NOS. 12-1146 AND CONSOLIDATED CASES

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

BRIEF OF PETITIONER UTILITY AIR REGULATORY GROUP

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December 9, 2013

PETITION FOR CERTIORARI FILED MARCH 20, 2013
CERTIORARI GRANTED OCTOBER 15, 2013

QUESTION PRESENTED

After this Court decided *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the United States Environmental Protection Agency (EPA) determined that its promulgation of motor vehicle greenhouse gas (GHG) emission standards under Title II of the Clean Air Act (CAA), 42 U.S.C. § 7521(a)(1), compelled regulation of carbon dioxide and other GHGs under the CAA's Title I Prevention of Significant Deterioration (PSD) and Title V stationary-source permitting programs. EPA adopted the Timing Rule and the Tailoring Rule, which added GHGs to the pollutants covered by the PSD and Title V programs even though (i) including GHGs would vastly expand the PSD and Title V programs in a way that contradicts Congress's intent, and (ii) GHGs such as carbon dioxide do not deteriorate ambient air quality (*i.e.*, the outside air that people breathe). The court of appeals held that the CAA and *Massachusetts* compelled inclusion of GHGs in these programs and, based on that holding, dismissed on standing grounds all petitions to review EPA's GHG permitting rules. The question presented is:

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

PARTIES TO THE PROCEEDING

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

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

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

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

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia

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

Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; and Portland Cement Association.

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

5. Respondent-intervenors below (with respect to certain petitions for review), who are respondents (or, in some cases, nominal respondents) on review, were American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; Commonwealth of Massachusetts; Conservation Law

Foundation; Environmental Defense Fund; Georgia ForestWatch; Indiana Wildlife Federation; Michigan Environmental Council; National Environmental Development Association's Clean Air Project; National Mining Association; Peabody Energy Company; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; South Coast Air Quality Management District; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; Utility Air Regulatory Group; Wild Virginia.

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

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

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

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

3. Additional petitioners below, who are nominal respondents on review, were Southeastern Legal Foundation, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Repre-

sentative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Energy-Intensive Manufacturers' Working Group on Green-

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

4. Petitioner-intervenors below (with respect to certain petitions for review), who are nominal respondents on review, were American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Corn Refiners As-

sociation; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Oilseed Processors Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

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

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection

Agency, on February 15, 2013; that office is currently held by Gina McCarthy.

CORPORATE DISCLOSURE STATEMENT

The Utility Air Regulatory Group (UARG) is a not-for-profit association of individual electric utilities and electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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JURISDICTION

The court of appeals entered judgment dismissing the Timing and Tailoring Rule cases on June 26, 2012. Pet. App. (No. 12-1146) 5a. Timely petitions for panel or en banc rehearing were denied on December 20, 2012. JA 141. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7401 *et seq.*, are reproduced at Pet. App. (No. 12-1146) 664a-680a. Relevant regulations implementing the CAA are reproduced at Pet. App. (No. 12-1146) 681a-692a.

STATEMENT OF THE CASE

This case concerns the decision of a panel of the lower court that, upon promulgation by the United States Environmental Protection Agency (EPA) of motor vehicle emission standards for greenhouse gases (GHGs) under Title II of the CAA, EPA was compelled by (1) this Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), applying the CAA's general definition of "air pollutant" to Title II of the CAA, and (2) the use of the term "air pollutant" in the

CAA's Prevention of Significant (PSD) and Title V provisions, to regulate stationary sources' GHG emissions under the Title I and Title V permitting programs.[1] At issue is whether this determination by EPA that stationary source regulation is statutorily compelled is a permissible reading of the CAA.

Pollutants like sulfuric acid, benzene, sulfur dioxide, and nitrogen dioxide are regulated under the Act because they contribute to local or regional concentrations in the ambient air that pose risks to public health or welfare. By contrast, as EPA explained, GHG concentrations "tend to be relatively uniform around the world," JA 1091, causing climate change effects that cannot be related to specific sources' emissions. Although EPA identified health and welfare effects from global GHG concentrations, EPA also recognized that "[c]urrent and projected levels of ambient concentrations" of GHGs themselves are not responsible for direct adverse effects locally and regionally. *Id.* at 1145.

The "basket" of substances constituting GHGs is dominated by one – carbon dioxide.[2] Carbon dioxide is a colorless gas that, like nitrogen and oxygen, is a natural component of the outside air people breathe.

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[1] Although this brief focuses on Title I PSD requirements, defining Title V "air pollutants" to include GHGs is also problematic; the arguments presented here regarding "major source" coverage generally also apply to Title V.

[2] EPA defines "GHGs" as consisting of six pollutants. Each is assigned a numerical value based on its "Global Warming Potential," measured relative to carbon dioxide, which is called "carbon dioxide equivalent." JA 290.

Ground-level ambient concentrations of carbon dioxide are uniform over large geographic areas and do not change measurably due to new carbon dioxide emissions from industrial and other sources. Exposure to carbon dioxide in ambient air is necessary to sustain life and is harmless to humans, animals, and property. See IPCC Special Report, Carbon Dioxide Capture and Storage, Annex 1, at 385 (2005), *available at* http://www.ipcc.ch/pdf/special-reports/srccs/srccs_wholereport.pdf.

