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.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*,

and five related cases.

On Writs of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter, which reflects the principle of separation of powers. The Center also has an interest in protecting the constitutional authority of the elected branches to provide national solutions to national problems, including the pressing and pervasive problem of air pollution, as argued in CAC's *amicus* brief this Term in *E.P.A. v. EME Homer City Generation*. CAC accordingly has an interest in this case.[1]

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief; letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Air pollution is a massive problem that inevitably crosses State lines and endangers the health and welfare of the American people, no matter where they may live. Facing a challenge at once immense and ever-changing, Congress enacted a broadly worded statute—the Clean Air Act (CAA)—to provide the Environmental Protection Agency (EPA) with a mandate as sweeping as the problem the CAA intended to address: both current and future air pollution challenges, guided by the best available scientific evidence. With the CAA, Congress tackled a complex and truly national problem. Moreover, the statute is a quintessential example of the Founders' design for the national government in action—a government in which Congress would have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[2]

Taking up its charge under the CAA, EPA analyzed the threat posed by greenhouse gas emissions from mobile sources after this Court's ruling in *Massachusetts v. EPA*, concluded that the threat was real, and issued regulations covering

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[2] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966) (Resolution VI). The principle of Resolution VI was translated into constitutional provisions—specifically, the powers granted to Congress in Article I—affording the federal government the ability to provide national solutions to national problems.

those emissions. From there, EPA extended an important permitting program to cover large stationary sources of greenhouse gas emissions, as required by the plain text of the CAA and as per EPA's longstanding interpretation of the Act. Finally, in the face of resource constraints and implementation challenges, EPA decided to phase in these new requirements over time, beginning with the largest emitters of greenhouse gases.

The D.C. Circuit upheld EPA's actions in full, describing the agency's interpretation of the CAA as "unambiguously correct" and "statutorily compelled." *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 113, 134 (D.C. Cir. 2012) ("*Coalition I*") (per curiam). Petitioners now ask this Court to reverse the D.C. Circuit's decision and, in the process, invalidate EPA's thirty-year-old interpretation of the CAA and upend important regulations addressing greenhouse gas emissions by large stationary sources.

To justify this bold request, Petitioners make the even bolder assertion that EPA's actions "contradict[] the Constitution's most fundamental principles of limited government and separation of powers." Brief of State Petitioners at 29. *See also Coal. for Responsible Regulation v. EPA*, Nos. 09-1322 et al., 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (*Coalition II*) (Kavanaugh, J., dissenting from denial of rehearing en banc) (warning that EPA's actions in this case threaten "the bedrock underpinnings of our system of separation of powers"). As Judge Kavanaugh alleged in dissent below, critics of the agency fear that the lower court's unanimous decision risks "green-light[ing] a significant shift of power from the Legislative Branch

to the Executive Branch" by permitting EPA to ignore the text of the CAA, circumvent the Framers' "cumbersome," "frustrating," and "laborious" legislative process, and "set" its own "economic and social policy as it sees fit." *Id.* On this view, shared by various Petitioners, EPA simply "rewrote" the CAA to suit its own policy goals rather than petitioning Congress to revise the CAA to specifically address global warming, as the Framers envisioned and as the statute allegedly requires. *Id.*; Brief of State Petitioners at 29 ("EPA believes it can disregard unambiguous, agency-constraining statutory rules and unilaterally establish a new regulatory regime to deal with novel environmental challenges").

These claims are baseless. Obviously, as "[t]he Framers specifically contemplated . . . there would be situations where the Executive Branch confronts a pressing need that it does not have current authority to address." *Coalition II*, 2012 WL 6621785, at *22. But this is not one of those situations.

Far from requiring EPA to return to Congress whenever a new challenge emerges, the CAA is a broadly worded statute that was purposefully crafted to deal with a complex, ever-changing problem like air pollution *without* requiring congressional action every time information arises about a particular new pollutant. As this Court recognized in *Massachusetts v. EPA*, 549 U.S. 497 (2007), Congress chose to define the air pollutants covered by the CAA in "sweeping," "capacious" terms—terms that easily cover greenhouse gases. *Id.* at 528-29, 532. Congress used similarly sweeping language when defining which air pollutants would trigger the permitting requirements

at issue in this case ("any air pollutant" emitted above certain statutory thresholds, 42 U.S.C. 7407(d)(1)) and which air pollutants would be covered by that permitting scheme's central substantive provision requiring facilities to regulate emissions using the best available control technology ("each pollutant subject to regulation under [the CAA]," 42 U.S.C. 7475(a)).

