

No. 12-1268

(CONSOLIDATED WITH NOS. 12-1146, 12-1248,
12-1254, 12-1269 AND 12-1272)

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 Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit*

**BRIEF OF THE COMMITTEE FOR A
CONSTRUCTIVE TOMORROW AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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CASES:	
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<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)	<i>passim</i>
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CONSTITUTION, STATUTES, REGULATIONS:	
U.S. Const., Art. I, § 1	5
Art. II, § 3	5
Clean Air Act, 42 U.S.C. §§ 7401, <i>et seq.</i>	<i>passim</i>
Environmental Protection Agency, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)	<i>passim</i>
Environmental Protection Agency, Proposed Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (April, 24, 2009)	26
Information Quality Act, 44 U.S.C. 3516	12
National Environmental Policy Act of 1969, 42 U.S.C. 4321; 4331-4335	11

Reorganization Plan No. 3 of 1970, 35 Fed. Reg.
15623, 84 Stat. 2086, as amended 11

RULES:

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES:

Gabriel Calzada Alvarez, *Study of the effects on unemployment of public aid to renewable energy sources*, King Juan Carlos University, 2009 13, 14

American Bird Conservancy, “Bird deaths from wind farms to continue under new federal voluntary industry guidelines,” <http://www.abcbirds.org/newsandreports/releases/110208.html> 18

Chris Booker, “The debt-ridden EU stares bankruptcy in the face,” *The Telegraph* (London), April 20, 2013 36

H. Harvey Brenner, “Many Factors in the Prediction of National Life Expectancy: GDP and unemployment,” Testimony before the U.S. Senate Committee on Public Works, June 15, 2011, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=37188bea-2c5f-4100-a767-f264f1a1ced2 15

Harold Brooks, “The tornado drought of 2012,” August 2, 2012, <http://www.norman.noaa.gov/2012/08/the-tornado-drought-of-2012/> 24-25

Alan Carlin, “National Center for Environmental Economics, comments on draft technical support document for endangerment analysis for greenhouse gas emissions under the Clean Air Act,” March 2009, http://WattsUpWithThat.files.wordpress.com/200906/endangerment_commentsv7b1.pdf	33
Chamber of Commerce of the United States, S. Ct. Brief, No. 12-1272	4
Joshua Chaffin, Pilita Clark and Chris Tighe, “Europe is shifting away from carbon agenda,” <i>Financial Times</i> , April 18, 2013	37
Congressional Research Service, Report for Congress, <i>The Information Quality Act: OMB’s Guidance and Initial Implementation</i> , September 17, 2004	21
“Controversy over EPA report prepared by Carlin,” http://en.wikipedia.org/wiki/Alan_Carlin	33
Judith Curry, “Laframboise on the IPCC,” October 19, 2011, http://judithcurry.com/2011/10/19/laframboise-on-the-ipcc/	31
Judith Curry, “The 52% ‘consensus’,” November 10, 2013, http://judithcurry.com/2013/11/10/the-52-consensus/	32
Judith Curry, “Warsaw loss and damage mechanism: A climate for corruption?” November 24, 2013, http://judithcurry.com/2013/11/24/warsaw-loss-and-damage-mechanism-a-climate-for-corruption/	38

- James Delingpole, “The real cost of global warming,” *The Telegraph*, February 28, 2011, <http://blogs.telegraph.co.uk/news/James-Delingpole/100078040/the-real-cost-of-global-warming/> 14
- Paul Driessen, *Affordable Energy: The foundation of human rights and environmental justice*, American Legislative Exchange Council, April 2010 14
- Paul Driessen, “Big Wind tax credit exterminates bird species: Thousands of birds killed by wind turbines,” *Washington Times*, December 22, 2012, <http://www.washingtontimes.com/news/2012/dec/22/big-wind-tax-credit-exterminates-endangered-specie/> 18
- Paul Driessen, “Our least sustainable energy option: From land use, economic, environmental or raw materials perspectives, wind is unsustainable,” October 19, 2011, <http://www.ChallengingClimate.org/story/4210/4331/Our-least-sustainable-energy-option.> . . . 17
- Paul Driessen, *Carbon Dioxide: The Gas of Life: Tiny amounts of this miracle molecule make life on Earth possible*, Committee For A Constructive Tomorrow (2013) 23
- The Economist*, “A sensitive matter: The climate may be heating up less in response to greenhouse gas emissions than once was thought,” March 30, 2013 22

<i>Economy Derailed: State-by-state impacts of the EPA regulatory train wreck</i> , American Legislative Exchange Council, April 2012	13
F. William Engdahl, “Glacier Meltdown: Another Scientific Scandal Involving the IPCC Climate Research Group,” <i>Global Research</i> , January 27, 2010	29
Environment News Service, “Warsaw climate talks end with deals on forests, financing,” November 24, 2013, http://ens-newswire.com/2013/11/24/warsaw-climate-talks-end-with-deals-on-forests-financing	38
Environmental Protection Agency, <i>Technical Support Document for Endangerment and Cause or Contribute finding for greenhouse gases under Section 202(a) of the Clean Air Act</i> , December 7, 2009	34
EurActiv, “EU leaders to square the circle of cheap energy,” April 13, 2013, http://www.euractiv.com/energy/eu-leaders-square-circle-cheap-energy-519606	37
Benjamin Franklin Quotations, http://benjamin-franklin.ru/BenjaminFranklinQuotes/ben-franklin-a-republic-quotes	9
Richard Gray and Ben Leach, “The never-ending scandal: New list of errors in IPCC report,” <i>Sunday Telegraph</i> , February 7, 2010	29
Patrice Hill, “As U.S. scales back, King Coal reigns as global powerhouse,” <i>Washington Times</i> , March 4, 2013	36

- Craig D. Idso and S. Fred Singer, *Climate Change Reconsidered: The Report of the Nongovernmental International Panel on Climate Change* (NIPCC), Chicago: Heartland Institute, 2009 30
- Craig D. Idso, Robert M. Carter and S. Fred Singer, *Climate Change Reconsidered: 2011 Interim Report of the Non-governmental International Panel on Climate Change*, Chicago: Heartland Institute, [http://www.nipccreport.org/reports/2011/pdf/05Extreme Weather.pdf](http://www.nipccreport.org/reports/2011/pdf/05Extreme%20Weather.pdf) 24
- Craig D. Idso, Robert M. Carter and S. Fred Singer, *Climate Change Reconsidered II: Physical Science*, Chicago: Heartland Institute, 2013 25, 32, 36
- Roy Innis, *Energy Keepers, Energy Killers: The new civil rights battle*, Bellevue, WA: Merril Press (2008) 14
- Institute for Energy Research, “Department of Energy spends \$11 million per job,” May 8, 2013, <http://www.InstituteForEnergyResearch.org/2013/05/08/does-11-million-jobs/> 13
- Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis* 31
- William F. Jasper, “UN summit fails to enact ‘complete transformation’ of world,” *The New American*, December 10, 2012 37

Joint Reply Brief for Non-State Petitioners and Supporting Interveners, Case No. 09-1322, Doc. No. 1341738 (November 14, 2011)	35
Donna Laframboise, <i>The Delinquent Teenager Who Was Mistaken for the World’s Top Climate Expert: An IPCC expose</i> ; Toronto: Ivy Avenue Press (2011)	28, 31
Donald Lambro, “Casualties in the jobs war: Suicide statistics start to track the unemployment rate,” <i>Washington Times</i> , May 8, 2013	15
Jonathan Leake, “UN climate panel shamed by bogus rainforest claim,” <i>Sunday Times</i> (London), January 31, 2009	29
Jonathan Leake and Chris Hastings, “IPCC mislead world over Himalayan glacier meltdown,” <i>The Times</i> (London), January 17, 2010	29
Marlo Lewis, “EPA permitting of greenhouse gases: What does legislative history reveal about congressional intent?” December 3, 2013, http://www.globalwarming.org/2013/12/03/epa-permitting-of-greenhouse-gases-what-does-legislative-history-reveal-about-congressional-intent/	7
Ross McKittrick, “IPCC models getting mushy,” <i>Financial Post</i> , September 16, 2013, http://opinion.financialpost.com/2013/09/16/IPCC-models-getting-mushy/	23
Sid Maher, “Europe’s \$287bn carbon waste: UBS,” <i>The Australian</i> , November 23, 2011	37

