No. _____

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

RACHEL L. BRAND
SHELDON GILBERT
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

MICHAEL C. GERAGHTY
Attorney General
STEVEN E. MULDER
State of Alaska
1031 W. 4th Avenue
Anchorage, AK 99501
(907) 269-5274

ROBERT R. GASAWAY
Counsel of Record
JEFFREY A. ROSEN, P.C.
JEFFREY BOSSERT CLARK
ADITYA BAMZAI
WILLIAM H. BURGESS
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
robert.gasaway@kirkland.com
(202) 879-5000

Counsel for Petitioner Chamber of Commerce of the United States of America

[Additional Counsel Listed on Signature Page]

QUESTIONS PRESENTED

The Environmental Protection Agency ("EPA") promulgated a series of four broad-ranging and interconnected rules to control emissions of greenhouse gases. In proposing the last rule in the sequence, EPA acknowledged that it would create a result "so contrary to what Congress had in mind — and that in fact so undermines what Congress attempted to accomplish with the [statute's] requirements — that it should be avoided under the 'absurd results' doctrine." App. 1837a. EPA nonetheless finalized the rule and then, in an attempt to cure the absurdity, rewrote codified limitations in the Clean Air Act.

The questions presented are:

1. Whether, once an agency has identified absurd results produced by its construction of a complex statutory scheme as a whole, the agency may deem the identified absurdity irrelevant to the construction of some individual provisions within the scheme and a justification for rewriting others.

2. Whether EPA's determination that greenhouse gases "may reasonably be anticipated to endanger public health or welfare" and otherwise are regulable under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), was "not in accordance with law" or was "arbitrary, capricious, [and] an abuse of discretion," § 7607(d)(9)(A).

3. Whether EPA incorrectly determined that all "air pollutants" regulated by the agency under the Clean Air Act's motor vehicle emissions provision, 42 U.S.C. § 7421(a)(1), must also be regulated under the Act's Prevention of Significant Deterioration of Air Quality and Title V programs when emitted from stationary sources.

RULE 14.1(b) STATEMENT

Petitioners are the Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation. The Chamber of Commerce of the United States of America was petitioner or petitioner-intervenor as to all of the challenged agency actions addressed by the consolidated judgment below. The State of Alaska and the American Farm Bureau Federation were petitioners and/or petitioner-intervenors in cases addressed by the consolidated judgment below.

Respondents herein, who were also respondents in the cases below, are the Environmental Protection Agency and the Administrator of the Environmental Protection Agency. Lisa P. Jackson held the office of Administrator until February 15, 2013, and Robert Perciasepe currently holds that office in an acting capacity.

Other parties who were petitioners in the cases addressed by the consolidated judgment below are the following: American Chemistry Council; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; Brick Industry Association; Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; The National Association of Manufacturers; National Federation of Independent Business; National Oilseed Processors Association; North American Die Casting Association; Portland Cement 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; Greg Abbott, Attorney General of Texas; Alpha Natural Resources, Inc.; Michele Bachmann, U.S. Representative, Minnesota 6th District; Haley Barbour, Governor of the State of Mississippi; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Kevin Brady, U.S. Representative, Texas 8th District; Paul Broun, U.S. Representative, 10th District; Dan Burton, U.S. Representative, Indiana 5th District; Glass Packaging Institute; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Commonwealth of Virginia; Competitive Enterprise Institute; Nathan Deal, U.S. Representative, Georgia 9th District; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; FreedomWorks; the Science and Environmental Policy Project; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel US Inc.; Phil Gingrey, U.S. Representative, Georgia 11th District; Great Northern Project Development, L.P.; Industrial Minerals Association—North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Landmark Legal Foundation; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Langdale Chevrolet-Pontiac, Inc.; The Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; John Linder, U.S. Representative, Georgia 7th District; Louisiana Department of Environmental Quali-

ty; Missouri Joint Municipal Electric Utility Commission; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Mining Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Rick Perry, Governor of Texas; Tom Price, U.S. Representative, Georgia 6th District; Dana Rohrabacher, U.S. Representative, California 46th District; Rosebud Mining Co.; John Shadegg, U.S. Representative, Arizona 3rd District; John Shimkus, U.S. Representative, Illinois 19th District; South Carolina Public Service Authority; Southeast Trailer Mart, Inc.; Southeastern Legal Foundation, Inc.; State of Alabama; State of Nebraska; State of North Dakota; State of South Carolina; State of South Dakota; State of Texas; Texas Agriculture Commission; Texas Commission on Environmental Quality; Texas General Land Office; Texas Public Utilities Commission; Texas Railroad Commission; Utility Air Regulatory Group; and Lynn Westmoreland, U.S. Representative, Georgia 3rd District.

Intervenors for petitioners in cases addressed by the consolidated judgment below—other than petitioners herein—include Alpha Natural Resources, Inc.; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of Commerce; Associated Industries of Arkansas; Brick Industry Association; Coalition for Responsible Regulation, Inc.; Colorado Association of Commerce & Industry; Commonwealth of Kentucky; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Governor of Mississippi Haley Barbour; Great Northern Project Development, L.P.; Idaho Association of Commerce and Industry; Inde-

pendent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association North America; Kansas Chamber of Commerce and Industry; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc; Langdale Ford Company; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Louisiana Department of Environmental Quality; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Manufacturers; National Association of Home Builders; National Cattlemen's Beef Association; National Electrical Manufacturers Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Business; National Mining Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Coal Association; Ohio Manufacturers Association; Peabody Energy Company; Pennsylvania Manufacturers Association; Portland Cement Association; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; State of Florida; State of Georgia; State of Indiana; State of Louisiana; State of Michigan; State of Nebraska; State of North Dakota; State of Oklahoma; State of South Carolina; State of South Dakota; State of Utah; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry; Utility Air Regulatory Group; Virginia Manufacturers Association; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

Intervenors for respondents in cases addressed by the consolidated judgment below include Alliance of

Automobile Manufacturers; Association of Global Automakers; Center for Biological Diversity; City of New York; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; Indiana Wildlife Federation; Michigan Environmental Council; Natural Resources Council of Maine; Natural Resources Defense Council; National Wildlife Federation; Ohio Environmental Council; Pennsylvania Department of Environmental Protection; Sierra Club; South Coast Air Quality Management District; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Wetlands Watch; and Wild Virginia.

