No. 12-_____

In The Supreme Court of the United States

SOUTHEASTERN LEGAL FOUNDATION, INC., et al.,

Petitioners,

v.

UNITED STATES 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

PETITION FOR WRIT OF CERTIORARI

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April 19, 2013

[Additional Parties Listed On Inside Cover]

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ADDITIONAL PETITIONERS

U.S. Representative Michele Bachmann; U.S. Representative Joe Barton; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Timber Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and Science and Environmental Policy Project

ADDITIONAL RESPONDENT

Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency

QUESTIONS PRESENTED

Leveraging this Court's opinion in *Massachusetts v. EPA*, 549 U.S. 547 (2007), the Environmental Protection Agency ("EPA") has launched the most expansive regulatory program in the history of the United States, a program that not only regulates greenhouse gas ("GHG") emissions from mobile sources (at issue in *Massachusetts*), but also from thousands (potentially millions) of stationary sources. By EPA's own admission, expanding GHG regulation to stationary sources was contrary to the express terms of the Clean Air Act ("CAA" or "the Act"), was at odds with clear congressional intent, and produced a regulatory program that was "absurd" and "impossible" to administer. The U.S. Court of Appeals for the D.C. Circuit, however, affirmed the totality of EPA's regulatory program, due in large part to that court's view that EPA's legal premises were compelled by *Massachusetts*.

This Petition raises three questions for this Court's consideration:

1. May EPA exert authority over GHG emissions under the Clean Air Act where (1) EPA acknowledged that its interpretation of the Act is fundamentally inconsistent with both the express terms of the Act and the manifest intent of Congress and would lead to results that are "absurd" and "impossible" to administer, (2) there exist reasonable alternative interpretations of the Act that do not create such conflicts and absurd results, and (3) EPA's

QUESTIONS PRESENTED – Continued

action was based on an irrational claim of scientific certainty in the face of ample contradictory and equivocal evidence in the rulemaking record?

2. Having adopted an "absurd" and "impossible" interpretation of the Act, may EPA then rewrite the statutory requirements of the CAA to substitute its own preferred "tailored" regulatory regime for stationary GHG emissions in order to avoid the absurd and impossible results of its own making?

3. Is EPA's administrative "tailoring" of the Act to avoid the absurd results of its own interpretation beyond judicial review on the ground that no party has standing to challenge the assumed administrative power to relax statutory requirements?

PARTIES TO THE PROCEEDINGS

Challenges to 74 Fed. Reg. 66,496 (Dec. 15, 2009) (the "Endangerment Finding"):

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and Science and Environmental Policy Project were petitioners below.

2. Respondent United States Environmental Protection Agency was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association;

PARTIES TO THE PROCEEDINGS – Continued

Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Chamber of Commerce of the United States of America; Ohio Coal Association; Utility Air Regulatory Group; National Association of Manufacturers; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical & Refiners Association; Western States Petroleum Association; State of Alabama; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Barry Smitherman, Chairman, Texas Public Utility Commission; and Portland Cement Association.

4. Petitioner-intervenors below, who are nominal respondents on review, were State of Alaska; Portland Cement Association; State of Nebraska; State of Florida; State of Hawaii; State of Indiana; State of Kentucky; State of Louisiana; Governor Haley Barbour, State of Mississippi; State of North Dakota; State of Oklahoma; State of South Carolina; State of South Dakota; State of Utah; State of Michigan; Glass Packaging Institute; Independent Petroleum Association of America; Louisiana Oil and Gas

PARTIES TO THE PROCEEDINGS – Continued

Association; National Electrical Manufacturers Association; Michigan Manufacturers Association; Indiana Cast Metals Association; Virginia Manufacturers Association; Colorado Association of Commerce and Industry; Tennessee Chamber of Commerce; West Virginia Manufacturers Association; Kansas Chamber of Commerce and Industry; Idaho Association of Commerce and Industry; Pennsylvania Manufacturers Association; Ohio Manufacturers Association; Wisconsin Manufacturers and Commerce; Nebraska Chamber of Commerce and Industry; Arkansas State Chamber of Commerce; Associated Industries of Arkansas; and Mississippi Manufacturers Association.

5. Respondent-intervenors below, who are respondents on review, were Commonwealth of Massachusetts; State of Arizona; State of California; State of Connecticut; State of Delaware; State of Iowa; State of Illinois; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; City of New York; Natural Resources Defense Council; Environmental Defense Fund; Sierra Club; National Wildlife Federation; Conservation Law Foundation, Inc.; Commonwealth of Pennsylvania, Department of Environmental Protection; State of Minnesota; and Wetlands Watch.

PARTIES TO THE PROCEEDINGS – Continued

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

Challenges to 75 Fed. Reg. 17,004 (Apr. 2, 2010) (the "Timing Rule"):

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank

PARTIES TO THE PROCEEDINGS – Continued

Lines; Southeast Trailer Mart, Inc.; and Georgia Agribusiness Council, Inc. were petitioners below.

2. Respondent United States Environmental Protection Agency was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; Clean Air Implementation Project; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Center for Biological Diversity; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Utility Air Regulatory Group; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio Coal Association; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of

PARTIES TO THE PROCEEDINGS – Continued

Independent Businesses; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; and Portland Cement Association.

4. Petitioner-intervenors below, who are nominal respondents on review, were Louisiana Department of Environmental Quality.

5. Respondent-intervenors below, who are respondents on review, were Environmental Defense Fund; Natural Resources Defense Council; Sierra Club; Indiana Wildlife Federation; Michigan Environmental Council; Ohio Environmental Council; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Ohio Coal Association; National Environmental Development Association's Clean Air Project; National Association

PARTIES TO THE PROCEEDINGS – Continued

of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Businesses; National Oilseed Processors Association; National Petrochemical and Refiners Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; Utility Air Regulatory Group; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Company; Alpha Natural Resources, Inc.; and Clean Air Implementation Project.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

PARTIES TO THE PROCEEDINGS – Continued

Challenges to 75 Fed. Reg. 25,324 (May 7, 2010) (the "Light-Duty Vehicle Rule"):

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and Science and Environmental Policy Project were petitioners below.

2. Respondent United States Environmental Protection Agency was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; American Iron and Steel Institute; Ohio Coal Association; Mark R. Levin, Landmark Legal Foundation; Gerdau Ameristeel

PARTIES TO THE PROCEEDINGS – Continued

US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Portland Cement Association; Chamber of Commerce of the United States of America; Utility Air Regulatory Group; National Mining Association; Peabody Energy Company; American Farm Bureau Federation; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Michigan Manufacturers Association; National Association of Home Builders; National Federation of Independent Businesses; National Oilseed Processors Association; National Petrochemical and Refiners Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; American Chemistry Council; American Forest & Paper Association, Inc.; Clean Air Implementation Project; State of Texas; Rick Perry, Governor of Texas; Greg Abbot, Attorney General of Texas; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; and Haley Barbour, Governor of the State of Mississippi.

PARTIES TO THE PROCEEDINGS – Continued

4. Petitioner-intervenors below, who are nominal respondents on review, were State of Georgia; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevorlet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF and Langboard, Inc. – OSB.

