No. 12-1248

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

REPLY BRIEF

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REPLY BRIEF

The briefs in opposition filed in response to the petition for a writ of certiorari in this case are more telling for what they do not say than for what they do. They do not disagree that the interpretation of the Clean Air Act adopted by the D.C. Circuit produces "absurd results," despite scores of cases from this Court and others holding that such an interpretation cannot be accepted—and clearly cannot be deemed the "unambiguous" reading, as the panel characterized its construction. Pet. 19-22. They do not dispute that the panel decision effectively grants the U.S. Environmental Protection Agency (EPA) perpetual discretion to rewrite explicit statutory directives governing the Act's coverage whenever and to whatever extent the agency deems it "reasonable" to do so, contrary to a long line of precedent holding that agencies may not exercise such legislative authority. Pet. 26-27. And the briefs do not seriously challenge, nor could they, that this case is of exceptional national importance, concerning as it does "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." Pet. 2. In short, the grounds justifying this Court's review appear essentially uncontested.

The opposition briefs are instead largely devoted to the merits of the parties' competing interpretations of the "prevention of significant deterioration" (PSD) provision of the Act. They argue at length that EPA's interpretation of that provision is "compelled" by the statute, and constitutes the provision's "unambiguous" and "literal" meaning (notwithstanding the ab-

surd results it admittedly produces), and that all proposed alternative constructions are invalid and unreasonable. Federal Br. in Opp. (U.S. Br.) 15-18, 32, 42; Environmental Br. in Opp. (Env. Br.) 2, 13, 30; State Br. in Opp. (State Br.) 11-17. These arguments are wrong, as explained previously, Pet. 22-24; moreover, this discussion simply demonstrates that the legal issues presented by this case are weighty, substantive, and worthy of review.

The briefs also confirm that the petition in this particular case, *American Chemistry Council* v. *EPA*, No. 12-1248, raises unique and discrete questions of statutory construction, distinct from those presented by petitions in the other related cases. U.S. Br. 16-17; Env. Br. 29-30; State Br. 11. The other petitions all address regulations adopted by EPA in response to *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), and they all challenge, either directly or implicitly, EPA's interpretation of that decision. This petition, by contrast, challenges an entirely different set of predecessor rules, first issued more than three decades ago, interpreting the PSD permitting provision. Pet. 6-14. It does not demand that *Massachusetts* be reconsidered, or that EPA be divested of all authority to regulate greenhouse gas emissions from stationary sources; rather, it seeks to harmonize *Massachusetts*'s holding with the pre-existing statutory and regulatory framework. Pet. 3-5. This petition can indeed properly be viewed as an independent but essential predicate to the others, particularly insofar as the petitioners in this case were the *only* ones found to have standing to challenge EPA's underlying interpretation of the PSD provision.

Other petitions present issues that are worthy of this Court's review, for the reasons set forth therein. This petition, however, raises unique issues that

should—and arguably must—be resolved independently of the others. For these reasons, the Court should grant review of this case, with briefing and argument to be coordinated, but not consolidated, with the proceedings in any other related cases to be addressed.

I. THE DECISION BELOW CONFLICTS WITH OTHER OPINIONS, ADOPTING AN INTERPRETATION OF THE CLEAN AIR ACT THAT PRODUCES ABSURD RESULTS WHILE REJECTING AN ALTERNATIVE CONSTRUCTION THAT AVOIDS THOSE ABSURDITIES.

The panel's decision, as explained in the petition, conflicts with well-settled principles of statutory construction. Pet. 19-27. That decision accepted EPA's interpretation of the PSD provision despite the fact that, by the agency's own admission, that interpretation produces "absurd results" and notwithstanding the availability of an alternative construction that avoids those results. *Id.* The panel then compounded the error by allowing the agency to address the absurdities by rewriting (through the *Tailoring Rule*) separate provisions of the Act. *Id.* In both respects, the panel's decision runs counter to a long line of precedent.

