Nos. 12-1146 and Consolidated Cases

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE STATES OF KANSAS, KENTUCKY, MONTANA, OHIO, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici States of Kansas, Kentucky, Montana, Ohio, West Virginia, and Wyoming have direct and substantial interests in this case. The decision below, affirming the Environmental Protection Agency's (EPA) new pre-construction permitting regime for greenhouse gas (GHG) emissions, will impose immense administrative costs upon the States that carry out the program. According to EPA's own estimates, if greenhouse gas emissions trigger pre-construction permitting requirements for industry under the Clean Air Act's plain terms and volumetric thresholds, then States would be forced to review *millions* of permit applications, costing the States *billions* of dollars. J.A. 550-51. Furthermore, EPA's regulatory regime will impose immense costs on the States' economies, as explained in this brief.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit." *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2538 (2011). That was the Court's common-sense explanation of the absurdity of regulating greenhouse gas emissions, in small increments, through *ex ante* permit requirements. "Of necessity," the unanimous Court observed, "Congress selects different regulatory regimes to address problems." *Id.* And it did not select a permit-based regime to micromanage small emissions of greenhouse gases.

Yet that is precisely how EPA now interprets Title I of the Clean Air Act. According to EPA, Congress unambiguously intended "air pollutant" to include greenhouse gas emissions, for purposes of the Prevention of Significant Deterioration (PSD) and Title V permitting programs. Therefore, EPA reasons, Congress required States to impose *ex ante* permit requirements for greenhouse gas emissions of as little as 100 or 250 tons per year. EPA concludes that only EPA can save the States and the public from the burdens that Congress has imposed upon them. EPA further declares that it must accomplish this by unilaterally replacing Congress's statutory volumetric thresholds with more lenient standards devised by the agency itself, to be tightened or loosened at any future time in EPA's sole discretion.

As the State and Industry Petitioners explain, EPA's interpretation is unfaithful to the Act's text, purpose, structure, and history. The *amici* States respectfully submit this brief to offer further

perspective on the ramifications of EPA's statutory interpretation at the heart of this case; to explain how EPA's misuse of the "absurd results" doctrine highlights the fundamental error of EPA's underlying statutory interpretation; and to restore the PSD and Title V programs to what Congress itself saw to be their "basic purpose": protecting air quality from local pollutants. J.A. 427.

The Clean Air Act recognizes that "air pollution control at its source is the primary responsibility of States and local governments," not the Federal government. 42 U.S.C. § 7401(a)(3). And in carrying out that responsibility, the States know firsthand the impacts of EPA's vast expansion of the Act's pre-construction permit programs, the PSD and Title V programs. As explained below, those impacts include not just the program's economic costs within the States, but also the immense burdens that EPA's PSD and Title V programs will impose on the State agencies tasked with administering them. These impacts on the States threaten the Act's very nature as a "cooperative federalism" program.

These burdens, and the other "absurd results" invoked by EPA in its attempt to justify the "Tailoring Rule," are all problems of EPA's own making. They would not have occurred if EPA had not insisted upon construing the Act in a manner unsupported by the Act's text, purpose, structure, and history. And they reflect EPA's attempt to aggrandize its own power and discretion, at the expense of the States.

ARGUMENT

I. "Any Air Pollutant," As That Term Is Used In The Clean Air Act's Pre-Construction Permitting Framework, Does Not Include Greenhouse Gas Emissions

The Clean Air Act imposes a pre-construction permitting requirement for power plants and other stationary sources, a requirement that is triggered by the emission of "any air pollutant" above statutorily defined threshold amounts by a "major emitting facility." 42 U.S.C. §§ 7479(1), 7475(a). As EPA itself notes, this program, known as Prevention of Significant Deterioration (PSD), was originally intended to protect local air quality: "the basic purpose of the PSD program . . . is to safeguard maintenance of the NAAQS"—that is, the National Ambient Air Quality Standards. J.A. 427 (citing S. Rep. No. 95-127, at 27 (1977), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 1371, 1401 (1979) (hereinafter "*Legislative History*")).

But, according to EPA, in this statutory context the term "any air pollutant" unambiguously includes greenhouse gas emissions, now that such emissions are "regulated" for purposes of the Act's automobile emissions program in a separate title of the Act. EPA rejects the notion that the Act's stationary source program covers only emissions that actually deteriorate local air quality. See, *e.g.*, J.A. 478 n.44.