RULE 29.6 STATEMENT

No petitioner has a parent company, and no publicly-held corporation has a 10% or greater ownership interest in any petitioner.

TABLE OF CONTENTS

Page(s)

APPENDIX CONTENTS

VOLUME I

U.S. Court of Appeals for the D.C. Circuit

VOLUME II

Federal Register Notices

VOLUME III

VOLUME IV

VOLUME V

Statutes

Miscellaneous

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Federal Register Notices

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The statement of the panel on rehearing *en banc* is unpublished but electronically reported at 2012 WL 6621785. App. 99a. The panel opinion appears at 684 F.3d 102. App. 1a.

JURISDICTION

The panel rendered its decision on June 26, 2012. The court of appeals then denied petitioners' petition for panel rehearing and rehearing *en banc* on December 20, 2012. On March 7, 20, and 25, 2013, the Chief Justice extended petitioners' respective deadlines for filing a petition for certiorari to and including April 19, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, are reproduced in the Appendix. App. 2097a-2129a.

STATEMENT

In the set of related rulemakings below, the Environmental Protection Agency ("EPA") sought to erect the costliest, farthest reaching, and most intrusive regulatory apparatus in the history of the American administrative state — regulations to govern emissions of greenhouse gases ("GHGs") that could eventually touch practically every aspect of every industry across the entire economy. If that were not enough to

warrant the Court's review of the judgment below, the unprecedented interpretive paths taken by EPA surely are.

Starting from a premise that it should interpret individual statutory provisions in isolation, EPA reached an endpoint that, in its own words, is "so contrary to what Congress had in mind — and that in fact so undermines what Congress attempted to accomplish * * * — that it should be avoided under the 'absurd results' doctrine." App. 1837a. This absurdity was sufficiently stark that "stationary sources" regulated under the CAA's programs designed for utility and heavy industrial "sources" of air pollution would include vast swaths of the economy never intended to be within the Act's ambit, including for the first time thousands of multifamily dwellings and even large single family homes. See *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule*, 74 Fed. Reg. 55,292, 55,338 (Oct. 27, 2009); App. 1756a, 1960a.

When faced with the admittedly absurd results caused by its construction of some provisions of the statute, EPA rewrote other provisions of the statute rather than stopping to consider whether the absurdity meant its statutory construction was wrong from the outset. To address the fact that its construction of the statute would sweep sources as small as individual homes within the Clean Air Act's ambit (which Congress admittedly never intended), EPA "unilaterally" increased the statute's emissions thresholds for stationary pollution sources from "250 tons to 100,000 tons — a 400-fold increase." App. 137a (Kavanaugh, J., dissenting).

EPA took this path even though this Court's opin-

ion in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), nowhere compelled the interpretations made in the agency rulemakings. To the contrary, the Court's decision in *Massachusetts* envisioned that any EPA GHG regulations would not lead to "extreme measures," *id.* at 531, such as a wholesale, agency-crafted, revision of statutory thresholds, and that EPA would "ground its reasons for action or inaction in the statute," *id.* at 535.

As Judges Kavanaugh and Brown observed in separate dissents from the denial of rehearing *en banc*, "this is not the proper way to interpret a statute." App. 138a (Kavanaugh, J., dissenting); see App. 118a-119a (Brown, J., dissenting). The existence of an absurdity requires agencies and courts to interpret ambiguous provisions or to exercise delegated interpretive discretion to avoid the absurdity. Absurd consequences have never been thought to confer, until this case, a license for agencies (or courts) to rewrite plain statutory language as the agency (or court) sees fit. "Instead of 'reading new words into the statute' to avoid absurd results, * * * the statute should be interpreted so that 'no absurdity arises in the first place.'" App. 138a (Kavanaugh, J., dissenting) (quoting *Kloeckner* v. *Solis*, 133 S. Ct. 596, 607 (2012)). By allowing an agency to engage in a series of statutory interpretations that produce a concededly "absurd" version of the whole statute, and then allowing it to declare the absurdity its jumping off point for rewriting plain statutory text, the decision below poses profound risks to the Constitution's separation of powers.

In the wake of its recent GHG rulemakings, EPA enforces a Clean Air Act fundamentally different from the one Congress enacted. This Court's imme-

diate review of the panel's error is necessary and appropriate. No other court of appeals can consider these EPA regulations because the D.C. Circuit has exclusive review jurisdiction over these EPA rulemakings. See 42 U.S.C. § 7607(b)(1). It is simply not possible to await further developments in lower courts. The petition for a writ of certiorari should be granted.

A. Statutory and regulatory framework.

Distinct parts of the CAA authorize EPA to regulate emissions from motor vehicle engines and emissions from stationary sources. In *Massachusetts*, this Court interpreted the Act's definition of "air pollutant" for purposes of the motor-vehicle provision without analyzing other aspects of the Act's motor-vehicle provision and without mentioning the Act's stationary source provisions.

1. Under section 202(a)(1) of the CAA,

> The Administrator shall by regulation prescribe * * * standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1). Similar terminology appears throughout the CAA. See §§ 7521(a)(3)(D), (e); 7671n; 7547(a)(1), (4); 7411(b)(1)(A), (f)(2)(B), (g)(2); 7408(a)(1)(A); 7571(a)(2)(A); 7545(c)(1); 7422(a); 7415(a); 7511b(f)(1)(A); 7429(e).

2. Under the CAA's core program, EPA may set

standards for pollutants designated as national ambient air quality standards ("NAAQS") pollutants — requiring, for example, that the concentration of a given NAAQS pollutant may not exceed more than a certain number of parts per billion in the ambient air. See 42 U.S.C. § 7407. Thus far, EPA has designated six NAAQS pollutants, none of which is a GHG: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide.

