No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the course of a series of regulatory actions taken by the Environmental Protection Agency subsequent to *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Agency decided that a particular Clean Air Act program regulating "stationary sources," the Prevention of Significant Deterioration (PSD) program, must apply to greenhouse gases, as a matter of a *Chevron* "step-one" mandate, once the Agency regulated "mobile-source" greenhouse-gas emissions. The Agency referred to this as the "automatic triggering" of PSD greenhouse-gas regulation. In the EPA's view, the matter turned on the meaning of the term "any air pollutant" in the PSD provisions governing those emitters required to seek permits, *i.e.*, any "major emitting facility." 42 U.S.C. §§ 7475(a), 7479(1) (2013). By longstanding regulations, the Agency had defined "any air pollutant" to include any air pollutant "subject to regulation" under any other part of the Act – hence the "automatic triggering" once mobile sources were regulated. As part of a consolidated judgment addressing multiple challenges to the various Agency actions involved, a panel of the United States Court of Appeals for the D.C. Circuit upheld EPA's action. The questions presented are:

1. Whether the Court of Appeals erred in determining that regulating stationary-source greenhouse-gas emissions under the Clean Air Act's Prevention of Significant Deterioration program, and an associated

QUESTIONS PRESENTED – Continued

program known as "Title V," is statutorily required as a matter of a *Chevron* "step-one" legislative command.

2. Whether, in determining that the Clean Air Act unambiguously requires application of the PSD program to greenhouse gases, the Court of Appeals and the EPA ignored required elements of statutory construction in cases of this type by failing to examine whether the various statutory components of that program were contradicted, nullified, or otherwise contravened by application to greenhouse gases, and, further, without considering whether alternative mechanisms exist for regulating stationary-source greenhouse-gas emissions under the Act that better serve the statute's dual concerns with the economy and the environment.

3. Whether a claimant may be barred from asserting a claim that applying the PSD program to greenhouse gases is not authorized by the Act because the claimant, or other large emitters of conventional pollutants, did not assert that claim at the time EPA promulgated decades-old regulations that involved conventional pollutants only, when, first, the claim at issue is uniquely and entirely limited to the application of the statute to greenhouse gases, and, second, the Agency, in any event, itself has modified the regulations to reflect a unique greenhouse-gas-specific definition of the key statutory term.

PARTIES TO THE PROCEEDING

Petitioners are the Energy-Intensive Manufacturers Working Group for Greenhouse Gas Regulation (Energy-Intensive Manufacturers Group) and the Glass Packaging Institute (GPI). The Energy-Intensive Manufacturers Group was the sole petitioner in the two principal cases below that are involved in this petition (Nos. 10-1114 and 10-1206), and GPI was a petitioner in related cases.

Respondents herein are the Environmental Protection Agency and Robert Perciasepe, Acting Administrator, Environmental Protection Agency.

The petitioners in related cases addressed by the consolidated judgment below, which are not petitioners herein, included the American Chemistry Council; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Brick Industry Association; the Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; The National Association of Manufacturers; National Oilseed Processors Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; Coalition for Responsible Regulation, Inc.;

PARTIES TO THE PROCEEDING – Continued

Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Nathan Deal, U.S. Representative, Georgia 9th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; Clean Air

PARTIES TO THE PROCEEDING – Continued

Implementation Project; American Iron and Steel Institute; Gerdeau Ameristeel US Inc.; Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Utility Air Regulatory Group; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio Coal Association; Indiana Cast Metals Association; National Federation of Independent Business; North American Die Casting Association, State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; Portland Cement Association; Georgia Coalition for Sound Environmental Policy, Inc.; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; Competitive Enterprise Institute; FreedomWorks; the Science and Environmental Policy Project; Pacific Legal Foundation. The respondents in related cases addressed by the consolidated judgment below included the U.S. Environmental Protection Agency (EPA) and Lisa P.

PARTIES TO THE PROCEEDING – Continued

Jackson, Administrator, U.S. Environmental Protection Agency.

RULE 29.6 STATEMENT

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

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation and the Glass Packaging Institute, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 684 F.3d 102 and reproduced at Petitioner Appendix ("Pet. App.") 1. The unpublished order of the D.C. Circuit denying rehearing en banc, including statements concurring or dissenting from the denial of rehearing en banc, is set out at Pet. App. 102.

JURISDICTION

The judgment of the Court of Appeals in the several cases consolidated below was entered on June 26, 2012. Pet. App. 1. A petition for rehearing en banc was denied on December 20, 2012. Pet. App. 102. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2013).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides, in pertinent part, that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1.

The Constitution of the United States provides, in pertinent part, that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The Constitution of the United States provides, in pertinent part, that "[t]he Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq*. (2013) are reproduced at Pet. App. 162.

INTRODUCTION

The Court will have received a number of worthy petitions in this important matter. Ours is among those that primarily address questions concerning the

proper interpretation of the Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act in the context of the Environmental Protection Agency's (EPA's) attempt to apply the PSD program to greenhouse gases (GHGs).

It may be helpful to the Court if we outline here how our petition relates to others of which we are aware that deal with closely related questions. In general, our principal argument raises the broadest and most fundamental challenge to EPA's interpretive approach to the provisions. We have framed our first question presented so that it is broad enough to encompass our principal merits argument, as well as those of other petitions concerned with interpretation of the PSD provisions in the GHG context, should the Court seek briefing on multiple approaches.

Petitioners' Principal Argument

Our principal argument is that the Agency and the court below used a mistaken approach to statutory construction, and that, when the correct approach is used, it is apparent that the application of the PSD program to greenhouse gases is not required by the statute as a matter of *Chevron* step-one as the Agency and lower court believe. In fact, it is our position that this program is not authorized by the Act.

Under the correct interpretive approach, it is apparent that each of the most important PSD statutory provisions involved is contradicted, nullified, or otherwise contravened by the attempt to apply the

PSD program to carbon dioxide and other greenhouse gases. This is only apparent, however, once the differences between greenhouse gases and the conventional pollutants for which Congress designed the program are considered. Those differences need to be considered in combination with the relevant PSD provisions, and the consequences of applying those provisions to GHGs need to be assessed in relation to the statute's intent, purposes, structure, and concerns.

