

Nos. 12-1146, 12-1248, 12-1254,
12-1268, 12-1269, and 12-1272

In The
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**On Writs Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

**BRIEF OF THE INSTITUTE FOR POLICY
INTEGRITY AT NEW YORK UNIVERSITY
SCHOOL OF LAW AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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[Additional Captions Listed On Inside Cover]

AMERICAN CHEMISTRY COUNCIL, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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ENERGY-INTENSIVE MANUFACTURERS WORKING
GROUP ON GREENHOUSE GAS REGULATION, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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STATE OF TEXAS, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

—————◆—————

CHAMBER OF COMMERCE
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

QUESTION PRESENTED

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

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INTEREST OF THE AMICUS CURIAE¹

The Institute for Policy Integrity at New York University School of Law² (“Policy Integrity”) is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity is a collaborative effort of faculty at New York University School of Law; a full-time staff of attorneys, economists, and policy experts; law students; and a Board of Advisors composed of leaders in public policy, law, and government.

Policy Integrity and its directors have produced extensive scholarship on the legality and economics of regulating greenhouse gas pollution under the Clean Air Act. An area of special concern for Policy Integrity is ensuring that federal environmental regulations are as efficient and effective as possible, within statutory constraints. The question presented, above, directly bears on these issues. As such, Policy Integrity has a significant interest in the outcome of this case—particularly in protecting long-standing EPA interpretations of the Clean Air Act’s carefully balanced structure against the incongruous readings offered by petitioners.

¹ The parties have submitted letters to the Clerk granting blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

² No part of this brief purports to present New York University School of Law’s views, if any.

SUMMARY OF THE ARGUMENT

Petitioners' various readings of the Prevention of Significant Deterioration ("PSD") program would produce incongruous outcomes and would upset EPA's long-standing interpretation of the Clean Air Act's carefully balanced structure.

First, decades of regulatory history and statutory amendments confirm that Congress intended PSD's trigger and its best available control technology ("BACT") requirements to cover all regulated pollutants, not just "criteria" or local pollutants. For over thirty years—through five rulemakings under five different presidential administrations of both parties—the Environmental Protection Agency ("EPA") has consistently interpreted PSD's permitting structure to apply to all regulated pollutants, including non-criteria pollutants like fluorides, as well as pollutants like ozone-depleting chemicals that have predominantly global air quality effects. Since 1980, industry groups have repeatedly tried to persuade EPA to restrict "any air pollutant" to only certain air pollutants; each time, EPA rejected those narrower interpretations. This Court should provide additional deference to EPA's longstanding consistent interpretation of the scope of the PSD program, both because the duration of the interpretation, and because the Clean Air Act's preclusion of review provision, Section 307(b)(1), reflect Congress's intent to promote stability in the Act's regulatory programs.

Congress also directly weighed in on the scope of the permitting provisions. In 1990, after a decade of

EPA's broad interpretation of "any air pollutant," Congress amended the Clean Air Act and selectively exempted only hazardous air pollutants from the PSD program. Because Congress did not exempt any other non-criteria or non-local pollutant from the PSD program, the 1990 amendments confirm that Congress agreed with EPA's interpretation of "any air pollutant."

Second, petitioners' various interpretations of "any air pollutant" would upset the Act's carefully crafted structure, in which PSD complements Section 111 in balancing the treatment of new, modified, and existing sources. The Act embodies a compromise between the regulation of new and modified sources, on the one hand, and the treatment of existing sources, on the other. Existing sources receive temporary transition relief under statutory provisions like PSD and Section 111, but once they undertake "any physical change" that "increases the amount of any air pollutant emitted," these modifying sources must come into compliance. *See* 42 U.S.C. § 7411(a)(4). EPA's interpretation of "any air pollutant" is necessary to maintain the robust framework that Congress intended for transitioning grandfathered sources into regulatory programs as they undertake changes that increase emissions. Petitioners' narrow understanding of the PSD program would interfere with that aim and could exacerbate the negative effects of grandfathering.

Petitioners' readings would also force EPA to adopt incompatible interpretations of the single statutory definition of "modification" shared by PSD and Section 111, preventing EPA from using PSD as the complement to Section 111 that Congress

intended. While Section 111 takes a measured, one-broad-category-at-a-time approach, PSD offers a more individualized and timely source-by-source approach. Applying PSD to greenhouse gases provides coverage for dangerous and controllable emissions from new and modified stationary sources until such time as Section 111 performance standards can be developed for each individual greenhouse gas source category. Petitioners' interpretations would upset that carefully designed statutory structure.

Third, the statutory language confirms that restricting the trigger for PSD permitting to only criteria or local pollutants is incorrect. The relevant inquiry is whether a source is located in an "area to which this part applies." A plain reading makes clear that this inquiry is purely geographic and does not depend on which pollutants the source emits. Yet some petitioners' interpretations could cause certain greenhouse gas sources to magically move from an "area to which this part" does not apply into an "area to which this part applies" without changing physical locations, just by virtue of beginning to emit other, non-greenhouse gas pollutants. Problematically, under such interpretations some sources would not fit into any of the three categories of areas that Congress created to classify all regions of the nation; petitioners would force such sources into a "no man's land" that is wholly at odds with the statute's structure.

Finally, petitioners' interpretations give rise to additional absurdities. In particular, by restricting the PSD program to only criteria or local pollutants, petitioners would alter the regulatory status of

multiple other non-criteria and global pollutants besides greenhouse gases that are already regulated under PSD. Such pollutants would be subject to PSD if emitted by facilities constructed *before* EPA began regulating greenhouse gases, but would be exempt if emitted by facilities built *after* EPA issued greenhouse gas regulations. But the timing of greenhouse gas regulations should be irrelevant to determining whether other pollutants are subject to PSD permitting. Moreover, facilities that already obtained a permit and expended resources to comply with PSD's requirements before EPA found that greenhouse gases endanger public welfare would be disadvantaged relative to future competitors that are exempted from the requirement under petitioners' approach. Such an interpretation creates instability and undermines the predictability of the regulatory regime.

