Nos. 12-1146, -1248, -1254, -1268, -1269, and -1272

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *ET AL.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Respondents.

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

JOINT REPLY BRIEF OF PETITIONERS IN Nos. 12-1248, 12-1254, 12-1268, AND 12-1272

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INTRODUCTION

The new greenhouse gas permitting programs devised by the Environmental Protection Agency represent one of the boldest seizures of legislative authority by an executive agency in history. EPA has assumed power to rewrite the Clean Air Act in order to establish a permitting regime that nullifies multiple statutory requirements while targeting only those facilities EPA chooses to regulate and proceeding only on the schedule that EPA decides is warranted in its own judgment. In so doing, EPA has exceeded the proper bounds of executive authority and created fundamental separation-of-powers problems.

All sides agree that EPA's construction of the key statutory provisions at issue produced absurd consequences. All sides agree that the CAA's Prevention of Significant Deterioration and Title V programs cannot work as enacted if extended to encompass GHG emissions. Congress designed the PSD program to require case-by-case permitting for a small number of large facilities that emit pollutants that measurably deteriorate air quality in defined geographic regions. Title V, too, is meant for only the largest, most heavily regulated stationary pollutant sources. So confined, these programs have been in place for decades. But if the Court were now to allow EPA to extend the programs to GHG emissions—substances emitted in quantities orders of magnitude greater than conventional pollutants and whose environmental impacts are felt globally, not locally—the programs will break down. EPA has effectively conceded as much by rewriting numerical, statutory, emission thresholds and identifying, in both the rulemakings below and subsequent agency guidance,

multiple statutory requirements that must be nullified to hammer the square peg of GHG controls into the round hole of the PSD permitting program.

This case is the first before the Court in which an enormously consequential agency interpretation is admitted by all as leading to absurd results, and in which the disputed question is what the Court should do in response. As petitioners' initial briefing shows, because extending the PSD and Title V programs to encompass GHGs is untenable as an interpretive matter, the Court should respond by overturning EPA's recent extension of those programs. Taking this step will not disrupt the agency's longstanding application of PSD and Title V to conventional pollutants, but it will save the agency, the D.C. Circuit, and eventually this Court from what would otherwise be an ongoing process of "making * * * up" a new version of the Clean Air Act. *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 415 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

Respondents' principal contentions are that EPA's statutory construction was compelled by two things, which together induced the agency to believe it had no choice but to apply the PSD and Title V programs to GHGs. The first is the Act-wide definition of "air pollutant," as construed by this Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). But this argument, among other flaws, proves too much; even EPA concedes that the term "air pollutant" must be interpreted in a particular and restrictive fashion for purposes of the PSD and Title V stationary-source programs. See JA1399-412 (limiting PSD requirements to "regulated [air] pollutants"). The question, then, is not *whether* the

term should be limited for purposes of the PSD and Title V programs, but *how* it should be so limited.

Respondents further contend that EPA's extension of PSD controls to GHG emissions merely implements a "longstanding interpretation" of the program. Brief for Federal Respondents (U.S. Br.) 27. But EPA concedes, as it must, that it significantly rewrote its longstanding definition of "a[ir pollutant] 'subject to regulation'" solely for purposes of regulating GHG emissions. *Id.* at 16 n.4, 26 n.6. This change to a core PSD definitional provision belies any notion that PSD controls on GHG emissions can be accommodated within pre-existing—much less "longstanding"—EPA regulations.

This case, importantly, is *not* about whether EPA may regulate GHGs under other CAA programs or whether GHG emissions from stationary sources are "within the agency's purview," as respondents attempt to characterize it. U.S. Br. 39; see also Brief of State Respondents (Resp. States) 10. EPA is, for example, promulgating rules addressing GHG emissions from certain stationary sources under the Act's separate New Source Performance Standards (NSPS) program. 79 Fed. Reg. 1430, 1452-54 & n.90 (Jan. 8, 2014) (citing *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011)). The NSPS program provides for nationally uniform emission standards addressing those pollutants from categories of sources that, in the agency's view, endanger the health of the Nation's public as a whole—standards that must take account of the source's contribution to pollution and the overall costs of regulation. See 42 U.S.C. §7411. This case, in contrast, turns on whether GHGs may be regulated under the very different PSD program. Unlike NSPS,

the PSD program involves facility-specific mandates for equipment and operational changes, depends on facility-specific determinations of local effects by state permitting authorities, and imposes fixed, 100/250 ton-per-year permitting thresholds. See *id.* §7475(a). These features make PSD permitting extraordinarily ill-suited to regulating GHGs.

Finally, contrary to respondents' suggestions, all petitioners are united in supporting as their primary argument that the PSD and Title V programs cannot and do not extend to encompass GHG emissions. (See Section I, *infra*.) And all petitioners are united in arguing—as a fallback position—that the "in any area" language in Clean Air Act Section 165 should be construed as limiting the facilities subject to PSD permitting. (See Section II, *infra*.) Far from offering "a welter of inconsistent theories," Brief of Environmental Respondents (Envr. Br.) 13; see U.S. Br. 22-23; Resp. States Br. 8-9, petitioners embrace the same primary and alternative contentions. Most important, petitioners all agree that examining the PSD and Title V programs' structure and individual requirements makes clear that those programs cannot extend to encompass controls on GHGs.

Respondents lack good answers for these core contentions. They cannot justify EPA's seizure of authority to rewrite and nullify key parts of the CAA—thus claiming for the agency the very "roving license to ignore the statutory text" that the Court declined to issue in *Massachusetts*. 549 U.S. at 533.

ARGUMENT

I. EPA Improperly Extended The PSD And Title V Programs To Encompass GHGs.

Nothing in respondents' briefs answers petitioners' showing that these rulemakings must be vacated in their entirety. The PSD program does not apply to GHG emissions, and attempting to extend it to cover such emissions produces absurd consequences and nullifies or distorts multiple elements of the Act. (See Section I.A, *infra*.) Moreover, vacating EPA's PSD rulemakings necessarily requires a parallel vacatur of the agency's extension of Title V permitting to GHGs. (See Section I.B, *infra*.)

A. EPA's PSD Interpretation Contravenes Multiple Statutory Provisions and Violates Separation-of-Powers Principles.

No matter how serious the problem, an agency cannot exercise its authority in a manner that is "inconsistent with a statutory mandate." *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Here, EPA's reading—and rewriting—of the CAA violates this elemental precept. If what EPA has done is allowed to stand, it will upend settled understandings of the relationship between congressional enactments and the proper bounds of an executive agency's authority to implement them.

1. EPA Impermissibly Rewrote and Ignored the Plain Terms of the PSD Statute.

Petitioners' initial briefing demonstrates that extending the PSD program to GHGs nullifies and distorts key elements of the statute. See, *e.g.*, Brief of

Chamber of Commerce *et al.* (Chamber Br.) 14-20; Brief of Energy-Intensive Manufacturers Working Group *et al.* (EIM Br.) 20-26; Brief of Utility Air Regulatory Group (UARG Br.) 20-25. By its plain terms, the PSD program regulates pollutants emitted from a small number of large stationary sources that measurably deteriorate local air quality in particular geographic areas. The program thus cannot accommodate the regulation of GHGs, which disperse uniformly throughout the global atmosphere and do not measurably affect local air quality in discrete geographic regions, or cause any exposure-related harms of the sort traditionally associated with conventional pollutants subject to PSD regulation.

