**Oral Argument Scheduled for February 28, 2012**

**No. 10-1073 (Lead) and Consolidated Cases (COMPLEX)**

# United States Court of Appeals for the District of Columbia Circuit

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

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Environmental Protection Agency Final Orders, 75 Fed. Reg. 17,004 (Apr. 2, 2010) and 75 Fed. Reg. 31,514 (June 3, 2010)

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## STATUTES AND REGULATIONS

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No. 10-1073 (Lead) and Consolidated Cases (COMPLEX)

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COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
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## REPLY BRIEF OF STATE PETITIONERS AND SUPPORTING INTERVENOR

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## SUMMARY OF ARGUMENT

EPA's unilateral decision to assert regulatory authority over stationary-source greenhouse-gas emissions cannot be reconciled with the text of the Clean Air Act. The unambiguous permitting thresholds established in the PSD and Title V programs are set far too low to accommodate a rational regime of greenhouse-gas regulation. Yet rather than seek corrective legislation from Congress, EPA took matters into its own hands, and promulgated a "Tailoring Rule" that rewrites the Clean Air Act by replacing its specific numerical permitting

thresholds with numbers of EPA's own choosing. Then EPA announced in its "Timing Rule" that it would begin regulating stationary-source greenhouse-gas emissions in accordance with this agency-concocted regime.

EPA's brief attacks the petitioners' standing and tries to justify its unilateral act of statutory revision by invoking "congressional intent." But in the end, EPA cannot overcome the fact that its Timing and Tailoring Rules transgress the most basic principle of the law governing administrative agencies: "[An] agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson*, 529 U.S. 120, 161 (2000). This Court should grant the petitions for review and vacate both the Tailoring Rule and the Timing Rule.

## ARGUMENT

### I. THE STATE PETITIONERS HAVE ARTICLE III STANDING.

EPA claims that the petitioners lack Article III standing to challenge the Timing and Tailoring Rules. Our opening brief noted that EPA's plans for regulating stationary-source greenhouse-gas emissions impose costly regulatory burdens on state governments, and that is one

of the "injur[ies] in fact" that we seek to redress in this Court. *See* State Pet. Br. 22–23.

EPA counters that a court decision vacating either the Timing or Tailoring Rules (or both) will aggravate rather than alleviate the regulatory burdens imposed on industry and state governments. And EPA insists that the petitioners therefore cannot show that their injury is "redressable" by this Court. *See* EPA Br. 79–80. On EPA's view, a favorable ruling from this Court can only make matters worse for State Petitioners and Industry Petitioners, not better.

Even if EPA were correct to assert that the relief requested by the petitioners will increase regulatory burdens on both industry and state governments, the State Petitioners would *still* have standing to challenge the Tailoring and Timing Rules under *Massachusetts v. EPA*, 549 U.S. 497 (2007). The States contend that the Tailoring Rule and Timing Rule each should be vacated as "not in accordance with law." 42 U.S.C. § 7607(d)(9). But whether these rules should be vacated because they impose too much regulation or too little regulation is immaterial in resolving the Article III standing of the State Petitioners. The State of Texas suffers "injury in fact" coming and going. It either suffers the

injury caused by onerous regulations, or else it suffers injuries allegedly caused by increased concentrations of greenhouse gases in the atmosphere,[1] which have been recognized by the Supreme Court as legally sufficient for Article III standing. *See Massachusetts*, 549 U.S. at 521–23 & n.18; *see also Massachusetts v. EPA*, 415 F.3d 50, 65–67 (D.C. Cir. 2005) (Tatel, J., dissenting). And once a single State can establish Article III standing to challenge both the Tailoring Rule and the Timing Rule, this Court can consider the entire petition for review. *See Massachusetts*, 549 U.S. at 518.

