Nos. 12-1146, 12-1248, 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 five related cases.

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

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QUESTION PRESENTED

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

RULE 29.6 STATEMENT

Respondents Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Indiana Wildlife Federation; Michigan Environmental Council; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; Wetlands Watch, and Wild Virginia (collectively, Environmental Organization Respondents), all respondent-intervenors in the court of appeals, are nonprofit environmental organizations. The Environmental Organization Respondents have no corporate parents and no publicly held corporation owns an interest in any of them.

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STATEMENT

A. Statutory Background. The Clean Air Act, enacted in 1970 and amended in 1977 and 1990, establishes a comprehensive array of programs "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). The Act requires EPA to establish standards that apply to a wide variety of air pollutants and stationary and mobile sources. These include health-based national ambient air quality standards ("NAAQS") set by EPA and implemented through state plans, *id.* 7408–7410, and technology-based performance standards applicable to various categories of stationary and mobile sources, *id.* 7411, 7521.

For these and all other provisions of the Act, "air pollutant" means "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive … substance or matter which is emitted into or otherwise enters the ambient air." *Id.* 7602(g). There are six NAAQS pollutants (or "criteria pollutants") and nearly 250 other air pollutants subject to regulation under other provisions of the Act.[1]

Complementing these standard-setting authorities are case-by-case permitting provisions enacted in the 1977 amendments that require

[1] See, *e.g.*, 40 C.F.R. Part 50 (six NAAQS pollutants); Part 60 (new source performance standards limiting NAAQS and non-NAAQS pollutants from various source categories); Part 63 (hazardous air pollutants); Part 82 (ozone-depleting substances); Part 86 (pollutants emitted by motor vehicles and engines). The addendum to this brief contains a glossary of abbreviations.

advanced pollution controls for all major new and modified stationary sources. The principal provisions at issue in this case are in Title I, Part C of the Act, entitled "Prevention of Significant Deterioration of Air Quality" ("PSD"). PSD's purpose is "to protect public health and welfare from any actual or potential adverse effect" that "may reasonably be anticipate[d] to occur from air pollution," "notwithstanding" achievement of "all" the NAAQS. *Id.* 7470(1). PSD permitting requirements apply to any new or modified "major emitting facility" located "in any area to which [Part C] applies," *id.* 7475(a), *i.e.,* any area designated an "attainment" or "unclassifiable" area, *id.* 7407(d), see also *id.* 7471. A "major emitting facility" is any stationary source that emits or has the potential to emit specified amounts of "any air pollutant"—at least 100 tons per year for a source in one of 28 listed industrial categories, or at least 250 tons per year for "any other source." *Id.* 7479(1). PSD permits must include emission limitations reflecting the "best available control technology" ("BACT") for "each pollutant subject to regulation under [the Act]." *Id.* 7475(a)(1), 7475(a)(4), 7479(3). The permitting authority, typically a state or local agency, determines BACT, defined as "the maximum degree of reduction of each pollutant subject to regulation" under the Act, taking into account "energy, environmental, and economic impacts and other costs." *Id.* 7479(3). Other PSD provisions divide attainment areas into "classes," *id.* 7472, 7474, and establish limits on the amount by which concentrations of NAAQS pollutants may increase. *Id.* 7473, 7475(a)(3)(A).

Together with the PSD provisions, Congress in 1977 enacted the more stringent permit requirements in Part D. Those provisions apply in any area

designated a "nonattainment area." That term is defined as "for any pollutant, an area which is designated 'nonattainment' with respect to that pollutant within the meaning of Section 7407(d) of this title." *Id.* 7501(2). An area can be designated nonattainment for one pollutant and attainment for others, and thus be affected by both permit programs. State plans for nonattainment areas must require permits for any new or modified "major stationary source[s]" emitting at least 100 tons per year, *id.* 7602(j), and each source must meet the "lowest achievable emission rate" ("LAER"), *id.* 7503. LAER is more stringent than BACT, see *id.* 7501(3), but is targeted only to the relevant nonattainment pollutant, *id.* 7501(3), 7503(a)(2). Where a source is also a "major emitting facility" under Section 7479(1), BACT applies to the source's other pollutants subject to regulation under the Act in accordance with PSD requirements.

The Title V permit program, added in the 1990 amendments, does not impose substantive requirements, but aims to enhance transparency and facilitate compliance with Clean Air Act requirements. It requires all stationary "major sources" (any source that emits or has the potential to emit 100 tons per year of "any air pollutant") and other stationary sources subject to emissions standards to have operating permits that collect in one place all applicable requirements of the Act. *Id.* 7661a(a), 7661c(a), 7661(2), 7602(j).

Nearly all states administer the permitting programs pursuant to state implementation plans approved by EPA.

B. Regulatory Implementation of the PSD and Title V Programs. For more than three decades EPA's regulations have consistently required a new or modified major emitting facility to obtain a PSD permit if (a) it is located in any area in attainment for at least one NAAQS and (b) it will emit requisite amounts of *any* air pollutant regulated under any provision of the Act.

In 1978, EPA defined the sources subject to PSD permit obligations as those that emit, in amounts meeting the statutory threshold, "any air pollutant regulated under the [Clean Air] Act." J.A. 1489 (federal requirement); J.A. 1508 (corresponding requirement for state PSD plans). And in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), industry petitioners raised and lost the very argument that petitioners press here—that PSD permitting can be triggered only by emissions of NAAQS pollutants. See *id.* at 352; *cf.* Brief of Petitioner American Chemistry Council, *et al.*, 15–23 ("ACC Br.").

EPA promulgated rules in 1980 confirming that as "required by *Alabama Power* and Sections [7475(a)] and [7479(1)] of the Act," "PSD review [applies] to any source that emits any pollutant in major amounts" to be constructed in any area that is in attainment for "*any* criteria pollutant." J.A. 1403. EPA explained that "all sources that are major for any pollutant subject to regulation under the Act and locate[d] in an area designated attainment or unclassified for any pollutant" are subject to permitting and that "neither section [7475] nor [7479(1)] links the pollutant for which the source is major and the pollutant for which an area is designated attainment or unclassifiable." J.A. 1405.

In revised regulations promulgated in 2002, EPA again reaffirmed that "[t]he PSD program applies automatically to newly regulated ... pollutants," regardless of the section of the Act under which those pollutants are regulated. J.A. 1389. See 40 C.F.R. 51.166(b)(49), 52.21(b)(50) (pollutants subject to PSD permitting include: NAAQS pollutants and precursors, pollutants subject to new source performance standards, substances subject to stratospheric ozone protection requirements, and any pollutant otherwise subject to regulation under the Act).[2]

EPA has similarly interpreted the Title V permit obligation to be triggered when a source emits major amounts of any air pollutant subject to regulation under any provision of the Act. See 57 Fed. Reg. 32,250, 32,252 (July 21, 1992).

C. Application to Greenhouse Gases. In 2007, this Court held in *Massachusetts v. EPA* that greenhouse gases "without a doubt" and "unambiguous[ly]" fall within "[the] Act's sweeping definition of 'air pollutant.'" 549 U.S. 497, 528–29 (2007). On remand, EPA determined that greenhouse gas air pollution may reasonably be anticipated to endanger public health and welfare and that emissions of six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) contribute to that pollution. J.A.

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[2] From 1978 through 1990, the list of triggering pollutants also included hazardous air pollutants regulated under 42 U.S.C. 7412. The 1990 Amendments rewrote Section 7412, expanding the number of hazardous air pollutants, establishing a separate, stringent permitting program for hazardous pollutant sources, and removing hazardous pollutants from the PSD program. See *id.* 7412(b)(1), 7412(b)(6), and 7412(c)(2).

