No. 12-1272 (consolidated with
Nos. 12-1146, 12-1248, 12-1252, 12-1268 and 12-1269)

In The Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND AMERICAN FARM BUREAU FEDERATION,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

BRIEF OF POLITICAL ECONOMISTS HENRY N. BUTLER, CHRISTOPHER DEMUTH, MARC LANDY, R. SHEP MELNICK, TODD J. ZYWICKI, AND THE CENTER FOR ENERGY INNOVATION AND INDEPENDENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTEREST OF *AMICI CURIAE* [1]

Amici are scholars whose work in political science and economics focuses on the separation of powers and the political economy of the regulatory state. *Amici* claim no special expertise on the difficult administrative law questions presented in this case. Rather, they respectfully seek to assist the Court by describing the political and institutional incentives that shape EPA's actions, as well as the consequences that are likely to flow from the Court's decision in this case.

Amicus curiae Henry N. Butler, a leading public policy analyst and specialist in law and economics, is a Foundation Professor of Law and Executive Director of the Law & Economics Center at George Mason. Professor Butler most recently served as executive director of the Searle Center on Law, Regulation, and Economic Growth at Northwestern University School of Law. He has held prior appointments at The Brookings Institution, Chapman University, the University of Kansas, the University of Chicago, and Texas A & M University.

Amicus curiae Christopher DeMuth is a Distinguished Fellow at the Hudson Institute in Washington, D.C. He was President of the American Enterprise Institute for Public Policy Research ("AEI")

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

from 1986-2008 and D.C. Searle Senior Fellow at AEI from 2008-2011. He has taught and written extensively on issues relating to health, safety, environmental, and economic regulation.

Amicus curiae Marc Landy is Professor of Political Science at Boston College. He has a B.A. from Oberlin College and a Ph.D in Government from Harvard University. He is an author of the ENVIRONMENTAL PROTECTION AGENCY FROM NIXON TO CLINTON: ASKING THE WRONG QUESTIONS, and, with Debra Knopman, CIVIC ENVIRONMENTALISM IN ACTION: A FIELD GUIDE TO REGIONAL AND LOCAL INITIATIVES, Progressive Policy Institute, 1999. He has also, with Martin Levin, edited a series of books on modern politics and public policy and written various articles on environmental law and policy.

Amicus curiae R. Shep Melnick is the Thomas P. O'Neill, Jr. Professor of American Politics at Boston College, where he teaches courses in both the political science department and the law school. He is author of REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (Brookings, 1983) as well as numerous articles on environmental policy and administrative law.

Amicus curiae Todd J. Zywicki is George Mason University Foundation Professor of Law at George Mason University School of Law and Senior Scholar of the Mercatus Center at George Mason. He is Co-Editor of the *Supreme Court Economic Review* and *Public Choice Concepts and Applications in Law* (West 2009). From 2003-2004, Professor Zywicki served as the Director of the Office of Policy Planning at the Federal Trade Commission

Amicus curiae the Center for Energy Innovation and Independence is a not-for-profit corporation established under the laws of Oklahoma. It has no stock and no parent corporation. The Center seeks to help our country realize its enormous untapped potential to produce energy from its vast natural resources, talent, and capital by ensuring the proper and most effective allocation of regulatory authority between the National government and the States. The Center pursues this objective by monitoring federal regulations and commenting upon them in connection with administrative and congressional proceedings. The Center also provides guidance on the contours of cooperative federalism in the area of energy policy.

SUMMARY OF ARGUMENT

Faced with the ambiguous statutory term "pollutant" in the Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act (CAA), the Environmental Protection Agency (EPA) chose a broad construction of that term, including carbon dioxide and other greenhouse gases. By EPA's own admission, that interpretation leads to absurd results—an explosion of permit requirements for small, heretofore exempt stationary source emitters that would overwhelm EPA and state permitting agencies.[2] To avoid that outcome, the agency in its "Timing" or "Triggering Rule" effectively re-wrote the unambigu-

---

[2] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Final Rule, 75 FED. REG. 31514, 31538-39 (June 3, 2010) (hereinafter "Tailoring Rule").

ous, numerical emission thresholds contained in the PSD provisions of the CAA. EPA further claims authority to revise the re-written thresholds again in the future.