Congress limited coverage of the Title I PSD and Title V permit programs to "major" sources, which Congress defined in reference to annual emissions of "any air pollutant" – 100 tons per year (tpy) for Title V, 42 U.S.C. §§ 7602(j), 7661(2)(B), and 100 or 250 tpy for PSD depending upon the type of source, *id.* § 7479(1). If these tpy thresholds are applied to carbon dioxide emissions, the coverage of these programs will no longer be limited to "major" sources. Carbon dioxide emissions result from combustion and are emitted from stationary sources in amounts that are orders of magnitude greater than other CAA-regulated combustion byproducts. A source that, for example, emits 250 tpy of sulfur dioxide or particulate matter is, invariably, a large industrial facility. On the other hand, sources emitting 250 tpy of carbon dioxide include hospitals, schools, apartment buildings, shopping centers, and innumerable other small non-industrial sources. JA 283-84.

1. The modern CAA was enacted in 1970 and significantly amended in 1977 and 1990, as Congress turned its attention to new problems and devised different approaches to existing problems. The Act con-

tains six distinct titles (Subchapters I through VI of 42 U.S.C. Chapter 85); each establishes different programs to address different pollution problems in different geographic areas for different types of sources.

Title II addresses emission standards for mobile sources, including motor vehicles. Title I establishes a variety of programs governing stationary source emissions, including programs addressing national ambient air quality standards (NAAQS), control technology standards, air toxics regulation, and visibility protection. Congress revised Title I in 1977, adding, *inter alia*, a PSD preconstruction permit program for large industrial sources. In 1990, Congress added Title V to create an operating permit program for large stationary sources. Title III contains the CAA's "general provisions," including the Act's general definition of "air pollutant" addressed in *Massachusetts*. 42 U.S.C. § 7602(g).

2. The starting point for Title I stationary source regulation is the NAAQS program. *Id.* §§ 7408, 7409; *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 249 (1976) (NAAQS program is the "heart" of the CAA). As specified by § 7409(b), EPA establishes NAAQS by defining maximum health- and welfare-protective concentrations of specific pollutants (so-called "criteria pollutants") in the "ambient air" – ground-level outdoor air to which people are exposed and which they breathe. *Train* v. *Natural Res. Def. Council*, 421 U.S. 60, 65 (1975) ("'ambient air[]' ... is the statute's term for the outdoor air used by the general public"); 40 C.F.R. § 50.1(e) ("Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access.").

After EPA promulgates a NAAQS, States have primary responsibility to ensure the ambient air within their borders attains and maintains the NAAQS. A State does this by adopting emission limitations and other measures in a state implementation plan (SIP) that it submits to EPA for review and approval. 42 U.S.C. §§ 7407, 7410. The CAA assigns responsibility for achieving NAAQS on a geographic basis. *Id.* § 7407(a). For each NAAQS, each state is divided into defined geographic areas that are designated, based on measured ambient air quality concentrations, as (1) "attainment" (meaning ambient air quality in the area is as good as or better than the NAAQS), (2) "nonattainment" (the area's ambient air quality is worse than the NAAQS), or (3) "unclassifiable." A geographic area may be in attainment with one NAAQS but nonattainment (or unclassifiable) for another.

3. The PSD program arose from litigation after EPA's approval in 1972 of the first SIPs. In *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253, 257 (D.D.C.), *aff'd per curiam*, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972), *aff'd per curiam by an equally divided Court sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973), the court ordered EPA to disapprove any SIP that allowed "attainment" ambient air quality in an area to "deteriorate" to the level of a NAAQS.

In 1974, EPA implemented that decision by promulgating the initial PSD rules. 39 Fed. Reg. 42,510, 42,514-17 (Dec. 5, 1974). Those rules sought to "prevent significant deterioration" of local ambient air quality in attainment areas by requiring permits before construction of named types of large industrial

sources (or modifications of such sources) could occur.[3] Deterioration of local air quality would be avoided by requiring that these large industrial facilities (i) not cause ambient air quality impacts above specified numerical "increments" for sulfur dioxide and particulate matter, and (ii) use "best available control technology" (BACT) for these pollutants.

4. In 1977, Congress enacted a PSD program based largely on EPA's 1974 rules. See *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 470-74 (2004). Like the 1974 rules, the statutory PSD program required preconstruction permits for construction or modification of major sources. The new statutory program covered only "major emitting facilit[ies]." 42 U.S.C. § 7479(1). For 28 listed categories of industrial facilities, sources were "major emitting facilit[ies]" if they "emit, or have the potential to emit, [100 tpy] or more of any air pollutant." *Id.* Recognizing that other large industrial facilities, outside the 28 categories, could have emissions that deteriorate local ambient air quality, Congress provided such a facility would be a "major emitting facility" if it had "the potential to emit [250 tpy] or more of any air pollutant." *Id.*

In 1978, EPA promulgated regulations to implement the statutory PSD program. JA 1496-536. Resolving challenges to those regulations, the D.C. Circuit in *Alabama Power Co.* v. *Costle*, 636 F.2d 323

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[3] Eighteen specifically identified categories of large industrial sources were subject to review under EPA's 1974 rules. 39 Fed. Reg. at 42,516.

(D.C. Cir. 1979), addressed Congress's intent for the PSD program.

Regarding "major emitting facility," the court explained the statutory definition was "not pollutant-specific, but rather identifies sources that emit more than a threshold quantity of *any* air pollutant." *Id.* at 352. The court observed that:

> Once a source has been so identified, it may become subject to [the] substantial administrative burdens and stringent technological control requirements [imposed by § 7475 (discussed further below)] for each pollutant regulated under the Act, even though the air pollutant, emissions of which caused the source to be classified as a "major emitting facility," may not be a pollutant for which NAAQS have been promulgated or even one that is otherwise regulated under the Act. As [is] apparent from consideration of the ramifications of this definition, Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air.

Id. at 352-53.