The consequences that must be considered as part of the core interpretive approach in a case of this type result directly from the application of text to the relevant facts, and they have thus been called "textual consequences."[1] Though the precise role of "consequences" can sometimes vary in different approaches to statutory construction, "textual consequences" represent an area of clear agreement.[2] Our argument, further, is that textual consequences are particularly important in cases that involve the application of a statute to a context that Congress did not contemplate as it fashioned the provisions in question.

By contrast, the Agency and the Court of Appeals' approach to interpretation of the statute is deficient

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

[2] *Cf.* Scalia & Garner, *id.,* and STEPHEN A. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 120 (Knopf 2005).

in three respects. First, it relies on language alone – in the course of a "plain language" analysis it ignores the facts that differentiate GHGs from conventional pollutants and the importance of those differences when addressing the relevant statutory text. Second, the approach is highly selective in the text it considers, ignoring the most important and telling provisions. Third, the approach fails to consider the "whole statute" in the sense of the entire "statutory scheme," and thus fails to recognize that there are other programs within the Clean Air Act far better suited to the regulation of the carbon emissions of stationary sources; furthermore, this approach fails to consider what this might mean for whether an ill-suited program must cover GHGs.

Put differently, the PSD program's provisions are transformed by the attempt to apply them to carbon dioxide, and those transformations must be included as a part of the interpretive assessment. A clear example of this transformation is the one featured in the Agency's effort to use the "absurd consequences" doctrine (and others) to rewrite, on a rolling basis, the statute's threshold for the size of facilities regulated. In order to capture only the nation's largest industrial facilities, the statute sets the threshold at 100 (and under some circumstances 250) tons per year of any air pollutant. Yet the statutory threshold when applied to ubiquitous and abundant carbon-dioxide emissions is transformed into its opposite. It captures facilities large and small.

As a matter of statutory construction, there are three primary problems with the Agency and the lower court's treatment of this particular "absurd consequence" and its standing in relation to the broader issues in statutory interpretation. First, as other petitions will likely emphasize, the Agency and lower court's approach violates the requirement that application of the absurd consequences doctrine as "rewriting authorization" must be a last resort, and a reasonable construction that avoids the absurdity must be adopted, if one is available, before turning to the doctrine for that purpose. Our argument adds a second reason the Agency and the lower court's approach is faulty – it fails to include this consequence as part of the assessment of textual consequences required by the proper interpretive approach. The Agency and lower court do not include it as part of the interpretive process going to the basic question of whether the PSD program can properly apply to greenhouse gases. Its consideration was required quite apart from the terms of the absurd consequences doctrine; it was required by the underlying proper interpretive process in the first instance.

The third basic reason the Agency and the Court's treatment of this particular transformation is part of a failed interpretive approach, as we emphasize to a far greater degree than other petitions, is that the Agency and the Court stopped there. That is, they failed to consider the many other textual provisions, some of them even more important, that were

transformed by application to greenhouse gases in ways that contradict the statute.

Against this background, we can more specifically place our petition in relation to others the Court has received or is likely to receive.

The petition of the Utility Air Regulatory Group (UARG) has already been filed (because UARG did not seek the extension provided to other petitioners). Their petition raises the question of whether the PSD program can be properly applied to greenhouse gases, as does ours, and the UARG petition, like ours, uses the absurd consequence involving the transformation of the effect of the 100/250-ton limit as a reason that the statute cannot properly apply. The UARG petition emphasizes one other aspect of the PSD statutory provisions. It relies on those provisions that embody Congress' intent that the PSD program apply only to those pollutants that affect air "quality" in the sense of a substance harmful to breathe.

We seek the opportunity to demonstrate that many other provisions of the PSD text are also contradicted, nullified, or otherwise contravened by application to GHGs. Many of these other provisions are highly consequential for energy-intensive industries. The potentially enormous (and difficult to measure) costs and disruption involved in PSD regulation of carbon, especially those that result from changes in industrial processes, practices, designs, and methods of operation that can be mandated

under the PSD program, have enormous and unique implications for the manufacturing sector.

Moreover, our argument does not rely in a "direct" or final way on Congressional intent at the time of passage in and of itself. Our analysis takes an additional step – one involving textual consequences. It says that, consistent with this Court's guidance, even if the flexibility afforded by an "implied delegation" to deal with a newly arising and uncontemplated problem would allow an agency to move beyond in some respects things "specifically intended" at the moment of the statute's enactment, it can do so only if the statute still would make sense in its own terms. An agency may not do so if, upon examination, application to the new context contravenes the statutory provisions in ways that render the statute unsuited for the new application and contrary to the statute's intent, purposes, structure, and limitations considered in the new context.

For example, we are in complete agreement with UARG about the importance of the fact that Congress constructed the PSD provisions having in mind air quality and the associated reliance on local conditions and impacts. But we would explore further important consequences of this for the attempt to apply the statute to GHGs. For example, this makes a nullity of the PSD provisions establishing measurements of local pollutant levels and assessment of local environmental impacts as the factual context, and thus the source of balanced and reasonable judgments, for PSD permitting decisions.

Also, while the UARG petition raises a standing question, we submit a different threshold question. UARG focuses on the lower court's entangling of standing with the key merits question about applicability of PSD to greenhouse gases. Ours focuses on the "timeliness" bar the court erected.

As we will further explain in our Statement, our reading is that the court proceeded to the statutory question of whether the PSD provisions can (or in its view, "must") accommodate greenhouse gases based on – only because of – the "timeliness" of the challenge of the Oil Seed Producers and the Homebuilders Association, who, because of their minimal emission of conventional pollutants, could not have challenged the relevant decades-old regulations covering conventional pollutants. It denied as untimely the challenges brought by larger emitters of conventional pollutants. Hence, our view of the court's core error in this respect involves its mistaken notion that a challenge by large emitters of conventional pollutants to PSD applicability to greenhouse gases could reasonably have been brought, or needed to be, at the time those regulations were issued, and that is how we frame the question presented. As petitioners here present it, the court dismissed the challenges to the Timing and Tailoring rules because it viewed the statutory-interpretation question as separate from those rules, which it viewed as providing only "relief" from "full" force of the application to greenhouse gases which the statute would otherwise require.

