No. 12-1146*

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF OF TEXAS OIL & GAS ASSOCIATION, TEXAS ASSOCIATION OF BUSINESS, AND TEXAS ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

BACKGROUND 6

ARGUMENT

EPA REPEATEDLY IGNORED A PERMISSIBLE INTERPRETATION OF THE CLEAN AIR ACT AND INSTEAD RELIED ON TOOLS OF LAST RESORT TO IMPROPERLY REWRITE CLEAR STATUTORY TEXT 13

A. The Agency Cannot Use Tools of Last Resort in the Face of Permissible Interpretations of the Clean Air Act 16

B. A Pollutant-Specific Interpretation of the Triggering Provision of the PSD Program is a Permissible Interpretation of the Clean Air Act that Avoids the Absurd Results Claimed by EPA.. 19

C. The Agency's Decision to Rewrite Perfectly Clear Statutory Provisions Constitutes an Impermissible Consolidation of Legislative and Executive Functions, Warranting Instead Application of the Canon of Constitutional Avoidance 24

CONCLUSION 27

ADDENDUM A – Table: Effects of the Interpretation of the Permitting Trigger on Annual PSD Permitting.. 28

TABLE OF AUTHORITIES

CASES

Alabama Power Co. v. *Costle*,
636 F.2d 323 (D.C. Cir. 1980) 6, 7, 8, 17

Ctr. for Biological Diversity v. *EPA*,
722 F.3d 401 (D.C. Cir. 2013) 18

Chevron, U.S.A., Inc. v. *NRDC*,
467 U.S. 837 (1984) 11, 15, 17

Clinton v. *City of New York*,
524 U.S. 417 (1998) 26

Grand Canyon Air Tour Coal. v. *FAA*,
154 F.3d 455 (D.C. Cir. 1998) 18

Griffin v. *Oceanic Contractors, Inc.*,
458 U.S. 564 (1982) 18

Holy Trinity Church v. *United States*,
143 U.S. 457 (1892) 18

In re Nofziger,
925 F.2d 428 (D.C. Cir. 1991) 16

INS v. *St. Cyr*,
533 U.S. 289 (2001) 26

Kloeckner v. *Solis*,
133 S. Ct. 596 (2012) 14, 15, 18

Logan v. *United States*,
552 U.S. 23 (2007) 17

Mackey v. *Lanier Collection Agency & Serv., Inc.*,
486 U.S. 825 (1988) 24

Massachusetts v. *EPA*,
549 U.S. 497 (2007) 10

Moncrieffe v. *Holder*,
133 S. Ct. 1678 (2013) 15

Sierra Club v. *EPA*,
719 F.2d 436 (D.C. Cir. 1983) 18

United States v. *Ron Pair Enters.*,
489 U.S. 235 (1989) 16

STATUTES

42 U.S.C. §§ 7401–7515 6

42 U.S.C. § 7407(d) 6

42 U.S.C. § 7408(a) 6

42 U.S.C. § 7409 6

42 U.S.C. § 7410(a)(2)(C) 7

42 U.S.C. § 7412 23

42 U.S.C. § 7470 7

42 U.S.C. § 7471 .... 7, 19, 21

42 U.S.C. § 7473(b)(4) 20

42 U.S.C. § 7475(a) 7, 9, 19, 21

42 U.S.C. § 7475(a)(3) 8, 22

42 U.S.C. § 7475(a)(3)(A) 20

42 U.S.C. § 7475(a)(4) 4, 8, 22

42 U.S.C. § 7475(c) 20
42 U.S.C. § 7479(1)..8, 19
42 U.S.C. § 7479(3)..8
42 U.S.C. § 7501(1)..21
42 U.S.C. § 7501(2)..21
42 U.S.C. § 7501(3)..7
42 U.S.C. § 7502 7
42 U.S.C. §§ 7661–7661c..2
42 U.S.C. § 7661a(a)...2

REGULATIONS

40 C.F.R. §§ 50.1–50.12...................................3, 6, 19
40 C.F.R. § 70.1 2
EPA, *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Final Rule*, 45 Fed. Reg. 52,676 (Aug. 7, 1980 9
EPA, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rules*, 74 Fed. Reg. 55,292 (Oct. 27, 2009)...10, 24
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THE FEDERALIST PAPERS (G. Willis ed. 1982) 25

Permits, New Source Review and Toxics Subcomm. of the EPA Clean Air Act Advisory Committee, *Interim Phase I Report of the Climate Change Work Group* (Feb. 3, 2010) 13

S. REP. NO. 95-127 (1977) 7, 21

COMMENTS TO RULEMAKINGS

Air Permitting Forum, *Comments on the Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and*

Corporate Average Fuel Economy Standards (Motor Vehicle Rule), EPA-HQ-OAR-2009-0472-7253 (Nov. 27, 2009) 14

Air Permitting Forum, *Comments on the Proposed Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program (PSD Interpretive Memorandum) (Proposed Reconsideration)*, EPA-HQ-OAR-2009-0597-0085 (Dec. 7, 2009) 14

Air Permitting Forum, *et al.*, *Comments on EPA's Proposed Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Tailoring Rule*, EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) 14

