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A Step By Step Look at *UARG v. EPA*: A New Layer of Greenhouse Gas Regulation

Kevin O. Leske^{*}

ABSTRACT

Hailed by many as the most important environmental law decision, the U.S. Supreme Court in Massachusetts v. EPA held that greenhouse gases (GHGs) are “air pollutants” that the United State Environmental Protection Agency (EPA) can regulate under the federal Clean Air Act (CAA). This groundbreaking conclusion soon led EPA to promulgate a series of related GHG regulations to address climate change. The cascading effect of the Supreme Court’s holding in Massachusetts that GHGs were covered by the Clean Air Act, however, remained to be seen.

One pivotal question was whether EPA’s post-Massachusetts promulgation of GHG emission standards for new motor-vehicles, in turn, required EPA to also regulate certain stationary sources of GHG emissions, such as power plants, industrial sources, as well as even smaller non-industrial sources, like small businesses and apartment buildings. And if the CAA did not compel EPA to regulate these sources, was EPA allowed to do so as a matter of its discretion under the CAA?

The Supreme Court, however, in UARG v. EPA has now resolved many of these questions that lingered in the wake of the Massachusetts v. EPA decision. Accordingly, this Article examines the very recent case of UARG v. EPA, which was decided by the Court in June of 2014.

It first gives a very brief background on greenhouse gases and climate change, as well as sets forth the provisions of the federal Clean Air Act at issue. The Article then summarizes the Supreme Court’s foundational holding in Massachusetts v. EPA that EPA has the authority to regulate GHGs under the CAA to address climate change.

^{*} Associate Professor of Law, Barry University School of Law. I would like to thank Caleb Knepper for his terrific research assistance and work on this Article, as well as EELJ Editor in Chief Michelle Gregory for her excellent work on this Article. I also am grateful to Dean Leticia Diaz for her support.

Next, it addresses the key challenge to EPA's post-Massachusetts authority to regulate GHGs by exploring the U.S. Court of Appeals for the D.C. Circuit's decision in Coalition for Responsible Regulation v. EPA, where the court rejected various petitioners' attempts to derail EPA's ambitious and creative plan to cut GHGs emissions from both mobile and stationary sources.

The Article then details the Supreme Court's June 2014 decision in UARG v. EPA. Specifically, it examines Justice Scalia's opinion on behalf of a majority of the Court; Justice Breyer's opinion concurring in part and dissenting in part; and Justice Alito's opinion concurring in part and dissenting in part. Finally, the last section of the Article then analyzes the potential impact of the Court's opinions, concluding that the decision is an important step forward in developing comprehensive greenhouse gas regulation.

I. BACKGROUND

A. GREENHOUSE GASES AND CLIMATE CHANGE

Greenhouse gases (GHG) refer to gases that act “like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat” when released into the atmosphere.¹ Anthropocentric sources of GHGs emissions are widespread; “cars, power plants, and industrial sites all release significant amounts of these heat-trapping gases.”²

Carbon dioxide has been called “the most important species” of a greenhouse gas³, as well as “[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere.”⁴ Many respected scientists are convinced that the “two trends are related” and that anthropocentric GHG emissions are the dominant factor in this climate change.⁵ Global climate change is predicted to “cause a host of deleterious consequences, including brought, increasingly severe weather events, and rising sea levels.”⁶

B. THE FEDERAL CLEAN AIR ACT

Congress enacted the Clean Air Act (CAA) “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”⁷ As part of its 1970 “overhaul” of the CAA, Congress was especially concerned about “the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles,” which “has resulted in mounting dangers to the public health and welfare.”⁸

¹ *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

² *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012).

³ *Massachusetts*, 549 U.S. at 504-505.

⁴ *See id.* at 504-505.

⁵ *See Massachusetts*, 549 U.S. at 505; *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012).

⁶ *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012).

⁷ *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

⁸ 42 U.S.C. §7401(a)(2) (2013). *See* Brief for Federal Respondents at 6.

To address these issues, the CAA sets as a goal the “reduction or elimination, through any measures, of the amount of pollutants produced or created at the source.”⁹ The CAA, however, regulates mobile sources of pollution (such as cars and trucks) differently than stationary sources (such as power plants and factories).¹⁰ At issue in this case are the stationary source permitting requirements mandated by the CAA under Title I and Title V.¹¹

1. Title I of the CAA

Under Title I, the EPA must establish National Ambient Air Quality Standards (NAAQS) for air pollutants.¹² As of 2014, six pollutants (sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead) are considered “criteria” pollutants that have corresponding NAAQS.¹³ These NAAQS are for the most part achieved through “State implementation plans” (SIPs), which, as their name suggests, are designed by states.¹⁴ In designing their SIPs, states are required to classify all areas within their borders as either being: (1)

⁹ 42 U.S.C. §7401(a)(3).

¹⁰ Title II of the CAA regulates air pollution from motor vehicles and other mobile sources. 42 U.S.C. §7521-7590 (2013). Generally speaking, EPA under Title II is required to establish vehicle standards for air pollutants that it determines “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. §7521(a)(1). Title I, on the other hand, contains several programs that regulate stationary sources of air pollution, including power plants and other industries. *See, e.g.*, 42 U.S.C. §7470-7479 (2013) (Title I’s Prevention of Significant Deterioration (PSD) program), 42 U.S.C. §7411 (2013) (Title I’s New Source Performance Standards), 42 U.S.C. §7501-7515 (2013) (Title I’s Nonattainment New Source Review permitting program). *See* Brief for Federal Respondents at 6-8.

¹¹ *See*, 42 U.S.C. §7470 et seq. (Title I’s Prevention of Significant Deterioration (PSD) program); 42 U.S.C. §7661 (2013) et seq. (Title V’s permitting program). *See, generally*, *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 (U.S. June 23, 2014), Slip Op. at 2-4.

¹² 42 U.S.C. §§7408–7409 (2013).

¹³ C.F.R. pt. 50 (2013). *See, generally*, *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 2-4.

¹⁴ 42 U.S.C. §7410 (2013). The CAA also outlines the specific steps necessary for the EPA to take in order to designate new “pollutants for which national ambient air quality standards” apply. 42 U.S.C. §7476(a) (2013). EPA has never classified GHGs as a NAAQS criteria pollutant. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 144 (D.C. Cir. 2012). In certain states, EPA administers the CAA and creates a Federal Implementation Plan (FIP) to implement the NAAQS.

in “attainment;” (2) in “nonattainment;” or (3) “unclassifiable” with respect to each NAAQS pollutant.¹⁵ Depending on which designation applies to a given area, SIPs are required to mandate that a source or proposed source in that area follow one (or more) of the CAA’s permitting programs.¹⁶

When sources are located in an area that is in attainment or is unclassifiable, they must follow the CAA’s Prevention of Significant Deterioration (PSD) provisions.¹⁷ Ever since the PSD program has existed, “every area of the country has been designated attainment or unclassifiable for at least one NAAQS pollutant.”¹⁸ Therefore, because “EPA interprets the PSD provisions to apply to sources located in areas that are designated attainment or unclassifiable for *any NAAQS pollutant, regardless of whether the source emits that specific pollutant*,” all stationary sources could have to obtain a PSD permit if they trigger the program’s provisions.¹⁹

The principal requirement of the PSD program is that a source is required to secure a permit before it either constructs or modifies a “major emitting facility” in “any area to which [the program] applies.”²⁰ In turn, the CAA defines a “major emitting facility” as any stationary source with the potential to emit 250 tons per year (tpy) of “any air pollutant” (or 100 tpy for certain types of sources)²¹ and a “modification” is defined as either a physical or operational change that results in the facility emitting more of “any air pollutant.”²²

¹⁵ 42 U.S.C. §7407(d) (2013).

¹⁶ 42 U.S.C. §7410(a)(2)(C), (I).

¹⁷ 42 U.S.C. §§7470–7492 (2013). Congress’s goal for the PSD program was to “protect public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipated to occur from air pollution.” 42 U.S.C. §7470(1) (Congressional declaration of purpose). *See* 42 U.S.C. §7471 (2013) (requiring that SIPs for the PSD program “shall contain emission limitations and such other measures as may be necessary... to prevent significant deterioration of air quality in each region.”).

¹⁸ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 3.

¹⁹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272. at 3 (emphasis added).

²⁰ 42 U.S.C. §§7475(a)(1) (2013), 7479(2)(C) (2013). *See UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 3.

²¹ 42 U.S.C. §7479(1).

²² 42 U.S.C. §7411(a)(4) (2013). The CAA does not set “by how much a physical or operational change must increase emissions to constitute a permit-requiring

If the source triggers the permitting requirement, it must show that it:

will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under [the CAA].²³

It must also use an emissions limitation that reflects the “best available control technology” (“BACT”) for “each pollutant subject to regulation under” the CAA.²⁴ BACT is defined as:

an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation” that is “achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques.”²⁵

BACT, in turn, is established “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.”²⁶

2. Title V of the CAA

‘modification.’” *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Slip Op. 4 n.1.

²³ 42 U.S.C. §7475(a)(3).

²⁴ 42 U.S.C. §7475(a)(4). The CAA, however, does not specify the amount of emissions of a particular “regulated pollutant” by a “major emitting facility” that would trigger BACT for that pollutant. *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Slip Op. at 4 n.1. By regulation, though, EPA has set pollutant-specific numerical thresholds that represent a *de minimis* level, under which a source’s emissions does not trigger BACT for that pollutant. *See id.*; 40 C.F.R. §§51.166(b)(2)(i), (23), (39), (j)(2)–(3), 52.21(b)(2)(i), (23), (40), (j)(2)–(3); *see id.* (citing *Alabama Power Co. v. Costle*, 636 F. 2d 323, 360–361, 400, 405 (D.C. Cir. 1979) (recognizing EPA’s authority to establish *de minimis* levels)); *see id.* (citing *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U. S. 214, 231 (1992) (“[D]e minimis non curat lex . . . is part of the established background of legal principles against which all enactments are adopted”).

²⁵ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 25 (quoting 42 U.S.C. §7479(3)).

²⁶ *Id.* at 25 (quoting 42 U.S.C. §7479(3)).

Distinct from Title I's PSD permitting system, there is a permit program found in Title V of the CAA.²⁷ As a general matter, Title V requires all "major sources" to have a comprehensive operating permit.²⁸ The definition of "major source" within the Title V program applies the CAA's general definition of "major source," which states that any stationary source with the potential to emit 100 tpy of "any air pollutant" qualifies as a major source.²⁹

In stark contrast with the PSD program, the Title V permitting program does not require sources to use BACT or install any other pollution control device for that matter.³⁰ Rather, its function is to establish a single CAA document under which all of the substantive requirements that a source must follow, such as "emissions limitations and standards" are found.³¹

C. MASSACHUSETTS V. EPA

In 1999, a group of 19 private organizations filed a rulemaking petition asking EPA to regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act."³² After taking the petition under consideration for close to four years, EPA entered an order denying the petition in 2003.³³ In its order, EPA offered two principal reasons for denying the petition: (1) the CAA does not authorize EPA to promulgate GHG regulations to address global climate change; and (2) that even if EPA had the authority to establish GHG emission standards, it would not be prudent to do so at that time.³⁴

In response to EPA denial, twelve states, three cities, an American territory, and the private organizations petitioned for review of EPA's decision in the U.S. Court of Appeals for the District of Columbia

²⁷ 42 U.S.C. §7661 (2013) et seq. (Title V's permitting program).

²⁸ 42 U.S.C. §7661(a).

²⁹ 42 U.S.C. §§7661(2)(B), 7602(j) (2013).

³⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 4 (stating that "[u]nlike the PSD program, Title V generally does not impose any substantive pollution-control requirements.").

³¹ 42 U.S.C. §7661c(a)–(c). Title V permits also include associated inspection, monitoring, and reporting requirements. *Id.*

³² *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007); 42 U.S.C. §7521 (2013).

³³ *Massachusetts*, 549 U.S. at 510 (citing 68 Fed.Reg. 52922 at 52925–52929, 52929–52931).

³⁴ *See id.* at 510 (citing 52925–52929 and 52929–52931).

Circuit.³⁵ A divided panel of the court agreed with the EPA's decision to not regulate GHGs, and held that in the context of scientific and policy considerations, the "EPA administrator properly exercised his discretion in denying the petition for rulemaking."³⁶ The petitioners appealed to the U.S. Supreme Court.³⁷

In a 5-4 decision, the Supreme Court, in *Massachusetts v. EPA*, reversed the D.C. Circuit Court and held that GHGs were "air pollutants" within the meaning of the CAA.³⁸ The Court had little trouble in concluding that GHGs fit within CAA's "sweeping definition" of "air pollutant," which included "any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air ...".³⁹ It therefore rejected EPA's argument that the CAA had not authorized it to regulate GHGs to address climate change.⁴⁰

Next, the Court rejected EPA's argument that, even if EPA had the statutory authority, it would be "unwise" to regulate GHGs at this time, calling EPA's explanation "divorced from the statutory text."⁴¹ But because EPA had not offered a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change" that was grounded in the CAA, the Court remanded the issue to EPA to give such an explanation.⁴²

II. THE REGULATION OF GHGs AFTER *MASSACHUSETTS*

A. *GHG RULEMAKINGS BY EPA IN RESPONSE TO MASSACHUSETTS V. EPA*

Following the Supreme Court's conclusion in *Massachusetts v. EPA* that GHGs "unambiguous[ly]" qualify as "air pollutants" that can be regulated under the Act, EPA promulgated a "cascading series of

³⁵ *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005).

