

Oral Argument Not Yet Scheduled

No. 10-1073 AND CONSOLIDATED CASES (COMPLEX)

**United States Court of Appeals
For the District of Columbia Circuit**

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petitions for Review of Environmental Protection Agency
Final Orders

BRIEF OF STATE PETITIONERS AND SUPPORTING INTERVENOR

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney
General

BILL COBB
Deputy Attorney General for
Civil Litigation

JONATHAN F. MITCHELL
Solicitor General

J. REED CLAY, JR.
Special Assistant and Senior
Counsel to the Attorney General

MICHAEL P. MURPHY
JAMES P. SULLIVAN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-2995
Fax: (512) 474-2697

COUNSEL FOR STATE PETITIONERS
AND SUPPORTING INTERVENOR
[Additional Counsel Listed Inside]

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 242-7445

Louisiana Department of
Environmental Quality
HERMAN ROBINSON,

Executive Counsel
DONALD TRAHAN
KATHY M. WRIGHT
Legal Division
P. O. Box 4302
Baton Rouge, LA 70821-4302
Tel: (225) 219-3985

GOVERNOR HALEY
BARBOUR
for the State of Mississippi
Post Office Box 139
Jackson, MS 39205-0139
Tel: (601) 359-3150
Fax: (601) 359-3741

JON BRUNING
Attorney General of Nebraska
KATHERINE J. SPOHN
Special Counsel to Attorney
General
2115 State Capitol Building
P. O. Box 98920
Lincoln, NE 68509-8920
Tel: (402) 471-2682
Fax: (402) 471-3297

WAYNE STENEHJEM
Attorney General
State of North Dakota
MARGARET OLSON
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Tel: (701) 328-3640
Fax: (701) 328-4300

ALAN WILSON
Attorney General
J. EMORY SMITH, JR.
Assistant Deputy Attorney
General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677

MARTY JACKLEY
Attorney General
State of South Dakota
ROXANNE GIEDD
Chief, Civil Litigation Division
Attorney General's Office
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel: (605) 773-3215
Fax: (605) 773-4106

KENNETH T. CUCCINELLI, II
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219
Tel: (804) 786-2436

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Court consolidated the following cases for review:

09-1073 (Lead), 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129, 10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1205, 10-1206, 10-1207, 10-1208, 10-1210, 10-1211, 10-1212, 10-1213, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, 10-1222

All State Petitioners and Supporting Intervenor join this joint brief in full, except for the Commonwealth of Virginia, which did not challenge the Tailoring Rule and therefore does not join the parts of the brief that address that rule.

(A) Parties, Intervenors, and Amici

Petitioners

Alpha Natural Resources, Inc. (10-1073, 10-1132)
American Farm Bureau Federation (10-1119, 10-1202)
American Frozen Food Institute (10-1073, 10-1127, 10-1218)
American Iron and Steel Institute (10-1109, 10-1147)
American Petroleum Institute (10-1127, 10-1218)
Attorney General Greg Abbott (10-1128, 10-1222)
Brick Industry Association (10-1127, 10-1218)
Center for Biological Diversity (10-1205)
Chamber of Commerce of the United States of America (10-1123, 10-1199)
Clean Air Implementation Project (10-1099, 10-1216)
Coalition for Responsible Regulation, Inc. (10-1073, 10-1132)
Collins Industries, Inc. (10-1083, 10-1131)
Collins Trucking Company, Inc. (10-1083, 10-1131)
Commonwealth of Virginia (10-1128)
Corn Refiners Association (10-1127, 10-1218)
Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation (10-1114, 10-1206)
Georgia Agribusiness Council, Inc. (10-1083, 10-1131)
Georgia Coalition for Sound Environmental Policy, Inc. (10-1200)
Georgia Motor Trucking Association, Inc. (10-1083, 10-1131)
Gerdau Ameristeel US Inc. (10-1110, 10-1148)
Glass Association of North America (10-1218)

Glass Packaging Institute (10-1127, 10-1218)
Great Northern Project Development, L.P. (10-1073, 10-1132)
Haley Barbour, Governor of Mississippi (10-1128, 10-1211)
Independent Petroleum Association of American (10-1127, 10-1218)
Indiana Cast Metals Association (10-1127)
Industrial Minerals Association – North America (10-1073,10-1132)
J&M Tank Lines, Inc. (10-1083, 10-1131)
Kennesaw Transportation, Inc. (10-1083, 10-1131)
Langboard, Inc. – MDF (10-1083, 10-1131)
Langboard, Inc. – OSB (10-1083, 10-1131)
Langdale Chevrolet-Pontiac, Inc. (10-1083, 10-1131)
Langdale Farms, LLC (10-1083, 10-1131)
Langdale Ford Company (10-1083, 10-1131)
Langdale Forest Products Company (10-1083, 10-1131)
Langdale Fuel Company (10-1083, 10-1131)
Landmark Legal Foundation (10-1208)
Louisiana Department of Environmental Quality (10-1221)
Mark R. Levin (10-1208)
Michigan Manufacturers Association (10-1127, 10-1218)
Mississippi Manufacturers Association (10-1127, 10-1218)
Missouri Joint Municipal Electric Utility Commission (10-1124, 10-1213)
National Association of Home Builders (10-1127, 10-1218)
National Association of Manufacturers (10-1127, 10-1218)
National Cattlemen’s Beef Association (10-1073, 10-1132)
National Environmental Development Association’s Clean Air Project
(10-1125, 10-1210)
National Federation of Independent Business (10-1127, 10-1219)
National Mining Association (10-1120, 10-1201)
National Oilseed Processors Association (10-1127, 10-1218)
National Petrochemical & Refiners Association (10-1127, 10-1218)
North American Die Casting Association (10-1127)
Ohio Coal Association (10-1126, 10-1145)
Peabody Energy Company (10-1118, 10-1203)
Portland Cement Association (10-1129, 10-1220)
Rick Perry, Governor of Texas (10-1128, 10-1222)
Rosebud Mining Company (10-1073, 10-1132)
South Carolina Public Service Authority (10-1207)

Southeast Trailer Mart, Inc. (10-1083, 10-1131)
Southeastern Legal Foundation, Inc. (10-1083, 10-1131)
Specialty Steel Industry of North America (10-1127)
State of Alabama (10-1128, 10-1211)
State of South Carolina (10-1128, 10-1211)
State of South Dakota (10-1128, 10-1211)
State of Nebraska (10-1128, 10-1211)
State of North Dakota (10-1128, 10-1211)
State of Texas (10-1128, 10-1222)
Tennessee Chamber of Commerce and Industry (10-1127, 10-1218)
Texas Agriculture Commission (10-1128)
Texas Department of Agriculture (10-1222)
Texas Commission on Environmental Quality (10-1128, 10-1222)
Texas General Land Office (10-1128, 10-1222)
Texas Public Utilities Commission (10-1128, 10-1222)
Texas Railroad Commission (10-1128, 10-1222)
The Langdale Company (10-1083, 10-1131)
U.S. Representative Dan Burton (10-1083, 10-1131)
U.S. Representative Dana Rohrabacher (10-1083, 10-1131)
U.S. Representative Jack Kingston (10-1083, 10-1131)
U.S. Representative John Linder (10-1083, 10-1131,)
U.S. Representative John Shadegg (10-1083, 10-1131)
U.S. Representative John Shimkus (10-1083, 10-1131)
U.S. Representative Kevin Brady (10-1083, 10-1131)
U.S. Representative Lynn Westmoreland (10-1083, 10-1131)
U.S. Representative Marsha Blackburn (10-1083, 10-1131)
U.S. Representative Michele Bachmann (10-1083, 10-1131)
U.S. Representative Nathan Deal (10-1083, 10-1131)
U.S. Representative Paul Broun (10-1083, 10-1131)
U.S. Representative Phil Gingrey (10-1083, 10-1131)
U.S. Representative Steve King (10-1083, 10-1131)
U.S. Representative Tom Price (10-1083, 10-1131)
Utility Air Regulatory Group (10-1122, 10-1212)
West Virginia Manufacturers Association (10-1127, 10-1218)
Western States Petroleum Association (10-1127, 10-1218)
Wisconsin Manufacturers and Commerce (10-1127, 10-1218)

Respondents

Environmental Protection Agency (Listed on all Cases)
Lisa Perez Jackson, Administrator, U.S. EPA (10-1123, 10-1199,
10-1219)

Intervenors for Petitioners

American Frozen Food Institute (10-1073, 10-1131, 10-1200)
American Petroleum Institute (10-1073, 10-1131, 10-1200)
Corn Refiners Association (10-1073, 10-1131, 10-1200)
Glass Association of North America (10-1073, 10-1131, 10-1200)
Independent Petroleum Association of America (10-1073, 10-1131,
10-1200)
Indiana Cast Metals Association (10-1073, 10-1131, 10-1200)
Louisiana Department of Environmental Quality (10-1073, 10-1109)
Michigan Manufacturers Association (10-1073, 10-1131, 10-1200)
National Association of Home Builders (10-1073, 10-1131, 10-1200)
National Association of Manufacturers (10-1073, 10-1131, 10-1200)
National Oilseed Processors Association (10-1073, 10-1131, 10-1200)
National Petrochemical & Refiners Association (10-1073, 10-1131,
10-1200)
Tennessee Chamber of Commerce and Industry (10-1073, 10-1131,
10-1200)
West Virginia Manufacturers Association (10-1073, 10-1131, 10-1200)
Western States Petroleum Association (10-1073, 10-1131, 10-1200)
Wisconsin Manufacturers and Commerce (10-1073, 10-1131, 10-1200)

Intervenors for Respondents

American Farm Bureau Federation (10-1073, 10-1131, 10-1205)
Brick Industry Association (10-1073, 10-1131)
Center for Biological Diversity (10-1073, 10-1131, 10-1200)
Commonwealth of Massachusetts (10-1073, 10-1131)
Commonwealth of Pennsylvania (10-1073, 10-1131)
Conservation Law Foundation (10-1073, 10-1131)
Department of Environmental Protection (10-1073, 10-1131)
Georgia ForestWatch (10-1073, 10-1131)
National Environmental Development Association's Clean Air Project
(10-1073, 10-1131)

National Mining Association (10-1073, 10-1109, 10-1131, 10-1205)
Natural Resources Council of Maine (10-1073, 10-1131)
Peabody Energy Company (10-1073, 10-1131, 10-1205)
South Coast Air Quality Management District (10-1073, 10-1131)
State of California (10-1073, 10-1131)
State of Illinois (10-1073, 10-1131)
State of Iowa (10-1073, 10-1131)
State of Maine (10-1073, 10-1131)
State of Maryland (10-1073, 10-1131)
State of New Mexico (10-1073, 10-1131)
State of New York (10-1073, 10-1131)
State of North Carolina (10-1073, 10-1131)
State of Oregon (10-1073, 10-1131)
State of Rhode Island (10-1073, 10-1131)
State of New Hampshire (10-1073, 10-1131)
Utility Air Regulatory Group (10-1073, 10-1131, 10-1205)
Wild Virginia (10-1073, 10-1131)

Movant-Intervenors for Respondents

Environmental Defense Fund (10-1073, 10-1131)
Indiana Wildlife Federation (10-1073)
Michigan Environmental Council (10-1073)
Natural Resources Defense Council (10-1073, 10-1131)
Ohio Environmental Council (10-1073)
Sierra Club (10-1073, 10-1131)

Amici Curiae for Petitioners

American Chemistry Council (Listed on all Cases)
Commonwealth of Kentucky (Listed on all Cases)

(B) Rulings Under Review

These petitions for review challenge:

1. EPA's final rule entitled *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (**Timing Rule**); and

2. EPA's final rule entitled *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) (**Tailoring Rule**).

(C) Related Cases

There are numerous cases related to these consolidated cases. The Court has placed these related cases into four separate groupings, as follows:

1. Twenty-six petitions for review consolidated under lead case No. 09-1322: (a) 16 petitions challenging EPA's final rule, *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) (**Endangerment Finding**); and (b) 10 petitions for review of EPA's denial of reconsideration of the Endangerment Rule, *EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 75 Fed. Reg. 49,556 (Aug. 13, 2010) (**Reconsideration Denial**).
2. Seventeen petitions for review consolidated under lead case No. 10-1092, challenging EPA's final rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) (**Tailpipe Rule**).
3. Twelve petitions for review consolidated under lead case No. 10-1167: three petitions challenging each of the following four EPA Rules: (a) *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978); (b) *Part 52 – Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978); (c) *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980); and (d) *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Baseline Emissions Determination; Actual-to-Future-Actual Methodology, Plantwide*

Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002).