Under the related "Prevention of Significant Deterioration of Air Quality" ("PSD") part of the CAA, EPA determines whether a region of the country is in "attainment" or "nonattainment" for each designated NAAQS pollutant, or, alternatively, whether a region is "unclassifiable" for that pollutant. 42 U.S.C. § 7407(d)(1)(A). An area in attainment is "any area * * * that meets the * * * ambient air quality standard for the pollutant." § 7407(d)(1)(A)(ii). By contrast, an area in nonattainment is "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national * * * ambient air quality standard for the pollutant." § 7407(d)(1)(A)(i). Finally, an unclassifiable area is any area that "cannot be classified on the basis of available information as meeting or not meeting the * * * ambient air quality standard for the pollutant." § 7407(d)(1)(A)(iii). The PSD program applies to those areas of the United States designated as in "attainment" or "unclassifiable," § 7471, and requires permits for major emitting facilities embarking on construction or modification projects in those regions, § 7475(a).

Section 165(a) of the CAA makes clear that the PSD program establishes permitting requirements solely for "major emitting facilities" located in at-

tainment or unclassifiable regions. Under section 165(a), "[n]o major emitting facility * * * may be constructed in any area to which this part applies unless" the facility obtains a PSD permit. 42 U.S.C. § 7475(a). To obtain a PSD permit, a covered source must, among other things, install the "best available control technology [BACT] for each pollutant subject to regulation under [the CAA]." § 7475(a)(4).

Section 169(a) defines "major emitting facility," for the purposes of the PSD program, as a stationary source "which emit[s], or [has] the potential to emit" either 100 tons per year ("tpy") or 250 tpy of "any air pollutant." 42 U.S.C. § 7479(1). Certain categories of sources — for example, iron and steel mill plants — qualify as "major emitting facilit[ies]" if they have the potential to emit over 100 tpy of "any air pollutant." *Id.* All other stationary sources are "major emitting facilit[ies]" if they have the potential to emit over 250 tpy of "any air pollutant." *Id.* Similarly, under the Act's Title V, stationary sources must obtain state-issued operating permits to establish compliance with the PSD requirements, among others, if they have the potential to emit at least 100 tpy of "any air pollutant." § 7602(j). In 1978, EPA interpreted the Act to define "major emitting facility" as a source that emits major amounts of "any air pollutant regulated under the [CAA]." *Part 51-Requirements for Preparation, Adoption, and Submittal of Implementation Plans*, 43 Fed. Reg. 26,380, 26,382 (June 19, 1978).

3. In *Massachusetts*, the Court considered whether the term "any air pollutant" in the CAA's new motor vehicle provision, section 202(a)(1), included GHGs such as "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons." 549 U.S. at 529; see 42 U.S.C. § 7602(g). After answering this question in

the affirmative, the Court remanded to EPA, noting that it had not reached "whether on remand EPA must make an endangerment finding" of the type required to promulgate regulations under section 202(a)(1). 549 U.S. at 534-535. While the Court noted that in the event such a finding were made EPA would "no doubt" have "significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies," it emphasized that it was not precluding EPA from denying the rulemaking petition altogether on grounds that other portions of the Act cabined EPA's regulatory authority: "[O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute." *Id.* at 533. The final sentence of the Court's analysis underscored the point: "EPA must ground its reasons for action *or inaction* in the statute." *Id.* at 535 (emphasis added).

B. Proceedings below.

1. On remand from this Court's decision, EPA opened a single regulatory docket, and issued a unified Advance Notice of Proposed Rulemaking ("ANPR"), to address GHG emissions. App. 1126a. In the ANPR's preface, the EPA Administrator observed it had "become clear" that EPA's regulation of GHGs from motor vehicle emissions under section 202(a)(1) could "trigger[]" "regulation of smaller stationary sources that also emit GHGs — such as apartment buildings, large homes, schools, and hospitals," resulting in "an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land." App. 1130a-1131a. The Administrator explained that, in his view, the CAA was "ill-suited for the task of regulating global greenhouse

gases." App. 1131a.

Other agencies submitted letters included in the ANPR that expressed concern about regulating GHGs under the CAA. For example, the Department of Transportation expressed concern "that attempting to regulate [GHGs] under the [CAA] will harm the U.S. economy while failing to actually reduce global [GHG] emissions." App. 1140a. The Department of Energy expressed concern about "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." App. 1157a. And the Department of Commerce expressed concern that such regulation "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." App. 1182a.

EPA's ANPR proposed to conduct a single rulemaking comprehensively addressing the propriety of regulating GHGs under the CAA. But despite having initially opened a single regulatory docket, EPA later elected to proceed in piecemeal fashion (thus making subsequent review in the court of appeals more difficult). EPA recognized that an affirmative endangerment finding could make it impossible for it to abide by statutory commands within the CAA. App. 1756a, 1836a-1837a. Yet despite recognizing the interconnections between the provisions of the Act, EPA conducted its administrative process in a fashion that ensured each individual rulemaking construed the Act's individual provisions but none construed the Act as a whole. And despite the sweeping scope of the combined rulemakings, which authorize EPA to

regulate the energy consumption of buildings everywhere in the United States, nowhere did EPA analyze the combined rules' total costs. Compare App 27a, 49a, with *Massachusetts*, 549 U.S. at 531 (remarking the EPA "would have to delay any action" to "'giv[e] appropriate consideration to the cost of compliance'") (quoting 42 U.S.C. § 7521(a)(2)); see also Executive Order 12,866 (Sept. 30, 1993) (requiring cost-benefit analysis).

2. EPA's rulemaking unfolded in a series of steps. EPA first issued a finding that GHGs were anticipated to endanger public health or welfare, which it then used as the predicate for promulgating emission standards for motor vehicles. EPA next determined that, having regulated motor vehicles, it was required also to regulate stationary sources. Finally, because the statutory thresholds for triggering regulation of stationary sources would require regulation of millions of sources never contemplated by Congress, EPA claimed authority to rewrite (and in fact rewrote) those regulation-triggering thresholds.

First, in the course of a rulemaking involving solely motor vehicles, EPA determined that a combination of six separate gases (including two not emitted by motor vehicles) defined as a single "air pollutant" were "reasonably [ ] anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009); App. 180a. EPA measured the impact of these gases — carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perflourocarbons, and sulfur hexafluoride — on a "carbon dioxide equivalent basis" that reflects the "warming effect" of each "relative to

carbon dioxide." App. 291a. EPA concluded that motor-vehicle emissions of these gases "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." App. 195a.

