NO. 12-1272

In the
Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES, ET AL.,
PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF ADMINISTRATIVE LAW PROFESSORS AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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May 24, 2013

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), the administrative law professors listed in appendix A, together with the Judicial Education Project, respectfully request leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari filed by the Chamber of Commerce of the United States, the State of Alaska, and the American Farm Bureau Federation. As required under Rule 37.2(a), *amici* timely provided notice to all parties' counsel of their intent to file this brief more than 10 days before its due date. Petitioners and most respondents, including the United States, have consented to the filing of this brief. (The letters granting consent have been submitted with this brief.) Certain respondents did not respond to *amici*'s request for consent* and, therefore, *amici* are filing this motion.

Amici law professors have taught and written extensively on administrative law as well as constitutional and environmental law. Together with the Judicial Education Project, they seek to assist the

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* Parties who did not respond include American Iron and Steel Institute and Gerdau Ameristeel US Inc.; Association of Global Automakers; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation and Glass Packaging Institute; Georgia; Georgia Coalition for Sound Environmental Policy; Mississippi; Missouri Joint Municipal Electric Utility Commission; Pacific Legal Foundation; Peabody Energy Co. and National Mining Association; South Carolina Public Service Authority; Utah; and Virginia.

Court by highlighting the foundational constitutional and administrative law principles at stake in this extraordinary case. As explained below, *amici* urge the Court to grant review because the decision below raises exceptionally important questions concerning administrative agencies' authority to rewrite plain, unambiguous statutory text. The Court's intervention is also needed to clarify the scope and meaning of its decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

The greenhouse gas programs adopted by the Environmental Protection Agency ("EPA") have taken on unprecedented legal forms and real-world consequences far beyond those contemplated in *Massachusetts*, to the point where "the bedrock underpinnings of our system of separation of powers are at stake." Pet.App. 152a (Kavanaugh, J., dissenting). Moreover, although EPA has acknowledged that its interpretation of the Clean Air Act leads to absurd consequences that Congress could never have intended, the court below believed that it had no option but to affirm EPA's interpretation and unprecedented assertion of authority to rewrite the statute. In doing so, the lower court departed from settled principles of administrative law, including the principles recognized in *Chevron USA, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

Amici seek leave to submit this brief in support of the petition filed by the Chamber of Commerce, *et al*. because that petition articulates the three issues that *amici* perceive as central to this case: (1) The Clean Air Act can and should be construed to avoid

the statutory absurdity created by EPA; (2) If the Act can *not* be construed to avoid absurdity, EPA must refrain from regulating greenhouse gases, pending congressional authorization; and (3) If absurdity cannot be avoided, and if *Massachusetts* commands the "must regulate" position inferred by EPA and by the court below, the Court should overrule *Massachusetts*.

Alternatively, given the multiple petitions and the extraordinary importance of the case (recognized by all judges of the court below), this Court's recent practice suggests that it may wish to entertain petitions and argument from several parties. In that event, *amici* seek leave to submit this brief to urge that the grants of petitions and the allotted argument time should fairly reflect the full range of positions urged by the several petitioners.

For these reasons, and because *amici* are well-equipped to help the Court evaluate the parties' arguments, the Court should grant this motion for leave to file a brief as *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether this Court, in light of the unprecedented agency and judicial decisions following *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), should overrule or, at a minimum, substantially clarify and limit its holding and opinion in that case?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae have a strong interest in the exceptionally important administrative and constitutional law issues presented by this case. *Amici* law professors, who are listed in Appendix A, have taught and written extensively on administrative law as well as constitutional and environmental law. *Amicus* Judicial Education Project ("JEP") is a non-profit educational organization in Washington, D.C. JEP is dedicated to defending the Constitution as envisioned by its Framers — a federal government of enumerated, limited powers. JEP educates citizens about these constitutional principles, with a focus on the judiciary's role in our democracy.