³⁶ *See id.* at 58.

³⁷ *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007).

³⁸ *Id.*, at 532.

³⁹ *Id.*, at 528-529 (citing 42 U.S.C. §7602(g)).

⁴⁰ *Id.*, at 528-529.

⁴¹ *Id.*, at 532.

⁴² *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007) (quoting 42 U.S.C. § 7521(a)(1) (2013)).

greenhouse gas-related rules and regulations.”⁴³ Consistent with the Court’s direction that “EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do,” EPA engaged in an extensive notice and comment proceeding on this issue.⁴⁴ More specifically, EPA sought to assess “whether sufficient information exists to make an endangerment finding” for GHGs.⁴⁵

After studying this issue for several years, EPA issued its “Endangerment Finding” that determined that GHGs “may reasonably be anticipated to endanger public health or welfare.”⁴⁶ In defining the universe of GHGs to be regulated, the Endangerment Finding established a single “air pollutant” as an “aggregate group of six long-lived and directly-emitted greenhouse gases” that are “well mixed” together in the atmosphere and cause global climate change.”⁴⁷ Specifically, it listed “carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.”⁴⁸ By calculating the impact of these particular GHGs on a “carbon dioxide equivalent basis,” (CO₂e) EPA concluded that emissions of these six well-mixed gases from motor-vehicles “contribute to the total greenhouse gas air pollution, and thus to the climate change problem,

⁴³ *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 115 (D.C. Cir. 2012) (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007)).

⁴⁴ *Massachusetts*, at 533. See, e.g. *Regulating Greenhouse Gas Emissions under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008) (“This advance notice of proposed rulemaking (ANPR) presents information relevant to, and solicits public comment on, how to respond to the U.S. Supreme Court’s decision in *Massachusetts v. EPA*.”), *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 18,886 (April 24, 2009) (“Today the Administrator is proposing to find that greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations.”).

⁴⁵ *Massachusetts*, at 534.

⁴⁶ *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Endangerment Finding”), 74 Fed. Reg. 66,536-37 (Dec. 15, 2009). See 42 U.S.C. §7521(a)(1).

⁴⁷ *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Endangerment Finding”), 74 Fed. Reg. at 536-37. See *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012).

⁴⁸ *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Endangerment Finding”), 74 Fed. Reg. at 536-37.

which is reasonably anticipated to endanger public health and welfare.”⁴⁹

Based on this finding, which was grounded in statutory authority found in the motor-vehicle provisions of the CAA, EPA was then required to promulgate regulations establishing GHG emission standards for cars and light trucks.⁵⁰ But before promulgating these standards (which would subsequently appear in a separate rule known as the “Tailpipe Rule”), EPA announced its “final decision” regarding the impact that the establishment of motor-vehicle greenhouse-gas standards would have on the stationary source permitting programs found in Title I (*i.e.*, the PSD program) and Title V.⁵¹ This became known as the “Triggering Rule.”⁵²

During the development of the Endangerment Finding, EPA had expressed its “longstanding interpretation” that a Tailpipe Rule would automatically trigger regulation of all stationary sources with the potential to emit GHGs in excess of certain statutory thresholds.⁵³

⁴⁹ *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 114-115. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Endangerment Finding”), 74 Fed. Reg. at 66,499. Carbon Dioxide equivalent (CO₂e) is based on the gases’ “warming effect relative to carbon dioxide ... over a specified timeframe.” *See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Endangerment Finding”), 74 Fed. Reg. at 536,519. *See also Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d at 114 (“Using the carbon dioxide equivalent equation, for example, a mixture of X amount of nitrous oxide and Y amount of sulfur hexafluoride is expressed as Z amount of CO₂e”).

⁵⁰ *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012). Under 42 U.S.C. § 7521(a)(1), EPA is required to set motor-vehicle emission standards for “any air pollutant ... which may reasonably be anticipated to endanger public health or welfare.” Therefore, EPA had a “statutory obligation” to regulate harmful greenhouse gases, once EPA had made its finding. 42 U.S.C. § 7521(a)(1); *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

⁵¹ *See* 42 U.S.C. §7470 (2013) et seq. (Title I’s Prevention of Significant Deterioration (PSD) program); 42 U.S.C. §7661 (2013) et seq. (Title V’s permitting program).

⁵² *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 6 (stating “hereinafter Triggering Rule”).

⁵³ *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d at 115. *See id.* (“EPA has long interpreted the phrase “any air pollutant” in both these provisions to mean any air pollutant that is regulated under the CAA. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans (“1980 Implementation Plan Requirements”), 45

These thresholds (as set forth, *supra*.) were 100 tpy under Title V and either 100 or 250 tpy under the PSD program depending on the type of source.⁵⁴

The staggering implication of its interpretation was not lost on EPA: it recognized that GHG emissions are generally “orders of magnitude greater” than the emissions of conventional pollutants regulated under those programs.⁵⁵ As a consequence, EPA recognized that countless “smaller industrial sources,” “large office and residential buildings, hotels, large retail establishments, and similar facilities” would now be subject to both PSD and Title V permitting.⁵⁶ This would have both “a profound effect on virtually every sector of the economy and touch every household in the land,” as well as represent an “unprecedented expansion of EPA authority.”⁵⁷

Nonetheless, EPA’s final decision was that, as predicted, a Tailpipe Rule would in fact trigger stationary-source permitting requirements.⁵⁸ With respect to timing, EPA determined that as soon as the Tailpipe Rule became effective, stationary sources would then potentially be subject to the PSD program and Title V based on their GHG emissions.⁵⁹ And shortly thereafter, EPA released the Tailpipe Rule, establishing emission standards for carbon dioxide for cars and trucks built for Model Years 2012 through 2016.⁶⁰ EPA made these standards effective as of January 2, 2011, but recognizing the consequence of making these standards effective, EPA issued another rule.⁶¹

Fed. Reg. 52,676, 52,711 (Aug. 7, 1980) (PSD program); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (“Tailoring Rule”), 75 Fed. Reg. 31,514, 31,553–54 (June 3, 2010) (discussing history of Title V regulation and applicability)). See also 73 Fed. Reg. 44420, 44498, 44511 (2008).

⁵⁴ 42 U.S.C. §7479(1) (2013) (PSD Program); 42 U.S.C. §§7661(2)(B), 7602(j) (2013) (Title V program). See *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 5.

⁵⁵ See *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 5 (quoting 73 Fed. Reg. 44430, 44498–44499).

⁵⁶ *Id.*

⁵⁷ See *Id.* at 5 (quoting 73 Fed. Reg. 44355).

⁵⁸ See *Id.* at 6 (citing 75 Fed. Reg. 17004 (2010)).

⁵⁹ *Id.*

⁶⁰ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,329–30 (May 7, 2010); see *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012).

⁶¹ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

In its “Tailoring Rule,” EPA sought to tailor the PSD and Title V programs in order to “reliev[e] overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources.”⁶² Under this “phase-in approach,” EPA stated that it would gradually increase the number of sources subject to PSD and Title V over time by altering the threshold levels.⁶³

Under Step 1, which spanned from January 2 through June 30, 2011, sources that already were subject to PSD and Title V because of their emission of conventional pollutants (so-called “anyway sources”) would have to follow the PSD program’s BACT requirement for GHGs if they emitted 75,000 tpy or more CO₂e.⁶⁴ No source, however, would “become newly subject to the PSD program or Title V solely on the basis of its greenhouse-gas emissions” during this period.⁶⁵ During Step 2, which lasted from July 1, 2011 to June 30, 2012, “non-anyway sources” (*i.e.*, sources that were not already subject to the PSD program) that had the potential to emit at least 100,000 tpy per year CO₂e of GHGs would now fall within the PSD and Title V permitting requirements.⁶⁶ Likewise, a source that undertook a “modification” that would increase its GHG emissions by at least 75,000 tpy CO₂e would also be subject to the program.⁶⁷

For Step 3, which began on July 1, 2013, EPA indicated that it would not commit to whether it would alter the thresholds moving forward or make other adjustments such as exempting certain sources from the programs.⁶⁸ For additional steps beyond Step 3, EPA pledged

⁶² *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012) (citing 75 Fed. Reg. 31,516 (2010)).

⁶³ *See UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 7 (citing 75 Fed. Reg. 31,514 (2010)).

⁶⁴ *See Id.* at 7 (citing 75 Fed. Reg. 31,514 (2010)).

⁶⁵ *See Id.* 7–8 (citing 75 Fed. Reg. 31,514 (2010)).

⁶⁶ *See Id.* at 8 (citing 75 Fed. Reg. 31,523–24 (2010)). Steps 1 and 2 were codified at 40 C.F.R. §§51.166(b)(48) and 52.21(b)(49) for PSD and at §§70.2 and 71.2 for Title V. *See Tailoring Rule* 31,606–31,608.

⁶⁷ *See UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 8 (citing 75 Fed. Reg. 31,523–24 (2010)). Steps 1 and 2 were codified at 40 C.F.R. §§51.166(b)(48) and 52.21(b)(49) for PSD and at §§70.2 and 71.2 for Title V. *See Tailoring Rule* 31,606–31,608.

⁶⁸ *See id.* at 8 (citing 75 Fed. Reg. 31,524 (2010)).

to engage in a rulemaking by April 30, 2016, to decide on how to handle smaller sources.⁶⁹

B. *THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT CASE OF
COALITION FOR RESPONSIBLE REGULATION V. EPA*

Unsurprisingly, the Endangerment Finding, as well as the Tailpipe, Triggering and Tailoring Rules were quickly challenged in the U.S. Court of Appeals for the D.C. Circuit in *Coalition for Responsible Regulation v. EPA*.⁷⁰ The panel of the D.C. Circuit consolidated the petitions for review for the four final agency actions by EPA.⁷¹

In a *per curiam* decision, the panel held that both the Endangerment Finding and Tailpipe Rule were neither arbitrary nor capricious.⁷² With respect to stationary sources, it found that EPA's interpretation that it must regulate GHGs from stationary sources was compelled by the statute and therefore dismissed the various petitioners' challenges on this issue.⁷³ The panel also determined that it was "crystal clear that PSD permittees must install BACT for greenhouse gases."⁷⁴ With respect to the permitting requirements under Title V, it held that the petitioners had "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V."⁷⁵ Finally, the panel further found that none of the petitioners had standing to challenge the Timing and Tailoring Rule and therefore dismissed the petitions on this issue for a

⁶⁹ See *id.* at 8 (citing 75 Fed. Reg. 31,525 (2010)). EPA codified its commitments with respect to Step 3 and beyond at §§52.22, 70.12, and 71.13. See Tailoring Rule 31606–31608. In 2012, EPA issued its final Step 3 rule, in which it decided not to lower the thresholds it had established at Step 2 until at least 2016. 77 Fed. Reg. 41,051 (2012).

⁷⁰ *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 116 (D.C. Cir. 2012).

⁷¹ *Id.* at 116.

⁷² *Id.* at 116. These challenges were made under 42 U. S. C. §7607(b) (2013), which directs a court to "reverse the Administrator's action in rulemaking if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 424 (D.C. Cir. 2011) (quoting 42 U.S.C. § 7607(d)(9)(A)).

⁷³ *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 116 (D.C. Cir. 2012).

⁷⁴ *Id.* at 137.

⁷⁵ *Id.* at 136.

lack of jurisdiction under Article III.⁷⁶ The D.C. Circuit denied rehearing *en banc*, with Judge Brown and Judge Kavanaugh separately dissenting.⁷⁷

III. THE U.S. SUPREME COURT DECISION

In response to the *per curiam* decision by the U.S. Court of Appeals for the D.C. Circuit, various parties petitioned for writs of certiorari objecting to numerous facets of the Endangerment Finding, as well as the related GHG rules.⁷⁸ Following the October 15, 2013 conference, the U.S. Supreme Court granted six petitions for a writ of certiorari and set forth the question presented as “whether the 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.”⁷⁹

On June 23, 2014, a divided Court affirmed in part and reversed in part the judgment of the D.C. Circuit. Justice Scalia wrote the majority opinion, with Justice Breyer and Alito, each writing separate opinions, concurring in part and dissenting in part.⁸⁰ Justice Breyer’s opinion was joined by Justices Ginsburg, Sotomayor, and Kagan.⁸¹ Justice Alito’s opinion was joined by Justice Thomas.⁸²

A. THE MAJORITY OPINION BY JUSTICE SCALIA

Justice Scalia writing for 4 Justices (Chief Justice Roberts and Justices Thomas, Kennedy, and Alito) introduced the case as involving “two distinct challenges to EPA’s stance on greenhouse-gas permitting

⁷⁶ *Id.* at 146.

⁷⁷ *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785 (decision on rehearing *en banc*).

⁷⁸ *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012).

⁷⁹ Supreme Court, Order List: 571 U.S. 3 (Oct. 15, 2013), available at http://www.supremecourt.gov/orders/courtorders/101513zor_4g25.pdf [[hereinafter Order List] (granting certiorari to *Utility Air Regulatory Group v. EPA*, *Am. Chemistry Council v. EPA*, *Energy-Intensive Mfrs. Working Group on Greenhouse Gas Regulation v. EPA*, *Se. Legal Found. v. EPA*, *Texas v. EPA*, and *Chamber of Commerce v. EPA*, and consolidating the cases).