793–810, 957–72 ("Endangerment Finding"). Accordingly, EPA promulgated standards for greenhouse gas emissions from light-duty motor vehicles in 2010. J.A. 698–703 ("Tailpipe Rule").

The Timing Decision and Tailoring Rule. Recognizing that regulation of greenhouse gas emissions from motor vehicles would trigger PSD and Title V permitting obligations under the terms of the Act and the agency's longstanding regulations, EPA initiated two proceedings. First, in an interpretive ruling issued after notice and comment (the "Timing Decision"), the agency determined that a pollutant becomes "subject to regulation" (and thus covered by PSD and Title V requirements) at the time compliance is required with the emission standards for that pollutant. For greenhouse gases, that date was January 2, 2011, when vehicles would first be obligated to comply with greenhouse gas emission standards under the Tailpipe Rule. JA 705.

In a second action known as the "Tailoring Rule," EPA undertook to implement PSD and Title V permitting requirements in steps, commencing with sources whose greenhouse gas emissions both exceed the 100/250 ton statutory thresholds and are equivalent to at least 100,000 tons of carbon dioxide per year. J.A. 309–11, 313.[3] EPA responded in detail to arguments that greenhouse gases should be exempt from PSD and Title V, and reaffirmed that the Act unambiguously includes all regulated air pollutants, including greenhouse gases, among the pollutants that trigger the permitting requirements. See J.A. 474–83, 500–02.

[3] "Carbon dioxide equivalent" takes account of differing heat-trapping potencies of greenhouse gases.

The agency also determined, however, that applying PSD and Title V permit requirements to all sources emitting greenhouse gases above the statutory thresholds immediately, before ameliorating efforts could be considered, would pose unmanageable administrative problems due to a sudden increase in the number of sources requiring permits. J.A. 355–57. Because carbon dioxide is emitted in large volumes from many sources, EPA estimated that the annual demand for PSD permits would increase from 280 to more than 81,000, and Title V operating permits from 14,700 to 6.1 million, with most of the estimated increase coming from smaller sources. J.A. 449. EPA found that those increases, in turn, would impose burdens on small sources and on permitting authorities, to the point of causing "[p]ermit gridlock." J.A. 284. EPA found that the agency and state permitting authorities did not have enough time before January 2, 2011 to complete the steps that could address those administrative burdens. Accordingly, the Tailoring Rule phased in the applicability of PSD and Title V permitting starting with the largest greenhouse gas emitters. J.A. 268.

EPA established an enforceable schedule for further rulemaking to gather additional information and evaluate whether the number of sources with emissions above the statutory thresholds could be reduced, and to streamline requirements for those that remain subject to permitting. J.A. 675–676, 681–682; see also 74 Fed. Reg. 55,292, 55,321 (Oct. 27, 2009) (Tailoring Rule Proposal) (finding that

streamlining mechanisms could "significantly reduce the number of sources subject to PSD and Title V").[4]

EPA pledged to "implement the phase-in approach by applying PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible," but reserved the possibility of deciding in a future rulemaking to stop at a point above the statutory thresholds if the agency determined that permissible streamlining and other measures were insufficient to resolve unworkable permitting burdens. J.A. 310.

EPA relied on three closely related legal rationales and the Administrator's general authority "to prescribe such regulations as are necessary to carry out his functions" under the Act. JA 281; see 42 U.S.C. 7601(a)(1). First, EPA determined that the costs and administrative burdens that would be associated with immediate application of PSD and Title V on January 2, 2011 to all sources with greenhouse gas emissions above the statutory thresholds would constitute "absurd results"

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[4] For example, recognizing its limited information on the emissions characteristics of smaller sources, J.A. 588–89, EPA committed to collect additional data and consider whether the number of sources whose "potential to emit" exceeds the statutory thresholds could be significantly lowered from EPA's original estimates. J.A. 588–95; 74 Fed. Reg. at 55,320–21. EPA also committed to explore streamlining methods, such as electronic permitting, which could simplify the permitting process for covered sources. EPA found that all these techniques would take time to implement. J.A. 590–91. The agency is following the process to which it committed. See 77 Fed. Reg. 41,051 (July 12, 2012); Clean Air Act Advisory Committee Report to EPA on Air Permitting Streamlining Techniques and Approaches for Greenhouse Gases (Sept. 14, 2012), available at http://www.epa.gov/oar/caaac/reports.html.

warranting application of statutory requirements "differently than a literal reading would indicate." J.A. 280, 286; see *id.* 447–48. Second, pointing to the administrative burdens for permitting authorities, EPA determined that an interim departure from the 100/250-ton thresholds was warranted under the doctrine of administrative necessity. See J.A. 544–53 (citing, *e.g.*, *Alabama Power*).[5] Finally, EPA invoked precedent recognizing that agencies may implement statutory requirements "one step at a time." See J.A. 553–57.

Since the Tailoring Rule was promulgated, PSD permitting has proceeded in an orderly fashion for the relatively small number of large sources that exceed the agency's interim regulatory thresholds. In the first two years of implementation, fewer than 200 greenhouse gas-emitting sources, all of them large facilities, have applied for PSD permits.[6]

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[5] EPA read the D.C. Circuit's administrative necessity precedents to require that "[w]hen an agency has identified what it believes may be insurmountable burdens in administering a statutory requirement," the agency must (1) attempt to "streamline administration as much as possible" within confines of the statute; (2) determine whether even after such streamlining, it is impossible to implement the statute; and (3) if so, "phase in or otherwise adjust the requirements so that they are administrable," provided it acts "in a manner that is as refined as possible so that the agency may continue to implement as fully as possible Congressional intent." J.A. 401–402.

[6] Greenhouse Gas Permitting Update, EPA Office of Air Quality Planning and Standards, National Association of Clean Air Agencies Meeting at 39 (Sept. 2013), available at http://www.westar.org/Docs/Business%20Meetings/Fall13/06.2%20NACAA%20fall%202013.PPT.

D. This Litigation. Numerous parties petitioned the D.C. Circuit to review the Endangerment Finding, Tailpipe Rule, Timing Decision, and Tailoring Rule. Certain parties also filed actions challenging EPA's 1978, 1980, and 2002 regulations confirming that PSD permitting applies to sources emitting any regulated air pollutant, not only sources emitting NAAQS pollutants.

A unanimous D.C. Circuit panel denied the petitions challenging the Endangerment Finding, the Tailpipe Rule, and the 1978–2002 PSD regulations, and dismissed those challenging the Timing Decision and the Tailoring Rule.

Regarding whether greenhouse gas emissions triggered PSD and Title V permitting, the court first addressed whether the 60-day limitation in 42 U.S.C. 7607(b) barred the attack on EPA's decades-old PSD regulations. The court held that two petitioners could invoke the statutory exemption for challenges based on "grounds arising after" the 60-day period because (unlike the other industry petitioners) they could not have challenged EPA's interpretation earlier. J.A. 231.

On the merits, the court found EPA's interpretation that PSD permitting applies to all regulated air pollutants, including greenhouse gases, to be "unambiguously correct" and "statutorily compelled." J.A. 193–94, 236. "[G]iven both the statute's plain language and the Supreme Court's decision in *Massachusetts*," the court had "little trouble concluding that the phrase 'any air pollutant' includes *all* regulated air pollutants, including greenhouse gases." J.A. 237. The court concluded that none of the "alternative interpretations of the PSD permitting triggers" offered by the challengers

"cast[s] doubt on the unambiguous nature of the statute." J.A. 241.

