Nos. 12-1146, 12-1152, 12-1153, 12-1248,
12-1253, 12-1254, 12-1268, 12-1269, 12-1272

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and eight related cases.

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

CONSOLIDATED BRIEF IN OPPOSITION OF ENVIRONMENTAL ORGANIZATION RESPONDENTS

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QUESTIONS PRESENTED

Nine petitions for certiorari challenge some or all of four actions of the Environmental Protection Agency concerning the regulation of greenhouse gases under the Clean Air Act, 42 U.S.C. 7401, *et seq.*: (1) a finding under Section 202(a)(1) of the Act, 42 U.S.C. 7421(a)(1), that greenhouse gas pollution may reasonably be anticipated to endanger public health or welfare (Endangerment Finding); (2) regulations establishing greenhouse gas emissions standards for new light-duty motor vehicles for model years 2012–2016 under Section 202(a)(2), 42 U.S.C. 7421(a)(2) (Tailpipe Rule); (3) an agency interpretation identifying the time at which greenhouse gases would become "subject to regulation" under the Act (Timing Decision), and (4) regulations phasing in the application of the Act's Title I, Part C, Prevention of Significant Deterioration (PSD) and Title V Operating Permit programs to stationary sources of greenhouse gas emissions (Tailoring Rule). In addition, certain petitioners challenge regulations promulgated by EPA in 1978, 1980, and 2002 interpreting the Act's PSD permitting requirements, 42 U.S.C. 7475(a), 7479(1).

The questions presented are:

1. Whether the Endangerment Finding complied with Section 202(a)(1), was supported by the record, and satisfied applicable procedural requirements.

2. Whether the Tailpipe Rule is consistent with Section 202(a)(2) and supported by the record.

3. Whether the statutory requirement to obtain a PSD construction permit applies to sources that emit sufficient amounts of any regulated air pollutant, including greenhouse gases.

4. Whether petitioners lacked Article III standing to challenge the Timing Decision and Tailoring Rule.

RULE 29.6 STATEMENT

Respondents Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Indiana Wildlife Federation; Michigan Environmental Council; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; Wetlands Watch, and Wild Virginia (Environmental Organization Respondents), all respondent-intervenors in the court of appeals, are nonprofit environmental organizations. The Environmental Organization Respondents have no corporate parents and no publicly held corporation owns an interest in any of them.

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INTRODUCTION

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court held that greenhouse gases "unambiguous[ly]" fall within the Clean Air Act's definition of "air pollutant," and that the Environmental Protection Agency has a duty under the Act to curb the emissions of these pollutants if it finds that they contribute to pollution that endangers public health or welfare. Responding to this Court's mandate, EPA has taken a series of carefully considered actions addressing greenhouse gas pollution.

Nine petitions for certiorari raise a variety of challenges to a D.C. Circuit decision upholding EPA's actions. Legal merit is not measured by "pages of briefing," see *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 465 (2001), and the many petitions and supporting briefs raise no issue worthy of this Court's review.

EPA's endangerment and contribution findings and emissions standards for motor vehicles simply implement *Massachusetts*' mandate. The D.C. Circuit correctly determined that these agency actions satisfied all requirements of Section 202(a) of the Act as interpreted by this Court in *Massachusetts*, and reflected EPA's careful, candid, and reasonable assessment of the "ocean" (Pet.App. 46a) of scientific evidence concerning climate change, its causes, and its effects.[1] No petitioner challenges the motor vehicle emissions standards, which EPA

[1] We cite to the Petition Appendix in *Utility Air Regulatory Group v. EPA*, No. 12-1146. The appendix to this brief contains a glossary of abbreviations.

established in coordination with the Department of Transportation as this Court contemplated in *Massachusetts.* These standards are delivering significant emissions reductions, and enjoy the automobile industry's support. None of the challenges to the endangerment finding and vehicle standards remotely warrants certiorari.

Nor is review warranted of the D.C. Circuit's ruling that EPA was "unambiguously correct" (Pet.App. 24a), in regulations promulgated in 1978, 1980, and 2002, that the Act's Prevention of Significant Deterioration (PSD) permitting provisions apply to major sources of any air pollutant regulated under the Act. (As the D.C. Circuit found, petitioners forfeited any challenge as to Title V's operating permit requirements.) The D.C. Circuit applied orthodox rules of statutory interpretation and held EPA's construction to be "statutorily compelled." Pet.App. 94a. Petitioners' varied and conflicting arguments persistently ignore plain statutory language—including the "air pollutant" definition this Court in *Massachusetts* held "unambiguous[ly]" (549 U.S. at 529) covers greenhouse gases.

The D.C. Circuit also correctly concluded that petitioners lacked Article III standing to challenge EPA's Timing Decision and Tailoring Rule, because these actions benefited rather than harmed petitioners. The petitions that challenge this ruling only confirm the marked departures from settled Article III principles that would be required to reach any different conclusion.

Although many petitions disregard or slight *Massachusetts*' holdings and reasoning, only that of

Texas, *et al.*, explicitly calls for this Court to reconsider and overrule its holding in *Massachusetts* that greenhouse gases are an "air pollutant" under the Act's statute-wide definition. The strong version of *stare decisis* that applies in statutory cases requires rejection of that request under any circumstances, and the request should be especially unwelcome given that just two years ago this Court relied squarely upon *Massachusetts* in holding that "the Clean Air Act and the EPA actions it authorizes" displace federal common law abatement actions against carbon dioxide-emitting power plants. *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011). *Massachusetts*, this Court explained, "made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act." *Id.* (citing 549 U.S. at 528–29).

Finally, any suggestions of dire practical impacts from the PSD permitting requirements are simply unfounded. In contrast with petitioners' implications that tens of thousands of sources are being affected, fewer than 200 sources, all of them large emitters, applied for PSD permits for greenhouse gas emissions in the first two years of the program. See *infra*, pp. 44 & nn.21–22. In short, there is no practical issue warranting the Court's intervention.

The petitions should all be denied.

STATEMENT

A. Statutory Background. The Clean Air Act establishes a comprehensive suite of programs "to promote the public health and welfare." 42 U.S.C. 7401(b)(1). For purposes of the Act, "'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g).

Section 202(a)(1) of the Act requires the EPA Administrator to determine whether, "in [her] judgment," "the emission of any air pollutant" from new motor vehicles "cause[s], or contribute[s] to, air pollution" that "may reasonably be anticipated to endanger public health or welfare." *Id.* 7521(a)(1). If the Administrator answers these questions affirmatively, then she "shall" promulgate vehicle emission standards "in accordance with the provisions of" Section 202. *Id.* Standards for passenger vehicles are governed by Section 202(a)(2), which provides that the standards "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. 7521(a)(2). See generally *Massachusetts*, 549 U.S. at 506, 532–35.

The Prevention of Significant Deterioration (PSD) program requires new and modified "major emitting facilities" to obtain preconstruction permits. 42 U.S.C. 7475. Covered facilities are those located in "attainment" areas (areas meeting at least one national ambient air quality standard (NAAQS)), 42 U.S.C. 7407(d)(1), 7471, 7475(a),[2] and which emit or have the potential to emit more than 100 or 250 tons per year of "any air pollutant." 42 U.S.C. 7479(1). The PSD program requires a preconstruction permit that includes, *inter alia*, emission limitations reflecting the best available control technology (BACT) for each pollutant "subject to regulation under the [Act]." 42 U.S.C. 7475(a)(1), (a)(4), 7479(3). For decades, EPA regulations have provided that, once an air pollutant becomes subject to regulation under any provision of the Act, emissions of that pollutant trigger application of PSD and Title V permitting—so that "the PSD program applies automatically to newly regulated ... pollutants." 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002). See also 43 Fed. Reg. 26,380, 26,397 (June 19, 1978); 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980); *Alabama Power v. Costle*, 636 F.2d 323, 352 (D.C. Cir. 1979) (observing that, under the statute, PSD permit applicability is not limited to NAAQS pollutants).

[2] NAAQSs have been established for six pollutants: lead, ozone, carbon monoxide, two forms of particulate matter, sulfur dioxide, and nitrogen dioxide. 40 C.F.R. 50.4–50.18. Dozens of other air pollutants are regulated under the Act. See *infra*, p. 34 n.17.

The Title V operating permit program does not impose substantive requirements, but requires "major sources" (any source that emits or has the potential to emit one hundred tons per year of any air pollutant) to have operating permits that collect in one place all applicable emissions standards. 42 U.S.C. 7661a(a), 7661(2), 7602(j). 57 Fed. Reg. 32,250, 32,251 (July 21, 1992).