ARGUMENT

I. MULTIPLE PRESIDENTIAL ADMINISTRATIONS OVER SEVERAL DECADES HAVE CONSISTENTLY APPLIED THE PREVENTION OF SIGNIFICANT DETERIORATION PERMITTING SCHEME TO ALL POLLUTANTS REGULATED UNDER THE CLEAN AIR ACT

For over three decades, under both Republican and Democratic presidential administrations, EPA has interpreted the triggering mechanism of the permitting scheme for the Prevention of Significant Deterioration (“PSD”) program to apply to all pollutants regulated under the Clean Air Act (the “Act”). Contrary to petitioners’ assertions that EPA’s broad interpretation had no “significant practical impact” until the Greenhouse Gas Tailoring Rule was proposed, *e.g.*, Am. Chemistry Council (“ACC”) Br. 8-11, EPA has received public comments over multiple decades seeking to limit the scope of the pollutants covered by the PSD program. Each time, EPA has affirmed that the statutory language mandates a broad interpretation of the phrase “any air pollutant” that includes all regulated pollutants.

A. For over Three Decades, EPA Has Consistently Interpreted the PSD Program to Apply to All Pollutants Regulated Under the Clean Air Act

Since 1980, under five presidential administrations—both Republican and Democratic—EPA has interpreted the PSD program to apply to all pollutants regulated under the Clean Air Act. Because EPA has for decades consistently interpreted PSD permitting to apply to all regulated pollutants, if this Court does

not conclude that the plain statutory language alone compels EPA's interpretation, then this Court should afford additional deference to the agency's consistent interpretation of the Act. This Court has repeatedly recognized the importance of "accord[ing] particular deference to an agency interpretation of longstanding duration." *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)) (internal quotation omitted); see also *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009) (explaining that EPA's consistent interpretation of a statutory provision for over three decades, "[w]hile not conclusive, . . . surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion"). EPA's thirty-year history of consistent interpretation of PSD requirements similarly warrants "particular deference."

As noted in respondents' briefs, when Congress created the PSD program in the 1977 Clean Air Act Amendments, it specifically considered the question of which pollutants can trigger PSD permitting requirements. In particular, the House passed a version of the bill that applied the PSD permitting requirements only to major sources that emitted sufficient quantities of so-called "criteria" pollutants—i.e., pollutants subject to National Ambient Air Quality Standards ("NAAQS"). However, in conference, Congress adopted the Senate's broader version of the program that applied the PSD permitting requirements to major sources emitting "any air pollutant" under the Act. See *Env'tl. Org. Resp'ts Br.* 23-25; *Fed. Resp'ts Br.* 53-54; *State Resp'ts Br.* 17. The D.C. Circuit then weighed in on the scope of the PSD program, holding—despite

industry arguments to the contrary—that all of the PSD program’s major substantive provisions apply “without qualification . . . with regard to each pollutant subject to regulation under the Act.” *Ala. Power Co. v. Costle*, 636 F.2d 323, 405-06 (D.C. Cir. 1980).

Following the decision in *Alabama Power*, in 1980, the EPA under President Carter interpreted the PSD permitting scheme for both new and modified sources to apply to all regulated pollutants. See 45 Fed. Reg. 52,676, 52,681 (Aug. 7, 1980) (“Any net significant emissions increase of any pollutant subject to regulation under the Act (not just those pollutants for which the source is major) now qualifies as a PSD modification.”).³ The 1980 rule applied the PSD program to a number of pollutants for which NAAQS had not been promulgated, including asbestos, beryllium, mercury, vinyl chloride, fluorides, sulfuric acid, total reduced sulfur/reduced sulfur, hydrogen sulfide, methyl mercaptan, dimethyl sulfide, dimethyl disulfide, carbon disulfide, and carbonyl sulfide. *Id.* at 52,708-09.

The EPA under President George H.W. Bush reiterated that PSD review applies to all pollutants regulated under the Act. In discussing which pollution increases count as “modifications” that trigger PSD permitting requirements, EPA explained

³ EPA had promulgated an even earlier regulation clarifying that the Best Available Control Technology (“BACT”) requirements of the PSD program apply to all pollutants regulated under the Act, and it has consistently applied this interpretation for over 35 years. 43 Fed. Reg. 26,388, 26,397 (June 19, 1978); 40 C.F.R. §§ 52.21(b)(50) & (j).

that it had always “equated ‘any air pollutant’ with pollutants ‘subject to regulation under (the Act)’ as that term is used in section 165(a)(3),” in contrast to the New Source Performance Standard (“NSPS”) program where it had “consistently treated ‘any air pollutant’ as referring only to those pollutants for which a performance standard has been promulgated under Section 111 for the specific source category in question.” 54 Fed. Reg. 27,286, 27,297 (June 28, 1989).

Likewise, the EPA under President Clinton affirmed that, for both new and modified sources, PSD permitting applies to all pollutants regulated under the Act, not just NAAQS pollutants, noting that “[f]or pollutants for which no NAAQS have been promulgated . . . the PSD requirements apply everywhere as long as an area is designated as attainment or unclassifiable for at least one pollutant for which NAAQS do exist.” 58 Fed. Reg. 31,622, 31,623 n.3 (June 3, 1993). When the Clinton EPA chose to regulate organic gases from municipal solid waste landfills⁴ under Section 111, it explained that, as “a consequence,” “PSD rules now apply to all subject stationary sources which have increases in landfill gas above the significance level.” 61 Fed. Reg. 9905, 9912 (Mar. 12, 1996).⁵

⁴ Landfill gas is not a criteria pollutant, but is instead a mixture of primarily organic gases—including methane and non-methane compounds—released from landfills during the decomposition process. *See* 61 Fed. Reg. at 9906.

⁵ EPA actively considered regulating methane (a greenhouse gas) under the PSD program in the landfill gas rule. Though it eventually decided to directly regulate only the non-methane organic compounds in the landfill gas, “methane reductions were quantified and considered in selecting the stringency level

In response to a commenter's request to clarify the scope of pollutants covered by the PSD program, President George W. Bush's EPA defined a new term, "regulated NSR [New Source Review] pollutant," which it used to determine the scope of pollutants that would trigger PSD requirements for both new sources and major modifications. 67 Fed. Reg. 80,186, 80,189, 80,240 (Dec. 31, 2002). EPA interpreted that term broadly to encompass a list of pollutants, including ozone-depleting substances⁶ and "[a]ny pollutant that otherwise is subject to regulation under the Act."⁷ *Id.* at 80,278.