Observing that "none of Petitioners' alternative interpretations applies to Title V," the court held they had "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V." J.A. 241.

The court of appeals held that no petitioner had established standing to attack the Timing Decision and Tailoring Rule, which benefited, rather than harmed, petitioners. J.A. 261–62, 265.

Petitions for rehearing en banc were denied, with Judges Brown and Kavanaugh dissenting.

SUMMARY OF ARGUMENT

As EPA correctly concluded, sources of greenhouse gases indisputably became subject to the PSD permitting and BACT requirements by operation of the statute once greenhouse gases became regulated pollutants in 2011. Every indication of legislative intent—including text, the statutory structure and history, EPA's 35 years of consistent administrative interpretation, and judicial interpretation—confirms that conclusion.

The PSD program is designed "to protect public health and welfare from any actual or potential adverse effect … from air pollution" "notwithstanding attainment and maintenance of all [NAAQS]." 42 U.S.C. 7470(1). Under the program, all new or modified "major emitting facilities" must undergo preconstruction review and comply with certain specific requirements, including using the best available control technology. *Id.* 7475(a). The statute provides that the PSD permit obligation is triggered by threshold emissions of "any air pollutant," *id.* 7479(1), and that the principal pollution-control

obligation, BACT, applies to "each pollutant subject to regulation under this chapter [*i.e.*, the Clean Air Act]," *id.* 7475(a)(4).

The statute-wide definition of "air pollutant"—whose broad scope was established in the same 1977 legislation that added the PSD program—"without a doubt" and "unambiguous[ly]" includes greenhouse gases. *Massachusetts*, 549 U.S. at 529. In *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011), this Court relied upon that conclusion in confirming EPA's authority to regulate greenhouse gas emissions from stationary sources. Since EPA's vehicle emissions standards came into force on January 2, 2011, greenhouse gases indisputably have been an "air pollutant subject to regulation under the Act."

Petitioners offer various theories by which they claim the Act can be interpreted to exempt greenhouse gases, but their arguments flout the statutory language and misunderstand the role of PSD permitting under the Act. Language encompassing "any air pollutant" and "each pollutant subject to regulation" plainly is not limited to NAAQS pollutants, "conventional" pollutants, or any of petitioners' other invented categories. As the BACT provision makes clear, coverage of all regulated pollutants is, in fact, central to the program. Indeed, at conference, the 1977 Congress specifically rejected the House bill's language limiting the PSD permit obligation to "any air pollutant for which a national ambient air quality standard is promulgated," choosing instead the broader terms of the Senate bill that became the statutory text.

Petitioners argue that the fact that carbon dioxide is emitted in high volumes by a large number of

sources obligated EPA to adopt an interpretation exempting greenhouse gases from the Act's permitting programs. Petitioners' "solution," however, lacks any basis in the statutory text, is entirely disproportionate to the implementation difficulties EPA actually confronted, ignores EPA's ongoing efforts to resolve those problems, and requires the agency to move far further from the text of the statute than does EPA's phased-in implementation plan.

Finally, the court of appeals correctly found that petitioners had forfeited any challenges to the application of Title V. Forfeiture aside, petitioners fail here to demonstrate how Title V, applicable to emissions of "any air pollutant" and intended to apply to the full universe of Clean Air Act obligations of each source, could reasonably exclude greenhouse gases.

I. THE PSD PROGRAM APPLIES TO SOURCES THAT EMIT MORE THAN THRESHOLD AMOUNTS OF ANY REGULATED AIR POLLUTANT, INCLUDING GREENHOUSE GASES.

Offering a welter of inconsistent theories, petitioners urge that EPA was obligated to exclude greenhouse gases from the PSD program. Some appear to seek a *complete* exemption, denying even that greenhouse gases are "pollutants subject to regulation under the Act" for purposes of the BACT requirement. See Brief for the State Petitioners 3–8 ("Texas Br."); Brief of Petitioner Utility Air Regulatory Group 25–32 ("UARG Br."); Brief of Petitioners Energy-Intensive Manufacturers Working Group 17–34 ("EIMWG Br."). Others acknowledge that sources otherwise subject to PSD

permitting are required to adopt controls for greenhouse gases, but assert nevertheless that only NAAQS pollutants can trigger the PSD permit obligation. See ACC Br. 18 n.7, 29 n.12. Still others draw analogies to *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), as their primary basis for a greenhouse gas exemption. See Brief of Southeastern Legal Foundation, *et al.* 7–18 ("SELF Br."); Texas Br. 4–8. And, misrepresenting EPA's findings in the Tailoring Rule, many petitioners plead for wholesale exemptions by pointing to "absurd" consequences. See Brief of Chamber of Commerce, *et al.* 1–2 ("Chamber Br."); EIMWG Br. 7–8, 29; SELF Br. 14; Texas Br. 9–10; ACC Br. 24–29. These arguments all lack merit.

A. Contrary to Petitioners' Contentions, Greenhouse Gases Are "Air Pollutants" for Purposes of the PSD Program.

Statutory Text. The unambiguous statutory text compels EPA's conclusion that the PSD permit obligation, including the BACT requirement, applies to greenhouse gases.

PSD permitting requirements apply to any "major emitting facility," defined as a facility that emits more than specified amounts of "any air pollutant." 42 U.S.C. 7475(a), 7479(1). "Air pollutant" for purposes of the entire Act "means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive … substance or matter which is emitted into or otherwise enters the ambient air." *Id.* 7602(g).

A PSD permit must include BACT controls for "each pollutant subject to regulation under this chapter," referring to 42 U.S.C. chapter 85, the Clean

Air Act as codified. *Id.* 7475(a)(4). See also Pub. L. No. 95–95, Section 127(a), 91 Stat. 685, 736, 741 (1977) (language as enacted, stating "… under this Act"). BACT is "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter." 42 U.S.C. 7479(3). See *Alabama Power*, 636 F.2d at 406 (noting statute's "litany of repetition" confirming that each regulated air pollutant is covered).

The references to "any air pollutant" in Section 7479(1), and to "each pollutant subject to regulation under this [Act]" in Sections 7475(a)(4) and 7479(3), manifestly include greenhouse gases. This Court has twice confirmed that greenhouse gases unambiguously fall within the Section 7602(g) statute-wide definition of that term. See *Massachusetts*, 549 U.S. at 532 (referring to "*the Clean Air Act*'s capacious definition of 'air pollutant'" (emphasis added)); *AEP*, 131 S. Ct. at 2537 ("[E]missions of carbon dioxide qualify as air pollution subject to regulation under the Act."). Furthermore, every PSD permit must demonstrate compliance with applicable new source performance standards ("NSPS") under Section 7411, see 42 U.S.C. 7475(a)(3)(C), 7475(a)(4), 7479(3), which, as *AEP* makes clear, can include standards for greenhouse gas emissions, see 131 S. Ct. at 2538. See also 42 U.S.C. 7479(3) (BACT definition requirement that "[i]n no event" may BACT standard be less stringent than an applicable NSPS).

