Nos. 12-1146, 12-1152, 12-1153, 12-1248,
12-1253, 12-1254, 12-1268, 12-1269, 12-1272

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and eight related cases.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND THE CITY OF NEW YORK

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

After this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Environmental Protection Agency (EPA) determined that emissions of greenhouse gases endanger public health and welfare and that therefore greenhouse-gas emissions from cars and light trucks must be regulated under the Clean Air Act, 42 U.S.C. §§ 7521-7554. Under the Act, that determination then required new and modified major stationary emitters of greenhouse gases to obtain permits under the Act's program for Prevention of Significant Deterioration (PSD). To mitigate the burdens that would fall on permitting authorities and sources, EPA decided to phase in PSD permitting requirements starting with the largest emitters, while at the same time committing to consider at a later date how best to apply the statutory requirements to smaller stationary sources. The questions presented are:

1. Whether EPA's decision to proceed one step at a time to regulate stationary-source emitters of greenhouse gases—beginning with the largest emitters while continuing to study and develop feasible approaches for smaller sources—is consistent with the conclusion that the Clean Air Act's PSD provisions cover greenhouse-gas emissions.

2. Whether greenhouse gases are subject to regulation under the PSD program for stationary sources, as a result of EPA's prior determination that certain greenhouse gases are dangerous air pollutants

subject to regulation under the mobile-source provisions of the Clean Air Act.

3. Whether EPA properly concluded that greenhouse gases are subject to regulation under the mobile-source program, on the basis of its finding that elevated concentrations of greenhouse gases in the atmosphere are reasonably anticipated to endanger public health or welfare, and that motor-vehicle emissions contribute to this air pollution.

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INTRODUCTION

Petitioners challenge application of the Clean Air Act's PSD provisions to greenhouse-gas emissions, based primarily on EPA's reasoned decision to extend PSD permitting requirements gradually to stationary sources, beginning with the largest emitters. Petitioners claim that this incremental approach shows that greenhouse gases are not properly covered by the PSD program at all. This claim, along with the several related claims raised in the various petitions for certiorari, does not warrant this Court's review.

Petitioners' objection to incremental application of the PSD program addresses a regulatory regime that is transitional, and for that reason alone is not certworthy. By applying PSD permitting first to the largest stationary sources, EPA did not concede that the PSD program is unsuited to addressing greenhouse-gas emissions, as petitioners contend. Rather, EPA reasonably concluded that incremental application of PSD permitting to stationary sources would ease the burdens on both the sources and the States, which are primarily responsible for issuing permits.

Petitioners' challenge to the statutory PSD provisions' application to greenhouse-gas emissions is thus premised on an incorrect characterization of EPA's transitional approach. This Court's recent decisions in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*Connecticut*"), confirm that greenhouse gases are air pollutants subject to regulation under the Clean Air Act and

that the Act speaks directly to greenhouse-gas emissions from stationary sources. And, as the court of appeals correctly found, petitioners lack standing to challenge EPA's transitional approach directly. None of the questions raised by petitioners thus warrant this Court's review.

STATEMENT

1. Although greenhouse gases are a serious threat to the health and welfare of the citizens of state and city respondents, EPA in 2003 took the position that greenhouse-gas emissions were nonetheless not subject to regulation under the Clean Air Act. A group of States, local governments, and environmental organizations challenged EPA's refusal to regulate greenhouse-gas emissions from motor vehicles. In 2007, this Court held in *Massachusetts* that the Clean Air Act's broad definition of "air pollutant" unambiguously covered greenhouse gases, and that EPA accordingly had the authority—indeed, the obligation—"to regulate emissions of the deleterious pollutant" if it found that greenhouse-gas emissions posed a threat to public health or welfare. 549 U.S. at 528-29, 533.

2. Following this Court's decision in *Massachusetts*, EPA determined in the "Endangerment Finding" that six "well-mixed" greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) endanger public health and welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). Citing a "very large and comprehensive base of scientific information,"

id. at 66,506, EPA found that emissions of greenhouse gases from the burning of fossil fuels, as well as from deforestation and other land-use changes, are transforming the chemistry of the Earth's atmosphere and changing its climate. *See id.* at 66,517-18, 66,522-23, 66,539-40. The agency further found that the increase in solar energy trapped inside the Earth's atmosphere will cause serious and far-reaching harms to public health and welfare, including more intense, frequent, and long-lasting heat waves; exacerbated smog in cities; longer and more severe droughts; more intense storms; and a rise in sea levels. *Id.* at 66,524-25, 66,532-33. EPA concluded that motor-vehicle emissions of greenhouse gases contribute to climate change and thus to the endangerment of public health and welfare. *Id.* at 66,498-99.

