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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, MORNING STAR PACKING COMPANY, NUCKLES OIL COMPANY, INC., dba MERIT OIL COMPANY, AND THE NATIONAL TAX LIMITATION COMMITTEE IN SUPPORT OF PETITIONERS

R.S. RADFORD
THEODORE HADZI-ANTICH*
*Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org
E-mail: tha@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation, et al.

QUESTION PRESENTED

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Federal Regulations

TABLE OF AUTHORITIES—Continued

Page

Federal Statutes

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Legislative History

Supreme Court Rule

Miscellaneous

INTEREST OF AMICUS CURIAE[1]

Amicus Pacific Legal Foundation ("PLF") is the largest and most experienced nonprofit public interest foundation of its kind in the United States. For 40 years, PLF has litigated in support of a reasonable balance between regulatory efforts to protect the environment and the guarantees of individual freedom and property rights that form the foundations of liberty. PLF's Global Warming Project seeks to ensure that government efforts to address global warming not be used as a pretext to undermine liberty. PLF submitted amicus briefs in *American Electric Power Company Inc., et al. v. Connecticut,* 131 S. Ct. 2527 (2011), and *Massachusetts v. EPA,* 549 U.S. 497 (2007), and was a petitioner in the consolidated cases challenging the first round of EPA regulation of greenhouse gases under the Clean Air Act, *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). PLF attorneys currently serve as lead counsel in two challenges to EPA mobile source greenhouse gas regulations pending in the D.C. Circuit, *California Construction Trucking Association v. EPA*, No. 13-1076, and *Delta Construction Company v. EPA*, No 11-1428.

Amicus Morning Star Packing Company ("Morning Star") is a California corporation that operates three greenhouse gas emitting stationary

---

[1] Counsel of record have consented to the filing of this brief. Letters evidencing consent are filed with the Clerk of the Court. In accordance with Rule 37.6, no counsel for a party authored any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submittal. No other person or group made a monetary contribution intended to fund the preparation or submission of this brief.

sources that process raw tomatoes into tomato paste. Natural gas boilers that heat the tomatoes at Morning Star's facilities generate quantities of carbon dioxide sufficient to qualify them as major stationary sources of greenhouse gas emissions.

Amicus Nuckles Oil Company, Inc., dba Merit Oil Company ("Merit Oil Company"), is a California corporation engaged in the distribution of petroleum products. Merit Oil Company's facilities generate substantial emissions of carbon dioxide, which may qualify them as major stationary sources of greenhouse gases. Merit Oil Company also operates numerous trucks that emit greenhouse gases subject to EPA's greenhouse gas emissions rules for mobile sources.

Amicus National Tax Limitation Committee ("NTLC") is a nonprofit organization established in 1975 to devise strategies to control the size of government spending and taxes. NLTC's mission is to: (1) make structural changes in fiscal and government practices at all levels of government, and (2) limit and control taxes and spending so as to enhance the power and freedom of individuals and their enterprises.

SUMMARY OF ARGUMENT

In these consolidated cases , this Court addresses an overarching issue arising under the Clean Air Act: whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Act for stationary sources that emit greenhouse gases. EPA made the determination in a final interpretive rule, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (the "Interpretive Rule"), which specifically covers the Act's Prevention of Significant Deterioration

("PSD") program and also implicates other stationary source permitting programs under the Act. The broad issue framed by this Court encompasses the question of whether EPA's new motor vehicle rules, *Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) ("LDVR"), trigger PSD permitting requirements.

Title I of the Clean Air Act contains the exclusive regulatory triggers for stationary sources of air emissions, while Title II contains the exclusive regulatory triggers for mobile sources. The Act's statutory structure shows that regulations under Title II, of themselves, cannot trigger permitting requirements under Title I. Further, the legislative history of the Act makes clear that Congress intended to place permitting triggers for stationary sources exclusively in Title I. EPA's interpretation conflicts with that intent and therefore is entitled to no deference under *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, 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.").

