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.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR RESPONDENTS COALITION FOR RESPONSIBLE REGULATION, INC., ALPHA NATURAL RESOURCES, INC., GREAT NORTHERN PROJECT DEVELOPMENT, L.P., AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDINGS

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

1. Petitioners in No. 10-1073 below were Alpha Natural Resources, Inc., Coalition for Responsible Regulation, Inc., Great Northern Project Development, L.P., Industrial Minerals Association–North America, Massey Energy Company, National Cattlemen's Beef Association and Rosebud Mining Company.

2. Respondents below were the United States Environmental Protection Agency and Lisa P. 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 Regina McCarthy.

3. Additional petitioners below were Southeastern Legal Foundation, Inc., Michele Bachmann, Marsha Blackburn, Kevin Brady, Dan Burton, Paul Broun, Nathan Deal, Phil Gingrey, Steve King, Jack Kingston, John Linder, Tom Price, Dana Rohrabacher, John Shadegg, John Shimkus, Lynn Westmoreland, 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, Southeast Trailer Mart, Inc., Georgia Agribusiness Council, Inc.; 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; Utility Air Regulatory Group; 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 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; State of Louisiana; 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; and Portland Cement Association.

4. Petitioner-intervenors below were Independent Petroleum Association of America, Indiana Cast Metals Association, Michigan Manufacturers Association, Tennessee Chamber of Commerce and Industry, West Virginia Manufacturers Association, Wisconsin Manufacturers and Commerce, Glass Association of North America, State of Louisiana, National Association of Manufacturers, American Petroleum Institute, Corn Refiners Association, National Association of Home Builders, National Oilseed Processors Association, Western States Petroleum Association, American Frozen Food Institute, and American Fuel & Petrochemical Manufacturers.

5. Respondent-intervenors below were Commonwealth of Massachusetts, Conservation Law Foundation, Natural Resources Council of Maine, Indiana Wildlife Federation, Michigan Environmental Council, Ohio Environmental Council, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, 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 Oregon, State of Rhode Island, Georgia ForestWatch, Wild Virginia, Center for Biological Diversity, National Mining Association, American Farm Bureau Federation, National Environmental Development Association's Clean Air Project, Utility Air Regulatory Group, Brick Industry Association, South Coast Air Quality Management District, State of North Carolina.

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

1. Petitioners in No. 10-1132 below were Alpha Natural Resources, Inc., Coalition for Responsible Regulation, Inc., Great Northern Project Development, L.P., Industrial Minerals Association–North America, Massey Energy Company, National Cattlemen's Beef Association and Rosebud Mining Company.

2. Respondents below were the United States Environmental Protection Agency and Lisa P. 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 Regina McCarthy.

3. Additional petitioners below were Southeastern Legal Foundation, Inc., Michele Bachmann, Marsha Blackburn, Kevin Brady, Paul Broun, Dan Burton, Phil Gingrey, Steve King, Jack Kingston, John Linder, Tom Price, Dana Rohrabacher, John Shadegg, John Shimkus, Lynn Westmoreland, 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.; 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; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Alliance of Forest Owners; American Forest & Paper Association; National Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of the State of Mississippi; State of South Carolina; State of Nebraska; Utility Air Regulatory Group; Missouri Joint Municipal Electric Utility Commission; Sierra Club; 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 Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; American Fuel & Petrochemical Manufacturers; 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 Commis-

sion; Texas Railroad Commission; Texas General Land Office; and State of Texas.

4. Petitioner-intervenors below were National Association of Manufacturers; 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 Oilseed Processors Association; National Petrochemical and Refiners Association; American Fuel & Petrochemical Manufacturers; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

5. Respondent-intervenors below were Natural Resources Defense Council; Environmental Defense Fund; Sierra Club; Conservation Law Foundation, Inc.; Georgia Forest Watch; Natural Resources Council of Maine; Wild Virginia; State of New York; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania Department of Environmental Protection; State of Rhode Island; South Coast Air Quality Management District; Center for Biological Diversity; National Mining Association; Brick Industry Association; Peabody Energy Company; American Farm Bureau Federation; National Environmental Development Association's Clean Air Project; Utility Air Regulatory Group.

RULE 29.6 STATEMENT

Petitioners Coalition for Responsible Regulation, Inc., Alpha Natural Resources, Inc., Great Northern Project Development, L.P., and National Cattlemen's Beef Association have no parent companies, and no publicly-held corporation owns 10% or more of their stock.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 191-267) is reported at 684 F.3d 102. The order of the court of appeals denying a petition for rehearing en banc (J.A. 139-190) is unreported, but available at 2012 WL 6621785.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. That court denied timely petitions for panel rehearing and rehearing en banc on December 20, 2012. A petition for certiorari was timely filed on March 20, 2013 and granted on October 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 166 of the Clean Air Act, 42 U.S.C. § 7476, titled "Other pollutants" (part of Part C of Title I of the Act, titled "Prevention of Significant Deterioration of Air Quality," 42 U.S.C. §§ 7470-7492), provides, in pertinent part:

> (a) *Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides*
>
> In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations

not more than 2 years after the date of promulgation of such standards.

