No. 12-1146

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

F. WILLIAM BROWNELL
(*Counsel of Record*)
NORMAN W. FICHTHORN
HENRY V. NICKEL
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., NW
WASHINGTON, D.C. 20037
(202) 955-1500
bbrownell@hunton.com

August 6, 2013 *Counsel for Petitioner*

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner hereby incorporates by reference the disclosure statement filed with its petition for a writ of certiorari on March 20, 2013.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Regulations:

Federal Register:

INTRODUCTION

The Brief for the Federal Respondents in Opposition (Government Response) mixes issues and arguments. As to the key issue raised by the Utility Air Regulatory Group (UARG) (in No. 12-1146) – *i.e.*, whether *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), compelled the U.S. Environmental Protection Agency (EPA) to include greenhouse gases (GHGs) in the Clean Air Act's (CAA or Act) Prevention of Significant Deterioration (PSD) and Title V permit programs for stationary sources – the Government Response confirms the need for certiorari.

The Government Response addresses nine petitions for certiorari (including UARG's) that arise from several different rules, consolidated below in four cases. The petitions filed by other parties raise technical, legal, and policy issues different from those raised by UARG. For example, some petitions address the basis and authority for EPA's finding that GHGs endanger public health. Another argues that EPA should have submitted the endangerment finding to the Science Advisory Board. Others contend that EPA's response to requests for reconsideration of the endangerment finding were flawed or that this Court should reconsider *Massachusetts*.

UARG's petition does not seek reconsideration of *Massachusetts* or address EPA's endangerment rule. Rather, it focuses on the central legal predicate for the lower court's unprecedented expansion of CAA regulatory authority over stationary sources: that court's decision that *Massachusetts* – a case that

dealt only with GHG regulation under the CAA Title II mobile source program – compels regulation of GHGs under the Title I PSD and Title V programs, even though that interpretation fundamentally transforms those programs by requiring regulation of an air pollutant and sources that Congress never intended to regulate under those programs. UARG briefed and argued below the question whether GHGs are a PSD and Title V "air pollutant," but the circuit court sidestepped UARG's arguments on the grounds that it lacked standing to challenge this radical expansion of CAA jurisdiction.

On the key issue UARG raised, Judge Kavanaugh observed that the fact that "[g]reenhouse gases may qualify as 'air pollutants' in the abstract" does not resolve how Congress used the phrase "air pollutant" in any individual, specialized CAA program. Pet. App. 650a-51a & n.3 (Kavanaugh, J., dissenting from denial of rehearing en banc). If, as UARG contends, the D.C. Circuit erred in concluding that *Massachusetts* compels inclusion of GHGs in the PSD and Title V stationary source programs, then any conceivable basis for the court's dismissal of UARG's petition for review on standing grounds disappears.

Equally important, a merits holding – here, that GHGs "are regulated under PSD and Title V pursuant to automatic operation of the CAA," Pet. App. 96a, as a result of *Massachusetts* and EPA's response to it – cannot create a standing bar. Inherent in any challenge to an agency's assertion of regulatory authority is the possibility of redress if the challenger's argument prevails. The lower court departed from

this Court's jurisprudence by refusing, based on a putative *Chevron* step one[1] statutory interpretation, to engage petitioner's argument about the permissible scope of EPA's statutory authority.

ARGUMENT

As the D.C. Circuit did, the Government here largely evades or misapprehends UARG's arguments. It does so by (1) ascribing to UARG arguments other petitioners present that UARG has never advanced or adopted and (2) ignoring or mischaracterizing critical elements of UARG's arguments. The Consolidated Brief in Opposition of Environmental Organization Respondents (Environmentalists' Response) does the same.

In particular, UARG does *not* contend (as some other petitioners contend here and argued below) that EPA lacks authority to regulate GHGs under the CAA's PSD program on the grounds that GHGs are not "criteria" pollutants (*i.e.*, pollutants for which EPA established national ambient air quality standards (NAAQS)). See, *e.g.*, Government Response at 34 ("In [petitioners'] view, the only purpose of the PSD program is to regulate criteria air pollutants, *i.e.*, the six air pollutants regulated under [NAAQS]."") (incorrectly citing UARG's petition (No. 12-1146)); *id.* at 35 (responding to petitioners' arguments on grounds that those arguments "proceed[]

---

[1] *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984).

from [this] false premise"). Rather, UARG's position is that the PSD program's congressional purpose, as reflected in the Act's language and structure, is to regulate those pollutants – and only those pollutants – that are emitted by a relatively small number of large facilities and that deteriorate ambient air quality. This statutory context is critical to identifying the air pollutants to which PSD and Title V apply. GHGs are not such a pollutant.