5. Respondent-intervenors below, who are respondents on review, were Association of International Automobile Manufacturers; State California; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Massachusetts; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Commonwealth of Pennsylvania; Department of Environmental Protection; City of New York; Natural Resources Defense Council; Natural Resources Defense Fund; Sierra Club; and Alliance of Automobile Manufacturers.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

PARTIES TO THE PROCEEDINGS – Continued

Challenges to 75 Fed. Reg. 31,514 (Jun. 3, 2010) (the "Tailoring Rule"):

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; and Georgia Agribusiness Council, Inc. were petitioners below.

2. Respondent United States Environmental Protection Agency was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; The Ohio Coal Association;

PARTIES TO THE PROCEEDINGS – Continued

American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Center for Biological Diversity; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Alliance of Forest Owners; American Forest & Paper Association; Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska; Utility Air Regulatory Group; Missouri Joint Municipal Electric Utility Commission; Sierra Club; Clean Air Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National

PARTIES TO THE PROCEEDINGS – Continued

Federation of Independent Businesses; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; and State of Texas.

4. Petitioner-intervenors below, who are nominal respondents on review, were National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

5. Respondent-intervenors below, who are respondents on review, were Natural Resources Defense Council; Environmental Defense Fund; Sierra Club; State of New York; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Mexico; State of Oregon; Commonwealth of Pennsylvania Department of Environmental

PARTIES TO THE PROCEEDINGS – Continued

Protection; State of Rhode Island; National Association of Manufacturers; City of New York; Association of International Automobile Manufacturers; and Alliance of Automobile Manufacturers.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

Challenges to 75 Fed. Reg. 49,556 (Aug. 13, 2010) (the "Reconsideration"):

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. –

PARTIES TO THE PROCEEDINGS – Continued

OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; and Georgia Agribusiness Council, Inc. were petitioners below.

2. Respondent United States Environmental Protection Agency was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Peabody Energy Company; Chamber of Commerce of the United States; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Barry Smitherman, Chairman of the Texas Public Utilities Commission; Pacific Legal Foundation; Commonwealth of Virginia; Utility Air Regulatory Group; and The Ohio Coal Association.

4. Petitioner-intervenors below, who are nominal respondents on review, were Chamber of Commerce for the United States of America.

5. Respondent-intervenors below, who are nominal respondents on review, were Natural Resources Defense Council; Conservation Law Foundation, Inc.;

PARTIES TO THE PROCEEDINGS – Continued

Sierra Club; National Wildlife Federation; and Wetlands Watch.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, United States Environmental Protection Agency.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Southeastern Legal Foundation, Inc. ("SLF") is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies. No publicly held corporation has ten percent or greater ownership interest in SLF.

Petitioner The Langdale Company is a Georgia corporation and is the parent company for a diverse group of businesses, some of which are described elsewhere in this Petition. The Langdale Company has no parent companies. No publicly held corporation has ten percent or greater ownership in The Langdale Company.

Petitioner Langdale Forest Products Company is a Georgia corporation and is a leading producer of lumber, utility poles, marine piling, and fence posts. Langdale Forest Products Company is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Forest Products Company.

Petitioner Langdale Farms, LLC is a Georgia Corporation in the business of producing soybeans, peanuts, cotton, pecans, tomatoes, hay, cattle, and fish. Langdale Farms, LLC is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Farms, LLC.

RULE 29.6 DISCLOSURE STATEMENT – Continued

Petitioner Langdale Fuel Company is a Georgia corporation in the business of providing fuel and lubricants for The Langdale Company's needs. Langdale Fuel Company is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Fuel Company.

Petitioner Langdale Chevrolet, Inc. is a Georgia corporation in the business of selling and servicing automobiles. Langdale Chevrolet, Inc. is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Chevrolet, Inc.

Petitioner Langdale Ford Company is a Georgia corporation in the business of selling and servicing automobiles and trucks, including for commercial fleets. Langdale Ford Company is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Ford Company.

Petitioner Langboard, Inc. – OSB is a Georgia corporation in the business of producing oriented strand board, which is used as flooring, roofing, and siding in the home construction industry. Langboard, Inc. – OSB is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has ten percent or greater ownership in Langboard, Inc. – OSB.

RULE 29.6 DISCLOSURE STATEMENT – Continued

Petitioner Langboard, Inc. – MDF is a Georgia corporation in the business of producing medium density fiberboard, which is used, among other things, in the construction of molding, flooring, and furniture. Langboard, Inc. – MDF is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has ten percent or greater ownership in Langboard, Inc. – MDF.

Petitioner Georgia Motor Trucking Association, Inc. is a Georgia corporation and trade association for the trucking industry in Georgia. The mission of the Georgia Motor Trucking Association is to promote: reasonable laws; evenhanded, common-sense administration; equitable and competitive fees and taxes; a market, political and social environment favorable to the trucking industry; and good citizenship among the people and companies of Georgia's trucking industry. It represents more than 400 for-hire carriers, 400 private carriers, and 300 associate members. Georgia Motor Trucking Association, Inc. has no parent corporation. No publicly held corporation has ten percent or greater ownership interest in the Georgia Motor Trucking Association, Inc.

Petitioner Collins Industries, Inc. is a Georgia corporation in the business of transporting building products. Collins Industries, Inc. has no parent corporation. No publicly held corporation has ten percent or greater ownership interest in Collins Industries, Inc.

RULE 29.6 DISCLOSURE STATEMENT – Continued

Petitioner Collins Trucking Company, Inc. is a Georgia corporation in the business of transporting pine and hardwood logs in Georgia. Collins Trucking Company, Inc. is a subsidiary of Collins Industries, Inc. No publicly held corporation has ten percent or greater ownership interest in Collins Trucking Company, Inc.

Petitioner Kennesaw Transportation, Inc. is a Georgia corporation in the business of truckload long-haul transportation of goods across the United States. Kennesaw Transportation, Inc. has no parent company. No publicly held corporation has a ten percent or greater ownership interest in Kennesaw Transportation, Inc.

Petitioner J&M Tank Lines, Inc. is a Georgia corporation in the business of transporting industrial-grade products, such as lime, calcium carbonate, cement, and sand; food-grade products, such as flour; and agricultural-grade products, such as salt. J&M Tank Lines, Inc. operates a fleet of tractors and tanks and has terminals located in Georgia, Alabama, and Texas. J&M Tank Lines, Inc. has no parent company. No publicly held corporation has a ten percent or greater ownership in J&M Tank Lines, Inc.

Petitioner Southeast Trailer Mart, Inc. is a Georgia corporation in the business of selling and servicing semi-trailers. Southeast Trailer Mart, Inc. has no parent company. No publicly held company

RULE 29.6 DISCLOSURE STATEMENT – Continued

has a ten percent or greater ownership in Southeast Trailer Mart, Inc.

Petitioner Georgia Agribusiness Council, Inc. is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship in Georgia. The Georgia Agribusiness Council, Inc. has no parent company. No publicly held company has a ten percent or greater ownership in Georgia Agribusiness Council, Inc.

