No. 16-1168

In the

Supreme Court of the United States

AMERICAN MUNICIPAL POWER, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, COMPETITIVE ENTERPRISE INSTITUTE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The regulation upheld by the court of appeals in this case requires impossible perfect performance that EPA admits has never been achieved and is in fact unachievable because accidents are an inevitable fact of industrial life. This ruling leaves hundreds of thousands of sources across the country at the mercy of EPA enforcement and citizen suits and threatens to generate unnecessary and unproductive litigation in federal district courts across the country.

The question presented is:

Can EPA lawfully issue emission standards under Clean Air Act Section 7412(d) that require impossible perfect performance and outlaw accidental releases?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), Competitive Enterprise Institute (CEI), and National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) respectfully submit this brief amicus curiae, in support of Petitioner American Municipal Power, Inc. (AMP).[1]

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF, headquartered in Sacramento, California, has offices in Washington, Florida, Hawaii, and Washington, D.C., as well. PLF is widely respected as an experienced advocate of constitutional boundaries, including separation of powers and the expanding power of the administrative state. PLF attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the relationship between the judicial power and the administrative state. *See, e.g.*, *U.S. Army Corps of Engineers v. Hawkes*, __ U.S. __, 136 S. Ct. 1807 (2016); *Sackett v. E.P.A.*, 566 U.S. 120 (2012); and *Epic Sys. Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), petition for cert. granted, No. 16-285 (Jan. 13, 2017).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Because of its history and perspective on these issues, PLF believes that its perspective will aid this Court in determining whether to grant the petition for writ of certiorari.

The Competitive Enterprise Institute (CEI) is a nonprofit 501(c)(3) organization, incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. To that end, CEI has participated as amicus, or counsel for amici, in past cases raising regulatory and administrative law issues. *See, e.g.*, *Sackett v. E.P.A.*, 566 U.S. 120; *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *State of West Virginia, et al. v. E.P.A., et al.*, No. 15-1363 (D.C. Cir.).

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a

year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

A zero failure process does not exist in the industrialized world we live in today. *Cf. Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 398 (D.C. Cir. 1973) (explaining that unanticipated industrial malfunctions are "an inescapable aspect of industrial life.") Mechanical devices, like the commercial, industrial, and institutional boilers at issue here, will fail. *Id.* Due to this unavoidable fact, the Clean Air Act (CAA) and those charged with implementing the CAA at the Environmental Protection Agency (EPA) have recognized for decades that "allowance[s] must be made for such factors"—that is, malfunctions—in the regulations that implement the CAA. *Id.*; *see* 59 Fed. Reg. 12,408, 12,440 (Mar. 16, 1994) (issuing 40 C.F.R. 63.6(f)(1) & (h)(1)). Unfortunately, this reasonable approach to CAA regulation ended in 2011 with the EPA's implementation of the Major Boilers Rule and the Area Boilers Rule, rules that govern more than 200,000 boilers throughout the 50 states. *U.S. Sugar Corp. v. E.P.A.*, 830 F.3d 579, 592 (D.C. Cir. 2016). As reflected in that lower court opinion which Petitioner American Municipal Power, Inc., asks this Court to review, the EPA and the lower court determined that the CAA as written ignores the fact that malfunctions are inevitable and instead sets up *all* CAA regulated parties to violate the CAA simply by virtue of operating boilers that create emissions. They did this by holding

that malfunctions must meet generally applicable emission standards that malfunctioning boilers simply cannot meet. Since all boilers will fail at one time or another, and the EPA does not interpret the CAA to account for this, all boiler operators will inevitably violate the CAA. That cannot be the law, and in fact the CAA unambiguously says it is not the law, despite the lower court and EPA's misinterpretation.

By its terms, the CAA expects regulated parties to meet *achievable* results. It does not demand perfection from boiler operators. Sound principles of statutory construction refute the EPA and lower court's misinterpretation of the CAA as to emissions—42 U.S.C. §§ 7401-7671q—and most relevantly, its misinterpretation of § 7412(d) in context with the entirety of the CAA, including § 7412(r).

First, the EPA and lower court failed to account for 42 U.S.C. §§ 7412(r)(1)-(11), which provides for "prevention of accidental releases," that is, malfunctions. It sets out a detailed, specific statutory scheme to address malfunctions in a way that § 7412(d) does not. Interpreting subsection (d) in the manner the EPA and the lower court have violates the harmonious-reading canon, which holds that there can be no reason to "needlessly render provisions in conflict if they can be interpreted harmoniously." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (1st ed. 2012). Here, if subsection (d) allows for citizen suits and discretionary prosecution for malfunctions, then the detailed scheme to address malfunctions *set out by Congress* in subsection (r) is rendered superfluous. That does not harmonize the CAA; it renders portions of the CAA in conflict with itself. This reflects error on the lower court's part.

