NO. 12-1272
(Consolidated with
Nos. 12-1146, 12-1248, 12-1254, 12-1268 and 12-1269)

In the
Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES, ET AL.,
PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS.

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

BRIEF OF ADMINISTRATIVE LAW PROFESSORS AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The disposition of this case requires a careful analysis of this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Everyone, including the parties and the court below, recognizes the momentous economic consequences at stake, as well as the difficult statutory and separation-of-powers questions that have arisen over EPA's interpretation of *Massachusetts*. The policy questions stir passionate interest on all sides. At its heart, however, *Massachusetts* was not a "global warming case"; it was an administrative law case. The disposition of this case may depend in no small part on what *Massachusetts* did and did not say on questions of administrative law.

Amici law professors (listed in Appendix A) have taught and written extensively on administrative law as well as constitutional and environmental law. The Judicial Education Project is a non-profit educational organization in Washington, D.C., dedicated to defending the Constitution as envisioned by its Framers—a federal government of enumerated,

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* law professors received no compensation for offering the views reflected herein. Counsel of record represented certain petitioners in the proceedings below, but is solely representing *amici* before this Court.

limited powers. Through this brief, they seek to inform the Court of the exceptionally important administrative law questions at issue in this extraordinary case.

Amici file this brief in support of petitioners the Chamber of Commerce, the State of Alaska, and the American Farm Bureau Federation (Case No. 12-1272). In *amici*'s judgment, those petitioners provide the most comprehensive discussion of the key issues in this case: the proper reading of *Massachusetts*; the correct interpretation of the Clean Air Act; and EPA's deployment of an "absurdity doctrine" that would permit agencies to rewrite congressional statutes and thus violate foundational separation-of-powers principles.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is the Court's third encounter with global warming and government policies on greenhouse gases. In its previous rulings, the Court held that EPA has authority to regulate greenhouse gas emissions under the Clean Air Act's "capacious" Act-wide definition of "air pollutant," *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), and that the agency "must ground its reasons for action or inaction in the statute," *id.* at 535. The Court also held that the congressional grant of authority displaces any claim arising under the federal common law of (interstate) nuisance, regardless of whether EPA actually exercises that authority. *American Elec. Power v. Connecticut,* 131 S. Ct. 2527, 2538–39 (2011).

This third encounter with global warming regulation is of a very different kind. It is the Court's first review of EPA's actual exercise of authority to issue binding greenhouse gas regulations, as distinct from the potential existence and displacement effect of that authority *vel non*. That exercise, all parties agree, is of breathtaking proportion, potentially covering millions of heretofore unregulated stationary emission sources with a highly prescriptive, detailed regime of permitting and compliance obligations. JA259–60. All parties also agree that the administration of that regime—the Prevention of Significant Deterioration ("PSD"), 42 U.S.C. §§ 7501 *et seq.*, and Title V, 42 U.S.C. §§ 7661 *et seq*., programs of the Clean Air Act—would, with respect to greenhouse gases, entail "absurd" consequences that Congress cannot conceivably have

intended. *See* 73 Fed. Reg. 44,354, 44,503 (July 30, 2008) (JA1271–73), *id.* at 44,512 (JA1309–10); 75 Fed. Reg. 31,514, 31,597 (June 3, 2010) (JA632–34); *see also* 74 Fed. Reg. 55,292, 55,306–11 (Oct. 27, 2009). For precisely that reason, EPA claims unprecedented authority to re-write, unilaterally, the numerical permitting thresholds contained in those programs, and to revise the rewritten thresholds whenever it chooses. *See* JA268.

The decisions of EPA and the court below rest on an aggressive interpretation of this Court's decision in *Massachusetts*. *See, e.g.*, JA973, JA236–37 (the Act's "plain[] language" is "buttressed" by *Massachusetts*' interpretation of section 302(g), 42 U.S.C. § 7602(g)); *cf.* JA180 (Kavanaugh, J., dissenting from denial of rehearing en banc) (the panel's "conclusion [that 'air pollutant' must include greenhouse gases for PSD purposes] appears to have been heavily if not dispositively influenced by *Massachusetts v. EPA*."). Upon casual reading, that understanding may appear to find support in *Massachusetts*' *dicta*, stripped from the context in which they appear and without accounting for the case's unusual posture. But it is important to determine with greater care what exactly this Court has and has not held with respect to EPA's authority and obligations to regulate greenhouse gases. That examination counsels a far more nuanced analysis than the broad-brush reading adopted by EPA and by the court below. Most critically with respect to the question presented here, and contrary to EPA's contention, *Massachusetts* did *not* hold that greenhouse gases must be "air pollutants" *for all purposes* of the Clean Air Act. This brief addresses

three sets of concerns arising over EPA's misinterpretation.

First, *Massachusetts* should be understood in the context of the posture in which the case arrived at the Court—EPA's denial of a rulemaking petition under section 202(a), 42 U.S.C. § 7521(a), governing emissions from new motor vehicles. While the Court's opinion contains broad (and occasionally ambiguous) pronouncements, its explicit holdings, as well as the relief granted, addressed the questions arising from the specific, discrete agency action under review. The Court's *dicta* provide no warrant for the agency's unprecedented assertion of regulatory authority in this case. (*See* Section I, below.)