Petitioner Competitive Enterprise Institute ("CEI") is a non-profit 501(c)(3) corporation organized under the laws of the District of Columbia for the purpose of defending free enterprise, limited government, and the rule of law. It has no parent companies. No publicly held corporation has a ten percent or greater ownership interest in it.

Petitioner FreedomWorks is a non-profit 501(c)(4) corporation organized under the laws of the District of Columbia for the purpose of promoting individual liberty, consumer choice and competition, and has over 870,000 members nationwide. It has no parent companies, and no publicly held corporation has a ten percent or greater ownership interest in it.

RULE 29.6 DISCLOSURE STATEMENT – Continued

Petitioner Science and Environmental Policy Project ("SEPP") is a non-profit 501(c)(3) corporation organized under the laws of the State of Virginia for the purpose of promoting sound and credible science as the basis for regulatory decisions. It has no parent companies, and no publicly held corporation has a ten percent or greater ownership interest in it.

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OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 684 F.3d 102 and reproduced at App. 1-103. The D.C. Circuit's orders denying panel rehearing and rehearing *en banc* are reproduced at App. 104-63.

JURISDICTION

The D.C. Circuit rendered its decision on June 26, 2012. App. 1. The court denied a timely petition for rehearing and rehearing en banc on December 20, 2012. App. 104. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Constitution of the United States provides, in relevant part, that "[t]he judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies to which the United States shall be a party." U.S. Const. art. III, § 2, cl. 1.

The Constitution further provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1.

Relevant provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq*., are reproduced at App. 166-68.

The rules challenged in the proceeding below are found in the Joint Appendix ("JA") of the proceeding below, as follows:

Endangerment Finding: JA00001-0052

Denial of Reconsideration: JA00053-0092

Timing Rule: JA00308-0328

Tailpipe Rule: JA00666-1071

Tailoring Rule: JA01147-1242

STATEMENT OF THE CASE

On April 2, 2007, this Court decided *Massachusetts v. EPA,* 549 U.S. 497 (2007). In that case, this Court held that the "sweeping definition" of "air pollutant" in the Clean Air Act unambiguously includes substances that contribute to climate change (also known as greenhouse gases). 549 U.S. at 528. "Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA [the United States Environmental Protection Agency] has the statutory authority to regulate the emission of such gases from new motor vehicles." 549 U.S. at 532. This Court then went on to hold that "[i]f EPA makes a finding of endangerment, the Clean Air Act *requires* the agency to regulate emissions of the deleterious pollutant from new motor vehicles."

549 U.S. at 533 (emphasis added). Finally, this Court stated that, whatever actions EPA takes, "[w]e hold only that EPA must ground its reasons for action or inaction in the statute." 549 U.S. at 535. This Court reserved the question "whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 534-35.

Ostensibly relying on this Court's opinion in *Massachusetts*, EPA implemented in quick succession four coordinated rules:

- A finding that (1) six greenhouse gases ("GHGs") taken in combination endanger both the public health and the public welfare, and (2) emissions of these GHGs from new motor vehicles contribute to the endangerment (the "Endangerment Finding," JA00001-0052);
- A rule concluding that the phrase "subject to regulation" in the CAA means "each pollutant 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" (the "Timing Rule," JA00308-0328);
- A rule issued jointly with the National Highway Traffic Safety Administration to regulate GHG tailpipe emissions from light-duty vehicles (the "Tailpipe Rule," JA00666-1071); and
- A rule to mitigate (or "tailor") the knock-on effects of the preceding three rules on

> stationary sources, specifically to amend the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for GHG emissions under the PSD and Title V programs of the CAA (the "Tailoring Rule," JA01147-1242).

Although seemingly disjointed in their promulgation, taken together these rules create a comprehensive, integrated program that gives EPA regulatory jurisdiction over a breadth of human activity unparalleled in the history of American governance. Through the Endangerment Finding, the Timing Rule, and the Tailpipe Rule, EPA enacted a regulatory program that covers essentially every human activity that uses any appreciable amount of energy derived from fossil fuels. According to EPA, these three rules triggered a scope of stationary source regulation that, by EPA's own acknowledgement, would make up to six million new stationary "sources" subject to EPA regulation, compared to 14,000 under the pre-GHG rules. Tailoring Rule, JA01147 at 01170. There would be more than 40,000 new permits required under the "Prevention of Significant Deterioration" ("PSD") program, compared to approximately 300 such permits under prior rules. *Id*. The scope of "source" facilities ensnared by this new EPA oversight would be staggering: offices, apartment buildings, retail establishments, government buildings (presumably even courthouses), small farms, and restaurants.

EPA admitted that its reading of the Clean Air Act would create a federal regulatory scope beyond anything Congress intended, would create "absurd consequences," and would be "impossible" to administer. *Id*. at JA01167.

Rather than taking these admissions as a sign that its reading of the Act was off-track, EPA leveraged the very absurdity of its interpretation as the rationale for another rule, the Tailoring Rule. In the Tailoring Rule, EPA "tailored" (that is, effectively rewrote) the Clean Air Act to mitigate the absurdity it had created with the first three rules. Among other things, the Tailoring Rule changed the express numerical thresholds set forth in the Clean Air Act that define "major sources" subject to regulation. EPA replaced the Act's specific numeric standards (100 or 250 tons per year, depending on source) with alternative values that EPA deemed more suitable (75,000 or 100,000 tons per year, depending on whether the source was already regulated). *Id*. at JA01150.[1] By rewriting these numerical thresholds, EPA reduced the number of sources subject to regulation from what would have been six million to a few hundred. *Id*. at JA01170.

Even under the "tailored" version of the Act fabricated by EPA, these rules and those to follow will

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[1] In establishing these new emission thresholds, EPA also invented a new "air pollutant," a "CO_2 – equivalent" or "CO_2e," "the aggregate sum of six greenhouse gases [two of which are not even emitted by automobiles] that constitute the pollutant that will be subject to regulation." Tailoring Rule, JA01147 at 01152.

impose costs on the U.S. economy that are staggering, including billions of dollars in compliance and delay costs.[2] The extension of these rules will cost tens, perhaps hundreds, of billions of dollars.[3]

Petitioners challenged all four of EPA's rules before the D.C. Circuit. Although the challenge was complicated by the fact that EPA chose to segregate the major components of the GHG program into separate rules, Petitioners argued that EPA's four rules are closely interrelated and should be reviewed together and that all four suffered from fatal legal deficiencies, both individually and

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[2] *See, e.g.*, Comments of the Honorable Fred Upton (Chairman, Committee on the Environment and Commerce), U.S. House of Representatives, quoted in Tom Schoenberg, *EPA Greenhouse-Gas Rules Upheld by U.S. Appeals Court*, Bloomberg News (Jun. 26, 2012), http://www.bloomberg.com/news/2012-06-26/epa-greenhouse-gas-rules-upheld-by-u-s-appeals-court.html (last visited Apr. 10, 2013) ("EPA's rules will impose billions of dollars in compliance and delay costs and represent an unprecedented expansion of EPA authority that has the potential to affect virtually every sector of the economy and touch every household.").

