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.

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

BRIEF FOR THE STATE 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.

PARTIES TO THE PROCEEDING

The Court has consolidated No. 12-1269 with Nos. 12-1146, 12-1248, 12-1254, 12-1268, and 12-1272. Petitioners in No. 12-1269, petitioners below, are the States of Texas, Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality.

Respondents in this Court, respondents below, are the U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency. Lisa P. Jackson ceased to hold the office of Administrator, U.S. Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy.

The following parties are considered respondents in No. 12-1269 under Supreme Court Rule 12.6, and are grouped according to their respective positions in the court below:

Petitioners

Alliance for Natural Climate Change Science and William Orr; Alpha Natural Resources, Inc.; American Chemistry Council; American Farm Bureau Federation; American Forest & Paper Association, Inc.; American Frozen Food Institute; American Fuel and Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; U.S. Representative Michele Bachmann; Haley Barbour, Governor of Mississippi; U.S. Representative Marsha Blackburn; U.S.

Representative Kevin Brady; Brick Industry Association; U.S. Representative Paul Broun; U.S. Representative Dan Burton; Center for Biological Diversity; Chamber of Commerce of the United States of America; Clean Air Implementation Project; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Competitive Enterprise Institute; Corn Refiners Association; U.S. Representative Nathan Deal; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Freedomworks; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel Corporation; U.S. Representative Phil Gingrey; Glass Association of North America; Glass Packaging Institute; Great Northern Project Development, L.P.; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association-North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; U.S. Representative Steve King; U.S. Representative Jack Kingston; Landmark Legal Foundation; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; U.S. Representative John Linder; Massey Energy Company; Michigan Manufacturers Association; Mississippi Manufacturers Association; Missouri Joint Municipal Electric Utility Commission; National Association of Home Builders; National

Association of Manufacturers; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Businesses; National Mining Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Portland Cement Association; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; Rosebud Mining Company; Science and Environmental Policy Project; U.S. Representative John Shadegg; U.S. Representative John Shimkus; South Carolina Public Service Authority; Southeast Trailer Mart Inc.; Southeastern Legal Foundation, Inc.; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Texas Agriculture Commission; Texas Attorney General Greg Abbott; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas General Land Office; Texas Governor Rick Perry; Texas Public Utilities Commission; Texas Public Utility Commission Chairman Barry Smitherman; Texas Railroad Commission; Utility Air Regulatory Group; Commonwealth of Virginia ex rel. Attorney General Kenneth T. Cuccinelli; West Virginia Manufacturers Association; Western States Petroleum Association; U.S. Representative Lynn Westmoreland; Wisconsin Manufacturers and Commerce;

Respondent

National Highway Traffic Safety Administration;

Intervenors for Petitioners

State of Alaska; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of Commerce; Associated Industries of Arkansas; Haley Barbour, Governor for the State of Mississippi; Chamber of Commerce of the United States of America; Colorado Association of Commerce & Industry; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Kansas Chamber of Commerce and Industry; State of Kentucky; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Farms, LLC; Langdale Ford Company; Langdale Fuel Company; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Electrical Manufacturers Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Manufacturers Association; Pennsylvania Manufacturers Association; Portland Cement Association; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry;

State of Utah; Virginia Manufacturers Association; West Virginia Manufacturers Association; Western States Petroleum Association; Wisconsin Manufacturers and Commerce;

Intervenors for Respondents

Alliance of Automobile Manufacturers; American Farm Bureau Federation; State of Arizona; Brick Industry Association; State of California; Center for Biological Diversity; State of Connecticut; Conservation Law Foundation; State of Delaware; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; State of Illinois; Indiana Wildlife Federation; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; Michigan Environmental Council; State of Minnesota; National Environmental Development Association's Clean Air Project; National Mining Association; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; State of New Hampshire; State of New Mexico; State of New York; City of New York; State of North Carolina; Ohio Environmental Council; State of Oregon; Peabody Energy Company; State of Rhode Island; Sierra Club; South Coast Air Quality Management District; Utility Air Regulatory Group; State of Vermont; State of Washington; Wetlands Watch; Wild Virginia.

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The opinion of the D.C. Circuit (J.A. 191-267) is reported at 684 F.3d 102. The D.C. Circuit's orders denying panel rehearing and rehearing en banc (J.A. 139-90) are unreported.

JURISDICTION

The D.C. Circuit entered judgment on June 26, 2012, and denied timely petitions for rehearing en banc on December 20, 2012. On March 8, 2013, the Chief Justice extended the time for filing a certiorari petition to and including April 19, 2013. The petition was filed on April 19, 2013 and granted on October 15, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7407 *et seq.*, are reproduced at Pet. App. 591a-619a. Relevant EPA rules are reproduced at J.A. 268-682, 1399-418.

