Nos. 12-1146 and Consolidated Cases

IN THE
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,

Petitioner,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER UNITED AIR REGULATORY GROUP

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December 16, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to ensure that the President of the United States is subject to the rule of law.

STATEMENT OF THE CASE

After issuing an endangerment finding that carbon dioxide and other supposed greenhouse gas emissions threatened the public health by causing potentially catastrophic global warming, the U.S. Environmental Protection Agency issued motor vehicle emission standards for such supposed greenhouse gas emissions under Title II of the Clean Air Act (CAA). This Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) involved the authority of the EPA to issue such vehicle emission standards under Title II of the CAA.

The EPA then concluded that once it began to regulate carbon dioxide and greenhouse gas emissions from motor vehicles under Title II of the CAA, Title I and Title V of the Act not only authorized it but compelled it to regulate stationary source emissions under those Titles. JA 771 at 283-84; EPA, *Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments* (May 2010).

EPA reached this conclusion even though it recognized that this would not be "consistent with other provisions of the [Title I] PSD [Prevention of Significant Deterioration] and title V requirements,

and inconsistent with – and, indeed, undermine – congressional purposes for the PSD and title V provisions." JA 418-19. The EPA itself also recognized that "applying PSD requirements literally to [greenhouse gas] sources…would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 454-55. The EPA itself further recognized that the same was true in regulating carbon dioxide and greenhouse gas emissions from stationary sources under Title V. *Id.* at 485.

The court below nevertheless upheld this EPA conclusion and regulatory extension. Rehearing *en banc* was denied, Judges Brown and Kavanaugh dissenting in separate opinions.

SUMMARY OF ARGUMENT

Our Constitution's fundamental framework provides for the people's elected representatives in Congress to set policy by legislative action, and for the Executive to execute it as enacted. It does not provide for the Executive to bypass the will of the Legislative branch in effective abuse of the delegated authority that this Court has allowed. But this is precisely what is happening today, on precisely the policy now before this Court in the present case.

President Obama repeatedly taunts the Congress, the people's elected representatives, collectively representing the broad geography and complex economic interests of this most advanced of all nations, with the threat, "If the Congress doesn't act, I will." Nowhere in our Constitution is there any

executive power for the Executive to bypass the intent of Congress in this way.

But this is not what is happening with the EPA regulating supposed greenhouse gas emissions. The EPA is being used by the Administration as a vehicle to circumvent the will of Congress, and for the Executive to set the policy on supposed greenhouse gases on its own. The Administration is consequently at present taking this nation back before the Magna Carta.

This present case reflects one legal challenge to the Administration's abuse of our fundamental Constitutional framework. The EPA itself has recognized and publicly admitted that it is acting contrary to the will of Congress.

What this case makes plain is that the Administration is trying to shoehorn its global warming regulatory agenda into a Clean Air Act that was never intended, and so is not suited, to carrying this freight. The regulation of carbon dioxide emissions from stationary sources are consequently contrary to the admitted intent of Congress, and the actual express language of the CAA. Rather than being compelled by operation of law, the regulation of carbon dioxide emissions at issue in this case is actually prohibited by operation of law.

Because federal law requires public policy to be based on sound science, we submit that the published record of peer reviewed literature, including *Climate Change Reconsidered II*, and the heavy politicization of self-intersted, government sponsored science,

warrants judicial inquiry on remand of whether the applicable legal standards have been met.

We further submit that given more recent experience with the growing breakdown of the fundamental framework of our Constitution, the increasing usurpation of the Constitutional role of the Legislative Branch by the Executive Branch, and the increasing awareness that Congress never intended for the CAA to regulate carbon dioxide emissions and the admitted unworkability of such regulation, that this Court revisit *Massachusetts v. EPA.* If the EPA is being used not only to bypass the Constitutional role of Congress, but to rewrite the Clean Air Act as passed by Congress, another usurpation of the Legislative Branch by the Executive Branch, we submit that it is time for this Court to save our nation's Constitution, and the rule of law.