Currently, the PSD regulations explicitly apply to numerous non-NAAQS pollutants aside from greenhouse gases, including: fluorides; sulfuric acid mist; hydrogen sulfide; total reduced sulfur; reduced sulfur compounds; municipal waste combustor

of the rule," as well as monetized as an ancillary benefit. Emissions Standards Division, EPA, Air Emissions from Municipal Solid Waste Landfills 1-27 (1995) (cited as Background Information Document in final rule at 61 Fed. Reg. at 9905), *available at* <http://epa.gov/ttn/atw/landfill/bidfl.pdf>. EPA also explained that it planned to "reduce emissions of methane and other greenhouse gases" according to the "directives contained in the [U.S. Climate Change] Action Plan" released in October 1993. *Id.* Thus, industry groups were clearly on notice, at least by 1996, that regulating greenhouse gases under the PSD program was a possibility.

⁶ Ozone-depleting substances are described in the definition of "regulated NSR pollutant" as "[a]ny Class I or II substance subject to a standard promulgated under or established by title VI of the Act," 40 C.F.R. § 52.21(b)(50)(iii); 67 Fed. Reg. at 80,278; *see* 53 Fed. Reg. 30,566 (Aug. 12, 1988) (imposing standards on ozone-depleting substances).

⁷ Except hazardous air pollutants, which had been excluded from PSD review by Congress in the Clean Air Act Amendments of 1990, as discussed further below.

organics, metals, and acid gases; municipal solid waste landfill emissions; and ozone-depleting chemicals. 40 C.F.R. §§ 51.166(b)(23)(i), 52.21(b)(50). These pollutants have effects at a variety of geographic scales. Most relevant to the application of PSD to greenhouse gases, the ozone-depleting chemicals covered by the PSD program also primarily affect air quality on a global scale. 53 Fed. Reg. at 30,566.

Five of the non-NAAQS pollutants (fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, and reduced sulfur compounds) have been covered since EPA's 1980 rule determined that PSD applied to all regulated pollutants, not just criteria pollutants. 45 Fed. Reg. at 52,709. EPA regulated ozone-depleting pollutants in 1988, which is when they became covered by the PSD program. *See* 53 Fed. Reg. at 30,566; EPA, Draft New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting, at A-18, A-20–21 tbl.A-4 (1990), *available at* <http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf>. Two other sets of pollutants became covered by PSD when EPA promulgated rules regulating them under Section 111. Municipal waste combustor organics, metals, and acid gases were added in 1991, and municipal solid waste landfill emissions were added in 1996. 56 Fed. Reg. 5488, 5506 (Feb. 11, 1991); 61 Fed. Reg. at 9918.

Due to EPA's consistent interpretation over decades that PSD permitting can be triggered by all pollutants regulated under the Act, this Court should afford additional deference to the agency's interpretation.

B. Over More than Three Decades, Industry Commenters and Permittees Have Repeatedly Encouraged EPA to Narrow the Scope of the Pollutants that Trigger PSD Review, but EPA Has Consistently Found that the Statute Mandates a Broad Interpretation

For decades, EPA has received public comments requesting that it limit the scope of pollutants that trigger the PSD permitting requirements, and it has consistently found that the statute prohibits it from doing so. Contrary to petitioners' assertion that the scope of pollutants covered by the PSD program was inconsequential until the promulgation of the Greenhouse Gas Tailoring Rule, ACC Br. 8-11, industry groups and EPA have repeatedly engaged with this question for over thirty years. EPA has consistently found that the statute requires it to apply PSD permits to sources exceeding emissions thresholds for any pollutant regulated under the Act.

When extending the notice-and-comment period for its 1980 regulations on PSD, following the final *Alabama Power* decision, EPA explicitly requested comment on "whether the Act supports the application of PSD review to any source or modification which would emit only non-criteria (non-NAAQS) pollutants in major amounts. For example, should a major source that would emit only hydrogen sulfide be subject to PSD?" 45 Fed. Reg. 6802, 6803 (Jan. 30, 1980). In response, EPA received numerous comments requesting that it limit the pollutants covered by the PSD program to only criteria pollutants.

Specifically, “[f]ourteen commenters argued” that “EPA should not apply PSD review to noncriteria pollutants, because the lack of NAAQS and increments for noncriteria pollutants indicates that Congress did not consider these pollutants to be able to cause significant deterioration and felt that the extent of harm by these pollutants has yet to be demonstrated.” 45 Fed. Reg. at 52,713. In addition, “[t]wo commenters urged” that “if EPA decides to regulate . . . sources of noncriteria pollutants, it should do so . . . only if section 111 or 112 (NSPS and [National Emission Standards for Hazardous Air Pollutants (‘NESHAP’)], respectively) has been made applicable after appropriate rulemaking to such sources of noncriteria pollutants.” *Id.*

EPA rejected these arguments, finding that the statute prohibited limiting the scope of PSD review to only NAAQS pollutants. The agency explained that “section 169(1) refers to sources with the potential to emit ‘any’ pollutant above certain amounts. Moreover, section 165(a)(4) states that BACT must apply to ‘each pollutant subject to regulation under this Act’ emitted by a source. Neither of these provisions is limited to criteria pollutants.” *Id.* With respect to whether PSD review for non-criteria pollutants should be limited to pollutants regulated under Sections 111 or 112, EPA found that “[t]he difficulty with this approach is that the Act requires PSD review, regardless of whether another rule already applies to the source except in the case of nonattainment pollutants.” *Id.* Moreover, “the suggested approach could allow an unacceptably large number of sources to escape review, since many sources may not have an applicable . . . NSPS or NESHAP limit.” *Id.* From the very early days of

implementing the relevant statutory provisions, EPA engaged with comments on whether the scope of PSD review should be limited to NAAQS pollutants and found that the statute prohibited such an approach.

More recently, during the comment period for the 1989 rule on New Source Review (“NSR”),⁸ commenters argued that the goals of protecting public health and welfare from pollutants covered by the NSPS and NESHAP programs (and not by NAAQS) “should be pursued exclusively through the NSPS and NESHAP programs, not through NSR.” 54 Fed. Reg. at 27,297. In response, EPA explained that, under the statute, the PSD program serves a special role that requires the agency to consider all air pollutants in administering the program. In particular, “the PSD program addresses all major sources and is designed ‘to protect public health and welfare from any actual or potential adverse effect’ from any air pollutant (Section 160(1)).” *Id.* The program also “possesses an inherent speed and flexibility in its ability to protect public health and welfare” that other Clean Air Act “programs lack.” *Id.* The PSD and nonattainment NSR programs

provide timely and focused responses to health and welfare issues arising from specific sources. These responses complement the type of long-range and general studies performed pursuant to Sections 111 and 112. The NSR programs also address all pollutants from each source in every

⁸ New Source Review encompasses both the PSD program and the Nonattainment New Source Review program, which applies to areas that do not meet the NAAQS for a particular criteria pollutant. 42 U.S.C. §§ 7501-7515.

source category, while the NSPS and NESHAP programs do not.

