No. _____

In the Supreme Court of the United States

STATE OF TEXAS, ET AL., PETITIONERS

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

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QUESTIONS PRESENTED

The Clean Air Act compels every stationary source that emits "one hundred tons per year or more of any air pollutant" to obtain an operating permit, and also requires a permit to build or modify any stationary source that emits "two hundred and fifty tons per year or more of any air pollutant." See 42 U.S.C. §§ 7475(a)(1), 7479(1), 7602(j), 7661a(a). After *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), held that carbon dioxide and other greenhouse gases are air pollutants under the Act, EPA sought to regulate greenhouse-gas emissions from stationary sources. EPA realized that to do so would be absurd if it adhered to the text of the Act, given that millions of buildings (including churches and schools) emit more than 100 or 250 tons per year of carbon dioxide. To enable its desired regulatory expansion, EPA promulgated a "Tailoring Rule" that discards the Act's numerical thresholds and creates a novel permitting regime exclusively for greenhouse gases. The questions presented are:

1. (a) Whether EPA's Tailoring Rule violates the Act by replacing Congress's unambiguous numerical permitting thresholds with criteria of EPA's own choosing. (b) Whether the D.C. Circuit improperly ducked this question on Article III standing grounds.

2. Whether Congress authorized EPA to regulate greenhouse-gas emissions from stationary sources, given that the Act imposes permitting thresholds that are absurdly low if applied to carbon dioxide.

3. Whether *Massachusetts* v. *EPA* should be reconsidered or overruled in light of the absurd permitting burdens that follow from treating carbon dioxide as an air pollutant under the Act.

PARTIES TO THE PROCEEDING

The court of appeals issued a single judgment on four consolidated causes, disposing of numerous petitions for review of various EPA actions. Petitioners in this Court, petitioners below, are the States of Texas, Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality.

Respondents in this Court, respondents below, are the U.S. Environmental Protection Agency and Robert Perciasepe, Acting Administrator of the U.S. Environmental Protection Agency.

The following parties are considered respondents under Supreme Court Rule 12.6, and are grouped according to their respective positions in the court below:

Petitioners

Alliance for Natural Climate Change Science and William Orr; Alpha Natural Resources, Inc.; American Chemistry Council; American Farm Bureau Federation; American Forest & Paper Association, Inc.; American Frozen Food Institute; American Fuel and Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; U.S. Representative Michele Bachmann; Haley Barbour, Governor of Mississippi; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; Brick Industry Association; U.S. Representative Paul Broun; U.S. Representative Dan Burton; Center for Biological Diversity; Chamber of Commerce of the United

States of America; Clean Air Implementation Project; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Competitive Enterprise Institute; Corn Refiners Association; U.S. Representative Nathan Deal; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Freedomworks; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel Corporation; U.S. Representative Phil Gingrey; Glass Association of North America; Glass Packaging Institute; Great Northern Project Development, L.P.; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association-North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; U.S. Representative Steve King; U.S. Representative Jack Kingston; Landmark Legal Foundation; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; U.S. Representative John Linder; Massey Energy Company; Michigan Manufacturers Association; Mississippi Manufacturers Association; Missouri Joint Municipal Electric Utility Commission; National Association of Home Builders; National Association of Manufacturers; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Businesses; National Mining Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting

Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Portland Cement Association; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; Rosebud Mining Company; Science and Environmental Policy Project; U.S. Representative John Shadegg; U.S. Representative John Shimkus; South Carolina Public Service Authority; Southeast Trailer Mart Inc.; Southeastern Legal Foundation, Inc.; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Texas Agriculture Commission; Texas Attorney General Greg Abbott; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas General Land Office; Texas Governor Rick Perry; Texas Public Utilities Commission; Texas Public Utility Commission Chairman Barry Smitherman; Texas Railroad Commission; Utility Air Regulatory Group; Commonwealth of Virginia ex rel. Attorney General Kenneth T. Cuccinelli; West Virginia Manufacturers Association; Western States Petroleum Association; U.S. Representative Lynn Westmoreland; Wisconsin Manufacturers and Commerce;

Respondent

National Highway Traffic Safety Administration;

Intervenors for Petitioners

State of Alaska; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of Commerce; Associated Industries of Arkansas; Haley Barbour, Governor for the State of Mississippi; Chamber of Commerce of the United

States of America; Colorado Association of Commerce & Industry; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Kansas Chamber of Commerce and Industry; State of Kentucky; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Farms, LLC; Langdale Ford Company; Langdale Fuel Company; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Electrical Manufacturers Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Manufacturers Association; Pennsylvania Manufacturers Association; Portland Cement Association; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry; State of Utah; Virginia Manufacturers Association; West Virginia Manufacturers Association; Western States Petroleum Association; Wisconsin Manufacturers and Commerce;

Intervenors for Respondents

Alliance of Automobile Manufacturers; American Farm Bureau Federation; State of Arizona; Brick Industry Association; State of California; Center for Biological Diversity; State of Connecticut; Conservation Law Foundation; State of Delaware; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; State of Illinois; Indiana