- Management Information Systems, *Potential impact of the EPA endangerment finding on low income groups and minorities*, March 2010 . . . 14
- Matt McGrath, “Green energy on the back foot after carbon trading blow,” BBC News, April 18, 2013, <http://www.bbc.co.uk/news/science-environment-22183232> 36
- Patrick Michaels and Paul Knappenberger, “New research calls into question high rates of sea level rise,” Cato Institute, December 20, 2012, <http://www.cato.org/blog/current-wisdom-new-research-calls-question-high-rates-sea-level-rise/> 25
- Marc Morano, *Special Report: More than 1000 international scientists dissent over manmade global warming claims, challenge UN IPCC*, <http://www.climatedepot.com/2010/12/08/special-report-more-than-1000-international-scientists-dissent-over-manmade-global-warming-claims-challenge-un-ipcc-gore-2/> 32
- Steven Mosher and Thomas Fuller, *Climategate: The CRUtape letters*, Lexington, KY: 2010 27
- National Economic Research Associates, “Economic Impacts of EPA’s Transport Rule and Utility MACT rule,” June 2011 13
- Oregon Institute of Science and Medicine, “Petition Project,” <http://www.oism.org/pproject/> 32

- Our Amazing Planet, “Snowy spring snaps records across US: Cold temperatures as much as 20 degrees below normal,” <http://weather.aol.com/2013/05/02/snowy-spring-snaps-records-across-us/> 24
- Peabody Energy Petition for Reconsideration of EPA’s endangerment finding, http://epa.gov/climatechange/Downloads/endangerment/Petition_for_Reconsideration_Peabody_Energy_Company.pdf 27
- Benny Peiser, “Global warming isn’t to blame for the disaster in the Philippines,” *The Spectator*, November 12, 2013 25
- Nathan Rao, “Coldest Easter ever: Arctic misery set to last week as temperatures drop to -15C; Britain is braced for the coldest Easter on record,” *Daily Express* (London), March 25, 2013 24
- Holly Richmond, “EPA: A human life is worth \$7.9 million,” *Grist*, January 26, 2011, <http://grist.org/article/2011-01-25-epa-a-human-life-is-worth-7-9-million/> 15
- David Rose, “Glacier scientist: I knew data hadn’t been verified,” London *Daily Mail*, January 24, 2010. 29

- David Rose, “Global warming stopped 16 years ago, reveals Met Office report quietly released,” MailOnline (London), Oct. 13, 2012, <http://www.dailymail.co.uk/sciencetech/article-2217286/Global-warming-stopped-16-yearsago-reveals-Met-Office-report-quietly-released-chart-prove-it.html> (April 10, 2013) 22
- S. Fred Singer and Dennis Avery, *Unstoppable Global Warming every 1,500 years*, Lanham, MD: Rowman & Littlefield Publishers, 2007 25
- Willie Soon and Paul Driessen, “Desperately seeking Arctic warmth: 300 years of exploration records show recent Arctic warming is not unusual,” *Washington Times*, May 12, 2010 25
- Lawrence Solomon, “Why humans don’t have much to do with climate change,” Huffington Post, December 9, 2013 (article also discusses origin of IPCC’s focus on manmade climate change and its marginalizing of natural factors), http://www.huffingtonpost.ca/lawrence-solomon/global-cooling_b_4413833.html . . . 32, 33
- Southeastern Legal Foundation, S. Ct. Brief, No. 12-1268 8
- Barry Stevens, “What drives water and energy improvements,” *The Daily Energy Report*, June 13, 2013 (includes USEIA chart of energy consumption in 2011), <http://www.dailyenergyreport.com/what-drives-water-and-energy-improvements> 7

Meera Subramanian, “The trouble with turbines: An ill wind,” *Nature*, June 20, 2012 18

James M. Taylor, “Cold spring pummels people, animals from Russia to Florida,” *Environment & Climate News*, May 2013 24

James Taylor, “House Testimony: EPA grossly overstates the economic benefits of regulation,” *Environment & Climate News*, July 2012, <http://news.heartland.org/newspaper-article/2012/07/13/house-testimony-epa-grossly-overstates-economic-benefits-regulation> . . 15, 16

Dr. Margo Thorning, senior vice president and chief economist, American Council for Capital Formation, Testimony before the United States House of Representatives Subcommittee on Energy and Power, Committee on Energy and Commerce, February 9, 2011 13

The Weather Channel, “Major hurricane drought continues in US,” October 24, 2012, <http://www.weather.com/news/weather-hurricanes/major-hurricane-drought-us-20120814> 25

Gerald Traufetter, “Can climate forecasts still be trusted? Confidence melting away,” ABC News Internet Ventures, January 28, 2010 29

The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. of the Judiciary, 113th Cong. 1st Sess. (2013) (statement of Jonathan Turley, Professor of Law, George Washington University) 6

U.S. Environmental Protection Agency, “Our mission and what we do,” <http://www2.epa.gov/aboutepa/our-mission-and-what-we-do> . . . 12

U.S. Senate Minority Report: *More than 700 international scientists dissent over man-made global warming claims: Scientists continue to debunk ‘consensus’ in 2008*, http://www.hatch.senate.gov/public/_files/USSenateEPWMinorityReport.pdf 31, 32

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 (April 10, 2013) 13

Wall Street Journal editorial, “Cap and trade collapses,” April 19, 2013 37

Anthony Watts, *Is the U.S. Surface Temperature Reliable? How do we know global warming is a problem if we can’t trust the U.S. temperature record?* SurfaceStations.org: 2009, <http://wattsupwiththat.com/2009/05/10/a-report-on-the-surfacestations-project-with-70-of-the-ushcn-surveyed/> 30

Anthony Watts, “IPCC Official: ‘Climate policy is redistributing the world’s wealth,’” November 18, 2010, <http://wattsupwiththat.com/2010/11/18/ipcc-official-‘climate-policy-is-redistributing-the-worlds-wealth’/> 37

- Anthony Watts, “New study using GRACE data shows global sea levels rising less than 7 inches per century,” WattsUpWithThat.com, July 3, 2013, <http://wattsupwiththat.com/2013/07/03/new-study-using-grace-data-shows-global-sea-levels-rising-less-than-7-inches-per-century/> . . . 25
- David Whitehouse, *The Global Warming Standstill*, London: Global Warming Policy Foundation (2013), http://www.thegwpcf.org/content/uploads/2013/03/Whitehouse-GT_Standstill.pdf 22
- Jim Wiegand, “Big Wind and avian mortality: Hiding the problem,” March 15, 2013, <http://www.MasterResource.org/2013/03/wind-avian-mortality-ii> 18

INTEREST OF THE AMICUS CURIAE

Founded in 1985, the Committee For A Constructive Tomorrow (CFACT) is a Washington, D.C.-based nonprofit public policy and education organization that promotes environmental protection, economic development, and longer, healthier, more productive and fulfilling lives through modern science and technology.¹

CFACT has served as an official non-governmental organization at United Nation's Framework Convention on Climate Change conferences, actively participating in every such conference and other U.N. events. CFACT also sponsors the www.ClimateDepot.com website for climate science news and policy information.

CFACT officers and advisors have appeared on radio and television programs and written books, reports and articles on climate change and impacts of government greenhouse gas policies on jobs, economic development, environmental values, and human health and welfare. They have also presented formal testimony and comments to the U.S. Environmental Protection Agency and other Federal agencies on proposals governing greenhouse gases, endangered species, and human health and welfare, to promote and

¹ Pursuant to S. Ct. R. 37.6, amicus CFACT hereby states that no counsel for any party authored this brief in whole or in part, and no person other than amicus, its members or its counsel have made any monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of amicus curiae briefs by filing letters evidencing their consent with the Clerk of the Court.

protect the interests of CFACT members and supporters and other United States citizens.

CFACT filed an amicus in support of the petition for writ of certiorari in this case and again urges the Court to rule on the merits that EPA's actions in this case violate the separation of powers provisions of the Constitution, the Clean Air Act as enacted by Congress, the findings of empirical mainstream science, and the protection of the overall human health, welfare and environment of Americans.

SUMMARY OF ARGUMENT

This Court held in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the Environmental Protection Agency had authority to decide whether to regulate carbon dioxide and other greenhouse gas (GHG) emissions from new motor vehicles under the Clean Air Act. On remand, EPA issued regulations governing such emissions from motor vehicles. It is now attempting to vastly expand its jurisdiction by regulating greenhouse gas emissions from stationary sources, such as power plants.

In affirming EPA's decision, the court of appeals failed to meaningfully consider arguments that EPA had gone far beyond its rulemaking authority by significantly rewriting the Clean Air Act to allow regulation of stationary sources. These actions contravene the Constitutional prescription that the Executive Branch has no authority to legislate on its own, but must faithfully execute the laws as written. Moreover, the court below also did not address EPA's failure to consider the changing body of mainstream evidence-based climate science, and the extensive

adverse impacts that its regulations will have on the environmental values and human health and welfare of American citizens.