It does not matter for Article III purposes whether State Petitioners are wearing an environmentalist hat or an anti-regulatory hat. State Petitioners challenge the Tailoring Rule because it flouts the unambiguous statutory permitting thresholds established in the Clean Air Act, and vacating that rule will redress either the "injury" of

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[1] In making this argument, the States do not concede the validity of EPA's Endangerment Finding, but rather assume (for the sake of argument) EPA's contention that the net effects of the Timing and Tailoring Rules will mitigate rather than aggravate the regulatory burdens imposed on the States. For this Court to deny that the States suffer "injury" from EPA actions that ameliorate the regulation of greenhouse-gas emissions would be to overrule *Massachusetts* and destroy any basis for EPA's Endangerment Finding.

onerous regulation *or* the "injury" recognized in *Massachusetts v. EPA*. The same goes for the Timing Rule. If vacating the Timing Rule would accelerate rather than postpone the regulation of greenhouse-gas emissions, as EPA claims, then State Petitioners can establish Article III standing under *Massachusetts* by asserting injuries caused by EPA's failure to regulate sooner. State Petitioners suffer "injury in fact" regardless of whether the Timing and Tailoring Rules regulate too much or too little. And given the "special solicitude" accorded to the States in Article III standing analysis, this is more than sufficient to establish standing in this case. *Massachusetts*, 549 U.S. at 520; *see also id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.").

Although we did not rely on *Massachusetts* to establish standing in our opening brief, we invoke it now to eliminate any residual doubts surrounding this Court's jurisdiction. And if this Court rejects our challenge to the Timing Rule and concludes that the Clean Air Act compels EPA to regulate stationary-source greenhouse-gas emissions as air pollutants, then this Court must vacate the Tailoring Rule and force

EPA to implement the 100/250 tpy permitting requirements specified in the statute. *Massachusetts* supplies the Article III standing needed for State Petitioners to present this argument. And although the State Petitioners are confident that this outcome will either provoke corrective legislation from Congress (which would supply the constitutionally required congressional input that EPA now attempts to avoid), or else provoke corrective administrative action by EPA itself, the Article III inquiry does not depend on the likelihood of these corrective measures. *See* EPA Br. 40, 81–84.

In all events, the premise of EPA's standing argument is wrong. EPA did not regulate greenhouse-gas emissions from stationary sources prior to promulgating the Timing and Tailoring Rules, and vacating those rules would simply restore the status quo. EPA's argument would be more plausible if it had strictly enforced the 100/250 tpy permitting requirements before announcing the Timing and Tailoring Rules, and then promulgated each of those rules as a means to alleviate regulatory burdens. But that does not describe this case.

## II. THE TAILORING RULE IS UNLAWFUL AND MUST BE VACATED.

The opening briefs submitted by EPA and State Petitioners proceed from irreconcilable notions of what law is. State Petitioners hold that the law is to be found in the enacted language of the Clean Air Act—the words that received formal approval in both Houses of Congress and were signed into law by the President. EPA, by contrast, believes that "congressional intent" is the law and that the text of federal statutes serves only as evidence of what that law might be. *See, e.g.*, EPA Br. 67 (arguing that agencies may disregard unambiguous statutory language "whenever the literal language of a statute would . . . undermine congressional intent"). Rather than rehashing our disagreements with EPA on these foundational matters of interpretation, we think we can be more helpful to this Court by correcting EPA's caricatures of our argument, and showing that the Timing and Tailoring Rules must be vacated even if one accepts the notion that "congressional intent" can trump unambiguous statutory language.

### A. Agencies and Courts May Depart from Unambiguous Statutory Language to Avoid Actual or Potential Constitutional Violations, But They May Not Replace Specific Numerical Permitting Thresholds with Numbers of Their Own Choosing Simply to Avoid a Constitutional but Undesirable Policy Outcome.

EPA's brief repeatedly mischaracterizes our argument, disregarding its nuances in an effort to make it seem implausible or extreme. We never argued that agencies "may not, under any circumstances," deviate from unambiguous statutory language. EPA Br. 39. Our opening brief recognized that agencies and courts may depart from unambiguous statutory language to avoid an actual *or potential* constitutional violation, and cited several Supreme Court rulings that support this practice. *See* State Pet. Br. 46–48. This longstanding practice of constitutional avoidance is a permissible method of interpretation because the Constitution is a higher source of law than federal statutes, and the need to avoid actual or even potential constitutional violations can justify a disregard of unambiguous statutory language.