Pursuant to the statutory mandate that it establish motor-vehicle emission standards for "any air pollutant . . . which in [the EPA administrator's] judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1), EPA promulgated a rule (the "Tailpipe Rule") establishing greenhouse-gas emission standards for cars and light trucks. Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. 25,324 (May 7, 2010). The Tailpipe Rule, which applies to vehicles manufactured in model years 2012-2016, *id.* at 25,328, went into effect on January 2, 2011. Reconsideration of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010) ("Timing Rule"). The

Rule is expected to reduce 960 million metric tons of carbon dioxide-equivalent emissions over the life of those vehicles and to yield net economic and social benefits ranging up to $2 trillion. 75 Fed. Reg. at 25,404.

3. The PSD program is a permitting scheme established by the Clean Air Act that regulates emissions from certain stationary sources. Administered largely by the States, it applies to those areas of the country designated as "attainment" areas because they are in compliance with at least one of the EPA-promulgated national ambient air-quality standards (NAAQS) for six defined pollutants. 42 U.S.C. §§ 7407(d)(1), 7471, 7475(a); 40 C.F.R. §§ 50.4–50.18. The PSD program requires permits for the new construction or modification of "major emitting facilities" in those areas, 42 U.S.C. § 7475(a)—*i.e.*, stationary sources that "emit, or have the potential to emit," either 100 tons per year (tpy) or 250 tpy of "any air pollutant," *id.* § 7479(1).[1] To obtain a PSD permit, a statutorily covered source must, among other things, also install the "best available control technology [BACT] for each pollutant subject to regulation" under the Clean Air Act. *Id.* § 7475(a)(4). Stationary sources may obtain permits from either a designated state permitting-

[1] The 100-tpy threshold applies to only certain types of stationary sources, such as steel mills. *See* 42 U.S.C. §§ 7475, 7479(1). All other stationary sources are subject to PSD permitting only if they have the potential to emit over 250 tpy of "any air pollutant." *Id.* § 7479(1). States may exempt "nonprofit health or education institutions" from permitting requirements. *Id.*

authority or, if no such authority exists, from EPA itself. The permit authorizes the construction or modification and prescribes, *inter alia*, an emission rate to limit the amount of air pollution that the source may emit once it begins or resumes operation. *See id.* § 7475(a).

By operation of statute, and under an interpretation of the Clean Air Act that EPA has followed for more than three decades, *see, e.g.*, Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980), once a pollutant is regulated under the Clean Air Act, stationary sources of that pollutant must comply with the permitting requirements of the PSD program. *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NRS), 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002). Accordingly, the regulation of greenhouse-gas emissions under the Tailpipe Rule governing mobile sources brought stationary-source greenhouse-gas emissions within the scope of the PSD program, in two ways relevant here.[2] First,

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[2] The Tailpipe Rule also operated to extend the distinct permitting program of Title V of the Clean Air Act to stationary sources emitting greenhouse gases. 42 U.S.C. §§ 7602(j), 7661(2), 7661a(a). The purpose of Title V is to collect all requirements applicable to a source in one permit. Once an air pollutant is "subject to regulation" under the Clean Air Act, a major stationary source must obtain a Title V permit, just like it must obtain a PSD permit. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,553-54 (June 3, 2010). The court of appeals found that petitioners had forfeited their arguments against Title V's application to greenhouse gases because none of their

greenhouse-gas emissions are factored into the threshold determination of whether a source emits enough of "any air pollutant"—*i.e.*, 100/250 tpy—to qualify for the PSD program. 42 U.S.C. §§ 7475(a)(1), 7479(1). Second, once a source is subject to PSD permitting, it must comply with the program's BACT requirements for greenhouse-gas pollutants, just as it must for "each [other] pollutant subject to regulation" under the Clean Air Act. *Id.* § 7475(a)(4).

4. When the greenhouse gases emitted by stationary sources became subject to the PSD permitting regime that regulates such sources, EPA confronted the following challenge. Because greenhouse-gas pollutants (particularly carbon dioxide) are emitted in much higher quantities than the pollutants previously regulated under the PSD program, the program's 100/250-tpy thresholds would bring emitters of greenhouse gases into the program in numbers far greater than emitters of other regulated pollutants. EPA therefore recognized the need for additional time and practical experience to determine how the States and EPA could handle the large number of newly covered sources while keeping permitting programs administrable.

