No. 12-1272 (consolidated with Nos. 12-1146, 12-1248, 12-1254, 12-1268 and 12-1269)

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *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 STATE AND LOCAL CHAMBERS OF COMMERCE AND OTHER BUSINESS ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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December 16, 2013

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

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INTERESTS OF *AMICI CURIAE*

Amici Curiae State and Local Chambers and Other Business Groups include 75 separate state and local business associations representing companies in 33 different states – including in the majority of the states that are *respondents* in this case.[1] Collectively, *Amici's* members include businesses of every size and in every industry, and conduct business throughout the entire United States. An important function of *Amici* is to represent the interests of their members before all branches of federal and state governments, including the courts.

Amici have an interest in the development of sound environmental regulations that are economically responsible. *Amici*'s members both produce and consume energy that results in the emission of greenhouse gases, and their emissions are now or could become subject to the PSD and Title V permitting programs for stationary sources that EPA claims are "triggered" by the regulation of greenhouse gas emissions from mobile sources. *Amici* submit this brief to the Court to explain the severe economic consequences that will flow regulating greenhouse gases under the Clean Air Act's PSD and Title V

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this *Amicus Curiae* brief by blanket agreements filed with the clerk of this court.

programs, which are ill-suited for limiting greenhouse gas emissions.[2]

Amici Curiae State and Local Chambers and Other Business Groups include the following organizations:

The Business Council of New York State, Inc.

Alaska Chamber of Commerce

Albany Area Chamber of Commerce

Albany-Colonie Regional Chamber of Commerce

Arctic Slope Regional Corporation

Arizona Chamber of Commerce and Industry

Arkansas State Chamber of Commerce

Associated Industries of Arkansas, Inc.

Association of Washington Business

Baltimore/Washington Corridor Chamber of Commerce

Battle Creek Area Chamber of Commerce

Beaver Dam Chamber of Commerce

Bismarck-Mandan Chamber of Commerce

Bossier Chamber of Commerce

Buckeye Valley Chamber of Commerce

Business Council of Alabama

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[2] Detailed statements of interest for each of the amici are available online at http://www.hollingsworthllp.com/news.php?NewsID=545 .

Catawba Chamber of Commerce

Chamber of Reno, Sparks and Northern Nevada

Chamber Southwest Louisiana

Charlotte Chamber of Commerce

Chicagoland Chamber of Commerce

Colorado Association of Commerce and Industry

Eau Claire Area Chamber of Commerce

Flagstaff Chamber of Commerce

Fox Cities Chamber of Commerce and Industry

Fremont Area Chamber of Commerce

Greater Fresno Area Chamber of Commerce

Gallup McKinley County Chamber of Commerce

Georgia Chamber of Commerce

Gilbert Chamber of Commerce

Greater Bakersfield Chamber of Commerce

Greater Beaumont Chamber of Commerce

Greater Burlington Partnership

Greater Irving-Las Colinas Chamber of Commerce

Greater Lehigh Valley Chamber of Commerce

Greater North Dakota Chamber

Greater Phoenix Chamber of Commerce

Greater Sandoval County Chamber of Commerce

Greater Shreveport Chamber of Commerce

Greater Springfield Chamber of Commerce (Illinois)

Greater Springfield Chamber of Commerce (Virginia)

Greater Summerville/Dorchester County Chamber

Green Bay Area Chamber of Commerce

Indiana Chamber of Commerce

Kentucky Chamber of Commerce

Las Vegas Metro Chamber

Lincoln Chamber of Commerce

Long Beach Area Chamber of Commerce

Louisiana Association of Business and Industry

Lynchburg Regional Chamber of Commerce

Manhattan Chamber of Commerce

Michigan Chamber of Commerce

Minnesota Chamber of Commerce

Missouri Chamber of Commerce

Myrtle Beach Area Chamber of Commerce

Nebraska Chamber of Commerce and Industry

North Carolina Chamber

Northern Michigan Chamber Alliance

Ohio Chamber of Commerce

Owatonna Area Chamber of Commerce and Tourism

Pennsylvania Chamber of Business and Industry

Sacramento Metro Chamber

Salt Lake Chamber

San Diego East County Chamber of Commerce

Santa Clarita Valley Chamber of Commerce

South Carolina Chamber of Commerce

State Chamber of Oklahoma

Tempe Chamber of Commerce

Texas Association of Business

Tucson Metro Chamber

Utah Valley Chamber

Virginia Chamber of Commerce

Visalia Chamber of Commerce

West Virginia Chamber of Commerce

Youngstown/Warren Regional Chamber

INTRODUCTION

Amici stand together for the interests of all businesses in America that will bear the direct economic brunt of the EPA's initial wave of economically devastating greenhouse gas regulations prompted by the Triggering Rule. In particular, *Amici* stand for