An agency may not, however, disregard an unambiguous statutory numerical threshold and replace it with one of its own choosing, simply to avoid a constitutional but undesirable policy outcome. The entire

point of enacting specific numerical permitting thresholds in the Clean Air Act was to constrain EPA's power and discretion by forcing it to seek corrective legislation whenever the codified permitting thresholds lead to suboptimal regulatory policies. Allowing EPA to fix the problem unilaterally by invoking doctrines of "absurd results," or "administrative necessity," or "one step at a time" circumvents the congressional involvement that the Clean Air Act was designed to preserve. In addition, the Tailoring Rule violates the Constitution because it arrogates to EPA the prerogative to set arbitrary numerical limits on greenhouse-gas emissions without congressional authorization and without any "intelligible principle" provided by Congress.

### 1. The Clean Air Act's rigid numerical permitting thresholds were enacted to force EPA to seek congressional authorization before establishing a new regime to deal with novel air-pollution problems.

EPA continues to invoke the "absurd results" doctrine to justify its disregard for the unambiguous numerical permitting thresholds in the Clean Air Act. But there is nothing "absurd" about a regime that forces EPA to choose between enforcing the 100/250 tpy permitting thresholds for greenhouse-gas emissions (and thereby provoking corrective

legislation from Congress), and refraining from regulating stationary-source greenhouse-gas emissions until Congress authorizes EPA to establish a more prudent regulatory regime. On the contrary, it is eminently sensible to attribute this regime to a national legislature jealous of its prerogatives and suspicious of agency administrators. The statute's rigidity is designed to force a collaborative solution to novel air-pollution problems and prevent EPA from striking out on its own. It is no different from the Delaney Clause that this Court enforced in *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987), a clause that banned all carcinogenic color additives—no matter how trivial the risk of cancer, and without regard to whether this would cause manufacturers to replace them with more dangerous (though noncarcinogenic) products. EPA's brief does not even mention, much less explain, how its "absurd results" argument can be squared with the outcome in *Public Citizen v. Young*, even though our opening brief relies heavily on that case. *See* State Pet. Br. 45–46.

EPA's brief repeatedly misrepresents our discussion of the "absurd results" doctrine and wastes its time by attacking straw men. We did not assert that the absurd-results doctrine "may only be applied when

literal application of the statute would violate the Constitution." EPA Br. 66. We noted only that most of the Supreme Court rulings cited in the Tailoring Rule relied on the canon of constitutional avoidance rather than the "absurd results" doctrine, and therefore offer no support for EPA's efforts to ignore the constitutionally unassailable language of the Clean Air Act. *See* State Pet. Br. 46–48. We also did not claim that the absurd-results doctrine "no longer exists"; nor did we assert that "the Supreme Court has not addressed this doctrine in many decades." EPA Br. 67. We said only that "EPA cannot identify *any* holding from the Rehnquist or Roberts Courts allowing courts or agencies to disregard unambiguous statutory language, other than in cases where the enacted language presents an actual constitutional violation or a serious constitutional question." State Pet. Br. 50. All that EPA can muster in response to this challenge is a citation of *Logan v. United States*, 552 U.S. 23 (2007), a decision that *rejected* a litigant's attempt to invoke the "absurd results" doctrine at the expense of unambiguous statutory language. *See* EPA Br. 67. EPA's attempt to pass off this 25-year dearth of favorable Supreme Court holdings as a sign of the absurdity doctrine's *health* is wishful thinking. The Supreme Court has

had many opportunities over the last 25 years to disregard unambiguous statutory language in the name of avoiding absurd results or preserving "congressional intent," and it has declined the opportunity every time. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005).

By spending its time attacking arguments that we did not make, EPA failed to challenge the arguments that we *did* present against its efforts to invoke the "absurd results" doctrine in this case. First, a recognized and accepted consequence of legislating by rules—including the specific numerical permitting thresholds established in the Clean Air Act—is occasional suboptimal and even absurd results. *See* State Pet. Br. 44–46. Legislatures choose to incur those costs in exchange for *benefits* obtained from cabining agency discretion, deterring regulated entities from engaging in rent-seeking efforts to lobby or "capture" agencies, simplifying agency decisionmaking processes, and enhancing representative democracy by guaranteeing congressional input into any subsequent decision to deviate from the Clean Air Act's unambiguous permitting thresholds. *Id.* at 39–41. EPA's use of the "absurd results" doctrine turns these carefully calibrated tradeoffs on their heads,

ignores the systemic benefits of adhering to the codified numerical permitting thresholds, and effectively disables Congress from ever establishing a regime that captures the benefits of imposing rule-based constraints on agency administrators. *Id.* at 44, 56–58. For EPA, the only goal of interpretation is to enable administrative agencies to impose an optimal policy for regulating greenhouse-gas emissions; its brief continues to assume away or ignore the collateral costs associated with disregarding the specific, rule-based permitting thresholds that Congress established in the Clean Air Act.