EPA promulgated the "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010), to respond to these concerns. The Tailoring Rule phases in permitting obligations for stationary sources under the PSD

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challenges were relevant to Title V and instead focused solely on the PSD program. Pet. App. 78a, *Utility Air Group v. EPA*, No. 12-1146. Petitioners have raised no independent challenge to Title V here.

program over several defined stages.[3] *See id.* at 31,544-45. The purpose of the Tailoring Rule was to "reliev[e] overwhelming permitting burdens" on state permitting authorities and sources, which would have resulted from immediate application of the PSD program nationwide, and to give EPA and the States additional time to study the practical effects of applying the PSD program to greenhouse-gas emissions. *Id.* at 31,516.

Under the Tailoring Rule, EPA committed to completing several discrete administrative actions by 2016 in an effort to bring into the PSD program greater numbers of stationary sources emitting greenhouse gases above the statutory thresholds. Under the first step, the PSD program was applied to the greenhouse-gas emissions of all entities already subject to PSD requirements for non-greenhouse-gas air pollutants. *Id.* at 31,523. Under the second step, which took effect on July 1, 2011, additional large sources of greenhouse-gas emissions—defined as newly built sources that have the potential to emit 100,000 tpy or modifications to existing sources that would increase emissions by 75,000 tpy—also became subject to the PSD program. *Id.* at 31,523-24.

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[3] EPA also issued the "Timing Rule," 75 Fed. Reg. 17,004, which clarified that greenhouse gases became a regulated pollutant under the PSD statute for permitting purposes on January 2, 2011, the first date on which the Tailpipe Rule's emission standards applied to new motor vehicles. *Id.* at 17,007. Petitioners "fail[ed] to make any real arguments against the Timing Rule" below, Pet. App. 95a, and raise no objections to it here.

EPA undertook these first two steps in a deliberate effort to regulate the largest greenhouse-gas emitters first. *Id.* at 31,516. Those sources were least burdened by the additional PSD requirements for greenhouse gases "because they may be expected to have the resources to comply with PSD's requirements and permitting authorities may be expected to accommodate those sources." *Id.* at 31,558. At the same time, these large sources produce about eighty-six percent of greenhouse-gas emissions from stationary sources above the statutory thresholds. *Id.* at 31,571. The States have been working with EPA to ensure that PSD permitting of these large sources is proceeding in an orderly fashion.

In the Tailoring Rule, EPA also committed to reassess the greenhouse-gas permitting burdens as States and EPA gain experience permitting larger numbers of greenhouse-gas-emitting sources, and to evaluate the use of streamlining tools to aid in permitting smaller sources. *Id.* at 31,573. EPA committed to complete a study by April 30, 2015, addressing the permitting obligations of smaller stationary sources, including whether regulatory changes—such as streamlined permitting options—might prove successful in reducing permitting workloads. EPA will issue a final rule regarding these sources by April 30, 2016. *Id.* at 31,525, 31,573, 31,608; 40 C.F.R. §§ 52.22(b)(2), 70.12(b)(2).

5. EPA's rulemaking for stationary sources of greenhouse gases received favorable comment from this Court in *Connecticut*, 131 S. Ct. at 2537, which was decided only two years ago. That case arose from a lawsuit filed by several of the state respondents

here and others, shortly after the petition for review was filed in *Massachusetts* and long before *Massachusetts* was decided by this Court. In *Connecticut*, the plaintiff States and others sought relief for stationary-source greenhouse-gas emissions by bringing federal common-law nuisance claims for injunctive relief against large power plants—the largest stationary emitters of carbon dioxide in the nation. By the time that case reached this Court, *Massachusetts* had been decided. Accordingly, the power plants and their supporting amici, many of whom are petitioners in these actions, argued that the States' federal common-law claims were displaced by Congress's comprehensive delegation of authority to EPA to regulate greenhouse-gas emissions from stationary sources—citing, as evidence of that delegation, the regulations challenged here. This Court agreed, holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 131 S. Ct. at 2537.

6. The petitions in this case challenge the regulations that resulted from the EPA actions authorized by the Clean Air Act. Petitioners filed multiple petitions in the District of Columbia Circuit challenging the Endangerment Finding, the Tailpipe Rule, the Timing Rule, the Tailoring Rule, and the application of the Clean Air Act's PSD permitting requirements to sources that emit major amounts of greenhouse-gas pollutants.[4] The court of appeals

[4] State respondents California, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, and

issued a *per curiam* decision denying or dismissing all the petitions. It further denied en banc review, noting that the legal issues were "straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent." Pet. App. 612a, *Utility Air Group v. EPA*, No. 12-1146 (Sentelle, C.J., concurring in denial of rehearing en banc).