EPA's new and unprecedented regulations will add extensive permitting, reporting and compliance delays and costs to manufacturing, transportation and facility operations. They will adversely affect the hiring and retention of employees in an already struggling economy, and the maintenance of modern living standards and human health and welfare. By forcing greater reliance on "renewable" energy, they will also harm human, wildlife and environmental health.

Despite the substantial costs that EPA's regulations will inflict on society, they will have no meaningful effect on atmospheric GHG levels, because emissions from numerous other nations will overwhelm any U.S. reductions.

These complex energy and climate change matters are properly handled through the legislative process, not through unilateral Executive Branch decisions driven by politicized agendas that are far out of step with mainstream climate science and fail to account for the enormous human and environmental costs, and competing needs, risks and benefits involved.

ARGUMENT**I. THE EPA'S ATTEMPT TO REGULATE GREENHOUSE GAS EMISSIONS FROM STATIONARY SOURCES WITHOUT AUTHORITY FROM CONGRESS IN ORDER TO ACCOMPLISH ITS PREFERRED POLICY OBJECTIVES VIOLATES THE SEPARATION OF POWERS**

*“In cases like this one, the bedrock underpinnings of our system of separation of powers are at stake....The Framers of the Constitution did not grant the Executive Branch the authority to set economic and social policy as it sees fit.”*²

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court concluded that EPA has authority to regulate carbon dioxide and other greenhouse gas (GHG) emissions from new motor vehicles, under Section 202 of the Clean Air Act. On remand, however, EPA issued regulations that seek to claim new and unprecedented authority for the agency to regulate greenhouse gas emissions not only from the limited category of new mobile sources, but also from coal-fueled electrical generating plants and ultimately *all* stationary sources.³

² *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, *19 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

³ For a good description of the regulatory history of these rules, see Brief of U.S. Chamber of Commerce, No. 12-1272, at 8-11.

EPA's new regulations are not authorized under the Clean Air Act. Instead, in order to promulgate its regulations and achieve its preferred policy objectives, EPA rewrote key provisions of the Clean Air Act, 42 U.S. C. §7401, *et seq.*, by changing precise *statutory* emission standards from 250 tons per year to 100,000 tons per year, to avoid what EPA itself recognizes would be the 'absurd result' of regulating greenhouse gas emissions from millions of fossil-fuel-powered facilities that otherwise would be subject to the much lower statutory limit. *See* 75 Fed. Reg. 31,514 (June 3, 2010). By issuing this so-called "Tailoring Rule," the EPA rewrote the Act's "Prevention of Significant Deterioration" (PSD) and Title V provisions to enable it to accomplish its preferred policy objectives by focusing its costly regulations (at least initially) on coal-fired generating plants, rather than face the certain public backlash that would occur if the agency were to apply them immediately to vast numbers of natural gas-powered generators, as well as factories and even shopping malls, apartment and office buildings, hospitals and farms that emit well in excess of 250 tons of carbon dioxide annually.

By taking these actions, EPA has violated the Constitution's clear separation of powers provisions between the two political branches of government. Article 1, Section 1 of the Constitution specifies that all legislative powers are vested in Congress, while Article II, Section 3, stipulates that the President (and by extension the Executive Branch) must faithfully execute laws enacted by Congress, and may only *recommend* to Congress "such Measures as he shall judge necessary and expedient."

Under our constitutional separation of powers, the President, EPA and other Executive Branch agencies may recommend legislative changes, but they have no authority to engage in actions that constitute lawmaking. Until such time as Congress accepts such recommendations and enacts legislation to implement them, the Executive Branch agencies are obligated to follow the laws as written, and not as they might wish the laws *had* been written. They may not ignore statutory provisions with which they disagree, nor implement and enforce regulations that they have devised out of whole cloth, in direct contravention to clear statutory language.

As Professor Jonathan Turley recently testified before Congress, the Obama Administration has been governing by “executive fiat” that “poses an obvious danger to liberty interests protected by divided government,” and where the “Fourth Branch threatens to become a government unto itself for all practical purposes.”⁴

It is therefore significant to note that Congress has repeatedly explored the idea of regulating greenhouse gases from *stationary* sources, but each time has chosen not to do so. In contrast, regulating greenhouse gas emissions from *mobile* sources requires no “extraordinary measures” because such emissions have long been effectively regulated through Congress’s clear direction, authorizing regulation of fuel-economy

⁴ *The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. of the Judiciary*, 113th Cong. 1st Sess., 19 (Dec. 3, 2013) (statement of Jonathan Turley, Professor of Law, George Washington University).

standards. As a recent and comprehensive report demonstrates, between 1989 and 2010, legislators introduced some 692 bills in Congress, addressing various aspects of GHG emissions and climate change. Only three bills proposed even small steps toward a full-fledged GHG permitting system akin to what EPA is trying to implement; only a few made it past the introduction or committee hearing phase; and *not one* was enacted.⁵

In seeking to rewrite the Clean Air Act to accomplish its preferred policy objectives, EPA is acting in open disregard for congressional intent and enactments. Even more serious, its actions will ultimately affect vast sectors of the United States economy, as energy is its lifeblood, and 82 percent of that energy is still hydrocarbons. In short, EPA has claimed authority to effectively control virtually everything Americans make, grow, ship, eat, drive and do – every aspect of our lives, livelihoods, liberties, living standards and even life spans.⁶

Its actions go far beyond any reasonable or rational interpretation of congressional authority or intent under the Clean Air Act, and far beyond anything this

⁵ Marlo Lewis, “EPA permitting of greenhouse gases: What does legislative history reveal about congressional intent?” December 3, 2013, <http://www.globalwarming.org/2013/12/03/epa-permitting-of-greenhouse-gases-what-does-legislative-history-reveal-about-congressional-intent/>

⁶ *See, e.g.*, Barry Stevens, “What drives water and energy improvements,” *The Daily Energy Report*, June 13, 2013 (includes USEIA chart of energy consumption in 2011), <http://www.dailyenerreport.com/what-drives-water-and-energy-improvements/>

Court could have intended under its 2007 *Massachusetts* decision.

In that regard, amicus agrees with petitioner Southeastern Legal Foundation (SLF) that this case falls squarely within this Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) where it concluded that Congress "could not have intended to delegate [to the FDA] a decision of such economic and political significance [to regulate tobacco] to an agency in so cryptic a fashion." *See* SLF Br. at 7-11.

That is precisely what is involved here, as EPA tries to circumvent Congress, rewrite laws to support and advance its agenda, ignore the separation of powers doctrine and other vital sections of our Constitution, and impose complex and unfair regulations that will grievously harm large segments of the American population. Its inexorable expansion of control represents an unprecedented political power grab over the energy production and consumption that fuels our economy and makes our jobs, opportunities and living standards possible.

As will be demonstrated *infra*, the impact of these unprecedented regulations will likely be radical, transformative, and with little or no regard for their negative impacts on our economy, environment, human health and welfare, or Constitutional system of government.

If Executive Branch agencies can rewrite statutes to achieve their own preferred policy goals, then the Legislative and Judicial Branches will become mere bystanders to administrative agencies that will follow

their own agenda, legislate and regulate as they wish, and be encumbered by little or no oversight, guidance or accountability.

In short, if EPA's actions are upheld, we may well have reached that point which Benjamin Franklin warned us. When asked at the close of the Constitutional Convention in 1787 whether our new government was a "monarchy or republic", he cautiously replied, "A republic, if you can keep it."⁷

II. EPA'S ATTEMPT TO REGULATE GREENHOUSE GASES FROM STATIONARY SOURCES IS FUNDAMENTALLY FLAWED AND CONTRARY TO THE PUBLIC INTEREST

*"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."*⁸

A. EPA Failed To Consider The Adverse Impacts That Its Regulations Will Have On The Health And Welfare Of Americans.

As noted, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court held that the Clean Air Act's "capacious" definition of "air pollutant" includes carbon

⁷ Benjamin Franklin Quotations, <http://benjamin-franklin.ru/BenjaminFranklinQuotes/ben-franklin-a-republic-quotes>

⁸ *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, *9 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from denial of rehearing *en banc*).

dioxide and other substances that many scientists say contribute to climate change, and that the EPA has the statutory authority to regulate the emission of such gases, if the agency finds that such emissions rise to a level that “endangers” human health and welfare. This Court also held that EPA “must ground its reasons for action or inaction in the statute.” The Court reserved any decision on “whether policy concerns can inform EPA’s actions, in the event that it makes such a finding.” *Id.* at 534-35.

