No. 12-1146 AND CONSOLIDATED CASES

IN THE SUPREME COURT OF THE UNITED STATES

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

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BRIEF OF *AMICUS CURIAE* PEABODY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Peabody Energy Corporation ("Peabody") is the world's largest private-sector coal company and a global leader in sustainable mining and clean coal solutions. The company serves metallurgical and thermal coal customers in nearly thirty countries on six continents. The company shipped 246 million tons of coal in 2010, nearly 80 percent of which came from existing coal mines in the United States, and the company has approximately 9 billion tons of proven and probably coal reserves. Peabody was a Petitioner below, seeking review of the United States Environmental Protection Agency's ("EPA") "Tail-pipe," "Tailoring," and "Timing" Rules, as well as its "Endangerment Rule." It filed a Response in support of the Petition for Certiorari in Case No. 12-1272 and is filing as an *amicus* in the proceedings at bar.[1]

QUESTION PRESENTED

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

STATEMENT OF THE CASE

Peabody adopts Petitioner Utility Air Regulatory Group's statement of the case for this brief.

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[1] The parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The rules at issue in this case constitute EPA's first foray into greenhouse gas ("GHG") regulation following this Court's landmark decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Whether and how to regulate GHGs remains a highly debated, contentious issue in Congress, agencies, and the courts because of the broad impact that these regulations would have on modern industrialized economies, in the United States and abroad.

In 2007 and 2011, the Court set forth two markers with respect to whether and how GHG emissions can be regulated. *See id.*; *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). First, the Court stated that such determinations must result from the *collective* judgment of Congress and EPA:

> "[T]he use of the word 'judgment,'" we explained in *Massachusetts*, "is not a roving license to ignore the statutory text." 549 U.S., at 533. "It is but a direction to exercise discretion within defined statutory limits." *Ibid.*

American Elec. Power Co., 131 S. Ct. at 2539. Second, the Court required potential benefits of such a rule to be weighed along with "our Nation's energy needs and the possibility of economic disruption." *See id.* (concluding the judiciary does not possess tools for making the type of complex policy determinations needed to set GHG emissions). The Court explained that such regulations "cannot be prescribed in a vacuum," but must result from an "informed assessment of competing interests." *Id.* at 2531.

EPA did not follow either direction in setting forth the regulatory regime at issue in this case. As

discussed below, it did not work with Congress on developing a series of programs designed for GHGs that properly balances the interests involved. First, it arrogated this power to itself. It tried to cram new permit requirements for GHG emissions into Clean Air Act ("CAA") programs ill-suited for this purpose. When this approach led to "absurd" results, EPA eschewed reasonable alternative interpretations of the CAA in favor of rewriting the CAA. *See* Final Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,557-67 (June 3, 2010). Second, EPA did not consider competing interests. For example, during the Endangerment Finding, EPA announced regulatory conclusions before the comment period ended and did not consider the immense benefits to the American people and economy of affordable fuels for electricity and their other daily needs.

The Court should now apply the bounds it set forth in *Massachusetts* and *AEP* to restrain EPA. As the Court wisely foretold in *Massachusetts*, it is the obligation of the Court under the CAA to "reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Massachusetts*, 549 U.S. at 528 (citing 42 U.S.C. § 7607(d)(9)). Agencies cannot be permitted to legislate in the guise of legislative interpretation. The Court should reverse the decision below and require EPA to follow the law and take direction from Congress on whether and how to regulate GHGs.

ARGUMENT

In 2007, this Court gave the EPA an "inch." It held that GHGs were considered pollutants under the CAA's definition section for the purpose of regulating emission in cars. *See Massachusetts*, 549 U.S. at 532 ("Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.").

Automobiles constitute a discrete product category where GHG reductions can be achieved in concert with National Highway Traffic and Safety Administration's ("NHTSA") Corporate Average Fuel Economy ("CAFE") standards for incrementally improving gas mileage. The primary way to achieve substantial GHG emission reductions from motor vehicles is to improve fuel economy. Thus, the mechanism for achieving GHG reductions for automobiles already existed within a government program. *See* Final Rule, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; 75 Fed. Reg. 25,324 (May 7, 2010) ("Auto Rule"). EPA did hot have to reinvent any programs to carry out its responsibilities under *Massachusetts*.