(b) *Effective date of regulations*

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 7410 of this title.

(c) *Contents of regulations*

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) *Specific measures to fulfill goals and purposes*

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) *Area classification plan not required*

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate mat-

> ter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410(c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

Other relevant provisions of the Clean Air Act are reproduced at Pet. App. 664a-680a (No. 12-1146).

INTRODUCTION

This case presents a straightforward question of statutory interpretation: Does EPA's decision to regulate mobile-source greenhouse gas (GHG) emissions under Title II of the Clean Air Act (Act) automatically compel stationary sources to obtain permits to emit GHG under Titles I and V of the Act? EPA answers "yes," even while conceding it must then rewrite unambiguous parts of the statute to avoid "severely undermin[ing] [the Act's] congressional purpose," 75 Fed. Reg. 31,514, 31,541-31,542 (June 3, 2010).

Petitioners provide many reasons to answer "no." For instance, the Utility Air Regulatory Group explains that the plain language and structure of Title I are inconsistent with regulating a globally dispersed pollutant such as GHGs. See Br. of Petitioner Utility Air Regulatory Group 20-32 (UARG Br.); see also Br.

of Petitioners Energy Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. (EIM Br.). And the American Chemistry Council demonstrates that the text of Title I demonstrates that only emissions of pollutants for which EPA has promulgated a national ambient air quality standard (NAAQS), in a region designated as "attainment" for that NAAQS, trigger stationary source permitting. See Br. of Petitioners Am. Chemistry Council et al. 15-23 (ACC Br.).

Respondents Coalition for Responsible Regulation, Inc., Alpha Natural Resources, Inc., Great Northern Project Development, L.P., and National Cattlemen's Beef Association (Coalition) offer another independent basis to conclude that EPA's interpretation is foreclosed by the statutory text: In Section 166 of the Act, 42 U.S.C. § 7476, Congress clearly directed how the PSD program could be extended to pollutants other than the two specifically mentioned in the statute, and EPA ignored those directives. Compliance with Section 166's substantive and procedural requirements not only is faithful to statutory text, but also avoids the absurdities inherent in EPA's reading and the need for administrative "tailoring" of unambiguous statutory provisions.

EPA's interpretation that a decision to regulate *mobile* sources triggers Title V permitting also is nonsensical: Title V simply codifies the Act's requirements otherwise applicable to *stationary* sources.

EPA's remarkable concession that its favored interpretation—which the panel held to be *compelled* by the statute—yields "absurd" consequences weighs heavily in favor of other interpretations that do not.

Petitioners and the Coalition have identified several. "[T]he simple and absolutely dispositive point in this case is the following: * * * [W]hen an agency is faced with two plausible readings of a statutory term, but one reading would cause absurd results, the agency cannot choose the absurd reading." J.A. 179 (Kavanaugh, J., dissenting from denial of reh'g en banc) (citing *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)).

STATEMENT OF THE CASE

1. Title I of the Act, including the Prevention of Significant Deterioration (PSD) program in Part C of that title, 42 U.S.C. §§ 7470-7492, is directed to the development and defense of NAAQS. *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (NAAQS are "the engine that drives nearly all of Title I of the [Act]").

a. 42 U.S.C. § 7409(a) directs EPA to promulgate NAAQS for air pollutants for which "air quality criteria" have been issued under 42 U.S.C. § 7408. NAAQS establish the maximum allowed concentrations of pollutants in the "ambient" air. *Train* v. *Natural Res. Def. Council*, 421 U.S. 60, 65 (1975).

The Act reserves to states primary responsibility for attaining NAAQS, through a state implementation plan (SIP). 42 U.S.C. § 7407(a). For each NAAQS, EPA must designate regions as either "attainment," "nonattainment," or "unclassifiable." *Id.* § 7407(d). Because area designations are "pollutant-specific," *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 350 (D.C. Cir. 1980), an area may be in attainment for one NAAQS, but nonattainment for another. J.A. 233.

b. Following EPA's approval of the first SIPs in 1972, *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253, 257 (D.D.C.), aff'd per curiam 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972), aff'd per curiam by an equally divided Court sub nom. *Fri* v. *Sierra Club*, 412 U.S. 541 (1973), ordered EPA to disapprove any SIP for an attainment area that would allow air quality to deteriorate to the level of a NAAQS.

Implementing that order, EPA promulgated regulations in 1974 to "prevent significant deterioration" in "area-wide concentrations" of sulfur dioxide (SO_2) and particulate matter (PM)—two pollutants for which EPA had then promulgated NAAQS. See 39 Fed. Reg. 42,510 (Dec. 5, 1974); *Alabama Power*, 636 F.2d at 347. The regulations required preconstruction permits for new major sources (and major modifications) in attainment areas. Permits ensured that (1) ambient air quality would not degrade beyond numerical "increments" for SO_2 and PM, and (2) sources would employ "best available control technology" (BACT) for SO_2 and PM. EPA acknowledged that, in the future, "it may become desirable to control deterioration due to * * * additional pollutants for which national standards might be set." 39 Fed. Reg. 31,000, 31,006 (Aug. 27, 1974).