The "100 ton-per-annum threshold" applicable to the "28 categories of facilities" listed in § 7479(1), the court said, indicates "Congress was concerned with large industrial enterprises – major actual emitters

of air pollution" and intended to exclude from the statute's major emitting facility definition "small industrial facilities within these categories [that] might actually and potentially emit less than the threshold amount." *Id.* at 354. Emphasizing this point, the court said it had "no reason to believe that Congress intended [the term "major emitting facility"] to define such obviously minor sources" as "the heating plant operating in a large high school or in a small community college," as "'major' for the purposes of the PSD provision."[4] *Id.*

5. The PSD program's exclusive focus on pollutants that can deteriorate ambient air quality in geographically-defined areas is evident in the 1977 statutory text. For example, Congress directed that "each applicable implementation plan shall contain emission limitations and such other measures *as may be necessary*, as determined under regulations promulgated under this part, to prevent *significant deterioration of air quality* in each [area] ... designated

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[4] Although the text of § 7479(1) plainly defines "major emitting facility" in reference to a source that emits the applicable threshold amount of "any air pollutant," EPA's 1978 regulations defined the equivalent regulatory term "Major stationary source" to mean sources within the 28 statutorily-identified industrial categories that "emit, or have the potential to emit, 100 [tpy] or more of any air pollutant *regulated under the Clean Air Act*." JA 1508 (emphasis added). EPA added the same limiting language to the 250-tpy threshold. Because no one objected to the limiting words "regulated under the Clean Air Act" added in EPA's definition, the *Alabama Power* court had no occasion to consider whether this EPA addition conformed to congressional intent.

pursuant to section 7407 ... as attainment or unclassifiable." 42 U.S.C. § 7471 (emphases added).

For "major emitting facilities" beginning construction after the 1977 CAA Amendments' enactment, Congress established in § 7475 requirements for preconstruction permitting. To receive a permit, a proposed facility's owner or operator must demonstrate

> that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant *in any area* to which this part applies ..., (B) [NAAQS] *in any air quality control region*, or (C) any other applicable emission standard or standard of performance under [the Act].

Id. § 7475(a)(3) (emphases added).

To evaluate the significance of air quality deterioration, the owner or operator must "conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or [are] having, on *air quality in any area which may be affected* by emissions from such source." *Id.* § 7475(a)(7) (emphasis added). Each proposed "major emitting facility" is subject to "an analysis ... of *the ambient air quality at the proposed site* and *in areas which may be affected* by emissions from such facility for *each pollutant subject to regulation under this [Act]* which will be emitted from such facility." *Id.* § 7475(e)(1) (emphases added). This analysis must address

> the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and *in the area potentially affected* by the emissions from such facility for *each pollutant regulated under this [Act]* which will be emitted from, or which results from the construction or operation of, such facility, ... and such other factors as may be relevant in determining *the effect of emissions from a proposed facility on any air quality control region.*

Id. § 7475(e)(3)(B) (emphases added).

In parallel to the air quality monitoring and analysis of "each pollutant subject to regulation" that the facility would emit, *id.* § 7475(e)(1), a PSD permit must contain emission limitations based on BACT for each such pollutant, *id.* § 7475(a)(4). Although the CAA does not define "each pollutant subject to regulation," *Alabama Power* rejected an argument, based on language in § 7476, that Congress intended that only sulfur dioxide and particulate matter be deemed "subject to regulation." 636 F.2d at 405-06. The D.C. Circuit found that "[t]hough Congress could have decided to delay the applicability of PSD for [other] pollutants until all studies and regulations required by [§ 7476] have been completed, Congress apparently chose not to do so...." *Id.* at 406. The court noted that "[w]hat legislative history there is on this point" indicated the BACT requirement "'should be applicable to all pollutants emitted from any new major emitting facility so that the maximum degree of emission reduction would be achieved *in order to*

minimize potential deterioration.'" *Id.* at 406-07 & n.81 (emphasis added) (quoting 123 Cong. Rec. S9162, S9170 (daily ed. June 8, 1977) (statement of Sen. Muskie)).

6. In 1999, several groups petitioned EPA to regulate motor vehicles' GHG emissions under Title II of the Act, 42 U.S.C. § 7521(a)(1). See 66 Fed. Reg. 7486 (Jan. 23, 2001). EPA denied the petition on the ground that GHGs are not an "air pollutant" under the general definitional provision in Title III of the Act (42 U.S.C. § 7602(g)). JA 1332-378.

On review, this Court rejected EPA's argument that the Act's broad general definition of "air pollutant" excluded GHGs, stating that "[o]n its face, the [§ 7602(g)] definition embraces all airborne compounds of whatever stripe." *Massachusetts*, 549 U.S. at 529. The Court concluded Title II embraced this capacious definition: "The broad language of [§ 7521(a)(1)] reflects an intentional effort to confer the flexibility necessary," *id.* at 532, to authorize regulation of all vehicle emissions that "contribute to[] air pollution which may ... endanger public health or welfare," 42 U.S.C. § 7521(a)(1), including vehicles' GHG emissions if those emissions contribute to an "endangerment."

7. After this Court decided *Massachusetts*, EPA determined that motor vehicles' GHG emissions throughout the nation "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," pursuant to § 7521(a)(1). JA 793, 821. EPA did not find, could not find, and was not called on to find that those emissions deteriorate ambient air quality; rather, it

found GHGs disperse throughout the global atmosphere and affect climate globally. *Id.* at 861-69. Following its Endangerment Finding, EPA promulgated the Motor Vehicle Rule, regulating vehicles' GHG emissions under § 7521(a). *Id.* at 683-704.