As the D.C. Circuit recognized, EPA's interpretation of the statute does not actually reflect the statute's "literal statutory definition." J.A. 237. Specifically, EPA construes the statutory term, "any

air pollutant," to refer only to any "regulated" air pollutant, even though the statute "nowhere requires that 'any air pollutant' be a *regulated* pollutant." *Id.* Nevertheless, even after departing from the statute's literal text, both EPA and the court below conclude that the Clean Air Act commands this and only this interpretation. *Id.* at 235-41. Their analysis misapplies *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007), obstructs Congress's clear intent, and undermines the law's long-understood meaning.

A. *Massachusetts* v. *EPA* Does Not Dictate EPA's Favored Interpretation

In affirming EPA's interpretation of "any air pollutant," 42 U.S.C. § 7479(1), the D.C. Circuit largely ascribed its conclusion to this Court's decision in *Massachusetts* v. *EPA*: "we are faced with a statutory term—'air pollutant'—that the Supreme Court has determined unambiguously includes greenhouse gases." J.A. 237 (citing *Massachusetts*, 549 U.S. at 529, and 42 U.S.C. § 7602(g)).

But *Massachusetts* v. *EPA* did not interpret the term "any air pollutant" in the context of the Clean Air Act's PSD and Title V framework for stationary sources (*i.e.*, 42 U.S.C. § 7479(1)). Rather, the Court in that case interpreted "air pollutant" strictly in the separate context of the Act's Title II framework for motor vehicle regulations. *Massachusetts*, 549 U.S. at 506, 532.

The distinction between Titles I and II is not pedantic; rather, the differences between them are crucial to the task of interpreting each of the Titles, even when both employ the term "air pollutant." Sometimes "the same phrase used in different parts

of the same statute means different things." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506 (2010); cf. *Nat'l Ass'n of Mfrs.* v. *NLRB*, 717 F.3d 947, 954 n.7 (D.C. Cir. 2013) (noting that "[e]ven within the Federal Register Act, the term 'promulgated' seems to have different meanings in different contexts").

And, in fact, this Court already has recognized that the Clean Air Act is precisely such a law, in a case decided on the same day as *Massachusetts* v. *EPA*. In *Environmental Defense* v. *Duke Energy Corp.*, the Court held that a single word in the statute could mean two different things: "modification" has one meaning for purposes of the Act's PSD program, and another meaning for the Act's "new source performance standards" program. 549 U.S. 561, 573-76 (2007). The Court recognized that "most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Id.* at 574 (brackets omitted).

This is true "even when the terms share a common statutory definition, if it is general enough." *Id.* (In *Environmental Defense*, for example, the statute provided only one definition of "modification." *Id.* at 576.) The "natural presumption that identical words used in different parts of the same act are intended to have the same meaning" is "not rigid"; it "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* at 574. A "given term in the same statute may take on distinct characters from association

with *distinct statutory objects* calling for *different implementation strategies*." *Id.* (emphasis added).

Those are precisely the considerations that belie EPA's and the lower court's conclusions that *Massachusetts* v. *EPA*'s interpretation of "air pollutant" for mobile sources unambiguously commands an identical interpretation for stationary sources. The two programs regulate "distinct statutory objects," each "calling for different implementation strategies." *Id.*

Furthermore, such practical considerations were central to the Court's task of interpreting "air pollutant" for the motor vehicle program in *Massachusetts* v. *EPA*. There, the Court concluded that to include greenhouse gas emissions as "air pollutants" for motor vehicle regulations would not lead to "extreme" consequences. 549 U.S. at 531. The Court's certainty reflected the successful petitioners' assurances that the Court's decision regarding the Act's application to motor vehicles would have *no* bearing on the separate question of whether EPA could also regulate stationary sources:

> The federal program for controlling air pollution from motor vehicles was first created in 1965, five years before the 1970 Act created the NAAQS program.[2] *The programs were not merged, and they retain significant independent status and effects.* Organizationally, mobile sources are regulated under Title II of the Act,

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2 And twelve years before the 1977 Act created the statutory PSD framework.

> which is separate from Title I . . . Furthermore, *the two programs cover different pollutants*."