Alliance of Auto. Mfrs., *Comments on EPA's Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, EPA-HQ-OAR-2009-0517-5083 (Dec. 28, 2009) 14

Nat'l Ass'n of Mfrs., *et al.*, *Petition to Reconsider Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulations* (July 6, 2010), *reprinted in* Joint App'x at 1495–1502, *Am. Chem. Council* v. *EPA*, No. 10-1167 (D.C. Cir. filed July 29, 2010) 13

INTERESTS OF *AMICI CURIAE*

The *amici curiae* are three trade associations that represent a variety of petroleum, manufacturing, and business interests throughout the State of Texas. The Texas Oil & Gas Association (TXOGA) is the oldest and largest petroleum trade association in the State of Texas; it represents approximately 5,000 members who, collectively, account for more than 90 percent of all crude oil and natural gas produced in Texas, operate nearly all of the State's refining capacity, and are responsible for the vast majority of the State's pipelines. The Texas Association of Business is a trade association with an over 85-year history of representing Texas businesses large and small. And the Texas Association of Manufacturers is a trade association representing over 450 large and small manufacturing companies located throughout the State of Texas. The *amici* have a substantial interest in the question presented herein, which relates to the proper regulation of Greenhouse Gas (GHG) emissions by stationary sources under the Clean Air Act.[1]

There are actually two issues fairly encompassed within the question on which this Court granted *certiorari*.[2] The first issue, addressed by a number of

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than *amici*, their members, or their counsel—made a monetary contribution specifically for the preparation or submission of this brief.

[2] The Court granted *certiorari* to resolve the following question: "Whether EPA permissibly determined that its regulation

the Petitioners, including the Utility Air Regulatory Group (No. 12-1146), relates to whether GHG emissions qualify as "air pollutants" under Title I of the Clean Air Act, such that they may be regulated under Title I's permitting programs. The second issue, address by Petitioners American Chemistry Council, *et al.* (No. 12-1248), concerns whether, if GHG emissions do qualify as "air pollutants" under Title I, GHG emissions from a stationary source trigger those permitting requirements.

Amici submit this brief in support of the Petitioners; they do so focusing exclusively on the second issue—specifically, whether GHG emissions from a stationary source trigger permitting requirements under Title I's Prevention of Significant Deterioration (PSD) Program.[3]

The Environmental Protection Agency sought to resolve the issue of PSD applicability through a series of rulemakings that culminated in the so-called

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of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."

[3] The Clean Air Act imposes separate permitting obligations on certain stationary sources under Title V of the Act. *See* 42 U.S.C. §§ 7661–7661c. That said, Title V "does not impose substantive new requirements." 40 C.F.R. § 70.1(b). Rather, it mandates that a source certify compliance with other requirements under the Act, including the PSD Program. *See, e.g.*, 42 U.S.C. § 7661a(a). Although this brief does not specifically address Title V, the scope of eligibility for permitting under the PSD Program would affect a stationary source's derivative obligations under Title V.

Tailoring Rule. But there was nothing routine about this administrative action. Through the Tailoring Rule, EPA invoked *tools of last resort* to rewrite perfectly clear portions of the Clean Air Act—*i.e.*, explicit numerical permitting thresholds of 100 and 250 tons per year. In this circumstance, the Agency cannot claim that it is owed deference; it instead bears the burden of demonstrating that there were *no other permissible interpretations* available to it before rewriting the Act. In other words, if there is at least one other permissible interpretation that would avoid the absurdities claimed by EPA, the Agency was *compelled to adopt such an interpretation* rather than rewrite the Act. EPA cannot meet this burden.

As *amici* explain more fully below, EPA was presented with numerous opportunities to adopt a permissible interpretation of the Clean Air Act—one that would have avoided the absurd results identified by the Agency, but without rewriting perfectly clear provisions of the Act. This alternative interpretation turns on the *pollutant-specific nature* of the PSD Program—a program that was designed to ensure that *specific areas* of the country would remain in attainment with national ambient air quality standards (NAAQS) for *specific, criteria pollutants*—currently, ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead, *but not GHGs*. *See* 40 C.F.R. §§ 50.1–50.12. Under a pollutant-specific interpretation of the PSD Program, a stationary source is required to get a PSD permit if it is in a *location* attaining a NAAQS for a criteria pollutant, and it will emit threshold quantities (100/250 tons per year) of *that criteria pollutant*.

Consistent with congressional intent, under this interpretation, EPA would continue to issue several hundred PSD permits each year. *See* Addendum A, *infra*, at 28. And under this interpretation, a stationary source that satisfies the pollutant-specific triggering requirement would have to install "best available control technology [(BACT)] for each pollutant subject to regulation under" the Act, 42 U.S.C. § 7475(a)(4). Thus, although a pollutant-specific approach would limit the number of stationary sources that are covered by the PSD Program, as intended by Congress, a source that is covered by the PSD Program might still have to install BACT for GHG emissions.