In issuing new GHG regulations for cars, though, EPA took the proverbial "mile." It used its Endangerment Finding that GHG emissions from light-duty vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger the public health and welfare as a justification to impose a regulatory scheme for GHG emissions on stationary sources. *See* Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under

Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Rule"). Specifically, EPA subjected two stationary source permitting programs, PSD preconstruction permits and the Title V operating permits, to GHG regulation. *See* Tailoring Rule, 75 Fed. Reg. at 31,514.

Unlike with cars, the PSD program in particular is not adaptable to regulating GHGs. The CAA vehicle and PSD programs are as different from each other as cars are from buildings. In particular, PSD is region-based.[2] It governs pre-construction permits to control emissions of localized pollutants in defined areas of the country in tandem with the National Ambient Air Quality Standards ("NAAQS"). Under NAAQS, a local "air quality control region" is deemed to be in "attainment" or "nonattainment" depending on whether it is in compliance with emission standards for six regulated pollutants: ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead. *See* 40 C.F.R. §§ 50.1-50.12. A state develops a plan for managing regions in that state.

For regions in attainment, a "major" emitter of the six regulated pollutants can receive a PSD preconstruction permit,[3] but it must demonstrate that it is using the "best available control technology" to limit emissions. 42 U.S.C. §§ 7471, 7475(a)(4). Typi-

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[2] *See Alabama Power Co. v Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979) ("Congress intended location to be the key determinant" for permitting requirements.).

[3] PSD requirements apply to a "major emitting facility" that undertakes construction or "modification." 42 U.S.C. § 7475(a), 7479(2)(C). The term "modification" is defined as a physical or operational change that results in the increased or new emissions of "any air pollutant." *Id.* §§ 7411(a)(4), 7479(2)(C).

cally, EPA issues a few hundred PSD permits per year. *See* Tailoring Rule, 75 Fed. Reg. at 31,514, 31,537. Nonattainment areas are governed by a different program and construction of "major" emitters is barred unless the facility demonstrates, among other things, that it can achieve the "lowest achievable emissions rate" for the pollutants. 42 U.S.C. §§ 7502(c), 7503(a).

Under this regime, determining whether a facility can be considered a "major" emitter is critically important. Congress did not leave this determination up to agency discretion. It set the threshold in the CAA, *i.e.*, the potential to emit 100 or 250 tons per year (tpy) of a proscribed pollutant depending on the type of facility. *Id.* at § 7479(1).

Cramming the regulation of GHG emissions into this NAAQS/PSD regime is profoundly misguided. GHGs are fundamentally different than NAAQS pollutants, as different as the term pervasive is from limited. GHGs are not emitted by discrete sources contributing to local pollution. Rather, allegations related to GHGs are that they are emitted by sources around the world, are well-mixed in the entire global atmosphere, and have accumulated in the atmosphere for more than a century. Indeed, once in the atmosphere, these emissions cannot be distinguished from each other. Further, GHGs are not limited to specific facilities. They are ubiquitous, with numerous human activities and natural occurrences releasing them around the world. In fact, GHG emissions outside of the United States constitute about 83% of the world's GHG emissions. *See* Robert Meltz, Cong. Research Serv., RL 32764, *Climate Change Litigation: A Growing Phenomenon* 8, fig. 2 (2008).

Regulating GHG emissions, therefore, is not a local issue, the effects of GHG emissions cannot be addressed through regional permitting, and global GHG emissions cannot be controlled through a subset of U.S. emitters. Basic commonsense supports the legal distinctions in this case.

I. EPA OVERSTEPPED ITS AUTHORITY IN RE-WRITING THE CLEAN AIR ACT'S PERMITTING THRESHOLDS

When EPA used the Auto Rule as a Trojan horse for regulating GHGs for stationary sources, it not surprisingly found the PSD and Title V programs' statutory thresholds of 100/250 tpy and 100 tpy, respectively, yielded "absurd" results. *See* 75 Fed. Reg. at 31,557-67. Millions of buildings emit more than the 100 tpy of GHGs just from combusting oil or natural gas for heating. Applying these thresholds to GHGs would require pre-construction permitting *per year* for more than 80,000 industrial facilities, office buildings and large residences. *See* 75 Fed. Reg. at 31,576. EPA properly expressed alarm that expanding the PSD program in such a way would cause unacceptable economic burdens on these facilities and lead to permitting gridlock within EPA.[4] In this respect, EPA was correct.

