No. 12-1269

In the
Supreme Court of the United States

STATE OF TEXAS, ET AL.,

Petitioners,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATES OF KANSAS, MONTANA, AND WEST VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI* STATES

The States of Kansas, Montana, and West Virginia have a direct and substantial interest in the Court granting the petition and reversing the D.C. Circuit's judgment. The decision below, affirming the Environmental Protection Agency's (EPA) pre-construction permitting regime for greenhouse gas (GHG) emissions, imposes immense administrative costs upon the States that must administer the program. According to EPA, state "permitting authorities will expend, on average, 301 hours to issue a PSD permit to an industrial source, [which] would cost $23,243," and they will expend "210 hours * * * to permit a commercial or residential source, which would cost $16,216." Pet. App. 212a.

Although the *amici* States file this brief in support of the petition for certiorari filed by the State of Texas *et al.*, other related petitions for certiorari have substantial merit and deserve this Court's consideration. See, *e.g.*, *Util. Air Reg. Group* v. *EPA*, No. 12-1146; *Commonwealth of Va.* v. *EPA*, No. 12-1152; *Pacific Legal Foundation* v. *EPA*, No. 12-1153; *Chamber of Commerce* v. *EPA*, No. 12-1272.

INTRODUCTION

Less than two years ago, this Court remarked upon the absurdity of attempting to impose a permitting regime for carbon dioxide. "Of necessity," the Court stressed, "Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit." *Am. Elec. Power Co.* v. *Connecticut* (*AEP*),

131 S. Ct. 2527, 2538 (2011). But EPA has attempted to do just that, in the rulemakings challenged in this case and upheld by the decision below. The result is a regulatory regime that, by EPA's own admission, "would have been unrecognizable to the Congress that designed" the governing statutory framework. Pet. App. 287a.

In 1977, Congress established the Clean Air Act's "Prevention of Significant Deterioration" (PSD) program, creating a preconstruction permitting program to prevent major polluters from degrading air quality, and yet "not impose undue costs to sources or undue administrative burdens to permitting authorities." See Pet. App. 112a. As EPA recognizes, the scope of this program was intentionally limited: Congress "intended to limit the PSD program to large industrial sources because it was those sources that were the primary cause of the pollution problems in question and because those sources would have the resources to comply with the PSD requirements." Pet. App. 285a-286a.

Yet EPA's interpretation of that statute, in the new carbon dioxide permitting regulations under challenge, would result in a program that is *by degrees of magnitude* more burdensome than before: Although Congress expected the program "to be measured in the hundreds or perhaps thousands of permits each year," Pet. App. 263a, the decision below would allow "*hundreds of thousands* of small stationary sources" to now fall under the greenhouse gas permitting programs. Pet. App. 35a (emphasis added). Such results are, by EPA's own admission, "absurd." Pet. App. 109a.

The decision below concludes that this outcome is dictated by this Court's own decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). Simply put, the D.C. Circuit has misinterpreted and misapplied that precedent. *Massachusetts* decided only what qualifies as an "air pollutant" for purposes of the Clean Air Act's "mobile source" emissions program—that is, for Title II of the Act. This Court did not purport to decide what constitutes "any air pollutant" in the Clean Air Act's entirely separate preconstruction permitting program under Title I of the Act. See *infra* pp. 4-12.

Yet by resting its analysis on an exaggerated and misconceived view of *Massachusetts* v. *EPA*, and by allowing EPA's theory of regulation-by-automatic-implication to defeat petitioners' standing, the court below allowed EPA to avoid meaningful judicial review of its statutory interpretation. By incorrectly finding that the court lacked jurisdiction to consider the Tailoring Rule, the decision below in fact avoided *any* holistic view of EPA's statutory interpretation of "any air pollutant" in the PSD program, and allowed the agency to make an interpretation that is, when taken within the context of the surrounding language of the statute, absurd. See *infra* pp. 12-20.