A similar analysis applies to the more limited issue of whether the LDVR triggers PSD permitting for stationary sources. The court of appeals upheld the Interpretive Rule by misconstruing the Clean Air Act's permitting scheme for stationary sources in PSD areas, effectively authorizing EPA to ignore mandated Title I requirements. In so ruling, the court below neglected the "rudimentary" administrative law principle that

regulatory action must comply with statutory requirements. *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

The steps necessary to trigger permitting requirements under Title I vary depending upon the type of stationary source, whether the stationary source is located in a "clean" or "dirty" air area of the nation, and whether the amount of its air emissions exceed certain statutory thresholds for designated air pollutants. Because the Interpretive Rule ignores these fundamental elements of the Clean Air Act in favor of a myopic reading of ancillary provisions, it should be rejected by the Court.

ARGUMENT

"*Congress . . . does not . . . hide elephants in mouseholes.*"[2]

I

THE PLAIN LANGUAGE AND STRUCTURE OF THE CLEAN AIR ACT DEMONSTRATE THAT CONGRESS DID NOT INTEND FOR TITLE II REGULATIONS GOVERNING MOBILE SOURCES TO TRIGGER PERMITTING REQUIREMENTS FOR STATIONARY SOURCES UNDER TITLE I

A. Title I and Title II Each Contain Their Own, Unique Triggers for Regulating Emissions of Air Pollutants.

The Clean Air Act, 42 U.S.C. §§ 7401-7671q is divided into distinct subchapters that deal with different sources and types of air pollution. The first two subchapters are at the heart of these consolidated cases. Subchapter I governs stationary sources of air pollution and establishes a partnership between federal and state government in regulating them. 42 U.S.C. §§ 7401-31, 7470-79, and 7501-15 ("Title I"). Subchapter II provides EPA with comprehensive authority to regulate mobile source emissions from automobiles, trucks, marine engines, aircraft, and the

---

[2] *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

fuels that power them. 42 U.S.C. §§ 7521 - 7590 ("Title II").[3]

At its most basic, a stationary source is any source of air pollution that is not mobile. 42 U.S.C. § 7602(z); 42 U.S.C. § 7411(a)(3). Title I authorizes EPA to regulate stationary sources under one of two programs: National Ambient Air Quality Standards For Criteria Air Pollutants ("NAAQS"), or National Emission Standards for Hazardous Air Pollutants ("NESHAPS"). The term "air pollutant" is defined broadly to include:

> Any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.

42 U.S.C. § 7602(g). This Court has held that greenhouse gases fit the definition of "air pollutant." *Massachusetts v. EPA*, 549 U.S. 497 (2007). Accordingly, stationary sources of greenhouse gas emissions could potentially be subject to permitting under Title I's NAAQS or NESHAPS regulatory programs. But the structure and text of the Act make clear that mere regulation of greenhouse gases under Title II cannot, of itself, trigger permitting requirements under Title I.

---

[3] To complete the picture, subchapter III sets forth ceratin general provisions and definitions, 42 U.S.C. §§ 7601-28 ("Title III"), subchapter IV addresses noise pollution ("Tile IV"), while subchapter IVA establishes a trading mechanism to control acid rain. 42 U.S.C. §§ 7651-51o. Subchapter V, establishes a permitting program for major stationary sources, subject to various thresholds. 42 U.S.C. §§ 7661-61f ("Title V"). Finally, subchapter VI addresses pollutants affecting the stratosphere, especially the ozone layer. 42 U.S.C. §§ 7671-71q ("Title VI").

1. NAAQS Triggers Stationary Source Permitting for Criteria Pollutants

The NAAQS regulatory program is "the engine that drives nearly all of Title I of the [Clean Air Act]." *Whitman v. Am. Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001). To regulate an air pollutant under NAAQS, EPA must first make a specific finding under Title I that emissions of the pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The air pollutant is thereafter referred to as a "criteria pollutant" because EPA must issue "air quality criteria" for such a pollutant. *Id*. § 7408(a)(2). EPA then sets an ambient air quality standard for the criteria pollutant. 42 U.S.C. §§ 7408-7410. To date, only six criteria pollutants have been identified and regulated under the NAAQS program: lead, sulfur dioxide, nitrogen dioxide, carbon monoxide, particulate matter, and ozone. 40 C.F.R. §§ 50.4 - 50.12. Greenhouse gases are not criteria pollutants.