In 1977, Congress codified the PSD program as Part C of Title I. See Pub. L. No. 95-95, 91 Stat. 731 (Aug. 7, 1977). Part C requires each SIP to contain "emission limitations and such other measures as may be necessary"—determined under regulations from EPA—to "prevent significant deterioration of air quality in each [air quality control] region" designated as attainment or unclassifiable. 42 U.S.C. § 7471.

Each new "major emitting facility" must obtain a preconstruction permit. 42 U.S.C. § 7475(a). To avoid unintended or disproportionate economic effects on small sources, the Act sets numerical emission thresholds below which a source is not subject to PSD permitting. See J.A. 1542; 42 U.S.C. § 7479(1) ("major emitting facility" means enumerated facilities that emit "one hundred tons per year or more of any air pollutant," and "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant"). Those thresholds make sense as applied to the two pollutants then regulated under the PSD program: SO_2 and PM.

No major emitting facility "may be constructed in any area to which th[e] [PSD program] applies" unless (among other things) "a permit has been issued for such proposed facility" following a demonstration that it will not cause or contribute to air pollution in excess of: (a) pollutant-specific numerical increments; (b) the NAAQS; or (c) any other applicable requirement of the Act. 42 U.S.C. § 7475(a)(1), (3). The facility must also be "subject to [BACT] * * * for each pollutant subject to regulation under th[e] [Act]." *Id.* § 7475(a)(4).

The Act establishes increments (i.e., maximum allowable increases from baseline) for SO_2 and PM. See 42 U.S.C. § 7473. For all "[o]ther pollutants"—including four named criteria pollutants and others for which NAAQS might later be promulgated—Congress "direct[ed] EPA to develop within two years [pollutant-specific] PSD programs." *Alabama Power*, 636 F.2d at 351; 42 U.S.C. § 7476.

Section 166 requires EPA to "conduct a study" and, by August 7, 1979, "promulgate regulations to

prevent the significant deterioration of air quality" from other pollutants for which NAAQS existed but for which EPA had yet devised a PSD program: "hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides." 42 U.S.C. § 7476(a). As to yet *other* pollutants, "for which [NAAQS] are promulgated after [the statute's effective date]," EPA must "promulgate [PSD] regulations not more than 2 years after the * * * [NAAQS]." *Ibid.*

Section 166 regulations may use different thresholds than the statutory PSD program for SO_2 and PM. See 42 U.S.C. § 7476(c) (regulations "shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in [the Congressional findings and declaration of purpose for Title I and Part C]."). The regulations must include "specific measures at least as effective as"—but not necessarily identical to—"the increments established [for SO_2 and PM] * * *, and may contain air quality increments, emission density requirements, or other measures." *Id.* § 7476(d).

Section 166 also provides a timeline for orderly implementation. It delays the effective date of any new PSD regulations until "one year after the date of promulgation," affords states 21 months to submit a "plan revision" to address any new permitting requirements, and directs EPA to "approve or disapprove the plan [revision] within 25 months." 42 U.S.C. § 7476(b).

c. EPA has interpreted "any air pollutant" in the statutory 100/250-ton thresholds—beyond which a source is a "major emitting facility" for PSD, 42

U.S.C. § 7479(1)—to mean not *any* pollutant, but *only* pollutants "subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50); see also 40 C.F.R. § 52.21(b)(1) (1978).

2. In 1990, Congress added Title V to the Act, requiring certain stationary sources to obtain a federal operating permit. 42 U.S.C. §§ 7661-7661f. Rather than "'impos[ing] new substantive air quality control requirements,'" a Title V permit "'consolidate[s] into a single document (the operating permit) all of the * * * [Act's] requirements applicable to a particular source of air pollution.'" *United States* v. *EME Homer City Generation, L.P.*, 727 F.3d 274, 280 (3d Cir. 2013) (quoting *Sierra Club* v. *Johnson*, 541 F.3d 1257, 1260-1261 (11th Cir. 2008)). Among other listed source types, Title V applies to "major stationary sources," defined as sources emitting 100 tons/year of "any air pollutant." 42 U.S.C. §§ 7602(j), 7661(2). As with PSD, EPA has interpreted "any air pollutant" in Title V to mean pollutants subject to regulation under the Act. 40 C.F.R. § 70.2.

3. *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007), held that GHGs fall within the Act's general definition of "air pollutant," in the context of mobile source regulation under Title II of the Act. On remand, EPA issued an Endangerment Finding, concluding that "elevated concentrations" of atmospheric GHGs "may reasonably be anticipated to endanger the public health and * * * welfare," and that "emissions of * * * [GHGs] from new motor vehicles contribute to th[is] air pollution." 74 Fed. Reg. 66,496, 66,516, 66,537 (Dec. 15, 2009). EPA also issued emissions standards for new cars in a joint rulemaking with the National

Highway Transportation Safety Administration. 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule").

