Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272

In the
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

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

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BRIEF OF AMICI CURIAE SENATOR MITCH MCCONNELL AND OTHER MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus curiae Mitch McConnell is the Senate Republican Leader. Other amici curiae are Senator Rand Paul; United States Representatives Andy Barr, Brett Guthrie, Thomas Massie, Hal Rogers, Ed Whitfield; and United States Representative Lamar Smith, Chairman of the House Committee on Science, Space, and Technology.

As the Senate Republican Leader, the Chairman of a House Committee having legislative jurisdiction over the policy matters at issue in this case, and Members of Congress, amici have a significant interest in protecting Congress's exclusive constitutional prerogative to legislate national policy through its exclusive constitutional authority to enact, amend, and repeal statutes. In this case, the Environmental Protection Agency ("EPA") has usurped Congress's exclusive authority by improperly exercising legislative power and unilaterally amending a statute.

Furthermore, amici represent States and congressional districts whose citizens have been adversely affected by the costly, controversial, and unlawful regulation at issue in this case. Amici's constituents' ability to participate in the democratic lawmaking process through their elected officials in

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[1] The parties' letters consenting to the filing of amicus briefs are on file with the Court. *See* SUP. CT. R. 37.3(a). No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief. *See* SUP. CT. R. 37.6.

Congress has been undermined by the EPA's actions, and their lives and livelihoods have been harmed by it.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case the EPA has construed specialized provisions of the Clean Air Act designed to regulate a limited number of air pollutants for which the EPA has established "National Ambient Air Quality Standards" to apply to *any* airborne compound regulated under *any* provision of the Clean Air Act, including carbon dioxide and other greenhouse gases. To avoid the sweeping costs and staggering administrative burdens resulting from its expansive interpretation, the EPA effectively *amended* specific, numerical permitting thresholds that Congress itself had unambiguously written into the Clean Air Act.

This the EPA cannot do. Our Constitution reserves the power to enact, amend, or repeal statutes to Congress alone. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417 (1998). To be sure, the EPA, like many other agencies, has been delegated authority to promulgate rules that *implement* the will of Congress as expressed by statute, and it may do so by filling in the details of general legislative commands and clarifying ambiguous statutory provisions. But neither the EPA nor any other entity in the Executive Branch may *override* the will of Congress by amending or disregarding specific, unambiguous statutory text. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). As Justice Frankfurter explained:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem , . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

The power claimed by EPA to amend specific, unambiguous provisions of a duly enacted statute not only intrudes on the lawmaking authority reserved by the Constitution to Congress, it also obscures accountability for significant policy decisions, such as the controversial and costly regulation at issue here. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 757-58 (1996). More important still, the power claimed by the EPA threatens to undermine our liberty, which "is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring).

ARGUMENT

I. Background

As explained in detail by petitioners, this case involves the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act, codified in sections 7420 to 7479 of Title 42. This program is designed to control emissions by stationary sources of pollutants for which the EPA has established National Ambient Air Quality Standards. To date the EPA has established standards for six air pollutants, which are referred to as NAAQS pollutants. Specifically at issue here are provisions of the PSD program that require certain specified stationary facilities to obtain permits before beginning new construction if they "emit, or have the potential to emit, one hundred tons per year or more of any air pollutant," and which impose the same permitting requirement on "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." 42 U.S.C. § 7479(1) (defining "major emitting facility"); *see also id.* § 7475(a)(1) (imposing permitting requirement on major emitting facilities).

In the context of the Clean Air Act's motor vehicle emissions program, this Court interpreted the phrase "air pollutant" to include "all airborne compounds of whatever stripe"—regardless of their potential for harm. *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007). The EPA has never interpreted the *stationary source* provisions at issue here, however, to require permits for facilities that emit 100 (or 250) tons per year of any sort of airborne compound, no matter how harmless. And all agree that this is correct—to read the statute to require permits for every stationary facility that emits 100 (or 250)

tons per year of a harmless airborne compound (steam, for example) would impose untold costs on countless facilities that in no way endanger ambient air quality.[2]

Rather, the dispute in this case is whether the stationary source provisions should be read to apply to air pollutants regulated under any program of the Clean Air Act, or to apply only to the NAAQS pollutants that are the target of the PSD program. For the reasons set forth by Judge Kavanaugh in his dissent from the denial of rehearing en banc, *see* Joint Appendix ("J.A.") 170-190, amici agree with petitioners that the latter reading is correct.