The government does not dispute that EPA failed to carefully assess the problems caused by applying the PSD program to GHGs. According to the government, the agency "concluded" long ago that regulation of a substance under any part of the Act automatically triggers PSD regulation, and then, "[a]pplying those principles," further "concluded," in the Triggering Rule, that PSD controls on GHGs were triggered automatically by EPA's mobile source regulation of GHGs. U.S. Br. 5. But this "conclusion" was reached without significant analysis of statutory text or consideration of the regulatory consequences of applying PSD requirements to GHG emissions. Nonetheless, the agency declared in the Tailoring Rule that the question whether PSD applies to GHGs had "already" been "decided" in the Triggering Rule; that the agency would not be "reopen[ing]" the matter, JA420; and that the time for review had passed, JA421 n.32. Only after announcing this *fait accompli* did EPA turn to considering how such regulation would actually work, contending that the

program could "readily accommodate" and be "readily applied" to GHGs. *Id.* at 420.

EPA's leap-before-you-look approach to interpretation is deeply flawed. Whether the PSD program can be applied to GHGs—a fundamentally different kind of substance from those heretofore regulated under the program—is a question that requires careful analysis of the statute's text, structure, history, and purpose. As petitioners demonstrated in their opening briefs, a proper statutory analysis shows that the PSD program cannot function as enacted by Congress if extended to GHGs. Indeed, EPA itself concluded that the resulting program would be "unrecognizable to the Congress that designed PSD." JA 454-55. Only by rewriting or nullifying multiple statutory provisions was EPA able to devise a program that, in the agency's view, could "readily accommodate" and be "readily applied" to GHGs. JA420. But the EPA-devised program is simply not what Congress enacted into law. No agency can replace a congressional enactment with a program of its own devising.

i. The incompatibility between the PSD program and regulation of GHG emissions is demonstrated most vividly by EPA's assertion of an unprecedented authority to revise the statute's emission thresholds. As even EPA admits, Congress enacted the PSD's 100/250 tons-per-year coverage thresholds to capture only large emission sources. See, *e.g.*, JA363. Based on its review of the legislative record, JA427-31, EPA concluded—correctly—that Congress "intended that PSD be limited to a relatively small number of large industrial sources," JA455, and "explicitly contemplated [that small sources] would not be included in the PSD program," JA429. Because

"major" sources represent the lion's share of pollution problems; because case-by-case permitting analyses are expensive; and because large sources can more readily bear such costs, "Congress paid careful attention to the types and sizes of sources that would be subject to the PSD program and designed the thresholds deliberately to limit the program's scope." JA453-54. These reasons for excluding minor sources from PSD requirements apply with even greater force in the GHG context.

The government recognizes that the PSD program's "legislative history suggests that those thresholds were settled on with a relative handful of known sources and known types of pollutants in mind." U.S. Br. 48 n.14. Hence, setting specific tons-per-year coverage thresholds was not "an oddly indirect way to accomplish what Congress could more readily have done directly." Envr. Br. 23. To the contrary, Congress performed a straightforward cost-benefit determination, enacted a workable, objective line dividing major and minor emitters, and provided that only sources on the large-source side of the line would be subject to PSD controls. Congress labeled these sources "*major* emitting facilities" for a reason—to distinguish them from small sources. Applying the PSD program to GHGs would nullify Congress's choice by sweeping hundreds of thousands of small sources into the program, thus transforming a command *not* to regulate small sources into a command *to* regulate them.

Instead of recognizing the obvious implications of this fact—that regulation of GHG emissions is incompatible with the PSD program—EPA took upon itself the task of rewriting the statutory thresholds. Attempting to defend its overreach, respondents now

trumpet EPA's promises eventually to lower the EPA-promulgated coverage thresholds as near as possible to the statutory levels. See U.S. Br. 46-51; Envr. Br. 33-35; Resp. States Br. 21. But these promises do nothing to ameliorate the problem; they exacerbate it. Imposing the PSD program's costly, burdensome requirements on hundreds of thousands of small sources "would be contrary to Congress's careful efforts to confine PSD to large industrial sources that could afford these costs." JA455; see also *id.* (imposing PSD on "small commercial or residential sources" would be "contrary to congressional intent for the PSD program, and in fact would severely undermine what Congress sought to accomplish in the program"); JA449-50, 467-68; Br. of State and Local Chambers of Commerce *et al.* 14-18. Tellingly, none of the response briefs offers any real cure for this problem.

Indeed, EPA's proposed solution—adopting "streamlining" measures to lessen the costs for small sources—entails a distinct and further nullification of statutory requirements. The statute requires individualized, source-by-source consideration as a condition of issuing a PSD permit, including a source-specific public hearing, 42 U.S.C. §7475(a), and a "case-by-case" determination of Best Available Control Technology (BACT), *id.* §7479(3). As EPA admitted, however, permitting authorities could not possibly individually assess and process site-specific applications from each of the thousands of small facilities that would be newly required to apply for permits. In 2009, fewer than 300 sources applied for a PSD permit, 74 Fed. Reg. at 55292, but under the new EPA regime that number could rise to more than 80,000 per year. JA377. Precisely because the

statute cannot be applied as written to hundreds of thousands of facilities, EPA proposes, eventually, to replace the unambiguous statutory requirement for case-by-case analysis with "presumptive" standards and "general" permitting. See, *e.g.*, 75 Fed. Reg. 31514, 31526 (June 3, 2010) (JA325). Put simply, EPA hopes to mitigate one statutory violation by committing another.

ii. Nor do respondents adequately address the fact that forcing GHGs into the PSD program cannot be reconciled with the local-impact analysis required "for each pollutant subject to regulation under this chapter." 42 U.S.C. §7475(e)(1). The PSD statute requires a "public hearing" regarding "the ambient air quality *at the proposed site* and *in areas* which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility." *Id.* §§7475(a)(2), 7475(e)(1) (emphasis added). Likewise, EPA must promulgate regulations requiring an analysis of "the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility *at the site* of the proposed major emitting facility and *in the area potentially affected* by the emissions from such facility for each pollutant regulated under this [Act]." *Id.* §7475(e)(3)(B) (emphasis added). These provisions dovetail with the more general requirement that the program be implemented through "emission limitations and such other measures" as are "necessary * * * to prevent significant *deterioration of air quality* in *each* [air quality control] *region*." *Id.* §7471 (emphasis added).