The decision below carries enormous costs, to be borne not just by regulated industries and American consumers, but also by States forced to administer this vastly expanded preconstruction permit system. These burdens are in addition to the broader opportunity cost—namely, the lost opportunity to develop an effective, market-based program to reduce greenhouse gas emissions throughout the country. If EPA's *ad hoc*, case-by-case permitting

program becomes entrenched, a holistic, cost-effective, market-based solution will likely never be achieved. See *infra* pp. 21-25.

The States signing this brief as *amici curiae* respectfully request that the Court hear this case and vacate the decision below. Only then can the question of how to regulate greenhouse gas emissions from stationary sources be resolved in a manner consistent with Congress's intent and understood meaning—and free from "absurd results" of EPA's own making.

REASONS FOR GRANTING THE PETITION

I. Neither The Clean Air Act's Terms Nor *Massachusetts* v. *EPA* Unambiguously Support EPA's "Expansive" Statutory Interpretation

As the State Petitioners explain, certiorari is necessary to determine whether Congress in fact authorized EPA to regulate greenhouse gas emissions through the PSD program of state-administered preconstruction permits. Pet. 28. That question centers upon the Clean Air Act's Section 169(1), which provides that a permitting requirement is triggered by the emission of "any air pollutant" above a statutorily defined threshold amount. See 42 U.S.C. § 7479(1).

In affirming EPA's interpretation of the statute, the decision below concludes that the agency's interpretation is dictated by this Court's own decision in *Massachusetts*, 549 U.S. 497, as well as by the "unambiguous" terms of the statute itself. Neither basis withstands scrutiny. Indeed, the court

and EPA ultimately concede that "any air pollutant" cannot mean for Title I's PSD program what "air pollutant" meant for Title II's mobile-source program in *Massachusetts* v. *EPA*. And they further concede that the statute's "unambiguous" meaning cannot be its literal meaning.

1. The decision below concludes that EPA's interpretation of Title I's PSD permitting trigger is controlled by this Court's own prior decision in *Massachusetts* v. *EPA*: "we are faced with a statutory term—'any air pollutant'—that the Supreme Court has determined is 'expansive,' and 'unambiguously' includes greenhouse gases." Pet. App. 73a (citing *Massachusetts*, 549 U.S. at 529) (brackets omitted).

But *Massachusetts* v. *EPA* did not interpret the term "any air pollutant," as found in Section 169(1) of the Clean Air Act (42 U.S.C. § 7479(1)). In that case, the Court considered how to interpret "air pollutant" in the context of the Act's Title II, which governs automobile emissions. See *Massachusetts*, 549 U.S. at 506, 532.

In *Massachusetts*, the Court ultimately held that "air pollutant," as defined in 42 U.S.C. § 7602(g) and applied to automobile emissions regulations, unambiguously includes greenhouse gases. 549 U.S. at 528-29. But in reaching that conclusion, the Court stressed that its interpretation of "air pollutant" would not lead to "extreme" consequences. *Id.* at 531. Its analysis was tailored to the specific context of Title II, and it did not purport to decide how the term "any air pollutant" would be interpreted and administered in Title I.

In fact, the Commonwealth of Massachusetts and other petitioners in that case stressed that the Court's decision would have *no* bearing on the separate question of how to interpret statutory provisions beyond Title II's mobile-source context:

> The federal program for controlling air pollution from motor vehicles was first created in 1965, five years before the 1970 Act created the [National Ambient Air Quality Standards (NAAQS)] program. *The programs were not merged, and they retain significant independent status and effects*. Organizationally, mobile sources are regulated under Title II of the Act, which is separate from Title I, concerning the NAAQS. * * * Furthermore, the two programs cover different pollutants.