Second, using the "absurdity" doctrine to allow EPA to pick new numerical thresholds for the Clean Air Act's permitting requirement will violate the Constitution—or, at the very least, present grave constitutional questions—by giving EPA discretionary powers without an "intelligible principle" provided by Congress. *See id.* at 54–56. In most cases, the constitutional-avoidance canon and the "absurd results" doctrine are allies, working together to support the same construction of a disputed statutory provision. *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). In this case, however, the constitutional-avoidance canon cuts *against* EPA's efforts

to invoke the "absurdity" doctrine. Although EPA disagrees with our constitutional objections to the Tailoring Rule, *see* EPA Br. 74–75, EPA never denies that the wide-ranging discretion that it exercises in the Tailoring Rule presents "serious constitutional doubt[s]" under the Supreme Court's separation-of-powers jurisprudence, and that is all that is needed for courts to invoke the canon of constitutional avoidance. *See, e.g.*, *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989).

Finally, the jurisprudence of the Rehnquist and Roberts Courts has embraced textualism and moved away from the *Church of the Holy Trinity*-style intentionalism that undergirds the "absurd results" doctrine. This does not mean that the absurdity doctrine "no longer exists," but it undeniably has fallen into disfavor with the current Supreme Court. A federal court of appeals, whose decisions will be reviewed by the Supreme Court, should therefore exercise great caution before subordinating unambiguous statutory language in the name of avoiding "absurd results"—especially when there are no constitutional difficulties associated with following the enacted statutory language.

In the end, EPA's "absurdity" argument is a reason to seek corrective legislation from Congress, which will not be long in coming if EPA applies the 100/250 tpy permitting thresholds to greenhouse-gas emissions. It does not license EPA to usurp this codified congressional prerogative by rewriting the numerical thresholds on its own, and then waiting to see whether the federal courts will sign or veto its amendments to the Clean Air Act.

**2. Administrative necessity.**

The "administrative necessity" doctrine cannot be used to give agencies "a revisory power inconsistent with the clear intent of the relevant statute." *Ala. Power Co. v. Costle*, 636 F.2d 323, 357–59 (D.C. Cir. 1980) (per curiam). The Tailoring Rule is not the work of an agency trying its best to implement the 100/250 tpy permitting thresholds specified in the Clean Air Act. Rather, it reflects an agency that thinks it can improve upon the Clean Air Act in the pursuit of better government. First, the Tailoring Rule announces new permitting thresholds for greenhouse-gas emissions—and *measures those emissions by $CO_2$ equivalents* rather than by the tonnage of the individual pollutant established in the Clean Air Act. Even if EPA could credibly

invoke resource constraints as a reason for failing to fully enforce the 100/250 tpy permitting requirements, that provides no excuse for changing the statute's unit of measurement for greenhouse-gas pollutants. Second, EPA cannot credibly invoke "necessity" when it has never even tried to enforce the overly burdensome 100/250 tpy permitting requirements in an effort to prompt corrective legislation from Congress.

**3. The one-step-at-a-time doctrine.**

EPA cannot invoke the one-step-at-a-time doctrine because it has no short-term or long-term plans to enforce the 100/250 tpy permitting requirements in the statute. EPA says Industry Petitioners contradict this assertion, EPA Br. 60–61, but Industry Petitioners' motion for a stay says only that EPA may someday expand coverage "all the way down to the statutory thresholds of 100 or 250 tpy *of* $CO_2e$," which differs from the 100 or 250 tpy required by the statute. Non-State Pet. Stay Mot. at 10, Doc. No. 1266109, Docket No. 10-1073 (Sept. 15, 2010). EPA does not assert that it has plans to eventually measure the quantity of greenhouse-gas emissions by the tonnage of each individual pollutant, so it cannot plausibly assert that the Tailoring Rule puts it on

the path to someday enforcing the unambiguous permitting thresholds of the Clean Air Act.