Brief for Petitioners at 28, *Massachusetts* v. *EPA*, 549 U.S. 497 (2007) (No. 05-1120) (emphasis added).[3]

In short, the Court in *Massachusetts* v. *EPA* tested its statutory interpretation against what it saw to be the practical consequences of that interpretation, in the narrow context of motor vehicle regulations under Title II of the Act. In that case, as in *Environmental Defense* v. *Duke Energy*, "[c]ontext counts." 549 U.S. at 576.

Context counts here, too. As EPA administers the Clean Air Act's PSD and Title V framework, it should interpret the Act in light of the consequences of its interpretation, not in spite of them.

B. EPA's Interpretation Of The PSD And Title V Frameworks Is Incompatible With Congress's Express Intent And Evident Understanding Of The Law

EPA's attempt to stretch Title I's PSD and Title V frameworks to include greenhouse gas emissions contradicts more than just the assurances of *Massachusetts* v. *EPA*'s pro-regulation petitioners. It also contradicts the expectations of the Congress that enacted the PSD program in the first place. If

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[3] The petitioners in that case went so far as to assert that critics' concerns that Title II mobile-source regulation might trigger Title I stationary-source regulation were merely an attempt to "change the subject," a "classic debater's trick." *Id.*

legislative history is relevant to the task of interpreting statutes in Step One of *Chevron*'s two-step process,[4] then this factor is fatal to EPA's statutory interpretation in this case.

EPA did not demonstrate that its interpretation of the statute "give[s] effect to the unambiguously expressed intent of Congress." *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). The legislative record of Congress's 1977 enactment of the PSD program lacks any evidence of congressional intent to cover greenhouses gas emissions, or any evidence that Congress understood the Act to accomplish this result.[5]

Instead, the legislative history is replete with statements of Congress's understanding and intention that the PSD program would apply only to a small set of large industrial facilities and local NAAQS pollutants. The PSD program's *ex ante*

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[4] In *Chevron* Step One's evaluation of whether the statute's commands are unambiguous, the Court applies "the traditional tools of statutory construction." *Chevron, U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). Some courts have included among those tools not just "text, structure, [and] purpose," but also "legislative history." See, *e.g.*, *Pharm. Research & Mfrs. of Am.* v. *Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (relying on legislative history that "makes quite clear" what "Congress's purpose" was).

[5] And as the State Petitioners explain, Congress repeatedly rejected efforts to expressly place greenhouse gas emissions within EPA's PSD jurisdiction, in the years after the 1977 Act. See Texas Br. 16.

permit requirement might be feasible "for very large sources, such as new electrical generating plants or new steel mills," the Senate Report explains, but it would "prove costly and potentially unreasonable if imposed on construction of storage facilities for" smaller sources that "have the potential to emit 100 tons of pollution annually." S. Rep. No. 95-127, at 96 (1977), *reprinted in* 3 *Legislative History* at 1470.

Congress intended and understood the PSD framework's 100 or 250 tons per year thresholds to exempt all but the largest emitters; the Act's regulatory reach would not extend to smaller sources, such as "dairies, farms, highways, hospitals, schools, grocery stores, and other such sources." Senate Debate on S. 252, June 8, 1977, *in* 3 *Legislative History* 705, 725. But, as the State Petitioners note, those are the types of small companies and organizations that would be subject to statutory PSD and Title V permitting requirements if greenhouse gases are deemed "air pollutants" for Title I of the Act. See Texas Br. at 3.

To deem greenhouse gas emissions to be "air pollutants" triggering PSD permitting requirements is wholly incompatible with these statements of congressional intent. For that reason, even EPA admits that its inclusion of greenhouse gas emissions "result[s] in a program that would have been unrecognizable to the Congress that designed PSD" and "intended that PSD be limited to a relatively small number of large industrial sources." J.A. 454-55. EPA's interpretation, by contrast, results in PSD and Title V programs that would govern virtually all industrial sources, because "virtually all sources emit

at least 100 [tons per year of carbon dioxide] annually." *Id.* at 456 n.39.

When EPA's interpretation collides with Congress's intent, the solution cannot be to allow EPA to unilaterally "tailor" the Clean Air Act's volumetric thresholds by degrees of magnitude, and subsequently to expand them in the agency's sole discretion. Rather, the proper solution is to enforce the Act as written, reasonably interpreting the term "any air pollutant" in a way that respects the Act's unambiguous volumetric thresholds and the congressional intent they embody.