Brief for Petitioners at 28, *Massachusetts*, 549 U.S. 497 (No. 05-1120) (emphasis added).[1]

What the Commonwealth of Massachusetts said about NAAQS holds all the more true for the PSD pre-construction permitting framework. Congress enacted PSD to give increased protection to local air quality in areas currently in attainment of national ambient air quality standards. See, *e.g.*, *New York* v. *EPA*, 413 F.3d 3, 12 (D.C. Cir. 2005). Congress aimed to not just "protect the air quality in national parks

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[1] In responding to its critics' attempts to tie Title II's mobile-source regulatory framework to Title I's stationary-source regulations, Massachusetts went so far as to denounce their conflation of Titles I and II as "a classic debater's trick," an attempt to "change the subject." *Id.*

and similar areas of special scenic or recreational value, and in areas where pollution was within the national ambient standards," but also to "assur[e] economic growth consistent with such protection." *Envtl. Def.* v. *EPA*, 489 F.3d 1320, 1323 (D.C. Cir. 2007).

This purpose differs entirely from the Title II mobile-source program at issue in *Massachusetts*, as the successful petitioners in that case stressed. The requirement that stationary sources obtain state-issued permits before emitting carbon dioxide entails a host of practical problems, none of which were considered in *Massachusetts*. These are precisely the types of considerations that justified the Court's acknowledgment, much more recently, that "Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit." *AEP*, 131 S. Ct. at 2538.[2]

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[2] The Court further observed in *AEP* that EPA's regulation of stationary sources' greenhouse gas emissions would occur, if at all, pursuant to New Source Performance Standards (NSPS), a federal program with simple, rate-based emissions caps. See 131 S. Ct. at 2538-39. The PSD program, in contrast, is designed to provide protections over-and-above NSPS standards, in order to protect *local air quality* in certain regions. The Court's analysis of NSPS instead of PSD in *AEP*, and its rejection of a permit-based framework for greenhouse gas emissions, was significant, because the Government's brief had focused predominantly on its PSD program rather than its NSPS program. See Brief for Tenn. Valley Auth. at 47-50, 50-51, *AEP*, 131 S. Ct. 2527 (No. 10-174) (PSD and NSPS, respectively).

Sometimes "the same phrase used in different parts of the same statute means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506 (2010). Indeed, this Court has recognized that the Clean Air Act is precisely such a statute for which common or similar terms, when used in disparate parts of the Act, "may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007). To that end, Title I's PSD provisions must be interpreted in their own context. This interpretation is not dictated by *Massachusetts* v. *EPA*.

2. In concluding that Section 169(l)'s "any air pollutant" includes greenhouse gases, the decision below places great weight on the word "any." Pet. App. 69a. Noting this Court's observation, in *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997), that "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" the lower court concludes that "Congress's use of the broad, indiscriminate modifier 'any' thus strongly suggests that the phrase 'any air pollutant' encompasses greenhouse gases." Pet. App. 69a.

But in presuming that "any" must have "an expansive meaning," the decision below ignores this Court's warning elsewhere that "any" is not *always* susceptible to an "expansive" interpretation: "any," when used in statutes, "can and does mean different things depending upon the setting." *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132 (2004). Thus, in other cases this Court "has specifically held

that in context the word 'any' may be construed in a non-expansive fashion." *Bell Atl. Tel. Cos.* v. *FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (citing *O'Connor* v. *U.S.*, 479 U.S. 27, 31 (1986)).

As this Court further explained in *Nixon*, "[t]o get at Congress's understanding" of what "any" means in a given statute, "it helps if we ask how Congress could have envisioned the [statute] actually working if the [agency] applied it" with such a broad construction. 541 U.S. at 132. In this case, as EPA itself concedes, if Section 169(1)'s "any air pollutant" were to cover greenhouse gases then the result would be a PSD program that "would have been unrecognizable to the Congress that designed" it. Pet. App. 287a.

3. Recognizing some of the problems inherent in reading "*any* air pollutant" literally, as well as the problems in simply applying *Massachusetts*'s broad definition of "air pollutant" in this context, the lower court and EPA ultimately adopt a definition of "any air pollutant" that "slightly narrows the literal statutory definition." *Id.* at 70a. They conclude that "any air pollutant" must mean "any *regulated* air pollutant"—including pollutants such as greenhouse gases which EPA has regulated only in a Title II mobile-source regime. *Id.* (emphasis added).