4. Five petitions for review consolidated under lead case No. 09-1018, challenging EPA's December 18, 2008 memorandum regarding *EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program*, 73 Fed. Reg. 80,300 (Dec. 31, 2008).

Case No. 10-1209, *National Alliance of Forest Owners and American Forest & Paper Association v. EPA*, challenging the Tailoring Rule, was severed by Order dated May 27, 2011, from these consolidated cases on motion of Petitioners American Forest & Paper Association and National Alliance of Forest Owners, and by that Order was held in abeyance pending a decision in Case No. 10-1073. *See* Doc. No. 1307898 (motion to sever); Doc. No. 1310363 (order placing case in abeyance).

Cases No. 10-1115, *Center for Biological Diversity v. EPA*, and No. 10-1215, *Sierra Club v. EPA*, challenging the Timing Rule and Tailoring Rule, respectively, were held in abeyance by Order dated November 16, 2010. *See* Doc. No. 1277729 (Order placing cases in abeyance). In addition, by that Order, certain issues in Case No. 10-1205, *Center for Biological Diversity v. EPA*, were severed and assigned a separate docket number, No. 10-1388, which the Court held in abeyance. *See id.* On June 16, 2011, the Center for Biological diversity filed an unopposed motion to dismiss its petition for review in Case No. 10-1205. *See* Doc. No. 1313541.

TABLE OF CONTENTS

Table of Authorities..... x

Glossary of Abbreviationsxvii

Jurisdiction..... 1

Statement of the Issues.....2

Statutes and Regulations.....3

Statement of the Case and Facts9

 A. Statutory Framework for Regulating Stationary-Source Emissions Under Title I and Title V of the CAA.9

 1. PSD.....9

 2. Title V..... 10

 B. EPA Decides to Regulate Greenhouse-Gas Emissions from Motor Vehicles Under Title II of the Clean Air Act..... 11

 C. EPA Concludes That the Tailpipe Rule Triggers Regulation of Stationary-Source GHG Emissions. 13

 D. EPA Issues the Tailoring Rule to Alleviate the Far-Reaching Regulatory Consequences of Its Decision to Regulate Greenhouse-Gas Emissions as “Air Pollutants” Under the PSD and Title V Programs. 15

Summary of the Argument 17

Standing 22

Argument..... 24

I. EPA’s Tailoring Rule Must Be Vacated As Contrary to Law.....26

 A. EPA’s Tailoring Rule Violates the Clean Air Act..... 28

 1. EPA Cannot Subordinate the Clean Air Act’s Unambiguous, Rule-Bound Numerical

Thresholds to Actual or Imagined
“Congressional Intent” 28

2. EPA Cannot Disregard the Clean Air Act’s
Unambiguous, Agency-Constraining
Numerical Thresholds By Invoking
“Absurdity” Or Other Doctrines. 43

B. EPA’s Tailoring Rule Violates the Constitution
By Seizing Discretionary Powers Where No
“Intelligible Principle” Has Been Provided By
Statute..... 54

C. EPA’s Tailoring Rule Tramples the Powers That
Congress Reserved to Itself in the Clean Air Act..... 56

II. The Timing Rule is Unlawful and Must be Vacated..... 546

A. This Court Must Vacate the Timing Rule Because
Congress Has Not Delegated To EPA the Power
to Decide Whether To Extend the Strict,
Unambiguous Permitting Requirements of the
PSD and Titel V Programs to Greenhouse-Gas
Emissions. 60

B. EPA’s Timing Rule Is Precluded by the Supreme
Court’s Ruling in *FDA v. Brown & Williamson
Tobacco Corp.* 64

C. The Supreme Court’s Holding in *Massachusetts v.
EPA* Extends Only to Motor-Vehicle Emissions,
and Cannot Justify EPA’s Decision To Regulate
Stationary-Source Greenhouse-Gas Emissions In
the Timing Rule. 68

Conclusion 72

Certificate of Service 75

Certificate of Compliance 76

Table of Authorities¹

Cases

<i>Ala. Power Co. v. Costle</i> , 636 F.2d 323 (D.C. Cir. 1980).....	52
<i>Ali v. Fed. Bureau of Prisons</i> , 552 U.S. 214 (2008)	33
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936)	48
<i>Barnhart v. Sigmon Coal Co.</i> , 534 U.S. 438 (2002)	37-38, 41
<i>Board of Governors v. Dimension Financial Corp.</i> 474 U.S. 361 (1986).....	37, 41
* <i>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	20, 21, 22, 27, 28, 35, 59
<i>Church of the Holy Trinity v. United States</i> , 143 U.S. 457 (1892)	33, 47, 49
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	41
<i>Exxon Mobil Corp. v. Allapattah Servs., Inc.</i> , 545 U.S. 546 (2005)	33, 34, 43
* <i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	21, 22, 24, 60, 62, 64, 66, 67, 69
<i>Green v. Bock Laundry Mach. Co.</i> , 490 U.S. 504 (1989)	47
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	46
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	30, 31, 35
<i>J.W. Hampton, Jr. & Co. v. United States</i> , 276 U.S. 394 (1928)	54

¹ Authorities upon which we chiefly rely are marked with asterisks.

La. Pub. Serv. Comm’n v. FCC,
476 U.S. 355 (1986)25

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 34, 35, 43

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 22, 23

Lyng v. Nw. Indian Cemetery Protective Ass’n,
485 U.S. 439 (1988)48

Massachusetts v. EPA,
549 U.S. 497 (2007) 12, 13, 68, 69, 70

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994)40

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 38, 41

Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.,
545 U.S. 967 (2005)36

Nat’l Petrochemical & Refiners Ass’n v. EPA,
630 F.3d 145 (D.C. Cir. 2010).....36

Nat’l Railroad Passenger Corp. v. Boston & Maine Corp.,
503 U.S. 407 (1992) 35, 36, 43

Nixon v. Mo. Mun. League,
541 U.S. 125 (2004) 46, 47

Nw. Austin Mun. Util. Dist. No. One v. Holder,
129 S. Ct. 2504 (2009).....48

Pennsylvania Department of Corrections v. Yeskey,
524 U.S. 206 (1998) 34, 43

Pub. Citizen v. U.S. Dep’t of Justice,
491 U.S. 440 (1989)47

Public Citizen v. Young,
831 F.2d 1108 (D.C. Cir. 1987) 44, 45, 46

Ragsdale v. Wolverine World Wide, Inc.,
535 U.S. 81 (2002).....37

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 46, 47

Rowland v. Cal. Men’s Colony,
506 U.S. 194 (1993)49

U.S. Brewers Ass’n v. EPA,
600 F.2d 974 (D.C. Cir. 1979).....53

United States v. Mead Corp.,
533 U.S. 218 (2001) 20, 59, 61, 62

United States v. Mitra,
405 F.3d 492 (7th Cir. 2005).....41

United States v. Ron Pair Enters.,
489 U.S. 235 (1989)49

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994).....47

W. Va. Univ. Hosps., Inc. v. Casey,
499 U.S. 83 (1991).....39

Whitman v. Am. Trucking Ass’ns,
531 U.S. 457 (2001) 54, 55, 56

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952)72

Constitution, Statutes and Regulations

U.S. CONST. art. I, § 7..... 31, 32, 46

5 U.S.C. § 5531

11 U.S.C. § 330(a)(1)34

21 U.S.C. § 321(g)(1)(C).....64

21 U.S.C. § 331(a)65

21 U.S.C. § 352(j)65

21 U.S.C. § 355(d)65

42 U.S.C. § 7401(a)(3)3
 42 U.S.C. § 74079
 42 U.S.C. § 7407(a)3
 42 U.S.C. § 7407(d)(1)(A)3
 42 U.S.C. § 7408(a)(1)4, 9
 42 U.S.C. § 7409(b)(1)4, 9
 42 U.S.C. § 7410(a)(1)4
 42 U.S.C. § 7411(a)(3)5
 42 U.S.C. § 74759
 42 U.S.C. § 7475(a)5
 42 U.S.C. § 7475(a)(1)2, 10
 42 U.S.C. § 7475(a)(4) 2, 10, 14, 15, 61, 70
 42 U.S.C. § 7475(c)5, 10
 42 U.S.C. § 7476(a) 63, 71
 42 U.S.C. § 7479 (1) 2, 6, 10, 59
 42 U.S.C. § 7479 (3)6
 42 U.S.C. § 7521(a)(1)12
 42 U.S.C. § 7601(a)1
 42 U.S.C. § 7602(g) 7, 12, 68, 69
 42 U.S.C. § 7602(j) 2, 7, 10, 59
 42 U.S.C. § 7607(b)(1)1, 2
 42 U.S.C. § 7607(d)(9)33
 42 U.S.C. § 7661(2)7
 42 U.S.C. § 7661a(a) 2, 7, 10, 11
 42 U.S.C. § 7661b(c)8, 11
 40 C.F.R. § 51.166(b)(48)(iv)17
 40 C.F.R. § 52.21(b)(49)(iv)17

40 C.F.R. § 52.21(b)(49)(v)17

Control of Emissions From New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,924 (Sept. 8, 2003) (GHG Rulemaking Denial)11

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) (**Endangerment Finding**) vi, 13

EPA’s Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556 (Aug. 13, 2010) (**Reconsideration Denial**)..... vi

EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program, 73 Fed. Reg. 80,300 (Dec. 31, 2008) vii

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (**Tailpipe Rule**)..... vi, 13

Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380 (June 19, 1978) vi

Part 52 – Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration, 43 Fed. Reg. 26,388 (June 19, 1978) vi

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Baseline Emissions Determination; Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean

Units, Pollution Control Projects, 67 Fed. Reg. 80,186
(Dec. 31, 2002) vii

*Prevention of Significant Deterioration and Title V
Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June
3, 2010) (**Tailoring Rule**)...vi, 16, 17, 22, 23, 26- 28, 32-3, 44, 47, 50, 53, 55

*Reconsideration of Interpretation of Regulations That
Determine Pollutants Covered by Clean Air Act Permitting
Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (**Timing
Rule**)..... v, 14, 15, 23, 59, 61

*Requirements for Preparation, Adoption, and Submittal of
Implementation Plans; Approval and Promulgation of Implementation
Plans*, 45 Fed. Reg. 52,676
(Aug. 7, 1980).....vi

Other Authorities

KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d
ed. 1963)41

JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF
CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL
DEMOCRACY* (1962).....38

