NO. 12-1146

IN THE
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether EPA correctly interprets *Massachusetts v. EPA* as authorizing EPA to regulate GHG emissions under any CAA program that gives EPA regulatory power over "air pollutants," provided that EPA makes the applicable predicate endangerment finding, regardless of whether, for the particular program, Congress did not intend to regulate GHGs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

CODE OF FEDERAL REGULATIONS:

FEDERAL REGISTER NOTICES:

OTHER AUTHORITIES:

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INTEREST OF *AMICUS CURIAE*

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

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

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for any party authored any part of this brief, and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. At least ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of WLF's intent to file. All parties have consented to the filing of this brief; the consents have been lodged with the Clerk.

WLF submits this brief in support of Utility Air Regulatory Group's (UARG) Petition for Writ of Certiorari following the lower court's dismissal of UARG's petition to review EPA's so-called "Timing" and "Tailoring" rules, but urges the Court to grant review in response to any of the numerous Petitions that have been or will be filed with respect to any of the rules at issue, to the extent that doing so provides an appropriate vehicle for limiting the applicability of *Massachusetts*.

STATEMENT OF THE CASE

On remand from this Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA adopted four rules that are the first steps in a broader EPA program of regulating GHGs as "air pollutants" under the CAA. EPA first issued the "Endangerment Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009), in which EPA found that GHG emissions from light-duty vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger the public health and welfare. In the "Auto Rule," 75 Fed. Reg. 25,324 (May 7, 2010), EPA promulgated greenhouse gas (GHG) emission standards for light-duty vehicles. In the "Tailoring Rule," 75 Fed. Reg. 31,514 (Jun. 3, 2010), EPA explained that, as it interpreted the CAA, regulation of vehicle GHG emissions automatically made GHGs subject to regulation under two stationary source permitting programs, the "Prevention of Significant Deterioration" (or "PSD") preconstruction permit program and the Title V operating permit program. *Id.* at 31,521-22.

EPA concluded that regulating GHGs under these two programs would produce an absurd result because applying the statutory thresholds for obtaining a permit to GHG-emitting sources would

result in so many sources requiring permits as to overwhelm the programs. *Id.* at 31,516. As a result, EPA unilaterally increased the statutory thresholds—as applied to GHGs but not to other air pollutants—from 100 or 250 tons per year under the PSD program (depending on the type of facility) and from 100 tons per year under the Title V program to 75,000 or 100,000 tons per year (depending on when the facility applied for the permit and whether it was a new or modified facility). *Id.* And under the "Timing Rule," 75 Fed. Reg. 17,004 (Apr. 2, 2010), EPA determined that GHGs would become subject to regulation under the two programs as of January 2, 2011.

Many states, businesses, and business associations from across the economic spectrum petitioned for review of these rules. A panel of the United States Court of Appeals for the D.C. Circuit either dismissed or denied all of the petitions. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). On December 20, 2012, the D.C. Circuit denied rehearing en banc, with Judges Kavanaugh and Brown dissenting. UARG has petitioned this Court for a Writ of Certiorari as to those portions of the D.C. Circuit's opinion dismissing its petition for review of the Tailoring Rule and Timing Rule. Both the Commonwealth of Virginia (No. 12-1152) and the Pacific Legal Foundation (No. 12-1153) have also filed Petitions, and WLF understands that additional Petitions will soon be filed.

REASONS FOR GRANTING THE PETITION

The rules challenged below are merely EPA's first foray into GHG regulation. As demonstrated below, EPA has embarked on a much broader program of GHG regulation that will eventually touch virtually all sectors of the economy. This brief presents the Court with a synopsis of GHG regulation that EPA has undertaken, or has been asked to undertake, following *Massachusetts*. The purpose of this synopsis is to provide the Court with a broader context in which to view the important issues raised by the Petition (and other Petitions). Based on a misreading of *Massachusetts*, EPA has initiated a sweeping regulatory program that will have far-ranging effects. EPA believes that because *Massachusetts* held that GHGs are "air pollutants" under the CAA's definitional section, EPA has the power and the obligation to regulate GHGs, upon making the predicate endangerment finding, under any of the CAA's myriad programs.

