No. 12-

IN THE

Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act requires a "major emitting facility," defined as a source of "two hundred and fifty tons per year or more" of an air pollutant, to comply with the permitting requirements of the "prevention of significant deterioration" (PSD) program of Part C of the Act if the facility is "in any area to which this part applies." 42 U.S.C. §§ 7475(a)(1), 7479(1). The Environmental Protection Agency (EPA) claims the power to revise that statutory threshold to "one hundred thousand tons per year or more" for greenhouse gases because, it explains, applying the statutory threshold as written to greenhouse gases would produce "absurd results" that would be "inconsistent with congressional intent" and "severely undermine congressional purpose." Pet. App. 617a. These "absurd results" occur only because EPA has interpreted the PSD provision to cover sources of 250 tons per year of *any* pollutant regulated under *any* part of the Act—now including greenhouse gases, as a result of EPA's regulatory actions after *Massachusetts* v. *EPA*, 549 U.S. 497 (2007)—even though the PSD program "applies" only to six designated "NAAQS pollutants."

The question presented is: Whether EPA properly interpreted Part C of the Clean Air Act, requiring a pre-construction permit for a "major emitting facility … in any area to which this part applies," 42 U.S.C. § 7475(a)(1),to apply to facilities emitting "*any* regulated air pollutant," when EPA's interpretation concededly produces absurd results, requiring (in the agency's view) that it rewrite separate statutory thresholds, and when an alternative construction—applying the provision only to sources of NAAQS pollutants subject to Part C—would avoid those results and would not require rewriting the statute.

PARTIES TO THE PROCEEDINGS

Petitioners herein, which were also the petitioners in this case below or in related cases addressed by the consolidated judgment below, include the American Chemistry Council; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; Brick Industry Association; Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; The National Association of Manufacturers; National Federation of Independent Business; National Oilseed Processors Association; North American Die Casting Association; Portland Cement Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers and Commerce.

Respondents herein, which were also the respondents in this case below, are the Environmental Protection Agency and Lisa Perez Jackson, Administrator, U.S. Environmental Protection Agency. Lisa Perez Jackson ceased to hold the office of Administrator, U.S. Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, U.S. Environmental Protection Agency.

The petitioners in this case below or in related cases addressed by the consolidated judgment below, which are not petitioners herein, included Greg Ab-

bott, Attorney General of Texas; Alpha Natural Resources, Inc.; American Farm Bureau Federation; Michele Bachmann, U.S. Representative, Minnesota 6th District; Haley Barbour, Governor of the State of Mississippi; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Kevin Brady, U.S. Representative, Texas 8th District; Paul Broun, U.S. Representative, 10th District; Dan Burton, U.S. Representative, Indiana 5th District; Chamber of Commerce of the United States of America; Glass Packaging Institute; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Commonwealth of Virginia; Competitive Enterprise Institute; Nathan Deal, U.S. Representative, Georgia 9th District; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; FreedomWorks; the Science and Environmental Policy Project; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel US Inc.; Phil Gingrey, U.S. Representative, Georgia 11th District; Great Northern Project Development, L.P.; Industrial Minerals Association—North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Landmark Legal Foundation; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Langdale Chevrolet-Pontiac, Inc.; The Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; John Linder, U.S. Representative, Georgia 7th District; Louisiana Department of Environmental Quality; Missouri Joint Municipal Electric Utility Commission; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air

Project; National Mining Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Rick Perry, Governor of Texas; Tom Price, U.S. Representative, Georgia 6th District; Dana Rohrabacher, U.S. Representative, California 46th District; Rosebud Mining Co.; John Shadegg, U.S. Representative, Arizona 3rd District; John Shimkus, U.S. Representative, Illinois 19th District; South Carolina Public Service Authority; Southeast Trailer Mart, Inc.; Southeastern Legal Foundation, Inc.; State of Alabama; State of Nebraska; State of North Dakota; State of South Carolina; State of South Dakota; State of Texas; Texas Agriculture Commission; Texas Commission on Environmental Quality; Texas General Land Office; Texas Public Utilities Commission; Texas Railroad Commission; Utility Air Regulatory Group; and Lynn Westmoreland, U.S. Representative, Georgia 3rd District.

The respondents in related cases addressed by the consolidated judgment below included the U.S. Environmental Protection Agency (EPA) and Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency. Lisa Perez Jackson ceased to hold the office of Administrator, U.S. Environmental Protection Agency, on February 15, 2013; that office is currently held in an acting capacity by Robert Perciasepe, Acting Administrator, U.S. Environmental Protection Agency.

Movant-intervenors for petitioners in certain of the cases addressed by the consolidated judgment below, which are not petitioners herein (unless identified above as petitioners herein), included Alpha Natural Resources, Inc.; American Farm Bureau Federation; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of Commerce; As-

sociated Industries of Arkansas; Brick Industry Association; Coalition for Responsible Regulation, Inc.; Chamber of Commerce of the United States of America; Colorado Association of Commerce & Industry; Commonwealth of Kentucky; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Governor of Mississippi Haley Barbour; Great Northern Project Development, L.P.; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association North America; Kansas Chamber of Commerce and Industry; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc; Langdale Ford Company; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Louisiana Department of Environmental Quality; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Manufacturers; National Association of Home Builders; National Cattlemen's Beef Association; National Electrical Manufacturers Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Business; National Mining Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Coal Association; Ohio Manufacturers Association; Peabody Energy Company; Pennsylvania Manufacturers Association; Portland Cement Association; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; State of Alaska; State of Florida; State of Georgia; State of Indiana; State of Louisiana; State of Michigan; State of Nebraska; State of North Dakota; State of Oklahoma; State of South Carolina; State of South Dakota; State of Utah; Steel Manufac-

turers Association; Tennessee Chamber of Commerce and Industry; Utility Air Regulatory Group; Virginia Manufacturers Association; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

Movant-intervenors for respondents in certain of cases addressed by the consolidated judgment below included Alliance of Automobile Manufacturers; American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; City of New York; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; Indiana Wildlife Federation; Michigan Environmental Council; National Environmental Development Association's Clean Air Project; National Mining Association; Peabody Energy Company; Natural Resources Council of Maine; Natural Resources Defense Council; National Wildlife Federation; Ohio Environmental Council; Pennsylvania Department of Environmental Protection; Sierra Club; South Coast Air Quality Management District; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Wetlands Watch; and Wild Virginia.

RULE 29.6 STATEMENT

None of the petitioners herein has a parent company, and no publicly held corporation has a 10% or greater ownership interest in any petitioner herein.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the National Association of Home Builders, the National Association of Manufacturers, the National Oilseed Processors Association, and other industry and trade associations whose members are affected by the regulations at issue, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 684 F.3d 102, and reproduced at Petition Appendix (Pet. App.) 1a-77a. The unpublished order of the D.C. Circuit denying rehearing en banc, including several statements concurring in or dissenting from the denial of rehearing en banc, is reproduced at Pet. App. 413a-64a.