[3] United States Senate Committee on Environment and Public Works, Minority Staff Report, *A Look Ahead to EPA Regulations for 2013* (Oct. 2012), http://cnsnews.com/sites/default/files/documents/A_Look_Ahead_to_EPA_Regulations_for_2013.pdf (last visited Apr. 10, 2013) ("These rules will cost more than $300 to $400 billion a year, and significantly raise the price of gas at the pump and energy in the home. It's not just coal plants that will be affected: under the Clean Air Act (CAA), churches, schools, restaurants, hospitals and farms will eventually be regulated.").

collectively.[4] On June 26, 2012, the D.C. Circuit rejected all of Petitioners' challenges. App. 1-103. While the court's opinion contains more than a dozen holdings, those most salient to this petition are:

- Petitioners had not shown that EPA failed to consider the scientific evidence in a "rational manner." *Id*. at 40.
- The Tailpipe Rule survived all challenges by Petitioners: EPA was not obliged to consider the absurd consequences on stationary sources before issuing the rule (*id*. at 49); there was no requirement that EPA's rule "meaningfully address" the problem that supposedly led to its promulgation (*id*. at 53); and EPA was not obliged to consider all costs (including stationary source costs) caused by issuance of the rule. *Id*. at 54.
- Petitioners had "forfeited" any challenge to EPA's regulation of stationary sources under the Title V program. *Id*. at 73-74.
- EPA was correct in concluding that regulation of stationary sources was compelled under the Act when emissions from mobile sources were subject to regulation,

[4] In addition, as part of the underlying administrative proceeding, Petitioners had asked EPA to reconsider the Endangerment Finding. EPA's denial of the Petition for Reconsideration was also the subject of a petition for review to the D.C. Circuit. *See* Denial of Reconsideration, JA00053-0092; Joint Opening Brief of Non-State Petitioners and Supporting Intervenors (Case No. 10-1239, Doc. No. 1341737, Nov. 14, 2011).

and there were no other interpretations available under the Act. *Id*. at 89-90.

- Petitioners lacked standing to challenge the Timing and Tailoring Rules. *Id*. at 96-97.

Petitioners timely filed motions for rehearing, and on December 20, 2012, the court denied those motions, with Judges Brown and Kavanaugh dissenting. App. 104-63.

REASONS FOR GRANTING THE PETITION

As Judge Kavanaugh noted in his dissent from the D.C. Circuit's denial of rehearing en banc, this case "is plainly one of exceptional importance." App. 139. The panel below agreed: "The underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance." *Id*. at 111. Judge Kavanaugh went on to describe the EPA regulations at issue as "the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency" (*id*. at 139), and further stated, "EPA's interpretation will impose enormous costs on tens of thousands of American businesses, with corresponding effects on American jobs and workers; on many American homeowners who move into new homes or plan other home construction projects; and on the U.S. economy more generally." *Id*. at 149. Judge Brown, in her dissent, made a related point: "The real absurdity is that this unprecedented expansion of regulatory control, this epic overreach, may very well

do more damage to the wellbeing of Americans than GHGs could ever do." *Id.* at 127.[5]

Against this backdrop of unprecedented regulatory expansion, which will produce crushing economic burdens and no detectable benefits, certiorari should be granted for four related reasons:

1. The conclusions of the EPA's Endangerment Finding are irrational and cannot support such a dramatic expansion of regulatory authority;

2. The Timing and Tailoring Rules are fundamentally contrary to the express terms of the Clean Air Act and the acknowledged intent of Congress;

3. The D.C. Circuit erred in finding that none of the Petitioners had standing to challenge the Timing and Tailoring Rules; and

4. This case portends an unconstitutional and dangerous shift in the balance of power from the Legislative Branch to the Executive Branch.

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[5] *See also* note 3 to Judge Brown's opinion (citing Joint Reply Brief for Non-State Petitioners and Supporting Intervenors at *1, (Case No. 09-1322, Doc. No. 1341738 (Nov. 14, 2011)): "Nor does [EPA] dispute that the new rules will impose massive burdens on a struggling economy, or that its program of vehicle standards will affect global mean temperatures by no more than *0.01 degree Celsius by 2100*." App. 127 (emphasis in original).

I. EPA's conclusions in the Endangerment Finding are irrational and cannot support such a dramatic expansion of regulatory authority.

In making the Endangerment Finding, EPA simply adopted the conclusions of the Intergovernmental Panel on Climate Change ("IPCC") that not only were human GHG emissions a cause of atmospheric warming in the second half of the twentieth century, but that it is "90-99% certain" that humans caused "most" of that warming.[6] The legal deficiency in this conclusion is that, given the current state of science, it is irrational (and therefore reversible) to make this conclusion with such certitude.

In adopting its conclusion verbatim from the IPCC, EPA claimed to rely on "three lines of evidence":

1. Temperature records;
2. Physical understanding of climate; and
3. Computer models of the climate system, which are based on the claimed physical understanding.

See JA00029.

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[6] According to EPA, "most" of the temperature increase in the second half of the twentieth century is "very likely" due to anthropogenic GHG emissions (JA03343), with "very likely" defined to mean "90 to 99% likely." App. 171, JA03355.

Petitioners demonstrated, with record evidence drawn primarily from the same assessment literature on which EPA relies, that each of these three lines of evidence is so weak and inconclusive that EPA's purported finding of "90-99% certain[ty]" meets the legal standard for vacatur of a rule that is arbitrary and capricious.[7] 42 U.S.C. § 7607(d)(9)(A).

As to the first line of evidence, EPA claimed that the twentieth century had witnessed an "unusual" rise in average global temperature, one that supposedly could not be explained by natural variability, and one that therefore demanded an anthropogenic explanation. The scientific evidence, however, shows otherwise:

- By EPA's own acknowledgement, there has been no global warming in recent years. Brief for Respondents at 54 (Case No. 10-1035, Doc. No. 1324992, Aug. 18, 2011) ("temperatures have not risen steadily over the last 10-15 years").
- During the last documented warming period, the measured warming was regional, not global; the Northern Hemisphere warmed, the tropics had no trend, and Antarctica cooled. App. 172, JA02166; App. 173, JA05120.

[7] This Court has not endorsed any particular view on the complicated issues related to emissions of GHGs and global warming. *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533 n.2 (2011).

- Moreover, the regional warming that did occur in various areas of the globe during the last documented warming period was not anomalous in climate history and was well within the normal range of historical variability. App. 175-76, JA02617 (Arctic); App. 177, JA01283; App. 178, JA05139 (US); JA05263-5264 (merely "plausible" that current temperatures are warmer than the Medieval Warm Period).

- While CO_2 has consistently trended upward, temperatures have not. Rather, there was a thirty-year period of cooling from the 1940s to the late 1970s, followed by twenty-one years of warming, followed by sixteen years of no global trend.[8] Over the second half of the twentieth century, there was no consistent warming. App. 180, JA02587.