The lawful response would have been for EPA to revisit the wisdom of regulating GHG under these programs. EPA, however, took it upon itself to rewrite Congress's statutory thresholds for when a facility is classified as a "major" emitter, but just of

[4] *See* 75 Fed. Reg. at 31,556-57 (concluding that proceeding under current thresholds would "overwhelm permitting authorities," causing permitting to take "a decade or longer").

GHGs. It decided that a threshold of 75,000 tpy for existing sources and 100,000 tpy for new sources would alleviate the absurd results of applying the statutory thresholds for the NAAQS pollutants to GHGs and then conveyed itself the additional authority to adjust these thresholds at its own discretion in order to encourage emission reductions in the future. *See id.* at 31,573. Congress never gave EPA this authority. If EPA's revisions to Congress's thresholds for stationary sources are allowed to stand for GHGs, agencies would be free to interpret a statute to create absurdity and then rewrite it to advance its own policy agenda.

A. Any Authority EPA Claims to Have Under the CAA to Set Emission Standards for GHGs is a Misinterpretation of the CAA

EPA fully appreciated that the impact of expanding PSD to GHGs was "inconsistent with Congressional intent," but claimed it was required to make these changes to fit GHGs into the existing permitting scheme. Proposed Tailoring Rule, 75 Fed. Reg. at 31,542. EPA's position of administrative necessity stems from an early EPA interpretation of its PSD authority in 1980. EPA had interpreted the CAA as providing that PSD permits were required not just for pollutants for which the Agency has established NAAQS, but *any pollutant that is regulated anywhere in the CAA under any program*. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980).

Under this broad interpretation, EPA claims that there was an automatic triggering effect when it regulated motor vehicle GHG emissions in the Auto Rule pursuant to *Massachusetts*. Once GHGs became regulated under this CAA program, it had to regulate GHGs under PSD and Title V programs as a matter of law. When this led to "absurd" results, EPA claims, it had no choice but to revise the statutory thresholds in order to satisfy this responsibility.

EPA took the wrong action. As Petitioners demonstrate, a reasonable alternative would have been for EPA to interpret the term "air pollutant" in the PSD and Title V programs in a more limited fashion, namely not including GHGs. *See* Brief of the Utility Air Regulatory Group at 20-25. EPA's 1980 misinterpretation stemmed from its response to the D.C. Circuit's ruling in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (reviewing certain EPA regulations pursuant to PSD). EPA's actions that led to *Alabama Power*, though, did not address emissions of substances in any way comparable to GHGs. As discussed above, GHGs are not regional, and the *Alabama Power* court did not have to consider the potential that applying the programs to those emissions could lead to absurd results.

EPA was presented with this and other reasonable alternative interpretations of the CAA during its deliberations of the stationary source rule that would have avoided the above absurdities. Undeterred, though, EPA persisted in interpreting the CAA in a way that created absurdity. Judge Kavanaugh wisely observed in a dissenting opinion below that "[w]hen an agency is faced with two initially plausible readings of a statutory term, but it turns out that

one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out." *Coalition for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322 et al., 2012 WL 6621785, *16 (D.C. Cir. Dec. 20, 2012). Yet, this is precisely the path EPA took.

Indeed, since *Massachusetts* EPA has been unwavering in its effort to regulate GHGs in a fashion broader than the Auto Rule alone. It signaled as early as the Advance Notice of Proposed Rulemaking on remand of *Massachusetts*, that it intended to maintain its interpretation and use the Auto Rule to regulate GHG emissions from stationary sources. *See* Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,497 (July 30, 2008). In the Endangerment Finding and the Auto Rule, EPA laid the groundwork for the need to change the statutory thresholds, stating the multitude of reasons existing thresholds would result in absurdities. *See* 75 Fed. Reg. at 31,540. In this regard, EPA could appear to approach its new regulation of GHGs in a "moderate" fashion. It could present the new regulations as alleviating undue burdens from a multitude of stationary sources around the country, rather than imposing such burdens on a certain class of them.