⁸⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 9.

⁸¹ *Id.* Opinion of Breyer, J. at 2.

⁸² *Id.* Opinion of Alito, J. at 2 .

for stationary sources.”⁸³ He stated that the Court must first “decide whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the *sole* basis of the source’s potential to emit greenhouse gases.”⁸⁴ His analysis of this question encompassed three distinct inquiries: (1) whether EPA’s view was compelled by the statute (Part II-A-1); (2) whether EPA’s view (although not compelled) was a reasonable construction of the CAA (Part II-A-2); and (3) whether EPA’s promulgation of the Tailoring Rule cured the unreasonable results that logically followed from EPA’s interpretation (Part II-A-3).⁸⁵

The second question for the Court, in his view, was to determine whether EPA “permissibly determined that a source *already subject to the PSD program* because of its emission of conventional pollutants (an “anyway source”) may be required to limit its greenhouse-gas emissions by employing the “best available control technology” for greenhouse gases.”⁸⁶ This discussion was found in Part II-B-1 and Part II-B-2.⁸⁷

Justice Scalia also set forth that the Court would follow the standard of review established by *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*⁸⁸ under which an agency is entitled to resolve statutory ambiguities found with a statute it administers.⁸⁹ Accordingly, he would assess whether EPA’s interpretation was reasonable and had “stayed within the bounds of its statutory authority.”⁹⁰

⁸³ *Id.* at 9.

⁸⁴ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 9 (emphasis added).

⁸⁵ *Id.* at 9–10.

⁸⁶ *Id.* at 9 (emphasis added). Justice Scalia pointed out how the EPA, through the Solicitor General of the United States, “evidently regards the second [issue] as more important” because these so-called “anyway sources” comprise of approximately 83% of U.S. stationary-source greenhouse-gas emissions, as contrasted to 3% for the sources captured under the first issue (that EPA sought to regulate at Steps 2 and 3 of the Tailoring Rule). *Id.* at 9–10 (citing Tr. of Oral Arg. 52).

⁸⁷ *Id.* at 9–10.

⁸⁸ *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984).

⁸⁹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 10.

⁹⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 10 (citing *Arlington v. FCC*, 569 U. S. ___, ___ (2013) (slip op., at 5) (emphasis deleted)).

1. *Whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit GHGs ("non-anyway sources")*

In Part II-A, authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, the Court analyzed whether EPA was correct that a source triggers the permitting requirements of both the PSD and Title V programs based exclusively on its potential to emit GHGs above the thresholds.⁹¹ EPA argued that its interpretation on this issue followed unambiguously from the CAA, but that even if it was not compelled, it represented a reasonable construction of the CAA – especially given its promulgation of the Tailoring Rule to mitigate any absurd results.⁹²

The 5-4 majority, however, rejected EPA's view and held that the "statute compelled EPA's greenhouse-gas-inclusive interpretation with respect to neither the PSD program nor Title V."⁹³ It then similarly rejected EPA's attempt to enforce this interpretation as part of its discretionary ability to construe ambiguous terms in the CAA and relatedly found that EPA's attempt to tailor the CAA as to these sources was impermissible.⁹⁴

- a. *Whether EPA's view that sources were required to obtain PSD and Title V permits based solely on their potential GHG emissions was compelled by the statute*

⁹¹ *Id.* at 10. 42 U.S.C. §7470 (2013) et seq. (Title I's Prevention of Significant Deterioration (PSD) program); 42 U.S.C. §7661 (2013) et seq. (Title V's permitting program). Justice Scalia called these "non-anyway sources", contrasting them from "anyway sources" which are sources already regulated under PSD and Title V for other pollutants.

⁹² *Id.* at 10. The D.C. Circuit concurred with EPA's construction of the statute, holding that the statute "compelled" this interpretation. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 134 (D.C. Cir. 2012).

⁹³ *Id.* at 10. In ruling on this issue, the Court also rejected the D.C. Circuit's holding that the petitioners' arguments on this issue had only applied with respect to the PSD program and that petitioners had therefore "forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V." See *id.* at 10 n.4 (citing *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 136 (D.C. Cir. 2012)).

⁹⁴ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, at 10-24.

In Part II-A-1, the Court addressed whether EPA was correct when it had determined that the CAA compelled EPA to require sources to obtain PSD and Title V permits based solely on potential GHG emissions that exceeded the statutory thresholds.⁹⁵ In analyzing this issue, the Court first examined the definition of “air pollutant” applied by the lower court when it determined that EPA’s interpretation was correct.⁹⁶

The Court concluded that the D.C. Circuit had erred by applying a “flawed syllogism” when it had analyzed the phrase “air pollutant” as that term is used within various provisions of the Clean Air Act.⁹⁷ The panel had reasoned that because the act-wide definition of “air pollutant” included GHGs (as confirmed by the Court in *Massachusetts*) and that because the PSD and Title V provisions make major sources of “air pollutants” subject to those provisions, then major emitters of GHGs therefore needed PSD and Title V permits.⁹⁸ But such a conclusion, the Court held, presupposed that the definition of “air pollutant” meant the same thing under the “general, Act-wide definition” as it did under the “permitting requiring provisions.”⁹⁹ The Court found this proposition “obviously untenable.”¹⁰⁰

The Court acknowledged that in *Massachusetts* it had previously defined “air pollutant” to include “greenhouse gases because it is all-encompassing; it ‘embraces all airborne compounds of whatever stripe.’”¹⁰¹ However, it declined to extend its interpretation of “air pollutant” to instances where the term is used in “operative provisions” of the CAA where EPA had “routinely given it a narrower, context-appropriate meaning.”¹⁰²

⁹⁵ *Id.* at 11.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 11.

⁹⁸ *Id.* at 11.

⁹⁹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 11. The Court called the Act-wide definition “the major premise” and the permitting-requiring provisions “the minor premise.” *Id.* at 11.

¹⁰⁰ *Id.* at 11.

¹⁰¹ *Id.* at 11 (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007)).

¹⁰² *Id.* at 11 (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007)). The Court noted that the CAA defines an air pollutant is “any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” *Id.* (citing 42 U.S.C. §7602(g)).

Justice Scalia, writing for the Court, pointed out that EPA since 1978 had interpreted the phrase “any air pollutant” in the PSD triggering provision to only apply to *regulated* air pollutants, which naturally was “a class much narrower” than the sweeping construction set forth in *Massachusetts*.¹⁰³ EPA, he noted, had construed the Title V triggering provision similarly since 1993.¹⁰⁴ In light of EPA’s long-standing “reasonable, context-appropriate meanings,” Justice Scalia criticized EPA for not devising a similarly context-based interpretation with respect to GHGs in the PSD and Title V contexts.¹⁰⁵

He then went on to list several other examples where EPA deviated from applying an all-encompassing definition when there had appeared a “generic references to air pollutants” in the CAA.¹⁰⁶ These included references from the New Source Performance standards (NSPS) provisions,¹⁰⁷ the Non-Attainment New Source Review provisions,¹⁰⁸ an enhanced monitoring provision,¹⁰⁹ and a visibility protection

¹⁰³ *Id.* at 11 (citing 43 Fed. Reg. 26403, codified, as amended, 40 C.F.R. §52.21(b)(1)–(2), (50)).

¹⁰⁴ *Id.* at 12 (citing Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Air Division Director, Regions I–X, pp. 4–5 (Apr. 26, 1993)). *See also*, Tailoring Rule 31607–31608 (amending 40 C.F.R. §§70.2, 71.2).

¹⁰⁵ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 12. Although it criticized EPA that “it is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances” it does seem to sidestep that these admittedly “harmless” substances are different than GHGs.

¹⁰⁶ *Id.* at 12–13.

¹⁰⁷ *Id.* at 12. A NSPS applies if an existing source undergoes a physical or operational change that increases its emission of “any air pollutant.” *Id.* 42 U.S.C. §7411(a)(2) (2013), (4), (b)(1)(B). When determining whether there has been an increase of “any air pollutant,” EPA only looks to pollutants to which EPA has already promulgated new source performance standards. *Id.*; 36 Fed. Reg. 24877 (1971), codified, as amended, 40 C.F.R. §60.2; 40 Fed. Reg. 58419 (1975), codified, as amended, 40 C.F.R. §60.14(a).

¹⁰⁸ *Id.* at 12–13. Under the non-attainment NSR provisions, sources with the potential to emit 100 tons per year of “any air pollutant” within a nonattainment area need a construction and operation permit. *Id.* 42 U.S.C. §7502(c)(5) (2013), 7602(j) (2013). EPA interprets this requirement as to only apply to pollutants for which the area is designated as being in nonattainment. *Id.*; 45 Fed. Reg. 52745 (1980), promulgating 40 C.F.R. §51.18(j)(2), as amended, §51.165(a)(2).

¹⁰⁹ *Id.* at 13. The CAA requires EPA to mandate “enhanced monitoring and submission of compliance certifications” for sources with the potential to emit 100 tons per year of “any air pollutant,” which EPA interprets to be limited to regulated

provision.¹¹⁰ These examples, he asserted, demonstrated how EPA had previously limited the definition of “any air pollutant.”¹¹¹

He was also clear that the Court’s *Massachusetts* decision did not alter these narrower, longstanding interpretations of “any air pollutant.”¹¹² Rather, he characterized the Court’s holding in *Massachusetts* as having provided “a description of the universe of substances EPA may *consider* regulating under the Act’s operative provisions.”¹¹³ In other words, the “capacious” interpretation of “air pollutant” was “not a command to regulate” all such pollutants under the CAA.¹¹⁴ EPA retained authority to decline to regulate certain air pollutants in circumstances where to do so would be at odds with the structure of the CAA.¹¹⁵

Justice Scalia then explained why this shifting meaning of “air pollutant” within the CAA was justified as a matter of statutory construction.¹¹⁶ He first characterized Congress’s use of the term “air pollutant” as “not conducive to clarity” and then dismissed the CAA as not a being a masterpiece of legislative drafting.¹¹⁷ Then, to counter the canon of construction “that identical words used in different parts of the same act are intended to have the same meaning,”¹¹⁸ he turned to another “canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

pollutants. *Id.* (citing §7414(a)(3), 7602(j) and 62 Fed. Reg. 54941 (1997), codified at 40 C.F.R. §§64.1, 64.2).

¹¹⁰ *Id.* at 13. Under the CAA, some sources of air pollutants that interfere with visibility must retrofit their facilities if they have the potential to emit 250 tons per year of “any pollutant,” which EPA interprets to be limited to visibility-impairing air pollutants. *Id.* (citing §7491(b)(2)(A), (g)(7) and 70 Fed. Reg. 39160 (2005), codified at 40 C.F.R. pt. 51, App. Y, §II.A.3).

¹¹¹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 13.

¹¹² *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 13.

¹¹³ *Id.* at 14.

¹¹⁴ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 14 (citing *Massachusetts v. EPA*, 549 U.S. 49, 528, 532 (2007)).

¹¹⁵ *Id.* at 14.

¹¹⁶ *Id.* at 15.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007)).

statutory scheme.”¹¹⁹ Therefore, even a statutory term defined by statute “may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.”¹²⁰ Based on this “fundamental” canon, he asserted, the presumption of consistent usage of the term “air pollutant” in the CAA “readily yields” to context in this case.¹²¹

In his majority opinion, however, he was careful to limit the reach of its analysis and holding on this issue.¹²² He made clear that it was not passing “on the validity of all the limiting constructions EPA has given the term ‘air pollutant’ throughout the Act.”¹²³ Rather, he was simply rejecting EPA’s position that the same expansive definition of “air pollutant” found by the Court in *Massachusetts* did not bind EPA’s hands when it interpreted the PSD and Title V permitting requirements, especially in the face of incompatibility of regulating GHGs in those programs.¹²⁴

Justice Scalia, on behalf of the Court on this issue, concluded by noting that there was “no insuperable textual barrier” for EPA to limit its interpretation of “any air pollutant” in the triggering provisions of PSD and Title V to only those pollutants that can be “sensibly” regulated by those programs.¹²⁵ Likewise, it was entirely consistent with the CAA (and the Court’s decision in *Massachusetts*) for EPA “to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.”¹²⁶ For all these reasons, the

¹¹⁹ *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000)).

¹²⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 13 (quoting *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007)).

¹²¹ *Id.* at 15 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000)).