STATEMENT

State Petitioners incorporate by reference the statement provided by the American Chemistry Counsel in No. 12-1248.

SUMMARY OF ARGUMENT

EPA is seeking to improve upon rather than implement the Clean Air Act. After declaring that it would begin regulating greenhouse-gas emissions

from stationary sources, EPA replaced unambiguous numerical permitting thresholds in the PSD and Title V programs with numbers and metrics of EPA's own creation, and then applied those agency-created criteria *solely* to greenhouse-gas emissions. EPA cannot use the "absurdity doctrine" as an excuse for departing from the Act's rigid, unambiguous permitting requirements, as the entire point of legislating by rule is to tolerate suboptimal policies in exchange for constraining an agency's discretion and forcing it to seek legislation (and therefore congressional input) before embarking on novel regulatory regimes.

EPA is correct to acknowledge the absurdity of applying the Act's 100/250 tons-per-year permitting requirements to CO_2 and other greenhouse gases, but the absurdity is caused entirely by EPA's questionable conclusion that greenhouse gases qualify as air pollutants subject to regulation under the PSD and Title V programs. An agency cannot construe *ambiguous* statutory language to *create* an absurdity, and then construe *unambiguous* statutory language to *avoid* that absurdity. The far-reaching and near-ridiculous regulatory burdens required by EPA's decision to regulate greenhouse-gas emissions under the PSD and Title V programs prove that the Act never delegated to EPA the authority to regulate greenhouse-gas emissions as "air pollutants" under those programs.

ARGUMENT

I. THE CLEAN AIR ACT CANNOT BE CONSTRUED TO AUTHORIZE EPA TO REGULATE GREENHOUSE-GAS EMISSIONS UNDER THE PSD AND TITLE V PROGRAMS.

The statutory permitting thresholds established in the PSD and Title V programs require facilities to obtain permits if they emit more than 100 tons per year (or in some cases, more than 250 tons per year) of "any air pollutant." 42 U.S.C. §§ 7475(a), 7479(1), 7602(j), 7661(2), 7661a(a). These numerical thresholds are set far too low to accommodate rational regulation of greenhouse-gas emissions. As EPA has acknowledged, applying the 100/250 tons-per-year (tpy) thresholds to CO_2 and other greenhouse gases "would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program." 75 Fed. Reg. 31,514, 31,533 (June 3, 2010) ("Tailoring Rule") (J.A. 355). This not only would expand the number of "major" sources subject to permitting requirements from 15,000 to more than 6,000,000, but it would also increase annual permitting costs from $12,000,000 to $1,500,000,000, and boost the number of man-hours required to administer these programs from 151,000 to 19,700,000. *See id.*, J.A. 381-88. Countless numbers of buildings, including churches and schools, would be subjected to EPA permitting requirements based on the CO_2 emissions from their water heaters.

The Clean Air Act cannot be interpreted to allow EPA to regulate greenhouse-gas emissions under either the PSD or Title V programs when the unambiguous statutory requirements would compel such preposterous consequences. 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 for purposes of 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.

EPA cannot salvage its efforts to regulate greenhouse-gas emissions under these programs by pointing to ambiguities in the Act's definition of "air pollutant" or other provisions and insisting on *Chevron* deference. *See, e.g.*, 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010) ("Timing Rule") (J.A. 721-22) ("Because the term 'regulation' is susceptible to more than one meaning, there is ambiguity in the phrase 'each pollutant subject to regulation under the Act' that is used in both sections 165(a)(4) and 169(3) of the CAA."). In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court refused to extend *Chevron* deference to FDA's decision to assert jurisdiction over tobacco products—even though those products fell squarely within the statutory definitions of "drugs" and "devices"—because the statutes governing FDA would have required the agency to ban cigarettes from interstate commerce.

Given that this outcome was incompatible with any semblance of rational regulation, the Court concluded that Congress could not have delegated to FDA the power to decide whether to regulate tobacco products. *Brown & Williamson* controls here and should lead the Court to disapprove EPA's attempt to regulate stationary-source greenhouse-gas emissions.

The facts of *Brown & Williamson* are remarkably similar to this case. The Food, Drug, and Cosmetic Act (FDCA) established FDA and authorized it to regulate drugs, among other items. The FDCA defined "drug" to include "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C). For many years, FDA declined to regulate tobacco products, even though the nicotine in those products is "intended to affect the structure or any function of the body." But in 1996 FDA changed tracks, declaring that nicotine qualified as a "drug" and asserting jurisdiction over tobacco products.