smaller businesses allegedly promised "relief" from regulatory burdens by the Tailoring Rule. In this brief, they explain why they are alarmed by EPA's decision in the Triggering Rule to assume vast, new regulatory authority over some 6 million new facilities – and why they are neither relieved nor comforted by its decision to *temporarily* delay regulation of some of those GHG sources.

Amici are concerned with the severe economic consequences that will result from regulating GHGs under the prevention of significant deterioration ("PSD") and Title V permitting programs, which the EPA itself admits are "contrary to what Congress had in mind." In fact, the programs so undermine what Congress attempted to accomplish in the PSD program that the EPA chose to re-write critical and clear provisions of the Clean Air Act to fit the "square peg" of GHGs into the "round hole" of the PSD program. *See* Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009). Virtually all of *Amici's* members are apprehensive about future regulation. Some of *Amici's* members will be directly impacted by being swept in to the PSD/Title V programs for the first time – even at the "tailored" coverage thresholds. Moreover, nearly all of *Amici's* members face imminent higher energy costs because of the new GHG regulations for "large" GHG sources, such as power generating facilities.

Amici are additionally concerned with the EPA's remarkable failure to engage the concerns of American small business adequately in the GHG rulemaking process. From the beginning until the present day, the agency has failed to adequately study and consider the effects of its GHG regulations on small enterprises. Instead, the agency has wrongly assumed that, by

regulating relatively large emitters first, and by delaying regulation of smaller sources, its GHG regulations would not "result in any increases in expenditures by any small entity." 74 Fed. Reg. 55,349 (Oct. 27, 2009).

EPA also incorrectly assumed that the its regulation of large emission sources would not increase costs of goods and services down the entire supply chain, thereby adversely forcing smaller enterprises to pay higher prices for energy and other essential goods and services. Finally, the agency erroneously assumed that its decision to defer regulation of small businesses would translate into "relief" – as opposed to trepidation and intimidation based on the agency's declaration of its power and intent to ultimately regulate *all* sources to the extent it deemed necessary.

EPA's assumptions reveal that the only "relief" achieved by the Tailoring Rule was administrative relief for the agency itself, not regulatory relief for American small business. Indeed, the Agency's refusal to forswear regulation of small business demonstrates its determination to accomplish the "absurd result" it allegedly seeks to avoid. EPA's remarkable claim that the Clean Air Act empowers its regulation of at least 6 million new sources never before regulated under the PSD/Title V programs – no matter how small the facility – is the "absurdity" – not the administrative nightmare of accomplishing that end.

To America's small enterprises, the question is not whether the nightmare will affect them – but when. As prudent businesses, they rightly foresee risks for which they must prepare and burdens for which they must account. Although EPA may disregard those

risks and burdens, America's small enterprises do not share that luxury.

SUMMARY OF THE ARGUMENT

Amici's arguments address the adverse economic consequences imposed by EPA's "Triggering Rule," in which the Agency claimed authority to regulate, for the first time, greenhouse gas emissions ("GHGs") from over 6 million large and small businesses. The entities subject to regulation include large and small factories and power plants, as well as bakeries, office buildings, hospitals, multifamily residential buildings, large private homes, and other "small sources" of GHG.

Significantly for these *Amici*, the Agency has never denied or disclaimed its authority under the Clean Air Act ("CAA") to regulate under the PSD and Title V programs *all* sources of GHG emissions that meet the modest numerical coverage thresholds identified by Congress in the CAA, however diminutive they may be. Instead, by promulgating its "Tailoring Rule," EPA merely deferred the exercise of its authority over "small entities" to an undefined date that suits its administrative convenience as it takes "one step at a time" to apply the statutory thresholds to GHG emissions. Although most small businesses have never before been subject to EPA's PSD or Title V permits, they now face the prospect of heavy-handed regulation – a risk that is imminent for many and, subject to the Agency's convenience, eventual for all.