This mandatory local-impact analysis cannot be performed for GHGs because, as EPA admits, GHGs have no measurable impact on local air quality in

particular areas or regions. See Chamber Br. 17-18; EIM Br. 19; UARG Br. 27-28; see also *PSD and Title V Permitting Guidance for Greenhouse Gases* 42 (EPA 2011) ("*GHG Permitting Guidance*"). The government tries to sidestep this mismatch by asserting that the amount of GHGs emitted is an "appropriate and credible proxy" for the "impact" of GHGs. U.S. Br. 32-33. But the statute does not contemplate assessments of global effects at all, much less the use of "proxies" for such assessments. Instead, the PSD program mandates an assessment of *actual* impacts "on any air quality control region" affected by the facility's emissions. *Id.* at 29. More specifically, it requires assessments based on a region's "ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility." 42 U.S.C. §7475(e)(3)(B). That is why, for all other pollutants subject to the PSD program, EPA demands an analysis of actual environmental effects, rather than relying on emissions levels as a "proxy" for the analysis specified by statute. See, *e.g.*, 40 C.F.R. §52.21(o). The agency's resort to proxies, uniquely and exclusively for GHGs, is compelling evidence that the PSD program does not apply to emissions of these substances.

Respondents next suggest that exempting GHGs from the statutory analysis of local impacts is permissible because not every potential type of harm will be found in every analysis of local impacts. See Envr. Br. 21-22. But the fact that only certain impacts will be felt in certain situations does not mean that the PSD program's requirement for analysis of local impacts—whatever those might be—may be dispensed with altogether. Here again, EPA

can fit GHGs into the PSD program only by nullifying the statute's requirements.

Contrary to respondents' contention, Envr. Br. 19, EPA did not find that a facility's GHG emissions measurably deteriorate "the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility." 42 U.S.C. §7475(e)(1). Rather, EPA stated that "*[c]limate change* is expected to increase regional ozone pollution." JA907 (emphasis added). Any such effect would be an indirect and global phenomenon, not a direct effect on air quality traceable to a particular facility's emissions. But what the statute requires is that permit applicants "determin[e] the effect of emissions from a proposed facility on any air quality control region." *Id.* §7475(e)(3)(B). Without any way to measure the contribution an individual facility's GHG emissions make to global climate change, let alone the contribution they make to any climate-change-mediated effects on ozone concentrations in particular air quality regions, the local-impact analysis demanded by the statute cannot be performed.

Likewise, the ocean acidification cited by respondents is a global—not a local—effect. See Envr. Br. 20. Ocean acidification cannot be traced to any particular facility's GHG emissions; hence, this effect also cannot reasonably be addressed by a statute that calls for case-by-case assessments of local impacts.

Even more fundamentally, respondents' arguments about local impacts cannot be squared with EPA's actual regulations. Those regulations impose controls on an "amalgamation" of six GHGs

based on their global-warming potential measured in carbon dioxide equivalents—not on the predicted direct or exposure-related harms caused by particular amounts of emissions of individual GHGs. See U.S. Br. 13 n.3; see also *id.* at 16-18 n.4 (explaining how thresholds were set with no focus on localized effects); *id.* at 26 n.6 (same). EPA may not regulate based on global climate-change effects and then defend its regulations based on unrelated exposure-related effects voiced for the first time on judicial review. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

In the end, respondents are left suggesting GHGs are simply different from other pollutants. See U.S. Br. 32 (noting that "the form and degree of analysis * * * will necessarily vary among pollutants"). But that is the whole point. The fact that GHGs are so unlike conventional pollutants that core statutory requirements cannot reasonably be implemented confirms that GHGs are not the sort of "pollutant" that may be regulated under the PSD program.

iii. For related reasons, regulating GHGs under the PSD program also collides with the statute's core substantive requirement—that major sources apply BACT for pollutants subject to regulation under the Act. The statute makes clear that the local-impact analysis is a prerequisite to, and is designed to inform, BACT analysis. See 42 U.S.C. §7475(e)(1) (providing that BACT review "shall be preceded by" the local-impact analysis). Critically, in determining BACT for a particular facility, the permitting authority must weigh the costs of emission reductions against, among other things, the localized "environmental * * * impacts" of reducing the emissions. *Id.* §7479(3); see also, *e.g.*, *Genesee Power Station Ltd. P'ship*, 4 E.A.D. 832, 845-47 (EAB 1993)

(EPA review board upholding decision not to require a particular technology as BACT where technology was "out of proportion to the environmental benefit that would be achieved"). But there is no way to measure any local environmental benefits of reducing GHG emissions from a given facility; hence, there is no way to properly calibrate a BACT analysis for GHGs. See *GHG Permitting Guidance* 41-42 (instructing permitting authorities to ignore "the endpoint impacts of GHGs" because "[q]uantifying these exact impacts attributable to the specific GHG source obtaining a permit in specific places is not currently possible with climate change modeling").

Moreover, a proper BACT analysis requires an assessment of tradeoffs between pollutants. EPA recognizes, for example, that controlling volatile organic compounds generates GHGs. *Id.* Likewise, virtually all control technologies consume energy, which means that reducing emissions of non-GHG pollutants will almost inevitably increase GHG emissions. Without a meaningful way to measure the environmental benefits of GHG emission reductions, there is no principled way to make these tradeoffs.

Because of the lack of proven control technologies for GHGs, regulation of GHGs will operate in practice as regulation of energy efficiency or energy consumption. See, *e.g.*, EIM Br. 23-25. Applying BACT to GHGs would thus grant EPA regulatory authority over the energy and operational efficiency of every significant GHG emitter in the United States—from deciding whether a factory used optimally efficient light bulbs in the cafeteria to specifying its basic industrial processes. See *GHG Permitting Guidance* 21-22, 28-32, 40-46. As a result, BACT for GHGs becomes an unbounded exercise in

command-and-control regulation—a form of regulation that virtually all agree is ill-suited for GHG emissions. See, e.g., Brief of Economists Thomas C. Schelling *et al.*

iv. None of respondents' remaining contentions justifies these statutory contraventions. Respondents argue at length that the PSD program's substantive requirements have been applied to more than just NAAQS pollutants. See U.S. Br. 29-33; Envr. Br. 18, 20-21. But that is irrelevant. Petitioners' contention is not that only NAAQS pollutants are subject to regulation under the PSD program. Rather, it is that the PSD program cannot be extended to encompass GHGs in light of the multiple statutory contradictions this extension entails.

Respondents further assert that, in the 1990 CAA amendments, Congress ratified EPA's view that ozone-depleting substances are subject to PSD even though their effects are primarily global. See U.S. Br. 33; Envr. Br. 19. But respondents fail to point to any "longstanding" interpretation that Congress could possibly have ratified. Cf. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013) (approving a prominent and clearly relevant 40-year-old interpretation that Congress had left undisturbed in amending the statute on six occasions). EPA first regulated ozone-depleting substances in 1988, just two years before the 1990 amendments. See 53 Fed. Reg. 30566 (Aug. 12, 1988). The 1988 rule said nothing about the PSD program, and respondents have identified no evidence that Congress was aware that EPA was applying PSD to ozone-depleting substances. Indeed, one of respondents' *amici* stretches so far as to advocate congressional ratification based on a *draft* EPA manual from

October 1990, only one month before the amendments—an even less substantial foundation for ratification. See Brief of Inst. for Policy Integrity 11. That is "at most legislative silence," a "treacherous" basis upon which to find "adoption of a controlling rule of law." *United States v. Wells*, 519 U.S. 482, 496 (1997) (internal quotation omitted). If anything, Congress's silence in the 1990 amendments cuts in the opposite direction, because those amendments added an entirely new title (Title VI) to address ozone-depleting substances, while saying nothing about subjecting those substances to PSD requirements. See 104 Stat. 2649.