But once FDA asserted jurisdiction over tobacco products, the FDCA required the agency to remove all tobacco products from the market. The statute required preapproval of any new drug, with limited exceptions, and required FDA to disapprove any new drug not safe and effective for its intended purpose. *Id.* § 355(d)(1)-(2), (4)-(5). The statute also prohibited "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded," *id.* § 331(a), and defined

"misbranded" to include drugs or devices "dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof," *id.* § 352(j).

FDA was understandably reluctant to take this drastic step. Following these unambiguous statutory requirements would have produced, in EPA parlance, an "absurd result," a regulatory regime so heavy-handed as to fall outside the bounds of reasonable policymaking. So rather than enforcing a nationwide ban on tobacco products, FDA crafted an intermediate regulatory regime, one that merely restricted the marketing of tobacco products to children. *Brown & Williamson*, 529 U.S. at 127-29. Much like the Tailoring Rule that EPA promulgated to avoid the drastic consequences of its decision to regulate greenhouse gases, FDA's tobacco-advertising rule similarly spurned an unambiguous statutory command in an effort to soften the impact of its decision to regulate tobacco as a drug.

The Court, however, vacated FDA's rule in its entirety, refusing to allow the agency to chart its own regulatory course when an unambiguous statutory provision required the agency to ban all "dangerous" drugs or devices within its jurisdiction. And because the statute would produce this absurdity of banning all cigarettes from the market, the Court concluded that FDA could not assert jurisdiction over tobacco products in the first place—*even though nicotine fell squarely within the FDCA's definition of "drug."* The

Court explained: "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id*. at 160.

Brown & Williamson should lead the Court to similarly disapprove EPA's attempts to regulate greenhouse-gas emissions under the PSD and Title V programs. EPA's decision to regulate stationary-source greenhouse-gas emissions, like FDA's attempt to assert jurisdiction over tobacco, would produce irrationally onerous regulatory burdens that can be avoided only by rewriting unambiguous statutory language. And EPA's actions, like FDA's failed tobacco effort, involve a novel assertion of agency power that does not fit with the regulatory regime envisioned by the decades-old governing statute. Finally, it is unlikely that Congress would have "intended to delegate" to EPA the power to regulate stationary-source greenhouse-gas emissions unilaterally, and render decisions of such "economic and political significance," especially when the numerical thresholds in the PSD and Title V provisions would render such a project unworkable. *Id*. at 160. Just as the Court required FDA to obtain legislation from Congress extending its regulatory authority to tobacco, so too should it require EPA to seek legislation from Congress authorizing it to regulate greenhouse-gas emissions under the PSD and Title V programs.

The unambiguous (and low) mass-based numerical thresholds in sections 7479(1) and 7602(j)

foreclose any inference that the Act implicitly delegates to EPA the power to decide whether to treat greenhouse-gas emissions as air pollutants under the PSD and Title V programs. The inability to regulate these emissions rationally while simultaneously remaining faithful to the rigid, agency-constraining numerical thresholds in the Act demonstrates that greenhouse-gas regulation does not fit with the PSD and Title V provisions.

II. IF THIS COURT CONCLUDES THAT THE CLEAN AIR ACT AUTHORIZES EPA TO REGULATE STATIONARY-SOURCE GREENHOUSE-GAS EMISSIONS, THEN EPA MUST ENFORCE THE STATUTORY PERMITTING THRESHOLDS AND SEEK CORRECTIVE LEGISLATION FROM CONGRESS.

If the Court nevertheless concludes that the Act authorizes or requires EPA to regulate greenhouse-gas emissions from stationary sources, then it should vacate the Tailoring Rule and require EPA to enforce the statute's unambiguous permitting requirements. If EPA thinks the statutory permitting thresholds in the PSD and Title V programs are set too low to allow for rational regulation, then EPA must seek corrective legislation from Congress, rather than replace the statute's numerical, mass-based permitting thresholds with numbers and metrics of EPA's own choosing. Neither the unwillingness of Congress to enact this legislation, nor the unwillingness of the Executive Branch to spend its political capital to obtain this legislation, can justify

an agency's flagrant disregard of unambiguous statutory language.*

EPA's Tailoring Rule is one of the most brazen power grabs ever attempted by an administrative agency. Rather than apply the unambiguous permitting requirements that the Act establishes for *all* air pollutants regulated under the PSD and Title V programs, EPA's Tailoring Rule invents its own permitting thresholds for CO_2 and other greenhouse-gas emissions, and sets them at approximately *750 to 1000 times* the threshold levels specified in the statute. J.A. 310-19. If that were not enough, EPA's Tailoring Rule also departs from the mass-based approach to significance levels established in the text of the Act, as it measures the threshold quantities of greenhouse-gas emissions according to their heat-trapping potential. J.A. 305-10, 340-49. This flouts the rule-based thresholds that the Act established to constrain EPA's discretion.