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[1] Counsel for all parties received notice of *amici*'s intent to file this brief 10 days before its due date; because some respondents did not consent, *amici* are submitting a motion for leave to file this brief. No counsel for any party authored this brief in whole or in part, and no 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. *Amici* law professors received no compensation for offering the views reflected herein. Counsel of record represented certain petitioners in the proceedings below, but is solely representing *amici* before this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

For all its high salience, *Massachusetts v. EPA*, 549 U.S. 497 (2007), was litigated and decided as a case about the proverbial statutory mousehole — the scope of EPA's discretion in making an "endangerment finding" under a single provision of a single title of the Clean Air Act. Petitioners in *Massachusetts* assured the Court that the mousehole contained nothing but a mouse. *See* Br. for Petitioner, at 3, *Massachusetts v. EPA*, 549 U.S. 497 (2007), 2006 WL 2563378. The Court's decision gave petitioners what they had asked, and no more: a remand, with instruction for EPA "to exercise discretion within defined statutory limits." *Massachusetts*, 549 U.S. at 533; *id.* at 534–35. The Court recognized that an affirmative endangerment finding under section 202(a)(1) would compel the regulation of greenhouse gas emissions from new motor vehicles. But such standards had governed the automobile industry for decades; no "extreme measures" or "counterintuitive" results would ensue. *Id.* at 531 (distinguishing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

What has since emerged from section 202(a)(1) is a full-scale elephant — an extra-statutory program for the regulation of greenhouse gas emissions from *stationary* sources that bids to become the most intricate, comprehensive, and expensive regulatory venture in the agency's history. According to EPA and the court below, the pachyderm was spawned, and its nurture is commanded, by the language of the Clean Air Act and by *Massachusetts*. The animal

cannot be accommodated within the structure and language of the Clean Air Act, but no worries: EPA claims discretion to effectively re-write unambiguous, non-discretionary, *numerical* regulatory thresholds, specified in its governing statute, to avoid any absurdity. Pet.App. 704a–13a (*Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,517–18 (June 3, 2010) ("Tailoring Rule")).

The maxim that Congress "does not . . . hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001), is only one of the principles of interpretation and administrative law to be brushed aside by EPA and the court below. EPA's position that extreme measures — re-christened "absurd results" for purposes of litigation — *will* in fact occur if the statute were enforced as written casts *Massachusetts*, or at any rate EPA's reading of the decision, in a very different light. And the notion that those consequences can be avoided, and ordinary canons of interpretation trumped, by resort to an "absurdity doctrine" that permits an agency to revise numerical statutory thresholds is unheard of. EPA's positions and their cavalier treatment by the court below raise urgent separation of powers concerns. They well-nigh compel review.

REASONS FOR GRANTING THE PETITION

I. EPA's Rules And The Decision Below Violate Bedrock Principles of Administrative Law.

The Court should grant review because EPA's greenhouse gas regulations violate bedrock principles of administrative law. Contrary to EPA's conclusions, no "canon" of construction permits an administrative agency to rewrite a statute, and EPA's claimed authority raises grave constitutional concerns. The Court should also grant review because the lower court's standing determination reflects growing confusion among the lower courts over agencies' ability to immunize their decisions from judicial scrutiny by regulating through partial waivers and exemptions.

A. EPA Failed to Ground its Actions in the Structure of the Statute.

The most startling of EPA's actions, not directly reviewed below, is the "Tailoring Rule" and its revision of "major" emitting sources, from the statutorily prescribed 250/100 tons per year ("tpy") to EPA's hand-picked 100,000/75,000 tpy for CO_2 emissions. The revision is warranted, EPA avers, because the application of the statutory thresholds with respect to CO_2 would entail "absurd" consequences that Congress cannot conceivably have intended — the coverage of tens of thousands and indeed millions of sources that have never before been subject to the Clean Air Act's permitting requirements. Pet.App. 778a–82a.

The court below suggests that the "absurdity" is a scarecrow fabricated by plaintiffs, or maybe by Judge Kavanaugh. *See, e.g.*, Pet.App. 133a; Pet.App. 26a–30a; Pet.App. 105a ("what he [Judge Kavanaugh] considers absurd results"). Not so: *EPA* itself termed the consequences "absurd." Indeed, EPA *relied* on "absurd[ity]" to justify the Tailoring Rule, and it deliberately *created* the absurdity through a carefully sequenced series of decisions. EPA reasons as follows:

(1) Pursuant to *Massachusetts*, EPA *must* make an endangerment finding under section 202(a)(1) on scientific grounds alone and *must not* consider downstream statutory consequences. Pet.App. 969a–74a.

(2) An endangerment finding having been made, EPA *must* (and did) issue a greenhouse gas emission standard for automobiles.