JURISDICTION

The D.C. Circuit entered a consolidated judgment addressing *American Chemistry Council* v. *EPA*, Nos. 10-1167 et al. (D.C. Cir.), as well as several related matters, on June 26, 2012. Pet. App. 3a. It denied timely petitions for rehearing en banc by order dated December 20, 2012. Pet. App. 413a-16a. On March 8, 2013, the Chief Justice granted an extension to and including April 19, 2013, of the time for filing a petition for a writ of certiorari. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at Pet. App. 465a-90a. Relevant rulemakings of the U.S. Environmental Protection Agency are reproduced at Pet. App. 78a-412a, 492a-909a.

INTRODUCTION

The regulatory regime upheld by the judgment below, covering a suite of rulemakings by the Environmental Protection Agency (EPA) addressing greenhouse gas emissions from stationary sources, represents the most sweeping expansion of EPA's authority in the agency's history, extending its reach to potentially millions of industrial, commercial, and residential facilities across the country, at costs estimated to run into the tens of billions of dollars per year. See 75 Fed. Reg. 31514, 31533, 31540, 31563, 31597 (June 3, 2010) (Pet. App. 579a-80a, 611a, 711a-14a, 858a-59a). Yet, that regime is premised on an interpretation of the Clean Air Act which all agree produces "absurd results" that are inconsistent with congressional intent, and that could be avoided by adopting a reasonable alternative construction of the statute. In a move aptly characterized by Judge Kavanaugh as "a very strange way to interpret a statute," Pet. App. 448a, EPA concluded that those absurdities could and should be addressed not by correcting its interpretation of the statute, but by rewriting separate and explicit statutory directives. Those provisions unambiguously define the threshold for emissions regulation as "two hundred and fifty tons per year or more" of an air pollutant, 42 U.S.C. § 7479(1), but EPA has unilaterally revised that threshold to "one hundred thousand tons per year or more" for emissions of greenhouse gases.

EPA has, moreover, explained that its alteration of the statutory threshold is just the first "phase" of this process. The agency will, it says, further revise that new threshold downward from time to time as the costs associated with regulation become acceptable, in its view, in light of potential benefits. 75 Fed. Reg. at 31573 (Pet. App. 754a-58a). EPA has, in other words, relied on the costs and absurdities created by its own interpretation of the Clean Air Act to grant itself a continuing license to create and revise the statutory scheme without regard to even the clearest congressional directives—a breathtaking assertion of agency policymaking power over a critical national issue.

Review of the D.C. Circuit's judgment upholding this regime is plainly warranted. The regulations under review were adopted in response to this Court's decision in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007), and the opinion of the court of appeals—issued after an extraordinary two days of oral argument addressing scores of separate petitions for review—repeatedly cites and relies upon that decision. *E.g.*, Pet. App. 3a-14a. But *Massachusetts* v. *EPA* does not address the question of statutory interpretation presented here, concerning whether the permitting provisions of Part C of the Clean Air Act "apply" to stationary sources emitting threshold amounts of greenhouse gases only (and no threshold amounts of air pollutants actually subject to Part C). In any event, that decision does not and could not support an interpretation of the Act that is so at odds with the relevant statutory text and basic principles of statutory construction.

Massachusetts v. *EPA* itself described these very types of issues, regarding the scope and limits of EPA's authority to regulate greenhouse gas emissions

under the Clean Air Act, as of "unusual importance" warranting a grant of certiorari even in the absence of a circuit conflict. 549 U.S. at 505-06. All members of the en banc court who addressed this case—even those concurring in the denial of rehearing—likewise agreed that the issues raised "are undoubtedly … of exceptional importance." Pet. App. 419a, 444a. The pervasive and far-reaching impacts these unprecedented regulations will have, which EPA itself concedes "could adversely affect national economic development" if fully implemented, 75 Fed. Reg. at 31557 (Pet. App. 685a), justify this Court's review.

The importance of these matters is further confirmed by the number of petitions seeking review of the judgment below, from a range of commercial organizations and also numerous States that, together, represent a substantial segment of this Nation's economic base as well as its population. This petition, filed by a broad coalition of leading industry and trade associations whose members are affected by EPA's regulations, seeks review of the same consolidated judgment, but presents a unique set of issues regarding how properly to harmonize interpretations of the Clean Air Act issued by EPA more than three decades ago with a regulatory and jurisprudential environment that has been dramatically altered by the recent greenhouse gas regulations issued by the agency in response to *Massachusetts* v. *EPA*.[1] For

[1] This petition addresses the case captioned below as *American Chemistry Council* v. *EPA*, Nos. 10-1167 et al. (D.C. Cir.), as well as the related action captioned as *National Association of Manufacturers* v. *EPA*, No. 10-1218 (D.C. Cir.), to the extent that action, challenging the *Tailoring Rule*, is necessary to accord full relief in this case. Notably, although this case arises as a result of *Massachusetts* v. *EPA*, insofar as that decision prompted EPA to undertake regulation of greenhouse gas emis-

these reasons, and as explained in greater detail below, this petition for certiorari should be granted.

STATEMENT OF THE CASE

Specifically at issue in this case is EPA's interpretation of the permitting provision of the "prevention of significant deterioration" (PSD) program in Part C of Title I of the Clean Air Act. That provision states that any "major emitting facility … in any area to which this part applies" must obtain pre-construction permits and comply with an extensive range of regulatory standards. 42 U.S.C. § 7475(a)(1). Although this provision can and should be read to cover only sources of those pollutants to which Part C actually "applies"—*i.e.*, so-called "NAAQS pollutants" addressed by the PSD program—EPA has interpreted it to apply to sources of *any* pollutant regulated under *any* part of the Act, now including greenhouse gases as a result of EPA's recent regulations addressing mobile sources (such as automobiles) in response to *Massachusetts* v. *EPA*. See 75 Fed. Reg. at 31557-67 (Pet. App. 687a-728a). EPA has acknowledged that its interpretation produces "absurd results" by potentially sweeping into the PSD program millions of

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sions, the arguments this petition presents, if accepted, would not require the Court to overrule *Massachusetts*, or even directly limit its holding, in that this petition focuses on different statutory language in a different part of the Clean Air Act than that addressed in *Massachusetts*. Other petitions seeking review of the consolidated judgment below address the related cases captioned as *Coalition for Responsible Regulation, Inc.* v. *EPA*, Nos. 09-1322 et al. (D.C. Cir.); *Coalition for Responsible Regulation, Inc.* v. *EPA*, Nos. 10-1073 et al. (D.C. Cir.); and *Coalition for Responsible Regulation, Inc.* v. *EPA*, Nos. 10-1092 et al. (D.C. Cir.). While the issues and arguments presented by this petition are distinct from those raised by petitioners in related matters, the petitioners herein also support many of the arguments presented in those petitions.

small commercial and residential sources of greenhouse gas emissions that Congress undoubtedly never intended to be covered. *Id.* It has nevertheless refused to adopt an alternative reading of the statute that would, by applying the program only to sources of NAAQS pollutants, accord with the statutory language and avoid those absurdities. See *id.* The petitions for review in this case challenged EPA's interpretation of the PSD provision as inconsistent with the Act, and otherwise unreasonable.