Frank H. Easterbrook, *Statutes’ Domains*,
50 U. CHI. L. REV. 533 (1983)42

Louis Kaplow, *Rules Versus Standards: An Economic
Analysis*, 42 DUKE L.J. 557 (1992)40

John F. Manning, *Textualism and the Equity of the Statute*,
101 COLUM. L. REV. 1 (2001).....38

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.
CHI. L. REV. 1175 (1989)39

Kenneth A. Shepsle & Barry R. Weingast, *The Institutional
Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85
(1987)38

Kenneth A. Shepsle, *Congress Is a “They,” Not An “It”:
Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON.
239 (1992)41

THE FEDERALIST NO. 47 (James Madison)72
S. 1224, 101st Cong. (1989)43
H.R. 5966, 101st Cong. (1990)43

GLOSSARY OF ABBREVIATIONS

APA – Administrative Procedure Act

CAA – Clean Air Act

CO_{2e} – Carbon Dioxide Equivalent

EPA – United States Environmental Protection Agency

FDA – Food and Drug Administration

FDCA – Food, Drug, and Cosmetic Act

GHG – Greenhouse Gas

GWP – Global Warming Potentials

NAAQS – National Ambient Air Quality Standard

NHTSA – National Highway Traffic Safety Administration

PSD – Prevention of Significant Deterioration

tpy – Tons Per Year

No. 10-1073 AND CONSOLIDATED CASES (COMPLEX)

United States Court of Appeals
For the District of Columbia Circuit

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petitions for Review of Environmental Protection Agency
Final Orders

BRIEF OF STATE PETITIONERS AND SUPPORTING INTERVENOR

JURISDICTION

Petitioners challenge two final rules issued by EPA: (1) the Timing Rule, and (2) the Tailoring Rule. EPA had jurisdiction over each of these final rules under the APA, 5 U.S.C. § 553, as well as the Clean Air Act, 42 U.S.C. § 7601(a). The Clean Air Act grants this Court exclusive jurisdiction over petitions for review challenging nationally applicable final actions of the EPA Administrator. *See* 42 U.S.C. § 7607(b)(1). It is undisputed that EPA's Timing and Tailoring Rules qualify as nationally applicable final actions.

State Petitioners timely filed their petitions for review challenging the Timing and Tailoring Rules within the 60-day period for judicial review provided in 42 U.S.C. § 7607(b)(1). The Court consolidated these and other related cases into Case No. 10-1073. Order, No. 10-1073 (Nov. 16, 2010).

STATEMENT OF THE ISSUES

1. Title V of the Clean Air Act requires stationary sources that emit “100 tons per year or more of any air pollutant” to obtain operating permits, while Title I requires permits before building or modifying any source that emits “250 tons per year or more of any air pollutant.” *See* 42 U.S.C. §§ 7661a(a); 7602(j); 7475(a)(1); 7479(1).

Can EPA replace these unambiguous, mass-based permitting thresholds with criteria of its own choosing, simply to alleviate the regulatory burdens caused by EPA’s decision to regulate stationary-source greenhouse-gas emissions as air pollutants?

2. The Clean Air Act allows EPA to regulate stationary-source air pollutants that are “subject to regulation” under the Act. *See, e.g.*, 42 U.S.C. § 7475(a)(4).

Does this ambiguous statutory language reflect a congressional decision to delegate to EPA the power to extend the Clean Air Act’s permitting requirements to greenhouse-gas emissions, where the rigid, unambiguous, numerical permitting thresholds in the Clean Air Act would impose absurd regulatory burdens on both EPA and Petitioners?

STATUTES AND REGULATIONS

The following statutory provisions are pertinent to this case:

CLEAN AIR ACT, TITLE I, PART A

42 U.S.C. § 7401(a)(3) [CAA § 101(a)(3)]: “The Congress finds— . . . that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments”

42 U.S.C. § 7407(a) [CAA § 107(a)]: “Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.”

42 U.S.C. § 7407(d)(1)(A) [CAA § 107(d)(1)(A)]: “By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

- (i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,
- (ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or
- (iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.”

42 U.S.C. § 7408(a)(1) [CAA § 108(a)(1)]: “For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.”

42 U.S.C. § 7409(b)(1) [CAA § 109(b)(1)]: “National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.”

42 U.S.C. § 7410(a)(1) [CAA § 110(a)(1)]: “Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national

ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.”

42 U.S.C. § 7411(a)(3) [CAA § 111(a)(3)]: “The term ‘stationary source’ means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.”

CLEAN AIR ACT, TITLE I, PART B

42 U.S.C. § 7475(a) [CAA § 165(a)]: “No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

...

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility”

42 U.S.C. § 7475(c) [CAA § 165(c)]: “Any completed permit application under section 7410 of this title for a major emitting facility in any area

to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.”

42 U.S.C. § 7479(1), (3) [CAA § 169(1), (3)]: “(1) The term ‘major emitting facility’ means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

...

“(3) The term ‘best available control technology’ means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of ‘best available control technology’ result in emissions of any pollutants which will

exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.”

CLEAN AIR ACT, TITLE III

42 U.S.C. § 7602(g) [CAA § 302(g)]: “The term ‘air pollutant’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ‘air pollutant’ is used.”

42 U.S.C. § 7602(j) [CAA § 302(j)]: “Except as otherwise expressly provided, the terms ‘major stationary source’ and ‘major emitting facility’ mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).”

CLEAN AIR ACT, TITLE V

42 U.S.C. § 7661(2) [CAA § 501(2)]: “The term ‘major source’ means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

- (A) A major source as defined in section 7412 of this title.
- (B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.”

42 U.S.C. § 7661a(a) [CAA § 502(a)]: “After the effective date of any permit program approved or promulgated under this subchapter, it

shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV–A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator’s discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.”

42 U.S.C. § 7661b(c) [CAA § 503(c)]: “Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to

exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.”

STATEMENT OF THE CASE AND FACTS

A. Statutory Framework for Regulating Stationary-Source Emissions Under Title I and Title V of the CAA.

The Clean Air Act establishes two programs relevant to this case: the program for prevention of significant deterioration of air quality (“PSD”), and the Title V permitting program.

1. PSD

Title I of the Clean Air Act establishes “national ambient air quality standards” (“NAAQS”) for air pollutants. *See* 42 U.S.C. §§ 7408(a)(1)(A), 7409(b)(1). Geographic areas are deemed either “attainment” or “nonattainment” areas with respect to each regulated air pollutant, depending on whether they satisfy the NAAQS for that pollutant. *See* 42 U.S.C. § 7407.

The PSD program applies in all attainment areas, as well as in “unclassifiable” areas. *See* 42 U.S.C. § 7475. In these areas where PSD provisions apply, the statute prohibits anyone from building or modifying a “major emitting facility” without first acquiring a permit.

See 42 U.S.C. § 7475(a)(1). The PSD permitting authorities must grant or deny applications within one year. See 42 U.S.C. § 7475(c). The PSD program further requires owners of “major emitting facilities” to demonstrate that their sources will comply with emissions limits achievable through the “best available control technology for each pollutant subject to regulation under this chapter.” 42 U.S.C. § 7475(a)(4). For purposes of the PSD program, the Clean Air Act defines a “major emitting facility”:

[S]tationary sources of air pollutants which emit, or have the potential to emit, *one hundred tons per year or more of any air pollutant* from [listed] types of stationary sources Such term also includes any other source with the potential to emit *two hundred and fifty tons per year or more of any air pollutant*.

42 U.S.C. § 7479(1) (emphases added).

2. Title V

Title V of the Clean Air Act requires all “major source[s]” of air pollution to obtain operating permits. See 42 U.S.C. § 7661a(a). “Major source[s]” under Title V are defined to include

any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, *one hundred tons per year or more* of any air pollutant.

42 U.S.C. § 7602(j) (emphasis added).

Title V allows EPA to “exempt one or more source categories (in whole or in part)” from Title V if compliance would be “impracticable, infeasible, or unnecessarily burdensome on such categories.” *See* 42 U.S.C. § 7661a(a). But the statute flatly forbids EPA to “exempt any major source” from Title V’s requirements. *See id.* (“[T]he Administrator may not exempt any major source from such requirements.”). The Title V permitting authorities must approve or deny any completed operating-permit application within 18 months. *See* 42 U.S.C. § 7661b(c).

B. EPA Decides to Regulate Greenhouse-Gas Emissions from Motor Vehicles Under Title II of the Clean Air Act.

In 2003, EPA concluded that it lacked authority to regulate greenhouse-gas emissions under the Clean Air Act. *See Control of Emissions From New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking*, 68 Fed. Reg. 52,922, 52,924 (Sept. 8, 2003) (GHG Rulemaking Denial) (“EPA believes that [the Clean Air Act] does not authorize regulation to address global climate change.”). Based on this view, it denied a petition from organizations calling for EPA to regulate greenhouse-gas emissions from motor vehicles. *Id.* The

petitioners had invoked section 202(a)(1) of the Clean Air Act, which directs the EPA Administrator to regulate air-pollutant emissions from new motor vehicles that “in [her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1).

In 2007, the Supreme Court disagreed with EPA’s interpretation of the Clean Air Act. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court noted that that “[t]he Clean Air Act’s sweeping definition of ‘air pollutant’ includes ‘any air pollution agent or combination of such agents, including any physical, chemical, . . . substance or matter which is emitted into or otherwise enters the ambient air,’” and held that greenhouse gases “without a doubt” qualify as air pollutants under the Act. *See* 549 U.S. at 528–29 (quoting 42 U.S.C. § 7602(g)). Rather than order EPA to regulate greenhouse-gas emissions from motor vehicles, the Court required EPA to consider whether greenhouse gases qualify as pollutants that “endanger public health or welfare” under section 202(a)(1), and noted that “[i]f EPA makes a finding of endangerment, the Clean Air Act *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles.” *Id.* at 533 (emphases

added). *Massachusetts* did not consider or discuss EPA's authority to regulate greenhouse-gas emissions from *stationary* sources.

After the *Massachusetts* ruling, EPA issued an endangerment finding for greenhouse gases, concluding that “six greenhouse gases taken together”—carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆)—“endanger both the public health and the public welfare of current and future generations” by causing or contributing to climate change. See *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,496–97 (Dec. 15, 2009) (Endangerment Finding). Later, and in a separate rulemaking, EPA promulgated GHG regulations for new motor vehicles jointly with the National Highway Traffic Safety Administration (NHTSA). See *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) (Tailpipe Rule).

C. EPA Concludes That the Tailpipe Rule Triggers Regulation of Stationary-Source GHG Emissions.

Neither the Endangerment Finding nor the Tailpipe Rule addressed EPA's authority to regulate greenhouse gas emissions from

stationary sources under the PSD and Title V programs. Under the PSD program, for example, it is not enough for EPA to conclude that greenhouse gases qualify as “air pollutants,” because the statute requires facilities to install “best available control technology” only for a *subset* of air pollutants—those “subject to regulation under this chapter.” 42 U.S.C. § 7475(a)(4) (requiring that major emitting facilities be “subject to the best available control technology *for each pollutant subject to regulation under this chapter*”) (emphasis added). EPA’s Timing Rule addresses the issue of when, if ever, greenhouse gases would become air pollutants “subject to regulation” under the Clean Air Act, triggering the PSD program’s best-available-control-technology requirements.