The briefs in opposition, rather than addressing these conflicts directly, attempt to elide them by focusing not on the problems with EPA's construction but on the merits of the alternative interpretation proposed by petitioners. *E.g.*, U.S. Br. 31-43. None of these arguments, however, render the issues presented by this case—implicating fundamental separation of powers principles—any less important or less worthy of this Court's review. In any event, particularly in light of the "absurd results" admittedly produced

by EPA's construction, it is clear that petitioners' interpretation is not only "reasonable" but required by the statutory language.

1. Petitioners' interpretation follows naturally from the statutory language, and avoids the absurd results that EPA's construction compels. The PSD provision imposes permitting requirements on any "major emitting facility … in an[ ] area to which this part [Part C] applies." 42 U.S.C. § 7475(a). This phrase can, on its face, be interpreted in one of two ways: as covering all facilities that emit "major" amounts of *any* pollutant in an attainment area, regardless of whether Part C "applies" to that pollutant, or alternatively only those facilities that emit "major" amounts of a NAAQS pollutant for which the area is in attainment (*i.e.*, a pollutant to which Part C "applies"). While EPA asserts that the former reading is compelled, the latter—the one advanced by these petitioners, which would have the effect of limiting PSD permitting to facilities emitting NAAQS pollutants—is at least equally reasonable, and equally compatible with the statutory language (and would, in addition, avoid both the absurd results produced by the agency's interpretation and any need to rewrite other statutory thresholds). Indeed, EPA itself initially proposed the latter interpretation in a 1979 rulemaking notice, before changing course and embracing the former in final regulations adopted in 1980. Pet. 9-10.[1]

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[1] This change in position—which calls into doubt EPA's position that its interpretation is "unambiguous" and "compelled"—is ignored by the United States, which asserts incorrectly that EPA has followed its interpretation of the PSD provision "[s]ince 1978." U.S. Br. 31-32.

Petitioners' interpretation finds added support in other provisions of the Act. It is undisputed, for example, that a separate provision directing EPA to set concentration limits for "any air pollutant in any area to which this part applies," 42 U.S.C. § 7473(b)(4), does not require the agency to set limits for *all* air pollutants in any area to which Part C applies. Pet. App. 59a-61a. Rather, it requires limits only for those NAAQS pollutants for which the area is in attainment. *Id.* A similar interpretation should apply to the PSD provision, given that both provisions use the same modifying language ("in any area to which this part applies"). See *Powerex Corp* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). This interpretation would, in addition, still allow greenhouse gases to be regulated as part of the PSD permitting program, as part of the "best available control technology" requirement applicable to any air pollutant "subject to regulation under [the Act]." 42 U.S.C. § 7475(a)(4).[2]

The interpretation advanced in this petition is thus not only "textually-defensible," U.S. Br. 41, but comports fully with the statutory language, structure, and purpose. It is perhaps for these reasons that none of the briefs in opposition actually challenge *this* interpretation, choosing instead to address the approach advocated by other petitioners. *E.g.*, U.S. Br. 32-34. That approach would hold that the phrase "any air pollutant"—as used in the separate statutory definition of "major emitting facility," 42 U.S.C. § 7479(1)—must be interpreted to exclude greenhouse gas emissions. U.S. Br. 32-34. Respondents argue at

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[2] This interpretation also would not preclude regulation of greenhouse gas emissions under other parts of the Act, including section 111. *Cf. Am. Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2537-38 (2011); U.S. Br. 38-39; State Br. 19-20.

length that this is inconsistent with *Massachusetts* v. *EPA*, as it adopts a more limited construction of "any air pollutant" than that discussed in this Court's opinion.[3] U.S. Br. 32-34.

These criticisms, of dubious validity regardless, are irrelevant here. The interpretation advanced in *this* petition does not concern the statutory definition of "major emitting facility," 42 U.S.C. § 7479(1); rather, it interprets the language of the separate PSD permitting provision, *id.* § 7475(a), concluding that a "major emitting facility" is subject to PSD permitting only if it emits a NAAQS pollutant to which Part C applies in the area. Nothing in the briefs in opposition casts doubt on the validity or reasonableness of this construction.[4]

2. The same cannot be said for EPA's interpretation. That interpretation, as explained in the petition, cannot be deemed a reasonable reading of the PSD provision given that in the agency's own view

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[3] The United States acknowledges in a footnote that the interpretation advanced by these petitioners relies on the phrase "in any area to which this part applies" in the PSD provision, but it then summarily—and inexplicably—discounts that construction on grounds that the phrase does not appear in the definition of "major emitting facility." U.S. Br. 36 n.15. But, of course, the phrase is equally effective to modify the term "major emitting facility," whether it appears in a substantive provision (as in the PSD provision) or a definitional clause.