The EPA, however, adopted the former reading, and in order to mitigate the enormous practical problems created by that interpretation, it claimed the power to rewrite the very specific numerical thresholds set forth in the statute that trigger the permitting requirement under the PSD program. Thus, the EPA determined that facilities that emit greenhouse gases (which are not NAAQS pollutants but which are newly regulated under the motor vehicle emissions program) will be subject to the permitting requirement not if they emit or have the potential to emit *100 (or 250) tons per year* of greenhouse gases, but only if they emit or have the potential to

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[2] The motor vehicles emissions program at issue in *Massachusetts v. EPA* did not regulate all "air pollutants," but only such air pollutants that the EPA determined "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 549 U.S. at 506 n.7 (quoting 42 U.S.C. § 7521(a)(1)).

emit *100,000 tons per year* of such gases. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514, 31516 (June 3, 2010). What is more, the EPA claimed the power to make further alterations to these numerical thresholds on an ongoing basis. *See id.* at 31516-17. It is the EPA's startling assertion of the legislative power to rewrite (and continue to rewrite) statutes that is addressed in the balance of this brief.

II. The Constitution Bars EPA from Rewriting a Duly Enacted Statute.

The Constitution does not authorize the President to enact, to amend, or to repeal statutes. *Clinton*, 524 U.S. at 438. To the contrary, "[t]he Founders of this Nation entrusted the law making power to the Congress alone." *Youngstown Sheet*, 343 U.S. at 589. To be sure, "some administrative agency action—rule making, for example—may resemble 'lawmaking.' " *Chadha*, 462 U.S. at 953 n.16. But such "administrative activity cannot reach beyond the limits of the statute" authorizing it. *Id*. In this case, however, the EPA seeks to arrogate to itself the power to amend specific statutory terms established by Congress, and to continue to revise those terms on an ongoing, ad hoc basis. It thus asserts power "not merely to disregard in a particular instance the clear will of Congress," but "to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Youngstown Sheet*, 343 U.S. at 609 (Frankfurter, J., concurring). Not only does the EPA's action usurp the authority to make "important choices of social policy" from "the branch of our Government most responsive to the popular will," *Industrial Union Dep't v. American Petroleum*

Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment), it also undermines the separation of governmental powers that our Constitution deems "essential to the preservation of liberty." THE FEDERALIST No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

A. Our Constitution Reserves the Legislative Power to Congress.

1. The Constitution explicitly defines the respective roles of the Congress and of the Executive in the legislative process. *Chadha*, 462 U.S. at 945. Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. "This text permits no delegation of those powers." *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 472 (2001). By contrast, Article I grants the Executive only a limited role in the lawmaking process: before bills passed by Congress may become law, they must "be presented to the President of the United States," who may "sign" bills that he "approve[s]" or "return" (veto) bills to which he objects. U.S. CONST. art. I, § 7. Article I further qualifies this check granted the President on Congress: if a bill returned by the President is reconsidered and approved by two thirds of each House of Congress, "it shall become a Law." *Id.*[3]

[3] As a technical matter, it appears that the Framers regarded the President's role in approving or returning bills as a check on the Legislative power, not as part of that power *per se*. As James Wilson explained at the Pennsylvania ratifying convention:

The history of the framing and ratification of the Constitution leave no doubt not only that "the prescription for legislative action in Article I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951, but also that "[t]hese provisions of Article I are integral parts of the constitutional design for the separation of powers," *id*. at 946.

In addition to his Article I power to sign or return bills, the President's only other constitutionally mandated role in the legislative process is to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art II, § 3. But this power, "granted

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> Sir, the Convention observed, on this occasion, strict propriety of language: "If he approve the bill, when it is sent, he shall sign it, but if not, he shall return it;" but no bill passes in consequence of having his assent: therefore, he possesses no legislative authority.
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> The *effect* of this power, upon this subject, is merely this: if he disapproves a bill, two thirds of the legislature become necessary to pass it into a law, instead of a bare majority. And when two thirds are in favor of the bill, it becomes a law, not by his, but by authority of the two houses of the legislature.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 473 (Jonathan Elliot ed., 1901). Alexander Hamilton likewise described the President's ability to veto a bill not as legislative power, but as "a salutary check upon the legislative body." THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate." *Youngstown Sheet*, 343 U.S. at 632 (Douglas, J., concurring). The Constitution thus expressly limits the President's role in the lawmaking process: he can only recommend laws and veto bills; he cannot make a law himself. *Id.* at 587 (majority); *see also id.* at 655 (Jackson, J., concurring).