The Timing Rule concludes that air pollutants are “subject to regulation” if “either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act” requires “actual control of emissions of that pollutant.” Timing Rule, 75 Fed. Reg. at 17,005 (citations omitted). It further holds that air pollutants are *not* “subject to regulation” if “EPA regulations only require monitoring or reporting.” 75 Fed. Reg. at 17,004. As for precise timing of when an air pollutant

becomes “subject to regulation” within the meaning of 42 U.S.C. § 7475(a)(4), the Timing Rule clarifies that this occurs at the moment when “the regulations addressing a particular pollutant become final and effective.” 75 Fed. Reg. at 17,015. The upshot is that greenhouse gases become “subject to regulation” on the date that EPA’s Tailpipe Rule goes into effect—January 2, 2011. *See* 75 Fed. Reg. at 17,007.

D. EPA Issues the Tailoring Rule to Alleviate the Far-Reaching Regulatory Consequences of Its Decision to Regulate Greenhouse-Gas Emissions as “Air Pollutants” Under the PSD and Title V Programs.

Several challenges immediately arose once EPA decided to regulate greenhouse gases as “air pollutants” under the PSD and Title V programs. These challenges arise from the statutory permitting thresholds established in the PSD and Title V programs, which require facilities to obtain permits if they emit more than 100 tons per year (or in some case, more than 250 tons per year) of “any air pollutant.” These numerical thresholds are set far too low to accommodate rational regulation of greenhouse-gas emissions. Were EPA to apply the 100/250 tons-per-year (“tpy”) thresholds, as required by statute, it “would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title

V program.” 75 Fed. Reg. at 31,533. This not only would expand the number of “major” sources subject to permitting requirements from 15,000 to more than 6 million, but it would also increase annual permitting costs from \$12 million to \$1.5 billion, and boost the number of man-hours required to administer these programs from 151,000 to 19,700,000. *See* 75 Fed. Reg. at 31,514, 31,539–40. Countless numbers of buildings, including churches and schools, would be subjected to EPA permitting requirements based on the CO₂ emissions from their water heaters.

EPA’s Tailoring Rule responds to these problems by replacing the permitting thresholds established in the Clean Air Act with an agency-created regime that determines whether a stationary source should be required to obtain a permit based on its emissions of greenhouse gases. First, rather than measure greenhouse-gas emissions by their mass, EPA’s Tailoring Rule creates a new metric called “CO₂ equivalent emissions (CO₂e).” 75 Fed. Reg. at 31,530. This CO₂e metric represents a weighted measure of six intermixed substances based on their “global warming potentials” (GWP). *Id.* at 31,606. EPA recognized “the tension between the mass-based metric in the statute and the CO₂e-

based metric we are adopting,” but it concluded that the CO_{2e} metric “best addresses the relevant environmental endpoint, which is radiative forcing of the GHGs emitted.” *Id.* at 31,531.

Second, the Tailoring Rule establishes its own numerical permitting thresholds for stationary-source greenhouse-gas emissions, hundreds of times larger than the levels designated in the statute, and phases them in over two time periods. *Id.* at 31,516, 31,606–07. Under the first phase, which began on January 2, 2011, PSD and Title V requirements apply to sources that emit more than 75,000 tpy CO_{2e} and that are otherwise classified as “major stationary sources.” *See Id.* at 31,606–07 (codified at 40 C.F.R. §§ 51.166(b)(48)(iv), 52.21(b)(49)(iv)). The second phase begins on July 1, 2011, and it will expand PSD and Title V coverage to sources that emit greenhouse gases in excess of 100,000 tpy CO_{2e}, regardless whether they are otherwise classified as “major stationary sources.” *Id.* at 31,606–07 (codified at 40 C.F.R. §§ 51.166(b)(48)(iv), 52.21(b)(49)(v)).

SUMMARY OF THE ARGUMENT

Federal statutes are not just helpful suggestions to agencies. Statutory language serves as the formal mechanism by which Congress

confers power on agency administrators, simultaneously establishing and constraining the scope of an agency's legitimate authority. The unambiguous numerical permitting thresholds in the Clean Air Act reflect a decision to legislate through rules rather than standards, rules that constrain EPA's discretion to pursue optimal regulatory policies in exchange for conserving decision costs and preserving congressional power. By establishing rigid statutory thresholds for all air pollutants, instead of authorizing EPA to establish "reasonable" pollution-specific thresholds, the Clean Air Act allocates power between legislature and agency and requires EPA to obtain congressional authorization before launching a new regulatory regime that departs from existing statutory requirements. EPA's Tailoring and Timing Rules flout this careful division of power and seek to impose unilaterally a drastic new regulatory regime without the congressional authorization or input required by the Clean Air Act.

The Tailoring Rule seeks to improve upon rather than implement the Clean Air Act by replacing the unambiguous numerical permitting thresholds with criteria of the EPA's own making. It must be vacated as a violation of the Act as well as an unconstitutional usurpation of

legislative power. Agencies have no power to convert statutory rules into standards by subordinating unambiguous statutory language to actual or imagined “congressional intent,” and in all events EPA offers no evidence that any legislators would have wanted EPA to rewrite the statute’s numerical permitting thresholds rather than seek corrective legislation from Congress. Nor can EPA use the “absurdity” doctrine to depart from the rigid, unambiguous thresholds established in the Clean Air Act; the entire point of legislating by rule is to tolerate suboptimal policies in order to constrain an agency’s discretion and force it to seek congressional legislation (and therefore congressional input) before embarking on novel regulatory regimes. EPA is quite right to note the absurdity of applying the Clean Air Act’s permitting regime to greenhouse-gas emissions, but the absurdity is caused entirely by the Timing Rule’s questionable conclusion that greenhouse gases qualify as air pollutants “subject to regulation” under the PSD and Title V programs. An agency cannot construe *ambiguous* statutory language to *create* an absurdity, and then assert a prerogative to construe *unambiguous* statutory language to *avoid* that absurdity.

EPA's Timing Rule must also fall. The mere existence of ambiguities in the statutory phrase "subject to regulation," or in the Clean Air Act's definition of "air pollutant," is insufficient to trigger *Chevron* deference to EPA's interpretation. Rather, EPA must demonstrate that these ambiguities reflect a congressional decision to delegate power to EPA in deciding whether to regulate greenhouse gases under the PSD and Title V programs. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that the *Chevron* framework applies only "when it appears that Congress delegated authority to the agency" to resolve statutory ambiguity). EPA cannot make any showing that Congress delegated to EPA the authority to decide whether to extend PSD and Title V permitting to greenhouse gases, given that the statute's rigid, mass-based permitting thresholds unambiguously foreclose EPA from establishing a rational permitting regime for these statutory-source pollutants. Quite the contrary, the numerical thresholds reflect an expectation that EPA would seek corrective legislation before extending the statute's permitting requirements to new and unforeseen environmental challenges that do not fit with the numerical thresholds established in the Clean Air Act.

The Timing and Tailoring Rules are also foreclosed by the Supreme Court's ruling in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). When the FDA decided in 1996 to assert jurisdiction over tobacco products, it encountered provisions in its organic statute that banned the interstate sale of any drug and device that is "dangerous to health." Rather than take the drastic step of banning tobacco products from interstate commerce, the FDA followed the approach of EPA's Tailoring Rule, spurning the unambiguous statutory requirements in favor of an agency-created regulatory regime that merely restricted the marketing of tobacco products to children. The Supreme Court not only refused to allow the FDA to "tailor" its tobacco regulations in this manner, it also concluded that the far-reaching consequences of extending FDA jurisdiction to tobacco products meant that the agency *could not regulate them at all*—even though nicotine undeniably qualified as a "drug" under the Food, Drug, and Cosmetic Act. On top of that, the Justices refused to defer to the FDA under *Chevron*, explaining that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160. *Brown & Williamson*

controls here. The far-reaching and near-ridiculous regulatory burdens required by EPA's decision to regulate greenhouse-gas emissions under the PSD and Title V programs prove that the Clean Air Act never delegated this authority to EPA in the first place. This forecloses any possible EPA claim to *Chevron* deference and compels this Court to vacate the Timing Rule.

STANDING

Petitioners satisfy the three elements needed for Article III standing: injury, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Injury: EPA's Timing and Tailoring Rules combine to mandate preconstruction review and permitting of greenhouse-gas emissions from stationary sources under the PSD and Title V programs, thus imposing administrative burdens on Petitioners as States. *See* Declarations of Steve Hagle & Elizabeth Sifuentez Supporting Texas's Motion for Stay (explaining various burdens the greenhouse-gas regulations impose on Texas in administering the regulations) (Attachments to Doc. No. 1266089, Cause No. 10-1041); *see also* 75 Fed. Reg. at 31,540 tbl. V-1. The Timing and Tailoring Rules also subject

Petitioners, as owners and operators of regulated stationary sources, to the costs of complying with the PSD and Title V programs.

Causation and Redressability: Where the petitioner is an object of the government action at issue, “there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Lujan*, 504 U.S. at 561–62. The Timing Rule, which purports to subject greenhouse-gas emissions to regulation under the Clean Air Act, and the Tailoring Rule, which EPA claims is necessary to prevent its Timing Rule from producing absurd results that neither Congress nor the agency would abide, *see* 75 Fed. Reg. at 31,541–49, operate together to cause the injuries just described. Without the Tailoring Rule, there can be no Timing Rule; and without the Timing Rule, State Petitioners are relieved of the administrative and pecuniary burdens described above.² The Court can thus redress State Petitioners’ injuries by setting aside the Timing and Tailoring Rules.

² The symbiosis of the Timing and Tailoring Rules is evidenced by the former’s repeated reliance upon the latter. *See, e.g.*, Timing Rule, 75 Fed. Reg. at 17,007, 17,009, 17,019, 17,020, 17,022, 17,023 (citing then-forthcoming Tailoring Rule).

ARGUMENT

Governments deploy awesome and far-reaching powers over the lives of their citizens. Every day governments seize property, incarcerate their citizens, and threaten to impose ruinous consequences on those who disobey their laws, rules, and orders. All of this requires a theory that can distinguish the legitimate coercive powers of a government from a schoolyard bully. In monarchies or dictatorships, where sovereignty resides in the person of a leader, the mere command of that leader or his subordinates suffices to legitimate government action. But in the United States, where sovereignty resides not in a person, but in the people, government officials must always derive their powers from sources external to themselves; they cannot justify their coercive acts based solely on their beliefs that good consequences will ensue.

Agency administrators derive their powers from Congress, and statutory language serves as the medium by which Congress transfers power to agencies and defines the boundaries of their legitimate authority. *See Brown & Williamson*, 529 U.S. at 161 (“[An] agency’s power to regulate in the public interest must always be grounded in a

valid grant of authority from Congress.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”). Sometimes Congress establishes standards for agencies, instructing them to regulate “in the public interest.” These types of standards confer considerable discretion on agency administrators, empowering them to establish policy unilaterally without seeking specific congressional authorization. Other times, however, Congress chooses to establish statutory rules, such as the specific numerical thresholds for permits in the Clean Air Act’s PSD and Title V provisions. Statutory rules constrain an agency’s ability to pursue optimal regulatory policies, but provide benefits by reducing decision costs for agency administrators, deterring regulated parties from seeking to lobby or “capture” agencies, and preserving congressional influence over future regulatory decisions by requiring agencies to seek congressional authorization before departing from the codified rules.

Calibrating these tradeoffs between rigid rules and flexible standards, and allocating powers between agencies and Congress, are essential parts of the legislative bargains reflected in the Clean Air Act

and its amendments. An agency that arrogates to itself the prerogative to decide how much discretion it should enjoy is no longer acting as an “agent” of Congress; it is acting as a sovereign entity. EPA’s attempts to justify its actions by invoking the lamentable policy consequences of adhering to the unambiguous numerical thresholds in the Clean Air Act establish only that EPA is acting as a benevolent dictator rather than a tyrant.