The absurd results of its broad construction should have prompted EPA to reject that construction. However, instead of accommodating the regulation of GHGs – an unforeseen problem when Congress enacted the CAA – to the statute, EPA chose to accommodate the statute to its preconceived regulatory objectives, in direct derogation of the statutory text. So far as *amici* are aware, that arrogation of authority is unprecedented. It is squarely inconsistent with the principles and purposes of the separation of powers. Four points are of particular concern:

1. The EPA's strategy of "tailoring" a statute to remedy an absurdity of the agency's own creation sets a dangerous precedent which would unbalance the allocation of powers between our constitutional branches of government. Rewriting statutes is a power that must be reserved to Congress. Under our system of government, there can be no executive prerogative to make binding rules without a basis in law.

2. EPA's claim of authority is doubly problematic because it undermines the effectiveness of interbranch scrutiny. By raising the triggering thresholds for PSD coverage, EPA seeks to thwart judicial review by claiming that the most interested and affected parties lack standing to challenge its legislative rewrite. And by dividing the interested parties affected by applying the PSD provisions to GHGs, EPA has significantly undermined political coalitions

that might otherwise challenge its actions before Congress.

3. Accepting EPA's claimed powers would have troubling consequences for the administration of the CAA. Because the PSD permitting process requires an open-ended inquiry into best available control technologies, including changes in practices and procedures by emitters, the process requires an inquiry into all forms of energy usage involving combustion. That process provides extraordinary opportunities for overreach and abuse. And it threatens to create an unauthorized, *ad hoc* energy policy across vast sectors of the U.S. economy.

4. Rejecting EPA's extraordinary claim of authority would have limited consequences for the agency's broader efforts to regulate GHGs and would likely promote more coherent development of policy in this area. The absurdity created by expanding the coverage of the PSD provisions to GHGs would not affect EPA's power under other sections of the CAA that do *not* create such absurdities. Any limit on EPA's power to regulate small emitters of GHGs is an issue best addressed by Congress, not the executive branch.

ARGUMENT

I. EPA's Claimed Authority to "Tailor" Statutory Text Asserts an Executive Prerogative Contrary to the Constitutional Separation of Powers.

Whatever the proper scope of permissible congressional delegation of policymaking power to the executive, EPA's actions in this case threaten the constitutional allocation of authority. Moreover, they do so in

a way that is both unprecedented and difficult to limit.

A. EPA's Purported Rationales for Altering the Statute Combine to Create Virtually Unchecked Executive Prerogative.

In support of its claimed authority to alter the express numerical thresholds in the statutory PSD provisions, EPA relies upon a mix of three doctrines: 1) the "absurd results" doctrine; 2) the "administrative necessity" doctrine; and 3) the "one-step-at-a-time" doctrine.[3] In substance, the agency insists that it *must* construe a statutory term that permits interpretation ("pollutant") in a way that produces absurdity – and then mobilizes that absurdity to rewrite a term ("250" tons per year (tpy)) that is not open to interpretation. That turns ordinary canons of construction and delegated powers upside-down.[4] According to EPA, "If congressional intent is not clear [because of an absurd result], then * * * the agency has discretion to fashion an interpretation that is a reasonable construction of the statute."[5] By "construction," however, the agency in this instance does not mean interpreting a word in a plausible manner, it means rewriting a troublesome word entirely.

The flaw in EPA's reasoning lies in confusing ambiguity with conflict or absurdity, particularly when that conflict or absurdity is not intrinsic to the statu-

---

[3] Tailoring Rule, 75 FED. REG. at 31516.