EPA then concluded that regulating GHG emissions from cars under Title II triggers automatic stationary-source regulation under Titles I and V. See 74 Fed. Reg. 55,292, 55,294 (Oct. 27, 2009); 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Rule"). As a result, no state could issue a PSD or Title V permit to a source that emits GHG above certain thresholds without subjecting it to review for GHG. 75 Fed. Reg. at 17,006. EPA did not address how, or whether, this reading would advance the objectives in Title I and Part C of ensuring compliance with NAAQS and preventing deterioration of air quality, or Title V's objective of collecting otherwise applicable requirements.

EPA acknowledged that immediate stationary-source regulation of GHGs would generate "absurd" results Congress could not have intended, subjecting thousands of sources, including small, non-industrial sources, to burdensome permitting reviews, and imposing $22.5 billion in paperwork costs alone. 75 Fed. Reg. 31,514, 31,517, 31,540 (June 3, 2010) (Table V-1). EPA conceded that its interpretation would extend stationary-source permitting to "an extraordinarily large number of small sources," which would "incur unduly high compliance costs" and impose "overwhelming administrative burdens." *Id.* at 31,541. The Agency estimated that some 81,000 sources per year would become subject to PSD (compared to a baseline of 280 per year), and approximately 6 million sources to Title V (compared to a baseline of 14,700). *Id.* at 31,536, 31,538. EPA concluded that "applying the PSD and Title V requirements literally (as previously interpreted narrowly by

EPA) * * * would severely undermine congressional purpose." *Id.* at 31,541-31,542.

EPA sought to cure this self-made absurdity, not by revisiting its expansive interpretation of the statutory triggers, but by revising upward by several orders of magnitude ("tailoring") the Act's *statutory* thresholds. 75 Fed. Reg. at 31,514 ("Tailoring Rule"). EPA defined the phrase "subject to regulation" to exempt sources emitting under 100,000 tons/year of GHGs. The Tailoring Rule also established a series of reductions in the threshold over time, but even the final thresholds do not come within two orders of magnitude of the statutory triggers. See *id.* at 31,566. EPA rejected the possibility that it had an obligation—or even discretion—to interpret the Act to avoid these "absurd results." *Id.* at 31,548.

EPA then ordered states immediately to revise their SIPs to accommodate GHG regulation. See 75 Fed. Reg. 53,892 (Sept. 2, 2010), 75 Fed. Reg. 77,698 (Dec. 13, 2010); 75 Fed. Reg. 81,874 (Dec. 29, 2010). EPA declared some state rules void retroactively from their moment of adoption years earlier, in essence because the states did not anticipate that EPA would later regulate GHG at particular thresholds. 75 Fed. Reg. 82,430, 82,431, 82,433 (Dec. 30, 2010). Notwithstanding laws giving states at least three years to revise their SIPs (see 42 U.S.C. § 7410(a)(1); 40 C.F.R. § 51.166(a)(6)(i)), EPA immediately imposed a GHG federal implementation plan (FIP) on certain states. 75 Fed. Reg. 82,246 (Dec. 30, 2010).

4. Dozens of parties sought review of the Endangerment Finding and the Tailpipe, Timing, and Tailoring Rules pursuant to 42 U.S.C. § 7607(b). The panel upheld the rules in their entirety, finding

EPA's interpretation "compelled" by the Act. J.A. 193-194, 236.

Under Step 1 of *Chevron USA Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the panel held that the term "any air pollutant" in 42 U.S.C. 7479(1) "unambiguously means 'any air pollutant regulated under the [Act].'" J.A. 241.[1] The panel adopted this interpretation while acknowledging that it would result in "overwhelming permitting burdens that would * * * fall on permitting authorities and sources." *Id.* at 235, 257. The statute compelled an "expansive" approach, in the panel's view, even though EPA itself had "narrow[ed] the literal statutory definition," which "nowhere requires that 'any air pollutant' be a *regulated* pollutant." *Id.* at 237. The panel rejected the "literal statutory definition" as yielding "absurd" results (*id.* at 238), while concluding that EPA's interpretation (which *also* yielded absurd results) was compelled (*id.* at 236, 246).

The panel rejected "three alternate interpretations" of the statute. J.A. 241. First, it rejected "a greenhouse gas-exclusive interpretation of 'pollutant,'" under which "a source would qualify as a 'major emitting facility' only if it emits 100/250 [tons per year] of 'any air pollutant' except [GHGs]," and sources subject to PSD would not be required to install BACT for GHGs. J.A. 242; see UARG Br. 25-32. The panel viewed the phrase "each pollutant subject

[1] The panel rejected EPA's contention that challenges to its interpretation of "any air pollutant" in 42 U.S.C. §§ 7475(a) & 7479(1) were time-barred. J.A. 225-231.

to regulation under [the Act]," 42 U.S.C. § 7475(a)(4), as "without qualification." J.A. 242.