[4] Whereas other petitioners would read the phrase "any air pollutant" to exclude greenhouse gases categorically, Judge Kavanaugh argued that the phrase should be read, in the context of the PSD program, to mean "any NAAQS air pollutant." Pet. App. 449a-54a. This construction, like that proposed in this petition, would allow greenhouse gas emissions to be regulated through the "best available control technology" requirement of the PSD program, *id.*, and would not preclude their regulation under other provisions of the Act.

the interpretation produces "absurd results" and requires rewriting of separate statutory provisions "to try to make it all work out." Pet. App. 448a; see Pet. 18-29.

a. All agree that the interpretation proposed by EPA produces "absurd results," by sweeping into the PSD program millions of commercial and residential facilities that Congress never intended to be subject to PSD permitting requirements. *E.g.*, U.S. Br. 37. All also agree that the interpretation proposed in this petition—restricting PSD permitting to sources of NAAQS pollutants—would avoid these problems. *E.g.*, *id.* The panel was therefore required, under a long line of precedent, *e.g.*, *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982), to reject EPA's interpretation in favor of the alternative offered by petitioners. Pet. 19-22. Yet, the panel did precisely the opposite, accepting EPA's construction and the absurdities with it.

Respondents offer no real rejoinder to this analysis. Instead, echoing the panel decision, they repeatedly characterize EPA's interpretation as the "unambiguous" and even "literal" reading of the statute. *E.g.*, U.S. Br. 15-18, 32, 42. Neither description fits. The interpretation is not "literal" because it construes the phrase "any air pollutant" in the definition of "major emitting facility" to mean "any *regulated* air pollutant"; it is not "unambiguous" because the PSD provision is at least equally susceptible to the interpretation advanced by these petitioners. Pet. 22-25. It is, moreover, well-settled that an interpretation that produces absurd results *cannot* be deemed the "unambiguous" meaning of a statute, or adopted even if a "literal" construction. Pet. 20-21. There is simply no way, in light of the acknowledged absurdities caused by EPA's interpretation, that the panel could have

properly adopted that interpretation—much less deemed it the "unambiguous" reading of the statute.[5]

State respondents suggest that these absurdities may be overlooked because they related principally to concerns over "immediate application" of the PSD program to all sources of greenhouse gas emissions at the statutory thresholds. State Br. 12-14. But, regardless of *when* EPA anticipated that the absurdities would arise or would be of greatest concern, the pertinent point—and only relevant one—is that EPA's interpretation produces absurd results, meaning that an alternative construction must be sought and adopted. See *Griffin*, 458 U.S. at 575. In any event, any claim that the absurd results are merely "temporary" rings hollow in light of EPA's recent decision to extend the modified thresholds through at least 2015, 77 Fed. Reg. 41051, 41064 (July 12, 2012), and assertion of authority to craft *permanent* exemptions for certain sources, 75 Fed. Reg. 31514, 31524 (June 3, 2010) (Pet. App. 541a-42a).

b. Respondents acknowledge that, in the *Tailoring Rule*, EPA assumed authority to modify the statutory emissions thresholds established by Congress to create exemptions from the permitting requirements based on the agency's judgment of the costs and benefits of regulation and how "[t]o better

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[5] The United States suggests in a footnote that, even if EPA's interpretation is not "unambiguous" under step one of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), it should still be upheld as a "reasonable" exercise of the agency's interpretive authority under step two. U.S. Br. 38 n.16. Ignoring for the moment that this argument was not presented in EPA's brief in this case below, it cannot be "reasonable" for an agency to adopt an interpretation of a statute that produces absurd results where an alternative interpretation would avoid those absurdities.

achieve Congress's purpose." U.S. Br. 12. This approach flatly contradicts fundamental separation of powers principles. Pet. 25-27.[6]