EPA subsequently determined in 2009 that carbon dioxide and other greenhouse gases (GHG) do endanger public health and wellbeing. It not only promulgated far-reaching rules governing motor vehicles, but also issued new regulations for new coal-fired power plants, and appears to be setting the stage for regulating any human activity that uses significant amounts of hydrocarbon energy by issuing its so-called “Triggering Rule”. 75 Fed. Reg. 17,004 (Apr. 2, 2010). The agency’s Triggering Rule and Tailoring Rule could ultimately cover millions of factories, refineries, cement kilns, shopping malls, apartment and office buildings, hospitals, schools, churches, farms, and countless other facilities that emit significant amounts of greenhouse gases.

As Judge Kavanaugh noted in his dissent below, EPA’s greenhouse regulations “will impose enormous costs on tens of thousands of American businesses, with corresponding effects on American jobs and workers ... and on the U.S. economy.” *Coalition for Responsible Regulation, Inc., supra*, at 18*. Moreover, these regulations are but one of more than 1,900 regulations that EPA has promulgated since January

2009, which themselves impose enormous costs on our economy.

Affordable, reliable energy is the lifeblood of modern society. This unprecedented expansion of regulatory control will affect every American business and household. In this struggling economy, it will drive employment downward even further, and damage the health and wellbeing of American citizens – and of the nation’s wildlife and environment – far more than any likely effects from manmade GHG emissions and global warming.

In short, EPA’s regulatory “cure” is far worse than the climate “disease” it claims to be preventing.

For these reasons, it is vitally important that EPA’s endangerment decision and rules be grounded not only in “the statute,” but also in solid science, sound public policy, careful attention to the *harmful effects* of its actions, and whether their costly, punitive approach will do anything to alleviate the dangers that EPA attributes to GHG emissions. EPA has sorely failed to meet these tests.

EPA’s mission is to “ensure the production, development and enhancement of the total environment,” foster and safeguard “the quality of the human environment,” and protect the environment, health and welfare of American citizens, based on data and analyses that are accurate, clear, complete, unbiased, and collected by the best available means.⁹

⁹ Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623, 84 Stat. 2086, as amended; National Environmental Policy Act of 1969, 42 U.S.C. 4321 and 4331-4335, Public Law 91-990; U.S.

The agency abrogates that mission and violates the law and its public trust. First, EPA's carbon dioxide and greenhouse gas regulations actually endanger human health and welfare far more than any reasonably foreseeable harmful effects from climate change. Second, it "safeguards" people from exaggerated or illusory risks which exist only in faulty computer models or Intergovernmental Panel on Climate Change (IPCC) documents that are based largely on manipulated, manufactured, misrepresented or highly selective data and analyses that do not accurately reflect mainstream science.

The agency's carbon dioxide regulations will put EPA in control of nearly everything Americans make, ship, grow, eat, drive and do. They will necessitate major changes in energy use and prices, electricity generation, manufacturing, transportation, heating and air conditioning, employment, and other components of the life styles, living standards, health and welfare of every American. They will harm human health and welfare, environmental values, wildlife habitats and populations, and the overall quality of the human environment.

Complying with EPA's GHG/CO₂ regulations will add hundreds of billions of dollars per year to current operating and compliance costs, first for automobiles and new coal-fired power plants, then for older units, and gradually for natural gas and other facilities.

Environmental Protection Agency, "Our mission and what we do," <http://www2.epa.gov/aboutepa/our-mission-and-what-we-do>; Information Quality Act, 44 U.S.C. 3516.

Those rising compliance costs will result in higher electricity and fuel prices, expensive facility retrofits and replacements, hundreds of thousands of lost jobs annually, and acute hardship for millions of families.¹⁰

EPA's endangerment decision has been used to justify taking billions of dollars from profitable sectors of the economy and diverting the funds to subsidize wind, solar and biofuel programs. Recent Department of Energy records reveal that \$26 billion in Energy Department subsidies and loan guarantees for renewable energy projects since 2009 created only 2,298 permanent jobs, at an actual cost of \$11.45 million per job. As studies in Spain and Scotland have documented, these expensive "green" energy programs ultimately cause the loss of two to four traditional jobs for every renewable energy position created, resulting in still more human hardship that EPA failed to consider, especially for minority and poor families.¹¹

¹⁰ United States Senate Committee on Environment and Public Works, Minority Staff Report, *A Look Ahead to EPA Regulations for 2013* (Oct. 2012), <http://www.inhofe.senate.gov/download/?id=28b57b78-30ba-4d78-bf32-2259797e513f&download=1>; National Economic Research Associates, "Economic Impacts of EPA's Transport Rule and Utility MACT rule," June 2011; Dr. Margo Thorning, senior vice president and chief economist, American Council for Capital Formation, Testimony before the United States House of Representatives Subcommittee on Energy and Power, Committee on Energy and Commerce, February 9, 2011; *Economy Derailed: State-by-state impacts of the EPA regulatory train wreck*, American Legislative Exchange Council, April 2012

¹¹ Institute for Energy Research, "Department of Energy spends \$11 million per job," May 8, 2013, <http://www.InstituteForEnergyResearch.org/2013/05/08/does-11-million-jobs/>; Gabriel Calzada

Companies forced to pay more for energy and regulatory compliance must often suspend construction projects, outsource work to other countries, reduce work forces, shift people to part-time status, close facilities, file for bankruptcy or close their doors. As breadwinners are laid off or forced to accept reduced work hours – while the cost of fuel, food, services and consumer products increases – families are left unable to heat and cool their homes properly, pay the rent or mortgage, buy clothing and medicines, take vacations, pay their bills, give to charity, save for college and retirement, or eat proper nutritious meals. Increasing numbers are made homeless; more people die from hypothermia. As companies cut back and more people go on unemployment, charitable and government revenues decline, leaving agencies with fewer funds for low income energy assistance, welfare, food stamps and similar programs – just when they are needed most.¹²

Being unable to find or keep a job erodes self-worth, self-confidence and psychological well-being. The stress of being unemployed, or involuntarily holding multiple

Alvarez, *Study of the effects on unemployment of public aid to renewable energy sources*, King Juan Carlos University, 2009; James Delingpole, “The real cost of global warming,” *The Telegraph*, February 28, 2011, <http://blogs.telegraph.co.uk/news/JamesDelingpole/100078040/the-real-cost-of-global-warming/>

¹² Management Information Systems, *Potential impact of the EPA endangerment finding on low income groups and minorities*, March 2010; Roy Innis, *Energy Keepers, Energy Killers: The new civil rights battle*, Bellevue, WA: Merrill Press (2008), p.1. Paul Driessen, *Affordable Energy: The foundation of human rights and environmental justice*, American Legislative Exchange Council, April 2010.

lower-paying part-time jobs, means poor nutrition, sleep deprivation, more miles of stressful, expensive commuting, increased risk of heart attacks and strokes, and higher incidences of depression and alcohol, drug, spousal and child abuse. It means more suicides and generally lower life expectancies. These problems have become especially acute among military veterans and for middle-aged male breadwinners, whose prospects for finding gainful employment, on par with what they once enjoyed, become increasingly lower the older they get and the longer they are out of work.¹³

In calculating the supposed regulatory benefits of its GHG regulations, EPA claims each “premature death” theoretically avoided creates millions of dollars in societal economic gains. However, it ignored altogether the *adverse impacts* – and the tens of billions of dollars in costs – that its endangerment decision and GHG rules will have on people’s health, wellbeing, life spans and environmental quality, with rising energy costs and declining economic opportunities affecting minority and other poor families most of all.¹⁴

¹³ Donald Lambro, “Casualties in the jobs war: Suicide statistics start to track the unemployment rate,” *Washington Times*, May 8, 2013; H. Harvey Brenner, “Many Factors in the Prediction of National Life Expectancy: GDP and unemployment,” testimony before the U.S. Senate Committee on Public Works, June 15, 2011, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=37188bea-2c5f-4100-a767-f264f1a1ced2;

¹⁴ Holly Richmond, “EPA: A human life is worth \$7.9 million,” *Grist*, January 26, 2011, <http://grist.org/article/2011-01-25-epa-a-human-life-is-worth-7-9-million/>; James Taylor, “House Testimony: EPA grossly overstates the economic benefits of regulation,”

EPA's endangerment decision could actually result in the premature death of thousands of Americans annually, with lost "human life values" totaling many billions of dollars. These impacts will be far worse than any global warming damages theoretically avoided. In short, every life allegedly or theoretically improved or saved by EPA's regulations is offset by lives injured or shortened because of the rules.