But in adopting that interpretation, the decision below does not merely hold that this interpretation is "reasonable," or even that it is the best of several competing, plausible interpretations. Rather, the court affirmatively concluded that "any regulated air pollutant" is, "in this context, the *only* plausible reading of 'any air pollutant.'" *Id.* at 71a (emphasis added).

The court's interpretive certainty is not matched by correspondingly clear evidence that Congress has "directly spoken to the precise question at issue," such that EPA's chosen interpretation of the statute reflects "the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The decision urges that it "makes sense" to subject all "regulated" air pollutants to PSD requirements, Pet. App. 71a-72a; it urges that this interpretation "is consistent with" the focus of the PSD program, *id.* at 72a; and it urges that this interpretation would help to ensure that the PSD program promotes the statute's "Congressional declaration of purpose," *id.* at 72a-73a. Yet nowhere does the decision below show that EPA's interpretation is the *only* one that "makes sense," is "consistent with" other parts of the PSD program, and would promote Congress's general purposes. In other words, the decision below attempts to demonstrate that the agency's interpretation is *reasonable*, but it does not demonstrate that the statute is *unambiguous*.

In fact, as the State Petitioners and others demonstrate, Title II's "any air pollutant" may be susceptible to multiple possible interpretations. See, *e.g.*, Pet. 30 ("There are several ways for this Court to hold that stationary-source greenhouse-gas emissions fall outside EPA's regulatory authority."). Judge Kavanaugh's dissent from the court's denial of rehearing *en banc*, too, offers an alternative interpretation more soundly rooted in the statutory

text than the interpretation endorsed by the decision below and by EPA. Pet. App. 578a.[3]

Furthermore, Judge Kavanaugh's dissent reiterates several of the reasons why the interpretation endorsed by the decision below is objectively unreasonable:

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[3] This is not to say that Judge Kavanaugh's own preferred interpretation is necessarily the only or even the best interpretation in all respects. Although he stresses that "any air pollutant," for purposes of triggering the PSD permit requirements, most reasonably means NAAQS pollutants, Pet. App. 578a, he elsewhere suggests that once a non-greenhouse-gas pollutant triggers PSD requirements for a facility, "each pollutant" might be defined differently for purposes of the "best available control technology" provision so that the facility would then *still* need to employ "best available control technology" for greenhouse gas emissions under that one provision of PSD, *id.* at 573a (quoting 42 U.S.C. § 7475(a)(4) ("each pollutant subject to regulation under this chapter")). That requirement, in turn, would still require the facilities to regulate 86% of greenhouse gas emissions that EPA currently plans to regulate through the PSD program. See Petition for Writ of Certiorari at 24 n.12, *Am. Chem. Council* v. *EPA*, No. 12-1248 (filed Apr. 18, 2013). By contrast, interpreting "air pollutant" consistently across the PSD program to cover only NAAQS "pollutants" would ensure that PSD would continue to protect each local community from pollutants that actually harm that community, while not transforming PSD into an unprecedentedly broad regulatory program utterly unforeseen by the Congress that enacted it. See Petition for Writ of Certiorari at 8, *Util. Air Reg. Group* v. *EPA*, No. 12-1146 (filed Mar. 20, 2013).

First and foremost, to include pollutants "regulated" only under the mobile-source program necessarily produces the "absurd results" that EPA itself later proposes to solve with the "Tailoring Rule." See *id.* at 576a.

Second, EPA's broad interpretation of "any air pollutant" carries with it the "counterintuitive and extreme" result of sweeping "[t]ens of thousands of businesses and homeowners * * * into the Clean Air Act's purview for the first time" and hitting them "with permitting costs averaging $60,000," along with other burdens that could "deter numerous projects from even starting in the first place." *Id.* at 580a-581a.