Wildlife Federation; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; Michigan Environmental Council; State of Minnesota; National Environmental Development Association's Clean Air Project; National Mining Association; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; State of New Hampshire; State of New Mexico; State of New York; City of New York; State of North Carolina; Ohio Environmental Council; State of Oregon; Peabody Energy Company; State of Rhode Island; Sierra Club; South Coast Air Quality Management District; Utility Air Regulatory Group; State of Vermont; State of Washington; Wetlands Watch; Wild Virginia.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

The executive branch in recent years has been all too eager to govern through unilateral edicts when Congress is unwilling or unable to provide legislative authorization for its endeavors. This phenomenon is to be expected under a Constitution that establishes many institutional obstacles to federal lawmaking—obstacles that will occasionally thwart policies that may be normatively desirable or politically popular. See U.S. Const. art. I, § 7. Yet this Court has consistently brought the executive branch to heel when it contradicts unambiguous statutory language or attempts to unilaterally implement policies in the absence of congressionally delegated authority. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gonzales* v.

Oregon, 546 U.S. 243 (2006); *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006). Petitioners call on this Court to once again rein in a usurpatious agency and remind the President and his subordinates that they cannot rule by executive decree.

OPINIONS BELOW

The opinion of the D.C. Circuit (Pet. App. 6a-102a) is reported at 684 F.3d 102. The D.C. Circuit's orders denying panel rehearing and rehearing en banc (Pet. App. 525a-588a) are unreported. The EPA's Tailoring Rule (Pet. App. 103a-524a) is reported at 75 Fed. Reg. 31,514.

JURISDICTION

The D.C. Circuit entered judgment on June 26, 2012, Pet. App. 6a, and denied timely petitions for panel rehearing or rehearing en banc on December 20, 2012, Pet. App. 525a, 530a. On March 12, 2013, Chief Justice Roberts extended the time for filing this petition for a writ of certiorari to and including April 19, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

Article III of the United States Constitution provides, in pertinent part, that "[t]he judicial Power 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 Clean Air Act, 42 U.S.C. §§ 7407 *et seq.*, are reproduced beginning at Pet. App. 591a. Relevant provisions of EPA's regulations are reproduced beginning at Pet. App. 620a.

STATEMENT

I. EPA Regulates Mobile-Source Greenhouse-Gas Emissions After *Massachusetts* v. *EPA*

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, 52,925 (Sept. 8, 2003) (declaring that "EPA believes that [the Clean Air Act] does not authorize regulation to address global climate change" (footnote omitted)). Based on this view, EPA denied a petition from organizations calling for the agency to regulate greenhouse-gas emissions from motor vehicles. *Id.* Those organizations had invoked section 202(a)(1) of the Act, which directs the EPA Administrator to regulate air-pollutant emissions from new motor vehicles that "in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

This Court disagreed with EPA's interpretation of the Act in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). The Court noted 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 air 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 (as opposed to mobile sources).

After the *Massachusetts* ruling, EPA issued an endangerment finding for greenhouse gases, concluding that "six greenhouse gases taken together"—carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)—"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* ("Endangerment Finding"), 74 Fed. Reg. 66,496, 66,496-97 (Dec. 15, 2009). Later, and in a separate rulemaking, EPA promulgated greenhouse-gas regulations for new motor vehicles jointly with the National Highway Traffic Safety Administration. See *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards* ("Tailpipe Rule"), 75 Fed. Reg. 25,324 (May 7, 2010).

II. EPA Also Decides To Regulate Greenhouse-Gas Emissions From Stationary Sources

Neither the Endangerment Finding nor the Tailpipe Rule addresses EPA's authority to regulate greenhouse-gas emissions from *stationary* sources. Under the Clean Air Act, stationary-source pollutants are regulated by the program for prevention of significant deterioration of air quality ("PSD"), as well as the Title V permitting program.

The PSD Program

Title I of the 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. §§ 7471, 7475. In 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). For purposes of the PSD program, the 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). 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).

The Title V Program

Title V of the 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 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).

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 eighteen months. See 42 U.S.C. § 7661b(c).

* * *

Once *Massachusetts* held that carbon dioxide and other greenhouse-gas emissions "without a doubt" qualify as an "air pollutant" under the Act, the text of the statute would appear to compel EPA to begin applying immediately the statute's 100/250 tons-per-year ("tpy") thresholds to carbon dioxide and other greenhouse-gas emissions. EPA, however, has interpreted the phrase "any air pollutant" in the PSD and Title V provisions to extend only to air pollutants *that are regulated under the Clean Air Act*, even though the text of the Act provides no support for this narrowing construction. See *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans* ("1980 Implementation Plan Requirements"), 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* ("Tailoring Rule"), 75 Fed. Reg. 31,514, 31,553-54 (June 3, 2010), Pet. App. 273a-279a (discussing history of Title V regulation and applicability); see also Pet. App. 70a (acknowledging that "EPA's definition of 'any air pollutant' slightly narrows the literal statutory definition, which nowhere requires that 'any air pollutant' be a *regulated* pollutant"). EPA therefore determined that it could not regulate greenhouse-gas emissions from stationary sources until the day its Tailpipe Rule went into effect. In EPA's view, the Tailpipe Rule, which regulates greenhouse-gas emissions from motor vehicles, triggers EPA's authority to regulate stationary-source greenhouse-gas emissions under the PSD and Title V programs, because the Tailpipe Rule is what converts greenhouse-gas emissions from mere "air pollutants" into air pollutants that are regulated under the Act.