Nor is there a basis for contending that Congress ratified EPA's interpretation that the PSD program applies to all pollutants regulated under the Act—regardless of whether they deteriorate local air quality—when it exempted hazardous air pollutants from the PSD program in the 1990 amendments. See U.S. Br. 27-29; Envr. Br. 26. Hazardous air pollutants, unlike GHGs, deteriorate local air quality. See 42 U.S.C. §7412. In the hazardous air pollutant exemption, Congress concluded that an existing class of regulated pollutants, even though they deteriorate local air quality and had previously been thought appropriate for regulation under the statute, should be exempt from PSD controls. This exemption thus says nothing helpful to EPA regarding the distinct issue of whether pollutants that do not deteriorate local air quality, are much more ill-suited for control under the PSD program, and were not even subject to regulation at the time of the 1990 amendments, should be similarly exempt from PSD permitting.

Likewise, the statute's inclusion of "climate" in its general definition of "welfare effects" has no

bearing on whether GHGs are subject to regulation under every CAA program. U.S. Br. 26-27; Envr. Br. 18 (citing 42 U.S.C. §7602(h)). Even today, dictionaries define "climate" as "[t]he meteorological conditions, including temperature, precipitation, and wind, that characteristically prevail in *a particular region*." American Heritage Dictionary (5th ed. 2013) (emphasis added). And the CAA's use of the terms "climate" and "weather" date to 1967, see Pub. L. No. 90-148, §2, 81 Stat. 485, 490 (1967), when "climate" was almost certainly understood to refer to weather patterns in particular regions, which can be affected by smog and other conditions caused by conventional pollutants. Regardless of whether "climate" may refer to the global climate for purposes of other CAA programs, that meaning is particularly ill-fitting for the PSD program, with its focus on air quality in defined geographic areas.

v. Finally, the Court should reject EPA's contention that the PSD program can at least be applied to GHG emissions from those sources otherwise subject to PSD based on their non-GHG emissions. See U.S. Br. 33-37. This contention is premised on a false notion that such an interpretation eliminates the absurd consequences that would otherwise arise. *Id*. In fact, the conflicts between the CAA and PSD controls on GHGs extend far beyond the question of which facilities must obtain PSD permits. Even if limited to large facilities, PSD controls on GHG emissions cannot be implemented consistent with the Act.

In any event, this alternative contention is belied by EPA's revision of key statutory language to create a GHG-specific definition of "air pollutant subject to regulation." See U.S. Br. 16 n.4, 26 n.6. Before this

rulemaking, the phrase "air pollutant subject to regulation" simply referred to a roster of particular chemical and physical substances that were regulated by the agency under the Clean Air Act. Those substances either were or were not "subject to regulation," regardless of the type of facility from which—or amount in which—they were emitted. Now, however, by incorporating its revisions to the statute's emissions thresholds into the regulatory definition of "subject to regulation" for purposes of GHGs, EPA has redefined "air pollutant subject to regulation" so that it depends on how much of the substance is emitted and from which facilities. See 40 C.F.R. §§51.166(b)(48)(i)-(v), 52.21(b)(49)(i)-(v). Now the same substance, for the first time under the PSD program, is either an "air pollutant subject to regulation" or not, depending on what facility it comes from and what quantity of it is emitted. Indeed, for purposes of some aspects of the PSD program, including the requirement of a local-impacts analysis for "each pollutant subject to regulation," 42 U.S.C. §7475(e)(1), GHGs would under EPA's view never be deemed a relevant "pollutant subject to regulation." U.S. Br. 31-32. These linguistic and conceptual distortions, so clearly in contravention of the statute, are another untenable result of EPA's newly devised GHG regulations.

In sum, even assuming EPA were able to show that applying BACT or other PSD requirements to GHGs is not "absurd," EPA would still need to show that its interpretation is consistent with the statute as a whole. For all the reasons explained above, EPA's approach distorts and nullifies central PSD provisions, quite apart from the agency's rewriting of the tons-per-year coverage thresholds. These

nullifications and distortions demonstrate that imposing PSD controls on GHG emissions is incompatible with the statute.

2. This Court's Decisions Confirm that the PSD Program Does Not Apply to GHGs.

The interpretation advanced by petitioners is also confirmed by this Court's decisions—in particular, by *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

i. In *Brown & Williamson*, the Court held that, although tobacco products appeared to fall within the literal scope of FDA's regulatory authority under the definitions of "drug" and "device" in the Food, Drug, and Cosmetic Act (FDCA), the agency's interpretation could not be accepted because it would produce results "'inconsistent with the administrative structure that Congress enacted into law.'" 529 U.S. at 125 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Tobacco products cannot in any circumstance be deemed "safe" for consumption, given the adverse health effects they cause; accordingly, were they subject to FDCA regulation, FDA would have been required to ban them entirely. *Id.* at 142-43. As FDA conceded, however, it was clear that Congress did not intend that result, as demonstrated, *inter alia*, by other statutes regulating the labeling and advertising of cigarettes. *Id.* at 159-60. The agency attempted to address this problem by regulating more modestly than what the statute called for—in other words, by "tailoring" the statute—such that it merely restricted sales of tobacco products without banning them altogether. *Id.* at 128-129, 133-143. The Court squarely rejected

this approach, holding that the conceded fact that the statute's provisions as enacted could not reasonably apply to tobacco products did not authorize the agency to revise statutory provisions. Instead, as the Court made clear, this incompatibility required that the FDCA be interpreted to categorically exclude tobacco products from FDA's regulatory ambit. *Id.*

The same reasoning applies here. Extending the PSD program to GHG emissions would, as EPA concedes, result in a program "unrecognizable" to Congress and "inconsistent with congressional intent." JA1399-412. EPA's attempt to address these problems by nullifying multiple statutory requirements depends on exactly the same approach the Court rejected in *Brown & Williamson*. The only permissible response, in this case as in that one, is to interpret the relevant program so as to avoid results that contravene the statute—here, by interpreting the PSD program not to apply to GHG emissions.

Brown & Williamson cannot be distinguished, as respondents would have it, on grounds that the relevant provisions in the FDCA were more "ambiguous" than those of the CAA. See U.S. Br. 37-38; Envr. Br. 31-33. There was no question in *Brown & Williamson* that tobacco products fell within the literal definition of "drug" and "device." Nonetheless, *Brown & Williamson* held that the statute did not require or even permit FDA to bring those products under its regulatory authority. 529 U.S. at 142-43. Likewise here, while there is no question that the CAA's Act-wide definition of "air pollutant" is flexible and capacious enough to encompass GHGs in some contexts, that definition does not mandate that GHGs be included within its scope for all purposes and in all

programs, regardless of statutory context. See, *e.g.*, EIM Br. 16-17.

In both cases, the dispositive interpretive evidence arose, not from the statutory terms themselves, considered in isolation, but from reading those terms "in context," within the statute as a whole. See *Brown & Williamson*, 529 U.S. at 132-33. And in each case, the agency wrongly interpreted the evidence by adopting an "extremely strained" interpretation—here, a bald rewrite of statutory provisions central to the PSD program. *Id.* at 160. As this Court said in *Brown & Williamson*, "[r]egardless of how serious the problem an administrative agency seeks to address, * * * it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Id.* at 125 (quoting *ETSI Pipeline*, 484 U.S. at 517).