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[8] David Rose, *Global warming stopped 16 years ago, reveals Met Office report quietly released . . . and here is the chart to prove it*, MailOnline (UK), Oct. 13, 2012, http://www.dailymail.co.uk/sciencetech/article-2217286/Global-warming-stopped-16-years-ago-reveals-Met-Office-report-quietly-released-chart-prove-it.html (last visited Apr. 10, 2013), depicting data from Met Office Hadley Centre observations datasets, http://www.metoffice.gov.uk/hadobs/hadcrut4/ (last visited Apr. 10, 2013); *see also A Sensitive Matter*, The Economist, Mar. 30, 2013, http://www.economist.com/news/science-and-technology/21574461-climate-may-be-heating-up-less-response-greenhouse-gas-emissions (last visited Apr. 15, 2013).

Therefore, the temperature line of evidence is far too equivocal to lend any logical support to EPA's overall finding to a 90-99% degree of certainty.

There are equally profound deficiencies in EPA's second line of evidence: the physical understanding of climate. If EPA's understanding of the effects of GHGs were correct, the very same causal factors supposedly responsible for anthropogenic global warming would result in certain observable physical indicators. In particular, EPA's physical understanding predicts a distinctive "hot spot" in the tropical upper troposphere. Fig. 1.3, App. 181; Fig. 1.9(f), JA05030. However, that "hot spot" is nowhere to be found. Multiple independent sets of measurements on diverse instrument platforms maintained by independent teams of scientists going back more than 40 years and comprising many millions of measurements all tell a consistent story – there is no hot spot as predicted by EPA's theory. App. 182, JA05118. The very assessment literature on which EPA relies acknowledges that this empirical refutation of EPA's theory of climate is a "potentially serious inconsistency."[9]

[9] United States Climate Change Science Program, Temperature Trends in the Lower Atmosphere, Steps for Understanding and Reconciling Differences, Synthesis and Assessment Product 1.1, *Temperature Trends in the Lower Atmosphere, Steps for Reconciling and Understanding Differences*, http://downloads.globalchange.gov/sap/sap1-1/sap1-1-final-all.pdf (last visited Apr. 10, 2013).

Thus, EPA's second line of evidence does not support its high-certainty finding.

The validity of the third line of evidence, the climate models on which EPA relies, has been discredited by a panoply of failed predictions. Most notably, these models erroneously predicted steadily increasing global average surface temperature with increasing GHG concentrations. App. 183, JA02584. Numerous other failed predictions can be amassed.[10] Even IPCC's lead scientists have acknowledged that the models and physical understanding on which they are based are hopelessly inadequate: "The fact is that we can't account for the lack of warming at the moment and it is a travesty that we can't." JA04309. *See Sierra Club v. Costle*, 657 F.2d 298, 333 (D.C. Cir. 1981), *rev'd on other grounds*, 463 U.S. 680 (1983) (while computer modeling "is a useful and often essential tool," an agency "must sufficiently explain the assumptions and methodology used in preparing the model" and must "*provide a complete analytic defense of its model (and) respond to each objection with a*

[10] For example, IPCC AR4 WG1 § 8.4.7 explains that "serious systematic errors in both the simulated mean climate and the natural variability persist" in attempts to model the El Niño Southern Oscillation. Intergovernmental Panel on Climate Change, *Fourth Assessment Report: Climate Change 2007, Working Group I: The Physical Science Basis*, 8.4.7 El Nino – Southern Oscillation, http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch8s8-4-7.html (last visited Apr. 10, 2013).

reasoned presentation.") (emphasis added) (internal quotation marks omitted). There must be "a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results." *Id. See also Owner-Operators Independent Drivers Ass'n v. FMCSA*, 494 F.3d 188, 203-05 (D.C. Cir. 2007).

In short, EPA's three lines of evidence are either weak and equivocal or outright invalid: There was no consistent trend of "global" warming in the second half of the twentieth century, nor any global warming in the last 16 years, and the regional warming that did occur was not anomalous. EPA's supposed physical understanding of GHG effects in the atmosphere is contradicted by copious empirical evidence, and the models on which EPA relies have proven to be wrong in many of their most important predictions, including current temperatures. As a result, it was irrational, arbitrary, and capricious for EPA to conclude that it was "90-99% certain" that, to the extent there has been any global warming in the second half of the twentieth century, man is the cause of most of it.[11]

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[11] In a related challenge, Petitioners showed that not only is EPA's claim of near certainty irrational, EPA's proposed remedy is ineffective and pointless. EPA admitted that the rule will, at most, reduce global temperatures by an immeasurable 0.006-0.015ºC over the next century and will reduce global sea rise by an equally undetectable 0.06-0.14 centimeters. Tailpipe Rule, JA00666 at 00838. Petitioners argued that the Tailpipe Rule was therefore arbitrary and capricious for several reasons, including, first, the self-evident conclusion that any rule that

(Continued on following page)

An immense expansion of the administrative state – of which these rules are but the first step[12] – thus rests upon an arbitrary and irrational foundation. But the D.C. Circuit deferred entirely and thus improperly to EPA on the "science" issues. While Petitioners acknowledge that some deference to the agency's judgment about scientific matters is appropriate, it is also true that deference, like scrutiny, can be carried too far. The D.C. Circuit gave "extreme" deference to EPA's Endangerment Finding. App. 35.

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has no discernible effect on the problem it addresses is arbitrary by definition, and second, it is irrational for EPA to argue that it is pursuing a solution "one step at a time," or that "every little bit helps," since the impossibility of empirical verification means that whether the rule has actually produced a "step" is inherently unknowable. Joint Opening Brief of Non-State Petitioners and Supporting Intervenors (Case No. 10-1094, Doc. No. 1311526, Jun. 3, 2011).

[12] Since launching the rules at issue here, EPA has promulgated GHG tailpipe standards for heavy-duty vehicles. Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles; Final Rule, 76 Fed. Reg. 57,105 (Sep. 15, 2011). EPA has also published a proposed rule establishing New Source Performance Standards for power plants, citing the Section 202 mobile source Endangerment Finding as legal justification. Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units; Proposed Rule, 77 Fed. Reg. 22,391, 22,413 (Apr. 13, 2012). The Endangerment Finding has also prompted regulatory proceedings under other federal laws, such as the National Environmental Policy Act, State and regional rulemakings, and private tort litigation. *See, e.g., WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012) (challenge to coal development leases in Powder River Basin based on alleged global warming effects), *appeal docketed*, No. 12-5300 (D.C. Cir. Sep. 26, 2012).

"Extreme" deference on scientific issues derogates the role of the courts, replacing judicial review, a key restraint on the aggrandizing tendencies of the administrative state, with nothing more than a rubber stamp. It trains agencies to camouflage their policy preferences as "science" to shield them from judicial review. *See* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Col. L. Rev. 1613 (1995); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733 (2011).

The D.C. Circuit was plainly reluctant to take on any meaningful review of the science behind the Endangerment Finding. Not one of Petitioners' actual science arguments was even mentioned by the court in its opinion. Indeed, it is as if Petitioners had not raised any questions about the underlying science at all. The specific defects in EPA's three lines of evidence identified by Petitioners, and the irrationality of EPA's basing such a high certainty finding on such weak premises, should have received a "searching and careful" evaluation from the court, instead of a free pass. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The court should have taken a hard look at the temperature records, the empirical evidence, and the validity of the models to determine whether EPA's claims of near-certainty could survive even a deferential standard of review.