Congress's reliance on the defined term "air pollutant" in the description of covered PSD sources in Section 7479(1) was a considered choice: Congress adopted the Section 7602(g) definition of "air pollutant" as part of the same 1977 statute that

established the PSD program. Pub. L. No. 95–95, Section 301(c), 91 Stat. 685, 770 (1977). Congress enacted a special definitions section for PSD, describing various terms as used "[f]or purposes of this part," 42 U.S.C. 7479. Congress, however, also chose not to adopt a special "PSD-specific" definition of "air pollutant," relying instead upon the broad Act-wide definition in Section 7602(g). *Cf. id.* 7491(g)(3) (specialized definition of "manmade air pollution" for Part C visibility program adopted in the 1977 Amendments, 91 Stat. 685, 744). When the Tailpipe Rule became effective, on January 2, 2011, greenhouse gases became a pollutant "subject to regulation under this [Act]," 42 U.S.C. 7475(a)(4), 7479(3), triggering the statutory BACT requirement for major greenhouse gas emitting facilities. As some petitioners appear to acknowledge, ACC Br. 29 n.12, there is no plausible way to read that BACT language to exclude greenhouse gases, which are undeniably "subject to regulation" under Section 7521 (and also will be under Section 7411, see *AEP*, 131 S. Ct. at 2538, 79 Fed. Reg. 1430 (Jan. 8, 2014) (proposed carbon dioxide NSPS for electric generating units)). See also J.A. 177 ("By its terms, Section 7475(a)(4) … applies to greenhouse gases, not just the NAAQS.") (Kavanaugh, J., dissenting from en banc denial).

The BACT requirement further confirms that greenhouse gases are "air pollutants" for purposes of the Section 7479(1) "major emitting facility" definition. A "pollutant subject to regulation under this [Act]," 42 U.S.C. 7479(3), is necessarily also "any air pollutant" within the meaning of Section 7479(1), see *Alabama Power*, 636 F.2d at 353 n.60; see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)

(adhering to "the theorem that the whole includes all of its parts").[7]

Nevertheless, petitioners insist that greenhouse gases are not *PSD* air pollutants. *E.g.*, UARG Br. 15 (greenhouse gases "fit within Section 7602(g)'s general definition" of "air pollutant," but are "not an air pollutant Congress intended to be regulated under PSD and Title V"). But, as noted, there *is no* "PSD-specific" definition of "air pollutant." Instead, Congress chose to rely on the term as broadly defined in Section 7602(g). That definition is not, as UARG would have it, optional. See *Burgess v. United States*, 553 U.S. 124, 129–30 (2008) (statutory definitions are usually "control[ling]") (internal quotation marks and citation omitted); *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010) (court "must follow" express statutory definition).

The familiar principle that a recurring statutory term may be read differently depending on context, see UARG Br. 24, Chamber Br. 21 (both citing *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007)), is not a license to ignore an unambiguous statutory definition. *Duke Energy* explained that any interpretive differentiation must stay "within the limits of what is reasonable, as set by the Act's common definition." 549 U.S. at 576. Petitioners do not attempt to show how *the text* of the "air pollutant" definition may reasonably be read to

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[7] EPA's longstanding regulation limiting the PSD trigger to regulated air pollutants provides no grounds for limiting "any air pollutant" to only a subset of regulated air pollutants. See J.A. 237–38 (D.C. Circuit panel's characterization of EPA's interpretation as "the only logical reading of the statute"). The statute is not ambiguous as to whether regulated air pollutants are covered. See 42 U.S.C. 7475(a)(4), 7479(1), 7479(3).

exclude greenhouse gases, or how a pollutant in the category "each pollutant subject to regulation under this [Act]," can somehow *not* be in the category "any air pollutant."

Statutory Purposes. Petitioners insist that covering greenhouse gases is beyond what they claim are the limited purposes of the PSD program: addressing only "conventional" or "local" air pollutants, or maintaining the NAAQS. *E.g.*, UARG Br. 25-30; Chamber Br. 19–20; EIMWG Br. 20–21; ACC Br. 22; SELF Br. 9–10.

The face of the Act contradicts these arguments. The PSD program's purpose is "to protect public health and welfare from any actual or potential adverse effect" from air pollution "notwithstanding" attainment of the NAAQS. See 42 U.S.C. 7470(1). The term "air pollution" is not limited to pollution caused by NAAQS pollutants. Effects on "welfare" are expressly defined to include effects on "weather" and "climate," *id.* 7602(h). Furthermore, PSD's breadth of purpose is reflected in Congress's decision to apply the program's central substantive requirement—BACT—to "each pollutant subject to regulation under this [Act]," see *id.* 7475(a)(4), 7479(3), and to condition issuance of a permit on compliance with "any other applicable emission standard or standard of performance under this [Act]," *id.* 7475(a)(3)(C). Those terms indisputably are *not* limited to NAAQS pollutants. See, *e.g.*, *AEP*, 131 S. Ct. at 2538 (discussing NSPS for greenhouse gases); 40 C.F.R. 60.752 (NSPS limiting emissions of non-methane organic compounds from landfills). See also 42 U.S.C. 7479(3) (BACT limitations cannot be less stringent than NSPS). As the panel recognized: "the PSD program was meant to protect against precisely the

types of harms caused by greenhouse gases." J.A. 240.

Petitioners contend that PSD is limited to air pollutants that harm local air quality, and therefore cannot include greenhouse gases. See, *e.g.*, UARG Br. 18, 27; SELF Br. 9–10. The factual premise that greenhouse gas emissions *do not* "deteriorat[e] ambient air quality," UARG Br. 25, is false. It is well documented, for example, that greenhouse gas pollution exacerbates local smog problems. See J.A. 803 (endangerment finding) (greenhouse gas emissions lead to "[i]ncreases in ambient ozone" that are "expected to increase serious adverse health effects"). In any event, petitioners' claimed limit to PSD coverage is found nowhere in the statute. *Cf. Massachusetts*, 549 U.S. at 512, 528-29 (rejecting a similar argument). The "welfare" to be protected by PSD includes effects on "climate," see 42 U.S.C. 7602(h), and BACT applies to *all* regulated pollutants, see *id.* 7475(a)(4), not just those that could satisfy some special "local-impacts" standard. The PSD program, moreover, has long covered pollutants whose primary harms to public health and welfare occur at a global level. See 40 C.F.R. 52.21(b)(50)(iii) (PSD regulations cover compounds that deplete the stratospheric ozone layer, listed at 42 U.S.C. 7671a).[8]

Similarly, the Chamber (Br. 15-16) invokes language referring to actual or potential adverse

[8] See also David W. Fahey, *et al.*, Twenty Questions and Answers About the Ozone Layer: 2010 Update 8–9, 14–19 (2010), available at http://ozone.unep.org/Assessment_Panels/SAP/Scientific_Assessment_2010/SAP-2010-FAQs-update.pdf (describing how ozone-depleting pollutants migrate to the upper atmosphere and deplete the protective ozone layer, causing cancer and other health harms).

effects to public health or welfare that "occur from air pollution or from *exposures* to pollutants in other media, which pollutants originate as emissions to the ambient air." 42 U.S.C. 7470(1) (emphasis added in brief). This point establishes nothing, because harms from greenhouse gases manifestly *are* "from air pollution." But it is also wrong: Greenhouse gas pollution is directly acidifying the oceans, which harms coral reefs, shellfish and other aquatic life, and is a paradigm example of harmful "exposures … in other media." See EPA, Technical Support Document for Endangerment Finding 38, 134 (Dec. 7, 2007) (End. C.A. J.A. 3386, 3482).