But the Court in *Massachusetts* only addressed whether EPA had authority to regulate GHG emissions under the 42 U.S.C. § 7521 program governing the emission of air pollutants from new motor vehicles. *Massachusetts*, 549 U.S. at 505. *Massachusetts* did not hold that EPA has authority to regulate GHGs under any other provision of the CAA without regard to Congress's intent as to the ambit of that particular provision. And *Massachusetts* certainly cannot be read as sanctioning the Tailoring Rule, in which EPA rewrote numerical regulatory thresholds plainly set forth in statutory text in order to enable EPA regulation of GHGs under statutory programs never designed for that purpose. As EPA GHG regulation now begins to spread to other areas

of the economy, this Court must use the opportunity presented to confine *Massachusetts* to its intended scope. Accordingly, WLF urges the Court to grant the Petition to clarify the scope of *Massachusetts* as it relates to EPA's authority to regulate GHGs.

I. THIS CASE IS EXCEPTIONALLY IMPORTANT BECAUSE EPA IS CLAIMING THAT *MASSACHUSETTS* GIVES IT SWEEPING POWERS TO REGULATE GHG EMISSIONS IN NEARLY EVERY CORNER OF THE ECONOMY.

EPA regulation of GHG emissions now threatens to go viral. In *Massachusetts*, this Court resolved the question "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles" in the affirmative. *Massachusetts*, 549 U.S. at 505. EPA has now seized on that decision to claim the authority—and indeed the obligation—to regulate GHG emissions not just from motor vehicles, and not just from large industrial sources, and not even just from the more than six million buildings and small facilities that were at issue in the case below, but from virtually all sectors of the economy—from trains to planes to ships and other watercraft, from farms and mines to the very broad category of "non-road engines," including "outdoor power equipment, recreational vehicles, farm and construction machinery, lawn and garden equipment, logging equipment and marine vessels." EPA *Memorandum in Response to Petitions Regarding Greenhouse Gas and Other Emissions from Marine and Nonroad*

Engines and Vehicles at 3.[2]

EPA's sweeping claim of authority is based on a simple calculus: (1) *Massachusetts* held that GHGs meet the definition of "air pollutants" under 42 U.S.C. § 7602(g), therefore (2) GHGs are air pollutants for all purposes under the CAA, and hence (3) EPA is authorized or obligated to regulate GHGs under the numerous and diverse CAA programs that govern air pollutant emissions wherever occurring throughout the economy, provided that EPA makes the requisite finding of endangerment. *See* 77 Fed. Reg. 22,392, 22,397 (Apr. 13, 2012) ("[*Massachusetts*] clarified that the authorities and requirements of the CAA … apply to GHG emissions.").

That EPA's calculus should produce such sweeping impacts should not be surprising. Because fossil fuels provide more than eighty percent of the Nation's energy,[3] and because carbon dioxide (CO_2), the principal GHG, is the inevitable byproduct of combusting fossil fuels (oxidizing carbon), the power to regulate GHGs is the power to regulate nearly everything.

Congressman John Dingell, former Chairman of the House Committee on Energy and Commerce and widely acknowledged as the principal author of the

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[2] EPA, *Memorandum in Response to Petitions Regarding Greenhouse Gas and Other Emissions from Marine and Nonroad Engines and Vehicles,* available at: http://www.eenews.net/assets/2012/06/18/document_pm_06.pdf (last visited Apr. 15, 2013).

[3] U.S. Energy Information Administration, *EIA's Energy in Brief: What are the major sources and users of energy in the United States*?, available at: http://www.eia.gov/energy_in_brief/article/major_energy_sources_and_users.cfm (last updated May 18, 2012).

1990 CAA Amendments, testified that regulating GHGs under the CAA would produce a "glorious mess."[4] Referring to the panoply of regulations that might result under EPA's reading of *Massachusetts*, Chairman Dingell said "[i]t is going to affect potentially every industry and every emitter and every person in this country…[and will create] a wonderfully complex world which has the potential for shutting down or slowing down virtually all industry and all economic activity and growth."[5] And as EPA itself stated in considering GHG regulation following *Massachusetts*, "[t]he potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land." 73 Fed. Reg. 44,354, 44,355 (Jul. 30, 2008).