Second, EPA's overreading of *Massachusetts* upends familiar *Chevron* canons. *See Chevron USA Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). On its migration from an "endangerment finding" to the comprehensive regulation of stationary sources, EPA employs the *Chevron* "step one" inquiry not as a comprehensive interpretive endeavor but as a simplistic "magic word" canon: so far as greenhouse gases are concerned, "air pollutant" must have the same meaning throughout the entire Clean Air Act. Confronted with the absurd consequences of that approach, EPA then claims authority to re-write unambiguous, numerical emission thresholds that govern the coverage of stationary sources under the PSD and Title V programs. In this deployment, *Chevron* canons *produce* the separation-of-powers

problems that those canons, properly applied, serve to contain. (*See* Section II, below.)

Third, in an administrative law context, the overreading of this Court's decisions poses special and particularly acute dangers. Separation-of-powers problems are never far afield, and agencies have powerful incentives to seize on judicial pronouncements as a warrant to expand their authority. This case poses those problems in spades. (*See* Section III, below.)

ARGUMENT

I. This Court's Decisions Do Not Command EPA's Position Or The Ruling Below.

EPA and the court below overread *Massachusetts* in three key respects. *First*, *Massachusetts* did *not* directly impose any affirmative regulatory obligations on EPA. In fact, the Court specifically disavowed any such holding. *Second*, *Massachusetts* did *not* hold that the generic Act-wide definition of "air pollutant" requires that the term have the identical meaning for all purposes and programs throughout the statute. The contrary interpretation puts *Massachusetts* on a collision course with *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). In that case, the Court held that EPA had discretion to interpret the term "modification" of a stationary emission source differently for different parts of the Act—despite an explicit statutory cross-reference that, on its face, appeared to mandate an identical construction. *Id.* at 576; *see 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."). *Third*, *Massachusetts* did *not* eliminate EPA's discretion with respect to regulating greenhouse gases; rather, it exhorted EPA "to exercise discretion within defined statutory limits." 549 U.S. at 533.

A. *Massachusetts* Imposed No Direct Regulatory Obligations On EPA.

In EPA's rendition, *Massachusetts* assumes the air of a *mandamus* ruling or, perhaps more modestly, a case compelling agency action unlawfully withheld. 5 U.S.C. § 706(1); *see, e.g.*, JA295, 1072–73; JA195 (*Massachusetts* "held that EPA had a 'statutory obligation' to regulate harmful greenhouse gases"). In truth, *Massachusetts* presented no such scenario and imposed no such obligation.

There was nothing to compel or mandate in *Massachusetts*—other than agency compliance with the correct legal standard—because EPA *had* taken a final action: it had denied a petition for rulemaking under section 202(a)(1). The review of that final action was an "arbitrary and capricious" case. *Massachusetts*, 549 U.S. at 505; *cf. American Elec.*, 131 S. Ct. at 2533 (summarizing *Massachusetts*' holding). This Court deemed the agency's action reviewable under the deferential standard applicable to denials of petitions for rulemaking (as distinct from full notice-and-comment rules). *Massachusetts*, 549 U.S. at 527 (citing *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 3–4 (D.C. Cir. 1987)).

From beginning to end, from the questions presented to the relief granted, *Massachusetts*

addresses the agency's reasons for its final action and the statutory provisions bearing on the adequacy of those reasons. The Court's opinion begins with a precise statement of petitioners' "two questions concerning the meaning of 202(a)(1)" of the Clean Air Act:

> whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

Massachusetts, 549 U.S. at 505. The Court's opinion answers the first question in the affirmative and the second in the negative. Admittedly, neither part of the opinion is free from ambiguity. The difficulties arise from the peculiar posture of the case.

As to petitioners' first question, the Court rejected the categorical position, then advanced by EPA, that greenhouse gases cannot be "air pollutants" for purposes of the Clean Air Act—not ever, not for any regulatory program. *Massachusetts*, 549 U.S. at 513 (stating the agency's position). While proffered in response to a rulemaking petition under a specific section (§ 202(a)(1)) of the Act, EPA's position could not and did not rest on an interpretation of *that* section. Instead, the agency maintained that greenhouse gases did not fall under the Act-wide definition of "air pollutant" in section 302(g). Repeatedly emphasizing the "broad," "sweeping," and "capacious" language of that provision, *Massachusetts* held that EPA's position was foreclosed: Section 302(g) "unambiguous[ly]"

includes greenhouse gases. *Massachusetts*, 549 U.S. at 529.

So far as *amici* are aware, no petitioner contests that holding. The far more difficult question is whether including greenhouse gases within section 302(g)'s "capacious" definition compels the same conclusion with respect to all of the Clean Air Act's other provisions. A few sentences in the Court's opinion, ripped out of context, may seem to suggest an affirmative answer. *E.g.*, *Massachusetts*, 549 U.S. at 532 ("Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has statutory authority to regulate the emission of such gases from new motor vehicles."). But the Court's contemporaneous decision in *Duke Energy Corp.* held that "a given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." 549 U.S. at 574. A more careful reading of *Massachusetts* dispels the notion that the term "any air pollutant" must have the same meaning for all statutory purposes.