1. The rules and regulations relevant here were developed over a period of more than 30 years, starting soon after enactment of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, and culminating in EPA's most recent rulemakings concerning greenhouse gases. A misconstruction of the Act by EPA in 1980, interpreting the PSD provision to cover sources of "any regulated pollutant" rather than only NAAQS pollutants, for decades had no practical importance but acquired enormous—indeed, transformative—significance once EPA classified greenhouse gases as regulated pollutants. *Infra* pp. 10-12. That regulatory history, and the underlying statutory structure, are essential to addressing the issues presented by this petition.

a. Title I of the Clean Air Act, enacted in 1977, establishes a framework for EPA to address concerns over ambient air quality attributed to emissions of pollutants from stationary sources, and in particular "to encourage and assist the development and operation of regional air pollution prevention and control programs." 42 U.S.C. § 7401(b)(4). Central to this regulatory scheme are the "national ambient air quality standards," or NAAQS. *Id.* § 7408. These standards, developed by EPA with public input, set the maximum permissible concentrations that may safely

be present in the local ambient air of "NAAQS pollutants," also known as "criteria pollutants." *Id.* §§ 7408-7409. The "NAAQS pollutants" are those pollutants that, in EPA's judgment, pose special risks to the public health and welfare—currently including ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead. See 40 C.F.R. §§ 50.1-50.12. For each of these six NAAQS pollutants, the statute directs EPA to determine whether each "air quality control region" in the country is or is not in compliance with the applicable NAAQS, and to designate the region accordingly as either in "attainment" or "nonattainment." 42 U.S.C. § 7407(d). Because these designations are pollutant-specific, a single geographic area may be in attainment with one NAAQS while in nonattainment with another. See *id.*; see also *Ala. Power Co.* v. *Costle*, 636 F.2d 323, 350 (D.C. Cir. 1980).

To assist regions in maintaining compliance with those NAAQS they have attained, and making progress toward meeting those they have not, Title I establishes two independent but complementary permitting programs to cover the large "industrial facilities" that Congress viewed as "primarily responsible for emission of the deleterious pollutants that befoul our nation's air." *Ala. Power*, 636 F.2d at 353. The first, the "prevent[ion] of significant deterioration" program of Part C, applies to the extent an area is already in attainment with a NAAQS. 42 U.S.C. § 7471. It requires that any "major emitting facility ... in any area to which this part applies" must obtain a permit before engaging in certain construction or modifications. *Id.* § 7475(a)(1). "Major emitting facility" is defined in Part C as a source "with the potential to emit two hundred and fifty tons per year or

more of any air pollutant." *Id.* § 7479(1).[2] In addition, these facilities must adopt the "best available control technology" for not only NAAQS pollutants (those governed by Part C), but also "each pollutant subject to regulation under [the Act]." *Id.* § 7475(a)(4).

The second program, the "nonattainment new source review" (NNSR) program of Part D, applies to the extent an area is not in attainment with an applicable NAAQS. *Id.* § 7501. It precludes construction of any "major stationary source[ ] anywhere in the nonattainment area" unless the facility can demonstrate, among other things, that its emissions will not exceed the "lowest achievable emission rate" for any pollutant for which the area is not attaining a NAAQS. *Id.* §§ 7502(c), 7503(a).[3] These more stringent requirements continue to apply until the local area achieves compliance with the relevant NAAQS. *Id.* Once it does, the PSD permitting provisions become applicable (at least with respect to that pollutant). *Id.* §§ 7471, 7501; see also 45 Fed. Reg. 52676, 52711-12 (Aug. 7, 1980) (Pet. App. 237a-39a).

These programs were thus designed to act in tandem to prevent areas in attainment from slipping into nonattainment and to bring nonattaining areas into attainment. See 42 U.S.C. §§ 7407, 7471, 7475, 7501-7502. Congress understood that the permitting

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[2] For certain types of facilities, the statute sets a lower emissions threshold of 100 tons per year or more of an air pollutant, for a source to qualify as a "major emitting facility." 42 U.S.C. § 7479(1). For convenience, the discussion herein refers only to the generally applicable 250 tons-per-year threshold.

[3] "Major stationary source" is defined as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." 42 U.S.C. § 7602(j).

requirements of the programs were expensive and burdensome, but deemed those costs acceptable because they would be imposed only on those large "industrial facilities" that "are financially able to bear the substantial regulatory costs" and that could make the greatest impact on local air quality through emissions reductions. *Ala. Power*, 636 F.2d at 353. Importantly, because these programs are complementary and "pollutant-specific," *id.* at 350, they may and often do apply concurrently to the same area and even the same facility: for instance, when a facility emits "major" quantities of both a NAAQS pollutant for which the area is attaining and one for which it is not.

b. Shortly after these provisions were enacted, EPA undertook two rounds of rulemakings to interpret and implement the statutory directives. 43 Fed. Reg. 26388 (June 19, 1978); 45 Fed. Reg. 52676 (Aug. 7, 1980) (Pet. App. 78a). As part of those proceedings, EPA proposed in 1979 to interpret the triggering provisions of the PSD and NNSR permitting programs similarly, with each applicable only if a facility emits "major" quantities of a *NAAQS pollutant* for which the area is in either attainment (PSD) or nonattainment (NNSR) for an applicable NAAQS. 44 Fed. Reg. 51924, 51949 (Sept. 5, 1979). This interpretation was consistent with the structure and purpose of the programs, as discussed above, as well as the language of the respective triggering provisions. 42 U.S.C. § 7475(a)(1) (requiring PSD permit for any "major emitting facility ... in any area to which this part applies"), § 7502(c)(5) (requiring NNSR permit for any "major stationary source anywhere in the non-attainment area").

In the final rule issued in 1980, however, EPA adopted a substantially different, and substantially

expanded, interpretation of the PSD triggering provision. 45 Fed. Reg. 52676 (Pet. App. 78a-412a). The agency held that a facility would be subject to PSD permitting if it emits "major" amounts of *any* pollutant regulated under the Act, even if it emits no NAAQS pollutants whatsoever, as long as the region in which the facility is located has been designated as in attainment for at least one NAAQS. *Id.* at 52710-11 (Pet. App. 232a-35a).