8. In 2009, EPA explained that "[c]urrently, EPA does not consider GHG emissions to be 'regulated ... pollutants' under the [Title I] PSD program.... EPA is in the process of reviewing its approach to PSD applicability...." 74 Fed. Reg. 55,292, 55,299 (Oct. 27, 2009) (proposed Tailoring Rule). Subsequently, EPA's Timing Rule addressed when GHGs would become "subject to regulation" for PSD purposes, JA 771, and "conclude[d] only that ... GHGs would not be considered 'subject to regulation' ... earlier than January 2, 2011," the Motor Vehicle Rule's effective date, *id.* at 772.

In its companion Tailoring Rule, EPA determined that, under *Massachusetts*'s holding that GHGs are within § 7602(g)'s "air pollutant" definition, once the Motor Vehicle Rule took effect and resulted in GHGs becoming "subject to regulation" under Title II, regulation of *stationary* sources' GHG emissions was compelled by operation of law under the Title I PSD and Title V programs. *Id.* at 283-84. According to EPA, "[o]ur legal basis for this rule is our interpretation of the PSD and title V applicability provisions," *id.* at 280, *i.e.*, "that GHG sources would become subject to the PSD and title V permitting programs upon finalization" of the Motor Vehicle Rule, EPA, Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments at 34 (May 2010), *available at* http://

www.regulations.gov/#!searchResults;rpp=25;po=0;s=EPA-HQ-OAR-2009-0517-19181;fp=true;ns=true (Response to Comments).

At the same time, EPA acknowledged that treating GHGs covered by the PSD and Title V programs the same as previously regulated pollutants would expand those programs to myriad sources Congress *never* intended to regulate. See, *e.g.*, JA 355-56, 486-87; 74 Fed. Reg. at 55,304 ("Congress, focused as it was [in 1977] on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources."). According to EPA, expanding the programs to cover smaller sources emitting GHGs over these thresholds would not be "consistent with other provisions of the PSD and title V requirements, and [would be] inconsistent with – and, indeed, undermine – congressional purposes for the PSD and title V provisions." JA 418-19. EPA concluded that "applying PSD requirements literally to GHG sources … would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 454-55; see also *id.* at 485 (same conclusion for Title V).

The Tailoring Rule was EPA's response to what it viewed as a conflict between (i) the unambiguous 100- and 250-tpy applicability thresholds that Congress used to define "major emitting facility" and (ii) clear congressional intent *not* to apply PSD to tens of thousands, and Title V to millions, of small sources. EPA resolved this perceived conflict by amending 40 C.F.R. § 51.166 to limit PSD coverage by initially defining the GHGs regulated under PSD as those GHGs

emitted in amounts at or above 100,000 tpy of carbon dioxide equivalent for new construction (and at or above 75,000 tpy of carbon dioxide equivalent for modifications). *Id.* at 674. Similarly, GHGs regulated under Title V were defined as those emitted in amounts at or above 100,000 tpy of carbon dioxide equivalent.[5] *Id.* at 677-78. Because EPA construed the Act to require that GHGs be regulated the same as other § 7602(g) air pollutants, notwithstanding that such regulation would contradict Congress's intent in defining "major" sources under PSD and Title V, EPA decided it would, on a step-by-step basis, "consider in future rulemaking how closely to the statutory thresholds [it] will be able to implement the PSD and title V programs." *Id.* at 289.

9. In promulgating the Tailoring Rule, EPA rejected rulemaking comments arguing that (i) *Massachusetts* did not require EPA to interpret "air pollutant," as used in the Act's PSD provisions, to include GHGs where their inclusion would be inconsistent with Congress's understanding of "major emitting facility," and (ii) EPA was prohibited from undertaking, step-by-step, a program that contradicts this congressional intent. See Response to Comments at 34-43. A panel of the lower court agreed with EPA that inclusion of GHGs was dictated by "binding Supreme Court precedent." JA 145.

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[5] The Tailoring Rule defines GHGs emitted below its 75,000-tpy and 100,000-tpy PSD thresholds and 100,000-tpy Title V threshold as not constituting air pollutants "subject to regulation" under the PSD and Title V programs, respectively. JA 673.

The D.C. Circuit denied petitions for rehearing en banc. Judges Brown and Kavanaugh dissented in separate opinions. Concurring in denial of rehearing, the panel judges reiterated their conclusion that, based on its reading of *Massachusetts*, "the panel's interpretation of the statute is the only plausible one." *Id.* at 144.

SUMMARY OF ARGUMENT

This Court in *Massachusetts* held that the CAA's general definition of "air pollutant" is sufficiently "sweeping" to encompass GHGs and that, under the language of § 7521(a) in Title II of the Act, EPA would have to prescribe standards for motor vehicles' GHG emissions if it found those emissions "endanger public health or welfare." *Massachusetts*, 549 U.S. at 528, 532-33. Nothing in *Massachusetts* supports the conclusion, however, that EPA's Title II endangerment finding and Title II motor-vehicle regulation compelled regulation of stationary sources' GHG emissions under very different Title I PSD and Title V programs.

Although GHGs fit within § 7602(g)'s general definition, they are not an air pollutant Congress intended to be regulated under PSD and Title V. In the PSD and Title V provisions, Congress defined "major emitting facility" so that only a certain type of source – large industrial facilities, relatively few in number – would be subject to those programs. The PSD definition covers stationary sources within 28 specific categories of industrial facilities that emit, or could emit, 100 tpy or more of "any air pollutant" and other stationary sources that emit 250 tpy or more of "any air pollutant." The Title V definition covers station-

ary sources that emit 100 tpy or more of "any air pollutant." Thousands of small, non-industrial sources, such as apartment buildings and schools, emit carbon dioxide in amounts well above 250 tpy, and millions of small sources emit carbon dioxide in amounts above the 100 tpy Title V threshold. To give effect to Congress's intent, therefore, carbon dioxide and other GHGs cannot be pollutants regulated under PSD and Title V.