Id. Thus, under the George H.W. Bush administration, EPA continued to maintain that PSD's statutory structure and purpose require a broad interpretation of "any air pollutant" to cover all pollutants regulated under the Act.

In other instances, permittees asked for clarification regarding whether PSD regulations apply to non-criteria pollutants. For example, in 1995, Dow Chemicals inquired whether a modification that increased emissions of fluorides would trigger PSD requirements even without an increase in criteria pollutants. Letter from John S. Seitz, Dir. of Office of Air Quality Planning and Standards, to Robert Kalish, Env'tl. Servs. Dep't of the Dow Chemical Co. (May 4, 1995), *available at* <http://www.epa.gov/region07/air/nsr/nsrmemos/noncrit.pdf>. EPA responded that this increase in the emissions of fluorides would, indeed, result in PSD applicability. *Id.*

C. The Argument for Deferring to EPA's Longstanding Interpretation Is Strengthened by the Preclusion of Review Provision of Section 307(b)(1), Which Reflects a Congressional Intent to Promote the Stability of the Clean Air Act's Regulatory Programs

Industry groups have had notice since at least 1980 that the scope of the PSD permitting provision covers all pollutants regulated under the Act. Section 307(b)(1) requires any legal challenge to nationally applicable regulation under the Act to be "filed within sixty days" from the promulgation date,

unless it is “based solely on grounds arising after” promulgation. 42 U.S.C. § 7607(b)(1). When revising Section 307, Congress expressed “concern” that “the statutory deadline (and the underlying policies of expedition and finality) may be circumvented,” and it consequently “reaffirm[ed] its intent to strictly limit” challenges “to those which are actually filed within” the sixty-day time limit. H.R. Rep. No. 95-294, at 322 (1977). Courts addressing this provision have recognized that this requirement serves the purpose of promoting the stability of longstanding regulatory frameworks. *See, e.g., Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (holding a challenge to EPA’s “longstanding” policy was barred under Section 307(b)(1)); *Natural Res. Def. Council v. EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (same).

Before the D.C. Circuit, the government argued that section 307(b)(1) barred all of the petitioners’ claims. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012). This issue is a jurisdictional one. *See Med. Waste Inst. & Energy Recovery Council*, 645 F.3d at 427 (holding that Section 307(b)(1) is jurisdictional); *Natural Res. Def. Council*, 571 F.3d at 1265 (same). As a result, this Court can address it even though respondents did not present the argument in a cross petition or in defense of the judgment below. But even if this Court decides not to address this jurisdictional matter, because of the important policy of regulatory stability reflected in Section 307(b)(1), it should accord additional deference to EPA’s consistent decades-long interpretation of the PSD permitting framework, beyond the deference normally given to longstanding interpretations.

**D. Congress's Targeted Amendment of the
Statutory Provisions Governing PSD
Confirms EPA's Broad Interpretation of
the Program's Scope to Include All
Regulated Pollutants**

After a decade of EPA's consistent, broad interpretation of the scope of pollutants that can trigger the PSD program, Congress amended the Clean Air Act. Among other changes, the new law exempted from the PSD program any hazardous chemicals covered by the NESHAP program. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 112(b)(6), 104 Stat. 2399, 2537. This targeted exemption for hazardous air pollutants was the only change Congress made to the scope of the PSD program: with respect to all other non-NAAQS pollutants, Congress did not alter EPA's consistent interpretation of PSD's trigger and BACT requirements.

Congress had a full decade between the promulgation of EPA's 1980 interpretation applying the PSD program to all regulated pollutants and the 1990 amendments to the Clean Air Act. After a long period in which it could observe the effects of EPA's interpretations, Congress chose to exempt only hazardous air pollutants from PSD coverage. After the initial enactment of a provision, "subsequent acts" of Congress "can shape or focus" the meaning of the statute. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Petitioners have turned *Brown & Williamson* on its head, arguing that Congress's failure to pass a comprehensive legislative scheme for greenhouse gases precludes EPA's inclusion of them in the PSD

program. However, *Brown & Williamson* actually supports respondents' position. In that case, this Court found that the "consistency" of the agency's longstanding position "bolster[ed] the conclusion" that Congress understood the agency's authority when it later legislated in that area. *Id.* at 157. This Court has further explained that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013) (quotation omitted). Congress's decision to exclude hazardous air pollutants—but not other non-criteria pollutants or pollutants with global effects—from the scope of PSD permitting indicates that Congress agreed with EPA's longstanding interpretation of the scope of the PSD's trigger and BACT requirements to include all regulated pollutants.

II. PETITIONERS' INTERPRETATIONS WOULD UPSET THE CLEAN AIR ACT'S CAREFULLY CRAFTED STRUCTURE, IN WHICH PSD COMPLEMENTS SECTION 111 IN BALANCING THE TREATMENT OF NEW, MODIFIED, AND EXISTING SOURCES

The Clean Air Act embodies a compromise between the regulation of new and modified sources, on the one hand, and the treatment of existing sources, on the other. Existing sources are given temporary transition relief under statutory provisions like PSD and Section 111, but once they undertake "any physical change" that "increases the

amount of any air pollutant emitted,” these modifying sources must come into compliance. *See* 42 U.S.C. § 7411(a)(4).⁹ EPA’s compatible interpretations of “any air pollutant” under both PSD and Section 111 are necessary to maintain the robust definition of “modification” that is essential to this statutory balance. Petitioners’ narrow interpretations of the PSD program would interfere with that aim and could exacerbate the negative effects of grandfathering.

The Clean Air Act further balances two different regulatory frameworks for new and modified stationary sources: a measured, one-broad-category-at-a-time approach under Section 111, and a more individualized and timely source-by-source approach under PSD. EPA’s interpretation of “any” and “each air pollutant” is necessary to maintain PSD as the complement to Section 111 that Congress intended for both new and modified sources. Again, petitioners’ interpretations would upset that carefully designed statutory structure.