Statutory Structure. PSD's pivotal substantive provision is the requirement that each major emitting facility install BACT for "each pollutant subject to regulation under this chapter." 42 U.S.C. 7475(a)(4), 7479(3). That requirement applies to major emitting facilities in all instances, unless Part D's more stringent requirements are triggered for a nonattainment pollutant. See pp. 2–3, *supra*. Congress anticipated that "changing circumstances and scientific developments," *Massachusetts*, 549 U.S. at 532, would lead to regulating additional pollutants in the future under the Act's various provisions, and provided that they would be covered by PSD permitting without any further prerequisites or qualifications.

Pointing out that some PSD provisions cover only NAAQS pollutants, several petitioners suggest the entire program is limited to such pollutants. See, *e.g.*, SELF Br. 11–13; EIMWG Br. 20–21. Yet, as noted in *Alabama Power*, 636 F.2d at 403–06, Congress carefully distinguished the scope of different provisions within Part C, making specific choices to

link various provisions to the appropriate categories of pollutants. Compare, *e.g.*, 42 U.S.C. 7475(a)(4) ("each pollutant subject to regulation" under Act), *id.* 7479(3) (same), *id.* 7475(d)(2)(D)(iii) (applicable only to "sulfur oxides"), *id.* 7479(1) ("any air pollutant"), *id.* 7476(a) & (b) (both addressing hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides), *id.* 7473(a) & (b) (both addressing particulate matter and sulfur dioxide only). As the panel ruled, that *some* PSD provisions apply only to a subset of "air pollutants" is not a basis for grafting those contextual limitations onto the broad statutory language governing application of PSD permitting and BACT, which lack any such limitations. J.A. 251. If a statute establishing various rights of "persons" included some provisions concerning "persons who are pregnant," it would not follow that "persons" throughout the statute means only women of childbearing age—particularly if there were a statute-wide definition stating that "'person' means any human being."

Thus, petitioners' observation that greenhouse gases do not implicate some of the factors required to be analyzed under Section 7475(e), *e.g.*, UARG Br. 26–28; EIMWG Br. 20–21, is no basis for an *exemption* of greenhouse gases from PSD permitting. Nor would petitioners' theory work for other pollutants. For example, Section 7475(e)(3)(B) requires permitting authorities to analyze "visibility"—even though many regulated pollutants (such as carbon monoxide, a NAAQS pollutant) do not affect visibility. The same point holds for other factors set out in Section 7475(e), *e.g.*, climate, meteorology, terrain, soils and vegetation. Further, most sources emit multiple pollutants, and it is

common for the statutory factors to be more germane to some emitted pollutants than others.[9]

Equally groundless are claims that BACT is inherently unsuitable for greenhouse gases. EIMWG Br. 23–26, Chamber Br. 18–19; but *cf.* ACC Br. 18 n.7, 29 n.12; Texas Oil & Gas Amicus Br. 8, 22. By specifying that "each pollutant subject to regulation under [the Act]" is subject to BACT, 42 U.S.C. 7475(a)(4), Congress unambiguously rejected such limitations. The encompassing language means that BACT could apply to pollutants initially regulated under programs quite different from PSD and ones whose characteristics (or even existence) were not known in 1977. In fact, BACT has been successfully applied to an eclectic variety of NAAQS and non-NAAQS pollutants, from particulate matter to chlorofluorocarbons to acid gases. *E.g.*, EPA, *RACT-BACT-LAER Clearinghouse*, http://cfpub.epa.gov/rblc/ (last visited Jan. 20, 2014) (searchable permitting database showing more than 550 PSD permits limiting emissions of the non-NAAQS pollutants hydrogen sulfide and sulfuric acid mist, between 1981 and 2013). And nothing in the actual experience of applying BACT to greenhouse gas sources since January 2011 supports petitioners' claims. The efficient production processes commonly

[9] UARG notes that EPA has confined "any pollutant" in 42 U.S.C. 7491(g)(7)—which requires EPA to regulate pollutants that impair visibility—to any "visibility-impairing" pollutant. UARG Br. 24. The regulation to which UARG refers does not construe the unqualified term "any air pollutant." Instead, it implements a congressional directive to address "any air pollutant *which may reasonably be anticipated to cause or contribute to any impairment of visibility*," 42 U.S.C. 7491(b)(2)(A) (emphasis added). See 40 C.F.R. pt. 51, App Y, III.A.2.

specified in greenhouse gas permits are proper measures to include in BACT analyses for all pollutants. See 42 U.S.C. 7479(3) (defining BACT with reference to "production processes," and "available methods, systems, and techniques" for reducing emissions of "each pollutant").

Nor is there any merit to the suggestion that applying BACT to greenhouse gases will not "advance the purposes" of the PSD program. Brief of Coalition for Responsible Regulation, *et al.* 15; see Cert. Pet., No. 12–1253 at 24–29 (same parties' similar claims about Tailpipe Rule). Application of BACT reduces emissions and encourages development of new pollution control technologies. There is no reason to doubt that BACT will prove as effective for greenhouse gases as it has for other pollutants.

The idea (*e.g.*, UARG Br. 22) that the 100/250-ton thresholds represent an instruction from Congress to exclude certain *pollutants* from the program is equally meritless. This would be an oddly indirect way to accomplish what Congress could more readily have done directly. As noted, Congress had no difficulty expressing itself when it wished to limit certain PSD provisions to certain pollutants. In Sections 7479(1) and 7475(a), however, the statute says that PSD permitting and BACT apply to "any" and "each" pollutant, respectively. It does not add any language that excludes certain pollutants or that authorizes EPA to exclude them, whether based on the number of sources that emit them or for any other reason.

Statutory History. That PSD permitting applies to major sources of *all* air pollutants, not just NAAQS pollutants, is verified by the explicit choice Congress made in the 1977 Conference, selecting the Senate's

more expansive "major source" definition and PSD permitting provisions over the more restrictive versions that had passed the House. The House bill defined a "major stationary source" subject to the permit obligation as a source emitting sufficient amounts of "any air pollutant for which a national ambient air quality standard is promulgated." Clean Air Act Amendments of 1977, H.R. 6161, 95th Cong., Section 103(f) (1997) (proposing new Section 7402(o)(1)), reprinted in 4 A Legislative History of the Clean Air Act Amendments of 1977, at 2251 (hereinafter cited as "Leg. Hist."). Permitting under that bill was focused on determining the expected effect of the source's emissions on air quality concentrations in affected areas. *Id.* But the Senate bill defined a major source ("major emitting facility") more expansively as one emitting sufficient amounts of "any air pollutant." The Senate bill also required each such source seeking a permit to meet BACT "for each pollutant subject to regulation under the Act." S. 252, 95th Cong., Section 42(a), 3 Leg. Hist. at 1177 (proposing new Section 7402(k)); *id.* Section 7, 3 Leg. Hist. at 1176 (proposing new Section 7410(g)(6)(A)). The conferees adopted the Senate definition, choosing the inclusive "any air pollutant," as in the final 42 U.S.C. 7479(1), over the NAAQS-only term. The conferees also chose the Senate's more expansive permitting provisions, including the BACT requirement, stating that "[t]he conditions of the permit are as in the Senate bill." H.R. Rep. No, 95–564, 3 Leg. Hist. at 532. The legislative history, in short, pointedly confirms that Congress deliberately chose the expansive terms "any air pollutant" and "each pollutant subject to regulation under this Act"

over more restrictive provisions that would have limited PSD in the way petitioners now urge.[10]