EPA explained that, in its view, this change was mandated by the statutory language. *Id.* It reasoned that because "major emitting facility" is defined as a source of "any air pollutant" (which the agency read as "any regulated air pollutant"), and because the PSD provision covers any "major emitting facility" located "in any area to which this part applies," any facility that emits "major" amounts of "any regulated pollutant" is automatically subject to PSD permitting if it is located in an area to which Part C "applies" for any NAAQS pollutant, regardless of whether the facility itself emits that pollutant. *Id.* The agency did not acknowledge or address the numerous questions raised by this interpretation: for example, that it rendered the statutory phrase "in any area to which this part applies" effectively superfluous—since *all* areas in the country were then, and still are, in attainment for at least one NAAQS pollutant, see 75 Fed. Reg. at 31561 (Pet. App. 705a)—and resulted in different triggers for the PSD and NNSR programs (the latter still limited to facilities emitting NAAQS pollutants) despite the similar language of the provisions and complementary nature of the programs.

This revised interpretation, although it theoretically expanded the scope of the PSD program when issued, did not have any practical impact at that time, or for three decades thereafter, because facilities that

emitted more than 250 tons per year of a "regulated air pollutant" almost invariably also emitted 250 tons per year of a NAAQS pollutant, and would thus be subject to PSD permitting under either interpretation. See 74 Fed. Reg. 55292, 55294-95 (Oct. 27, 2009). Further, because during this period EPA disclaimed any interest in regulating (and even the authority to regulate) greenhouse gases, there was no reason for industry groups or others to challenge that interpretation based on speculation over what problems or absurdities it might otherwise produce. See, *e.g.*, 68 Fed. Reg. 52922, 52925-31 (Sept. 8, 2003).

c. The practical inconsequence of the situation changed dramatically, however, with EPA's response to this Court's decision in *Massachusetts* v. *EPA*. *Massachusetts* held that greenhouse gases fall within the definition of "air pollutant" in Title II of the Clean Air Act, and that EPA was required to consider a rulemaking petition seeking regulation of greenhouse gas emissions from motor vehicles. 549 U.S. at 528-32.

In response, EPA commenced a new series of rulemakings addressing greenhouse gas emissions. 74 Fed. Reg. at 55294-95. On December 15, 2009, it issued its *Endangerment Finding*, concluding that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," and should be regulated under the mobile source provisions of the Act. 74 Fed. Reg. 66496 (Dec. 15, 2009). Thereafter, on May 7, 2010, it issued a final rule establishing standards restricting greenhouse gas emissions from certain light-duty vehicles. 75 Fed. Reg. 25324 (May 7, 2010).

With this regulation, known as the *Tailpipe Rule*, greenhouse gases became for the first time a "regu-

lated air pollutant" under the Clean Air Act. 74 Fed. Reg. at 55294-95. The consequences of this were potentially significant and wide-ranging, as EPA recognized at the time, in light of its interpretation of the PSD permitting provision. *Id.* Greenhouse gases are emitted by a vastly greater number of stationary sources, and at vastly higher amounts, than other pollutants the agency had previously regulated, see 73 Fed. Reg. 44354, 44402-03 (July 30, 2008); Nat'l Research Council, *Climate Change Science* 1-10 (2001); if greenhouse gas emissions themselves triggered PSD permitting, millions of additional sources, including relatively small commercial and even residential facilities, would be immediately swept into the PSD program under the statutory "two hundred and fifty tons per year or more" threshold, see 74 Fed. Reg. at 55294-95. EPA estimated that the number of annual PSD permitting actions, which had numbered in the hundreds, would jump to more than 81,000 per year. 75 Fed. Reg. at 31576 (Pet. App. 772a). Requiring all of these new facilities to comply with permitting obligations would, it said, "overwhelm permitting authorities," impose additional costs on these facilities and local governments of potentially billions of dollars per year, and "adversely affect national economic development." *Id.* at 31556-57 (Pet. App. 682a-85a).

These consequences—so clearly contrary to Congress's intent that EPA itself described them as "absurd," *id.* at 31557-58 (Pet. App. 688a)—prompted the agency to undertake another rulemaking to address them. But, although the problems were directly attributable to the agency's decision to stay wedded to its own decades-old interpretation of the PSD permitting provision, and could be corrected by simply revising that interpretation to apply only to major sources

of NAAQS pollutants (as, in fact, EPA had proposed in 1979), EPA refused to do so. *Id.* at 31560-67 (Pet. App. 701a-28a). Instead, it responded by asserting a right to alter the statutory definition of "major emitting facility" to raise by orders of magnitude the stated emissions threshold, which would have the effect of exempting a sufficient number of sources of greenhouse gas emissions to render the program manageable in the agency's view. *Id.* In the *Tailoring Rule*, EPA directed that, for the current "phase" of regulation, those facilities emitting less than 100,000 tons per year of greenhouse gases—a 400-fold increase above the statutory threshold of 250 tons per year—would not be deemed "major emitting facilities" and would thus not be subject to PSD permitting. *Id.* EPA also stated it would exercise its claimed discretion to make further adjustments to the statutory threshold on an ongoing basis, based on its continuing assessment of the benefits and burdens of regulation and perceived capacity of local permitting authorities. *Id.* at 31524, 31548-49 (Pet. App. 540a-42a, 647a-48a).[4]

2. Numerous petitions for review were thereafter filed in the D.C. Circuit, raising a range of challenges to EPA's actions, including whether EPA had statutory authority to regulate greenhouse gases at all. Pet. App. 9a. The petitions in this case (*American Chemistry Council* v. *EPA*, see *supra* note 1), however, focused on EPA's interpretation of the PSD provision, as set forth in the 1980 rulemaking and the *Tailoring Rule*. *Id.* at 56a-57a.

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[4] In a recent rulemaking, EPA announced that, as part of the next "phase" of its implementation of the permitting program, it would not lower the threshold, but continue to apply the 100,000 tons-per-year threshold. 77 Fed. Reg. 41051, 41052 (July 12, 2012).

a. The petitions for review and the underlying cases were consolidated for purposes of hearing. Pet. App. 1a-9a. A three-judge panel of the D.C. Circuit heard argument in the cases over the course of two days in February 2012. In a single judgment issued on June 26, 2012, the panel rejected all of the petitions. *Id.*

The panel devoted a substantial part of its opinion to the issues raised in this case regarding the PSD provision. Pet. App. 35a-67a. The panel determined first that, although certain petitioners in other cases lacked standing to proceed with their claims, the petitioners here have standing to challenge EPA's interpretation of that provision, as set forth in the 1980 rulemaking, because some of their members would be subject to the burdensome PSD permitting requirements only because EPA had interpreted those requirements as being triggered by emissions of "any regulated air pollutant," now including greenhouse gases. *Id.* at 35a-41a. Further, because these petitions were filed within 60 days after issuance of the *Tailpipe Rule*—the rulemaking that rendered greenhouse gases a "regulated air pollutant" for the first time—they were timely under the "grounds arising after" judicial review provision of the Clean Air Act. *Id.* at 37a (quoting 42 U.S.C. § 7607(b)(1) ("[a petition for review] based solely on grounds arising after [sixty days after issuance of the challenged rulemaking] shall be filed within sixty days after such grounds arise")).