A. EPA’s Interpretation of “Any Air Pollutant” Is Necessary to Achieve the Balance Congress Struck Between New and Modified Sources, on the One Hand, and Existing Sources, on the Other

When Congress designed the PSD program and other key elements of the 1977 amendments to the Clean Air Act, an overarching goal was to strike the

⁹ Both new and existing sources are, of course, subject to regulations under other provisions as well, such as through state implementation plans under Section 110 and for hazardous air emissions under Section 112. *See* 42 U.S.C. §§ 7410, 7412.

proper balance by promoting economic growth while still protecting the public welfare through enhanced air quality. *New York v. EPA*, 413 F.3d 3, 13 (D.C. Cir. 2005); *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 909 (7th Cir. 1990) [hereinafter *WEPCO*] (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 851 (1984) & H.R. Rep. No. 95-294, at 211 (1977)); *see also* 42 U.S.C. §§ 7470(1)-(3) (listing public welfare, enhanced air quality, and economic growth among the congressional purpose for the PSD program). To achieve this goal, Congress “carved out a significant difference between existing sources on the one hand and new or modified sources on the other.” *New York*, 413 F.3d at 13.

Under the PSD program, new and modified major stationary sources are subject to pre-construction permits and must install BACT for significant emissions of any regulated pollutant. 42 U.S.C. § 7475; *see also* 40 C.F.R. § 51.166(b)(23) (defining significance levels that exempt de minimis modifications). Notably, both new and modified sources are identified by their emission of “any air pollutant”: new sources include major emitters of “any air pollutant,” 42 U.S.C. § 7479(1); and modified sources—defined by reference to Section 111 of the statute—similarly include sources that significantly increase their emissions of “any air pollutant,” 42 U.S.C. § 7479(2)(C) (referencing § 7411(a)(4)).

By contrast, the PSD program does not regulate existing, unmodified sources. Congress determined that retrofitting existing plants would be much more expensive compared to integrating pollution controls into either new construction or planned upgrades. *WEPCO*, 893 F.2d at 901 (quoting H.R. Rep. No. 95-

294, at 185). Moreover, Congress predicted that most of the significant, existing polluters would retire and be replaced in the near future. See Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 Nw. U.L. Rev. 1677, 1682 nn.19-20 & 1684 n.31 (2007) (citing legislative history). In particular, Congress assumed many old plants only had “relatively short remaining useful lives.” H.R. Rep. No. 95-294, at 186; *accord*. S. Rep. No. 95-127, at 128 (1977) (additional views of Sen. Baker) (explaining that the 200 coal-fired power plants in the United States over the age of 20 years were becoming relatively expensive to continue operating, and that “[m]ost will be totally phased out of operation in the next 5 to 20 years”).

As a result, Congress thought that the cost of applying PSD permits to existing sources would be high, while the benefits would be limited, since most unmodified sources had only short remaining lives during which they could continue impairing air quality. Congress thus granted existing sources temporary transition relief, until they upgraded or else became obsolete and were replaced by new construction. *Ala. Power Co. v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979) (explaining the goal was to “minimize disruption” at existing sources “until ‘modifications’ of those facilities increased emissions”). Crucially, Congress did not intend to give existing sources “a perpetual immunity from all standards.” *Id.* at 400; *accord* *WEPCO*, 893 F.2d at 909 (“Congress did not permanently exempt existing plants . . .”). Rather, as the industrial stock expeditiously turned over, Congress anticipated that the PSD program would facilitate the steady

reduction of all air emissions. *See* 75 Fed. Reg. 31,514, 31,561 (June 3, 2010).

The mechanism to transition existing sources into the regulatory regime as they upgrade or make other modifications, therefore, is essential to the balance struck by Congress. To that end, the definition of “modification” must be given its intended meaning, requiring any existing stationary sources that significantly increase their emissions of “any air pollutant” to become subject to the PSD requirements. As the Seventh Circuit observed, “[a] too restrictive interpretation of ‘modification’ might upset the economic-environmental balance in unintended ways.” *WEPCO*, 893 F.2d at 909. EPA correctly interprets the phrase “any air pollutant” to include greenhouse gases for purposes of triggering PSD both for new sources and for modifying existing sources. This approach advances congressional intent by continuing the robust framework to transition existing sources into PSD’s regulatory regime as they undertake significant modifications.

B. Petitioners’ Narrow Interpretations of “Any Air Pollutant” Would Create Inconsistencies with Section 111 and Could Exacerbate the Undesirable Effects of Grandfathering

Like PSD, Section 111 also reflects a carefully drawn balance among new, modified, and existing source regulation. *See* 42 U.S.C. §§ 7411(a)-(d) (requiring new and modified sources to achieve performance standards consistent with the best, adequately demonstrated system of emissions reductions, but allowing some tailoring of existing source performance standards to “the remaining

useful life of the existing source”). Crucially, the PSD program expressly adopts Section 111(a)’s definition of “modification.” 42 U.S.C. § 7479(2)(C) (referencing § 7411(a)(4)). In other words, the two programs share a single statutory definition of the term that is essential to securing the Clean Air Act’s “economic-environmental balance.” *See WEPCO*, 893 F.2d at 909.

Petitioners all argue that the phrase “any air pollutant” under the PSD program should mean something less than *any* regulated air pollutant. *E.g.*, Coal. for Responsible Regulation Br. 16-25 (arguing PSD addresses only criteria pollutants); Util. Air Regulatory Grp. Br. 25-32 (arguing PSD addresses only local pollutants). Though petitioners focus almost exclusively on how PSD should regulate new sources of only *certain* air pollutants, the necessary implication of their readings is that PSD would also apply to modifications that increase only *certain* (not any) air pollutants. Otherwise, petitioners’ interpretations would produce the incongruous outcome in which greenhouse gas emissions from newly constructed sources would not initially trigger PSD requirements, but any subsequent modifications that caused any significant increase in greenhouse gas emissions would suddenly trigger PSD. Instead, petitioners implicitly must want to erase the word “any” from Section 111(a)’s definition of “modification.”