B. Regulatory Background. In *Massachusetts*, this Court held that greenhouse gases "without a doubt" and "unambiguous[ly]" fall within "the Act's sweeping definition of 'air pollutant,'" 549 U.S. at 528–29 (citing and discussing 42 U.S.C. 7602(g)). The Court also held that Section 202(a)'s "clear ... command" required EPA to make a "scientific judgment" as to "whether greenhouse gas emissions contribute to climate change," unless it found the science too profoundly uncertain to permit such a judgment. *Id.* at 533–34.

Endangerment Finding. On remand from *Massachusetts*, EPA determined that greenhouse gas pollution may reasonably be anticipated to endanger public health and welfare, and that vehicular greenhouse gas emissions contribute to that pollution. 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009). See also 74 Fed. Reg. 18,886 (Apr. 24, 2009) (proposed finding). The Endangerment Finding rested on a massive foundation of scientific evidence developed over decades by thousands of scientists in a range of fields, and reflected in tens of thousands of peer-reviewed publications. EPA prepared a detailed technical support document (TSD) relying in part on comprehensive analyses incorporating thousands of peer-reviewed studies of current

climate change research developed by the Intergovernmental Panel on Climate Change, the United States Global Change Research Program (USGCRP), and the National Research Council (NRC)—each of which was in turn subject to further peer review. TSD 6, D.C. Cir. Endangerment Joint Appendix (End.JA) 3354. The agency then put the TSD through "three rounds of technical review by ... 12 federal experts," "three rounds of internal EPA review," and "two rounds of public comment," and prepared an 11-volume response to the thousands of written comments it received. See Response to Comments (RTC) 1–10, End.JA 3566.

EPA found that:

- Atmospheric carbon dioxide (CO_2) and methane concentrations have increased by approximately 38% and 149%, respectively, since the Industrial Revolution, "almost all" due to anthropogenic emissions, and these concentrations are significantly higher than they have been for at least 650,000 years. 74 Fed. Reg. at 66,517.

- Warming of the climate system "is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level." *Id.*

- Average surface temperatures have risen by 1.3 ± 0.32° F over the past century (1906–2005), with the greatest warming occurring during the past 30 years, and the 20 warmest years on record all occurring since 1981. *Id.*

- Anthropogenic greenhouse gas emissions very

likely caused most of the warming that occurred over the past 50 years. *Id.* at 66,517–18, 66,522–23.

- Climate models project an increase in global average temperatures of 2.0–11.5° F during the twenty-first century. *Id.* at 66,519; see also TSD 69, End.JA 3417 (citing projections for 2030 of between 2°–4° F).

- Reducing greenhouse gas emissions would reduce the pace and magnitude of the temperature rise. TSD 66, End.JA 3414.

Based on copious record evidence that warming temperatures will cause (and in some cases are already causing) increased risks of mortality and illness from reduced air quality, intensified heat waves, and more frequent and more intense storms, see 74 Fed. Reg. 66,497–99, 66,516–36; see also TSD ES4, 89–93, End.JA 3345, 3437–3441, the Administrator found that greenhouse gas pollution is "reasonably anticipated to endanger public health, for both current and future generations." 74 Fed. Reg. at 66,524.[3] The Administrator also found that climate change poses a variety of risks to public welfare, including increased droughts, sea level rise, harms to agriculture, more severe storms, and increased storm surge damage and flooding in coastal communities, *id.* at 66,497–99, 66,525,

[3] The Administrator recognized that climate change will have some positive effects on health and welfare, but explained why adverse effects are likely to be preponderant. See, *e.g.*, 74 Fed. Reg. at 66,525 (increase in heat-related deaths, which already exceed cold-related deaths, likely to overwhelm reductions in cold-related deaths).

66,530–36, and will "fundamentally rearrange U.S. ecosystems," *id.* at 66,498. In addition to the harmful effects from greenhouse gases' heat-trapping characteristics and the resulting climate changes, increased atmospheric concentrations of CO_2 have already caused a marked increase in the acidity of ocean water, with potentially serious implications for coral reefs, shellfish and other aquatic life. TSD 38, 134, End.JA 3386, 3482.

Contribution Finding. The Administrator also found that emissions from new motor vehicles "cause or contribute" to greenhouse gas pollution. See 74 Fed. Reg. 66,537–41. In making this determination, the Administrator considered, among other things, motor vehicles' large share of both global and domestic greenhouse gas emissions. *Id.* at 66,539.

Administrative Reconsideration. EPA denied ten petitions seeking administrative reconsideration of the Endangerment Finding, and issued a 360-page response addressing the petitions' claims that the science underlying the finding was flawed. 75 Fed. Reg. 49,556 (Aug. 13, 2010).

Tailpipe Rule. Explaining that once an endangerment finding is made, "section 202(a) requires EPA to issue standards," EPA promulgated greenhouse gas emissions standards for light-duty motor vehicles on May 7, 2010. 75 Fed. Reg. 25,324, 25,398 (Tailpipe Rule). In developing the standards, EPA considered the range of statutory factors set out in Section 202(a)(2), including available technology, cost of compliance, and the time period necessary to implement the standards. *Id.* at 25,403–04. EPA found that the Rule would prevent emissions of nearly one billion metric tons of CO_2 equivalent

(CO_2e). *Id.* at 25,404, 25,519–20.[4]

EPA's Actions Regarding Stationary Sources. Recognizing that regulating greenhouse gas emissions from motor vehicles would by operation of law trigger PSD and Title V permitting, *supra* p. 5, EPA initiated two proceedings to address the application of those programs. First, in the Timing Decision, the agency determined that a pollutant is "subject to regulation" (and thus covered by the PSD and Title V requirements) when compliance with emission limitations for that pollutant is first required—in the case of greenhouse gases, January 2, 2011, the date that the first 2012 model year vehicles would be subject to greenhouse-gas emission standards under the Tailpipe Rule. 75 Fed. Reg. 17,004, 17,004–07 (Apr. 2, 2010). Second, in the Tailoring Rule, EPA phased in the permitting requirements starting with the largest greenhouse gas emitting sources, commencing with sources that have the potential to emit 100,000 tons CO_2e per year of greenhouse gases. 75 Fed. Reg. 31,514, 31,522–23 (June 3, 2010). EPA determined that these measures were necessary to avoid unworkable administrative burdens that would result from immediately subjecting smaller sources to permitting requirements, and would still cover sources responsible for the vast majority (about 86

[4] Carbon dioxide equivalent units (CO_2e) take account of greenhouse gases' differing heat-trapping potencies; for example, methane is 25 times more potent than carbon dioxide over a 100-year time-scale, and nitrous oxide is 298 times more potent. See, *e.g.*, 75 Fed Reg. at 25,421. EPA defined the pollutant "greenhouse gases" to include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. 74 Fed. Reg. at 66,497.

percent) of stationary source greenhouse gas emissions. *Id.* at 31,543–45, 31,556, 31,571.

C. This Litigation. Numerous parties petitioned the D.C. Circuit to review the Endangerment Finding, Tailpipe Rule, Timing Decision, and Tailoring Rule, and some also filed actions seeking review of EPA's 1978, 1980, and 2002 regulations confirming that the Act's PSD permit program applies to sources emitting any regulated air pollutant, not just sources emitting NAAQS pollutants. Petitioners in the latter proceeding argued that the advent of greenhouse gas regulation constituted new grounds authorizing belated judicial review of the old regulations, notwithstanding the Act's 60-day review period, 42 U.S.C. 7607(b)(1); *American Chemistry Council v. EPA*, D.C. Cir. No. 10-1167. The D.C. Circuit organized the petitions into four sets of consolidated cases, and heard oral argument over two days in February 2012.

A unanimous D.C. Circuit panel (Sentelle, C.J., and Rogers and Tatel, JJ.) denied the petitions challenging the Endangerment Finding, the Tailpipe Rule, and the 1978–2002 PSD regulations. The panel dismissed for lack of Article III standing the petitions challenging the Timing Decision and Tailoring Rule.

The court rejected arguments that EPA was obligated to consider various "policy concerns and regulatory consequences" before making an Endangerment Finding, reasoning that Section 202(a)(1) "requires EPA to answer only two questions: whether particular 'air pollution'—here, greenhouse gases—'may reasonably be anticipated to endanger public health or welfare,' and whether

motor-vehicle emissions 'cause, or contribute to' that endangerment." Pet.App. 32a–33a. The court concluded that the agency had properly confined itself to the statutorily-required "'scientific judgment' about the potential risks greenhouse gas emissions pose to public health or welfare." *Id.* 33a (quoting *Massachusetts*, 549 U.S. at 534). The court rejected requests to "re-weigh the scientific evidence," *id.* 44a, and concluded that parties seeking administrative reconsideration had not "provided substantial support for their argument that the Endangerment Finding should be revised," *id.* 51a.