Further, whatever "endangerment" carbon dioxide may present due to effects of global climate change, carbon dioxide *does not deteriorate ambient air quality* – the quality of the air people breathe. The CAA's PSD provisions address exclusively the review, analysis, monitoring, and control of "air pollutants" that deteriorate ambient air quality in specifically defined geographic areas. Carbon dioxide does not fit within those provisions.

ARGUMENT

The CAA is an expansive statute that addresses different pollution problems using different regulatory responses. In a statute with distinct titles and numerous specialized programs, the general definition of "air pollutant" must be broad enough to reflect the entire range of substances that might be regulated under any of those diverse programs. Accordingly, the definition of "air pollutant" in § 7602(g) establishes, as *Massachusetts* holds, the outer bounds of what airborne substances are *potentially* eligible for regulation under any given CAA program.

Regarding regulation of motor vehicle emissions under Title II, the Act directs EPA to "prescribe ...

standards applicable to the emission of any air pollutant from ... new motor vehicles" where EPA determines those "air pollutant" emissions "cause, or contribute to, air pollution which may reasonably be anticipated *to endanger* public health or welfare." 42 U.S.C. § 7521(a) (emphasis added). Thus, any "air pollutant" the motor-vehicle emissions of which EPA concludes present an "endangerment" must be regulated under Title II standards for vehicles throughout the nation.

Regarding regulation of stationary source emissions under Title I, Congress provided different criteria for determining what pollutants to regulate under different programs. For example, "[f]or the purpose of establishing" NAAQS, EPA must develop "a list which includes each air pollutant ... [the] emissions of which ... cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7408(a)(1). But, unlike Title II endangerment findings, this Title I endangerment finding is not the end of the process of identifying pollutants that can be regulated. Rather, under the NAAQS provisions, EPA's regulatory attention focuses on a specific type of endangerment: Only those listed pollutants that have "effects on public health or welfare ... *from the presence of such pollutant in the ambient air, in varying quantities*," may become air quality "criteria" pollutants for which NAAQS are established. *Id.* § 7408(a)(2) (emphasis added). NAAQS, in turn, must be based on EPA-defined "air quality criteria." *Id.* §§ 7408(a)(2), 7409(b).

For hazardous air pollutants, under § 7412, EPA must regulate "air pollutants" that Congress listed in

§ 7412(b)(1). EPA must "periodically review" this list and, "where appropriate," revise it to add those air pollutants EPA determines "present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects ... or adverse environmental effects." *Id.* § 7412(b)(2).

In Title I, Part C, *i.e.*, the Act's PSD provisions, Congress directed that PSD requirements apply to "major emitting facilit[ies]," defined to include listed industrial facilities and "any other [stationary] source[s]" that emit above a specified numerical amount of "any air pollutant." *Id.* § 7479(1). Such facilities' emissions are to be regulated "as may be necessary ... to prevent significant deterioration of air quality" in geographically-defined air quality control regions. *Id.* § 7471. Part C is directed at protecting ambient air, the air people breathe, from the type of "deleterious pollutants that befoul our nation's air." *Alabama Power*, 636 F.2d at 353.

Massachusetts addressed whether § 7521(a)(1) "authorizes EPA to regulate [GHG] emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change" that "'endanger[s] public health or welfare.'" 549 U.S. at 528. No party in *Massachusetts* argued, or had reason to argue, that, if the "air pollutant" definition in § 7602(g) covered GHGs, those substances could not – in conformance with congressional intent – be considered air pollutants under § 7521(a)(1). Thus, after finding the § 7602(g) definition "embraces all airborne compounds of whatever stripe," *id.* at 529, the Court had no reason to consider a less expansive interpretation in the Title II context, see,

e.g., *id.* at 531 ("EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles" or any "extreme" or "counterintuitive" results that would flow from such regulation).

The Court acknowledged that the "Congresses that drafted § [7521(a)(1) in Title II] might not have appreciated the possibility that burning fossil fuels could lead to global warming." *Id.* at 532. But by authorizing regulation of vehicles' air pollutant emissions that "endanger," those Congresses "understood that without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete." *Id.* "The broad language of § [7521(a)(1)]," the Court found, "reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence." *Id.*

Is the language of the CAA's PSD and Title V provisions equally "broad," "reflect[ing]" comparable congressional intent that GHGs be regulated under those programs? No. As explained below, it is clear on the face of the CAA that substances such as GHGs – while they may be air pollutants within the meaning of § 7602(g) – were never intended by Congress to be regulated as air pollutants under the PSD and Title V programs.

I. GHGs Cannot Be a Pollutant Under the CAA's PSD and Title V Programs Because Innumerable Small, Non-Industrial Sources Would Be "Major Emitting Facilities" Contrary to Congressional Intent.

The "broad language" engaged in *Massachusetts* provides that EPA "shall ... prescribe" by regulation "standards applicable to the emission of any air pollutant from *any class or classes of new motor vehicles or new motor vehicle engines,* which ... cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (emphasis added). This language finds no corollary in the corresponding provisions of Title I and Title V that identify the emission sources that are subject to PSD and Title V requirements.