More generally, Article II mandates that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. And the President can execute only duly enacted laws. *Youngstown Sheet*, 343 U.S. at 587; *see also id.* at 633 (Douglas, J., concurring) ("the power to execute the laws starts and ends with the laws Congress has enacted"). Thus, as this Court explained in the landmark *Steel Seizure Case*, which struck down an executive order purporting to authorize the seizure of steel mills without statutory approval, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. at 587; *accord Chadha*, 462 U.S. at 953 n.16.

In short, the Constitution separates the power to make law from the duty to execute the law. And "[t]he Founders of this Nation entrusted the law making power to the Congress alone." *Youngstown Sheet*, 343 U.S. at 589. It follows that the President may not enact law. The Constitution just as surely prohibits "unilateral Presidential action that either repeals or amends parts of duly enacted statutes," *Clinton*, 524 U.S. at 439, for it is well settled that "[a]mendment and repeal of statutes, no less than

enactment, must conform with Article I," *Chadha*, 462 U.S. at 954. Indeed, in *Clinton v. City of New York* this Court struck down provisions of the Line Item Veto Act purporting to authorize the President to "cancel" certain types of duly enacted tax and spending measures. 524 U.S. at 436. As this Court explained, "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id.* at 438.[4]

2. To be sure, although Article I makes clear "that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity," *Loving*, 517 U.S. at 758 (citation omitted), it does not follow "that only Congress can make a rule of prospective force," *id.* "To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Id.*; *see also id.* (quoting 5 WORKS OF THOMAS JEFFERSON 319 (P. Ford ed., 1904) (letter to E. Carrington, Aug. 4, 1787)) ("Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution."). This Court has thus long since concluded that separation of powers principles "do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). And "Congress has found it frequently

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[4] Indeed, though the Constitutional Convention ultimately granted the President a qualified veto over legislation, it unanimously rejected a proposal that would have allowed the President the power even temporarily "to suspend any legislative act." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103-04 (Max Farrand ed., 1911).

necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution . . . ." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

While this Court has thus permitted Congress to delegate some authority that it could exercise itself, *Loving*, 517 U.S. at 758, it has nonetheless made clear that "rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law," *Ernst & Ernst*, 425 U.S. at 213. "Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Id.* at 213-14 (quotation marks omitted).

The vast majority of this Court's cases upholding congressional delegations of authority that Congress could exercise itself have followed the pattern of *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), a seminal case in which this Court held, in an opinion written by Chief Justice Marshall, that Congress may establish "general provision[s]" by statute and delegate "power . . . to those who are to act under such general provisions to fill up the details." *Id.* at 43. As then Justice Rehnquist observed a century-and-a-half later, these cases have addressed circumstances where Congress has enacted statutes that "lay down the general policy and standards that animate the law," leaving those assigned to administer the statutes "to refine those standards, 'fill in the blanks,' or apply the standards to particular cases." *Industrial Union Dep't*, 448 U.S. at 675 (Rehnquist,

J., concurring in judgment).[5] In all of these cases, this Court has required that "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [administer the statute] is directed to conform." *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409. This requirement enforces the constitutional requirement that Congress may not delegate the power to make laws but may only delegate the authority to take actions, including making rules, that implement its statutes. *Loving*, 517 U.S. at 771.

In a handful of cases dating back to the *Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), this Court has also upheld statutes permitting the Executive to suspend, alter, or cause to take effect provisions set forth in the statute itself, but only if a legislatively specified finding has been made. Almost without exception, however, these cases have addressed statutes governing foreign relations, a field in which the President has broad constitutional authority under Article II that "does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). As this Court has recognized, "congressional legislation . . . within the internation-

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[5] Examples of such cases abound. *See, e.g.*, *Whitman*, 531 U.S. 457; *Loving*, 517 U.S. 748; *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta*, 488 U.S. 361; *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *New York Central Secs. Corp. v. United States*, 287 U.S. 12 (1932).

al field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.*; *accord Clinton*, 524 U.S. at 445; *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 691 (1892). *Marshall Field & Co.* and *J.W. Hampton, Jr. & Co.*, for example, both upheld tariffs that could be suspended and reinstated, or raised and lowered, based upon the President's finding of certain facts involving international commerce.