EPA must designate areas of the country as either in "attainment" or "nonattainment" with each ambient air quality standard. 42 U.S.C. § 7407(d). Such area designations are specific for each criteria pollutant. *Alabama Power Co. v. Costle*, 636 F.2d 323, 350 (1979). At any given time a single geographic area may be an attainment area for one criteria pollutant and a nonattainment area for another. *Id.* Congress established two parallel NAAQS permitting programs applicable to certain new and modified stationary

sources of air pollutants.[4] Because NAAQS can only apply to criteria pollutants designated under Title I, no NAAQS permitting requirement in any area is triggered by any "air pollutant" other than a criteria pollutant. 42 U.S.C. § 7411(b)(1)(A); 42 U.S.C. § 7411(d)(1).

a. Attainment Area Permitting Is Triggered by Emissions of Criteria Pollutants

The PSD program ensures that clean air in attainment areas of the nation does not degrade into nonattainment status. 42 U.S.C. § 7470. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990). To that end, the PSD program aims "to prevent significant deterioration of air quality in each region . . . designated . . . as attainment." 42 U.S.C. § 7471. The purpose of PSD permitting is to prevent criteria pollutant emissions from causing a violation of ambient air quality standards. 42 U.S.C. § 7475(a)(3).

The permitting trigger for stationary sources in PSD areas provides:

> No major emitting facility . . . may be constructed *in any area to which this part applies* unless . . .a permit has been issued for such proposed facility.

42 U.S.C. § 7475(a)(1), (4). (emphasis added). The language "in any area to which this part applies" cannot mean nothing. *Moskal v. United States*, 498

---

[4] Those permitting programs are administered by states through State Implementation Plans (the "SIPs"). 42 U.S.C. § 7410(a)(2)(C).

U.S. 103, 109 (1990) (courts must give effect to every clause and word of a statute). "[T]his part," *i.e.*, the PSD program, only "applies" to NAAQS in geographic areas that have attained ambient air quality standards for one or more criteria pollutants for which an endangerment finding has been made under Title I. 42 U.S.C. § 7411(b)(1)(A); 42 U.S.C. § 7411(d)(1). Accordingly, the permitting requirement is triggered specifically by criteria pollutants emitted from major stationary sources in an area attaining NAAQS.

The inconvenient truth for EPA is this: There is no NAAQS for greenhouse gases because they are not criteria pollutants. Indeed, greenhouse gases cannot become criteria pollutants unless and until EPA makes an endangerment finding for them under Title I of the Act. 42 U.S.C. § 7408(a)(1)(A). This EPA has not done. Therefore, PSD permitting requirements are not, and cannot be, triggered for stationary sources of greenhouse gases merely because EPA regulates their emissions from new motor vehicles under Title II of the Act.

b. Nonattainment Area Permitting Is Triggered by Emissions of Criteria Pollutants

The nonattainment new source review ("NNSR") program seeks to improve air quality in "dirty" air areas that do not comply with NAAQS. 42 U.S.C. §§ 7502, 7503. The Act requires certain categories of major stationary sources in such areas to obtain NNSR permits that impose the "lowest achievable emissions rate" to control emissions. The permitting trigger is emissions of criteria pollutants from specific types of sources in amounts above statutory thresholds.

42 U.S.C. §§ 7501(3), 7502. Unlike the PSD permitting program, NNSR permitting is triggered when a major stationary source is located in an area that has not yet achieved compliance with NAAQS for a particular criteria pollutant. 42 U.S.C. §§ 7503(a), 7502. But like the PSD permitting requirement, NNSR permitting can be triggered only by emissions of criteria pollutants. 42 U.S.C. §§ 7407(d), 7410(k)(5). Greenhouse gases are not criteria pollutants and therefore are not subject to NAAQS. Accordingly, mere regulation of greenhouse gas emissions from new motor vehicles cannot, of itself, trigger permitting requirements under the NNSR program.

2. NESHAPS Triggers Stationary Source Permitting for Hazardous Air Pollutants

EPA is authorized to regulate air pollutants that it finds are extraordinarily hazardous to human health by imposing strict national emissions limitations under Act's NESHAPS program. 42 U.S.C. § 7412. NESHAPS standards are developed for stationary sources under Title I on a separate track, and under separate procedures, from NAAQS. *Id.* Greenhouse gases have not been designated as hazardous air pollutants and, therefore, cannot be regulated under the NESHAPS program. Accordingly, mere regulation of greenhouse gas emissions from new motor vehicles cannot, of itself, trigger permitting requirements under the NESHAPS program.