In the panel decision, the court first rejected challenges to the Endangerment Finding, holding that EPA's scientific judgment that greenhouse-gas emissions contribute to global warming and thereby threaten public health and welfare was fully supported by the administrative record and was consistent with the text and structure of the Clean Air Act and with this Court's decision in *Massachusetts*. Pet. App. 31a-53a. The court also rejected challenges to the Tailpipe Rule on the merits, rejecting petitioners' arguments that EPA had improperly failed to consider the impacts of the Rule on stationary-source permitting. Pet. App. 53a-60a.

Rhode Island intervened in support of respondent EPA in the three consolidated cases challenging the Endangerment Finding, the Tailpipe Rule, and the Tailoring Rule. Other respondents here were involved in one or two of these cases. Connecticut and Minnesota intervened in the cases challenging the Endangerment Finding; Delaware, Vermont, Washington, and New York City intervened in the cases challenging the Endangerment Finding and Tailpipe Rule; New Hampshire intervened in the cases challenging the Endangerment Finding and the Tailoring Rule; and North Carolina intervened in the case challenging the Tailoring Rule. Respondents join as to the arguments that address the issues in the case(s) in which each intervened below.

With respect to stationary-source issues, petitioners advanced divergent theories in challenging the application of the PSD program to greenhouse-gas emissions. Some petitioners argued, both below and now in their cert petitions, that greenhouse-gas emissions are completely exempt from regulation under the PSD program. *See* Pet. of Energy-Intensive Manufacturers Working Group ("EIM Pet.") at 38 (No. 12-1254); Pet. of Southeastern Legal Foundation, Inc. at 25 (No. 12-1268); Pet. of State of Texas ("Texas Pet.") at 18-19 (No. 12-1269), Pet. of Utility Air Regulatory Group ("UARG Pet.") at 23-24 (No. 12-1146). Others argued for a more limited exemption: they argued that only emissions of one of the six identified NAAQS pollutants could lead to PSD permitting obligations, but that any facilities thus subject to those obligations may be required to comply with BACT requirements to limit not just NAAQS pollutants, but greenhouse-gas emissions as well. *See* Pet. of American Chemistry Council ("ACC Pet.") at 23-24 & n.12 (No. 12-1248); *see also* Pet. App. 646a (Kavanaugh, J., dissenting in denial of rehearing en banc).

The court of appeals rejected both arguments, concluding that the PSD permitting requirements unambiguously apply to stationary sources that emit greenhouse gases. Pet. App. 67a-77a. The court's decision was based on the plain language of 42 U.S.C. § 7479(1), which extends the PSD program to emitters of "any air pollutant" over the statutory threshold of 100/250 tpy, as well as the plain language of § 7475(a)(4), which requires major emitting facilities to install BACT for "each pollutant subject to

regulation" under the Clean Air Act. Pet. App.73a-75a. The court found that the language in both of these provisions clearly included greenhouse-gas pollutants in light of this Court's holding in *Massachusetts* that the statutory term "'air pollutant' . . . unambiguously encompasses greenhouse gases." Pet. App. 73a.

As for petitioners' argument that EPA lacked authority to phase in permitting requirements through the Timing Rule and Tailoring Rule, the court held that petitioners lacked standing to bring such challenges because EPA's phased approach mitigated rather than caused injury. Pet. App. 100a-101a. The court thus did not have jurisdiction to reach the merits of whether EPA was authorized to phase in the PSD permitting requirements for major sources of greenhouse gases. Pet. App. 95a-106a.

REASONS FOR DENYING THE PETITIONS

EPA's phased application of PSD permitting to major stationary sources of any regulated air pollutant, including greenhouse gases, does not warrant review. Petitioners challenge here only the beginning steps in a series of steps that EPA will take to accommodate practical concerns about the burdens of permitting such sources immediately. Thus, contrary to petitioners' characterization, these lawsuits do not identify any permanent departure from the PSD program's statutory emissions thresholds—but rather a transitional program that will be subject to further study and modification in the near future. Nor do these lawsuits properly raise any concerns about the applicability of PSD permitting to smaller

sources of greenhouse-gas emissions, because EPA's and the States' treatment of those sources continues to be adapted to reflect their ongoing experience with permitting for greenhouse-gas emissions. Such time-limited and transitional administrative actions raise no issues important enough to merit this Court's immediate intervention in an ongoing process.