[4] *Chevron USA Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

[5] Tailoring Rule, 75 FED. REG. at 31517.

tory text, but rather is a function of the agency's own unnecessary construction.

As *amici* understand it, the conventional and proper dynamic of agency construction of statutory language does not involve such manufactured circumstances but rather involves language that is ambiguous or uncertain in its application to particular situations. However, the meaning of the PSD threshold language of "250" tpy is not even remotely ambiguous. In fact, it is as precise as imaginable. Nor is there any ambiguity in its uniform application to the category of "pollutant[s]," however defined.

The only ambiguity relevant here is in the scope of the genus "pollutant[s]," which EPA properly recognized did not encompass *all* conceivable pollutants, but only a subcategory thereof. In choosing an overbroad subcategory, however, EPA created not an ambiguity, but an absurdity. Such an absurdity certainly is informative about the quality, or lack thereof, of EPA's construction of the term "pollutant[s]," but it tells us nothing about the meaning and application of the 250 tpy trigger language.

Even had Congress unmistakably spoken and included a sweeping category of pollutant that would make the remainder of the PSD provisions absurd and unworkable, that would not suggest an ambiguity in the statute; it instead would suggest a foolish or nonsensical statute. Incoherence and absurdity of that sort may well be grounds for courts refusing to enforce a statute, but they are certainly not grounds for authorizing an executive agency to simply adopt a new version of that statute that it deems preferable. Unlike where Congress has explicitly or implicitly

delegated to an agency the power to fill in certain details in the case of absurdity (assuming, *arguendo*, that it was not created by the agency's own flawed construction of other parts of the statute), Congress has merely made a mistake or an incoherent choice. But such an error implies no delegation to the executive of editorial authority over statutes – nor could it. Even when Congress makes poor or unworkable choices, "[a]llowing an agency to substitute its own policy choices for Congress's policy choices * * * would undermine core separation of powers principles."[6]

Whatever the proper scope of delegation to executive agencies, it is a fundamental premise of our constitutional system that where Congress, within the scope of its authority, has spoken on an issue, an agency is bound to apply the law as enacted. If a law is so incoherent or unworkable that it cannot as a practical matter be obeyed, then it is up to Congress to make whatever new choices are required, rewrite the law in whatever form the political process dictates, and thereby resolve any conflict or absurdity. It is most certainly not the role of an executive agency to assume the task of legislative revision and write whatever law *it* deems preferable.

Maintaining and enforcing a staunch separation between the legislative power to make (or remake) the law and the executive power to carry such law into execution as directed by Congress is especially important in our modern administrative state. The growth of federal legislation and the administrative

---

[6] *Center for Biological Diversity* v. *EPA*, 722 F.3d 401, 414 (2013) (Kavanaugh, J., concurring).

state during the past century has created a corpus of legislation so vast that one or more federal statutes can be found to touch on nearly every issue. As a result, legislators rarely write upon a clean slate and are much more likely to step into a legislative muddle in which existing statutes already create reservoirs of delegated executive branch authority, often imperfectly matched to evolved conditions or the particular features of the issue at hand. As a result, what Guido Calabresi described as the problem of "legal obsolescence" is pervasive.[7] In such circumstances, the potential for conflict among disparate legislation touching upon common topics increases and the probability of absurd results grows. Determining which branch of government is empowered to deal with such mismatches or conflicts between existing statutes and contemporary problems thus goes to the very heart of the separation of powers in the modern age.

Accepting EPA's use of absurdity to claim deference to the agency's "tailoring" existing or conflicting law would effectively grant agencies license to legislate in a large and increasing set of circumstances. In such cases, executive branch agencies could become the first and last governmental actors whenever thorny mismatches between existing statutes and contemporary problems come to the fore. Such an expansion of potential agency authority also would create perverse incentives: whereas before agencies had every reason to avoid absurdities for fear of getting bogged down in unworkable situations, they

---

[7] A COMMON LAW FOR THE AGE OF STATUTES 2 (1982).

would now have every reason to find and exploit them. As Judge Kavanaugh noted, the authority claimed by EPA would have significant ramifications for constitutional separation of powers:

> Agencies presumably could adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness. Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process.