This solution, unlike EPA's, would "follow the cardinal rule that a statute is to be read as a whole." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). It would honor "one of the most the basic interpretive canons," that a "statute should be construed so that effect is given to *all* its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314-15 (2009) (quoting *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004)). And in honoring not just the absurd results doctrine but also these other canons of construction, it would avoid treating the absurd results doctrine as "conclusive," to the detriment of other equally important canons of construction. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001); *see also id.* at 95 ("Specific canons 'are often countered . . . by some maxim pointing in a different direction.'") (quoting *Circuit City Stores* v. *Adams*, 532 U.S. 105, 115 (2001)).

Again, "Congress selects different regulatory regimes to address different problems." *Am. Elec. Power Co.*, 131 S. Ct. at 2538. In this case, Congress

did not select the PSD regulatory regime to address greenhouse gas emissions.[6]

II. EPA's Preconstruction Permit Program Will Impose Immense Costs Upon The States And The Public

As the primary administrators of EPA's PSD and Title V permit programs, the States know firsthand the immense costs that would be imposed if "air pollutant" were to include greenhouse gases for purposes of those programs. Indeed, the States bear much of those costs directly.

If greenhouse gas emissions are covered by the PSD and Title V programs, then the Clean Air Act's 100 and 250 tons per year thresholds "would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program." J.A. 355. In

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[6] The unanimous Court's analysis in *American Electric Power Co.* v. *Connecticut* is relevant for another reason. After noting the implausibility of attempting to regulate greenhouse gas emissions through an *ex ante* permit regime, the Court focused on EPA's other regulatory priority, the pending "New Source Performance Standards" rulemaking pursuant to 42 U.S.C. § 7411. See 131 S. Ct. at 2538-39. That focus was instructive, because the Court declined to mention at all EPA's pending PSD and Title V permit rulemaking, which had been the predominant focus of the Government's brief in that case. See Brief for Tenn. Valley Auth. at 47-50 (PSD), 50-51 (NSPS), *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174).

the absence of "streamlined permit procedures," the result would be "administrative strains" leading "to multi-year backlogs in the issuance of PSD and title V permits, which would undermine the purposes of those programs." *Id.* at 356. Worse still, "the addition of enormous numbers of additional sources would provide *relatively little benefit* compared to the costs to sources and the burdens to permitting authorities." *Id.* (emphasis added).

EPA's own estimates of the new costs and administrative burdens are shocking:

> On the PSD side, annual permit applications would increase by over 300-fold, from 280 to almost 82,000; costs to the permitting authorities would increase more than 100-fold, from $12 million to $1.5 *billion*; and the permitting authorities would need to hire, train, and manage 9,772 FTEs [*i.e.*, full-time equivalent workers]. For title V, total permit applications would increase by over 400-fold, from 14,700 to 6.1 million; costs to the permitting authorities would increase from $62 million to $21 *billion*; and the permitting authorities would need to hire, train, and manage 229,118 FTEs.

J.A. 550-51 (emphasis added). In short, EPA's interpretation of the PSD and Title V statutes would have Congress commanding States to accomplish "an impossible administrative task." *Id.*

The States already are beginning to bear burdens of reviewing greenhouse gas emissions in administering the Clean Air Act for stationary sources. In *amicus* West Virginia, for example, the

inclusion of greenhouse gas emissions as "Best Available Control Technology," for PSD and Title V permits triggered by non-greenhouse-gas pollutants, already has increased the State's administrative burden by approximately five to ten percent, according to the State's internal estimates. If EPA's interpretation of the PSD and Title V frameworks withstands judicial review and carbon dioxide itself triggers PSD and Title V permitting requirements, then West Virginia will also incur the much more substantial costs of reviewing additional permit applications triggered by greenhouse gas emissions.

Those costs will increase over time, especially as EPA revises its tailoring rule downward in years to come, toward the statutory 100 or 250 tons per year thresholds—a trajectory that EPA purports to commit to its own exclusive discretion. See, *e.g.*, J.A. 288 ("we cannot say at this point how close to the statutory thresholds we will eventually reach . . . we do not find it necessary to answer these questions in this rule, and instead we expect to resolve them through future rulemaking").