And third, the term "air pollutant" appears in still other parts of the Clean Air Act, and in those instances EPA does *not* interpret that phrase as including greenhouse gas emissions. *Id.* at 581a-582a.

Those are precisely the types of considerations that should inform courts' and regulators' interpretation of the term "any air pollutant," in the context of Title I's PSD framework. Only by granting the petition for certiorari, and reversing the judgment below, can the Court ensure that EPA's broad interpretation of "any air pollutant" is actually reasonable, and that EPA will seriously evaluate the relative merits of narrower interpretations.

II. The Decision Below Allows EPA To Rewrite Its Authorizing Statute, Causing Injury Yet Avoiding Judicial Review

The States are injured by EPA's decision to force them to administer a permitting program for carbon

dioxide emissions—this the agency does not deny. The new requirements will cost States millions of dollars in administrative costs, create massive compliance burdens for utilities, manufacturers, and residential facilities, and impose a veritable construction freeze at a time when growth and job creation are essential to our nation's fragile economic recovery. See *supra* p. 1.

Nevertheless, the decision below dismisses all challenges to EPA's "Timing" and "Tailoring" Rules for lack of standing—specifically, for lack of causation. "Industry Petitioners were regulated and State Petitioners required to issue permits not because of anything EPA did in the Timing and Tailoring Rules, the court below claims, but *by automatic operation of the statute*." Pet. App. 96a (emphasis added).

1. To attribute petitioners' injuries exclusively to Title I's "automatic operation" is an exercise in legal fiction. Statutes "do not interpret themselves," John Chipman Gray, *The Nature and Sources of Law* 162 (1909).[4] Title I's PSD provisions are interpreted first by EPA, and then by the courts. In the present case, petitioners were not required to administer or comply with the PSD framework for greenhouse gases until EPA promulgated rules—the Timing and Tailoring Rules—that defined which greenhouse gases, and in what quantities, would in fact trigger

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[4] This fact is nowhere better illustrated than by the twenty-five pages of analysis in the opinion below explaining why the phrase "any air pollutant" is "unambiguous." See Pet. App. 67a-91a.

permitting requirements. Those rules, therefore, and not the statute's "automatic operation," cause the States' injuries.

EPA's greenhouse gas rulemaking, conducted in the aftermath of *Massachusetts* v. *EPA*, reflects the fact that statutory interpretation is not a static, one-time-only inquiry. As the Court stressed in *Chevron*, the "initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron,* 467 U.S. at 864. The agency must interpret its statutes and regulations in light of "the ever-changing facts and circumstances surrounding the subjects regulated," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), continuing to apply its "unique expertise and policymaking prerogatives" to "complex or changing circumstances[.]" *Martin* v. *OSHA*, 499 U.S. 144, 151 (1991).[5]

Furthermore, as this Court has many times explained, "[l]iving under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.'" *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939)) (brackets omitted). This requirement of clarity in regulation is grounded in the Due Process Clause of

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[5] See also, *e.g.*, *Nat'l Cable Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005); *Rust* v. *Sullivan*, 500 U.S. 173, 186-87 (1991).

the Fifth Amendment, and demands that "regulated parties should know what is required of them so they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

Thus, even if EPA previously had interpreted PSD requirements as attaching to all "regulated" pollutants, this Court's intervening decision in *Massachusetts* v. *EPA* raised new questions as to whether EPA's prior interpretation was still justified, or whether it merited reconsideration. Prior to *Massachusetts* v. *EPA*, the agency had not considered carbon dioxide to be an "air pollutant" at all. After *Massachusetts* v. *EPA*, the agency necessarily had to consider whether its previous framework for interpreting and administering the permitting program remained tenable.

EPA itself initially acknowledged the problems inherent in maintaining its former interpretation of Title I's permitting trigger in a post-*Massachusetts* era: "Juxtaposing the limited scope of the universe of PSD sources that Congress had in mind against the broad terms that Congress used in defining [PSD applicability], raises the question of whether a narrower interpretation of those terms may be permissible under various judicial doctrines." *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44354, 44506 (July 30, 2008).