Addressing the merits of EPA's interpretation of the PSD provision, the panel acknowledged the agency's concession that its construction produces "absurd results." Pet. App. 69a-70a. Nevertheless, the panel concluded that the agency's interpretation must be accepted because it represented, according to the

panel, the "unambiguous" reading of the statute. *Id.* at 50a-54a. The panel held, further, that the alternative construction proposed by the petitioners, interpreting the PSD permitting provision as being triggered only by emissions of NAAQS pollutants, was barred by *Massachusetts* v. *EPA*. *Id.*

b. Several petitions for rehearing followed. Pet. App. 415a. The petitioners argued, among other things, that their alternative interpretation of the PSD provision is fully consistent with *Massachusetts* v. *EPA*. That interpretation, they explained, does not rely on limiting the general definition of "air pollutant" but, rather, flows from the language of the PSD triggering provision, which by its terms imposes permitting requirements only on facilities "to which [Part C] applies"—*i.e.*, facilities emitting pollutants subject to a NAAQS. See *id.* at 418a, 446a-48a.

The rehearing petitions were denied on December 20, 2012. Judges Kavanaugh and Brown each filed separate statements dissenting from the denial of rehearing en banc, and the panel filed a joint concurring statement responding to those dissents. Pet. App. 420a-64a. Notably, all of these statements agreed that the "questions [implicated by] and the outcome of this case are undoubtedly matters of exceptional importance," with "massive real-world consequences" not only for regulated industries but also for the Nation's "economic and environmental policy." *Id.* at 419a, 444a.

In contrast to the panel's holding that EPA's construction of the PSD permitting trigger was "compelled" by the Clean Air Act, Judges Kavanaugh and Brown found it "evident" that the most "straightforward" and "sensible" reading of the statute is that the trigger instead is "limited to NAAQS air pollutants," Pet. App. 447a-49a; see also *id.* at 421a (noting Judge

Brown's agreement with Judge Kavanaugh's opinion). They found the panel's pervasive reliance on *Massachusetts* v. *EPA* unfounded. *Id.* at 431a-41a, 454a-61a. That opinion, they explained, held that the term "any air pollutant" includes greenhouse gases in the context of mobile source regulation under Title II of the Act, but it did not address the issue here—whether regulation of greenhouse gas emissions from mobile sources necessarily triggers regulation of emissions from stationary sources. *Id.* at 437a-39a, 457a-58a. This is particularly true for the PSD program, Judge Kavanaugh explained, in light of the structure of that program, with its focus on NAAQS pollutants, and the language of the PSD triggering provision. *Id.* at 457a-61a. Indeed, even if EPA's interpretation might otherwise have been a permissible reading of the PSD provision, they reasoned, it was necessarily foreclosed—and certainly could not constitute the "unambiguous" interpretation of the statute—given that it admittedly produced "absurd results" inconsistent with congressional intent. *Id.*

Especially troubling to both Judge Brown and Judge Kavanaugh was EPA's response to the absurdities resulting from its interpretation: promulgation of the *Tailoring Rule*. Pet. App. 447a-48a. Whereas those absurdities should have prompted EPA to adopt a more limited interpretation of the PSD permitting provision, the agency instead "re-wrote the very specific [threshold emissions] trigger" set forth in the Act to reduce artificially the number of facilities subject to PSD permitting. *Id.* They described this action as "an abuse of the absurdity and administrative necessity doctrines" and an "unprecedented expansion of regulatory control." *Id.* at 433a; see also *id.* at 447a-49a. As Judge Kavanaugh put it: "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." *Id.* at 448a.

Judge Kavanaugh further explained that the agency's analysis was particularly disturbing because it contemplated not merely a single episode of statutory re-writing (although that alone would have been unlawful), but an assertion of continuing revisionary power in the years going forward based solely on the agency's weighing of costs and benefits. Pet. App. 448a-49a. "EPA's assertion of such extraordinary discretionary power both exacerbates the separation of powers concerns in this case and underscores the implausibility of EPA's statutory interpretation. Put simply, the statute cannot be read to grant discretion to EPA to raise or lower the [statutory] permitting triggers as EPA sees fit." *Id.* at 448a n.1. If that assertion of agency prerogative were upheld, he warned, it risked "significantly enhanc[ing] the Executive Branch's power at the expense of Congress's and thereby alter[ing] the relative balance of powers in the administrative process." *Id.* at 449a.

REASONS FOR GRANTING THE PETITION

The judgment of the court of appeals plainly warrants review. That decision adopts an EPA interpretation of the Clean Air Act that the agency concedes produces "absurd" consequences inconsistent with congressional intent, and it allows the agency to address those consequences by exercising effectively unrestricted discretion to rewrite—on an ongoing basis—separate, explicit statutory directives in order to revise the scope of the statute's coverage. See Pet.

App. 447a-49a. The resulting regulatory regime, both uncontemplated by the statute and indeed contrary to its express terms, represents the most sweeping expansion of EPA authority in the agency's history, potentially affecting millions of enterprises across the Nation and costing businesses and local government billions of dollars annually. See 75 Fed. Reg. at 31533, 31540, 31563 (Pet. App. 579a-80a, 611a, 711a-14a). This Court should intervene now, before the agency proceeds further down this unprecedented regulatory path.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW RESTS ON AN IMPERMISSIBLE INTERPRETATION OF THE CLEAN AIR ACT IN WHICH THE AGENCY HAS ASSERTED AUTHORITY TO REWRITE EXPRESS STATUTORY TERMS.

The decision below contravenes fundamental doctrines of statutory construction and conflicts with scores of cases from this Court and others applying those principles. *First*, it accepts an interpretation of the PSD provision of the Clean Air Act that by EPA's own admission produces "absurd results"—despite the availability of an alternative, reasonable construction (indeed, one EPA proposed in 1979) that would avoid those results. *Infra* Part I.A. *Second*, it allows the agency to address those absurdities by rewriting other explicit and clear statutory requirements, creating exemptions that were not approved or anticipated by Congress and that are based solely on the agency's own judgment regarding the costs and benefits of regulation. *Infra* Part I.B. Either of these holdings would warrant review of the judgment below; taken together, they certainly do.

A. The Decision Below Adopts An Agency Interpretation Of The Clean Air Act That The Agency Itself Concedes Produces Absurd Results.

