No. _____

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

---

PETITION FOR A WRIT OF CERTIORARI

F. WILLIAM BROWNELL
(*Counsel of Record*)
NORMAN W. FICHTHORN
HENRY V. NICKEL
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., NW
WASHINGTON, D.C. 20037
(202) 955-1500
bbrownell@hunton.com

March 20, 2013 *Counsel for Petitioner*

QUESTIONS PRESENTED

After this Court decided *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Environmental Protection Agency (EPA) found that its promulgation of motor vehicle greenhouse gas (GHG) emission standards under Title II of the Clean Air Act (CAA), 42 U.S.C. § 7521(a)(1), compelled regulation of carbon dioxide and other GHGs under the CAA's Title I prevention of significant deterioration (PSD) and Title V stationary-source permitting programs. Even though EPA determined that including GHGs in these programs would vastly expand the programs contrary to Congress's intent, EPA adopted rules adding GHGs to the pollutants covered. The panel below held the CAA and *Massachusetts* compelled inclusion of GHGs and, based on that holding, dismissed all petitions to review the GHG permitting program rules on standing grounds. The questions presented are:

1. Whether *Massachusetts* compelled EPA to include GHGs in the PSD and Title V programs when inclusion of GHGs would (i) transform the size and scope of these programs into something that EPA found would be "unrecognizable to … Congress," Petition Appendix 345a, 380a, and (ii) expand the PSD program to cover a substance that does not deteriorate the quality of the air that people breathe.

2. Whether dismissal of the petitions to review EPA's GHG permit-program rules was inconsistent with this Court's standing jurisprudence where the panel premised its holding that standing was absent on its merits holding that GHGs are regulated "pursuant to automatic operation of the CAA." *Id.* at 96a.

PARTIES TO THE PROCEEDING

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

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

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

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

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Geor-

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

braska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; and Portland Cement Association.

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

5. Respondent-intervenors below (with respect to certain petitions for review), who are respondents (or, in some cases, nominal respondents) on review, were American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Indiana Wildlife Federation; Michigan Environmental Council; National Environmental Development Association's Clean Air Project; National Mining Association; Peabody Energy Company; Natural Resources Council of Maine; Natural Re-

sources Defense Council; Ohio Environmental Council; Sierra Club; South Coast Air Quality Management District; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; Utility Air Regulatory Group; Wild Virginia.

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

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

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

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

3. Additional petitioners below, who are nominal respondents on review, were Southeastern Legal Foundation, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Geor-

gia 10th District; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska; Missouri Joint Municipal Electric Utility Commission; Clean Air

Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Oilseed Processors Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National Association of Home Builders; National Federation of Independent Business; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott; Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; and State of Texas.

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

um Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

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

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

RULE 29.6 DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE STATEMENT x

TABLE OF CONTENTS xi

TABLE OF AUTHORITIES xiv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE PETITION 18

I. Certiorari Is Needed To Address Whether *Massachusetts* Compels Regulation of GHGs, Which Include Carbon Dioxide, Under the CAA's Title I PSD Program and Title V of the Act 19

II. Certiorari Is Needed To Address the Panel's Decision that Petitioners Lack Standing To Challenge the Timing and Tailoring Rules 28

III. This Petition Raises an Unusually Important Question of Federal Law. 32

CONCLUSION 35

APPENDIX MATERIALS:

VOLUME I:

APPENDIX A: Order of U.S. Court of Appeals for the District of Columbia Circuit Dismissing Petitions for Review of Timing and Tailoring Rules and Denying Other Petitions for Review 1a

APPENDIX B: Opinion of U.S. Court of Appeals for the District of Columbia Circuit 6a

APPENDIX C: U.S. Environmental Protection Agency, 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") 108a

VOLUME II:

APPENDIX D: U.S. Environmental Protection Agency, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule") 149a

APPENDIX E: Order of U.S. Court of Appeals for the District of Columbia Circuit Denying Panel Rehearing 598a

VOLUME III:

APPENDIX F: Order of U.S. Court of Appeals for the District of Columbia Circuit Denying Petitions for Rehearing En Banc of Chamber of Commerce of the United States of America and National Association of Manufacturers, et al. 603a

APPENDIX G: Order of U.S. Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing En Banc of Pacific Legal Foundation 662a

APPENDIX H: Federal Statutes 664a

APPENDIX I: Federal Regulations 681a

TABLE OF AUTHORITIES

Page

Cases:

Abbott Labs. v. *Young*, 920 F.2d 984 (D.C. Cir. 1990) 23

Alabama Power Co. v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979) 29

American Electric Power Co. v. *Connecticut*, 131 S. Ct. 2527 (2011) 22

Bell v. *Hood*, 327 U.S. 678 (1946) 31

Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 3, 28

Environmental Defense v. *Duke Energy Corp.*, 549 U.S. 561 (2007) 21, 23

Food & Drug Administration v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 32

General Dynamics Land Systems, Inc. v. *Cline*, 540 U.S. 581 (2004) 23

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 31

Massachusetts v. *EPA*, 549 U.S. 497 (2007) ..... *passim*

Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 23

Sierra Club v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972), *aff'd per curiam by an equally divided Court sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973) 9

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 31

Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) 8, 9

Union Electric Co. v. *EPA*, 427 U.S. 246 (1976) 8

United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 23

United States v. *Ron Pair Enterprises*, 489 U.S. 235 (1989) 28

Constitution and Statutes:

U.S. Const. art. III, § 2, cl. 1 2

Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*

42 U.S.C. § 7407 ..... 9, 25

42 U.S.C. § 7407(d)(1)(A) 9

42 U.S.C. § 7409 8

42 U.S.C. § 7409(b) 9

42 U.S.C. § 7410(a) 9

42 U.S.C. § 7410(k) 9

42 U.S.C. § 7411(a)(4) 21

42 U.S.C. §§ 7470-7479 1
42 U.S.C. § 7471 25
42 U.S.C. § 7475 25
42 U.S.C. § 7475(a) 12
42 U.S.C. § 7475(a)(4) 12
42 U.S.C. § 7475(e)(1) 12, 25
42 U.S.C. § 7479(1) 11, 22
42 U.S.C. § 7491(g)(7) 22
42 U.S.C. § 7521(a)(1) 1, 12, 13, 25
42 U.S.C. §§ 7521-7590 8
42 U.S.C. § 7602(g) 12, 29
42 U.S.C. § 7602(h) 17, 27
42 U.S.C. §§ 7651-7651*o* 8
42 U.S.C. §§ 7661-7661f 1
42 U.S.C. § 7661a(a) 6
42 U.S.C. §§ 7671–7671q 8