In making the Endangerment Finding, EPA relied on analysis involving many steps between the emitted GHGs and the anticipated endangerment. In addition, EPA adopted an analysis that was "largely qualitative in nature, and is not reducible to precise metrics or quantification" — without "establish[ing] a specific threshold metric for each category of risk and impacts" and without "necessarily placing the greatest weight on those risks and impacts which have been the subject of the most study or quantification." App. 311a-312a. This "qualitative" assessment covered a period of analysis spanning "from the current time to the next several decades, and in some cases to the end of this century." App. 313a.

EPA rejected the view that it could consider only "direct health effects such as respiratory or toxic effects associated with exposure to greenhouse gases." App. 314a. EPA determined that GHGs endangered public "welfare" based on multi-step causation chains leading to effects over the long term on (i) "food production and agriculture," (ii) "forestry," (iii) "water resources," (iv) "sea level rise and coastal areas," (v) "energy, infrastructure, and settlements," and (vi) "ecosystems and wildlife." App. 343a.

Second, as a consequence of its endangerment finding, and pursuant to the CAA's provision authorizing EPA to establish motor-vehicle emission standards for "any air pollutant * * * which may reasona-

bly be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1), EPA issued a "Tailpipe Rule" setting emission standards for cars and light trucks. *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010).

Third, EPA determined that once the agency had triggered regulation of GHGs from motor vehicles, it was obliged automatically to regulate "stationary sources" of GHGs under the PSD and Title V programs. EPA understood in making this determination that regulating stationary-source emissions of carbon dioxide as a GHG means regulating the burning of fossil fuels, which in turn means regulating the production and consumption of energy throughout the economy. Nonetheless, EPA reasoned that, once the Tailpipe Rule set motor-vehicle emission standards for GHGs, those gases became regulated pollutants under the Act, requiring PSD regulation and Title V permitting as well. See *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010); App. 690a.

In reaching this conclusion, EPA relied on its preexisting, pre-*Massachusetts* interpretation of the CAA, under which emissions regulations under other parts of the Act trigger regulation of stationary GHG emitters because "any air pollutant" means any air pollutant regulated under the CAA. See App. 871a-881a; see also *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980).

Because GHGs, especially carbon dioxide, are

emitted in far greater amounts and from many more sources (including people) than other "air pollutants," EPA recognized that extending its preexisting interpretation of the Act to GHGs would produce regulatory effects so severe as to be "absurd." App. 690a. EPA recognized in particular that the energy consumption practices of millions of industrial, residential, and commercial sources would newly become subject to EPA regulation because those facilities' GHG emissions would exceed the 100/250 tons-per-year emission thresholds provided for by statute. The number of facilities subject to PSD and Title V would thus jump 400-fold — from 15 thousand to 6.1 million. See App. 782a-798a, 813a & Table V-I. Its new rules taken together, EPA acknowledged, would require an expenditure of $22.5 billion in paperwork costs alone (compared to $74 million today, see *id.*) plus billions more in compliance costs (which EPA declined to estimate, App. 27a, 49a).

Having identified an absurdity inherent in its statutory construction, EPA addressed the situation by rewriting the statute, not revisiting the construction. Specifically, whereas Congress decided that the PSD and Title V programs would apply to facilities discharging more than either 100 or 250 tons per year of regulated pollutants, the agency reworked the statutory language and held henceforth the programs would apply only to sources emitting greenhouse gases in amounts more than 75,000 or 100,000 tons per year — two new, EPA-invented thresholds. App. 690a. EPA contended that it was forced to engage in this statutory rewriting because, after EPA had interpreted the CAA to require regulation of GHGs from stationary sources, the consequences of a straightforward application of the statutory thresh-

olds were absurd:

> To apply the statutory PSD and title V applicability thresholds literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. These extraordinary increases in the scope of the permitting programs would mean that the programs would become several hundred-fold larger than what Congress appeared to contemplate. Moreover, the great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting and that, at the present time, in the absence of streamlined permit procedures, would face unduly high permitting costs.

App. 780a.

EPA asserted further authority to revise statutory thresholds on grounds that it claimed were both "intertwined" with and "independent" of the absurdity canon. App. 817a. Specifically, EPA relied on an "administrative necessity" doctrine, which it contended allows an agency to decline to "follow the literal requirements" of a statute that "is impossible for the agency to administer." App. 827a-828a. And EPA relied on a so-called "one-step-at-a-time" doctrine, which it contended allows agencies to "implement statutory mandates one step at a time." App. 830a. Having once rewritten statutory language on authori-

ty of the absurdity canon (and other doctrines), EPA then claimed further discretion to rewrite the same language by way of adjusting the invented thresholds over time and as it sees fit. App. 844a.

Fourth, in a separate "Timing Rule," EPA established January 2, 2011 as the date when major stationary emitters of GHGs would become subject to EPA regulation. See *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010); App. 598a.

3. A diverse coalition of more than seventy business groups, public policy groups, and States challenged EPA's GHG rules. In addition, several industry and public policy groups petitioned for review of EPA's interpretation of the PSD permitting triggers set forth in EPA's 1978, 1980, and 2002 rules. Because 42 U.S.C. § 7607(b)(1) permits parties to petition for review of final agency action "within sixty days" of any "grounds arising after" the expiration of the ordinary statutory review period, these petitioners explained that their challenges to the historical rules did not ripen until 2010, when EPA first elected to regulate GHGs under the CAA by promulgating the Tailpipe Rule.

In a *per curiam* opinion, a panel of the D.C. Circuit, composed of then-Chief Judge Sentelle and Judges Rogers and Tatel, dismissed the petitions for review as to the Timing and Tailoring Rules and denied the petitions for review as to the remainder of the rules. App. 98a.

As an initial matter, although *Massachusetts* had expressly declined to address whether EPA "must" make an endangerment finding, the panel assumed

that the decision actually went farther. The panel construed *Massachusetts* as holding "that EPA had a 'statutory obligation' to regulate harmful greenhouse gases." App. 18a.

