation. Simply stated, 100 tons per year means 100 tons per year.

Green v. Bock Laundry Machine Company, another case EPA uses to support its reliance on the "absurd results" doctrine, involves an interpretation of the Federal Rule of Evidence 609(a). *Green v. Bock Laundry Machine Company*, 490 U.S. 504 (1989). This rule permits a party to introduce evidence that a witness has been convicted of a certain type of crime to impeach the witness provided the probative value

of said evidence outweighs its prejudicial effect on a defendant. Although the term "defendant" applies in both civil and criminal cases, the Court ruled that the "probative value" test was not applicable in civil cases where oftentimes, the designation as plaintiff and defendant was one of "happenstance." Id. at 510. The Court determined that Congress intended "only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1)." Id. at 524.

These cases involve narrow deviations from the language of the respective underlying statutes. In the case of *Environmental Defense Fund v. EPA*, the exception permitted was merely a matter of form. For the rule to apply, a state had to make concrete guarantees that it was planning on abiding by the mandates of the CAA. *In re Nofziger* involved a minor expansion entirely consistent with the purpose of a provision of the Independent Counsel Act. *Green v. Bock Laundry* did not involve an agency exception to a statutorily imposed duty, it involved an interpretation of the term "defendant" in the context of the federal rules of evidence.

These cases do not support an agency arbitrarily and capriciously altering a clear standard imposed by a statute and cannot be utilized by EPA as a legal justification for reliance on the legal theory of "absurd results."

2. The Doctrine Of "Administrative Necessity" Does Not Support EPA's Arbitrary And Capricious Deviation From The Standards.

EPA primarily relies on the D.C. Circuit case of *Alabama Power v. Costle* to justify its reliance on the doctrine of administrative necessity. 75 Fed. Reg. 31,543. Importantly, in this case, the circuit court invalidated an EPA crafted exemption – EPA failed to effectively justify the "heavy burden" of validating its reliance on the doctrine of administrative necessity.

The D.C. Circuit recognized that "categorical exemptions from the clear command of a regulatory statute, though sometimes permitted, are not favored." *Alabama Power v. Costle*, 636 F.2d 323, 358-360 (D.C. Cir. 1980). The circuit court continued, "[there is] substantive authority (for an agency) to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute." Id. at 358-359. The circuit court presumes that the agency exception is based on an application of a legislative command or directive. If an agency overcomes a heavy burden and demonstrates that it is impossible to comply with a legislatively imposed duty or command, it may be able to invoke the doctrine as justification for a carefully crafted and narrow exception.

EPA was not under any statutory command to regulate GHG emissions from stationary sources. EPA has, on its own and without and directive from

Congress, determined that GHGs constitute a pollutant for purposes of the Act. EPA believes the issuance of the "light-duty motor vehicle rule" triggered an obligation to regulate stationary sources under the PSD and Title V permitting programs. 75 Fed. Reg. 17,006. However, the absurd results that occur when EPA concluded that regulating pollutants from one source (light-duty motor vehicles) triggered regulation for an entirely different purpose indicate the PSD and Title V programs were never intended to apply to GHGs.

EPA created its own administrative necessity by promulgating these regulations. It cannot utilize a doctrine designed to apply in situations where an agency is under a specific directive. In reality, there is no administrative necessity to tailor the existing applicability thresholds of the PSD and Title V programs because there is not any statutory command to regulated GHGs.

3. The Doctrine of "One-Step-At-A-Time" Does Not Support EPA's Arbitrary And Capricious Deviation From The Standards.

EPA reliance on the judicial doctrine of "one-step-at-a-time" as further justification for the Tailoring Rule fails for many of the same reasons the judicial doctrine of administrative necessity fails. The statute was never designed to apply to GHGs. EPA assumes Congress intended it to regulate GHGs under the

PSD and Title V programs. The application of the threshold provisions to stationary sources emitting GHGS, however, indicates otherwise.

Moreover, this doctrine does not allow fundamental transformations of the statute. An agency "cannot 'restructure [an] entire industry on a piecemeal basis' through a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale." *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) (citing, in part, *ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984)).

The use of "one-step-at-a-time" also evinces EPA's true intentions. EPA states that this approach allows EPA to cull the number of stationary sources subject to PSD and Title V until such time EPA can "make the permitting programs much more efficient to administer for GHGs, and that therefore may allow their expansion to smaller sources." 75 Fed. Reg. 31,516. On one hand EPA explains that Congress intended PSD and Title V permitting programs to apply to a limited number of sources – those defined as major emitting facilities. 75 Fed. Reg. 31,550. Yet, EPA also indicates that it will begin to take steps to regulate more sources under its "Step 3." EPA states, "if permitting authorities increase their resources, or if implementation experience and more seasoned staff results in more effective use of scarce permitting resources, then we expect that we will be able to phase

in the application of PSD and Title V to more sources. . . ." 75 Fed. Reg. 31,524.

C. EPA Should Not Be Permitted To Ignore Constitutional Limitations Simply Because It Faces An Inconvenient Statutory Obligation.

If the Court authorizes EPA to craft "an escape route from the occasional absurdity generated by literal application" of the Act, it would permit an interpretation that "points out the undesirability of employing [an interpretation] too rigorously in certain domains." Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 525 (1988). When EPA deviates from the words of the statute and, instead creates an exception that allows it to conform to the statute's "purpose," EPA "[embarks] upon a potentially infinite regress in which all forms of concretization are defensible." Schauer, *Formalism*, 97 Yale L.J. at 534. Such a view, "collapses the distinction between a rule and a reason, and thus loses the very concept of [the] rule." Id.

Congress elected to place specific statutory thresholds in the act. The CAA does not delegate authority to EPA to determine what constitutes a "major emitting facility." Such a determination "prevents the contemplations of every fact and principle relevant to a particular application of the rule." Schauer, *Formalism*, 97 Yale L.J. at 535. This "acontextual rigidity is what makes it a rule." Id. Unlike instances where there is a definable delegation to EPA to determine

particular applicability provisions, Congress never granted EPA the authority to craft its own thresholds.

If EPA can, in essence, strike statutory language and replace it with what it deems as administratively manageable, it will have unfettered authority to regulate hundreds of thousands of sources. In the now famous words of Justice Scalia, it will regulate everything from "Frisbees to flatulence." *Massachusetts v. EPA*, 549 U.S. 497, 558 (2007). As stated in the context of tobacco regulation, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Food and Drug Administration v. Brown & Williamson Tobacco*, 529 U.S. 120, 160 (2000).

CONCLUSION

EPA engaged in an improper legislative function when it rewrote the clear statutory thresholds for PSD and Title V applicability. As explained in detail by Petitioners, EPA had the option of adopting a statutory interpretation that avoided the absurdities. Instead, EPA has elected to adopt the extreme route and now attempts to justify its actions through spurious application of three judicially created legal doctrines. Such action should not receive the Court's imprimatur. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1069 (D.C. Cir. 1998) ("In effect, the [agency] has embarked upon an adventurous transplant operation in response to blemishes in the statute that

could have been alleviated with more modest corrective surgery.").

For the foregoing reasons, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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