Therefore, in the aftermath of *Massachusetts* v. *EPA*, the agency had to issue *some* rule to clarify its intentions before it could penalize sources for failing

to obtain permits for the emission of carbon dioxide or penalize states for failing to process such permits; And after conducting notice and comment rulemaking proceedings, EPA formally decided to expand permitting programs to cover carbon dioxide in the Timing and Tailoring Rules.

EPA now claims that its decision to cover carbon dioxide is immune from challenge because the agency *nowhere made this decision explicit.* Indeed, the agency's carbon dioxide permitting rules simply *assume* a massive new regulatory regime into being, while at the same time drastically altering the substance of the Clean Air Act to make this "automatic" interpretation plausible. In fact, according to the panel below, the Clean Air Act's permitting program must be "self-executing" in the most literal sense of the term: for it "automatically" requires regulators to delete whole sections of its statutory text and replace them with alternatives of their own choosing.

But regardless of the fact that EPA characterizes its creative statutory interpretation in the Timing and Tailoring rules as "automatic," those rules were the first agency actions imposing upon the States and other petitioners the burdens and obligations of regulating carbon dioxide emissions through preconstruction permits. These actions transformed EPA's permitting regime from a limited program, intended to cover a small number of large industrial facilities, to a massive new regulatory endeavor affecting millions of "small commercial and residential sources," a result "contrary to congressional intent" even in EPA's own estimation. Pet. App. 282a, 288a. And these actions accordingly

caused the petitioners' injuries, giving them standing to petition for judicial review.

The D.C. Circuit's contrary conclusion, holding that petitioners lacked standing to challenge these rules, produces a number of negative consequences:

a. First and foremost, the decision below artificially truncates the analysis of how to reasonably interpret the statutory term that triggers Title I's PSD requirements. As noted above, the term "any air pollutant," as used in Section 169(1) of the Clean Air Act (42 U.S.C. § 7479(1)), does not exist in a vacuum. "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 that is compatible with the rest of the law." *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (citations omitted).

In this case, Congress's inclusion of clear, numerical thresholds for Title I's PSD framework indeed clarifies the meaning of the term "any air pollutant," and demonstrates that EPA's preferred interpretation is not a "permissible meaning," because the "substantive effect" of applying those standards to greenhouse gas emissions necessarily produces "absurd results." See Pet. App. 184a (finding that "literal application of the thresholds" to carbon dioxide would produce "absurd results"); *id.* at 296a ("[T]he many-year delays in permit issuance and the consequent chilling of economic development * * * provide perhaps the clearest indication that

applying the PSD applicability provisions to GHG sources without tailoring produces absurd results.").

The fact that "absurd results" necessarily follow from EPA's interpretation of the statute calls that interpretation into substantial doubt. *United States* v. *Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940). To ignore those absurd results, and instead "tak[e] a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute[.]" *Id.* at 542.

Yet that is precisely what EPA and the decision below do. By preventing petitioners from challenging the Timing and Tailoring Rules, the decision below strips the statutory inquiry of its most important context. The lower court allows EPA to thwart congressional intent by enlarging an ambiguous statutory provision ("any air pollutant") to produce absurd results, and then narrowing a correspondingly *unambiguous* statutory provision (*i.e.*, the numerical thresholds) in order to mask those absurd results and avoid judicial review.

b. Furthermore, by endorsing EPA's interpretation of Title I despite the absurd results that follow, and by then allowing EPA to "tailor" its enforcement of the statute by increasing—at least initially—the numerical thresholds triggering the PSD permitting requirements, the decision below raises questions of constitutional due process and the separation of powers. Allowing EPA to "cure" the absurd results of its statutory interpretation by rewriting other statutory text would seem to allow the agency complete discretion to produce absurd

results in the future, by simply rescinding or ratcheting down the thresholds set forth in the Tailoring Rule. At that stage, with the deadline for judicial challenge safely passed, it is unclear what would prevent the agency from applying permitting requirements to smaller and smaller sources, and yet claiming immunity from challenge because the clock has run on the faulty interpretation that produced the absurd results in the first place.