Second, the manner in which the EPA and the lower court interpret subsection (d) and ignore subsection (r) also violates the general/specific canon, which holds that when a statute contains separate provisions that may govern the same issue, the more specific provision should be given effect over the more general. *See* Scalia & Garner, *Reading Law* at 183 ("the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."). Subsection (r) addresses malfunctions explicitly; subsection (d), the focus of the EPA and the lower court, does not. The EPA and lower court read into this subsection that which was not there, despite Congress having explicitly addressed in subsection (r) what the EPA and lower court read into subsection (d).

Third, and perhaps most basically, the EPA and lower court's interpretation of the CAA renders the law absurd. *See* Scalia & Garner, *Reading Law* at 234 (citing William Blackstone, *Commentaries on the Laws of England* (4th ed. 1770)) for the proposition that where "words bear . . . a very absurd signification, if literally understood, we must a little deviate from the received sense of them."). By conceding that malfunctions will happen with any boiler (indeed, with any industrial equipment), and then countenancing an interpretation of the CAA that renders a malfunction a violation of the CAA, the agency and the lower court have deemed all operators of boilers inevitable violators of the CAA. Congress did not enact the CAA to declare those who operate boilers—the commercial, industrial, and institutional operators that provide the backbone of our economy—law breakers. Rather, Congress sought to set *achievable* standards for these operators. § 7412(d). If the EPA and lower court

correctly concluded that the literal meaning of § 7412(d) led to this conclusion (notwithstanding the harmonious and general/specific canons), then they should have deviated from this interpretation so as to avoid rendering the subsection an absurdity.

For these reasons, the Court should grant review and ultimately vacate the lower court decision.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE CONGRESS DIRECTLY SPOKE TO HOW MALFUNCTIONS SHOULD BE ADDRESSED IN THE CAA, AND THE LOWER COURT AND EPA FAILED TO HEED THAT STATUTORY INSTRUCTION

A. Congress Sets "Achievable" Standards in the Clean Air Act; EPA Ignores This Requirement

Congress enacted the CAA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The 1990 CAA Amendments overhauled the Act's "Hazardous Air Pollutants" (HAPs) provision, codified at 42 U.S.C. § 7412. But at every turn, Congress set out in the text of the CAA that any demands put on the regulated must be "achievable" demands. Here, the lower court and the EPA failed to heed that statutory command.

The word "*achievable*" appears over and over in the statute. For example, after identifying nearly two hundred HAPs that warranted emissions restrictions,

see 42 U.S.C. § 7412(b)(1), Congress directed the EPA to identify the sources of each HAP, *see id.* § 7412(c), and then to set emissions limits for each source that result in HAPs reduction to the greatest extent "*achievable*" by current technology. *See generally Nat'l Ass'n for Surface Finishing v. E.P.A.*, 795 F.3d 1, 4 (D.C. Cir. 2015) (citing 42 U.S.C. § 7412(b)(1), (c), (d)). For major sources of HAPs, the CAA directs the EPA to establish emissions caps that result in the "the maximum degree of reduction in emissions" that the EPA determines is "*achievable*." *Id.* § 7412(d)(2). In practice this cap is known as a "maximum achievable control technology" standard, or "MACT" standard for short. *See Nat. Res. Def. Council v. E.P.A. (NRDC II)*, 529 F.3d 1077, 1079 (2008). The EPA uses a two-step process to set a MACT standard.

First, the CAA establishes a "MACT floor" for each category or subcategory, *Sierra Club v. E.P.A. (Sierra Club I)*, 353 F.3d 976, 980 (2004), based on *achievable* results. *Id.* The MACT floor ensures that all HAPs sources "at least clean up their emissions to the level that their best performing peers have shown *can be achieved*." *Id.* (emphasis added). Second, the EPA then determines whether current technology makes it possible for a source to perform better than the best performing similar source or sources; that is, the EPA determines whether a source can perform "beyond the floor." *Nat'l Lime Ass'n v. E.P.A.*, 233 F.3d 625, 629 (2001). In making this determination, the EPA must decide if this tougher standard is "achievable." 42 U.S.C. § 7412(d)(2). The CAA also allows the EPA to create work-practice and management-practice standards if achieving an emissions numeric standard is not achievable, or "feasible." 42 U.S.C. § 7412(h)(1).