Regulations:

40 C.F.R. § 50.1(e) 8
40 C.F.R. § 51.166 15
40 C.F.R. Part 51, App. Y, § III.A.2 22
40 C.F.R. § 52.21(b)(1) 22

40 C.F.R. § 60.14(a) 22

Federal Register:

39 Fed. Reg. 42,510 (Dec. 5, 1974) 10

66 Fed. Reg. 7486 (Jan. 23, 2001) 12

68 Fed. Reg. 52,922 (Sept. 8, 2003) 12

73 Fed. Reg. 44,354 (July 30, 2008) 26

74 Fed. Reg. 55,292 (Oct. 27, 2009) 10, 13, 14, 33

74 Fed. Reg. 66,496 (Dec. 15, 2009) 1, 13

75 Fed. Reg. 25,324 (May 7, 2010) 2, 13

75 Fed. Reg. 49,556 (Aug. 13, 2010) 1

Legislative Materials:

S. Rep. No. 95-127 (1977), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 1375 (1979) 11

Miscellaneous:

EPA, Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments (May 2010), Docket No. EPA-HQ-OAR-2009-0517-19181 ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

The Utility Air Regulatory Group respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing its petitions to review rules of the United States Environmental Protection Agency (EPA) that address (i) the date on which greenhouse gases (GHGs) emitted from stationary sources are considered regulated pollutants under the Title I prevention of significant deterioration (PSD) preconstruction permitting program and the Title V general operating permit program of the Clean Air Act (CAA or Act),[1] 75 Fed. Reg. 17,004 (Apr. 2, 2010) (the Timing Rule), Petition Appendix (Pet. App.) 108a-148a, and (ii) how GHG emissions from stationary sources are to be regulated under those CAA provisions, 75 Fed. Reg. 31,514 (June 3, 2010) (the Tailoring Rule), Pet. App. 149a-597a. This petition does not address other aspects of the D.C. Circuit's opinion and decision, including the aspects of the decision that concern (i) EPA's rule finding that GHG emissions from motor vehicles "endanger" public health and welfare within the meaning of 42 U.S.C. § 7521(a)(1), 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment Finding), (ii) EPA's denial of reconsideration of that finding, 75 Fed. Reg. 49,556 (Aug. 13, 2010), or (iii) EPA's rule setting GHG emission standards for light-duty motor vehicles under 42

---

[1] The PSD preconstruction permitting program is contained in Subpart 1 of Part C of Title I of the CAA. 42 U.S.C. §§ 7470-7479. The Title V program is, as the name indicates, contained in Title V of the Act. *Id.* §§ 7661-7661f.

U.S.C. § 7521(a)(1), 75 Fed. Reg. 25,324 (May 7, 2010) (Motor Vehicle Rule).

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 684 F.3d 102 and reproduced at Pet. App. 6a-107a. The D.C. Circuit's orders denying panel rehearing and rehearing en banc are reproduced at Pet. App. 598a-663a. Relevant excerpts of the Timing Rule are reproduced at Pet. App. 108a-148a, and the Tailoring Rule is reproduced at Pet. App. 149a-597a.

JURISDICTION

The D.C. Circuit entered judgment dismissing the Tailoring and Timing Rule cases on June 26, 2012, Pet. App. 5a, and denied timely petitions for panel rehearing or rehearing en banc on December 20, 2012, *id.* at 602a, 607a, 663a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Constitution of the United States provides, in pertinent part, that "[t]he judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority … [and] to Controversies to which the United States shall be a party." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the CAA, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at Pet. App. 664a-680a.

Relevant provisions of EPA's regulations implementing the CAA are reproduced at Pet. App. 681a-692a.

INTRODUCTION

Certiorari is needed to address a matter of exceptional importance: Did *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), compel EPA to regulate GHGs under the CAA Title I PSD and Title V operating permit programs where doing so would (i) extend those programs' coverage to tens of thousands or even millions of small sources that Congress intended *not* to regulate, and (ii) expand a program focused on preventing significant deterioration to include a pollutant – carbon dioxide – that does not deteriorate air quality? As Judge Kavanaugh explained in dissenting from denial of rehearing en banc, EPA's monumental extension of CAA regulatory authority by administrative fiat puts "the bedrock underpinnings of our system of separation of powers … at stake," Pet. App. 658a (Kavanaugh, J., dissenting).

Beyond the CAA, this case has significant implications for all complex regulatory statutes that contain separate programs addressing different aspects of the statutes' regulatory objectives. The decision below stands for the principle that, under step one of the two-step test set forth in *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), a regulatory agency must give a term that appears in each of various different programs in a given statute the same broad meaning given that term by the statute's general provisions, regardless of the focus or scope of those individual programs. Here, EPA

insisted it had no choice but to apply to specific CAA programs (*i.e.*, the PSD and Title V programs) the expansive reading this Court in *Massachusetts* gave to "air pollutant" in the Act's general provisions. As Judge Kavanaugh observed, the fact that "[g]reenhouse gases may qualify as 'air pollutants' in the abstract" does not resolve how Congress intended "air pollutant" to be understood in the context of any individual, specialized CAA program. Pet. App. 650a-651a n.3 (Kavanaugh, J., dissenting).

This petition does not ask this Court to revisit its holding in *Massachusetts*. Rather, it asks this Court to address a distinct issue: whether *Massachusetts* obligated EPA to regulate GHGs, including carbon dioxide, under provisions of the Act – the Title I PSD program and the Title V operating permit program – that address regulatory requirements and standards for regulation that are fundamentally different from other CAA programs, including the mobile-source provisions (Title II) at issue in *Massachusetts*.

EPA freely acknowledged that regulation of carbon dioxide emissions under the Title I and Title V permitting programs subjects "an extraordinarily large number of sources" to the CAA for the first time, *contrary to explicit congressional intent* to cover only a limited number of large industrial facilities. Pet. App. 339a, 345a (application of PSD to GHGs would result in "more than 81,000 … PSD [permits] each year, an increase of almost 300-fold," "result[ing] in a program that would have been unrecognizable to the Congress that designed PSD"); see also *id.* at 380a (application of the Title V permitting program to

GHGs "would result in a program unrecognizable to the Congress that enacted title V[,] … expand[ing] [the program] from the current 14,700 sources to some 6.1 million"). This unprecedented expansion of CAA stationary-source jurisdiction, EPA said, would in turn result in insurmountable burdens for (i) state authorities required to conduct millions of new permit proceedings,[2] and (ii) the countless sources that would be subject to the CAA for the first time as a result of carbon dioxide regulation (including shopping malls, hospitals, stadiums, and apartment buildings). *Id.* at 155a.