Finally, these unprecedented actions are occurring amid a protracted economic recession that has been prolonged and worsened by a plethora of burdensome regulations from EPA and other Executive Branch agencies. Adding these bootstrapped and illegal rules to the burdens already shouldered by our weakened economy would likely be devastating for numerous small and large businesses, families and communities.

EPA does not even mention any of these considerations – let alone include them in its "human environment" and "human health and welfare" analyses, place quantitative values on these impacts, conduct cost-benefit studies, or attempt to determine how many lives will be shortened or lost by these major rulemakings. This deliberate failure violates the National Environmental Policy Act, Information

Environment & Climate News, July 2012, <http://news.heartland.org/newspaper-article/2012/07/13/house-testimony-epa-grossly-overstates-economic-benefits-regulation>; Matt Ridley, "Earth to Met Office: Check your climate facts. The latest science suggests that our policy on global warming is hopelessly misguided," *The Times* (London), May 20, 2013, <http://www.thetimes.co.uk/tto/opinion/columnists/article3769210>.ece

Quality Act, EPA mission statement, and other laws that EPA is required to follow.

B. EPA Failed To Consider Adverse Impacts On The Environment

The agency likewise ignores the significant harm that its endangerment decision and GHG regulations will inflict on the natural environment.

Hydrocarbons provide 82 percent of all U.S. energy consumption. EPA's greenhouse gas rules will inexorably compel America to replace many of these fuels with expensive, unreliable "renewable" alternatives that cost jobs, require far more land and raw materials than do fossil fuels, and cause significant impacts on scenic values, wildlife habitats, and vital bird and bat populations.

A typical 600-megawatt gas-fired power plant requires several hundred acres to generate affordable power 90 percent of the time. In sharp contrast, a 600-MW wind installation like Fowler Ridge in Indiana requires 355 giant turbines, 50,000 acres and 515,000 tons of concrete, steel, copper, fiberglass and rare earth metals to generate expensive electricity intermittently only 20 percent of the time. It also requires a 600-MW gas turbine, to provide power whenever the wind is not blowing, extensive transmission lines from both the wind facility and backup gas generator, and thus far more raw materials than the gas-fired facility alone.¹⁵

¹⁵ Paul Driessen, "Our least sustainable energy option: From land use, economic, environmental or raw materials perspectives, wind is unsustainable," October 19, 2011, <http://www.ChallengingClimate.org/story/4210/4331/Our-least-sustainable-energy-option>

The U.S. Fish and Wildlife Service acknowledges that wind turbines kill at least 440,000 eagles, hawks, falcons and other rare, threatened, endangered and protected birds each year. The actual total for the nation's 40,000 turbines is likely many millions of birds and bats annually, based on European studies of actual bird and bat deaths, and accounting for deceptive actions by turbine operators to minimize and hide reported death tolls. As turbines proliferate in response to EPA's endangerment decision and move increasingly into mountain and wetland areas, this unsustainable toll will rise steadily, and some species will be driven nearly to extinction in many areas, in violation of the Endangered Species Act, Migratory Bird Treaty Act and other laws. (Wind turbines also impair nearby property values and can cause persistent human health problems, due to their constant sonic and subsonic noise and flickering-light effects.)¹⁶

In summary, EPA's greenhouse gas regulations will have *net deleterious impacts* on wildlife and their habitats, and on jobs and human health and wellbeing. They will *cost human lives*. These facts must be part of the agency's calculations of risks and benefits. EPA

¹⁶ Meera Subramanian, "The trouble with turbines: An ill wind," *Nature*, June 20, 2012; American Bird Conservancy, "Bird deaths from wind farms to continue under new federal voluntary industry guidelines," <http://www.abcbirds.org/newsandreports/releases/110208.html>; Paul Driessen, "Big Wind tax credit exterminates bird species: Thousands of birds killed by wind turbines," *Washington Times*, December 22, 2012, <http://www.washingtontimes.com/news/2012/dec/22/big-wind-tax-credit-exterminates-endangered-specie/?page=all>; Jim Wiegand, "Big Wind and avian mortality: Hiding the problem," March 15, 2013, <http://www.masterresource.org/2013/03/wind-avian-mortality-ii/>

cannot merely promote the alleged benefits of its carbon dioxide regulations, while ignoring these significant costs – especially when the benefits themselves are based on climate science that is itself highly suspect and even dishonest.

Accordingly, the agency's regulations are illegal, arbitrary, capricious, and harmful to the environment, health and welfare of American citizens.

C. EPA's Findings Of Harm From Greenhouse Gases Are Contrary To Mainstream Science and Empirical Data.

EPA has failed to meet the test of scientific integrity and credibility. Its carbon dioxide regulations are based on faulty and cherry-picked scientific reports, and on computer models that poorly reflect our still inadequate understanding of climate system dynamics, have completely failed to predict global temperatures, and have generated extreme storm and drought scenarios that are nowhere reflected in actual events. These false claims and scenarios must not be the basis for regulations that control and damage America's energy, economy, jobs, health and welfare, as amicus demonstrated, *supra*.

The agency's position hardly reflected genuine climate science or the weight of scientific opinion or consensus a half dozen years ago in 2007, when this Court rendered its decision in *Massachusetts v. EPA*. It certainly did not in 2009, when EPA found that carbon dioxide endangers human health and welfare, which amicus disputes. Since then, science has moved dynamically forward. Earth's climate and weather events have refused to cooperate with EPA's dire

predictions, even as the agency's views and decisions seemingly remain etched in stone.

The weight of credible empirical evidence and scientific opinion now makes it increasingly clear that the views of amicus comport with responsible mainstream views on climate change science, while EPA represents the extreme fringe of alarmist opinion.

The issue is not, and never has been, whether carbon dioxide and other greenhouse gases "contribute to" climate change. They do. Rather, the issues are:

- (1) Whether these gases now *dominate* planetary climate variation, supplanting complex solar, cosmic, atmospheric, oceanic and other forces that have governed global warming and cooling, storms and other climate changes throughout Earth's history;
- (2) Whether human GHG emissions will cause *dangerous* climate changes that a technologically advanced United States will be unable to withstand, mitigate or adapt to;
- (3) Whether an EPA *failure* to adopt greenhouse gas regulations will be more harmful to Americans' environment, health and welfare than the effects of *implementing* these costly, damaging rules; and
- (4) Whether EPA's costly actions will have any measurable effect on global temperatures, even using the most sensitive instruments and assuming that CO₂ plays a dominant role in climate change.

Nothing in the climate record or in EPA's endangerment finding or vehicle and power plant rules supports a positive answer to any of these questions.

Nothing supports its claim of “90-99% certainty” that humans caused “most” of the sporadic atmospheric warming that Earth experienced between 1950 and 1997. Extensive empirical evidence suggests that EPA’s actions were based on analyses and claims that were erroneous, dishonest, even fraudulent, and clearly beyond the boundaries of mainstream empirical science.

The Information Quality Act and related Federal guidelines require that EPA and other regulatory agencies base “major” and “influential” rulemakings on data and analyses that are accurate, clear, complete, unbiased and collected by the best available methods. EPA failed to do this. Section 108(a) of the Clean Air Act itself states: “Air quality for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.”¹⁷

EPA’s actions are in derogation of these requirements. Indeed, the scientific and observational basis for EPA and IPCC claims of “dangerous manmade climate change” is tenuous, biased, inaccurate, incomplete, unsupported by actual observations, and lacking in scientific integrity.

¹⁷ Congressional Research Service, Report for Congress, *The Information Quality Act: OMB’s Guidance and Initial Implementation*, September 17, 2004, https://it.ojp.gov/documents/CRS_IQ_Act_OMB_Guidance_and_Implementation.pdf; Clean Air Act, 42 U.S.C. § 7408(a), Air Quality Criteria and Control Techniques.

If EPA and IPCC claims about the effects of carbon dioxide and other greenhouse gases on weather and climate were correct, observations and measurements of temperatures, storms, sea levels and other physical parameters over the past 35 years would reflect those claims and the forecasts of computer models used to support them. However, actual physical evidence contradicts the models and claims of unprecedented catastrophes caused by increasing CO₂ levels.