### B. The Tailoring Rule Violates the Constitution by Allowing EPA to Choose Its Own Numerical Permitting Thresholds for Greenhouse-Gas Emissions Without an "Intelligible Principle" from Congress.

The Constitution permits agencies to administer the laws, but it forbids them to exercise legislative powers. The Supreme Court has consistently held that agency discretion must be guided by an "intelligible principle" from Congress; otherwise it crosses the line into constitutionally forbidden agency lawmaking. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). When EPA decided to disregard the specific numerical permitting thresholds in the Clean Air Act, and replace them with permitting thresholds of its own choosing, it did so without the aid of any "intelligible principle" in the Clean Air Act.

EPA gestures toward provisions in the statute that require PSD and Title V regulation of air pollutants, encourage regulation of large sources, and discourage permitting gridlock. *See* EPA Br. 75. But none of those provisions have anything to say about the relevant question: Where should EPA draw the line between the stationary sources that require permitting under PSD and Title V and those that don't? The

Clean Air Act of course provides an "intelligible principle" for answering this question: the specific numerical thresholds (100/250 tpy) codified in the statute. But once EPA decided to cast aside that intelligible principle, it left itself at sea in deciding how to replace the statutory requirements with agency-created permitting thresholds. There is nothing in the statute to indicate whether EPA should employ cost-benefit analysis, regulate "in the public interest," or seek to minimize greenhouse-gas emissions at all costs—once it decides to improve upon the 100/250 tpy permitting thresholds.

EPA tries to defend its Tailoring Rule as "rational" and consistent with "congressional intent," but none of this addresses the constitutional objection. *See* EPA Br. 75–76. The discretion that led EPA to settle on these arbitrary 75,000/100,000 tpy $CO_2e$ thresholds must be constrained by an "intelligible principle" provided *in the enacted statutory language*. *See Whitman*, 531 U.S. at 473. EPA does not (and cannot) cite anything in the statute that provides a measuring stick for the EPA-chosen permitting thresholds.

### C. The Tailoring Rule Is Unlawful Even if EPA Wants "Congressional Intent" to Determine Its Legality.

EPA's brief repeatedly intones that the Tailoring Rule reflects "congressional intent." *See* EPA Br. 76 ("[T]he Tailoring Rule implements congressional intent."); *id.* at 70 ("[T]he Tailoring Rule . . . employed its statutorily-granted authority to establish a common sense process for implementing the intent of Congress."). Even if one assumes (for the sake of argument) that agencies may subordinate unambiguous statutory language to "congressional intent," EPA's Tailoring Rule *still* must be vacated as unlawful.

EPA encounters three insurmountable obstacles to claiming the mantle of "congressional intent." The first problem is that the Congress that enacted the 1990 Clean Air Act Amendments *rejected* several legislative proposals to regulate greenhouse-gas emissions. *See, e.g.*, H.R. 5966, 101st Cong. (1990); S. 1224, 101st Cong. (1989). The second is Congress's persistent refusal to enact any legislation requiring EPA to regulate greenhouse-gas emissions in the years leading up to *Massachusetts v. EPA*. The third is Congress's failure to enact legislation authorizing EPA to depart from the 100/250 tpy permitting thresholds for greenhouse gases. If the Tailoring Rule reflects

"congressional intent," then Congress would have enacted legislation to that effect by now. Instead, Congress has *for decades* refused to enact legislation necessary for EPA to establish a workable and rational regulatory regime for stationary-source greenhouse-gas emissions.

EPA's brief has no answer for this consistent congressional intransigence. The closest it comes to acknowledging or addressing this problem is its contention that *Massachusetts* "made it clear under the CAA it is irrelevant that Congress had specific intent with respect to greenhouse gases." EPA Br. 52. But if that is true, then EPA cannot turn around and invoke "congressional intent" to defend the Tailoring Rule's departures from unambiguous statutory language. And in all events, EPA *still* has not attempted to show how its Tailoring Rule can represent "congressional intent" when it flouts unambiguous provisions in the Clean Air Act that Congress has repeatedly declined to repeal or amend.

Thus, the Tailoring Rule must be vacated regardless of whether one believes that "congressional intent" can supersede unambiguous statutory language. It cannot be squared with either the text of the

Clean Air Act or the "congressional intent" that EPA repeatedly invokes.