The D.C. Circuit next upheld the Tailpipe Rule. The court noted that petitioners did "not challenge the substantive standards," but focused "principally on EPA's failure to consider the cost of stationary-source permitting requirements triggered by the Rule." *Id.* 53a. It concluded that "plain text of Section 202(a) and precedent refute Petitioners' contentions." *Id.*

Turning to the challenges to the PSD permitting provisions, the court first addressed a jurisdictional question: whether petitioners could challenge EPA's decades-old interpretation that PSD applies to all regulated pollutants in light of the 60-day review limit in Section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1). The court noted that EPA's interpretation actually had been challenged in petitions for review of the 1978 regulations, see Pet.App. 61a (citing industry briefs in *Alabama Power*), and that EPA had "highlighted" (*id.*) its longstanding interpretation in regulations promulgated in 1980 and 2002. The court

determined, however, that two petitioners—the National Association of Homebuilders (NAHB) and the National Oilseed Processors Association (NOPA)—could invoke Section 307(b)'s exemption for "grounds arising after" the 60-day period because, unlike "other Industry petitioners[]," at least some of their members would not have had ripe challenges to EPA's interpretation earlier. Pet.App. 66a.

On the merits, the D.C. Circuit found EPA's interpretation of the PSD permitting trigger to be "unambiguously correct" and "statutorily compelled." *Id.* 24a, 72a. The court explained that "given both the statute's plain language and the Supreme Court's decision in *Massachusetts*," it had "little trouble concluding that the phrase 'any air pollutant' includes *all* regulated air pollutants, including greenhouse gases." *Id.* 73a.

The court considered the "alternative interpretations of the PSD permitting triggers" offered by the challengers, but concluded that none "cast[s] doubt on the unambiguous nature of the statute." *Id.* 77a. The court rejected, as inconsistent with statutory text, arguments that the PSD program is "focused solely on localized air pollution" (*id.* 81a–83a); that the phrase "any area to which this Part applies" in Section 165(a) imposes a "pollutant-specific situs requirement" limiting PSD permitting triggering solely to NAAQS pollutants (*id.* 83a–94a); and a third proposed interpretation, not pressed in the present petitions, based upon 42 U.S.C. 7476(a) (Pet.App. 94a–95a).

While the challengers advocated at length various theories by which the PSD program might be "construed" to exclude greenhouse gases, they

advanced no arguments as to the Title V operating permit program. Observing that "none of petitioners' alternative interpretations applies to Title V," the D.C. Circuit held that they had "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V." Pet.App. 78a.

The court next rejected the challenges to the Timing Decision and Tailoring Rule, holding that petitioners had "fall[en] far short" of demonstrating any of the three elements of standing under Article III. *Id.* 100a. The court explained that "neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases," and that both Rules "actually mitigate Petitioners' purported injuries." *Id.* 100a–101a.

The full D.C. Circuit denied petitions for rehearing en banc. Judge Brown dissented, expressing her view that *Massachusetts* was wrongly decided. *Id.* 615a–625a. Judge Kavanaugh, also in dissent but focusing on the PSD provisions, argued that "any air pollutant" in Section 169(1) should be read to mean only NAAQS pollutants. *Id.* 638a–661a. The panel members filed a joint concurrence responding to the dissenters' arguments, concluding that: "Here, Congress spoke clearly, EPA fulfilled its statutory responsibilities, and the panel, playing its limited role, gave effect to the statute's plain meaning." *Id.* 612a.

REASONS FOR DENYING THE PETITIONS

I. PETITIONERS' CHALLENGES TO THE ENDANGERMENT FINDING AND TAILPIPE RULE LACK MERIT AND ARE UNWORTHY OF FURTHER REVIEW

The D.C. Circuit's unanimous decision sustaining EPA's interpretation of Section 202(a) is unassailably correct, anchored in the plain language of that provision and this Court's *Massachusetts* ruling. So too is the court's disposition of challenges to the scientific record on which EPA based its actions. Petitioners' arguments graft requirements onto Section 202 that are not part of the statute Congress enacted, and their arguments concerning EPA's analysis of the record fail to establish that the agency or the D.C. Circuit committed any error, let alone error warranting this Court's review. No member of the full court, including the two judges who dissented from rehearing en banc, suggested that petitioners' attacks on the Endangerment Finding or Tailpipe Rule warranted further review. (Judge Brown's criticism on those points was based on her view that *Massachusetts* itself was wrongly decided. Pet.App. 615a–625a). Texas's request to overrule *Massachusetts* disregards core *stare decisis* principles.

A. Petitioners' Challenges to EPA's Interpretation of Section 202(a)(1) Are Unworthy of Further Review.

The Chamber of Commerce's argument that Section 202(a)(1) requires a "particular type of causal connection between air pollutants and endangerment"—one that "calls to mind" common-

law foreseeability tests, Pet. 21, 23 (citing *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928)), was not raised before the agency or the D.C. Circuit and is therefore forfeited. See *U.S. v. Jones*, 132 S. Ct. 945, 954 (2012). Regardless, this insubstantial argument is unworthy of review. Section 202(a) requires promulgation of standards when vehicle emissions "cause, or contribute to" air pollution which, in the Administrator's "judgment," "may reasonably be anticipated to endanger public health or welfare." This language would be a startlingly improbable way to codify common law concepts. To the contrary, Congress adopted the Section 202(a)(1) endangerment formulation to emphasize and reinforce the Administrator's duty to take precautionary action to prevent harm before it occurs, on the basis of probative but still uncertain scientific evidence. See *Ethyl Corp. v. EPA,* 541 F.2d 1, 24–25 (D.C. Cir. 1976) (en banc); *Massachusetts*, 549 U.S. at 506 n.7.

The Chamber's related suggestions that the impacts of climate change are too "remote" to constitute "public health" effects (Pet. 23–25) or that only "inhalational" effects can qualify as such (Pet. 17, 24; see also Pet.App. 622a–623a (Brown, J., dissenting)) are likewise meritless. Increased greenhouse gas concentrations result in warming and produce, among other things, intensified heat waves, exacerbated smog, exacerbated disease vectors, and more frequent and intense storms—all of which can cause death or illness. 74 Fed. Reg. at 66,497–99, 66,516–36. Other familiar forms of Clean Air Act-regulated pollution endanger public health by non-"inhalational" routes. For example, chlorofluorocarbons harm public health by depleting

the ozone layer in the stratosphere, allowing cancer- and cataract-causing radiation from the sun to reach the Earth's surface. The most urgent human health effects from mercury emissions occur as a result of consuming fish contaminated by mercury emitted from smokestacks, transported through the air and deposited in water bodies, where it is transformed by microorganisms into methylmercury and concentrated through bioaccumulation in the aquatic food chain. See also *Ethyl Corp.*, 541 F.2d at 9, 45–46 (upholding regulation of fuel additives based in part on evidence of possible harms to health of children who ingest dust containing lead originating from auto emissions). The Chamber's assertion that the serious risks amply documented in the record are "beyond the bounds of what Congress intended for the agency to address" (Pet. 24) is forcefully contradicted by the Act's "broad language." See *Massachusetts*, 539 U.S. at 532. See also *id.* at 529 n.26 (greenhouse gases are "unquestionably" air pollution "agents" notwithstanding their characteristics as atmospheric pollutants).[5]

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[5] The "indirectness" argument is the opposite of one the Chamber urged—successfully—in previous Clean Air Act litigation: In a challenge to EPA's 1997 ozone NAAQS, the Chamber faulted the agency for failing to account for the (claimed) benefits of ground-level ozone in blocking ultraviolet (UVB) radiation, which causes skin cancer and cataracts. The Chamber characterized these UVB-shielding effects of ozone pollution as "direct health effects of ground-level ozone in the ambient air," Small Business Reply Br., D.C. Cir. No. 97-1441 at 7 (filed Aug. 6, 1998), and dismissed as "desperate" the contention that those effects were "too indirect to be counted." Small Business Opening Br., D.C. Cir. No. 97-1441 at 23 (filed March 23, 1998). The D.C. Circuit unanimously ruled that EPA must consider these UVB effects, *American Trucking*

The Chamber's labored argument (Pet. 26–27) that EPA erred by treating harms flowing from climate change as "health" dangers rather than "welfare" effects is particularly specious.[6] The premise that Section 202(a) contemplates some strict dichotomy is facially implausible, given that it mandates regulation when air pollution endangers "public health *or* welfare." In any event, it was plainly reasonable for EPA to consider effects such as death and illness from heat waves, increased smog, and new or exacerbated disease vectors as "health" risks. The Chamber's complaint does not warrant this Court's attention.