Rather than forcing EPA to await congressional fine-tuning in the face of new scientific evidence or new technological advances, Congress charged the agency with crafting new regulations to address new air pollution challenges as they arise—just as EPA did here in the face of the growing threat of global warming. This was Congress's conscious choice, embodied in the plain text of the CAA. Far from "rewriting" the statute, EPA sought to address the bulk of the problem posed by greenhouse gas emissions as quickly as possible under the terms of the CAA and pursuant to the authority granted to the agency by Congress. If this Court reverses the D.C. Circuit's decision and overturns EPA's actions here, it risks not only subverting the core purposes of the CAA specifically, but also limiting the capacity of Congress and the President to address massive, complex, dynamic issues, more generally.

Simply put, in this case, each branch of government did its constitutionally prescribed job. Congress enacted a broadly worded statute intended to cover truly national problems of air pollution, both now and in the future, like global warming. The President, through EPA, sought to carry out Congress's broad mandate to execute the law as best he could, with limited resources and in the face of

practical administrative challenges. Far from threatening "the bedrock underpinnings" of the Framers' system, this case is a prime example of that system working precisely as the Framers intended.

ARGUMENT

I. The Framers Created A Federal Government With The Power To Address Truly National Problems, With Congress Enacting Related Laws And The President "Faithfully" Carrying Out Those Laws With "Energy" And "Vigour."

In the summer of 1787, the Framers set out to create a national government worthy of their Revolution—a government "vested with sufficient powers for all general and national purposes," THE FEDERALIST NO. 3, at 17 (John Jay) (Robert A. Ferguson ed., 2006), but one that also remained accountable ultimately to the American people. Fearful of concentrating too much power in any one branch of government, the Framers' solution was to divide primary policy-making responsibilities between two branches of government—a Congress with the authority to "enact laws" that addressed truly national problems and a President who would "execut[e]" those laws with "energy" and "vigour." THE FEDERALIST NO. 75, at 414 (Alexander Hamilton); THE FEDERALIST NO. 70, at 391 (Alexander Hamilton); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("The Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a

permanent separation of powers."). While each branch was given "the necessary constitutional means, and personal motives, to resist encroachment from the other[]," THE FEDERALIST NO. 51, at 287-88 (James Madison), when acting together, Congress and the President would have sufficient power to govern our new nation effectively.

This new system was in sharp contrast to the feeble Articles of Confederation under which the Framers had toiled for nearly a decade. Ratified in 1781, the Articles established a confederacy built on a mere "league of friendship" that was comprised of only a single branch of government, a "Congress" made up of State delegations. ARTICLES OF CONFEDERATION of 1781, arts. III, V. This Congress paled in comparison to the vibrant national government embodied in our enduring Constitution.

Under the Articles, Congress struggled to procure troops and money during the Revolutionary War. *See* 18 THE WRITINGS OF GEORGE WASHINGTON 488 (John C. Fitzpatrick, ed. 1931) (Letter to Alexander Hamilton, March 4, 1783); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 45-46 (2005). It could not ensure State compliance with international treaties. *Id.* at 47. And, without the power to impose taxes or regulate interstate commerce, it could not control inflation, secure the nation's long-term credit, or police interstate trade disputes. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 619 (1999).

When the Framers finally met in Philadelphia for the Constitutional Convention in 1787, they sought to fix these deficiencies and establish a government with sufficient power to govern the new

nation. They settled upon dividing the legislative and executive domains—providing Congress with the power to enact laws that addressed truly national problems and the President with the power to execute those legislative commands energetically.

