No. 12-1254

In The
Supreme Court of the United States

THE ENERGY-INTENSIVE MANUFACTURERS WORKING GROUP ON GREENHOUSE GAS REGULATION, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

PETITIONERS' REPLY BRIEF

RONALD TENPAS
MORGAN, LEWIS & BOCKIUS
1111 Pennsylvania Ave., NW
Washington, DC 20004
(202) 739-5435

JOHN J. MCMACKIN, JR.*
WILLIAMS & JENSEN, PLLC
701 8th St., NW, Suite 500
Washington, DC 20001
(202) 659-8201
jjmcmackin@wms-jen.com
*Counsel of Record

Counsel for Petitioners

August 6, 2013

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 STATEMENT

Pursuant to the Court's Rule 29.6, undersigned counsel state that the petitioners have no parent corporation and that no other publicly held corporation has ownership in them.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

PETITIONERS' REPLY BRIEF

Our petition raises arguments not just against the interpretation of the Prevention of Significant Deterioration ("PSD") program provisions of the Clean Air Act adopted by the Environmental Protection Agency and the lower court, under which the PSD program must be applied to greenhouse gases, but more fundamentally to the interpretive method each employed. The Agency and lower court's conclusion that they have no choice but to apply the PSD program to greenhouse gases ("GHGs") represents an impermissible construction masquerading as a *Chevron* step-one command of Congress, enabled by a method of interpretation that ignores context, consequences, and directly relevant provisions of the Act.

The errors of interpretive approach underlying this case will affect the cascade of subsequent cases involving the Act and greenhouse gases, making sensible regulation unlikely. The first example is *Center for Biological Diversity v. Environmental Protection Agency*, No. 11-1101, slip op. (D.C. Cir. July 12, 2013), in which the D.C Circuit on various grounds sided with environmental-group petitioners, who argued that exempting so-called "biogenic" greenhouse-gas emissions from the PSD program, as EPA wished to do, "violates the Clean Air Act's plain language." *Id.* at 12. Among the cases likely to come is one claiming that the Agency, despite its opposition to the idea, has no choice but to issue a National Ambient

Air Quality Standard ("NAAQS") for greenhouse gases.[1]

The thrust of our argument is that to include greenhouse gases in "air pollutant" or its variants within the PSD statutory provisions contravenes in various ways *all* of the key statutory components of that program. As *Massachusetts* reminded us, and the government's opposition reiterates, the fact that broad statutory language enables a statute to "be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 532 (2007) (citation omitted). It is vital that the Court clarify, however, that if the unanticipated consequences of an unanticipated application reveal that key statutory provisions have been nullified, contradicted, or rendered absurd or ineffective, this is compelling evidence that the statute's permissible breadth has been exceeded. Stretching a statute beyond its limits does not fill in its gaps; it tears its fabric, and the contravened provisions each represent a thread of that torn fabric.

We argue that the ways in which the statutory provisions are contravened cannot be detected without considering the differences between carbon dioxide and conventional pollutants, for which the

---

[1] *Cf.*, *e.g.*, Rich Raiders, *How EPA Could Implement a Greenhouse Gas NAAQS*, 22 FORDHAM ENVTL. L. REV. 233, 252-285, 308-310 (Spring 2011).

provisions were designed, and, further, considering the effects of these differences when combined with the relevant provisions. We adopted the term "textual consequences" from a recent treatise[2] to identify these effects, but the term "substantive effect" as used by the Court in *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (citations omitted) captures the same idea. "Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.*

The only PSD provision for which there was an inquiry involving any of the facts differentiating carbon dioxide from conventional pollutants and textual consequences concerned the effect of applying to GHGs the 100-ton facility-size determinant within the definition of "major emitting facility," resulting in the explosion in the number of facilities regulated that, in turn, necessitated the Tailoring Rule. It is emblematic of this case in two respects. First, this consequence was not considered as part of an interpretive endeavor going to the question of whether "air pollutant" as used in the PSD part properly includes greenhouse gases; it was used only as a premise for the rewriting of statutory provisions, something the

---

[2] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 352 (Thompson/West 2012).

doctrine would permit only if no reasonable alternatives were available. Second, Congress used 100 tons, as all seemingly agree, to make sure that only the nation's largest industrial facilities, such as power plants and steel mills, were regulated. Notwithstanding that, the Agency, which believes its obligation is to the literal and de-contextualized "one hundred tons of any air pollutant," rather than the contextually-informed meaning of that phrase, *i.e.*, large emitters only, promises to find ways eventually to regulate small emitters, getting as close to the 100-ton threshold as possible. 12-1254 Pet. 14.[3] The Agency is not saving the statute from absurdity; it is disobeying it.