Of course, regulators are not the only ones who bear the cost of regulation. People and businesses will bear the greatest burdens of this new regulatory program. According to EPA, if greenhouse gas emissions are "pollutants" for PSD purposes, then the annual number of PSD permit applications would increase from 280 to 82,000 sources per year, and "commercial and residential sources—the great majority of which are small businesses—would each incur, on average, almost $60,000 in PSD permitting expenses." J.A. 455. "This result," EPA adds, "would be contrary to Congress's careful efforts to confine

PSD to large industrial sources that could afford these costs." *Id.*

Moreover, EPA's interpretation would place 6.1 *million* sources above the 100 tons per year threshold for purposes of the Title V permit program. J.A. 485. At a per-application cost of $23,175 (for commercial or residential sources) or $46,350 (for industrial sources), EPA's interpretation would cost "a staggering $49 billion per year over a 3 year period"—much of these costs incurred for "relatively little benefit." *Id.* at 487.

The imposition of PSD's and Title V's *ex ante* permitting requirements could also deter or greatly delay the development of new facilities. The permitting process can take up to nearly two years, not counting judicial review of a permit decision. See J.A. 303 (Title V permits). EPA recognizes that under a GHG permitting regime, "the number of PSD permits will be about twice what we estimated at proposal, and the average processing time for both PSD and title V permits will be two or three times greater than what we estimated at proposal." J.A. 385-86. Those delays would be further exacerbated by the time it would take State and local permitting authorities to hire and train an immense new workforce: "it would take the permitting authorities 2 years, on average, to hire the staff necessary to handle a ten-fold increase in PSD permits and a 40-fold increase in title V permits, and that 90 percent of their staff would need additional training in all aspects of permitting for GHG sources." *Id.* at 386. All told, the opportunity costs of permit delays caused by such a vast new regulatory program may be incalculable, but they are certainly enormous.

EPA has not attempted to calculate the total costs that would be imposed by its broad interpretation of "air pollutant" for PSD and Title V purposes. But its analysis suggests that if greenhouse gases are deemed "air pollutants" under these statutes, then the costs of such a program would be astonishing. EPA estimates that just the first two and a half years of applying the PSD and Title V programs to facilities exceeding the statute's 100/250 tons per year emissions thresholds would cost over $193 *billion*. J.A. 647.

Yet EPA candidly admits that if greenhouse gas emissions are "air pollutants" within the meaning of the PSD and Title V statutes and if Congress's volumetric thresholds were enforced, then "the addition of [these] enormous numbers of additional sources would provide *relatively little benefit* compared to the costs to sources and the burdens to permitting authorities." J.A. 356 (emphasis added).

Ultimately, the administrative burdens and economic costs may threaten the sustainability of the Clean Air Act's "cooperative federalism" character. Congress created the Act's PSD and Title V programs to be "an experiment in cooperative federalism." *Michigan* v. *EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); see also *Luminant Generation Co.* v. *EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (same). But by expanding the PSD and Title V programs to cover greenhouse gas emissions, and thus forcing States to bear millions or billions of dollars in new administrative burdens, EPA risks transforming these programs from "cooperative federalism" to national micromanagement.

Just weeks after promulgating the Timing and Tailoring Rules, EPA published a proposed "SIP Call," indicating that thirteen EPA-approved State implementation plans (SIPs) were inadequate to implement EPA's new greenhouse gas requirements. 75 Fed. Reg. 53892 (Sept. 2, 2010). That list included several of the Petitioner and *Amici* States in this case. *Id.* at 53899. EPA finalized that rule just months later, demanding that the States update their SIPs to cover greenhouse gas emissions. 75 Fed. Reg. 77698 (Dec. 13, 2010). When Texas failed to revise its SIP to EPA's satisfaction, EPA replaced Texas's SIP with a Federal Implementation Plan (FIP). 76 Fed. Reg. 25178 (May 3, 2011).