EPA's current forbearance, in the Tailoring Rule, does not moot the absurd results caused by its "longstanding" interpretation of the phrase "any air pollutant," in light of this Court's decision in *Massachusetts* v. *EPA*, because "the due process protection against vague regulations 'does not leave regulated parties * * * at the mercy of *noblesse oblige*.'" *Fox*, 132 S. Ct. at 2318 (quoting *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010) (alteration in original, brackets omitted)). EPA has noted that it plans to maintain current permitting thresholds while it evaluates regulating smaller sources. Pet. App. 435a-436a. Today, the agency assures (in informal "guidance") that despite those unambiguous statutory thresholds for PSD applicability, "small farms, churches, restaurants, and small commercial facilities" are "not likely to be covered" by the requirements.[6] But in the final rule EPA states that ultimately it *will* regulate small sources down to lower and lower levels—perhaps

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[6] EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* 3-4 (Mar. 2011), *available at* http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf.

even down to the bare statutory thresholds. Pet. App. 144a-146a.

In short, EPA offers States and industry no guarantee of regulatory forbearance or safe harbor in the future, especially given what EPA finds to be unambiguous statutory commands. Instead, the decision below gives EPA *carte blanche* to expand and rewrite sections of its own authorizing statute, leaving States without a remedy even as they are forced to bear the costs of administering the program.

In that respect, EPA's innovative form of regulation-by-implication—*i.e.*, asserting that the statute itself "automatically" stretches an existing regulatory program to new contexts—allows EPA to completely insulate its unlawful overreach from judicial review. And, if other agencies adopt this regulatory paradigm, the decision below would allow agencies to adopt regulatory regimes through fragmented rules and assumptions, claiming that none of these, *when viewed in a vacuum*, directly causes the injury suffered by petitioners.

By allowing EPA to permanently avoid review of its carbon dioxide permitting rules, the panel below sets a dangerous precedent, elevating form over substance and rewarding the agency's procedural contortions. The decision stands for the proposition that administrative agencies may usurp legislative authority, cause injury, and yet evade judicial review.

III. By Approving EPA's Greenhouse Gas Rules, The Decision Below Entrenches A Permit-Based System That Imposes Great Burdens On The States And Will Deter Market-Based Solutions

The decision below, if left intact, would impose enormous costs on businesses that must comply with the unprecedented new permit requirements; on their customers; and on the States that must administer this new program.

As petitioners have noted, federal agencies urged EPA to consider these costs from the very outset. At the time of EPA's original advance notice of proposed rulemaking, the Commerce Department's "fundamental concern with the [draft rulemaking's] approach to using the CAA to regulate GHGs" was "that it would impose significant costs on U.S. workers, consumers, and producers and harm U.S. competitiveness without necessarily producing meaningful reductions in global GHG emissions." 73 Fed. Reg. at 44371. The Energy Department, too, warned that the regulations would be "an enormously elaborate, complex, burdensome and expensive regulatory regime that would not be assured of significantly mitigating global atmospheric GHG concentrations and global climate change." *Id.* at 44365.

As EPA itself concluded, if the PSD pre-construction permit requirements automatically applied to all greenhouse gas emissions in excess of the statutory 100/250 tons-per-year thresholds, then "permitting authorities across the country would face over $1.5 *billion* in additional PSD permitting costs each year. This would represent an increase of 130

times the current annual burden hours * * * for permitting authorities." Pet. App. 214a (emphasis added). The administrative burden would require States to hire "a total of almost 10,000 new [full-time employee equivalents] to process PSD permits for GHG emissions." *Id.* As the State Petitioners explain, the States would need those extra regulatory officials to process permit applications for not just industrial sources but also "[c]ountless numbers of buildings, including churches and schools," due to "the carbon dioxide emissions from their water heaters." Pet. 8.