The only thing now holding back this glorious mess is that EPA does not have the resources to promulgate regulations in every area of the economy all at once. As a result, as described below, EPA has decided to implement GHG regulation on a schedule that reflects—not Congress' priorities as set forth in the CAA or other statutory text—but the Agency's own self-generated priorities. But this schedule is *ad hoc*: EPA has never published an overall agenda, timetable, or even statement of priorities for GHG regulation. Thus, despite how impactful GHG

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[4] *Strengths and Weaknesses of Regulating GHG Emissions Using Existing Clean Air Act Authorities*: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce, 110th Cong. 7 (2008) (statement of Rep. Dingell).

[5] *Id.* at 8.

regulation will be, American business is left without the ability to anticipate which areas of the economy EPA will decide to regulate next and in what timeframe.

EPA's view seems to be that not only does it have the authority or even obligation to regulate virtually the entire economy, it also enjoys the discretion to decide who and when to regulate on a schedule of its own choosing, which it will announce in its own good time. And in some instances, including in the regulations that are the subject of the Petition, EPA has gone even further and engaged in fanciful interpretations of the CAA in choosing what categories of GHG-emitting sources to regulate and when—even when these interpretations fly in the face of plainly expressed Congressional intent. In the Tailoring Rule, for instance, EPA "tailored"—meaning it rewrote—statutory thresholds for regulation so that the PSD and Title V programs would more resemble programs that EPA thinks are in the public interest rather than the programs Congress enacted into law. The fact that the court of appeals immunized this transparently *ultra vires* act from judicial review on the ground of standing emphasizes all the more the troubling extent of EPA's assertion of authority in the wake of *Massachusetts*.[6]

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[6] EPA's claim of discretion to regulate where and when it chooses is made even more troubling given that no EPA regulation of any sector—no matter how large that sector's GHG emissions are in relation to other sectors—will have any meaningful impact on the overall climate. In *Massachusetts*, 549 U.S. at 524-525, in discussing standing, this Court found that domestic motor-vehicle emissions constitute six percent of global CO_2 emissions and hence "make a meaningful contribution to greenhouse gas concentrations." Yet EPA's own analysis shows that by 2100 its GHG motor vehicle regulations

EPA's arrogation to itself of nearly unlimited regulatory power, combined with nearly unlimited discretion to choose when to exercise that power—to the point of rewriting statutes—cannot possibly have been this Court's intended result in *Massachusetts*. The most fundamental principles of our legal system forbid this accumulation of power by an administrative agency. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("Agencies may play the sorcerer's apprentice but not the sorcerer himself"); *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457, 472, 475 (2001) (holding that agency action must be guided by a congressionally-established "intelligible principle"; Congress "must provide substantial guidance on setting air standards that affect the entire national economy.").

In *Massachusetts*, the federal defendants asked this Court, in determining whether Congress intended that the CAA apply to GHGs, to take into consideration the effect of regulating GHGs under the CAA beyond just the 42 U.S.C. § 7521(a) program at issue in that case,[7] but the Court declined. This Court now has the opportunity to cabin EPA's and the lower court's reading of *Massachusetts* to sole the issue decided by that case—whether the CAA authorizes regulation of motor vehicle GHG emissions. Without such limitation—that is, without this Court's clarifying that *Massachusetts* does not extend so far as to hold that GHGs are automatically "air pollutants" for the purpose of every other CAA program regardless that Congress may have intended

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will reduce global temperatures by a mere .006 to .015 ^{o}C. 75 Fed. Reg. at 25,495.

[7] Brief for the Federal Respondents at 23-24, *Massachusetts v. EPA* (No. 05-1120).

otherwise in a particular program—EPA's authority over how the nation uses energy will be nearly boundless.