To postpone results that EPA concluded would, "as a practical matter, vitiate much of the purpose of" the statutory language limiting application of these programs to large industrial facilities, *id.* at 347a, EPA promulgated the Tailoring Rule. EPA designed that rule to exclude initially very small sources of GHG emissions but then, in phases, to expand GHG regulation "one-step-at-a-time," *id.* at 457a-461a, until *all of the additional sources that Congress never intended to cover are in the program*. In doing so, EPA declined the invitation to interpret the term "air pollutant" as used in the Act's PSD and Title V provisions to exclude GHGs in order to confine those programs to the bounds EPA recognized had been set by Congress. See EPA, Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's

---

[2] States typically issue PSD and Title V permits to sources within their borders. EPA issues these permits only in the rare situation where the state delegates its responsibility to EPA or EPA disapproves the state's plan to issue these permits.

Response to Public Comments at 34-43 (May 2010), Docket No. EPA-HQ-OAR-2009-0517-19181 (Response to Comments).

A panel of the D.C. Circuit dismissed petitioner's challenge to the Tailoring Rule after concluding that stationary-source GHG regulation was compelled by "automatic operation of the statute" and "binding Supreme Court precedent." Pet. App. 101a, 612a. According to the panel, because EPA's "one-step-at-a-time" rules would initially mitigate the extraordinarily damaging impacts that "all-at-once" GHG stationary-source regulation would produce, "Petitioners lack Article III standing to challenge" the Tailoring Rule. *Id.* at 96a (emphasis in original). Judges Brown and Kavanaugh wrote opinions dissenting from denial of petitions for en banc rehearing of the panel's decision. *Id.* at 613a-661a.

STATEMENT OF THE CASE

1. This case concerns the decision of a panel of the lower court that EPA was bound by (i) this Court's decision in *Massachusetts* interpreting 42 U.S.C. § 7602(g) in the context of Title II of the CAA, and (ii) the term "air pollutant" in the Act's PSD and Title V provisions, to regulate stationary source emissions of GHGs under the Title I and Title V permitting programs.[3]

[3] Because the Title V program provides that requirements applicable to a given stationary source under the CAA be collected in an "operating permit," 42 U.S.C. § 7661a(a), and because the only GHG requirements for stationary sources that currently exist for electric generating facilities owned and operated by

2. Carbon dioxide is the most ubiquitous and the largest by volume of the six pollutants that are encompassed by EPA's definition of GHGs. Carbon dioxide is not a substance like sulfur dioxide, nitrogen oxides, or particulate matter that pollutes the air people breathe. Ground-level carbon dioxide is part of the atmosphere and is necessary to life. Carbon dioxide (like other GHGs) mixes rapidly and is distributed uniformly in the sea of carbon dioxide and other GHGs already present in the atmosphere at ground level (and above). Plants need, and people and animals exhale, carbon dioxide as part of the elementary processes of life. Because carbon dioxide is typically released by stationary sources in amounts that are orders of magnitude greater than other pollutants, hospitals, schools, apartment buildings, shopping malls, and innumerable other small sources would become CAA-regulated stationary sources *if* carbon dioxide is regulated as an air pollutant under Title I and Title V. Pet. App. 154a-155a. As a result, carbon dioxide is unique – fundamentally different from the other substances that have been regulated under the CAA Title I and Title V permitting programs.

---

members of petitioner arise from the PSD preconstruction permit program, resolution of the PSD applicability issue here will resolve their existing Title V concerns, cf. Response to Comments at 43 ("EPA agrees … that where a source has previously been issued a Title V permit, the permit need not be revised … if the source is not subject to any additional applicable requirements."). Accordingly, this petition focuses principally on the Title I PSD program.

3. The CAA contains six titles, each of which establishes different programs to address different air pollution problems in different geographic areas and for different types of sources. For example, Title II of the Act addresses emission standards for mobile sources, including motor vehicles and aircraft (42 U.S.C. §§ 7521-7590); Title IV addresses acid rain, including emissions from stationary combustion sources (*id.* §§ 7651-7651*o*); and Title VI addresses stratospheric ozone protection (*id.* §§ 7671-7671q). Title I of the CAA establishes a variety of programs governing emissions from stationary sources, including programs addressing ambient air quality standards, emission control technology standards, air toxics regulation, visibility protection, and others. Titles I and V also include programs for preconstruction permits (PSD) and operating permits (Title V) for large industrial sources.

4. The starting point for regulating stationary sources under CAA Title I is the national ambient air quality standards (NAAQS) program. *Id.* § 7409; *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 249 (1976) (the NAAQS program is the "heart" of the CAA). NAAQS define the maximum allowed concentrations of specific pollutants (called "criteria pollutants") in the "ambient" air – *i.e.*, ground-level air quality concentrations of substances in the air to which people are exposed and which they breathe. See 40 C.F.R. § 50.1(e) (defining "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access"); *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 65 (1975) (ambient air is

the "statute's term for the outdoor air used by the general public"). EPA sets NAAQS at the level that is requisite to protect public health and welfare. 42 U.S.C. § 7409(b). Following promulgation of a NAAQS, states have primary responsibility to ensure that the ambient air within their borders attains and maintains the NAAQS. *Id.* § 7407. States do this by adopting emission limitations for sources and other measures in a state implementation plan (SIP) that is submitted to EPA for its review and approval (or disapproval). *Id.* § 7410(a), (k). The CAA assigns responsibility for achieving NAAQS on a geographic basis. *Id.* § 7407. With respect to each NAAQS, EPA designates each area as "attainment" (meaning ambient air quality in the area is as good as or better than the level represented by the NAAQS), "nonattainment" (ambient air quality in the area is worse than the NAAQS), or "unclassifiable," based on measured ambient air quality concentrations in that area. *Id.* § 7407(d)(1)(A). A single geographic area may be in attainment with one NAAQS but nonattainment with another.

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

at 257. In 1974, implementing the district court's decision, EPA established the initial PSD program through rulemaking. 39 Fed. Reg. 42,510, 42,514-17 (Dec. 5, 1974).