See *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs* ("Timing Rule"), 75 Fed. Reg. 17,004, 17,005 (Apr. 2, 2010).

III. EPA Issues The "Tailoring Rule" To Avoid Applying The Statutory Permitting Thresholds To Greenhouse-Gas Emissions

Several challenges arose once EPA decided to regulate greenhouse gases as an "air pollutant" 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 tpy (or, in some cases, more than 250 tpy) of "any air pollutant." These numerical thresholds are set far too low to accommodate rational regulation of carbon dioxide emissions. Were EPA to apply the 100/250 tpy thresholds to carbon dioxide, 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." Tailoring Rule, Pet. App. 183a. 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 *id.* at 103a-104a, 214a-217a. Countless numbers of buildings, including churches and schools, would be subjected to EPA permitting requirements based on the carbon dioxide emissions from their water heaters.

EPA's response to these problems was to promulgate the "Tailoring Rule," which replaces the unambiguous numerical permitting thresholds established in the 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. EPA's Tailoring Rule departs from the statute in two respects. First, rather than measure greenhouse-gas emissions by their mass, EPA's Tailoring Rule creates a new metric called "CO_2 equivalent emissions (CO_2e)." Pet. App. 511a. This CO_2e metric represents a weighted measure of six intermixed substances based on their "global warming potentials." *Id.* EPA recognized "the tension between the mass-based metric in the statute and the CO_2e-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 [greenhouse gases] emitted." *Id*. at 174a.

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 105a-106a, 513a-515a. 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 93a, 123a-125a (codified at 40 C.F.R. §§ 51.166(b)(48)(iv), 52.21(b)(49)(iv)). The second phase began on July 1, 2011, and it expanded 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 93a, 123a-125a, 139a, 218a, 339a (codified at 40 C.F.R. §§ 51.166(b)(48)(v), 52.21(b)(49)(v)).

IV. The D.C. Circuit Rejects All Challenges To EPA's Stationary-Source Greenhouse-Gas Regulations

Texas, along with sixteen other States and numerous industry petitioners, filed petitions for review challenging the Endangerment Finding, the Tailpipe Rule, the Timing Rule, and the Tailoring Rule. The D.C. Circuit rejected all of petitioners' challenges to the Endangerment Finding. Pet. App. 33a-51a. Texas had argued in the D.C. Circuit that EPA's Endangerment Finding was arbitrary and capricious because EPA had refused to quantify a threshold atmospheric concentration at which greenhouse gases will endanger public health or welfare, but the D.C. Circuit concluded that "EPA need not establish a minimum threshold of risk or harm before determining whether an air pollutant endangers." *Id.* at 44a.

The D.C. Circuit also rejected petitioners' challenges to the Tailpipe Rule. See Pet. App. 54a-57a. Texas had attacked the Tailpipe Rule on the ground that EPA had failed to consider that its decision to regulate *mobile-source* greenhouse-gas emissions under the Tailpipe Rule would "trigger" an obligation to regulate greenhouse-gas emissions from *stationary sources* under the PSD and Title V programs—and EPA's failure to consider the costs of imposing these absurdly low permitting thresholds on carbon dioxide emissions violated the arbitrary-and-capricious doctrine by "fail[ing] to consider an important aspect of the problem." *Motor Vehicle*

Mfrs. Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The D.C. Circuit, however, rejected this argument, concluding that section 202(a)(1) of the Clean Air Act *compelled* EPA to regulate greenhouse-gas emissions from motor vehicles once it had issued an Endangerment Finding, regardless of the collateral consequences of that decision. See Pet. App. 51a-54a.

Finally, the D.C. Circuit disposed of petitioners' challenges to EPA's regulations of stationary-source greenhouse-gas emissions. Petitioners challenged EPA's stationary-source rules on two grounds.

First, petitioners argued that Congress could never have delegated to EPA the prerogative to regulate greenhouse-gas emissions from stationary sources, given the preposterous consequences that arise from applying the statute's 100/250 tpy permitting thresholds to carbon dioxide emissions. Instead, petitioners maintained, the only logical reading of EPA's authority to regulate "air pollutant[s]" under the PSD and Title V programs is that it extends only to the pollutants for which EPA has established NAAQS under 42 U.S.C. § 7407. There are six of these "NAAQS pollutants": carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. And none of the greenhouse gases that EPA seeks to regulate is a NAAQS pollutant.

Petitioners' argument rested on statutory structure. The PSD program is primarily focused on the preservation of national ambient air quality standards. It requires EPA to designate certain pollutants as "NAAQS pollutants" and then establish national ambient air quality standards for those

pollutants. See 42 U.S.C. § 7407. Then EPA must determine whether each region of the country is in "attainment" or "nonattainment" for each NAAQS pollutant, or whether that region is "unclassifiable" for that pollutant. See 42 U.S.C. § 7407(d)(1)(A). The PSD program applies to all areas designated as in "attainment" or "unclassifiable" for any NAAQS pollutant, and requires permits before any "major emitting facilit[y]" constructs or modifies projects in those regions. See 42 U.S.C. §§ 7471, 7475(a). For purposes of the PSD program, the Act defines a "major emitting facility" as:

> [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). And no permit may issue unless the owner of the "major emitting facilit[y]" installs the "best available control technology for each pollutant subject to regulation under this chapter." 42 U.S.C. § 7475(a)(4).