Yet erasing the word “any” from the definition of “modification” would undermine PSD’s congressionally designed role as a supplement to Section 111. In 1977, Congress concluded that Section 111 had not achieved the desired air quality

goals by itself, and so enacted the PSD program, “which aimed at giving added protection to air quality.” *See Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567 (2007). The Act clearly envisions the PSD program working in conjunction with Section 111. PSD permits must require compliance with Section 111 performance standards, 42 U.S.C. § 7475(a)(3)(C), and BACT must be at least as stringent as applicable performance standards, *see* 42 U.S.C. § 7479(3).

This Court has already determined it is “plain” that Section 111 “speaks directly” to greenhouse gas emissions. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (explaining Section 111 applies to new and modified sources in stationary categories that contribute significantly to dangerous pollution, including greenhouse gases). EPA has in fact begun developing greenhouse gas performance standards for modified power plants under Section 111. *See* 78 Fed. Reg. 39,535, 39,536 (July 1, 2013) (setting a June 2015 deadline to finalize standards for modified power plants). EPA “plainly” has authority, under Section 111(a)(4)’s reference to “any air pollutant,” to regulate modifying sources that increase their greenhouse gas emissions. Yet petitioners would incongruously block EPA from regulating the increased greenhouse gas emissions from the exact same modifying sources under the PSD program—a program that Congress intended as a complement to Section 111 and that shares Section 111(a)(4)’s definition of “modification.” *See also* Fed. Resp’ts Br. 45-46 (noting the inconsistency that petitioners’ interpretations would cause with Section 111(a)(3)); State Resp’ts Br. 15-16 (explaining why PSD cannot be read to have a narrower scope than Section 111).

The bizarre and confusing outcome of petitioners' interpretations should be avoided, especially since a plain reading yields much more harmonious results. While under certain circumstances an agency may have discretion to apply different regulatory interpretations to recurring statutory text, *see Env'tl. Def.*, 549 U.S. at 575-76, it would be unprecedented for a court to *require* an agency to apply two such incompatible interpretations to a single statutory phrase. *See also id.* at 584 (Thomas, J., concurring in part) (encouraging EPA to pursue a unified regulatory definition of "modification," which "better serves PSD's goals").

The particular interpretation put forward by the American Chemistry Council ("ACC") would further risk exacerbating the negative effects of grandfathering. As described above, Congress deliberately exempted, or "grandfathered," existing sources from PSD regulation, intending to offer temporary and environmentally benign transition relief to existing sources.¹⁰ Unfortunately, the PSD

¹⁰ Excessive grandfathering is one of several less-than-economically-efficient aspects of the PSD provisions. Amici for petitioners note that the PSD program's command-and-control structure does not allow the market-based approaches that would provide the most efficient regulation of pollutants like greenhouse gases. Economists Amicus Br. 12. This statutory constraint on regulatory design, however, is not specific to greenhouse gases, but applies to any pollutants regulated under the PSD program that might be more efficiently controlled through a market-based regime. *See generally* Inst. for Policy Integrity, *The Road Ahead* (2009), available at <http://policyintegrity.org/files/publications/TheRoadAhead.pdf> (detailing the availability of market-based mechanisms under the Act). Though we may wish for a more economically efficient statute, that desire does not give EPA or courts license to ignore the plain statutory language.

program's history has not borne out Congress's original expectations for grandfathering. The disparity between regulatory standards for old and new sources "distort[s] the economic analysis that existing plant owners undertake when deciding whether to modernize or replace a plant." Nash & Revesz, *supra*, at 1708. Grandfathered, aging sources gain a crucial advantage in their operating costs relative to new competitors, which might otherwise be more efficient but are also more regulated. The economic incentive for these increasingly obsolete grandfathered plants is to continue operating rather than upgrade and incur new regulatory costs. See generally *id.*; see also Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 Nw. U.L. Rev. 1581, 1616 (2011).

Consequently, grandfathering extends the operating lives of old, dirtier plants, discourages the introduction of new, more efficient upgrades or plants, and can actually lead to worse environmental quality than if no regulation had ever been enacted. See Nash & Revesz, *supra*, at 1708-1710 (citing empirical evidence for these negative effects); see also *WEPCO*, 893 F.2d at 912 (noting that the company admitted its plans for extensive renovation "represent a *life extension* of the units from their *planned retirement dates*") (citations omitted). In one telling empirical study, grandfathering led to an 8% delay in capital retirement for every doubling of stringency of new source regulations relative to existing sources. Michael T. Maloney & Gordon L. Brady, *Capital Turnover and Marketable Pollution Rights*, 31 J.L. & Econ. 203, 226 (1988). That slowed turnover of the old, less efficient industrial stock

correlated with an overall increase in sulfur dioxide emissions compared to if no regulations had been enacted—with emissions rates up to 27% higher in states with the strongest grandfathering distortions. *Id.*

Grandfathering has given rise to additional poor incentives. First, it discourages polluters from efficiently anticipating changes in legal rules. While a firm might rationally choose to anticipate stricter regulations by investing now in better technology to save on future compliance costs, a grandfathered firm lacks that motivation. Revesz & Westfahl Kong, *supra*, at 1590, 1594-96. Second, grandfathering encourages polluters to devote significant resources to arguing before Congress, EPA, and the courts for further extensions of their transition relief, to maintain the artificial advantage that grandfathering granted them against prospective competitors. Nash & Revesz, *supra*, at 1729. For decades, industry has routinely lobbied legislators and regulators and has persistently fought in the courts to continue the PSD exemptions for existing sources, Revesz & Westfahl Kong, *supra*, at 1628-32—a trend of rent-seeking behavior that has continued in the present debate over the application of PSD to greenhouse gas emissions, *see* 75 Fed. Reg. at 31,592 (noting that industry commenters asked for even more transition relief under the Tailoring Rule). Though under certain circumstances, some limited, temporary grandfathering may be cost-benefit justified, *see generally* Revesz & Westfahl Kong, *supra*, at 1583-84, given the history of the PSD program, any further extension of grandfathering is, at this time, “a poor option.” Nash & Revesz, *supra*, at 1717.

