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

In The
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

On Writs Of Certiorari To The
United States Court Of Appeals For The
District Of Columbia Circuit

BRIEF OF PETITIONERS IN NO. 12-1254,
THE ENERGY-INTENSIVE MANUFACTURERS
WORKING GROUP ON GREENHOUSE
GAS REGULATION AND THE
GLASS PACKAGING INSTITUTE

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December 9, 2013

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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 PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the District of Columbia Circuit:

Challenges to 75 Fed. Reg. 17,004 (Apr. 2, 2010) (the "Timing Rule"):

1. The Utility Air Regulatory Group, petitioner on review, was a petitioner below.

2. The United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John

PARTIES TO THE PROCEEDINGS – Continued

Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Nathan Deal, U.S. Representative, Georgia 9th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; Clean Air Implementation Project; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio Coal Association; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers

PARTIES TO THE PROCEEDINGS – Continued

Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; Portland Cement Association.

4. Petitioner-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Louisiana Department of Environmental Quality; Michigan Manufacturers Association; National Association Manufacturers; National Mining Association; National Oilseed Processors Association; National Petrochemical

PARTIES TO THE PROCEEDINGS – Continued

& Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce.

5. Respondent-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were Alpha Natural Resources, Inc.; American Farm Bureau Federation; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Chamber of Commerce of the United States of America; Clean Air Implementation Project; Coalition for Responsible Regulation, Inc.; Corn Refiners Association; Glass Packaging Institute; Great Northern Project Development, L.P.; Independent Petroleum Association of America; Michigan Manufacturers Association; Industrial Minerals Association – North America; Mississippi Manufacturers Association; 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 Business; National Mining Association; National Oilseed Processors Association; National Petrochemical and Refiners Association; Ohio Coal Association; Peabody Energy Company; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and

PARTIES TO THE PROCEEDINGS – Continued

Industry; Utility Air Regulatory Group; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce.

6. Respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

Challenges to 75 Fed. Reg. 31,514 (June 3, 2010) (the "Tailoring Rule"):

1. The Utility Air Regulatory Group, petitioner on review, was a petitioner below.

2. The United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review were Southeastern Legal Foundation, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia

3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy, Inc.; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Energy-Intensive Manufacturers' Working Group on

PARTIES TO THE PROCEEDINGS – Continued

Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska; Missouri Joint Municipal Electric Utility Commission; Clean Air Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National Association of Home Builders; National Federation of Independent Business; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; State of Texas.

PARTIES TO THE PROCEEDINGS – Continued

4. Petitioner-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Oilseed Processors Association; National Petrochemical & Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce.

5. Respondent-Intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; Clean Air Implementation Project; Commonwealth of Massachusetts; Conservation Law Foundation; Georgia ForestWatch; National Environmental Development Association's Clean Air Project; National Mining Association; Natural Resources Council of Maine, Inc.; Peabody Energy Company; South Coast Air Quality Management District; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State

of Rhode Island; Utility Air Regulatory Group; West Virginia.

6. Respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

CORPORATE DISCLOSURE STATEMENT

The Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation is a coalition of individual companies and the Glass Packaging Institute is a non-profit association. Neither has outstanding shares or debt securities in the hands of the public nor has a parent company. No publicly held company has a 10 percent or greater ownership interest in either.

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STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (Vintage 2006)..14

OPINIONS BELOW AND JURISDICTION

Pursuant to the Court's briefing order, we adopt these portions of the briefs of other petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Article I of the Constitution of the United States are set out at Pet. App. 2. Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* are reproduced at Pet. App. 162-190.

STATEMENT OF THE CASE

Pursuant to the Court's briefing order, we adopt the Statements of the other petitioners, and add the following points concerning the PSD program:

1. Pre-GHG History.

Over the contentious course of its pre-greenhouse-gas (GHG) history, the Prevention of Significant Deterioration (PSD) program was focused primarily on the relatively straightforward matter of "bolt on" control devices such as catalytic converters and particle precipitators.[1] Nevertheless, it has been

[1] The nature of the program is well reflected in the administrative litigation involving it. A compilation of Environmental

(Continued on following page)

among the Clean Air Act's most criticized and controversial programs, primarily because of the complexity involved in the determination of "best available control technology" (BACT), which it requires. Thus, in proposing its Tailoring Rule, EPA described the PSD program – because of the complexity of the BACT determination – as a "complicated, resource-intensive, time consuming and sometimes contentious process." 74 Fed. Reg. at 55,321-22. In its Advance Notice of Proposed Rulemaking on Regulating Greenhouse Gases Under the Clean Air Act (ANPR), EPA reviewed a long list of the program's controversial aspects, including:

> Because of the case-by-case nature . . . the complexity . . . and the time needed to complete the PSD permitting process, it can take . . . more than a year to receive a permit. . . . There have been significant and broad-based concerns . . . over the years due to the program's complexity and the costs, uncertainty, and construction delays. . . .

73 Fed. Reg. at 44,500-01.

2. As Applied to GHGs.

A remarkably detailed picture of the PSD program as applied to GHGs is already available, from three sources. First, the Agency's discussion in the Tailoring Rule of the reach and burdensomeness of

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Review Board cases is available at http://yosemite.epa.gov./oa/EAB_Web_Docket.nsf/PSD+Permit+Appeals?OpenView.

the program when applied to GHGs, which EPA, in turn, used to justify the temporary exemption of minor emitters from it; second, the extensive and detailed general "PSD and Title V Permitting Guidance for Greenhouse Gases"[2] (hereinafter "*Guidance*"); and, third, some initial EPA sector-specific additional permitting guides. Below is a brief summary of two important aspects revealed in those documents.

a. Local Orientation of the Statute To Be Ignored.