Of course, EPA's power to impose a FIP and displace a State's program, in a particular case, does not by itself signal the end of cooperative federalism; after all, the Clean Air Act does provide for FIPs. But as a practical matter, the magnitude of the burden that the States face under EPA's re-interpretation of the PSD and Title V programs, among others, places the Act's cooperative federalism "experiment" under unprecedented strain. Cf. Patrick Morrisey, Attorney General of West Virginia, *et al.*, *Last Call For Cooperative Federalism? Why EPA Must Withdraw SIP Call Proposal On Startup, Shutdown, and Maintenance*, Washington Legal Foundation Legal Backgrounder (Sept. 13, 2013). Many States, including Petitioners and *Amici* States, have apprised EPA that the "recent increase in the level of federal regulatory activity under the Clean Air Act has generated a corresponding increase in concerns among the States regarding the preservation of their role in environmental protection." Jon Bruning, Attorney General of Nebraska, *et al.*, *Perspective of*

18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111(d) of the Clean Air Act 1-2 (Sept. 11, 2013).

The Act requires none of these problems. When EPA's interpretation of "any air pollutant" would require States to carry out "an impossible administrative task," J.A. 551, EPA should consider seriously the possibility that its interpretation of the statute is fundamentally wrong.[7]

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[7] Such caution is particularly warranted when the agency is establishing a regulatory model that may be difficult or impossible to later replace with market-based reforms. EPA noted in its 2008 advance notice of proposed rulemaking that market mechanisms, "when well-suited to the environmental problem, offer important advantages over non-market-oriented approaches." 73 Fed. Reg. 44354, 44409 (July 30, 2008). But the institution of non-market regulatory regimes can entrench interests that become very difficult to overcome. See, *e.g.*, Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 Tul. L. Rev. 845, 915 (1999) ("Deregulation . . . may come about only if the distributive consequences to entrenched interest groups and politicians is large enough to offset the rents they are sacrificing."); Nathaniel O. Keohane *et al.*, *The Choice of Regulatory Instruments in Environmental Policy*, 22 Harv. Envtl. L. Rev. 313, 365 (1998) ("aggregate demand for a market-based instrument is likely to be greatest (and the opportunity costs of legislator support is likely to be least) when the environmental problem has not previously been regulated").

III. The "Absurd Results" Doctrine Does Not Allow EPA To Save Itself From Absurdities Of Its Own Making, Nor Does It Free EPA To Alleviate The "Absurdity" By Any Means That It Chooses

In re-interpreting the PSD and Title V statutes to include greenhouse gas emissions as "air pollutants," EPA recognized that its interpretation was incompatible with the statutory 100/250 tons per year thresholds triggering the statutes' permitting requirements. J.A. 447-502. But EPA's nominal effort to cabin and correct this absurdity, through the Tailoring Rule, fails to consider that these were absurd results of EPA's making, not Congress's. Cf. J.A. 454-55 ("It is not too much to say that applying PSD requirements literally to GHG sources at the present time . . . would result in a program that would have been unrecognizable to the Congress that designed PSD").

As explained below, an agency cannot invoke the "absurd results" doctrine to remedy absurdities of the agency's own making, any more than the patricidal defendant can invoke the court's mercy as an orphan. And in the rare cases where the doctrine's application actually is warranted, it requires a court to select the alternative statutory construction that does the *least* violence to Congress's enacted text. EPA's failure to heed both of these doctrinal limitations illustrates the fundamental constitutional problems inherent in allowing agencies a free hand to re-write statutes to solve problems that the agency itself created.

A. The "Absurd Results" Doctrine Does Not Apply When The "Absurdity" Results From The Agency's Untenable Interpretation Of The Statute

The "absurd results" doctrine is a narrow exception to the normal rules of statutory construction. Courts and agencies must "begin with the understanding that Congress says in a statute what it means and means in a statute what it says there[.]" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks omitted). Thus, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (quotation marks omitted).

The absurd results exception that the Court noted parenthetically is limited strictly. The Constitution commits the legislative power to Congress, not to agencies or courts. Thus, resort to the absurd results doctrine to "override the literal terms of a statute" is appropriate "only under rare and exceptional circumstances." *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930); see also *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 441 (2002) ("the Court rarely invokes such a test to override unambiguous legislation"). In those rare cases where Congress's intentions are embodied in generally stated laws that, if applied literally, would direct results plainly at odds with Congress's intent and understanding of the law, it falls to the courts to employ a limiting construction to avoid such results.