Starting from this premise, the panel addressed the heart of EPA's analysis — the Endangerment Finding. The panel held that the ultimate absurdity EPA had identified was "irrelevant" to the initial endangerment inquiry. App. 28a. It then concluded that the Endangerment Finding rested upon an "unambiguously correct" construction of the CAA and was not arbitrary and capricious, in part because the CAA "does not leave room for EPA to consider as part of the endangerment inquiry the stationary-source regulation triggered by an endangerment finding." App. 28a-29a.

The panel determined that the grounds-arising-after challenges to EPA's PSD permitting triggers were timely at least as to two industry petitioners. App. 50a-56a. The panel ruled, however, that no petitioner had standing to challenge the Timing and Tailoring Rules — the two rules acknowledging the absurdity and rewriting the statute in its wake — because those rules supposedly served to ease regulatory burdens that EPA had already set in motion via its other GHG rulemakings. App. 88a.

4. The panel denied rehearing, and the full D.C. Circuit denied rehearing *en banc*, with Judge Kavanaugh and Judge Brown dissenting separately. App. 99a.

Judge Kavanaugh opened his opinion by noting this case is "plainly one of exceptional importance." App. 133a (Kavanaugh, J., dissenting). Judge Kavanaugh reiterated the U.S. Chamber's statement

that "the EPA regulations at issue here as 'the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency.'" *Id.* "By requiring a vastly increased number of facilities to obtain pre-construction permits," Judge Kavanaugh said, "EPA's interpretation will impose enormous costs on tens of thousands of American businesses, with corresponding effects on American jobs and workers; on many American homeowners who move into new homes or plan other home construction projects; and on the U.S. economy more generally." App. 142a.

Judge Kavanaugh noted that EPA had reserved unto itself a right to adjust its invented 75,000 and 100,000 ton-per-year thresholds over time, thus bringing more and more facilities into its program through its own "unilateral discretion." App. 137a n.1. Judge Kavanaugh observed that "EPA's assertion of such extraordinary discretionary power both exacerbates the separation of powers concerns in this case and underscores the implausibility of EPA's statutory interpretation." *Id.* According to Judge Kavanaugh, "[a]llowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process." App. 138a.

Judge Brown, in turn, emphasized that EPA had failed to properly interpret the "reasonably anticipated to endanger" language in section 202(a)(1): "In order to reasonably anticipate that a pollutant will contribute to air pollution that endangers public health or welfare, the Agency would have to conclude that pollution created by CO_2 or another GHG is a *reasonably direct cause* of the damage to public health and

welfare." App. 116a (emphasis added).

According to Judge Brown, "[q]uestions of public health impacts from air pollution have consistently been based on the direct — that is, inhalational — effects of exposure to the pollutant," as opposed to the more indirect harms caused by climate change. App. 116a-117a; see also App. 118a ("If there can be this much logical daylight between the pollutant and the anticipated harm, there is nothing EPA is not authorized to do."). Judge Brown further observed that "Congress should not be presumed to have deferred to agencies on questions of great significance more properly resolved by the legislature." App. 122a (citing *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). Both Judge Brown and Judge Kavanaugh skeptically viewed EPA's invocation of the "absurd results" canon — as a kind of "abuse" used "to preempt legislative prerogatives." App. 121a (Brown, J., dissenting); see also App. 154a (Kavanaugh, J., dissenting). Far from minimizing the importance of this case, the members of the original panel responded with a joint statement acknowledging that "the underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance." App. 106a.

REASONS FOR GRANTING THE PETITION

EPA's GHG rulemakings violate an elementary interpretive principle: Before using the absurdity doctrine to rewrite codified numerical thresholds, an agency must endeavor to construe the statute to avoid the absurdity in the first instance. The "whole statute" canon of construction requires that all statutory provisions be considered together, a task that is particularly important in the context of a complex

statutory scheme like the CAA. In the rulemakings below, EPA could and should have construed the Act as a whole, thus avoiding the need to rewrite numerical thresholds. Having failed to do so, the agency's interpretation of the Act was "not in accordance with law" or, at best, was "arbitrary, capricious, [and] an abuse of discretion." 42 U.S.C. § 7607(d)(9)(A).

I. EPA improperly deployed the "absurd results" canon.

EPA employed a novel and expansive interpretation of its authority to regulate pollutants that "may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1). The agency recognized that its construction of the statute caused consequences "so contrary to what Congress had in mind" that they "should be avoided under the 'absurd results' doctrine." App. 1840a. The agency then rewrote other provisions of the statute to avoid the absurdity of its initial construction. This interpretive approach was fundamentally misguided.

1. The principle that statutes should be construed to avoid absurd results "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way." *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment). As William Blackstone explained, "the rule is, that where words bear either none, or a very absurd signification, if literally understood, *we must a little deviate from the received sense of them*." 1 W. Blackstone, Commentaries on the Laws of England 60 (1765) (emphasis added). Blackstone's formulation recognized that "little" deviations from legislative text — as opposed to wholesale rewriting — could at times allow a court to construe

statutes more consistently with legislative intent than "literal[]" application of the law.

Critically, the absurdity canon does not permit "an unhealthy process of amending the statute by judicial interpretation." *Pub. Citizen*, 491 U.S. at 470 (Kennedy, J., concurring in judgment). Where (as here) a court or agency acknowledges absurd results that would follow from a particular statutory interpretation, the proper course is to interpret the statute to avoid the absurdity. See *Mova Pharm.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (absurd results do not grant the agency "a license to rewrite the statute").

Such an approach is especially appropriate where the provisions being interpreted are interwoven into a complicated regime like the CAA. As Judge Hand explained, statutory text lives a "communal existence" with the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used." *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). A reviewing court thus "should not confine itself to examining a particular statutory provision in isolation," but should instead determine "[t]he meaning — or ambiguity — of certain words or phrases" by placing those words "in context." *Brown & Williamson*, 529 U.S. at 132-133. "Regardless of how serious the problem an administrative agency seeks to address, * * * it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (quotation marks and citations omitted).

Accordingly, to the extent the CAA contained am-

biguities or gaps, both EPA and the Court below were obliged to fill in the gaps and interpret the ambiguous terms to avoid absurd consequences. EPA should have endeavored to construe the Act reasonably and comprehensively — and not necessarily in a manner that would most aggrandize its authority.