¹²² *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 15.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 15–16. The Court declined to determine whether any of the proffered interpretations (that limited the reach of the PSD triggers) were reasonable. For example, the Court noted that Judge Kavanaugh has asserted below that it would be reasonable for EPA to construe “any air pollutant” in the PSD context to encompass

Court rejected EPA's argument that the plain language of the CAA compelled EPA to find that sources of GHG emissions were subject to the PSD and Title V provisions.¹²⁷

- b. Whether EPA's interpretation that excessive GHGs emissions triggered PSD and Title V was a reasonable interpretation of the CAA

Although EPA had argued that its interpretation that GHGs regulation had been triggered under the PSD and Title V was mandated by the plain language of the CAA, it also maintained that, even if not compelled, it was nonetheless a permissible construction of the Act.¹²⁸ In Part II-A-2, Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, addressed this alternate argument and concluded that EPA's interpretation was not reasonable.¹²⁹

Although the majority recognized that *Chevron* provided a deferential framework that allowed EPA to "operate 'within the bounds of reasonable interpretation,'" it rejected EPA's view.¹³⁰ The Court reasoned that the proper statutory interpretation of an ambiguous term must look to "the specific context in which . . . language is used" as well as "the broader context of the statute as a whole."¹³¹ Thus, a seemingly ambiguous statutory provision "is often clarified by the remainder of the statutory scheme" especially in circumstances where only one

only the six NAAQS pollutants. *Id.* at 16 (citing Coalition for Responsible Regulation, Inc. v. EPA, No. 09-1322 etc. (CADDC, Dec. 20, 2012), App. 171-180, 2012 WL 6621785, *15-*18 (opinion dissenting from denial of rehearing en banc)). Other petitioners set forth a more nuanced argument that because "permitting is required only for major emitting facilities "in any area to which [the PSD program] applies," 42 U.S.C. §7475(a) (2013), the relevant pollutants are only those NAAQS pollutants for which the area in question is designated attainment or unclassifiable." *Id.* And still others offered an even more limited interpretation; namely, that "any air pollutant" in the PSD provision should be cabined to air pollutants that had localized effects on air quality. *Id.*

¹²⁷ *Id.* at 16.

¹²⁸ *Id.* See Tailoring Rule 31517.

¹²⁹ *Id.*

¹³⁰ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, at 16 (citing *Arlington*, 569 U. S., at 1868 (slip op., at 5)). *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.* 467 U. S. 837, 842-843 (1984).

¹³¹ *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341 (1997)).

construction results in “a substantive effect that is compatible with the rest of the law.”¹³²

The Court then highlighted that EPA had “repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act’s structure and design.”¹³³ For example, EPA had conceded that applications for PSD permit would balloon from approximately 800 to about 82,000 each year.¹³⁴ Similarly, the administrative costs of the PSD program would skyrocket from \$12 million to over \$1.5 billion.¹³⁵ And even more troublesome would be the “decade-long delays” that could result which would cause “construction projects to grind to a halt nationwide.”¹³⁶

With respect to the Title V program, the Court called the consequences “equally bleak” if sources were required to secure permits based on the potential GHG emissions.¹³⁷ Permits would be required for over 6 million sources (up from about 15,000 sources) and administrative costs would rise from \$62 million to \$21 billion annually.¹³⁸ And even more dramatically, “the newly covered sources would [collectively] face permitting costs of \$147 billion.”¹³⁹

Beyond these practical consequences, the Court further explained that the inclusion of the smaller sources would contravene congressional intent: a result EPA had conceded during its rulemaking for the Tailoring Rule.¹⁴⁰ For instance, the majority quoted EPA’s admission that inclusion of GHGs as a regulated pollutant under PSD and Title

¹³² *Id.* at 16-17 (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988)). *See id.* (“an agency interpretation that is “inconsisten[t] with the design and structure of the statute as a whole,” does not merit deference” quoting *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. —, —, 133 S.Ct. 2517, 2529, 186 L.Ed.2d 503 (2013), (slip op., at 13)).

¹³³ *Id.* at 17.

¹³⁴ *Id.* (citing Tailoring Rule 31557).

¹³⁵ *Id.*

¹³⁶ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 17.

¹³⁷ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 17.

¹³⁸ *Id.* (citing Tailoring Rule at 31562–31563).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 17 (quoting EPA’s Tailoring Rule (at 31533) that “the great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting.”).

programs would result in a 1,000-fold increase in the statutory permitting thresholds and would therefore “so severely undermine what Congress sought to accomplish.”¹⁴¹

Next, the Court explained that the PSD and Title V programs were aimed towards “a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.”¹⁴² To mandate that smaller sources must secure permits for their GHG emissions alone would therefore conflict with Congress’s regulatory design.¹⁴³ To support its view, the Court cited to provisions within the PSD provisions that levy “numerous and costly requirements” on covered sources.¹⁴⁴ For example, application materials for a PSD permit include detailed analyses of potential pollution-related effects, demonstrations that potential emissions will not contribute to applicable pollution standards, as well as identifying (and subsequently installing) the “best available control technology” for every regulated pollutant emitted.¹⁴⁵

Likewise, the Court pointed out that the CAA imposes a significant workload on the permitting authority, which is usually a state agency in states that have federally delegated programs.¹⁴⁶ The reviewing agency is required to grant or deny a permit within a year and must convene a public hearing on the source’s request for a permit.¹⁴⁷ Thus, the Court parroted EPA’s own words that the PSD’s “complicated, resource-intensive, time-consuming, and sometimes contentious process” highlighted why Congress must have contemplated the program applying to “hundreds of larger sources,” not “tens of thousands of smaller sources.”¹⁴⁸

Although the Court conceded that Title V did not contain parallel substantive mandates, it did note that the procedural requirements were substantial.¹⁴⁹ Among other requirements, sources subject to Title V must apply for a permit within a year of becoming subject to the

¹⁴¹ *Id.* (quoting Tailoring Rule at 31554).

¹⁴² *Id.*

¹⁴³ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 17 (quoting *Brown & Williamson*, 529 U. S., at 156).

¹⁴⁴ *Id.* at 18.

¹⁴⁵ *Id.* (citing 42 U.S.C. §7475(a)(3), (4), (6), (e)).

¹⁴⁶ *Id.* at 18–19.

¹⁴⁷ *Id.* (citing 42 U.S.C. §7475(a)(2), (c)).

¹⁴⁸ *Id.* (quoting 74 Fed. Reg. 55304, 55321–55322).

¹⁴⁹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 17.

program and include a “compliance plan” outlining how it will meet its obligations under the CAA, along with an on-going annual certification, as well as agreeing to “inspection, entry, monitoring ... and reporting requirements.”¹⁵⁰ The Court finished its analysis of Title V by repeating EPA’s own view that Title V is “finely crafted for thousands,” not millions, of sources.¹⁵¹

Justice Scalia concluded the five Justice Majority decision on this issue by relying on an additional reason why EPA’s interpretation was unreasonable.¹⁵² He also found that inclusion of GHGs within the PSD and Title V triggers “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”¹⁵³ And especially when an agency’s new-found interpretation impacts “a significant portion of the American economy,” he warned that the Court must be skeptical in the absence of clear direction by Congress.¹⁵⁴

Here, he held, EPA’s interpretation that required permits for millions of small sources fell “comfortably” within the type of interpretations that the Court could not condone in the name of agency discretion.¹⁵⁵ The Court was even more convinced of its decision given

¹⁵⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 17 (quoting 42 U.S.C. §§7661b(b)–(c) (2013), 7661c(a)–(c)). The Court also outlined the significant procedural burdens on the permitting authorities, such as the requirement of (1) holding a public hearing (§7661a(b)(6)); (2) forwarding the application and any proposed permit to EPA and adjoining States (§7661d(a)); (3) responding in writing to their comments (§7661d(b)(1)). Slip Op. at 19. See also §§7661a(b)(7), 7661b(c) (if permitting authority does not issue or deny the permit within 18 months, any interested party can sue to compel a decision “without additional delay”) and §7661d(b)(2)–(3) (interested party can petition EPA to block permit and EPA must grant or deny such a petition within 60 days, and that decision is subject to judicial review).

¹⁵¹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 19. (quoting Tailoring Rule at 31563).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (quoting *Brown & Williamson*, 529 U. S., at 159). See also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U. S. 607, 645–646 (1980) (plurality opinion).

¹⁵⁵ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 19–20. The Court declined to take on the EPA’s argument that if EPA were to change its long-held interpretation of “potential to emit” then the number of sources that would trigger the permitting provisions would drastically minimized. *Id.* at 20 n.7.

EPA's admission that a contrary conclusion would transform the CAA into a statute that EPA itself had admitted would be "unrecognizable to the Congress that designed" it.¹⁵⁶

- c. Whether EPA's could make its interpretation reasonable by adjusting the levels at which a source would trigger the PSD and Title V permitting requirements

In the final section of the Court's Opinion, Part II-A-3, Justice Scalia, again writing for the Court, assessed whether EPA could "cure" its unreasonable interpretation of the CAA by "tailoring" the PSD and Title V requirements.¹⁵⁷ As set forth in more detail *supra*, EPA's Tailoring rule established a 100,000 tpy CO₂e trigger for GHGs, essentially overriding the statutory 100 or 250 tpy trigger that applies to all other regulated pollutants.¹⁵⁸ The Court concluded that EPA could not rewrite the statutory thresholds in an effort to "validate" its interpretation of the triggering provisions to include GHGs.¹⁵⁹

The Court's view on this issue was straightforward:

An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or

The Court suggested that, even if such an interpretation were to be proffered, it was questionable whether "eliminate the unreasonableness of EPA's interpretation." Likewise, it expressed doubt that "streamlining" the permitting process (such as issuing "general" or "electronic" permit) would cure the "fundamental problem of EPA's claiming regulatory authority over millions of small entities that it acknowledges the Act does not seek to regulate." *Id.* (at 20 n.7.)

¹⁵⁶ *Id.* at 20 (quoting Tailoring Rule at 31555). The Court also declined to shed light as to whether a similar result would follow if EPA were to re-define to exclude carbon dioxide from its "aggregate pollutant" definition. *Id.* at 20 n.7. This, according to EPA would make the inclusion of GHGs compatible with the PSD program and Title V. *Id.* (20 n.7).

¹⁵⁷ *Id.* The Court noted that the D.C. Court had held that petitioners lacked Article III standing to challenge the Tailoring Rule because that the rule did not harm petitioners because it, in fact, had "relaxed" the statutory requirements. *Id.* at 21. But because EPA relied on the Rule in order to make its interpretation reasonable, the Court analyzed the validity of the Rule. *Id.* at 21.

¹⁵⁸ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, at 21.

¹⁵⁹ *Id.*

ambiguity; they must always “give effect to the unambiguously expressed intent of Congress.”¹⁶⁰

In this case, the “precise numerical thresholds” found in the PSD and Title V could not be clearer and thus the Court found that EPA’s attempt to substitute its own numbers was “well beyond the bounds of its statutory authority.”¹⁶¹

The Court noted that EPA had not asserted that the revised thresholds in the Tailoring Rule were merely an expression that EPA would not enforce against smaller sources.¹⁶² Rather, the Court recognized that EPA needed to alter the statutory limits to protect smaller sources from citizen suits, whereby sources could be enjoined from constructing, modifying or operating, as well as face civil penalties of up to \$37,500 per day of violation.¹⁶³ Especially given that EPA had recently confirmed citizens had “independent enforcement authority” that could not be negated by EPA’s (or a State’s) decision not to enforce the provisions of the CAA, the Tailoring Rule became an essential element to make EPA’s interpretation reasonable.¹⁶⁴

Next, the Court found irrelevant the case of *Morton v. Ruiz*,¹⁶⁵ which EPA had argued supported the Tailoring Rule.¹⁶⁶ In *Ruiz*, the

¹⁶⁰ *Id.* at 21. (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665 (2007) (quoting *Chevron*, 467 U. S., at 843)).

¹⁶¹ *Id.* at 20 (quoting *Arlington*, 569 U. S., at ____ (slip op., at 5) (internal quotations deleted)).

¹⁶² *Id.* at 21–22.

¹⁶³ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 22 (citing 42 U.S.C. §§7413(b), 7604(a), (f)(4); 40 C.F.R. §19.4).

¹⁶⁴ *Id.* at 22 (citing 78 Fed. Reg. 12477, 12486–12487 (2013)). *See id.* at 22 (“The Solicitor General is therefore quite right to acknowledge that the availability of citizen suits made it necessary for EPA, in seeking to mitigate the unreasonableness of its greenhouse-gas-inclusive interpretation, to go beyond merely exercising its enforcement discretion” (citing Tr. of Oral Arg. 87–88)).

¹⁶⁵ *Id.* at 22.

¹⁶⁶ *Id.* (citing Tr. of Oral Arg. 71, 80–81). The Court summarized the *Ruiz*, as follows: “Congress had appropriated funds for the Bureau of Indian Affairs to spend on providing assistance to “Indians throughout the United States” and had not “impose[d] any geographical limitation on the availability of general assistance benefits.” *Id.* at 22 (quoting *Ruiz*, 415 U. S. 199, 206–207, and n. 7 (1974)). It held that “the Bureau could not deny benefits to off-reservation Indians because it had not published its eligibility criteria” and “stated in dictum that the Bureau could, if it followed proper administrative procedures, “create reasonable classifications and eligibility requirements in order to allocate the limited funds available.”” *Id.* (citing *Ruiz* at 230–231).

Court, had stated in *dictum* that an agency could “adopt policies to prioritize its expenditures *within the bounds established by Congress*.”¹⁶⁷ Thus, according to the *UARG* majority, *Ruiz* merely stood for the proposition that although an agency confronting resource constraints could change its own conduct, it could not re-write the law by changing the “unambiguous requirements imposed by a federal statute.”¹⁶⁸ To do otherwise, the Court held, “would deal a severe blow to the Constitution’s separation of powers.”¹⁶⁹ Although the Executive branch’s power extends to resolving certain questions that Congress did not address when it promulgated the statute in question, the Court made clear that such power does not include the authority to re-write the statute when following unambiguous terms are not practical in the agency’s view.¹⁷⁰

In concluding its analysis on why it was incorrect for EPA to “tailor” the CAA’s thresholds, Justice Scalia, writing for the Court, briefly responded in a footnote to Justice Breyer’s (and 3 other Justice’s) dissenting view on this issue.¹⁷¹ He first challenged Justice Breyer’s view that EPA was allowed to “read an unwritten exception” into “the particular number used by the statute” in circumstances where the statute had not given a “sensible regulatory line.”¹⁷² Finding “no principle of administrative law that would allow an agency to rewrite such a clear statutory term,” he dramatized such a view by “shudder[ing] to contemplate the effect that such a principle would have on democratic governance.”¹⁷³

Next, Justice Scalia addressed Justice Breyer’s argument that there should be “no difference between (a) reading the statute to exclude greenhouse gases from the term “any air pollutant” in the permitting

Id. (emphasis in original). See *Id.* at 22 (citing *Lincoln v. Vigil*, 508 U. S. 182, 192–193 (1993)).