EPA concedes the incontestable, admitting that its Tailoring Rule "do[es] not accord with a literal reading of the statutory provisions for PSD applicability." J.A. 448. Yet EPA tries to defend its Tailoring Rule by noting that obeying the statutory language "would create undue costs for sources and

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* The court of appeals refused to address the legality of the Tailoring Rule by holding that the petitioners lacked standing to challenge it, but this conclusion is mistaken for the reasons explained in State Petitioners' certiorari petition. Pet. 22-28, *Texas v. EPA*, No. 12-1269 (U.S. Apr. 19, 2013).

impossible administrative burdens for permitting authorities," J.A. 418, and attempts to create a legal veneer for its unilateral rewriting of the Act by invoking "congressional intent," the "absurdity doctrine," and *Chevron* deference. None of this can justify an agency's decision to countermand unambiguous statutory language and expand its discretion by converting statutory rules into standards.

A. EPA Cannot Subordinate The Clean Air Act's Unambiguous, Rule-Bound Numerical Thresholds To Actual Or Imagined "Congressional Intent."

In defending its insouciance toward the enacted text of the Act, EPA makes an audacious claim: that "clear" congressional intent can trump unambiguous statutory language and liberate agencies to convert statutory rules into agency-empowering standards. EPA writes: "[I]f congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent." J.A. 285.

That is nonsense. Even the clearest expressions of "congressional intent" cannot license an agency to convert the Act's rule-bound numerical thresholds into standards that empower EPA administrators to weigh costs against benefits. This much is clear from *INS v. Chadha*, 462 U.S. 919 (1983). Once Congress confers discretionary powers on an agency

administrator, it cannot revoke that discretion by deploying a one- or two-house "legislative veto" over the agency's decisions. *Id.* at 954-55. A two-house legislative veto is as clear a manifestation of "congressional intent" as one can imagine, yet even these "clear" congressional intentions cannot control an agency's decisionmaking—unless they are codified in a statute that successfully runs the bicameralism-and-presentment process.

In like manner, once agency discretion is *restricted* by statute, it cannot be loosened by unenacted congressional wishes. Suppose that each house of Congress approved a nonbinding resolution urging EPA to ignore the Act's statutory thresholds for all air pollutants and replace them with thresholds chosen by the EPA Administrator. One would think this should qualify as a "clear" manifestation of congressional intent—and it is far more clear than anything that EPA has offered in its Tailoring Rule. Yet no one would maintain that these unenacted aspirations could liberate EPA from an unambiguous statutory constraint. Surely less reliable indicators of congressional intent—such as opinion polls of current or former legislators, or facile and unsupported assertions of "congressional intent"—cannot be invoked to displace unambiguous, agency-controlling statutory language either.

EPA's Tailoring Rule treats enacted statutory language not as law, but as mere evidence of what the law might be. The "real" law, according to EPA, is "congressional intent," and statutory text serves as

little more than a guide to agencies as they attempt to discover or construct how "Congress" would want them to deal with problems. *See, e.g.*, J.A. 285 ("*To determine congressional intent*, the agency must first consider the words of the statutory requirements, and if their literal meaning answers the question at hand, then, *in most cases*, the agency must implement those requirements by their terms.") (emphases added); J.A. 409 ("If the literal meaning of the statutory requirements is clear then, absent indications to the contrary, the agency must take it to indicate congressional intent and must implement it.").

EPA's efforts to equate the law with "congressional intent" rather than enacted text of federal statutes is irreconcilable with the jurisprudence of this Court. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (holding that arguments based on legislative "intent" have no relevance when interpreting unambiguous statutes); *Penn. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (assuming that "Congress did not 'envisio[n] that the [statute] would be applied to state prisoners,'" but holding that "in the context of an unambiguous statutory text that is irrelevant" (citation omitted)); *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.").

EPA's intentionalism is also irreconcilable with modern understandings of how the legislative process functions. First, this Court has recognized that legislation embodies compromises between competing interests, and that abstract speculations about congressional "intent" and "purpose" can unravel bargains memorialized in the enacted language. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002); *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986); *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-19 (1980). The Act's provisions reflect compromises along many different dimensions. Most obviously, its provisions trade off the goals of providing clean air against the need to avoid excessive regulatory burdens. Congress "intended" to pursue each of these competing goals, yet *how much* an agency should pursue clean air and *how much* it should seek to avoid onerous regulation can be determined only by following the enacted statutory language. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.").