In any event, the court of appeals appropriately did not even reach the merits of petitioners' challenge to EPA's authority to phase in permitting requirements because it correctly found that petitioners lack standing. That standing ruling follows well-established precedents and raises no issue meriting this Court's review. EPA's regulation of stationary sources of greenhouse gases is otherwise unremarkable. The Clean Air Act's PSD provisions unambiguously require permitting for sources that emit more than threshold amounts of any regulated air pollutant, including greenhouse gases, and the court of appeals' opinion is consistent with this Court's recent rulings in *Massachusetts* and *Connecticut*.

Finally, petitioners' remaining arguments—specifically those concerning the Endangerment Finding and the Tailpipe Rule—allege only errors in EPA's factual findings or misapplications by the court of appeals of a properly stated rule of law. The few petitioners that press these arguments do not persuasively explain why this Court should ignore its general rule that it "rarely grant[s]" certiorari on these grounds. Sup. Ct. R. 10. Indeed, no member of the court of appeals, including the judges who dissented from the denial of rehearing en banc, would have ruled in petitioners' favor on these arguments.

I. EPA's Step-by-Step Program for Imposing Permitting Requirements on Stationary Sources Presents No Question Warranting This Court's Review.

1. Petitioners urge this Court to find that the Tailoring Rule's departure from the PSD statute's emissions thresholds demonstrates that the PSD program was never meant to cover greenhouse-gas emissions. That argument mischaracterizes EPA's rulemaking. EPA did not determine that it would permanently depart from the PSD statute's emissions thresholds, nor that it would forever be infeasible for PSD permits to be issued to all sources covered by the statute.

Instead, EPA determined only that, in implementing the unambiguous statutory language that major emitters of "any air pollutant," 42 U.S.C. § 7479(1), be subject to PSD permitting, immediate application of current PSD requirements to all stationary sources emitting more than 100/250 tpy of greenhouse gases would be too burdensome on those sources and on the States that would issue PSD permits. *See* 75 Fed. Reg. at 31,572. EPA thus adopted a step-by-step approach that restricted the PSD program's initial application only to those sources that emit more than 75,000/100,000 tpy of greenhouse gases—a limitation that EPA determined (and no party disputes) was necessary to mitigate significant burdens on state permitting agencies, yet still encompasses eighty-six percent of the greenhouse-gas emissions for stationary sources. *Id.* at 31,567-72. At the same time, EPA committed to a further rulemaking by April 30, 2016, to address the

permitting obligations of smaller sources, with an eye toward reducing the burdens on the States and regulated entities—such as with streamlined permitting requirements, exemptions for *de minimis* emitters, or some combination of those approaches. *See* 40 C.F.R. § 52.22(b)(2)(ii); 75 Fed. Reg. at 31,525.

Thus, the current disparity between the stationary sources covered by the PSD program under the Tailoring Rule, and the sources covered by the PSD program's statutory language, is not, as petitioners contend, a confession by EPA that greenhouse-gas emissions are categorically unsuited to regulation under the PSD program. Instead, it is merely a temporary accommodation to certain practical obstacles in applying an existing regulatory scheme to a new class of pollutants. There is no need for this Court to review EPA's reasoned approach to this transitional situation.

2. Petitioners also directly challenge EPA's authority to phase in a complex regulatory program, rather than implement it all at once, through the Tailoring Rule. As a threshold matter, the court of appeals did not reach the merits of this claim because it found that petitioners lacked standing to bring it. As the panel correctly concluded, the Tailoring Rule benefits petitioners, rather than injures them, by reducing the burdens of the PSD program. Petitioners have not identified any persuasive reason that this jurisdictional issue merits the Court's further review.[5]

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[5] Texas argues, for the first time, that it has standing because there is "'some possibility' that the requested relief will

In any event, EPA's decision to phase in permitting requirements in light of undisputed administrative burdens is well grounded. As this Court recognized in *Massachusetts*, EPA need not "resolve massive problems" such as greenhouse-gas emissions "in one fell regulatory swoop," and may "instead whittle away at them over time, refining [its] preferred approach as circumstances change and as [the agency] develop[s] a more nuanced understanding of how best to proceed." 549 U.S. at 524. In particular, decisions from this Court and the D.C. Circuit have acknowledged that administrative necessity may justify an agency's reasonable judgment that an administrative program may be extended to its full scope gradually over time, rather than all at once, in order to ease burdens on both regulatory authorities and regulated entities.[6]

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prompt the injury-causing party to reconsider the position that allegedly harmed the litigant." Texas Pet. at 27 (emphasis omitted) (quoting *Massachusetts*, 549 U.S. at 518). But Texas did not make this argument in the court of appeals, and this Court does not typically consider arguments that were neither raised nor addressed below, *Travelers Cas. & Surety Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007). Moreover, even in its petition, Texas fails to explain what action the "injury-causing party" (*i.e.*, EPA) would take that would alleviate the States' injuries.