[JA175] (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

B. EPA's Purported Limits on its "Tailoring" Authority Are Illusory.

Though EPA tries to minimize the breadth of its claimed authority, there is no meaningful substance to its suggestions that traditional limits on deference to agency interpretations and the constraint of perceived congressional intent provide adequate limits to that authority.

First, in sharp contrast to agencies' ordinary interpretive and gap-filling authority, EPA now claims "broad discretion considering that both the statutory terms cannot be considered dispositive and underlying congressional intent is not clear."[8] In ordinary interpretive situations where there exists some ambi-

---

[8] Tailoring Rule, 75 FED. REG. at 31546.

guity, the express terms of the statute still provide some outer boundary that limits the scope of agency discretion. But when starting with the premise of incompatible congressional directives, there is no reasoned basis for choosing which of Congress's incompatible edicts should take priority. Hence the choice of policy direction will be left entirely in the hands of agency "discretion." Consistency with the statute becomes a meaningless test where the statute is claimed to be inconsistent with itself.

Second, a claimed limit of fidelity to congressional intent similarly lacks substance in the case of absurdity and incompatible textual indicia of intent. Furthermore, congressional intent as to different portions of large and complex litigation is always a mix of compromises and competing concerns. On EPA's theory in this case the agency will be left free to select which thread of congressional "intent" should be followed.

For example, in this case one could read the PSD triggering thresholds to indicate an intent to cover only the limited class of conventional industrial pollutants for which such thresholds were designed and make sense. Surely the weight-based numerical applicability cutoffs provided explicitly by the statute provide the best evidence of the sort of pollutants the section is intended to address. If applying these thresholds to GHGs results in absurdity, as EPA asserts, that provides fairly strong evidence against the idea that Congress intended application of PSD to GHGs. EPA ignored that far more plausible view of congressional intent in favor of a more expansive supposed intent to cover a broad range of pollutants

with no regard for the explicit and implicit limits written into the law.[9]

The malleability of EPA's purported limit of congressional intent can also be seen in the fact that the intent EPA claims to follow is by no means supported by the historical record. Indeed, as the EPA originally argued in its 2003 decision *not* to regulate GHGs under the CAA, Congress has addressed the issue of global climate change through a number of statutes separate from the CAA.[10] Deliberations over the bipartisan overhaul of the Act in 1990 explicitly considered and rejected adding provisions to target greenhouse gas emissions, with the only pertinent amendments relating to monitoring of GHGs.[11] If EPA contends its application of the PSD program to GHGs nevertheless conforms to a discernible congressional intent, as a historical matter that simply makes no sense. At the very least, the confusion and necessarily competing strands of intent that would be examined under such an inquiry mean that the agency is effectively unconstrained by congressional intent as it seeks to apply the PSD provisions to GHGs.

When EPA reads "250" as "100,000," then, it should not be thought of as performing an act of "interpretation" in any meaningful sense. Rather, the agency is rewriting the law on the fly without any fixed legislative guideposts governing its choice. The

---

[9] Tailoring Rule, 75 FED. REG. at 31550.

[10] Notice of denial of petition for rulemaking: Control of Emissions From New Highway Vehicles and Engines, 68 FED. REG. 52922, 52927 (2003).

[11] 46 CQ ALMANAC 232-33, 279-281 (1990).

end result is a kind of modern-day prerogative: the executive branch's notion of the public good is taken as sufficient justification for actions otherwise not prescribed or sanctioned by law.