The Coalition for Responsible Regulation (CRR) insists (Pet. 7, 24–29) that EPA's Endangerment Finding and vehicle standards should be vacated based on the standards' supposed "futility" (or the absence of a rigorous "demonstration" of their "efficacy"). Yet it is not CRR's position that EPA should have promulgated *more* effective tailpipe standards (*no* party actually challenges the substance of EPA's emission standards). Nor is CRR a regulated party: none of the petitioners is regulated by the Tailpipe Rule (and the auto manufacturers support it).

Ass'ns. v. EPA, 175 F.3d 1027, 1051–53 (D.C. Cir. 1999), *rehearing denied in relevant part*, 195 F.3d 4, 10 (D.C. Cir. 1999), *rev'd in part on other grounds*, 531 U.S. 457 (2001).

[6] This contention is forfeited. It appeared below in a single, opaque sentence on page 58 of industry petitioners' lengthy opening brief, and the D.C. Circuit did not address it. See *Mogenhan v. Napolitano*, 613 F.3d 1162, 1165 n.1 (D.C. Cir. 2010) ("skeletal" arguments forfeited).

Contrary to CRR's suggestion, the emission reductions resulting from the vehicle standards are manifestly substantial: EPA projected the standards will reduce greenhouse gases by 962 million metric tons of over the lifetime of model year 2012–2016 vehicles. 75 Fed. Reg. at 25,490, Table III.F.1-2. Even if the standards had not been strengthened for later model years,[7] by 2050 they would have resulted in an estimated 22.8 percent emission reduction from the U.S. transportation sector and a 6 percent reduction in emissions from *all domestic sources* over that period. *Id.* at 25,489. "Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations." *Massachusetts*, 549 U.S. at 525.

CRR advances an "interpretation" of Section 202 whereby endangerment may be found only if the air pollution problem in question is due *solely* to the vehicle emissions and can be *entirely* resolved by vehicle standards. This bears no resemblance to the provision Congress enacted. Section 202(a)(1) states that EPA "shall" promulgate emissions standards (a) if air pollution may reasonably be anticipated to endanger public health or welfare and (b) if new vehicle emissions "contribute" to that pollution. See *Massachusetts*, 549 U.S. at 533–34.[8] The *content* of

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[7] In 2012, EPA and DOT issued more advanced standards for model years 2017–25, also with the auto industry's support, that will further reduce greenhouse gas emissions from vehicles sold in those years. See 77 Fed. Reg. 62,624 (Oct. 15, 2012).

[8] CRR's theories are at odds with the statutory text. Compare Pet. 20 ("Only an interpretation that requires a contribution to 'endangerment' is faithful to the Act's text and structure.") with Section 202(a)(1) (EPA "shall" prescribe standards when it finds that vehicle emissions "cause, or

the vehicle standards is determined in accordance with Section 202(a)(2), which mandates emission reductions that are achievable considering manufacturers' need for lead time, the availability of technology, and compliance costs. Thus, Section 202(a) does not require that vehicle emissions must be the sole cause of the pollution problem, or that abatement of those emissions must fully cure it. The statutory criteria for endangerment and for the vehicle standards readily dispose of CRR's claims that the D.C. Circuit's construction affords EPA "unconstrained" discretion (Pet. 35) or precludes "meaningful" judicial review (Pet. 34–36).

The Section 202(a) framework—endangerment and contribution findings triggering a duty to regulate, and standards turning on cost and feasibility rather than on achieving a specific risk-reduction or health-based goal—is common in other key provisions of the Act, including the Section 111 new source performance standards. See *American Electric Power,* 131 S. Ct. at 2537–38. Such provisions rest on the perfectly rational *congressional* premise that reducing emissions that "contribute" to dangerous air pollution will reduce the danger.[9]

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contribute to, *air pollution* which may reasonably be anticipated to endanger public health or welfare.") (emphasis added).

[9] CRR claims the emissions reductions "would largely occur anyway as a result of the NHTSA fuel economy standards." Pet. 14; see Pet. 27 & n.5. But Section 202(a) imposes legal obligations "independent" from those under the fuel economy statute, see *Massachusetts*, 549 U.S. at 532, and the fact that EPA and NHTSA coordinated to make compliance easier is

EPA followed these statutory commands in all respects. First, EPA determined that greenhouse gas air pollution endangers the public health and welfare of present and future generations. Second, EPA determined that emissions of greenhouse gases from motor vehicles contribute to greenhouse gas air pollution, a finding that considered factors such as vehicles' "relative importance" as pollution sources. See 74 Fed. Reg. 66,537–41. (No party challenged that contribution finding in the D.C. Circuit.) Third, EPA determined the level of emissions reductions achievable in light of available automotive technology, lead-time, and manufacturers' compliance costs. See 75 Fed. Reg. at 25,403–04, 25,463, 24,519–20.

In an effort to rewrite Section 202(a), CRR (Pet. 17–18) misapplies the administrative law principle of reasoned explanation articulated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). That principle requires an agency to consider relevant factors, but "the determination of what is relevant" comes from the statute. *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1116 (D.C. Cir. 1979). Thus, *State Farm* explains that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." 463 U.S. at 43. See also *American Trucking Ass'ns*, 531 U.S. at 465–68

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hardly a mark against them. Furthermore, EPA's vehicle standards are projected to result in 47 percent greater greenhouse gas reductions than projected under the NHTSA fuel economy standards over the lives of model year 2012–2016 vehicles. 75 Fed. Reg. at 25,490, Table III.F.1-2; *id.* at 25,635–36, Table IV.G.1-4.

(holding the Act did not permit EPA to consider costs in setting NAAQS, despite arguments that such consideration was not only "relevant," but vitally important to the national economy). Indeed, in *Massachusetts* this Court emphasized this very point, rejecting a "laundry list" of "policy" reasons as "divorced from the statutory text." 549 U.S. at 532–33. Nothing in Section 202(a)(2) permits EPA to withhold motor vehicle emissions standards because they alone will not fully solve the pollution problem, or requires the agency to measure the efficacy of potential standards before deciding whether endangerment exists.

CRR repeatedly invokes the D.C. Circuit's decision in *Ethyl*, but, as the panel noted, "[n]othing in *Ethyl* implied that EPA's authority to regulate was conditioned on evidence of a particular level of mitigation; only a showing of significant *contribution* was required." Pet.App. 57a. Indeed, *Ethyl* rejected arguments very like CRR's, holding that EPA had properly regulated lead from motor vehicles even though lead comes from "multiple sources" and airborne lead from automobiles "in and of itself, may not be a threat," and explaining that "no regulation could ever be justified" if the agency were barred from attacking cumulative harms incrementally. 541 F.2d at 30. See also *Massachusetts*, 549 U.S. at 524 (agencies generally approach "massive problems" by "whittl[ing] away at them over time"); 42 U.S.C. 7421(a)(1) (providing for revision of emissions standards "from time to time"). CRR's challenges are unworthy of further review.

B. Petitioners' Attacks on EPA's Analysis of the Scientific Record Lack Merit And Are Unworthy of Review.

Southeastern Legal Foundation asks the Court (Pet. 10–17) to review EPA's analysis of the climate science. Notwithstanding its high rhetorical pitch, SLF's attack is, in substance, tellingly indirect and circumscribed. Citing a few passages in the vast record, SLF asks the Court to brand "irrational" (Pet. 10) EPA's assignment of a 90–99 percent confidence level to the finding that human activities caused most of the warming that occurred in the second half of the twentieth century.[10]

EPA dealt candidly with uncertainties in the massive scientific record addressing the causes and effects of climate change. EPA's finding was based on a consideration of "the totality of scientific evidence, some of which was assessed as being virtually certain ... while other evidence was less

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[10] SLF (Pet. 12 & n.8) cites post-decisional materials to suggest that subsequent developments have cast doubt upon the scientific basis for EPA's finding. Besides being improper in a record review case, see 42 U.S.C. 7607(d)(7), the claim is patently untrue. See, *e.g.*, NRC, *America's Climate Choices* at 17 (2011) (finding that increased concentrations of greenhouse gases "definitively" cause global warming); *id.* at 19 (confirming that United States is experiencing the impacts of climate change, including sea level rise and increasing frequency and severity of heavy rainfall, drought, and wildfires across multiple regions of the country), *available at* https://download.nap.edu/catalog.php?record_id=12781; NRC, *Advancing the Science of Climate Change* (2010) ("[C]limate change is occurring, is caused largely by human activities, and poses significant risks for—and in many cases is already affecting—a broad range of human and natural systems.") (quoted in 75 Fed. Reg. at 49,558).

certain." RTC 1-35, End.JA 3593; see also 74 Fed. Reg. at 66,497, 66,506. The appeals court carefully reviewed the scientific record, Pet.App. 39a–45a, and examined the few marginal objections petitioners did raise (mostly abandoned in SLF's petition here). See *id.* 42a (observing that "Industry Petitioners do not find fault with much of the substantial record EPA amassed in support of the Endangerment Finding").