As Judge Kavanaugh observed, this Court in *Massachusetts* "did not purport to say that every other use of the term 'air pollutant' throughout the sprawling and multi-faceted [CAA] necessarily includes greenhouse gases." Pet. App. 650a. Instead, "[e]ach individual [CAA] program must be considered in context." *Id.* *This* understanding of the Act is at the heart of UARG's argument.

This is not to say that "air pollutant," as defined at 42 U.S.C. § 7602(g), is "ambiguous."[2] UARG does not argue that it is. Indeed, it is not surprising that a general definition in a statute that includes multiple and diverse programs in which that term appears would be "capacious." *Massachusetts*, 549 U.S. at 532.

---

[2] Cf. Government Response at 38 n.16 ("Because the term 'any air pollutant' is not ambiguous, petitioners' reliance … on *Environmental Defense* v. *Duke Energy Corp.*, 549 U.S. 561 (2007), is misplaced."); Environmentalists' Response at 33-34 (same).

It is precisely *because* "air pollutant" as construed in *Massachusetts* unambiguously includes GHGs such as carbon dioxide that it was imperative that EPA – consistent with its historic practice and traditional canons of statutory interpretation – evaluate the universe of "air pollutants" to which the PSD and Title V programs apply and keep those programs' size and scope within the bounds Congress intended. EPA acknowledged that "applying PSD requirements literally to GHG sources … *would result in a program that would have been unrecognizable to the Congress that designed PSD*." Pet. App. 345a (emphasis added); see also *id.* at 379a-80a (regulating GHGs under Title V "contrary to congressional intent" and "unrecognizable"). But, far from excluding GHGs from the PSD and Title V programs as contrary to congressional purposes, EPA interpreted *Massachusetts* and the effect of EPA's motor vehicle GHG rulemaking as *compelling* PSD and Title V regulation of stationary sources' GHG emissions, notwithstanding that regulation's admitted transformative consequences for PSD and Title V that cannot coexist with Congress's clear intent.

UARG advanced below, and presents here, an alternative understanding of the statute that – in contrast to EPA's "regulatory modification of the … [statutory PSD and Title V] thresholds" – *can* be "reconciled with the literal text of all the relevant CAA provisions," Government Response at 42, while avoiding the problems EPA tried to fix through its regulatory amendment of the statutory text that establishes those unambiguous numerical thresholds.

The court below and Respondents here refused to engage this understanding of the statute. Certiorari should be granted to allow review of this essential understanding, which is faithful to all relevant statutory language and to Congress's purposes.

I. Certiorari Is Warranted and Necessary To Address the Decision Below that *Massachusetts* Compels a Radical Expansion of CAA Regulation of Stationary Sources.

Under *Massachusetts*, GHGs fall within the "capacious definition of 'air pollutant'" in 42 U.S.C. § 7602(g). *Massachusetts*, 549 U.S. at 532. UARG does not ask the Court to revisit or reconsider *Massachusetts* in any respect. All that UARG argues here is that, while GHGs are an "air pollutant" within the general provision defining that term, 42 U.S.C. § 7602(g), they are *not* an "air pollutant" that Congress intended to regulate under the Act's PSD or Title V provisions.

The Government argues that "[u]nder petitioners' interpretation, the term 'any air pollutant' would *include* greenhouse gases" under one CAA program (Title II motor vehicle emission standards); "*exclude* greenhouse gases" under another (PSD); "and would again *include* greenhouse gases" in a third (42 U.S.C. § 7411 stationary source standards). Government Response at 39 (emphases in original). The Government condemns this interpretation because petitioners purportedly failed to describe "any indication from Congress that it was using the term ["air pollutant"] differently." *Id.* Had the Government taken proper note of UARG's argument, the "indication

from Congress" that EPA must ensure that pollutant coverage fits program purpose would have been perfectly evident.[3]

Congress designed the PSD program for protection of localized "ambient" air quality – put simply, the air that people *breathe* – in certain geographically defined areas (*i.e.*, air quality control regions) within a state.[4] To this end, 42 U.S.C. § 7471 provides that "each applicable implementation plan shall contain emission limitations and such other measures as may be necessary … to prevent *significant deterioration of air quality* in each [air quality control] region." (Emphasis added.) Thus, on the face of the statutory PSD provisions, Congress provided an unambiguous "indication" that the PSD program is di-

---

[3] As Judge Kavanaugh observed, "the [CAA] is a very complicated statute encompassing several distinct environmental programs"; thus, "[i]t is no surprise … that the motor vehicle emissions program and the [PSD] program … employ," as do other "parts of the Act," "a term like 'air pollutant' in a context-dependent way." Pet. App. 654a. He therefore emphasized the necessity of judicial "caution before reflexively importing the interpretations applicable to one [CAA] program into a distinct [CAA] program." *Id.* at 655a.