The Title II standards apply without qualification where the endangerment criterion is met for "any air pollutant" emitted from "any ... new motor vehicles." In contrast, Congress provided that the Part C PSD requirements apply not to "any" stationary source but only to those that are "major emitting facilities" – a relatively small number of large industrial sources defined as facilities with actual or potential emissions of "any air pollutant" that equal or exceed 100 tpy (in specifically listed industrial categories) and 250 tpy (for sources in other, unlisted industrial categories).[6] *Id.* § 7479(1).

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[6] Congress similarly limited Title V major sources to large industrial sources, 42 U.S.C. §§ 7602(j), 7661(2)(B), and the argu-

(Continued . . . .)

In using the term "major emitting facility," Congress intended "to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission[s]" that deteriorate ambient air. *Alabama Power*, 636 F.2d at 353. Only such large industrial facilities were to be subject to the Act's PSD provisions. See JA 453 ("Congress ... designed the thresholds *deliberately* to limit the program's scope." (emphasis added)).

If the 250-tpy threshold for "any air pollutant" identified, in Congress's contemplation, the "large industrial enterprises," not otherwise listed, to which PSD is to apply, *Alabama Power*, 636 F.2d at 354, it necessarily follows that Congress *never* intended that GHGs be regulated under the PSD program. Myriad small sources, *not* "industrial" in nature, emit GHGs in amounts well above 250 tpy. Regulating GHGs as an "air pollutant" under Part C would drag such sources into the PSD program as "major emitting facilities," contradicting Congress's expectation and intent. *Id.* (Congress did not "intend[] to define such obviously minor sources [as a high school heating plant] as 'major' for the purposes of the PSD provision.").

EPA understood this when it promulgated the Tailoring Rule. JA 453 ("Congress intended to limit the PSD program to large industrial sources because

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ments presented in this section regarding PSD also apply to Title V. See *supra* note 1.

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."); *id.* at 454 (describing PSD provisions' legislative history and noting "[t]he DC Circuit had occasion, in *Alabama Power*, to acknowledge this legislative history").

As EPA observed, "*Congress intended* that PSD be limited to a *relatively small number of large industrial sources*[,]" and it was "not too much to say that applying PSD requirements literally to GHG sources ... would result in a program that *would have been unrecognizable to the Congress that designed PSD*." *Id.* at 454-55 (emphases added); *id.* at 449 ("the great majority of these new sources [that would be regulated by applying PSD to GHGs] will be small commercial or residential sources," a result "contrary to congressional intent for the PSD program"); *id.* at 485 (Title V).

Yet, in contravention of congressional intent, EPA promulgated a rule that does "apply[] PSD requirements literally to GHG sources," *id.* at 454, with a twist – a rule that establishes a 100,000-tpy carbon dioxide equivalent "major source" threshold for GHGs as compared to the 100- and 250-tpy statutory thresholds. And, *curious and curiouser*, EPA "expect[s] to ... lower[] thresholds, as appropriate, in the future," expanding GHG regulation "one-step-at-a-time," *id.* at 555, 556-57, by bringing into the PSD program sources EPA concedes Congress never intended be regulated under that program.

EPA contended it was compelled to do this because *Massachusetts* held GHGs were an "air pollu-

tant" under § 7602(g) and because GHGs were "subject to regulation" under Title II as an "endangering" pollutant. The court below agreed. Given "both the statute's plain language and ... *Massachusetts*," the D.C. Circuit said, it had "little trouble concluding that the phrase 'any air pollutant' includes *all* regulated air pollutants, including [GHGs]," for purposes of PSD and Title V. *Id.* at 237. *Massachusetts*, which did not consider GHG regulation under PSD or Title V, does not support the D.C. Circuit's conclusion that it had "little trouble" reaching.

In an expansive statute like the CAA, a general definition of a term such as "air pollutant" must be sufficiently capacious to reflect the entire range of substances that might be regulated under any one or more of several diverse programs established by the statute. Thus, § 7602(g) sets the outer bounds of the air pollutants that are potentially eligible for regulation under the various CAA programs; it does not define the precise meaning or delineate the exact scope of that term for each CAA individual program.

Throughout the CAA's history, EPA has carefully limited Title I programs only to those substances within the § 7602(g) "air pollutant" definition that Congress intended be regulated under each individual program. For example, although § 7411 provides that new source performance standards (NSPS) apply whenever a source undertakes a "physical change ... which increases the amount of *any* air pollutant emitted," 42 U.S.C. § 7411(a)(4) (emphasis added), EPA by regulation narrowed the universe of air pollutants that trigger NSPS to those "[air] pollutant[s] to which a standard applies" under 40 C.F.R. part 60.

40 C.F.R. § 60.14(a). And although § 7491 defines "major stationary source[s]" to which the CAA visibility protection program applies as sources "with the potential to emit 250 tons or more of *any* pollutant," 42 U.S.C. § 7491(g)(7) (emphasis added), EPA by regulation limited the pollutants in this program to "visibility impair[ing]" pollutants, see, *e.g.*, 40 C.F.R. pt. 51, app. Y, § III.A.2. And in the rulemaking at issue here, although EPA read *Massachusetts* to compel PSD and Title V regulation of *all* GHGs, EPA limited regulation only to GHGs emitted at or above the 100,000- or 75,000-tpy carbon dioxide equivalent levels. JA 674, 677-78.

EPA's historic approach of identifying which of the § 7602(g) air pollutants are subject to individual CAA programs not only makes sense, it comports with fundamental principles of statutory construction. "Of necessity, Congress selects different regulatory regimes to address different problems." *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2538 (2011). The same term appearing in different statutory programs can (indeed, must) be given different regulatory meanings where congressional intent differs. See *Abbott Labs.* v. *Young*, 920 F.2d 984, 987 (D.C. Cir. 1990). "A given term in the same statute 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).