Respondents do not, for the most part, even attempt to justify EPA's rewriting of the Clean Air Act through the *Tailoring Rule*, asserting instead that the validity of that action should not be addressed because the panel found that no petitioner had standing to present an independent challenge to it. *E.g.*, U.S. Br. 43. But that holding, even if correct, does not bar these petitioners from addressing the *Tailoring Rule* as part of their challenge to EPA's interpretation of the PSD provision. Pet. 28 n.15. The *Tailoring Rule* was promulgated to address the "absurd results" produced by that interpretation, and if that interpretation is invalidated the *Tailoring Rule* would also have to be vacated. *Id.* Since these petitioners have standing to challenge EPA's interpretation of the PSD provision, they can, of course, address the impact of that challenge, if successful, on the *Tailoring Rule*. *Id.*

Respondents also suggest that the *Tailoring Rule* might be upheld as a valid exercise of agency authority under the "administrative necessity" or "step-by-step" doctrines. State Br. 14-17. Neither these nor any other doctrines, however, grant an agency authority to modify and override express and unequivocal statutory directives, as EPA has done here. Pet. 27-28. That is particularly true where, as here, an

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[6] As Judge Kavanaugh noted in a recent opinion addressing the extraordinary discretion granted to EPA by the decision in this case: "What we are left with now is a statute that is a far cry from what Congress intended or enacted. So EPA is necessarily making it up as it goes along. That is not how the administrative process is supposed to work." *Ctr. for Biological Diversity* v. *EPA*, No. 11-1101, 2013 WL 3481511, at *11 (D.C. Cir. July 12, 2013) (Kavanaugh, J., concurring).

alternative interpretation exists that would avoid the absurdities and, therefore, "obviate[ ] the need for the EPA to phase in the statutory standard." U.S. Br. 37. In this circumstance, it is not merely "wise policy" to adopt the alterative interpretation, *id.*, but affirmatively mandated.

II. THIS CASE RAISES ISSUES OF EXCEPTIONAL NATIONAL IMPORTANCE.

Review is additionally warranted, as explained in the petition, because this case is clearly of "exceptional national importance." Pet. 29-31. The United States, in fact, appears to all but concede this point in its brief. See U.S. Br. 18.

Other respondents, however, seem to argue that review should be denied because the new EPA's regulations have not yet had a substantial "practical" impact, and "fewer than 200 sources, all of them large emitters, applied for PSD permits for greenhouse gas emissions in the first two years of the program." Env. Br. 3. But, while the *Tailoring Rule* has clearly suppressed the number of permit applications, the fact remains that, under EPA's interpretation, EPA's regulatory reach now extends to *millions* of new sources, including "smaller" commercial and residential facilities, State Br. 12-13, with associated costs estimated by EPA itself to run into the tens of billions of dollars annually. See Pet. 29-30.

Respondents also suggest that the Court should delay consideration of EPA's regulatory program because the program is at its "beginning" and is "transitional," subject to further revision at the agency's discretion. State Br. 1, 12. Quite the contrary, these considerations confirm that this Court's review is urgently needed, to address at the outset whether the agency does have the authority to rewrite the Act to

revise the scope of the PSD program. If this issue is not addressed now, EPA will simply continue to create exemptions to try to implement its impermissible interpretation of the Act. The most recent example, but certainly not the last, is EPA's *Deferral Rule*, which temporarily exempted sources of biogenic carbon dioxide from the PSD program because, the agency said, it was not prepared at the time to decide whether and how to regulate such emissions; the D.C. Circuit invalidated the rule on grounds that EPA had not offered an adequate rationale for creating the exemptions, with Judge Kavanaugh noting in concurrence that the "absurdities and anomalies" identified by the agency could be traced back to its construction of the PSD provision and "just underscore how flawed EPA's interpretation was from the get-go." See *Biological Diversity*, 2013 WL 3481511, at *9-11. Review should be granted immediately, to stem the tide of these cases, provide needed clarity to the regulated community, and ensure these questions are addressed by the Court before EPA proceeds further.

CONCLUSION

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

Respectfully submitted,

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