Accepting this kind of prerogative power for agencies, especially in situations where no exigency demands urgent action, would permanently unbalance the branches in the executive's favor. Rather than needing a statute directly authorizing it to address a particular issue, an agency need only find a law tangentially related to an issue that can plausibly be applied. At that point, any problems of structural mismatch can be "tailored" away by effectively rewriting the statute.

The concern that EPA will use its claimed tailoring power expansively to rewrite other parts of the law not to its taste is far from speculative. The agency offered the identical combination of rationales (absurdity, administrative necessity, and one-step-at-a-time) in order to justify an exemption to the PSD program's applicability for GHGs emitted from biogenic processes – despite the lack of statutory text on which this exemption might be based. That particular use of the maneuver was rejected by the D.C. Circuit.[12] As Judge Kavanaugh's concurrence rightly noted, EPA's rationale for the Tailoring Rule has ensured that "EPA is necessarily making it up as it goes along. That is not how the administrative process is supposed to work."[13] While EPA failed in that particular

---

[12] *Center for Biological Diversity* v. *EPA*, 722 F.3d 401 (2013).

[13] *Id.* at 415, 414 (Kavanaugh, J., concurring).

instance, its varied tailoring efforts should alert this Court to the potentially broad impact of allowing EPA to keep the legislative revision authority it has claimed.

II. EPA's Tailoring Strategy Reduces the Likelihood of Effective Interbranch Scrutiny.

Having claimed a power of legislative revision for itself, EPA has also adopted an approach to implementing that power that runs a significant risk of insulating it from the scrutiny of the other branches, thereby exacerbating the dangers of its approach for the separation of powers.

A. EPA Erects Barriers to Judicial Review of Its Legislative Rewrite by Claiming Affected Litigants Lack Standing.

EPA has sought to insulate its actions from judicial review by claiming that litigants do not have standing to challenge the upward "revision" of the PSD thresholds. The D.C. Circuit accepted this position. Smaller emitters, it said, benefit from the statutory rewrite; large emitters would be subject to regulation with or without the agency's "tailoring," by operation of the statute.[14] Thus, no regulated party can have standing to challenge the agency's action. Regulatory beneficiaries, in contrast, enjoy broad rights to petition the agency for rulemaking and to demand more aggressive regulation.

This litigation asymmetry would have a distorting effect on environmental policy and would skew the

---

[14] [JA261-66].

type of cases that come before the courts for review. While Congress did mean to empower environmental interests to monitor EPA's policymaking through the CAA's standing provisions, there is no reason to think that it wished to destroy industry litigants' ability to challenge the agency when its rules run afoul of the law. But that is precisely the effect of court of appeal's standing decision.

B. EPA's Divide and Conquer Approach Undermines the Chances of Effective Legislative Involvement.

EPA's approach to implementing the PSD triggering threshold for GHGs also creates a danger of insulating EPA's statutory rewrite from revision by Congress.

By tailoring the PSD emission thresholds, EPA can effectively "tailor" the size of the coalition of interests mobilized against it, ensuring that opposition never achieves majority support. Should legislation look imminent at some point, EPA could exempt certain key sources by resetting the applicability thresholds accordingly – while preserving its discretion to expand the thresholds once the political winds shift again. The separation-of-powers concerns are grave.

It is a well-established result in the political economy of interbranch relations that bureaucratic deviations from prescribed policies are difficult for legislators to correct even when they can perfectly monitor executive branch choices. In a classic article, McCubbins, Noll, and Weingast demonstrated that coalitional politics often make targeted corrections to restore the prior status quo politically untenable. If

bureaucrats are able to violate procedures meant to fix policy in place they will be able to effectively decide policy within some zone of discretion, playing potential coalition partners off against each other.[15] The early history of the PSD program vividly confirms this lesson. The imperative to reject state plans which "permit the significant deterioration of existing air quality" was originally a judicial mandate, later accepted and championed by EPA. This development fundamentally changed congressional politics regarding the CAA, as House and Senate committees favoring the new policy could achieve their preferred policies simply by blocking White House proposals that would have restored the policy status quo. Ultimately, these shifts made without the benefit of legislative deliberation caused significant administrative problems for the EPA.[16]

Rather than mobilizing to elicit legislatively-produced coherence, therefore, firms facing the possibility of regulation will only have the incentive to posture such that EPA will make adjustments to exempt their operations. The ensuing game of bluffing and adjusting will contribute to the unpredictability of EPA's policies, and ultimately end up disadvantaging those firms which are unwilling to engage in this kind of unsavory gamesmanship.