The other petition (or type of petition, if there is more than one) that it is important to distinguish from ours is that (or those) which do not seek relief from PSD GHG applicability for all potentially covered facilities, only for smaller facilities. Under this argument, all large emitters who have to obtain PSD permits for conventional pollutants would also be covered for greenhouse-gas emissions. This would include most American industries, and it would leave most of American industrial production subject to PSD regulation. The relief that petitions with this thrust would provide is very similar in scope to the relief provided by the Agency under its "absurd consequences" rewriting. Such petitions seek a sounder statutory basis for such relief. The interpretation of the statute they propose would apply to conventional pollutants as well as greenhouse gases.

In keeping with the narrower focus, this argument does not address the various "substantive" provisions of the PSD program or their transformation, contradiction, or nullification when applied to greenhouse gases. Its focus is solely on the proper interpretation of provisions relating to the 100/250-ton threshold governing the size of facilities subject to PSD regulation.

STATEMENT OF THE CASE

In the conception of the Agency and the lower court, PSD carbon regulation is the result of an essentially unstoppable cascade of dominoes that

began with *Massachusetts v. EPA*. In *Massachusetts*, the Court found the term "air pollutant" in the Clean Air Act "flexible" and "capacious" enough to include greenhouse gases. *Massachusetts*, 549 U.S. at 532.

Massachusetts contains significant limiting language, and its express mandate to EPA is narrowly tailored. At issue in that case was whether EPA had to proceed to make an "endangerment finding" with respect to greenhouse gases under the mobile-source provisions of the Act. This Court concluded that, "Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles." *Id*. The final line of the Court's opinion states, "We hold only that EPA must ground its reasons for action or inaction in the statute." *Id*. at 535. The Court also said, "We need not and do not reach the question of whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. *Cf. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-844 (1984*)." Id.* at 534.

The mobile-source endangerment finding that was the subject of *Massachusetts* is the first of four proceedings that followed that case and that were consolidated for review before the D.C. Circuit in this case. This first Agency proceeding was officially entitled Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a)

of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I). Petitioners do not challenge EPA's actions in that rulemaking.

The second proceeding, known as the "Tailpipe Rule," established greenhouse-gas emission standards for light-duty vehicles, which we likewise do not challenge. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,323 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 531, 533, 536-538, and 600). This rule is nevertheless relevant to our case as what the Agency conceived to be the "triggering event" for PSD stationary-source regulation. As a result of the rule, GHGs became an air pollutant "subject to regulation under the Act," because, as is the basis for the Agency's position, its regulations had long interpreted the PSD statute's "any air pollutant" phrase to include the Agency-injected "subject to regulation under the Act" addendum.

The third proceeding, known as the "Timing Rule," addressed the question of "when" greenhouse gases became "subject to regulation under the Act" after the Tailpipe Rule. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50-51, and 70-71). The key issue of whether – as opposed to when – light-duty-vehicle regulation "automatically triggered" PSD stationary-source regulation was not addressed in the rule; instead it was the unexamined premise of the rule. Hence, in

terms of the Petitioners' core claim, it was at this juncture that the Agency first failed to engage in the requisite statutory interpretation, instead treating the matter as self-evident and somehow already decided.

The fourth proceeding was the "Tailoring Rule," which employed the "absurd consequences" doctrine, along with the "administrative necessity" and "one step at a time" doctrines, to address the single "absurd consequence" that the Agency had pre-selected for mitigation – the dramatic increase in the number of facilities regulated under the program and the increased sweep of the type of facility regulated. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,513 (June 3, 2010) (to be codified at 40 C.F.R. pt. 52). Here again, the assumed and unexamined premise was that PSD did apply to GHGs. The Agency concluded that the number of facilities covered and permits required would increase many hundreds of times, and that requiring all of these newly regulated facilities to comply with permitting obligations would "overwhelm permitting authorities," incur additional costs of billions of dollars per year, and "adversely affect national economic development." *Tailoring Rule,* 75 Fed. Reg. at 31,556-57. The Agency decided on a plan of a rolling re-writing of the 100/250-ton-per-year (tpy) threshold, beginning with 100,000 tons. *Id.* at 31,524 and 31,548-49.

For purposes of this petition, there are four particularly important aspects of the Tailoring Rule.

First, the absurdity that the Agency identifies and cures is not the regulation of small facilities contrary to Congress' intent that the program cover only the largest emitters, but the much narrower problem that neither the permitting authorities nor the small facilities could deal well with the permitting process. Hence, while the Agency initially rewrote the statute's 100/250-tpy thresholds to be a 100,000-tpy threshold, it promises to look for permitting "streamlining" techniques to move closer to the 100/250-tpy level, explicitly reserving judgment on how far it will or can go, based on streamlining progress, in capturing the escaped small emitters. *Tailoring Rule,* 75 Fed. Reg. at 31,566. It promises that it "seeks to include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible and as quickly as possible. . . ." *Id*. at 31,548. Hence, the Agency avowedly seeks a program that extends to hundreds of thousands or millions of emitters of all kinds, not just the largest industrial emitters that Congress targeted for PSD regulation, which, the Agency reports, number about 15,000. *Id*. at 31,540.

Second, though the Agency had planned and issued a Notice of Proposed Rulemaking to solve the crush of permitting by directly rewriting the 100 and 250 numbers, it abandoned that in the final rule in favor of a new definition of the term "subject to regulation" itself. Under this new definition, which applies to greenhouse gases only, GHGs are "subject to regulation" if they are emitted from a facility emitting them in amounts above the Agency's new (and future)

numerical thresholds, but not "subject to regulation" if emitted from a facility emitting them in lesser amounts. *Id*. at 31,575-83 and 31,607. This is the first time the Agency had defined a "regulated pollutant" by the quantity in which it is emitted rather than by the kind of pollutant the Agency sought to regulate.