The government's opposition does not argue that the approach to statutory construction we advance is wrong. Nor does it argue that the provisions of the PSD part of the Act are not contravened by the GHG application in the ways we contend. Instead, it ignores our petition's arguments, focusing, instead, in its consideration of PSD GHG applicability, on what we would characterize as far less fundamental and more easily answered arguments of other petitions. In fact, the argument which garners most of its attention, that which would limit "any air pollutant" as used in the PSD provision defining "major emitting facility" to NAAQS pollutants, is largely a diversion from the fundamental question of whether "any air

[3] The government's opposition correctly insists that the Agency "did not disavow the goal of ultimately applying those thresholds according to their literal terms." Govt. Opp. 41.

pollutant" and its variants as used within the PSD provision include greenhouse gases in light of its statute-damaging effects and available statutory alternatives. Moreover, as the principal petition that advances the NAAQS interpretation specifies, this interpretation allows PSD GHG regulation – and the transformation of the nature of PSD regulation carbon-dioxide inclusion entails – for most of industrial America, including petitioners' members. Its relief, therefore, is only 3 percent greater than that afforded by the Tailoring Rule itself. 12-1248 Pet. fn. 12.

The following are the principal points that the government's opposition evades – but that answer many of the contentions the opposition does make.

1. A misperceived *Chevron*-one obligation that ignores the effects of context shift.

It is essential to understand that this confounding case does not represent the normal situation of an agency claiming flexibility to interpret its statute to achieve the statute's policy ends;[4] this is a case of an agency claiming its hands are tied by the statute. Hence, the Agency claims it must apply an intrusive, prescriptive and particularistic means of regulation, one that it has itself described as ponderous and

[4] *See*, *e.g.*, Susannah Landes Foster, Note, *When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency*, 96 GEO. L.J. 1347 (2008).

uncertain (12-1254 Pet. 24-25), even when other means, involving standard-setting, are available under the statute.[5]

The chief source of the error involved is a failure to consider the first part of the two-part *Chevron* step-one determination, requiring that Congress has "directly addressed the precise question at issue" (the second part being that it answered it unambiguously). *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The first part usually does not matter – but it *does* matter when there has been a shift in context, topic or subject matter, as here. When that is present, provisions of apparent clarity can be subjected to a shift in meaning or import by the shift in topic.

Congress, of course, did not consider the question of whether the PSD program should apply to greenhouse gases, nor consider the effects of the differences between carbon dioxide and conventional pollutants as it fashioned the PSD provisions. That is the *reason*, moreover, that the PSD provisions do not make sense for greenhouse gases, and that their meaning or import is transformed when applied to them. The transformation cannot be detected by a "plain language"

[5] The principle alternative involves the sector-by-sector establishment of New Source Performance Standards, which the agency has begun for the power sector. *See American Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011).

analysis, only by one that considers textual consequences.

A related confounding aspect of this case is that it refuses to acknowledge the obvious – the elephant in the room – and its implications. The basis for the absurd consequences doctrine is that courts assume Congress "would not act in an absurd way." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). "The absurdity doctrine rests on the intuition that some . . . outcomes are so unthinkable that the federal courts may safely presume that legislators did not foresee those particular results."[6]

In this case, the cause of the identified absurdity of applying PSD to small emitters is, of course, not Congressional mistake, inadvertence or lack of foresight. It is *Massachusetts'* conclusion that the statute is flexible and capacious enough to apply to greenhouse gases, even if Congress did not expressly contemplate this. But the Court's statement spoke only to the Act's potential for dealing flexibly with a new problem; it was not a mandate to apply existing provisions without an assessment of carbon-dioxide's impact on their function and import. In this case, the interpretive question is no longer about flexibility and reach in general. The question is whether an expansive conception of "air pollutant" that includes carbon

---

[6] *See* John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2394 (2003).

dioxide encompasses phenomena with sufficiently uniform characteristics such that the rules and standards of the PSD program necessarily, without examination, fit the new problem and the newly regulated substance.