Second, the panel rejected a reading under which a stationary source triggers PSD permitting only if it "has major emissions of a NAAQS criteria pollutant" and "is located in an area attaining *that pollutant's* air quality standard." J.A. 246; ACC Br. 15-23. The panel acknowledged that this reading would "alleviat[e] any 'absurd results'" because "EPA [has] declined to make greenhouse gases a NAAQS criteria pollutant." *Ibid.* Although the term "any air pollutant" is "capable of narrower interpretations," the panel "garnered" no textual basis for narrowing here. *Id.* at 251, 252.

Finally, the panel rejected the argument that "to regulate new pollutants through the PSD program, EPA was required to go through the process prescribed by [Section] 166." J.A. 255. The panel acknowledged that Section 166 "provides specific steps that EPA must take when designating new 'pollutants for which [NAAQS]' apply." *Ibid.* And it did not dispute that EPA "failed to follow" those steps here. J.A. 256. But the panel interpreted Section 166 as applying "only to new pollutants for which [NAAQS] apply." *Ibid.* (internal quotation marks omitted). Because EPA "never classified [GHGs] as a NAAQS criteria pollutant," Section 166 "has absolutely no bearing" on EPA's "addition of [GHGs] into the PSD [c]onstellation." *Ibid.* ("entirely inapplicable"). The lower court also invoked its 1980 decision in *Alabama Power*, which it viewed as "reject[ing] a nearly identical argument." *Ibid.*

5. The court of appeals denied en banc rehearing over two substantial dissents. J.A. 139, 145, 170.

EPA's expansive interpretation, Judge Kavanaugh explained, "has a glaring problem" and "would lead to absurd results" that even EPA conceded were "'contrary to'" and "'undermine[d]'" "'what Congress had in mind.'" *Id.* at 172-173 (quoting 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009)). EPA erred by rejecting "the narrower and more sensible interpretation of the term 'air pollutant,'" and instead "re-wr[iting] the very specific 250-ton [statutory] trigger" to "'tailor' the absurdity" it had created. *Id.* at 173-174. Given the absurdities infecting EPA's interpretation, and "[i]n the context of the [PSD] program as a whole," Judge Kavanaugh found it "straightforward" that "the term 'air pollutant' refers to the NAAQS air pollutants" and thus EPA had "exceeded its statutory authority." *Id.* at 175, 170. Judge Brown also dissented, concluding that regulation of GHGs under the Act "rest[s] on the shakiest of foundations," because "[a]mbient air quality * * * was the point, purpose, and focus of the [Act]." J.A. at 147-149.

SUMMARY OF ARGUMENT

The panel erred in holding the Act *compels* the conclusion that regulating GHGs from cars under Title II automatically triggers stationary-source permitting under Titles I and V, which even EPA concedes leads to absurd results requiring *ad hoc* "tailoring" of unambiguous statutory provisions. EPA may add new pollutants to PSD only through Section 166, which avoids the absurd results and other legal infirmities of EPA's approach.

The panel erred in concluding that Section 166 "has absolutely no bearing" (J.A. 256) on the scope of the PSD program of which it is a central part. Sec-

tion 166 provides EPA flexibility to establish specific measures for permitting new pollutants, and a "framework for stimulating improved control technology." 42 U.S.C. § 7476(c). Section 166 also provides orderly timeframes for implementation, consistent with the Act's structure of cooperative federalism, *id.* § 7476(b), in contrast to EPA's hurried imposition of federal dictates. EPA unquestionably failed to follow Section 166 here. J.A. 256.

The panel also erred by dismissing arguments about Title V, mistakenly concluding that they were waived. EPA erred by treating a regulation inapplicable to stationary sources (the Tailpipe Rule) as a trigger for a permitting program that merely collects otherwise applicable *stationary*-source requirements. In addition, Title V expressly forbids EPA from exempting major sources, as it did here.

ARGUMENT

EPA does not claim that its GHG rulemakings addressing Titles I and V of the Act do anything to advance the purposes of those titles. Rather, EPA contends that statutory text compels its rules regardless of their effect. A careful examination of the statute as a whole, considering text, context, and purpose, shows that the Act forecloses EPA's interpretation.

I. EPA's Determination That The Tailpipe Rule Triggers PSD Regulation Conflicts With Section 166 Of The Act

A. EPA Failed To Follow The Statutory Mechanism For Extending The PSD Program To New Pollutants

The plain text of Part C reflects Congress's intent to prevent significant deterioration of criteria air pollutants regulated at the time of its enactment in 1977. The Act contains explicit requirements for SO_2 and PM, the two criteria pollutants for which EPA already had developed a PSD program. See 38 Fed. Reg. 25,678 (Sept. 14, 1973) (SO_2); 36 Fed. Reg. 8,186 (Apr. 30, 1971) (PM). Section 163 specifies numerical increments ("maximum allowable increases over baseline concentrations") for those pollutants. 42 U.S.C. § 7473(b). Congress's focus on PM and SO_2 is consistent with the EPA regulations on which it based the PSD statute. See 39 Fed. Reg. at 31,006 (addressing SO_2 and PM).