What is clear is that Congress never authorized these actions. Congress did not give EPA the authority to arrogate to itself the power to regulate GHGs, establish GHG emission limits at its own discretion, or continue setting GHG emission limits on an ongoing basis. These actions are not only contrary to the

CAA's text, but they also contravene Congress's purposeful decision to deny EPA the authority to set emission limits for the pollutants that it intended to be subject to the PSD. The lower court ruling approving of these acts should be reversed.

B. EPA Has Followed a Pre-Ordained Path to Regulate GHG Emissions

In pulling back the curtain on EPA's approach to regulate GHGs, one can see that at each stage in this regulatory process, EPA refused to consider regulatory decisions or interpretations that might lead the Agency to not regulate GHGs beyond the Auto Rule. The events surrounding the Endangerment Finding particularly demonstrate an Agency on a pre-ordained mission.

As alluded to earlier, before regulating GHGs under the Auto Rule, EPA had to determine through an Endangerment Finding that GHGs emitted from cars pose a danger to public health and welfare. EPA issued this proposed Endangerment Finding on April 17, 2009, less than three months after the Administration took office.[5] About a month later, *before the 60-day comment period closed*, the President and EPA Administrator announced that EPA had already concluded negotiations with automakers, certain environmental advocates and labor union representatives, and the State of California on the specific motor vehicle GHG regulations that would result from this process.

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[5] Press Release, President Obama Announces National Fuel Efficiency Policy, The White House, May 19, 2009, *at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/.

Although it is not known exactly when these negotiations commenced, the fact that they concluded just one month after the Endangerment Finding was proposed strongly suggests that the Administration had initiated efforts to negotiate a regulation to restrict GHG emissions even before it moved forward with the Endangerment Finding proposal. The public did not know of the existence of these negotiations until the deal was announced.[6]

The Administrator claimed that the "deal" only committed EPA to *propose* GHG regulations and that the commitment to finalize those regulations was contingent on the outcome of the Endangerment Finding.[7] The words used by the President and Administrator at the press conference, however, belie that claim.[8] The White House Press Release stated

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[6] *The New York Times* quoted California's representative in the negotiations as saying that EPA required that no one keep written records of the negotiations, *see* Colin Sullivan, *Vow of Silence Key to White House-Calif. Fuel Economy Talks*, N.Y. Times, May 20, 2009, even though EPA issued a memorandum on "Transparency in EPA's Operations" declaring its rulemaking processes will follow "the principles of transparency and openness." Lisa P. Jackson, Memorandum, *Transparency in EPA's Operations*, Apr. 23, 2009.

[7] *See Endangerment Finding*, 74 Fed. Reg. at 66,502.

[8] A central plank of the Administration's campaign was to reduce GHG emissions by 80 percent by 2050. *See* New Energy for America, *at* http://my.barackobama.com/page/content/newenergy_more (last visited Dec. 10, 2013). In one of her first acts, the EPA Administrator issued an "Opening Memo to EPA employees" stating "we will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act." Memorandum from Lisa P. Jackson to All EPA Employees, Jan. 23, 2009, *available*

that "[t]his groundbreaking policy delivers on the President's commitment to *enact* more stringent fuel economy standards."[9] The Administrator echoed, saying EPA "will . . . cut tons of pollution from the air we breathe, and make a lasting down payment on cutting our greenhouse gas emissions."[10] The announcement also specified the exact timeframe and standards for these new regulations.

What's more, EPA did not hide the fact that it was acting pursuant to a policy agenda. In the preamble to the proposed Endangerment Finding, EPA emphasized that its ultimate conclusions may reflect science, but they would also "embody policy considerations" of this Administration. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,892, n.10 (Apr. 24, 2009) (to be codified in 40 C.F.R. Ch. 1). In this regard, EPA did not follow the most basic procedural requirement in notice-and-comment rulemaking: an agency with an open mind. *See Advocates for Highway and Auto Safety v. Federal Hwy. Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994).