B. EPA's Interpretive Rule Is at Odds with the Clean Air Act

1. EPA's Interpretation Conflicts with the Plain Language of the Act

EPA's position can be stated succinctly. Once "any air pollutant" becomes subject to an enforceable standard under *any* provision of the Clean Air Act, *i.e.*, after the standard "takes effect," the pollutant is subject to permitting requirements under the PSD program. Interpretive Rule, 75 Fed. Reg. 17,004 at 17,006-13. According to EPA, this interpretation applies regardless of whether the standard is set for a criteria pollutant or any other pollutant and regardless of whether it is issued under Title I for stationary sources or under Title II for mobile sources. *Id*. at 17,006. The Interpretive Rule provides that, because greenhouse gases are subject to emissions limitations applicable to new motor vehicles in the LDVR, such gases constitute an "air pollutant" that is "subject to regulation" under the Act, making it automatically subject to permitting pursuant to the PSD program. 75 Fed. Reg. at 17,007. But that interpretation is impermissible because it conflicts with the text and structure of the Clean Air Act. *Chevron*, 467 U.S. at 845 (agency interpretation of a statute is impermissible if it "is not one that Congress would have sanctioned").

The Interpretive Rule is based on a myopic reading of two statutory definitions and one additional snippet of statutory text. First, the term "major emitting facility" is defined as a facility within a long list of categories of stationary sources having the potential to emit 100 tons per year or more of "any air

pollutant,"[5] 42 U.S.C. § 7479. Second, the term "best available control technology," is defined as "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility." 42 U.S.C. § 7479. Third, the requirement to install best available control technology applies to "each pollutant subject to regulation under this chapter." 42 U.S.C. § 7479(3). But the actual permitting trigger built into the PSD program limits permitting to stationary sources that are "major emitting facilit[ies] . . . *in any area to which this part applies*." 42 U.S.C. § 7475(a) (emphasis added). The Interpretive Rule ignores this important permitting threshold requirement.

Significantly, the phrase "in any area to which this part applies" appears throughout the PSD statutory text. For example, the Act provides:

> The maximum allowable concentration of *any air pollutant in any area to which this part applies* shall not exceed a concentration for such pollutant for each period of exposure equal to:
>
> (A) the concentration permitted under the *national secondary ambient air quality standard*, or
>
> (B) the concentration permitted under the *national primary ambient air quality standard*.

---

[5] Other types of stationary sources not fitting within the statutorily designated categories (but which emit criteria pollutants), are subject to a regulatory threshold of 250 tons or more per year.

42 U.S.C. § 7473(b)(4) (emphasis added). EPA is not authorized under the Act to set "national ambient air quality standards" for any pollutants other than criteria pollutants. 42 U.S.C. § 7411(b)(1)(A); 42 U.S.C. § 7411(d)(1). Accordingly, the term "any air pollutant in any area to which this part applies" refers only to criteria pollutants subject to NAAQS, as confirmed by the use of the term "ambient air quality standard" twice within 42 U.S.C. § 7473(b)(4).

The use of similar language in other parts of the PSD statutory provisions leads to the same conclusion:

> No major emitting facility . . . may be constructed *in any area to which this part applies* unless:
>
> . . .
>
> (3) . . . emissions . . . will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for *any [air] pollutant in any area to which this part applies* more than one time per year, (B) *national ambient air quality standard* in any air quality control region.

42 U.S.C. §§ 7475(a)(3)(A), (B) (emphasis added). In turn, another provision of the PSD program provides:

> Any completed permit application . . . for a major emitting facility *in any area to which this part applies* shall be granted or denied not later than one year after the date of filing of such completed application.