¹⁶⁸ *Id.* at 22.

¹⁶⁹ *Id.* at 22.

¹⁷⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, at 23 (citing *Barnhart v. Sigmon Coal Co.*, 534 U. S. 438, 462 (2002) (agency lacked authority “to develop new guidelines or to assign liability in a manner inconsistent with” an “unambiguous statute”)).

¹⁷¹ *Id.* at 24 n.8. See *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. (opinion concurring in part and dissenting in part).

¹⁷² *Id.* at 24 n.8 (quoting Opinion of Breyer, J. at 10).

¹⁷³ *Id.*

triggers, and (b) reading the statute to exclude sources emitting less than 100,000 tons per year from the statutory phrase “any . . . source with the potential to emit two hundred and fifty tons per year or more.”¹⁷⁴

Justice Scalia explained that, unlike the “specific, numerical permitting thresholds” found in the PSD and Title V triggers, the statutory context demonstrate that the term “air pollutant” is subject to interpretation as to which of the “full range of pollutants” should be encompassed within those programs.¹⁷⁵ Therefore, although EPA retains some discretion to reasonably define “air pollutant” within certain programs of the CAA, there was “no room for EPA to exercise discretion in selecting a different threshold.”¹⁷⁶

2. Whether sources that are regulated already because of other regulated pollutants (“anyway sources”) must install Best Available Control Technology for their GHG emissions

In Part II-B of the Court’s opinion, Justice Scalia addressed “anyway sources,” *i.e.*, those sources that require permits based on their emissions of more conventional pollutants (like particulate matter or ozone).¹⁷⁷ More specifically, he analyzed “whether EPA reasonably interpreted the Act to require those sources to comply with “best available control technology” emission standards for greenhouse gases.”¹⁷⁸

In Part II-B-1, which was joined again by Chief Justice Roberts, Justice Kennedy, and Justices Thomas and Alito,¹⁷⁹ Justice Scalia first defined the key PSD requirement that a source needs to be “subject to the best available control technology” for “each pollutant subject to regulation under [the Act]” that emitted.¹⁸⁰ After defining BACT, he

¹⁷⁴ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, *See* Breyer, at 7.

¹⁷⁵ *Id.* at 24 n.8.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 25.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (Opinion of Alito, J. at 8 n.3 (stating that “[w]hile I do not think that BACT applies at all to “anyway sources,” if it is to apply, the limitations suggested in Part II–B–1 might lessen the inconsistencies highlighted in Part II of this opinion, and on that understanding I join Part II–B–1”)).

¹⁸⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 25 (quoting 42 U.S.C. §7475(a)(4)).

noted that BACT is determined “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.”¹⁸¹

Next, the Court surveyed the arguments by the parties that EPA cannot and should not require BACT for GHG for these “anyway sources.”¹⁸² Some petitioners had argued that BACT is an inappropriate control strategy for GHGs because BACT typically involves “end-of-stack controls” like catalytic converters or particle collectors.¹⁸³ They had asserted that BACT for GHGs, on the other hand, would focus on energy use that could result in regulation of “every aspect of a facility’s operation and design,” right down to the “light bulbs in the factory cafeteria.”¹⁸⁴ The Court then cited to EPA documents that seemed to support some of these concerns.¹⁸⁵ For example, an EPA guidance document explained that in its early years of the BACT development for GHGs, the “foundation” of BACT would involve mandatory improvements in energy efficiency.¹⁸⁶ But the Court noted that the BACT analysis would later include more traditional controls such as “carbon capture and storage” which is “reasonably comparable to more traditional, end-of-stack BACT technologies.”¹⁸⁷

The Court, however, recognized that there were limits on BACT that could help blunt an attempt by a permitting authority from reaching too far in mandating certain energy efficiency improvements.¹⁸⁸ For

¹⁸¹ *Id.* at 25 (quoting 42 U.S.C. §7479(3)).

¹⁸² *Id.*

¹⁸³ *Id.* (citing Brief for Petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. in No. 12–1254, p. 7).

¹⁸⁴ *Id.* (citing Brief for Petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. in No. 12–1254, p. 7. *See also* Joint Reply Brief for Petitioners in No. 12–1248 etc., pp. 14–15 (“BACT for [greenhouse gases] becomes an unbounded exercise in command-and-control regulation” of everything from “efficient light bulbs” to “basic industrial processes”).

¹⁸⁵ *Id.* at 26.

¹⁸⁶ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 26 (citing EPA’s PSD and Title V Permitting Guidance for Greenhouse Gases 29 (Mar. 2011) (hereinafter Guidance). *Id.* (citing Peloso & Dobbins, Greenhouse Gas PSD Permitting: The Year in Review, 42 Tex. Env. L. J. 233, 247 (2012) (“Because [other controls] tend to prove infeasible, energy efficiency measures dominate the [greenhouse-gas] BACT controls approved by the states and EPA”)).

¹⁸⁷ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 26 (citing Guidance 29, 32, 35–36, 42–43). *See also* Guidance at 32, n. 86.

¹⁸⁸ *Id.*

instance, because BACT applies to a source's "proposed facility,"¹⁸⁹ BACT cannot mandate that a source redesign its facility.¹⁹⁰ Likewise, since BACT is required only for pollutants that the source itself emits, the Court pointed out that EPA had explained that "reductions in a facility's demand for energy from the electric grid" cannot be mandated as BACT.¹⁹¹ Finally, the Court cited to an EPA's Guidance Document, which intimates that every minimal savings in energy efficiency should not be mandated as BACT.¹⁹² Instead, it had stressed that the key consideration was "whether a proposed regulatory burden outweighs any reduction in emissions to be achieved, and should concentrate on the facility's equipment that uses the largest amounts of energy."¹⁹³

Following these introductory materials on BACT, Justice Scalia turned to the pivotal question addressed in Part II-B on "whether EPA's decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under *Chevron*."¹⁹⁴ Justice Scalia, writing for a majority of the Court, found that it was permissible to regulate these "anyway sources."¹⁹⁵ However, unlike the previous sections, his holding was not joined by Justices Alito and Thomas.¹⁹⁶ Rather, Justice Scalia (and Chief Justice Roberts and Justice Kennedy) were joined by Justices Breyer, Ginsburg, Kagan, and Sotomayor to form a 7-2 decision on this issue.¹⁹⁷

In his majority opinion on this issue, Justice Scalia first distinguished the text of the BACT provision from the text of the PSD and Title V permitting triggering provisions.¹⁹⁸ Under the plain language of the BACT provision, BACT is required "for each pollutant

¹⁸⁹ *Id.* (citing 42 U.S.C. §7475(a)(4)).

¹⁹⁰ *Id.* (citing *Sierra Club v. EPA*, 499 F. 3d 653, 654–655 (CA7 2007) and *In re Pennsauken City, N. J., Resource Recovery Facility*, 2 E. A. D. 667, 673 (EAB 1988)).

¹⁹¹ *Id.* at 27 (citing 44 Fed. Reg. 51947 (1979) and Guidance at 24).

¹⁹² *Id.* at 26 (citing Guidance at 31).

¹⁹³ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 27.

¹⁹⁴ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 27. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* See Opinion of Justice Alito, at 8 (only dissenting from Part II-B-2).

¹⁹⁷ *Id.* See Opinion of Breyer, J., at 2. Justices Breyer, Ginsburg, Kagan, and Sotomayor dissented from the Court's holding as to "non-anyway sources". *Id.* at 12.

¹⁹⁸ *Id.*

subject to regulation under [the Clean Air Act].”¹⁹⁹ This, Justice Scalia asserted, was “far less open-ended than the text of the PSD and Title V permitting triggers,” which decades ago the D. C. Circuit had found “would not seem readily susceptible [of] misinterpretation.”²⁰⁰

He then repeated the broad scope that the term “*any air pollutant*” in the PSD and Title V permit triggering provisions could take.²⁰¹ This, he asserted, demonstrated that Congress had envisioned that EPA would be called upon to clarify the precise pollutants that should be covered by each regulatory program.²⁰² On the other hand, he explained that the more precise phrase, “each pollutant subject to regulation under this chapter,” provided in the BACT provision showed that Congress had expressed its intent, leaving much less room for EPA to interpret the contours of the program.²⁰³ And unlike the term “air pollutant,” the term “each pollutant subject to regulation under this chapter” had always been given a consistent meaning by both Congress and by EPA.²⁰⁴

Next, Justice Scalia explained that, even if the text of the provision did not compel his interpretation, there was no practical problem in applying BACT to GHGs that would render EPA’s interpretation unreasonable.²⁰⁵ In other words, applying BACT would not be “so disastrously unworkable,” so as to “result in such a dramatic expansion of agency authority” or “extend EPA’s jurisdiction over millions of previously unregulated entities.”²⁰⁶ Thus, he was not convinced that BACT was “incapable of being sensibly applied to greenhouse gases.”²⁰⁷

He then ended Part I-B by stressing that the Court’s holding on this issue was narrow: nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases

¹⁹⁹ *Id.* (citing 42 U.S.C. §7475(a)(4)).

²⁰⁰ UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 27 (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 404 (1979)).

²⁰¹ UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 27 (emphasis added).

²⁰² *Id.* at 27.

²⁰³ *Id.*

²⁰⁴ *Id.* at 28.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 28.

emitted by “anyway sources.”²⁰⁸ Furthermore, he made clear that EPA would also have to limit the coverage of these “anyway sources” by establishing a *de minimis* level under which a source would not have to install BACT for GHGs.²⁰⁹

In addressing this issue, Justice Scalia also, in a footnote, addressed Justice Alito’s argument that BACT is “fundamentally incompatible” with GHG emissions.²¹⁰ He challenged Justice Alito’s conclusion that because the BACT analysis must take into account the ambient air quality in the area surrounding a particular source (which was impossible to do for GHG emissions), GHGs should never be subject to BACT.²¹¹ Justice Scalia countered that was no reason to find that GHGs “must be categorically excluded from BACT” just because one aspect of the BACT analysis did not work for GHGs.²¹²

Next, he took on Justice Alito’s view that EPA’s Guidance Documents for GHG BACT represented “arbitrary and inconsistent decision making.”²¹³ He first noted that the Guidance was not being subject to judicial review in the case and, simply stated, it was conceivable that EPA and state permitting authorities could figure out a lawful way to comply with the CAA requirement that BACT analysis be performed “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.”²¹⁴

Finally, Justice Scalia concluded the Court’s opinion by “sum[ming] up.”²¹⁵ First, the Court (in a 5-4 decision) found that “EPA

²⁰⁸ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 28.

²⁰⁹ *Id.* at 28–29. The Court noted that under the Tailoring Rule EPA had required BACT for sources that emit more than 75,000 tons per year CO₂e. *Id.* at 28. This amount, however, was not intended to be a *de minimis* level. *Id.* Accordingly, the Court found that EPA retained authority to set a *de minimis* level in the future and the Court’s finding that the Tailoring Rule was impermissible was not based on the Court belief that 75,000 tons per year CO₂e exceeded a permissible *de minimis* level. *Id.* at 28–29.

²¹⁰ *Id.* at 29.

²¹¹ *Id.* See *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 4–5.

²¹² *Id.* See *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 4–5.

²¹³ See *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 8.

²¹⁴ *Id.* at 29 (quoting §7479(3)).

²¹⁵ *Id.*

exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based [only] on their greenhouse-gas emissions” (*i.e.*, “non-anyway sources”).²¹⁶ Thus, it prohibited EPA from looking at GHG emissions to determine whether a source is a “major emitting facility” (or undergoes a “modification” in the PSD context) or whether a source qualifies as a “major source” in the Title V context.²¹⁷ Second, it held (in a 7-2 decision) that it was permissible for EPA to regard GHGs as a “pollutant subject to regulation under this chapter” for purposes of mandating BACT for “anyway sources.”²¹⁸ Accordingly, Justice Scalia, affirmed in part and reversed in part the decision by the D.C. Circuit.²¹⁹

B. JUSTICE BREYER’S OPINION

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in part and dissented in part from Justice Scalia’s Opinion for the Court.²²⁰ They agreed with Justice Scalia (who had been joined by Chief Justice Roberts and Justice Kennedy) that “anyway sources” (*i.e.*, stationary sources that were already subject to the PSD provisions based on their emissions of non-GHGs pollutant that exceed the PSD trigger) were subject to BACT for their GHG emissions.²²¹ Therefore, these Justices joined Part II-B-2 of Justice Scalia’s Opinion.²²²

They disagreed, however, with Justice Scalia’s conclusion in Part II-A that EPA was prohibited from interpreting the CAA to require sources that emit more than 100,000 tpy CO₂e of GHGs to obtain permits under the PSD and Title V programs.²²³ Accordingly, Justices

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 8.