But in doing so, the courts must take care not to put the cart before the horse. The absurd results

doctrine applies only when the absurdity in question is the product of a statute's *unambiguous* direction. When an interpretation of ambiguous text produces absurd results, those results should signal that the statute's "proper scope" has been misconstrued to begin with. *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989).[8]

In this case, EPA's interpretation of the statute produces results so absurd that they would be "unrecognizable to the Congress that designed" the statute. J.A. 454-55. But EPA fails to take the next obvious step of asking whether these results cast doubt upon its interpretation of "air pollutant" for purposes of PSD and Title V. The fact that Congress could not possibly have intended the specific 100/250 tons per year threshold to apply to greenhouse gases proves that the agency misinterpreted the Act's general "any air pollutant" phrase, not that Congress

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[8] See also *Chem. Mfrs. Ass'n* v. *Natural Res. Def. Council*, 470 U.S. 116, 125-26 (1985) (because the "broadest sense" of a statutory phrase leads to a nonsensical result, that statutory phrase "has no plain meaning" for purposes of *Chevron*'s Step One); *Chapman* v. *United States*, 500 U.S. 453, 476 (1991) (Stevens, J., dissenting) ("There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result."); *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 144 (2004) (Stevens, J., dissenting) ("Before nullifying Congress' evident purpose in an effort to avoid hypothetical absurd results, I would first decide whether the statute can reasonably be read so as to avoid such absurdities, without casting aside congressional intent.").

intended EPA to have broader discretion to address the matter in spite of the statutes.

EPA should have relinquished its preferred interpretation and accepted an interpretation that makes sense of the *whole* statutory scheme. Here, as elsewhere, "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001). If EPA had interpreted "any air pollutant" in the PSD context as covering only regulated pollutants that deteriorate local air quality—which EPA itself recognizes was "the basic purpose" of the PSD and Title V statutes (J.A. 427)—then the results would not have been absurd.

B. The Absurd Results Doctrine Requires A Court To Select The Limiting Construction That Does The Least Violence To The Statute

Proceeding from the mistaken premise that the term "air pollutant," in the PSD and Title V context, necessarily includes greenhouse gas emissions, the agency attempts to redress the absurd consequences of its interpretation by effectively amending Congress's statute. And the court of appeals, proceeding from the mistaken premise that *Massachusetts* v. *EPA* controlled the interpretation of "air pollutant" in this context, agreed. In a profound understatement, the court acknowledged the strain that EPA's interpretation of "air pollutant" puts on the cohesiveness of the PSD and Title V programs as a whole: "That EPA adjusted the statutory thresholds to accommodate regulation of

greenhouse gases emitted by stationary sources may indicate that the [Clean Air Act] is a regulatory scheme less-than-perfectly tailored to dealing with greenhouse gases." J.A. 205.

Even if the court and EPA were correct that Congress's choice of terms, rather than EPA's interpretation of those terms, is what gave rise to the absurd results, the appropriate remedy would be to adopt the narrowing construction that "does *least* violence to the text." *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in the judgment).[9] This ensures the doctrine's core purpose of preserving legislative intent in the face of a result Congress could not possibly have intended. See *Pub. Citizen*, 491 U.S. at 471 (Kennedy, J., concurring); see also *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("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.").

In this case, if EPA had been correct that the absurd results were of Congress's making rather

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[9] See also *id.* at 533 (Blackmun, J., dissenting) (urging an interpretation that does least violence to the Congress's intent); *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (invalidating a rule that avoided absurd results but was "gravely inconsistent with the text and structure of the statute," rejecting the agency's "adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery").

than EPA's, then the best option would have been the simplest one: not to negate plainly stated numerical thresholds, but rather to adjust the construction of "any air pollutant" to cover only "pollutants" that actually deteriorate local air quality—which, EPA itself notes, was "the basic purpose" of Congress in enacting the statute. J.A. 427. Such construction "adds a qualification that the [phrase] does not contain but . . . does not give the [phrase] a meaning . . . it simply will not bear." *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring in the judgment). As the lower court acknowledged, "nothing in the [Clean Air Act] requires regulation of a substance simply because it qualifies as an 'air pollutant' under this broad definition." J.A. 238. Moreover, the term "air pollutant" is, "in some contexts, capable of narrower interpretations." *Id.* at 251. Extending the narrower interpretation to the very same term in § 7479(1) requires the least statutory revision and is the most consistent Congress's decision to legislate one set of thresholds for all "air pollutants." It would avoid all of the unintended consequences that flow from EPA's interpretation of the Act.