Petitioners' second question concerned the agency's claimed discretion to decline to exercise regulatory authority. The Court held that the agency had "offered no reasoned explanation," only "a laundry list of [policy] reasons not to regulate." *Massachusetts*, 549 U.S. at 533–34. And it held that "EPA must ground its reasons for action or inaction in the statute." *Id.* at 535. Legal scholars and lower courts have struggled to discern the Court's precise holding on this point. The discretion-limiting

language may refer to the agency's determination of whether an air pollutant meets section 202(a)(1)'s "endangerment" standard or (also) to the agency's decision about whether to make that judgment in the first instance. *See, e.g.*, Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 78–80, 83–87 (2007) (discussing the ambiguity in detail). In *amici*'s estimation, *Massachusetts* is best read for the more limited proposition that "*once EPA has responded to a petition for rulemaking*, its reasons for action must conform to the authorizing statute." *Massachusetts*, 549 U.S. at 533 (emphasis added).[2] Both EPA and the D.C. Circuit have adopted that reading. JA194–95; JA1072–73; *but see Natural Res. Defense Council v. FDA*, 872 F. Supp. 2d 318, 333–34 (S.D.N.Y. 2012). Either way, *Massachusetts* channels *but does not erase* EPA's discretion to take *or decline* to take action on an endangerment finding under section 202, let alone other regulatory programs.

The Court's opinion in *Massachusetts* powerfully supports a circumspect interpretation. It ends, in its last sentences, with a concise statement of the relief granted, tailored to the questions presented:

> We need not and do not reach the question whether on remand EPA must make an

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[2] On a more aggressive interpretation, *Massachusetts* might be read as holding that EPA *must* make an "endangerment finding" whenever it receives a petition to that effect. *Cf. Massachusetts*, 549 U.S. at 549 (Scalia, J. dissenting). For reasons stated in the text, *Massachusetts* ought not be read in such a novel construction.

> endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. We hold only that EPA must ground its reason for action or inaction in the statute.

Massachusetts, 549 U.S. at 534–35 (citation omitted); *see also* S. Ct. R. 14.1(a).

Put politely, it is a stretch to convert this summary of the Court's holding—which disclaims any judicially imposed agency obligation to make an endangerment finding, let alone to regulate—into an affirmative "'statutory obligation' to regulate." JA195.[3] Even if *Massachusetts* made it likely that some federal regulation of greenhouse gas emissions would follow, the Court's holding imposed no legal obligation even with respect to the mobile source program at issue in the case, not to mention the Clean Air Act at large.

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[3] The "statutory obligation" quoted by the court below appears in the following sentence: "Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time." *Massachusetts*, 549 U.S. at 534 (citing 68 Fed. Reg. at 52,930–31). The sentence summarizes the agency's position at the time. It cannot plausibly be read as an affirmative judicial command to regulate; rather, it simply says that scientific uncertainty is not a sufficient reason for inaction. In the two-page section containing the quoted language, *Massachusetts* repeatedly declined to decide whether EPA must act even by making an endangerment finding under section 202(a), let alone regulate. *Id.* at 533; *id.* at 534 ("We need not and do not reach the question whether on remand EPA must make an endangerment finding . . . .").

And yet: overreading *Massachusetts*, EPA has constructed, and the court below has upheld, the propositions that (1) an air pollutant that "fit[s] well" under a "capacious," statute-wide definition *must* be an "air pollutant" for all purposes of that Act; and (2) a ruling that limits an agency's discretionary authority to reasons grounded "in the statute" eliminates agency discretion altogether. JA201–05, 221–22, 236–38. Both propositions suffer from a common fallacy, that of the excluded "third" or "middle." Both reach far beyond the limited holdings of *Massachusetts*. Both run up hard against bedrock tenets of administrative law. Both should be rejected.

B. *Massachusetts* Did Not Hold That Greenhouse Gases Are "Air Pollutants" For All Purposes Of The Act.

EPA's "Triggering Rule," which is also referred to as its "Timing Rule," 75 Fed. Reg. 17,004 (Apr. 2, 2010) (JA705), is a critical step in a sequence of rulemaking proceedings orchestrated by EPA in the wake of *Massachusetts*. EPA made an "Endangerment Finding" under section 202(a), which in turn prompted the imposition of greenhouse gas emission standards for new motor vehicles. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009) (JA793); 75 Fed. Reg. 25,324 (May 7, 2010) (JA683). EPA then issued its Triggering Rule, prompting the imposition of greenhouse gas emission standards for stationary sources under the Clean Air Act's PSD and Title V programs—which, if administered in accordance with the Act's unambiguous terms, would extend the expensive, cumbersome PSD permitting

requirements to even very small sources and render both programs unworkable by overwhelming the capacity of state and federal permitting authorities. EPA failed to properly consider that statutory absurdity in its Triggering Rule. JA705. Instead, it issued a "Tailoring Rule," effectively rewriting the statutory emission standards. *See* 75 Fed. Reg. 31,514 (June 3, 2010) (JA268). EPA's central defense of this remarkable assertion of authority, and the holding of the decision below, is that *Massachusetts* compelled the result.