²²⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 2.

²²¹ *Id.*, Opinion of Breyer, J. at 11–12. *See* 42 U.S.C. §7475(a)(4) (2013).

²²² *Id.*, Opinion of Breyer, J. at 12.

²²³ *Id.*, Opinion of Breyer, J. at 12 (“But as for the Court’s holding that EPA cannot interpret the language at issue here to cover facilities that emit more than 100,000 tpy of greenhouse gases by virtue of those emissions, I respectfully dissent.”).

Breyer, Ginsburg, Sotomayor, and Kagan dissented from this holding for “non-anyway sources,” resulting in a 5-4 decision on this issue.²²⁴

Justice Breyer first focused on the Court’s opinion in *Massachusetts v. EPA* to support his view that sources should be subject to the PSD and Title V permitting requirements solely on their emissions of GHGs above the new threshold set by EPA in the Tailoring Rule.²²⁵ He noted how the Court had held in *Massachusetts* that GHGs could be regarded as an “air pollutant” under the CAA’s general definition.²²⁶ He then challenged the majority opinion’s conclusion that GHGs, although being “air pollutants” under the CAA’s general definition, do not also fall within the definition of “any air pollutant” under the more specific provisions of the PSD and Title V permitting programs.²²⁷

After summarizing the PSD and Title V provisions at issue, Justice Breyer honed in onto the key provision at issue that the PSD program applies to “any stationary source that has the potential to emit two hundred fifty tons per year or more of any air pollutant.”²²⁸ In his view, however, the “interpretive difficulty” was not in determining whether GHGs fit within the definition of “any air pollutant.”²²⁹ Rather, it was the provision’s use of the term “two hundred fifty tons per year or more” (which he called the “250 tpy threshold”).²³⁰ Justice Breyer conceded that, as the majority opinion had explained, that the 250 tpy threshold is too easy to trigger when dealing with GHG emissions.²³¹ Therefore, as a practical matter, adhering to this low threshold would result in tens of thousands of sources triggering the provisions, regulating in an “extremely expensive and burdensome, counterproductive, and perhaps

²²⁴ *Id.*, Opinion of Breyer, J. at 12. As described, *supra*, Justice Alito and Justice Thomas joined Justice Scalia’s opinion, except for Part II.B.2. Opinion of Alito, J. at 8.

²²⁵ *Id.*, Opinion of Breyer, J. at 2. (citing *Massachusetts v. EPA*, 549 U. S. 497 (2007)).

²²⁶ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 2 (citing 42 U. S. C. §7602(g) and *Massachusetts v. EPA*, 549 U. S. 497, 528–529 (2007)).

²²⁷ *Id.*, Opinion of Breyer, J. at 2 (citing Slip Op. at 10–24). Although Justice Breyer only addressed the PSD program throughout his opinion, he did so only “[t]o simplify the exposition” because “a parallel analysis applies to Title V.” *Id.* at 3.

²²⁸ *Id.*, Opinion of Breyer, J. at 2–3.

²²⁹ *Id.*, Opinion of Breyer, J. at 3–4.

²³⁰ *Id.*, Opinion of Breyer, J. at 3.

²³¹ *Id.*, Opinion of Breyer, J. at 4.

impossible” endeavor for the parties involved.²³² And with respect to the CAA’s design, he admitted, too, that it would also contravene congressional intent in having PSD only apply to large sources “whose emissions are substantial enough to justify the regulatory burdens.”²³³

In his view, however, EPA had taken a permissible, and inherently reasonable, response to these significant concerns when it promulgated the Tailoring Rule.²³⁴ By raising the trigger for GHGs emissions from 250 tpy to 100,000 tpy, EPA had effectively limited the PSD program to “a relatively small number of large industrial sources.”²³⁵ Justice Breyer also recognized that although the Tailoring Rule cured the practical concerns posed by the statutory threshold, the Rule had effectively rewritten the statute.²³⁶ He mused:

What is to be done? How, given the statute’s language, can the EPA exempt from regulation sources that emit more than 250 but less than 100,000 tpy of greenhouse gases (and that also do not emit other regulated pollutants at threshold levels)?²³⁷

To arrive at his answer, he first summarized the majority’s analysis as having found that the statute did not mandate that GHGs fall within the PSD trigger of “any air pollutant” and that it had essentially found an “implicit exception” into the provision because of the absurd results that would follow from their inclusion.²³⁸ He characterized the Court as having rewritten the definition of “major emitting facility” to now cover “stationary sources that have the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those air pollutants, such as carbon dioxide, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*”²³⁹

²³² *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 4. See Slip Op. at 17–20, and n. 7.

²³³ *Id.*, Opinion of Breyer, J. at 4.

²³⁴ *Id.*, Opinion of Breyer, J. at 4.

²³⁵ *Id.*, Opinion of Breyer, J. at 4 (citing 75 Fed. Reg. 31514, 31555 (2010) and *id.* at 31523–31524).

²³⁶ *Id.*, Opinion of Breyer, J. at 4.

²³⁷ *Id.*, Opinion of Breyer, J. at 4.

²³⁸ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 4.

²³⁹ *Id.*, Opinion of Breyer, J. at 4–5 (emphasis in original); See *id.* (citing Opinion of the Court at 15–16 that “[T]here is no insuperable textual barrier to EPA’s interpreting ‘any air pollutant’ in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly

He then proceeded to make clear that he agreed that, as a general matter, that Congress's use of the word "any" usually does not mean "any in the universe" and that therefore courts should interpret "any" in context.²⁴⁰ Quoting Judge Learned Hand,²⁴¹ legal philosophers,²⁴² and Latin maxims,²⁴³ Justice Breyer showed that he completely understood that the "law has long recognized that terms such as "any" admit of unwritten limitations and exceptions."²⁴⁴ Likewise, he agreed with the majority where Justice Scalia had noted that not every reference to "air pollutant" in the CAA should be construed as taking on the all-encompassing meaning as interpreted by the *Massachusetts* Court.²⁴⁵

However, Justice Breyer challenged the Court's decision to fashion an "atextual" exception in the phrase "any air pollutant" by excluding GHGs from that phrase.²⁴⁶ He noted that Congress had also used the word "any" in the PSD definition of the term "major emitting facility."²⁴⁷ That term, he pointed out, was defined as "any . . . source

regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written").

²⁴⁰ *Id.*, Opinion of Breyer, J. at 5 (citing *FCC v. NextWave Personal Communications Inc.*, 537 U. S. 293, 311 (2003) (BREYER, J., dissenting) (" 'Tell all customers that . . . ' does not refer to every customer of every business in the world")).

²⁴¹ *Id.*, Opinion of Breyer, J. at 5 ("[w]e can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time." *Borella v. Borden Co.*, 145 F. 2d 63, 64 (CA2 1944)).

²⁴² *Id.*, Opinion of Breyer, J. at 6 (" '[w]hoever shall willfully take the life of another shall be punished by death' " need not encompass a man who kills in self-defense; nor must an ordinance imposing fines upon those who occupy a public parking spot for more than two hours penalize a driver who is unable to move because of a parade. *See Fuller, The Case of the Speluncean Explorers*, 62 *Harv. L. Rev.* 616, 619, 624 (1949)").

²⁴³ *Id.*, Opinion of Breyer, J. at 5 ("The maxim *cessante ratione legis cessat ipse lex*—where a law's rationale ceases to apply, so does the law itself—is not of recent origin." citing *Zadvydas v. Davis*, 533 U. S. 678, 699 (2001) (citing 1 *E. Coke, Institutes* *70b); *Green v. Litter*, 8 *Cranch* 229, 249 (1814) (Story, J.) ("cessante ratione, cessat ipsa lex")).

²⁴⁴ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 6.

²⁴⁵ *Id.*, Opinion of Breyer, J. at 6 (citing Slip Op. at 12–13 and 42 U.S.C. §7602(g)).

²⁴⁶ *Id.*, Opinion of Breyer, J. at 6–7.

²⁴⁷ *Id.*, Opinion of Breyer, J. at 7 (citing 42 U.S.C. §7479(1)).

with the potential to emit two hundred and fifty tons per year or more of any air pollutant.”²⁴⁸

And, in his view, *this* appearance of the word “any” was the more appropriate place to carve an exception to the word’s plain language.²⁴⁹ Accordingly, in order to avoid the absurd results that would follow from GHG emissions triggering the PSD permitting program, an implicit exception for GHGs should be read into the phrase “any source” – rather than the phrase “any air pollutant.”²⁵⁰

To him, shifting the “location of the exception” by “finding flexibility in ‘any source’ [was] far more sensible than the Court’s route of finding it in ‘any air pollutant.’”²⁵¹ In other words, he proposed to change the definition of “major emitting facility” by implicitly excluding *sources* “emitting unmanageably small amounts of greenhouse gases, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.”²⁵²

Such an interpretation, in his view, would result in a “real-world purpose” from “a legal, administrative, and functional perspective.”²⁵³ First, he found that his interpretation would effectuate Congress’s intended goal of specifying a 250 tpy statutory threshold, which was “to limit the PSD program’s obligations to larger sources while exempting the many small sources whose emissions are low enough that imposing burdensome regulatory requirements on them would be senseless.”²⁵⁴ He cited a Senate Report and a statement made by Senator Edmund Muskie, one of the prime architects of these provisions, to support the view that the PSD program would not cover “houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources.”²⁵⁵

²⁴⁸ *Id.*, Opinion of Breyer, J. at 7 (citing 42 U.S.C. §7479(1)) (emphasis to provision added by Breyer, J.).

²⁴⁹ *Id.*, Opinion of Breyer, J. at 7.

²⁵⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 7.

²⁵¹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 7.

²⁵² *Id.*, Opinion of Breyer, J. at 7.

²⁵³ *Id.*, Opinion of Breyer, J. at 7–8.

²⁵⁴ *Id.*, Opinion of Breyer, J. at 8.

²⁵⁵ *Id.*, Opinion of Breyer, J. at 8 (quoting 123 Cong. Rec. 18013, 18021 (1977)); *id.* (PSD program “is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small

He also applauded EPA for similarly recognizing that Congress enacted the 100/250 tpy threshold in order to target the large industrial sources.²⁵⁶ EPA had stated that Congress wanted to focus on these sources because they were not only the primary cause of the pollution problems at the time, but also could shoulder the significant burden in complying with the program.²⁵⁷

Although Justice Breyer conceded that the Court's holding had also effectively limited the PSD program along these same lines, he maintained that the Court's interpretation of the phrase "any air pollutant," went much further than this goal.²⁵⁸ He opined that the Court's decision effectively had allowed dangerous air pollutants to go unregulated just because such pollutants might not be able to be practically regulated at the statutory thresholds.²⁵⁹ He found "[n]othing in the statutory text, the legislative history, or common sense" that supported the view that the PSD triggers should be construed in a way that would undercut Congress's expansive definition of "any air pollutant" in the PSD program.²⁶⁰ Removing *substances*, rather than *facilities* from the PSD program was simply not the prudent method for correcting any practical problem with the application of the 250 tpy threshold.²⁶¹ Thus, he declared his "source-related exception would address any concern with the threshold while going no further."²⁶²

It would also reinforce the flexibility that Congress envisioned for the CAA.²⁶³ Citing the Court's opinion in *Massachusetts*, he highlighted how Congress wanted to ensure that EPA had the authority to adjust to scientific developments and changing circumstances in order

gasoline jobber or on the construction of a new heating plant at a junior college." S. Rep. No. 95-127, p. 96 (1977)).

²⁵⁶ UARG v. EPA, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Breyer, J. at 8-9.

²⁵⁷ *Id.*, Opinion of Breyer, J. at 8-9.

²⁵⁸ *Id.*, Opinion of Breyer, J. at 9 (quoting Slip Op. at 18: the "Court similarly acknowledges that "the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.").

²⁵⁹ *Id.*, Opinion of Breyer, J. at 6-7.

²⁶⁰ *Id.*, Opinion of Breyer, J. at 9.

²⁶¹ *Id.*, Opinion of Breyer, J. at 9.

²⁶² UARG v. EPA, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Breyer, J. at 9.

²⁶³ UARG v. EPA, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Breyer, J. at 9-10.

to prevent the CAA from becoming obsolete.²⁶⁴ The majority's decision, he asserted, eroded this authority by denying EPA the ability to reach the large sources that Congress intended to be covered simply on the basis that a newly recognized pollutant (namely carbon dioxide) did not suit the thresholds that Congress established years ago.²⁶⁵

To him, tethering the exception to the scope of the term "any source" would also preserve the more important phrase in the statutory definition (*i.e.*, "any air pollutant") as opposed to the numerical threshold that applies to any and all pollutants.²⁶⁶ This, too, he asserted would preserve EPA's discretion to address matters that concern the orderly administration of the CAA, as well as when EPA reasonably determined that regulating a new pollutant would result in an impermissible expansion of the CAA.²⁶⁷

Justice Breyer's last point was that his interpretation would better effectuate the very purpose of the CAA, which is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."²⁶⁸ Once EPA determined in its Endangerment Finding that GHGs emissions from motor-vehicles endanger human health and welfare, he believed that it was "at the core of the purpose" of the CAA for EPA to then regulate and control industrial emissions of GHGs.²⁶⁹ He concluded as his opinion that because the Court's over-reaching (and unnecessary) "no greenhouse gases" exception subverts the CAA's

²⁶⁴ *Id.*, Opinion of Breyer, J. at 9-10 (quoting *Massachusetts*, 549 U. S., at 532). See also *id.* (recognizing in *Massachusetts* that "[t]he broad language of" the Act-wide definition of "air pollutant" "reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence").