[6] *See, e.g., Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 1002 (2005) (upholding decision to move toward regulating certain entities incrementally); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 477-78 (D.C. Cir 1998), *cert. denied*, 526 U.S. 1158 (1999) (upholding agency decision to adopt multistep timetable for reducing aircraft noise from sightseeing tours in Grand Canyon National Park); *cf. Ala. Power v. Costle*, 636 F.2d 323, 358-59 (D.C. Cir. 1979) (recognizing

EPA's step-by-step approach reasonably serves both the purposes of the Clean Air Act and the interests of the States. And it also serves—or in any case does not impair—the interests of the covered parties. The Tailoring Rule's temporary 75,000/100,000 tpy emissions thresholds, though significantly higher than the statutory thresholds, cover *eighty-six percent* of greenhouse-gas emissions from stationary sources. *See* 75 Fed. Reg. at 31,571; ACC Pet. at 24, n.12 (relying on this fact in support of its interpretation of the statutory scheme). At the same time, limiting the population of regulated stationary sources as a temporary measure relieves the States from the burden of responding to potentially tens of thousands more permitting applications than they are currently equipped to handle. *See* 75 Fed. Reg. at 31,534. And it mitigates any potential burdens on the covered sources by phasing in their permitting obligations over time. EPA's phased approach thus maintains the workability of PSD permitting while covering the lion's share of greenhouse-gas emissions from stationary sources.

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that EPA could invoke administrative necessity if PSD permitting burdens became overwhelming).

II. EPA's Application of PSD Requirements to Major Sources of Greenhouse-Gas Emissions Accords with *Massachusetts* and *Connecticut* and with the Plain Language of the Clean Air Act.

1. EPA's regulation of greenhouse-gas emissions from stationary sources under the PSD permitting program is entirely unremarkable in light of this Court's decisions in *Massachusetts* and *Connecticut*. PSD permits are required for new and modified stationary sources emitting major amounts of "any air pollutant," and sources in the PSD program must install BACT "for each pollutant subject to regulation" under the Clean Air Act. 42 U.S.C. §§ 7475(a)(4), 7479(1). *Massachusetts* found that the Clean Air Act's general definition of "air pollutant" unambiguously encompassed greenhouse gases. 549 U.S. at 528-29. And *Connecticut* found it "equally plain that the [Clean Air Act] 'speaks directly' to emissions of carbon dioxide" from stationary sources. 131 S. Ct. at 2537. The court of appeals' decision that the language of the PSD statute unambiguously applies to any regulated air pollutant, including greenhouse gases, was a straightforward application of the statute and this Court's precedents.

Accepting petitioners' argument here that the PSD program does not cover greenhouse gases would be inconsistent with *Connecticut*'s holding that EPA's authority to regulate greenhouse-gas emissions from stationary sources displaces federal common law. *Connecticut* recognized that Congress's delegation to EPA of "the decision whether and how to regulate carbon-dioxide emissions from power plants" precluded

the States from bringing federal common-law claims to limit greenhouse-gas emissions from those sources. *Id.* at 2538. In recognizing this displacement, the Court cited EPA's authority and plans for rulemaking under the New Source Performance Standards (NSPS) program in section 111 of the Act, 42 U.S.C. § 7411, and further referenced EPA's "phasing in" of permitting requirements under the Tailoring Rule.[7] *Connecticut*, 131 S. Ct. at 2533, 2537.

Indeed, the parties in *Connecticut* specifically cited the PSD program as an example of EPA's delegated authority. *See* Reply Brief for Tennessee Valley Authority as Resp. Supporting Pets. 17-18, *Connecticut*, 131 S. Ct. 2527 (No. 10-174) ("Carbon dioxide . . . is therefore addressed by the CAA's provisions for the prevention of significant deterioration (PSD) of air quality."). And certain petitioners here appeared as amici to likewise urge this Court to find displacement based on what they then acknowledged to be the Clean Air Act's "comprehensive" delegation of authority to EPA to regulate greenhouse-gas

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[7] This Court primarily relied on the NSPS program's regulation of existing power plants because that program was most directly applicable to the power plants that were the defendants in the *Connecticut* litigation. By contrast, PSD permitting requirements apply only to new or modified facilities. However, it would make little sense to construe the PSD program more narrowly than the NSPS program, as Amici States of Kansas, Montana, and West Virginia suggest (Br. at 7 n.2), given that Congress added the PSD program specifically in response to concerns that the pre-existing NSPS program inadequately limited pollution from stationary sources. *See Envtl. Defense Fund v. Duke Energy Power Corp.*, 549 U.S. 561, 567-68 (2007).

emissions from stationary sources. *See, e.g.*, American Chemistry Council et al., as Amici Curiae in Support of Pets. at 27-28, *Connecticut*, 131 S. Ct. 2527 (No. 10-174).