EPA determined that the statutory "permit triggers" of sections 165(a) and 169(1), 42 U.S.C. §§ 7475(a), 7479(1), *required* the imposition of PSD requirements for "major" greenhouse gas emission sources. Section 169(1), the agency noted, governs sources that (potentially) emit in excess of specified amounts of "any air pollutant." Thus, in the agency's view, once it classified greenhouse gases as regulated pollutants under section 202(a), the statute's plain language compelled the regulation of those pollutants under the PSD program. JA333–36. The court below did not deem that determination merely "permissible"; it held that the agency *had no other choice*. JA236 ("[W]e agree with EPA that its longstanding interpretation of the PSD permitting trigger is statutorily compelled."). In support of that conclusion, the court cited the Act's "plain language" and this Court's ruling in *Massachusetts*. *Id*.

Strikingly, however, the court below in fact disavowed the proposition that the statute's "plain language" means, literally, *any* air pollutant. The phrase, the court explained (agreeing with EPA's

position) must in this context mean any *regulated* air pollutant: any other interpretation would be "absurd." JA237–38. Similarly, EPA has in several other instances adopted a narrowing definition, where adherence to an "any means any" position would render statutory provisions and programs senseless. *See, e.g.*, 40 C.F.R. pt. 51, App. Y, sec. II.A. (in the context of the Act's visibility program, 91 Stat. 685, "any pollutant" means "any visibility-impairing pollutant").[4]

Under this interpretation, "any air pollutant" thus means each and every pollutant in any statutory context—except when it doesn't. And both the ironclad rule ("any means each and every") *and* the exception ("any pollutant" means "any regulated pollutant") are supposedly commanded by the statute. Manifestly, a "plain language" analysis cannot yield such a result. JA175–79 (Kavanaugh, J., dissenting from denial of rehearing en banc). *Massachusetts*—and the perceived gloss it put on the statute—is the *only* basis for EPA's and the lower court's "must regulate" interpretation of the permit triggers. Yet the agency's interpretation of *Massachusetts* merits no *Chevron* deference, *see*

[4] The court below provided an extended statutory interpretation purporting to explain why "any pollutant" in that context must be understood in a narrower sense. JA238–41. Regardless of what one makes of the discussion, it confirms that statutory interpretation requires close attention to the context, not a mechanical importation of terms from one portion of a statute into another. *Duke Energy*, 549 U.S. at 574–76.

Negusie v. Holder, 555 U.S. 511 (2009) and, in any event, the agency misreads *Massachusetts*.

Upon casual reading, *Massachusetts* may seem to permit or perhaps even encourage EPA's expansive reading. *See, e.g.*, *Massachusetts*, 549 U.S. at 528 (emphasizing the "sweeping definition of 'air pollutants'" in section 302(g)); *id.* at 529 ("On its face, the definition [of air pollutants in section 302(g)] embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'"); *id.* at 532 (greenhouse gases "fit well within" the definition); *id.* at 531 ("[T]here is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter."); *id.* at 529 ("The statute is unambiguous."). The lower court laid great stress on these pronouncements and, in particular, *Massachusetts*'s suggestion that the statute is unambiguous. JA237 ("Crucially for purposes of the issue before us [the interpretation of the section 165(a) and section 169(1) permit triggers], the Court concluded that 'the statute is unambiguous.'" (quoting *Massachusetts*, 549 U.S. at 529)). Respectfully, that inference is unwarranted.

Each and every one of the just-quoted, broad and inclusive formulations appears in the Court's analysis of the meaning *of section 302(g).* The Court's references to "the statute" must be understood in that context, lest they become meaningless: it is difficult to imagine an entire statute that is unambiguous *per se*, across the board, and in every respect. The precise question before the Court was whether EPA was right in insisting "that

carbon dioxide is not an 'air pollutant' within the meaning of [section 302(g)]," and the Court's answer was that "[t]he statutory text forecloses EPA's reading." *Massachusetts*, 549 U.S. at 528. The statutory text is section 302(g), as distinct from section 202(a) or, for that matter, the PSD permitting triggers. Whether a particular statutory phrase like "any air pollutant" is unambiguous in any given regulatory context or necessarily imported into that context is a separate question; it remains a matter of statutory interpretation.

Unlike EPA's and the lower court's attempt to read *Massachusetts* as a mandate for a-contextual literalism, the reading just described renders *Massachusetts* consistent with the Court's holding and opinion in *Duke Energy*—decided the same day, under the same statute. The Court held in that case that EPA had discretion to interpret the term "modification" of a stationary emission source differently for different parts of the Act—despite an explicit statutory cross-reference (added by a standalone technical amendment) that, on its face, appeared to mandate an identical construction. *Duke Energy*, 549 U.S. at 576. Even in that context, the Court held that "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Id.* at 574; *see also id.* 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." (citation omitted)). If an explicit cross-reference from one program to another cannot strictly command an identical

interpretation, a statute-wide definition of "air pollutant" cannot do so either—least of all when an agency's insistence to the contrary produces a statutory "absurdity" and a corresponding claim of authority to rewrite the statute.