---

[15] Matthew McCubbins, Roger Noll, and Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 436-37 (1989).

[16] R. Shep Melnick, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 72-73 (1983).

Although Congress retains the power to provide a decisive resolution through a clarifying amendment, such a solution inverts the constitutionally established structural hurdles of enacting legislation. The Constitution intentionally and explicitly imposed barriers to enacting legislation, in the service if limited government. But if an executive agency can make law without overcoming such hurdles, the constitutional structure works to prevent Congress from correcting or nullifying such executive law-making. That converts the constitutional scheme from one intended to make it hard to pass legislation into one making it hard to cabin executive prerogative.

Empowering the executive branch to rewrite awkward statutory provisions does more than change the status quo bias from inertia to executive-driven action. Those who hope to propose a coherent and well-designed policy regime to address a problem must now present a political package that is preferable not only to the policy reflected in current law, but also better than whatever powerful interest groups expect to be able to get from the tailoring agency. Consequently, legislatively imposed coherence becomes less likely; experimentation on behalf of well-connected interest groups, more likely.

III. Applying the PSD Requirements to GHGs Will Lead to *Ad Hoc* Energy Policy that EPA is Ill-Suited to Create.

As noted at the outset, the difficulties presented by this case arise primarily from EPA's flawed and unnecessary construction of "pollutant[s]" in the PSD provisions as including GHGs. That construction led

to the absurd results, which in turn led EPA to claim authority to rewrite the statute. But the consequences of EPA's inclusion of GHGs do not stop there. Precisely because the PSD provisions were never designed for GHGs, implementing those requirements will lead to still further legislative encroachment by EPA.

One example of the further problems EPA's choices will create is the application of the PSD program's "Best Available Control Technology" (BACT) standard.[17] With regard to traditional pollutants subject to the PSD permitting requirements, BACT is designed to operate on a case-by-case basis, allowing permitting authorities to take into account site-specific factors in determining which kinds of technologies can appropriately be required for each source of emissions. These factors are combined to reach a source-wide emissions reduction target that satisfies the permitting authority's judgment of "achievability."[18] While this flexibility is valuable in the regulation of conventional pollutants, applying it in the GHG context is likely to create special problems of unequal regulatory burdens. For conventional pollutants, the CAA can plausibly aspire to the goal of minimizing total emissions. It may be impossible to achieve zero

---

[17] CAA § 165(a)(4) and § 169(3), rules codified at 40 CFR 52.21(j), SIP rules at 40 CFR 51.166(j), specific states' SIPs (40 CFR Part 52, Subpart A – FFF).

[18] EPA, PSD and Title V Permitting Guidance for Greenhouse Gases, EPA-HQ-OAR-2010-0841-0001 (November 2010) (http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0841-0001), 18.

emissions, but the goal of maximum possible reduction in emissions is nevertheless a plausible one.

The case is quite different for GHGs, however. Especially with respect to CO_2, aiming for zero emissions would be equivalent to aiming for an abolition of combustion reactions. (Even the most ambitious visions of carbon capture and sequestration allow some leakage.) Attempting to implement BACT thus poses a conundrum, which becomes apparent when we consider EPA's guidance on how permitting authorities should determine BACT.