Even as atmospheric carbon dioxide levels kept rising – slowly before 1940, more rapidly 1940-1970, and still more quickly after that, ultimately reaching 400 parts per million in 2013 (0.04 percent of Earth's atmosphere) – average global temperatures *rose* 1910-1940, *fell slightly or remained stable* 1940-1979, rose slightly 1979-1997, and remained *unchanged* from 1997 to the present. Rising levels of plant-fertilizing CO₂ have enhanced plant growth and “greened” the planet, but have not resulted in steadily higher temperatures. Even University of East Anglia's Climate Research Unit scientists have acknowledged that they “cannot account for the lack of warming” in recent years.¹⁸

¹⁸ See David Whitehouse, *The Global Warming Standstill*, London: Global Warming Policy Foundation (2013), http://www.thegwpcf.org/content/uploads/2013/03/Whitehouse-GT_Standstill.pdf; David Rose, “Global warming stopped 16 years ago, reveals Met Office report quietly released,” MailOnline (UK), October 13, 2012, <http://www.dailymail.co.uk/sciencetech/article-2217286/Global-warming-stopped-16-yearsago-reveals-Met-Office-report-quietly-released-chart-prove-it.html> (April 10, 2013); “A Sensitive Matter: The climate may be heating up less in response to greenhouse gas emissions than once was thought,” *The Economist*, March 30, 2013 (noting that Hadley Center data show the average global temperature was 58.1 degrees F (14.5 C) in 1997 and 2012, with

This empirical temperature record demonstrates that EPA's reliance on models is misplaced and contradicts its claim that Earth's climate is highly sensitive to increasing atmospheric carbon dioxide levels. There is no evidence that Earth is approaching a "tipping point" in preventing "dangerous" global warming. Indeed, an August 2013 IPCC graph dramatically shows that every IPCC climate model over the past 22 years (1990-2012) predicted that average global temperatures would be as much as 0.9 degrees C (1.6 degrees F) higher than they actually were. And yet the computer models remain the primary basis for EPA policies and rulemakings, while the agency dismisses empirical "real world" data and observations.¹⁹

The past two winters were among the coldest in decades for many parts of Canada, Russia, central Europe and the United Kingdom. A lethal "100-year, record-smashing" spring cold and snow across central Europe in March 2013 killed thousands of people. Britain's coldest on record Easter 2013 was followed by a week of freezing temperatures, gales and snow, with roads and schools closed, millions of families without

periods of slight warming and cooling in between, ranging sporadically 0.1-0.7 degrees F annually above or below this 58.1 degree mark); Paul Driessen, *Carbon Dioxide: The Gas of Life: Tiny amounts of this miracle molecule make life on Earth possible*, Committee For A Constructive Tomorrow (2013) (summarizing results of over 100 peer-reviewed scientific papers on CO2 and plant growth).

¹⁹ Ross McKittrick, "IPCC models getting mushy," *Financial Post*, September 16, 2013, <http://opinion.financialpost.com/2013/09/16/IPCC-models-getting-mushy/>

power, and hundreds of poor pensioners dying of hypothermia. Spring 2013 was one of the coldest on record for the United States.²⁰

The frequency and severity of hurricanes, tornadoes, floods and droughts have not deviated from observed trends and cycles over the last century and are well within the normal range of historic variability. No Category 3 or higher hurricane has made landfall in the USA since 2005, the longest such period in over a century, and 2013 was the first year since 1994 when not one major Atlantic hurricane even formed. The years 2012 and 2013 gave the United States its fewest strong tornadoes since 1954. Genuine empirical science does not attribute this low ebb in “extreme weather events” to carbon dioxide, nor would true science blame CO₂ when such events do occur.²¹

²⁰ Nathan Rao, “Coldest Easter ever: Arctic misery set to last week as temperatures drop to -15C; Britain is braced for the coldest Easter on record,” *Daily Express* (London), March 25, 2013; James M. Taylor, “Cold spring pummels people, animals from Russia to Florida,” *Environment & Climate News*, May 2013, page 13; Steven Goddard, “U.S. headed for coldest spring on record,” <http://steven-goddard.wordpress.com/2013/05/02/us-headed-for-the-coldest-spring-on-record/>; Our Amazing Planet, “Snowy spring snaps records across US: Cold temperatures as much as 20 degrees below normal,” <http://weather.aol.com/2013/05/02/snowy-spring-snaps-records-across-us/>. For Britain, the record cold and snow comes just 13 years after CRU scientist David Viner warned that global warming meant “children just aren’t going to know what snow is.”

²¹ Craig D. Idso, Robert M. Carter and S. Fred Singer, *Climate Change Reconsidered: 2011 Interim Report of the Non-governmental International Panel on Climate Change*, Chicago: Heartland Institute, pp 123-150, <http://www.nipccreport.org/report-s/2011/pdf/05ExtremeWeather.pdf>; Harold Brooks, “The tornado

Arctic climate and sea ice are within a few percentage points of their “normal” levels for the past fifty years. The Antarctic is experiencing more ice and colder weather than at any time in decades. The rate of sea level rise has barely changed in a century and now stands at less than seven inches per century.²²

That the models’ often scary forecasts have been incorrect and unsupported by actual observations is not surprising. Earth’s climate system is complex, dynamic, turbulent and frequently changing. However, computer climate models employ simplified assumptions that: carbon dioxide is the primary driving force behind climate change; water vapor only *amplifies* the effects

drought of 2012,” August 2, 2012, <http://www.norman.noaa.gov/2012/08/the-tornado-drought-of-2012/>; The Weather Channel, “Major hurricane drought continues in US,” October 24, 2012, <http://www.weather.com/news/weather-hurricanes/major-hurricane-drought-us-20120814>; Craig D. Idso, Robert M. Carter and S. Fred Singer, *Climate Change Reconsidered II: Physical Science*, pp. 945-954; Benny Peiser, “Global warming isn’t to blame for the disaster in the Philippines,” *The Spectator*, November 12, 2013.

²² Patrick Michaels and Paul Knappenberger, “New research calls into question high rates of sea level rise,” Cato Institute, December 20, 2012, <http://www.cato.org/blog/current-wisdom-new-research-calls-question-high-rates-sea-level-rise/>; S. Fred Singer and Dennis Avery, *Unstoppable Global Warming Every 1,500 Years*, Lanham, MD: Rowman & Littlefield Publishers, 2007 (pages 37-40, 137-140); Willie Soon and Paul Driessen, “Desperately seeking Arctic warmth: 300 years of exploration records show recent Arctic warming is not unusual,” *Washington Times*, May 12, 2010; *Climate Change Reconsidered II: Physical Science*, pp. 637-47; 756-796; Anthony Watts, “New study using GRACE data shows global sea levels rising less than 7 inches per century,” WattsUpWithThat.com, July 3, 2013.

of CO₂; and the sun and cosmic rays play only insignificant roles. These and other invalid assumptions illustrate the models' problem of "garbage in, garbage out" and reflect late physicist Niels Bohr's Yogi Berra-esque observation that "prediction is very difficult, especially about the future." <http://www.quotationspage.com/quote/26159.html>

Compounding these problems, EPA did no climate research of its own. The agency simply cherry-picked studies that supported its political agenda and ignored extensive empirical observations, data and reports that *questioned or contradicted* the agency's findings. It relied "most heavily" on the 2007 findings of the Intergovernmental Panel on Climate Change, to claim there is "compelling and overwhelming" evidence that climate change endangers human health and welfare. It insisted that the IPCC papers represent "the best available scientific assessments" and that they "have gone through rigorous and transparent peer review."²³

²³ On April 24, 2009, EPA wrote: "EPA has developed a technical support document (TSD) which synthesizes major findings from the best available scientific assessments that have gone through rigorous and transparent peer review. The TSD therefore relies most heavily on the major assessment reports of both the Intergovernmental Panel on Climate Change (IPCC) and the U.S. Climate Change Science Program (CCSP). EPA took this approach rather than conducting a new assessment of the scientific literature. The IPCC and CCSP assessments base their findings on the large body of many individual, peer-reviewed studies in the literature, and then the IPCC and CCSP assessments themselves go through a transparent peer-review process." Proposed Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,894 (April, 24, 2009). Since the CCSP itself also relies heavily on IPCC documents, the IPCC is really the

However, EPA did not even (1) review the studies used to justify its rulemaking to assess their reliability, credibility or integrity; (2) determine whether they actually had been peer-reviewed; or (3) revise its findings as new evidence became available. These fatal flaws further underscore the arbitrary and illegal nature of its endangerment decision and undue reliance on IPCC documents.