Congress enacted the Administrative Procedure Act (APA") to ensure the public a meaningful opportunity to participate in the rulemaking process and to enable agencies to educate themselves before establishing regulations. *See Texaco, Inc. v. Federal*

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at http:// blog.epa.gov/administrator/2009/01//opening-memo-to-epa-employees/ (last visited Dec. 10, 2013).

[9] *President Obama Announces New Fuel Efficiency Policy*, *supra* note 5 (emphasis added).

[10] *Id.*

Power Comm'n, 412 F.3d 740, 744 (3d Cir. 1969); *American Fed. of Labor & Congress of Indus. Orgs. v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (The "essential purpose" of the comment period is to generate "comments that will permit the agency to improve its tentative rule announced in the notice of proposed rulemaking."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (An "exchange of views, information, and criticism between interested persons and the agency" must be allowed.). This process is not to be a meaningless exercise where an Agency goes through the motions, but has a firm commitment to a predetermined course, as EPA appeared to do here with respect to GHGs.

Further, even though EPA had already stated its strategy to use motor vehicle regulations to trigger GHG regulations for stationary sources, the settlement negotiations reportedly did not include representatives from any stationary sources. In fact, several entities asked the Agency during the Endangerment Finding proceedings to consider the regulatory consequences of making this finding on stationary sources. They noted that EPA traditionally considers endangerment and regulatory responses together so that these decisions are not made in a vacuum. *See generally* Comments of Peabody Energy Co., Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Docket ID No. EPA-HQ-OAR-2009-0171 (filed June 23, 2009). The agency denied these overtures, choosing to trigger and develop new GHG rules outside of Congress's authority and without considering the broader consequences of these new rules on the nation's economy or energy needs.

C. New GHG Regulations Should Not Result from a Flawed and Biased Process

The process EPA used to regulate GHG emissions, along with the regulations themselves, stands in stark contrast to the long-standing tenets of congressional energy policy of weaving together progressive, cogent strategies for managing risks, benefits, and capabilities of America's energy sources.[11] This balanced approach recognizes that the power to regulate GHGs is the power to regulate the use of fossil fuels, and is thus the power to regulate nearly everything in the economy. It should be done with caution and through a fully informed process.

Congress has been keenly aware that, under the well-established formula that "wealth=health," the public health and welfare has improved dramatically as a direct result of fossil fuel energy.[12] This relationship is not an accident. The direct cause of both the increased emissions and the improvements in health and welfare is society's use of energy. The public relies on fossil fuel energy for turning on lights, heating homes, running appliances, and meeting their most basic transportation needs. The National Academy of Engineering identified societal electrification as the most significant "engineering achievement" of the twentieth century." George Constable & Bob Somerville, A Century of Innovation:

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[11] *See* Peter S. Glaser, F. William Brownell, & Victor E. Schwartz, *Managing Coal: How to Achieve Reasonable Risk with an Essential Resource*, 13 Vt. J. of Envtl. L. 177 (2011).

[12] *See, e.g.*, Sam H. Schurr et al., Electricity in the American Economy, Agent of Technological Progress (Greenwood Press, 1990).

Twenty Engineering Achievements That Transformed Our Lives (Joseph Henry Press 2003).

EPA's regulations, though, blindly put the nation on a path toward more expensive energy. As advocates for the poor and elderly have expressed, limiting GHG emissions, whether through litigation, legislation, or regulation, can disproportionately impact their constituents.[13] American households earning between $10,000 and $30,000 allocated twenty-three percent of their 2011 after-tax income to energy—more than twice the national average and a 65% increase from ten years earlier.[14] As one study of the Endangerment Finding concluded, GHG regulation "will impact low income groups, the elderly, and minorities disproportionately, both because they have lower incomes to begin with, but also because they have to spend proportionately more of their incomes on energy." Management Information Services, Inc., Executive Summary: Potential Impact of EPA Endangerment Finding on Law Income Groups and Minorities, at 2-3 (Mar. 2010), *at* http://www.misinet.com/publications/APA-0310.pdf.