Rather than give meaning to the targeted nature of the PSD Program, EPA chose in 1980 to adopt an interpretation that would require a stationary source to apply for a PSD permit any time it emitted threshold quantities of *any* air pollutant subject to regulation anywhere under the Act, as long as the source is located in an area attaining a NAAQS for *any* pollutant, even if that source does not emit that criteria pollutant at all. For many years the absurdity inherent in EPA's approach lay dormant, but when the Agency first applied it to GHG emissions, the fallacy of this approach became patently obvious. Whereas Congress only intended for the Agency to issue *several hundred* PSD permits each year, the Agency's interpretation would mean that *tens of thousands* of sources of GHG emissions would have to apply for a permit every year, including small and nonindustrial sources like schools, hospitals, and apartment buildings.

The revelation of such an absurdity should have caused EPA to reevaluate its underlying interpretation of the PSD Program, but instead, it used the occasion to "tailor" perfectly clear provisions of the Clean Air Act. The upshot of EPA's approach is that it gets to select for itself which sources of GHG emissions are required to apply for permits under the Act, in direct contravention of the numerical thresholds mandated by Congress. And EPA has assumed for itself the authority to modify this approach, going forward, in its *unbounded discretion*.

EPA's choices can be analogized to the questions that face a traveler during a long journey. Many years ago, EPA set about to traverse the interpretative path that is the Clean Air Act. In 1980, it came to a fork in the road. From where it stood, there appeared to be two equally viable options. And as with any binary choice, the Agency was forced to select between those two options and move forward. Unfortunately, after nearly 30 years down its chosen path, EPA came to learn that it had reached an interpretative dead end; the path that it selected placed it at the precipice of absurdity. And yet, rather than return to the fork and then head down the path that would have avoided this absurdity, the Agency did the one thing it could not do; it rewrote the Clean Air Act to avoid an absurdity that was a product of its own making.

Such a misappropriation of legislative authority is unprecedented. The supporting judgment of the court of appeals should be reversed.

BACKGROUND

1. Title I of the Clean Air Act regulates emissions of air pollutants from certain stationary sources. *See* 42 U.S.C. §§ 7401–7515.

Among the programs established under Title I, Part A establishes national ambient air quality standards (NAAQS) for criteria pollutants—pollutants whose presence in the ambient air pose particular risks for public health and welfare. *See id.* § 7408(a). There are currently a very limited number of criteria pollutants: ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead. *See* 40 C.F.R. §§ 50.1–50.12. Under Section 109 of the Act, EPA must promulgate a NAAQS that sets safe levels for each criteria pollutant. *See* 42 U.S.C. § 7409. And under Section 107, EPA must designate areas of the country as either in attainment or in nonattainment with each NAAQS. *See id.* § 7407(d).

Importantly, area designations are NAAQS-specific and, therefore, "pollutant-specific" as well. *E.g.*, *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 350 (D.C. Cir. 1980); *see also* 42 U.S.C. § 7407(d). Thus, a single geographic area may be in attainment with one NAAQS while in nonattainment with another.

One of the goals of Title I was to help ensure that each area of the country is in attainment with each NAAQS. Among its means of achieving that goal, Congress established two complementary permitting programs: one for areas in nonattainment, and a second for areas in attainment with each NAAQS. Both permitting programs are run principally by the

States through implementation programs. *See* 42 U.S.C. § 7410(a)(2)(C).

For areas in nonattainment, Congress established the Nonattainment New Source Review (NNSR) Program in Part D of Title I of the Act. To help these areas achieve attainment, Congress required certain stationary sources in those areas to obtain NNSR permits that impose the "lowest achievable emissions rate" to control emissions of the criteria pollutant whose NAAQS the area is not attaining. *See id.* §§ 7501(3), 7502.

The other permitting program, the PSD Program of Part C of Title I, was enacted to ensure that areas in attainment would remain so. *See Alabama Power*, 636 F.2d at 349; *see also* 42 U.S.C. § 7470; S. REP. NO. 95-127, at 29 (1977) (stating that the PSD Program was designed to "protect national ambient air quality standards"). The first substantive provision of the PSD Program, Section 161 of the Act, links the program to attainment areas. It requires State or federal implementation plans to "contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality in each region (or portion thereof) designated . . . as attainment" pursuant to Section 107. 42 U.S.C. § 7471.

The principal means by which the PSD Program helps to achieve continued attainment with each NAAQS is a preconstruction permitting regime. Section 165 of the Act requires a permit before construction begins on any "major emitting facility . . . in any area to which this part applies." *Id.* § 7475(a).

Securing and satisfying a PSD permit are demanding obligations. To get one, a facility must demonstrate, among other things, that its emissions will not cause air quality to exceed any NAAQS—which is to say, a facility must demonstrate that its emissions will not cause an attainment area to become a nonattainment area for any criteria pollutant. *See id.* § 7475(a)(3). In addition, after a PSD permit is issued, a facility must install "best available control technology for each pollutant subject to regulation under" the Act, which may include both criteria and non-criteria pollutants. *Id.* § 7475(a)(4); *see also id.* § 7479(3) (defining "best available control technology").

All parties agree that Congress only intended for the PSD Program to apply to "facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for" air pollution. *Alabama Power*, 636 F.2d at 353. In addition, Congress recognized that "[t]he numbers of sources that meet these criteria . . . are reasonably in line with EPA's administrative capability." *Id.* at 354.