(3) The regulation of greenhouse gas emissions from automobiles triggers the regulation of stationary sources with respect to such pollutants. Pet.App. 700a–04a.

(4) Because applying the statutory thresholds of the PSD program and Title V would violate the intent of Congress, EPA may revise the thresholds. Pet.App. 704a–13a.

Step (2) is commanded by the mandatory ("shall") language of section 202(a)(1). Steps (1), (3), and (4), in contrast, are not.

As for Step (1), the endangerment finding is committed to the agency's discretion, as

circumscribed by the Act. *Massachusetts* did not hold that EPA had to make such a finding. 549 U.S. at 534 ("We need not and do not reach the question whether on remand EPA must make an endangerment finding . . ."). Instead, the Court instructed EPA to "ground its reasons for action or inaction in the statute." *Id.* at 535. This no doubt constrained EPA's discretion, but contrary to the assertions of the agency and the court below, residual discretion remained. Insofar as the agency or the court below assumed that EPA had no latitude in exercising its discretion, they erred. That Congress proscribes the factors an agency may consider in exercising its judgment does not excuse the agency from actually exercising judgment in the discharge of its statutory responsibilities. A constrained choice is still a choice. Moreover, *Massachusetts* made clear that it did not decide "whether policy concerns can inform EPA's actions in the event that it makes such a finding," let alone whether the EPA could — or is even compelled — to interpret the remainder of its statutory obligations in light of the legal obligations such interpretations would entail.

As for Step (3), several petitioners argue forcefully that the language of the PSD program permits a less categorical interpretation than EPA's. *Amici* express no view on the correct interpretation of the Clean Air Act's pertinent provisions, discussed at length in the opinions below. *Amici* instead respectfully draw the Court's attention to the interpretive principles that should guide the analysis on Steps (1) and (3).

EPA has a duty to construe its organic statutes so as to avoid resort to extravagant canons. *Environmental Def. v. Duke Energy*, 549 U.S. 561, 576 (2007). That duty extends to interpreting the statute *as a whole*. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). An interpretation of an individual clause that produces absurdity in another part of the statute is not a permissible interpretation. *Kloeckner v. Solis*, 133 S. Ct. 596, 606–07 (2012).

The agency's freedom to choose its own procedures, *see Mobil Oil Expl. & Prod. Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978)), provides no license to dispense with canons of statutory coherence and integrity. Especially if the absurd consequences are as ineluctable as EPA makes them out to be, the agency had a duty to consider them at the front end. Eager to tip over the first of its regulatory dominoes, however, EPA explicitly declined to consider those consequences. That refusal and the appellate court's acceptance, Pet.App. 28a–30a, constitute reversible error.

B. EPA's "Canons" Do Not Permit Administrative Revisions of Unambiguous Statutory Standards.

At Step (4), EPA invokes three "canons" in defense of its re-write of the statutory thresholds: the absurdity, administrative necessity, and one-step-at-a-time canons. As proffered by EPA, each canon violates basic principles of statutory interpretation. In their proper application, moreover, the canons are mutually exclusive.

Absurdity. The absurdity canon permits the judicial correction of scrivener's and drafter's errors. But the absurdity must be of a kind that no reasonable person could intend, and it "must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 238 (2012); *cf. Appalachian Power v. EPA*, 249 F.3d 1032, 1043 (D.C. Cir. 2001) (per curiam) (applying the canon). The provisions at issue here were no "error" but a deliberate legislative compromise. *See Sierra Club v. EPA*, 719 F.2d 436, 445 (D.C. Cir. 1983). No reason exists to think that Congress meant anything but what it said.

Under a related doctrine of absurdity *avoidance*, courts and agencies may choose a permissible reading of a statute over what may be its most natural reading. *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218–22 (2009); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989); *id.* at. 470–71 (Kennedy, J., concurring). Judge Brown's and Judge Kavanaugh's dissents below are sensibly read as applications of that maxim. In contrast, no legitimate theory and no case supports EPA's *refusal* to construe the Act to avoid absurdity.

EPA's flagship "absurdity" case is *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989). *See* Pet.App. 819a–28a. *Ron Pair* does acknowledge the existence of "rare cases" in which the results of a literal application are demonstrably at odds with the drafters' intentions. That recitation, needed to cover

cases of drafting error, is one thing. The *holding* of *Ron Pair* is another: the judicial analysis must begin with the language of the statute — and must end there when the language is unambiguous. *Ron Pair*, 489 U.S. at 241; *cf. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) (explaining his "fifth vote" in *Ron Pair* as "reaffirming this Court's adherence to statutory text").