Finally, the CAA also sets out separately how "unanticipated emission" events—that is, malfunctions—should be treated. *See* 42 U.S.C. § 7412(r)(2)(A). Section 7412(r) sets out that an accidental release" is any "unanticipated emission . . . into the ambient air from a stationary source" of any substance that is "extremely hazardous" or that could "cause death, injury, or serious adverse effects to human health or the environment" in the case of an accidental release. *Id*.; § 7412(r)(3). This portion of the CAA then sets out carefully considered consequences for "unanticipated emissions," consequences that while severe do not allow for citizen suit, unlike violations of the MACT standards set out at § 7412(b)-(d).

In order to meet the CAA strictures, the EPA issued a "Major Boilers" rule and an "Area Boilers" rule in 2011 and then revised versions of the rules in 2013. *See* 2011 Major Boilers Rule, 76 Fed. Reg. at 15,613; 2011 Area Boilers Rule, 76 Fed. Reg. at 15,560-61; 2013 Major Boilers Rule, 78 Fed. Reg. at 7,144-45; 2013 Area Boilers Rule, 78 Fed. Reg. at 7,496. These rules set out the various types of boilers, the manner in which they operate, and most importantly the standards they must meet for HAPs. The EPA found it difficult to account for HAP emissions when boilers malfunction because the EPA could not test for emissions during these processes and thus could not determine standards for them. *See U.S. Sugar Corp.*, 830 F.3d at 599. For this reason, historically the EPA exempted boilers from normal numeric MACT-standard compliance during malfunctions. *Id.* (citing *Standards of Performance for New Stationary Sources*, 42 Fed. Reg. 57,125 (Nov. 1, 1977). The lower court rejected that approach premised on its original misreading of the CAA that set in motion the rules now

at issue, in a case known as *Sierra Club v. E.P.A. (Sierra Club III)*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008) (concluding that the CAA "require[s] that there must be continuous . . . standards" and observing that the exemption meant that "no . . . standard governs these events," vacating the exemption for malfunctions (as well as startups and shutdowns) when the issue arose in a case challenging a different rule). That prior decision did not account for Section 7412(r) and its carefully-tailored approach to "unanticipated emissions." *See id generally*.

Because of that *Sierra Club III* decision, the EPA determined it could not treat malfunctioning boilers differently than correctly functioning boilers when it set the MACT floors for major and area boilers; it required sources to comply with all MACT floors *even during periods of malfunction*. *See* 2011 Major Boilers Rule, 76 Fed. Reg. at 15,613; 2011 Area Boilers Rule, 76 Fed. Reg. at 15,560-61. The EPA took this position despite acknowledging that all boilers will malfunction, resulting in unanticipated emissions at one time or another, *id.* at 606—it's an "inescapable aspect of industrial life." *Portland Cement Ass'n*, 486 F.2d at 398. In other words, that a boiler cannot *achieve* a MACT standard when its malfunctioning did not stop the EPA from requiring a boiler to achieve the MACT standard when it is malfunctioning—a physical impossibility. *See* 2013 Area Boilers Rule, 78 Fed. Reg. at 7,496; 2011 Area Boilers Rule, 76 Fed. Reg. at 15,560-61. It also did not stop the lower court from similarly misinterpreting the CAA to approve the mistake made by the EPA.

B. EPA's Major and Area Boiler Rules Ignore That the CAA Directly Speaks to Malfunctions

The lower court's interpretive mistake begins and ends with its misapplication of the *Chevron*[2] Doctrine to the Major and Area Boilers Rules. The lower court acknowledged that it had to apply the two-step *Chevron* Doctrine to the EPA's interpretation of the CAA, but it should have stopped at Step 1. Step 1 of *Chevron* requires the court to ask whether Congress "has directly spoken to the precise question at issue," and if it has the court "must give effect to [its] unambiguously expressed intent." *Id*. at 842-43. Under *Chevron*'s first step, the Court must determine whether the provisions of the CAA are ambiguous. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, Congress directly spoke to how malfunctions should be treated by the EPA, which was not via § 7412(d) and its demand on regulated parties to meet *achievable* standards, but rather via § 7412(r) and its demands placed on regulated parties when their equipment malfunctions. The lower court erred when it failed to stop at Step 1 and moved on to Step 2, which allowed the court to then determine that the EPA's interpretation of Section 7412 was not arbitrary and capricious. The court never should have moved to Step 2 because the CAA, when properly interpreted, directly

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[2] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

instructs the reader how malfunctions should be treated.