A. The Constitution Provides Congress With The Authority To Enact Laws That Address Truly National Problems.

Article I of the U.S. Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. When considering which "legislative Powers" to "grant[]" this new Congress, the delegates to the Constitutional Convention adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 FARRAND'S RECORDS at 131-32. *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2615 (2012) (Ginsburg, J., concurring in part and dissenting in part); AMAR, AMERICA'S CONSTITUTION, at 108; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-12 (2010). The delegates then passed Resolution VI on to the Committee of Detail, which was responsible for transforming this structural constitutional principle into a list of enumerated powers. *Id*. at 10.

The Convention later settled upon Article I, section 8, of the Constitution, which set out the specific powers vested in the new Congress. Many of these powers corrected recognized deficiencies in the

Articles of Confederation, providing Congress with the authority necessary to govern the new nation, including the power to "borrow money on the credit of the United States," "lay and collect Taxes . . . to . . . provide for the common Defence and general Welfare," "raise and support Armies," and "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8.

Considered together, these powers were intended to capture the idea that "[w]hatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (Jonathan Elliot ed., 2d ed. 1836) (Statement of James Wilson). In other words, Article I, section 8, was not an attempt to limit the federal government for its own sake, but rather was adopted "so that the new federal government would have power to pass laws on subjects and concerning problems that are federal by nature"—those that individual states could not "unilaterally solve" and that might, in turn, "hamper economic union in the short run and threaten political and social union in the long run." Balkin, 109 MICH. L. REV. at 12, 13.

B. The Framers Expected The President To "Faithfully Execute" Congressionally Enacted Laws With "Energy" And "Vigour."

Under our enduring Constitution, Congress's partner in carrying out national policy is the

President. Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. By establishing a "single, independent Executive," the Framers sought to infuse the executive branch of their new government, above all, with "energy," THE FEDERALIST NO. 70, at 388 (Alexander Hamilton)—energy to carry out Congress's commands, energy to oversee an independent branch of government, and energy to "preserve, protect, and defend" the new Constitution, U.S. CONST. art. II, § 1, cl. 8. *See also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 599-603 (1994) ("[T]he Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration."). This was in sharp contrast with the failed Articles of Confederation, which vested executive authority, quite feebly, in Congress. ARTICLES OF CONFEDERATION OF 1781, art. IX, §§ 4, 5.

Under the Articles, the "president" did not lead a separate branch of government, but rather merely "preside[d]" over Congress, and the presidency itself was limited to Congress's sitting Members. ARTICLES OF CONFEDERATION OF 1781, art. IX, § 5. In reimagining this office in Philadelphia, the Framers were looking for a President "who would be far more than a legislative presiding officer, a state governor, or a prime minister, but far less than a king." AMAR, AMERICA'S CONSTITUTION, at 131.

Unlike the "president" of the Articles of

Confederation, the Framers' new President would lead his own branch of government—a branch charged with executing the legislative commands of Congress and administering "good government," especially in its various "details." THE FEDERALIST NO. 72, at 399 (Alexander Hamilton); *cf. City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013). To those ends, the President was given the responsibility to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3.

The President would be aided in his considerable responsibilities by a team largely of his own choosing and "subject to his superintendence." THE FEDERALIST NO. 72, at 400 (Alexander Hamilton); *see also* THE FEDERALIST NO. 76, at 420 (Alexander Hamilton) ("It is also not very probable that [the President's] nomination would often be overruled [by the Senate]."). The First Congress quickly established the President's power to remove a subordinate officer unilaterally, therefore solidifying his control over the executive branch. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 320 (2012). When it came time to act, the final decision was the President's and the President's alone. AMAR, AMERICA'S CONSTITUTION, at 188; *see also* THE FEDERALIST NO. 71, at 397 (Alexander Hamilton) (explaining that it is "desirable" that the President should "dare to act his own opinion with vigour and decision").

This vision of executive power was closely tied to the Framers' theory of republican accountability. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

("While agencies are not directly accountable to the people, the Chief Executive is . . . ."). In their view, the American people's "two greatest securities" against executive abuse were the "restraints of public opinion" and "the opportunity of discovering with facility and clearness the misconduct of the persons they trust." THE FEDERALIST NO. 70, at 393 (Alexander Hamilton). By creating a single, "energetic Executive," the Framers sought to draw a clear line of responsibility from each executive action back to the President himself. *See id.* at 394 (arguing that a single executive will be "more narrowly watched and more readily suspected").

