No. 12-1268

In The Supreme Court of the United States

SOUTHEASTERN LEGAL FOUNDATION, INC., et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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ADDITIONAL RESPONDENT

Gina McCarthy, Administrator, United States Environmental Protection Agency

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 Disclosure Statement for Petitioners was set forth on pp. xix-xxiv of the Petition, and there are no changes to that statement.

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REPLY BRIEF

There can be no serious dispute that this challenge to the greenhouse gas ("GHG") regulations of the Environmental Protection Agency ("EPA") presents legal issues of "exceptional importance," as judges on both sides of the decision below recognized. *See* Pet. App. 111 (panel opinion); *id.* at 139 (Kavanaugh, J., dissenting from denial of rehearing en banc). Chief among these issues is a question that demands this Court's attention: May EPA disregard the mandatory provisions of the Clean Air Act ("CAA") in pursuit of an agency-driven agenda to control GHG emissions? That question is all the more worthy of this Court's consideration in light of the breathtaking scope of the challenged rules and the staggering costs they will impose on the American economy. *See id.* (Kavanaugh, J., dissenting) (describing this rulemaking as "the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency").

EPA took upon itself authority to rewrite the statute to avoid what the agency conceded would be the "absurd" and "impossible" consequences of its preferred interpretation of the CAA – consequences that EPA readily confessed could not have been intended by Congress. *See* Tailoring Rule, JA01147 at 01150-51, 01181; App. 144-45 (Kavanaugh, J., dissenting). This interpretational maneuver represents an unprecedented and lawless aggrandizement of regulatory power.

In response to these compelling grounds for certiorari, EPA and its supporters put forward a train of arguments calculated to compartmentalize the case into artificially narrow legal boxes and thereby avoid effective judicial review of the whole. *See* Brief for Federal Respondents in Opposition ("Fed. Opp.") 18-47; Consolidated Brief in Opposition of Environmental Organization Respondents ("Envtl. Org. Opp.") 15-45. They claim that this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), is the locomotive driving their renegade train.

Respondents' strategy succeeded below, *see* Pet. App. 1-103, where the court of appeals held, among other things, that EPA's Endangerment Finding was pre-blessed by *Massachusetts*; that its interpretation of scientific evidence was entitled to "extreme," unquestioning deference; that EPA's regulation of stationary source emissions of GHGs was compelled by its Endangerment Finding and Tailpipe Rule; and that no party had standing to challenge EPA's claimed authority to override the CAA's mandatory thresholds for "major" stationary source permitting. *See id.* at 27-32, 34-40, 63-91, 93-99 (internal quotation marks omitted). As a result, the most sweeping and burdensome regulatory regime in American history has thus far received free judicial passage.

The petitions now pending before this Court present the last, best opportunity for any meaningful check on the EPA Administrator's exercise of what can fairly be described as unconstrained legislative and regulatory power. *See, e.g.*, Endangerment Finding,

JA00001 at 00029-30 (explaining EPA Administrator's grand strategy of addressing "the risks and impacts [of GHGs] across all climate-sensitive elements of public health and welfare, now and projected out into the foreseeable future," "from the current time to the next several decades, and in some cases to the end of this century"); Tailoring Rule, JA01150-51 (claiming agency prerogative to override CAA's mandatory thresholds on grounds that applying requirements enacted by Congress to GHG emissions would produce "absurd" and "impossible" results); Fed. Opp. 41 (claiming that "'absurd results' doctrine" gives EPA wide latitude to craft various new thresholds in place of statutory requirements) (quoting Tailoring Rule). Petitioners respectfully submit that denial of review in this case will sanction a massive repositioning of power away from Congress and into the hands of a single unelected officer of the executive branch.

A. There Are Significant Grounds to Question the Rationality of EPA's GHG Endangerment Finding.

Respondents claim that EPA's science-based justifications, and the court of appeals' review of these conclusions, are straight-forward and ordinary, and that EPA's Endangerment Finding was effectively compelled by *Massachusetts*. *See* Fed. Opp. 20-23. Neither claim is valid.