42 U.S.C. § 7475(c) (emphasis added). Each provision echoes the others, and the meaning is clear.

The PSD permitting program was intended to "prevent significant deterioration" in clean air regions of the nation that have attained compliance with NAAQS. 42 U.S.C. § 7471. And the PSD permitting trigger requires a stationary source to be physically located in an attainment area and emit at least one of the criteria pollutants in excess of the statutorily prescribed threshold amount. *Wisconsin Elec.*, 893 F.2d at 904. Congress intended to control emissions from such stationary sources to ensure that an attainment area does not become a nonattainment area over time. Control over noncriteria pollutants is irrelevant to the statutory goal of ensuring continued compliance with ambient air quality standards for criteria pollutants. That is why Congress designed the PSD permitting trigger to apply only to criteria pollutants. If Congress meant something else, it could have easily left out the phrase "in any area to which this part applies" throughout the statutory text establishing the PSD Program. But Congress did not do that. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (specific context of language is important element of statutory construction).

By requiring PSD permits for sources with major emissions of greenhouse gases that are not criteria pollutants, EPA has expanded the PSD program to do much more than prevent significant deterioration of air quality in areas meeting NAAQS standards. In so doing, EPA has rewritten the text and structure of the Clean Air Act. This EPA cannot do, no matter how much it may wish that the statute was drafted in conformance with its administrative predilections. *Food and Drug Administration v. Brown & Williamson*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency

seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'"), (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Accordingly, contrary to EPA's Interpretive Rule, the statutory term "major emitting facility in any area to which this part applies" must be limited to a source with major emissions of any criteria pollutant whose NAAQS the source's area is attaining. EPA may not use the term "any regulated pollutant" located in an ancillary provision of the Act to bootstrap permitting requirements for sources not otherwise subject to NAAQS requirements. "Congress . . . does not . . . hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. *See U.S. v. American Trucking Associations, Inc.*, 310 U.S. 534, 542 (1940) (Isolating a few words from their overall statutory context does "not contribute greatly to the discovery of the purpose of the draftsmen of a statute.").

2. The Structure of the Act Does Not Allow for EPA's Interpretation

EPA's interpretation is contrary to the structure of the Clean Air Act. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) ("In expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole law, and its object and policy") (quoting *Maestro Plasctics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)). Title I authorizes EPA to institute controls over stationary sources when EPA follows the regulatory steps set forth in Title I for establishing NAAQS or NESHAPS. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-08 (1995) (complex structure of Endangered Species Act relevant to a determination

of statutory meaning and scope). The procedures and criteria for regulating under Title I and Title II are different. And using the definitions of "major stationary source" and "best available technology" to manufacture authority by which to subject stationary sources not otherwise subject to NAAQS permitting requirements under the PSD Program is impermissible because "Congress . . . does not alter the fundamental details of a regulatory scheme in . . . ancillary provisions." *Whitman*, 531 U.S. at 468.

Taken as a whole, the Clean Air Act does not permit an interpretation that would subject stationary sources to permitting under the PSD program as a result of greenhouse gas regulations under Title II for mobile sources unless the source is otherwise independently subject to NAAQS. As Judge Kavanaugh aptly observed in his dissent to D.C. Circuit's refusal to rehear the case below en banc, "Congress designed the statute's permitting requirement based on facilities' NAAQS emissions, but, *once those facilities are subject to the permitting requirement*, they must *also* meet a range of other minimum environmental standards."[6] Given the structure of the Act, such a result is compelled by virtue of this Court's long-standing policy that "[a]ll laws should receive a sensible construction." *U.S. v. Kirby*, 74 U.S. 482, 486 (1869).

In short, the PSD program is tethered to emissions of the six criteria pollutants because those pollutants are the only drivers of ambient air quality standards, whose maintenance is the sole purpose of

[6] The statement of the Court on rehearing en banc is unpublished but it is electronically reported at 2012 WL 6621785, Kavanaugh, J., dissenting (emphasis added).

PSD permitting. Yet EPA's Interpretive Rule has made it an all purpose permitting program. The structure and plain language of the Clean Air Act require a different interpretation.

II

THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO ESTABLISH DIFFERENT REGULATORY TRIGGERS FOR TITLE I AND TITLE II

The current general form of the Clean Air Act can be traced to the Clean Air Act Amendments of 1970.[7] Congress amended the Act in 1977[8] to fine tune the PSD Program, making further adjustments in 1990.[9] *See generally,* Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 Hous. L. Rev. 679 (1999) (tracing the history of federal air emissions control). There is an extensive legislative history explaining congressional intent regarding the relationship between Title I and Title II of the Act, as set forth in reports of standing committees. *See* Norman J. Singer, 2A Sutherland Statutory Construction § 48:6 (7th ed. 2007) ("The report of the standing committee in each house of the legislature which investigated the desirability of the statute under consideration is often used as a source for determining

---

[7] Clean Air Act Amendments of 1970, Pub. L. No. 91-6054, 84 Stat. 1676 (1970).