The statute imposes as part of its permitting regime – using "shall" language – requirements explicitly made applicable to "each pollutant subject to regulation under the Act" to monitor and assess the air quality surrounding the facility to be permitted, as well as to assess local environmental impacts, as to vegetation, soil or visibility. 42 U.S.C §§ 7475(a)(6), 7475(a)(7), 7475(e)(1), 7475(e)(3)(B). The monitoring, analysis and data required are preconditions to issuing a permit and are to be available for the required local hearing. 42 U.S.C. §§ 7475(a), 7475(a)(1), 7475(a)(2), 7475(e)(1), 7475(e)(3)(C); *Guidance*, 20, 38, 44, 45.

Because these locale-centric factors do not fit the nature of GHGs and the harm associated with them,

[2] PSD and Title V Permitting Guidance for Greenhouse Gases, Pub. No. EPA-457/B-11/001 (March 2011), http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf.

the Agency, in an aside in the Tailoring Rule, 75 Fed. Reg. at 31,520 (June 3, 2010) (J.A. 300-01), elaborated in the *Guidance* (47-48; *see also* 39, 41-42), declared that these requirements may be ignored by permitting officials and applicants. Further, the Agency declared, a "proxy" for these considerations will be "to focus on reducing GHG emissions to the maximum extent." *Guidance*, 48.

b. Aspects of Production Regulated.

The statute requires BACT, which is defined to include not just "control technology" in the everyday sense but also production technology, as well as operational and "process" options. In the statute's words, it includes "production processes and available methods, systems, and techniques." 42 U.S.C. § 7479(3).

Because of the correlation of carbon emissions with energy consumption, PSD carbon regulation, explicitly, is mostly a scheme to regulate energy consumption. As the Guidance puts it, "The application of methods, systems, or techniques to increase energy efficiency is a key GHG-reducing opportunity that falls under the category of 'lower-polluting processes/practices.'" *Guidance,* 29; *see also* 21-22, 28-32, 40-46. For example, all of the BACT options in the Agency's 39-page document on reducing GHG emissions in steel-industry production are about *energy efficiency*. *See generally*, Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from the Iron and Steel Industry (Sept. 2012).

As that document also notes, "Because energy is a major part of a manufacturer's cost of production, many companies typically have strong internal programs that perform the same functions. . . ." *Id.*, 5.

The broader Guidance calls for ranking each *option* for each *aspect* of production that could affect the emission of carbon dioxide or consumption of energy, from best to worst. The end sought is "control options that result in energy efficiency measures to achieve the lowest possible emission level." *Guidance*, 37; *see also* 21-22, 28-32, 40-46. The Agency specifies that selection should "default to the highest level of control for which the applicant could not adequately justify its elimination based on energy, environmental and economic impacts." *Id.*, 45.

At one extreme, the microscopic, the Agency confirms that control options could reach the selection of light bulbs in a factory cafeteria, yet it assures that is unlikely "since the burden of this level of review would likely outweigh any gain in emissions reductions achieved." *Guidance*, 31. However, regulation of "induced draft fans and electric water pumps," for example, is likely to be worth the effort. *Id*.

At the other extreme, with respect to the most fundamental matters, EPA states that permitting authorities can demand changes that would "fundamentally redefine the source," as otherwise defined by the facility owner's "goal, objectives, purpose or basic design of the facility." *Guidance,* 26. However, the Agency cautions, this should be ordered only after a "hard look." *Id.*

One example of regulation between these extremes of light-bulb selection and facility-redefinition involves the commercially and industrially ubiquitous "natural gas boiler." Regulation of a boiler could include specification of a "combination of oxygen trim control, an economizer and condensate recovery for the boiler, along with high transfer efficiency design for the heat exchanger," a "preventative maintenance program" for the controller, and "a requirement for periodic maintenance and calibration of the natural gas meter and the steam flow analyzer." *Guidance*, F1-3.

SUMMARY OF ARGUMENT

There are differences between, on the one hand, the conventional pollutants and conventional pollution Congress had in mind as it wrote the provisions of the PSD and title V programs, and, on the other, carbon dioxide and global warming. These differences cause the nature, function, effect or import of each of the key statutory provisions that make up these programs to change dramatically when they are applied to GHGs. As a result, at least ten of these provisions – nine for the PSD program and one for title V – are damaged in various ways by their extension to GHGs. The various types of damage include: (*i*) nullification, as reflected in the obscured but critical Agency admission that all concerned may ignore statutorily-commanded provisions essential to the integrity of PSD regulation; (*ii*) self-contradiction,

exemplified by the fact that a provision meant to assure that minor emitters were excluded from the program instead becomes a provision that requires their regulation; (*iii*) absurdities, admitted and unadmitted, that result; and (*iv*) elephantine expansion, beyond Congressional intent and beyond all reason.