General canons of statutory interpretation are helpful in resolving statutory meaning. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 611 (1989). Here, three interpretative canons are particularly helpful. First, the harmonious-reading canon, which holds that a court should interpret a statute "as a symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted); *see generally* Scalia & Garner, *Reading Law* at 180-183 (discussing the harmonious-reading canon). Second, the general/specific canon, which recognizes as a rule of statutory construction "that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). And lastly, the absurdity canon, which sets out that an interpretation of a law which leads to absurdity should give way to a reasonable interpretation. Scalia & Garner, *Reading Law* at 234-239.

1. The Harmonious-Reading Canon Renders Sections 7412(d) Compatible with Section 7412(r); the Lower Court's Decision Improperly Renders Subsection (r) Superfluous

Justice Scalia and Bryan Garner have explained that "it is invariably true that intelligent drafters do not contradict themselves" and thus two provisions in the law that appear to contradict each other should be read to render them compatible with each other. Scalia & Garner, *Reading Law* at 180. The manner in which

both the EPA and the lower court have interpreted § 7412(d) renders it incompatible with § 7412(r). Congress—the presumed intelligent drafter here—did not intend that.

Section 7412(r) includes provisions designed to both "prevent" accidental releases and to "minimize the consequences of any such release." § 7412(r)(1). That includes a program authorizing the EPA to "promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements." § 7412(r)(7). The CAA directs the EPA to use the provision to "promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases[.]" *Id*. The law goes on to require a risk management plan for accidental releases, that is, malfunctions, and it gives the EPA the authority to seek a court order to stop the danger or threat posed by an accidental release. § 7412(r)(9). Further, it criminalizes dangerous negligent releases of HAPs. § 7412(r)(1).

The provisions of Section 7412(r)—the specific section of the CAA intended to address accidental releases—speak to the same concerns that the EPA spoke to when it wrote the Major and Area Boiler Rules. But Congress set out how it wanted malfunctions dealt with in Section 7412(r), not Section 7412(d). In 7412(d), Congress set out how it anticipated the EPA to set up *achievable* CAA requirements for industrial equipment that emits HAPs, including boilers. But, contrary to the EPA's conclusion and the

lower court's decision, Congress did not intend that portion of the Act to speak to malfunctions—for that, it wrote 7412(r). No "intelligent drafter" would craft a law that made everyone a law breaker—but, since all boilers will malfunction and thus not achieve the MACT standards—that is the logical consequence of interpreting 7412(r) in the manner that the EPA and the lower court interpreted it.

In defense of its reading of the CAA, the lower court asserted that 7412(d) states that boilers must meet MACT standards "continuously," thus to exempt malfunctions from the MACT standards would not comply with the CAA. *See U.S. Sugar Corp., v. E.P.A.*, 830 F.3d at 598 (citing 42 U.S.C. § 7602(k)). But a court is charged with harmonizing the statute, not plucking one word from it and giving it outsized influence over the rest of the statute. Scalia & Garner, *Reading Law* at 180-82.

This Court has relied on the harmonious-reading canon to resolve these kinds of statutory misinterpretation cases before it in the recent past. In *Bond v. United States*, __ U.S. __, 134 S. Ct. 2077, 2091 (2014), the Court considered whether a criminal prohibition codified in the Chemical Weapons Convention Implementation Act of 1998 could apply to a defendant whose "amateur attempt . . . to injure her husband's lover" with common chemicals resulted in the victim suffering a "minor thumb burn readily treated by rinsing with water." *Id.* at 2083. The government convicted Bond pursuant to the portion of the Act that rendered it unlawful for any person to knowingly "use . . . any chemical weapon." *Id.* at 2085; *see also* 18 U.S.C. § 229(a). Despite the fact that Bond had obviously used a "chemical weapon" within the

meaning of the statute and with the necessary intent, the Court reversed Bond's conviction by harmonizing the manner in which it interpreted the entirety of the statutory scheme. *Bond*, 134 S. Ct. at 2091. The majority held that "chemical weapon" could not be given its defined meaning because doing so would violate other principles of statutory interpretation—namely the "background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.'" *Id.* at 2091 (citation omitted).