Thus, given the burdens of applying for, then implementing, PSD permits, the threshold question is which sources need them. A "major emitting facility" potentially subject to PSD permitting is defined as one with "major" emissions—more than 100 or 250 tons per year—of "any air pollutant." 42 U.S.C. § 7479(1). But not all major emitting facilities need PSD permits. Under the PSD Program's triggering provision, Section 165(a), only those "in any area to

which this part applies" need obtain one. *Id.* § 7475(a).

2. At issue here are two potential interpretations of the PSD Program's triggering provision.

In interpreting the PSD Program's statutory trigger, EPA has long placed controlling weight on the phrase "major emitting facility." Ignoring the pollutant-specific nature of the PSD Program, along with the statutory phrase "in any area to which this part applies," EPA has insisted that any stationary source that exceeds the 100- or 250-tons-per-year thresholds for *any* air pollutant subject to regulation *anywhere* under the Act must obtain a PSD permit. *E.g.*, EPA, *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Final Rule*, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980).

But there is another way to read the PSD Program's statutory trigger. Under this alternative interpretation, a major emitting facility is required to obtain a PSD permit only if it is *located* in an area attaining the NAAQS for a criteria pollutant, and it will emit threshold quantities of *that criteria pollutant*. Simply put, the PSD Program can (and should) be read to impose a pollutant-specific, situs requirement.

EPA's interpretative choice—a pollutant-indifferent approach—posed no problem for many years. That is, even under EPA's approach, the Agency only issued several hundred PSD permits each year. EPA, *Prevention of Significant Deteriora-*

tion and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31,514, 31,537 (June 3, 2010).

But this all changed when EPA promulgated the so-called Tailpipe Rule, which regulated GHG emissions under Title II of the Act in response to this Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). *See* EPA, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010). Because GHG emissions were now a regulated pollutant somewhere under the Act, EPA claimed that it was required to issue permits to stationary sources that exceeded the 100- or 250-tons-per-year thresholds established in the definition of a "major emitting facility" located within the PSD Program. *See* Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,516. By so doing, EPA estimated that it would now field *more than 82,000* PSD permit applications each year, covering many sources that, heretofore, had never been subject to regulation under the Act. *Id.* at 31,538. Moreover, EPA acknowledged that the review of this crushing number of applications would exceed its administrative capability and could lead to delays in issuing permits of "a decade or longer." *Id.* at 31,557.

EPA freely admitted that such an explosion of PSD permits would be "inconsistent with Congress's expressed intent," but it claimed that such an outcome was compelled by a "literal application" of the Clean Air Act. EPA, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rules*, 74 Fed. Reg. 55,292, 55,304 (Oct. 27, 2009). Indeed, EPA claimed that it was precluded

from reconsidering its underlying interpretation of the PSD Program's triggering provision. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,517 (claiming that, "under *Chevron* Step 1," the Agency could not reconsider the scope of the PSD permitting program).

To remedy the absurdity imbued in its interpretation, EPA promulgated a rulemaking, the so-called Tailoring Rule, which invoked administrative tools of last resort—the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines—to rewrite and delay the application of the PSD Program's otherwise clear 100- and 250-tons-per-year thresholds. *Id.* at 31,516. EPA proposed to reduce the number of PSD permits that the Tailpipe Rule would require by "tailoring" the emissions thresholds for stationary sources of GHG emissions, raising them far, far above the statutory thresholds set out in the definition of a "major emitting facility." *See id.* at 31,560.

Commenters in this and related rulemakings, including Petitioners American Chemistry Council, *et al.* (No. 12-1248), proposed that EPA adopt the narrower, pollutant-specific interpretation of the PSD permitting trigger, which would avoid the absurdities upon which EPA relied to justify changing the statutory thresholds.[4] Indeed, because GHG emissions are not criteria pollutants, no area of the country is designated as in attainment with such a NAAQS. Thus, under this narrower interpretation, no newly constructed source with major emissions of only GHGs would have to obtain a PSD permit, and no existing major source undertaking a modification

[4] *See infra* note 6 (citing comments to related rulemakings).

would have to get a PSD permit solely because of its increased GHG emissions.

But EPA rejected these proposals, reaffirmed its interpretation of the PSD permitting trigger, and settled on 100,000 tons per year as the new, GHG-specific threshold. *Id.* at 31,560–62. Even under these super-elevated thresholds, EPA still expects the new number of annual PSD permit applications to surpass the old. *See id.* at 31,536–41; *see also* Addendum A, *infra*, at 28.

The Tailoring Rule was implemented in two phases—with more promised. During the first phase, which lasted until June 30, 2011, no construction of a major source required a PSD permit solely because of GHG emissions. *See id.* at 31,516. That said, during this phase, the PSD Program still regulated GHG emissions insofar as sources that were required to get a PSD permit were required to adopt BACT for GHG emissions. During the second phase of the Tailoring Rule, which took effect on July 1, 2011, the new GHG-specific thresholds kicked in. EPA has stated that it will propose additional phases for the Tailoring Rule in order to expand PSD permitting to "smaller sources." *Id.* at 31,566. All the same, the Agency stated that, in addressing "permitting requirements for smaller sources," it will "tak[e] into account . . . problems concerning costs to sources and burdens to permitting authorities." *Id.* Thus, it is possible that in applying this cost-benefit approach, EPA may never get around to fully implementing its interpretation of the PSD Program to sources of GHG emissions that would otherwise satisfy the 100- and 250-tons-per-year thresholds.