With respect to the last, inflation of the effect of textual provisions to unintended and unreasonable dimensions, the best example is PSD's signature BACT requirement. BACT is defined by the statute to include not just "control technology" as commonly understood, but to include "production processes and available methods, systems and techniques." 42 U.S.C. § 7479(3). Applied to the conventional pollutants for which PSD was intended, this resulted in a program that was essentially about "add on" controls such as catalytic converters or particle collectors, with only occasional forays into operations. Applied to carbon dioxide, it covers – as the Agency has explained in great detail – every aspect of a facility's operation and design that affects either its emission of carbon dioxide or its consumption of energy, because the latter is the primary determinant of the former. This is – as EPA has explained – everything conceivable, from light bulbs in the factory cafeteria to changes that, in the Agency's term, "fundamentally redefine the facility."

With respect to "absurdity," the Agency correctly acknowledged that its reading would lead to regulation of millions of previously and intentionally excluded

minor emitters of all sizes. EPA employed the absurdity, administrative necessity and one-step-at-a-time doctrines to *facilitate* the eventual achievement of permanent contravention of the statute's meaning and intent, by promising to regulate, eventually, as many as possible of the minor emitters Congress told it to exclude.

The Agency explicitly equated the "absurdity" involved with the "administrative necessity" it could not yet meet: it did not have enough permitting capacity to regulate all of the small facilities and minor emitters swept into the program by the inclusion of CO_2. In keeping with this, EPA promises to find (statute-contravening) ways to "streamline" permitting, through such things as "general permits" and "presumptive BACT." Its goal – and commitment – is to regulate as many as possible of the minor emitters, as rapidly as possible. This is the same reasoning that would attempt to solve the problem of an over-broadly interpreted criminal statute by streamlining indictment and eliminating trial for the newly targeted would-be criminals, because of the "absurdity" of not enough enforcement personnel and courtrooms.

The Agency trumpets its commitment to eventual full compliance with the literal terms of the Act as it reads it. This is as damaging a mistaken commitment as ever made by an administrative agency. Compliance with the literal GHG-*transformed* meaning, import or effect of CAA provisions is a commitment to Congressional-intent-defying, statute-destroying,

elephantine regulation, created without constitutional processes.

The underlying errors of interpretive approach that produced this commitment and any number of other errors of interpretive outcome in this matter, are truly fundamental, and both the Agency and lower court make them. Their approach had two primary characteristics: undue reliance on "plain" and "isolated" language. The Agency and court stopped at "plain language," or as the Agency often put it, "literal" meaning. Hence, their approach was unable to see the damage to the text's import and intended effects caused by the GHG application. This can only be seen by an interpretive process that includes "substantive effects" or "textual consequences."

Similarly, the approach of the Agency and court fell victim to the limitations of "isolated language," in two respects. First, abandoning the process that it had begun in an ANPR, the Agency made no effort to see the statute as an integrated whole. It thereby abandoned any effort to consider alternative ways of regulating stationary sources under the statute that might better serve what the Agency itself has correctly identified as the statute's "dual" purposes – controlling pollution and "promoting" economic growth. 75 Fed. Reg. at 31,555 (J.A. 452). Second, it ignored the "whole statute" in another sense by ignoring all of the relevant substantive statutory components of the PSD program and their transformation, contradiction,

and nullification that result when they are applied to GHGs.

The misuse of plain meaning and the associated error of ignoring relevant statutory context and its effects in the new GHG context produced an indefensible claim by the Agency and lower court that there existed a *Chevron*-one command of Congress that tied the Agency's hands. The law made the Agency do it.

Chevron step one, in its original and full formulation, applies where Congress has "directly addressed the precise question at issue" and answered it "unambiguously." *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 842-43 (1984). PSD carbon regulation – and its "triggering" – were not within Congress' wildest imagination as it created the program, just as they would not be within the contemplation of any rational policymaker as a means to regulate carbon and combat climate change.

In fact, Congress was speaking with *Chevron* clarity – about conventional pollutants, not carbon dioxide and global warming and their marriage with the PSD program. And, any "ambiguity" that exists in this case is, precisely, the radical change in meaning, import or effect of otherwise clear terms when they are applied to GHGs, to the point of their self-contradiction.

Rather than being a *Chevron*-one command, PSD and title V GHG regulation fails at step one of *Chevron* because it clearly contravenes the statute – as apparent under the proper interpretive approach.

Moreover, it represents a clearly impermissible construction of the statute under *Chevron* step two for exactly the same reasons. And, because it is impermissible, it is also beyond the Agency's authority under the separation-of-powers-bounded conception of agency authority last stated by this Court in *City of Arlington, Texas v. F.C.C.,* 133 S.Ct. 1863, 1870 (2013). Similarly, for the same reason, it violates the judicial review provisions incorporated into the Act itself, which, in addition to the familiar "contrary to law" standard for reversing agency actions, contains the less often quoted but even more basic standard "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 42 U.S.C. §§ 7607(b)(9)(B), 7607(b)(9)(C).

A fundamentally erroneous approach to statutory construction for cases involving application of the CAA to GHGs has created – without ownership of the decision in any branch – a prescriptive and particularistic scheme of comprehensive regulation of industrial operations that has the potential for almost unlimited harm.

It is, however, just the beginning. This is but the first of a likely endless parade of cases that turn the CAA on its head, and claims the Act's plain language requires it.

