Nos. 12-1146 and consolidated cases

# In the Supreme Court of the United States

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

*v.*

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

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

## REPLY BRIEF FOR THE STATE PETITIONERS


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## ARGUMENT

*Massachusetts v. EPA* interpreted "air pollutant" to include "all airborne compounds of whatever stripe." 549 U.S. 497, 529 (2007). EPA agrees that extending this understanding of "air pollutant" into PSD and Title V produces numerous absurdities. Its proposed solution is to re-write the unambiguous statutory language of those programs. The proper response is to cabin *Massachusetts*'s understanding of "air pollutant" to Title II and NSPS. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). The statutory definition of "air pollutant" is capable of sustaining a more narrow construction in the context of PSD and Title V. *See* 42 U.S.C. § 7602(g); *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007) (allowing defined statutory terms to be interpreted differently in different provisions of a statute). Agencies and courts must first construe *ambiguous* statutory language to avoid absurdity, before re-writing *unambiguous* statutory language to avoid that absurdity.

### I. THE CLEAN AIR ACT DOES NOT AUTHORIZE EPA TO REGULATE GHGS UNDER PSD OR TITLE V.

EPA's construction of "air pollutant" has produced at least three absurdities in the PSD and Title V programs. EPA's attempts to avoid these absurdities are foreclosed by the unambiguous language of the Act.

First, PSD and Title V require permits if a source emits more than 100 or 250 tons per year ("tpy") of "*any* air pollutant." 42 U.S.C. §§ 7475(a), 7479(1), 7602(j), 7661(2), 7661a(a) (emphasis added). By equating "air pollutant" with "all airborne compounds of whatever stripe," EPA is left with a statute that requires permits from entities that emit harmless or beneficial substances such as oxygen. EPA purports to have "solved" this problem by re-writing the statutory language. Rather than requiring permits for entities that emit threshold amounts of "any air pollutant," as the statute commands, EPA instead imposes these requirements only on sources that emit air pollutants subject to regulation under the Act. *See* EPA Br. 43.

None of the respondents explains how "*any* air pollutant" can refer only to a *regulated* air pollutant. Nor do they explain how EPA can sustain this construction when a separate statutory provision requires "the best available control technology for each pollutant *subject to regulation under this chapter*." 42 U.S.C. § 7475(a)(4) (emphasis added). When Congress wanted to refer only to *regulated* air pollutants, it knew how to do so. Yet the qualification that appears in section 7475(a)(4) is conspicuously absent from the permitting triggers for the PSD and Title V programs. *See id.* §§ 7479(1), 7602(j), 7661(2); *see also Russello v. United States*, 464 U.S. 16, 22–23 (1983) ("'[W]here Congress includes particular language in one section of a

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in original) (citation omitted)).

EPA claims that the "relevant statutory context" supports its atextual construction because "[t]he requirements of the PSD program address only pollutants that are regulated in some way under the Act." EPA Br. 43. That only strengthens the contrast with the statute's definition of "major emitting facility," which uses the phrase "any air pollutant" without qualification. And in all events, EPA's reliance on these PSD provisions does nothing to support its atextual construction of Title V, whose permitting requirements extend to sources that emit more than 100 tpy of "any air pollutant." *Compare* 42 U.S.C. §§ 7602(j), 7661(2), 7661a(a), *with* EPA Br. at 55-56.

The second absurdity created by EPA's interpretation of "air pollutant" arises from the unambiguous 100/250 tpy permitting thresholds of the PSD and Title V programs, which are set far too low to allow for rational regulation of GHGs. *See* J.A. 381-88.[1] And the third absurdity comes from

[1] As EPA recognizes, the States' reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and their argument for a narrow construction of "air pollutant" are equally applicable to PSD and Title V. *See* EPA Br. 56. The State petitioners preserved these arguments and they have not

section 7475(a)(4)'s requirement to impose the "best available control technology," which as applied to GHGs would not only empower but *require* EPA to micromanage every aspect of energy consumption in EPA-regulated buildings. *See* Joint Industry Reply Br. Here, too, EPA re-writes unambiguous statutory requirements, by scratching out the legislatively enacted permitting thresholds, and by excluding from the BACT requirement entities that emit GHGs in amounts below EPA-concocted thresholds. *See* EPA Br. 17 n.4; J.A. 506-09.