The *Bond* manner of harmonizing the Chemical Weapons Convention Implementation Act of 1998 to avoid turning a minor imbroglio into a federal crime, despite the fact that the defendant did indeed use a chemical weapon within the meaning of the statute, sheds light on the question before the Court in this case. The lower court gave outsized importance to the statutory requirement to make sure boilers "continuously" meet MACT standards above the rest of the CAA, which reflects Congress's careful desire to treat malfunctions differently than the regular operation of an operating boiler. Doing so ignored the whole of the law in favor of one word, and violated the harmonious reading canon.

2. The General/Specific Canon Requires EPA To Follow Section 7412(r) in the Manner it Treats Malfunctions, Rather than via Sections 7412(a), (b), and (d)

The General/Specific canon of statutory construction also demonstrates that the lower court misread the unambiguous CAA and should never have reached *Chevron* Step 2 in its analysis. This canon

instructs the interpreter that a more general statutory provision should yield to the more specific provision, all other things being equal. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (explaining the general/specific canon). "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales*, 504 U.S. at 384.

That is particularly true where, as in the CAA, Congress has enacted a comprehensive scheme and "has deliberately targeted specific problems with specific solutions." *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting); *see also HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (the specific governs the general "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]." This is so because "[t]he specific provision comes closer to addressing the very problem posed by the case at hand is thus more deserving of credence." Scalia & Garner, *Reading Law* at 183. Here, the problem is how to treat malfunctions, and Section 7412(r) addresses specifically how Congress wants malfunctions handled by the EPA, whereas 7412 (d) speaks only to how the EPA should regulate boilers in general.

HCSC-Laundry offers a good comparator for how the general/specific canon works. 450 U.S. at 1. There, petitioner was a Pennsylvania non-profit laundry and linen service formed to provide those services to fifteen § 501(c)(3) hospitals, and to provide ambulance service to them. *Id.* at 2. Petitioner applied to the Internal Revenue Service (IRS) for an exemption under § 501(c)(3) from federal income taxation. *Id.* at 3. The IRS denied the exemption because § 501(e) of the IRS

Code was the exclusive provision under which a cooperative hospital service organization could qualify as "an organization organized and operated exclusively for charitable purposes" and therefore be exempt from federal income taxation. *Id*. Because subsection (e) did not mention laundry service, the IRS reasoned that petitioner was not entitled to the tax exemption. *Id*.

The Supreme Court sided with the IRS. *Id*. at 8. The Court recognized that the petitioner fit the broad general language of 501(c)(3) for "charitable organizations:"

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

26 U.S.C. § 501(c)(3)(1976). The petitioner was a corporation organized for charitable purposes, its earnings did not benefit any private shareholder or

individual, and its activities were not designed to influence legislation or political campaigns. *Id*. at 5-6. It fit § 501(c)(3)'s general guidelines for income tax exemption. *Id*.

Despite that seeming qualification for the general exemption, the Court concluded that it did not fit the more specific provision contained in 501(e) that allows for income tax exemptions for certain hospitals and their service organizations, as long as those organizations were involved in a laundry list of activities. *Id*. Unfortunately for petitioner, that list did not include laundry services. *Id*. at 6. Therefore, even though petitioner fit the general exemption from taxes, this Court concluded 501(e) applied rather than (c)(3), since it more specifically addressed an organization like the petitioner's. *Id*.

The Court explained the general/specific canon: "it is a basic principle of statutory construction that a specific statute, here subsection (e), controls over a general provision such as subsection (c)(3), particularly when the two are interrelated and closely positioned, both in fact being parts of § 501 relating to exemption of organizations from tax." *Id*. (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 761 (1961)). That explanation of the canon fits the instant case well. Here, the general portion of the CAA, Section 7412(d) and its demand on regulated parties to meet *achievable* standards *continuously* as per Section 7402(k), could be thought to require boilers to meet MACT standards even when malfunctioning, or face exposure to prosecution and suit by third-parties. But Section 7412(r) controls because it more specifically addresses malfunctions, just as 501(e) controlled *HCSC-Laundry*

because it addressed hospitals and service organizations related to hospitals.