Of course, the Framers ultimately left Congress with a great deal of authority to either enlarge or restrict the President's discretion in any given policy area, as long recognized by this Court's decision in *Chevron*. As this Court explained just last Term, when crafting legislation, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge agency discretion." *City of Arlington*, 133 S. Ct. at 1868. In the end, the President is left with the simple duty to carry out those commands as best he can, with "energy" and "vigour," and, of course, within the constraints imposed by Congress—just as he did in the present case.

II. In Enacting The Clean Air Act, Congress Identified A Massive, Ever-Changing, Truly National Problem—Air Pollution—And Provided The Executive Branch With The Tools Necessary To Address It.

Air pollution—including the massive challenge posed by greenhouse gas emissions—is precisely the sort of problem that the Framers envisioned our national government addressing. Air pollution inevitably crosses State lines, with decisions made in one State often affecting the air quality in others. *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2350 (1996). Relevant to this case, this is especially true of greenhouse gas emissions, as gases emitted in one State inevitably mix in the atmosphere with emissions from other States to cause global warming—a problem that, in turn, alters the climate in ways that affect citizens nationwide. *See* Brief for State Respondents at 1-2. This is a serious problem, beyond the ability of any individual State to address by itself. At the same time, it is one that falls squarely within the authority granted by Congress to EPA through the CAA.

The CAA was carefully crafted to deal with a complex, ever-changing problem like air pollution. As this Court recognized in *Massachusetts v. EPA*, 549 U.S. 497 (2007), Congress chose to define "air pollutant" in the CAA in "sweeping," "capacious" terms. *Id.* at 528-29, 532. Rather than limiting this key definition in any significant way, Congress defined an "air pollutant" as "*any* air pollution agent or combination of such agents, including *any* physical, chemical, biological, radioactive . . . substance or

matter which is emitted or otherwise enters the ambient air." 42 U.S.C. 7602(g) (emphases added).

By choosing to define this term so broadly, Congress ensured that EPA had sweeping authority under the CAA to address new air pollutants—and, with them, new air pollution problems—as they arise, without requiring the President to return to Congress every time new scientific findings justify new regulatory actions. As such, while the animating goal of the CAA—combating air pollution—remains the same, the specific air pollutants requiring regulatory action at any given moment change as the underlying science changes. And, while Congress retains the authority, as always, to step in and clarify the executive branch's statutory mandate, the law itself is broad enough to ensure that the executive branch is not powerless in the face of an emerging threat and ongoing congressional deliberations.

This is a necessary feature of the CAA, not a bug, as this Court explicitly recognized in *Massachusetts*. There, the Court concluded that the CAA—and its definition of "air pollutant"—"unquestionably" and "unambiguous[ly]" encompassed greenhouse gases. *Massachusetts*, 549 U.S. at 528-29, 532. Even while Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming," it made the conscious choice to draft the CAA in broad language—language that "confer[red] the flexibility necessary to forestall . . . obsolescence." *Id.* at 532. Indeed, Congress understood that "without regulatory flexibility, changing circumstances and

scientific developments would soon render the [CAA] obsolete." *Id.*

Turning to the specific CAA program at the center of this case—the Prevention of Significant Deterioration (PSD) permitting program—Congress used similarly capacious language. *See* Brief for State Respondents at 10-15. The PSD program was designed to prevent the significant deterioration of air quality in areas that were already complying with the national ambient air quality standards (NAAQS) for at least one criteria pollutant. 42 U.S.C. 7471; *see also* Brief for Federal Respondents at 40-41. To receive a preconstruction permit under this program, each covered facility must: (1) meet air pollution standards for NAAQS pollutants, 42 U.S.C. 7475(a)(3)(A) & (B); (2) satisfy "any . . . applicable emission standard or standard of performance under [the CAA]," 42 U.S.C. 7475(a)(3)(C); and (3) install the best available control technology (BACT) for each pollutant "subject to regulation under [the CAA]." 42 U.S.C. 7475 (a)(4).