But at a minimum, we urge the Court not to approve the expansion of EPA regulatory authority over carbon dioxide to stationary sources, which even the EPA admits cannot practically be done without the EPA rewriting the CAA as passed by Congress.

ARGUMENT

I. THE CONSTITUTION PROVIDES FOR CONGRESS TO SET POLICY AND THE EXECUTIVE TO EXECUTE IT

Our Constitution's fundamental framework provides for the people's elected representatives in Congress to set policy by legislative action, and for the

Executive to execute it as enacted. It does not provide for the Executive to bypass the will of the Legislative branch in effective abuse of the delegated authority that this Court has allowed. But this is precisely what is happening today, on precisely the policy now before this Court in the present case.

President Obama repeatedly taunts the Congress, the people's elected representatives, collectively representing the broad geography and complex economic interests of this most advanced of all nations, with the threat, "If the Congress doesn't act, I will." Nowhere in our Constitution is there any executive power for the Executive to bypass the intent of Congress in this way. The framers provided for the Legislative branch to set the policy by legislation, with all of the wrangling and compromises that may take, representing all of the diverse interests, and then for the Executive to execute that policy, as legislatively enacted.

But this is not what is happening with the EPA regulating supposed greenhouse gas emissions. The EPA is being used by the Administration as a vehicle to circumvent the will of Congress, and for the Executive to set the policy on supposed greenhouse gases on its own. The Administration is consequently at present taking this nation back before the Magna Carta. Call it the Julius Ceaser option.

Everybody paying attention knows that the Congress even when it was overwhelmingly controlled by the President's own party in the first two years of this President's first term rejected the policies the EPA is now implementing. The President and

Congressional leaders of the President's own party tried to pass legislation to authorize the EPA to regulate carbon dioxide and other supposed greenhouse gas emissions. The President's own party reflected a rising tidal wave of well grounded public opposition in failing to pass that proposed legislation.

This present case reflects one legal challenge to the Administration's abuse of our fundamental Constitutional framework. The EPA itself has recognized and publicly admitted that it is acting contrary to the will of Congress. The EPA itself has said that the very regulations under challenge in this case would not be "consistent with other provisions of the [Title I] PSD [Prevention of Significant Deterioration] and title V requirements, and inconsistent with – and, indeed, undermine – congressional purposes for the PSD and title V provisions." JA 418-19. The EPA itself has also recognized that "applying PSD requirements literally to [greenhouse gas] sources…would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 454-55.

What this case makes plain is that the Administration is trying to shoehorn its global warming regulatory agenda into a Clean Air Act that was never intended, and so is not suited, to carrying this freight. In regard to stationary sources in particular, the CAA is focused on localized, ambient air quality. "Ambient" air refers to the air that people are exposed to, and which they breathe. *Train v. Natural Res. Def. Council,* 421 U.S. 60, 65 (1975); 40 C.F.R. Section 50.1(e). That is the proper focus for actual pollutants that threaten the public health and

welfare like sulfuric acid, benzene, sulfer dioxide, and nitrogen dioxide, where localized emissions and sources have localized and regional effects.

But the effects and sources of so-called greenhouse gases are not localized or regional, but global. In regard to the traditional, actual pollutants, the regulatory focus is on varying localized or regional concentrations of the pollutants, which are determined primarily by localized and regional emissions from major localized or regional sources. The EPA itself has recognized, however, that so-called greenhouse gas concentrations "tend to be relatively uniform around the world," J.A. 1091.

Moreover, the globalized concentration of the primary so-called greenhouse gas, carbon dioxide, has natural causes that result in natural global concentations of CO2. In addition, the relatively uniform global concentrations of CO2 have global sources well beyond the jurisdiction of even the EPA, or the Administration. As a result, the localized or regional sources of carbon dioxide emissions that are the subject of CAA regulation are not directly responsible for any localized or regional effects of global CO2 concentrations, and those localized or regional effects of global CO2 concentrations cannot be controlled by regulation of localized or regional sources of carbon dioxide emissions. As the EPA itself has again realized, "[c]urrent and projected levels of ambient concentrations" of so-called greenhouse gases are not responsible for any direct adverse effects locally and regionally. J.A. 1091 at 1145.