Second, the Act, like all statutes, must decide whether to pursue these goals by establishing statutory rules ("drive no faster than 55 miles per hour") or standards ("drive at a speed reasonable under the circumstances"). Legislating by rule has many virtues but also drawbacks. On the plus side,

statutory rules can promote predictability and planning, avoid arbitrary treatment of regulated entities, and reduce decision costs for those who implement the law. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). But statutory rules can be crude; they are sometimes insensitive to context, or over- or under-inclusive in relation to their underlying goals. Standards, by contrast, confer discretion on future decisionmakers to avoid suboptimal outcomes in particular cases, but this type of regime comes at the price of increased decision costs, the potential for arbitrary or unpredictable decisions, and (perhaps) increased error costs if future decisionmakers are untrustworthy. Rules and standards also allocate power between the legislature and the agencies and courts that implement the law. Standards delegate power to future decisionmakers such as agencies and courts, while statutory rules withhold discretion from these institutions and force them to seek legislative approval before deviating from the codified regime. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992). How to calibrate these tradeoffs between rules and standards is an essential component of the legislative compromise necessary to produce statutes such as the Clean Air Act. But allowing agencies or courts to invoke abstract notions of "congressional intent" empowers those institutions to convert statutory rules into standards and withhold from Congress the prerogative of

legislating by rule. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (declaring that courts and agencies are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes").

Third, this Court has recognized that Congress, as a multi-member body, is incapable of having "intentions" or "purposes." *See Barnhart*, 534 U.S. at 461; *Dimension Fin.*, 474 U.S. at 374; *Mohasco*, 447 U.S. at 818-19; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . ."); KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); Kenneth A. Shepsle, *Congress Is a "They," Not An "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005) ("Congress is a 'they' and not an 'it'; a committee lacks a brain (or, rather, has so many brains with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity)."). Legislative outcomes can be manipulated by agenda control and logrolling, clouding any efforts to discover congressional "intentions" from the voting records of its members. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) ("[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little

more than wild guesses."). Legislatures simply produce outcomes, which must be enforced by courts and agencies.

In all events, even if one accepts "congressional intent" as a coherent concept, EPA's empirical claims regarding "congressional intent" are demonstrably false. There is no "clear" congressional intent from the legislators who enacted the Act or the 1977 amendments because the issues of global warming and greenhouse-gas emissions were not salient at the time of enactment. That means we not only do not know, but we cannot even reconstruct, how the Congresses of 1970 or 1977 would have wanted EPA to deal with this problem. As for the Congress that enacted the 1990 Clean Air Act Amendments, that Congress *rejected* several legislative proposals to regulate greenhouse-gas emissions, a fact that EPA conveniently ignores throughout its Timing and Tailoring Rules. *See, e.g.*, H.R. 5966, 101st Cong. (1990); S. 1224, 101st Cong. (1989). The statute's rigidity demonstrates that the legislatures that enacted the Clean Air Act's provisions expected EPA to come to Congress to seek statutory amendments and authorization to regulate newfound hazards such as global warming. And if the present-day Congress "intends" for EPA to disregard the numerical thresholds in the Act, as EPA suggests, then EPA should have no trouble securing corrective legislation from Congress.

B. EPA Cannot Disregard The Clean Air Act's Unambiguous, Agency-Constraining Numerical Thresholds By Invoking The "Absurdity Doctrine."

EPA's efforts to defend the Tailoring Rule by invoking the "absurdity doctrine" fail for several reasons.

First, agencies cannot rely on "absurd results" as an excuse to convert unambiguous statutory rules into standards. *Every* rule will produce suboptimal or even absurd results at the margins. Yet the entire point of legislating by rule is to tolerate these less-than-ideal outcomes in exchange for the benefits of cabining agency discretion, minimizing decision costs, and preserving the legislature's power vis-à-vis the agency. EPA's theory of "absurd results" would empower agencies to smuggle cost-benefit analysis into *any* statutory mandate, even when the statute expressly rejects this type of utilitarian calculus. *See* J.A. 356 ("For both programs, the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs to sources and the burdens to permitting authorities."). And it would disable Congress from using statutory rules as a means of forcing agencies to obtain congressional authorization and input before regulating novel and unforeseen environmental problems.