Respondents also argue that *Brown & Williamson* does not control because, in that case, Congress enacted separate "tobacco-specific legislation" demonstrating that tobacco products could not be subject to FDA jurisdiction. See U.S. Br. 38. But this Court cited that legislation (addressed in part II.B of the opinion) not as a *sine qua non* for its holding but only as additional support for its conclusion (already established in part II.A) that regulating tobacco products is inconsistent with the overall FDCA program. See *Brown & Williamson*, 529 U.S. at 142 (concluding that, "[c]onsidering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction," before addressing tobacco-specific legislation).

At bottom, extending PSD emissions controls to GHGs runs headlong into the statutes. The PSD program has long provided effective—albeit painstakingly slow, uncertain, and contentious (see, *e.g.*, EIM Br. 1-2)—regulation of localized, conventional-pollutant emissions from a small number of genuinely "major" sources. If expanded to encompass GHGs, however, the program becomes unmanageable within the terms set by Congress. "The idea that Congress gave [EPA] such broad * * * authority," allowing it to regulate nearly any and all aspects of any industrial or commercial facility that results in the emissions of GHGs, "through an implicit delegation [in the CAA] * * * is not sustainable." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (similar). Without "a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [an agency] unprecedented power over American industry." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980).

ii. Rather than confronting the statutory language Congress enacted, or directly countering *Brown & Williamson*, respondents attempt to characterize two other decisions—*Massachusetts v. EPA*, 549 U.S. 497 (2007), and *American Electric Power v. Connecticut,* 131 S. Ct. 2527 (2011) (*AEP*)—as compelling its conclusion that the PSD program applies to GHGs. But neither case addresses the PSD program at all, much less prospectively blesses EPA's decision to read "250 tons to [mean] 100,000 tons—a 400-fold increase." JA173 (Kavanaugh, J., dissenting). In fact, applying the PSD program to

GHGs produces the very type of "extreme measures" *Massachusetts* condemns. 549 U.S. at 531.

a. *Massachusetts* did not, as respondents suggest, hold that GHGs must be considered an "air pollutant" for all purposes and deemed subject to regulation under all parts of the Clean Air Act simply because they may fall within a literal reading of the Act-wide definition in Section 302(g), 42 U.S.C. §7602. See U.S. Br. 40; Envr. Br. 15-19; Resp. States Br. 10-12. To the contrary, after concluding that GHGs may qualify as an "air pollutant" under that general definition, the Court went on to consider whether applying the particular regulatory program at issue—the mobile source emissions program of Title II—was consistent with the statute and produced no "counterintuitive" consequences. 549 U.S. at 531. The Act-wide definition thus does not constitute the whole of the inquiry into the meaning of "pollutant" for purposes of each of the Act's substantive provisions.

The same analysis applies here. The PSD and Title V programs have their own text, structure, history, and purposes. And it is profound error to conflate the law governing these programs with the distinct questions concerning mobile sources addressed in *Massachusetts*. See, *e.g.*, Chamber Br. 21; EIM Br. 13-17; UARG Br. 24-25. As this Court recognized in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007), "the natural presumption that identical words used in different parts of the same act are intended to have the same meaning * * * is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with

different intent." *Id.* at 574 (internal quotations omitted).

Duke Energy disposes of respondents' arguments that *Massachusetts* controls this case. *Duke Energy* holds that the statutory term "modification" means different things when used in the NSPS and the PSD programs—despite the fact that both programs explicitly incorporate the same definitional provision and even though the definitional cross-reference to that provision was added by a standalone Clean Air Act amendment. *Id.* at 576. The *Duke Energy* decision carefully explains that the "context" of the statute made clear that the two uses of the term did not have to mean the same thing: "[c]ontext counts." *Id.*; see also *id.* at 574 ("[A] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies. The point is the same even when the terms share a common statutory definition.").

Indeed, the Court has previously applied this context-sensitive approach to interpreting the meaning of "pollutant." In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), the Court unanimously held that the term "pollutant" in the Clean Water Act—which, like the Clean Air Act, is defined to include "radioactive materials"—was properly read in the context of multiple relevant statutory provisions to exclude three types of radioactive material. See *id.* at 23-24. Petitioners emphasized *Train*, see Chamber Br. 21; Brief of Southeastern Legal Foundation, Inc., *et al.* (SLF Br.) 19, but respondents offer no answer.

b. Any argument that *Massachusetts* compels EPA's interpretation is further undermined by the fact that EPA itself does not adhere to the broadest definition of "air pollutant" that appears in that opinion. Rather than reading "air pollutant" or "each pollutant" for purposes of the PSD program to mean "all airborne compounds of whatever stripe," as in *Massachusetts*, 549 U.S. at 529, EPA reads those terms to mean "any *regulated* air pollutant," JA236 (emphasis added). Likewise, EPA has adopted other, narrowing interpretations of the definition of "air pollutant" for purposes of other CAA provisions; for instance, by interpreting the term under the visibility protection program of Part C as limited to "visibility-impairing pollutants." 40 C.F.R. pt. 51, app. Y, §III.A.2. That even EPA concedes "air pollutant" does not and cannot sustain its most expansive meaning throughout the Act underscores the inconsistencies of respondents' argument. See JA186 (Kavanaugh, J., dissenting) ("EPA cannot simultaneously latch on to *Massachusetts v. EPA* and reject *Massachusetts v. EPA*.").

Nor would following *Brown & Williamson* here implicitly overrule *Massachusetts*. See U.S. Br. 37-38; Envr. Br. 31-33. *Massachusetts* explained that *Brown & Williamson* did not support a different meaning of "air pollutant" in the context of the Act's Title II because there was nothing "counterintuitive" or problematic about applying mobile source standards to emissions of GHGs from vehicles. 549 U.S. at 531. That is not the case here, where EPA's preferred construction nullifies multiple statutory provisions, and EPA acknowledges that applying PSD requirements to GHG emissions produces absurd consequences.

At base, the critical flaw in EPA's analysis, both here and in *Massachusetts*, is the agency's failure to appreciate that statutory terms like "any air pollutant" and "each pollutant" must be read with care and in context. In *Massachusetts*, instead of considering context-dependent meanings, EPA offered a statute-wide interpretation that categorically *excluded* GHGs. *Id.* at 528. EPA now repeats its error—this time, by offering a statute-wide interpretation that categorically *includes* GHGs. This Court rejected EPA's categorical approach in *Massachusetts* and should do so again here.

c. Respondents also rely on this Court's decision in *AEP*, arguing that it shows that GHGs are subject to regulation under all of the Act's stationary source programs, including PSD. See U.S. Br. 40; Envr. Br. 15-19; Resp. States Br. 10-12. *AEP* says nothing of the sort.

AEP held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of [GHG] emissions." 131 S. Ct. at 2537. The Court specifically relied on the NSPS program, which allows EPA to issue through rulemaking national standards of performance for emissions from categories of stationary sources. *Id.* Although the opinion did note, in an earlier section summarizing EPA's regulatory efforts, that the agency had sought to apply PSD to "major" sources of GHG emissions, it conspicuously did not cite or rely on the PSD program in holding that common law actions were displaced.