[4] States have "primary responsibility" to assure that the ambient air within their borders (which area may be subdivided into "air quality control region[s]") attains the NAAQS. 42 U.S.C. § 7407(a). "Ambient air" is "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e); see also *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 65 (1975) ("'ambient air[]' … is the statute's term for the outdoor air used by the general public").

rected *not* at regulation of emissions, such as GHG emissions, that EPA determines create endangerment due to their uniform presence throughout the global atmosphere, but at regulation of emissions "as … necessary … to prevent significant deterioration" of the quality of the air that people breathe.

The Government dismisses the fact that EPA interprets, in its codified regulations, the term "any pollutant," as used "in the CAA provision addressing visibility protection, as including only 'visibility-impairing pollutants,'" by observing that "context is critical." Government Response at 39-40 n.17. "Because the visibility program regulates only visibility-impairing pollutants," the Government states, "that portion of the statutory scheme does provide an indication that Congress was using the term 'any pollutant' in a more limited manner." *Id.*

Just so. Context *is* critical. And, in the "context" of the Act's PSD provisions, not only "the statutory scheme" but also the statutory text provide dispositive "indication" that Congress limited PSD regulation to those "air pollutants" that fit a program to prevent deterioration of ambient air quality caused by emissions from a relatively small number of large industrial sources. On its face, that statutory text precludes regulation of a substance like carbon dioxide, which does not "deteriorate" the air people breathe but inclusion of which expands program cov-

erage to a degree that contradicts congressional intent.[5]

Emissions of the NAAQS criteria pollutants can deteriorate the air people breathe. So, too, can emissions of other, non-criteria air pollutants that EPA has regulated under the PSD program since that program's inception.[6] Indisputably, however, emissions of carbon dioxide do *not* deteriorate ambient air quality. EPA has never argued to the contrary. Given this, and given that the statutory PSD provisions regulate only those air pollutants that deteriorate the quality of the air people breathe, including car-

---

[5] While "context makes it clear that Congress intended to [limit PSD to] … air pollutant[s] regulated under the CAA," Government Response at 37-38, context likewise establishes that Congress limited PSD to such pollutants that are emitted by a relatively small number of large industrial sources. The Environmentalists' Response contends that EPA regulations "limit[ing]" the CAA visibility protection program to "'visibility-impairing' pollutants … merely reflects explicit statutory text limiting the scope of the visibility provisions," while claiming "[n]o similar limitation on the term 'any air pollutant' is found" in the PSD provisions. Environmentalists' Response at 36-37. But, as explained herein, there *is* such "explicit statutory text" limiting PSD to air pollutants that *deteriorate* ambient air quality.

[6] As the Environmentalists' Response notes, a "wide variety of regulated, non-NAAQS pollutants," *e.g.*, fluorides and sulfuric acid mist, have long "been subject to PSD." Environmentalists' Response at 34 n.17. Left unmentioned, however, are that emissions of these non-NAAQS pollutants deteriorate ambient air quality and that (unlike GHGs) they are emitted in significant quantities only by a relatively small number of large sources.

bon dioxide for regulation under the PSD program is plainly unlawful.

II. Certiorari Is Warranted and Necessary To Address the D.C. Circuit's Conclusion that, in Light of That Court's Merits Decision, UARG Has No Standing To Challenge EPA's GHG Rules.

How could it possibly be, UARG asked the court below, that EPA could construe the PSD and Title V provisions in a manner that ignores the fundamental distinction between GHGs and every other "air pollutant" regulated under those programs, when *EPA itself* expressly acknowledged that treating GHGs the same way it treats other pollutants under PSD and Title V would expand those programs' coverage to capture tens of thousands of small sources that Congress intended *not* be regulated under PSD and Title V? UARG never got an answer to this question.