The only way the statute can be construed (rather than re-written) to avoid these absurdities is to narrow EPA's interpretation of "air pollutant" in the PSD and Title V programs. The Clean Air Act defines "air pollutant" as:

> any air pollution agent or combination of such agents, including

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been forfeited. *See* Final Brief of State Petitioners and Supporting Intervenor at 59, *Coal. for Responsible Reg., Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073) ("The low, mass-based permitting thresholds established by the PSD *and Title V* provisions simply do not fit with a world in which EPA treats greenhouse-gas emissions as air pollutants under those programs. EPA must therefore obtain more specific authorization from Congress before asserting a prerogative to regulate greenhouse-gas emissions under either the PSD *or Title V* programs." (emphases added)). The D.C. Circuit's claim that the petitioners "forfeited" their challenge to EPA's interpretation of Title V is indefensible, and EPA does not rely on it. J.A. 241; EPA Br. 55-56.

> any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

42 U.S.C. § 7602(g). On its face, it is possible to construe this language as extending only to "air pollution agents," *i.e.*, substances that "pollute" the air by rendering it "impure or unclean." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1910 (2d ed. 1949) (defining "pollute" as "[t]o make or render impure or unclean"); *Massachusetts*, 549 U.S. at 559 (Scalia, J., dissenting). EPA's all-things-airborne view leaves the phrase "air pollution agent" without any work to do, and renders superfluous the entire second sentence of section 7602(g). It is also possible to interpret "air pollution agent" to exclude GHGs. Heat-trapping gases are not inherently harmful; to the contrary, *some* presence of GHGs is not only beneficial but necessary to keep the Earth's climate from slipping into another ice age. Whether we have reached the point at which GHG emissions should be

deemed harmful is a highly subjective question, which requires a theory of optimal climate and involves picking winners and losers across the globe.

EPA says that any such narrowing construction of "air pollutant" is foreclosed by *Massachusetts*, and EPA implies (though it does not explicitly argue) that "air pollutant" must have a uniform meaning throughout the Act. *See* EPA Br. 45-46. EPA is mistaken on both counts. Although EPA correctly observes that *Massachusetts* equated "air pollutant" with "all airborne compounds of whatever stripe" in the context of Title II, this Court has also held on multiple occasions that statutory terms—even defined statutory terms—need not be given uniform interpretations throughout an act. *See, e.g.*, *Duke Energy*, 549 U.S. at 575-76 ("There is, then, no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically. Context counts." (citations and internal quotation marks omitted)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997); *see also* EPA Br. 46 n.12 (acknowledging that EPA "has interpreted the term 'any pollutant,' within the definition of 'major stationary source' that appears in the CAA provision addressing visibility protection, as including only 'visibility-impairing pollutants'"). It is not only permissible but imperative to adopt differing constructions of a statutory term when that is the only way to satisfy the competing demands of

avoiding absurdity, preventing agencies from re-writing unambiguous statutory language, and accommodating *stare decisis* considerations. Section 7602(g)'s definition of "air pollutant" is ambiguous on its face, and EPA cannot pretend that its hands are tied by *Massachusetts* when *Duke Energy* and other rulings of this Court allow defined statutory terms to carry different meanings in different surrounding contexts.[2]

## II. IF THE COURT CONCLUDES THAT THE CLEAN AIR ACT AUTHORIZES EPA TO REGULATE GHGS UNDER PSD AND TITLE V, THEN THE COURT SHOULD ENFORCE THE STATUTORY PERMITTING THRESHOLDS AND DISAPPROVE THE TAILORING RULE.