EPA's PSD regulations sought to "prevent significant deterioration" of local ambient air quality in attainment areas by requiring preconstruction permits before construction of major new sources or modifications of major existing sources of air pollutants that are subject to NAAQS could occur. Deterioration of local air quality would be avoided by requiring that the source (i) not cause ambient air quality impacts above specified numerical "increments" for two criteria pollutants (sulfur dioxide and particulate matter), in order to prevent the "significant deterioration" of ambient air quality, and (ii) use "best available control technology" (BACT) for these pollutants. The 1974 PSD program applied to sulfur dioxide, nitrogen oxides, and particulate matter, air pollutants that can deteriorate the quality of the air people breathe.

In 1977, Congress enacted a statutory PSD program largely based on the 1974 regulatory program. Like the 1974 regulations, the statutory PSD program required source owners and operators to obtain preconstruction permits for the proposed construction of major new sources and for proposed major modifications of major existing sources, in order to prevent significant deterioration of ambient air quality. 74 Fed. Reg. 55,292, 55,308 (Oct. 27, 2009) ("As the legislative history makes clear, Congress enacted … PSD … to resolve issues arising when sources of

criteria pollutants seek to build or expand in areas with air quality that meets the [NAAQS].").

Concerned about the PSD program's potentially adverse economic impacts, Congress set precise, numerical tonnage amounts restricting the program's applicability to a relatively small number of large industrial facilities, which the statute refers to as "major emitting facilities." See, *e.g.*, S. Rep. No. 95-127, at 96-97 (1977), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 1375, 1470-71 (1979); see also Pet. App. 344a ("Congress paid careful attention to the types and sizes of sources that would be subject to the PSD program and designed the thresholds deliberately to limit the program's scope…."). Congress defined "major emitting facility" as a large facility that emits (or has the potential to emit) at least 250 tons per year (tpy) of "any air pollutant," or at least 100 tpy of "any air pollutant" if the facility is within certain, statutorily enumerated industrial source categories. 42 U.S.C. § 7479(1); see also Pet. App. 346a ("Congress did not expect PSD to apply to large numbers of small sources ... and instead expected the 100/250 tpy thresholds to limit PSD's applicability to larger sources.").

Reflecting the PSD program's focus on pollutants that can deteriorate ambient air quality, Congress in 1977 enacted statutory air quality "increments" to prevent deterioration of ambient air quality with respect to sulfur dioxide and particulate matter. Congress also authorized EPA to promulgate regulations to "prevent[] … significant deterioration of air quali-

ty" for certain other pollutants with local air quality effects. 42 U.S.C. § 7475(a). And it directed EPA to promulgate regulations for "analysis … of *the ambient air quality* at the proposed site [of the new facility] and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this [Act] which will be emitted from such facility." *Id.* § 7475(e)(1) (emphasis added). Finally, Congress provided that PSD permits are to contain emission limitations based on BACT for pollutants that are "subject to regulation" under the Act. *Id.* § 7475(a)(4).

5. In 1999, public interest groups filed a petition for rulemaking asking EPA to regulate emissions of GHGs, including carbon dioxide, from motor vehicles under Title II of the Act, 42 U.S.C. § 7521(a)(1). See 66 Fed. Reg. 7486 (Jan. 23, 2001). EPA denied the petition on the ground that GHGs are not an "air pollutant" under the general definitional provision in Title III of the Act, *i.e.*, 42 U.S.C. § 7602(g).[4] 68 Fed. Reg. 52,922 (Sept. 8, 2003).

On review, this Court rejected EPA's arguments that (a) the Act's general definition of "air pollutant" was not broad enough to encompass GHGs, and (b) GHGs therefore were not an "air pollutant" that was potentially eligible for regulation under Title II.

---

[4] 42 U.S.C. § 7602(g) provides that "[t]he term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive … substance or matter which is emitted into or otherwise enters the ambient air."

Massachusetts, 549 U.S. at 528-29. According to the Court, "[o]n its face, the [42 U.S.C. § 7602(g)] definition embraces all airborne compounds of whatever stripe." *Id.* at 529. The Court then turned its attention to Title II of the Act and found that GHG regulation would not fundamentally change the Title II program: "The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary" to regulate GHG emissions from motor vehicles. *Id.* at 532 (citing 42 U.S.C. § 7521(a)(1)).

6. After this Court decided *Massachusetts*, EPA determined in 2009 in the Endangerment Finding that GHG emissions from vehicles throughout the nation "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," pursuant to 42 U.S.C. § 7521(a)(1). 74 Fed. Reg. at 66,505. EPA did not, and could not, find that GHGs deteriorate local ambient air quality; rather, it found that GHGs disperse throughout the global atmosphere and affect climate. *Id.* at 66,514-16. Following issuance of its 2009 Endangerment Finding, EPA promulgated the Motor Vehicle Rule, regulating GHG emissions from passenger vehicles under 42 U.S.C. § 7521(a) of the Act. 75 Fed. Reg. at 25,324.

7. In 2010, EPA explained that "[c]urrently, EPA does not consider GHG emissions to be 'regulated … pollutants' under the [Title I] PSD program…. EPA is in the process of reviewing its approach to PSD applicability." 74 Fed. Reg. at 55,299. EPA's review produced the Title I stationary source rules – the Timing Rule and the Tailoring Rule – at issue here.

In the Timing Rule, EPA addressed when GHGs would become "subject to regulation" for purposes of the PSD program. Pet App. 125a. According to EPA, the Timing Rule "concludes only that … GHGs would not be considered 'subject to regulation' … earlier than January 2, 2011," the date the Motor Vehicle Rule took effect. *Id.* at 126a. EPA said it would address in a companion rule "the applicability of PSD requirements for GHG-emitting sources." *Id.*

In the companion rule (the Tailoring Rule), EPA explained its view that once the Motor Vehicle Rule took effect, regulation of GHG emissions from stationary sources was required by operation of law under the Title I PSD permit program and the Title V operating permit program. *Id.* at 154a. According to EPA, "our legal basis for this rule is our interpretation of the PSD and Title V applicability provisions," *id.* at 150a, which is "that GHG sources would become subject to the PSD and title V permitting programs upon finalization of the [Motor Vehicle Rule]," Response to Comments at 34.

Given the statutory 100-tpy and 250-tpy PSD applicability thresholds, however, EPA also concluded that regulating GHGs under the PSD and Title V programs would extend the programs to cover sources Congress never intended to regulate. See, *e.g.*, Pet. App. 235a-236a, 380a-381a; 74 Fed. Reg. at 55,304 ("Congress, focused as it was [in 1977] on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources."). According to EPA, "[t]hese results are not

consistent with other provisions of the PSD and title V requirements, and are inconsistent with – and, indeed, undermine – congressional purposes for the PSD and title V provisions." Pet. App. 305a. EPA concluded that "applying PSD requirements literally to GHG sources … would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 345a; see also *id.* at 380a (applying Title V requirements literally to GHG sources "would result in a program unrecognizable to the Congress that enacted title V").