The second has arrived. It is *Center for Biological Diversity v. E.P.A.,* No. 11-1101, slip. op. (D.C. Cir. July 12, 2013). There the court on various grounds sided with environmental-group petitioners who

argued that exempting from the PSD program – as EPA wished to do – so-called "biogenic" carbon dioxide, the kind that comes from decaying plant material, "violates the Clean Air Act's plain language" and that therefore "the agency has no *authority* to exempt any sources of carbon dioxide." *Id.*, 12. (emphasis added).

Against this, the Agency had argued that it had authority to defer regulation while it studied the matter "because these sources have unique characteristics that were 'unquestionably unforeseen when Congress enacted [the] PSD program.'" *Id.* As a concurrence stated, however, given the D.C. Circuit precedent – that is, the case presently before this Court – "There is zero basis in the text . . . to distinguish biogenic carbon dioxide. . . . " (Kavanaugh, J., concurring, at 1).

As our argument demonstrates, EPA does not have the authority to regulate GHGs under the PSD program, because of the damage to the statute's terms it causes. Under the precedent represented by the case under review, however, and the mistaken approach to interpretation it represents, parties are successfully arguing, by contrast, that the Agency does not have authority *not* to regulate, even, a distinctively different form of GHGs, or, even, as the Agency thought wise, take time to study the question in a way that took into account factual differences of potentially enormous policy significance.

For the present – broader – case, the factual differences between GHGs and conventional pollutants are the reasons that no reasonable person or political entity would choose or has chosen a prescriptive, particularistic, public-hearing-requiring means of regulating carbon – and energy. They are also the reasons that the meaning, import or effect of all of the important PSD and title V statutory components has been destructively transformed.

ARGUMENT

I. Whether Any Particular CAA Provision or Program Can Encompass GHGs Requires an Interpretive Approach that Considers the Effects of Applying the Relevant Provisions to GHGs.

The Agency and lower court relied on plain and isolated language, making it impossible for them to see the effect that the GHG application had on the relevant statutory provisions.[3] Before proceeding in Section II to the particular statute-defying effects of applying the PSD statutory provisions to GHGs, we briefly outline the relationship of *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), to the change in meaning

[3] The approach of the lower court, featuring "plain" language, lack of "ambiguity," "clear" congressional intent, *Chevron* step one, and "judicial inquiry is complete," is illustrated at: Pet. 18-19, and J.A. 144, 145, 236, 242.

or import of CAA terms in this and similar cases and the approach to interpretation it makes necessary, using three propositions.

1. The change in meaning or import of the Act's terms can only be seen by examination of what the Court has called "substantive effects," rather than relying on plain and isolated language alone. As the Court has explained,

> Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect compatible with the rest of the law.

United Sav. Ass'n of Tex. v. Timbers of Indwood Forest Assoc., Ltd., 484 U.S. 365, 371 (1988). This element of the requisite interpretive process could also be called attending to "textual consequences."[4]

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[4] *See*, ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at 352 (Thompson/West 2012). ["Some outcome-pertinent consequences – what might be called textual consequences – are relevant to a sound textual decision – specifically those that: . . . cause a private instrument or governmental prescription to be ineffective . . . invalid . . . contain a provision that contradicts another provision . . . (or) produce an absurd result . . . "]; *cf.*, STEVEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 120 (Vintage 2006) ["(T)o emphasize consequences is to emphasize consequences related to the particular textual provision at issue."].

2. Even if *Massachusetts*' holding was that the statute's general definition of "air pollutant" was such that it *must* include greenhouse gases, as opposed to that it is broad enough *to* include greenhouse gases, that would not necessarily control its meaning in any given "statutory context." This is the holding of *Brown & Williamson,* which was addressing, *inter alia*, a definition of "drug" in the Food, Drug & Cosmetic Act that did in fact, as all agreed, necessarily include nicotine. Yet there the Court warned:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. *See Brown v. Gardner,* 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (other internal citations omitted).

Similarly, that is the import of *United States v. Palmer*, 16 U.S. 610, 631 (1818), wherein Chief Justice Marshall said of the meaning of "any person or persons" in a piracy statute under consideration:

> The words of the section are in terms of unlimited extent. The words "any person or persons" are broad enough to comprehend every human being. But general words must

> not only be limited to cases within jurisdiction of the state, but also those objects to which the legislature intended to apply them.

3. Moreover, in any event, the definition of "air pollutant" in the CAA cannot be said necessarily to include GHGs. The limited statement that definition can support is that it is unambiguously broad enough *to* include GHGs, such that one cannot say as a matter of definition alone that it cannot. A careful reading of *Massachusetts* indicates that was all the Court was saying, in keeping with terms of the definition.

That definition is essentially circular, turning on a tautological use of the adjective "polluting" in the term "polluting agent." 42 U.S.C. § 7602(g). It would be possible to misread the Court's opinion, as the lower court seems to, to say that because the definition contains an unexceptional elaboration that the "polluting agent" can be in any form of matter, from molecule to compound or radiation, that, therefore, any molecule, compound or electromagnetic wave is an "air pollutant" so long as it meets the definition's other (also very broadly defined) requirement that it is "emitted" into the air. This, however, would include light, data transmission, baseballs and animal waste – solid, liquid or gaseous. Most of the definition's restrictiveness – and the key to its meaning – are in the open-ended and flexible "polluting."

Underlying the mistaken reading, of course, is a logical fallacy. It would be no more valid than this claim: "Because 'American hero' is defined as 'any agent of a heroic action, including a person of any gender, nationality or country of birth,' we are all American heroes thereby."