EPA tries to pass off its "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010), as akin to an act of prosecutorial discretion. *See* EPA Br. 49 (claiming that the Tailoring Rule falls within EPA's "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated

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[2] The American Chemistry Council offers a way to avoid the absurdity of imposing PSD permitting on entities that emit more than 250 tpy of GHGs, but that does not prevent the absurdities of imposing Title V permitting on sources that emit more than 100 tpy of "any air pollutant," nor does it address the fact EPA's approach would result in nullifying or distorting central PSD provisions such as the BACT requirement and the mandatory local-impact analysis.

responsibilities" (quoting *Massachusetts*, 549 U.S. at 527)); *cf. Heckler v. Chaney*, 470 U.S. 821 (1985).

The problem with this argument is that the statute specifically defines the scope of EPA's discretion to exempt sources from the permitting requirements of PSD and Title V, and it expressly withholds the "discretion" that EPA has claimed for itself. Title V, for example, grants EPA discretion to "exempt one or more source categories (in whole or in part)" from its permitting regime if EPA "finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories," but it goes on to say that EPA "*may not exempt any major source* from such requirements." 42 U.S.C. § 7661a(a) (emphasis added); *see also id.* § 7479(1) (authorizing States to exempt "nonprofit health or education institutions," but nothing else, from the "major emitting facilit[ies]" subject to PSD). To allow an agency to invoke "discretion" in the teeth of these statutory provisions would effectively give the executive a dispensing power over the Clean Air Act.[3]

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[3] EPA denies that it has "flatly exempt[ed]" sources from PSD or Title V because the Tailoring Rule contains aspirational statements that EPA *might*, at some unknown point in the future, impose Title V permitting on all sources emitting more than 100 tpy of $CO_2$. *See* EPA Br. at 16-18; J.A. 497 ("With the tailoring approach, over time, more sources *may* be included in title V, consistent with those provisions and legislative history." (emphasis added)). *But see* J.A. 498 ("However, as part of the tailoring approach, we recognize that we may at some point

The respondents also suggest that the legality of the Tailoring Rule is outside the question presented. *See* N.Y. Br. 20 n.10. But "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." SUP. CT. R. 14(a). The task of resolving whether EPA "permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases" fairly encompasses disputes regarding the scope of those "permitting requirements," as well as the substantive obligations imposed on entities subjected to PSD permitting. *See, e.g.*, 42 U.S.C. § 7475(a)(4); EPA Br. 6, 24 (acknowledging that disagreements over the scope of section 7475(a)(4) are within the question presented).

The legality of the Tailoring Rule is also relevant to whether EPA lawfully asserted jurisdiction over GHGs in the PSD and Title V programs, which is undoubtedly within the scope of the question presented. If EPA's Tailoring Rule is unlawful, as the States maintain, then it is more difficult to

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determine that it is appropriate to exclude certain sources, such as the smallest of the GHG sources."). Apparently EPA believes that temporary exemptions are not "exemptions" under section 7661a(a), even when indefinite in duration and when the agency has made no commitment to enforce Title V against all major sources in the future. That is not a tenable argument.

justify a construction of the statute that treats GHGs as "air pollutants" under PSD and Title V.

## III. *MASSACHUSETTS* SHOULD BE RECONSIDERED OR OVERRULED IF IT COMPELS EPA TO REGULATE GHGS UNDER PSD OR TITLE V.

The Court need not reconsider or overrule *Massachusetts* unless it rejects the States' reliance on *Duke Energy* and concludes that "air pollutant" must have the same meaning in PSD and Title V that it has in Title II. If (and only if) this Court decides that "air pollutant" must have a uniform interpretation throughout the Act, then the States respectfully ask this Court to reconsider *Massachusetts*'s holding that "air pollutant" unambiguously includes "all airborne compounds of whatever stripe." Forcing EPA to treat *every* airborne substance as an "air pollutant" is demonstrably untenable in light of the provisions in the PSD and Title V programs.

