

**In The
Supreme Court of the United States**

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.,

Respondents.

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

**BRIEF OF *AMICUS CURIAE*
LANDMARK LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

MARK R. LEVIN
MICHAEL J. O'NEILL
MATTHEW C. FORYS
LANDMARK LEGAL
FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
703-554-6100

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL
FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559
816-931-1115 (Facsimile)
rpetehutch@aol.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF LANDMARK LEGAL FOUNDATION.....	1
INTRODUCTION AND SUMMARY OF ARGU- MENT.....	1
ARGUMENT.....	4
I. Certiorari Is Necessary To Bring EPA Into Compliance With The Court's Direc- tives	4
II. Certiorari Will Present The Opportunity To Revisit The Practice Of Deferring To Federal Agencies When Determining The Scope Of Agencies' Statutory Authority	6
CONCLUSION.....	10

TABLE OF AUTHORITIES

Page

CASES

<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	8
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	6, 7, 8, 10
<i>Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County</i> , 1 Ohio St. 77 (1852)	9
<i>City of Arlington v. FCC</i> , 133 S. Ct. 1863 (2013)	7
<i>Engine Mfrs. Ass’n v. EPA</i> , 88 F.3d 1075 (D.C. Cir. 1996)	9
<i>Field v. Clark</i> , 143 U.S. 649 (1892)	9
<i>Friends of the Earth, Inc. v. EPA</i> , 446 F.3d 140 (D.C. Cir. 2006)	9, 10
<i>Loving v. United States</i> , 517 U.S. 748 (1996)	9
<i>Michigan v. EPA</i> , 135 S. Ct. 2699 (2015)	<i>passim</i>
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943)	4
<i>Talk Am., Inc. v. Mich. Bell Tel. Co.</i> , 131 S. Ct. 2254 (2011)	8
<i>Utility Air Regulatory Group v. EPA</i> , 134 S. Ct. 2427 (2014)	6

STATUTES & REGULATIONS

Clean Air Act, 42 U.S.C. §§ 7401 <i>et seq.</i>	<i>passim</i>
42 U.S.C. § 7412(n)(1)	3
42 U.S.C. § 7412(n)(1)(A)	3, 4, 6, 7
77 Fed. Reg. 9304	3

STATEMENT OF INTEREST OF LANDMARK LEGAL FOUNDATION¹

Landmark Legal Foundation (“Landmark”) is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioners State of Michigan, *et al.* Petition for a Writ of Certiorari. For reasons stated herein, Landmark respectfully requests the Court grant certiorari.



INTRODUCTION AND SUMMARY OF ARGUMENT

Whether federal agencies and inferior courts must comply with the Court’s decisions is the fundamental question supporting the grant of certiorari in this case. Certiorari is necessary to protect the integrity of the Court’s directives and to rein in a recalcitrant Environmental Protection Agency (“EPA” or

¹ The parties have consented to the filing of this brief and were provided timely notice of intent to file. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Nor person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

“Agency”) that has little respect for the statutory limits placed on its authority by the Clean Air Act (“Act”), 42 U.S.C. §§ 7401 *et seq.* Less than one year ago, the Court ruled that EPA “must consider cost – including, most importantly, cost of compliance” before promulgating a final rule regulating emissions of hazardous air pollutants from power plants. *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015). EPA has ignored this ruling and failed to: (1) consider costs at the requisite stage in the rule’s formulation; and (2) suspend implementation of the rule. Certiorari is particularly required to ensure that a federal agency “stray[ing] far beyond” its statutory limitations is not enabled, via an inferior court’s judicial nullification, to continue to disregard statutory limitations as determined by the Court.

Finally, certiorari will present the Court with the opportunity to address the constitutionality of the Court’s practice of deferring to federal agencies’ interpretation of federal statutes. This case illustrates the threat to limited government posed when federal agencies such as EPA are afforded nearly unfettered deference in interpreting the scope of their authority under the law. Instead of exercising its power with proper deference to other branches of government, these agencies exercise a brazen disregard for the expressed limits of the law. EPA chose to ignore the specific directive from the Court that it conduct a cost analysis “at the initial decision to regulate.” EPA should not be accorded deference when it fails to adhere to the directions or interpretations from the Court.