Petitioners now reverse course and ask this Court to declare that Congress did not intend major sources of greenhouse-gas emissions to be regulated under the PSD program. *See e.g.*, Pet. of Chamber of Commerce ("Chamber Pet.") at 29-31 (No. 12-1272); Texas Pet. at 18-19; EIM Pet. at 38. But *Massachusetts* and *Connecticut* confirmed EPA's authority to regulate greenhouse-gas emissions from stationary sources as the flip side to limiting the States' ability to pursue their own remedies against stationary sources under federal common law. If, as petitioners contend, the Clean Air Act does not delegate to EPA the statutory authority to regulate greenhouse-gas emissions from stationary sources, then EPA's statutory authority cannot displace federal common-law remedies for global-warming harms caused by power plants and other major stationary sources. Petitioners cannot simultaneously argue that EPA's authority under the Clean Air Act displaces the States' invocation of federal common-law nuisance claims, while arguing that EPA does not actually have relevant regulatory authority.

2. Contrary to the arguments of certain petitioners, the regulation of greenhouse gases under the PSD program would hardly require an unprecedented expansion of the Clean Air Act. *See e.g.*, EIM Pet. at 23-29. For one thing, as petitioners acknowledge, the Act specifically authorizes EPA to "tak[e] into account energy . . . and economic impacts and other

costs," *see, e.g.*, *id.* at 28 (citing 42 U.S.C. § 7479(3)), a built-in protection against any unreasonable burdens that might arise in the future.

Moreover, the recent practical experience of the States belies any concern that applying PSD-permitting requirements to greenhouse-gas emissions will radically alter the regulatory landscape. The PSD permits that the States have issued under the Tailoring Rule have focused primarily on improving the efficiency of facilities, not on transforming them altogether. For example, a new natural-gas-fired power plant in St. Charles, Maryland, will meet the BACT requirement for greenhouse gases by, *inter alia*, using high-efficiency combined cycle turbines fueled by pipeline-quality natural gas.[8] These turbines will reduce the cost of energy while at the same time lowering the facility's costs for capital, operation, and maintenance. Similarly, the PSD permit for a replacement cement kiln in Ravena, New York, requires the facility to meet its BACT emission limit for greenhouse gases by, *inter alia*, undertaking certain measures to optimize the design of the kiln for energy efficiency, which will cut greenhouse-gas pollution by forty percent while reducing the facility's cost of energy.[9] These permits demonstrate that

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[8] *See* Md. Pub. Serv. Comm'n, Environmental Review of the Proposed Modification to the CPV St. Charles Project (Draft), Case No. 9280, Doc. 39 (Jan. 26, 2012), *available at* http://webapp.psc.state.md.us/Intranet/home.cfm (search cases).

[9] N.Y. State Dep't of Envtl. Conserv., State Environmental Quality Review (SEQR) Findings Statement 13-14 (July 19, 2011), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/laffindings.pdf.

extending the PSD program to greenhouse gases fits well within the existing regulatory structure to appropriately reduce emissions that would otherwise contribute to serious harms.

3. Given the plain language of the statute and the long-standing application of the PSD program to all air pollutants regulated under the Clean Air Act, there is no merit to certain petitioners' claim that the PSD program should be limited to emitters only of the six identified NAAQS pollutants, rather than of "any air pollutant." *See, e.g.*, ACC Pet. at 24; Chamber Pet. at 28. The court of appeals' decision—that EPA's application of the PSD program to sources of any regulated air pollutant was the "only plausible reading," Pet App. 74a—was correct and unexceptional. *See* Pet. App. 70a-77a.

When Congress wanted to limit a program in the fashion proposed by petitioners, it knew how to do so. The "nonattainment new source review program" (NNSR) establishes permitting rules and regulations for new or modified emissions sources in non-attainment areas that are more stringent than under the PSD program and that are specifically aimed at improving air quality until the NAAQS are met. *See* 42 U.S.C. §§ 7501-7509. As relevant here, the NNSR statute specifically limits its application to the six identified NAAQS pollutants—in contrast to the PSD statute's broader reference to "any air pollutant." For example, NNSR permitting obligations apply to "an area which is designated 'nonattainment' *with respect to that pollutant*." *Id.* § 7501(2) (emphasis added); *id.* § 7502(c)(5). Similarly, the NNSR statute requires sources to obtain emission offsets only "of the

relevant air pollutant" to timely "ensur[e] attainment of the applicable" NAAQS. *Id.* § 7501(1). The expressly narrower scope of the NNSR program thus supports a broader interpretation of the scope of the PSD statute.