2. Instead of taking a lawful interpretive path, EPA chose the "unhealthy process of amending the statute by [agency and] judicial interpretation." *Pub. Citizen*, 491 U.S. at 470 (Kennedy, J., concurring in judgment). After engaging in a series of statutory interpretations and acknowledging the resulting absurdity, EPA frankly discarded precise numerical limitations that Congress had placed on its authority. App. 780a.

Far from scrutinizing EPA's highly unusual interpretive method, the panel concluded that petitioners could not challenge the absurd consequences that concededly flow from the Endangerment Rule. *First*, the panel claimed that the absurdity EPA had identified was "irrelevant" to the endangerment inquiry, because the CAA "does not leave room for EPA to consider as part of the endangerment inquiry the stationary-source regulation triggered by an endangerment finding." App. 29a. *Second*, when petitioners argued the Tailoring Rule unlawfully attempted to address a conceded absurdity by simply rewriting the statute, the panel held that they lacked Article III standing because EPA's Tailoring Rule eased the regulatory burdens earlier set in motion by EPA's Endangerment Rule. See App. 88a-89a.

The upshot was that the panel nowhere addressed the absurdity that EPA acknowledges follows from its construction of the CAA — thus allowing EPA to es-

cape judicial scrutiny of its rewriting of the Clean Air Act. This cannot be right. Agencies may not "use shell games to elude review." *Tesoro Alaska Petroleum Co.* v. *FERC*, 234 F.3d 1286, 1293-1294 (D.C. Cir. 2000). The panel should have seen the agency's procedural gerrymandering for what it was — an improper means of sidestepping judicial review. And it should have recognized that substituting much higher numerical thresholds for much lower ones is never a permissible way to construe a statute. These failures by the panel require correction by this Court.

II. EPA improperly failed to construe the CAA in a manner that would avoid the absurdity that resulted from its own interpretation.

Had the panel required EPA to construe the entire CAA sensibly as a whole, it would have concluded that EPA had several available avenues for avoiding the absurdity that resulted from the agency's preferred interpretation.

A. EPA incorrectly construed section 202(a)(1)'s requirement that an air pollutant "reasonably be anticipated to endanger public health or welfare."

To make an endangerment finding, EPA was statutorily required to find that an air pollutant may "reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The statutory text, and its settled construction, do not allow EPA to address any and all issues that may be thought of as relating to "health" or "welfare" in the abstract. Instead, the Act cabins EPA's authority by using the specific statutory terms "health" and "welfare" and requiring a particular type of causal connection between air pollutants and endangerment.

Here, EPA departed from prior agency practice and failed to find the requisite causal connection between GHG emissions, on the one hand, and an endangerment of (a) public health or (b) public welfare, on the other. The agency's strained analysis — together with its concession that its overall construction of the Act produces an absurdity — makes clear that the Act's structure simply is not a good fit for addressing harms caused by GHG emissions.

Nor does the Court's decision in *Massachusetts* compel a different result. Indeed, *Massachusetts* could hardly have been clearer in directing that, on remand, "EPA *must* ground its reasons for action *or inaction* in the statute." *Massachusetts*, 549 U.S. at 535 (emphasis added). By overlooking this Court's clear directive, and mistakenly reading *Massachusetts* to hold that the "EPA had a statutory *obligation* to regulate harmful greenhouse gases," App. 18a (emphasis added, quotations marks omitted), the panel left undisturbed EPA's failure to articulate a standard for establishing causal connections.

1. The statutory term "reasonably be anticipated to endanger" requires EPA to establish an appropriate causal connection between emissions of "air pollutants" and "public health" or "public welfare," as those terms are used in the CAA.

Congress's use of the terms "endanger" and "anticipate" ensure that EPA regulates only those types of endangerment that fit within the Act's structure by requiring the agency to establish appropriate causal connections between a pollutant and endangerment. "Endanger" means to "expose to harm or danger" or "to imperil." American Heritage Dictionary of the English Language (4th ed. 2000). "Anticipate" means

among other things to "realize beforehand," to "foresee," to "deal with beforehand." *Id.* (definition of "anticipate"). The term "reasonably be anticipated to endanger" thus calls to mind the "foreseeability" tests long used in a variety of contexts to determine legal causation of cognizable harms. See *Palsgraf* v. *Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). "It is a well established principle of law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause: *causa proxima non remota spectatur*." *Waters* v. *Merchants' Louisville Ins. Co.*, 36 U.S. (Pet. 11) 213, 222 (1837) (Story, J.); cf. *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011) ("To prevent 'infinite liability,' courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim."); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring).

Without these limitations, EPA could claim a sweeping authority to regulate all "airborne compounds of whatever stripe," *Massachusetts*, 549 U.S. at 529, that affect "well-being," 42 U.S.C. § 7602(h), thus assuming unto itself an almost limitless policy discretion. An essential predicate to regulation under the Act is, therefore, that EPA must reasonably foresee that a particular type of air pollution will harm or imperil public health or welfare. The "statutory term 'will endanger' and the "relationship of that term to other sections of the Clean Air Act" thus "limit" and "direct" EPA's authority. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 29 (D.C. Cir. 1976) (en banc).

Here, EPA failed to appreciate these limitations on its authority. EPA found endangerment of public health and welfare based, not on the harms involving

people's exposures to pollutants, but on remote causal connections of a type beyond the bounds of what Congress intended for the agency to address. Had the panel below scrutinized EPA's analysis of legal causation — as opposed to concluding such scrutiny is pretermitted by *Massachusetts* — it would have realized that its analysis as to both public health and public welfare was inadequate under the plain terms of the statute and a poor fit with the overall structure of the Act.

2. EPA's finding of an endangerment of "public health" was based on a misreading of the Act. The CAA treats effects on "health" and "welfare" distinctly. In addressing the effects of GHGs on public "health," EPA inappropriately included considerations that, if they are relevant to an endangerment finding at all, may be considered only as relating to public "welfare."