I. EPA’S TAILORING RULE MUST BE VACATED AS CONTRARY TO LAW.

EPA concedes the incontestable, admitting that its Tailoring Rule “do[es] not accord with a literal reading of the statutory provisions for PSD applicability.” 75 Fed. Reg. at 31,554. (How anyone could read these provisions other than “literally” EPA does not explain; there is no middle ground between a “literal” reading of numerical permitting thresholds and defiance.) Rather than apply the unambiguous numerical thresholds that the Clean Air Act establishes for *all* air pollutants regulated under the PSD and Title V programs, EPA’s Tailoring Rule creates its own threshold levels for carbon dioxide and other greenhouse-gas emissions, and sets them at approximately *750 to 1,000 times* the threshold levels specified in the statute. 75 Fed. Reg. at

31,523–24. As if that were not enough, EPA’s Tailoring Rule also departs from the mass-based approach to significance levels established in the text of the Clean Air Act; it measures the threshold quantities of greenhouse-gas emissions according to their CO_{2e} metric rather than tons. 75 Fed. Reg. at 31,522, 31,530–31. This also flouts the rule-based thresholds that the Clean Air Act established to constrain EPA’s discretion. A “major stationary source” is to be determined by the mass of the emitted pollutants, not their environmental impact.

EPA defends its Tailoring Rule by noting that obeying the statutory language “would create undue costs for sources and impossible administrative burdens for permitting authorities,” 75 Fed. Reg. at 31,547, and attempts to create a legal veneer for its unilateral rewriting of the Clean Air Act by invoking “congressional intent,” the “absurdity” doctrine, and *Chevron* deference. None of this can justify an agency’s decision to countermand unambiguous statutory language and expand its discretion by converting statutory rules into standards. On the contrary, the very breadth of powers already conferred on agencies by the *Chevron* regime is what makes EPA’s attempt to expand its discretionary powers by rewriting unambiguous statutory language so

frightening. EPA only confirms its overreaching with its astonishing claim that the atextual Tailoring Rule is not only permissible but *compelled* under *Chevron* Step One. *See* 75 Fed. Reg. at 31,517 (asserting that “the approach we take in this Tailoring Rule . . . is required under *Chevron* Step 1”).

A. EPA’s Tailoring Rule Violates the Clean Air Act.

1. EPA Cannot Subordinate the Clean Air Act’s Unambiguous, Rule-Bound Numerical Thresholds to Actual or Imagined “Congressional Intent.”

In defending its insouciance toward the enacted text of the Clean Air Act, EPA makes an audacious claim: that “clear” congressional intent can trump unambiguous statutory language and liberate agencies to convert statutory rules into agency-empowering standards. EPA writes: “[I]f congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent.” *See* 75 Fed. Reg. at 31,517.

This statement rests on an empirical premise that “Congress” (EPA does not specify which session of Congress it has in mind) clearly

“intended” that EPA not only regulate stationary-source greenhouse-gas emissions, but also depart unilaterally from the Clean Air Act’s permitting thresholds and replace them with numbers of its own choosing. EPA does not cite *any* evidence from legislative history or other sources to support this claim; it assumes it to be true and then asserts that “congressional intent” is “clear.” EPA does not even consider, let alone refute, the possibilities that: (a) Congress “intended” that EPA seek congressional authorization before regulating greenhouse gases or other air pollutants that do not fit with the Clean Air Act’s rule-based regulatory regime; (b) Congress had no “intentions” whatsoever on these issues, because the threat of global warming was not salient at the time it enacted the Clean Air Act and its amendments; or (c) Congress could not agree on what should be done about greenhouse-gas emissions and left the issue unresolved.

Fortunately, one need not resolve these possibilities, because even the clearest expressions of “congressional intent” cannot license an agency to convert the Clean Air Act’s rule-bound numerical thresholds into standards whereby EPA administrators weigh costs against benefits. Congress cannot give or revoke powers to agencies by wishing

it to be so. This much is clear from *INS v. Chadha*, 462 U.S. 919 (1983), the legislative-veto case. Once Congress confers discretionary powers on an agency administrator, it cannot revoke that discretion by deploying a one- or two-house “legislative veto” over the agency’s decisions. *Id.* at 954–55. A two-house legislative veto is as clear a manifestation of “congressional intent” as one can imagine, yet even these “clear” congressional intentions cannot control an agency’s decisionmaking—unless they are codified in a statute that successfully runs the bicameralism-and-presentment process.

In like manner, once agency discretion is *restricted* by statute, it cannot be loosened by unenacted congressional wishes. Suppose that each house of Congress approved a non-binding resolution urging EPA to ignore the Clean Air Act’s statutory thresholds for all air pollutants and replace them with thresholds chosen by the EPA Administrator. This would surely qualify as “clear” congressional intent—far more clear than anything that EPA has offered in its Tailoring Rule. Yet no one would maintain that these unenacted aspirations could liberate EPA from an unambiguous statutory constraint. Surely less reliable indicators of congressional intent—such as opinion polls of current or

former legislators, or facile and unsupported assertions of “congressional intent”—cannot be invoked to displace unambiguous, agency-controlling statutory language either.

It is easy to see the implausibility of EPA’s position if one imagines a Clean Air Act that explicitly countenances EPA’s efforts to elevate congressional intentions over statutory language. Suppose Congress had appended the following provision to the Clean Air Act:

If any unforeseen problem of air pollution arises, EPA shall conduct a formal opinion poll among all living members of the Congress that enacted this statute.³ Any course of action that wins majority approval shall have the force of law and override any contrary statutory provisions in the Clean Air Act.

No one could think this type of provision constitutional, for the same reason that the Supreme Court disapproved the one-house legislative veto in *Chadha*: It allows congressional wishes to carry the force of law without surmounting the bicameralism-and-presentment procedures established in Article I, § 7. Form counts for everything under the Constitution, and unenacted or imagined congressional preferences—no matter how “clear” they may be—can never be used to displace unambiguous statutory language that successfully ran the gamut of

³ Or, if one prefers, EPA could conduct a formal opinion poll “among all current members of Congress.”

Article I, § 7. It is far more tenuous for EPA to assert a revisionary power in this case, where the Clean Air Act lacks any statutory provision purporting to confer legal status on unenacted congressional “intentions,” and where EPA offers zero evidence that members of Congress “intended” for EPA to depart unilaterally from the Clean Air Act’s agency-constraining provisions.

The fundamental problem with EPA’s Tailoring Rule is that it treats enacted statutory language not as law, but as mere evidence of what the law might be. The “real” law, according to EPA, is “congressional intent,” and statutory text serves as little more than a guide to agencies as they attempt to discover or construct how “Congress” would want them to deal with problems. *See, e.g.*, 75 Fed. Reg. at 31,517 (“*To determine congressional intent*, the agency must first consider the words of the statutory requirements, and if their literal meaning answers the question at hand, then, *in most cases*, the agency must implement those requirements by their terms.”) (emphases added); *id.* at 31,545 (“If the literal meaning of the statutory requirements is clear then, absent indications to the contrary, the agency must take it to indicate congressional intent and must

implement it.”); *id.* at 31,564 (explaining that “[i]f congressional intent is clear, we must adopt and implement an applicability approach that is as close as possible to congressional intent”).

EPA’s efforts to equate the law with “congressional intent” rather than enacted text of federal statutes is irreconcilable with the modern Supreme Court’s approach to statutory construction, and this fact alone should lead this Court to vacate the Tailoring Rule as “not in accordance with law.” 42 U.S.C. § 7607(d)(9). To be sure, there was once a time when EPA’s interpretive methodologies held sway among the Justices. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (“[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”). But those days have long since vanished, and the Supreme Court’s recent decisions have repeatedly emphasized that enacted statutory language must prevail over actual or imagined “congressional intent.” *See, e.g., Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted”); *Exxon Mobil Corp. v. Allapattah Servs.*,

Inc., 545 U.S. 546, 567 (2005) (holding that arguments based on legislative “intent” have no relevance when interpreting an unambiguous statute).

In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998), for example, the Court *assumed* that “Congress did not ‘envisio[n] that the [Americans With Disabilities Act] would be applied to state prisoners,’” but held that “in the context of an unambiguous statutory text that is irrelevant.”

Lamie v. U.S. Trustee, 540 U.S. 526 (2004), goes even further. In that case, the Supreme Court acknowledged that a provision of the Bankruptcy Code contained an “apparent legislative drafting error.” *See id.* at 530 (describing 11 U.S.C. § 330(a)(1)). Yet the Court held that it must respect the objective meaning of the enacted text, rather than plumb the statute’s legislative history in search of “congressional intent.” The Court emphasized that “[w]e should prefer the plain meaning [of the statute] since that approach *respects the words of Congress.*” *See id.* at 536 (emphasis added). Regarding the alleged “scrivener’s error,” the Court held that “[i]f Congress enacted into law

something different from what it intended, *then it should amend the statute to conform it to its intent.*” *Id.* at 542 (emphasis added).⁴

Finally, EPA’s Tailoring Rule suggests that *Chevron* compels agencies to subordinate unambiguous statutory text to clear “congressional intent.” But neither *Chevron* nor the Supreme Court’s post-*Chevron* rulings offer any support for this view. *Chevron* describes Step One as presenting “the question *whether Congress has directly spoken* to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (emphasis added). Congress “speaks” only in the form of enacted statutory language, *see Chadha*, 462 U.S. at 950–51, and post-*Chevron* rulings dispel any notion that *Chevron* Step One privileges “congressional intent” over unambiguous statutory text. In *Nat’l Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992),

⁴ While the *Lamie* Court discussed the statute’s legislative history near the end of its opinion, it did so only after noting that it was “unnecessary” to do so, *see id.* at 539, and then only to refute the petitioners’ one-sided characterizations of that history, *see id.* at 539–41.

the Court described Steps One and Two of *Chevron* as turning exclusively on statutory text:

If the agency interpretation is *not in conflict with the plain language of the statute*, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. *If the text is ambiguous* and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.

Id. at 417-18 (emphases added) (citations omitted). *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) ("At the first step [of *Chevron*], we ask *whether the statute's plain terms* 'directly address[s] the precise question at issue.' *If the statute is ambiguous on the point*, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.')" (emphases added) (citation omitted); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 152 (D.C. Cir. 2010) ("We begin with the text of the statute to determine whether Congress has spoken directly to the precise issue."). These post-*Chevron* opinions make clear that an unambiguous statutory provision is the "unambiguously expressed intent of Congress," and cannot be subordinated to an agency's ruminations about legislative "intent."

The modern Supreme Court's rejection of EPA's intentionalism is not some passing fad, but reflects numerous insights from scholars and more sophisticated understandings of how the legislative process functions.

First, the Supreme Court has recognized that legislation embodies compromises between competing interests, and that abstract speculations about congressional "intent" and "purpose" can unravel bargains memorialized in the enacted language. As the Court observed in *Board of Governors v. Dimension Financial Corp.*:

Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise

474 U.S. 361, 374 (1986). See also *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (noting that "any key term in an important piece of legislation" will reflect "the result of compromise between groups with marked but divergent interests in the contested provision" and that "[c]ourts and agencies must respect and give effect to these sorts of compromises") (emphasis added); *Barnhart v. Sigmon*

Coal Co., 534 U.S. 438, 461 (2002) (“The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess.”); *Mohasco Corp. v. Silver*, 447 U.S. 807, 818–19 (1980) (recognizing that “tempestuous legislative proceedings” produced final legislation that “was clearly the result of a compromise” and that “our task [is] to give effect to the statute as enacted”). The Court’s efforts to preserve legislative compromise build on insights from public-choice theorists and other scholars who have emphasized how Article I’s bicameralism-and-presentment requirements, and the additional veto-gates created by Congress’s committee structure, empower political minorities to block legislation or insist on compromise in return for their assent. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 233–48 (1962); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 89 (1987); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 70–78 (2001).