The issue before the Court in this proceeding concerns the validity of EPA's "Triggering Rule," a rulemaking that claims that the Agency's decision to regulate GHGs from mobile sources automatically "triggers" the regulation of GHGs from stationary

sources. According to EPA's own projections, the "Triggering Rule" leads to "absurd results" (to use EPA's own terminology), including the devastating economic consequences from regulating 6 million new facilities.

To avoid this "absurdity," EPA's "Tailoring Rule" takes a red pen to modify the Clean Air Act to temporarily avoid the consequences associated with regulating greenhouse gas emissions from nearly every source in the United States – irrespective of the amount of their relative contribution to global climate change. When EPA first proposed the Tailoring Rule, the Agency insisted that the rule is "not expected to result in any increases in expenditures by any small entity." 74 Fed. Reg. 18909 (April 24, 2009). Despite this expectation, the administrative record, sound economic analysis, and common sense flatly contradict EPA's assurances.

In reality, numerous "small entities," such as small power generation facilities, anticipate emissions that may exceed the Tailoring Rule's thresholds. As a result, they will immediately be subject to onerous, time consuming, and expensive "Prevention of Significant Deterioration" ("PSD") and Title V permitting requirements for greenhouse gases. It can take years and hundreds of thousands of dollars in paper work costs alone for a company to obtain these permits, which is why Congress designed them to only apply to facilities emitting conventional pollutants.

Moreover, the Tailoring Rule does not provide a true "safe harbor" for "small entities" which do not qualify for immediate regulation. Instead, it provides only a *temporary* exemption from PSD and Title V requirements. EPA fully intends to consider lowering the thresholds to expand the program to small sources.

When EPA ultimately regulates all the way down to the statutory thresholds, EPA's expansion plans will inexplicably pursue the same "absurd" results that the Tailoring Rule was created to avoid.

Finally, even those "small entities" that avoid outright regulation will not escape EPA's attention. EPA has announced that it plans to reduce those enterprises' greenhouse gas emissions through alternative means, such as increasing energy efficiency – a tactic which guarantees additional compliance expenditures. EPA foresees piecemeal regulations that narrow the compliance focus to "equipment within a facility" as opposed to the overall facility itself, and even "residential sectors" are not excluded from examination.

The threat of these invasive and intrusive regulations produces a "chilling effect" that impacts plans for expanding operations, entering into new markets, and developing new products. Both large and small enterprises will reasonably hesitate if growth entails the complexities and costs of regulatory compliance. Those which move forward will surely pass their increased costs, including higher energy expenses, on to their customers. Businesses that cannot do so will suffer decreased profits in the midst of the current economic crisis – a setback that can ultimately threaten their survival.

Nothing in the Clean Air Act mandates the path of economic adversity that EPA has chosen. After this Court decided *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA had a wide variety of options available – including refusing to regulate greenhouse gases from stationary sources because such a decision would precipitate the "absurd" economic chaos the EPA admitted would flow from the regulation of GHGs for

stationary sources. Nevertheless, EPA elected to pursue the "absurdity" despite its devastating economic impact on American business.

ARGUMENT

I. The Economic Impacts Of Triggering GHG Regulations Under the PSD And Title V Programs Will Be Devastating, Both At the "Tailored" Levels And At The Statutory Coverage Thresholds.

EPA's Triggering Rule represents perhaps the largest single regulatory expansion in the Agency's history. Indeed, a brief filed by Nobel economists in support of certiorari described the EPA's program as "unprecedented, sweeping, and costly" and concluded that "[i]f implemented, the regulatory choice [to pursue regulation of GHGs under the PSD and Title V programs] will impose *substantial*, yet *avoidable*, costs on society, while reducing the potential that the problem identified will be resolved." *See* Brief of Economists Thomas C. Schelling, Vernon L. Smith, and Robert W, Hahn as Amici Curiae in Support of Petitioners, at 3-4, 10 (emphasis added).