Section 166 also instructs EPA how to address the criteria pollutants then in existence other than SO_2 and PM, including "hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides." 42 U.S.C. § 7476(a). And EPA must issue PSD "regulations" for any other pollutants "for which [NAAQS] are promulgated after August 7, 1977." *Ibid.* In directing EPA to "promulgate [PSD] regulations" for such air pollutants, *ibid.*, Congress obviously assumed that the statutory PSD program for SO_2 and PM would not apply of its own force.

With respect to "other pollutants," Section 166 grants EPA flexibility to establish "numerical

measures against which permit applications may be evaluated" (i.e., increments or triggering thresholds), and to create a "framework for stimulating improved control technology" (i.e., a BACT-type element). 42 U.S.C. § 7476(c). Although regulations for "[o]ther pollutants" "shall provide specific numerical measures against which permit applications may be evaluated," they need not be identical to the statutory program if they are "at least as effective." *Id.* § 7476(c), (d). Section 166 provides flexibility to ensure "protection of air quality values" while remaining faithful to "the goals and purposes [of Title I and Part C]." *Id.* § 7476(c).

Section 166 also sets an orderly implementation schedule. Any new regulations take effect only "one year after the date of promulgation," and states have "21 months" to submit a "plan revision" to reflect new permitting requirements. 42 U.S.C. § 7476(b). The one-year delay allows Congress to review the rules before the states must implement them. See 72 Fed. Reg. 54,112, 54,118 (Sept. 21, 2007) (citing H.R. Conf. Rep. 95-564, at 151 (1977)). The statute further contemplates EPA "approv[al] or disapprov[al] [of] the plan [revision]" within "25 months." *Ibid.*

Congress's expectation that EPA would address additional pollutants by pollutant-specific regulation, not by shoehorning them into the statutory program for SO_2 and PM, is confirmed by how unsuited that program is to regulating a non-criteria pollutant such as GHGs. Petitioners explain this mismatch in greater detail. See UARG Br. 25-32; ACC Br. 15-23; see generally EIM Br.

Among other anomalies, Section 161 applies to "prevent significant deterioration of air quality in

each region * * * designated pursuant to section 7407 * * * as attainment or unclassifiable [for a NAAQS,]" 42 U.S.C. § 7471, but there are no such "region[s] * * * designated" for GHGs because EPA has not promulgated a NAAQS for GHGs. Section 162 contemplates PSD increments varying with location, such as national parks. *Id.* § 7472. That requirement makes no sense for GHGs, which are uniformly distributed around the globe. Nor does Section 165(a)(4)'s requirement that a "proposed facility" be "subject to [BACT] * * * for each pollutant subject to regulation under this chapter," *id.* § 7475(a)(4), have meaning in a program that prevents ambient air quality from deteriorating to the level of the NAAQS, absent a NAAQS for GHGs.

These textual markers demonstrate that Congress created a three-step PSD program: (1) the statute applies of its own terms to SO_2 and PM; (2) EPA must develop a *regulatory* PSD program for hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides within a certain time; and (3) EPA must promulgate regulations to address any future NAAQS pollutants. The statute contains no indication that EPA should apply the statutory (SO_2 and PM) PSD program to non-criteria pollutants: Any future application of Part C is limited to criteria pollutants—i.e., pollutants "for which [NAAQS] are promulgated after August 7, 1977."

In this context, the phrase "any air pollutant" in Section 169(1)—and the phrase "any pollutant subject to regulation under th[e] [Act]," in Section 165(a)(4)—are best understood in their literal, present-tense sense, as applying to pollutants subject to regulation *in 1977*. See *United States* v. *Wilson*, 503 U.S. 329,

333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). That reading fulfills the PSD program's stated purposes, is consistent with that Part's other provisions and legislative history, and avoids the absurdities that cause EPA to "tailor" the Act.

B. Section 166 Provides The Exclusive Mechanism By Which "Other Pollutants" Can Trigger PSD Regulation

Read in light of familiar principles of statutory construction, Section 166 establishes the exclusive pathway for bringing "other pollutants" into Part C.

The statute contains several strong textual indications that new pollutants do not trigger PSD permitting unless EPA has complied with Section 166. Section 166(a) directs EPA to "conduct a study" and promulgate "regulations to prevent the significant deterioration of air quality" resulting from the enumerated pollutants. Under Section 165, no permit may issue unless EPA first reviews it "in accordance with regulations promulgated by the Administrator," 42 U.S.C. § 7475(a)(2). Issuance of regulations under Section 166 is therefore a practical prerequisite to PSD permitting. Section 165 also directs a permitting authority to determine whether a proposed facility will "cause, or contribute to, air pollution in excess of * * * maximum allowable increase * * * for any air pollutant," *id.* § 7475(a)(3); only under Section 166 does EPA establish such increments for other pollutants. *Id.* § 7476(c).