Yet the ACC's interpretation would risk exacerbating these negative consequences of grandfathering. ACC claims that "any air pollutant" should mean just criteria air pollutants, for purposes of triggering PSD, ACC Br. 12; as explained above, this interpretation would also exclude greenhouse gases from the definition of "modification." But for purposes of applying BACT requirements, ACC reads "each air pollutant" to include greenhouse gases. *Id.* at 18 n.7 & 29 n.12; *see also* J.A. 177 (Kavanaugh, J., dissenting from the denials of rehearing en banc) ("By its terms, Section 7475(a)(4) . . . applies to greenhouse gases."). The result would be that large new sources, like new power plants—which would likely already trigger PSD by virtue of their other, non-greenhouse gas pollutants—would have to install BACT for greenhouse gases. However, existing, modifying sources, like a coal power plant undergoing an upgrade that increases its emissions, would not have to install BACT for greenhouse gases, since modifying sources only have to install BACT for the pollutants that the modification significantly increased, and ACC's interpretation would exempt greenhouse gas from the definition of "modification." *See* 40 C.F.R. § 51.166(j)(3) ("A major modification shall apply best available control technology for each a [sic] regulated NSR pollutant for which it would be a significant net emissions increase at the source."). Consequently, ACC's interpretation would lead to new sources facing more stringent emissions standards than modifying sources. This increased disparity would exacerbate all the ills of grandfathering.

In short, all of petitioners' various interpretations of the phrases "any" and "each air pollutant" will

lead to statutory inconsistencies and economic inefficiencies. The Court should instead uphold EPA's interpretations as consistent with congressional intent.

C. EPA's Interpretation of "Any" and "Each Air Pollutant" to Include Greenhouse Gases Under PSD Complements Section 111 and Fills Regulatory Gaps that Would Otherwise Result

EPA is in the process of developing greenhouse gas performance standards for new power plants under Section 111. 79 Fed. Reg. 1430 (proposed Jan. 8, 2014). Once finalized, those performance standards will in turn trigger statutory requirements to regulate modified and existing power plants for their greenhouse gas emissions as well. *See* 42 U.S.C. §§ 7411(b) & (d); *see also* Comments from Policy Integrity, to EPA, on Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources 5-7 (June 25, 2012), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0660-9908>. These regulatory plans do not make the application of PSD to greenhouse gases irrelevant. To the contrary, Congress designed PSD to supplement Section 111, and PSD fills several important gaps.

First, as noted previously, the Clean Air Act clearly envisions the PSD program working in conjunction with Section 111 performance standards. *See Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567 (2007). PSD permits must require compliance with Section 111 performance standards, 42 U.S.C. § 7475(a)(3)(C), and BACT must be at least as stringent as applicable performance standards, while

allowing for case-by-case adjustments to require even more stringent limits, *see* 42 U.S.C. § 7479(3). Note that many non-criteria pollutants subject to the PSD program are also regulated under Sections 111(b) and (d). *Compare supra* pp. 10-11 (listing non-criteria pollutants regulated by PSD) *with* 40 C.F.R. pt. 60 (regulating “designated pollutants” like sulfuric acid mist and fluorides under Section 111). Far from being redundant, the two provisions are clearly meant to work in harmony.

Second, finalized performance standards for new, modified, and existing power plants under Section 111 are still several years away at the earliest; in particular, issuing a rule on existing sources will only start another potentially time-consuming process of states developing implementation plans. *See* 78 Fed. Reg. at 39,536 (targeting completed standards by June 2016); *but see* 42 U.S.C. § 7410 (describing the lengthy process for developing state implementation plans). Litigation, and attendant delay, is essentially inevitable for the Section 111 performance standards for both new and existing power plants. Meanwhile, the PSD program will continue to apply the latest pollution control techniques to all new major power plants and to significant modifications at existing power plants.

Third, these initial regulatory plans under Section 111 cover only power plants, and not other stationary sources of significant greenhouse gas emissions. For example, EPA has yet to announce a new schedule for issuing greenhouse gas standards for refineries under Section 111, after missing earlier deadlines set by settlement agreement. *See* James E. McCarthy, *EPA Standards for Greenhouse Gas*

Emissions from Power Plants 3 (Cong. Res. Serv. Report R43127, 2013), available at <http://www.fas.org/sgp/crs/misc/R43127.pdf>. Refineries contribute over 200 million metric tons of greenhouse gases annually—about 3% of all U.S. emissions. See Office of Air Quality Standards and Planning, EPA, *Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from the Petroleum Refining Industry* 3 (2010), available at <http://www.epa.gov/nsr/ghgdocs/refineries.pdf>. Other significant stationary sources of greenhouse gases not yet regulated under Section 111 include natural gas systems; cement plants; producers of lime, nitric acid, and other chemicals; and landfills and waste treatment facilities, among others. See EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2011* ES5–ES7 (2013), available at <http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2013-Main-Text.pdf>. Though some of these categories may eventually become subject to greenhouse gas standards under Section 111, see 40 C.F.R. pt. 60 (listing some of these sources as regulated categories under Section 111), EPA would have to issue individual Section 111 regulations for each separate category, one by one. By contrast, EPA has already released guidance on applying greenhouse gas-related PSD and BACT requirements to refineries, cement plants, paper and pulp plants, landfills, nitric acid plants, iron and steel plants, and other large industrial emitters of greenhouse gases. See EPA, Clean Air Act Permitting for Greenhouse Gases, <http://www.epa.gov/nsr/ghgpermitting.html> (last visited Jan. 27, 2014) (listing available GHG Control Measure White Papers); see also, e.g., EPA Clean Air

Tech. Ctr., RACT/BACT/LAER Clearinghouse: RBLC ID OH-0357, <http://cfpub.epa.gov/rblc/index.cfm> (follow “Search Database” hyperlink; then follow “RBLC ID Search” hyperlink; then search for “OH-0357) (last visited Jan. 27, 2014) (listing a PSD permit issued by Ohio in 2013 to a modifying refinery for its greenhouse gas emissions). Because PSD is source-specific rather than category-specific, it can regulate pollutants like greenhouse gases in a more timely and individualized manner.