But instead of choosing the narrowest alternative construction of "any air pollutant," EPA insisted on the *broadest* possible construction of that term, despite the cascade of absurdities that result and the more drastic regulatory fixes necessary to remedy them. To shoehorn its interpretation of "any air pollutant" into this context, EPA substituted its own greenhouse-gas-specific emissions limit for

Congress's clear thresholds, completely negating the thresholds that Congress had carefully devised.[10]

Moreover, in insisting upon its interpretation of the Act's more general term ("air pollutant") and adjusting the Act's specific numerical thresholds, EPA ignored this Court's caution that the absurd results doctrine allows only for slight adjustment to a statute's "[g]eneral terms," *United States* v. *Kirby*, 74 U.S. 482, 486 (1868), not wholesale revisions of its *specific* terms. This limitation, too, is intended to preserve the supremacy of congressional intent, by limiting the potential for courts and agencies to encroach on legislative intent. See *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892).[11]

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[10] See also D. Wiley Barker, *The Absurd Results Doctrine, Chevron, and Climate Change*, 26 BYU J. Pub. L. 73, 97 (2012) (concluding that EPA's approach in this case "does the most violence to the statutory language by changing the clear numbers of the statute"); Katherine Kirklin O'Brien, *Beyond Absurdity: Climate Regulation and the Case for Restricting the Absurd Results Doctrine*, 86 Wash. L. Rev. 635, 653 (2011) ("EPA's Tailoring Rule may represent the broadest interpretation of the absurd results doctrine to date, as it revises unambiguous, numerical statutory standards").

[11] As the Court explained in *Holy Trinity Church*:

> This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the

In this case, by contrast, EPA has substituted its own will for that of Congress in the most egregious way—by construing a general statutory term so as to force an alteration of Congress's specific numerical standard—an alteration that "satisf[ies] the policy preferences of the [agency]," but that presumes to decide unilaterally "battles that should be fought among the political branches and the industry." *Barnhart*, 534 U.S. at 462 (2002).

EPA cannot say that all of this was done in the interests of preserving Congress's literal words, "any air pollutant." For even after rewriting the emissions threshold, EPA's position still relies upon construing "any air pollutant" to mean any "*regulated* pollutant," in order to avoid bringing facilities within the purview of PSD based solely on their emissions of harmless chemicals. J.A. 237-38.[12]

In sum, EPA surveyed the plausible alternative constructions of the statute, and chose the one that does the most violence to the Act—and that maximizes EPA's own power and discretion at the

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> words, makes it unreasonable to believe that the legislator intended to include the particular act.

Holy Trinity Church, 143 U.S. at 459.

[12] That construction of "air pollutant" also results in the Act requiring the "useless" exercise of collecting "continuous [GHG] air quality monitoring data" for every designated area, even though GHGs dissipate into the global atmosphere and do not measurably alter ambient air quality. See Brief of Util. Air Regulatory Group at 27.

expense of the States. If the Act itself gives rise to absurd results, all of those unintended consequences can and must be avoided by a limiting construction of "any air pollutant" to refer only to pollutants that actually deteriorate local air quality.

* * *

This case demonstrates the risk inherent in expanding the absurd results doctrine to allow agencies to revise congressional statutes as EPA did here. An agency motivated to regulate in a manner inconsistent with the express intent of Congress has a clear incentive to identify "plain meanings" and "absurd results" in the legislative text where the text may in fact be ambiguous and the alleged absurdities illusory. As Publius noted, executive departments exercise not "merely judgment," but "force," The Federalist No. 78 (Alexander Hamilton). For that very reason, courts must take care to "keep agencies tethered to Congress and to our representative system of government." David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 7 (2010). EPA has "programs it is eager to execute. But those programs will be legitimate—and will be sustained in court—only if their implementation conforms to the rule of law." *Id.* at 8.

When EPA nullifies Congress's plainly stated volumetric thresholds and replaces them with new thresholds of the agency's own making, EPA becomes the author of the laws it administers. This "violate[s] a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013)

(Scalia, J. concurring in part and dissenting in part) (citing Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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