That Congress established an express, detailed mechanism to incorporate other criteria pollutants creates a strong inference that Congress did not "give

[EPA] a free hand authority," *Alabama Power*, 636 F.2d at 354, to expand the PSD program's scope while ignoring procedures specified for such "[o]ther pollutants." That "Congress include[d] particular language" for adding new NAAQS pollutants to the PSD program "but omit[ted]" any reference to adding non-NAAQS pollutants implicates the "genera[l] presum[ption] that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) (internal quotation marks omitted). Congress's care in crafting a system for including new NAAQS in a statute focused on their achievement and maintenance—and lack of any reason why EPA should have free reign to add non-NAAQS pollutants—"justif[ies] the inference" that Congress excluded non-NAAQS pollutants "by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

To similar effect, the absence of any language conferring discretion on EPA to extend PSD at will violates the rule that "[c]ourts do not lightly conclude that Congress intended such major consequences [as expanding PSD permitting to include GHGs] absent some indication that Congress meant to do so." J.A. 179 (Kavanaugh, J., dissenting) (citing *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-61 (2000)).

EPA's error in "cho[osing] an admittedly absurd reading over a perfectly natural reading of the relevant statutory text" (J.A. 187 (Kavanaugh, J., dissenting)) is highlighted by considering how compliance with Section 166 avoids the legal and practical problems that required EPA's "tailoring." Under Sec-

tion 166, EPA can establish appropriate "numerical measures," as to which the statute is silent for GHGs. EPA may develop a "framework for stimulating improved control technology," rather than mechanical application of BACT—an important degree of flexibility given that GHGs are not really susceptible to BACT. See Chamber Br. 18; EIM Br. And EPA need not establish an "area classification plan," a useless construct for GHGs given their uniform global distribution.

Section 166 also has the advantage of allowing for orderly implementation, consistent with the "wide discretion" the Act reserves to the states in crafting implementation plans. *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 470 (2004). As noted, Section 166 provides EPA two years to promulgate PSD regulations after adopting a new NAAQS, delays implementation for "one year," affords states 21 months to submit a "plan revision," and directs EPA to act on the revision "within 25 months." 42 U.S.C. § 7476(b). By contrast, EPA's "SIP Call" regulations gave some states mere weeks to update their plans before imposing a federal plan.

C. The Panel Misreads The Statute By Treating Section 166 As Irrelevant

1. Rather than engaging with the above analysis, the panel summarily concluded that Section 166 "applies only to new 'pollutants for which [NAAQS]' apply." J.A. 256 (quoting 42 U.S.C. § 7476(a)). Consequently, EPA could add *non*-NAAQS pollutants as a permit trigger, without regard to Section 166.

This approach reads a fragment of statutory text ("pollutants for which [NAAQS] are promulgated," 42

U.S.C. § 7476(a)) "'in isolation,'" contrary to the cardinal rule that courts must "'read statutes as a whole.'" *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010) (quoting *United States* v. *Morton*, 467 U.S. 822, 828 (1984)). The panel ignored the more plausible reading: that Section 166 applies to new NAAQS because Part C of the Act, in which it is located, applies only to NAAQS pollutants.

Even if Part C were not so limited, the panel's reading ignores other clues, including Section 166's caption, which applies to "[o]ther pollutants" without limitation to NAAQS. 42 U.S.C. § 7476. It disregards Section 166's repeated use of the mandatory "shall," imposing numerous requirements on how EPA may subject "[o]ther pollutants" to PSD. And the panel attributes to Congress the perverse intention of imposing detailed restrictions on EPA's addition of new NAAQS pollutants to PSD (a program enacted to address region-specific concerns), while requiring EPA to immediately apply the statutory PSD program built for SO_2 and PM to any other non-NAAQS pollutant EPA identifies, no matter how poor the fit.

Section 166's reference to NAAQS confirms what is evident from the PSD program's text and structure: Permitting is triggered only by emission of NAAQS pollutants by a source located in a region that is in attainment for that NAAQS. This understanding harmonizes Section 166's reference to NAAQS with the PSD program's broader scope.

2. The panel also relied on *Alabama Power* v. *Costle*, 636 F.2d 323, 405-406 (D.C. Cir. 1980), which rejected an attempt to postpone Section 165(a)'s "Au-

gust 7, 1977" effective date for PSD regulation of the four pollutants named in Section 166(a). J.A. 256.

Alabama Power is not binding on this Court, and any persuasive value is undercut because the D.C. Circuit did not have occasion to consider the absurdities that result from applying that interpretation to GHGs. Even if the court's interpretation were facially "plausible" when viewing Section 166 in isolation, it must yield to "the simple and absolutely dispositive point in this case": EPA's reading of the statute "produces what even EPA itself admits are absurd consequences." J.A. 179 (Kavanaugh, J., dissenting).