Just before EPA rendered its December 2009 endangerment decision, the first group of “Climategate” emails revealed that a closed network of scientists controlled the IPCC process, manipulated data and excluded opinions that differed from their own, to promote alarmist perspectives on manmade global warming while excluding evidence and reports showing that ongoing and future climate changes were natural in origin and were neither “dangerous” nor unprecedented. Then, as EPA was issuing its first four GHG rules in 2010 and 2011, a second collection of Climategate emails and other revelations and studies further undermined the false scientific foundation for these destructive EPA rules.²⁴

Climategate emails and independent studies also reveal that many analyses and reports included in the

primary source of all EPA analyses and pronouncements, and all IPCC biases, errors and misstatements are thus transferred to EPA and U.S. public policy and regulations.

²⁴ See, e.g., Steven Mosher and Thomas Fuller, *Climategate: The CRUtape letters*, Lexington, KY: 2010; Peabody Energy Petition for Reconsideration of EPA’s endangerment finding, http://epa.gov/climatechange/Downloads/endangerment/Petition_for_Reconsideration_Peabody_Energy_Company.pdf

IPCC's Fourth Assessment Report and relied upon by EPA in reaching its conclusions were inaccurate, created by activist groups or students, represented as "peer-reviewed" when they were not, or otherwise fell far below standards of scientific honesty and credibility that are required by law and are essential for such an important and far-reaching public policy decision as the CO₂ endangerment regulations.

Contrary to repeated claims by IPCC Chairman Rajendra Pachauri (and EPA) that the Panel's climate assessment reports rely solely, entirely and exclusively on scholarly peer-reviewed source material, fully 30 percent of the papers and other references cited by the IPCC in its 2007 Fourth Assessment Report (AR4) were *not* peer reviewed, and many of the IPCC's "lead authors" were only graduate students or were even environmental activists.²⁵ Many of its scariest, most headline-grabbing claims of climate disasters deviated the most from basic standards of scrutiny, credibility and integrity. To cite just a few examples:

1. Prominent IPCC claims that droughts caused by global warming would destroy 40 percent of the Amazon rainforest were founded on a World Wildlife Fund press release, which was based on "research" by two young activists, who predicated their analysis on a science journal article that addressed forest *logging*

²⁵ Donna Laframboise, *The Delinquent Teenager Who Was Mistaken for the World's Top Climate Expert: An IPCC expose*; Toronto: Ivy Avenue Press (2011); pp. 184-185 (the citizen audit of AR4).

and burning by local people, and said nothing about rainfall or climate change.²⁶

2. The IPCC's 2007 Fourth Assessment Report also claimed Himalayan glaciers would "disappear by the year 2035," depriving communities in the region of water. This assertion was based on another World Wildlife Fund press release, which was based on a non-peer-reviewed article in a popular science magazine – which was based on an email from a single glaciologist, who later admitted his prediction was pure "speculation." The IPCC lead author in charge of this section subsequently said the Himalayan glacier meltdown had been included – despite his knowing of its false pedigree – because he thought highlighting it would "encourage" policy makers and politicians "to take concrete action" on global warming.²⁷

²⁶ Jonathan Leake, "UN climate panel shamed by bogus rainforest claim," *Sunday Times* (London), January 31, 2009; Richard Gray and Ben Leach, "The never-ending scandal: New list of errors in IPCC report," *Sunday Telegraph*, February 7, 2010

²⁷ Jonathan Leake and Chris Hastings, "IPCC mislead world over Himalayan glacier meltdown," *The Times* (London), January 17, 2010; Gerald Traufetter, "Can climate forecasts still be trusted? Confidence melting away," ABC News Internet Ventures, January 28, 2010; F. William Engdahl, "Glacier Meltdown: Another Scientific Scandal Involving the IPCC Climate Research Group," Global Research, January 27, 2010; David Rose, "Glacier scientist: I knew data hadn't been verified," London *Daily Mail*, January 24, 2010. *The Times* of London reported that India's top glaciologists called Hasnain's claims about imminent glacial meltdown "inherently ludicrous." India's most renowned glacier experts had just completed an exhaustive study that found no evidence of unusual temperature upturns in the Himalayas and said it would take 300 years for the glaciers to melt.

3. Almost *90 percent* of the National Weather Service's climate-monitoring stations failed NWS "siting" requirements, by being too close to heat sources that contaminated data and caused stations to report higher than actual temperatures. Yet, their records and other biased data were relied on by the EPA and IPCC as evidence of U.S. and global warming trends.²⁸

These and numerous other errors, deficiencies and outright misrepresentations were further compounded by the IPCC's analytical and decision-making process, which is highly secretive, non-transparent and directed by scientists who frequently chose, evaluated and even modified colleagues' material, to build their case for alarming, human-caused global warming and prepare a first draft assessment report. At the second-draft stage, the review process is dominated by government officials, chosen to reflect their countries' climate policies and ensure diversity of national origin, though not the great diversity of expert opinion on critical climate issues. In fact, at both stages, world-renowned experts have been *excluded* if their studies and conclusions did not reflect the contrived "consensus"

²⁸ Anthony Watts, *Is the U.S. Surface Temperature Reliable? How do we know global warming is a problem if we can't trust the U.S. temperature record?* SurfaceStations.org: 2009, <http://wattsupwiththat.com/2009/05/10/a-report-on-the-surfacestations-project-with-70-of-the-ushcn-surveyed/>; Craig D. Idso and S. Fred Singer, *Climate Change Reconsidered: The report of the Nongovernmental International Panel on Climate Change* (NIPCC), pp. 114-30, Chicago: Heartland Institute, 2009.

views on warming, severe weather, species extinction, sea level rise, droughts, diseases and other topics.²⁹

Nevertheless, the IPCC's 2013 Fifth Assessment Report or AR5 says previous warnings that the West Antarctic and Greenland ice sheets will disintegrate, and tropical and boreal forests will collapse, are now seen as highly unlikely. Previous predictions of increasing global drought, AR5 notes, "were probably overstated. Changes in global ocean circulation are now also "not considered likely."³⁰

The arbitrary nature of EPA's claim of "certainty" and "consensus" is further underscored by the agency's continued failure to acknowledge: a statement signed by 31,000 American scientists, saying they see "no convincing scientific evidence" that humans are causing dangerous climate change; a U.S. Senate report listing more than 700 international scientists who "dissent from" manmade global warming disaster claims; a poll by the American Meteorological Society that found fully 48 percent of U.S. meteorologists believe there is no evidence that humans are causing dangerous climate change; and the 986-page peer-reviewed report by 52 Nongovernmental International

²⁹ Donna Laframboise, *The Delinquent Teenager Who Was Mistaken for the World's Top Climate Expert: An IPCC expose*; Toronto: Ivy Avenue Press (2011); especially pp. 106-109, 114-116, 152, 169, 214-219; Judith Curry, "Laframboise on the IPCC," October 19, 2011, <http://judithcurry.com/2011/10/19/laframboise-on-the-ipcc/>.

³⁰ Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis*, Table 12.4 and Chapter 2, Section 2.6.2.2

Panel on Climate Change (NIPCC) scientists, *Climate Change Reconsidered II: Physical Science*.³¹

Also missing from EPA's portfolio are studies that would help it better understand, assess and factor in the powerful, complex, interrelated *natural* forces that drive climate fluctuations, cycles and changes. Only then will we be able to discern and separate significant human influences – and begin to predict why, when, how and where Earth's climate is likely to change in the future. That is important, as more scientists note that the sun has entered a “quiet phase” and some are predicting a return to Little Ice Age conditions over the coming decades. However, EPA has shown no interest in such analyses.³²

³¹ Oregon Institute of Science and Medicine, “Petition Project,” <http://www.oism.org/pproject/>; U.S. Senate Minority Report: *More than 700 international scientists dissent over man-made global warming claims: Scientists continue to debunk ‘consensus’ in 2008*, http://www.hatch.senate.gov/public/_files/USSenateEPWMinorityReport.pdf; a Climate Depot report updates the Senate document, by adding 300 scientists to this list: Marc Morano, *Special Report: More than 1000 international scientists dissent over manmade global warming claims, challenge UNIPCC*, <http://www.climatedepot.com/2010/12/08/special-report-more-than-1000-international-scientists-dissent-over-manmade-global-warming-claims-challenge-un-ipcc-gore-2/>; Judith Curry, “The 52% ‘consensus’,” November 10, 2013, <http://judithcurry.com/2013/11/10/the-52-consensus/>; *Climate Change Reconsidered II: Physical Science*, *supra*.