It is an elementary principle of statutory construction that courts must avoid an interpretation of a statute that is demonstrably inconsistent with Congress's intent, particularly one which produces results so contrary to any conceivable legislative purpose as to be deemed "absurd." *E.g.*, *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). This principle applies even when the construction at issue might be characterized as a "literal" reading of the provision, *e.g.*, *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), but it carries yet greater force when the statutory language is reasonably subject to alternative interpretations that would resolve the identified absurdities, *e.g.*, *Griffin*, 458 U.S. at 575. When faced with that situation, a court *cannot* accept the "absurd" interpretation, even if it might be otherwise deemed "literal" or "unambiguous," and *must* adopt the alternative construction. *Id.*[5]

The decision below contravenes this basic principle. The interpretation it adopts, reading the PSD permit-

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[5] *See also, e.g.*, *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 138 (2004); *Cramp* v. *Bd. of Pub. Instruction*, 368 U.S. 278, 286 (1961); *Conservation Law Found., Inc.* v. *Busey*, 79 F.3d 1250, 1267 (1st Cir. 1996); *Long* v. *Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 375 (3d Cir. 2012); *Bellum* v. *PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005); *Breedlove* v. *Earthgrains Baking Cos.*, 140 F.3d 797, 800 (8th Cir. 1998); *Ewing* v. *Rodgers*, 826 F.2d 967, 970 n.3 (10th Cir. 1987); *Silva-Hernandez* v. *U.S. Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 364 (11th Cir. 2012); *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998); *Wassenaar* v. *Office of Pers. Mgmt.*, 21 F.3d 1090, 1094 (Fed. Cir. 1994).

ting provision to apply to facilities emitting threshold amounts of "any regulated air pollutant," is acknowledged "[to be] inconsistent with—and, indeed, [to] undermine—congressional purposes." 75 Fed. Reg. at 31547 (Pet. App. 643a). EPA in fact concedes that this interpretation produces "absurd results," by potentially sweeping into the PSD program millions of small commercial and residential facilities that Congress never intended to be subject to the burdensome permitting requirements. *Id.* at 31557-58 (Pet. App. 684a-88a). The court of appeals had no option in this circumstance but to search for an alternative construction that would avoid the absurdities and, if available, to adopt that construction. See, *e.g.*, *Griffin*, 458 U.S. at 575.

The D.C. Circuit did precisely the opposite. It refused to consider whether an alternative construction might resolve the absurdities and, instead, held that EPA's interpretation must be accepted because it represented the "unambiguous" reading of the statute. Pet. App. 50a-51a. That conclusion is flatly wrong as a matter of interpretative principle: an interpretation that produces "absurd results" *cannot* be deemed the "unambiguous" meaning of a statute, *e.g.*, *Lamie* v. *U.S. Tr.*, 540 U.S. 526, 536 (2004), and *cannot* be accepted by a court without at least consideration of possible alternative constructions, *e.g.*, *Alaska Pipeline*, 436 U.S. at 643; *United States* v. *Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940). The panel's decision violates these essential principles of statutory construction, as set forth in numerous cases from this Court and others.[6]

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[6] *See, e.g.*, *Griffin*, 458 U.S. at 575; *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459-60 (1892); *Conservation Law Found., Inc.* v. *Busey*, 79 F.3d 1250, 1267 (1st Cir. 1996); *Frank G.* v. *Bd. of Educ.*, 459 F.3d 356, 368 (2d Cir. 2006); *In re Magic*

There is simply no way to justify the panel's decision given the "absurd results" produced by the interpretation the panel adopts. But the decision fails even on its own reasoning, because EPA's interpretation clearly cannot be deemed the "unambiguous" meaning of the statutory language. The PSD provision states that the permitting requirements of Part C apply to a "major emitting facility ... in any area to which this part applies." 42 U.S.C. § 7475(a)(1). There are at least two ways to read this phrase, if considered solely in isolation. It might conceivably be read, as EPA urges, to mean a facility emitting threshold quantities of a pollutant in any area to which Part C "applies" for *any* pollutant. Alternatively, the phrase can be read, as the petitioners maintain (and as EPA itself originally concluded, see *supra* p. 9 (citing 44 Fed. Reg. at 51949)), to mean a facility emitting threshold quantities of a pollutant in an area to which Part C "applies" for *that* pollutant, meaning that a facility is subject to the PSD program only if it emits a NAAQS pollutant for which the local area is attaining. That both of these interpretations may constitute grammatically plausible readings of the PSD provision confirms that EPA's construction

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Rests., Inc., 205 F.3d 108, 116 (3d Cir. 2000); *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004); *Sykes* v. *Columbus & Greenville Ry.*, 117 F.3d 287, 290-91 (5th Cir. 1997); *United States* v. *Calor*, 340 F.3d 428, 431 (6th Cir. 2003); *United States* v. *Tex-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978); *Kananen* v. *Matthews*, 555 F.2d 667, 669-70 (8th Cir. 1977) (per curiam); *Seal 1* v. *Seal A*, 255 F.3d 1154, 1160 (9th Cir. 2001); *Robbins* v. *Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006) (en banc); *Miccosukee Tribe of Indians* v. *S. Everglades Restoration Alliance*, 304 F.3d 1076, 1086 (11th Cir. 2002); *Ala. Power Co.* v. *Costle*, 636 F.2d 323, 360 (D.C. Cir. 1980); *Wassenaar* v. *Office of Personnel Mgmt.*, 21 F.3d 1090, 1094 (Fed. Cir. 1994).

is, at the least, not the "unambiguous" reading of the provision.[7]

Indeed, when the provision is considered in context in light of the statute's structure and purpose, EPA's interpretation is clearly unreasonable. It would, for example, render the critical phrase "in any area to which this part applies" effectively superfluous, given that *all* areas of the country are now and always have been in attainment for at least *one* pollutant, 75 Fed. Reg. at 31561 (Pet. App. 705a), meaning that never in the statute's history has there been a single area in the country to which Part C does not "apply" to that extent.[8] Moreover, other provisions in Part C use that same phrase in the pollutant-specific manner suggested by the petitioners: for instance, all agree that a provision setting concentration limits for "any air pollutant in any area to which this part applies," 42 U.S.C. § 7473(b)(4), governs not all pollutants in an area but only those *NAAQS* pollutants for which the area is in attainment, and to which Part C therefore "applies." Pet. App. 59a-61a.[9] And it is undisputed that Congress intended that the PSD permitting requirements would be imposed only on large "industrial facilities"—not small commercial and residential sources of greenhouse gases—that "are finan-

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[7] *See, e.g.*, *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 419 n.2 (2005) (a statute is ambiguous when "its text, literally read, admits of two plausible interpretations").

[8] *See also, e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed ... so that no part will be inoperative or superfluous ....") (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06 (6th ed. 2000)).

[9] *See also, e.g.*, *Powerex Corp* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

cially able to bear the substantial regulatory costs ... [and,] as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air." *Ala. Power*, 636 F.2d at 353.