When defining which "major emitting facilities" were covered by these permitting requirements, 42 U.S.C. 7475, Congress chose broad language, requiring the program to cover facilities emitting more than 100 or 250 tons per year (depending on the type of facility) of "*any* air pollutant," 42 U.S.C. 7407(d)(1) (emphasis added). Since 1978, EPA has interpreted this key phrase to include any air pollutant regulated by the CAA, 43 Fed. Reg. 26,380, 26,382 (June 19, 1978)—not limiting it to NAAQS pollutants (*e.g.*, Am. Chemistry Council Br. 2-3) or some other circumscribed list (*e.g.*, Southeastern Legal Found. Br. 9-18, 20), as Petitioners urge. *See*

Brief for Environmental Respondents at 23-25 (demonstrating that the related legislative history supports EPA's broad reading of the CAA); Brief for State Respondents at 16-19 (same).

Therefore, whenever EPA decides to regulate a new air pollutant under any other provision of the CAA, EPA interprets the Act as also requiring it to extend the PSD permitting program to any facility emitting that new pollutant above the relevant statutory threshold. 43 Fed. Reg. 26380, 26382 (June 19, 1978). Petitioners challenge this longstanding interpretation in the present case.

III. EPA's Longstanding Interpretation Of The Clean Air Act—Namely, That The PSD Permitting Program Applies To All Regulated Pollutants—Is Compelled By The Plain Text Of The Statute.

Following this Court's decision in *Massachusetts*, EPA issued regulations covering greenhouse gas emissions caused by light-duty motor vehicles. 75 Fed. Reg. 25,324, 25,398 (May 7, 2010). Under EPA's longstanding interpretation of the CAA, these new greenhouse gas regulations, in turn, required EPA to apply the PSD permitting requirements to certain large stationary sources responsible for emitting greenhouse gases. This interpretation of the CAA is plainly valid for at least two reasons.[3]

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[3] For Respondents' detailed responses to Petitioners' varied statutory arguments for limiting the PSD Program's scope, see Brief for Federal Respondents at 29-

First, and most important, this interpretation is compelled by the text of the statute itself, as recognized by the court below. *See Coalition I*, 684 F.3d at 132-44; *see also Pub. Citizen*, 491 U.S. at 469 (Kennedy, J., concurring) ("There is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute."). As outlined in Part II, *supra*, the CAA provisions addressing the PSD program extend its preconstruction permitting requirements to any "major emitting facility" being constructed or modified in any NAAQS-compliant area. 42 U.S.C. 7475(a). In turn, these provisions define a "major emitting facility" as a stationary source emitting at least 100 or 250 tons per year of "*any* air pollutant," 42 U.S.C. 7479(1) (emphasis added). This intentionally broad definition plainly includes greenhouse gases.

As discussed in Part II, *supra*, the CAA defines "air pollutant" quite broadly—a definition that this Court has called "sweeping" and has read to "embrace[] all airborne compounds of whatever stripe," including greenhouse gases. *Massachusetts*, 549 U.S. at 528, 529; *see also American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (explaining that "emissions of carbon dioxide qualify as air pollution subject to regulation under the [CAA]"). Furthermore, both common sense and this Court's previous decisions dictate that Congress typically uses the "expansive" word "any" to further broaden the application of a given definition. *See*

33, 39-46, 52-55; Brief for Environmental Respondents at 14-23; Brief for State Respondents at 24-30.

United States v. Gonzales, 520 U.S. 1, 5 (1997); *see also Massachusetts*, 549 U.S. at 529 (explaining how Congress's "use of the word 'any'" reinforced Congress's expansive definition of "air pollutant"). Therefore, by placing "any" before the words "air pollutant" in the CAA's provisions addressing the PSD permitting program, Congress sought to broadly apply an already "sweeping" definition. As a result, the plain text of the statute itself compels EPA to apply the PSD permitting requirements to major greenhouse gas emitters in NAAQS-compliant areas.