Even at the temporary "tailored" coverage thresholds adopted by the EPA in the "Tailoring Rule," the consequences for the American economy will be severe as energy facilities are forced to close, resulting in higher energy costs that are passed down the supply chain. But the EPA has claimed that the Tailoring Rule is just one "step" in its regulatory approach, and asserts authority in the Triggering Rule to regulate over 6 million facilities at the statutory threshold levels. The threat of impending regulation of those facilities, as well as the eventual regulation of those facilities, each represents distinct, additional

economic costs that have been routinely under-appreciated by the EPA. In particular, the economic implications for America's small enterprises will be crushing.

A. The Type And Scope Of Direct Burdens Imposed On Businesses By Regulating GHGs Under The PSD And Title V Programs.

A 2008 study regarding the potential economic impacts of regulating GHGs under the PSD and Title V programs illustrates the implications for regulating GHGs under those programs. According to the report, the GHG emission threshold of 250 tpy "is reached when a business uses about $70,000" in "stationary" energy costs (i.e., not cars, trucks and similar), assuming a modest $10 per 1000 cubic feet natural gas, or $3 per gallon oil. *See* Portia M. E. Mills and Mark P. Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO2 as a Pollutant* (U.S. Chamber of Commerce, 2008), at 3.[3] That means, according to the report, that at 250 tpy, "an operation as small as 1,000 square feet is sufficient to emit 250 tpy." *Id.*

The Triggering Rule is economically remarkable not only because of the *scope* of expanded regulatory authority – in terms of the over 6 million facilities potentially subject to regulation by the programs for the first time – but also because of the *type* of regulation (PSD and Title V permitting) that those entities would face. The PSD/Title V permitting process is

[3] Available at http://www.uschamber.com/reports/regulatory-burden-compliance-dimension-regulating-co2-pollutant (last visited Dec. 9, 2013).

extremely burdensome on the applicant. In 2004, EPA calculated that a PSD permit costs an applicant an average of $125,120 and requires 866 hours for the applicant to complete.[4] Moreover, in the Tailoring Rule, EPA admitted that "a literal application of the title V applicability provisions to all GHG sources would result in *permitting delays of some 10 years*," even though the statute requires resolution in 18 months. 75 Fed. Reg. 31563-64. (emphasis added). What's more, "citizen suits" may challenge the issuance of a Title V permit.[5] Defending permits substantially increases their costs, and the threat that a permit could be challenged will itself have a chilling effect.

The aggregate impact of the regulatory authority asserted by EPA in the Triggering Rule was well-described by the Secretaries of Agriculture, Energy, Transportation, and Commerce in the 2008 ANPR. They explained that regulating GHGs under PSD/Title V provisions would give EPA "de facto zoning authority through control over thousands of what formerly were local or private decisions, impacting the construction of schools, hospitals, and commercial and residential development." 73 Fed. Reg. at 44360.

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[4] *See* Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 CFR Part 51 and 52), Carrie Wheeler, Operating Permits Group, Air Quality Policy Division. Available at Docket No. EPA-HQ-OAR-2004-0081.

[5] Such actions can be used to require a facility to comply with any "standard, limitation, or schedule established under any permit issued pursuant to Title V or under any applicable State implementation plan approved by U.S. EPA, any permit term or condition, and any requirement to obtain a permit as a condition of operations." Clean Air Act § 304(f)(4).

B. Even At The Temporary "Tailored" Coverage Thresholds, The Economic Impacts Of Regulating GHGs Under the PSD And Title V Programs Will Be Devastating.

The Triggering Rule set in motion a regulatory cascade that will have tremendous direct and indirect impacts on the economy generally, but in particular for smaller entities.

1. EPA's Proposed GHG Regulations Will Force Energy Generating Facilities To Close And Drive Up Energy Prices At A Time When Other New Energy Regulations Have Imposed $290 Billion In Costs On Industry.