²⁶⁵ *Id.*, Opinion of Breyer, J. at 10.

²⁶⁶ *Id.*, Opinion of Breyer, J. at 10.

²⁶⁷ *Id.*, Opinion of Breyer, J. at 10-11 (citing *Barnhart v. Walton*, 535 U. S. 212, 222 (2002) (enumerating factors that we take to indicate that Congress intends the agency to exercise the discretion provided by *Chevron*)).

²⁶⁸ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Breyer, J. at 11 (quoting 42 U.S.C. §7401(b)(1), and citing §7470(1) (2013) (A purpose of the PSD program in particular is "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution") and §7602(h) ("All language [in the Act] referring to effects on welfare includes . . . effects on . . . weather . . . and climate"))).

²⁶⁹ *Id.*, Opinion of Breyer, J. at 11.

purpose, he dissented from the Court's holding that EPA could not tailor the PSD program to reach these larger sources.²⁷⁰

C. JUSTICE ALITO'S OPINION

Justice Alito, joined by Justice Thomas, concurred in part and dissented in part from Justice Scalia's Opinion.²⁷¹ Specifically, the pair agreed with Justice Scalia, Chief Justice Roberts, and Justice Kennedy that EPA could not require "non-anyway sources" to secure PSD or Title V permits on the sole basis of the its potential GHG emissions.²⁷² This formed a 5-4 decision on this issue.²⁷³

As to "anyway sources," however, Justice Alito and Justice Thomas dissented from Part II-B-2 where the Court had found that "anyway sources" were required to obtain PSD permits and use BACT for their GHG emissions.²⁷⁴ But in order to "lessen the inconsistencies" that requiring BACT would cause, they endorsed the limitations suggested by Justice Scalia in Part II-B-1 and "on that understanding" they specifically joined Part II-B-1.²⁷⁵

Simply stated, the fundamental thrust of Justice Alito's opinion was that *Massachusetts v. EPA* was wrongly decided.²⁷⁶ In his view, the Court should have heeded EPA's admission at that time that "key provisions of the [Act] cannot cogently be applied to [greenhouse gas] emissions."²⁷⁷ His opinion then proceeded to expose why "these cases further expose the flaws with that decision."²⁷⁸

In Part I, Justice Alito first very briefly summarized that he agreed with the Court's conclusion on "non-anyway sources" (and therefore joined Parts I and II-A of the Court's opinion).²⁷⁹ He repeated Justice

²⁷⁰ *Id.*, Opinion of Breyer, J. at 11-12.

²⁷¹ *Id.*, Opinion of Alito, J. at 2 .

²⁷² *Id.*, Opinion of Alito, J. at 2.

²⁷³ *Id.*, Opinion of Alito, J. at 2.

²⁷⁴ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Alito, J. at 2.

²⁷⁵ *Id.*, Opinion of Alito, J. at 2, 8 n.3.

²⁷⁶ *Id.*, Opinion of Alito, J. at 2. Both Justice Alito and Justice Thomas dissented in *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007).

²⁷⁷ *Id.*, Opinion of Alito, J. at 2 (quoting Brief for Federal Respondent in *Massachusetts v. EPA*, O. T. 2006, No. 05-1120, p. 22).

²⁷⁸ *Id.*, Opinion of Alito, J. at 2.

²⁷⁹ *Id.*, Opinion of Alito, J. at 2.

Scalia's view that the only way to avoid absurd results of fitting GHGs into the CAA's key programs was for EPA to essentially rewrite the CAA, which EPA could not do.²⁸⁰ Thus, it was impermissible for EPA to "cross out the figures enacted by Congress and substitute figures of its own."²⁸¹

In Part II, Justice Alito discussed why he disagreed with the Court's decision that "anyway sources," were required to use BACT for their GHG emissions.²⁸² Like the PSD and Title V triggers, he asserted that fitting GHGs into the BACT analysis "badly distorts" Congress's regulatory scheme under the CAA.²⁸³ He rejected both the textual and practical justifications offered by the Court.²⁸⁴

First, with respect to the textual analysis, Justice Alito criticized the Court for being inconsistent.²⁸⁵ He pointed out that the Court had rejected a literal interpretation of "pollutant" in Part II-A in finding that GHGs were not pollutants for the purpose of the PSD and Title V triggers.²⁸⁶ But then in Part II-B, where the Court had found that sources would have to apply BACT, he asserted that the Court had "turn[ed] on its heels and adopt[ed] a literal interpretation."²⁸⁷

He further explained that he agreed with the Court's conclusion in Part II-A that "any pollutant" for purposes of the PSD and Title V triggers actually meant "pollutant, other than a greenhouse gas."²⁸⁸ But, in Justice Alito's view, the Court erred by not carrying this more limited construction of "any pollutant" over to its Part II-B analysis when it determined whether GHGs qualified as a pollutant for the purpose of the BACT requirement.²⁸⁹ If it had not gone astray, the Court would have found that any "pollutant subject to regulation under [the CAA]" in the BACT provision should also mean "pollutant, *other than a*

²⁸⁰ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Alito, J. at 2.

²⁸¹ *Id.*, Opinion of Alito, J. at 2.

²⁸² *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Alito, J. at 3.

²⁸³ *Id.*, Opinion of Alito, J. at 3.

²⁸⁴ *Id.*, Opinion of Alito, J. at 3.

²⁸⁵ *Id.*, Opinion of Alito, J. at 3.

²⁸⁶ *Id.*, Opinion of Alito, J. at 3.

²⁸⁷ *Id.*, Opinion of Alito, J. at 3.

²⁸⁸ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272, Opinion of Alito, J. at 3.

²⁸⁹ *Id.*, Opinion of Alito, J. at 3 (citing 42 U.S.C. §7475(a)(4)).

greenhouse gas, subject to regulation under [the Act].”²⁹⁰ But, of course, the Court did not so hold, and for this reason Justice Alito called the Court’s literalism analysis “selective,” resulting “in a strange and disjointed regulatory scheme.”²⁹¹

Relatedly, Justice Alito questioned the anomalous result that occurs with respect to these inconsistent conclusions.²⁹² According to the Court’s interpretation in Part II-A, a source (that is not otherwise subject to the PSD requirements for a different pollutant) can release “an unlimited quantity of GHGs without triggering the need for a PSD permit (and installing BACT).”²⁹³ But if that same source is already subject to the PSD requirements, it *would* be required to use BACT because it is an “anyway source” according to the Court’s Part II-B analysis.²⁹⁴

Next, in Part II-B of his opinion, Justice Alito outlined why the “BACT analysis is fundamentally incompatible with the regulation of greenhouse-gas emissions.”²⁹⁵ First, under the PSD program, he explained, BACT is aimed to address the localized effects for emissions of the covered pollutants.²⁹⁶ In addition, as a general matter, BACT and other types of pollution mitigation measures work together “to prevent significant deterioration of air quality *in each region*.”²⁹⁷ To support this goal, BACT is determined “on a case-by-case basis” taking into account local pollution conditions.²⁹⁸

²⁹⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 3–4 (citing 42 U.S.C. §7475(a)(4)).

²⁹¹ *Id.*, Opinion of Alito, J. at 3.

²⁹² *Id.*, Opinion of Alito, J. at 4.

²⁹³ *Id.*, Opinion of Alito, J. at 4.

²⁹⁴ *Id.*, Opinion of Alito, J. at 4.

²⁹⁵ *Id.*, Opinion of Alito, J. at 4.

²⁹⁶ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 4.

²⁹⁷ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 4 (citing 42 U.S.C. §7471) (emphasis added by Justice Alito).

²⁹⁸ *Id.*, Opinion of Alito, J. at 5 (citing 42 U.S.C. §7479(3)). *See id.* (CAA requires an analysis of “the ambient air quality . . . at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under [the Act].” §7475(e)(3)(B) (2013) (emphasis added by Justice Alito)). *See also id.* (noting that the CAA “also requires a public hearing on “the air quality *at the proposed site and in areas which may be affected* by emissions

Applying these principles, Justice Alito proposed that a BACT analysis for GHGs would have to include the monitoring of the area, as well as an assessment of the effect of GHG pollution in and around the source, among other things.²⁹⁹ However, this exercise demonstrated why, in his view, BACT was incompatible with GHG emissions: “The effects of greenhouse gases, however, are global, not local.”³⁰⁰ He therefore found it unsurprising EPA had declared that PSD permit applicants and permitting officials could disregard these provisions of the Act.³⁰¹

The second incompatibility highlighted by Justice Alito concerned the CAA requirement that the permitting authority compare and balance the environmental benefits afforded from a particular pollution control device with any adverse effects that could result from requiring that device.³⁰² He pointed out that EPA had similarly conceded that this comparison could not be performed “on a case-by-case basis with respect to greenhouse gases.”³⁰³ He then devoted the remainder of his opinion analyzing in detail why the determination on “a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs” of BACT for GHGs was unworkable.³⁰⁴

For instance, he cited EPA’s five-step framework that it had developed to assist permitting authorities to perform the BACT analysis.³⁰⁵ In order to provide another specific example of why BACT

from such facility for each pollutant subject to regulation under [the Act] which will be emitted from such facility.” §§7475(a)(2), (e)(1) (emphasis added by Justice Alito)).

²⁹⁹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 5.

³⁰⁰ *Id.*, Opinion of Alito, J. at 5 (citing PSD and Title V Permitting Guidance for Greenhouse Gases 41–42 (Mar. 2011)).

³⁰¹ *Id.*, Opinion of Alito, J. at 5 (citing 75 Fed. Reg. 31520 (2010)).

³⁰² *Id.*, Opinion of Alito, J. at 5. These consequences include any negative impact on the environment, energy conservation, and the economy. *See id.*

³⁰³ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 5. These consequences include any negative impact on the environment, energy conservation, and the economy. *See id.*

³⁰⁴ *Id.*, Opinion of Alito, J. at 5–8 (citing 422 U.S.C. §7479(3)).

³⁰⁵ *Id.*, Opinion of Alito, J. at 5–6 and n.1 (citing New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting (Oct. 1990)). According to the Manual, the steps are:

(1) The applicant must identify all available control options that are potentially applicable by consulting EPA’s BACT clearinghouse along with other reliable sources.

was incompatible with GHG regulation, he describes the fourth step of the framework.³⁰⁶ Under this step, certain control technologies are removed from the list of possible candidates because of their “collateral impacts,” including adverse environmental effects or a deleterious impact on energy consumption or the economy.³⁰⁷ In other words, the “positives” of a particular control measure are to be balanced against the “negatives.”

He pointed out EPA had conceded that it is impossible for a permitting authority to actually estimate (much less, quantify) any potential reduction that a source could have on any of these potential impacts.³⁰⁸ Therefore, a permitting authority cannot compare benefits in any meaningful way with any adverse impacts from requiring any given pollution control device.³⁰⁹

Justice Alito also used the example of when a permitting authority was called upon to determine whether to require a pollution control measure that would “both decrease a source’s emission of greenhouse gases and increase its emission of a conventional pollutant that has a negative effect on public health.”³¹⁰ He then explored “[h]ow should a permitting authority decide whether to require this change?”³¹¹ He quoted EPA’s advice which recommended that a permitting authority should not “attempt to determine or characterize specific environmental

(2) The technical feasibility of the control options identified in step 1 are eliminated based on technical infeasibility.

(3) The control technologies are ranked based on control effectiveness, by considering: the percentage of the pollutant removed; expected emission rate for each new source review (NSR) pollutant; expected emission reduction for each regulated NSR pollutant; and output based emissions limit.

(4) Control technologies are eliminated based on collateral impacts, such as: energy impacts; other environmental impacts; solid or hazardous waste; water discharge from control device; emissions of air toxics and other non-NSR regulated pollutants; and economic impacts.

(5) The most effective control option not eliminated in step 4 is proposed as BACT for the pollutant and emission unit under review.

Id.

³⁰⁶ *Id.*, Opinion of Alito, J. at 6.

³⁰⁷ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 6.

³⁰⁸ *Id.*, Opinion of Alito, J. at 7.

³⁰⁹ *Id.*, Opinion of Alito, J. at 7.

³¹⁰ *Id.*, Opinion of Alito, J. at 7.

³¹¹ *Id.*, Opinion of Alito, J. at 7–8.

impacts from GHGs emitted at particular locations,” but rather “focus on the amount of GHG emission reductions that may be gained or lost by employing a particular control strategy and how that compares to the environmental or other impacts resulting from the collateral emissions increase of other regulated NSR pollutants.”³¹² But these instructions, he asserted, were futile because without knowing the impact that a proposed reduction in GHG emissions would have, no actual comparison could be made.³¹³

Finally, he challenged EPA’s suggestion that in making a GHG BACT determination permitting authorities would be able to rely on the “great deal of discretion” that accompanies these types of decisions.³¹⁴ This type of incomprehensible standard, he asserted, was the hallmark of “arbitrary and inconsistent decision making” and not what the drafters of the CAA contemplated.³¹⁵

Justice Alito concluded his opinion by noting that he did agree with some the limitations suggested by the Court in Part II–B–1.³¹⁶ These limitations, he thought, might lessen the inconsistencies that he had discussed and “on that understanding” he joined Part II–B–1 of the majority decision.³¹⁷

IV. IMPLICATIONS OF THE SUPREME COURT’S DECISION

Although the precise contours of the Court’s decision remain to be seen, several significant observations can be made with respect to the impact on the EPA rules at issue in *UARG v. EPA*, as well as perhaps to upcoming GHG regulations. This Part thus assesses and analyzes the implications of the Court’s holding, as well as the opinions of Justice Breyer and Justice Alito.