Setting emission levels for GHGs, as with any gas or pollutant, is a policy decision that requires a careful balancing of the amount of emissions society will allow given the benefits of the underlying activity. It cannot be made by ignoring one side of the scale. Congress has long approached the issue of GHG reg-

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[13] *See* Eugene M. Trisko, Energy Cost Impacts on American Families, 2001–2011 (2011), *available at* http://www.americaspower.org/sites/default/files/Energy_Cost_Burdens_on_American_Families_2011.pdf.

[14] *See id.* at 2.

ulations with purposeful deliberation. Any lack of direction EPA perceives from Congress on whether or how to regulate GHG emissions from stationary sources is not a void that EPA can fill on its own. Thus, even if under *Massachusetts* GHGs qualify as a pollutant in the CAA, EPA must work with Congress to develop programs that strike the balance *Congress* desires for regulating GHG emissions.

II. EPA OVERREACH HAS GROWN IN RECENT YEARS

EPA's unauthorized rewriting of the CAA for stationary source permits is one of several examples in recent years where the agency has overreached its authority. As discussed below, one such case was before this Court last year. In that and other administrative law cases, this Court appreciated the risk of allowing agencies to implement political agendas unchecked by Congress or the regulated community. The public can lose trust in their unelected officials to fairly and faithfully execute the nation's laws.

A. Courts Have Been Admonishing EPA for Overstepping Its Authority

In the past several years, a number of EPA's actions have been challenged as overstepping the Agency's bounds. Several federal appellate courts have found that EPA has either exceeded its authority or issued inappropriate orders, sometimes, as this Court found, by the "strong-arming of regulated parties." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

For example, last year, the U.S. Court of Appeals for the Fifth Circuit held that EPA "overstepped the bounds of its narrow statutory role" in disapproving a State Implementation Plan ("SIP"). *See Luminant*

Generation Co. v. EPA, 675 F.3d 917, 926 (5th Cir. 2012). As part of the cooperative federalism approach of the NAAQS program, states have discretion to develop a SIP in order to assure that the regions in their states that are in attainment stay in attainment and that they are taking steps to correct any regions that are in nonattainment.

In this case, EPA disapproved of three amendments Texas made to its SIP for regulations implementing the state's permits for emission limits. The Court found that EPA, in addition to missing its statutory deadline to act by three years, had no basis for rejecting the amendments. The court noted that the amendment satisfied all federal requirements and that EPA's disapproval was based on "purported nonconformity with three extra-statutory standards that EPA created out of whole cloth." *See id.* at 932.

Also last year, the Fifth Circuit rejected another EPA attempt to invalidate a Texas emissions-related rule. *See Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012). This rule allowed sources to make adjustments to its emissions without further regulatory action if the emissions were under the proscribed limits. The court concluded that EPA's rejection was not based on any violation of the CAA, but the Agency's own "preference for a different drafting style, instead of the standards Congress provided in the CAA." *Id.* at 679. EPA, the court continued, "abuse[d] its discretion," "act[ed] beyond its Congressional mandate," "usurp[ed] state initiative[s] in the environmental realm," and "disrupt[ed] the [CAA's] balance of state and federal responsibilities." *Id.*

The Sixth Circuit had to restrain EPA in another case involving CAA regulations. *Summit Petroleum*

Corp. v. EPA, 690 F.3d 733, 741 (6th Cir. 2012). In this case, EPA construed the term "adjacent" so that it could aggregate emissions from several "adjacent" sources of emissions over a forty square mile region to have them qualify as a "single" stationary source. Only by aggregating their emissions would they qualify as a "major" source under the CAA programs and, therefore, be subject to heightened EPA regulation. The Court vacated EPA action, stating the interpretation was contrary to the dictionary definition, case law, regulatory history, and EPA's own previous guidance. *See id.* at 741-50.

Finally, as this Court experienced first-hand in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), EPA overstepped its bounds in demanding that an Idaho couple preparing to build a home in a residential neighborhood stop work on their house. *See id.* at 1370. EPA claimed the two-third acre lot was a "wetland" protected under the Clean Water Act and told the Sackets to restore the site to its natural state pursuant to an EPA-approved Restoration Work Plan, give the agency access to the property, and turn over certain records or be fined up to $75,000 per day. *See id.* at 1370-71. EPA then argued, successfully in the lower courts, that this edict could not be challenged.

This Court reversed, stating "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Id.* at 1374.