Petitioners argued that the phrase "any air pollutant" in section 7479(1) must be understood in the context of the surrounding statutory provisions of the PSD program, which are concerned with maintaining the standards that EPA has established for NAAQS pollutants. Indeed, without some limiting construction of the phrase "any air pollutant," EPA would have been compelled to apply the PSD permitting thresholds for carbon dioxide

emissions from the moment the Act was enacted—and apply those permitting thresholds not only to carbon dioxide emissions but to "all airborne compounds of whatever stripe." *Massachusetts*, 549 U.S. at 529; see also *id.* at 558 n.2 (Scalia, J., dissenting) (noting that "*everything* airborne, from Frisbees to flatulence, qualifies as an 'air pollutant'" under *Massachusetts*'s construction of the Clean Air Act). Even EPA recognizes that it cannot possibly construe "any air pollutant" in section 7479(1) as broadly as the holding in *Massachusetts*. See, *e.g.*, Tailoring Rule, Pet. App. 123a-124a (describing the PSD program as covering sources that emit or have the potential to emit 100/250 tpy of "any pollutant *subject to regulation* under the CAA") (emphasis added). But rather than equating the "air pollutant[s]" in section 7479(1) with NAAQS pollutants, EPA has interpreted "any air pollutant" in section 7479(1) to mean "any air pollutant regulated under the Clean Air Act." See 1980 Implementation Plan Requirements, 45 Fed. Reg. at 52,711. On this view, carbon dioxide and other greenhouse gases became "air pollutant[s]" within the meaning of section 7479(1) as soon as the Tailpipe Rule took effect—but were not "air pollutant[s]" before that date.

The D.C. Circuit held that EPA's limiting construction of "any air pollutant" was "statutorily compelled"—even though EPA's interpretation is hard to reconcile with *Massachusetts* and leads to absurd results when the 100/250 tpy statutory permitting thresholds are applied to carbon dioxide emissions. The D.C. Circuit acknowledged that the text of section 7479(1) "nowhere requires that 'any

air pollutant' be a *regulated* pollutant." Pet. App. 70a. Yet it refused to acknowledge that the statute was ambiguous or susceptible of other limiting constructions. The Court explained:

> [I]f "any air pollutant" in the definition of "major emitting facility" w[ere] read to encompass both regulated and nonregulated air pollutants, sources could qualify as major emitting facilities—and thus be subjected to PSD permitting requirements—if they emitted 100/250 tpy of a "physical, chemical, [or] biological" substance EPA had determined was harmless. It is absurd to think that Congress intended to subject stationary sources to the PSD permitting requirements due to emissions of substances that do not "endanger public health or welfare." *Id*. § 7521(a)(1). Thus, "any regulated air pollutant" is, in this context, the only plausible reading of "any air pollutant."

Id. at 71a (second alteration in original). The petitioners contended that it is equally "absurd" to think that Congress intended to apply the statute's 100/250 tpy permitting thresholds to carbon dioxide emissions. But the D.C. Circuit was unwilling to regard that absurdity as a reason to adopt petitioners' limiting construction of the statute.

In the alternative, petitioners argued that if EPA and the courts refuse to accept petitioners' limiting construction of "any air pollutant," then the courts must compel EPA to follow the unambiguous statutory permitting thresholds as written until Congress enacts corrective legislation. The rigid

numerical permitting thresholds in the Clean Air Act reflect a decision by Congress to legislate through rules rather than standards—and the entire point of legislating by rule is to constrain the executive's discretion to pursue optimal regulatory policies in exchange for conserving decision costs and preserving congressional influence over future policy decisions. By establishing fixed and unambiguous permitting thresholds for all air pollutants, instead of authorizing EPA to establish "reasonable" pollution-specific thresholds, the 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. Allowing EPA to replace the statute's rigid permitting thresholds with numbers of EPA's own choosing flouts this careful division of power and allows EPA to unilaterally impose a drastic new regulatory regime without the congressional authorization or input required by the Act.

The D.C. Circuit, however, held that petitioners lacked Article III standing to challenge EPA's Tailoring Rule. Petitioners recited the basis for standing in their opening brief, explaining that vacating the Tailoring Rule would relieve them of the administrative and pecuniary burdens that follow from EPA's decision to regulate stationary-source greenhouse-gas emissions. Final Br. of State Pet'rs & Supporting Intervenor 22-23. Petitioners asserted that they would be subject to less regulation were they to prevail because vacating the Tailoring Rule would force EPA to choose between requiring permits for every building that emits more than 100 (or 250)

tpy of carbon dioxide—an outcome EPA described as "absurd" and "impossible"—and abandoning its plans to regulate stationary-source greenhouse-gas emissions. *Id.* at 23, 27 (citing Tailoring Rule, 75 Fed. Reg. at 31,541-49).