Fourth, applying BACT to the significant greenhouse gas emissions of new and modified sources on a continuous and case-by-case basis fills an important gap during periods when Section 111 performance standards are waiting for revision. Performance standards under Section 111 are required to be revised only every eight years. 42 U.S.C. § 7411(b). Yet often revisions take significantly longer. *See, e.g.*, Comments from Policy Integrity, to EPA, on New Source Performance Standards for Nitric Acid Plants 2 (Nov. 28, 2011), *available at* http://policyintegrity.org/documents/IPI_Comments_on_Nitric_Acid_NSPPS_Final1.pdf (noting EPA’s nitric acid performance standards had not been revised in nearly forty years). Meanwhile, without the PSD program, new and modifying sources would have limited incentive to research and invest in increasingly efficient greenhouse gas control technologies. Exempting greenhouse gas emissions from the PSD program would remove some of the incentive for industry to anticipate and develop new technologies. Indeed, one of “the basic goals of the 1977 Amendments,” which created the PSD program, was “technology forcing.” *WEPCO* at 909-10 (citing legislative history); *see also* S. Rep. No. 95-127, at 18

(1977) (“[T]o augment the innovative character of industry in reaching for more effective, less-costly systems to control air pollution . . . [p]ossibly most important is that portion of the bill that establishes a system . . . to prevent significant deterioration of air quality.”).

EPA’s consistent interpretation of the phrases “any” and “each air pollutant” enables PSD to continue serving the role Congress intended, as an essential complement to Section 111. Petitioners’ attempts to exempt greenhouse gases from the PSD program would undermine this carefully balanced statutory structure.

III. THE ARGUMENT THAT THE PERMITTING REQUIREMENT OF SECTION 165(A) CAN BE TRIGGERED ONLY BY NAAQS POLLUTANTS IS UNTENABLE

The permit requirement of Section 165(a) is triggered by the following statutory provision: “No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless (1) a permit has been issued for such proposed facility . . .” 42 U.S.C. § 7475(a).

The ACC argues that this provision is triggered only by criteria pollutants and not any other pollutants, including greenhouse gases. *See* ACC Br. 15-16. A key interpretive question concerns the meaning of “any area to which this part applies.” “This part” refers to Part C of Subchapter I of the Clean Air Act, which is labeled “Prevention of Significant Deterioration of Air Quality.” Under Section 161, 42 U.S.C. § 7471, covered areas are

those designated under Section 107, 42 U.S.C. § 7407, “as attainment or unclassifiable.” For each criteria pollutant, all areas in all states must be designated as either nonattainment, attainment, or unclassifiable. 42 U.S.C. § 7407(d). It thus follows that “this part applies,” by its terms, to any area that is not classified as nonattainment for every criteria pollutant.

The plain meaning of the statute makes clear that the relevant inquiry is purely geographic. It concerns whether a major emitting facility is located in an area that meets the NAAQS for at least one pollutant. There is, in contrast, no plausible interpretation under which whether a facility is located in “an area to which this part applies” would depend instead on what types of pollutants the facility emits.

Under the ACC’s interpretation, a facility emitting greenhouse gases would not be in an “area to which this part applies” even though an adjoining facility emitting pollutants regulated by NAAQS would be in such an area. And if the facility emitting greenhouse gases were to subsequently start emitting criteria pollutants, it would thereby move from an area “to which this part” does not apply and into area “to which this part applies,” without, of course, changing its location at all. No plausible interpretation of the term “area to which this part applies” can support the ACC’s position.

The ACC’s position also gives rise to a “no man’s land” that is inconsistent with the structure of the Act. As indicated above, under Section 107(d) all areas in the country are placed in one of three categories (nonattainment, attainment, and

unclassifiable) for each NAAQS pollutant. 42 U.S.C. § 7407(d). Two of these categories (attainment and unclassifiable) are covered by the PSD program under Section 161. 42 U.S.C. § 7471. The statute does not contemplate the possibility that certain sources would be in no area at all, which is what the ACC's position implies.

IV. PETITIONERS' APPROACHES—FAR FROM AVOIDING “ABSURD RESULTS”—WOULD GIVE RISE TO THEIR OWN SET OF ABSURDITIES

The ACC and other petitioners argue that the only way to eliminate the “absurdity” that they claim would result from the Tailoring Rule is to read Section 165(a) as applying to only criteria pollutants or only pollutants with local effects. *See, e.g.*, ACC Br. 28. But these interpretations would create a host of other problems and their own set of absurdities.

There is no way for EPA to have known, back in 1977 when the PSD provisions were enacted, that more than 30 years later it would make an endangerment finding for an air pollutant emitted in large quantities by a large number of relatively small polluters. The “absurdity” argument raised by petitioners does not call into question EPA's consistent approach, over 30 years, to apply the Section 165(a) trigger to all other air pollutants regulated under the Act. Indeed, because other pollutants that EPA has regulated under the PSD program are emitted in small quantities, the alleged “absurdity” is not present with respect to those pollutants. Instead, petitioners' argue that the agency should now, for the first time, begin to read Section 165(a) to be restricted to either criteria

pollutants or pollutants with only local effects, in order to avoid requiring PSD permitting for too many sources.

What happens, then to the non-NAAQS or global pollutants that were previously regulated? The only plausible answer under petitioners' readings is that they would be exempted going forward. As a result, the facilities that already obtained a permit and expended resources to comply with the PSD permitting requirements before EPA found that greenhouse gases endanger public welfare would be placed at a disadvantage relative to competitors that built their facilities later and therefore become exempted from the requirement under petitioners' approach. Such an approach creates instability and undermines the predictability of the regulatory regime.

Most importantly, the statutory interpretation question of whether non-criteria or non-local pollutants other than greenhouse gases can trigger the PSD permitting provisions should not depend on whether or when EPA makes an endangerment finding for greenhouse gases. For the regulatory status of all other non-criteria and non-local pollutants to change simply because EPA begins regulating dangerous greenhouse gases would violate the "independence of irrelevant alternatives" precept, which is a key requirement for rationality. See R. Duncan Luce & Howard Raiffa, *Games and Decisions* 27 (1957) (introduction of third alternative should not affect preference relationship between two original alternatives); see also Amartya Sen, *Social Choice Theory: A Re-Examination*, 45 *Econometrica* 53, 58-59 (1977) (analyzing attributes of social

welfare functions). Non-criteria pollutants and global pollutants other than greenhouse gases would be subject to the PSD permitting provisions if they are emitted by facilities constructed *before* EPA begins regulating greenhouse gases, but would be exempt from these provisions if they are emitted by facilities built *after* such greenhouse gas regulations. But the timing of greenhouse gas regulations should be irrelevant to determining whether other pollutants are subject to the PSD program's permitting requirement.

So, petitioners are simply wrong when they claim that the problem caused by the statutory thresholds of 250 and 100 tons could be solved simply by adopting their interpretations of the triggering provision.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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