To put the point directly: while *Massachusetts* unequivocally rejected EPA's categorical contention that greenhouse gases *could not* be "air pollutants" for any purposes of the Act, *Massachusetts*, 549 U.S. at 528, the Court did not thereby embrace EPA's current, equally categorical position that greenhouse gases *must* be air pollutants for all purposes and programs of the Clean Air Act without regard to the statutory or real-world consequences of such an interpretation. To spell out the omitted "third" in EPA's analysis: It is entirely possible and plausible that an air pollutant that is *included* by the capacious definition of section 302(g) is an air pollutant for some *but not all* purposes of the Act. Section 302(g) unambiguously embraces greenhouse gases within the Act-wide pollutant definition. EPA's statutory authority, much less its statutory obligation, to regulated greenhouse gases under any particular Clean Air Act program is a very different question—which the Court left explicitly undecided even with respect to section 202(a), let alone other programs. *Id.* at 535. The Court's decision in *American Electric Power* likewise assumed EPA's potential *authority* to regulate greenhouse gas emissions from fossil-fuel fired power plants (rather than motor vehicles) but explicitly contemplated the possibility that EPA might lawfully "decline to regulate carbon-dioxide emissions altogether at the

conclusion of its [pending] rulemaking." 131 S. Ct. at 2538–39.

To be sure, *Massachusetts* rejected the notion that EPA has "authority to narrow that definition [of section 302(g)] whenever expedient by asserting that a particular substance is not an [air pollution] 'agent.'" 549 U.S. at 529 n.26. And while a "whenever expedient" prohibition is not much of a restraint on an agency's discretion, the Court rejected several of EPA's proffered reasons for declining jurisdiction over greenhouse gases. Crucially, however, that discussion focuses not on regulation under the Clean Air Act at large but on regulation *under section 202(a)*. Nothing in *Massachusetts* suggests that EPA would be foreclosed from ever applying a narrowing construction when necessary to harmonize the Clean Air Act's provisions and avoid results that Congress could not have intended.

Significantly, the Court rejected EPA's reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), on two grounds. *First*, the Court concluded that unlike an FDA ban on tobacco products, "EPA jurisdiction would lead to no such extreme measures." *Massachusetts*, 549 U.S. at 531. That determination is readily explained by the posture of the case. The *Massachusetts* petitioners solemnly averred that they were seeking no relief beyond a reconsideration of the rulemaking petition. *See* Br. for Petitioner at 3, *Massachusetts*, 549 U.S. 497, 2006 WL 2563378. The Court awarded only that limited relief, *Massachusetts*, 549 U.S. at 534–35, and it carefully noted EPA's discretion to delay action and to consider compliance costs *under section*

202(a)(2). *Id.* at 531. *Second*, the Court observed that, in contrast to congressional actions suggesting that FDA lacked authority to regulate tobacco, "EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases *from new motor vehicles*." *Id.* (emphasis added). Moreover, the Court rejected EPA's contention that EPA regulation of greenhouse gases might conflict with the authority of the Department of Transportation to set mileage standards, a consideration that is obviously irrelevant outside the context of regulating mobile sources. *Id.* at 531–32. The discussion strongly suggests that the unambiguous, statute-wide definition of "air pollutant" does not compel EPA to regulate merely because the same term appears in another operative provision.

As a technical matter of administrative law, it is arguable that *Massachusetts* leaves the question of whether greenhouse gases must be regulated as air pollutants open even with respect to new motor vehicle emissions under section 202(a). What is not arguable is that *Massachusetts* emphasized that neither "extreme measures" and "counterintuitive" results nor statutory conflicts would ensue from regulating "greenhouse gases from new motor vehicles." *Id.* at 531. In sharp contrast, everyone agrees that applying the numerical emission thresholds in the PSD and Title V programs to stationary source greenhouse gas emissions *would* entail "extreme measures" and directly conflict with Congress's intent.

The numerical statutory thresholds are not only completely unambiguous; they also reflect a deliberate and careful legislative compromise. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 350, 353–54 (D.C. Cir. 1979) (per curiam). Congress carefully structured the PSD and Title V programs to "minimize disruption," *id.* at 350, and carefully selected the numerical thresholds to "identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air." *Id.* EPA does not dispute that the statutory thresholds, as applied to greenhouse gases, would entail precisely the disruption that Congress sought to avoid. The agency's response—an exemption for smaller emitters in the form of a statutory rewrite, subject to future upward revision, *see* JA268—conflicts not only with the plain language of the statute but also with the legislature's unmistakable intent. Congress designed the statutory thresholds as a safe harbor for smaller emitters, not an EPA-administered holding pen.