In a five-step process, sources and their regulators are to: 1) determine all of the available control technologies, 2) eliminate those that are "technically infeasible," 3) rank the remaining technologies by effectiveness, 4) evaluate the technology determined to be most effective, including its "energy, environmental and economic impacts," and 5) select the BACT.[19]

Especially at Step 4, using this template to determine appropriate measures to reduce GHG emissions invites permitting authorities to essentially engineer an *ad hoc* energy policy from whole cloth. This is because permitting authorities must go beyond considering appropriate add-on control technologies. They must also consider requiring use of inherently lower-emitting processes, practices, and designs.[20] In the case of GHG emissions, that injunction could become tantamount to determining just how important the source's energy usage is, with authorities at least tac-

---

[19] *Id.* at 19, 42.

[20] *Id.* 27, 31-32.

itly making case-by-case determinations of the social benefits and social costs of energy usage. Permitting authorities are grossly underqualified to perform this deeply political task. And they will receive almost no additional guidance from the PSD provisions, which aim to minimize emissions at reasonable costs rather than to balance competing legitimate social needs, including those served by energy consumption.

Faced with such a situation, a lobbying bonanza would ensue in which firms would seek to gain a within-industry advantage over their competitors by securing favorable permitting decisions. Because of BACT's sensitivity to site-specific factors, authorities will have the power to require disparate emissions reductions strategies at different plants based on their assessment of the relative economic value of greater energy usage at one operation compared to another. Inconsistency, capriciousness, and advantages to the politically savvy are the sure results.

At the same time, environmental groups will exert pressure to make more ambitious use of the PSD statute, since in its current form it provides the EPA a nearly unconstrained grant of power to address GHG emissions. One law professor has boldly suggested rewriting the tailoring rule so as to make EPA a nationwide overseer of building codes, which position it could use to mandate widespread energy efficiency requirements for nearly all new construction in the United States.[21] This proposal is but the first

---

[21] Albert Monroe, *Using Building Codes to Rewrite the Tailoring Rule and Mitigate Climate Change*, 30 PACE ENVTL. L. REV. 58 (2012).

of many that will surely follow seeking to exploit the PSD as a license to legislate independent of Congress.

In the face of this regulatory expansion potentially covering all CO_2 producing activities, it is worth noting that the resulting permit-based policy represents an abysmal cost-benefit proposition, particularly as compared to more market-oriented solutions. As EPA's own website notes, using economic incentives (through taxes or tradable emissions permits) "provide[s] continuous inducements, monetary and near-monetary, to encourage polluting entities to reduce releases of harmful pollutant[s]" rather than simply encouraging them to do the least possible to comply with plant-specific regulations.[22] Creating economy-wide incentives for making improvements where they can be undertaken at the least cost is especially important for issues such as global climate change, where there is no localized component to make a single source's emissions especially problematic. The overall social value of regulating GHGs through PSD is thus likely to be low.

---

[22] EPA, Economic Incentives (web page) (http://yosemite.epa.gov/ee/epa/eed.nsf/webpages/EconomicIncentives.html); *see also* Winston Harrington and Richard D. Morgenstern, Economic Incentives versus Command and Control, 152 RESOURCES 13, 15 (Fall/Winter 2004) (noting that economic incentives are generally more efficient than command and control systems).

IV. Denying EPA Authority to Include GHGs as Part of the PSD Program Will Have No Meaningful Adverse Effects.

If this Court were to reject EPA's position, there would be few meaningful consequences from an environmental protection perspective. As EPA itself has recognized, such a ruling would have no consequences for other potential avenues of GHG regulation under the CAA. The agency argued that its application of the absurdity doctrine "has no relevance for applying other CAA requirements – such as the requirements concerning endangerment and contribution findings under CAA section 202(a)(1) or emission standards for new motor vehicles or new motor vehicle engines under CAA section 202—to GHGs or GHG sources."[23] If this Court were to hold that the absurdity from applying the PSD provisions to GHGs means those provisions do not apply, the same logic would apply: the absurdity is entirely with reference to the PSD statute, without any necessary implications for the application of other parts of the CAA to GHG emissions.