B. EPA's Increased Use of "Sue and Settle" Tactics for Rulemaking

During this same period of time, there have been reports of EPA trying to impose new legal obligations outside of the normal regulatory process through a little-known practice called "sue and settle." *See generally* William L. Kovacs et al., Sue and Settle: Regulating Behind Closed Doors (U.S. Chamber of Commerce 2013), *available at* http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf. In these actions, an advocacy group files a lawsuit challenging an agency action or rule. In settling the case, the agency agrees to effectively adopt the advocacy group's position. *See id.* This is all done outside of the safeguards of rulemaking and the ability of the affected regulated community to provide input. *See id.* at 11.

This process is not new or unique to EPA, but the reports suggest that the use of such agreements by EPA has increased in recent years. *See id.* at 14. More than one hundred of EPA's new rules, resulting in billions in annual compliance costs, are the product of sue-and-settle agreements. *See id.* at 14-15. In about 60 cases since 2009, EPA has not defended itself in the lawsuits, leading some to call these actions "friendship suits" that are designed to allow EPA to regulate outside the scrutiny of the public, state officials, and the regulated industry. *See id.* at 30-42. When trade groups have intervened to assert their rights to be heard should the case result in any new regulations, some courts have found that the groups lack judicial standing to participate in the cases, thereby perpetuating this practice. *See, e.g.,*

Defenders of Wildlife v. Jackson, 284 F.R.D. 1 (D.D.C. 2012).[15]

The U.S. Court of Appeals for the Ninth Circuit, this year, drew a line on "sue and settle" regulations, holding that an agency cannot use consent decrees to effectively promulgate a standard or rule change without following required procedures. *See Conservation Northwest v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013). This case involved an agreement between a coalition of environmental groups and the Bureau of Land Management to alter the method of assessing the impact of logging on wildlife in the Pacific Northwest. *See id.* at 1184-85. The Ninth Circuit concluded that the agency must provide an opportunity for public comment on alternatives the agency was required by law to consider. *See id.*

The Court should consider this case in the context of other attempts by federal agencies, including EPA, to impose preferred policy agendas outside of either their authorizations or the proper regulatory process.

III. THE COURT IS THE LAST LINE OF DEFENSE AGAINST AGENCY OVERREACH

Earlier this year, the Court affirmed that agencies are entitled to substantial deference in interpreting their authorizing statute, including the scope of their own authority. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). But, the Court was equally unambiguous that when "Congress has established a clear line . . . the agency cannot go beyond it." *Id.* at 1876; *Louisiana Pub. Serv. Comm'n*

[15] *See also Center for Biologic Diversity v. EPA*, No. C-11-06059, 2012 WL 909831 (N.D. Cal. Mar. 16, 2012); *Center for Biologic Diversity v. EPA*, 274 F.R.D. 305 (D.D.C. 2011).

v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it"). Here, Congress established a clear line on emission thresholds for PSD and Title V programs. EPA crossed that line to avoid self-induced absurdities.

Chief Justice Roberts observed last year that in the current era, regulatory regimes are rapidly expanding and the federal bureaucracy "wields vast power and touches almost every aspect of daily life." *City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., joined by Kennedy and Alito, J.J., dissenting). Using EPA's "strong-arming" of the Sacketts as an example, Chief Justice Roberts cautioned that "the danger posed by the growing power of the administrative state cannot be dismissed." *Id*. at 1879. The Court has a "duty to police the boundary between the Legislature and the Executive," particularly given the "dramatic shift in power" from Congress to agencies that exert a "potent brew of executive, legislative, and judicial power." *Id*. at 1886.[16]

If the Court fails to strike down the EPA actions at issue here, a key boundary between congressional and agency powers will go unpoliced. EPA and other federal agencies will be emboldened to arrogate more power for themselves and take shortcuts, both with respect to expanding their rulemaking authority and circumventing the normal rulemaking process.

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[16] *See also* Jonathan Turley, *The Rise of the Fourth Branch of Government*, Wash. Post, May 24, 2013 (cautioning that agencies are exercising increased autonomy with less accountability, sometimes issuing "abusive or nonsensical" rules).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully request this Court to reverse the ruling below.

Respectfully submitted,

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