To limit these requirements to major emitters of NAAQS pollutants or to exclude greenhouse gases altogether, as Petitioners urge, would be tantamount to rewriting clear statutory text. *See* Brief for Environmental Respondents at 37. Simply put, "any air pollutant" means *any* air pollutant, including greenhouse gases. *Coalition I*, 684 F.3d at 113, 134 ("[W]e have little trouble concluding that the phrase 'any air pollutant' includes *all* regulated air pollutants, including greenhouse gases."). And, under *Chevron*, EPA "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 843; *see also City of Arlington*, 133 S. Ct. at 1874.

Second, EPA's interpretation of the CAA's PSD program provisions—now challenged by Petitioners—is more than three decades old, Brief for Federal Respondents at 39-40, and was upheld by the D.C. Circuit in this case as "unambiguously correct" and "statutorily compelled," *Coalition I*, 684 F.3d at 113, 134. Over thirty years ago, EPA first interpreted the phrase "any air pollutant" to cover "any air pollutant regulated under the [CAA]." 43 Fed. Reg. 26380,

26382 (June 19, 1978). The agency has since reaffirmed this interpretation in regulations promulgated in 1980 and 2002, 67 Fed. Reg. 80,186 (Dec. 31, 2002); 45 Fed. Reg. 52,676 (Aug. 7, 1980). Importantly, this interpretation is also consistent with the landmark D.C. Circuit decision addressing the PSD program, during which industry groups made the same NAAQS-only argument that Petitioners are making now. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 352 (D.C. Cir. 1980); Brief for Environmental Respondents at 4.

This longstanding interpretation extends the PSD permitting program to emissions from any regulated pollutants—not just NAAQS pollutants—but excludes any air pollutants not yet regulated by the CAA. Far from simply inventing this interpretation to cover greenhouse gases and greenhouse gases alone, EPA has been following it for decades, extending the PSD program to cover many other non-NAAQS pollutants, including fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, municipal waste combustor organics, acid gases, and solid waste landfill emissions, 40 C.F.R. 51.166(b)(23)(i). Therefore, a decision invalidating EPA's decades-old interpretation requiring the PSD permitting program to cover all regulated pollutants also risks unsettling EPA's regulations of other non-NAAQS pollutants. *See* Brief for Federal Respondents at 29; Brief for State Respondents at 31-35.

Finally, Congress set out a broad purpose for its PSD program, consistent with covering large stationary sources of greenhouse gas emissions. Indeed, in a section entitled "Congressional

declaration of purpose," Congress explained that the "purpose," in part, of the PSD program was "to protect public health and welfare from any actual or potential adverse effect which in [EPA's] judgment may reasonably be anticipate to occur from air pollution." 42 U.S.C. 7470(1). Elsewhere, the CAA further explained that "[a]ll language referring to effect on welfare includes, but is not limit to, effects on . . . . weather . . . and climate." 42 U.S.C. 7602(h).

In the end, the plain text of the statute, longstanding interpretive practice, and Congress's stated purpose for the PSD program all support upholding EPA's longstanding interpretation that the CAA's PSD permitting program applies to all regulated pollutants.

IV. Far From "Rewriting" The Statute, EPA's Decision To Phase In The PSD Program's Permitting Requirements Was A Valid Attempt To Faithfully Execute Its Duties Under The CAA Within The Constraints Imposed By Congress.

By applying the PSD program's permitting requirements to major greenhouse gas emitters in NAAQS-compliant areas—as required by the CAA's plain text—EPA now faces serious implementation challenges. *See* Brief for Federal Respondents at 15-16, 47-48; Brief for State Respondents at 20-24.

Because greenhouse gases "are emitted in far greater volumes than other pollutants," the immediate extension of the PSD permitting program to all facilities exceeding the statutory thresholds for greenhouse gas emissions would potentially cover

thousands of new sources, "overwhelm[] the resources of permitting authorities," and "severely impair[] the functioning of [related] programs." 75 Fed. Reg. 31,514, 31,514 (June 3, 2010); *see also* Brief for State Respondents at 21-23 (describing the burdens on State permitting authorities). All told, had it immediately extended the permitting program in this manner, EPA would have increased the total number of PSD preconstruction permits from 280 per year to over 81,000 per year—in turn, imposing new "permitting burdens" upon a "large number of small sources that . . . constitute a relatively small part of the environmental problem" and threatening to overwhelm the State permitting authorities' limited resources. 75 Fed. Reg. 31,514, 31,533, 31,554 (June 3, 2010).

