March 31, 2016

The Honorable James Inhofe
U.S. Senate
Washington, DC 20510

The Honorable Barbara Boxer
U.S. Senate
Washington, DC 20510

The Honorable Fred Upton
U.S. House of Representatives
Washington, DC 20515

The Honorable Frank Pallone
U.S. House of Representatives
Washington, DC 20515

Re: Implications of *Michigan v. EPA* for Current Proposals to Amend TSCA

Dear Chairman Inhofe, Ranking Member Boxer, Chairman Upton, and Ranking Member Pallone:

We, the undersigned, are law professors, legal scholars, and public interest lawyers from across the country who work in the fields of administrative, public health, and environmental law. We write to express concern that in light of the Supreme Court's June 2015 *Michigan v. EPA* decision, recent efforts to reform the federal Toxic Substances Control Act of 1976 could impose unintended requirements on the Environmental Protection Agency to consider costs before deciding whether to regulate a chemical. Such requirements, we believe, would unduly burden EPA's ability to effectively protect public health, even in the face of credible threats of toxic chemical exposures. We therefore urge conferees to address our concern as they work to reconcile the Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, and the TSCA Modernization Act of 2015, H.R. 2576.

Michigan v. EPA addressed a dispute over an EPA decision that it would be "appropriate and necessary" to regulate mercury emissions from certain power plants under the federal Clean Air Act, 42 U.S.C. § 7412(n)(1)(A). EPA did not consider costs when determining regulation would be "appropriate and necessary." In a 5-4 decision, the Supreme Court held that EPA erred because the words "appropriate and necessary" implicitly require EPA to consider costs. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (finding that "it is not even rational, never mind 'appropriate' to impose billions in economic costs in return for a few dollars in health or environmental benefits"); *id.* at 2708 ("it is unreasonable to read an instruction to an administrative agency to determine whether a regulation is 'appropriate and necessary' as an invitation to ignore cost").

In view of that reasoning, *Michigan v. EPA* could impact the way S. 697 is ultimately interpreted by courts. Like § 7412(n)(1)(A), many sections of S. 697 envision a multi-step regulatory process. Different regulatory stages include information collection, safety testing, safety determinations, and setting risk management rules for chemicals shown to pose an unreasonable risk. While S. 697 does not contain the phrase "appropriate and necessary," there are several provisions requiring EPA to take actions "as appropriate" that could undercut directives to exclude cost considerations found elsewhere in the legislation. A court could extend the Supreme Court's reasoning in *Michigan v. EPA* on "appropriate and necessary" to the use of "appropriate" in several sections of S. 697, imposing unintended requirements of cost considerations that in

turn undermine EPA's ability to effectively — and expeditiously — manage risks posed by harmful toxic chemicals.

Specifically, we would like to direct your attention to the following sections of S. 697:

"Appropriate" and prioritization. S. 697 would add a new section, 4A, to TSCA. Under this section, EPA would be responsible for creating lists of high and low priority chemicals for evaluation. The subsection delineating criteria for high and low priority chemicals directs EPA to consider "the recommendation of the Governor of a State or a State agency with responsibility for protecting health or the environment from chemical substances appropriate for prioritization screening." *See* S. 697 § 4A(a)(4)(A) (emphasis added). Interpreted broadly, that use of "appropriate" could require or permit EPA to consider costs as part of a decision whether to even prioritize a chemical for safety review.

"Appropriate" and new chemicals. S. 697's amended Section 5 of TSCA on new chemicals also uses the phrase "as appropriate." Generally, that section would require manufacturers and processors to submit a notice to EPA for new chemicals or significant new uses of a chemical. After reviewing the notice, EPA would then need to determine whether the chemical is unlikely to meet the safety standard, likely to meet the safety standard, or if additional information is necessary to determine whether the chemical meets the safety standard. *See* S. 697 § 5(d)(3). Under that framework, if the chemical is not likely to meet the safety standard or additional information is needed, EPA may "take appropriate action" and issue a consent agreement or order "as appropriate" to prohibit the chemical or restrict its use. *See* S. 697 §§ 5(d)(3)(A), 5(d)(3)(C); 5(d)(4)(A)(i)(I). If EPA decides to regulate a new chemical for safety, the agency may impose restrictions "as appropriate," including, but not limited to, warnings, recordkeeping, and bans. *See* S. 697 § 5(d)(4)(C). Because the section would require EPA to first decide whether to regulate new chemicals and subsequently decide which restrictions to impose, the context is similar to *Michigan v. EPA*. In view of the parallel, a court could interpret "appropriate" to require or permit onerous and counterproductive cost considerations at two points in the rulemaking process — when EPA decides whether to regulate a new chemical *and* when the agency decides on the type of restriction to impose, even if that is not what the legislation is currently intended to do.

"Appropriate" and existing chemicals. S. 697 would significantly amend Section 6 of TSCA, which provides EPA authority to evaluate the safety of existing chemicals. Under the new Section 6, EPA would assess the high priority chemicals identified in Section 4A and then impose risk management rules as needed to meet the proposal's safety standard. The phrase "as appropriate" and the word "appropriate" appear in several places in Section 6:

- Before regulating a high priority chemical, EPA would have to conduct a safety assessment and decide whether the chemical meets the safety standard. Then, "as appropriate based on the results of a safety determination," EPA would be able to pursue a risk management rule. *See* S. 697 § 6(a)(3). That situation is perhaps the one that most closely parallels the two-step rulemaking process that was at issue in *Michigan v. EPA*. The proposal would require an initial safety study followed by a decision to regulate "as appropriate." Given that context, a court could interpret "as appropriate" to require or

permit a burdensome and counterproductive cost consideration as part of the decision whether to regulate under this section.

- In Subsection (c) on safety determinations, S. 697 instructs that if a chemical does not meet the safety standard, EPA would need to impose a rule to either restrict the use of the chemical in such a way that it meets the safety standard, or if that were not possible, to ban or phase out the chemical "as appropriate." *See* S. 697 § 6(c)(1)(B)(ii). That language implies that EPA could have or be permitted to consider costs before deciding to ban or phase out a chemical, even if it were clear that a chemical failed the safety standard.

- If additional information is necessary to make a safety determination, EPA would be permitted to take "appropriate action" to get additional information from manufacturers or processors. *See* S. 697 § 6(c)(1)(C). Interpreted broadly, a court could reason that "appropriate action" requires or permits yet another consideration of cost before EPA can decide whether and how to seek additional information.

- Under Subsection (d) on risk management rules, a regulation may apply to mixtures, "as appropriate." *See* S. 697 § 6(d)(2)(A)(i). That means EPA would likely have or be permitted to consider costs before extending a risk management rule to mixtures.

The latest interpretation of "appropriate and necessary" by the Supreme Court in *Michigan v. EPA* could lead to similar interpretations of "appropriate" as used in S. 697 and could create new, unintended requirements for the EPA to consider costs at various stages of the regulatory process. Therefore, as conferees work together to reconcile S. 697 and H.R. 2576, we respectfully urge them to remove references to "as appropriate" and "appropriate" action and make clear that EPA should not have to consider costs when deciding whether to regulate a chemical. Doing so, we believe, will more effectively bolster EPA's ability to protect the American public against toxic chemical exposures.

Sincerely,

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The Honorable Nancy Pelosi
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The Honorable Edward Markey
The Honorable John Shimkus
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