Here, it is evident in the statutory definition of "major emitting facility" that Congress did not intend that GHGs be an "air pollutant" under the PSD program. Accordingly, it is of no moment that GHGs are

regulated under the Title II motor vehicle program. That regulatory action, under that program, could not trigger PSD permitting requirements for tens of thousands (and Title V requirements for millions) of small, non-industrial stationary sources under programs that cover only a very limited number of large industrial facilities. EPA acted unlawfully in promulgating rules that are predicated on that misunderstanding of the Act.

II. Congress Intended that Only "Air Pollutants" that Deteriorate Ambient Air Quality Be Regulated Under the PSD Program.

The broad language of § 7521(a)(1) that the Court in *Massachusetts* read as "reflect[ing] an intentional effort" by Congress to bestow "flexibility" on EPA to regulate GHGs, 549 U.S. at 532, was language calling for standards that limit emissions that "endanger public health or welfare." The Act's PSD provisions, in contrast, contain no directive to, or authorization for, EPA to regulate emissions that "endanger public health or welfare." Rather, the PSD provisions require EPA to adopt regulations to implement a program focused exclusively on "air pollutants" that deteriorate ambient air quality – *i.e.*, the air people breathe – in specific, geographic air quality control areas or "region[s]." 42 U.S.C. § 7471; see *id.* §§ 7407(a), (d), 7475, 7479(1).

As discussed above, the global effects of carbon dioxide are not effects caused by carbon dioxide deteriorating ambient air quality in the geographic areas PSD is directed at protecting. To the contrary, from the perspective of the quality of the ambient air, carbon dioxide is effectively indistinguishable from ni-

trogen and oxygen. See *supra* pp. 2-3. Regulation of carbon dioxide as an "air pollutant" under the PSD program, therefore, is contrary to congressional intent and thus unlawful. Cf. 73 Fed. Reg. 44,354, 44,408 (July 30, 2008) ("The global nature and effect of GHG emissions raise questions regarding the suitability of CAA provisions [like PSD] that are designed to protect local and regional air quality....").

Under § 7471, "each applicable [SIP] shall contain emission limitations and such other measures as may be necessary ... to prevent significant deterioration of *air quality* in each" of the areas within a state designated pursuant to § 7407. 42 U.S.C. § 7471 (emphasis added). Further, § 7475(e) directs EPA to promulgate regulations governing an analysis, based on air quality monitoring information, of the impacts on "ambient air quality at the *proposed site* and in *areas which may be affected* by emissions from" a proposed new facility with respect to "*each pollutant subject to regulation* under [the Act] which will be emitted from such facility." *Id.* § 7475(e)(1) (emphases added).

In § 7475(e), Congress expressly directs that the PSD preconstruction analysis be based on "continuous air quality monitoring" to ascertain expected effects, both at the proposed facility site and "in areas which may be affected by emissions ... [of] each pollutant subject to regulation under [the Act]" that the facility will emit. *Id.* § 7475(e)(1), (2). The "continuous ... monitoring" of ambient concentrations of carbon dioxide in the vicinity of a proposed source will reveal concentrations indistinguishable from ambient levels elsewhere, thus providing no meaningful information on ambient air quality that might be dete-

riorated by that source's emissions. Exclusion of carbon dioxide from the "pollutants" covered by the PSD program follows, therefore, from the very nature of the air quality analysis Congress required under that program for "pollutant[s] subject to regulation."

Any other conclusion would mean the statute demands an absurd result. If "each pollutant subject to regulation" includes GHGs, then the global nature of GHG emissions would require, under § 7475(e), a permit applicant to evaluate every area in the United States – Hawaii and Alaska included.[7] In other words, § 7475(e) would have to be construed to require each proposed major emitting facility first to collect meaningless "continuous [GHG] air quality monitoring data" for every designated area because every area "may be affected by emissions from such facility." *Id.* § 7475(e)(1), (2). Then, this meaningless data would go into the analysis required for each designated area in the nation. The results of this exercise would be wholly useless. As EPA has acknowledged, "because GHG emissions from single sources are small relative to aggregate emissions, and GHGs, once emitted from a given source, become well mixed in the global atmosphere," there are no "tools ... for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single source."[8]

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[7] The entire land mass of the United States has been divided into areas that have been designated under § 7407. 40 C.F.R. §§ 81.11-81.356.

[8] Letter from R.J. Meyers, EPA, to H.D. Hall, U.S. Fish and Wildlife Service, & J. Lecky, National Marine Fisheries Service, at 4 (Oct. 3, 2008), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0472-11543.

Yet, the entire *point* of PSD preconstruction analysis is to "evaluat[e] ... end-point impacts attributable to the emissions ... from a single source."

Furthermore, under § 7475(a)(4), a proposed "major emitting facility" must be "subject to [BACT] for each pollutant subject to regulation under [the CAA which is] emitted from, or which results from, such facility." As with the § 7475(e) use of "each pollutant subject to regulation," that term in § 7475(a)(4) must be read to refer *only* to those pollutants that deteriorate ambient air quality. See, *e.g.*, *Erlenbaugh* v. *United States,* 409 U.S. 239, 243 (1972) ("a legislative body generally uses a particular word with a consistent meaning in a given context"). Giving the same term in the same section of the statute a reading that would include only pollutants that deteriorate ambient air quality comports with congressional intent, as the *Alabama Power* court found. 636 F.2d at 406-07 n.81 (The BACT requirement in § 7475(a)(4) covers more than criteria pollutants "'in order to minimize potential deterioration.'") (quoting legislative history).