1. Petitioners argue that it was irrational for EPA to conclude with "90-99% certain[ty]" that human sources of GHGs caused "most" of the reported

atmospheric warming in the second half of the twentieth century. Pet'n 10 (quoting Endangerment Finding). This core expression of scientific certainty was based on three lines of evidence, each of which was shown by Petitioners below to be so deeply flawed and inaccurate as to make the agency's high-certainty determination arbitrary and capricious. *Id.* at 10-17.

The arbitrary-and-capricious standard requires a court to examine the logical basis for an agency's stated judgment, even where the materials cited include scientific studies, to ensure that the agency has exercised reasoned decisionmaking in reaching a determination, including in the level of "certainty" supporting the judgment. *See Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 104-05 (1983) (carefully examining the rationality of an expert agency's scientific assumptions) (cited in Fed. Opp. 21); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (invalidating several EPA determinations based on scientific studies) (cited in the decision below at Pet. App. 35).

In opposing certiorari, the Federal Respondents *do not even mention* Petitioners' challenge to EPA's unsupportable claim of "90-99% certain[ty]." Instead, they argue that the Endangerment Finding in general must be accepted as long as there was any substantial evidence to support the ultimate finding. *See* Fed. Opp. 19. But there was no sufficient examination by the court of appeals of the evidence and rationality of the EPA's specific conclusion concerning the "90-99%" level of certainty, which was fundamental to the

entire Endangerment Finding. The court of appeals relied on the rubric of "extreme deference" to an agency's reading of scientific studies and thereby avoided any meaningful review of EPA's faulty high-certainty conclusion. *See* Pet. App. 34-40. That approach will only invite agencies to smuggle their policy preferences past judicial review by disguising them in the cloak of "science." Pet'n 17.

2. Nor did this Court's decision in *Massachusetts* pre-judge the validity of EPA's Endangerment Finding. The Court in *Massachusetts* did not address "whether on remand EPA must make an endangerment finding [for GHGs] or whether policy concerns can inform EPA's actions in the event that it makes such a finding." 549 U.S. at 534-35. And the Court expressly stated that EPA could avoid taking further action on GHGs *not only* if it determined that GHGs "do not contribute to climate change," *but also* "if it provides some *reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do*," provided the agency's grounds for not acting are based on the requirements of the statute, not on extraneous policy concerns. *Id.* at 533 (emphasis added).[1]

[1] The record here presents just such a "reasonable" – indeed, *compelling* – statutory basis for EPA to decline to make a GHG endangerment finding: EPA's own recognition that "absurd" and "impossible" consequences would flow from the regulation of GHGs unless the statute is rewritten to eliminate clear stationary source mandates. Respondents are flatly wrong when

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B. EPA Acted Contrary to the CAA in Promulgating the Timing and Tailoring Rules for Stationary Source Regulation of GHG Emissions.

In trying to defeat this Court's review, Respondents strain to avoid the central issue warranting this Court's intervention: Where an agency's preferred regulatory agenda cannot be reconciled with the express terms and structure of the governing statute and flies in the face of congressional intent, may the agency rely on the "absurd" and "impossible" consequences of its own action as a basis to conform the statute to the agency's agenda? Petitioners maintain that the answer to that question is self-evidently no.

Rather than confronting the issue head on, Respondents claim that EPA had no choice but to regulate GHG emissions from major stationary sources, both because EPA has long interpreted "any air pollutant" in the definition of "major emitting facility" under the Prevention of Significant Deterioration of Air Quality ("PSD") program, 42 U.S.C. § 7479(1), to mean "any air pollutant regulated under the [CAA]," Fed. Opp. 31-33 (internal quotation marks omitted),

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they claim that *Massachusetts* prohibits EPA from considering such "projected implications" in rendering the Endangerment Finding. Fed. Opp. 22. These implications flow directly from EPA's reading of the statute itself, not from any extra-statutory policy objectives like those raised in *Massachusetts*. *See* 549 U.S. at 533-34. Being "ground[ed] . . . in the statute," they are therefore proper reasons for deciding against an endangerment finding. *Id.* at 535.

and because this Court supposedly already held that the statute requires such regulation in *Massachusetts* and *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). *See* Fed. Opp. 31-39; Envtl. Org. Opp. 29-39. These are not grounds to uphold EPA's override of clear statutory requirements.