More important, in all of the cases of this type, the President's action "was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *Marshall Field & Co.*, 143 U.S. at 693; *accord J.W. Hampton, Jr., & Co.*, 276 U.S. at 410-11. This understanding of the constitutional limitations on the Executive's regulatory power was echoed more recently in *Clinton v. City of New York*. The Court distinguished the unfettered executive authority to cancel duly enacted tax and spending measures at issue there from the statutes upheld in prior cases in which "Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President." 524 U.S. at 445. The cases thus uniformly establish not that Congress may "delegate its power to make a law," but only that it "can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends

to make, its own action depend." *Marshall Field & Co.*, 143 U.S. at 694.[6]

In short, although some administrative action may resemble lawmaking, and although this Court has sometimes described such action as "quasi-legislative," *Chadha*, 462 U.S. at 953 n.16, such administrative authority "is not the power to make law," *Ernst & Ernst*, 425 U.S. at 213. An Agency's "administrative activity cannot reach beyond the limits of the statute that created it," *Chadha*, 462 U.S. at 953 n.16, and the "scope" of any rules it promulgates "cannot exceed the power granted [it] by Congress," *Ernst & Ernst*, 425 U.S. at 214. Thus, executive action, even performed under delegated authority, must adhere to the dictates of the underlying statute, and "[t]he courts, when a case or controversy arises, can always ascertain whether the will of Congress has been obeyed and can enforce adherence to statutory standards." *Chadha*, 462 U.S. at 953 n.16 (quotation marks and citation omitted).

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[6] As this Court explained, the power to legislate conditionally is an essential part of Congress's law making authority:

> To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.

Id. (quotation marks omitted).

B. The EPA Has Improperly Arrogated to Itself the Legislative Power.

As explained above, *see supra* Part I, the EPA has in this case effectively *amended* a duly enacted statute, purporting to alter—indeed to increase by a magnitude of *40 to 100* times—specific numerical thresholds expressly established by Congress itself. More startling still, the EPA has expressly claimed the power to make additional changes to the statutory thresholds on an ongoing, ad hoc basis. Far from a permissible exercise of rulemaking authority, the EPA's action on its face constitutes an impermissible attempt by an Executive agency to exercise Legislative authority in violation of Article I of the Constitution and well settled separation of power principles.

This is not a case like *Wayman* and its numerous progeny where an agency has simply "fill[ed] up the details" of "general provisions" established by Congress. *Wayman*, 23 U.S. (10 Wheat.) at 43. Rather, the EPA has purported to *alter* specific details of a statutory scheme that Congress itself elected to establish in black and white. Nor is this a case like the *Brig Aurora* and similar cases where Congress has authorized the Executive to suspend or alter a statutory term *if a legislatively specified finding has been made*. Leaving aside the obvious constitutional differences between the Clean Air Act and the statutes governing foreign relations at issue in the cases like the *Brig Aurora*, nothing in the Clean Air Act remotely authorizes the EPA to alter or suspend the specific statutory thresholds at issue here.

It is thus clear that the power asserted by the EPA here is nothing less than a "unilateral power to change the text of duly enacted statutes." *Clinton*,

524 U.S. at 447. The exercise of such power by the Executive Branch cannot be reconciled with constitutional precept, practice, or precedent. *See, e.g.*, *id.* at 439; *Chadha*, 462 U.S. at 953 n.16; *Ernst & Ernst*, 425 U.S. at 214. Indeed the unilateral, unbounded power claimed by the EPA in this case goes well beyond the item veto power invalidated in *Clinton v. City of New York*, which Congress had expressly authorized by statute and which was limited to specific tax and spending measures.

The EPA's attempt to rewrite the specific statutory thresholds established by Congress not only contradicts, but defies, well-settled delegation principles and fundamental precepts of administrative law. Again, rulemaking power is simply "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst*, 425 U.S. at 213-4. Accordingly, an agency may promulgate regulations only to address matters that Congress has left for it to decide. *See Chevron v. National Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Thus, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* This Court has further held that where a statute "is silent or ambiguous with respect to [a] specific issue," *id.* at 843, there is an "implicit" delegation to the agency to address that "particular question," *id.* at 844. But where "Congress has directly spoken to the precise question at issue. . . , that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The unambiguous, specific numerical thresholds established by the Clean Air Act thus

demonstrate that Congress did not delegate to the EPA any authority to alter those provisions. In addition, the EPA's asserted power to amend specific numerical thresholds of the Clean Air Act cannot be reconciled with the fundamental principle that "[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it." *Chadha*, 462 U.S. at 953 n.16; *see also Whitman*, 531 U.S. at 485 ("The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion."). Embracing the power asserted in this case would eliminate any meaningful constraint on agency rulemaking.