The Tailoring Rule was EPA's response to what it viewed as a conflict between the explicit statutory 100/250 tpy applicability thresholds and clear congressional intent *not* to apply the PSD program to tens of thousands, and the Title V program to millions, of small sources. In this rule, EPA amended 40 C.F.R. § 51.166 (which provides minimum criteria for PSD provisions in SIPs) by purporting to make GHGs subject to PSD starting on January 2, 2011. This amended rule defines the GHGs regulated under PSD as those GHGs emitted in amounts above 100,000 tpy of "carbon dioxide equivalent"[5] for new construction (and above 75,000 tpy of carbon dioxide equivalent for modifications), *id.* at 587a, and defines the GHGs regulated under Title V as those GHGs

---

[5] "GHGs," as defined by EPA, consist of six separate air pollutants. Each of those pollutants has been assigned a numerical value based on the pollutant's "global warming potential," which measures each pollutant relative to carbon dioxide. For example, according to EPA, one ton of methane equals twenty-one tons of carbon dioxide equivalent. Pet. App. 167a.

emitted in amounts above 100,000 tpy of carbon dioxide equivalent, *id.* at 591a. These thresholds are orders of magnitude above the CAA's 100/250-tpy thresholds for PSD and Title V permit applicability.[6] Because EPA interpreted the Act to require that GHGs be regulated the same as other § 7602(g) pollutants, notwithstanding that such regulation would be contrary to congressional intent for PSD and Title V, EPA determined that it would reserve authority to expand regulation of GHGs "step by step" until GHGs became subject to regulation at the statutory 100/250 tpy thresholds. *Id.* at 159a.

8. In promulgating the Tailoring Rule, EPA rejected rulemaking comments arguing that (i) *Massachusetts* did not require EPA to interpret the term "air pollutant" in the Act's PSD provisions to include GHGs, and (ii) EPA was prohibited from undertaking, step by step, to implement a program that contradicts congressional intent. See Response to Comments at 34-43; see also Comments of the Utility Air Regulatory Group on the Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule at 15, 19-40 (Dec. 28, 2009), Docket No. EPA-HQ-OAR-2009-0517-5317 (UARG Comments). A panel of the lower court agreed with EPA on the ground that this result was dictated by "binding Supreme Court precedent." Pet. App. 612a.

---

[6] Under the Tailoring Rule, GHGs emitted below the rule's 75,000-tpy and 100,000-tpy PSD thresholds and the rule's 100,000-tpy Title V threshold are not "air pollutants" subject to regulation under the PSD and Title V programs, respectively.

According to the panel, "Congress made perfectly clear that the PSD program was meant to protect against precisely the types of harms caused by greenhouse gases" because the PSD program's declaration of purpose includes a reference to the word "welfare," which, this Court observed in *Massachusetts,* includes effects on weather and climate. *Id.* at 76a (citing 42 U.S.C. § 7602(h)). "[G]iven both the statute's plain language and the Supreme Court's decision in *Massachusetts v. EPA*," the panel said it "ha[d] little trouble concluding that the phrase 'any air pollutant' [in PSD] includes *all* regulated air pollutants, including greenhouse gases." *Id.* at 73a (emphasis in original).

Having concluded that "Industry Petitioners were regulated and State Petitioners required to issue permits not because of anything EPA did in the Timing and Tailoring Rules, but by automatic operation of statute," the panel then concluded that Petitioners lacked standing to challenge either the Timing Rule or the Tailoring Rule. *Id.* at 100a-101a. According to the panel, "neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases." *Id.* at 101a. These injuries, the panel said, were caused by the statute and were not remediable by any judgment of the court.

9. The D.C. Circuit denied petitions for rehearing en banc, with dissenting opinions filed by Judges Brown and Kavanaugh. In a concurring opinion filed by the original panel members, those judges reiterated their conclusions that the Court in *Massachusetts*

"expressly *held* that the Clean Air Act's 'sweeping definition of "air pollutant"' unambiguously includes greenhouse gases," *id.* at 609a (emphasis in original), and that, based on that reading of *Massachusetts*, "the panel's interpretation of the statute is *the only plausible one*," *id.* at 611a (emphasis added). By contrast, Judges Brown and Kavanaugh explained in dissent that the statute was open to other readings and that those readings, which would avoid conflicts with congressional intent, were plausible. They would have granted rehearing "for the full court to consider the propriety of extending *Massachusetts* to Title V and the PSD program," *id.* at 614a-615a (Brown, J., dissenting), and "to carefully but firmly enforce the statutory boundaries" that they concluded EPA had transgressed, *id.* at 661a (Kavanaugh, J., dissenting).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to address whether *Massachusetts* v. *EPA* compels regulation of GHGs under the PSD and Title V permitting programs of the CAA. Certiorari is also needed to clarify that petitioner has standing under this Court's settled law on justiciability and to ensure that the regulated community can obtain judicial review of agency action regulating GHGs in the D.C. Circuit, which has exclusive jurisdiction to review many agency rulemakings, including national rulemakings under the CAA. Finally, given the expansive regulation that the rules at issue here would compel, this is an issue of great importance to the Nation.

I. Certiorari Is Needed To Address Whether *Massachusetts* Compels Regulation of GHGs, Which Include Carbon Dioxide, Under the CAA's Title I PSD Program and Title V of the Act.

According to the panel, *Massachusetts* unleashed a cascade of CAA requirements automatically and by operation of law. The panel found that because under "*Massachusetts* … greenhouse gases 'unambiguous[ly]' may be regulated as an 'air pollutant' under the Clean Air Act," *id.* at 25a, "once [the Motor Vehicle] Rule took effect and made greenhouse gases a regulated pollutant under Title II of the Act," that triggered application of the Title I PSD program "*automatically* … to facilities emitting over 100/250 tpy of greenhouse gases." *Id.* at 71a (emphasis added).

Because millions of small facilities throughout the Nation emit GHGs at rates greater than 100 tpy, EPA's interpretation that *Massachusetts* compels regulation of GHGs under these programs would cause a radical expansion of Title I PSD and Title V jurisdiction. Programs that Congress enacted to apply to only a comparative handful of large industrial facilities would be transformed, overnight, into programs encompassing innumerable small sources. *Id.* at 345a-346a. As EPA explained, these programs would thereby become unrecognizable to the Congress that enacted them, *id.* at 345a, and this result "would, as a practical matter, vitiate much of the purpose of the 100 tpy [statutory] cut-off for [CAA applicability to] industrial sources," *id.* at 347a.