The closest this Court has come in the post-*Chevron* era to endorsing an agency-engineered departure from an arguably unambiguous statute is *Zuni Public School District No. 89 v. Department of Education*. There, the Secretary of Education had adopted a method of calculating federal financial assistance to local school districts, at variance with the literal terms of the statute (the federal Impact Aid Act), that in her judgment better reflected the purposes of Congress. The Court sustained the Secretary's action on that basis.[2] Significantly, EPA

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[2] Justice Breyer's majority opinion stressed the paradoxical results of a literal interpretation and, considering dictionary definitions, found the statute's technical terms ambiguous. *Zuni*, 550 U.S. at 91–93; *id.* at 107 (Kennedy, J., concurring). Justice Stevens would have sustained the Department's action based on the canon of absurdity. *Id.* at 107 n.3 (Stevens, J., concurring) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892))). Strikingly, though, even Justice Stevens' concurring opinion does not help EPA here: "[T]his is a quintessential example of a case in which the statutory text was obviously enacted to adopt the rule that the Secretary administered both before and after the enactment of the rather confusing language found in [the statute;] . . . [we have]

has not relied and cannot rely on *Zuni*. That case dealt with a (linguistically defined) method of calculation, not (as here) express numerical thresholds. And the Court *rejected* the notion that the agency could unilaterally revise obvious statutory commands. *Zuni*, 550 U.S. at 93.

Nor does *Massachusetts* help EPA. The majority held that greenhouse gases fit within the Clean Air Act's "capacious" definition of air pollutants, and it concluded that a broadly worded statute, intended to forestall regulatory obsolescence, may entail applications that the enacting Congress did not foresee. 549 U.S. at 532. Even "dynamic" statutory interpretation, however, provides no warrant for an administrative agency to divine what Congress might have said about an unanticipated application and what regulatory program it might have enacted if it had thought about the matter; and then to mobilize that hypothetical, inchoate intent against the text of the statute.

EPA's proposed "remedy" powerfully reinforces the urgency of adhering to conventional canons. Superficially, EPA's modification is relatively simple: 100/250 tpy means 100,000/75,000 tpy for CO_2. But it is also unbounded: on EPA's theory, virtually any number would do. Moreover, EPA's modification would grant the agency discretion to cover or exempt entire industries as it sees fit — a discretion that the statute forecloses. *Alabama Power Co. v. Costle*, 636

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evidence of congressional intent with respect to the precise point at issue." *Id.*at 106.

F.2d 323, 354 (D.C. Cir. 1979) (per curiam) (interpreting sections 165 and 169 of the Clean Air Act and noting that the statute "does not give the agency a free hand authority to grant broad exemptions."). Still worse, EPA reserves the right and in fact promises to revise the revision, subject to further revision. Pet.App. 933a–37a. Today's absurdity may become tomorrow's inexorable command, or maybe not. The statutory commands having been obliterated, meaningful judicial review is forever held at bay.

Administrative Necessity. EPA attempts to justify its position on the ground that the statute as written is impossible to administer. Pet.App. 704a–09a. Courts have on rare occasions recognized an agency's ability to cope with the administrative impossibility of adhering strictly to statutory commands. *Morton v. Ruiz*, 415 U.S. 199, 230–31 (1973); *Alabama Power*, 636 F.2d at 358 (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968)). But EPA's Tailoring Rule falls far outside the scope of permissible agency action.

Congress did envision an exemption from the permitting requirements under the PSD and Title V programs. It wrote that exemption into the statute: 100/250 tpy (for PSD) and 100 tpy (for Title V). 42 USC § 7479. In other words, Congress clearly expressed its intent to create that exemption *and no others*. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 87–88 (2006) (existence of specific statutory "carve-outs . . . makes it inappropriate for courts to create additional, implied exceptions"); *Sierra Club*, 719 F.2d at 453 (same).