II. EPA REGULATION FOLLOWING *MASSACHUSETTS* SHOWS THE NEED FOR THIS COURT TO PLACE LIMITS ON *MASSACHUSETTS'* APPLICABILITY

1. GHG permits. EPA's assertion of virtually unlimited authority to regulate GHG emissions throughout the economy, and similarly broad discretion to decide where and when to exercise that authority, is most pronounced in the two CAA permit programs at issue in this case. Even before EPA began a rulemaking to promulgate its Endangerment Rule, EPA was aware that, as it interpreted the CAA, regulation of GHGs under 42 U.S.C. § 7521(a) would trigger unworkable Title V and PSD permit requirements for numerous buildings and small facilities that had never before been required to obtain these permits. In its Advance Notice of Proposed Rulemaking on remand following *Massachusetts*, EPA stated that, if it regulated GHG emissions from light-duty vehicles, it would construe the CAA as requiring PSD and Title V permits for any new or modified stationary source potentially emitting at least 100/250 tons of GHGs per year (for the PSD program) and 100 tons of GHGs per year (for the Title V) program. 73 Fed. Reg. at 44,497. EPA recognized that, given this interpretation, "many types of new GHG sources and GHG-increasing modifications that have not heretofore been subject to PSD would become subject to PSD permitting requirements," because "the mass CO_2 emissions from many source types are orders of magnitude greater than for currently regulated pollutants." *Id.*

at 44,498. The result would be that "many types of new small fuel-combusting equipment could become subject to the PSD program," including potentially any facility with a "small *commercial* furnace" used for space heating. *Id.* (emphasis in original). The result would be to increase the number of PSD permit applications by a factor of ten, extending the permit program to "smaller industrial sources, as well as large office and residential buildings, hotels, large retail establishments, and similar facilities." *Id.* at 44,499. EPA noted that similar problems would occur in the Title V program. *Id.* at 44,511-12.

By the time EPA issued the Endangerment Rule and the Auto Rule, it had concluded that regulating GHG emissions under the PSD and Title V programs would so increase the number of sources requiring permits as to effectively disable the two programs. EPA estimated that more than six million buildings and facilities potentially emit at least 100 tons per year of GHGs, as compared with 15,000 sources that currently have the potential to emit traditional air pollutants above the 100/250 ton per year level for PSD regulation. GHG regulation would result in 82,173 sources requiring PSD permits every year, as compared with only 688 without GHG regulation. The more than 6 million sources that potentially emit at least 100 tons per year of GHG would all require Title V permits. According to EPA, just the cost of administering the PSD permitting program—not even including the cost imposed on facilities to reduce GHG emissions—would rise from $12 million per year to $1.5 billion per year. The Title V administration cost would rise from $63 million per year to a whopping $21 *billion*. 75 Fed. Reg. at 31,540, Table V-1.

EPA had little trouble finding that this dramatic expansion of permits and the "staggering" cost to permitting authorities "would do nothing less than overwhelm" these programs. *Id.* at 31,563. The resulting programs would become "unrecognizable to the Congress" because "the great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting." *Id.* at 31,533. According to EPA, "[p]ermitting authorities have estimated that it would take 10 years to process a PSD application, on average, and the resulting backlog would affect the permit applications for all sources, not just GHG emitters." 74 Fed. Reg. 55,292, 55,304 (Oct. 27, 2009) (proposed Tailoring Rule). Moreover, according to EPA, "[f]or both programs, the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs to sources and the burdens to permitting authorities. In the case of PSD, the large number of small sources that would be subject to control constitute a relatively small part of the environmental problem." Tailoring Rule, 75 Fed. Reg. at 31,533. And for Title V, "the great majority of the 6.1 million additional permittees would not be subject to any CAA requirements and, as a result, would be issued permits that do not include any applicable requirements." 74 Fed. Reg. at 55,304.

Having made these findings, EPA should have concluded that the PSD and Title V programs were never intended by Congress to apply to GHGs. Because EPA was locked into its interpretation of *Massachusetts* that GHGs are "air pollutants" for all purposes under the CAA, EPA's solution was to rewrite the statutory thresholds so that the resulting program would be administratively manageable. But

EPA's purported solution does not erase the fact that the PSD and Title V programs cannot be administered as Congress intended if GHGs are regulated.