ARGUMENT

EPA REPEATEDLY IGNORED A PERMISSIBLE INTERPRETATION OF THE CLEAN AIR ACT AND INSTEAD RELIED ON TOOLS OF LAST RESORT TO IMPROPERLY REWRITE CLEAR STATUTORY TEXT.

EPA squandered numerous opportunities to adopt a permissible interpretation of the Clean Air Act—one that would have avoided the absurd results that EPA claimed as a justification for rewriting perfectly clear provisions of the Act. Back in 2009, the pollutant-specific approach was raised and discussed by stakeholders at the very first meeting of the Climate Change Work Group of the EPA Clean Air Act Advisory Committee (CAAAC).[5] The pollutant-specific approach was discussed further with the Agency and the Work Group, formally presented in a *White Paper*, and raised in a series of public comments to the Agency, including in comments to the rulemaking at issue here.[6]

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[5] *See* Permits, New Source Review and Toxics Subcomm. of CAAAC, *Interim Phase I Report of the Climate Change Work Group* 3–4 (Feb. 3, 2010) (*available at* http://www.epa.gov/oar/caaac/climate/2010_02_InterimPhaseIReport.pdf).

[6] *See* Charles H. Knauss, *White Paper for EPA Climate Change Workgroup: Scope of the PSD Problem to Be Addressed: Why There Is No Automatic PSD Trigger or "NAPT" Simply Because GHGs Become Regulated Under the Clean Air Act* (Jan. 8, 2010, rev. Feb. 8, 2010), *reprinted in* Joint App'x at 1495–1502, *Am. Chem. Council* v. *EPA*, No. 10-1167 (D.C. Cir. filed July 29, 2010) (Nat'l Ass'n of Mfrs., *et al.*, *Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulation* (July 6, 2010) (*available at*

Instead, EPA rejected the ideas of its own advisory committee and chose to invoke the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines to rewrite and delay the application of the PSD Program's otherwise clear 100- and 250-tons-per-year thresholds. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,516. And yet, the Agency was too quick to invoke these administrative tools.

The doctrines on which EPA relies are truly tools of last resort. As this Court recently reaffirmed in a related context, instead of "reading new words into [a] statute" to avoid absurd results, the statute should be interpreted so that "no absurdity arises in the first place." *Kloeckner* v. *Solis*, 133 S. Ct. 596, 606–07 (2012). Here, as in *Kloeckner*, it is EPA's

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http://www.nam.org/~/media/08BC270F7B3A4E9498F4142084843460/Petition_for_EPA_to_Reconsider_PSD_Regulations.pdf#page=23)); *see also* Air Permitting Forum, *et al.*, *Comments on EPA's Proposed Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Tailoring Rule*, EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) (raising the same approach discussed in the *White Paper*); Alliance of Auto. Mfrs., *Comments on EPA's Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, EPA-HQ-OAR-2009-0517-5083 (Dec. 28, 2009) (same); Air Permitting Forum, *Comments on the Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Motor Vehicle Rule)*, EPA-HQ-OAR-2009-0472-7253 (Nov. 27, 2009) (same); Air Permitting Forum, *Comments on the Proposed Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program (PSD Interpretive Memorandum) (Proposed Reconsideration)*, EPA-HQ-OAR-2009-0597-0085 (Dec. 7, 2009) (same).

"own misreading that creates the need to 'fix'" the PSD Program. *Id.* at 607.

A pollutant-specific interpretation of the PSD Program's triggering provision avoids the absurdities claimed by EPA. As explained in detail below, under this alternative interpretation, EPA will continue to field only several hundred PSD permit applications each year. *See* Addendum A, *infra*, at 28.

In rejecting this approach, EPA adopted a heightened showing of congressional intent nowhere supported by *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), or its progeny. According to EPA, a "literal reading" of the Act supported its pollutant-indifferent approach, and because it could find no "explicit statements in the legislative history that Congress intended to limit PSD applicability to sources of NAAQS pollutants," the Agency was *precluded* from adopting the pollutant-specific approach. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562. But this standard turns *Chevron* on its head. It allowed EPA to reject a *permissible* interpretation of the statute, and substitute for it an interpretation that required the Agency to rewrite perfectly clear statutory provisions, all because the Agency could not say for sure that the pollutant-specific approach was compelled. As this Court explained in a different context, "That the only cure [proposed by the Government] is worse than the disease suggests the Government is simply wrong." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013); *see also Chevron*, 467 U.S. at 843 (holding that, where a statute is ambiguous, an agency does not have license to rewrite the statute any way it might deem fit; it must adopt an

interpretation "based on a permissible construction of the statute").

The end result of EPA's approach is that it gets to select for itself which sources of GHG emissions are required to apply for permits under the Act. But the Clean Air Act does not grant EPA the authority to determine for itself which sources warrant regulation under the PSD Program; it includes very specific emissions thresholds that the Agency is powerless to rewrite.