Second, EPA's Tailoring Rule wrongly conflates the canon of constitutional avoidance with a generalized prerogative of agencies to avoid "absurd

results" by converting statutory rules into standards. Many of the authorities that EPA cites involve cases in which the Court bent enacted statutory language to avoid an actual or potential *constitutional violation*. *See* J.A. 393-95 (citing *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132-33 (2004); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542-45 (2002); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); *Pub. Citizen v. DOJ*, 491 U.S. 440, 453-54 (1989)). Yet there is a great distance between the constitutional-avoidance canon and the absurdity doctrine applied by EPA. The avoidance doctrine is narrow; it applies only when the enacted statutory language would violate the Constitution or present a serious constitutional question. It is rooted in principles of constitutional supremacy and promotes judicial restraint by enabling courts to avoid unnecessary constitutional pronouncements. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988); *see also Ashwander v. TVA*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring). EPA's notions of "absurdity" extend far beyond these situations, allowing agencies or courts to depart from unambiguous statutory language merely to avoid a suboptimal policy outcome, even when a straightforward textual interpretation would comply with all constitutional requirements. No matter how undesirable as a matter of policy, there is nothing

unconstitutional, or even constitutionally questionable, about imposing onerous regulatory burdens on buildings that emit greenhouse gases when the text of the Act establishes unambiguous numerical permitting thresholds.

Indeed, in this case the canon of constitutional avoidance *compels* EPA to adhere to the Act's specific numerical thresholds. As explained in Part II.C, EPA's decision to depart from these statutory rules empowers EPA to choose its own numerical thresholds without an "intelligible principle" provided by Congress. And even if one thinks that EPA's actions can be salvaged under the Constitution, it cannot be denied that EPA's unilateral revision of these numerical guidelines at least presents serious constitutional questions under the Court's nondelegation precedents. EPA's atextual interpretation aggravates rather than alleviates constitutional problems, by seizing discretionary powers without an "intelligible principle" provided by Congress. The Tailoring Rule's attempt to rely on the Court's constitutional-avoidance cases boomerangs.

Finally, even if one accepted the legitimacy of EPA's generalized "absurdity doctrine," it *still* would not justify EPA's unilateral departure from the Act's numerical thresholds. It would indeed be absurd to apply the Act's numerical thresholds to greenhouse-gas emissions, but it hardly follows that EPA may "cure" the absurdity by disregarding unambiguous statutory text. The proper means of avoiding this

absurdity is not by replacing the unambiguous numerical thresholds in the Act with arbitrary targets of EPA's own choosing, but by concluding that stationary-source greenhouse-gas emissions cannot qualify as "air pollutants" subject to regulation under the PSD and Title V programs. Nothing in the Act *compels* EPA to include greenhouse gases within the ambit of air pollutants regulated by the PSD and Title V programs; the relevant statutory provisions can be construed to exclude greenhouse-gas emissions from stationary sources, as the other petitioners explain in their briefs. When an agency can avoid an "absurd" result by adopting a plausible construction of statutory language, it cannot decline to follow that course and insist on curing the absurdity by disregarding *unambiguous* statutory language.

C. EPA's Permitting Requirements For Stationary Sources That Emit Greenhouse Gases Violate The Constitution By Seizing Discretionary Powers Where No "Intelligible Principle" Has Been Provided By Statute.

EPA's agency-created permitting requirements violate not only the Act, but also the Constitution. Agencies are allowed only to administer the laws; they may not exercise legislative powers that Article I vests exclusively in Congress. It is of course inevitable that agencies will exercise discretion when they implement federal statutes. Congress is not omniscient and cannot establish mechanical rules for every conceivable scenario that may arise. But the

Constitution requires federal statutes to authorize agency discretion *and* provide an "intelligible principle" to guide that discretion. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Any agency that exercises discretionary powers absent an "intelligible principle" from Congress has crossed the line into constitutionally forbidden lawmaking.

EPA's decision to replace the Act's numerical thresholds with targets of its own creation is not and cannot be based on any intelligible principle provided by Congress. The Act envisions that EPA will either comply with the numerical thresholds or seek corrective legislation from Congress; as a result, it does not supply any intelligible principle for the improvisation project that EPA has undertaken in the Tailoring Rule. So even if EPA could conjure up a non-arbitrary justification for choosing 75,000 tpy CO_2e and 100,000 tpy CO_2e as the "new" threshold levels for greenhouse-gas emissions, it cannot link these decisions to any guideline provided in a federal statute, and it therefore cannot characterize its regulatory regime as anything but agency legislation.

EPA declares in its Tailoring Rule that future phase-ins will apply PSD and Title V "at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point." J.A. 310. Putting aside whether this can qualify as "intelligible," this reflects at most an effort *by EPA* to supply itself with a guiding

principle for the new threshold levels that it will choose. But *Whitman* squelches the notion that agency-supplied guidelines can satisfy the constitutional demand that *Congress* provide an intelligible principle to guide agency discretion. *See* 531 U.S. at 473. EPA's decision to establish new threshold levels for greenhouse-gas emissions is not governed by a congressionally supplied intelligible principle, and should be vacated as an unconstitutional exercise of legislative power.