This Court has not hesitated to correct an error of statutory interpretation, even (unlike here) in the absence of absurd results and where many other courts have endorsed that interpretation. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 643 (2001) (Ginsburg, J., dissenting) (noting that majority decided question differently than every court of appeals to consider it); *Jones* v. *United States*, 526 U.S. 227, 254 (1999) (Kennedy, J., dissenting) (same). This Court's obligation independently to decide the merits of a question presented, without giving other courts' decisions precedential weight, is particularly important where time and circumstances reveal practical and legal infirmities in an earlier approach. See, *e.g.*, *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878-2881 (2010).

In any event, the panel drew the wrong lesson from *Alabama Power*, which squarely rejected an analogous attempt by EPA to tailor statutory permitting thresholds to offset the Agency's own implausible interpretation. EPA had defined "potential to emit"

in a way that inflated the number of sources subject to PSD review beyond what was "cost-effective," and "would strain to the limits the agency's resources." 636 F.2d at 352-356. To solve this (self-imposed) problem, EPA sought to exempt from PSD review any source with emissions below 50 tons/year, notwithstanding the statute's explicit 100/250 ton-per-year thresholds. *Id.* at 355-356. The D.C. Circuit held that EPA's reading "falls well beyond the agency's exemption authority," and adopted—despite deference to EPA—a different reading of the threshold trigger. *Id.* at 353-355. For the same reasons, EPA's current efforts to "tailor" the clear statutory thresholds to mitigate its self-made absurdities must fail.

3. The panel also held that GHGs are unambiguously a "pollutant subject to regulation under th[e] [Act]" for purposes of Section 165(a)(4)'s BACT requirement. J.A. 242. As a result, sources subject to PSD because of their emissions of *other* pollutants must satisfy BACT for GHGs. As petitioners explain, this reading ignores textual reasons why the PSD statute is incompatible with GHG regulation. See UARG Br. 28; see generally EIM Br. (explaining why BACT for GHGs constitutes regulation of means of production, not emission controls). It also ignores Section 166(c)'s directive that any regulatory PSD program must include "a framework for stimulating improved control technology"—a clear reference to crafting a "BACT-like" approach appropriate for the new pollutant, replacing mechanical application of Section 165(a)(4). Critically, under Section 166, EPA may establish appropriate permitting thresholds for new pollutants, avoiding the absurdities created by

its current approach and the need for ad hoc "tailoring" of the statutory thresholds for PM and SO_2.[2]

II. EPA Misreads The Act As Requiring Pointless Title V Regulation

Based on its interpretation that the term "any air pollutant" in Title V means any pollutant subject to regulation anywhere in the Act, 40 C.F.R. § 70.2, EPA concluded that regulation of GHGs from cars under Title II also triggered mandatory Title V permitting of GHG emissions from stationary sources. EPA did not, and could not, explain why Congress would have triggered a permitting requirement intended solely to collect otherwise applicable *stationary*-source requirements, *EME Homer City*, 727 F.3d at 280, based on EPA having promulgated a requirement (the Tailpipe Rule for cars) inapplicable to stationary sources.

Regardless, the statute forecloses EPA's approach. Although Title V grants EPA discretion to exempt certain sources, it expressly prohibits EPA from ex-

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[2] That EPA has previously applied Section 165(a)(4)'s BACT requirement to non-NAAQS pollutants, see 75 Fed. Reg. at 31,561-31,562, does not immunize the Agency's interpretation from challenge. "Age is no antidote to clear inconsistency with a statute," particularly where a change in circumstances has recently removed that interpretation from its prior "unscrutinized and unscrutinizable existence." *Brown* v. *Gardner*, 513 U.S. 115, 122 (1994) (citation omitted); *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 165-167 (2004) (rejecting as inconsistent with statute's "clear meaning" agency interpretation endorsed for nearly 20 years). EPA's own concession that stationary-source GHG permitting generates "absurd" results constitutes a significant new circumstance that justifies revisiting the Agency's historical position.

empting any "major source." 42 U.S.C. § 7661a(a) provides that EPA may "exempt one or more source categories" from Title V permitting if "compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome[,] * * * except that the Administrator may not exempt any major source from such requirements." Yet exempting "major source[s]" of GHGs is precisely what EPA did in the Tailoring Rule. 75 Fed. Reg. at 31,523-31,524.[3] This clear statutory violation reveals EPA's error in interpreting "any air pollutant" in Title V to include GHGs simply because they are regulated under Title II.

[3] The panel erroneously held that petitioners "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V" by "failing to raise [the argument] in their opening brief." J.A. 241. But petitioners (including the Coalition) squarely raised the issue, devoting an entire sub-heading to the argument that "EPA is expressly forbidden to 'exempt any major source' from Title V requirements." Joint Opening Br. of Non-State Pet'rs & Supporting Intervenors at 46-47, No. 10-1073 (D.C. Cir. Dec. 14, 2011) (Doc. 1347709).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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