Third, in what appears to be almost an aside in the Rule, and as elaborated upon in the Agency's related Permitting Guidance, permitting authorities and applicants are told they should ignore the provisions of § 165(e) of the Act (42 U.S.C. § 7475(e) (2013)) that set out the program's monitoring and environmental-impact-analysis requirements. It includes among the provisions to be ignored those found in § 165(e)(1), 42 U.S.C. § 7475(e)(1), requiring an analysis of the air surrounding the applicant's facility, as well as the requirement found in § 165(e)(3)(B), 42 U.S.C. § 7475(e)(3)(b), requiring analysis of specified local environmental impacts on things such as vegetation, soil and visibility. The Agency explains that these are to be ignored because such analyses do not make sense for greenhouse gases, which cause harm by changes in upper layers of the atmosphere. *Tailoring Rule,* 75 Fed. Reg. at 31,520; *PSD and Title V Permitting Guidance for Greenhouse Gases*, EPA-457/B-11/001, 47-48 (March 2011).[3]

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[3] This is relevant to the issues presented in this petition in several ways, two of which are most important. First, it nullifies an essential ingredient of the statutory scheme that provides a reasoned framework for the Agency's permitting decisions.

(Continued on following page)

Fourth, though the Agency several times asserts that it is not "reopening" the question of whether the PSD provisions apply to greenhouse gases, it does in the course of its "absurd consequences" analysis make a (one-paragraph) foray into statutory interpretation addressed to that question. *Tailoring Rule*, 75 Fed. Reg. at 31,548. It evidently believed it must do so because a principle of "absurd consequences" rewriting is that the statute otherwise and "literally" would require the absurd consequence. The Agency thus here explicitly based its argument for PSD applicability to GHGs on the assertion that the statutory "components" can be "readily applied" to GHGs and thus can "readily accommodate" them. *Id*.

In fact, there are only two components of PSD regulation which the Agency specifically examined to see if they can be "readily applied" to and can "readily accommodate" greenhouse gases. First, in the Tailoring Rule's principal topic and action, the Agency concluded that the fit of the 100/250-ton PSD thresholds and greenhouse gases was so poor it was absurd, and the program could not, without "tailoring," accommodate the results. The other component it examined, though it does not incorporate this insight into the analysis, is the set of § 165(e) impact-analysis-requirement provisions discussed in point

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Second, the statutory provision is couched in mandatory language, including the phrase, "each pollutant subject to regulation under the Act," that taken literally would require application to greenhouse gases.

three above – those that fit so poorly they should be ignored.

Multiple challenges were brought to each of the four EPA rulemakings. They were consolidated for review in *Coalition for Responsible Regulation v. EPA*.[4] A three-judge panel of the D.C. Circuit, in a per curiam opinion, rejected all challenges to the four rulemakings. Pet. App. 1. The following elements of the decision are of particular relevance to this petition.

The court held that the phrase "any air pollutant" contained in the 42 U.S.C. §§ 7745(a), 7749(1) "eligibility trigger" "includes *all* regulated air pollutants, including greenhouse gases" (Pet. App. 67) and that EPA's "longstanding" interpretation to that effect is "compelled by the statute" (Pet. App. 89) and is the only "logical" (Pet. App. 67) or "plausible" (Pet. App. 68) reading of "any air pollutant." The court's reasoning relies on the generality of the word "any" (Pet. App. 67) and the Supreme Court's statement in *Massachusetts* that greenhouse gases "are indisputably an 'air pollutant'" (Pet. App. 66), finds that this reading is "buttressed" by *Massachusetts'* holding that the statute's "overarching" definition "unambiguously" includes greenhouse gases (Pet. App. 66), and states that it finds further support throughout the CAA, citing three provisions. Pet. App. 66-71.

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[4] *Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102 (D.C. Cir. 2012) (to be found at Pet. App. 1).

The court also agreed with the EPA that because the challenges to the PSD triggering mechanism as set out in the Agency's "longstanding" regulations were based on "legal arguments that were available during the normal judicial review periods for the 1978, 1980 and 2002 Rules," none of the industry challenges were timely – except for those of the National Association of Home Builders and Oilseed Processors Association. Pet. App. 56. Those two groups were not barred because their emissions even of conventional pollutants were too small to qualify at the 100/250-ton threshold, and thus the addition of greenhouse gases gave them newly "ripened" claims concerning the regulations, which they brought within the required 60-day period. *Id.* The court proceeded to the merits on that basis.

Petitions for rehearing en banc were denied on December 20, 2012, with two dissents. Pet. App. 102. In their joint response to the dissents from the denial of rehearing, the three judges of the original panel concluded:

> To be sure, the stakes are high. The underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance. The legal issues presented, however, are straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent. There is no cause for en banc review. Pet. App. 109.

Earlier in the statement, the panel summarized its approach to the case, and to the interpretation of the statute, thus:

> . . . Here, Congress spoke clearly, EPA fulfilled its statutory responsibilities, and the panel, playing its limited role, gave effect to the statute's plain meaning. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43 (1984) ("if the intent of Congress is clear, that is the end of the matter; for the court, as well as the Agency, must give effect to the unambiguously expressed intent of Congress.") Pet. App. 108.

REASONS FOR GRANTING THE PETITION

Regulation of carbon-dioxide and other greenhouse-gas emissions of "stationary sources" by EPA under the PSD program is likely the most extensive, intrusive, burdensome, and potentially harmful scheme of regulation in the nation's history. In its basic structure as well as in all of its important provisions, the PSD program does not fit the unique challenges presented by greenhouse-gas regulation. PSD regulation is prescriptive, particularistic, case-by-case, and painfully prolonged. It requires a public hearing in every case, and demands "maximum" achievable reductions. It is not possible to conceive of a worse way of regulating carbon-dioxide emissions. No other country has contemplated any such thing, and no policymaker would ever recommend it.