Yet, according to the panel, "given both the statute's plain language and the Supreme Court's decision in *Massachusetts v. EPA*, [it had] little trouble concluding that the phrase 'any air pollutant' includes *all* regulated air pollutants, including greenhouse gases," for purposes of PSD and Title V. *Id.* at 73a (emphasis in original). This, the panel held, "forecloses" any argument that EPA had authority to interpret the term "air pollutant" more narrowly for these other CAA programs. *Id.* at 81a; cf. *id.* at 650a (Kavanaugh, J., dissenting) ("The panel opinion … appears to have been heavily if not dispositively influenced by *Massachusetts v. EPA*.").

But *Massachusetts* does not compel the conclusion that an "air pollutant" under 42 U.S.C. § 7602(g) is necessarily an air pollutant for purposes of any individual program under the CAA. No party in *Massachusetts* argued that the scope of the term "air pollutant" under 42 U.S.C. § 7521(a)(1) was narrower than the definition of air pollutant in 42 U.S.C. § 7602(g). And this Court found no reason to adopt a narrowing interpretation, concluding that "[t]he broad language of [42 U.S.C. § 7521(a)(1) in Title II] reflects an intentional effort to confer the flexibility" needed to regulate a broad range of substances, including GHGs. *Massachusetts*, 549 U.S. at 532.

42 U.S.C. § 7602(g) defines the outer bounds of the "air pollutants" that are potentially eligible for regulation under the various CAA programs. This is understandable in a lengthy, expansive statute like the CAA, which has different programs addressing different pollution problems. In such a statute with

several titles and programs, a general definition of pollutant has to be broad enough to reflect the entire range of substances that might be regulated under any one or more of the diverse programs it establishes.

EPA's argument in *Massachusetts* that GHGs were not an "air pollutant" under 42 U.S.C. § 7602(g), if accepted, would have been sufficient to resolve the question whether GHGs were pollutants eligible for regulation under 42 U.S.C. § 7521. But, as Judge Kavanaugh observed, the fact that "[g]reenhouse gases may qualify as 'air pollutants' in the abstract" does *not* resolve the definition of "air pollutant" for each individual regulatory program of the CAA. Pet. App. 651a n.3 (Kavanaugh, J., dissenting); cf. *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (a CAA case decided the same day as *Massachusetts* and holding that statutory terms must be interpreted in light of their context and the statute as a whole and that the same term may mean different things in different parts of the statute).

Indeed, in implementing the CAA over the past decades, EPA has been careful to define which of the 42 U.S.C. § 7602(g) air pollutants are to be regulated under each individual CAA program. Thus, while 42 U.S.C. § 7411 provides that new source performance standards (NSPS) apply whenever a source undertakes a "physical change … which increases the amount of *any* air pollutant emitted," 42 U.S.C. § 7411(a)(4) (emphasis added), EPA by regulation has narrowed the universe of air pollutants that trigger

NSPS to those "[air] pollutant[s] to which a standard applies" under 40 C.F.R. part 60. 40 C.F.R. § 60.14(a). Although 42 U.S.C. § 7491 defines "major stationary source[s]" to which the CAA visibility protection program applies as sources that "emit 250 tons or more of *any* pollutant," 42 U.S.C. § 7491(g)(7) (emphasis added), EPA by regulation has defined the pollutants that trigger this program as a specific set of "visibility-impairing pollutants," see, *e.g.*, 40 C.F.R. Part 51, App. Y, § III.A.2. And, although 42 U.S.C. § 7479 defines "major emitting facilit[ies]" that are subject to the PSD program as those that emit more than 100 or 250 tpy of "any air pollutant," 42 U.S.C. § 7479(1), EPA has by regulation narrowed the scope of air pollutants that can trigger PSD to "any regulated NSR [new source review] pollutant," 40 C.F.R. § 52.21(b)(1). Finally, in the very rulemaking at issue here, although EPA (and the panel) read *Massachusetts* to compel PSD and Title V regulation of *all* GHGs, EPA defined GHGs for PSD and Title V to include only those emitted above the 100,000- or 75,000-tpy levels of carbon dioxide equivalent. Pet. App. 587a, 591a.

The historic approach that identifies which of the 42 U.S.C. § 7602(g) "air pollutants" are air pollutants subject to individual CAA programs makes eminent sense. "Of necessity, Congress selects different regulatory regimes to address different problems." *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2538 (2011). And the same term appearing in different statutory programs can (indeed, must) be given different regulatory meanings where congressional in-

tent is different. See *Abbott Labs.* v. *Young*, 920 F.2d 984, 987 (D.C. Cir. 1990) ("[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes."). "A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Envtl. Def.*, 549 U.S. at 574; see also *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596-97 (2004) ("age" has different meanings within Age Discrimination in Employment Act); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 212-13 (2001) ("wages paid" has different meanings within Social Security Act Amendments of 1939); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) ("employee" has different meanings within Title VII of the Civil Rights Act of 1964).

The CAA is not self-implementing. Rather, rulemaking is required under each of the separate CAA programs to spell out the specific elements of each, *including the pollutants to which the program applies*. When EPA – or a reviewing court – seeks to give content to the term "air pollutant" as used in each of these programs, 42 U.S.C. § 7602(g)'s broad definition of air pollutant is always the beginning, but not the end, of the analysis.

If EPA had engaged in this inquiry here, it would have narrowed the scope of "air pollutants" covered by the Title I PSD and Title V permitting programs to exclude carbon dioxide entirely from those programs, and not partially and temporarily as EPA did.

First, as EPA acknowledged, the explicit statutory 100/250-tpy "threshold limitations" for PSD applicability served as "Congress's mechanism for limiting PSD" to a limited number of large industrial facilities. Pet. App. 343a; see also *id.* at 380a-383a (Title V). The Act's 100/250-tpy "major source" numerical thresholds have a singular meaning that is *not* subject to alteration through "interpretation"; these numerical limitations restrict PSD and Title V's coverage to relatively few "large industrial sources," while excluding numerous smaller "commercial and residential sources." *Id.* at 345a-346a; see also *id.* at 319a ("Congress had reason to expect the total size of the PSD program to be measured in the hundreds of permits a year," not tens of thousands); *id.* at 382a ("Congress did not expect" to include "small commercial and residential sources" in Title V).