The Clean Air Act's provisions reflect compromises along many different dimensions. Most obviously, its provisions trade off the goals of providing clean air against the need to avoid excessive regulatory burdens. Congress "intended" to pursue each of these competing goals, yet *how much* an agency should pursue clean air and *how much* it should seek to avoid onerous regulation can be determined only by following the enacted statutory language. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.").

Second, the Clean Air Act, like all statutes, must decide whether to pursue these goals by establishing statutory rules ("drive no faster than 55 miles per hour") or standards ("drive at a speed reasonable under the circumstances"). Legislating by rule has many virtues but also drawbacks. On the plus side, statutory rules can promote predictability and planning, avoid arbitrary treatment of regulated entities, and reduce decision costs for those who implement the law. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). But statutory rules can be crude; they are

sometimes insensitive to context, or over- or under-inclusive in relation to their underlying goals. Standards, by contrast, confer discretion on future decisionmakers to avoid suboptimal outcomes in particular cases, but this type of regime comes at the price of increased decision costs, the potential for arbitrary or unpredictable decisions, and (perhaps) increased error costs if future decisionmakers are untrustworthy. Rules and standards also allocate power between the legislature and agencies and courts that implement the law. Standards delegate power to future decisionmakers such as agencies and courts, while statutory rules withhold discretion from these institutions and force them to seek legislative approval before deviating from the codified regime. *See, e.g.,* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992). How to calibrate these tradeoffs between rules and standards is an essential component of the legislative compromise necessary to produce statutes such as the Clean Air Act. But allowing agencies or courts to invoke abstract notions of “congressional intent” empowers them to convert statutory rules into standards and withhold from Congress the prerogative of legislating by rule. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (declaring

that courts and agencies are “bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes”).

Third, the Supreme Court has recognized that Congress, as a multi-member body, is incapable of having “intentions” or “purposes.” See *Barnhart*, 534 U.S. at 461; *Dimension Fin.*, 474 U.S. at 374; *Mohasco*, 447 U.S. at 818–19; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) (“[I]t is virtually impossible to determine the singular ‘motive’ of a collective legislative body . . .”). Again, this reflects the contributions of public-choice theory, which has shown the difficulties in aggregating individuals’ preferences and goals into coherent collective choices. See, e.g., KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); Kenneth A. Shepsle, *Congress Is a “They,” Not An “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992); *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005) (“Congress is a ‘they’ and not an ‘it’; a committee lacks a brain (or, rather, has so many brains with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity).”).

Legislative outcomes can be manipulated by agenda control and logrolling, clouding any efforts to discover congressional “intentions” from the voting records of its members. *See, e.g.*, Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (“[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses.”). Legislatures simply produce outcomes, which must be enforced by courts and agencies.

In all events, even if one accepts “congressional intent” as a coherent concept, EPA’s empirical claims regarding “congressional intent” are demonstrably false. There is no “clear” congressional intent from the legislators who enacted the Clean Air Act or the 1977 amendments, because the issues of global warming and greenhouse-gas emissions were not salient at the time of enactment. That means we not only do not know, but we cannot even reconstruct, how the Congresses of 1970 or 1977 would have wanted EPA to deal with this problem. As for the Congress that enacted the 1990 Clean Air Act Amendments, that Congress *rejected* several legislative proposals to regulate greenhouse-gas emissions, a fact that EPA conveniently

ignores throughout its Timing and Tailoring Rules. *See, e.g.*, H.R. 5966, 101st Cong. (1990); S. 1224, 101st Cong. (1989). The statute's rigidity demonstrates that the legislatures that enacted the Clean Air Act's provisions expected EPA to come to Congress to seek statutory amendments and authorization to regulate newfound hazards such as global warming. And if the *present-day* Congress "intends" for EPA to disregard the numerical thresholds in the Clean Air Act, then EPA should have no trouble seeking corrective legislation from Congress. EPA's inability to obtain legislation from Congress reveals that its efforts to wrap itself in the mantle of "congressional intent" are much too glib.

The Tailoring Rule's decision to elevate "congressional intent" over unambiguous statutory text defies the Supreme Court's rulings in *Lamie*, *Yeskey*, *Boston & Maine*, and *Exxon Mobil*. It deserves to be vacated for that reason alone.

2. EPA Cannot Disregard the Clean Air Act's Unambiguous, Agency-Constraining Numerical Thresholds By Invoking "Absurdity" Or Other Doctrines.

EPA also attempts to defend its disregard of the Clean Air Act's language by insisting that applying the statute's permitting thresholds

to greenhouse-gas emissions would produce “absurd results.” EPA’s efforts to invoke the “absurdity” doctrine fail for several reasons.

First, agencies cannot rely on “absurd results” as an excuse to convert unambiguous statutory rules into standards. *Every* rule will produce suboptimal or even absurd results at the margins. Yet the entire point of legislating by rule is to tolerate these less-than-ideal outcomes in exchange for the benefits of cabining agency discretion, minimizing decision costs, and preserving the legislature’s power vis-à-vis the agency. EPA’s theory of “absurd results” would empower agencies to smuggle cost-benefit analysis into *any* statutory mandate, even when the statute expressly rejects this type of utilitarian calculus. *See* 75 Fed. Reg. at 31,533 (“For both programs, the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs to sources and the burdens to permitting authorities.”). And it will disable Congress from using statutory rules as a means of forcing agencies to obtain congressional authorization and input before regulating novel and unforeseen environmental problems.

This Court’s ruling in *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987), makes clear that agencies must respect Congress’s decisions

to legislate by rule—even when that leads to “absurd results,” and even when the *Chevron* framework applies to the agency’s statutory interpretations. The Delaney Clause of the Color Additive Amendment prohibited the FDA from listing any color additive that is “found by the Secretary to induce cancer in man or animal.” Problems arose when the Delaney Clause required the FDA to ban color additives posing exceedingly minor risks of cancer, which caused industry to substitute noncarcinogenic toxics that were actually more dangerous than the forbidden “carcinogenic” options. This produced a result not only absurd, but perverse.

The FDA attempted to fix this problem by asserting a “de minimis” exception to this absolute prohibition on carcinogenic color additives, arguing that this would advance the legislative goal of protecting public health. This Court would have none of it, and held the agency to the enacted text of the statute at *Chevron* Step One, even as it acknowledged that its “failure to employ a *de minimis* doctrine may lead to regulation that not only is ‘absurd or futile’ in some general cost-benefit sense but also is directly contrary to the *primary* legislative goal.” *Young*, 831 F.2d at 1113. None of this mattered because there

was no statutory “language inviting administrative discretion” on the pertinent point. *Id.* at 1112. The FDA’s remedy was to seek amendment of the Delaney clause through the bicameralism-and-presentment procedures of Article I, § 7. It could not assert a unilateral amending power under *Chevron*, even as this Court recognized that the enacted language produced “absurd.”

Second, EPA’s Tailoring Rule wrongly conflates the canon of constitutional avoidance with a generalized prerogative of agencies to avoid “absurd results” by converting statutory rules into standards. Many of the authorities that EPA cites involve cases where the Supreme Court bends enacted statutory language to avoid an actual or potential *constitutional violation*. See *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132–33 (2004) (applying the clear-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991)); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002) (“[A]lthough we have not directly addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, *we can say that the notion at least raises a serious constitutional doubt*. Consequently, we have good reason to rely on a

clear statement principle of statutory construction.”) (emphasis added); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (“[W]e do not impute to Congress an intent to pass legislation *that is inconsistent with the Constitution as construed by this Court.*”) (emphasis added); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (“We are confronted here with a statute which, if interpreted literally, produces an absurd, *and perhaps unconstitutional*, result.”) (emphasis added); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 466 (1989) (“[C]onstruing FACA to apply to the Justice Department’s consultations with the ABA Committee *would present formidable constitutional difficulties . . .*”) (emphasis added); *see also* 75 Fed. Reg. at 31,542 (citing *Nixon*, *Raygor*, *X-Citement Video*, *Green*, and *Public Citizen*).

Yet there is a great distance between the venerable constitutional-avoidance canon and the generalized “absurdity” doctrine spawned by *Church of the Holy Trinity*. The avoidance doctrine is narrow; it applies only when the enacted statutory language would violate the Constitution or present a serious constitutional question. It is rooted in principles of constitutional supremacy and promotes judicial restraint

by enabling courts to avoid rendering unnecessary constitutional pronouncements. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445–46 (1988); *see also Ashwander v. TVA*, 297 U.S. 288, 345–46 (1936) (Brandeis, J., concurring). EPA’s notions of “absurdity” extend far beyond these situations, allowing agencies or courts to depart from unambiguous statutory language merely to avoid a suboptimal policy outcome, even when a straightforward textual interpretation would comply with all constitutional requirements. No matter how undesirable as a matter of policy, there is nothing unconstitutional, or even constitutionally questionable, about imposing onerous regulatory burdens on buildings that emit greenhouse gases when the text of the Clean Air Act establishes unambiguous numerical permitting thresholds.

Indeed, in this case the canon of constitutional avoidance *compels* EPA to adhere to the Clear Air Act’s specific numerical thresholds. As we will explain in Part B, EPA’s decision to depart from these statutory rules violates the nondelegation doctrine, as it empowers EPA to choose its own numerical thresholds without an “intelligible principle”

provided by Congress. And even if one thinks that EPA's actions can be salvaged under the Constitution, it cannot be denied that EPA's unilateral revision of these numerical guidelines at least presents serious constitutional questions under the Supreme Court's nondelegation precedents. EPA's atextual interpretation aggravates rather than alleviates constitutional problems, by seizing discretionary powers without an "intelligible principle" provided by Congress. The Tailoring Rule's attempt to rely on the Supreme Court's constitutional-avoidance cases boomerangs.

Third, the remaining Supreme Court decisions on "absurdity" that the Tailoring Rule cites either follow the enacted text of statutes and acknowledge the "absurdity" doctrine only in dictum, or else pre-date the modern Supreme Court's repudiation of *Church of the Holy Trinity's* intentionalism. See, e.g., *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201 (1993) (construing the word "person" in *in forma pauperis* statute as limited to natural persons, excluding corporations and associations); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("The language before us expresses Congress' intent . . . with sufficient precision so that reference to legislative history and to pre-Code

practice is hardly necessary.”); *see also* 75 Fed. Reg. at 31,542–43 & nn.25–26 (citing Supreme Court rulings that date from 1981 or earlier). EPA cannot identify *any* holding from the Rehnquist or Roberts Courts allowing courts or agencies to disregard unambiguous statutory language, other than in cases where the enacted language presents an actual constitutional violation or a serious constitutional question.