PSD regulation of carbon is a policy debacle, unnecessary, indefensible, and undefended, that emerged without an exercise in reasoned policymaking from a fundamentally erroneous approach to statutory interpretation in cases of this type, a language-only and tendentiously language-selective approach that renders the statute helpless in the face of nonsensical regulatory results in a new context. It assigns to Congress responsibility for "directly" and "precisely" commanding the imposition of a regulatory regime Congress did not and would never create. PSD carbon regulation is an outcome that exceeds all reasonable limits, produced by a process that evades constitutional processes.

The position of the Agency, now adopted by the lower court, was that "the law made them do it."[5] Petitioner respectfully submits that as important as this case is because of the nature of the regulation it involves, it is even more important because of the misconception of "law" it involves. It is a conception that destroys the proper relationship between law, policymaking, and the respective branches of government. In a statutory case, "what the law is" is determined by the statute's interpretation, under the correct standards and processes, not by a form of radically de-contextualized literalism.

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[5] In fact, the government agreed to this very phrase in oral argument below.

When a statute created for one context is applied to another there is no *a priori* reason to believe that the resultant regulatory regime will make sense or that it will not contradict the intended meaning and import of the statutory terms. The "literal" meaning of the statutory provisions in the new context, such as those in this case meant to define and cover only the largest industrial facilities, may lead to outcomes that defy the statute. In such a situation, no analytical method that depends on "language alone" can determine whether the meaning and import of the language involved has been transformed by the new context into something that contradicts the statute as a whole, and common sense as well.

The Agency and the court below did not venture beyond plain and de-contextualized language. They ignored the direct and practical consequences of applying the statutory provisions to carbon-based emissions. To compound the error, they chose to focus only on a few provisions, ignoring most of the most consequential and telling ones. By the first error they divorced the statute from real-world consequences and the evidence of meaning such consequences could provide; by the second they divorced it from the rest of the text and the evidence of meaning available from it.

This approach to statutory interpretation by the Agency and the court in fact involved *policy creation* – but it was *implicit*, *de facto* policy creation that ignored context, facts, consequences, and relevant policy concerns. This would be dangerous in any area

of policymaking, but in the matter of carbon regulation it is almost unlimitedly irresponsible, and consequential – given the role of carbon-dioxide-releasing processes in our economy and lives.

Carbon's intimate relationship to much of human productive activity and its associated ubiquity and abundance puts great pressure on each of the three questions inherent in the establishment of any regulatory regime: whether to regulate, if so how, and how much. With respect to the second two questions, it is possible that rules and standards fashioned for conventional pollutants, when applied to carbon dioxide, can create absurdly intrusive, unrestrained, inefficient and, in light of alternatives, unnecessary regulation that transgresses all reasonable limits. That is this case.

The misconception of law involved in this case removes human judgment from one of the most significant policy choices of our times – how to regulate carbon. Similarly, it divorces governmental action from constitutional and political accountability. It amounts to a claim that Congress has directly and precisely commanded something Congress did not consider and that would be anathema to it. This case, among other things, emphatically invokes this Court's obligation to say, in this context, what "the law" is, and, at least in some respects, what the nature of "law" is.

I. The Court of Appeals Has Decided a Matter of Extraordinary National Importance that Should Be Decided – and Corrected – by This Court.

A. PSD-Program Carbon Regulation Is One of the Most Extensive, Intrusive, Unworkable and Potentially Damaging Regulatory Regimes Ever Imposed.

The scheme of regulation involved in this case is unprecedented. The PSD program and carbon dioxide are an unnatural and destructive mix. The PSD permitting program is particularistic, prescriptive, prolonged, and uncertain. When it is applied to carbon dioxide, moreover, the components that establish its "scope" both in the sense of which facilities are regulated and which aspects of those facilities are regulated, written with conventional pollutants in mind, balloon to elephantine proportions. Similarly, the components which give PSD permitting decisions a reasonable factual context involving local environmental impacts are rendered meaningless. When applied to carbon dioxide, the PSD provisions make environmental permitting authorities, *inter alia,* into comprehensive industrial regulators, without meaningful restraints, able to dictate every decision that affects a facility's emission of carbon dioxide *or* its consumption of energy.

PSD GHG regulation can be described in five basic dimensions.[6] Each is important to understanding how consequential EPA's action is for American industry, and each reflects a way that the PSD program is unsuited for the regulation of greenhouse gases.

1. Basic form or structure. PSD carbon regulation is particularistic, prescriptive, and case-by-case. It requires a public hearing, and has proven to be a font of litigation. Petitioner submits it is not possible to find a regulatory structure less compatible with the regulation of carbon, primarily because of the command-and-control PSD regime's diametric and classically inefficient opposition to market forces and its inherent uncertainty and delay. In the Tailoring Rule, the EPA itself described PSD permitting, before such permitting was exponentially complicated by the addition of carbon-dioxide emissions and energy consumption, as a "complicated, resource-intensive, time consuming and sometimes contentious process." *Tailoring Rule,* 75 Fed. Reg. at 55,321-22. In the

[6] Because the court below and the Agency view its substance (in light of the perceived "*Chevron* step-one" and "plain-language" mandate) as irrelevant, the Court will not find a meaningful description of PSD carbon regulation in the circuit court's opinion, and it takes considerable piecing-together to get a good picture of it even from the Agency proceedings. Put differently, we believe that the case, because of the elements of the requisite and ignored interpretive approach, is "about" something very different than the Court of Appeals and Agency thought, and it thus involves very basic, descriptive facts about the regulation in question which they avoided.

Agency's first step after *Massachusetts,* when, in a process it later abandoned, the Agency began thinking about its various options for the regulation of carbon in an Advance Notice,[7] the EPA had this to say about it: "Because of the case-by-case nature . . . the complexity . . . and the time needed to complete the PSD permitting process, it can take . . . more than a year to receive a permit . . . . *Id*. at 44,500. "There have been significant and broad-based concerns . . . over the years due to the program's complexity and the costs, uncertainty, and construction delays. . . ." *Id*. at 44,501.