Examining the largest GHG sources in the nation, the American Action Forum (AAF) recently determined that the current proposals for regulating GHGs under the Clean Air Act will affect tens of thousands of jobs and a variety of industries. *See* Sam Batkins and Catrina Rorke, *Implications of Regulating Existing Greenhouse Gas Sources* (American Action Forum, June 24, 2013).[6] Natural gas generation, steel mills, refineries, and plastics manufacturing will all have to adjust to the new regulations. *Id.* According to the researchers, "any limitations on carbon output will inevitably pull coal-based facilities off the grid." *Id.* (explaining that "off-the-shelf technologies can only cut about five percent of emissions from existing

[6] Available at http://americanactionforum.org/insights/implications-of-regulating-existing-greenhouse-gas-sources (last visited December 7, 2013).

facilities" and therefore the "results of regulation will either be the implementation of as-yet non-existent sequestration technology or some measure of fuel switching away from coal").

The researchers project that "regulating carbon emissions from existing facilities will require us to generate electricity – and produce things like steel, plastics, and oil products – in some other way." *Id.* For those who can "adjust" to "some other way," the costs of modifying facilities will be substantial. Since all of the substitutes for coal, including renewable fuels, nuclear energy, and natural gas are "imperfect" replacements, the nation will face an "uncertain energy future." *Id.* As EPA moves to regulate stationary sources beyond the power generation industry, traditional manufacturers "face a much more difficult route to identifying appropriate substitutes and achieving serious reductions." *Id.*

There are serious questions regarding whether industry is prepared to absorb the additional costs associated with these mandates – particularly in light of a $290 billion wave of energy-related regulations over the last four years from EPA and the Department of Energy combined. *Id.* (combined impact of rules such as Air Toxics Rule and Cross-State Air Pollution Rule is "more than the Gross Domestic Product of Norway" and is forcing older facilities to close).

2. Smaller Power Generation Businesses Will Be Directly And Disproportionately Impacted By EPA's Proposed GHG Regulations.

Significantly, not all power generation companies are large enterprises. Within the energy generation sector itself, there are a significant number of small

businesses that will be disproportionately impacted by EPA's GHG regulations. Small facilities with sparse capital reserves will be most heavily impacted by stringent GHG standards. Even though smaller producers contribute less than one-percent of U.S. emissions, they "will face the same regulatory hurdles that large utilities encounter." Sam Batkins, *Small Business Implications of Greenhouse Gas Regulation* (American Action Forum, Sept. 19, 2013).[7] EPA is fully aware of this disparate impact on these small businesses:

> In EPA's GHG reporting rule, its analysis went a step further and analyzed the "cost-to-sales ratios." With costs per entity from 14,000 to 17,000, the regressive effects were apparent. EPA found an entity with 1-20 employees would bear a cost-to-sales ratio of 1.32 percent, compared to 0.05 percent for a business with 100-499 employees. The largest entities, 1,000-1,499 employees, would bear the lowest ratio of cost-to-sales, 0.02 percent. *In other words, the smallest businesses bear a regulatory burden 65 times greater than their largest competitors do.*

Id. (emphasis added). The impact of this burden on smaller generators threatens their very existence. Many such facilities, especially those depending upon coal for fuel, will be forced to close – and a host of smaller facilities will be retired from otherwise productive service. *Id.*

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[7] Available at http://americanactionforum.org/research/small-business-implications-of-greenhouse-gas-regulation (last visited December 7, 2013).

3. Consumers, As Well As Large And Small Businesses, Will Be Indirectly Impacted As Higher Energy Costs Are Passed Along.

The retirement of facilities has economic consequences beyond the shuttered plants themselves. Recent research has confirmed that the retirement of coal-fired power plants results in higher energy prices. *See* Metin Delibi, Frank C. Graves, and Onur Aydin, *Coal Plant Retirements: Feedback Effects on Wholesale Electricity Prices* (Dec. 5, 2013).[8] According to the researchers, the resulting coal-plant retirements "will drive up market prices" and "not all of these impacts are currently reflected in public forecasts or market forward prices.[9] This new study also includes a qualitative assessment of impacts on capacity prices, concluding that forced coal retirements "*would tend to increase the capacity prices in the short to medium term.*"[10]

EPA, in its dash to regulate GHGs, failed to adequately consider the broad economic impact of removing such facilities from service. These increased energy costs are a *direct and significant impact placed on all sectors of the American economy* – a major burden that the Agency failed to consider before

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[8] Available at http://www.brattle.com/system/news/pdfs/000/000/584/original/Coal_Plant_Retirements_-_Feedback_Effects_on_Wholesale_Electricity_Prices.pdf?1386199719 (last visited Dec. 7, 2013).