The issues SLF does raise are unworthy of further review. For example, SLF's claim (Pet. 13) to have "refut[ed]" EPA's physical understanding of climate change—based on the absence of a predicted "'hot spot' in the tropical upper troposphere"—was not timely raised in Petitioners' opening briefs below and was thereby forfeited. See *Catawba County v. EPA*, 571 F.3d 20, 38 (D.C. Cir. 2009). In any event, SLF's arguments disregard EPA's explanation that more recent and accurate data demonstrate warming consistent with modeled predictions. RTC 3-7, End.JA 3815–16. Similarly, SLF is wrong in arguing (Pet. 14–15) that short-term and regional climate variability (driven by complex but familiar climate dynamics) casts doubt on science's understanding of long-term, documented warming trends or on the models that predict them. Both basic principles of physics and climate models project long-term, large-scale responses of average global temperature to rising greenhouse gas concentrations—precisely what has been observed. See RTC 3-6, End.JA 3814–15. Further review is unnecessary.

Virginia's assertion (Pet. 27) that EPA "impermissibly delegated" its responsibility under Section 202(a)(1) to form its own "judgment" on endangerment is likewise unworthy of further

review. The D.C. Circuit explained, Pet.App. 38a–39a, that the Administrator exercised her independent judgment and appropriately reviewed and referenced both primary scientific sources and syntheses of those sources. See, *e.g.*, 74 Fed. Reg. at 66,497, 66,510–12, 66,517–19. As the court observed: "This is how science works. EPA is not required to re-prove the existence of the atom every time it approaches a scientific question." Pet.App. 38a–39a.

Nor need this Court review the D.C. Circuit's unanimous rejection of Virginia's claim (Pet. 16) that EPA "misapplied" 42 U.S.C. 7607(d)(7)(B), which requires EPA to initiate a reconsideration proceeding if the objection a party raises could not have been raised during the public comment period and the objection is "of central relevance to the outcome of the rule." The reconsideration petitions principally claimed that the IPCC assessment report contained several items of flawed and unreliable information. EPA examined these claims carefully, see Pet.App. 50a, and the D.C. Circuit observed that the reconsideration petitions demonstrated no "pattern of flawed science," that only a few of the alleged IPCC shortcomings really were errors, and that EPA had not relied on them. *Id.* 51a–52a. The court also sensibly rejected Virginia's argument (Pet. 15–17) that EPA's detailed explanation for denying reconsideration was itself proof that reconsideration was required. *Id.* 52a–53a.

The Pacific Legal Foundation's contention that EPA was required to make the proposed Endangerment Finding available to the Science Advisory Board (SAB) faces fatal procedural

barriers. This statutory objection was not timely raised during the public comment period, End.JA 4843, see 42 U.S.C. 7607(d)(7)(B), and improperly relies on non-record assertions in a declaration submitted with PLF's en banc petition. See *id.* 7607(d)(7)(A), 7607(e). In any event, the contention is plainly unworthy of this Court's review. The provision on SAB review is, by its terms, limited to instances in which (1) a "proposed criteria document, standard, limitation, or regulation" (2) "is provided to any other Federal agency for formal review and comment." See *id.* 4365(c)(1). The panel found that PLF "failed to respond" to EPA's demonstration, during the rulemaking, that the Endangerment Finding was not subject to interagency "formal review and comment" within the meaning of the SAB statute, see Pet.App. 49a; see also RTP 3-7, End.JA 4842–44. PLF now advances a strained and unsupported argument (Pet. 15) that the public comment process under the Clean Air Act itself constitutes a "formal" interagency review that triggers SAB review.[11] Its allegations of intra-circuit conflicts (*e.g.*, Pet. 23–25) were not persuasive to any member of full D.C. Circuit; PLF's en banc petition was denied without a recorded vote. Pet.App. 663a.

[11] The D.C. Circuit's alternative conclusion (Pet.App. 48a–49a) that any error concerning the SAB provision was harmless under the Act's "substantial likelihood" standard for "alleged procedural errors," 42 U.S.C. 7607(d)(8), does not merit review either. Although PLF protests (Pet. 21–23) that that provision applies only to certain Clean Air Act violations, its text contains no such limitation, and the APA's "prejudicial error" standard, 5 U.S.C. 706, would apply in any event.

C. Pleas to Reconsider *Massachusetts* Ignore Statutory *Stare Decisis* and the *American Electric Power* Decision.

Texas's petition explicitly—albeit half-heartedly—asks the Court "to reconsider *Massachusetts*'s holding that carbon dioxide and other greenhouse gases unambiguously qualify as 'air pollutant[s]' within the meaning of the Act." Pet. 31. The Court should reject this plea under "[b]asic principles of *stare decisis*." See *U.S. v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012).

"[A] difference of opinion within the Court ... does not keep the door open for another try at statutory construction," *Watson v. U.S.*, 552 U.S. 74, 82 (2007), and no intervening fact or legal development undermines this Court's decision. On the contrary, the body of scientific evidence of anthropogenic climate change and its harms has become even more robust since 2007, see, *e.g.*, *supra*, p. 23 n.10, and all three branches of the federal government, as well as States and regulated parties, have acted in reliance upon *Massachusetts*.

Indeed, while Texas insists (Pet. 31) that the Court did not foresee how *Massachusetts* would resonate beyond the Act's vehicle standards provision, Texas does not even cite the Court's unanimous 2011 decision in *American Electric Power* that power plant greenhouse gas emissions are also subject to regulation under Clean Air Act provisions such as Section 111. See 131 S. Ct. at 2537 ("[T]he Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from

fossil-fuel fired power plants."). As *American Electric Power* explained, "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act." *Id.* (citing 549 U.S., at 528–529). The Court accepted arguments by major electric utilities (members of trade associations before the Court here) that power plants' greenhouse gas emissions are indeed subject to regulation under the Act. See, *e.g.,* AEP Pet'r Br. in No. 10-174, at 46 ("[T]he Clean Air Act delegates regulatory authority over carbon dioxide emissions to EPA, and thus displaces federal common law claims."); *id.* at 43 (maintaining that Act "speaks directly" to carbon pollution from stationary sources) (internal quotation marks and citations omitted).

Texas's desultory argument based on two constitutional decisions (Pet. 33) ignores this Court's longstanding emphasis that "*stare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done." *Home Concrete & Supply*, 132 S. Ct. at 1841. Accord *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 139 (2008); *Hohn v. U.S.*, 524 U.S. 236, 251 (1998); *Patterson v. McLean Credit Union,* 491 U.S. 164, 172–73 (1989). Indeed, since *Massachusetts,* Congress has considered but declined to adopt scores of legislative proposals that would have repealed, deferred, or otherwise curtailed EPA's authority to regulate greenhouse gas emissions.[12] Texas's plea to

[12] At least sixty-one such bills or resolutions have been introduced in Congress—and none has been enacted into law. See, *e.g.*, S. Amdt. 359 to S. Con. Res. 8, 113th Cong. (2013); H.R. 2081, 113th Cong. (2013); S.2365, 112th Cong. (2012); H.R. 3409, 112th Cong. (2012); S.J. Res. 26, 111th

strip EPA of the statutory authority recognized in *Massachusetts* and recently reaffirmed in *AEP* cannot be reconciled with the values of stability and separation of powers that statutory *stare decisis* serves.