2. "Scope" in the sense of aspects of production regulated. The transformed PSD carbon-regulation program now claims the power to prescribe every aspect of production, practices, processes, operations, methods, systems, techniques, equipment, technologies, work practices, or designs which affect carbon emissions *or* the consumption of energy, because the latter affects the former.[8] To understand the scope of

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[7] Advance Notice of Proposed Rulemaking (ANPR) on Regulating Greenhouse Gases under the Clean Air Act (CAA), 73 Fed. Reg. 147 (July 30, 2008).

[8] The statute, as part of its definition of "best available control technology" uses the terms "production processes and available methods, systems and techniques." 42 U.S.C. § 7479(3) (2013). The EPA's elaboration of what this allows it to control in the context of GHG control is found in regulations or in *PSD and Title V Permitting Guidance for Greenhouse Gases* ("Permitting Guidance"), EPA-457/B-11/001 (March 2011). In fact, the Guidance is in large measure an elaboration of things found buried in the proceedings, particularly, in the Tailoring Rule, or otherwise

(Continued on following page)

the regulatory revolution involved, it is vital to understand that PSD carbon regulation is essentially a scheme of energy-consumption regulation through particularistic regulation of everything that consumes energy. Environmental-permitting authorities have now become comprehensive, prescriptive regulators of industrial operations and design because they claim the right to regulate anything and everything that affects energy use. *Permitting Guidance* at 21-22, 28-32, 40-46 ("The application of methods, systems, or techniques to increase energy efficiency is a key GHG-reducing opportunity that falls under the category of 'lower-polluting processes/practices.'")[9] The aspects regulated would include everything that matters in making – every one of the hundreds of complex and interrelated judgments that go into such a decision – for instance, steel, aluminum, glass, chemicals, paper, or cement. If this approach were taken to the regulation of the carbon emissions of

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hidden in plain sight in that rule and its predecessor proceedings.

[9] Even with respect to energy-control equipment, as opposed to energy-consuming aspects of operations generally, the program is unlimitedly prescriptive and intrusive. A useful example is found in the Permitting Guidance for the relatively simple matter of a "natural gas boiler," under which regulation could include a "combination of oxygen trim control, an economizer and condensate recovery for the boiler, along with high transfer efficiency design for the heat exchanger," a "preventive maintenance program" for the controller, and "a requirement for periodic maintenance and calibration of the natural gas meter and the steam flow analyzer." *Permitting Guidance* at F1-3.

vehicles, the permitting authorities would hold sway over the slope of the windshield, the height of the vehicle, its weight, the pressure of its tires, and whether it had a roof rack – and that would be before the permitting authority got to the engine, transmission, fuel choice, or driving habits of its operator.

3. "Scope" in the sense of which facilities are regulated. As all agree, the enacting Congress meant to limit the PSD and Title V programs to only the largest industrial emitters by specifying the threshold as those facilities that emit more than 100 or 250 tpy of "any air pollutant." Though the Agency measures the increase in facilities regulated caused by the addition of GHGs to the phrase "any air pollutant" in various (and confusing) ways, for PSD the best measure is the number of PSD permits required each year: an increase from 668 to 81,598. *Tailoring Rule*, 75 Fed. Reg. at 31,538. For Title V (which involves permitting at longer than annual intervals), the increase in the number of permits went from 14,700 to over six million. *Tailoring Rule*, 75 Fed. Reg. at 31,536. Thus we have two measures of the dual-program's inflation: 277-fold and 408-fold. There is likewise a transformation in "kind" – those subject to regulation now include not just factories (now of all sizes), but farms, apartments, churches, hospitals, and bakeries.

4. Limits. When the potential scope and intrusiveness of regulation reaches as broadly as the above, it raises the question of whether there are other, separate provisions that limit that scope.

Certainly, this would have been a central focus of a congress that was establishing industrial regulation of carbon emissions or energy consumption. The EPA, however, recognizes no limit, at least in principle, on the environmental authorities' powers over industrial practices, processes, production, or design. The most trivial and most fundamental aspects of industrial production offer good examples. With respect to the smallest, most ancillary aspects, the Agency explicitly refuses to rule out, in principle, the imposition of more efficient light bulbs in the factory cafeteria, though it says this level of regulation might not be worth it. *Permitting Guidance* at 31. With respect to fundamental things, the Agency explicitly refuses to rule out, in principle, changes to the basic industrial process involved that would "fundamentally redefine the source" (*Id.* at 26-27), as otherwise defined by the facility's owner's "goal, objectives, purpose or basic design of the facility" (*Id*. at 26), though, the Agency cautions permitting authorities, this should only be done after a "hard look." *Id*.

5. Standard. The PSD statutory scheme requires the "maximum degree of reduction of each pollutant regulated under this Act . . . taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3) (2013). To enforce this for carbon, the Permitting Guidance calls for "control options that result in energy efficiency measures to achieve the lowest possible emission level." *Permitting Guidance* at 37. The selection should "default to the highest level of control for

which the applicant could not adequately justify its elimination based on energy, environmental and economic impacts." *Id*. at 45.

B. The Interpretive Approach of the Agency and the Circuit Court Removes Policy Considerations and Judgment from Vitally Important Policy Decisions Concerning How to Regulate Carbon Dioxide and Other Greenhouse Gases.

A mistaken belief in PSD ineluctability, founded on a mistaken approach to statutory construction, has denied the Agency the clarity of policy vision that would enable it to see less structurally problematic means of carbon regulation than PSD available under the Act. More generally, it represents a form of implicit and fact and consequence-blind policy creation that renders reasoned and constitutional government illusory. Without basic considerations of context, statutes themselves can become vehicles for rendering the separation of powers ineffectual, and the process of legislative rulemaking becomes a matter of chance more than reason.