II. The Most Important PSD and Title V Statutory Provisions Are Contravened in Various Ways by Their Application to GHGs.

We note at the outset two preliminary points about the meaning, effect or import of key PSD and title V provisions as affected by their application to GHGs.

First, all of the PSD provisions at issue are directly tied to one of the *four* usages in the PSD part of the Act of the term "any air pollutant subject to regulation under the Act" (or variants of it), or to the fifth instance in which the phrase "regulated under the Act" has been added, by the Agency's "longstanding" interpretation, to the statute's broader term "any air pollutant."

With respect to that phrase in particular, a kind of "cross reference" (of which the Act is laden), our argument is that the principles of holism, which include the statute's purposes and all of its relevant provisions, and the importance of statutory context and "substantive effects," apply just as they do to any other statutory term, whatever its function. Since

this phrase is what the Agency refers to as the "automatic trigger" of PSD (and title V) regulation, the key point is that whether Congress would have intended that an "automatic trigger" apply to a new or transformed context depends on what is triggered thereby and the effect on relevant text.

This is in the same way that triggering of a pound of gunpowder is one thing, of plastic explosives quite another. In formal terms, the trigger is in the nature of an if/then statement: if x, then y. Such statements are not necessarily valid for all meanings of x.

Second, all of the substantive effects that contravene the provisions in various ways result from three categories of differences between GHGs and conventional pollutants.

1. Carbon dioxide's relative ubiquity and abundance in human productive activity as compared to that of conventional pollutants. Much of industrial activity involves using heat, derived from combustion, which by definition releases carbon dioxide, to cause chemical reactions involving carbonate materials that separately release carbon dioxide, to produce things using energy-consuming machinery.[5]

[5] *See, generally*, Comments of Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation, at 11, also 19-22, 27-29, 30-36, 40-41; EPA-HQ-OAR-2009-0517 (also: 2009-0472 and 2009-0597) (Dec. 26, 2009).

2. GHGs are "well mixed" in the atmosphere and their harm is caused by long-term build-up in upper atmospheric levels. 68 Fed. Reg. at 52,926-27 (Sep. 8, 2003). These differences render it impossible to use ambient levels of GHGs or assessment of local impacts to gauge regulation of GHGs, in practice and in theory.

3. Energy is a "first party" cost. As a consequence, unlike with respect to the emission of conventional pollutants, energy efficiency, which is what the PSD GHG scheme regulates, is incentivized by market forces, especially for energy-intensive industries.[6] Moreover, for related reasons, PSD GHG regulation amounts to the second-guessing of an almost unlimited number of production-management trade-offs involving such things as reliability, speed, familiarity, convenience, maintenance and product quality and differentiation.[7] This difference also explains why, when an inter-agency task force, which included EPA, last examined the matter, America's energy-intensive industries were on course to meet the President's goals for carbon emissions – without regulation.[8]

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[6] *See,* Steel Industry Guidance Document, *ante*, p.4, at 45.

[7] *See,* Comments, *supra* note 5.

[8] *See*, The Effects of H.R. 2454 on International Competitiveness and Emission Leakage in Energy-Intensive and Trade-Exposed Industries (Dec. 2, 2009) (available at http://www.epa.gov/climatechange/economics/economicanalyses.html#interagency) ("Overall . . . the total energy-related CO_2 emissions of the six sectors . . . would decline nearly 20 percent from 1996 to 2020 under business-as-usual circumstances." *Id.*, 19).

There are at least nine instances in which applying the PSD provisions to GHGs contravenes those provisions in various ways, and a tenth related to title V. We briefly outline them below, including references to places where the Agency for various reasons – including declaring some provisions void – has itself elaborated them.

1 & 2. The statutory scheme features provisions, as part of the PSD permitting process, requiring monitoring and analysis of the ambient air quality around the facility to be regulated and, similarly, analysis of local impacts as to "climate, meteorology, terrain, soils, vegetation and visibility." 42 U.S.C §§ 7475(a)(6), 7475(a)(7), 7475(e)(1), 7475(e)(3)(B). These requirements are expressed in "shall" terms by the statute, and pertain to "each pollutant subject to regulation under the Act." The required actions and information are preconditions for issuing a permit. 42 U.S.C. §§ 7475(a), 7475(a)(1), 7475(a)(2), 7475(e)(1). And, the information is to be available for the required local hearing. 42 U.S.C. §§ 7475(a)(2), 7475(e)(3)(C); *Guidance*, 44. The information is an essential part of a reasonable case-by-case permitting decision, as required by the Act, and is an essential part of the showing an applicant must make, and the burden it must carry, to obtain its permit. *Guidance*, 20, 38, 44, 45. Yet, because these requirements make no sense for GHGs, EPA declared in an aside in the Tailoring Rule that permitting officials and applicants may ignore them. 75 Fed. Reg. at 31,520 (J.A.

300-01). It elaborates on the point at length in the Guidance. *Guidance*, 47-48, *see also* 39, 41-42. In other words, these statutory provisions, as EPA effectively concedes, are contradicted, rendered ineffective or nullified, or, alternatively, rendered absurd, by the GHG application.