Where Congress intended to grant EPA discretion to exempt certain sources due to resource constraints (for non-major sources in Title V), it provided that authority. In so doing, it *prohibited* EPA from exempting any major source from Title V. 42 USC § 7661(a). Exemptions for a significant portion of an industry from statutory requirements are impermissible even where a statute permits their "modification." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231–32 (1994). The injunction applies more strictly yet where, as here, the statute specifically precludes such steps.

Further, categorical exemptions from statutory commands are a highly disfavored method of addressing administrative necessity. *See, e.g.*, *Alabama Power*, 636 F.2d at 356–61. Courts will look to the statute for flexibility that would render the exemptions unnecessary. *Id.* at 358. That is not the option EPA chose here; it is the option it rejected both in its Endangerment Rule and in its interpretation of section 165.

Alternatively, or in addition, agencies may change their own regulations to avoid absurdity. *See Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1205 (D.C. Cir. 1984). The administrative necessity upon which EPA bases its Tailoring Rule — permitting requirements exceeding its regulatory capabilities — exists as a result of EPA's policy of subjecting major sources of any regulated pollutant to PSD and Title V permitting. In its Timing Rule, EPA explicitly declined to revisit those regulations. Pet.App. 598a (*Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by*

Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,006 (Apr. 2, 2010)).

EPA relies extensively on pre-*Chevron* cases. *See* Pet.App. 823a–28a. Its efforts to justify the Tailoring Rule within the *Chevron* framework, *id.*, are futile: post-*Chevron* cases demonstrate an increased judicial reluctance to accept administrative necessity arguments. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d. 1060, 1068 (D.C. Cir. 1998); *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989) (when faced with absurd results, agencies are on better ground taking minor interpretative liberties, rather than re-writing statutory commands).

More troubling even than EPA's failure to consider regulatory options short of *de facto* statutory amendment is the fact that EPA's plan does not even envision full compliance with Congress's statutorily expressed intent. EPA states that it cannot determine whether it will eventually be able to fully comply with the statutory requirements established for PSD and Title V. Pet.App. 974a–79a. In that situation, EPA will create a *permanent* exception from the requirements and claim "absurd results" as justification. *Id.* All along this path to nowhere in particular, EPA will compare the costs and benefits of covering additional sources without reference to any intelligible statutory objective, let alone the text. That is impermissible.

One Step at a Time. EPA invokes a never-before-seen "one-step-at-a-time" doctrine. Pet.App. 989a–93a. The only authority cited by EPA is *Massachusetts'* unremarkable assertion that

"[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop." 549 U.S. at 524. The proposition appears in a discussion of *jurisdiction* — specifically, the majority's rejection of the contention that EPA's failure to regulate greenhouse gas emissions from new mobile sources lacked an adequate causal connection to petitioners' alleged injuries. It has nothing to do with EPA's regulatory authority or the *Massachusetts* Court's views of that authority. It falls far short of supporting the authority EPA claims here — not the undisputed authority to implement a statute in an orderly fashion but the authority to periodically *revise* that program, in the exercise of a discretion the statute unmistakably withholds.

C. EPA's Claim of Authority Raises Grave Separation of Powers Concerns.

EPA avers that its "canons" are "intertwined" so as to "form a comprehensive basis for EPA's tailoring approach." Pet.App. 843a. Not so: The canons are mutually exclusive.

If the coverage of major sources as defined by the Clean Air Act is "absurd" with respect to greenhouse gases, then it *will remain* "absurd" and there is nothing "administrative" or "step-by-step" about the Tailoring Rule; it is simply a statutory re-write. Alternatively, a straightforward application of the statute as written is *not* absurd, and its phase-in is a matter of administrative economy. In that case, "absurdity" is entirely beside the point — and EPA has embarked on a regulatory program that would entail precisely the "extreme measures" disavowed in *Massachusetts*. 549 U.S. at 531.

The conjunction of made-up canons would permit EPA to make or break, coddle or cajole, cover or exempt entire industries at will. Courts have consistently viewed that form of discretion with great suspicion. Notably, many of the "administrative necessity" cases relied on by EPA caution that the doctrine is no warrant for exempting select industries from regulatory commands. *Envtl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1282 (D.C. Cir. 1980); *Alabama Power*, 636 F.2d at 401. Claims of such authority have been rejected even when proffered by an agency with circumscribed jurisdiction, in a rapidly changing market environment, and for respectable reasons. *MCI Telecomms.*, 512 U.S. at 231–32. The FCC's claim of authority invalidated there fell far short of EPA's claimed authority to administer an industrial policy for the entire economy.