In 2012, EPA issued a finding under 42 U.S.C. § 7412(n)(1) that regulating power plants was “appropriate and necessary.” Shortly thereafter, it promulgated the Mercury and Air Toxics (MATS) Rule establishing emissions standards for power plants. *Michigan v. EPA*, 135 S. Ct. 2699, 2075 (2015), 77 Fed. Reg. 9304, 9308, 9311. EPA “concluded that ‘costs should not be considered’ when deciding whether power plants should be regulated under § 7412.” *Id.* at 2705. Upon review, the Court ruled that EPA has exceeded its authority and that EPA “must consider cost – including, most importantly, cost of compliance – before deciding whether regulation is appropriate and necessary.” *Id.* at 2711. The Court then remanded the case to the D.C. Circuit “for further proceedings consistent with this opinion.” *Id.* at 2712.

The D.C. Circuit did not vacate the rule. It requested briefing and ultimately denied requests for vacatur. In denying these requests, the D.C. Circuit noted “that EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016.” App. 2a-3a. EPA argued in its opposition to requests for vacatur that staying implementation of the rule would have little practical effect as it would make a § 7412(n)(1) finding that would account for the cost of the rule. EPA Mem. in Opp. at 23.



ARGUMENT

I. CERTIORARI IS NECESSARY TO BRING EPA INTO COMPLIANCE WITH THE COURT'S DIRECTIVES.

Congress specified that EPA may regulate power plants under § 7412 “if the Administrator finds such regulation is appropriate and necessary after considering the results of the study.” 42 U.S.C. § 7412(n)(1)(A). The “appropriate and necessary” standard according to the Court, “plainly subsumes consideration of cost.” *Michigan v. EPA*, 135 S. Ct. at 2709. Further, this standard “governs the initial decision to regulate.” *Id.* Therefore, EPA has had an ongoing requirement to “consider cost – including, most importantly, cost of compliance – *before* deciding whether regulation is appropriate and necessary.” *Id.* at 2711 (emphasis added).

Courts are bound by the “foundational principle of administrative law” that they “may uphold agency action only on the grounds that the agency invoked when it took the action.” *Id.* at 2710 (*citing SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Based on this principle, if an agency’s rule is legally deficient at the outset, the agency cannot retroactively cure the deficiency with assurances that the agency intends at some future time to comply with the law.

EPA estimates that its decision to regulate power plants pursuant to § 7412 will cost those plants “nearly \$10 billion a year.” *Michigan v. EPA*, 135 S. Ct. at 2706. EPA however, “refused to consider

whether the costs of its decision outweighed the benefits.” *Id.* Within the context of its § 7412 analysis EPA “gave cost no thought at all, because it considered cost irrelevant to its initial decision to regulate.” *Id.*

Given its failure to consider costs when reaching the decision as to whether the rule was “appropriate and necessary” and the decision of the Court, one would believe EPA would suspend implementation and conduct a new cost analysis. EPA has not taken this course. Instead, the Agency relies on assurances that it “intends to complete the required consideration of cost for the ‘appropriate and necessary’ finding as close to April 15, 2016 as possible.” EPA Mot. to Govern Future Proceedings at 12. EPA attempts to cure a deficiency to an invalid rule by retroactively conducting a cost analysis. This directly conflicts with the Court’s directive that the Agency consider costs at the outset.

Equally egregious is the fact that the Court specifically addressed the very scenario it now faces. EPA justifies its actions by stating that it intends to consider costs pursuant to the adequate and necessary standard in the future. However, the court noted the importance of the timing of the finding: “Cost may become relevant again at a later state of the regulatory process, but that possibility does not establish irrelevance at the initial decision to regulate.” *Michigan v. EPA*, 135 S. Ct. at 2709. EPA has attempted to placate the Circuit Court and, presumably, the Court with assurances that they will complete

the required cost analysis “at a later stage in the regulatory process.” *Id.* This should not be permitted.

Certiorari will afford the Court with the opportunity to order EPA to comply with the directives of *Michigan v. EPA*.

II. CERTIORARI WILL PRESENT THE OPPORTUNITY TO REVISIT THE PRACTICE OF DEFERRING TO FEDERAL AGENCIES WHEN DETERMINING THE SCOPE OF AGENCIES’ STATUTORY AUTHORITY.