## III. THE TIMING RULE IS UNLAWFUL AND MUST BE VACATED.

### A. After *Mead*, the *Chevron* Framework Applies Only When a Statute Contains an "Indication" of "Congressional Intent" to Delegate Interpretive Authority to an Agency.

*United States v. Mead*, 533 U.S. 218 (2001), changed the rules for determining when reviewing courts should apply the *Chevron* framework to agency interpretations of statutes. Prior to *Mead*, statutory ambiguity was *presumed* to represent an implied delegation of interpretive authority to the agency charged with administering the statute. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). But *Mead* rejects that presumption of delegated authority, and holds that mere statutory ambiguity is no longer sufficient to trigger the *Chevron* framework. Instead,

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference *when it appears that Congress delegated authority to the agency* generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, *or by some other indication of a comparable congressional intent*.

*Mead*, 533 U.S. at 226–27 (emphases added). *Mead* replaces the old presumption with a contextualized inquiry: Courts must now ask whether the statute contains *evidence of congressional intent to delegate* interpretive authority to the agency charged with administering the statute. *Id.* at 240 (Scalia, J., dissenting) (criticizing *Mead* for establishing "a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so" and for "disclaim[ing] any hard-and-fast rule for determining the existence of discretion-conferring intent"); *see also* Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003) ("Rather than taking ambiguity to signify delegation, *Mead* establishes that the default rule runs against delegation. Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency at hand, in the particular statutory scheme at hand, *Chevron* deference is not due and the *Chevron* two-step is not to be invoked.").

EPA deems all of this "nonsensical," EPA Br. 43, and some commentators have expressed similar views about the *Mead* opinion. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 215 (2006) (denouncing *Mead* as "close to disastrous on institutional grounds").

But EPA cannot escape the fact that *Mead* forecloses courts from applying the *Chevron* framework absent *evidence* of congressional intent to delegate interpretive authority to the agency. *See Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (citing *Mead* and holding that an "agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue"); *id.* ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."). EPA's assertion that "*Chevron* deference applies when a provision is ambiguous," EPA Br. 43, is demonstrably untrue post-*Mead*. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 245 (2006) (refusing to apply the *Chevron* framework to the Attorney General's interpretation of ambiguous language in the Controlled Substances Act, and noting that Chevron can apply only when a rule is "promulgated pursuant to authority Congress has delegated to the official").

EPA is also wrong to say that "[u]nder Petitioners' reasoning, Congress would purposefully have to create ambiguous statutory provisions and then expressly assign an agency specific authority to

interpret those provisions." EPA Br. 43. *Mead* does not require statutes to explicitly delegate interpretive authority to agency administrators, and it recognizes that delegations of interpretive can be implied:

> "[s]ometimes the legislative delegation to an agency on a particular question is implicit." [*Chevron*,] 467 U.S. at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can *still be apparent from the agency's generally conferred authority and other statutory circumstances* that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . .

*Mead*, 533 U.S. at 229 (emphasis added). The problem for EPA is that the Clean Air Act cannot possibly be read to explicitly *or implicitly* delegate to EPA the authority to regulate stationary-source greenhouse-gas emissions under the PSD and Title V programs, because the unambiguous permitting thresholds do not allow for a rational regulatory regime. That EPA announced its Timing Rule pursuant to rulemaking authority granted in 42 U.S.C. § 7601(a)(1) does not signify that Congress delegated to EPA the power to regulate stationary-source greenhouse-gas emissions, as EPA claims. *See* EPA Br. 45. The FDA's tobacco regulations in *Brown & Williamson* were likewise promulgated

under the agency's rulemaking authority, yet that did not stop the Supreme Court from concluding that "Congress could not have intended to delegate a decision of such economic and political significance" to the FDA. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

Finally, EPA quotes *Brown & Williamson* out of context. While EPA trumpets the Court's statement that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency," it conveniently omits the sentence immediately following that passage: "*In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.*" *Id.* at 159 (emphasis added). Like *Brown & Williamson*, this is "hardly an ordinary case," and it not plausible to believe that the Clean Air Act implicitly delegates authority to EPA to decide whether to regulate stationary-source greenhouse-gas emissions when the statute's permitting requirements would produce such preposterous results. *Brown & Williamson* was also written before *Mead* repudiated once and

for all the presumption that mere statutory ambiguity represents an implied delegation of interpretive authority to administrative agencies.