II. EPA'S CONSTRUCTION OF THE PSD APPLICABILITY PROVISIONS WAS CORRECT AND DOES NOT MERIT FURTHER REVIEW

Many petitioners challenge the D.C. Circuit's ruling upholding EPA's long-standing interpretation that the PSD construction permit program applies to sources emitting threshold quantities of any regulated air pollutant.[13] There are substantial differences among their various theories, some of which have shifted even since the decision below. Some petitioners seek to exclude greenhouse gases entirely from the PSD program (*e.g.*, Texas Pet. 30; Chamber Pet. 28–29), while the ACC petitioners (Pet. 24 n.12) and Judge Kavanaugh's dissent (Pet.App. 646a) acknowledge that sources subject to PSD permitting because they emit other pollutants

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Cong. (2010); S. 1622, 111th Cong. (2009); H.R. 2846, 111th Cong. (2009); S. 570, 111th Cong. (2009).

[13] Whether EPA's decades-old interpretation is still open to challenge despite the 60-day limitation in 42 U.S.C. 7607(b)(1) turns on (1) whether the D.C. Circuit correctly ruled (Pet.App. 62a–67a) that the two trade associations, NAHB and NOPA, could avoid the statutory bar, and (2) whether that ruling also allows *other* parties to assert distinct challenges to the long-standing interpretation. *Cf.* EIMWG Pet. at ii (Question Presented No. 3). See *NRDC v. EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (holding that the restriction is jurisdictional); *Motor & Equip. Mfrs. Ass'n v. Nichols,* 142 F.3d 449, 460 (D.C. Cir. 1998) (same).

must control their greenhouse gas emissions using the "best available control technology." Below, the ACC petitioners argued for a greenhouse gas-excluding interpretation based upon what they called a "pollutant-specific situs requirement" ostensibly flowing from the phrase "in any area to which this part applies" in Section 165(a). See Pet.App. 83a; Petitioners' Opening Br. in D.C. Cir. No. 10-1166 at 29–31. But now they refer to "the alternative interpretation advanced by this petition and Judge Kavanaugh," see ACC Pet. 24 n.12, even though Judge Kavanaugh did not even cite the statutory phrase ACC previously highlighted as operative and crucial.

None of petitioners' protean arguments warrants further review. As the D.C. Circuit held, EPA's decades-old reading of the Act is "unambiguously correct" and "statutorily compelled" (Pet.App. 24a, 72a) by the plain text of the PSD applicability provisions: Section 165(a) requires any "major emitting facility" being constructed in a PSD area to obtain a permit, 42 U.S.C. 7475(a), and Section 169(1) defines "major emitting facility" as a stationary source emitting 100 or 250 tons or more per year of "*any* air pollutant." *Id.* 7479(1) (emphasis added). Under Section 302(g), "air pollutant," "when used in this [Act] ... means *any* air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air," *id.* 7602(g) (emphasis added). That language cannot reasonably be limited to the six NAAQS pollutants. Moreover, this Court held in *Massachusetts* that the definition "without a doubt" and "unambiguous[ly]" includes

greenhouse gases. 549 U.S. at 529. "Given all this," the appeals court had "little trouble concluding that 'any air pollutant' in the definition of 'major emitting facility' unambiguously means 'any air pollutant regulated under the [Act],'" including greenhouse gases. Pet.App. 77a.

The D.C. Circuit explained in careful detail why the various "alternative" interpretations of the PSD trigger offered by petitioners and Judge Kavanaugh are inconsistent with the statute. *Id.* 77a–95a. Each involves untenable departures from the text of the statute.[14] ACC and other petitioners now argue, in reliance on Judge Kavanaugh's dissent, that EPA *must* adopt different regulatory definitions of the statutory term "air pollutant" depending on the program at issue, and that "any air pollutant" in Section 169(1) *must* be read to mean "any NAAQS pollutant." See, *e.g.*, ACC Pet. 19–25; Pet.App.

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[14] Petitioners contend that the D.C. Circuit mistakenly assumed that *Massachusetts*, which involved only mobile sources, had resolved PSD's application to stationary sources of greenhouse gases. See, *e.g.*, UARG Pet. 18–20. That charge is unfounded. The D.C. Circuit recognized that the PSD coverage issue was separate and unaddressed by *Massachusetts*, and it entertained the possibility that the PSD provisions could be read to exclude regulated air pollutants such as greenhouse gases, notwithstanding 35 years of EPA regulations. Ultimately, however, the court found that the statutory text precluded that approach. In construing the PSD program, the D.C. Circuit properly took account of *Massachusetts*' holding as to the "unambiguous" meaning of the Act's "air pollutant" definition, just as this Court did in *American Electric Power*, 131 S. Ct. at 2537 (Section 111 applies to greenhouse gases because "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act." (citing 549 U.S. at 528–29)).

640a–643a, 648a. But this argument violates basic principles of statutory construction. "Air pollutant" is a defined term expressly applicable *throughout the Act*. See 42 U.S.C. 7602 ("When used in this chapter"); *Massachusetts*, 549 U.S. at 532 (referring to "*the Clean Air Act*'s capacious definition of air pollutant") (emphasis added); *American Electric Power*, 131 S. Ct. at 2537 ("[E]missions of carbon dioxide qualify as air pollution subject to regulation under the Act."). "Statutory definitions control the meaning of statutory words." *Burgess v. United States*, 553 U.S. 124, 129–30 (2008) (quoting *Lawson v. Suwannee Fruit & S.S. Co.,* 336 U.S. 198, 201 (1949)). See also *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010) ("When a statute includes an explicit definition, we must follow that definition.") (citation and internal quotation marks omitted). As the Court concluded in *Massachusetts*, Congress would not have defined "air pollutant" in Section 302(g) "so carefully and so broadly, yet confer[red] on EPA the authority to narrow that definition whenever expedient." 549 U.S. at 529, n.26.

Contrary to petitioners' careful efforts to bury it, *e.g.*, UARG Pet. 20–21, Congress's use of the defined term "air pollutant" in Section 169(1)'s designation of PSD sources was no accident: Congress amended and expanded the definition of "air pollutant" to its current, broad form as part of the same 1977 legislation by which it enacted the PSD program. Pub. L. No. 95-95, § 301, 91 Stat. 685, 770 (1977).[15]

[15] Prior to the 1977 amendments, Section 302(g) had defined "air pollutant" to mean "an air pollution agent or combination of such agents." Pub. L. No. 91-604, § 16(g), 84 Stat. 1676, 1710 (1970).

And in 1990, when Congress established a separate permitting program for hazardous air pollutants (which are non-NAAQS pollutants), Congress enacted a specific provision exempting these pollutants from PSD permitting. 104 Stat. 2399, 2537 (1990), codified at 42 U.S.C. 7412(b)(6) (PSD "shall not apply" to hazardous air pollutants); see also 42 U.S.C. 7412(g)(2). This exemption would have been unnecessary if PSD had been limited to NAAQS pollutants all along.

Although the appeals court did not—and did not need to—go beyond statutory text, the legislative history shows with exceptional clarity that Congress intended PSD permitting to apply to the full range of air pollutants, specifically including those that threatened to cause, to quote the committee that authored the provisions, "[w]orldwide weather modification." H.R. Rep. No. 95-294, at 138 (1977). The committee "recognized the strong need for a policy of preventing significant deterioration of air quality" for, among other reasons, "avoidance of unnecessary stratospheric and atmospheric modifications due to air pollution," *id.* at 105, and extensively quoted from a path-breaking National Academy of Sciences study of global warming, *Understanding Climate Change*. *Id.* at 138.

Judge Kavanaugh relied upon *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007), for the proposition that an agency may interpret a recurring statutory term differently depending on the context. Pet.App. 652a–653a; see also UARG Pet. 21. But that modest principle is not a license to ignore an unambiguous definition that expressly applies across a statute based upon generalized

appeals to context. On the contrary, *Duke Energy* explained that any interpretive differentiation must stay "within the limits of what is reasonable, as set by the Act's common definition." 549 U.S. at 576.[16] Neither Judge Kavanaugh's dissent nor any of the petitions even attempts to show how the text of the Section 302(g) definition may "reasonably" be read to exclude numerous non-NAAQS pollutants that have long been regulated under the Act,[17] or how, notwithstanding this Court's parsing of the very same "unambiguous" definition in *Massachusetts*, the same text may now be read as excluding

[16] *Duke Energy* approved EPA's use of different regulatory definitions of the common, statutorily defined term "modification" employed in two different Clean Air Act programs (NSPS and PSD). The regulations provided different methods of measuring an emissions "increase," an undefined word within the common statutory term. The argument the Court rejected was that EPA's use of an hourly test for measuring an NSPS "increase" precluded the agency, in subsequent PSD rulemaking, from using an annual test for a PSD "increase." See 549 U.S. at 567–59, 574–76. There was no claim in *Duke Energy* that the text of the relevant statutory definition precluded the annual approach, and nothing in the Court's opinion (or any of petitioners' other cases) suggests that an agency, in interpreting an iterated statutory term to fit differing contexts, may stray from the boundaries fixed by the text of the term.