Perhaps no "extreme" economic consequences would occur if the decision below were to stand: EPA's statutory re-write is tailored to avert them. And even on EPA's extravagant theory, one could argue, there would remain a limitation on the agency's discretion — not the statute or the courts, but rather the pain threshold of Congress. That limit depends crucially on the ability of industries to absorb the costs of EPA's greenhouse gas regime without visible dislocations (such as plant closures or direct job losses): should such consequences occur, Congress would intervene. EPA has been careful to avoid such outcomes, and it will likely continue to do so. *See* Philip A. Wallach, *U.S. Regulation of Greenhouse Gas Emissions*, Brookings Governance Studies (October 26, 2012), *available at* http://www.

brookings.edu/research/papers/2012/10/26-climate-change-wallach.

That train of thought, however, should be resisted. The power to exempt is the power to govern. One can imagine a constitutional system that empowers administrative agencies to stick-build a regulatory empire until the legislature stops them. Under *our* system, agency action requires an affirmative legal basis. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

D. The Court of Appeals' Standing Determination Warrants Independent Review and Reversal.

The court below dismissed industry petitioners' standing in two paragraphs. Their alleged injury, the court wrote, occurred "not because of anything EPA did . . . but by automatic operation of the statute." Pet.App. 88a. According to the court, the injury at issue was neither caused by EPA's Tailoring and Timing Rules nor redressable by a favorable decision. *Id.* The holding is in error.

Had EPA issued a rule to implement the stationary source requirements to greenhouse gas emitters in accordance with the statutory text, there would be no question about the regulated industries' standing. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). The standing problem perceived by the court below emerges where an agency *exempts* a covered (or coverable) entity from a (potentially) applicable prohibition or mandate: in those cases, the complained-of regulation looks separable from the

source of the injury — that is, the "automatic" operation of the statute. [3]

In the lower courts, there is growing confusion over the proper standing analysis in this context. *See, e.g.*, *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (2012). The position of the court below, however, is not and should not be the law. For example, in analogous "competitor standing" cases, the Court has held that firms have standing to challenge agency action in favor of someone else (provided, of course, that the complaining firms meet the requirements of imminent and particularized injury). *See, e.g.*, *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970); *see also, e.g.*, *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010); *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004) (per curiam). In contrast, under the panel's reasoning, an agency could virtually always immunize its regulations by means of partial waivers and exemptions. That perplexing position should be rejected.

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[3] As in *Massachusetts* the petitions for review here were "authorized" under 42 U.S.C. § 7607(b)(1). *See* 549 U.S. at 498. That means petitioners have "standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed" the petitioners. *Id.* Under *Massachusetts*, "meeting all the normal standards for redressability and immediacy" is not required. *Id.*

II. There Is No *Stare Decisis* Obstacle to Overruling *Massachusetts v. EPA*.

Several petitioners urge this Court to reject EPA's aggressive reading of *Massachusetts* on the grounds of Judge Kavanaugh's dissent: *Massachusetts* does not command an extension of greenhouse regulation to the PSD program. While that may well be a sensible position, it also means that global warming policy will be improvised in a partnership between EPA and the court of appeals—one endangerment finding, one industry, one EPA invention at a time. Petitioners Chamber of Commerce *et al.*, as we understand them, urge a position close to Judge Brown's dissent and, in the alternative, ask that *Massachusetts* be overruled. That may well be the most compelling disposition.

A. Overruling *Massachusetts v. EPA* Would be Consistent With Sound Principles and Precedents.

"The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) (quoting The Federalist No. 78 at 471 (Hamilton) (C. Rossiter ed. 1961)). The Court applies *stare decisis* more rigidly in statutory than in constitutional cases. *See, e.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962); *Illinois. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). In statutory as well as constitutional cases, however, *stare decisis* is a policy or presumption, not an ironclad rule.

Helvering v. Hallock, 309 U.S. 106, 119 (1940). Of course, a court that decides to overrule precedent "must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring). But where a statutory decision was plainly in error, and where additional reasons counseled overruling and no countervailing considerations (such as reliance) compelled respect, the Court has not hesitated to overturn its statutory precedents.[4] Three commonly cited reasons for overruling apply in this case.