D. EPA's Tailoring Rule Arrogates Powers That Congress Reserved To Itself In The Clean Air Act.

When Congress enacted and amended the Act, it chose to establish and retain specific numerical thresholds in the statute rather than instruct EPA to promulgate "reasonable" or "sensible" threshold levels for individual air pollutants. By doing this, Congress established that the threshold levels of pollutants would be governed by a rule rather than a standard. One reason legislatures establish rules is to reduce decision costs for those who implement the law, even though this may incur error costs by binding agency administrators to a crude statutory regime. But statutory rules serve another important function: They allocate power between the legislature and the agency that implements the legislative command.

When a federal statute delegates broad discretionary powers to an agency, it becomes more difficult for Congress to influence the agency's future

decisionmaking. Had the Act simply instructed EPA to "regulate air pollution in the public interest," then EPA would have free rein to regulate greenhouse-gas emissions (or any future air pollution) without seeking permission or input from Congress. But by establishing rigid numerical thresholds in the text of the Act, Congress sought to hamstring EPA from *unilaterally* attacking some new and unforeseen problem of air pollution while relegating Congress to the sidelines. The decision to allocate power in this manner is an essential component of the bargaining that produced the Act and its amendments; for EPA to disregard this choice reflects nothing more than a raw power grab and a denigration of congressional prerogatives.

EPA apparently does not fancy the prospect of waiting for Congress to amend these numerical thresholds through legislation. Any efforts to obtain corrective legislation will require bargaining and concessions from both Congress and the Administration. EPA might not get everything that it wants, and the President will have to spend political capital that he might wish to preserve for other matters. How much easier to rewrite unilaterally the Act's numerical thresholds and avoid the bother of negotiating with the people's elected representatives. Yet the temptation to stray from the allocations of power memorialized in statutes is precisely why the Act provides for judicial review of agency action. If this Court decides that EPA has the statutory authority to regulate greenhouse-gas

emissions from stationary sources, it should disapprove the Tailoring Rule and force EPA to bargain with Congress over these matters.

III. *MASSACHUSETTS V. EPA* SHOULD BE RECONSIDERED OR OVERRULED IF IT COMPELS EPA TO REGULATE STATIONARY-SOURCE GREENHOUSE-GAS EMISSIONS.

Before 2007, EPA held that greenhouse gases did not qualify as "air pollutants" under the Act, which defines "air pollutant" as

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

42 U.S.C. § 7602(g). EPA explained that it had traditionally construed the term "air pollution agent" as limited to pollutants "that occur primarily at ground level or near the surface of the earth . . . not higher in the atmosphere." 68 Fed. Reg. 52,922, 52,926-27 (Sept. 8, 2003) (J.A. 1350); *see also id.* at J.A. 1350 (noting that greenhouse gases such as CO_2 are "fairly consistent in concentration throughout the world's atmosphere up to approximately the lower stratosphere"). This view led EPA to refrain from regulating greenhouse-gas emissions under *any* of the Act's provisions—not only the stationary-source regulations in the PSD and Title V programs, but also the motor-vehicle regulations in Title II.

Massachusetts v. EPA, 549 U.S. 497 (2007), held that EPA could no longer refuse to regulate *motor-vehicle* greenhouse-gas emissions simply by insisting that greenhouse gases fail to qualify as "air pollutants." *Id.* at 528-32. This holding rested on two propositions. First, this Court observed that the four greenhouse gases emitted by motor vehicles—"[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons"—qualify as "physical [and] chemical . . . substances[s] which [are] emitted into . . . the ambient air" within the meaning of section 7602(g). *Id.* at 529. Second, this Court distinguished *Brown & Williamson* by noting that EPA regulation of motor-vehicle greenhouse-gas emissions "would lead to no . . . extreme measures." *Id.* at 531. *Massachusetts* never considered whether EPA could or should regulate *stationary-source* greenhouse gases as air pollutants under the PSD and Title V programs, where the Act's rigid permitting thresholds would produce burdens that exceed any semblance of rational regulation.

Massachusetts's holding need not and should not be extended to stationary-source greenhouse-gas emissions. *Massachusetts*'s decision to regard motor-vehicle greenhouse-gas emissions as "air pollutants" under section 7602(g) rested in part on the absence of preposterous consequences. *Id.* Here, by contrast, EPA itself recognizes that including stationary-source greenhouse-gas emissions within the meaning of "air pollutant" will produce ridiculous outcomes, and for this reason the agency refuses to obey the

unambiguous permitting thresholds specified in the PSD and Title V provisions. *See* Part II, *supra*. And the *Massachusetts* Court never had the opportunity to consider the implications of defining the term "air pollutant" to include greenhouse-gas emissions from stationary sources, as not one of the twenty-nine briefs submitted by the parties and their amici informed the Court of the absurdities that would arise from extending the PSD and Title V permitting requirements to every building that emits more than 100 (or 250) tpy of CO_2. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that when an issue "was not . . . raised in briefs or argument nor discussed in the opinion of the Court[,] . . . the case is not a binding precedent on this point").