A. The Agency Cannot Use Tools of Last Resort in the Face of Permissible Interpretations of the Clean Air Act.

EPA seemed to acknowledge the difficulties it would face in invoking administrative tools of last resort, but it never truly grappled with them. *See* Final Tailoring Rule, *supra*, at 75 Fed. Reg. at 31,542. For instance, while acknowledging that this Court has "held that the literal meaning of a statutory provision is not conclusive 'in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters,'" *id.* (quoting *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 242 (1989)), EPA went on to note that the doctrine is not really "rare" because it has been discussed in "'legions of court decisions,'" *id.* (quoting *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991)).

Yet, the true import of the "absurd results," "administrative necessity," and "one-step-at-a-time" doctrines is not the frequency with which these doctrines have been discussed by the courts; it is that

they are exceedingly difficult to invoke. In *Logan* v. *United States*, for example, this Court explained that statutory terms "may be interpreted against their literal meaning where the words '*could not conceivably have been intended to apply*' to the case at hand." 552 U.S. 23, 36 (2007) (emphasis added). EPA has all but admitted that it cannot satisfy that standard here.

Even if EPA's pollutant-indifferent interpretation could be said to be supported by a "literal reading" of the Act, Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562, the same can be said about a pollutant-specific approach. But, unlike EPA's approach, the pollutant-specific approach does not produce absurd results. The Agency was required to consider the absurdity of its approach at *Chevron*'s first step. *See Chevron*, 467 U.S. at 843 n.9 (noting that an agency must "employ[] traditional tools of statutory construction," which includes the absurdity canon, at *Chevron*'s first step). Instead, EPA ruled out a *permissible* interpretation of the PSD Program's triggering provision—an interpretation that would not have worked an absurd result—*not* because it was contrary to congressional intent, but rather, because EPA could find no "explicit statements in the legislative history that" such an interpretation was *mandated* by Congress. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562. That was error. *See Chevron*, 467 U.S. at 843 (holding that, even if a statute can be read to support more than one permissible interpretation, the agency must select a *reasonable* interpretation of the statute); *see also Alabama Power*, 636 F.2d at 359 (explaining that, under the related doctrine of administrative necessity, an agency may be

relieved of the obligation "to do an impossibility," but the agency bears the "heavy burden" of demonstrating the existence of such an impossibility); *accord Sierra Club* v. *EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983).[7]

The invocation of cases like *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892), should carry a stigma. *See* Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,542 & n.25. Before an agency may rewrite perfectly clear provisions in a statute, it should be required to demonstrate that *no other permissible alternative construction* was available to the agency that would have avoided the claimed absurdity. *See Kloeckner*, 133 S. Ct. at 606–07; *see also Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (emphasizing that "interpretations of a statute which would produce absurd results are to be avoided if al-

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[7] The EPA's approach also fails the administrative "one-step-at-a-time" doctrine developed by the D.C. Circuit. Under that doctrine, an agency may achieve a statutory mandate in a "piecemeal fashion," but it must work towards the goal of full compliance with that congressional mandate. *E.g.*, *Ctr. for Biological Diversity* v. *EPA*, 722 F.3d 401, 409–10 (D.C. Cir. 2013); *see also Grand Canyon Air Tour Coal.* v. *FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) (explaining that "it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all"). EPA has not met that burden here. By its own admission, the Agency has stated that, under its interpretation of the PSD Program's triggering provision, it is not sure that it will ever achieve full compliance with the statutory thresholds. *See* Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,566 (stating that, in addressing "permitting requirements for smaller sources," the Agency will "tak[e] into account . . . problems concerning costs to sources and burdens to permitting authorities").

ternative interpretations consistent with the legislative purpose are available"). As demonstrated in the section that follows, EPA cannot make that showing here.

B. A Pollutant-Specific Interpretation of the Triggering Provision of the PSD Program is a Permissible Interpretation of the Clean Air Act that Avoids the Absurd Results Claimed by EPA.

EPA had before it a completely permissible interpretation of the PSD Program's triggering provision that would have avoided the absurd results claimed by the Agency—a pollutant-specific approach. This approach not only maintains fidelity with the text and structure of the Act, but it also would continue to achieve Congress's overarching goal in enacting the PSD Program—to help ensure continued attainment of NAAQS for criteria pollutants.

Under Section 165 of the Act, not all newly constructed or modified "major emitting facilit[ies]" are required to get a PSD permit; rather, a PSD permit is only required of a "major emitting facility . . . in any area to which this part applies." 42 U.S.C. § 7475(a). A "major emitting facility" is one with major emissions—100 or 250 tons per year—of "any pollutant." *Id.* § 7479(1). "[T]his part [Part C] applies" to an area only with respect to specific criteria pollutants for which the area is in attainment with a governing NAAQS, *see id.* § 7471. And a criteria pollutant includes ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead, *but not GHG emissions*, 40 C.F.R. §§ 50.1–50.12. Ignoring the import of these phrases in tandem, EPA has

placed exclusive emphasis on the definition of "major emitting facility," construing the permitting obligations of the PSD Program to apply to any facility emitting major amounts of "*any* air pollutant subject to regulation" *anywhere* under the Act. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562 (emphasis added). But there is another way to read these phrases in tandem: A stationary source is required to get a PSD permit if it is in a *location* attaining a NAAQS for a criteria pollutant, and it will emit threshold quantities (100/250 tons per year) of *that criteria pollutant*.