[17] A wide variety of regulated, non-NAAQS pollutants have been subject to PSD for decades. See, *e.g.*, 40 C.F.R. 51.166(b)(23)(i) (PSD applicability regulations for fluorides; sulfuric acid mist; hydrogen sulfide; total reduced sulfur; municipal waste combustor organics, metals and acid gases; and solid waste landfill emissions). Judge Kavanaugh's NAAQS-only gloss on "any air pollutant" would exclude all these pollutants, which fall into the category "any air pollutant" just as clearly as do greenhouse gases.

greenhouse gases. Congress's decision, in Section 169(1), to modify "air pollutant" with the "expansive" term "any," see *U.S. v. Gonzales,* 520 U.S. 1, 5 (1997), further emphasizes the intended breadth of the definition.

Petitioners (ACC Pet. 9, 24) and Judge Kavanaugh (Pet.App. 647a) wrongly conclude that Section 169(1) can be limited to NAAQS pollutants because the PSD program, they contend, is focused singularly on NAAQS attainment. The statute says otherwise. As the panel observed (Pet.App. 90a), Title I, Part C, Subpart 1, of the Act, containing the PSD provisions, is entitled "Clean Air," and opens with an expansive statutory statement of purpose: "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to result from air pollution." 42 U.S.C. 7470(1). See also *Massachusetts*, 549 U.S. at 506 (under the Act effects on welfare include "'effects on ... weather ... and climate'" (quoting 42 U.S.C. 7602(h)).

Furthermore, the PSD permit program's central substantive provision, the requirement in Section 165(a)(4) to install BACT, expressly applies to "each pollutant subject to regulation under this" Act, 42 U.S.C. 7475(a)(4), as ACC (Pet. 8, 24 nn.11 & 12) and Judge Kavanaugh (Pet.App. 646a) both acknowledge. If PSD really had the claimed "NAAQS-only" mission, Congress would hardly have required sources to install controls for all regulated pollutants.

The Section 165(a)(4) BACT provision highlights one of the more emphatic ways in which the

statutory text refutes the NAAQS-only theory: As a matter of logic and ordinary understanding, if a "pollutant" is "subject to regulation under the [Clean Air Act]," it is necessarily included in the broader phrase "any air pollutant" in Section 169(1). See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (adhering to "the theorem that the whole includes all of its parts"). Judge Kavanaugh's analysis specifically depends upon the clearly untenable proposition that the category "each pollutant subject to regulation" in Section 165(a)(4) is "broader" (Pet.App. 646a) than "any air pollutant" in Section 169(1)—and that the former, but not the latter, includes greenhouse gases. Both ordinary meaning and the D.C. Circuit's canonical early decision construing the PSD provisions say the opposite: "that the § 169(1) definition of major emitting facility refers to a broader category of pollutants than does that of § 165." *Alabama Power*, 636 F.2d at 352 n.60.

But the flaws in the "NAAQS-only" theory do not end there: Section 165(a)(3) requires that PSD permittees demonstrate compliance not only with the NAAQS, but also with "*any other* applicable emission standard or standard of performance under" the Act. 42 U.S.C. 7475(a)(3) (emphasis added). These "other" emissions standards include new source performance standards, 42 U.S.C. 7411, which indisputably apply to non-NAAQS air pollutants, including greenhouse gases, as this Court recognized in *American Electric Power*, 131 S. Ct. at 2537. See also Pet.App. 612a.

The NAAQS-only arguments are marred by other logic errors. Petitioners and Judge Kavanaugh

emphasize that while the Act's visibility provision defines "major stationary sources" by reference to threshold amounts of "any pollutant," 42 U.S.C. 7491(g), EPA's regulatory guidance limits the program to "visibility-impairing" pollutants. See Pet.App. 654a; UARG Pet. 22. But this merely reflects explicit statutory text limiting the scope of the visibility provisions to "any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area." 42 U.S.C. 7491(b)(2)(A); see also *id.* 7491(c)(1)–(2). No similar limitation on the term "any air pollutant" is found in Section 169(1). *Some* PSD provisions are expressly linked to the NAAQS (*e.g.*, Section 163(b)(4), cited by Judge Kavanaugh, Pet.App. 645a, specifying maximum allowable increases of NAAQS pollutants); however, numerous *other* pivotal PSD provisions (including Sections 160(1), 165(a)(3)(C), and 165(a)(4)) expressly apply to non-NAAQS pollutants.[18]

The three D.C. Circuit panel judges also correctly rejected (Pet.App. 610a–611a) Judge Kavanaugh's argument (Pet.App. 641a–642a) that a "NAAQS-pollutant-only" interpretation was justified by the interest in avoiding "absurd results" in the form of an unexpectedly large number of PSD permits. As the concurring judges explained, that

[18] EPA *has* interpreted the Section 169(1) source definition to reach no more broadly than the substantive requirements of the PSD program. See Pet.App. 73a–74a (discussing EPA's longstanding regulatory limitation of the PSD program to regulated air pollutants, *i.e.*, those subject to substantive limitations under PSD provisions such as Section 165(a)(4)'s BACT requirement).

argument depends on the plainly incorrect premise that "NAAQS pollutant" is a "plausible interpretation" of "any air pollutant." See Pet.App. 611a. Moreover, EPA found only that the administrative demands created by immediate application of PSD to a large number of sources led to absurd results; the agency never concluded that it would be absurd to apply PSD to non-NAAQS pollutants generally, or greenhouse gases in particular. To the contrary, EPA found that Congress clearly intended PSD to apply to all regulated pollutants, including greenhouse gases. See, *e.g.*, 75 Fed. Reg. at 31,517. In the Tailoring Rule, EPA responded to well-documented administrative issues by phasing in PSD and Title V permitting, focusing first on the largest industrial sources and committing to future evaluations of the permitting process before potentially extending permitting to smaller sources. *Id.* at 31,514–17, 31,535–40.

No party that sought to challenge EPA's authority to adopt the Tailoring Rule had standing to do so, and the D.C. Circuit thus did not reach the question of EPA's phase-in authority. See Pet.App. 106a. Even if that merits question were somehow before this Court (and if all of the reasons the agency gave for the Tailoring Rule were held invalid), the correct response would not be to read a textually unsupportable "NAAQS-only" limitation into Section 169(1), but to enforce the statute as written. See, *e.g.*, *American Trucking Ass'ns*, 531 U.S. at 466, 471 (rejecting an invitation to read ambiguity into the Act to avoid assertedly extreme economic burdens, because the statute "unambiguously" settled the matter); *Union Elec. Co. v. EPA*, 427 U.S. 246, 265–

66 (1976) (similar); *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 575 (1982) (even when an unambiguous statute might produce "'mischievous, absurd or otherwise objectionable'" consequences, the remedy is with Congress) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

In sum, the D.C. Circuit correctly ruled that EPA's longstanding construction of the PSD applicability provisions was statutorily compelled, and further review is unwarranted.

Several petitioners seek review of EPA's interpretation that Title V applies to sources of greenhouse gas emissions. See Texas Pet. 28; SLF Pet. 20–21; Chamber Pet. i (Question Presented No. 3). However, as the D.C. Circuit correctly found, petitioners failed to advance any "alternative interpretations" regarding Title V and thus had "forfeited any challenges to EPA's greenhouse-gas inclusive interpretation" of that program's scope. Pet.App. 78a. Tellingly, the one petition that attempts to contest this finding is only able to cite arguments belatedly presented in reply briefs. SLF Pet. 21 & n.13. Judge Kavanaugh's dissenting opinion nowhere even mentions Title V. Review is unwarranted here as well.

III. THE D.C. CIRCUIT'S RULING THAT NO PETITIONER HAS STANDING TO CHALLENGE THE TAILORING RULE WAS CORRECT AND IS UNWORTHY OF REVIEW

Three petitions urge the Court to review the D.C. Circuit's ruling that no challenger to EPA's Tailoring Rule had Article III standing. Texas Pet. at 20–28; UARG Pet. 28–32; SLF Pet. 27–29.[19] But the D.C. Circuit's unanimous conclusion that these challenges fell "far short" of Article III's requirements rests on a straightforward and entirely correct application of familiar standing principles, and does not warrant review by this Court. Pet.App. 100a (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The court explained, correctly, that "neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases." *Id.* 101a. That obligation, the court had explained already, stems directly from the statute. The Tailoring Rule, by restricting the number of sources subject to PSD and Title V, *eases* burdens on both regulated entities and permitting authorities. As a result, the court recognized that setting aside the Tailoring Rule would, "if anything," "significantly exacerbate Petitioners' injuries." *Id.* See *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.) (denying standing where "the requested relief will actually worsen the plaintiff's position").