The short of it is that *Massachusetts* does not impose a generalized "'statutory obligation' to regulate" greenhouse gases, least of all by means of an administrative rewrite of the statutory language. And because the confessedly "extreme measures" and the "absurdity" that attend the regulation of stationary sources were neither presented nor considered in *Massachusetts*, it is pure speculation

what the Court *might* have said about those matters.[5] In this very different case and context, reliance on *Massachusetts* beyond its specific holding is misplaced. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and "[i]f they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

C. *Massachusetts* Directed EPA To Exercise Discretion In Accordance With The Statute.

The same misreading of *Massachusetts* characterizes the agency's and the lower court's discussion of whether EPA must act in the first instance. It is uncontested that EPA's interpretation of *Massachusetts* would produce "absurd" consequences: EPA not only admitted but affirmatively relied on that absurdity in defense of its Tailoring Rule. JA286. And yet on EPA's account and that of the court below, agency discretion to take that statutory absurdity into account disappears at

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[5] Responding to Judge Brown's dissent from the denial of rehearing *en banc*, the panel disputes this characterization, observing that a respondent's brief adverted to the potential consequences for stationary source regulation. JA142–43. Respectfully, that is exceedingly thin gruel. Not one word in *Massachusetts* discusses the question. Whether individual justices considered the consequences *in foro interno* is haruspicy, not legal argument. *Cf. City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013).

each critical juncture. Just as EPA supposedly lacked discretion to give a narrowing construction to the statutory term "air pollutant," so too it supposedly was barred from considering statutory absurdity in conducting its endangerment finding and in deciding whether to make such a finding.

The court below described the absurdity as a scarecrow of petitioners' imagination. *See, e.g.*, JA205 ("However absurd Petitioners consider [EPA's re-write of the PSD emission thresholds] . . . it is still irrelevant to the endangerment inquiry."); *cf.* JA144 (ascribing "what he considers absurd results" to "Judge Kavanaugh"). The court ignored that EPA itself admitted that its decision to trigger regulation under the PSD and Title V programs produced absurd results. JA286. Instead, the court again rested on what it viewed as *Massachusetts*' interpretation of the statute. Thus, an endangerment finding requires "scientific judgment," "not policy discussions." JA202 (citing *Massachusetts*, 549 U.S. at 534); JA204 ("The statute speaks in terms of endangerment, not in terms of policy . . . ."). In the court's opinion, petitioners' arguments concerning the statutory absurdity that would result from an "any means any" interpretation of the permit triggers were merely additions to the "laundry list" of policy reasons already rejected in *Massachusetts*. JA204.

To be sure, *Massachusetts* did limit EPA's discretion in responding to a rulemaking petition and rejected the agency's "laundry list of reasons not to regulate." 549 U.S. at 533. And it is fair to say that this Court's discussion is in some tension with the

pronouncement earlier in the opinion that agency denials of rulemaking petitions are subject to a deferential standard of review: the Court's dismissal and rejection of the agency's prudential reasons to defer regulation has a "hard look"-ish flavor. *See id.* at 532–34; *cf.* Freeman & Vermeule, 2007 Sup. Ct. Rev. at 97–98. Even so, *Massachusetts* did not erase EPA's discretion. Rather, it exhorted the agency "to exercise discretion within defined statutory limits." *Massachusetts*, 549 U.S. at 533.

Again, the lower court's interpretation commits the fallacy of the excluded "third." A consideration of statutory absurdity is not a "scientific" inquiry or judgment. But it is not a mere "policy discussion" either; it is a matter of statutory interpretation. Even the hardest of looks cannot be viewed as a command to drive an agency into statutory absurdity, and nothing in *Massachusetts* dictates that result. In fact, EPA's failure to consider absurdity at each stage of the rulemaking process is an abuse of the discretion *Massachusetts* affirmatively preserved and commanded. 549 U.S. at 533; *id.* at 535 ("EPA must ground its reasons for action or inaction in the statute.").

II. Under *Chevron*, Statutes Should Be Interpreted To Avoid Separation-Of-Powers Problems.

In an administrative law context, the reasons for strict adherence to Supreme Court holdings and conventional canons of law—rather than the tenor or atmospherics of the Court's decisions—are particularly compelling. Separation-of-powers concerns are never far afield. False steps may put

post-*Chevron* administrative law and the separation-of-powers doctrine in conflict, and both at risk. The panel's curt response to Judge Kavanaugh's and Judge Brown's dissents from the denial of rehearing *en banc* suggests the gravity of the problem.

The dissenting judges stressed the profound implications of allowing EPA to seize authority to revise statutory thresholds and decide when to regulate greenhouse gas emissions from stationary sources. Surely, both urged, a decision of that import must be decided by Congress, not judges; and *Massachusetts* should not be read to hold otherwise. JA168 (Brown, J., dissenting) ("the matter properly belongs before Congress, not courts or agencies"); JA188 (Kavanaugh, J., dissenting) ("the bedrock underpinnings of our system of separation of powers are at stake"). The panel agreed that the "underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance." JA145. And it agreed that "'the question here is: Who Decides?'" *Id.* (quoting JA187 (Kavanagh, J., dissenting)).