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[4] The presumption of (statutory) *stare decisis* is potent in constraining the judicial "discretion" Hamilton had in mind — that is, the room for judgment (and error) that any legal system will entail. It is far less potent in cases of clear judicial error. *Cf.* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 8 (2001) (in antebellum America, "when convinced of a precedent's error, most courts and commentators did not indulge a presumption against overruling it.").

There is no meaningful reliance here. Congress has not legislated in reliance on *Massachusetts*, and regulated industries complain about their inability to rely on anything at all, should EPA's improvised program go forward. EPA, in a fashion, has "relied" on *Massachusetts*. But its interpretation of the decision merits no deference, and its legitimacy is precisely what is at issue in this case. This Court's decision in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), relied on *Massachusetts* only to extent of affirming EPA's general authority to regulate greenhouse gases. *Cf. id* at. 2537–39 (explicitly noting EPA's delegated discretion to regulate or not to regulate).

First, overruling may be warranted when a precedent was decided on erroneous premises. *See, e.g.*, *Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 696 (1978); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)). *Massachusetts* assumed, explicitly but erroneously, that EPA's regulatory jurisdiction over greenhouse gases would have no "extreme consequences," *Massachusetts*, 549 U.S. at 531; and that an affirmative endangerment finding under section 201(a)(1) would prompt the regulation of greenhouse gases from automobiles but nothing else. *Id.* ("EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases *from new motor vehicles*.") (emphasis added); *id.* at 533 ("If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant *from new motor vehicles*.") (emphasis added). Petitioners assured this Court, confidently but misleadingly, that nothing more was at stake. *See, e.g.*, Br. for Petitioner, at 3, *Massachusetts v. EPA*, 549 U.S. 497 (2007), 2006 WL 2563378 ("Petitioners ask this Court to correct EPA's legal errors and to remand the case to the agency with directions to apply the correct legal standard to this matter; that is all. A judgment in favor of petitioners will not mandate regulation of air pollutants associated with climate change."). None of the opinions in *Massachusetts* provide any indication that this Court suspected the extreme, counterintuitive, and absurd consequences now at issue. Those consequences provide ample reason to

revisit *Massachusetts*. "Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects . . . and improve on the treatment of the earlier case." Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 423 (1988).

Second, overruling may be appropriate when a precedent has prompted confusion and proved "unworkable," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991); or when it was "badly reasoned," *Holder v. Hall*, 512 U.S. 874, 936 (1994) (Thomas, J., concurring). The maxim applies in statutory as well as constitutional cases. *See, e.g.*, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 n. 1 (1965). Particularly instructive is *Hubbard v. United States*, 514 U.S. 695 (1995), which overruled *United States v. Bramblett*, 348 U.S. 503 (1955). Writing for the majority, Justice Stevens said that *Bramblett*, while "not completely implausible," was "nevertheless unsound" and warranted overruling on account of intervening legal developments. *Hubbard*, 514 U.S. at 706. Justice Scalia concurred on different grounds, noting "that so many Courts of Appeals have strained so mightily to discern an exception that the statute does not contain . . . demonstrates how great a potential for mischief federal judges have discovered in the mistaken reading of [the statutory provision at issue], *a potential we did not fully appreciate when* Bramblett *was decided*." *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring) (emphasis added).

The *Massachusetts* Court may or may not have appreciated the difficulties of accommodating

greenhouse gas regulation under a statute built for very different purposes. *Cf.* Arnold W. Reitze, Jr., Air Pollution Control Law: Compliance & Enforcement 427 (2001). This case removes any doubt on that score, and it poses a stark choice: allow *this* exception, and many others will follow. Especially on a matter of such undoubted consequence, one statutory re-write or exception is one too many.

Third, the fact that a decision "unsettles" the law may argue in favor of overruling. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 502 (2007) (Scalia, J., concurring in part and concurring in judgment); *Helvering*, 309 U.S. at 119. *Massachusetts* unsettles and collides with several more embracing and sounder doctrines.