As to whether EPA will ever apply the statutory thresholds to GHG-emitting facilities, EPA merely states that it will develop permitting "streamlining techniques," that States will "ramp up resources in response to the additional demands placed upon them" under EPA's "tailored" requirements, and that EPA will "address expanding the PSD program in a step-by-step fashion to include more sources over time." 75 Fed. Reg. at 31,559. Thus, EPA may decide to defer indefinitely compliance with Congress's permitting thresholds, in which case GHG regulation would always be at odds with the statutory PSD and Title V thresholds. Or EPA will comply with Congress's requirements, in which case millions of small sources that Congress never intended to be subject to these programs will be required to obtain permits. Either way, EPA views the choice of which of millions of buildings and facilities will be required to obtain permits, when they will be required to do so, and precisely what burden they and permitting authorities will be required to bear as one that it will make, not Congress. This cannot possibly be squared with the PSD and Title V programs enacted by Congress.

2. Ambient Air Quality Standards. EPA may also embark on GHG regulation under the National Ambient Air Quality Standards (NAAQS) program, a result that would be even more absurd than EPA GHG regulation under the Title V and PSD permit programs. Under the NAAQS program, EPA sets ambient air quality standards for the most ubiquitous

air pollutants; those standards define the safe level of such air pollutants in the ambient air. 42 U.S.C. §§ 7408-7409. EPA sets primary NAAQS for pollutants that may endanger the public health and secondary NAAQS for pollutants that may endanger the public welfare. 42 U.S.C. § 7409. EPA then divides the country into attainment and nonattainment areas for these NAAQS, 42 U.S.C. § 7407, with states required to adopt measures to bring nonattainment areas into attainment and to prevent attainment areas from slipping into nonattainment. 42 U.S.C. § 7410. States that do not bring nonattainment areas into attainment within five years, with the possibility of one five-year extension, are subject to severe sanctions. 42 U.S.C. §§ 7502(a)(2)(B), 7509. States are also subject to severe sanctions if they do not bring nonattainment areas into attainment "as expeditiously as practicable." *Id.*

Under 42 U.S.C. § 7408(a)(1), EPA is required to issue air quality criteria for pollutants that the Administrator determines, "in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources."[8] If EPA were to make the predicate § 7408(a)(1)

[8] An air pollutant must also meet a third criterion under 42 U.S.C. § 7408(a)(1) for EPA to issue air quality criteria: it must be a pollutant "for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section." In *NRDC v. Train*, 545 F.2d 320 (2nd Cir. 1976), the Second Circuit found that this factor does not provide EPA with discretion not to promulgate air quality criteria for air pollutant meeting the other § 7408(a)(1) factors. Without resolving the matter, EPA posits that it may nevertheless enjoy such discretion. 73 Fed. Reg. at 44,477, n. 229.

findings for a GHG and to list a GHG as a "criteria" pollutant, EPA would seemingly be required to issue GHG air quality criteria (under § 7408(a)(1), "the Administrator *shall*" issue air quality criteria if it makes the predicate findings (emphasis added)) and thereafter promulgate GHG NAAQS (under 42 U.S.C. § 7409(a)(2), "the Administrator *shall* publish [proposed NAAQS], simultaneously with the issuance of such criteria" (emphasis added)).

Under such a scheme, GHG regulation under the NAAQS program would be patently unworkable. In contrast to the NAAQS program that Congress created in the CAA, where some areas are in attainment and others in nonattainment depending on local air pollution levels, a GHG NAAQS would render the entire country in attainment or nonattainment (depending on the level at which EPA set the NAAQS) because there are no local GHG levels, only global levels. And because foreign GHG emissions are growing rapidly while domestic emissions are flat or falling,[9] individual States—or all States together—would be powerless to eliminate GHG nonattainment if EPA set the NAAQS below current atmospheric levels, or to maintain

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[9] Global GHG emissions are projected to increase by 50% by 2050, "primarily due to a 70% growth in energy-related CO_2 emissions." *Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction*, available at: http://www.oecd.org/env/indicators-modelling outlooks/climatechangechapteroftheoecdenvironmentaloutlookto 2050theconsequencesofinaction.htm (last visited Apr. 15, 2013). On the other hand, domestic energy-related CO_2 emissions are projected to remain below 2005 levels through 2040. U.S. Energy Information Administration, *Annual Energy Outlook 2013 Early Release Overview* at 3, available at http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2013).pdf (last visited Apr. 15, 2013).