³² See, e.g., Lawrence Solomon, “Why humans don’t have much to do with climate change,” Huffington Post, December 9, 2013 (article also discusses origin of IPCC’s focus on manmade climate change and its marginalizing of natural factors),

Alan Carlin, a 37-year veteran EPA analyst, understood these problems and prepared a detailed paper, strongly advising the agency to look carefully at the science behind global warming claims and not rely on IPCC assessment reports. Carlin's supervisor tried to suppress the paper and refused to forward it to the EPA group preparing the final report that would guide the endangerment decision. His supervisor told him: "The administrator and administration has [sic] decided to move forward on endangerment, and *your comments do not help the legal or policy case for this decision.*"³³ [emphasis added]

In all these actions, EPA has acted like an unethical prosecutor, who is determined to get a conviction, has based his case on circumstantial evidence, and is willing to allow tainted evidence, hide exculpatory evidence, and deny defendant the right to present his defense or cross-examine adverse witnesses. Considering the severity of the impacts that these greenhouse gas regulations are likely to inflict, EPA's actions are no less egregious and intolerable.

Indeed, EPA's position now seems to be that any global warming or cooling, heat waves and cold outbreaks, floods and droughts, normal or unusual

http://www.huffingtonpost.ca/lawrence-solomon/global-cooling_b_4413833.html

³³ Alan Carlin, "National Center for Environmental Economics comments on draft technical support document for endangerment analysis for greenhouse gas emissions under the Clean Air Act," March 2009, <http://WattsUpWithThat.files.wordpress.com/200906/endangermentcommentsv7b1.pdf>; "Controversy over EPA report prepared by Carlin," http://en.wikipedia.org/wiki/Alan_Carlin

snowfall or rainfall, more or fewer hurricanes and tornadoes of greater or lesser intensity – whatever happens to our weather or climate – is all the result of human GHG/CO₂ emissions, and proof of human-caused climate disruption. This “heads-I-win-tails-you-lose” game may be good politics, public relations and agenda promotion. But it is bad science, unprincipled public policy and misguided environmental regulation.

Despite these rampant deficiencies in the IPCC reports and the blatant politics involved in handling what Judge Kavanaugh called “the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency,” the Environmental Protection Agency simply rubber-stamped the IPCC’s 2007 conclusions and concluded that it is “very likely” (a “90-99 percent probability”) that human greenhouse gas emissions caused “most” of the warming that Earth experienced during the second half of the twentieth century.³⁴

That conclusion, EPA’s endangerment finding and its GHG/CO₂ regulations have no foundation in reality or honest, objective, mainstream science. They are irrational, arbitrary and capricious and cannot justify this unprecedented expansion of regulatory authority, especially considering the severe impacts the decision will have on the environment, economy, human health and welfare, and Constitutional principles of our nation.

³⁴ Environmental Protection Agency, *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, at 7 (December 7, 2009).

Congress never intended to let EPA control virtually the entire United States energy infrastructure and economy – especially on the basis of such faulty and fraudulent reasoning, and such unlawful and unlimited legislative and regulatory authority. This Court should reject EPA’s counterfeit science and illegal rulemaking initiatives.

D. Even Full Compliance With EPA’s Regulations Would Achieve Zero Benefits, Because Emissions From Other Countries Will Continue Increasing Total Atmospheric GHG Levels.

EPA’s proposed remedy for allegedly dangerous global warming is also ineffective and pointless. Even the agency has admitted that its actions will reduce global temperatures by impossible-to-measure hundredths of a degree over the next century – even under the highly questionable assumption that greenhouse gases are now the dominant forces behind climate change.³⁵

By 2030, coal will be the most widely used fuel worldwide, as developing countries bring electricity to billions of people who still have little or no access to power and are desperate to escape crushing poverty.

³⁵ As Circuit Judge Brown noted in her opinion, “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.*” [emphasis in original]. *Coalition for Responsible Regulation, Inc., supra*, at *9 n.3. (citing Joint Reply Brief for Non-State Petitioners and Supporting Interveners at *1, (Case No. 09-1322, Doc. No. 1341738 (Nov. 14, 2011))).

Even Europe has returned to coal in the last two years, with several countries using it to generate up to half their electricity, the International Energy Agency notes; these power plants will emit more carbon dioxide, sending atmospheric CO₂ levels steadily higher. For example, Germany is phasing out its “greenhouse-gas-friendly” nuclear power plants and replacing them with coal-fired facilities.³⁶

China already accounted for 46 percent of global coal demand in 2011; its 2011-2012 *increase* in carbon dioxide emissions exceeded the United Kingdom’s *total* CO₂ emissions by 200 million tons. Total manmade carbon dioxide from all U.S. sources represents barely 0.1 percent of the overall annual global increase in this important plant-fertilizing gas (from natural and manmade sources), and coal-fired power plants account for just a small fraction of that amount.³⁷

No developing countries are willing to sign new binding carbon dioxide reduction commitments. Japan has abandoned its pledge to slash GHG emissions and will now allow them to rise. The European Union’s climate change policy is verging on collapse, after the European Parliament voted against new subsidies for its CO₂ emissions trading program, and European

³⁶ Patrice Hill, “As U.S. scales back, King Coal reigns as global powerhouse,” *Washington Times*, March 4, 2013; Matt McGrath, “Green energy on the back foot after carbon trading blow,” BBC News, April 18, 2013, <http://www.bbc.co.uk/news/science-environment-22183232>.

³⁷ Chris Booker, “The debt-ridden EU stares bankruptcy in the face,” *The Telegraph* (London), April 20, 2013; *Climate Change Reconsidered II: Physical Science*, pp.151-65.

leaders are calling for studies of how climate and renewable energy policies hurt families and industries, which are increasingly outraged over soaring energy prices, lost jobs, and elderly people dying of hypothermia because they can no longer afford adequate home heating.³⁸

Underscoring the surreal nature of these EPA and IPCC actions, chief secretary of the U.N. Framework Convention on Climate Change Christiana Figueres has said the next climate treaty will bring about a “complete economic transformation of the world.” IPCC Working Group III co-chair Ottmar Edendorfer has admitted that international climate policy is not even about environmental protection; it is about “how we redistribute the world’s wealth.”³⁹

China, India, island nations and poor countries demand “compensation,” “adaptation” and “mitigation” money, to pay for “losses and damages” from rapidly rising seas and more frequent, more intense storms and droughts. Contrary to empirical data and the views

³⁸ Joshua Chaffin, Pilita Clark and Chris Tighe, “Europe is shifting away from carbon agenda,” *Financial Times*, April 18, 2013; Sid Maher, “Europe’s \$287bn carbon waste: UBS,” *The Australian*, November 23, 2011; *Wall Street Journal* editorial, “Cap and trade collapses,” April 19, 2013; EurActiv, “EU leaders to square the circle of cheap energy,” April 13, 2013, <http://www.euractiv.com/energy/eu-leaders-square-circle-cheap-en-news-519606>.

³⁹ William F. Jasper, “UN summit fails to enact ‘complete transformation’ of world,” *The New American*, December 10, 2012; Anthony Watts, “IPCC Official: ‘Climate policy is redistributing the world’s wealth,’” November 18, 2010, <http://wattsupwiththat.com/2010/11/18/ipcc-official-‘climate-policy-is-redistributing-the-worlds-wealth’/>

of numerous mainstream scientists, they insist these things are already happening, will worsen in the future and are the fault of industrialized nations that helped raise CO₂ levels to 400 ppm. They want at least \$30 billion immediately, followed by upwards of \$100 billion per year, plus free energy, pollution control and industrial technologies.⁴⁰

If EPA's endangerment policies are allowed to remain in force, the United States will soon be among very few nations that impose draconian and punitive GHG reduction schemes, regardless of their cost to human health and welfare and environmental values – and one of the few paying these losses and damages claims. The effect on global CO₂ emissions and global climate change will be zero.

Such a result would be pointless, inhumane, environmentally damaging, contrary to any reasonable interpretation of the Clean Air Act, a textbook example of arbitrary and capricious actions by unaccountable government regulators, and a clear violation of U.S. constitutional principles of separation of powers.

⁴⁰ Environment News Service, "Warsaw climate talks end with deals on forests, financing," <http://ens-newswire.com/2013/11/24/warsaw-climate-talks-end-with-deals-on-forests-financing/>; Judith Curry, "Warsaw loss and damage mechanism: A climate for corruption?" November 24, 2013, <http://judithcurry.com/2013/11/24/warsaw-loss-and-damage-mechanism-a-climate-for-corruption/>.

CONCLUSION

For these reasons, and reasons discussed in the briefs of the Southeastern Legal Foundation and other petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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