Thus, the 100/250-tpy statutory language must be read to define what pollutants are PSD and Title V-regulated: *only* those pollutants that "a relatively small number of large industrial sources" emit in amounts above the statutory thresholds. *Id.* at 345a; see also Response to Comments at 37 (The statutory "threshold for these source categories makes sense only in terms of conventional pollutants … and cannot be reconciled with an unbounded reading of the phrase 'any pollutant subject to regulation.'"). Because many thousands or even millions of small sources emit carbon dioxide above these statutory thresholds, carbon dioxide cannot be a PSD or Title V pollutant.

Furthermore, while 42 U.S.C. § 7521 in Title II of the CAA focuses on emissions whose presence in the atmosphere *generally* may "endanger public health or welfare," 42 U.S.C. § 7521(a)(1), the PSD program in Title I of the Act focuses on protection of *localized* ambient "air quality" – *i.e.*, the air people breathe in certain geographically defined 42 U.S.C. § 7407 areas within a state. Thus, 42 U.S.C. § 7471 provides that "each applicable [SIP] shall contain emission limitations and such other measures as may be necessary … to prevent significant deterioration of *air quality* in each [air quality control] region," *i.e.*, the local air quality control regions designated pursuant to 42 U.S.C. § 7407 based on ground-level pollutant measurements. (Emphasis added). Further, 42 U.S.C. § 7475 directs EPA to promulgate regulations governing analysis of impacts on "ambient air quality" that might flow from "emissions from [the PSD] facility." *Id.* § 7475(e)(1). Through such provisions, Congress made clear that the statute's PSD requirements are directed *not* to regulation of emissions of air pollutants that may endanger public health or welfare due to their uniform presence throughout the global atmosphere, but rather to such regulation "as may be necessary … to prevent significant deterioration" of the air that people breathe. *Id.* § 7471.

The PSD program addresses pollutants that deteriorate local air quality. By contrast, EPA's regulation of carbon dioxide, the most prevalent GHG included in EPA's definition of GHGs, is driven *not* by concerns over deterioration of local or regional ground-level air quality but by distinct environmen-

tal concerns. As EPA explained in an Advance Notice of Proposed Rulemaking published in 2008 (prior to concluding that it was compelled by the statute and *Massachusetts* to regulate stationary-source GHG emissions), "GHGs become well mixed throughout the global atmosphere so that the long-term distribution of GHG concentrations is not dependent on local emission sources. Instead, GHG concentrations tend to be relatively uniform around the world." 73 Fed. Reg. 44,354, 44,401 (July 30, 2008). Thus, according to EPA, "GHGs emitted anywhere in the world affect climate everywhere in the world." *Id.*

Accordingly, as EPA recognized, the "global nature and effect of GHG emissions raise questions regarding the suitability of CAA provisions [like the PSD provisions] that are designed to protect local and regional air quality by controlling local and regional emission sources." *Id.* at 44,408. Among other things, "the geographic location of emission sources and reductions [is] generally not important to mitigating global climate change." *Id.* Moreover, "[c]urrent and projected levels of ambient concentrations" of GHGs, including carbon dioxide, were "not expected to cause any direct adverse health effects, such as respiratory or toxic effects, which would occur as a result of the elevated GHG concentrations themselves." *Id.* at 44,427. As a result, carbon dioxide simply does not have the characteristics of a PSD pollutant.

Finally, contrary to the panel's suggestion, see Pet. App. 76a, the existence of the term "welfare" in

the "Congressional declaration of purpose" – a term that the Act describes (at 42 U.S.C. § 7602(h)) as including "effects on … weather … and climate" – does not relieve EPA of its statutory responsibility to determine whether a 42 U.S.C. § 7602(g) pollutant such as GHGs falls within the scope of the PSD program. As with "air pollutant," the CAA broadly defines "welfare" in the general definitions section so as to be able to serve, to the degree relevant, various programs within the Act addressing regulation of specific types of pollution.

In *Massachusetts*, this Court found that regulation of GHGs under Title II, triggered by a general endangerment finding, would not lead to "extreme," "counterintuitive" measures not contemplated by Congress. *Massachusetts*, 549 U.S. at 531. This Court observed that "EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases *from new motor vehicles*." *Id.* (emphasis added). By contrast, neither EPA nor the D.C. Circuit ever examined here whether the GHG "welfare" effects targeted for regulation were welfare effects addressed by the PSD program, *i.e.*, effects related to local, ground-level pollution of the quality of the air people breathe. For all the reasons discussed above, whether GHGs present welfare concerns on a global basis is immaterial to the question before EPA here: whether GHGs are a PSD pollutant.

Certiorari should be granted to address the panel's conclusion that this Court's decision in *Massachusetts* compelled inclusion of a pollutant in the PSD

program that does not deteriorate air quality, where that inclusion expands regulation demonstrably beyond the bounds set by Congress.

II. Certiorari Is Needed To Address the Panel's Decision that Petitioners Lack Standing To Challenge the Timing and Tailoring Rules.

In the proceedings below, petitioner challenged EPA rules that, for the first time in the history of the CAA, make GHGs a regulated air pollutant under the PSD and Title V programs. EPA's Tailoring Rule definition of what GHGs are subject to PSD and Title V covers GHG emissions from facilities owned and operated by members of petitioner, subjecting petitioner's members to new regulatory restrictions. If petitioner's challenge to these rules were accepted on the merits, GHGs could not be included in the PSD program and any further harm to petitioner's members from the rules would thereby be averted.

As predicates for its rulemaking actions at issue here, EPA simultaneously embraced two incompatible principles of administrative law. See Pet. App. 642a-643a n.1. The first was a "traditional tool[] of statutory construction," *Chevron*, 467 U.S. at 843 n.9, that EPA labeled the "absurdity" doctrine. Pet. App. 150a-151a. Under this doctrine, an agency must refrain from adopting the literal – or most expansive – reading of a statutory term where such a construction would be contrary to congressional intent. See, *e.g.*, *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 242 (1989). The second was the so-called doctrine of "administrative necessity," which applies

where an agency cannot fully implement Congress's clear intent immediately. See, *e.g.*, *Ala. Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). The administrative necessity doctrine allows the agency to implement a program in phases – one step at a time, if need be – and thereby, by proceeding incrementally, give full effect to clear congressional intent over time.