II. The Timing and Tailoring Rules are fundamentally contrary to the express terms of the Clean Air Act and the acknowledged intent of Congress.

Even without EPA's irrational certitude, the core analytical and legal deficiency of EPA's entire GHG program arises from the combined effect of the Timing and Tailoring Rules. Through these two rules, EPA uses a convoluted, strained, and implausible reading of the Clean Air Act to conclude, despite substantial evidence to the contrary, that Congress actually managed to conceal a vast multi-billion dollar regulatory program in several previously unnoticed subparagraphs of the Act. In essence, EPA's GHG program depends upon the assumption that Congress actually succeeded in hiding an elephant in a mouse hole.

The path to EPA's outcome is tortured. At the outset, EPA used the Timing Rule to invoke jurisdiction over GHG emissions from stationary sources on the grounds that any substance regulated under any provision of the Clean Air Act must automatically and inevitably be regulated under all provisions of the Clean Air Act. That interpretation, however, produced a scope of regulation that even EPA had to admit was "absurd" and administratively "impossible." So, having launched an absurd and impossible regulatory program under its own interpretation of the CAA, EPA used the Tailoring Rule to rewrite the statute in order to dial back the self-inflicted absurdity to a

level that the agency judged would be more administratively and politically tolerable.

This misguided regulatory framework stands on two flimsy footings: first, a reading of the Clean Air Act that was contrary to its express terms and failed to comport with ordinary rules of statutory interpretation, and, second, an overly literal reading of this Court's holding in *Massachusetts*. Neither footing can bear the weight placed upon it.

1. The first error is that the regulatory program promulgated by EPA is inconsistent with the express terms of the Clean Air Act. Indeed, EPA conceded that it was ignoring congressional intent and purpose: "[T]hese results are not consistent with – and, indeed, undermine – congressional purposes set forth for PSD and title V provisions." Tailoring Rule, JA01147 at 01181. EPA further concluded that "applying PSD requirements literally to GHG sources at the present time . . . would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id*. at 01189.

In this respect, at least, EPA was right: EPA's program to regulate stationary sources of GHGs cannot be reconciled with a proper reading of the Act. EPA erred in concluding that it could fix this problem by "tailoring" the provisions of the Act itself. In point of fact, no "tailoring" can fix the underlying problem: GHGs cannot be "air pollutants" for stationary sources because the statutory mechanisms for regulating emissions of air pollutants from stationary

sources cannot be lawfully or logically applied to GHG emissions:

- PSD provisions apply only to areas designated under Clean Air Act § 107(d), 42 U.S.C. § 7407(d) (App. 164), that meet ambient air quality standards. There are no ambient air quality standards for GHGs, nor can there be because the regionally focused PSD provisions cannot logically be applied to what EPA contends are globally "well-mixed" pollutants like GHGs.

- Congress established the 100/250 tons per year thresholds for those "major sources" in the PSD program requiring permits on the expectation that the permitting program would apply to a "relatively small number of large industrial sources." Tailoring Rule, JA01147 at 01189. The number of sources that would be subject to regulation under the EPA's GHG program, however, is anything but a "relatively small number."

- Congress expressly specified an emission threshold for sources that must obtain a Title V permit at 100 tons per year. Clean Air Act section 501, 42 U.S.C. § 7661, App. 167. Even on Savile Row, no one could conceivably "tailor" 100 to mean 75,000. Beyond setting an express numerical threshold, Congress expressly forbade EPA to deviate from that threshold. Clean Air Act § 502(a), 42 U.S.C.

> § 7661a, App. 167-68. But by EPA's own admission, these mandatory statutory thresholds (100 or 250 tons per year), with no possibility of exception, lead to absurd results when applied to emissions of GHGs from stationary sources. At these levels, more than six million sources would suddenly be subject to regulation,[13] an interpretation all acknowledge is far outside the bounds of congressional intent.

For both the PSD and Title V programs, EPA admits that regulating GHGs at the statutory thresholds would create absurd and impossible regulatory requirements (Tailoring Rule, JA01147 at 01150-01151), an admission Petitioners contend invalidates the statutory construction that produced this result.

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[13] The D.C. Circuit held that "none of Petitioners' alternative interpretations applies to Title V" and therefore Petitioners "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V." App. 73-74. It is true that Petitioners did offer three plausible interpretations of the CAA that would not produce EPA's "absurd" results when applied to the PSD program. However, Petitioners never limited their arguments solely to PSD. Petitioners specifically argued (1) that Congress never envisaged that the Title V program would be applied to GHGs (Joint Reply Brief of Non-State Petitioners and Supporting Intervenors at 1 (Case No. 10-1131, Doc. No. 1342386, Nov. 16, 2011)), (2) that regulating GHGs as "air pollutants" for stationary sources would unlawfully subject millions of sources to Title V requirements (*id*. at 27), (3) that Petitioners' Title V arguments were timely made (*id*. at 31), and (4) that the Tailoring Rule violated the prohibition in Section 502(a) on exempting major sources from Title V. *Id*. at 35.

But instead of drawing the obvious conclusion that its reading of the Act was wrong, EPA acted to "tailor" the "inconvenient truth" out of existence.

EPA justified this regulatory frolic and detour by arguing that there was no other possible interpretation of the Act that would permit it to do otherwise. But the Clean Air Act does not compel its own repudiation, and there are reasonable alternative interpretations that do no violence to the Act's terms.

- For example, the Clean Air Act's definition of a "major emitting facility" in the PSD program logically means a facility that emits more than the threshold quantity of pollutants *regulated under that program*. In other words, the term "air pollutant" for the PSD program means a "pollutant" for which there is a "National Ambient Air Quality Standard" ("NAAQS"). Joint Opening Brief of Non-State Petitioners and Supporting Intervenors at 22 (Case No. 10-1083, Doc. No. 1314204, Jun. 20, 2011).

- As another example, Petitioners showed that the term "air pollutant," whatever its meaning for mobile sources, should have a meaning for PSD purposes consistent with the entirety of the PSD program. For example, under Section 165(a) of the Act (preconstruction requirements) (42 U.S.C. § 7475, App. 166), permits are required only for major sources in "any area to which this part applies." "[T]his part" applies to *areas* that are in

> attainment (or unclassified) for the NAAQS. Clean Air Act § 161, 42 U.S.C. § 7471, App. 165. In other words, the PSD provisions make no sense except in terms of the attainment/nonattainment status of specific areas, for which a NAAQS has been established for specific criteria pollutants.

There are other reasonable interpretations of the phrase "air pollutant" and other permissible constructions of the stationary source provisions that similarly do not lead to absurd, impossible outcomes. The key point is that EPA was faced with several possible interpretations of the term "air pollutant" in the context of stationary sources, yet chose the only interpretation that led to absurd results, was concededly contrary to clear congressional intent, and radically expanded EPA's regulatory authority. That, Petitioners argued, rendered the interpretation unlawful.

2. The second deficiency is that the havoc wreaked on the Clean Air Act arose from an overly literal, and erroneous, reading of this Court's holding in *Massachusetts*. This Court held in *Massachusetts* that GHGs met the "capacious" definition of "air pollutant" for purposes of emissions from mobile sources. 549 U.S. at 532. What was not before this Court and what the Court did not decide in *Massachusetts* was whether the definition of "air pollutant" encompassed GHGs from stationary sources under the PSD and Title V permitting programs.