C. This Court Should Grant Certiorari So As To Prevent the Absurd Result of Deeming Hundreds of Thousands of Institutions and Commercial Enterprises in Violation of the CAA Simply Because They Operate Boilers

The two boiler rules at issue here apply to "over 200,000 boilers at over 100,000 separate facilities;" the boilers are used for manufacturing, processing, mining, refining, and in shopping malls, laundromats, apartment complexes, restaurants, hotels, medical centers, schools, churches, prisons, and courthouses. *See U.S. Sugar*, 830 F.3d at 592 (citing 2011 Area Boilers Rule, 76 Fed. Reg. at 15,557). In sum, the rules will profoundly impact Americans' lives, in that boilers are ubiquitous even if usually they remain unseen. And every boiler operator will inevitably be deemed violators of the CAA if the lower court's interpretation of the CAA is allowed to stand.[3] Since a malfunctioning

[3] The lower court submits that the injury these 100,000 or more industrial, commercial, and institutional boiler operators suffer can be mitigated if not ameliorated by the EPA's largesse in the way it *chooses to enforce* violations of the rules. *See U.S. Sugar*, 830 F.3d at 608 ("At the very least, the language permits the EPA to ignore malfunctions in its standard-setting and account for them instead through its regulatory discretion"). The lower court is mistaken for two reasons. First, as previously explained, the court mistakenly concludes that an ambiguity in the CAA allows the court to move to Step 2 of *Chevron* and deem the EPA's approach reasonable. The statute is, in fact, not ambiguous and thus the inquiry should have stopped at Step 1. Second, this approach confers a kind of unchecked, discretionary power upon the EPA in regards to the CAA that members of this Court have (continued...)

boiler cannot meet the CAA's MACT standards, and all boilers malfunction at one time or another, 200,000 boilers violate the CAA once they are put into service. This is absurd, and not what Congress intended when it wrote the CAA. "As Blackstone explained: '[W]here words bear . . . a very absurd signification, if literally understood, we must a little deviate from the received sense of them.'" Scalia & Garner, *Reading Law* at 234 (citing Blackstone, *Commentaries on the Laws of England*, § 2 at 60).

Here, the lower court's determination that malfunctioning boilers can be held to "achievable" standards even though even the EPA concedes malfunctioning boilers cannot achieve those § 7412(d) standards was an absurd misreading of the CAA and its requirements. That the court knew this but did nothing about it to fix the absurdity adds insult to injury. And the court knew it: the court acknowledged

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[3] (...continued)
previously recognized as failing to properly provide due process in similar circumstances. *See U.S. Army Corps of Eng'rs v. Hawkes, Co., Inc.*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring) (explaining that Army Corps' virtually unchecked power to declare property subject to its control pursuant to the Clean Water Act may violate the Constitution's demand for due process); *see also* Tr. of Oral Arg. in *Sackett v. E.P.A.*, O.T. 2011, No. 1062 (When told that the EPA could in its discretion double the fines on CAA violators but counsel for the government did not know that it ever had done so, Justice Scalia retorted, "I wouldn't bet the house on that.") Here, the EPA's unchecked authority to pursue any boiler operator at its whim—since all boilers violate the CAA under the EPA and lower court's approach to it—similarly suggests the failure to accord due process that this Court has previously demanded from federal agencies. Moreover, regardless of whether EPA might choose a magnanimous approach in dealing with these situations, the concern remains that companies will face citizen suits.

that "malfunctions are inevitable in the operation of area and major boilers. According to the EPA, 'even equipment that is properly designed and maintained can sometimes fail and . . . such failure can sometimes cause an exceedance of the relevant emission standard'" *Id.* at 606. Yet, while acknowledging that malfunctions can and will occur, and that even the EPA knows this, the court then went on to say that the CAA allows for the EPA to implement rules demanding that boilers meet emission standards *even when they malfunction*. *Id.* at 608. Both of these points cannot be true, where the CAA sets out that the emissions standards must be "achievable." The CAA demands "achievable" standards; malfunctioning boilers cannot *by definition* meet standards in place for non-malfunctioning boilers: they are malfunctioning.

The rule of absurdity "seeks to make sense of the text." *See* Scalia & Garner, *Reading Law* at 235. When the CAA demands that boilers meet achievable standards continuously, it later sets out how malfunctions should be treated. Exempting malfunctions from § 7412(d) makes sense of the CAA. The EPA's rules and lower court's holding do not make sense of the entire text of the CAA, they are absurd misreadings of it.

CONCLUSION

For the reasons set forth above, the Court should grant the requested petition and confirm that the portion of the CAA designed to apply to routine emissions, Section 7412(d), does by its terms not apply to malfunctions and thus EPA must revise its Boiler MACT rule to exclude malfunctions from its purview,

since Congress created Section 7412(r) to address "unanticipated emissions" events—that is, malfunctions.

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Respectfully submitted,

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