None of this would matter if the statutory definition of "air pollutant" were clear enough to *compel* EPA to regulate stationary-source greenhouse gases. But it isn't; the phrase "air pollution agent" leaves wiggle room, *see Massachusetts*, 549 U.S. at 555-60 (Scalia, J., dissenting), and there is nothing paradoxical about interpreting section 7602(g)'s definition of "air pollutant" to include greenhouse-gas emissions from motor vehicles but not stationary sources, given the implausibility of regulating greenhouse-gas emissions in a manner consistent with PSD and Title V permitting regimes. The briefs submitted by the Industry Petitioners offer several ways for the Court to interpret the Act in a manner that excludes

greenhouse-gas emissions from the PSD and Title V programs, or that prevents greenhouse-gas emissions from triggering the permitting requirements of those programs.

EPA claims that it can interpret the Act to require the regulation of stationary-source greenhouse-gas emissions, and then avoid the absurd consequences of extending the PSD and Title V permitting requirements to greenhouse gases by replacing the unambiguous numerical thresholds specified in the Act with numbers and metrics of its own choosing. EPA's analysis is backward. Agencies can rewrite unambiguous statutory language in the name of avoiding "absurdity," if at all, only when no other permissible construction of the statute is available to avoid that absurdity. Indeed, EPA's analysis reflects a perverse brand of agency self-aggrandizement: The more mischief an agency causes by its interpretations of a statute, the more power it will have to rewrite the unambiguous provisions of a statute. To find *any* possible construction of the Act that avoids extending the PSD and Title V permitting regimes to greenhouse gases is to *require* a ruling that disapproves EPA's interpretation of the statute.

If this Court concludes that *Massachusetts* compels EPA to regulate greenhouse-gas emissions under the PSD and Title V programs, then the State Petitioners respectfully request that this Court reconsider *Massachusetts*'s holding that CO_2 and other greenhouse gases unambiguously qualify as

"air pollutant[s]" within the meaning of the Act. Even EPA recognizes that the term "air pollutant" cannot possibly extend to "all airborne compounds of whatever stripe," nor can it extend to all "physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air." *Massachusetts*, 549 U.S. at 529 (majority opinion) (internal quotation marks omitted). EPA insists that the term "air pollutant" extends only to "physical, chemical [or] biological" substances *subject to regulation under the Clean Air Act*—even though this limiting construction finds no support from *Massachusetts*, which equated the term "air pollutant" with "all airborne compounds of whatever stripe," and further insisted that this construction of "air pollutant" was *compelled* and could not be narrowed by EPA. *See id.* at 529; *see also id.* at 558 n.2 (Scalia, J., dissenting).

The problems with *Massachusetts*'s interpretation of "air pollutant" are made painfully apparent by this case. With CO_2 as an "air pollutant," every building that emits more than 100 or 250 tpy of CO_2 becomes subject to permitting requirements, a result that imposes extreme and unacceptable regulatory burdens on EPA and the more than 6,000,000 buildings that would suddenly become required to obtain permits. *See* Part I, *supra*. EPA deems these results so absurd that it refuses to apply the Act as written. *See* J.A. 280-88, 459-68. EPA also does not agree with *Massachusetts*'s all-encompassing definition of "air pollutant" because it refused to deem stationary-source greenhouse-gas emissions

"air pollutant[s]" under the statute until after it had promulgated its Endangerment Finding and the Tailpipe Rule. *See* J.A. 709.

Stare decisis is "not an inexorable command," *see Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991), and this Court has not hesitated to reconsider or overrule cases that have proven "unworkable" or "legitimately vulnerable to serious reconsideration," *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). *Massachusetts*'s holding that CO_2 and other greenhouse gases "unambiguous[ly]" qualify as "air pollutant[s]" under the Act should be reconsidered in light of the preposterous results that are produced under the PSD and Title V programs.

* * *

Fusing the law-making power with the law-execution power contradicts the Constitution's most fundamental principles of limited government and separation of powers. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring); THE FEDERALIST NO. 47 (Madison). Yet EPA believes it can disregard unambiguous, agency-constraining statutory rules and unilaterally establish a new regulatory regime to deal with novel environmental challenges. Few propositions could be more subversive of the rule of law, or the notion that agency power must be authorized rather than assumed. A ruling that approves this agency-created regulatory regime will allow EPA to become a law unto itself.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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