A ruling against EPA as to the applicability of PSD would do little to impair EPA's overall ability to regulate GHG emissions effectively under the CAA as a whole, and would thus be entirely consistent with the Court's holding in *Massachusetts v. EPA*, as *amici* understand it. EPA's already-existing or planned rules promulgating regulations for mobile source emissions (Title II) and setting industry-wide standards for new or modified stationary sources (New Source Performance Standards under § 111) will pre-

---

[23] Tailoring Rule, 75 FED. REG. at 31548.

sumably be unaffected. So, too, would any future efforts to designate GHGs as "criteria" pollutants subject to National Ambient Air Quality Standards (under § 109). While these regulatory options each share some of the PSD program's inefficiencies, none is necessarily beset by the same absurdities or so likely to give rise to abuses.

Precluding the regulation of GHGs from PSD permitting would have one clear substantive consequence: it would preclude CAA permitting of emissions from small, non-industrial sources, barring further congressional action. In contrast, EPA's Tailoring Rule promises to exempt those sources only until further notice and as the agency may see fit. For those who believe that regulation of small sources of GHG emissions would be socially valuable, this result might be unwelcome. Rather than needing only to convince the EPA at some future time to expand the scope of its program by lowering the applicability thresholds, they would need to persuade Congress to change the law. But surely it cannot be a cause of great distress for our policymaking apparatus to be required to function as constitutionally prescribed, rather than through a series of administrative kludges.

Furthermore, when we look at other recent cases in which courts rejected awkward executive branch applications of an existing statute, the record ought to give some encouragement to proponents of regulatory change. In *MCI v. AT&T*, this Court rejected the Federal Communication Commission's attempt to make a key filing requirement optional for non-dominant carriers as a means of promoting competi-

tion, finding that the Commission's interpretation of its ability to "modify any requirement" stretched the discretion conferred by the statute far past its breaking point.[24] In response, Congress passed the Telecommunications Act of 1996, promoting competition in a far more orderly and comprehensive manner.[25]

In *FDA v. Brown & Williamson Tobacco Corp.*, this Court rejected the Food and Drug Administration's awkward attempt to apply the "safety"-protective Food, Drug, and Cosmetic Act to the regulation of tobacco, unconvinced by the agency's promises to tailor the statute to accommodate the differences between tobacco and medical prescription drugs.[26] Over the decade that followed, Congress intensely debated a number of regulatory schemes for tobacco, culminating in passage of the Family Smoking Prevention and Tobacco Control Act of 2009.[27] Though the regulation prescribed by the eventual legislation bore some resemblance to the administratively crafted option rejected by this Court, there were also crucial differences setting the overall regulatory scheme on a very

---

[24] *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994).

[25] Pub. L. No. 104-104, 110 STAT. 56 (1996). See Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 858, 864 (1997) (noting that the FCC's efforts at self-guided reform "had reached the limits of [its] legal authority and institutional competence," thus necessitating legislative intervention).

[26] 529 U.S. 120 (2000).

[27] Pub. L. No. 111-31, 123 Stat. 1776 (2009).

different, better-crafted, and more coherent foundation.[28]

To the extent that regulating small sources of GHG emissions is a priority, a similar path is quite conceivable should the Court reject EPA's attempt to tailor the PSD program. There has been and continues to be a great deal of congressional attention paid to the question of global climate change.[29] That these efforts have to this point failed to produce comprehensive legislation is hardly proof of the impossibility of future Congressional action. When such action does come, it would unquestionably be better targeted at the particular contours of global climate change and GHG emissions than the current square peg pounded into the round hole of PSD.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

---

[28] See Philip A. Wallach, *When Can You Teach an Old Law New Tricks?* 16 N.Y.U. J. LEGIS. & PUB. POL'Y 689, 728-732 (2013).

[29] See *Massachusetts* v. *EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amici Curiae

Dated: December 16, 2013