Nevertheless, EPA read the Court's holding as a mandate to expand the regulation of GHGs from mobile sources to stationary sources. In issuing the Timing Rule, EPA essentially concluded that this Court's holding in *Massachusetts* established an "in-for-one/in-for-all" definition of "air pollutant," such that if GHGs are pollutants subject to regulation for mobile sources, GHGs must be *ipso facto* an air pollutant everywhere else in the Act, no matter how absurd that outcome. "We do not believe that this term is ambiguous with respect to the need to cover GHG sources under either the PSD or title V program." Tailoring Rule, JA01147 at 01182 n.31. This enormously consequential result ultimately rests on a reading of the definition of "air pollutant" so broad that even air itself is an "air pollutant." Such an incontinent meaning cannot be read as a mandate to override the meticulous statutory architecture of stationary source regulation.

This Court's decision in *Massachusetts* did not compel EPA to apply the same definition of "air pollutant" everywhere the term occurred in the Act. Nor did it compel EPA to read "subject to regulation" to require regulations that are obviously contrary to congressional intent, or to rewrite the statute to provide more convenient terms. It is axiomatic that any regulation "contrary to clear congressional intent" is unlawful. *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 843 n.9 (1984). If applying the *Massachusetts* definition of "air pollutant" to stationary sources leads to an outcome "contrary to clear congressional

intent," EPA should have opted for another permissible interpretation of the statute. This Court directed EPA to comply with the statute, not to "tailor" it.

EPA's error is similar to that presented in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980), where EPA had defined "major emitting facility" so broadly that it had no choice but to "tailor" the definition to exempt certain sources from PSD review. There, the D.C. Circuit held that EPA had no authority to "tailor" the statute to exempt certain sources, and EPA's only lawful choice was to interpret the statute to avoid the overbreadth in the first place. *Id.* at 353, 356-57.

It is relatively common in complex statutes for the same term to apply differently in different contexts. *See, e.g.*, *Environmental Defense v. Duke Energy*, 549 U.S. 561, 574 (2007) ("the natural presumption that identical words used in different parts of the same act are intended to have the same meaning is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."). Nothing in *Massachusetts* compelled EPA to disregard this ordinary rule of statutory interpretation.[14]

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[14] Not even EPA thinks that the definition of "air pollutant" in the Act should be read with mindless literalism. EPA itself admits that the definition of "air pollutant" (namely "any physical

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Fundamentally, if an agency's interpretation of a statute or of a controlling court decision produces an absurd outcome, the first and most obvious conclusion is that the agency, not Congress and not this Court, has gone awry. That should have been all the more apparent in this case. Here, the putative absurdity arose not from anything in the Clean Air Act itself. The stationary source provisions of the Act have operated just fine for several decades. Nor did this Court create the absurdity in *Massachusetts*, where the Court made no determination respecting stationary sources, since the issue was not before the Court. Rather, the absurdity arose only from the way EPA chose to read the Act. As Judge Kavanaugh said, the ultimate clincher in this case is one simple point: EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text.

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or chemical substance emitted into air") cannot possibly be taken literally; doing so, for example, would require PSD preconstruction permits for substances that are utterly harmless and not regulated under the Clean Air Act at all. For that reason, even EPA applies a limiting construction to the term "air pollutant," meaning not "*any* physical or chemical substance emitted into air," but only those substances "*regulated under the Act*." *See* D.C. Circuit Court opinion, App. 69-70. Therefore, it is beyond dispute that some kind of context-dependent reading to the term "air pollutant" must be applied. The issue is how far the agency may go in applying context. EPA ignores a rational approach to context and necessarily trips over itself, ending up with absurd results.

III. The D.C. Circuit erred in concluding that none of the Petitioners had standing to challenge the Timing and Tailoring Rules.

To appreciate the error of the holding that Petitioners lacked standing to challenge the Timing and Tailoring Rules, it is useful to consider how EPA partitioned its GHG rules to immunize this massive regulatory program from judicial review. The ultimate impact on stationary sources arose not directly from the Endangerment Finding or the Tailpipe Rule's regulation of mobile sources, but from the follow-on effects of the Timing Rule (which supposedly triggered the regulation of emissions from stationary sources) and the Tailoring Rule (which used the "absurdity" rationale to permit the exercise of regulatory jurisdiction far beyond congressional authorization). But EPA asserted that no one had standing to challenge these rules, even though these rules provided the mechanism by which Petitioners' harms arose. Specifically, EPA asserted that no one was aggrieved by the Timing Rule, since all it did was restate a long-standing interpretation (long-since past challenging); and that no one was aggrieved by the Tailoring Rule, since all it did was relax otherwise applicable standards, and no one can possibly be harmed by the relaxation of regulatory obligations that would otherwise apply. Final Brief for Respondents at 76-96 (Case No. 10-1083, Doc. No. 1347529, Dec. 14, 2011). In sum, EPA claimed that it could launch the most massive regulatory program in American history, imposing billions of dollars in compliance costs

on the U.S. economy and burdening millions of American citizens in the process, and no one had standing to challenge the program.

This argument should not have detained the D.C. Circuit, but the court nevertheless held that none of the Petitioners had standing to challenge the Timing and Tailoring Rules. The court held that Petitioners had failed to establish an "injury in fact" resulting from these rules. App. 96. In support of this conclusion, the court stated that Petitioners' harms arise "not because of anything EPA did in the Timing and Tailoring Rules, but by the automatic operation of the statute." *Id.* at 96-97. "Indeed," the court continued, "the Timing and Tailoring Rules actually mitigate Petitioners' purported injuries." *Id*. at 97.

This error demands certiorari review by this Court for several reasons. First, the so-called "automatic operation of the statute" is not automatic at all – Petitioners' harms result instead from EPA's deliberate choice to read the statute to yield absurd results that are contrary to congressional intent instead of a perfectly natural reading that does not. Second, the court's holding ensured an inadequate piecemeal review of EPA's GHG program, allowing EPA to evade scrutiny of that program through a justiciability shell game.

Finally, the decision below on standing conflicts with the precedents of this Court. The D.C. Circuit's conclusion on standing assumed that Petitioners had already lost on their challenges to the other rules. In essence, the court held that because it found no basis

for overturning the Endangerment Finding or Tailpipe Rule, Petitioners had no standing to challenge a relaxation of the resulting regulatory requirements for stationary sources. Under clear precedent from this Court, though, this is not the proper test. There are only three prerequisites for standing: An injury in fact that is concrete and actual; causation – a fairly traceable connection between the injury and the conduct of the defendant; and redressability – a likelihood that the requested relief will redress the alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Petitioners undeniably satisfy these tests when EPA's GHG program is considered as a whole. The court erred by artificially segmenting its analysis of the legality of the program into separate components and by deciding the merits of challenges to some components before considering petitioners' standing to challenge others. But the components are inextricably linked – a positive Endangerment Finding inevitably led to mobile source regulation under the Tailpipe Rule, which (via the Timing Rule) inevitably led to stationary source regulation. That being so, the court's determination on the merits of the Endangerment Finding and the Tailpipe Rule cannot control standing to challenge the inevitable consequences of those results for stationary sources. In essence, the court erroneously allowed a merits determination to control standing. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91-92 (1998) (whether a cause of action exists goes to the merits of the case and not standing). The D.C. Circuit's approach improperly denied effective judicial review of the full program.