Nor can EPA's position be deemed a "literal" construction of the statutory text, as EPA has claimed. 75 Fed. Reg. at 31516-17 (Pet. App. 507a-11a). Far from it, EPA's interpretation—unlike the petitioners'—admittedly adds limiting language to the statute, construing the phrase "any air pollutant" in the definition of "major emitting facility" to read instead "any *regulated* air pollutant." Pet. App. 47a-49a (emphasis added). Although EPA argues that this addition is required in order to avoid a host of absurd results that would be caused by applying the PSD program to sources of unregulated pollutants (beyond the absurdities resulting from EPA's current interpretation), see 75 Fed. Reg. at 31516-17 (Pet. App. 507a-11a), the fact remains that EPA's interpretation is by its own terms not a literal one.[10]

That interpretation is also, as Judge Kavanaugh noted, plainly inconsistent with the statutory structure and congressional intent. It finds no support in the surrounding statutory language, and it fails even to address the absurdities identified by the agency, as it would not prevent the millions of enterprises that emit threshold amounts of only greenhouse gases—which Congress undoubtedly did not intend to be subject to PSD permitting requirements—from being

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[10] *See, e.g.*, *Lamie*, 540 U.S. at 538 (cautioning against interpretations that would "read an absent word into the statute"); *cf. Kloeckner* v. *Solis*, 133 S. Ct. 596, 606-07 (2012) (refusing to adopt interpretation of statute, despite government's claim that its construction was needed to avoid "absurd results," when that interpretation "requires our reading new words into the statute" and when an alternative interpretation exists).

swept into the PSD program.[11] The only reasonable approach in this regard is the one suggested by Judge Kavanaugh. That approach would resolve those absurdities by reading the phrase "any air pollutant" in this context to mean "any *NAAQS* pollutant," thereby excluding from the PSD program sources of only greenhouse gas emissions in accordance with the purpose and focus of the statute. Pet. App. 449a-54a.[12]

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[11] When Congress wanted to refer to pollutants "subject to regulation" under the Act, it clearly knew how to do so, as demonstrated by another provision of Part C that requires facilities to adopt the "best available control technology" for "each pollutant subject to regulation under this chapter." 42 U.S.C. § 7475(a)(4); *see also, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 22-23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[12] It should be noted that the alternative interpretation advanced by this petition and Judge Kavanaugh would not preclude all regulation of greenhouse gas emissions in the stationary source context. For example, facilities subject to the PSD permitting program, based on their emissions of NAAQS pollutants, would still be required under this interpretation to adopt the "best available control technology" for greenhouse gas emissions under 42 U.S.C. § 7475(a)(4) in their PSD permit, assuming greenhouse gases are properly considered a "pollutant subject to regulation" for purposes of that provision. Pet. App. 451a. This interpretation would therefore still cover 83% of the national greenhouse gas emissions that would otherwise be covered by EPA's construction—in contrast with EPA's *Tailoring Rule*, which by rewriting the statutory thresholds covers 86% of those emissions. *See* 75 Fed. Reg. at 31540, 31568, 31571, 31600 (Pet. App. 611a, 736a, 748a, 871a). Phrased differently, EPA's approach would impose on affected businesses and regulators the substantial costs associated with the expanded permitting program, delaying (and possibly in some cases effectively prohibiting) construction and dealing potentially serious damage to the national economy, in order to obtain an increase in emissions

The decision below adopts a non-literal interpretation of an ambiguous statutory provision that affirmatively adds language to the statute and admittedly produces absurd results inconsistent with congressional intent, all while categorizing the statute as "unambiguous." See Pet. App. 50a-51a. That decision contravenes basic principles of statutory construction, warranting this Court's review.

B. The Decision Below Allows The Agency To Rewrite Express And Unequivocal Statutory Terms.

However problematic the panel's interpretation of the PSD permitting provision, EPA's response to the absurdities created by that interpretation raises potentially far greater concerns. To address those absurdities, the agency did not reconsider its interpretation of the statute, or apply to Congress for relief. Instead, through the *Tailoring Rule*, it arrogated to itself authority to unilaterally modify express statutory thresholds set forth in the Clean Air Act and exempt from the definition of "major emitting facility," which by its terms applies to sources of 250 tons or more per year of "any air pollutant," those facilities emitting less than 100,000 tons per year of greenhouse gases. 75 Fed. Reg. at 31560-62 (Pet. App. 701a-08a). Nothing in the statute supports or authorizes this new threshold; rather, it is entirely of the agency's own crafting, based on its views of a "reasonable balancing of protection of the environment with promotion of economic development." *Id.* at 31573 (Pet. App. 755a).

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coverage of only 3% over the coverage produced by the alternative interpretation supported by the petitioners and Judge Kavanaugh.

Agencies cannot unilaterally revise acts of Congress in this way. This basic principle, central to our system of separated powers, has been recognized in case after case. See*, e.g.*, *Kloeckner*, 133 S. Ct. at 606-07; *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968); see also *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (an agency faced with a perceived "statutory anomaly" does not "thereby obtain a license to rewrite the statute"). It is indeed the guiding tenet that underlies all of this Court's administrative agency jurisprudence, from *Chevron* to *Mead* to *Brand X*. An agency may exercise only that interpretative authority that is conferred by Congress, and may not construe or apply a statute in a manner contrary to or inconsistent with its terms. See *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 983 (2005); *United States* v. *Mead Corp.*, 533 U.S. 218, 231-33 (2001); *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).[13]

There is no way to reconcile the *Tailoring Rule* with these precedents. That rule alters express and unambiguous statutory terms in a manner that was plainly not contemplated by Congress, and it cannot be regarded as a valid exercise of authority conferred—either explicitly or implicitly—by any provision of the statute. Pet. App. 448a-49a & n.1 (Kavanaugh, J.) ("Put simply, the statute cannot be read to grant discretion to EPA to raise or lower the

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[13] *See also, e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J. concurring) (when faced with an ambiguity, courts must adopt an interpretation that does the "least violence to the text"); *Mova*, 140 F.3d at 1068 ("When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.").

permitting triggers as EPA sees fit."). It is, instead, a bald assumption and exercise of legislative power by an Executive Branch agency and, as the dissenting members of the en banc panel noted, a blatant violation of separation of powers principles. *Id.*

The justification offered by EPA for its action is that it was required to adopt the *Tailoring Rule* as a matter of "administrative necessity," in order to render the PSD program manageable as applied to greenhouse gases. 75 Fed. Reg. at 31541-47 (Pet. App. 617a-39a). However, neither the "administrative necessity" doctrine nor any other principle allows an agency to alter the methods dictated by Congress or to modify or ignore statutory mandates, as EPA has done in the *Tailoring Rule*. Even when strict compliance with a statute might be deemed administratively difficult, or even "impossible," courts may not grant to an agency "general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." *Ala. Power*, 636 F.2d at 357-58; *see also, e.g.*, *Kloeckner*, 133 S. Ct. at 606-07. That is, however, effectively what the court of appeals did here.[14]

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[14] This is, in any event, not a situation in which an agency has taken "incremental" steps that, while not satisfying statutory goals in full, are arguably consistent with the statute and within the bounds of delegated authority. *Cf., e.g.*, *Massachusetts*, 549 U.S. at 524. Rather, the agency in this case has seized authority that is not granted by the statute and adopted a regulation that directly contravenes the statutory language by changing the statutory thresholds established by Congress. Indeed, EPA has determined that it may adopt "permanent exclusion[s]" from the statutory PSD requirements for certain sources that, in the agency's view, are "too small" or "inconsequential in terms of [greenhouse gas] contribution" to merit regulation. 75 Fed. Reg. at 31524 (Pet. App. 541a).