EPA's brief contested standing on the ground that vacating the Tailoring Rule would subject petitioners to more regulation, not less, because the Tailoring Rule replaced the Act's numerical permitting thresholds with higher numbers. Br. for Resp'ts 76-84. Relying upon the D.C. Circuit's assurances that "an appellant may use his reply brief to respond to a contention made by the appellee," petitioners explained that EPA's implausible prediction of regulatory impact did not foreclose standing. *United States* v. *Van Smith*, 530 F.3d 967, 973 (D.C. Cir. 2008) (citing *Envtl. Def. Fund* v. *EPA*, 210 F.3d 396, 401 n.8 (D.C. Cir. 2000)). Petitioners explained that "[e]ven if EPA were correct to assert that the relief requested by the petitioners will increase regulatory burdens," the petitioning States would simply "wear[] an environmentalist hat" and enjoy standing for the same reasons as the eponymous Commonwealth in *Massachusetts* v. *EPA*. Final Reply Br. of State Pet'rs & Supporting Intervenor 3-6. Moreover, petitioners adhered to their position that vacating the Tailoring Rule "will either provoke corrective legislation from Congress * * *, or else provoke corrective administrative action by EPA itself," thus yielding a reduction in overall regulation. *Id.* at 6.

The D.C. Circuit avoided ruling on the legality of the Tailoring Rule by embracing EPA's standing argument while refusing to consider petitioners'

reply. See Pet. App. 95a-101a. The D.C. Circuit agreed that the Tailoring Rule "actually mitigate[s]" petitioners' regulatory burdens, because without the Tailoring Rule EPA would be compelled to require permits for any stationary source that emits more than 100 or 250 tpy of carbon dioxide. Pet. App. 96a. The D.C. Circuit reiterated that EPA had no choice but to regulate greenhouse-gas emissions under the PSD and Title V programs once greenhouse-gas emissions from mobile sources became subject to regulation under the Tailpipe Rule. *Id.* Because the D.C. Circuit continued to reject petitioners' claim that the Act *could be interpreted* to limit the PSD and Title V programs to the six NAAQS pollutants, it found that a decision vacating the Tailoring Rule could not induce EPA to abandon or delay its plans to regulate stationary-source greenhouse-gas emissions. The D.C. Circuit also found the prospect of corrective legislation from Congress too "speculative" to support redressability, and noted that Congress might respond by establishing permitting requirements for greenhouse-gas emissions more burdensome than the permitting thresholds in EPA's Tailoring Rule (even if less burdensome than the 100/250 tpy thresholds in the statute). Pet. App. 97a-98a. The D.C. Circuit refused to consider petitioners' response to EPA's standing argument because they did not raise it in their opening brief, and because petitioners "fail[ed] to cite any record evidence to suggest that they are adversely affected by global climate change." Pet. App. 100a.

V. The D.C. Circuit Denies Petitioners' Request For Rehearing En Banc, Over Dissent

Petitioners then sought rehearing en banc, but a majority of the eligible judges voted to deny this request. Judges Brown and Kavanaugh, however, dissented from the denial of rehearing en banc.

Judge Brown argued that *Massachusetts*'s holding that carbon dioxide and other greenhouse gases unambiguously qualify as "air pollutants" under the Clean Air Act should apply only to tailpipe emissions, and that *Massachusetts*'s reasoning "does not extend to Title V and the PSD program." Pet. App. 559a. And Judge Kavanaugh declared that "EPA has exceeded its statutory authority" by attempting to regulate greenhouse-gas emissions from stationary sources. As Judge Kavanaugh saw matters, 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. Pet. App. 566a.

REASONS FOR GRANTING THE PETITION

Although petitioners presented numerous arguments against EPA's rulemaking in the D.C. Circuit, the following three issues present questions worthy of certiorari review.

The first is the legality of EPA's Tailoring Rule, which spurns the unambiguous numerical permitting thresholds established in the Clean Air Act and replaces them with numbers and metrics of EPA's own choosing.

The second is whether Congress has delegated to EPA the authority to regulate greenhouse-gas

emissions from stationary sources, given the ridiculously low permitting thresholds that the Clean Air Act would impose for carbon dioxide emissions.

The third and final question is whether this Court's holding in *Massachusetts* v. *EPA* should be reconsidered or overruled in light of the preposterous consequences that arise from treating carbon dioxide as an "air pollutant" under the Clean Air Act.

The Court should grant certiorari on each of the three questions because of their "unusual importance." *Massachusetts*, 549 U.S. at 506; see also Pet. App. 539a (opinion of Sentelle, Rogers, and Tatel, JJ., concurring in the denials of rehearing en banc) ("The underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance."). No circuit split can develop because the D.C. Circuit has exclusive jurisdiction to review nationally applicable final actions of the EPA Administrator, so there is no point in waiting for further percolation. See 42 U.S.C. § 7607(b)(1). Finally, the jurisdictional objections that the D.C. Circuit raised to the first of these three issues are worthy of review in their own right, and in all events should not deter this Court from reviewing that question in light of its unusual importance. See *Massachusetts*, 549 U.S. at 505-06 (noting the Court's decision to grant certiorari "notwithstanding the serious character" of the Article III standing objections raised in the courts below).