In short, Congress made clear on the face of the PSD program's provisions that that program is directed *not* to regulation of emissions of air pollutants that may endanger public health or welfare due to their uniform presence throughout the global atmosphere. Rather, that program is to provide for such regulation "as may be necessary ... to prevent significant deterioration" of the quality of the air that people breathe (*i.e.*, ambient air) in defined geographic areas affected by new emissions. 42 U.S.C. § 7471.

The court below, addressing none of this, instead relied heavily on the "'Congressional declaration of purpose'" for the PSD sections that "provides, in relevant part, that '[t]he purposes of this part are ... to protect public health and welfare from any actual or potential adverse effect which in the [EPA] Administrator's judgment may reasonably be anticipated to occur from air pollution.'" JA 240 (ellipsis in original) (quoting 42 U.S.C. § 7470(1)). Because the CAA "provides that '[a]ll language referring to effects on welfare includes ... effects on ... weather ... and climate,'" it must follow, according to the court, that "one express purpose of the [PSD] program is to protect against the harms caused by greenhouse gases." *Id.* (first ellipsis added) (quoting 42 U.S.C. § 7602(h)).

But this does not follow at all. Much as the Act provides an expansive general definition of "air pollutant" to embrace, but not to define the scope of, a range of programs, the Act defines "effects on welfare" broadly to be able to serve various programs within the Act addressing different kinds of pollution problems. That "effects on welfare" includes "weather" and "climate" effects does not mean *the PSD program* can be viewed as one that must address pollutants contributing to global "climate" impacts. As the PSD provisions show, welfare effects in the PSD program must be construed to refer to effects caused by air pollutants that deteriorate the quality of the air people breathe. Accordingly, the PSD programmatic provisions may, consistent with the PSD purposes section, address effects on "weather" and "climate" such as smog – a local or regional fog-like meteorolog-

ical condition produced through photochemical transformation of pollutants in the ambient air.[9] See Christa McAuliffe Planetarium, The Straight Line on Bad Ozone, at 1 (undated), *available at* www.starhop.com/library/pdf/studyguide/high/Ozone-21.pdf. The PSD purposes section cannot be used to stretch those programmatic provisions to cover global climate effects when it is a program established to address local and regional pollution.[10]

* * *

As discussed above, the statutory definition of "major emitting facility," by its terms, identifies a source that emits above certain specified amounts of "any air pollutant." The court below, after observing

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[9] Only in the past two decades or so did references to "climate" and "weather" come to suggest anything more than regional meteorological conditions. Those terms were included in the definition of "effects on welfare" when the Act was amended in 1970 and first appeared in 1967 in a provision addressing sustained weather patterns in particular regions of the United States. Pub. L. No. 90-148, § 2, 81 Stat. 485, 490 (1967) (directing Secretary of Health, Education, and Welfare to "define," for the Act's purposes, "atmospheric areas of the Nation on the basis of those conditions, including ... climate, meteorology, and topography, which affect the interchange and diffusion of pollutants in the atmosphere"); Pub. L. No. 91-604, § 15(a)(1), 84 Stat. 1676, 1710 (1970).

[10] A reference to "climate," like a reference to "endangerment," does not resolve whether the reference is to local, regional, or global effects. For example, in § 7603 ("Emergency powers"), the term "endangerment" refers to acute, local threats, while in § 7521 ("Emission standards for new motor vehicles or new motor vehicle engines"), "endangerment" may cover everything from local to global effects.

that "the literal statutory definition" of "major emitting facility" "nowhere requires that 'any air pollutant' be a *regulated* pollutant," opined that "'any regulated air pollutant' is the only logical reading of the statute." JA 237. According to the court:

> [I]f "any air pollutant" … was read to encompass … nonregulated air pollutants, sources could … be subjected to PSD permitting requirements – if they emitted 100/250 tpy of a "physical, chemical, [or] biological" substance EPA had determined was harmless. It is absurd to think that Congress intended to subject stationary sources to the PSD permitting requirements due to emissions of substances that do not "*endanger public health or welfare*."

Id. at 238 (quoting 42 U.S.C. § 7521(a)(1)) (emphasis added).

So much confusion encapsulated in so few words: This tortured statutory analysis reflects the critical flaw in the reasoning of the court below. Congress indeed did not intend that the stationary source thresholds be used to subject to PSD emissions determined to be "harmless." It intended those thresholds to define a limited population of large industrial facilities. Congress also did not intend that pollutants regulated under the PSD program would include every "air pollutant" that "endanger[s] public health or welfare" but would not *deteriorate ambient air quality* – the sole focus and congressionally sanctioned purpose of regulation under Title I, Part C.

GHGs such as carbon dioxide are, as this Court concluded, air pollutants under § 7602(g)'s general definition. They may be "air pollutants" that EPA found to "endanger public health or welfare" under Title II. But they are not – and EPA does not dispute that they are not – "air pollutants" that deteriorate ambient air quality, and it is the "deterioration" of ambient air quality – not "endangerment" – that is the criterion for regulating a substance under PSD. Consequently, EPA's interpretation that, under the CAA's terms, regulation of motor vehicle GHG emissions under Title II compelled the application of Title I PSD permitting requirements to stationary sources' GHG emissions is an impermissible construction of the Act.

CONCLUSION

The judgment should be reversed and the case remanded for the court of appeals to grant the Utility Air Regulatory Group's petitions for review and to set aside EPA's determination that GHG emissions are regulated under the PSD and Title V programs.

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December 9, 2013