CAA regulation of localized and regional sources and effects of traditional, actual pollutants consequently quite rightly begins with state regulatory implementation plans (State Implementation Plans (SIPs)) for those localized and regional sources. 42 U.S.C. Sections 7407, 7410. But effective regulation of the sources and effects of the relatively uniform, global concentrations of carbon dioxide and other so-called greenhouse gases requires cooperative *international and global* regulation. Traditional CAA regulation for this concern consequently only distracts from any possibly necessary international and global regulation.

Moreover, CAA regulation is focused on major local sources of the regulated emissions, at emission levels suited to the traditional, actual pollutants, but not to carbon dioxide and other so-called greenhouse gases. Regulation of stationary sources begins at annual emissions of "any air pollutant" at 100 tons per year (tpy) for Title I, 42 U.S.C. Sections, 7602(j), 7661(2)(B), and 100 or 250 tpy for PSD depending on the source. *Id.*, Section 7479(1). Sources emitting any of the traditional, actual pollutants at these threshold levels are all major industrial facilities, which is what Congress intended to regulate under the CAA, as the EPA itself has recognized as indicated above. But sources emitting 250 tpy of carbon dioxide include hospitals, schools, apartment buildings, and literally millions of other small, non-industrial sources. JA 283-284.

Such regulation of these innumerable smaller institutions is what the EPA itself is referring to when it says, "applying PSD requirements literally to

[greenhouse gas] sources…would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 454-55. As this Court recognized in *Alabama Power Co. v. Costle,* 636 F. 2d 323 (D.C. Cir. 1979), "Congress was concerned with large industrial enterprises – major actual emitters of air pollution" and it intended to exclude from such regulation "small industrial facilities within these categories [that] might actually and potentially emit less than the threshold." *Id.* at 354. This Court went on in *Alabama Power* to explain that it had

> "no reason to believe that Congress intended [the term 'major emitting facility"] to define such obviously minor sources [as] the heating plant operating in a large high school or in a small community college, [as] 'major' for the purposes of the PSD provision."

Id. Yet that is exactly what the EPA is now seeking to regulate that is under challenge today in the present case.

Because EPA recognizes that applying CAA regulation to all these sources would be politically, economically and practically intractable, it is busily rewriting the Clean Air Act it is supposed to be implementing as enacted, another practice that violates the fundamental framework of our Constitution, and that is becoming all too common in this unprecedented Administration. See, e.g., the Affordable Care Act. Can all these stationary sources for CO2 emissions possibly be subject to requirements for pre-construction and operating permits, as would

be required by the terms of the Title I PSD and Title V, as enacted?

The EPA itself recognizes quite clearly no. That is reflected in the EPA's very own so-called Tailoring Rule, in which it purports to rewrite rather than execute the CAA as passed by Congress to raise the statutory thresholds for carbon dioxide regulation for stationary sources from 100 tpy under the Title I PSD and 250 tpy under Title V to 100,000 tpy. J.A. 453, 674, 677-78. But the admitted unworkability of applying CAA regulation to stationary sources of carbon dioxide should have told the EPA that Congress never intended such regulation in enacting the CAA, and that the CAA consequently not only did not compel such regulation, it did not even authorize it.

The EPA did explicitly recognize that "Congress, focused as it was on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources." JA 355-56, 486-87; 74 Fed. Reg. at 55,304. But the EPA, somehow, instead interpreted this admitted Congressional intent not to regulate carbon dioxide under the CAA for supposed global warming as authorizing it to throw out the fundamental framework of our Constitution, and for the Executive Branch to bypass and usurp the Constitutional role of the Legislative Branch, setting policy itself rather than executing the policy established by Congress.