A reasonable interpretive process would encompass an examination of all of the key provisions of the PSD part to see if they, like the definition of major emitting facility, have been transformed by the GHG application, perhaps in ways that are destructive of them and of reasonable regulation. The focus should be on those characteristics that distinguish carbon dioxide from conventional pollutants, such as its ubiquity and abundance, which when combined with the 100-ton facility-size specification generate the absurd, Congressionally-uncontemplated outcome. These same distinguishing characteristics drive the intent-defeating expansion of the definition of "best available control technology" ("BACT") (12-1254 Pet. 25-27) and the corollary destruction of its statutory limits (*Id.* at 27-28).

Another distinguishing characteristic involves the fact that carbon dioxide is "well mixed" in the atmosphere, such that its local levels are so transient as to be irrelevant, and the related fact that the mechanisms by which it is said to cause harm likewise are global. It is this characteristic that leads the Agency to inform permitting authorities that they may ignore the complex of statutory provisions requiring measurement and assessment of ambient levels and local environmental impacts, even though

the statute unequivocally requires them for every pollutant "subject to regulation under the Act," and even though they are an essential part of a PSD permitting decision. 12-1254 Pet. 15.

2. Massachusetts' misunderstood use of "unambiguous."

By ignoring the first prong of a *Chevron* step-one analysis, the Agency and lower court deny themselves the ability to see the context-shift-caused meaning-shift at the core of this case – a shift that *creates ambiguity* in the sense of a new meaning revealed through a consideration of new context. They compound their interpretive confusion by a misunderstanding of the Court's use of "unambiguous" in *Massachusetts*.

In *Massachusetts*, the Court, seemingly *contra* to then-unrendered *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) declined to defer to the Agency's conclusion that the term "air pollutant" as defined in the Act should *not* be interpreted to include greenhouse gases. In the course of overturning the Agency's judgment, the Court made use of the term "unambiguous" (*Massachusetts*, 549 U.S. at 529). That use has been taken by the lower court and the Agency to mean that the flexible and capacious statutory definition of "air pollutant" is unambiguous and inflexible with respect to the *mandatory* inclusion of carbon

dioxide in every context. 12-1254 Pet. 38-39.[7] Instead, however, what this Court must have been saying, given that this is all that is linguistically supportable, is that the definition was capacious and flexible enough *to* include greenhouse gases, such that one could not say that it *could* not.

For the lower court in particular, its misunderstanding of this Court's "unambiguous" reference is virtually determinative. 12-1254 Pet. App. 66-67, 71. Rather than, in *City of Arlington's* term, "rigorously applying" a rule that an agency may not adopt an impermissible construction (*City of Arlington*, 133 S. Ct. at 1874), and conducting the fact- and consequence-dependent analysis necessary to determine whether it had, the lower court declared simply that "the legal issues . . . are straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent," and cited *Chevron* for the obligation of the court and Agency to give effect to "the unambiguously expressed intent of Congress." 12-1254 Pet. App. 109.

3. Ignoring of "statutory context."

The misuse of *Massachusetts* and of "ambiguity" by the lower court and the respondents has another

---

[7] In his concurrence in *City of Arlington*, Justice Breyer referred to the normal conception of "ambiguous": "The words are open-ended – *i.e.*, 'ambiguous.'" *City of Arlington*, 133 S. Ct. at 1876.

dimension. They refuse to acknowledge that the *Massachusetts* Court left the essential matter of considering "statutory context" to future cases. As we noted in our petition, the Court in *Brown & Williamson Tobacco* rightly and forcefully emphasized that "ambiguity is a creature not of definitional possibilities but of statutory context." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). Moreover, *Brown & Williamson* was emphasizing this as part of a *Chevron*-one determination: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to a particular statutory provision in isolation." *Id.* at 132.