attainment, if EPA set the NAAQS above current atmospheric levels. Indeed, because EPA's Endangerment Rule found that *current* atmospheric levels of GHG emissions endanger public health,[10] EPA might conclude that it is locked into setting a primary GHG NAAQS at a level below current atmospheric levels, transforming the entire country into a nonattainment area. The consequences of such a result would be economically devastating, given the highly restrictive nonattainment area obligations to which States would become subject, 42 U.S.C. §§ 7501-7509a, including a ban on construction of new GHG-emitting sources unless they obtain more than one ton of GHG offsets for every ton of GHG they emit. 42 U.S.C. § 7503(a). As EPA itself admitted:

> At the outset, it would appear to be an inescapable conclusion that the maximum 10-year horizon for attaining the primary NAAQS would be ill-suited to GHGs. The long atmospheric lifetime of the six major emitted GHGs means that atmospheric concentrations will not quickly respond to emissions reduction measures (with the possible exception of methane, which has an atmospheric lifetime of approximately a decade). In addition, in the absence of substantial cuts in worldwide emissions, worldwide concentrations of GHGs would continue

[10] "Endangerment Finding: The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases … in the atmosphere threaten the public health and welfare of current and future generations." EPA Climate Change Website, available at: http://www.epa.gov/climatechange/endangerment/#findings (last visited Apr. 15, 2013).

> to increase despite any U.S. emission control efforts. Thus, despite active control efforts to meet a NAAQS, the entire U.S. would remain in nonattainment for an unknown number of years. If States were unable to develop plans demonstrating attainment by the required date, the result would be long-term application of sanctions, nationwide (e.g., more stringent offset requirements and restrictions on highway funding), as well as restrictions on approvals of transportation projects and programs related to transportation conformity.

73 Fed. Reg. at 44,481.

As absurd as this potential regulation may be, EPA has had before it since December 2009 a petition demanding that EPA establish a GHG NAAQS.[11] That Petition seeks "deep and rapid greenhouse emissions reductions—on the order of 45% or more below 1990 levels by 2020." Like the PSD and Title V programs, EPA's correct course on GHG regulation under the NAAQS program would be to conclude that Congress did not intend such regulation. But EPA's calculus—GHGs are "air pollutants" under any CAA program—would seemingly rule out that sensible course.

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[11] *See* Center for Biological Diversity and 350.org, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (Dec. 2, 2009), http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf (last visited Apr. 15, 2013).

3. Powerplants. EPA has already begun the process of regulating GHG emissions from new fossil-fueled powerplants under 42 U.S.C. § 7411's New Source Performance Standards program. 77 Fed. Reg. 22,392. Although EPA has had performance standards for powerplant emissions of traditional pollutants in place since the 1970s, and although these powerplant standards have always differed for plants fueled with coal and plants fueled with natural gas, *see* 40 C.F.R. Part 60, Subparts Da, KKKK, EPA's proposed standard for powerplant GHG emissions sets a single standard for coal and natural gas plants. 77 Fed. Reg. at 22,394. Only natural gas plants, however, can meet EPA's proposed standards, unless the coal plants install carbon capture systems that EPA recognizes are prohibitively expensive without government support. *Id.* at 22,394, 22,399. Thus, the proposed standard would effectively ban the commercial development of new coal-fueled generation in the United States. EPA also states that it will initiate a rulemaking to set GHG performance standards for existing fossil-fueled powerplants.[12] EPA entered into a settlement agreement to simultaneously issue final standards for new and existing powerplants by May 26, 2012.[13] Having missed that deadline, EPA's regulatory schedule seems now to be totally within its discretion.

4. Petroleum refineries. EPA also entered into a

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[12] *See* Jean Chemnick, April 10, 2013, *EPA to tackle existing power plant carbon rule in fiscal '14 – Perciasepe,* E&E NewsPM (Apr. 10, 2013), available at http://www.eenews.net/eenewspm/2013/04/10/1 (last visited Apr. 15, 2013).