The present case consequenty provides a vehicle for this Court to restore the Magna Carta and the

fundamental framework of our Constitution to American government. That can begin most fundamentally by recognizing that contrary to urban legend, the science regarding possible catastrophic anthropogenic global warming is hotly contested. A recent comprensive report (993 8½ by 11 pages) by one body of top flight international climate scientists concludes that global temperature variations in the past 100 years were predominantly determined by natural causes, such as long term ocean current cycles and solar activity cycles. Nongovernmental International Panel on Climate Change (NIPCC), *Climate Change Reconsidered II* (Chicago: Heartland Institute, 2012). The high tone nature of the true scientific debate is further demonstrated by Patrick J. Michaels, Paul C. Knappenberger, Robert C. Balling, Mary J. Hutzler & Craig D. Idso, The Missing Science from the Draft National Assessment on Climate Change, Center for the Study of Science, Cato Institute, Washington, DC, 2012.

Because federal law requires public policy to be based on sound science, we submit that the published record of peer reviewed literature, including *Climate Change Reconsidered II*, and the heavy politicization of self-intersted, government sponsored science, warrants judicial inquiry on remand of whether the applicable legal standards have been met. We submit that much is to be learned on the issue from testimony from such eminent scientists as Richard Lindzen, long time Alfred P. Sloan Professor of Atmospheric Sciences at the Massachusetts Institute of Technology, William Happer, Cyrus Fogg Brackett Professor of Physics at Princeton University, Roy Spencer, a leader of the NASA satellite global

temperature monitoring team and Principal Research Scientist at the University of Alabama at Huntsville, Fred Singer, Professor Emeritus of Environmental Science at the University of Virginia, and the founder and first Director of the National Weather Satellite Service; Patrick Michaels, Research Professor of Environmental Sciences at the University of Virginia, and past President of the American Association of State Climatologists, and dozens of others.

But even the heavily politicized Intergovernmental Panel on Climate Change (IPCC) of the United Nations tells us in a recent publication that carbon dioxide is a natural, trace gas (0.038%) in the atmosphere essential to all life on the planet, odorless, colorless and harmless as a direct matter to humans and animals, whose own breathing is a source of carbon dioxide emissions, and highly beneficial to plant and agricultural growth. IPCC Special Report, Carbon Dioxide Capture and Storage, Annex 1, at 385 (2005).

We further submit that given more recent experience with the growing breakdown of the fundamental framework of our Constitution, the increasing usurpation of the Constitutional role of the Legislative Branch by the Executive Branch, and the increasing awareness that Congress never intended for the CAA to regulate carbon dioxide emissions and the admitted unworkability of such regulation, that this Court revisit *Massachusetts v. EPA.* If the EPA is being used not only to bypass the Constitutional role of Congress, but to rewrite the Clean Air Act as passed by Congress, another usurpation of the Legislative Branch by the Executive Branch, we

submit that it is time for this Court to save our nation's Constitution, and the rule of law.

But at a minimum, we urge the Court not to approve the expansion of EPA regulatory authority over carbon dioxide to stationary sources, which even the EPA admits cannot practically be done without the EPA rewriting the CAA as passed by Congress.

II. CARBON DIOXIDE EMISSIONS FROM STATIONARY SOURCES CANNOT BE A POLLUTANT SUBJECT TO REGULATION UNDER THE EXPRESS TERMS OF THE CAA'S PSD AND TITLE V PROVISIONS.

The broad language in Section 7521(a)(1) of Title II of the CAA that this Court found in *Massachusetts v. EPA* as authorizing the EPA to regulate carbon dioxide emissions from motor vehicles is not remotely found in Title I and Title V relating to regulation of emissions from stationary sources. 42 U.S.C. Section 7521(a)(1). So nothing in *Massachusetts v. EPA* compels the regulation of carbon dioxide emissions from stationary sources as a matter of law.