3 & 4. By limiting the program to objectively defined "major emitters," Congress blocked EPA from regulating minor emitters – because they could not afford it *and* because they were a minor part of the problem of local conventional pollution. *See*, *Alabama Power v. Costle,* 636 F.2d 323, 353-54 (D.C. Cir. 1979); *see also,* 75 Fed. Reg. at 31,550, 31,558-59 (J.A. 430, 467-68). For instance, the Senate version of the legislation gave an exemplary list of the kinds of minor emitters to be excluded even if they somehow had the potential to emit more than the legislation's general threshold of 100 tpy of "any air pollutant": "houses, dairies, farms, highways, hospitals, schools, grocery stores and other such sources." *See*, 75 Fed. Reg. at 31,550 (J.A. 429) and the legislative history cited there. In the statute as enacted, Congress chose to assure their (and similar minor facilities') exclusion by raising the regulatory threshold as to them to *250* tpy of "any air pollutant" – creating an extra margin to assure that these facilities would never be subjected to PSD permitting. 42 U.S.C. § 7479(1); *see also,* 75 Fed. Reg. at 31,550 (J.A. 430). Hence, in selecting both the 100- and 250-tpy definitions of "major" facilities, Congress was taking advantage of a common quality of all conventional pollutants: the fact that they are emitted in small, even if harmful, amounts.

It did so to remove EPA discretion to determine how major was major, but to accomplish that in a way that did not try to name all of the kinds of excluded facilities. However, as EPA explains, it is the marked difference of CO_2 in the relevant dimension – its relative ubiquity and abundance in human productive activity – that causes the statutory terms to take on an import that is opposite that of the enacted provision and the Congressional intent that accompanied it. 75 Fed. Reg. at 31,535 (J.A. 363). The Agency, nonetheless, promises to regulate as many of these minor emitters as possible, as soon as possible, through streamlining of the permitting process. *See,* 75 Fed. Reg. at 31,523, 31,548, 31,566, 31,573, 31,577 (J.A. 310, 421-22, 502-03, 529, 549).[9] The comparable dynamic respecting the title-V 100-tpy threshold makes the fourth statutory contravention. 42 U.S.C. § 7602(j); 75 Fed. Reg. at 31,583 (J.A. 485-502, 574). Lastly, the Court needs to be aware of this additional point: To accomplish conveniently these statutory contraventions without the need for states to change their parallel statutes, the Agency has adopted a radically new GHG-specific regulation interpreting the words "subject to regulation," under which GHGs are both subject to regulation and not, depending not on their chemical identity but the quantity and location of their emission. *See*,

[9] The government correctly insists that the Agency "did not disavow the goal of ultimately applying those thresholds according to their literal terms." Br. for Fed. Resps. in Opp. 41.

75 Fed. Reg. 31,607 (J.A. 680-81); *see also* 75 Fed. Reg. 31,525 (J.A. 320-23).

5. BACT – Production Processes, Methods, Systems, Techniques, etc. The sweeping definition of BACT includes "production processes and available methods, systems, and techniques. . . ." 42 U.S.C. § 7479(3). Again, the effect of this provision when it is applied to GHGs transforms the program from one of limited intrusion to a comprehensive scheme of regulation of industrial operations.

6. BACT – Energy. The definition of BACT incorporates the following qualification: "which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility. . . ." 42 U.S.C. § 7479(3). The statute contemplated "energy" as one of the potential costs of regulating conventional pollutants – as is almost always the case because devices such as catalytic converters and particle precipitators consume energy, and low-contaminant fuels likewise are often less energy-efficient. *See, e.g., Guidance*, 39, 41. Applied to carbon dioxide, the role of energy is turned on its head. PSD regulation becomes mostly a scheme for the *mandating of energy efficiency* in all its manifestations. It converts a limitation on regulation – *i.e.*, the weighing of increases in energy consumption required to control conventional pollutants – into an object of regulation, a regulated *first*-party cost, one that opens the factory door or the farm gate to unlimited regulator access.

7 & 8. BACT – Case-by-Case Requirement and Local Hearing Requirement. In the language quoted above, the BACT definition incorporates the statute's requirement of case-by-case analysis, hearing, and decision. A companion of the BACT-definition case-by-case requirement is the PSD public hearing requirement, found in 42 U.S.C. § 7475(a)(2), requiring as a pre-condition of a permit that "a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." *See also,* 42 U.S.C § 7475(e)(3)(C). Commenting on changes to the program worked by the 1977 amendments, in *Alabama Power v. Costle*, 636 F. 2d 323, 350 (D.C. Cir. 1979), the court emphasized these changes: "case-by-case determination of BACT rather than automatic application of NSPS . . . provisions requiring public hearing in all cases instead of mere opportunity for written comment." Both of these provisions are rendered ineffective or nullified both by the elimination of local-impacts information and analysis and the proposed streamlining of the permitting process through "general permits" and "presumptive BACT."

9. BACT – Local Impacts. As indicated above, the BACT definition incorporates the phrase "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, [the permitting authority] determines is achievable for such facility." 42 U.S.C. § 7479(3). Hence, this

aspect of *the definition of BACT* also incorporates consideration of the local information to be adduced under the requirements of §§ 7475(a)(6) and 7475(e) discussed above, the same requirements and associated information that the Agency has declared applicants and permitting authorities are free to ignore.

10. BACT – "Economic Effects and Other Costs." The damage to the BACT definitional factors is nowhere greater than with respect to the "economic impacts and other costs." 42 U.S.C. § 7479(3). Given the pervasiveness of the effects of PSD carbon regulation on production, and the nearly impossible-to-measure impact it could have on production efficiency, reliability, quality, familiarity of personnel with existing practices, maintenance, and such, factoring in costs to permit applicants would be so complex and uncertain as to be nearly impossible.