EPA purports to rely on *Massachusetts*'s definition of "air pollutant," yet EPA refuses to impose Title V or PSD permitting requirements on sources that emit more than 100 or 250 tpy of unregulated airborne substances—even though the statute requires permits for entities emitting more than 100 or 250 tpy of "*any* air pollutant." The only way EPA can defend its interpretation of the PSD and Title V permitting triggers is for this Court either to cabin *Massachusetts*'s holding so that its all-encompassing definition of "air pollutant" does

not carry over to PSD and Title V, or overrule it. Otherwise EPA is left to claim that statutes do not mean what they say—that the word "any" can somehow be construed to mean "a subset of."

The respondents contend that limiting or overruling *Massachusetts* would undercut *AEP*, as well as EPA's decision to regulate mobile-source GHGs under Title II. *See* EPA Br. 35-36; N.Y. Br. 16 n.6. Not so. The States are not asking this Court to hold that section 7602(g)'s definition of "air pollutant" unambiguously excludes GHGs. They are asking this Court to recognize only that section 7602(g)'s definition is flexible enough on its face to accommodate either a GHG-inclusive or a GHG-exclusive reading. Whether that definition can or should be construed to include GHGs (or everything airborne) depends on the context provided by surrounding statutory provisions. *See Duke Energy*, 549 U.S. at 575-76; *see also Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) (holding that courts should employ all "traditional tools of statutory construction" at *Chevron* step one).

*Massachusetts*'s construction of "air pollutant" was plausible in the context of Title II, because Title II does not permit regulation of "air pollutants" until EPA issues an endangerment finding, and construing "air pollutant" broadly to include GHGs would not trigger "extreme" or absurd results in Title II. *See Massachusetts*, 549 U.S. at 531. The same is

true of the NSPS program at issue in *AEP*. *See* 42 U.S.C. § 7411(b)(1)(A) (limiting NSPS regulations to sources that contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare"). By contrast, Title V and PSD require permits for every source emitting more than 100 or 250 tpy of "*any* air pollutant"—regardless of whether the pollutant is regulated or harmful. It is absurd to impose this requirement on every entity that emits threshold amounts of $CO_2$ or harmless substances such as oxygen. In the context of these two programs, "air pollutant" cannot reasonably be construed to include "all airborne compounds of whatever stripe."

*Massachusetts* never considered the implications of its holding for PSD and Title V, and none of the 30 briefs in that case alerted the Court to the problems that would arise under those programs if "air pollutant" means "all airborne compounds of whatever stripe." EPA parrots the D.C. Circuit panel's statement that the *Massachusetts* briefs "explicitly raised the argument that interpreting 'air pollutant' to include greenhouse gases could have tremendous consequences for stationary-source regulation." EPA Br. 35 n.8 (quoting J.A. 142 (Sentelle, C.J., Rogers and Tatel, JJ., concurring in the denials of rehearing en banc)). But the panel cited only one brief to support that claim—a brief that never so much as mentions Title V and whose

sole discussion of PSD appears in the following passage:

> In addition to imposing controls on existing sources through SIPs or FIPs, state and EPA regulatory authorities also are directed to impose requirements on the construction of new major sources of air pollution and the modification of existing major sources. CAA §§ 160-169, 42 U.S.C. §§ 7470-7479 (Prevention of Significant Deterioration ("PSD") requirements for areas attaining NAAQS); and CAA section 173, 42 U.S.C. § 7503 (new source review ("NSR") requirements for areas not attaining NAAQS). Among other things, these preconstruction permitting programs required by the Act mandate that new or modified sources utilize the Best Available Control Technology (in attainment areas), CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3), or meet even more stringent Lowest Achievable Emission Rates (in non-attainment areas), CAA §§ 171(3), 173(a)(2), 42 U.S.C. §§ 7501(3), 7503(a)(2).

Brief of Respondent $CO_2$ Litigation Group, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3043971, at *19. There is no mention of the fact that the 100/250 tpy permitting thresholds in PSD and Title V are set too low for $CO_2$ emissions. Nor does the brief point out that PSD and Title V permitting requirements are triggered by the emission of "*any* air pollutant"—which cuts strongly against the notion that "air pollutant" *must* be construed to encompass "all airborne compounds of whatever stripe." There was no reason for the Court to consider these implications for the PSD and Title V programs.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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