[13] Fossil Fuel-Fired Power Plant Settlement Agreement, http://www.epa.gov/airquality/cps/pdfs/boilerghgsettlement.pdf (last visited Apr. 15, 2013).

settlement agreement to set Section 111 GHG performance standards for petroleum refineries by November 10, 2012.[14] EPA has missed the regulatory deadlines set forth in that settlement agreement as well, further confirming that EPA's timetable for regulating petroleum refineries is entirely within its discretion.

5. Cars and trucks. EPA did not wait long after its first round of light-duty motor vehicle GHG standards went into effect before adopting a second round of standards. These standards would virtually revolutionize the motor vehicle industry, requiring the equivalent of an average fuel economy of 54.5 miles per gallon by 2025. 77 Fed. Reg. 62,624 (Oct. 15, 2012). EPA similarly adopted GHG standards for heavy-duty trucks. 76 Fed. Reg. 57,106 (Sept. 15, 2011).

6. Airplanes. EPA regulation of airplane GHG emissions awaits resolution of the instant case. On December 5, 2007, a number of entities petitioned EPA to commence a rulemaking making a finding that GHG emissions from aircraft engines may reasonably be anticipated to endanger public health and welfare and, upon making such a finding, to regulate such emissions under 42 U.S.C. § 7572(a)(2)(A). When EPA did not act on the petition, these entities brought suit to compel action, and a district court ordered EPA to conduct proceedings to determine whether it would make the endangerment finding. *See Center for Biological Diversity v. EPA*, 794 F. Supp. 2d 151 (D.D.C. 2011). EPA responded to the court's order by issuing a

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[14] Petroleum Refineries Settlement Agreement, http://www.epa.gov/airquality/cps/pdfs/refineryghgsettlement.pdf (last visited Apr. 15, 2013).

memorandum stating that it would defer conducting such proceedings until resolution of the instant case but would proceed thereafter.[15] The memorandum further states that if EPA makes an endangerment finding, it will regulate GHG emissions from aircraft engines.

7. Ocean-going vessels and nonroad engines. In an October 3, 2007 petition, several entities asked EPA to make an endangerment finding and to regulate GHG emissions from ocean-going vessels under 42 U.S.C. § 7547(a)(4). Similarly, in a January 29, 2008 petition, several entities asked EPA to make an endangerment finding and to regulate nonroad engines under § 7547(a)(4) and to undertake timely rulemaking procedures to adopt emissions standards to control and limit GHG emissions from new nonroad engines. As EPA stated, "Petitioners sought EPA regulatory action on a wide range of nonroad engines and equipment, including outdoor power equipment, recreational vehicles, farm and construction machinery, lawn and garden equipment, logging equipment and marine vessels, that Petitioners believe contribute substantially to GHG emissions." *Memorandum in Response to Petitions Regarding Greenhouse Gas and Other Emissions from Marine and Nonroad Engines and Vehicles* at 3.[16] After a district court ruled that § 7547(a)(4) gives

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[15] EPA, *Memorandum in Response to Petition Regarding Greenhouse Gas Emissions from General Aviation Aircraft Piston Engines,* (July 18, 2012), available at: http://www.epa.gov/otaq/regs/nonroad/aviation/ltr-response-av-ld-petition.pdf (last visited Apr. 15, 2013).

[16] Memorandum available at: http://www.eenews.net/assets/2012/06/18/document_pm_06.pdf (last visited Apr. 15, 2013).

EPA discretion to decide whether and when to undertake proceedings to make an endangerment finding, *Center for Biological Diversity v. EPA*, 794 F. Supp. 2d at 158, EPA declined to do so "at this time," citing a lack of current administrative resources. Memorandum at 4. Thus, whether and when EPA decides to impose GHG requirements on the very broad nonroad engine category is a matter over which EPA claims exceedingly broad discretion.

8. Locomotives. Several groups filed a request for rulemaking to address GHGs and black carbon from locomotives under section 42 U.S.C. § 7547(a)(5).[17] To date, WLF is unaware of any EPA action on this petition.

9. Farms. A September 21, 2009 petition asks EPA to make an endangerment finding and regulate GHG emissions from concentrated animal feeding operations under 42 U.S.C. § 7411.[18] EPA has not yet taken action on that petition.

10. Coal mines. On June 16, 2010, several parties asked EPA to regulate GHG emissions from coal

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[17] *See* http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20110921EPAResponse.pdf (last visited April 17, 2013).