A pollutant-specific approach is fully consistent with the text of the PSD Program. Besides Section 165(a), Congress used the phrase "in any area to which this part applies" only three other times throughout the Clean Air Act, all in PSD Provisions: Section 163(b)(4), Section 165(a)(3)(A), and Section 165(c). *See* 42 U.S.C. §§ 7473(b)(4), 7475(a)(3)(A), 7475(c). Congress's use of this phrase in Section 163(b)(4) is particularly instructive. There, Congress provided that "[t]he maximum allowable concentration of *any air pollutant in any area to which this part applies* shall not exceed a concentration for such pollutant for each period of exposure equal to" the lowest of the concentrations permitted under the "primary" or "secondary" NAAQS for that pollutant. *Id.* § 7473(b)(4) (emphasis added). In this context, "in any area to which this part applies" plainly modifies "any air pollutant," and limits the meaning of that latter phrase to criteria pollutants. *Id.* In contrast, if the phrase "in any area to which this part applies" was pollutant indifferent, as EPA claims, then Section 163(b)(4) would apply to *non-criteria*

pollutants. Yet, EPA cannot set a "maximum allowable concentration" for such pollutants, because noncriteria pollutants have no primary or secondary NAAQS. Thus, the phrase "any area to which this part applies" should be read to impose a pollutant-specific approach throughout the PSD Program, including in that program's triggering provision, Section 165(a). *See id.* § 7475(a).

A pollutant-specific approach also comports with the overall structure of Title I. Beyond the pollutant-specific nature of the NAAQS Program generally, the PSD Program was specifically designed to complement the NNSR Program. That latter program was intended to "ensur[e] attainment of the applicable national ambient air quality standard" for an area that is "designated 'nonattainment' with respect to [criteria] pollutant[s]" designated under Section 107. 42 U.S.C. § 7501(1), (2). It would make little sense if, in enacting these complementary programs, Congress provided that the trigger for the NNSR Program is pollutant-specific, but the trigger for the PSD Program is pollutant-indifferent.

And a pollutant-specific approach is fully consistent with the overarching purpose of the PSD Program as well. Congress designed the PSD Program to implement what its unabbreviated name provides—to "*prevent significant deterioration* of air quality in each region . . . designated pursuant to [Section 107] as attainment," 42 U.S.C. § 7471 (emphasis added)—and to complement and reinforce the pollutant-specific NAAQS Program, *see* S. REP. NO. 95-127, at 29 (1977) (stating that the PSD Program was designed to "protect national ambient air quality

standards"). Indeed, one of the basic requirements for obtaining a PSD permit is for a qualifying facility to demonstrate that it will not cause an attainment area to become a nonattainment area for any NAAQS. *See* 42 U.S.C. § 7475(a)(3).

Critically, the pollutant-specific approach avoids the immediate absurdities claimed by EPA. Under such an approach, "not a single additional PSD permit would be required." Charles H. Knauss & Shannon S. Broome, *EPA's Missed Opportunity to Ground Its GHG Tailoring Rule in the Statute: What the* Situs *Argument Would Mean for the Future of the PSD Program*, 42 ENVTL. L. REP. 10,424, 10,430 (May 2012) (*available at* http://elr.info/sites/default/files/docs/42.ELR.10424.pdf). As the table reprinted in an addendum to this brief depicts, unlike EPA's interpretation of the PSD Program's triggering provision, which would require EPA to issue an estimated *82,173 permits* each year, a pollutant-specific approach would maintain the status quo at *688 permits* annually. *See* Addendum A, *infra*, at 28.

Moreover, because a stationary source that satisfies the pollutant-specific requirements discussed above would still have to install "best available control technology for each pollutant subject to regulation under" the Act, 42 U.S.C. § 7475(a)(4), a covered facility may have to install BACT for GHG emissions even under a pollutant-specific approach. Thus, a pollutant-specific approach would sensibly limit the number of stationary sources that are covered by the PSD Program—without doing violence to the program as a whole.

EPA did not refute any of these observations. Instead, beyond claiming that it was required to find that a pollutant-specific approach was *compelled* by the "legislative history" of the Clean Air Act Amendments of 1977, *see* Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,562, EPA argued that, because Section 165(a)(4) requires a PSD permit holder to adopt BACT for "each pollutant subject to regulation" under the Act, Congress intended for the PSD *triggering provision* to be pollutant indifferent as well, *id.* at 31,561. But EPA puts the cart before the horse. There is no logical reason why the PSD Program's permitting trigger must be coextensive with the substantive requirements of that program. Indeed, Congress adopted just such a non-coextensive approach under Section 112 of the Act. There, Congress determined that only "major sources"—those that may emit at least 10 tons per year of a hazardous air pollutant—would be subject to stringent "maximum achievable control technology" (MACT) standards, but once a source so qualifies, it is subject to MACT for all hazardous air pollutants, including pollutants for which it is not capable of emitting above the 10-ton threshold. *See* 42 U.S.C. § 7412.