[9] *Coal Plant Retirements Likely to Alter Future Power Prices According to Study by Brattle Economists*, The Brattle Group (December 5, 2013). Available at http://www.brattle.com/news-and-knowledge/news/584 (last visited Dec. 7, 2013).

[10] *Id.*

predicting that its GHG regulations would not "result in any increases in expenditures by any small entity." 74 Fed. Reg. 18909 (April 24, 2009).

At the same time this suppressive force is applied, the costs of goods and services used by small entities will surely increase – spurred by the economic burdens imposed on large manufacturers who produce the materials and goods used by small businesses. Although EPA opines that large sources of GHG will not sustain "direct economic burdens" because PSD and Title V requirements are "already mandated" by the Clean Air Act, 75 Fed. Reg. at 31595, the *indirect* economic burdens present a grim picture. The burden of compliance is enhanced by the inevitable impact of increased energy costs. Since compliance costs in the power generation industry will increase dramatically, all users – large and small – will face increased costs for electrical power.

It is unrealistic to expect that large companies will not pass these increased costs down to customers by raising prices. Customers include "small entities" which must then absorb the cost of EPA's regulatory burdens. Unfortunately, it is increasingly difficult for small businesses to pass costs down to end users and consumers. As a result, small businesses will inevitably confront the risk of decreased profits – or losses – as a result of higher prices for essential goods and services.

Although EPA presumed that temporarily exempting smaller sources from permitting requirements would provide regulatory relief, the Agency does not intend to adopt a hands off approach. "[S]maller sources of GHGs will be the focus of voluntary emission reduction programs and energy efficiency measures that lead to reductions in GHGs." *Id.* at

31599. Even during the "exemption" period, the Agency reserves the right to *require* small sources to reduce emissions in an "efficient manner:"

> These approaches, which may be developed through both federal and state efforts, include *requirements*, incentives, and educational outreach to promote efficiency improvements to boilers and furnaces and energy efficient operations, including, for example, weatherization programs.

Id. at 31557 (emphasis added); *see also id.* at 31600. Trapped in an economic vise between unavoidable price increases and inescapable inhibitions on growth, America's small enterprises face an intimidating future – one which EPA has inexplicably overlooked.

C. Businesses Not Yet Directly Regulated Under PSD/Title V Due To The Tailoring Rule Are Justifiably Concerned About Eventual Regulation.

Enterprises not yet swept into the PSD and Title V programs for GHGs are justifiably concerned that the Tailoring Rule does not protect them from the burdens of eventual GHG regulation. Under EPA's regulatory scheme, "smaller entities" are only *temporarily* exempted from PSD and Title V regulations if their emissions fail to exceed the threshold levels specified in the regulations.

1. The Temporary Nature of the Tailoring Rule.

"Smaller entities" were not formally "exempted" because EPA concluded that they were not eligible for

regulation. According to EPA, the delay was motivated by its own limited resources and administrative limitations:

> The tailoring proposal contemplated at least a 6-year exclusion from permitting for small sources. This proposed exclusion was based on the overwhelming numbers of permitting actions at small sources and the need for time for permitting authorities to secure resources, hire and train staff, and gain experience with GHG permitting for new types of sources and technologies. It was also based on the time needed for EPA to develop, and for states to adopt, streamlining measures to reduce the permitting burden (*e.g.*, concerning PTE, presumptive BACT, or general permits).

75 Fed. Reg. at 31524 (June 3, 2010); *see also id.* at 31525. After the Rule's small source "exemption" expires, the Agency plainly intends to pursue regulatory action:

> *We further commit to completing another round of rulemaking addressing smaller sources by April 30, 2016.* Our action in that rulemaking would address permitting requirements for smaller sources, taking into account the remaining problems concerning costs to sources and burdens to permitting authorities.