This case presents an opportunity to revisit the extent to which the Court will defer to an agency’s interpretation of the agency’s statutory authority. Here, EPA has explicitly ignored the directives of the Court and refused to suspend implementation of the rule until it had considered the costs in making a § 7412(n)(1)(A) determination.

Chevron, of course, instructs the Court to uphold an agency’s “reasonable resolution of an ambiguity in a statute the agency administers.” *Michigan v. EPA*, 135 S. Ct. at 2707 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). There are recognized limits to this deference as “agencies must operate within the bounds of reasonable interpretation.” *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014). Additionally, while “*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive

gerrymanders under which an agency keeps parts of a statutory context it likes while throwing away parts it does not.” *Michigan v. EPA*, 135 S. Ct. at 2708.

Here, EPA states that its intention “to complete the required consideration of cost for the ‘appropriate and necessary’ finding as close to April 15, 2016 as possible” will satisfy the requirements of § 7412(n)(1)(A). EPA Mot. to Govern Future Proceedings 12. EPA appears to believe its interpretation of “appropriate and necessary” supersedes the Court’s ruling. In so doing, it has rejected the “unambiguously expressed intent of Congress” and engaged in policy formulation. Such actions “raise serious separation of powers questions.” *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring).

EPA’s failures “bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference.” *Id.* By ignoring its statutory obligation to assess costs as part of reaching a determination as to whether the MATS rule is “appropriate and necessary” EPA has “without any particular fidelity to the text” determined that it will implement a regulation that will impose enormous costs on a particular segment of the energy sector. *Id.* at 2713. Indeed, EPA’s actions suggest the concerns expressed by Chief Justice Roberts are prescient: “It would be a bit much to describe the result ‘as the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013)

(Roberts, C.J., dissenting) (*citing Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011)).

The Court “should be alarmed that [EPA] felt sufficiently emboldened” by past decisions, *Michigan v. EPA*, 135 S. Ct. at 2713 (Thomas, J., concurring), to explicitly reject the Court’s directives. What is to prevent other agencies from substituting their policy judgments for that of Congress? Why should an agency such as EPA operate with deference when it doesn’t respect the Court’s findings? Agencies have become so “emboldened” they no longer subscribe to the interpretation of the Court – even in cases where the Court engages in a *Chevron* analysis.

This case is unique in that there is a clear directive from the Court that EPA has failed to act upon. In so doing, EPA has abused the privilege of deference bestowed by the Court in *Chevron*. Such actions should not be rewarded by permitting a recalcitrant agency the license of deference.

Of course, there is a constitutionally permissible role for administrative rulemaking. However, this case illustrates the constitutional principle that: “[T]he judicial power as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.” *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring). Landmark acknowledges there are instances where a “hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.” *Buckley v. Valeo*, 424 U.S. 1, 120-121

(1976). Thus, “[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues and defeat the Framers’ design of a workable National Government. *Loving v. United States*, 517 U.S. 748, 758 (1996). Congress, however, is the only body that can make a rule of prospective force.” *Id.*

There are therefore limits to an agency’s authority. In *Field v. Clark*, the Court states: “The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.” The Court then distinguished the actions, “[t]he first cannot be done; to the latter no valid objection can be made.” *Field v. Clark*, 143 U.S. 649, 692-693 (1892) (quoting *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)). “The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things on which the law makes or intends to make, its own action depend.” *Field v. Clark*, 143 U.S. at 694.

“EPA may not ‘avoid Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.’” *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) (quoting, in part, *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)). Further, EPA cannot “set aside a statute’s plain language simply

because the agency thinks it leads to undesirable consequences in some application.” *Friends of the Earth, Inc. v. EPA*, 446 F.3d at 145.

EPA’s failure to implement the directives of the Court casts serious doubt over the deference agencies should be afforded when determining the extent of their authority under *Chevron*. This case presents a unique opportunity for the Court to revisit the “practice of deferring to agency interpretations of federal statute.” *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring).

CONCLUSION

For the reasons stated herein Landmark respectfully urges the Court to grant Petitioners’ Writ of Certiorari.

Respectfully submitted,

MARK R. LEVIN
MICHAEL J. O’NEILL
MATTHEW C. FORYS
LANDMARK LEGAL
FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
703-554-6100

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL
FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559
816-931-1115 (Facsimile)
rpetehutch@aol.com

Attorneys for Amicus Curiae