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE LEGALITY OF EPA'S TAILORING RULE

EPA's Tailoring Rule represents one of the most audacious power-grabs ever attempted by an administrative agency. 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 approximately *400 to 1000 times* higher than the levels specified in the statute. Pet. App. 136a-142a. If that were not enough, EPA's Tailoring Rule departs from the mass-based approach to significance levels established in the text of the Act; it measures the threshold quantities of greenhouse-gas emissions according to an agency-created CO_2e metric rather than tons. *Id*. at 132a-133a, 171a-177a. This flouts the rule-based thresholds that the Clean Air Act established to constrain EPA's discretion. Under the statute, a "major stationary source" is to be determined by the mass of the emitted pollutants, not their environmental impact or heat-trapping potential.

Agencies do not have the power to countermand unambiguous statutory language in this manner. The entire point of legislating by rule (rather than by standard) is to constrain agency discretion, even though these constraints will on occasion produce suboptimal policy outcomes. See, *e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 539 (1988). Rules also serve to allocate power between the legislatures that enact

the laws and the agencies and courts that implement the laws. Open-ended standards delegate power to institutions that implement the law (such as agencies and courts), whereas statutory rules such as the numerical permitting thresholds in the Clean Air Act withhold discretion from those 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 compromises necessary to produce statutes such as the Clean Air Act. 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").

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, as 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 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 CO_2e and 100,000 tpy CO_2e 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.

The D.C. Circuit was wrong to think that it could avoid passing upon these problems by dismissing petitioners' challenges to the Tailoring Rule for lack of standing. Petitioners maintain that vacating the Tailoring Rule will reduce their regulatory burden, on balance, given EPA's admission that regulation of stationary-source greenhouse-gas emissions would be absurd and impossible absent the Tailoring Rule. EPA counters that vacating the Tailoring Rule will actually increase petitioners' regulatory burden. But the Tailoring Rule injures petitioners no matter which side is right about its ultimate regulatory impact. Vacating the Tailoring Rule will either redress the injury of onerous regulation, see *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 561-62 (1992), or else it will redress the environmental injury recognized in *Massachusetts*, 549 U.S. at 521-23 & n.18. Petitioners have standing coming and going, so the D.C. Circuit should not have ducked its obligation to rule on the merits of EPA's Tailoring Rule. Cf. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); Gerald Gunther, *The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

The D.C. Circuit refused to consider petitioners' *Massachusetts*-based counterargument on the ground that it first appeared in a reply brief. See Pet. App. 95a-101a. Petitioners, however, had no obligation to respond in their opening brief to an argument EPA had not yet made—namely, that vacating the Tailoring Rule would increase rather than decrease the regulatory burdens pertaining to stationary-source greenhouse-gas emissions. After EPA injected this new argument into the case, petitioners used their reply brief to do exactly what the name suggests: They *replied* that even if EPA were correct about the ultimate regulatory impact, petitioners would still have standing under *Massachusetts*. By combining dubious analyses of standing and forfeiture, the D.C. Circuit exhibited the passive virtues at their worst.

The D.C. Circuit also faulted petitioners for "fail[ing] to cite any record evidence to suggest that they are adversely affected by global climate change." Pet. App. 100a. But it is not necessary for

the States to buttress their claim of injury with empirical proof when EPA does not deny that greenhouse-gas emissions contribute to climate change, and that climate change injures the States. EPA's Endangerment Finding is rife with findings of how greenhouse-gas emissions injure the States. Indeed, EPA cannot deny the States' claim of environmental injury without confessing that the Endangerment Finding must be vacated. And if this Court believes that evidence from the record is needed to establish this injury it is easily found in the Endangerment Finding.[1]

In all events, a State need not provide empirical proof of the harms from global climate change after *Massachusetts*, which holds as matter of Article III

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[1] See, *e.g.*, 74 Fed. Reg. at 66,525 (warning of increased regional ozone pollution across the United States); *id.* at 66,532 (estimating that forest productivity will decrease "in the Interior West, the Southwest, eastern portions of the Southeast, and Alaska," and fire dangers and insect problems will increase in other regions); *id.* (forecasting that the "shrinking snowpack due to warming" presents "very serious risks to major population regions, such as California, that rely on snowmelt-dominated watersheds for their water supply"); *id.* ("Warmer temperatures and decreasing precipitation in other parts of the country, such as the Southwest, can sustain and amplify drought impacts."); *id.* (warning of increased salinization from intrusion of salt water that will negatively affect fresh-water supplies in coastal areas); *id.* at 66,533 (predicting lower water levels in the Great Lakes and major river systems that will "exacerbate challenges relating to water quality, navigation, recreation, hydropower generation, water transfers, and bi-national relationships"); *id.* (predicting coastal flooding, shoreline erosion, and progressive inundation and wetland loss for coastal States and communities).

standing law that "the harms associated with climate change are serious and well regarded," and cites with approval a National Research Council Report that "identifies a number of environmental changes that have already inflicted significant harms" including rising sea levels. *Massachusetts*, 549 U.S. at 521. Just as the prospect of losses to Massachusetts's coastline caused by global warming was sufficient to afford Massachusetts standing, the prospect of such losses occurring in Texas is equally sufficient to afford standing. And having accepted as true the global-warming theory and rising sea levels as a consequence, one need only note that Texas too has abundant coastline at risk.