Fourth, even if one accepted the legitimacy of EPA’s generalized “absurdity” doctrine, it *still* would not justify EPA’s unilateral departure from the CAA’s numerical thresholds. It would indeed be absurd to apply CAA’s numerical thresholds to greenhouse-gas emissions, but it hardly follows from this observation that EPA may “cure” the absurdity by disregarding unambiguous statutory text. The proper means of avoiding this absurdity is not to replace the unambiguous numerical thresholds in the Clean Air Act with arbitrary targets of EPA’s own choosing, but rather to conclude that greenhouse gases cannot qualify as air pollutants “subject to regulation” under the Act. Nothing in the Clean Air Act *compels* EPA to include greenhouse gases within the ambit of air pollutants “subject to regulation” under the PSD and Title V permitting regimes; the relevant statutory

provisions could easily be construed as limited to pollutants named in the Clean Air Act. When an agency can avoid an “absurd” result by adopting a plausible construction of *ambiguous* statutory language, it cannot decline to follow that course and insist on curing the absurdity by disregarding *unambiguous* statutory language.

Finally, even if one believes that the Clean Air Act compels EPA to regulate greenhouse gases as air pollutants, adhering to the CAA’s numerical limits will *still* not produce absurd results because Congress could amend the Clean Air Act to ameliorate this situation. In the process of enacting this corrective legislation, Congress might impose some limits on EPA’s authority to regulate GHGs, but that is not an “absurd result” at all. “Democracy” would be a more apt description, as it would ensure that the representative legislature will weigh in on this crucial public-policy question. That Congress enacted statutory *rules* when it established the numerical thresholds in the Clean Air Act may not signal that legislators wanted EPA to apply these low threshold levels to every conceivable air pollutant. But it most assuredly reflects the expectation that EPA would seek statutory authorization before departing from them. The “absurdity” doctrine gives no leverage to

EPA when Congress is likely to enact legislation to alleviate the “absurd” regulatory burdens, and when the underlying statute’s rule-like provisions are designed to ensure congressional participation in future decisionmaking. EPA has no justification for a preemptive strike, which rests only on its desire to avoid congressional input into this fledgling regulatory regime.

EPA’s Tailoring Rule also invokes the “administrative necessity” doctrine and the “one-step-at-a-time” doctrine. Neither of these doctrines has been recognized by the Supreme Court, although they do crop up in some opinions of this Court. There is no authority of which we are aware that allows agencies to depart from unambiguous statutory language in the name of the “administrative necessity” doctrine. *See, e.g., Ala. Power Co. v. Costle*, 636 F.2d 323, 357–59 (D.C. Cir. 1980) (per curiam) (recognizing the “administrative necessity” doctrine while insisting that “[c]ourts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute”). And in all events, EPA cannot invoke “administrative necessity” when Congress would be certain to enact

corrective legislation if EPA were to apply the statutory threshold levels to greenhouse-gas emissions.

EPA acknowledges that the “one-step-at-a-time” doctrine applies only “when the agency remains on track to implement the [statutory] requirements as a whole.” 75 Fed. Reg. at 31,517; *see also U.S. Brewers Ass’n v. EPA*, 600 F.2d 974, 982 (D.C. Cir. 1979) (permitting EPA to implement a statutory mandate “one step at a time” because it was “still well within the one-year period granted by statute”). But it is clear that EPA has no plans to reach these small-level sources, as required by the Act. Instead, the Tailoring Rule states that EPA “intend[s] to apply them as closely to those levels as is consistent with congressional intent and administrative imperatives, in light of the ‘absurd results,’ ‘administrative necessity,’ and ‘one-step-at-a-time’ doctrines.” 75 Fed. Reg. at 31,518. This does not reflect incrementalism by an agency intending to fulfill a statutory command, but evasion by an agency determined to rewrite the statutory commands.

B. EPA's Tailoring Rule Violates the Constitution By Seizing Discretionary Powers Where No "Intelligible Principle" Has Been Provided By Statute.

EPA's Tailoring Rule violates not only the Clean Air Act, but also the Constitution. Under the Constitution, agencies are allowed only to administer the laws; they may not exercise legislative powers that Article I vests exclusively in Congress. It is of course inevitable that agencies will exercise discretion when they implement federal statutes. Congress is not omniscient and cannot establish mechanical rules for every conceivable scenario that may arise. But the Constitution requires federal statutes to both authorize that discretion *and* provide an "intelligible principle" to guide agency discretion. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Any agency that exercises discretionary powers absent an "intelligible principle" from Congress has crossed the line into constitutionally forbidden lawmaking.

EPA's decision to replace the numerical thresholds in the Clean Air Act with targets of its own making is not and cannot be based on any intelligible principle provided by Congress. The Clean Air Act envisions that EPA will either comply with the numerical thresholds or

seek corrective legislation from Congress; as a result, it does not supply any intelligible principle for the improvisation project that EPA has undertaken in the Tailoring Rule. So even if EPA could conjure up a non-arbitrary justification for choosing 75,000 tpy CO₂e and 100,000 tpy CO₂e as the “new” threshold levels for greenhouse-gas emissions, it cannot link these decisions to any guideline provided in a federal statute, and it therefore cannot characterize the Tailoring Rule as anything other than agency legislation.

EPA declares in its Tailoring Rule that future phase-ins will apply PSD and Title V “at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point.” 75 Fed. Reg. at 31,523. Putting aside whether this can qualify as “intelligible,” this reflects at most an effort *by EPA* to supply itself with a guiding principle for the new threshold levels that it will choose. But *Whitman* squelches the notion that agency-supplied guidelines can satisfy the constitutional demand that *Congress* provide an intelligible principle to guide agency discretion:

The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the

prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.

531 U.S. at 473. EPA’s decision to establish new threshold levels for greenhouse-gas emissions is not governed by a congressionally supplied intelligible principle, and it must therefore be vacated as an unconstitutional exercise of legislative power.

C. EPA’s Tailoring Rule Tramples the Powers That Congress Reserved to Itself in the Clean Air Act.

When Congress enacted and amended the Clean Air Act, it chose to establish and retain specific numerical thresholds in the statute rather than instruct EPA to promulgate “reasonable” or “sensible” threshold levels for individual air pollutants. By doing this, Congress established that the threshold levels of pollutants would be governed by a rule rather than a standard. As we discussed earlier, one reason legislatures establish statutory rules is to reduce decision costs for those who implement the law, even though this may incur error costs by binding agency administrators to a somewhat crude regime. But statutory rules serve another important function: They allocate power between the legislature and the agency that implements the legislature’s command.

When federal statutes delegate broad discretionary powers to agencies, it becomes more difficult for Congress to influence the agency's future decisionmaking. Had the Clean Air Act simply instructed EPA to "regulate air pollution in the public interest," then EPA would have free rein to regulate greenhouse-gas emissions (or any future air pollution) without seeking permission or input from Congress. But by establishing rigid numerical thresholds in the text of the Clean Air Act, Congress sought to hamstring EPA from *unilaterally* attacking some new and unforeseen problem of air pollution while relegating Congress to the sidelines. The decision to allocate power in this manner is an essential component of the bargaining that produced the Clean Air Act and its amendments; for EPA to disregard this choice reflects nothing more than a raw power grab and a denigration of congressional prerogatives.

EPA apparently does not fancy the prospect of waiting for Congress to amend these numerical thresholds through legislation. Any efforts to obtain corrective legislation will require bargaining and concessions from both Congress and the Administration. EPA might not get everything that it wants, and the President will have to spend

political capital that he might wish to save for other matters. How much easier to rewrite unilaterally the Clean Air Act's numerical thresholds and avoid the bother of negotiating with the people's elected representatives. Yet the temptation to stray from the allocations of power memorialized in statutes is precisely why the Clean Air Act provides for judicial review of agency action. This Court must vacate the Tailoring Rule and force EPA to bargain with Congress over these matters.

II. THE TIMING RULE IS UNLAWFUL AND MUST BE VACATED.

EPA's Timing Rule must also be vacated. EPA cannot plausibly interpret the Clean Air Act to allow it to extend the permitting requirements of the PSD and Title V programs to greenhouse-gas emissions when the unambiguous statutory requirements of those programs would compel such preposterous consequences. The low, mass-based permitting thresholds established by the PSD and Title V provisions simply do not fit with a world in which EPA treats greenhouse-gas emissions as air pollutants under those programs. EPA must therefore obtain more specific authorization from Congress before

asserting a prerogative to regulate greenhouse-gas emissions under either the PSD or Title V programs.

EPA cannot salvage its Timing Rule by pointing to ambiguities in the Clean Air Act and insisting on *Chevron* deference. *See, e.g.*, 75 Fed. Reg. at 17,007 (“Because the term ‘regulation’ is susceptible to more than one meaning, there is ambiguity in the phrase ‘each pollutant subject to regulation under the Act’ that is used in both sections 165(a)(4) and 169(3) of the CAA.”). This is so for two reasons.

First, the Supreme Court no longer presumes, as it did in *Chevron*, that statutory ambiguity alone represents an implied delegation of interpretive authority to an agency. *See Chevron*, 467 U.S. at 843. After *Mead*, 533 U.S. at 226–27, *Chevron* deference applies only when statutes contain evidence of an affirmative congressional decision to vest an agency with interpretive discretion over a disputed statutory provision. The Clean Air Act cannot delegate to EPA the prerogative to decide whether to regulate greenhouse gases under the PSD and Title V permitting programs when the *unambiguous*, mass-based numerical thresholds in sections 7479(1) and 7602(j) are incompatible with a

regime that includes greenhouse-gas emissions as air pollutants under those programs.

Second, the Supreme Court’s ruling in *FDA v. Brown & Williamson*, 529 U.S. 120, refused to extend *Chevron* deference to the FDA’s decision to assert jurisdiction over tobacco products—even though these products fell squarely within the statutory definitions of “drugs” and “devices”—because the statutes governing the FDA would have required the agency to ban cigarettes entirely from interstate commerce. Given that this outcome was incompatible with any semblance of rational regulation, the Court concluded that Congress could not have delegated to FDA the power to decide whether to regulate tobacco products, and for that reason vacated the FDA’s rulemaking. *Brown & Williamson* controls here and compels this Court to vacate EPA’s Timing Rule.

A. This Court Must Vacate the Timing Rule Because Congress Has Not Delegated To EPA the Power to Decide Whether To Extend the Strict, Unambiguous Permitting Requirements of the PSD and Title V Programs to Greenhouse-Gas Emissions.

EPA’s Timing Rule relies on ambiguous language in the Clean Air Act to support its decision to regulate greenhouse gases under the PSD

and Title V programs. One provision on which it relies is 42 U.S.C. § 7475(a)(4), which requires major emitting facilities in attainment areas to install “the best available control technology for each *pollutant subject to regulation under this chapter*.” EPA interprets the phrase “pollutant subject to regulation under this chapter” to include not only the pollutants regulated by statutory provisions in the Clean Air Act, but also those covered by EPA regulations promulgated under the Act. *See* 75 Fed. Reg. at 17,006. By adopting this broad construction of section 7475(a)(4), EPA enabled itself to regulate greenhouse-gas emissions under the PSD program as soon as its “Tailpipe Rule” went into effect on January 2, 2011. *See id.* at 17,019–29.

Even if one believes that the statutory language in section 7475(a)(4) is ambiguous, EPA’s interpretation cannot qualify for *Chevron* deference to the extent it applies the PSD and Title V permitting requirements to greenhouse-gas emissions. Before *Mead*, of course, a statutory ambiguity was *presumed* to represent an implied delegation of interpretive power to the agency that enforces the statute. But the Court’s *Mead*-era cases reject this presumption and require evidence that Congress intended to vest the agency with discretion to

adopt the statutory interpretations that it chooses. *See, e.g., Mead*, 533 U.S. at 231–32 (refusing to apply *Chevron* when the statute “give[s] no indication that Congress meant to delegate authority” to the agency to resolve the statute’s ambiguity); *id.* at 239 (Scalia, J., dissenting) (“What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary.”); *Brown & Williamson*, 529 U.S. at 160 (withholding *Chevron* deference from the FDA’s seemingly reasonable interpretation of statutory language because “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”).