### B. The Clean Air Act Does Not Implicitly Delegate Authority to EPA to Regulate Stationary-Source Greenhouse-Gas Emissions Under the PSD and Title V Programs.

EPA asserts that the Clean Air Act *compels* it to regulate stationary-source greenhouse-gas emissions because the PSD and Title V programs extend to "any air pollutant." *See* EPA Br. 48–49 (quoting 42 U.S.C. §§ 7479(1), 7661(2)). But the text of the Clean Air Act does not compel EPA to include stationary-source greenhouse-gas emissions within the category of "any air pollutant," especially when the permitting thresholds in the PSD and Title V programs do not fit with a regime that treats stationary-source greenhouse-gas emissions as "air pollutant[s]." EPA claims that *Massachusetts* ties its hands on this issue, *see* EPA Br. 49, but *Massachusetts* held only that EPA must regulate *motor-vehicle* greenhouse-gas emissions as "air pollutants," and it did reach the question whether stationary-source greenhouse-gas emissions must be regulated under PSD and Title V. We explained in our opening brief that *Massachusetts* is distinguishable from this case for three reasons. First, the specific numerical permitting thresholds

for stationary-source greenhouse-gas emissions would produce near-ridiculous regulatory consequences if EPA were regard them as "air pollutants" under the PSD and Title V programs. That was not the case for the motor-vehicle emissions at issue in *Massachusetts*. Second, the PSD and Title V permitting programs extend only to air pollutants "subject to regulation," *see* 42 U.S.C. § 7475, a limitation that was not present in the Title II provisions litigated in *Massachusetts*. Third, 42 U.S.C. § 7476(a) envisions that PSD regulations will extend only to a subset of "air pollutants": those that qualify as "hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides," or "pollutants for which national ambient air quality standards are promulgated after August 7, 1977." EPA's brief does not address any of these bases on which to distinguish *Massachusetts*, content to insist that *Massachusetts* compels greenhouse-gas regulation in a context that was not litigated in that case.

*American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (hereinafter "*AEP*"), also does not compel EPA to regulate stationary-source greenhouse-gas emissions. The litigants in that case assumed for the sake of argument that the Clean Air Act authorizes EPA to

regulate stationary-source greenhouse-gas emissions, and they did not contest that issue before the Court. *See id.* at 2540–41 (Alito, J., concurring). Issues that the Supreme Court assumes without challenge from the litigants do not establish precedential holdings. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37–38 (1952). This is especially true when the Court has no opportunity to consider the problems that would arise from applying the unambiguous permitting thresholds in the PSD and Title V programs to stationary-source greenhouse-gas emissions.

EPA cannot continue to pretend that statutory language or Supreme Court precedent compel it to extend PSD and Title V permitting requirements to stationary-source greenhouse-gas emissions—especially when it has declined for decades to regulate greenhouse-gas emissions under those programs. The phrase "air pollution agent" can reasonably be construed to extend only to stationary-source emissions that adulterate the ambient air near the surface of the earth, rather than greenhouse-gas emissions that are spread throughout the Earth's atmosphere. *See Control of Emissions*

*from New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking*, 68 Fed. Reg. 52,925, 52,926–27 (Sept. 8, 2003). *Massachusetts* forecloses EPA from adopting this construction of "air pollution agent" only with respect to motor-vehicle greenhouse-gas emissions, and the unreasonably low permitting thresholds established in the PSD and Title V programs preclude any inference that the Clean Air Act implicitly delegates to EPA the prerogative to extend those permitting requirements to stationary-source greenhouse-gas emissions.

EPA claims that the Timing Rule determines only the *date* on which greenhouse-gas emissions become subject to PSD and Title V, and does not purport to resolve the question *whether* stationary-source greenhouse-gas emissions can be regulated under those programs. EPA Br. 45. Because the Clean Air Act cannot be understood to implicitly delegate to EPA the authority to regulate stationary-source greenhouse-gas emissions, it logically follows that the statute cannot delegate a prerogative to decide *when* to begin regulating those gases under PSD or Title V.

## CONCLUSION

The Court should grant the petitions for review and vacate the Timing and Tailoring Rules.

Respectfully submitted.

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