1. EPA has no discretion to ignore the 100- and 250-tons-per-year emissions thresholds for "major" stationary source permitting under the PSD program and Title V of the CAA. The statute makes clear that these permitting requirements are mandatory and are not subject to waiver or exception. *See* 42 U.S.C. § 7475 (no "major emitting facility . . . may be constructed" in an air quality attainment area subject to the PSD program "unless . . . a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part"); *id.* § 7661a ("the Administrator may not exempt any major source from [Title V's permitting] requirements").

Instead of reading these clear mandates out of the statute, it would have been far more reasonable for EPA to reconsider its previous interpretation of which "regulated pollutants" trigger PSD and Title V permitting requirements in the first place. *Cf. Alabama Power Co. v. Costle*, 636 F.2d 323, 356-57 (D.C. Cir. 1980) (holding that EPA had no authority to expand statutory exemptions from PSD review and rejecting interpretation that required such expansion).

That alternative approach would be fully consistent with the statute because the framework and structure of the CAA make it evident that Congress intended the stationary source permitting programs to address the release of pollutants having the potential to degrade air quality in local regions. *See* Pet'n 19-20. Since the asserted climate effects of GHG emissions are global, such emissions, by definition, could have no distinct measurable impact on local or regional air quality standards. *Cf. AEP*, 131 S. Ct. at 2536 (recognizing that GHGs "become well mixed in the atmosphere" and that any effects of GHG emissions in one region could not be separated from effects of such emissions anywhere) (internal quotation marks omitted). It would thus be reasonable for EPA to refrain from treating GHGs as air pollutants subject to emissions limitations under Title V and the PSD program. *See* Pet'n 20-23.

2. Respondents are wrong to claim that regulation of GHG emissions from stationary sources is compelled by *Massachusetts* and *AEP*.

In holding that GHGs fall within the "capacious" definition of "air pollutant" in the CAA, 549 U.S. at 532, *Massachusetts* said nothing about the scope of EPA's discretion to define which pollutants are subject to stationary source regulation. *See id.* at 504 (making clear the Court was addressing only two questions: "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute").

Neither did this Court prejudge the present issue when it concluded in *AEP* that the CAA "speaks directly" to the subject of carbon-dioxide emissions from power plants. 131 S. Ct. at 2537. The question before the Court was whether the CAA "displace[d] any federal common law right to seek abatement of" such emissions, *id.*, and the Court simply held that it does. The Court was careful to reach no judgment on whether the CAA requires regulation of GHG emissions from stationary sources. *See id.* at 2538-39 ("The critical point is that Congress delegated to EPA the decision *whether* and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law. Indeed, *were EPA to decline to regulate carbon-dioxide emissions altogether* . . . , the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.") (emphases added).

Thus, despite their arguments opposing review, Respondents cannot defend EPA's stationary source regulatory regime on the basis of *stare decisis*. *See* Fed. Opp. 34. No prior decision of this Court even remotely approves EPA's strategem of overriding the clear dictates of the CAA and refusing to consider a more reasonable approach to stationary source emissions of GHGs. The rulemaking at issue here has crossed wholly beyond the borders of any regulatory territory previously sanctioned by this Court.

C. Petitioners Are Not Foreclosed from Challenging EPA's Timing and Tailoring Rules.

Respondents argue that standing must be analyzed in isolation for each separate aspect of the challenged rules, rather than "in gross," Fed. Opp. 46 (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted)); Envtl. Org. Opp. 41, and they claim there is no standing to challenge the Timing Rule, because it is based on an earlier interpretation of the statute, or the Tailoring Rule, because it "actually mitigate[s] Petitioners' purported injuries." Fed. Opp. 45 (quoting Pet. App. 97); *see* Envtl. Org. Opp. 40-42. It is important to recognize Respondents' standing argument for what it is: a bold assertion that EPA can adopt the broadest and most costly regulatory regime in history and not one person in the United States has standing to challenge it. *See* Fed. Opp. 43-47; Envtl. Org. Opp. 40-42. That assertion has no legitimacy.