Resort to these doctrines is particularly inappropriate in this case, given that the agency has itself created the purported "necessity" on which it seeks to rely. The only reason EPA needs (in its view) to rewrite the statute, relying on doctrines of administrative necessity and the like, is because of the absurdities created by its own interpretation of the Act. See 75 Fed. Reg. at 31541-47 (Pet. App. 617a-39a). But it is well-established, by this Court's precedent and the law of all circuits, that the proper remedy for an agency interpretation that would create undue administrative difficulties is not for a court to "manufacture for [the] agency a revisory power" but, rather, for the agency to adopt an alternative, reasonable construction of the statute. *Ala. Power*, 636 F.2d at 357-58; see also*, e.g.*, *Kloeckner*, 133 S. Ct. at 606-07. Only that result is consistent with the principles of *Chevron* and its progeny: agencies may in appropriate circumstances have discretion to choose among "reasonable" alternative interpretations of a provision, but they never have authority to select one that is contrary to the statute. *E.g.*, 467 U.S. at 842-43.[15]

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[15] The panel made no attempt to justify the unprecedented interpretive exercise reflected in the *Tailoring Rule*, reasoning that it need not consider that rulemaking once it determined that EPA's interpretation of the PSD provision was "unambiguous." Pet. App. 50a-51a. But this ignores that the validity of EPA's interpretation of the PSD permitting provision is inextricably tied to the validity of the *Tailoring Rule*, as the *Tailoring Rule* provides the sole means by which EPA can, in the agency's view, address the absurdities created by that interpretation. *See* 75 Fed. Reg. at 31541-47 (Pet. App. 617a-39a). Indeed, it is uncontested that, if EPA's interpretation of the PSD provision were set aside, the *Tailoring Rule* would also have to vacated, because EPA's sole rationale for "tailoring" the statutory thresholds would have been eliminated. *See also supra* note 1. As noted previously, *supra* pp. 13-14, in contrast to certain other peti-

The decision below represents a dramatic departure from prior opinions interpreting the Clean Air Act and other statutes, and seriously undermines the Court's jurisprudence in this field, which has consistently emphasized the need for strict adherence by agencies to congressional commands. *E.g.*, *id.*; see also*, e.g.*, *Kloeckner*, 133 S. Ct. at 606-07; *Griffin*, 458 U.S. at 575; *Ala. Power*, 636 F.2d at 357-58. To address this conflict, and reinforce governing administrative law doctrine and basic separation of powers principles, certiorari should be granted.

II. REVIEW IS WARRANTED IN LIGHT OF THE EXTRAORDINARY NATIONAL IMPORTANCE OF EPA'S REGULATION OF GREENHOUSE GAS EMISSIONS.

The panel's decision would warrant review in any event in light of the exceptional national importance of this case. The regulations at issue were adopted as a direct result of EPA's reading of this Court's opinion in *Massachusetts* v. *EPA*, which itself acknowledged the "unusual importance" of questions regarding the scope of EPA's authority and responsibility to regulate greenhouse gas emissions. 549 U.S. at 505-06. Those questions are no less important now that EPA has undertaken greenhouse gas regulation; to the contrary, they have assumed even greater significance.

Whereas the impact of EPA's decision *not* to regulate greenhouse gas emissions in *Massachusetts* was prospective and largely speculative, relating to asserted future risks from climate change, see *id.*, the impacts of the EPA regulations at issue in this case

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tioners, the panel unequivocally held that the petitioners in this case have standing to challenge EPA's interpretation of the PSD provision.

are immediate, concrete, and massive. Those regulations extend EPA's regulatory reach to millions of new sources across the Nation, potentially affecting every sector and every business in the country. See, *e.g.*, 75 Fed. Reg. at 31526, 31597 (Pet. App. 551a, 861a). EPA reports that its current "phase" of regulations will alone give rise to permitting costs of more than $30.5 million per year. EPA, *Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, attach. C at 23 tbl.3-1, 28 tbl.3-2 (2010); see also 75 Fed. Reg. at 31571 (Pet. App. 746a). This does not include the costs to install and operate more expensive equipment and systems to meet PSD permitting requirements (including the "best available control technology" to address greenhouse gas emissions), which are just now evolving and which will likely implicate far greater expenditures. Total costs could, EPA estimates, increase to more than $50 *billion* per year if in future "phases" the agency chooses to implement the PSD program at the statutory threshold of 250 tons per year. 75 Fed. Reg. at 31533, 31540, 31563 (Pet. App. 579a-80a, 611a, 711a-14a). EPA itself acknowledges that these costs—as well as the anticipated significant delays in construction associated with the expanded PSD permitting program—could have "adverse[ ] [e]ffect[s] ... [on] economic development" in the Nation. *Id.* at 31557 (Pet. App. 685a).

The importance of these questions is not, however, limited to economic and practical concerns, but implicates also the jurisprudential consequences of the decision below. That decision represents a drastic break from settled jurisprudence, of both this Court and all circuit courts (including other opinions of the D.C. Circuit), recognizing that agency authority must be strictly circumscribed according to and within the

bounds set by governing statute. *Supra* pp. 25-26. If the panel's opinion stands, and other courts follow its reasoning, the result would be a dramatic expansion of agency power at the expense of Congress. It is not too much to say, as one of the dissenting judges below remarked, that "the bedrock underpinnings of our system of separation of powers are at stake." Pet. App. 462a (Kavanaugh, J.) ("If a court mistakenly allows an agency's transgression of statutory limits, then we green-light a significant shift of power from the Legislative Branch to the Executive Branch.").

This case is one that warrants this Court's review regardless of whether the panel's decision is viewed as right or wrong. The regulatory regime upheld by that decision constitutes the most significant expansion of EPA's authority in the agency's history, and it was adopted in response to this Court's opinion in *Massachusetts*. See Pet. App. 3a-4a. These issues should be considered by this Court before EPA proceeds further down this unprecedented regulatory path.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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