In the context of the CAA, references to protecting or endangering "public health" have long been understood to refer to health risks based on inhalational or other exposures to a pollutant. See *NRDC, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (holding that, in promulgating NAAQS, the CAA "does not permit EPA to consider" the health consequences of unemployment)*, vacated in irrelevant part by NRDC, Inc.* v. *EPA*, 921 F.2d 326 (D.C. Cir. 1991). Consistent with the structure of the Act, effects unrelated to exposure to pollutants and occurring over a long time horizon have never before been treated as "health" effects.

EPA's rulemaking proposal acknowledged that "there is no evidence that greenhouse gases *directly* cause health effects." App. 322a (emphasis added).

But despite vigorous objections from commenters that EPA could lawfully find endangerment of health only for exposure-related effects of pollutants involving inhalation, skin exposures, ingestion, and the like, App. 322a-324a, EPA nonetheless found an endangerment of public health based, not on harms involving people's exposure to pollutants, but on more remote causal connections more appropriately considered under the Act's "welfare effects" provisions. App. 324a.

3. EPA's finding of endangerment of public "welfare" also misreads the Act.

As an initial matter, EPA never made clear that endangerment to "welfare" — as opposed to public "health" — was an independent and sufficient ground for the Endangerment Finding. EPA's erroneous interpretation of the term "public health" therefore suffices, standing alone, to require reversal of the rulemaking. See *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

At any rate, EPA's failure to identify the statutorily required causal connection was, if anything, more glaring with respect to endangerment of "welfare" than endangerment of "health." The CAA provides a specific statutory method for categorizing "welfare effects." Against this backdrop, past findings of welfare endangerment have focused on particularized exposure-related welfare effects falling into one or more of ten primary categories enumerated by statute; namely, effects on (i) soils, (ii) water, (iii) crops, (iv) vegetation, (v) manmade materials, (vi) animals, (vii) wildlife, (viii) weather, visibility, and climate, (ix) damage to and deterioration of property, and (x) hazards to transportation. See 42 U.S.C.

§ 7602(h). EPA's analysis should have turned on applying this statutory scheme.

Rather than pursuing the inquiry framed by the CAA, EPA chose to organize its endangerment analysis for welfare around an invented six-part scheme lacking a discernible relation to principles drawn from the Act. EPA thus set aside the categories enumerated by the Act in favor of making predictions of how a multi-stage set of causes might produce impacts in future decades on (i) "food production and agriculture," (ii) "forestry," (iii) "water resources," (iv) "sea level rise and coastal areas," (v) "energy, infrastructure and settlements," and (vi) "ecosystems and wildlife." See generally App. 338a-366a.

EPA's analysis under its chosen scheme for analyzing "welfare effects," like its analysis of endangerment of public health, did not rely on findings of exposure-related harms. Indeed, EPA never contended that harmful welfare effects attributable to exposures to greenhouse gases were likely to occur in the near term. Cf., *e.g.*, App. 363a (addressing "near term" impacts). Rather, EPA interpreted the Act as allowing the agency to conclude that welfare endangerment may reasonably be anticipated based on effects both distant in time and causal proximity from the relevant pollutant emissions.

EPA did not contend its finding of welfare endangerment could be justified exclusively based on direct welfare effects involving "climate." Compare App. 71a, 78a (panel opinion). And while EPA noted that section 202(a)(1)'s enumeration of welfare effects concludes by listing two extremely broad categories of potential welfare effects after the dividing phrase "as well as" — namely, "effects on economic values and

on personal comfort and well-being," App. 247a — it provided no "intelligible principle" for analysis of these statutory terms that would allow for realistic assessments of welfare effects rather than arbitrarily truncated analysis. *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457 (2001). Indeed, EPA failed to identify any discernible limits on its interpretation of these statutory terms, let alone the "*substantial guidance*" that this Court deemed necessary for EPA's "setting air standards that affect the entire national economy." *Id.* at 475 (emphasis added). And it refused to be guided by Congress' framing of the welfare endangerment inquiry by discarding the statute's categorization of "welfare effects" in favor of newly devised categories of its own choosing. In doing so, EPA discarded the "intelligible principle" based on traditional exposure-related causation of harms (relied on in *Whitman*), but failed to replace it with any other intelligible principle drawn from the statute.

For its part, the panel overlooked EPA's failures to articulate any intelligible standard, thinking there was no interpretive work to do other than apply *Massachusetts*.

4. Finally, EPA erred by interpreting the Act as compelling it to disregard the effect of compliance with law already in place under related regulatory programs.

Although the National Highway Traffic Safety Administration had been directed by a 2007 congressional enactment to issue fuel economy standards for new motor vehicles providing major reductions in GHG emissions, see Energy Independence and Security Act, Pub. L. No. 110–140, 121 Stat. 1492 (Dec.

19, 2007), EPA's rulemaking ignored the emissions reductions that could be "reasonably anticipated" due to the new statutory requirements. App. 257a. EPA reasoned that, despite its obligation to assess what "may reasonably be anticipated," section 202(a) somehow precluded it from considering the emissions reductions reasonably to be expected from compliance with the law. App. 272a-273a.

EPA's refusal to consider reasonably anticipated legal compliance behaviors violates the plain terms of the Act. Any real-world welfare endangerment that "may reasonably be anticipated" over decades to centuries must necessarily account for behavior reasonably expected to occur over those long timespans under laws already in place. App. 272a-273a.

B. EPA incorrectly determined that any "air pollutant" regulated pursuant to section 202(a) must also be regulated under the PSD program.

EPA's rulemaking was also infected by a second, independent error. Relying on prior rulemakings, EPA determined that this Court's holding that GHGs are included within the term "air pollutant" in the Act's overall definitional provision, see *Massachusetts*, 549 U.S. at 529, means *a fortiorari* that GHGs must be deemed "air pollutants" under the CAA's Prevention of Significant Deterioration program, see App. 62a.

EPA failed to recognize that the term "air pollutant," as used in the PSD program, could be given a narrower interpretation to cover just the six NAAQS pollutants — all of which cause exposure-related health problems — rather than encompassing all airborne compounds deemed harmful and regulated by

EPA under any CAA program. As this Court recently explained in interpreting the Clean Air Act, "the natural presumption that identical words used in different parts of the same act are intended to have the same meaning * * * is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Environmental Defense* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quotation marks and ellipsis omitted).