IV. This case portends an unconstitutional and dangerous shift in the balance of power from the Legislative Branch to the Executive Branch.

Both the scope and the method of EPA's dramatic expansion of its regulatory authority warrant certiorari review because they implicate fundamental issues of governance and separation of powers. Judge Kavanaugh captured the point in his dissent from the Order denying rehearing:

> [I]f this case stands as a precedent that influences other agency decisionmaking, the future consequences likewise could be significant: Agencies presumably could adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness. Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process.

App. 144-45. Agencies that can re-write or ignore statutes that stand in their way are essentially unconstrained by law, resulting in an unbridled rearrangement of power contrary to the constitutional order.

As Judge Kavanaugh correctly noted, the shift in the balance of power authorized by the D.C. Circuit goes far beyond this one case. Congress did not

authorize EPA to go forth and do good – Congress specified particular areas where it deemed regulation to be warranted. Regulating GHG emissions from stationary sources was obviously not one of them, with even EPA recognizing the "absurd" results that such regulation would produce. Yet the D.C. Circuit has validated an assertion of agency power that clearly goes well beyond the congressional delegation of administrative authority. Such an outcome portends dangers to the American system of government that dwarf the serious implications under the Clean Air Act.

Both EPA and the D.C. Circuit point to this Court's opinion in *Massachusetts* as somehow mandating this outcome. This petition, therefore, presents the opportunity for this Court to specify exactly what *Massachusetts* did and did not authorize with respect to EPA's regulation of GHGs under the Clean Air Act. That clarification will likely entail revisiting the application of *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), to the regulation of GHGs under the CAA. In *Massachusetts*, this Court distinguished *Brown & Williamson* in affirming EPA's power to regulate GHG emissions from mobile sources under the CAA for two reasons: (1) jurisdiction over GHGs would not lead to "extreme measures" (549 U.S. at 530) and was not counterintuitive (*id*. at 531); and (2) there was no unbroken series of congressional enactments incompatible with EPA authority to regulate GHGs under the Act. *Id*.

However, in light of EPA's GHG program as promulgated since *Massachusetts*, both reasons for distinguishing *Brown & Williamson* should be revisited with a fresh perspective. EPA has asserted that *Massachusetts* forced it to implement measures that even EPA acknowledges are "extreme" (or in EPA's exact parlance, "absurd" and "impossible") and that are overtly contrary to how Congress intended the Clean Air Act to operate for stationary sources. In addition, the backdrop of congressional action and inaction on GHGs for more than twenty years leads to the inescapable conclusion that Congress did not intend to grant EPA authority to regulate GHGs, particularly for stationary sources. As pointed out in the dissenting opinions of Judges Kavanaugh and Brown, over the past several years, Congress has repeatedly considered and refused to enact precisely the kinds of GHG controls at issue here. In 2009, the House of Representatives passed a global warming bill, supported by the President, which failed in the Senate. Numerous other bills have been introduced over the years, but none has been passed into law. *See* App. 161 n.5. In drafting the 1990 Clean Air Act Amendments, Congress considered, and expressly rejected, proposals authorizing EPA to regulate GHGs under the CAA. By one estimate, Members of Congress proposed more than 400 bills concerning GHGs between 1990 and 2009. App. 119.

In other words, the history of congressional action and inaction, when viewed in light of the absurd

consequences of applying GHG emission limitations to stationary sources, makes it abundantly clear that Congress did not intend for EPA to have the authority to regulate emissions of GHGs from stationary sources. In this broader context, as opposed to the narrow definitional reading of the Act in *Massachusetts*, the applicability of *Brown & Williamson* is clear.

In essence, there are two analytical directions presented by current circumstances. First, if this Court was correct that the holding in *Massachusetts* would not produce counterintuitive and extreme consequences, then EPA and the D.C. Circuit misinterpreted *Massachusetts* and had no lawful basis to approve regulations with plainly extreme and counterintuitive consequences. Alternatively, if EPA and the D.C. Circuit were correct that the regulation of GHG emissions from stationary sources was compelled by the holding in *Massachusetts*, then this Court was wrong in assuming that no counterintuitive, extreme measures would result from its decision.[15] In either event, the profound importance of

[15] Both Judge Brown and Judge Kavanaugh identified this tension between the course of EPA's regulatory onslaught and the assumption in *Massachusetts* that there would be no extreme or counterintuitive consequences as a result of the decision. As Judge Brown said, "[B]ound as I am by *Massachusetts*, I reluctantly concur with the Panel's determination that EPA may regulate GHGs in tailpipe emissions. But I do not choose to go quietly. Because the most significant regulations of recent memory rest on the shakiest of foundations, Part I of this

(Continued on following page)

this case, and the enormous and unprecedented regulatory burdens inflicted by the rules at issue, provide the strongest grounds for certiorari review. This case presents an exceptionally important opportunity for this Court to revisit the question of whether GHGs should be regulated under the Clean Air Act at all and to clarify that nothing in *Massachusetts*, as decided then or as clarified in this matter, mandates an unconstitutional shift of power from Congress to EPA.

If the program here is allowed to stand, it will validate a rationale that creates an avenue for regulatory authority unprecedented in American history. That cannot possibly be what this Court envisioned in *Massachusetts,* so it is now appropriate for this Court to grant the petition to clarify the boundaries between legislative and executive authority.

Admittedly, the arguments raised by Petitioners suggest that under the only reasonable interpretation of the CAA, emissions of GHGs from stationary sources could be subject to no regulation at the present time. And it would leave in place the messy stalemate between a Congress that has declined to act and an executive agency driven to address what it believes to be an important problem. But such

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statement engages *Massachusetts*'s interpretive shortcomings in the hope that either Court or Congress will restore order to the CAA." App. 113.

dilemmas inhere in the nature of the American system of government.

> [W]hile a government of opposite and rival interests may sometimes inhibit the smooth functioning of administration . . . [t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. . . . [Global warming] may be a pressing national problem, but a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse.

Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138, 3157 (2010) (internal quotation marks omitted).

CONCLUSION

In petitioning for a writ of certiorari in *Massachusetts*, the State of Massachusetts asserted that there can be no reasonable debate about the importance of climate change. In fact, there can be such a debate. As shown above, EPA's certitude is irrational, the costs of the GHG regulations are immense, and the benefits of any regulatory program are acknowledged to be so *de minimis* that they are literally undetectable. Any program with all costs and no benefits is certainly worthy of debate.

There should be no debate, however, that our country must be governed with a respect for constitutional

separation of powers, congressional prerogatives, and limitations on executive usurpations of legislative power. These principles are of the greatest importance for the jurisprudence and role of this Court. The rules at issue in this case pose a momentous threat to those principles.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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