EPA may purport to mitigate these costs and burdens, at least at the outset, through the Tailoring Rule, but under its interpretation of Title I this is merely an act of regulatory grace. According to the agency, the Clean Air Act would require EPA to ratchet the threshold levels downward, and the compliance burden upward, over time. This approach leaves details of the ratchet entirely within EPA's discretion.

The *amici* States know firsthand the costs of the PSD program, and the new costs imposed by expanding PSD to cover greenhouse gas emissions. In West Virginia, for example, the inclusion of greenhouse gas emissions for purposes of New Source Review has already increased the State's permitting burden by approximately five to ten percent, according to the State's internal estimates. If the decision below stands, and carbon dioxide itself begins to trigger permitting requirements, West Virginia will incur the costs of reviewing these additional permit applications as well; but even if carbon dioxide simply requires "Best Available

Control Technology" (or "BACT") when permits are triggered by conventional pollutants, the administrative costs of this alone will entail significant additional burdens for the State. West Virginia estimates that the incremental cost of including greenhouse gases in permit review ranges from about $57,500 to $115,000 per year. The total cost to States will only increase going forward, especially if EPA decides to revise its tailoring rule over time to decrease the applicable emissions thresholds—a decision that EPA commits to its own exclusive discretion, injecting great uncertainty into the program and imposing costs on everyone potentially subject to the rule.

These administrative burdens illustrate precisely the costs that Judge Williams recognized in another EPA case involving the preconstruction regulatory requirements of "New Source Review"—namely, "the painful consequences of reliance on command-and-control regulation," which is far less efficient than reliance on market-based mechanisms. *New York v. EPA*, 413 F.3d 3, 45 (D.C. Cir. 2005) (Williams, J., concurring). Preconstruction permit requirements provide "an incentive for firms to string out the life of old plants." *Id.* But "emissions charges or marketable pollution entitlements," by contrast, "provide incentives for firms to use—at each and every plant—all pollution control methods that cost less per unit than the emissions charge or the market price of an entitlement, as the case may be." *Id.* (emphasis omitted.)

Judge Williams is not alone, of course, in recognizing the general superiority of market-based incentives over command-and-control permit

regimes. EPA, too, has recognized that "market-oriented regulatory approaches, when well-suited to the environmental problem, offer important advantages over non-market-oriented approaches," first and foremost in that they "can achieve a particular emissions target at a lower social cost than a non-market-oriented approach." 73 Fed. Reg. at 44409-10; see also, *e.g.*, *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units*, 70 Fed. Reg. 28606, 28616 (May 18, 2005) (explaining that tradable emissions allowances, "in accordance with market forces," give sources "an incentive to endeavor to reduce their emissions cost-effectively").

EPA's new permit-centric system is likely to block development of better, market-based alternatives. As scholars have noted, command-and-control regulatory regimes inevitably win favor among not just regulators and other government officials (who retain the power to distribute benefits and allocate costs), but also among favored industry participants who enjoy the resultant benefits. See, *e.g.*, Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 Tul. L. Rev. 845, 915 (1999); Nathaniel O. Keohane, Richard L. Revesz & Robert N. Stavins, *The Choice of Regulatory Instruments in Environmental Policy*, 22 Harv. Evil. L. Rev. 313, 365 (1998) (noting that because "some of the current preferences for command-and-control standards simply reflects a desire to maintain the regulatory status quo," "the aggregate demand for a market-based instrument is likely to be greatest * * * when the environmental problem has not previously been regulated").

Neither this Court's decision in *Massachusetts* v. *EPA* nor the statutory text itself commands that future. But only by granting the petitions for certiorari on the decision below can this Court ensure that EPA will grapple seriously with the full ramifications of its interpretation of the PSD framework—including the "absurd results" of the agency's own making.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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