Rather than resolve UARG's question in deciding a *Chevron* step one challenge to the Timing and Tailoring Rules based on a well-established principle of statutory construction, see UARG Pet. (No. 12-1146) at 22-23, 28, 30-31, the D.C. Circuit concluded that UARG lacked standing to ask the question. The court reasoned that once EPA made its GHG endangerment finding and regulated vehicles' GHG emissions under CAA Title II, GHGs became an air pollutant that was subject to the same stationary source regulation as every other pollutant under the CAA Title I PSD and Title V permitting programs, and that this occurred "by automatic operation of the statute." Pet. App. 101a. And because the EPA actions being challenged (*i.e.*, the Timing and Tailoring

Rules) "actually mitigate[d] Petitioners' purported injuries," the court continued, those challenged actions inflicted no injury that could be redressed by a favorable decision. *Id.* That is, having *first* interpreted the CAA as compelling EPA to regulate GHGs under the PSD and Title V programs the same as every other pollutant (even though EPA had found such regulation would contradict congressional intent), the court below concluded that UARG lacked standing to challenge that interpretation, as it was the Act itself – not anything EPA had done – that harmed UARG.

In other words, the D.C. Circuit here announced a remaking of standing jurisprudence in the administrative law context: It will henceforth reject, on standing grounds (and without any analysis), *Chevron* step one (or step two) challenges whenever the court differs from the challenger in its view of the statute on *Chevron* step one grounds.[7] It was on this basis that the D.C. Circuit excused itself from engaging any of UARG's arguments concerning why the CAA could *not* be interpreted as authorizing (much less compelling) EPA to regulate GHGs as a PSD and Title V air pollutant and why such an interpretation violates congressional intent.

For its part, the Government now concedes UARG members have suffered an "injury." Government Re-

---

[7] Another, even more recent application of the D.C. Circuit's startling new standing jurisprudence is *Texas* v. *EPA*, __ F.3d __, 2013 WL 3836226 (D.C. Cir. July 26, 2013).

sponse at 45, 46. The Government notes UARG's argument that acceptance of UARG's understanding of the statute would "'establish[] that [GHGs] are not an air pollutant that is subject to PSD and Title V'" regulation at all, with the consequence that the "present injury caused by" such regulation "would be redressed." *Id.* The Government contends, however, that "[t]hat injury … arises not from the Timing or Tailoring Rule, but from the EPA's interpretation of the PSD (and Title V) triggering mechanism," an interpretation it says was "embodied in separate rules first promulgated in 1978." *Id.* On this basis, the Government argues UARG "cannot rely on the injury caused by the EPA's interpretation of the PSD triggering mechanism to establish [its] standing to challenge the Timing and Tailoring Rules." *Id.* at 46.

But EPA never did, in 1978 or at any time *before* it promulgated the Timing and Tailoring Rules, set forth an interpretation of the CAA under which a substance like carbon dioxide, which indisputably does *not* deteriorate ambient air quality, must be regulated under PSD as if it were an air pollutant that *does* deteriorate ambient air quality. The only interpretation EPA adopted in 1978, when it first promulgated rules implementing the statutory PSD provisions, was its clarification that "any air pollutant," as used in the definition of "major emitting facility" at 42 U.S.C. § 7479(1), was limited to "any air pollutant regulated under the Clean Air Act" (as included in EPA's regulatory definition of the equivalent term, "major stationary source"). See 43 Fed. Reg. 26,380, 26,382 (June 19, 1978). EPA said noth-

ing to suggest that an airborne substance that did *not* deteriorate ambient air quality would be deemed an air pollutant for which regulation *under the PSD program* would be required, much less that its inclusion in PSD would occur by "automatic operation" of the CAA upon that substance's becoming regulated under some other CAA provision.

The first time EPA interpreted the "PSD triggering mechanism" in that way was when it promulgated the Timing and Tailoring Rules, after this Court in *Massachusetts* had held that GHGs fit within the general statutory definition of "air pollutant" and that that definition governed use of that phrase in 42 U.S.C. § 7521(a)(1) for motor vehicle regulation. Because, as the Government acknowledges, UARG has suffered an injury due to that interpretation, a favorable decision by the court below, holding that interpretation to be unlawful, would have redressed UARG's injury.

CONCLUSION

For the foregoing reasons and those stated in UARG's petition, the writ of certiorari should be granted.

Respectfully submitted,

F. WILLIAM BROWNELL
(Counsel of Record)
NORMAN W. FICHTHORN
HENRY V. NICKEL
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., NW
Washington, D.C. 20037
(202) 955-1500
bbrownell@hunton.com

Counsel for Petitioner

August 6, 2013