The unambiguous (and low) mass-based numerical thresholds in sections 7479(1) and 7602(j) foreclose any inference that the Clean Air Act implicitly delegates to EPA the power to decide whether to extend the PSD and Title V permitting requirements to greenhouse-gas emissions. The inability to regulate these emissions rationally while simultaneously remaining faithful to the rigid, agency-constraining

numerical thresholds in the Clean Air Act demonstrates that greenhouse-gas regulation does not fit with the PSD and Title V permitting regime. In addition, 42 U.S.C. § 7476(a) presumes that PSD regulations will apply *only* to air pollutants for which EPA has promulgated national ambient air quality standards:

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

42 U.S.C. § 7476(a) (emphasis added). The statute presupposes that PSD regulations will extend only to “hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides,” *or* “pollutants for which national ambient air quality standards are promulgated after August 7, 1977.” Yet NAAQS have never been promulgated for greenhouse gases, and it is impossible to establish *national* ambient air quality standards for gases whose presence is spread evenly throughout the atmosphere and whose concentration levels depend on events and emitters outside the control of our government.

No other provision of the Clean Air Act can implicitly vest EPA with authority to bring greenhouse gases within the ambit of PSD or Title V permitting requirements—at least not until Congress amends the numerical permitting thresholds to allow for rational greenhouse-gas regulation.

B. EPA’s Timing Rule Is Precluded by the Supreme Court’s Ruling in *FDA v. Brown & Williamson Tobacco Corp.*

The Timing Rule is also foreclosed by the Supreme Court’s ruling in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

The facts of *Brown & Williamson* are remarkably similar to this case. The Food, Drug, and Cosmetic Act (FDCA) established the Food and Drug Administration (FDA) and authorized it to regulate drugs, among other items. The FDCA defined “drug” to include “articles (other than food) intended to affect the structure or any function of the body.” 21 U.S.C. § 321(g)(1)(C). For many years, the FDA declined to regulate tobacco products, even though one could easily conclude that the nicotine in cigarettes and other tobacco products is “intended to affect the structure or any function of the body.” But in 1996 the FDA

changed tracks; the agency declared that nicotine qualified as a “drug” and finally asserted jurisdiction over tobacco products.

Once the FDA asserted jurisdiction over tobacco products, the provisions of the FDCA required the agency to remove all tobacco products from the market. The statute required pre-market approval of any new drug, with limited exceptions, and required FDA to disapprove any new drug that is not “safe and effective” for its intended purpose. 21 U.S.C. §§ 355(d)(1)–(2), (4)–(5). It also prohibited “[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded,” 21 U.S.C. § 331(a), and defined “misbranded” to include drugs or devices “dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof,” *id.* § 352(j).

The FDA was understandably reluctant to take this drastic step. Following the requirements of these unambiguous statutory provisions would have produced, in EPA parlance, an “absurd result,” a regulatory regime so heavy-handed as to fall outside the bounds of reasonable policymaking. So rather than enforcing a nationwide ban on cigarettes

and other tobacco products, FDA crafted an intermediate regulatory regime, one that aimed only to restrict the advertising and marketing of tobacco products to children. *Brown & Williamson*, 529 U.S. at 127–29. Much like the “Tailoring Rule” that EPA promulgated to avoid the dramatic consequences of its decision to regulate greenhouse gases, the FDA’s tobacco-advertising rule similarly spurned an unambiguous statutory command in an effort to soften the impact of its decision to regulate tobacco as a drug.

The Supreme Court, however, vacated the FDA’s rule in its entirety. It refused to allow the agency to chart its own regulatory course when an unambiguous statutory provision required the agency to ban all “dangerous” drugs or devices within its jurisdiction. And because the statute would produce this absurdity of banning all cigarettes from the market, the Justices concluded that the FDA could not assert jurisdiction over tobacco products in the first place—even though nicotine fell squarely within the FDCA’s definition of “drug.” Wrote the Court: “[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Id.* at 160.

Brown & Williamson compels this Court to vacate EPA's Timing Rule, and its attempts to extend the PSD and Title V permitting requirements to greenhouse-gas emissions. The Timing Rule, like the FDA's attempt to assert jurisdiction over tobacco, would produce irrationally onerous regulatory burdens that could be avoided only by rewriting unambiguous statutory language. And the Timing Rule, again like the FDA's failed efforts to regulate tobacco, involves a novel assertion of agency power that does not fit with the type of regulatory regime envisioned by the decades-old governing statute. And finally, it is unlikely that Congress would have "intended to delegate" to EPA the power to regulate greenhouse-gas emissions unilaterally, and render these decisions of "economic and political significance," especially when the numerical thresholds in the PSD and Title V provisions would render such a project unworkable. Just as the Supreme Court required the FDA to obtain legislation from Congress expanding its authority to tobacco products, this Court should require EPA to seek legislation from Congress authorizing it to regulate greenhouse-gas emissions under the PSD and Title V programs.

C. The Supreme Court’s Holding in *Massachusetts v. EPA* Extends Only to Motor-Vehicle Emissions, and Cannot Justify EPA’s Decision To Regulate Stationary-Source Greenhouse-Gas Emissions In the Timing Rule.

Prior to 2007, EPA held that greenhouse gases did not qualify as “air pollutants” under the Clean Air Act, which defines “air pollutant” as

any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

42 U.S.C. § 7602(g). EPA explained that it had traditionally construed the term “air pollution agent” as limited to pollutants “that occur primarily at ground level or near the surface of the earth . . . not higher in the atmosphere.” 68 Fed. Reg. at 52,926–27. *See also id.* (noting that greenhouse gases such as carbon dioxide are “fairly consistent in concentration throughout the world’s atmosphere up to approximately the lower stratosphere”). This view led EPA to refrain from regulating greenhouse gases under *any* Clean Air Act provisions—not only the stationary-source regulations in the PSD and Title V programs, but also the motor-vehicle regulations in Title II of the Clean Air Act.

Massachusetts v. EPA, 549 U.S. 497 (2007), held that EPA could no longer refuse to regulate *motor-vehicle* greenhouse-gas emissions simply by insisting that greenhouse gases fail to qualify as “air pollutants.” This holding rested on two propositions. First, the Court observed that the four greenhouse gases emitted by motor vehicles— “[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons”— qualify as “physical [and] chemical . . . substances[s] which [are] emitted into . . . the ambient air” within the meaning of section 7602(g). *Id.* at 529. Second, the Court distinguished *Brown & Williamson* by noting that EPA regulation of motor-vehicle greenhouse-gas emissions “would lead to no . . . extreme measures.” *Id.* at 531. *Massachusetts* never considered whether EPA could or should regulate *stationary-source* greenhouse gases as air pollutants under the PSD and Title V programs, where the Clean Air Act’s rigid permitting thresholds would produce burdens that exceed any semblance of rational regulation.

Three independent reasons prevent the *Massachusetts* holding from sustaining EPA’s Timing Rule. First, *Massachusetts*’s decision to regard *motor-vehicle* greenhouse-gas emissions as “air pollutants” under section 7602(g) rested on the absence of preposterous consequences. *Id.*

at 531. Here, by contrast, EPA itself recognizes that extending the PSD and Title V permitting requirements to stationary-source greenhouse-gas emissions will produce ridiculous outcomes, and for this reason the agency refuses to obey the unambiguous permitting thresholds specified in the PSD and Title V provisions. Of course, none of this would matter if the statutory definition of “air pollutant” were clear enough to *compel* EPA to regulate greenhouse gases under the PSD and Title V permitting regimes. But it isn’t; the phrase “air pollution agent” leaves wiggle room, *see Massachusetts*, 549 U.S. at 555–60 (Scalia, J., dissenting), and there is nothing paradoxical about interpreting section 7602(g)’s definition of “air pollution” to include greenhouse-gas emissions from motor vehicles but not stationary sources, given the implausibility of regulating greenhouse-gas emissions in a manner consistent with the PSD and Title V statutory requirements.

Second, the PSD program requires major emitting facilities to install best available control technology for “each pollutant *subject to regulation under this chapter*,” 42 U.S.C. § 7475(a)(4) (emphasis added), and EPA requires PSD and Title V permits only for the “air pollutants” covered by that statutory provision. The statutory provisions governing

motor-vehicle regulations, by contrast, are not limited by this ambiguous “subject to regulation” caveat, which further distinguishes *Massachusetts* and undercuts any claim that the Clean Air Act *compels* EPA to extend the PSD and Title V permitting requirements to greenhouse-gas emissions.

Finally, as noted earlier, 42 U.S.C. § 7476(a) envisions that PSD regulations will extend only to a subset of “air pollutants”: those that qualify as “hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides,” or “pollutants for which national ambient air quality standards are promulgated after August 7, 1977.” Greenhouse gases do not fall under either category, and no such statutory provision limited the air pollutants subject to EPA’s motor-vehicle regulations.

EPA claims that it can interpret the Clean Air Act to require the regulation of stationary-source greenhouse-gas emissions, and then avoid the absurd consequences of extending the PSD and Title V permitting requirements to greenhouse gases by replacing the unambiguous numerical thresholds specified in the Clean Air Act with numbers of its own choosing. EPA’s analysis is backward. Agencies can rewrite unambiguous statutory language in the name of avoiding

“absurdity,” if at all, only where no other permissible construction of the statute is available to avoid that absurdity. Indeed, EPA’s analysis reflects a perverse brand of agency self-aggrandizement: The more mischief an agency causes by its interpretations of a statute, the more power it will have to rewrite the unambiguous provisions of a statute. To find *any* possible construction of the Clean Air Act that avoids extending the PSD and Title V permitting regimes to greenhouse gases is to *require* a ruling that vacates the Timing Rule.

CONCLUSION

Fusing the law-making power with the law-execution power contradicts the Constitution’s most fundamental principles of limited government and separation of powers. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); THE FEDERALIST NO. 47 (James Madison). Yet the Tailoring and Timing Rules rest on the premise that EPA may disregard unambiguous, agency-constraining statutory rules and unilaterally establish a new regulatory regime to deal with novel environmental challenges. Few propositions could be more subversive of the rule of law, or the notion that agency power must be authorized

rather than assumed. To uphold EPA's actions in the Tailoring and Timing Rules will allow every agency to become a law unto itself.

The petitions for review should be granted, and the Tailoring and Timing Rules should be vacated.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil
Litigation

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Solicitor General

J. REED CLAY, JR.
Special Assistant and Senior
Counsel to the Attorney General

MICHAEL P. MURPHY
Assistant Solicitor General

JAMES P. SULLIVAN
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-2995
Fax: (512) 474-2697

COUNSEL FOR STATE PETITIONERS
AND SUPPORTING INTERVENOR

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing **Brief of State Petitioners and Supporting Intervenor** was filed electronically with the Court by using the CM/ECF system on this 20th day of June 2011. Parties, intervenors, and amici who are registered CM/ECF users will be served by the appellate CM/ECF system. The following counsel, who are not CM/ECF users, will be served via Federal Express, standard overnight delivery:

Kelvin Allen Brooks
Office of the Attorney General, State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
COUNSEL FOR STATE PETITIONERS
AND SUPPORTING INTERVENOR

CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 12,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Century Schoolbook 14-point type face, or

this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell

COUNSEL FOR STATE PETITIONERS AND
SUPPORTING INTERVENOR

Dated: June 20, 2011