Id. at 31522 (emphasis added). "Smaller sources" are in line for regulation subject to the "streamlining" of permitting processes over the six years following the Tailoring Rule's promulgation:

> *No PSD provision explicitly imposes any limitation of PSD to large industrial sources*,

> and Congress's reasoning for focusing on large industrial sources—which was that these sources are best suited to handle the resource–intensive analyses required by the PSD program—could extend to GHG sources under certain circumstances (that is, large sources first, *and smaller sources after streamlining methods are developed*).

Id. at 31558 (emphasis added); *see also id*. at 31559 ("Taking certain actions—including streamlining PSD requirements—can render PSD more affordable and thereby allow its application to smaller sources in a more cost-effective manner.").

Nothing in the Tailoring Rule provides any assurance that small sources will not be regulated. Indeed, the Agency construed the Clean Air Act to require regulation of *all* sources:

> [W]e find nothing in the PSD provisions or legislative history that would indicate Congressional intent to exclude GHG sources. Accordingly, we believe that Congress must be said to have intended an affirmative response for whether PSD applies to sources of GHGs *as a general matter*.

Id. at 31558 (emphasis added).

This conclusion means that *every* source of GHG, no matter how inconsequential its emissions may be, is within EPA's regulatory reach and grasp. To understand why presently unregulated entities are alarmed, imagine the economic consequences if each 2,000 square foot fast food franchise in America faced a 10-year Title V permitting delay (as EPA predicted in the Tailoring Rule), an extra $125,000 in permitting

costs, and an additional 866 employee hours to complete the application.

2. The Impact of EPA's Threat To Ratchet Down Coverage Thresholds.

Small businesses might count themselves fortunate to avoid *immediate* PSD and Title V requirements, but they remain at risk from coercive Agency actions regarding GHG. The Agency fully intends to use other "*regulatory and/or non-regulatory tools for reducing emissions from smaller GHG sources* because we believe that these tools will likely result in more efficient and cost-effective regulation than would case-by-case permitting." *See id*. (emphasis added). Viewed in this perspective, the Tailoring Rule's "regulatory relief" is illusory. Indeed, the regulatory sword *presently* hangs over the future of America's small enterprises. The only question is when it will fall.

The EPA's asserted ability to time its regulatory expansions gives the Agency significant leverage over the regulated community – perhaps to exact concessions from the businesses in unrelated areas in exchange for further delaying GHG regulations. This threat is not insignificant in its potential power. For example, suppose that the EPA next ratcheted down the coverage thresholds to sweep in 1% of the 6 million facilities it has claimed regulatory authority over in the Triggering Rule. Based on an average permit cost of $125,120 and an application burden of 866 hours, such a "modest" expansion of the EPA's regulatory agenda would cost at least an additional $7.5 billion and 60,000,000 employee hours, or approximately 25,000 full-time-employees. The incentives to avoid a

modest $7.5 billion regulatory expansion would be great.

Indeed, smaller emitters of GHGs – those in the range of 25,000 tpy to 75,000 tpy – *already* consider themselves in the Agency's crosshairs for the next wave of regulations. Although the *final* Tailoring Rule claimed that the PSD and Title V programs would initially apply only to sources emitting more than 75,000 or 100,000 tpy (depending on source-type) of GHG emissions (as compared to the statutory coverage thresholds of 100/250 tpy, the *initial*, proposed Tailoring Rule would have regulated those same GHG sources at a 25,000 tpy threshold. *See* 74 Fed. Reg. 55292 (Oct. 27, 2009). Given the EPA's claim that it is only *temporarily* adjusting the 100/250 tpy statutory coverage threshold, companies that emit between 100 tpy and 25,000 tpy are reasonably apprehensive that they are proceeding on "borrowed time."

II. EPA wrongly failed to consider the interactive and cumulative effects and costs of its GHG regulations.

The burdens and developments discussed above were not entirely unforeseen by EPA. Indeed, they are consistent with the Agency's initial predictions. In the preface to its Advance Notice of Public Rulemaking ("ANPR"), EPA Administrator acknowledged that it was "clear" that the Agency's regulations of motor vehicle emissions could "trigger" regulation of "smaller stationary sources that also emit GHGs – such as apartment buildings, large homes, schools, and hospitals," resulting in an "unprecedented expansion" of EPA authority that would have a "profound effect on virtually every sector of the economy and touch every household in the land." 73 Fed. Reg. 44355 (July

30, 2008). Despite this early foresight into its own regulatory potential, the Agency has never considered or calculated the interactive and cumulative effects and costs of *all* of the Administration's climate change rules and regulations.