4. A self-contradictory implied delegation.

Massachusetts is an implied delegation case, finding that the Act is flexible enough to confer authority on the Agency to deal with a newly arising problem that Congress did not examine in writing the Act. The way the Court discussed the matter at issue in *American Elec. Power Co.* reflects the normal conception of such a delegation: " . . . Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants. . . ." *American Elec. Power Co.*, 131 S. Ct. at 2539.

An implied delegation to deal with an emergent, uncontemplated problem is utterly irreconcilable with a *Chevron*-one "direct" and "precise" command to

apply the PSD provisions to the unexamined problem whether or not the resultant regime is sensible or necessary and whether or not such application destroys the integrity of the PSD program itself by contradicting, nullifying, or rendering absurd its key provisions. In addition to obscuring an impermissible construction, the facile assertion by the Agency and lower court of a *Chevron*-one Congressional command defeats the political accountability *Chevron* was meant to enforce and an implied delegation demands. Perhaps more than any other single imperative, this case calls for clarification of the *terms and scope* of the implied delegation to address climate change under the CAA, the Agency's responsibilities under that delegation, and the delegation's relationship to a *Chevron*-one command.

5. The ignored "vertical" dimension of the transformation of PSD regulation.

While the government's opposition addresses – inadequately – the "horizontal" transformation of the PSD program involving the dramatic expansion in the number and type of facilities covered, it ignores the "vertical" transformation involving an even more significant expansion into the operations of the facilities it covers. That is, also transformed is the matter of how deeply PSD regulation intrudes into industrial operational and design decisions. As set out in our petition, the application to carbon dioxide of the broadly worded terms of the BACT definition turns a relatively narrow program into an unprecedented

regime with authority over every aspect of industrial operations, and every aspect of the design of industrial facilities, that affects the production of carbon dioxide *or* the consumption of energy. 12-1254 Pet. 23-29. All such aspects may be prescribed in a permit, and all are subject to a public hearing.

This is an unprecedented level of intrusion, and it is difficult to imagine a more significant transformation of a regulatory statute. To say the least, this is not something Congress anticipated, much less directly and precisely commanded under *Chevron* one. Given alternative means of regulation under the Act, it is also wholly unnecessary. A properly holistic interpretive approach, encompassing statutory context and substantive effect, as this Court's precedent requires, would have shown PSD regulation of carbon dioxide and other greenhouse gases to be an impermissible construction of the Clean Air Act, producing a form of regulation no congress would enact, no other country has attempted, and that is indefensible as a matter of regulatory policy.

6. Carbon Policy and the Clean Air Act.

Between respondents' claim of statutory compulsion and a congressional command, and petitioners' of an impermissible construction, lies a fundamental difference in interpretive approach. It is the difference between literalism and de-contextualization on the one hand and an approach encompassing differentiating facts, consequences, judgment, and responsibility

on the other. Without the latter approach, there is no rational basis, for instance, for faithful interpretation of trust documents by a trustee facing radically changed circumstances as in a situation of *cy pres* application, nor would there be a basis for reasonable application of the Fourth Amendment to modern means of electronic surveillance. *Cf.*, *e.g.*, *Town of Brookline v. Barnes*, 327 Mass. 201, 97 N.E.2d 651 (1951); *Kyllo v. U.S.*, 533 U.S. 27 (2001). Similarly, without it there is little hope for sensible, responsible, and accountable application of the Clean Air Act to carbon dioxide.

Respectfully submitted.

RONALD TENPAS
MORGAN, LEWIS & BOCKIUS
1111 Pennsylvania Ave., NW
Washington, DC 20004
(202) 739-5435

JOHN J. MCMACKIN, JR.*
WILLIAMS & JENSEN, PLLC
701 8th St., NW, Suite 500
Washington, DC 20001
(202) 659-8201
jjmcmackin@wms-jen.com
**Counsel of Record*

Counsel for Petitioners

August 6, 2013