Petitioner argued in EPA's Tailoring Rule rulemaking and to the court below that, once EPA found (as it plainly did) that defining "air pollutant" under the PSD and Title V programs to include GHGs would produce results inimical to congressional intent, EPA was obligated to interpret "air pollutant" as used in PSD and Title V more narrowly to exclude GHGs. Administrative necessity, *a doctrine designed to give effect to congressional intent*, could never be invoked to justify agency rulemaking action designed to transform – even incrementally – the PSD and Title V programs into something Congress indisputably never contemplated.

Yet, after reaching its conclusion that *Massachusetts* compelled rejection of petitioner's statutory argument, the panel dismissed for lack of subject matter jurisdiction the petitions for review of the Timing and Tailoring Rules, including the argument of petitioner that "EPA exceeded the boundaries of its lawful [statutory] authority" in adopting a phased program for GHG regulation that would end in PSD and Title V programs that Congress never intended. Pet. App. 99a. According to the panel, the CAA's definition of "air pollutant," 42 U.S.C. § 7602(g), as inter-

preted by this Court in *Massachusetts*, "requires PSD and Title V permits for major emitters of greenhouse gases." Pet. App. 95a. As a result, the panel concluded,

> Industry Petitioners were regulated … *not* because of anything EPA did in the Timing and Tailoring Rules, *but by automatic operation of the statute*. Given this, neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases.
>
> Indeed, the Timing and Tailoring Rules actually mitigate Petitioners' purported injuries.

Id. at 100a-101a (emphases added). Only by reaching the merits on *Massachusetts* grounds (without even mentioning the "congressional intent" canon of construction upon which petitioner's statutory interpretation argument was based) could the panel find that "Petitioners lack Article III standing to challenge both [the Timing and Tailoring] rules." *Id.* at 96a (emphasis omitted).

In this case, petitioner argued that EPA's conclusion that PSD and Title V regulation of GHGs would produce results contrary to congressional intent required a narrowing interpretation of the broad definition of "air pollutant" to exclude GHGs for purposes of the PSD and Title V programs. See UARG Comments at 34-39. The panel's refusal – on purported standing grounds – to "address the merits of [petitioner's] … claims" that any EPA phase-in of

GHG requirements would produce results contrary to congressional intent, Pet. App. 99a, improperly conflated the merits with Article III standing. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93, 95-97 (1998) (rejecting an approach that "convert[s] the merits issue in this case into a jurisdictional one"); cf. *Bell* v. *Hood*, 327 U.S. 678 (1946) (nonexistence of a cause of action not a proper basis for a jurisdictional dismissal).

Here, petitioner suffers injury in fact from EPA rules that require its members' stationary sources to apply for permits that restrict their GHG emissions beginning January 2, 2011 (the date established by EPA's Timing Rule). If petitioner's statutory construction argument were accepted – thereby establishing that GHGs are not an air pollutant that is subject to PSD and Title V requirements – its members' present injury caused by GHG regulation would be redressed. Nothing more is required for petitioner to demonstrate standing. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The panel's decision is, thus, at odds with this Court's settled case law on justiciability.

The panel's standing decision is particularly troublesome insofar as it establishes precedent with respect to future phases of EPA's PSD regulatory program for GHGs. If petitioner lacks Article III standing here – on the asserted grounds that EPA's pursuit of an expansion of CAA stationary-source jurisdiction that is incompatible with congressional intent in steps, rather than all at once, "mitigate[s] Petitioners' purported injuries," Pet. App. 101a – then

petitioner's standing to object to further steps in pursuit of this unlawful end is also at risk. Certiorari is needed to clarify the law on standing for the D.C. Circuit – the court with exclusive jurisdiction to review nationally applicable rules under the CAA and many other federal regulatory statutes – in a context that is of extraordinary importance for the Nation.

III. This Petition Raises an Unusually Important Question of Federal Law.

In *Massachusetts*, this Court recognized the "unusual importance" of questions concerning EPA's authority to regulate GHG emissions under the CAA. 549 U.S. at 506. This case presents, if anything, issues of even greater importance than the questions presented in that case, given the extraordinary expansion of CAA Title I jurisdiction at stake.

The Court observed in *Massachusetts* that reading 42 U.S.C. § 7521 to encompass regulation of emissions of GHGs under Title II of the CAA from new motor vehicles "would lead to *no … extreme measures*." *Id.* at 531 (emphasis added). In fact, the Court observed, regulation of GHG emissions from motor vehicles and engines under Title II would "not directly expand or contract the universe of vehicles and engines subject to" that program. Pet. App. 632a. On this basis the Court distinguished its decision in *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), setting aside a regulatory expansion of Food and Drug Administration authority over tobacco products. *Massachusetts,* 549 U.S. at 531 ("'common sense' intui-

tion [suggested] that Congress never meant to remove those products from circulation").

In contrast, as EPA acknowledged, extending PSD and Title V requirements to GHG emissions from stationary sources would "subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold" in CAA jurisdiction, Pet. App. 339a, and would "expand [the Title V program] from the current 14,700 sources to some 6.1 million," *id.* at 380a. This, EPA observed, would impose impossible burdens on states that are responsible for issuing CAA permits and that will be confronted with a massive and unprecedented escalation in the number of permit proceedings. And because PSD permits are required prior to construction of new and modified sources, reading *Massachusetts* to mandate automatic application of PSD requirements to GHGs threatens to give rise to profound economic impacts across the Nation. As EPA recognized, if source owners and operators are unable to obtain PSD permits authorizing new construction or existing-source modifications for tens of thousands of facilities per year, for any reason – including the states' and EPA's inability to process a large number of permits – economic activity in many areas of the country would be seriously impaired. See 74 Fed. Reg. at 55,344 (According to EPA, once GHGs were regulated under Title II, the PSD program, "by its terms, prohibits a source that is subject to PSD from constructing or modifying without a permit."); see also *id.* at 55,294.

EPA's action here opened uncharted vistas of CAA Title I and Title V jurisdiction over small sources across the country and for every state permitting authority – jurisdiction Congress never contemplated would exist. And because the panel below found that no petitioner had standing to challenge the merits of EPA's two rules authorizing a step-by-step expansion of CAA Title I and Title V jurisdiction to capture hosts of small sources throughout the Nation, EPA's continuing regulatory actions could wholly escape judicial review if the panel's judgment is left undisturbed.

This Court should grant certiorari to address a decision that has profound and far-reaching implications for administrative law generally, for states, for the Nation's economy, and for the present and future administration of the CAA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. WILLIAM BROWNELL
(Counsel of Record)
NORMAN W. FICHTHORN
HENRY V. NICKEL
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1500
bbrownell@hunton.com

Counsel for Petitioner

March 20, 2013