[8] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

[9] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2468 (1990).

the intent of the legislature.") *See also*, *Dole v. United Steelworkers of America*, 494 U.S. 26, 40-43 (1990) (legislative history used to help establish the "clearly expressed intent of Congress" to support judicial refusal to defer to agency statutory interpretation). *See generally*, Matthew C. Stephenson & Adrian Vermule, Chevron Has Only One Step, 95 Va. L. Rev. 597 (2009) (legislative history a useful tool in determining whether statutory intent is clear). The reports of two standing committees show that Congress intended to place permitting triggers for stationary sources exclusively in Title I.

A. The Legislative History of the Clean Air Act Amendments of 1970 Show That Title II Rules May Not Form the Basis Upon Which Permitting Requirements Are Imposed Under Title I

The report of the Standing Senate Committee on Public Works that investigated the need for and crafted the language of the 1970 Amendments, S. Rep. No. 91-1196, contains evidence of legislative intent for both Title I and Title II. The Committee observed that the purpose of permitting a new stationary source under Title I is to ensure that the new source "would not hinder" the attainment of NAAQS "air quality standards and goals" for air pollutants, "for which criteria documents are to be issued and for which national ambient air quality standards and implementation plans are to be established." *Id*. at 17-18. The report goes on to state that NAAQS must be "attained and maintained" for criteria pollutants, designated in the report as "such agents," through the

appropriate permitting channels. *Id*. at 54. The focus is entirely on criteria pollutants.

The report also addresses the role and scope of the mobile source regulatory program under Title II, by which the government is authorized "to abate emissions from new and existing aircraft, new and existing vessels and boats, new and existing diesel engines for railroads, and new and existing trucks and buses and other commercial vehicles." S. Rep. 91-1196 at 23. There is no suggestion that regulation of noncriteria air pollutants under Title II would or could trigger permitting requirements under Title I. Indeed, the government is required to make independent judgments regarding the degree to which mobile sources contribute to air quality deterioration and to set emission standards separately for such sources:

> The proposed bill would require the Secretary to make a judgment on the contribution of mobile sources to deterioration of air quality and establish emission standards which would provide the required degree of control.

Id. at 24. The report contains guidance regarding the degree of emission reduction *from mobile sources* that would be "necessary to meet health standards," *id*. at 25-26, showing that the Title II program was intended only to complement the Title I program, and not to drive it.

The 1970 Amendments expanded Title II to include a transportation fuels regulatory program:

> Under the procedure that would be established by the Committee bill, the Secretary could designate any fuel that is

> used for vehicles. Once designated, the fuel would have to be registered by the Secretary prior to sale.

S. Rep. 91-1196 at 33. Thus, Title II was intended to regulate both tailpipe emissions and the fuels that could be used by vehicles. *See also id*. at 59 ("Such emissions standards must be based on the degree of emission control *needed* to protect the public health and welfare *and the implementation of ambient air quality standards* without any reference to the power source or the propulsion system.") (emphasis added). Mobile source standards under Title II are intended to help *achieve* ambient air quality standards that are established under Title I, not to be an independent trigger of Title I requirements, and there is no hint that mobile source regulations could serve as a springboard for stationary source permitting.

Finally, the report addresses the independent regulatory trigger for tailpipe emissions under Title II by authorizing the government:

> To prescribe regulations establishing standards governing the emission of all known pollution agents from [mobile sources] which cause or contribute to air pollution which endangers the public health or welfare.
>
> Such emissions standards must be based on the degree of emission control needed to protect the public health and welfare and the implementation of ambient air quality standards without any reference to the power source or the propulsion system.

Id. at 59. The report shows that, rather than being the basis for any permitting requirement under Title I, the Title II endangerment finding must be set for mobile sources as "needed . . . [for] the implementation of ambient air quality standards." Thus, NAAQS under Title I is the dog that wags the Title II tail and not the reverse, as suggested by EPA's Interpretive Rule, which seeks to make mobile source regulation of greenhouse gases an independent trigger for permitting stationary sources.