Moreover, this is an error likely to affect future questions concerning the Clean Air Act and carbon regulation. Other questions about regulation of greenhouse gases under the Clean Air Act that will face the nation and likely reach this Court are directly affected. For instance, there is the question of whether a "National Ambient Air Quality Standard"

("NAAQS") must be issued for GHGs – since the relevant NAAQS provisions share some terms and characteristics in which the Agency and the circuit find an ineluctable mandate to impose PSD regulation of carbon. In fact, this was the principal issue in the briefing cited by the court below, in the denial of the petition for rehearing, for the proposition that because some of the consequences of stationary-source regulation were briefed to the Court in *Massachusetts,* the Court considered them in rendering its decision. *See* Pet. App. 138. Petitioners respectfully submit that this contention alone is a serious error worthy of review. Vigorously contested (as these were) assertions in briefings to the Supreme Court, involving matters the Court does not address, cannot be taken by lower courts effectively to decide these matters, upon which later cases turn.

C. The Court of Appeals Has Erected an Erroneous "Timeliness" Bar in Cases of This Type, Which Will Have the Effect of Denying Claimants a Reasonable Opportunity to Seek Judicial Review of Allegedly Unauthorized Expansions of the Scope of Regulatory Statutes, Particularly Those Driven by Changes in Science or Technology.

The lower court was correct that petitioners' challenge was untimely[10] only if the court was correct

[10] *See ante* p. 18 for a description of the timeliness issue.

that textual consequences and the associated legal claims unique to the challenged greenhouse-gas application of PSD do not matter. Because they do, the court's timeliness bar represents a very serious error, destructive of timely, rational, and necessary judicial review in one of the most important types of administrative law cases that will come to the courts in general and the D.C. Circuit in particular.

II. The Decision of the Court of Appeals Conflicts with Important Decisions of This Court.

A. This Case Represents a Fundamentally Mistaken Approach to Statutory Interpretation in Cases Regarding One of Our Complex, Multi-Part Regulatory Statutes Considered in Contexts Not Contemplated by the Enacting Congress.

In *FDA v. Brown & Williamson*, this Court cautioned against the pseudo-*Chevron* clarity produced by the de-contextualized reliance on general statutory definitions of jurisdictionally important terms:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. *See Brown v. Gardner,* 513 U.S. 115, 118 (1994) ("Ambiguity

> is a creature not of definitional possibilities but of statutory context.") It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (*citing Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1959)).

An essential component of this is a "whole statute" approach to interpretation, and *Brown & Williamson* uses that very phrase, or an "overall scheme" variant, more than half a dozen times. In addition to its clear directives, *Brown & Williamson* offers a clear *example* of the kind of analysis required. The Court delved deeply into contested matters involving various and complex provisions of the Food, Drug and Cosmetic Act as they applied to the facts that distinguish tobacco and cigarettes from other "drugs" or "drug delivery devices" covered by the Act.

As fully reflected in *Brown & Williamson,* by logic and precedent, statutory interpretation in "implied delegation/unanticipated context" cases of this type requires, *inter alia*, a three-element process: (i) identification of the facts that differentiate the context of application from the context of enactment; (ii) identification of the relevant statutory provisions; and (iii) consideration of the "textual consequences" of applying one to the other. Moreover, the "whole statute" approach requires consideration of optional means of regulation under all of the available statutory

programs, and a consideration of which can best serve the statute's purposes, given the new context. In the Petitioners' view, correcting the lower court's substantial departure from the approach required in cases such as this by this Court's precedents is a fundamental reason for granting this petition.

Clearly, the lower court and the Agency have failed to recognize the approach required. As indicated above, they instead applied a de-contextualized "plain language" approach that ignored the differences between carbon dioxide and conventional pollutants, the relevant provisions of the PSD part of the statute, and the textual consequences of combining the two. It may be that the Agency and lower court misunderstood *Massachusetts,* believing that when this Court distinguished *Brown & Williamson* for limited purposes, it also extinguished the core interpretive principles it represents.

An example of a hypothetical "Interstate Commerce Act," paralleling the example used by Judge Kavanaugh involving "vehicles in the park" in his dissent to the denial of rehearing en banc,[11] illustrates the basic mismatch between the approach to

[11] Judge Kavanaugh uses a variation on the staple of discussions of law and language involving the regulation of all "vehicles" in the park. Pet. App. 149-51, fn. 3. In terms of our basic point, the inappropriateness of an original broad interpretation that included bicycles is indicated by a "later" provision that requires reinforced gas tanks on all "park vehicles," and, further, that inappropriateness is clear only based upon knowledge of how bicycles differ from trucks.

interpretation employed by the Agency and the lower court and the nature of the question presented. That is, it shows why it is that the searching inquiry including facts and consequences of the type conducted by the Court in *Brown & Williamson* is essential to avoid the kind of absurdity that this case represents.

As illustrated by Judge Kavanaugh's example, the question is: what happens in the "next case"? What if the expanded definition – expanded beyond the legislative process of induction that produced it – does not make sense in a particular statutory context involved? If the early case defining the jurisdictionally important term did not address particular programs within the regulatory scheme in question, what should happen when a subsequent case does?

The Court in *Massachusetts* held that the statutory phrase "any air pollutant" was capacious and flexible enough to encompass new developments. This is in the same way a court might say, in another case involving multi-part regulatory statutes, that, for instance, "mode of interstate transportation" is flexible enough to include the Internet once it was developed.

This case is akin to the "Interstate Commerce Act" hypothetical in the following way. Imagine that the act, written for a different era, hypothetically contains speed limits for its "modes of interstate transportation" when they encounter populated areas and intersections. If the statute is to be applied to the Internet as a "mode of interstate transportation," the

agency involved could not determine if the speed-limit part of the statute properly applied to the new context without considering the differences between the Internet as a mode of interstate commerce and trains or trucks and the difference those differences might make when combined with the relevant textual components of the program. If the statute used "55 miles per hour" to specify a reasonable speed, that does not have the same meaning or import when applied to the Internet, and, indeed, the further consideration of the facts and context might lead one to conclude that for purposes of this provision, at least, the term "mode of interstate transportation" does not include the Internet, no matter how capacious and flexible the term's definitional potential.