The D.C. Circuit noted that the Commonwealth of Massachusetts had submitted "unchallenged affidavits and declarations" in that case to prove Article III injury. Pet. App. 100a. But those affidavits and declarations were necessary only because the EPA in that case denied that its failure to regulate greenhouse-gas emissions harmed the State petitioners. See Brief for the Federal Respondent, *Massachusetts* v. *EPA*, No. 05-1120, 2006 WL 3043970, at *7 (U.S. Oct. 24, 2006) ("Petitioners have failed to carry their burden of establishing that they will be harmed by the specific agency action they challenge—EPA's decision not to regulate greenhouse gas emissions from new motor vehicles within the United States."). In this case EPA *acknowledges* that the failure to limit stationary-source greenhouse-gas emissions injures the States by contributing to climate change. The Commonwealth of Massachusetts obviously did not have the benefit of this Court's decision in

Massachusetts when it filed its petition for review. *Massachusetts* now establishes that States have Article III standing to challenge EPA's failure to sufficiently regulate greenhouse-gas emissions; so long as *Massachusetts*'s standing analysis remains good law, Texas has as much of a right to challenge the legality of the Tailoring Rule as Massachusetts would have.[2] That Texas's motivations for challenging the Tailoring Rule may differ from petitioners' motivations in *Massachusetts* is immaterial to the existence of an injury in fact, or to any other aspect of Article III standing.

The D.C. Circuit further erred by rejecting the theory of standing petitioners urged in their opening and reply briefs. Petitioners argued that EPA's regulation of stationary-source greenhouse-gas emissions imposed administrative and regulatory burdens on the States, and that vacatur of the Tailoring Rule would redress this injury by forcing EPA to choose between the absurd result of requiring permits for every building that emits more than 100 (or 250) tpy of carbon dioxide, and abandoning or postponing its plans to regulate stationary-source greenhouse-gas emissions under the PSD and Title V programs. The D.C. Circuit deemed this argument "speculative" because there is no guarantee that a judicial decision vacating the Tailoring Rule would alleviate rather than aggravate the regulatory

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[2] The States are not challenging *Massachusetts*'s analysis of Article III standing; they are asking this Court to reconsider only *Massachusetts*'s holding that carbon dioxide and other greenhouse gases unambiguously qualify as "air pollutant[s]" under the Clean Air Act. See *infra* at 31-33.

injuries imposed on the States, and insisted that the States must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." See Pet. App. 97a (quoting *Lujan*, 504 U.S. at 561).

The D.C. Circuit's analysis of redressability is not consistent with *Massachusetts*. *Massachusetts* held that when private litigants challenge final actions of the EPA Administrator under 42 U.S.C. § 7607(b)(1), they are asserting a "procedural right to protect [their] concrete interests," and they therefore need only show "some possibility" that judicial relief will redress the alleged injury:

> [A] litigant must demonstrate that * * * a favorable decision will redress that injury. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561. However, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests," *id.*, at 572, n.7—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—"can assert that right without meeting all the normal standards for redressability and immediacy," *ibid.* When a litigant is vested with a procedural right, that litigant has standing *if there is some possibility that* the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.

Massachussetts, 549 U.S. at 517-18 (emphasis added). Petitioners are challenging the Tailoring Rule under the same statutory provision at issue in *Massachusetts*: 42 U.S.C. § 7607(b)(1). They need only show "some possibility," not a "likelihood," that

a decision vacating the Tailoring Rule will alleviate the administrative and regulatory burdens imposed by EPA.

The D.C. Circuit's analysis of standing is troubling for an additional reason: It allows EPA to escape judicial review of its stationary-source regulations by subdividing them into separate rules. Had EPA promulgated the Endangerment Finding, the Tailpipe Rule, the Timing Rule, and the Tailoring Rule as part of a single rulemaking proceeding, the courts would undoubtedly have jurisdiction to rule on EPA's decision to depart from the unambiguous permitting requirements of the Clean Air Act. But EPA thinks it can insulate the Tailoring Rule from judicial review by promulgating it separately from the other parts of its stationary-source regulatory regime, and then claiming that the Tailoring Rule only alleviates the regulatory burdens on petitioners and therefore imposes no Article III injury.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER CONGRESS HAS DELEGATED TO EPA THE AUTHORITY TO REGULATE GREENHOUSE-GAS EMISSIONS FROM STATIONARY SOURCES, GIVEN THE ABSURDLY LOW PERMITTING THRESHOLDS THAT THE CLEAN AIR ACT WOULD APPLY TO CARBON DIOXIDE EMISSIONS

The Court should also grant certiorari to decide whether EPA has statutory authority to regulate greenhouse-gas emissions from stationary sources, when the unambiguous statutory requirements of the PSD and Title V programs would compel results that EPA deems absurd. 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 carbon dioxide and other greenhouse gases as "air pollutant[s]" under those programs. And the Congress that enacted the 1990 Clean Air Act Amendments rejected several legislative proposals to regulate greenhouse-gas emissions from stationary sources. See, *e.g.*, H.R. 5966, 101st Cong. (1990); S. 1224, 101st Cong. (1989).