More fundamentally, the fact that the EPA would alter the terms unambiguously specified in a duly enacted statute makes clear that the power it asserts is not Article II authority to adopt regulations implementing the will of Congress, but rather Article I power "to make law" by amending specific provisions of that statute. *Ernst & Ernst*, 425 U.S. at 213-14. Indeed, by purporting to exercise authority that Congress unambiguously withheld, the EPA does not "merely . . . disregard in a particular instance the clear will of Congress." *Youngstown Sheet*, 343 U.S. at 609 (Frankfurter, J., concurring). Rather, it "disrespect[s] the whole legislative process and the constitutional division of authority between President and Congress." *Id.*[7]

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[7] The EPA contends that rewriting the statutory thresholds is justified, *inter alia*, to avoid absurd results. But given that "[i]t is the Government's own misreading that cre-

C. The Power Asserted by the EPA Here Infringes on the Constitutional Prerogatives of Congress, Undermines Government Accountability, and Threatens Liberty.

1. To permit the Executive Branch to issue regulations that actually alter specific details of a statutory framework that Congress has itself established with specificity—here the specific numerical permitting thresholds in the PSD program that EPA has effectively amended from *100 (or 250) tons per year* to *100,000 tons per year*—would, in the words of Judge Kavanaugh, "green-light a significant shift of power from the Legislative Branch to the Executive Branch," effectively giving the Executive Branch "the authority to set economic and social policy as it sees fit." J.A. 188. Amici, as Members of Congress, are of course deeply concerned with the EPA's blatant intrusion on Congress's lawmaking authority in this case.[8]

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ates the need to 'fix' " the statute, the proper remedy is not to rewrite the statutory thresholds but to "reject the Government's odd view" that the permitting requirement applies to non-NAAQS pollutants so that "no absurdity arises in the first place." *Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012); *see also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in judgment) (when construing statute to avoid absurd results, court should adopt interpretation that "does least violence to the text" while still avoiding absurdity).

[8] It bears emphasis that Congress is well aware of the issue that EPA sought to address here. As Judge Kavanaugh explained:

> In 2009, the House of Representatives passed a global warming bill that was supported

2. Vindicating Congress's exclusive authority to make the laws also promotes government accountability. As this Court has explained, "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." *Loving*, 517 U.S. at 757-58. The Executive Branch is, by contrast, "[i]ll suited to that task." *Id*. at 758. Invalidating agency action that infringes upon Congress's Article I lawmaking power thus ensures that important matters of public policy are decided by the people's representatives. In this regard, the separation of powers promotes accountability since the policy makers will have to answer to the electorate for the choices they have made. *Id*.

3. To be sure, "[l]egislative action may indeed often be cumbersome, time-consuming, and apparently inefficient." *Youngstown Sheet*, 343 U.S. at 629 (Douglas, J., concurring). By contrast, "executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency." *Id*. But "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." *Chadha*, 462 U.S. at 944. And while "a government with distributed authority . . . labors under restrictions from which oth-

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> by the President. But the Senate did not pass it. In the early 2000s, Senators McCain and Lieberman sought to pass global warming legislation, but no law was ultimately enacted. Numerous other bills have been introduced over the years, and various legislative efforts are ongoing.

J.A. 189.

er governments are free[,] [i]t has not been our tradition to envy such governments." *Youngstown Sheet*, 343 U.S. at 613 (Frankfurter, J., concurring). Indeed, "it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." *Chadha*, 462 U.S. at 958-59.

Foremost among these values are the preservation of liberty and the "[d]eterrence of arbitrary or tyrannical rule." *Loving*, 517 U.S. at 757. Having "lived under a form of government that permitted arbitrary governmental acts to go unchecked," *Chadha*, 462 U.S. at 959, those who framed and ratified the Constitution believed separation of powers to be "essential to the preservation of liberty." THE FEDERALIST No. 51, at 321 (James Madison); *see also, e.g.*, *Mistretta*, 488 U.S. at 380; *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). As particularly relevant here, the Framers believed, with Montesquieu, that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." THE FEDERALIST No. 47, at 302 (James Madison) (quoting Montesquieu). Indeed, "[t]he abuses by the monarch recounted in the Declaration of Independence provide dramatic evidence of the threat to liberty posed by a too powerful executive." *Metropolitan Wash. Airports Auth.*, 501 U.S. at 273.

Amici respectfully submit that experience has demonstrated the wisdom of the Framers' design. This Court should not countenance the EPA's attempt to exercise lawmaking power, for "[l]iberty is always at stake when one or more of the branches

seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). In the memorable words of Justice Jackson, "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown Sheet*, 343 U.S. at 655 (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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