But the panel failed to afford those questions the careful consideration they deserve. Instead, according to the panel, "Congress spoke clearly, EPA fulfilled its statutory responsibilities, and the panel, playing its limited role, gave effect to the statute's plain meaning." *Id.* Cite to *Chevron*, *id.*, and to all a good night. With respect, that reply falls far short of engaging with the dissenters' arguments and the real stakes in this case. And it is not consistent with *Chevron*.

A. *Chevron* Is A Doctrine Of Statutory Interpretation, Not Of "Magic Words."

Time and again, EPA and the court below rely on *Massachusetts'* averment that "[t]he statute"—*i.e.* the definition of "air pollutant" in section 302(g)—is "unambiguous." *E.g.*, JA194, 237, 240, 241, 959, 973, 1163 n.230.

"Unambiguous" is shorthand for the question whether Congress "has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842–43. Still, "unambiguous" in this sense is, well, ambiguous. *See, e.g.*, Gary Lawson, Federal Administrative Law 608–10, 640 (6th ed. 2013). It may mean "obvious and indisputable," as when a statute says that it applies to anyone who emits in excess of, say, 250 tons per year of some pollutant. Or, "unambiguous" may mean a high degree of confidence: it's the meaning of the legal term that we (judges) can be sure of, once we have applied and exhausted traditional tools of statutory construction. *See, e.g.*, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843–44 (2012); *see also Dole v. United Steelworkers*, 494 U.S. 26, 35–40 (1990) (applying traditional tools of statutory construction and examining the statute as a whole to avoid a "counterintuitive" statutory interpretation).

EPA is of three minds on the subject. It maintains that it may re-write a numerical statutory standard—an *obviously, indisputably* "unambiguous" term—in its own discretion, based on interpretive canons. JA285–88. On the other hand, the agency insists that it cannot and must not do any interpretive work on the term "air pollutant" in the

statutory permit triggers—supposedly because the statutory language is "plain" and *Massachusetts* says so. On the third hand, the agency says that the very same term, in the very same provisions, may and must be read in a narrowed sense ("any *regulated* pollutant").

The agency cannot have it all three ways. The better understanding of *Massachusetts* is that section 302(g) unambiguously includes greenhouse gases. What the term means in any given regulatory context remains a matter of statutory construction in accordance with conventional canons. Among those canons are the propositions that agencies must construe their organic statutes so as to avoid resort to extravagant canons, *Duke Energy*, 549 U.S. at 576; that their duty extends to interpreting the statute as a whole, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); and that an interpretation of an individual clause that produces absurdity in another part of the statute is not a permissible interpretation, *Kloeckner v. Solis*, 133 S. Ct. 596, 606–07 (2012). In neglecting to apply any of these canons, EPA failed to ground its reasons for action in the statute.

B. EPA's Position Up-Ends *Chevron*'s Rationale.

Chevron is rooted in concerns about delegation. Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 329 (2000); John F. Manning, *The Non-Delegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223 (2000). *Massachusetts*, fairly read, is entirely consistent with that orientation. EPA may not categorically and arbitrarily decline to exercise jurisdiction conveyed by a carefully worded,

"capacious" statutory term, or turn a blind eye to statutory provisions that deliberately signal "breadth" and a congressional intent to permit agency adjustments to new evidence and circumstances. *Massachusetts*, 549 U.S. at 532. But the actual exercise of that broad authority remains subject to ordinary demands of statutory interpretation.

In the interpretation of EPA and the court below, *Massachusetts* upended this constitutionally grounded regime. Once it is determined that a broad term ("air pollutant") *authorizes* the agency to regulate greenhouse gases, the agency *must* do so—even when the regulatory enterprise is confessedly absurd and in conflict with Congress's plain intent. On the basis of that reading, the agency has taken a plain-vanilla *Chevron* ruling to produce, rather than avoid, a separation-of-powers problem.

The problem, moreover, is not a mirage or 2L AdLaw puzzle; it is real. For example, EPA has claimed authority to exempt biogenic sources of greenhouse gases from regulation, on the theory that, while such emissions are unambiguously subject to regulation, actual regulation would be "absurd" and excessively burdensome for the agency. *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013) (rejecting EPA's position). And there is method to this madness: while EPA's Tailoring Rule, for now, exempts smallish greenhouse gas emitters from regulation on the grounds of "absurdity" and "administrative necessity," the agency explicitly reserves authority to regulate those sources at some future point, in some way, in conformity with the

statute or maybe not: absurdity, "one step at a time." JA403. In feigned obeisance to what it claims to be the unambiguous commands of the Clean Air Act and *Massachusetts*, the agency is simply "making it up as it goes along. That is not how the administrative process is supposed to work." *Center for Biological Diversity*, 722 F.3d at 415 (Kavanaugh, J., concurring).

Massachusetts provides no warrant for any of this. The decision did not settle the vexing, perplexing question of fitting an unanticipated "air pollutant" (greenhouse gases) into a statute built for different purposes. Rather, it commanded EPA to be serious—to "ground its reasons for action *or inaction* in the statute." *Massachusetts*, 549 U.S. at 535 (emphasis added). Precisely when and where the regulatory grant is broad (and where the structure of the statute does not easily accommodate, in all contexts, an unanticipated problem), an agency must take special care to conform its programs to the operative terms of the statute, to respect its unmistakable commands, and to make sense of the statute as a whole. *Kloeckner*, 133 S. Ct. at 596; *Duke Energy*, 549 U.S. at 576; *Pilot Life Ins. Co.*, 481 U.S. at 51.