Since the EPA's ANPR was published in 2008, many other federal agencies have issued regulations regarding climate change. *See generally*, Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 24 Harv. J. L. & Pub. Policy 421, 440-444 (2012). Nevertheless, neither the EPA nor any other agency has evaluated the magnitude of the regulations' overall impact on the economy – much less their cumulative impact on small enterprises. In the absence of an analysis that collectively evaluates the impact of the Administration's entire regulatory package, EPA cannot credibly claim that its GHG regulations will not "result in any increases in expenditures by any small entity." Without an accounting for the total burden, even a small additional impact may be the "straw that broke the camel's back."

The Executive Branch of our federal government seems determined to have each agency take a "tunnel vision" approach to climate change – without bothering to calculate or account for the cumulative burden its bureaucratic regime imposes on American business. For example:

- In October 2009, the President issued an executive order requiring all federal agencies to reduce their GHG emissions and improve their environmental performance. The order required all agencies to set a GHG emission reduction target for

2020, to reduce vehicle fleet petroleum use by 30 per cent by 2020, and to implement a "net-zero-energy" building requirement by 2030. *See id.*, at 442.

- The president also directed the Department of Energy to set more stringent energy efficiency standards for appliances, including both commercial and residential products, under the Energy Policy Act of 2005. *See id.*
- The Council on Environmental Quality promulgated draft guidance on the "Consideration of the Effects of Climate change and Greenhouse Gas Emissions" under the National Environmental Policy Act. The guidance describes how federal agencies must evaluate and consider the potential climate change impacts of significant federal actions subject to regulation under NEPA. *See id.*, at 442-43.
- The Interior Department launched a "coordinated strategy" to address the impact of climate change on lands and waters managed by agencies within the Department. The Department created a "Climate Change Response Council" that will require each bureau and office within the Department to incorporate climate change concerns into agency management plans and decision-making, including "major decisions regarding potential use of resources under the Department's purview." The Department also "prioritized development of renewable energy on public lands and offshore waters to reduce

our dependence on foreign oil and to reduce greenhouse gas pollution." The Forest Service is also considering how climate change concerns should alter its management of national forests. *See id.*, at 443.

- The Fish and Wildlife Service designated 187,000 square miles of "barrier islands, denning areas and offshore sea ice as critical habitat for polar bears, which are listed as a threatened species. The Endangered Species Act requires consultations with the Service when undertaking, funding, or permitting actions that could adversely affect critical habitat. *Id.* at 443.
- The SEC decided to issue critical guidance for public companies on how the SEC's disclosure requirements apply to economic and legal risks relating to climate change. The SEC concluded that public companies may have an obligation to disclose risks associated with proposed climate change legislation, regulation, and international agreements, the indirect economic consequences of such regulations and potentially material impacts of climate change on their business. *Id.* at 443-44.

The cumulative economic effect of these vast expansions of federal executive power regarding climate change has never been calculated – much less the impact on the small businesses that are potentially affected by them. Even a shorthand description of these massive initiatives vividly reveals a multi-front administrative burden imposed upon the American

economy – a burden that surely impacts the largest and most sophisticated American businesses, and which surely has the potential, insofar as small business is concerned, to be frankly oppressive.

Before EPA is permitted to impose the burdens of its expansive programs "in a vacuum," EPA owes the regulated community, the American people, and this Court a candid and complete accounting of how its proposals fit into the cumulative economic impact of the Administration's climate change initiatives. Since the Administration has not provided such an accounting in its arguments here, this Court should legitimately question whether EPA's regulatory adventure is based on a sound economic foundation.

CONCLUSION

Whatever alternative approaches might be adopted to address greenhouse gases – none of which are addressed or endorsed by this brief – EPA has charted a course that damages the American economy by pursuing regulations that are as ineffective as they are oppressive. Under such circumstances, and in light of the compelling legal arguments advanced by Petitioners, this Court should return EPA's exercises to the "drawing board" – with instructions to consider the practical economic impact of its "command and control" policies before endangering the nation's economic health and welfare.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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December 16, 2013