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[19] Texas (Pet. 20) urges the Court to review the merits of the Tailoring Rule, which the D.C. Circuit did not reach. But see *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) ("[W]e are a court of review, not of first view.") (internal quotation marks and citations omitted).

Petitioners suggest that they satisfy Article III requirements "when EPA's GHG program is considered as a whole." SLF Pet. 29. See also UARG Pet. 28–32. But such arguments ignore the principle that "[s]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citations and internal quotation marks omitted); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990). Here, the D.C. Circuit heard and decided each of the claims for which petitioners established their standing to sue (including the claim that the issuance of vehicle standards does not trigger PSD permitting for major sources of greenhouse gas emissions). But no petitioner demonstrated an injury caused by the Tailoring Rule or redressable by its *vacatur*, and the court was therefore right to hold that petitioners lacked standing to challenge it.

Texas's standing theories (Pet. 22–23, 26) are utterly without merit. Texas appears to have largely abandoned its theory that vacating the Tailoring Rule would prompt congressional repeal. See Pet.App. 101a–103a. Texas now makes an unexplained assertion (Pet. 22) that vacating rules that *relax* regulatory burdens would somehow "redress the injury of onerous regulation." Alternatively, Texas claims (Pet. 23–26) that, although it *opposes* action to mitigate climate change, Texas has standing to seek *vacatur* of the Tailoring Rule based on the same loss of coastline that the Commonwealth of Massachusetts established in *Massachusetts v. EPA*. The D.C. Circuit held that this argument had not been

properly presented under circuit precedent and court rule, see *Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002); D.C. Cir. R. 28(a)(7), Pet.App. 104a–105a, and that Texas had failed to introduce any supporting evidence for it, Pet.App. 105a–106a.

Texas's plea for standing based on an injury it does not believe it is suffering and does not want to remedy shows scant respect for the "integrity of the judicial process," *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation marks and citation omitted), and is not worthy of discretionary jurisdiction. See *id.* (discussing rules prohibiting litigants from playing "fast and loose with the courts" or using "self-contradiction ... as a means of obtaining unfair advantage" (internal quotation marks and citations omitted)).

The D.C. Circuit's standing ruling represented the straightforward application of settled Article III requirements. No further review is required.

IV. THE CASE DOES NOT PRESENT LEGAL ISSUES WORTHY OF REVIEW, AND PETITIONERS' ASSERTIONS REGARDING ITS PRACTICAL IMPACT ARE UNFOUNDED

Attempting to compensate for the absence of legal issues warranting review, petitioners resort to magniloquent assertions (*e.g.*, Chamber Pet. 1) about the importance of the cases and the supposed practical effects of EPA's actions. But as the members of the D.C. Circuit panel put it, while "[t]he underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance," "the legal issues presented ... are straightforward, requiring no more than the

application of clear statutes and binding Supreme Court precedent." Pet.App. 612a.[20]

Indeed, the relatively few challenges to the Endangerment Finding and Tailpipe Rule—to the extent they raise legal issues at all—are strained efforts that run directly against the plain language of Section 202(a) and this Court's interpretation of that provision in *Massachusetts*. Petitioners' few glancing criticisms of EPA's exercise of its "scientific judgment," *Massachusetts*, 549 U.S. at 533–34, are paradigms of uncertworthiness. Petitioners, moreover, do not direct any serious attack on the regulations actually before the Court, the motor vehicle emissions standards. No party challenged the substance of those standards, which have enormous environmental and consumer benefits. These issues clearly do not warrant further review.

Petitioners' various challenges to EPA's construction of the PSD applicability provisions all depend upon denying effect to the Clean Air Act's unambiguous text. The D.C. Circuit's reaffirmation of a longstanding, plain language interpretation of the PSD provisions does not merit this Court's review. Petitioners failed to present any challenge to EPA's construction of Title V below. Many of the

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[20] This distinction is a longstanding one. Discussing certiorari jurisdiction before the House Judiciary Committee in 1922, Chief Justice Taft explained that a case that is "very important ... financially" or otherwise "important to the parties," may turn on a "principle of law ... which is not important because it is well settled," and that "[i]n such cases we reject the petition." *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the House Comm. on the Judiciary*, 67th Cong. 2 (1922).

petitions attempt indirectly to attack (gross mischaracterizations of) the Tailoring Rule, without attempting to show that the D.C. Circuit erred in ruling that no one had standing to challenge it.

With respect to stationary sources, no petitioner can credibly contend that the impact of greenhouse gas regulation as actually implemented is unreasonable or oppressive. Permitting is proceeding at a reasonable pace across the country and across industrial sectors. In the first two years of the program, fewer than 200 greenhouse gas-emitting sources, all of them large emitters, applied for PSD permits.[21] The majority of the PSD permits issued have been for industrial sources such as electric generating units and natural gas processing plants.[22] As with any PSD permit, each determination of BACT by state or federal permitting authorities requires consideration of cost, 42 U.S.C. 7479(3), and is subject to judicial review. EPA's actions on greenhouse gas permitting have been fact-based and measured, with careful attention to preserving administrability for permitting agencies. See, *e.g.*, 77 Fed. Reg. at

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[21] U.S. EPA, Greenhouse Gas Permitting Update, Office of Air Quality Planning and Standards, National Association of Clean Air Agencies Meeting, at 5 (Dec. 12, 2012), available at http://www.4cleanair.org/Documents/NACAADecember12MeetingGHGPermittingUpdate.pdf (GHG Permitting Update); *id.* at 6 (28 applications for Title V permits filed between July 1 and December 10, 2012). See also 77 Fed. Reg. 41,051, 41,058 (July 12, 2012) (44 greenhouse gas permits issued during first 15 months of program).

[22] GHG Permitting Update at 5.

41,053-59. No practical issue warrants intervention by this Court.

EPA, in short, is properly moving forward with the work of applying the Act to a dangerous form of air pollution. None of the issues raised in the petitions warrants further review.

CONCLUSION

The nine petitions should be denied.

Respectfully submitted.

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Appendix: Glossary of Abbreviations

GLOSSARY OF ABBREVIATIONS

AEP:	American Electric Power
ACC:	American Chemistry Council
Act:	Clean Air Act, 42 U.S.C. 7401-7671q
APA:	Administrative Procedure Act, 5 U.S.C. 551, *et seq.*
BACT:	Best available control technology
CAA:	Clean Air Act, 42 U.S.C. 7401-7671q
Chamber:	Chamber of Commerce of the United States of America
CO_2:	Carbon dioxide
CO_2e:	Carbon dioxide equivalent
Contribution Finding:	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)
CRR:	Coalition for Responsible for Regulation

DOT:	Department of Transportation
EIMWG:	Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation
Endangerment Finding:	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)
End.JA:	Joint Appendix in D.C. Cir. No. 09-1322 (Endangerment)
EPA:	Environmental Protection Agency
GHG:	Greenhouse gases
IPCC:	Intergovernmental Panel on Climate Change
NAAQS:	National ambient air quality standards
NAHB:	National Association of Homebuilders
NHTSA:	National Highway Traffic Safety Administration
NOPA:	National Oilseed Processors Association

NRC:	National Research Council
NSPS:	New source performance standards
Pet.App.:	Petition Appendix in *Utility Air Regulatory Group v. EPA*, No 12-1146
PLF:	Pacific Legal Foundation
PSD:	Prevention of Significant Deterioration
RTC:	Response to Comments
RTP:	Response to Petitions
SAB:	Scientific Advisory Board
Section 111:	42 U.S.C. 7411
Section 165:	42 U.S.C. 7475
Section 169:	42 U.S.C. 7479
Section 202:	42 U.S.C. 7521
Section 302:	42 U.S.C. 7602
Section 307:	42 U.S.C. 7607
SLF:	Southeastern Legal Foundation

Tailoring Rule:	Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)
Tailpipe Rule:	Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010)
Timing Decision:	Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010)
TSD:	Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act
UARG:	Utility Air Regulatory Group
USGCRP:	United States Global Change Research Program