B. The Legislative History of the Clean Air Act Amendments of 1977 Shows that Congress Did Not Intend for the Regulation of Mobile Sources of Air Pollutants Under Title II To Trigger Title I Permitting Requirements for Stationary Sources Under the PSD Program

The Standing House Committee on Interstate and Foreign Commerce drafted House Bill 6161, which was enacted as the 1977 Amendments. The committee report discusses the purposes and intent of various provisions of the amendments, including the PSD Program. H. Rep. 95-294 at 1 (May 12, 1977). One key purpose was:

> To provide greater legislative guidance and clearer legislative intent with respect to certain issues on which there has been significant administrative or judicial dispute [including] prevention of significant deterioration.

Id. at 2. The "dispute" was over the scope and purpose of EPA's PSD program based on the perceived

conflicting goals of economics and air quality. The amendments sought to "assure economic growth in a manner consistent with existing clean air resources" in PSD areas. *Id*. at 8. To this end, the 1977 amendments created three separate classes of attainment areas, all of which are inextricably tied to national ambient air quality standards, which apply only to criteria pollutants. *Id*. at 8-9 ("Each state must classify those areas which are cleaner than the national ambient air quality standards as class I, class II, or class III for all pollutants for which national ambient air quality standards are established."). Thus, the purpose of the PSD permitting program is to ensure that no NAAQS criteria pollutant emitted within any of the three classified attainment areas comes to exceed the "allowable increment" for that criteria pollutant. *Id*. Because allowable increments apply *only* to emissions of criteria pollutants, the emission of any air pollutant other than a criteria pollutant cannot serve as the trigger for PSD permitting.

Referring to administrative and judicial efforts to construe the earlier Clean Air Act Amendments of 1970, the House Report explains that the intent of the 1977 amendments is "to provide more specific congressional guidance as to how [the PSD] policy is to be implemented." H. Rep. 95-294 at 108. To that end, the House Report states that a major purpose of the PSD program is "to protect public health from harmful exposure to air pollutants occurring at levels below the minimum national ambient air standards," *id*. at 141, and to ensure that allowable increments of criteria pollutants will not be exceeded. *Id*. at 145. The report further emphasizes the point by stating that permits should be granted "[i]f the source demonstrates . . .

that its emissions will not cause to be exceeded the applicable air quality standards, increments, and emissions limitations the State adopted when it classified the areas involved." *Id.* The House Report could not have been more explicit—the PSD permitting program hinges on the maintenance of NAAQS and the allowable increments for criteria pollutants. Contrary to EPA's Interpretive Rule, there is not even a hint that anything other than emissions of criteria pollutants could trigger PSD permitting requirements.

If further proof were required that the mere regulation of mobile source emissions does not trigger PSD permitting, it can be found in two additional statements of the Standing House Committee on Interstate and Foreign Commerce. First, the House Report states that the 1977 statute "[l]imits application of the [PSD Program] *only* to those areas of the country with air quality superior to the *national air quality standards*," *id.* at 147 (emphasis added), again underlining that the permitting trigger applies only to criteria pollutants in attainment areas.

Second, the House Report devotes over 90 pages to detailed discussions of Congress's intent in connection with the PSD permitting program. *Id.* at 221-312. Not one word in those pages (or, for that matter, elsewhere in the House Report) intimates that the trigger for PSD permitting is anything other than preconstruction review in attainment areas for new or modified major stationary sources of criteria pollutants. Indeed, there is no mention that mobile source regulation of an "air pollutant" under Title II was intended to trigger PSD permitting requirements under Title I. Given the length of the House Report (over 500 pages), if Congress had intended to trigger PSD permitting for

new or modified major stationary sources simply by the expedient of regulating mobile sources, surely there would have been some mention of such an important new regulatory trigger in the House Report, which goes through elaborate analyses in order to express legislative intent.

CONCLUSION

For these reasons, this Court should hold that it was not permissible for EPA to determine that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

DATED: December, 2013.

Respectfully submitted,

R.S. RADFORD
THEODORE HADZI-ANTICH*
*Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org
E-mail: tha@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation, et al.