Settled and Consistent Administrative and Judicial Construction. EPA has revised its PSD regulations several times since 1977, and each time it has provided that PSD permitting is triggered by emissions of any regulated air pollutant and that BACT applies to each such pollutant. See pp. 4-5, *supra*. Moreover, in reviewing EPA's initial 1978 regulations, the D.C. Circuit confirmed that both those features of EPA's rules reflect the statute's express mandates. *Alabama Power*, 636 F.2d at 352 (statutory permit requirement is "not pollutant-specific, but rather identifies sources that emit more than a threshold quantity of any air pollutant"), *id.* at 406 ("plain language" makes it "clear" that BACT requirement applies to all pollutants subject to regulation), *id.* at 370 n.134 (non-NAAQS pollutant subject to PSD permitting requirements). EPA's settled, 35-year-old understanding of how the PSD permit and BACT obligations work belies petitioners' and amici's breathless narratives of self-

[10] The 1977 record also attests that, contrary to petitioners' suggestions of narrow and local concern, Congress saw the PSD program as serving to "avoid[] … unnecessary stratospheric and atmospheric modifications due to air pollution," H.R. Rep. No. 95–294, at 105, 138 (1977), 4 Leg. Hist. at 2572, 2605. The report quoted from a path-breaking National Academy of Sciences study, *Understanding Climate Change*, that called attention to risks of "inadvertent weather modification on a scale large enough to affect man's well-being" due to emissions of carbon dioxide and other pollutants. *Id.* at 138, 4 Leg. Hist. at 2605. Similar concerns about carbon dioxide emissions were expressed in Senate debate. See 6 Leg. Hist. at 5368 (statement of Sen. Bumpers).

aggrandizement by an agency overzealously targeting greenhouse gases.

These settled administrative and judicial constructions, moreover, formed the background to the comprehensive 1990 Clean Air Act Amendments, which excised a category of non-NAAQS pollutants (hazardous air pollutants regulated under Section 7412) from PSD, but otherwise left in place the prior PSD applicability provisions and EPA's consistent 35-year regulatory interpretation of them. Pub. L. No. 101–549, Section 301, 104 Stat. 2399, 2537 (1990) (codified at 42 U.S.C. 7412(b)(6)); *id.*, 104 Stat. at 2545 (codified at 7412(g)(2)); see also *supra*, p. 5 n.2. "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827–28 (2013) (internal quotation marks and citation omitted).

B. ACC's Alternative Argument that the "In Any Area" Language Limits the PSD Permit Trigger to NAAQS Pollutants Is Meritless.

Alone among the petitions, ACC's urges a different argument for exempting greenhouse gases as a PSD trigger based on the phrase "in any area to which this part applies" in 42 U.S.C. 7475(a). According to ACC (Br. 16), "Part C 'applies' to an area only with respect to those pollutants for which the area is in attainment," so that PSD can be triggered only by emissions of a NAAQS pollutant for which the area in question is designated attainment. Notably, ACC does not dispute that BACT applies to each "pollutant subject to regulation" under the Act, and

that that category includes greenhouse gases. *Id.* at 29 n.12.

ACC's theory, like the others, conflicts with the statutory text. "[A]ny area to which this Part applies" unambiguously means any attainment area—*i.e.*, an area subject to Part C because air quality in that area satisfies the NAAQS with respect to at least one NAAQS pollutant. "This part" is Part C, and Part C "applies" to all areas that are classified as attainment (or unclassifiable) for at least one NAAQS pollutant. See 42 U.S.C. 7407(d)(1)(A)(ii)–(iii), 7471.

Indeed, in "ordinary" usage, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011), the "area" something is "in" does not depend on the thing's characteristics; whether a building is "constructed in an agricultural area" does not turn on whether it is a computer store or a barn. But according to ACC, a major emitting facility can be located smack in the middle of an attainment area—and be surrounded on all sides by sources ACC agrees must obtain PSD permits—yet *not* be "in an area to which this part applies," because it does not emit threshold amounts of the particular pollutant for which that area is designated in attainment. The Clean Air Act does not work that way. It defines an "area" not on some facility-by-facility basis but by the area's attainment status, which is determined by the concentrations of pollutants prevailing in that area, regardless of source. See 42 U.S.C. 7407(d)(1); *Alabama Power*, 636 F.2d at 365 (noting that Congress used "precise language" "where its concern was more source (rather than area) specific").

Had Congress really intended to limit PSD in the manner ACC advocates, it would not have followed such an eccentric route, but would have used

language *exactly like that in the House bill that Congress rejected*. It would have defined covered sources by reference to emissions of "any air pollutant for which a national ambient air quality standard is promulgated." H.R. 6161, Section 103(f), 4 Leg. Hist. 2251. To adopt petitioners' interpretation would "read back into the Act the very ... [language] that the Senate committee deleted." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (citations and internal quotation marks omitted). See also *Doe v. Chao*, 540 U.S. 614, 622–23 (2004).

ACC's theory, first presented and correctly rejected decades ago,[11] rests heavily on the proposition that Congress's purposes in the PSD program were confined to NAAQS pollutants. ACC Br. 22–23. But, as noted above, pp. 14–18, that is manifestly wrong. ACC itself acknowledges (Br. 29 n.12), as it must, that the central substantive requirement, BACT, applies to *all* regulated

[11] After the initial *Alabama Power* decision held that EPA had followed the "clear mandate of the statute" in applying PSD permitting to all regulated pollutants, 606 F.2d 1068, 1085 (D.C. Cir. 1979) (per curiam), parties including ACC's predecessor, the Chemical Manufacturers Association, filed a rehearing petition identifying 10 non-NAAQS pollutants that would trigger PSD under the court's and EPA's construction. Those petitioners cited the example of hydrogen sulfide, complaining that major emitters of the compound would be subject to both permitting and BACT obligations, even though the pollutant had been originally regulated under NSPS only for one narrow source category. See Industry Petitioners' Petition for Rehearing on Application of PSD Requirements to Pollutants Other than Sulfur Dioxide and Particulates in *Alabama Power Co. v. Costle*, D.C. Cir. No. 78-1006 at 15–16 (filed July 19, 1979). In the final *Alabama Power* decision, the D.C. Circuit rejected this position and pointedly reaffirmed that PSD permitting and BACT applies to all regulated air pollutants. 636 F.2d at 352–53, 370 n.134.

pollutants, 42 U.S.C. 7475(a)(4), 7479(3). See also 42 U.S.C. 7475(a)(3) (requiring compliance with NSPS), 7479(3).

ACC claims (Br. 18) that EPA's interpretation renders "in any area to which this Part applies" superfluous because every area in the country attains at least one NAAQS pollutant. But this was not a certainty to the 95th Congress.[12] Further, the phrase has other purposes. First, as *Alabama Power* held, 636 F.2d at 364–67, the phrase distinguishes PSD areas from nonattainment areas, prohibiting EPA from imposing further controls on emissions of nonattainment pollutants due to concerns about downwind attainment areas. Furthermore, the statute divides PSD areas into three classes (I, II, and III), subject to differing requirements, see 42 U.S.C. 7472 (initial classifications), 7474 (reclassifications), 7475(a)(5) (referencing Class I areas), 7475(b) (referencing Class II areas). The "in any area" clause serves to make clear that, unlike some other PSD provisions, the requirement to obtain a pre-construction permit applies in *all* three types of PSD areas. See *United States v. Atl. Research Corp.*, 551

[12] As the panel noted, J.A. 255, it was unknown in 1977 whether all areas would always meet at least one NAAQS. Indeed, at that time, the available EPA air quality data identified a number of areas (including Los Angeles and New York) that had failed to meet all five of the then NAAQS. See Initial Brief for Intervenors in Support of Respondents in *Am. Chem. Council v. EPA*, D.C. Cir. No. 10-1167, at 23 n.9 (filed July 7, 2011) (citing EPA, Monitoring and Air Quality Trends Report, tbl. 3–5 (1974), attached as Addendum A to that brief). EPA's 1980 preamble reflected this understanding, specifically noting that PSD would not apply if a source is "located in an area which is designated nonattainment for all criteria pollutants." J.A. 1403–04.