Nothing in Title I and Title V of the CAA mentions carbon dioxide emissions at all. Rather they provide for regulation of "any air pollutant" from "major emitting facilities" defined as those emitting more than 100 tpy in 28 named industrial categories and 250 tpy from any other source. 42 U.S.C. Sections 7479(1), 7602(j), and 7661(2)(B).

This Court recognized in *Alabama Power*, 636 F. 2d at 353, that Congress intended with this language to limit regulation to "facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions" that pollute ambient air. JA 453 ("Congress…designed the thresholds deliberately to limit the program's scope" of regulation).

The EPA itself explicitly recognized this limitation on regulation of emissions from stationary sources, saying, "Congress intended to limit the PSD program to large industrial sources because it was those sources that were the primary cause of the pollution problems in question and because those sources would have the resources to comply with the PSD requirements." JA 453. The EPA added, "Congress intended that PSD be limited to a relatively small number of large industrial sources," and it was "not too much to say that applying PSD requirements literally to [greenhouse gas] sources…would result in a program that would have been unrecognizable to the Congress that designed PSD. JA 454-55. EPA, in fact, confessed that its stationary sources carbon dioxide emissions rule at issue in this case would apply to "small commercial and residential sources…contrary to congressional intent for the PSD program." JA 449. EPA recognized as well that the same applied to the regulation of carbon dioxide emissions from stationary sources under Title V. JA 485.

The only reasonable conclusion from this analysis is that Congress did not intend to authorize EPA's regulation of carbon dioxide emissions from

stationary sources under Title I and Title V of the CAA. EPA itself recognized that such regulation was contrary to Congressional intent.

But somehow the EPA concluded that this conflict authorized it to throw out the fundamental Constitional framework that Congress as the Legislative Branch sets the policies through legislation, and the Executive Branch executes those policies as provided by Congress in the legislation. So the EPA proceeded to rewrite the legislation to increase the 100 tpy and 250 tpy thresholds for authorized regulation to 100,000 tpy in the case of stationary sources.

What that means is that the EPA's stationary source regulation under Title I and Title V of the CAA is contrary to the express language of the CAA. So instead of the EPA being compelled by operation of law to issue such regulation, the regulation it actually issued was prohibited by the express legislative language of the CAA and the EPA's own admitted Congressional intent behind the CAA, in regard to regulation of carbon dioxide emissions from stationary sources.

It would be only honestly faithful to the Constitution to hold that before the EPA can adopt costly and controversial carbon dioxide regulation that the democratically elected representatives of the people first pass legislation authorizing such regulation. That is the conclusion compelled by operation of law, if we are still to be a nation governed by the rule of law, and the Constitution.

III. TITLE I OF THE CAA AUTHORIZES ONLY REGULATION TO PROTECT LOCALIZED AMBIENT AIR QUALITY, NOT TO REGULATE GLOBAL CONCENTRATIONS OF CARBON DIOXIDE.

The Title I PSD provisions of the CAA authorize regulation of emissions protecting the localized ambient air quality that people are exposed to and breathe. 42 U.S.C. 7475(e). That is because Congress intended in the CAA to regulate traditional, actual pollutants, for which localized sources affect localized concentrations with localized effects. It did not intend to regulate odorless and colorless carbon dioxide that humans and other animals actually themselves emit when they breath out, and that actually promote more rapid plant and agricultural growth at the bottom of the food chain. See *Climate Change Reconsidered II*. It did not intend to govern globally uniform concentrations of carbon dioxide with supposed hotly contested global effects, which is primarily out of the reach and jurisdiction of the EPA, and, indeed, of the U.S. government.

Rather than authorizing regulation to govern global effects of carbon dioxide emissions, 42 U.S.C. Section 7471 authorizes implementation of state based regulation to address localized effects from localized sources. EPA's regulation of carbon dioxide emissions from stationary sources is consequently contrary to Congressional intent, and so is unlawful.

CONCLUSION

For all of the foregoing reasons, the ruling of the court below should be reversed.

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