In response, EPA adopts the following extraordinarily liberating – and statute-defying – conception of such "costs" for purposes of PSD carbon regulation: "The emphasis should be on the cost of control relative to the amount of pollutant removed, rather than the economic parameters that provide an indication of the general affordability of the control alternative relative to the source." *Guidance,* 38.

The "economic parameters that provide an indication of the general affordability of the control alternative to the source," of course, concern things like "production costs," "capital costs," "materials costs," "costs of maintenance and repair," "cost of goods sold," "profit margins," and "return on investment" – the "parameters" that make private economic

activity possible. Concern with cost to a regulated entity in this everyday sense has been turned into the very different concept of the relative efficiency of one pollution/energy-control strategy to another. The irony is that the very structure of PSD regulation – prescriptive and particularistic – makes true efficiency even in that sense unachievable.

III. Extension of the PSD Program to GHGs, as the Agency and Lower Court Conceive It, Contradicts Important Doctrines in Administrative Law, Defeating Their Purposes.

In addition to the absurd consequences doctrine discussed above, two others have been subjected to rationale-defying contravention.

A. The *Chevron* Doctrine Is Misused, Causing the Mis-Assignment of Accountability for the Policy Decisions Implicit in PSD GHG Regulation and Defeating Rational Policymaking.

Of the many reasons for the *Chevron* typology, the most basic is to assign policymaking responsibility and accompanying accountability to the two policymaking branches, as opposed to courts. *See*, *Chevron,* 467 U.S. at 864-65 ["Such policy arguments are more properly addressed to legislators or administrators, not to judges. . . . (A)n agency to which Congress has delegated policymaking responsibilities may, within limits of the delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments."].

Here, by virtue of the false *Chevron*-one claim, EPA and the lower court assign responsibility for PSD and title V carbon regulation – "directly" and "precisely" – to Congress, even though it is a way of regulating *carbon dioxide* Congress did not contemplate and that would be unthinkable to it. By the same token, political responsibility is evaded by the Executive,[10] which claims its hands are tied by Congress.

Moreover, *rational* policymaking, not just accountable policymaking, is utterly defeated. It is replaced by the irrational premise that a means of regulation appropriate for conventional pollutants is necessarily appropriate – or tolerable – for GHGs.

Additionally, this Court has explained *Chevron* as a stable "background" rule against which Congress can legislate. Congress knows that if it leaves ambiguous gaps in statutes it will be for agencies to fill them, and, if it wishes to avoid that, it must write unambiguously. *See generally, City of Arlington, Texas v. F.C.C.*, 133 S.Ct. 1863, 1868 (2013).

Chevron is usually thought to refer to a statutory gap, which, indeed, is how *Chevron* explained itself. *See*, *Chevron*, 467 U.S. 837 at 843-44 ("If congress has explicitly left a gap. . . ."). This case is not about

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[10] Indeed, PSD carbon regulation seems directly contrary to Administration policy. *See*, Barack Obama, President, U.S.A., 2013 State of the Union Address (Feb. 12, 2013) (calling for "market-based" carbon regulation).

gap-filling. It is a case of stretching the coverage of a statute beyond that for which it was designed, and each statutory contravention represents a snapping of a thread of the statutory fabric stitched by Congress.

There is no colorable *Chevron*-one command *to* regulate GHGs under the PSD program. The *Chevron* command was to regulate *conventional* pollutants under the program if they are regulated elsewhere in the Act. Congress supported this command with substantive PSD provisions that make sense for conventional pollutants, but not for GHGs. Congress cannot be said to have commanded an application that contravenes the provisions that it wrote.

A *Chevron*-one command with respect to GHGs exists in this case – the *Chevron*-one command *not* to regulate GHGs under the PSD and title V programs. Under an approach to interpretation that includes substantive effect, this is clear. Moreover, for the same reasons – the ten contraventions of the text – PSD and title V GHG regulation would represent an impermissible construction of the Act under *Chevron* step two.

B. The Implied Delegation Doctrine Is Misused.

As the above indicates, any implicit delegation to regulate GHGs under the CAA found in its flexible and capacious definition of "air pollutant" cannot apply to PSD and title V regulation. To so apply it would be to create an irrational "term" for such delegation, under which Congress would be said to

require: apply the Act's PSD provisions, written for the conventional-pollutant context, to GHGs without considering whether the application changes their effect in ways that contravene the provisions, whether it makes sense, or whether there are better ways under the Act to attempt to achieve the statute's purposes. Because this also involves the constitutionally significant destruction of any intelligible principle for a delegation of authority to regulate GHGs, we discuss it further in that context, below.

IV. PSD Application to GHGs Fails Because It Causes Absurdity and Raises Grave Constitutional Issues.

Other petitioners have explicated well the principle that any permissible alternative interpretation, in particular the interpretation that PSD and title V do not apply to GHGs, should prevail over one that causes absurdity. To this we add the constitutional doubt avoidance canon: "When the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided." *Crowell v. Bensen*, 285 U.S. 22, 62 (1932).