All the rules at issue here work together, from end to end, as part of an integrated whole, and Petitioners' standing to challenge the resulting GHG regulatory regime cannot properly be defeated by focusing on each separate segment of the rulemaking to the exclusion of the whole. EPA's gross misapplication of the CAA began with the Endangerment Finding, where EPA drew irrational certainty from the cited studies and decided from the very outset it was going to ignore the "absurd" and "impossible" consequences that would flow from its preferred GHG agenda under the express terms of the CAA. The

agency's misguided enterprise then ran through the Timing Rule, where EPA determined that the regulation of mobile source GHG emissions approved in the Tailpipe Rule compelled the regulation of stationary sources, JA00308-28, and where EPA failed to reconsider, as Petitioners argue it must, which "regulated pollutants" require stationary source restrictions under Title V and the PSD program. And, finally, the agency's regulatory enterprise concluded with the Tailoring Rule, where EPA executed the last lawless act that enabled implementation of the entire regime from beginning to end – the act of overriding the CAA's mandatory permitting thresholds for major stationary sources to save the program from the "absurd" and "impossible"-to-implement requirements that EPA recognized the statute would otherwise mandate, JA01147 at 01150-51.

Each segment in this train of decisions was a *sine qua non* to the overall regime, and if Petitioners succeed in invalidating any one of these essential segments, EPA's entire GHG regulatory program will fall. Indeed, the "absurd" and "impossible" results that EPA confronted at the conclusion of this rulemaking in the Tailoring Rule should have been a clear and unmistakable signal that the entire train was on the wrong track, that Congress never intended to delegate to EPA the authority to go this far, and that EPA must double back and revisit the earlier interpretation of the statute applied in the Timing Rule. In these circumstances, given the essential interrelationship among the parts of this

rulemaking, to claim that Petitioners have no basis to challenge the Timing and Tailoring Rules makes an utter mockery of standing doctrine.

D. EPA's GHG Regulatory Enterprise Represents a Seismic Shift in the Balance of Power Between Congress and the Executive Branch that Calls Out for Meaningful Judicial Review.

Respondents' briefs in opposition to certiorari are conspicuously silent on the critical point that EPA's GHG rules rest on a blatant usurpation of congressional prerogatives.

The authority assumed by EPA to rewrite core provisions of the CAA is nothing less than an executive branch seizure of legislative power, *see* Pet. App. 144-45 (Kavanaugh, J., dissenting), in disregard of the Constitution's declaration that "[a]ll legislative Powers herein granted shall be vested in [the] Congress." U.S. Const. art. I, § 1. The arrogation of such legislative power by an executive agency, promulgating the single largest regulatory program in the history of our Nation, rightly demands the most careful scrutiny by this Court.

The acknowledged "absurd[ity]" and "impossib[ility]" of implementing EPA's vision for GHG regulation of stationary sources, and the concession by EPA that the consequences of its program "are not consistent with – and, indeed, undermine – congressional purposes set forth for PSD and title V

provisions," JA01181, make it appropriate for this Court to consider *de novo* whether the regulation of GHGs as air pollutants under the stationary source permitting provisions of the CAA is within the sphere of authority Congress delegated to EPA. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 135-37, 144 (2000) (holding that FDA lacked authority to regulate tobacco products because exercising such authority in accordance with statutory requirements would produce "extreme measures" incompatible with congressional intent). This Court did not consider the question of stationary source GHG regulation when it rejected EPA's reliance on *Brown & Williamson* in *Massachusetts*. *See* 549 U.S. at 531. In any event, the "extreme measures" EPA now acknowledges would follow from such regulation if the CAA's mandatory thresholds are not overridden make it appropriate for the Court to revisit the relevance of *Brown & Williamson*.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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