There is nothing "anomal[ous]," U.S. Br. 45, in concluding that some CAA programs may apply to GHG emissions whereas the PSD program

categorically cannot. Standards of performance under the NSPS program are established through notice-and-comment rulemaking, are uniformly applicable nationwide, and may be tailored by EPA to apply only to those sources that most directly contribute to endangerment of health or welfare within the terms of the statute. See 42 U.S.C. §7411. Regulations governing "[d]esign, equipment, [and] work practices," while permitted under the NSPS program, may be promulgated only upon a finding that it would not be "feasible to prescribe or enforce a standard of performance." *Id.* §7411(h)(1). The PSD permitting requirements, by contrast, are not established through rulemaking, but rather by state permitting authorities in light of localized environmental impacts. Moreover, PSD requirements—including BACT—apply in blanket fashion to all facilities that exceed the 100/250 tons-per-year emissions thresholds, with no further distinction based on a facility's type, size, or actual contribution to air pollution. See *id.* §7475(a), (e). It is not "anomal[ous]" to conclude, given all these distinctions, that Congress intended that the NSPS program, and other Clean Air Act programs, would differ in the kind and scope of pollution problems they address as compared to the PSD program. Critically, nothing in petitioners' argument addresses NSPS regulation of GHGs.

3. EPA Far Exceeded the Bounds of Executive Authority By Deploying the Absurdity Doctrine as a Roving License to Rewrite Statutory Text.

Petitioners' opening briefs explain that EPA's invocation of the absurdity doctrine crossed the critical line separating an administrative agency's valid interpretation and implementation of statutory authority from the outright nullification and overriding of a legislative enactment. See Chamber Br. 23-32; SLF Br. 18-27; EIM Br. 29-31. Respondents offer remarkably little in response to these serious separation-of-powers problems.

i. As petitioners explained, the Court's cases recognize just two situations in which the absurdity canon may be deployed consistent with fundamental separation-of-powers principles. *First*, where minor, self-evident, adjustments to literal meaning suggest themselves, the Court has countenanced making those adjustments on authority of the canon. See Chamber Br. 24-25; SLF Br. 18-21. *Second*, where a specific application of a statute, seemingly authorized by the plain text, is manifestly absurd, the Court has been willing to declare that one application to be beyond the statute's proper scope. See *id.*

By so limiting the canon's application to these categories of cases, the Court has ensured that no "unhealthy process of amending the statute by judicial interpretation" arises from its deployment. *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in judgment). Nonetheless, EPA invoked a previously unknown variant of the doctrine below, thus crossing the line and invading the province of Congress. Confronted in

its Triggering Rule with a manifestly absurd statutory interpretation, EPA should have closely examined that interpretation, in accordance with the elementary rule that potentially absurd interpretations are best avoided by reading the relevant statute so that "no absurdity arises in the first place." *Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012). Had EPA revisited its interpretation, it would have found that the absurd consequences the agency identified, far from being compelled, run afoul of the statute in multiple ways.

More fundamentally, EPA should have recognized the unlawfulness of its response to the absurd consequences it correctly identified. Once EPA was unable to find a modest, self-evident correction that would preserve the design of the statute, it should have recognized that the Court's precedents compelled the conclusion that GHGs simply do not fit within the PSD program. See Chamber Br. 30-32; SLF Br. 18-21. Contrary to the government's claims, see U.S. Br. 49, not even the D.C. Circuit's decision in *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998), endorses the radical notion that agencies can rewrite statutory provisions to obtain preferred policy outcomes. And even if *Mova* did support such notions, it would remain a court of appeals precedent that would have to give way in view of this Court's extensive absurdity canon jurisprudence—all of which the government, quite tellingly, declines to engage.

ii. Unable to defend EPA's misuse of the absurdity doctrine to expand its regulatory authority, respondents attempt to re-characterize the absurdity found by the agency. According to respondents, regulating GHGs under the PSD program is not

substantively absurd at all, but is instead only *administratively* burdensome to the extent that it contemplates such regulation to be put in place right away. See, *e.g.*, U.S. Br. 33-34; Resp. States Br. 21; Envr. Br. 8-9. But, while the administrative impossibility of processing thousands of PSD permits was *one* of the reasons why EPA found that applying the PSD program as written to GHGs would be absurd, it was not the only one. The other was that hundreds of thousands of small sources that Congress did not intend to subject to the costs and burdens of PSD permitting would be swept into the program. See, *e.g.,* JA355-56 ("These extraordinary increases in the scope of the permitting programs would mean that the programs would become several hundred-fold larger than what Congress appeared to contemplate. Moreover, the great majority of additional sources * * * would be small sources that Congress did not expect would need to undergo permitting."). Wholly apart from "administrative necessity," EPA concluded that this vast expansion of the program would be "contrary to congressional intent for the PSD program, and in fact would severely undermine what Congress sought to accomplish with the program." JA449; accord JA392-93.

This enormous, substantive expansion of the program—not the administrative burden entailed by it—was the reason why EPA said Congress would have found the resulting program "unrecognizable." JA454-55. Moreover, it is no answer that EPA believes it can ameliorate these absurd results by adopting "streamlining" measures to reduce the costs for small sources. JA325. Those measures

contravene the statute's express requirements for individualized, case-by-case review.

Nor is there merit to the contention that EPA's rewriting of the statute's emission thresholds was justified because EPA "confront[ed] conflicting statutory commands." U.S. Br. 49. The choice between a permissible interpretation of one provision and the rewriting or nullification of others is in no sense a choice between "conflicting" commands. The 100 and 250 tons-per-year thresholds are a clear "statutory command." But there is no countervailing statutory command to impose PSD controls on GHG emissions. As noted above, EPA itself concedes that the terms "any air pollutant" and "each pollutant" cannot be given their broadest possible construction and must be read restrictively in the PSD context. JA234, 236 (emphasis omitted). But unlike the statutory text relied on by EPA, "250 tons per year" permits no alternative construction. This unambiguous text ought to have been respected—not rewritten—by being applied in a fashion that excludes GHGs from the PSD statutes.

B. EPA's Title V Regulations Must Also Fall.

If the Court finds that the PSD program does not apply to GHGs, it follows that the Title V program likewise does not apply to GHGs. Those programs have been interpreted by EPA to have the same scope in this regard, 75 Fed. Reg. 31514, 31562, and the agency concedes that its preferred interpretation gives rise to similar absurd results in the Title V context. *Id.* at 31514, 31563, 31596-97. Indeed, these problems are magnified in the Title V area, as the number of facilities swept into the program under

EPA's interpretation rises into the millions. *Id.* Furthermore, just as with the PSD program, EPA has relied on these absurd results—and its adulterated version of the absurdity doctrine—to promulgate new "regulatory" Title V emissions thresholds of the agency's own choosing. *Id.*

Respondents offer no reason to think that Congress expected Title V to apply to sources that are not subject to PSD or other CAA permitting programs. Title V does not itself impose substantive emissions standards or limitations, but instead directs that covered sources certify compliance with all applicable regulatory requirements under other provisions, such as PSD. *Id.* at 31554. This means that a source not subject to PSD or other programs would still be obligated to apply for and obtain a permit, with all attendant expenses, but the permit would set forth no substantive requirements—in EPA's words, it would be an "empty permit." *Id.* at 31563. Nothing in the language or history of Title V suggests that this result was intended or is permissible, particularly given EPA's concession that requiring all facilities covered by its interpretation to obtain permits (even empty permits) would overwhelm permitting authorities. *Id.* at 31551-52, 31562-64, 31573.