[18] Humane Society of the United States *et al.*, *Petition to list concentrated animal feeding operations under Clean Air Act section 111(B)(1)(A) of the Clean Air Act, and to promulgate standards of performance under Clean Air Act sections 111(B)(1)(B) and 111(D)*, www.foe.org/sites/default/files/HSUS_et_al_v_EPA_CAFO_CAA_Petition.pdf (last visited Apr. 15, 2013).

mines under 42 U.S.C. § 7411.[19] EPA has not yet acted on the petition but may do so shortly.[20]

11. All major categories of industrial activity. On February 19, 2013, a petition was filed asking EPA to set GHG performance standards for the dozens of categories of industrial sources for which EPA has set non-GHG performance standards under 42 U.S.C. § 7411. The petition asks that EPA prioritize regulation by a cost-benefit test and focus first on regulation of "larger sources, including natural gas and petroleum systems, landfills, iron and steel producers, cement producers, nitric acid plants, and wastewater treatment facilities."[21] EPA has not yet acted on the petition.

12. State actions to address the international effect of domestic emissions. The petition referred to

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[19] WildEarth Guardians, *et al*., *Petition for Rulemaking Under the Clean Air Act to List Coal Mines as a Source Category and to Regulate Methane and Other Harmful Air Emissions from Coal Mining Facilities Under Section 111*, (June 16, 2010), http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Coal_Mine_Petition-06-15-2010.pdf(last visited Apr. 15, 2013).

[20] In response to a lawsuit to compel EPA to act on the petition, EPA represented to the court that its staff is currently preparing a draft response to Plaintiffs' petition for signature by the appropriate senior agency official that would deny Plaintiffs' petition and defer regulation at the present time. Joint Motion to Govern Further Proceedings, *WildEarth Guardians, et al. v. EPA*, No. 11-cv-02064-RJL (D.D.C. Apr. 5, 2013).

[21] Institute for Policy Integrity, *Petition for Rulemakings and Call for Information under Section 115, Title VI, Section 111, and Title II of the Clean Air Act to Regulate Greenhouse Gas Emissions,* (Feb. 19, 2013), http://policyintegrity.org/documents/Policy%20Integrity%20Omnibus%20GHG%20Petition%20under%20CAA.pdf (last visited Apr. 15, 2013).

in item 10 above also asked the EPA to require states to submit plans to "prevent or eliminate the endangerment" that their emissions allegedly are causing internationally. Petition for Rulemaking at 7. EPA has not yet acted on the petition.

13. Cap-and-trade program to address GHG emission effects on stratospheric ozone. The petition referred to in item 10 above also asked EPA to formulate a cap-and-trade program to address asserted GHG impacts on stratospheric ozone. EPA has not yet acted on the petition.

14. Transportation fuels. On July 29, 2009, a petition asked that EPA adopt regulations instituting a cap-and-trade system to control emissions of greenhouse gases from fuels used in motor vehicles, nonroad vehicles, and aircraft, under 42 U.S.C. §§ 7545, 7571.[22] EPA has not responded to the petition, and on November 28, 2012, the petitioner informed EPA that it intended to bring a lawsuit to compel EPA to do so.[23]

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[22] Institute for Policy Integrity, *Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act to Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels,* (July 29, 2009), http://policyintegrity.org/projects/documents/7.29.09IPIPetitiontoEPA.pdf (last visited Apr. 15, 2013).

[23] Institute for Policy Integrity, *Notice of Intent to File Suit under Section 304 of the Clean Air Act for Failure to Respond to Petition for Rulemaking under Sections 211 and 231 of the Clean Air Act,* (Nov. 28, 2012), http://policyintegrity.org/documents/11.28_.12_Notice_to_EPA_of_Intent_to_Sue_on_CAA_Petition_.pdf (last visited Apr. 15, 2013).

CONCLUSION

EPA has embarked on a scheme of broad, *ultra vires* GHG regulation that is likely to spread, on a timetable of EPA's choosing, to virtually the entire economy. It is vitally important, before this program proceeds any further, that the Court grant certiorari to clarify the intended scope of *Massachusetts*.

Respectfully submitted,

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