Massachusetts is in tension, if not irreconcilable conflict, with *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The majority opinion strongly suggests and, under the D.C. Circuit's interpretation holds, that greenhouse gases are *unambiguously* air pollutants for all purposes of the Clean Air Act. As noted by Judge Kavanaugh, however, EPA itself has consistently maintained that the term "air pollutant" carries different meanings in different parts of the Clean Air Act, depending on its context. Pet.App. 149a–51a (Kavanaugh, J., dissenting). The agency has merely disavowed that position for purposes of greenhouse gas regulation. It is entirely possible — and sometimes plausible — that the same term, used throughout a statute, nonetheless carries different meanings. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519

U.S. 337, 343 (1997); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004). But it is impossible for an *unambiguous* statutory term to do so. Thus, unless EPA's earlier position is to be discarded, *Massachusetts* should be overruled to the extent it holds that the term "air pollutant" is unambiguous.

Furthermore, *Massachusetts* casts grave doubt on precedents holding that special caution is warranted with respect to statutory interpretations that generate substantial expansions of an agency's regulatory authority. *Whitman*, 531 U.S. at 468 (citing *MCI Telecomms.*, 512 U.S. at 231); *Brown & Williamson*, 529 U.S. at 161. While *Massachusetts* distinguished *Brown & Williamson* on the grounds, *inter alia*, that a ruling in petitioners' favor would entail no "extreme" and "counterintuitive" measures, EPA's PSD and Title V regulations will encompass sources and industries that have never been subject to regulation. At the same time, EPA claims authority to exempt many of those sources by means of a unilateral re-write of unambiguous standards. For reasons discussed above, that claimed authority is a *very* major consequence. *Cf. MCI Telecomms.*, 512 U.S. at 231. To the extent *Massachusetts* warrants that reach, it should be overruled.

Finally, *Massachusetts* gives rise to a highly unorthodox consequence: climate change regulation on demand. The language of section 201(a)(1) ("in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare") is sprinkled liberally throughout the Clean Air Act. *E.g.*, 42 U.S.C. § 7408(a)(1)(A); *id.*

§ 7411(b)(1)(A). Almost always, the language serves as a *mandatory* trigger for regulation. One endangerment finding having been made, it is hard to see — on the theory of EPA and the court below — how EPA could decline to regulate in response to pending petitions for greenhouse gas controls from sea to shining sea. *See, e.g.*, Center for Biological Diversity, Petition to Establish National Pollution Limits for Greenhouse Gases (filed Dec. 2, 2009); Institute for Policy Integrity, Petition for Rulemakings (filed Feb. 19, 2013).[5] Those petitions, of course, are not before the Court. But they are matters of public record, and they are "not before the Court" in the same way in which the PSD program and Title V were "not before the Court" in *Massachusetts*: they are dominoes yet to be arrayed and tipped over.

B. Separation of Powers Concerns Strongly Counsel Overruling.

In this extraordinary case, the common reasons for overruling are powerfully reinforced by separation of powers concerns. The construction of a nationwide regulatory system of unprecedented proportions ought to be left to Congress, not to an agency's extra-statutory, unguided improvisation. But the case also

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[5] For example, the latter petition requests regulation under Section 115, which would compel EPA to require any states containing sources of international air pollution — in the case of greenhouse gases, *all* states — to revise their SIP so as to "prevent or eliminate" the danger to foreign health and welfare. 42 U.S.C. § 7415(a), (c), (b).

raises a more subtle but equally disturbing separation of powers question.

Massachusetts can be understood as an attempt to force political accountability: it held Congress to the dynamic, forward-looking statute that it wrote. If Congress does not like the result, it can, should, and surely will change the statute. In a system of bicameralism and separated powers, however, that line of reasoning is problematic. Judicial decisions often change the baseline against which Congress legislates. So here: pre-*Massachusetts*, separation-of-powers impediments cut against regulation; post-*Massachusetts*, they cut the other way.

Massachusetts appeared to require no action at all — no regulation, and not even an endangerment finding. And yet, EPA can say (as it has already said) that its greenhouse gas rulemaking cascade is compelled by the inexorable commands of the statute, as interpreted by this Court. Congress, for its part, cannot stop the momentum — not because the constitutional impediments have broken down but, paradoxically, because they are working as intended. In short, barring this Court's timely intervention, a regulatory elephant will march forward — and nobody will know whence it came.

If "accountability" means anything, it means citizens' ability to ask, *who is responsible* — and, at the end of the day, to get a tolerably clear answer. To the considerable extent that *Massachusetts* threatens that bedrock foundation of our government, it should be overruled.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

List of *Amici* Law Professors

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