Against this backdrop, respondents can only reiterate the D.C. Circuit's erroneous conclusion that petitioners waived their argument. See, *e.g.*, Envr. Br. 37. But that is not true. Petitioners challenged EPA's flawed interpretation of Title V, just as it challenged EPA's flawed interpretation of the PSD program. The initial joint industry brief submitted below, argued, for example, that "[j]ust as Congress never intended the PSD program to reach tens of

thousands of small sources, Congress quite clearly never intended that Title V extend to millions of small sources" and that, "as with the PSD definition of 'major emitting facility,' EPA must define the 'pollutants' that trigger Title V in reference to the pollutants Congress intended to be covered." Non-State Petitioners DC Cir. Br. 47. The government responded to this argument, see U.S. DC Cir. Br. 114-15, and the joint industry reply brief reiterated the point, see Non-State Petitioners DC Cir. Reply Br. 36-37. Tellingly, the government does not assert that this argument was waived, but instead addresses it on the merits. See U.S. Br. 55-56. Under any fair reading of the record, petitioners' Title V challenge was fully preserved and should now rise or fall with petitioners' PSD challenge.

II. Alternatively, The Court Should Reverse On The Ground That PSD Permits Are Triggered Only By Emissions Of NAAQS Pollutants For Which An Area Is In Attainment.

All petitioners contend, as their primary argument, that the PSD and Title V programs do not extend in any respect to GHG emissions. That interpretation fully preserves the integrity of all PSD and Title V permitting provisions and avoids all absurd consequences and statutory nullifications that arise from EPA's preferred interpretation. Alternatively, petitioners contend—as a fallback position—that, if the Court should reject the primary argument presented above, then for the reasons given in the opening brief of petitioners American Chemistry Council *et al.* (ACC Br.) the "in any area" language in Section 165, 42 U.S.C. §7475(a), should be construed as limiting the facilities subject to PSD permitting. Specifically, PSD permitting should be

limited to facilities that emit major amounts of a NAAQS pollutant in an area that is attaining the NAAQS for that particular pollutant.

For two primary reasons, petitioners' alternative argument should be reached only in the event that petitioners' primary argument is rejected. *First*, deciding whether the PSD and Title V programs extend to GHGs at all is a logically antecedent question to whether the programs apply to GHGs and other pollutants in a particular fashion. *Second*, accepting petitioners' primary argument will grant *all* the relief that *all* petitioners seek from these EPA rulemakings, and resolve *all* of the inconsistencies and absurdities created by applying the PSD program to GHGs. Accepting petitioners' alternative argument, by contrast, would provide only some of that relief and resolve only some of the interpretive disputes in play. Before deciding a fallback issue that resolves only a subset of the questions in issue, the Court should first see whether the fallback issues can be mooted, especially where, as here, the primary argument must be addressed in any event.

i. None of the response briefs makes a serious effort to argue that the key statutory phrase at issue—"in any area to which this part applies"—compels their pollutant-indifferent interpretation. Nor could they. Any such contention is foreclosed by respondents' concession that Congress used that same phrase in Section 163(b)(4), 42 U.S.C. §7473(b)(4), in a pollutant-specific manner. See U.S. Br. 54 n.16. Respondents acknowledge—as did the court below, JA250—that the phrase "in any area to which this part applies" as it appears in Section 163(b)(4) cannot mean "in any area attaining NAAQS

for *any* pollutant," and must instead mean "any area attaining NAAQS for *such* pollutant." ACC Br. 17-18.

The only question, then, is whether the phrase can reasonably bear the same pollutant-specific meaning under both Section 163(b)(4) and Section 165(a). See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005) (discussing presumption that same terms in same statute carry same meaning). On this score, respondents offer nothing to suggest that the statutory context compels the differences in meaning insisted upon by EPA.

The slight textual differences in the provisions respondents identify, see U.S. Br. 54 n.16; Envr. Br. 30 n.13, do not evince such an intent. That the phrase "in any area to which this part applies" modifies different terms in the two provisions—"air pollutant" in Section 163(b)(4) and "major emitting facility" in Section 165(a)—does not require that it *must* be read differently. This is particularly true because the statute expressly defines the term "major emitting facility" as a source of threshold amounts of "any air pollutant." 42 U.S.C. §7479(1). Read in this light, Section 165(a) states, in effect, that permitting obligations will be imposed on the construction of any "facility [that emits major amounts of any air pollutant] * * * in any area to which this part applies." 42 U.S.C. §§7475(a), 7479(1). It is thus not only permissible but reasonable to interpret Section 165(a)'s reference to "in any area to which this part applies" to refer to areas attaining the relevant NAAQS for those NAAQS pollutants that a facility emits in major amounts. Likewise, the mere fact that Section 163(b)(4) addresses concentrations of pollutants in a given area, while Section 165(a) addresses emissions of a pollutant from a facility, see

Envr. Br. 30 n.13, does not suggest that the phrases must be interpreted differently in the two provisions—particularly given that they were enacted at the same time and are part of the same regulatory program.

ii. Respondents nonetheless contend that, even if the phrase "in any area to which this part applies" *can* be given a pollutant-specific meaning (as its usage in Section 163(b)(4) indicates), the "ordinary" usage of the phrase supports a contrary, pollutant-indifferent construction. See U.S. Br. 53; Envr. Br. 27-28. Nothing in "ordinary" linguistic usage, however, compels a single yes-or-no answer to the question whether Part C "applies" to an area. To the contrary, it is perfectly acceptable to say that Part C "applies" to an area for some purposes but not for others. ACC Br. 15-17. That is especially true given that, under the statute, areas are designated as "attainment" or "nonattainment" on a pollutant-specific basis. 42 U.S.C. §7407(d). If, for example, an area were in attainment for particulate matter and nonattainment for sulfur dioxide, and one were to ask whether Part C "applies" to that area, it would be entirely reasonable to answer "only with respect to particulate matter"—as opposed to an unqualified "yes" or "no." Indeed, EPA itself has stated that "[t]he *applicability* of the PSD program to a particular source [in an area] * * * is pollutant-specific." 70 Fed. Reg. 59582, 59583 (Oct. 12, 2005) (emphasis added).