FDA v. *Brown & Williamson*, 529 U.S. at 159-61, refused to extend *Chevron* deference to the FDA's decision to assert jurisdiction over tobacco products—even though those 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, this Court concluded that Congress could not have delegated to FDA the power to decide whether to regulate tobacco products. *Brown & Williamson* controls here and compels the conclusion that EPA lacks authority to regulate greenhouse-gas emissions from stationary sources.

Massachusetts 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 pollutant[s]." 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). *Massachussetts*, 549 U.S. 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.

There are several ways for this Court to hold that stationary-source greenhouse-gas emissions fall outside EPA's regulatory authority. One approach is to hold that EPA's authority to regulate "air pollutant[s]" under the PSD and Title V programs extends only to the pollutants for which EPA has established NAAQS under 42 U.S.C. § 7407. See *supra* at 11. Everyone in this case acknowledges that the term "air pollutant" requires *some* limiting construction; not even EPA contends that the PSD and Title V permitting requirements apply to "all airborne compounds of whatever stripe." *Massachusetts*, 549 U.S. at 529. Yet once it is acknowledged that only a subset of "air pollutant[s]" are subject to regulation under PSD and Title V, an agency cannot include carbon dioxide within the scope of these regulated air pollutants without running afoul of *Brown & Williamson*.

Another approach is to remand the Tailpipe Rule on account of EPA's failure to consider how its decision to regulate *mobile-source* greenhouse-gas emissions would trigger an obligation to regulate

greenhouse-gas emissions from *stationary sources* under EPA's construction of the Clean Air Act.

However the Court decides to resolve these issues, the question whether EPA has statutory authority to regulate *stationary-source* greenhouse-gas emissions in light of the 100/250 tpy permitting thresholds is appropriate for this Court's review.

III. THIS COURT SHOULD GRANT CERTIORARI TO RECONSIDER OR OVERRULE *MASSACHUSETTS*'S HOLDING IN LIGHT OF THE ABSURDITY OF APPLYING THE STATUTORY PERMITTING REQUIREMENTS TO CARBON DIOXIDE EMISSIONS

Massachusetts never considered the implications of its holding for stationary-source greenhouse-gas emissions. While it recognized that EPA regulation of motor-vehicle greenhouse-gas emissions "would lead to no * * * extreme measures," it did not acknowledge or consider the absurdity of applying the Clean Air Act's 100/250 tpy permitting thresholds to carbon dioxide emissions from *stationary* sources. Petitioners respectfully request that this Court grant certiorari to reconsider *Massachusetts*'s holding that carbon dioxide and other greenhouse gases unambiguously qualify as "air pollutant[s]" within the meaning of the Act.

Even EPA recognizes that the term "air pollutant" cannot possibly extend to "all airborne compounds of whatever stripe," nor can it extend to all "physical [and] chemical * * * substance[s] which [are] emitted into * * * the ambient air." EPA insists that the term "air pollutant" extends only to "physical, chemical [or] biological" substances *subject to regulation under the Clean Air Act*—even though this limiting construction finds no support from this

Court's decision in *Massachusetts*, which equated the term "air pollutant" with "all airborne compounds of whatever stripe," and further insisted that this construction of "air pollutant" was *compelled* and could not be narrowed by EPA. See *Massachusetts*, 549 U.S. at 529; see also *id.* at 558 n.2 (Scalia, J., dissenting).

The problems with *Massachusetts*'s interpretation of "air pollutant" are made painfully apparent by this case. With carbon dioxide as an "air pollutant," every building that emits more than 100 or 250 tpy of carbon dioxide becomes subject to permitting requirements, a result that boosts the number of permits required from 15,000 to more than 6 million, increases annual permitting costs from $12 million to $1.5 billion, and raises the number of man-hours required to administer these programs from 151,000 to 19,700,000. EPA deems these results so absurd that it simply refuses to apply the Clean Air Act as written. See Tailoring Rule, Pet. App. 108a, 293a-297a. EPA also does not agree with *Massachusetts'*s all-encompassing definition of "air pollutant" because it refused to deem stationary-source greenhouse-gas emissions "air pollutant[s]" under the statute until after it had promulgated its Endangerment Finding and the Tailpipe Rule. See Timing Rule, 75 Fed. Reg. 17,004.

Stare decisis is "not an inexorable command," see *Payne* v. *Tennessee*, 501 U.S. 808, 827-28 (1991), and this Court has not hesitated to reconsider or overrule cases that have proven "unworkable" or "legitimately vulnerable to serious reconsideration," *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986). *Massachusetts*'s holding that carbon dioxide "unambiguous[ly]"

qualifies as an "air pollutant" under the Clean Air Act should be reconsidered in light of the preposterous results that are produced under the PSD and Title V programs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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