In addition, EPA's approach renders superfluous Congress's inclusion of the phrase "in any area to which this part applies." Even before EPA adopted its overly-broad definition of the PSD Program's triggering provision, *every area of the country had been—and continues to be—in attainment with at least one NAAQS*. *See, e.g.*, Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,561. If EPA's broad interpretation of the trigger is the only permissible one, then Congress could have simply omitted the phrase "in any area to

which this part applies." EPA's chosen path therefore violates the canon that superfluity—*i.e.*, "an interpretation of a congressional enactment which renders superfluous another portion of that same law"—should be avoided. *E.g.*, *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Regardless of whether a pollutant-specific approach is compelled by the text, structure, and purpose of Title I of the Clean Air Act, it is plainly a permissible approach. As a result, EPA was not free to reject it over an approach that required the Agency to rewrite other provisions of the Act.

C. The Agency's Decision to Rewrite Perfectly Clear Statutory Provisions Constitutes an Impermissible Consolidation of Legislative and Executive Functions, Warranting Instead Application of the Canon of Constitutional Avoidance.

An absurdity of the magnitude claimed by EPA—the expansion of PSD permitting from *688* to an estimated *82,173* sources annually—should have caused the Agency to reevaluate its underlying interpretation of the PSD Program. Indeed, the Agency itself recognized that the results of its interpretation were "so contrary to what Congress had in mind—and [would] in fact so undermine[] what Congress attempted to accomplish with the PSD requirements"—that they were appropriately characterized as "absurd." Proposed Tailoring Rule, *supra*, 74 Fed. Reg. at 55,310.

And yet, faced with an absurdity of its own making, the Agency instead arrogated for itself the au-

thority to rewrite perfectly clear statutory text. It increased by over 400-fold the 100- and 250-tons-per-year thresholds, settling upon 75,000 and 100,000 tons per year. Final Tailoring Rule, *supra*, 75 Fed. Reg. at 31,516. And the Agency stated that, in addressing future "permitting requirements for smaller sources," it would "tak[e] into account . . . problems concerning costs to sources and burdens to permitting authorities." *Id.* at 31,566. Thus, the Agency claimed virtually unfettered discretion to make and implement legislative judgments about which sources should be subject to permitting for GHG emissions. Such a course is both unprecedented and unconstitutional.

To the Framers of our Constitution, separating the powers of government was a means to prevent a potentially deleterious end—the "accumulation of all powers, legislative, executive, and judicial, in the same hands." FEDERALIST NO. 47, at 244 (G. Willis ed. 1982) (J. Madison). According to Thomas Jefferson: "The concentrati[on of these powers] in the same hands[] is precisely the definition of despotic government." FEDERALIST NO. 48, at 252 (J. Madison quoting T. Jefferson). And James Madison—associating any such accumulation with "tyranny"—rejected any notion that our Constitution is "chargeable with the accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation." FEDERALIST NO. 47, at 244.

These statements might appear hyperbolic to the modern American, but the Framers undoubtedly imbued our Constitution with structural safeguards that have continued vitality to this day. For in-

stance, this Court struck down the line-item veto as unconstitutional precisely because it gave to "the President the unilateral power to change the text of duly enacted statutes." *Clinton* v. *City of New York*, 524 U.S. 417, 447 (1998). A similar outcome is warranted here.

The traditional canon of constitutional avoidance should have compelled EPA to adopt a narrower interpretation of the PSD Program's triggering provision. Under this canon, "[i]f an otherwise acceptable construction of a statute would raise serious constitutional problems" (as does an agency's decision to unilaterally rewrite clear statutory text), "and where an alternative interpretation of the statute is 'fairly possible,'" the statute should be construed "to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299–300 (2001). Here, EPA was faced with *more than* a "fairly possible" alternative interpretation, but instead elected to cling to an interpretation that not only produced absurd results, but also served as a justification for the Agency to rewrite the Clean Air Act and assume for itself the authority to decide which stationary sources are subject to permitting for GHG emissions.

Because EPA failed to apply the canon of constitutional avoidance, this "Court is obligated to" do so. *Id.* That canon places yet another thumb on the scale against the interpretation adopted by EPA.

* * *

As Judge Kavanaugh remarked in his dissent from the denial of rehearing *en banc* in these cases: "When an agency is faced with two initially plausible

readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out." J.A. 174. Settled principles of administrative and constitutional law counsel against providing EPA with such a precedent here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Table: Effects of the Interpretation of the Permitting Trigger on Annual PSD Permitting

	Pre-GHG Permitting Under the PSD Program	Post-GHG Permitting Under A Pollution-Indifferent Approach	Tailoring Rule Step-1: Existing Sources Subject to BACT	Tailoring Rule Step-2: 100,000 Major Source; 75,000 Major Modification	Pollutant-Specific Approach to PSD Permitting
Annual Number of PSD New Construction Actions	240	19,889	240	242	240
Annual Number of PSD Modification Actions	448	62,284	448	1,363	448
Facilities Potentially Subject to BACT for GHGs Annually	0	82,173	688	1,605	688

* All columns except the last are based on estimates articulated in the Tailoring Rule, 75 Fed. Reg. at 31,540.