Facing these serious implementation challenges, EPA did what the executive branch is charged with doing. It sought to carry out its statutory mandate as best it could within the constraints imposed by Congress. *See* Brief for Environmental Respondents at 8-9; Brief for State Respondents at 5-6. Given the regulatory burdens of immediately extending the PSD permitting program to greenhouse gas emissions, EPA decided to phase in enforcement of the PSD permitting requirements over time, "starting with the largest GHG emitters." 75 Fed. Reg. 31,514, 31,514 (June 3, 2010).

This approach is consistent with this Court's guidance in *Massachusetts*. There, while discussing the regulation of mobile sources of greenhouse gas emissions, this Court explained that EPA need not "resolve massive problems" like greenhouse gas emissions "in one fell regulatory swoop."

Massachusetts, 549 U.S. at 524. Instead, EPA may "whittle away at them over time, refining [its] preferred approach as circumstances change and as [EPA] develop[s] a more nuanced understanding of how best to proceed." *Id.*; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002 (2005) (upholding the FCC's step-by-step, "incremental[]" approach to regulating information-service providers). That is precisely what EPA is doing here.

EPA's approach—its Tailoring Rule—would immediately address the bulk of the related problem, covering "major emitting facilities" that "represent[] 86 percent of the coverage at full implementation of the statutory . . . thresholds." 75 Fed. Reg. 31,514, 31,571 (June 3, 2010). From there, EPA would phase in smaller sources "at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible." 75 Fed. Reg. 31,514, 31,523 (June 3, 2010). While EPA conceded that it may have to "stop the phase-in process short of the statutory threshold levels," it set out several specific steps before reaching that point. 75 Fed. Reg. 31,514, 31,523, 31,548 (June 3, 2010).

Again, EPA started by covering the largest greenhouse gas emitters first, beginning with any new facilities with the potential to emit 100,000 tons per year of greenhouse gases or modifications to any existing facilities that would increase greenhouse gas emissions by 75,000 tons per year. 75 Fed. Reg. 31,514, 31,523-24 (June 3, 2010). From there, EPA committed itself to studying how best to phase in smaller stationary sources—whether through de minimis exceptions, streamlined permitting, or some

other measure—with a deadline for completing this assessment by 2015. 75 Fed. Reg. 31,514, 31,525 (June 3, 2010). Finally, EPA would issue a rule dealing with smaller sources by April 30, 2016, 75 Fed. Reg. 31,514, 31,573 (June 3, 2010), and "may continue the phase-in process with further rulemaking after 2016," 75 Fed. Reg. 31,514, 31,523 (June 3, 2010).

Far from "rewriting" the statute, as Petitioners contend, EPA is carrying out the CAA's requirements one step at a time. Brief for Environmental Respondents at 8-9. Consistent with good administration, EPA identified practical problems posed by enforcing the statute immediately and in full, and settled upon an approach that dealt with the largest emitters now, while setting a deadline for addressing smaller emitters later. *See* Brief for Federal Respondents at 50-51.[4]

This approach satisfied—and did not subvert—the central purpose of the CAA and its PSD permitting program, addressing the vast majority of greenhouse gas emissions by stationary sources at the outset and charting a path for expanding the program to cover additional sources later, based upon EPA's ongoing experience implementing the program. This is not a suspension of the relevant statutory provisions nor a failure to enforce the CAA as written. To the contrary, EPA is setting priorities based on both practical realities and its limited resources,

[4] Congress, of course, retains the opportunity and authority to fine-tune the relevant statutory thresholds and deadlines as EPA's implementation of the current regulation proceeds.

biting off no more than it or, as important, the regulated entities themselves, can chew at any given time. This phase-in of the CAA's requirements is not a rewrite of the statute, and it is fully consistent with the executive authority vested in the President by Article II of our enduring Constitution and the separation of powers evidenced in the Framers' design.

CONCLUSION

EPA's regulation of greenhouse gas emissions under the PSD permitting program is a reasonable and valid interpretation of the CAA, and this Court should affirm the lower court's decision upholding it.

Respectfully submitted,

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