Petitioners' alternative interpretation not only contradicts the plain language of the statute—it would also upend the States' more than three-decades-long application of the PSD program to "any air pollutant regulated under the [Clean Air Act]." *See* Pet. App. 70a (quotation marks omitted). The States have enacted both statutes and regulations reflecting this understanding. *See*, *e.g.*, Ala. Admin. Code § 335-3-14-.04(2)(ww) (pollutants covered under PSD permitting include non-NAAQS pollutants, such as a pollutant subject to a standard promulgated under the NSPS program); 6 N.Y.C.R.R. § 231-4.1(b)(44) (pollutants subject to PSD requirements include, *inter alia*, "any contaminant that otherwise is subject to regulation under the Clean Air Act" except hazardous air pollutants regulated separately). And both EPA and the States have regulated a broad range of non-NAAQS pollutants under the PSD program, including fluorides, hydrogen sulfide, metals, municipal-waste combustor organics, solid-waste landfill emissions, sulfuric-acid mist, and total-reduced sulfur. *See* 40 C.F.R. § 51.166(b)(23)(i) (establishing significance levels for pollutants subject to PSD). Petitioners' novel interpretation of the PSD program unnecessarily threatens well-established programs regulating airborne pollutants across the country.

III. Petitioners' Remaining Arguments Do Not Merit This Court's Review.

The other arguments raised by petitioners concern only alleged "erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, and thus do not present questions worthy of certiorari.[10]

First, petitioners' challenges to EPA's Endangerment Finding essentially ask this Court to second-guess the "scientific judgment" that *Massachusetts*, 549 U.S. at 533-34, ordered the agency to reach. *See e.g.*, Chamber Pet. at 22-24; Pet. for Coalition for Responsible Regulation ("CRR Pet.") at 19 (No. 12-1253). But a "court must generally be at its most deferential" when the agency is "making predictions, within its area of special expertise, at the frontiers of science." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983). Here, EPA conducted a rigorous, thorough, and balanced review of an extensive scientific record and properly focused on the factors set forth in the statute. As required by the Clean Air Act, 42 U.S.C. § 7521(a)(2), EPA determined, based on a substantial record, that motor-vehicle greenhouse-gas emissions "contribute to" climate-change harms. Pet. App. 41a-42a; 74 Fed. Reg. at 66,499. And EPA further determined that global warming caused by greenhouse-gas emissions results in public-health harms, such as more premature deaths from heat waves and more respiratory illnesses from smog, as

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[10] Numerous other issues are raised in the nine certiorari petitions. On those issues, state and city respondents join in the arguments made in the other briefs opposing certiorari.

well as adverse welfare effects that are occurring now. Pet. App. 42a (citing 74 Fed. Reg. at 66,497-98); *see also* 74 Fed. Reg. at 66,525, 66,533. The court of appeals correctly concluded that, under the deferential standard of review applicable to agencies' scientific judgments, the record amply supported the Endangerment Finding. Pet. App. 39a-45a.

Second, petitioners' challenges to the Tailpipe Rule here also present no question worthy of review. For example, contrary to Coalition for Responsible Regulation's argument, the Tailpipe Rule did not fail to "meaningfully address" the climate-related harms documented in the Endangerment Finding. CRR Pet. at 19-23. EPA identified substantial climate-related benefits attributable to the Tailpipe Rule—such as the avoidance of 962 million metric tons of carbon dioxide equivalent pollution from light duty vehicles. *See* 75 Fed. Reg. at 25,490, Table III.F.1-2. Indeed, the Tailpipe Rule will produce large reductions in greenhouse-gas emissions from one of the largest and fastest-growing source categories. *See* 75 Fed. Reg. at 25,326 ("Mobile sources emitted 31 percent of all U.S. [greenhouse gases] in 2007 . . . and have been the fastest-growing source of U.S. [greenhouse gases] since 1990."). Petitioners also argue that EPA should have considered emissions reductions from other sources, such as the fuel economy standards passed by the National Highway Traffic Safety Administration. CRR Pet. at 27-28; Chamber Pet. at 27-28. This Court rejected a similar argument in *Massachusetts*, based on the fact that EPA is under an independent statutory duty to promulgate standards. *See* 549 U.S. at 532. The court of appeals was thus correct in

holding that this argument is foreclosed by *Massachusetts*. Pet. App. 55a. Further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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