EPA notes that Section 165(a) does not itself explicitly "link[ ] the pollutant for which the source is major and the pollutant for which an area is designated attainment." U.S. Br. 41. But this simply begs the question. The same could be said of the

parallel permitting provision in Part D, which requires an NNSR permit "for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area," 42 U.S.C. §7502(c)(5), with "major stationary source" defined to mean any facility that emits 100 tons per year or more of "any air pollutant," *id.* §7602(j). If EPA applied the same interpretation to 42 U.S.C. §7502(c)(5) that it applies to Section 165(a), then a facility that emitted 100 tons per year of any pollutant would be required to obtain an NNSR permit if it was located in an area designated nonattainment for any *other* pollutant, even if the facility did not emit 100 tons per year or more of that pollutant. But even EPA agrees such a reading would misconstrue 42 U.S.C. §7502(c)(5), which requires facilities to obtain an NNSR permit "only if they emit in major amounts the pollutant(s) for which the area is designated nonattainment." JA1406.

There also is no merit to respondents' contention that a more "natural" way for Congress to have achieved a pollutant-specific result would have been to limit "air pollutant" in the definition of "major emitting facility" in 42 U.S.C. §7479(1) to NAAQS pollutants. U.S. Br. 54; Envr. Br. 27-28. Limiting the term "air pollutant" in 42 U.S.C. §7479(1) to NAAQS pollutants would *not* have achieved the same result as the pollutant-specific interpretation of Section 165(a) because the pollutant-indifferent and pollutant-specific interpretations produce different results, even when dealing only with NAAQS pollutants. For example, if a facility emits major amounts of particulate matter but not sulfur dioxide and is located in an area that is in attainment for sulfur dioxide only, the facility would not be subject

to PSD at all under a pollutant-specific interpretation, but it would be subject to PSD under EPA's pollutant-indifferent interpretation. JA1407.

EPA's purported concern (not mentioned in the rulemakings) that a pollutant-specific interpretation would open the door to "regulatory arbitrage," by offering incentives for sources to locate in areas that are in nonattainment for the pollutants they emit in major amounts, is entirely unrealistic. U.S. Br. 55. By locating in an area in nonattainment for the pollutant it emits in major amounts, a facility would subject itself to Part D's *more* burdensome technology and emission offset requirements than would apply under the analogous Part C requirements. See JA1405. The Part D requirements for nonattainment areas demand, for example, that facilities comply with the "lowest achievable emission rate"; that is, with the "*most* stringent emission limitation" required or achieved in practice by similar sources anywhere in the country, 42 U.S.C. §7501(3) (emphasis added). The Part D requirements also obligate many facility owners to offset emissions increases with equivalent reductions from other sources of the same pollutant in the same area—a requirement that, in certain circumstances, may effectively preclude construction of the source. *Id.* §7503(c).

Moreover, a pollutant-specific interpretation of Section 165(a) avoids rendering core aspects of the statute superfluous in practice. EPA acknowledges that, under its interpretation, the PSD program has applied "in practice" to facilities located "anywhere in the Nation" from the day of its enactment to today; hence, the phrase "any area to which this part applies" has never served any real limiting function.

U.S. Br. 55-56. Other respondents attempt to explain away this anomaly by contending that the phrase has other purposes, but these explanations are unconvincing. The phrase does not, even under EPA's interpretation, "distinguish[] PSD areas from nonattainment areas." Envr. Br. 29. This is because EPA reads the phrase as subjecting facilities to PSD review even when the only pollutants they emit in major amounts are ones for which the area is in nonattainment. JA1407. Nor was the phrase necessary to make clear that PSD permitting "applies in *all* * * * PSD areas." Envr. Br. 29; Resp. States Br. 30 n.13. That would have been clear had Congress omitted the phrase entirely or said simply "in any area." Only the pollutant-specific interpretation gives the full phrase—"in any area *to which this part applies*"—any practical force and effect.

iii. Respondents, moreover, offer no persuasive reason why Congress would have designed the PSD trigger to be pollutant-indifferent but the NNSR trigger to be pollutant-specific, even though the two programs are designed to work in tandem. Indeed, EPA recognizes that, in order to harmonize Parts C and D, Part C must apply in a pollutant-specific way at least to some degree because it is "implicit in * * * the structure of the Act" that NNSR requirements, and not PSD requirements, apply to pollutants for which the area is in nonattainment. JA1405.

It is no answer to say that the definition of "nonattainment area" in Part D is by its terms pollutant-specific in character. See Envr. Br. 30. As petitioners explained in their opening brief—without any answer from respondents—the provisions of Parts C and D each refer to precisely the same provision, 42 U.S.C. §7407(d), in defining areas as

either in attainment or nonattainment, *id.* §§7471, 7501(2), and, furthermore, 42 U.S.C. §7407(d) defines attainment and nonattainment in parallel fashion as area designations that are both made "for the pollutant," *id.* §7407(d)(1)(A)(i), (ii). This parallelism further indicates that *both* attainment area and nonattainment area designations are pollutant-specific; the limiting language in Part D simply confirms the point. See ACC Br. 21-22.

Respondents are further mistaken in suggesting that Part D, unlike Part C, exhibits a "single-minded focus on eliminating NAAQS violations." Envr. Br. 30. To obtain Part D NNSR permits, facility owners must demonstrate that all major stationary sources they own or operate in the relevant state comply "with all applicable emission limitations and standards under this chapter." 42 U.S.C. §7503(a)(3). That Part C's and Part D's substantive requirements *both* in certain respects go beyond attaining and maintaining NAAQS provides no basis for construing *either* program's triggering provision to be pollutant-indifferent, but rather confirms that the two provisions should be construed harmoniously.

In sum, given that all agree the PSD and NNSR programs were designed to complement one another, and absent any indication that the applicability provisions of the two programs must be interpreted differently, the same pollutant-specific meaning applied to Part D should be applied to Part C.

iv. Finally, if the issue were to be reached by the Court (in the event the Court rejects the argument presented in Part I, *supra*), then the pollutant-specific interpretation of 42 U.S.C. §7475(a) is definitively confirmed by the fact that EPA's

preferred construction admittedly produces absurd consequences. A pollutant-indifferent construction, for instance, requires a facility to obtain a PSD permit if it emits major amounts of a harmless air pollutant such as water vapor. See ACC Br. 25-26. And it sweeps hundreds of thousands of small sources into PSD, resulting in a program that by EPA's own estimation "would have been unrecognizable to the Congress that designed PSD." JA454-55; cf. Br. Tex. Oil & Gas Ass'n, *et al.* 22, 28. Only by rewriting the statutory definition of "major emitting facility," adding the words "regulated under this chapter" to "air pollutant," and increasing by many magnitudes the statutorily prescribed emission thresholds, can EPA avoid some (but by no means all) of the statutory nullifications entailed by its preferred interpretation.

EPA's interpretation is, for this reason and many others, entitled to no deference. In adopting the pollutant-indifferent interpretation, EPA did not purport to be exercising policymaking discretion to adopt a reasonable interpretation of an ambiguous provision. Rather, it claimed the pollutant-indifferent interpretation was unambiguously "required" by the statute, JA1404—even to the point of producing admittedly absurd consequences and even though the agency itself once proposed a pollutant-specific interpretation, *id.* at 1415. That is a conclusion under the first step of *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), as to which EPA receives no deference. *Id.* at 842. In all events, EPA cannot now claim that this interpretation—which it concedes produces a regulatory regime "unrecognizable" to the Congress that enacted it—is a

reasonable statutory construction entitled to deference under the second step of *Chevron*.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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