III. No Agency Has Authority To Rewrite Unambiguous Statutory Requirements.

This case presents a recurrent problem—that of a Supreme Court of unquestioned authority but limited capacity to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and to make its rulings "stick" throughout a vast judicial system in competition with institutions that may

have very different ideas and incentives. Constitutional commands, professional norms, and Supreme Court decisions ameliorate the difficulty to some extent. Lower courts and administrative agencies are supposed to discern, fairly construe, and then follow this Court's *holdings*—as opposed to *dicta*, atmospherics, or the perceived trajectory of the Court's jurisprudence. *See, e.g.*, *Kokkonen v. Guardian of Life Ins. Co.*, 511 U.S. 375, 379 (1994); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Invariably, however, agencies and lower courts will look for "signals" beyond the Court's strict holdings. In light of the sheer mass of government business and lower court decisions on one hand and the Court's limited capacity to exercise review in all but a handful of administrative law cases on the other, it is entirely predictable that agencies and lower courts will look for such signals—and that this Court should economize on its monitoring function by sending them. *Massachusetts* has been widely understood in that light. Freeman & Vermeule, 2007 Sup. Ct. Rev. at 51–52.

Alas, the enterprise carries a grave risk that the signals may be misunderstood. In the administrative context, that risk often becomes a separation-of-powers risk. It is particularly severe in politically charged cases where the Court's decisions are of an action- or agency-forcing nature, as opposed to a decision that limits agencies or lower courts. In the vernacular, a "cut it out" command can be disobeyed only at some peril of discovery. In contrast, a "get going" command is not readily distinguishable from a "the sky is the limit" signal of encouragement. It can

be invoked as authority from here to eternity, barring only congressional intervention or a further Supreme Court ruling, to the effect of "that is not what we meant."

This Court is hardly unfamiliar with "go ahead" rulings that, under the force of bureaucratic empire-building, mushroomed into regulatory regimes far beyond the Court's intent or imagination. Most instructive perhaps in the present (environmental) context is the Court's decision in *United States v. Riverview Bayside Homes*, 474 U.S. 121 (1985). In that case, the Court upheld a regulation by the U.S. Army Corps of Engineers that, in a departure from the agency's earlier position, interpreted the statutory term "waters of the United States," contained in the Clean Water Act, to cover not only navigable waters but also certain wetlands connected to those waters. Predictably, government agencies (the Corps as well as EPA) relied on the decision to further expand their jurisdiction over wetlands that, though unconnected to waters of the United States, were said to have a migratory bird "nexus." The Court resolutely rejected that step. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 171 (2001) ("We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*."). Even after that decision, lower courts continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains. Five years later, the Court again rejected the government's essentially boundless view of its jurisdiction. *Rapanos v. United States*, 547 U.S. 715 (2006); *id.* at 779 (Kennedy, J., concurring in

judgment); *cf. id.* at 758 (Roberts, C.J., concurring) ("Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power."); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) ("Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view." (citing *Rapanos* and *SWANCC*)).

The precise legal questions in this case differ from those at issue in *SWANCC* and *Rapanos*. Still, the parallels are instructive. Here as there, the starting point is a generous judicial interpretation of a statute-wide term defining the scope of the agency's jurisdiction. Here as there, the agency has seized on the Court's initial holding and perceived signal as an "essentially limitless grant of authority." Here as there, the agency has refused to give reasonable meaning to its organic statute and instead claimed authority to decide in its own discretion whom and what it will regulate, in what way. Here as there, an administrative agency has been and will be careful not to push its authority to the point of triggering congressional intervention.

Here, however, unlike there, the agency has mobilized this Court's ruling not simply to expand its authority but to re-write the statute; and the stakes are infinitely higher. This Court's administrative law cases—from *Chevron* to *Mead* to *City of Arlington*, and every decision in between—are

grounded in the premise that any exercise of agency authority is to be constrained by and assessed in light of "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring). As this Court has explained, these principles of administrative law establish "a stable background rule against which Congress can legislate." *Id.* at 1868 (majority opinion). "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Id.*

The entire edifice collapses if, as EPA maintains, administrative agencies have free rein to unilaterally rewrite unambiguous statutory text whenever their preferred policies require an interpretation that results in absurd consequences. *See, e.g.*, *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in judgment) (construing statutes to avoid absurd results "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way"). When an agency interprets a statute at war with the statutory text in a fashion that leads to absurd results and nullifies central statutory provisions, the only permissible answer is that the agency's interpretation must be wrong and that some other interpretation is required. *Cf. National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (accepting interpretation that harmonizes statutory provisions but "does not override express statutory mandates").

The Court should firmly reject EPA's extraordinary attempt to dismantle basic safeguards of administrative law and claim authority to rewrite statutory text. Instead, the Court should clarify that EPA must heed *Massachusetts*' holding and comply with settled principles of administrative law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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