U.S. 128, 137 (2007) (language alleged to be surplusage "performs a significant function simply by clarifying").[13]

ACC's effort (Br. 19–21) to transplant the pollutant-specific approach of Part D nonattainment permitting into PSD permitting reflects a fundamental misunderstanding of the two programs. A "nonattainment area" is defined as "for any air pollutant, an area which is designated 'nonattainment' with respect to that pollutant," 42 U.S.C. 7501(2), and Part D has a single-minded focus on eliminating NAAQS violations. See, *e.g.*, *id.* 7501(1) ("reasonable further progress" obligation defined in terms of "reductions in emissions of the relevant air pollutant" and to "ensur[e] attainment of the applicable [NAAQS]"), 7502(a)(2) (deadlines), 7502(c)(1) (first substantive requirement of Part D is to "provide for attainment" of NAAQS), 7503(a)(1)(B) (permit may issue if, inter alia, emissions of "such pollutant … will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area"). In contrast to the targeted focus of Part D, permitting under Part C applies in all areas with one exception: Areas with pollutants whose concentrations are so high as to violate the

[13] ACC claims (Br. 15–17) that the use of the phrase "in any area to which this part applies" in 42 U.S.C. 7473(b)(4) supports its reading of the phrase in Section 7475(a). That provision deals with "maximum allowable concentrations" (which only apply to NAAQS pollutants), and expressly refers to the NAAQS. *Id.* 7473(b)(4). As explained above, the contextually limited scope of particular statutory provisions does not carry over to other provisions for which there are no such limitations, *supra*, pp. 20–22. The "in any area" phrase in Section 7473(b)(4), like that in 7475(a), makes clear that the relevant requirement applies to all attainment areas.

NAAQS, warranting application of the nonattainment requirements and their more stringent LAER standard. *Supra*, pp. 2–3; see also J.A. 1405–1407 (emphasizing different scope of PSD and nonattainment regulations in 1980 preamble).

Finally, ACC suggests (Br. 29 n.12) that its alternative interpretation would (or *might*) still require sources subject to PSD permitting due to threshold emissions of NAAQS pollutants to install BACT for their greenhouse gas emissions—which ACC asserts would bring sources responsible for most greenhouse gas emissions within the scope of PSD. But, while ACC may be commended for yielding (more or less) to the extraordinary clarity of the scope of the BACT provisions, ACC's own position is hardly modest: It would change ground-rules that have governed the Act's PSD program over its entire life, overturning a decades-old regulatory structure that has been revisited and reaffirmed by multiple administrations since 1977, tested in judicial review, and left unchanged by Congress in 1990. See *supra*, pp. 4–5. It would do so for *all* non-NAAQS air pollutants, including many that—as the State Respondents demonstrate—have been subject to PSD permitting for decades. Among these pollutants are ozone-depleting substances, 40 C.F.R. 52.21(b)(50)(iii), and acid gases and hydrogen sulfide, *id.* 51.166(b)(23)(i).

C. *Brown & Williamson* Provides No Authority for a Greenhouse Gas Exemption.

Arguments that *Brown & Williamson* supports exempting greenhouse gases (Chamber Br. 5, 22; Texas Br. 4–7; SELF Br. 17–18) should be rejected, just as they were in *Massachusetts*, 549 U.S. at 530-

31. See J.A. 142 (D.C. Circuit panel opinion respecting denial of en banc review).

First, *Brown & Williamson* pointedly cautioned that, "a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 529 U.S. at 125–26 (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984)). Far from speaking in "cryptic" terms, Texas Br. 7 (quoting *Brown & Williamson*, 529 U.S. at 160), Congress has unambiguously provided that PSD permitting cover sources of "any air pollutant," in part to counteract adverse effects on "climate." 42 U.S.C. 7470(1), 7602(h). EPA's straightforward obedience to that statutory mandate is nothing like the "strained" FDA statutory interpretation at issue in *Brown & Williamson*, 529 U.S. at 160. Second, while FDA regulation would have produced a ban on tobacco products, application of PSD would (as in *Massachusetts*, 549 U.S. at 531) produce only *regulation* of emissions under authority expressly requiring consideration of compliance costs. See 42 U.S.C. 7479(3). Third, *Brown & Williamson* noted that, acting against a long, unbroken background of FDA statements disclaiming authority to regulate tobacco, Congress had "repeatedly acted to preclude any agency from exercising significant policymaking authority in the area" of tobacco regulation. 529 U.S. at 144, 157, 160. No such backdrop of EPA disclaimers exists here either as to greenhouse gases generally or as to PSD's application to that pollutant.

Petitioners (SELF Br. 5, 15–17) also seek support from the introduction of bills that were not enacted. "[P]ostenactment congressional actions and deliberations" cannot alter the unambiguous terms of the Clean Air Act. See *Massachusetts,* 549 U.S. at

529–30; *accord Brown & Williamson,* 529 U.S. at 155. And in any event, in marked contrast to *Brown & Williamson*, Congress has enacted no legislation inconsistent with application of the Clean Air Act permitting programs to greenhouse gases. Indeed, Congress has been fully apprised of EPA's actions on greenhouse gas permitting, and has considered, but declined to adopt, many proposals to eliminate, narrow, or defer EPA's authority to implement greenhouse gas permitting. See, *e.g.*, H.R. 153, 112th Cong. (2011) (proposed funding restrictions); H.R. 910, 112th Cong. (2011) (proposed override of Endangerment Finding and Tailoring Rule); S. Amdt. 236 to S. 493, 112th Cong. (2011) (proposed increase of statutory PSD thresholds for greenhouse gases); S. 3072, 111th Cong. (2010) (proposed suspension of stationary source greenhouse gas permitting for two years); see also Environmental Organizations' Br. in Opp. 28–29 n.12.

D. Petitioners' Arguments Based on "Absurd" Results Provide No Basis for Excluding Greenhouse Gases from the PSD Program.

Having failed to show any basis for excluding greenhouse gases from PSD permitting under ordinary rules of construction, many petitioners argue that the same total exclusion must be adopted to avoid "absurd" results. Petitioners distort EPA's findings in the Tailoring Rule, which were limited to the consequences of *immediately* applying the statutory emissions thresholds without streamlining, into a finding the agency has never made, of permanent and irremediable absurd results. Ignoring unambiguous congressional intent that large sources of any air pollutant should undergo PSD permit review and meet BACT, petitioners try to

parlay EPA's limited findings into a total exemption from one of Congress's major anti-pollution programs for even the largest sources of greenhouse gases and other non-NAAQS pollutants.[14]

To begin, petitioners invariably misstate what EPA determined the absurdity to be. The basis for EPA's actions under all three rationales it invoked was "the costs to sources and administrative burdens to permitting authorities" from "application of the PSD and title V programs for [greenhouse gas] emissions at the statutory levels *as of January 2, 2011*." J.A. 286 (emphasis added). See also J.A. 356–357 (discussing administrative necessity). The agency nowhere determined that those costs and burdens were permanent. To the contrary, the objective of the Tailoring Rule was to begin implementing PSD permitting for the largest greenhouse gas sources first, while allowing EPA to consider further burden-reducing regulatory adjustments and streamlining procedures in order to enable the application of PSD permitting "as close to the statutory levels as possible … as quickly as possible." J.A. 310. See pp. 7–8 & n.4, *supra*; see also J.A. 507–08. Indeed, EPA determined that it could "craft workable, common-sense solutions" to these implementation challenges. J.A. 594. Thus, the premise of petitioners' argument—that permanent, grave consequences inevitably flow from applying

[14] Some petitioners (*e.g.*, Texas Br. 17–20) and amici assail the Tailoring Rule itself, claiming that even if PSD permitting applies to greenhouse gases, EPA lacks any authority to adjust the PSD thresholds to limit permitting to large sources. The court of appeals correctly held that no petitioner has standing to challenge the Tailoring Rule, and this Court declined to grant review of either the standing question or the legality of the Rule.