In the normal case, these two avoidance canons, seeking to avoid unnecessary constitutional doubt and absurd outcomes, could be said to seek to protect Congress from itself – to protect its presumed intent

from its imperfect execution. In the present case, the canons apply in a different way and with added force – they protect, in addition, Congress' Article I prerogatives, and its ability to fulfill the obligations that accompany them, to exercise reasoned judgment about the necessary and proper means of exercising its powers. Because the canons would protect against absurdity and unconstitutionality caused not by any action of Congress or its drafting, but from actions of other branches that cause untoward results in a statute that otherwise does not contain them, the canons serve the separation of powers, as well as sound interpretation.

A. It Causes Absurdity.

PSD GHG regulation is thoroughly absurd, root and branch. For instance, it constitutes this three-headed absurd-policy creature: (*i*) an energy-efficiency-driven BACT definition so intrusive it can impose almost unlimited costs on trade-exposed, energy-intensive industries, costs as extensive as could be imposed on any regulated utility; (*ii*) a regulatory "cost" mechanism so transformed it is no longer concerned with costs to the facility owner in a business-survival-relevant sense; yet, (*iii*) no mechanism of a rate-regulation type to assure that the demi-utility can earn an asset-replacement-level return, or any return. And, in response to pleas from the energy-intensive industries that this could create quintessential CAA-policy absurdity, severe economic harm to the country coupled with worsening of global

GHG emissions, the Agency responded it may someday look into that matter under its "absurd consequences" powers: Regulate first; find out if it is absurd later. 75 Fed. Reg. at 31,589-90 (J.A. 602-04); Comments of EIM Group, *ante*, p.18 n.5.

B. It Raises Grave Constitutional Issues.

The core Article I issues in this case can be summarized using two concepts that have been well explored by this Court – proper "means" of regulation and a proper "delegation" of legislative powers.

While Congress' power under the Commerce Clause to regulate GHGs is not challenged in this case, there are pressing questions of the proper *means* of regulation and the delegation of the determination of the proper means. The text and form of PSD regulation, applied to carbon dioxide, produce the most extensive and intrusive exercise of the Commerce Power in our history. In order to regulate one thing – the level of GHG emissions – the PSD program claims the power to prescribe virtually everything, even to the point of "fundamentally redefining the facility" regulated.

Because pollution, and *a fortiori* carbon dioxide emissions and energy consumption, are not themselves "interstate commerce," Congress' power to regulate them comes from the Necessary and Proper Clause. In *McCulloch v. Maryland,* 4 Wheat. 316, 421 (1819), the Court, in an opinion by Chief Justice Marshall, established the test for determining whether

an act of Congress has selected a means permissible under that clause to regulate a concededly proper end:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

As Justice Scalia wrote in his concurrence in *Gonzales v. Raich,* 485 U.S. 1, 39 (2005), the requirements that the means selected be "appropriate," "plainly adapted" to the end sought, "not prohibited," and "consistent with the letter and spirit of the constitution," are "not mere hortatory." The Court enforces them by striking down legislation.

If Congress had enacted PSD/title V carbon regulation, that would have presented a substantial issue as to whether the means chosen met the *McCullough v. Maryland* requirements. Because Congress did not choose these means, additional substantial constitutional questions are raised, because Congress was denied the opportunity *to make the judgments* involved in determining whether the means were proper.

The opportunity to make these judgments is a necessary concomitant of the vesting of both the Commerce and Necessary and Proper powers in Congress by Article I. The most important cases of this Court establishing the broad limits of the Commerce

Power turn on deference to *Congress'* exercise of judgment in the exercise of its powers. *See*, *e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); and *United States v. Darby,* 312 U.S. 100, 121 (1941).

The fundamental Article I concerns involved in this can also be seen by considering this Court's explication of proper terms of delegation of legislative powers. In fact, carefully expressed, as this Court has made clear, the legislative power vested in Congress by Article I *cannot* be delegated. *Touby v. United States*, 500 U.S. 160, 165 (1991) ["From the (language of this section of the Constitution) the Court has derived the non-delegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government."].

Accordingly, to retain the legislative power but leave some important decision-making to others, Congress must lay down in the delegating legislation "intelligible principles" to govern its exercise. "When Congress confers decision-making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.' " *Whitman v. American Trucking Associations, Inc.,* 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., Co. v. United States,* 276 U.S. 394, 409 (1928)).

If decision-making authority pursuant to an Article I power cannot be delegated without an intelligible principle to govern it, it follows that it cannot

be delegated *implicitly* without an intelligible principle to govern it. Indeed, such a scenario would seem to present even greater separation of powers problems, since potentially it would involve other branches in the expropriation of unguided legislative powers – not just their delegation by Congress.

The PSD program is an elaborate and detailed *express* delegation to EPA to regulate conventional pollutants. At a general level, the most fundamental principles upon which that delegation is based involve careful study of, and the making of distinctions appropriate to, the different conventional pollutants to be covered by PSD. In addition to this and other general principles, there are *specific terms, provisions, rules and standards* to govern the delegation. All of this is rendered incoherent, even self-contradictory, by the application to GHGs.

The most aggressive exercise of the Commerce Power in our history, PSD/title V carbon regulation, does not in any real sense represent an "act" of Congress, nor does it represent, therefore, an opportunity afforded Congress to guide and restrict its exercise. In *Whitman*'s phrase, while the PSD-enacting Congress enacted principles and terms to which the Agency's actions must "conform" as part of the express PSD delegation, these are "deformed" by a misperceived implied delegation (or, here, misperceived command) to regulate GHGs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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