Here, the terms "air pollutant" in the definitional provision and PSD program clearly have distinct meanings — as even EPA acknowledges. Although *Massachusetts* said that "air pollutant" means "all airborne compounds of whatever stripe" under section 202(a)(1), 549 U.S. at 529, EPA did not use that broad definition for the term "air pollutant" in the PSD statute, recognizing that it would be illogical to require preconstruction permits because of emissions of any airborne compound, including airborne compounds that have not been deemed harmful enough to be regulated under the CAA. EPA itself has therefore recognized that the *Massachusetts* definition of "air pollutant" cannot control the definition of "air pollutant" under the PSD statute. As Judge Kavanaugh explained, "EPA cannot simultaneously latch on to *Massachusetts* v. *EPA* and reject *Massachusetts* v. *EPA*" in interpreting the term "air pollutant" in the PSD context. App. 150a (dissenting opinion).

C. EPA incorrectly exercised its delegated authority in regulating GHGs.

In *Massachusetts*, the Court recognized that EPA could decline to make an endangerment finding for

GHGs "if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether [GHGs endanger public health or welfare]." 549 U.S. at 533. Accordingly, once it recognized the absurd consequences of squeezing GHGs into the terms of the CAA, EPA was obliged to decline to regulate GHGs if no saving construction of the Act were available. It is "highly unlikely that Congress" would have wanted concededly absurd, economy-wide regulation of these air pollutants. *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 231 (1994).

Indeed, if *Brown & Williamson* was an "extraordinary case" requiring the agency to "hesitate before concluding that Congress" intended an improbable "implicit delegation" of authority to regulate, 529 U.S. at 143, 159, this case is even more extraordinary and requires even more hesitation. See App. 122a-123a (Brown, J., dissenting). In *Massachusetts*, the Court reasoned that construing "air pollutant" to include GHGs "would lead to no [ ] extreme measures" as had occurred in *Brown & Williamson*, because there was "nothing counterintuitive to the notion that EPA can curtail" harmful automotive GHG emissions as it had long done under the CAA. 549 U.S. at 531. Now, however, EPA's admittedly absurd extension of GHG emissions controls to hundreds of thousands of small, non-industrial sources far outside anything contemplated by Congress undercuts this distinction.

* * *

At all events, were there any doubts about EPA's interpretations of section 202(a)(1) or the relevant PSD and Title V statutes, EPA was bound to interpret one or all of them to avoid the absurdity that

would be produced by a contrary interpretation. *Massachusetts* does not compel a different result, but to the extent that the Court finds that it does, petitioners respectfully submit that the Court should revisit some aspects of the decision.

III. This case presents recurring questions of national importance.

EPA's GHG rulemakings have enormous economic consequences, and the agency's interpretive method poses profound questions under the Constitution's system of separation of powers.

1. There can be little doubt that "[t]his case is [ ] one of exceptional importance" with "massive real-world consequences." App. 133a (Kavanaugh, J., dissenting), As even the members of the panel that upheld the regulations recognized, "[t]he underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance." App. 106a. Neither EPA nor any of its intervenors or *amici* has questioned the staggering practical consequences of these rulemakings. Indeed, EPA avoided performing a cost-benefit analysis of the stationary source aspects of these rulemakings, perhaps hesitating to find out how staggering those consequences really are.

EPA's rulemakings establish a regulatory apparatus the likes, costs, and breadth of which have never before been seen, effectively establishing EPA as a national zoning board with jurisdiction over the entire economy — for the first time ever imposing the CAA's regulatory burdens so heavily and directly on States, industry, farms, convenience stores, hospitals, shopping malls, churches, even homes.

2. The rulemakings below pose profound ques-

tions under the Constitution's separation of powers. If uncorrected, EPA's new understanding of the absurdity canon as granting *carte blanche* for agency amendments to clear statutory text will establish a milestone in the relationship between the legislative and executive branches. As Judge Kavanaugh observed, "undue deference or abdication to an agency carries its own systemic costs. If a court mistakenly allows an agency's transgression of statutory limits, then we green-light a significant shift of power from the Legislative Branch to the Executive Branch." App. 152a-153a (Kavanaugh, J., dissenting).

Whatever the magnitude of the threat to health or welfare posed by climate change, the threat surely does not justify an agency's wholesale rewriting of statutory provisions. No matter how important an agency's policy goals, the agency may not pursue means and ends not encompassed within its congressional delegation of authority — however fondly it may wish to press the square peg of a preferred regulatory program into the nearest statutory round hole. "Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging *both* of the political branches." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 637 (2006) (separate opinion) (emphasis added). As the Framers recognized, the "failures of * * * regulation may be a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3157 (2010) (quotation marks, alterations, and citations omitted).

The willingness, perhaps eagerness, of unelected EPA officials to construe statutory language in a manner producing absurd results justifying agency-crafted, statutory amendments conflicts with the deliberative governance our Framers envisioned. The Court's review is needed to determine the legitimacy of EPA's new understandings of its interpretive authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RACHEL L. BRAND
SHELDON GILBERT
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

MICHAEL C. GERAGHTY
Attorney General
STEVEN E. MULDER
State of Alaska
1031 W. 4th Avenue
Anchorage, AK 99501
(907) 269-5274

ELLEN STEEN
DANIELLE QUIST
American Farm Bureau Federation
600 Maryland Ave., SW
Washington, DC 20024
(202) 406-3600

ROBERT R. GASAWAY
Counsel of Record
JEFFREY A. ROSEN, P.C.
JEFFREY BOSSERT CLARK
ADITYA BAMZAI
WILLIAM H. BURGESS
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
robert.gasaway@kirkland.com
(202) 879-5000

Counsel for Petitioner Chamber of Commerce of the United States of America

DOUGLAS A. HENDERSON
Troutman Sanders LLP
600 Peachtree Street, NE
Atlanta, GA 30308
(404) 885-3479

JESSE K. MARTIN
Troutman Sanders LLP
401 Ninth Street, N.W.
Washington, D.C. 20001
(202) 274-2950

Counsel for Petitioner American Farm Bureau Federation

April 19, 2013