Underlying the importance of context in this example is the limited usefulness of categories. Thus, the fact that carbon dioxide can be considered an "air pollutant" does not answer most of the important questions about regulating it or whether the term can be reasonably so read within any given statutory program, just as "mode of interstate transportation" may not, without more, answer such questions with respect to the Internet.

There is a further reason that the question of interpretive approach involved in this case merits a grant of certiorari. The combination involved in this case of a misperceived *Chevron* step-one command, the PSD provisions, and carbon dioxide raise substantial constitutional concerns. These, in turn, invoke the constitutional-question "avoidance" canon.

See, e.g., Crowell v. Bensen, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided."); *cf.* Pet. App. 157 (dissent to denial of reh. en banc, Kavanaugh, J.) (" . . . (T)he bedrock underpinnings of our separation of powers are at stake.").

One example of the serious constitutional issues involved concerns Article I powers, the Commerce Clause and the Necessary and Proper clause. "As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end. . . . Moreover, the means must be 'consistent with the letter and spirit of the constitution.'" *Gonzales v. Raich,* 541 U.S. 1, 421 (2005) (Scalia, J., concurring). In light of its inherent characteristics, its ubiquity and abundance, its pervasive presence in much of human productive activity, the means by which carbon is regulated is every bit as important as whether or not it is regulated at all. Regulation of carbon is a lever by which the government can control much of the private sector. In this case, actual legislation by Congress has been hollowed out and made a vehicle for a Trojan-horse invasion of legislative prerogatives. Among other things, the EPA's approach has denied Congress the opportunity to make any judgment about the necessity

and propriety of the PSD mechanism as a means of regulating carbon under the Commerce Power. Moreover, the lower court and Agency's conclusion that a *Chevron* step-one obligation exists implies that Congress would be a party to an absurd type of implied delegation. Under it, the authority to regulate an unforeseen problem is deemed delegated but Congress commands that rules it created for another context be applied whether or not they fit the new situation and regardless of the availability of other options.

The nature of the creation of PSD GHG regulation denies citizens protections inherent in the nature of representative government, under which there are matters upon which Congress would not intrude in command-and-control fashion even if it has the power to do so. The concerns as to which the interpretive approach of the Agency and lower court is oblivious are concerns that make PSD carbon regulation unthinkable to any American congress – and yet, it exists.

B. The Mistaken Approach to Statutory Interpretation Is Inextricably Linked to a Misreading of this Court's Decision in *Massachusetts v. EPA*.

The key to understanding the misuse of *Massachusetts* by the Agency and lower court is the fact that *Massachusetts* did not consider the PSD provisions, and thus the Court was not conducting a "whole

statute" examination that considered the term "any air pollutant" in the PSD statutory context. Even if some urged the court to anticipate the quandary that EPA has now created – a program that as EPA itself says Congress would not recognize[12] – this Court, instead, in *Massachusetts* clearly decided on a one-step-at-a-time approach.

As Judge Kavanaugh put it in his dissent to the denial of rehearing en banc, "[*Massachusetts*] did not purport to say that every other use of the term 'air pollutant' throughout the sprawling and multi-faceted Clean Air Act necessarily includes greenhouse gases. Each individual Clean Air Act program must be considered in context." Pet. App. 149. Or, as Judge Brown put it in her dissent to denial, "But we need not follow *Massachusetts* off the proverbial cliff and apply its reasoning to the unique Title V and PSD provisions not considered in that case." Pet. App. 122.

Of the many other important ways in which *Massachusetts* was misunderstood by the Agency and lower court, one stands out: they treat the decision as if it held that "any air pollutant" as defined in the Act *must* be read to contain greenhouse gases, as opposed to a reading that says it is sufficiently flexible and capacious such that one cannot say that it cannot. In other words, the Agency and the court mistakenly read *Massachusetts* to say that inclusion, as a matter of statutory definition, is mandatory and inflexible

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[12] *Tailoring Rule*, 75 Fed. Reg. at 31,547.

and that the usage within the statute must be univocal. That reading of the definition in question is not linguistically supportable, since the definition turns on a tautological use of the term "pollutant," and the associated reading of *Massachusetts*, for that additional reason, is incorrect. 42 U.S.C. § 7602(g) (2013).

C. The Mistaken Approach Likewise Involves Misunderstanding and Misuse of Important Doctrines in Administrative Law, Particularly *Chevron*, "Implied Delegation" and "Absurd Consequences."

If PSD carbon regulation is allowed to stand on the Agency and lower court's terms, a new *Chevron* category will have been created, one that cannot logically exist in an "unanticipated context" case. It combines a *Chevron* step-one "clear" command, based upon Congress having "directly addressed the precise question at issue,"[13] with a context Congress did not consider.

Massachusetts is an implied delegation case. It holds that the Clean Air Act, by the generality of its key terms, particularly "air pollutant," is flexible enough, at least potentially, to allow the EPA to try to address a problem that was neither contemplated by the enacting Congress nor expressly delegated to the Agency. It is nonsensical to view the terms of the

[13] *Chevron*, 467 U.S. at 843.

implied delegation involved as they are, effectively, viewed by the Agency and the lower court: apply the provisions of the PSD program to greenhouse gases without an inquiry that includes the consequences of doing so and thus without a basis for determining whether it makes sense and whether there are better ways available under the Act.

This case also manipulates the "absurd consequences" doctrine to facilitate absurdity, not correct it. The EPA promises a rolling rewrite of relevant statutory provisions over the years, combined with permitting streamlining, to get as close as possible to regulating all of the left-out small facilities, under a statute that used a 100/250-ton limit in order to exclude them. Just as this case represents a misapprehension of what law is, it misunderstands what is absurd and what is not. So oblivious is the Agency to the effects of de-contextualization that in its approach to absurdity, the Agency thinks it must honor Congress' abiding concern with the de-contextualized numbers "100" and "250," regardless of their meaning within the statute and regardless of the consequences. It refuses to acknowledge that what is to be honored is the statute's concern for small businesses, not de-contextualized numbers.

CONCLUSION

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

Respectfully submitted.

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