PSD to greenhouse gases—has no foundation in any finding by EPA.

To the extent petitioners invoke absurd consequences to justify a permanent exclusion of greenhouse gases from PSD coverage, the effort is doomed because there is no basis in the text for such an exclusion. As demonstrated above, the encompassing PSD terms "*any* air pollutant" and "*each* air pollutant subject to regulation" unambiguously mandate coverage of greenhouse gases. See pp. 14–26, *supra*. Where an unambiguous statute produces "mischievous, absurd or otherwise objectionable" consequences, "the remedy lies with [Congress]." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (quoting *Crooks v. Harrelson,* 282 U.S. 55, 60 (1930)).[15] Indeed, the Court has twice rejected similar results-based claims for judicial alteration of unambiguous provisions of the Clean Air Act. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 466, 471 (2001) (rejecting an invitation to read ambiguity into the Act to avoid assertedly extreme economic burdens because the statute "unambiguously" settled the matter); *Union Elec. Co. v. EPA*, 427 U.S. 247, 265–66 (1976).

Furthermore, the absurd results doctrine does not condone the sweeping exclusion from PSD permitting that petitioners seek. In the limited circumstances

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[15] See also, *e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. … . This allows both of our branches to adhere to our … respective … constitutional roles.") (citing cases); *United States v. Granderson*, 511 U.S. 39, 60 (1994) (Scalia, J., concurring in the judgment); *id.* at 68 (Kennedy, J., concurring in the judgment).

where it applies, the doctrine allows only the narrowest deviation necessary to achieve congressional intent. See, *e.g.*, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring) (approving non-literal interpretation that did the "least violence" to the plain language of the statute); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("When [an] agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent."). Yet petitioners seek a permanent PSD exemption for all greenhouse gas sources (and many petitioners seek the same for all other non-NAAQS pollutants), including those emitted by large sources for which implementation is immediately feasible in accordance with the statute as written. See J.A. 589–90. Indeed, those are the very sources that petitioners emphasize Congress squarely intended to cover, see ACC Br. 22; EIMWG Br. 21; UARG Br. 21–22, and no credible claim exists that it is absurd, unworkable, or contrary to congressional intent for PSD permitting to apply to them for greenhouse gases. The exclusion of those sources would depart further from unambiguous statutory language than petitioners accuse EPA of doing. The Tailoring Rule alleviates the very burdens and consequences of which petitioners complain, deviating far less from the statute's literal terms and conforming far better to congressional purpose than the relief petitioners seek.[16]

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[16] Even if there were any ambiguity in the PSD triggering provisions, it could not be found in "any" or "each" air pollutant, but only in the possible tension, in the factual context of a high-volume pollutant, between those unambiguously

Some petitioners object that the Tailoring Rule offends separation of powers principles by rewriting the statutory emission thresholds. *E.g.*, SELF Br. 23–28. But EPA is carrying out the statutory permitting programs in a manner that heeds both expressed congressional objectives and the practical realities of implementation. The true affront to separation of powers principles here lies in petitioners' pleas to override Congress's explicit prescriptions concerning the broad applicability of these programs.

II. PETITIONERS' ARGUMENTS FOR EXEMPTING GREENHOUSE GASES FROM TITLE V ARE WAIVED AND, IN ANY EVENT, MERITLESS.

In the D.C. Circuit, petitioners made no serious attempt to support exclusion of sources of greenhouse gases from Title V. Accordingly, the D.C. Circuit held petitioners' Title V claims were waived. J.A. 241. See *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002). Even in this Court, petitioners do not make any serious effort to address Title V, and instead recycle flawed arguments against applying the PSD program to greenhouse gas sources.

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inclusive terms and expectations in 1977 that the numerical thresholds would focus permitting on large sources. Any such tension should be resolved by the administering agency through a reasonable accommodation of the text and congressional purposes. See *Chevron*, 467 U.S. at 843. In that event, petitioners' favored options would be impermissible. Petitioners' total exclusion of greenhouse gases would unreasonably forego permitting for even the largest sources, for which applying the statute as written is feasible. Likewise, excluding non-NAAQS pollutants would unreasonably eliminate permitting for sources of a large set of pollutants that raise none of the problems on which petitioners rely.

See UARG Br. 20–21 n.6; Chamber Br. 14, 21, 30; SELF Br. 2, 9–18; Texas Br. 3.

The plain language of Title V provides no grounds for excluding sources that emit greenhouse gases. Congress's decision to predicate Title V obligations on emissions of "any air pollutant" as broadly defined in Section 7602(g) was purposeful and matched to the intended universal scope of the program. See 42 U.S.C. 7661(2)(b), 7661c(a). Indeed, Title V permits cover requirements established under the entirety of the statute, including programs for hazardous pollutants, acid rain, stratospheric ozone protection, and state implementation plan requirements. See *id.* 7661a(a).

Some petitioners repeat their PSD-specific arguments for use against application of Title V to greenhouse gases. Chamber Br. 14, SELF Br. 7–10. These arguments have no relevance beyond that program, as the Title V program contains none of the PSD language on which these arguments are based. Petitioners' assertions that Congress did not intend Title V to apply to greenhouse gases because of the large numbers of sources potentially covered, *e.g.*, UARG Br. 24–25, fail on the same grounds as their similar PSD arguments. See *supra*, pp. 33–37; 74 Fed. Reg. at 55,321, 55,324 (noting that streamlining efforts for Title V are especially promising).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 21, 2014

ADDENDUM: Glossary of Abbreviations

GLOSSARY OF ABBREVIATIONS

ACC:	American Chemistry Council
Act:	Clean Air Act, 42 U.S.C. 7401-7671q
BACT:	Best available control technology
Chamber:	Chamber of Commerce of the United States of America
CRR:	Coalition for Responsible Regulation
EIMWG:	Energy-Intensive Manufacturers Working Group
Endangerment Finding:	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)
End. J.A.:	Joint Appendix in D.C. Cir. No. 09-1322 (Endangerment)
EPA:	Environmental Protection Agency
GHG:	Greenhouse gases
LAER:	Lowest achievable emission rate
NAAQS:	National ambient air quality standard(s)
NSPS:	New source performance standards

Part C:	Clean Air Act, Title I, Part C – Prevention of Significant Deterioration of Air Quality, 42 U.S.C. 7470-7492
Part D:	Clean Air Act, Title I, Part D – Plan Requirements for Nonattainment Areas, 42 U.S.C. 7501-7515
PSD:	Prevention of Significant Deterioration
SELF:	Southeastern Legal Foundation
Tailoring Rule:	Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)
Tailpipe Rule:	Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010)
Timing Decision:	Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010)
Title V:	Clean Air Act, Title V – Permits, 42 U.S.C. 7661-7661f
UARG:	Utility Air Regulatory Group