The most important facet of the Court’s opinion was its reaffirmation of EPA’s authority to regulate GHG emissions to address climate change. This should be considered a significant step forward in EPA’s ability to continue to protect human health and welfare from the effects of climate change. Next, the Court’s decision, of course, directly

³¹² *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 7–8 (quoting Guidance 42).

³¹³ *Id.*, Opinion of Alito, J. at 8.

³¹⁴ *Id.*, Opinion of Alito, J. at 8 (citing Guidance 41).

³¹⁵ *Id.*, Opinion of Alito, J. at 8.

³¹⁶ *Id.*, Opinion of Alito, J. at 8.

³¹⁷ *Id.*, Opinion of Alito, J. at 8.

impacted EPA's authority to reach various stationary sources of GHG emissions. On this issue, EPA was dealt a mixed decision that hinged on whether the source was considered an "anyway source" or "non-anyway source."

The Court's various opinions also set forth broader principles that will likely have an impact on future EPA actions. For example, the majority suggested it would be hesitant to allow EPA to seize power not readily contemplated by Congress when it established the CAA; to deviate from the statutory provisions of the CAA; and to extend its authority to require pollution control measure that were too far beyond ones traditional use currently used under the CAA.

A. THE COURT RE-AFFIRMED AND CLARIFIED ITS CORE HOLDING IN MASSACHUSETTS V EPA.

In deciding the case, the Court declined to re-examine the core holding in *Massachusetts v. EPA* that GHGs were "pollutants" under CAA and therefore could be regulated by EPA to address climate change.³¹⁸ The *Massachusetts* Court had split by a vote of 5-4 on this issue and although it was unlikely that the Court would overturn such a recent decision, commentators noted how the possibility was there.³¹⁹

By a vote of 7-2, however, the *UARG* Court re-affirmed its holding that the term "air pollutant" includes "greenhouse gases because it is all-encompassing; it 'embraces all airborne compounds of whatever stripe.'"³²⁰ While Justice Alito and Justice Thomas continued to express their view that *Massachusetts v. EPA* "was wrongly decided,"³²¹ Chief

³¹⁸ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272 at 11 (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007), approvingly).

³¹⁹ See Johnathan Alder, Further thoughts on today's Supreme Court decision on greenhouse gas regulation (available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/23/further-thoughts-on-todays-supreme-court-decision-on-greenhouse-gas-regulation/>) (last visited Sept. 24, 2014).

³²⁰ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272 at 11 (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007)).

³²¹ *Id.*, Opinion of Alito, J. at 2.

Justice Roberts and Justice Scalia remained faithful to the Court's precedent under *stare decisis*.³²²

Also of significance is that the Court clarified its holding in *Massachusetts* by limiting its scope. It declined to extend its expansive interpretation of the general definition of "air pollutant" to all instances where the CAA uses that term in the "operative provisions."³²³ Thus, although it is now beyond dispute that EPA, as a general matter, can regulate GHGs under the CAA, the permissibility of future attempts to regulate will now depend on which provisions EPA is using.

In sum, this re-affirmation and clarification of EPA's authority to regulate GHGs to address climate change allows EPA to continue its current efforts to regulate GHGs emissions, such as for mobile sources under Title II and for "anyway sources" under the PSD and Title V programs.³²⁴ Likewise, it clears the way, as a threshold matter, for future regulatory actions, such as EPA's already pending Clean Power Plan (CPP) rule.³²⁵

B. THE COURT'S APPROVAL OF EPA'S AUTHORITY OVER "ANYWAY SOURCES" IS A SIGNIFICANT STEP TO ADDRESS STATIONARY SOURCE GHG EMISSIONS

Another important aspect of the Court's decision was its holding that EPA was permitted to mandate that "anyway sources" use BACT to mitigate their GHG emissions.³²⁶ In addition, there are several more nuanced issues that come out of the Court's decision, the significance of which remain to be seen. For example, because the Court approved of EPA's authority to require GHG BACT for "anyway sources," some

³²² *Id.* at 11-16 (applying the holding in *Massachusetts v. EPA* to this case). See Johnathan Alder, Further thoughts on today's Supreme Court decision on greenhouse gas regulation (available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/23/further-thoughts-on-todays-supreme-court-decision-on-greenhouse-gas-regulation/>).

³²³ *Id.* at 11 (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007)).

³²⁴ 42 U.S.C. §7521 (2013); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule ("Tailpipe Rule"), 75 Fed. Reg. 25,324 (May 7, 2010).

³²⁵ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (June 18, 2014).

³²⁶ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272 at 27.

have questioned whether the Court invalidated the Tailoring Rule *en toto*.³²⁷ However, as a practical matter, it seems clear that the Court envisioned further work by EPA on remand with respect to delineating the BACT requirement for GHGs. Accordingly, EPA might retract the rule or revise it on its own. In addition, although it did approve EPA's authority to mandate GHG BACT, the Court suggested that EPA's discretion to mandate BACT was not unlimited.

1. The Court's decision is a significant step in controlling GHG emissions from stationary sources.

The Court's 7-2 decision on "anyway sources" represents a significant step in controlling GHG emissions from U.S. industrial sources. As Justice Scalia pointed out, "anyway sources" addressed in Part II-B of his Opinion constitute approximately 83% of U.S. stationary-source GHG emissions.³²⁸ And "non-anyway sources" addressed in Part II-A, on the other hand, only comprised of 3% of GHG stationary source emissions.³²⁹ Thus, the sheer magnitude of GHG emissions that EPA was cleared to regulate under the CAA makes the Court's decision a significant step forward in address and mitigate the impacts from climate change.

2. It remains to be seen whether EPA must re-promulgate a rule for "anyway sources."

Although the Court's opinion reads like the Court struck down the Tailoring Rule in its entirety, it appears that parts of the rule remain valid.³³⁰ As set forth, EPA designed the Tailoring Rule as various

³²⁷ *Id.* at 28-29. See, e.g., Jonathan Z. Cannon, UARG v. EPA: Is the Tailoring Rule All Dean or Just Part Dead, National Law Review, <http://www.natlawreview.com/article/uarg-v-epa-tailoring-rule-all-dead-or-just-part-dead> (last visited Sept. 24, 2014).

³²⁸ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272 at 29.

³²⁹ *Id.* at 29.

³³⁰ *Id.* at 29 (only invalidating EPA's regulations "[t]o the extent that they purport to" interpret the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse gas emissions). See, e.g., Jonathan Z. Cannon, UARG v. EPA: Is the Tailoring Rule All Dean or Just Part Dead, National Law Review,

“steps” to phase-in the regulation of GHGs.³³¹ Step 1 applied to “anyway sources” (*i.e.*, those sources that were already subject to the PSD and Title V programs because of their releases of conventional pollutants).³³² If these sources had GHG emissions more than 75,000 tpy CO₂e, they were required to install BACT for GHGs.³³³ Step 2, on the hand, addressed “non-anyway sources,” which EPA asserted had to obtain PSD and Title V permits based solely on its GHG emissions above 100,000/75,000 tpy CO₂e.³³⁴

While it is clear that Step 2 was invalidated because it applied to “non-anyway sources,” the underlying mandate in Step 1 of the Tailoring Rule appears to remain viable under the Court’s decision. After all, this class of sources was specifically the focus of the Court’s holding in Part II-B, which approved EPA’s authority over “anyway sources.”³³⁵ Thus, depending on EPA’s view and its policy-choice, it might not have to engage in an entirely new rulemaking process to capture “anyway sources” or it could engage in a streamlined process. Either scenario could result in a significant saving in time in requiring such source install GHG BACT.

3. *EPA still might need to set de minimis level for the BACT requirement, which may further limit the scope of sources covered by the program.*

Another significant implication of the Court’s decision on “anyway sources” is its language that EPA can only require GHG BACT for those

<http://www.natlawreview.com/article/uarg-v-epa-tailoring-rule-all-dead-or-just-part-dead> (last visited Sept. 24, 2014).

³³¹ See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,606-08 (June 3, 2010); *see also* UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 7-8.

³³² See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,606-8 (June 3, 2010); *see also* UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 7-8.

³³³ See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,606-08 (June 3, 2010); *see also* UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 7-8.

³³⁴ See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,606-08 (June 3, 2010); *see also* UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 7-8.

³³⁵ UARG v. EPA, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 24-29.

sources that emit “more than a *de minimis* amount of greenhouse gases.”³³⁶ Although EPA in the Tailoring Rule seemed to be setting a *de minimis* level by increasing the trigger to 75,000 tons per year CO₂e, the Court noted that EPA “did not arrive at that number by identifying [it as] the *de minimis* level.”³³⁷ And the Court then specifically stated that they were not holding that “75,000 tons per year CO₂e necessarily exceeds a true *de minimis* level.”³³⁸

The potential impact of this language is significant. Consistent with the Step 1 requirement, EPA could still maintain that only those “anyway sources” that emit more than 75,000 tpy CO₂e install BACT, as long as it grounded its selection of this amount as a *de minimis* level (or as an interim level) rather than as regulatory re-writing of the statute.³³⁹ Not only would this allow EPA to expedite coverage of “anyway sources,” but it also, in effect, could allow EPA to continue to “tailor” the triggering provision for GHG BACT through the use of a *de minimis* level into the future.

4. *The Court found that there were limits on EPA’s BACT requirement for GHGs.*

Another significant restraint that the Court placed on EPA’s authority over “anyway sources” involved the selection of the appropriate BACT for GHGs.³⁴⁰ The Court “acknowledge[d] the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation.”³⁴¹ Accordingly, it clarified that its “decision should not be taken as an endorsement of all aspects of EPA’s current approach, nor as a free rein for any future regulatory application of BACT in this distinct context.”³⁴²

For example, the Court warned EPA that GHG BACT should not be grounded in mandating energy efficiency improvements that were not

³³⁶ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 28.

³³⁷ *Id.* at 28–29.

³³⁸ *Id.* at 28–29.

³³⁹ *Id.* at 28–29 (citing *Alabama Power*, at 405).

³⁴⁰ *Id.* at 25–27.

³⁴¹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 28.

³⁴² *Id.* at 28.

focused on the proposed source in question.³⁴³ The Court noted that BACT must apply to a source's "proposed facility;"³⁴⁴ EPA cannot mandate that a source redesign its facility;³⁴⁵ and EPA cannot mandate "reductions in a facility's demand for energy from the electric grid" as BACT.³⁴⁶

It is noteworthy that the part of the Court's decision within which these suggested limitations were found (Part II-B-1) was not joined by Justices Breyer, Ginsburg, Sotomayor, or Kagan.³⁴⁷ Although they joined Part II-B-2, which was the Court's holding on this issue, these Justices presumably did not agree that EPA should be constrained along the lines listed by Justice Scalia in section 1.³⁴⁸

Part II-B-1, however, did become the majority view of the Court because Justice Alito and Justice Thomas joined this part.³⁴⁹ This was a curious move because they had dissented from the core holding in Part II-B-2, where the Court had held BACT could be required of "anyway sources."³⁵⁰ Justice Alito, however, explained his rationale by stating that though the limitations might lessen the inconsistencies of requiring a GHG BACT, "on that understanding," he would join Part II-B-1.³⁵¹ Thus, parties will likely be able to use this language as constituting the view of the majority of the Court during the GHG BACT process to help mitigate permitting agencies from reaching too far.

C. THE COURT'S DECISION ON "NON-ANYWAY SOURCES" WILL GREATLY REDUCE ADMINISTRATIVE BURDEN AND COSTS TO SMALLER SOURCES

³⁴³ *Id.* at 26.

³⁴⁴ *Id.* at 26 (citing 42 U.S.C. §7475(a)(4)).

³⁴⁵ *Id.* at 26 (citing *Sierra Club v. EPA*, 499 F. 3d 653, 654–655 (CA7 2007) and *In re Pennsauken City., N. J., Resource Recovery Facility*, 2 E. A. D. 667, 673 (EAB 1988)).

³⁴⁶ *Id.* at 27 (citing 44 Fed. Reg. 51947 (1979) and Guidance at 24).

³⁴⁷ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Breyer, J. at 12 (joining only Part II–B–2 of the Court's opinion in Part II).

³⁴⁸ *Id.*, Opinion of Breyer, J. at 12 (joining only Part II–B–2 of the Court's opinion in Part II).

³⁴⁹ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272, Opinion of Alito, J. at 2.

³⁵⁰ *Id.*, Opinion of Alito, J. at 2.

³⁵¹ *Id.*, Opinion of Alito, J. at 2.

The Court's decision that sources cannot trigger the PSD and Title V permitting requirements solely on the basis of their GHG emissions (*i.e.*, "non-anyway sources") was extremely significant because it will unquestionably result in administrative and regulatory relief. The burden on both permitting authorities and sources were not in real dispute. Thus, it is straight-forward to predict the dramatic impact the Court's decision will have on this issue.

For example, as EPA had set forth in the Tailoring Rule, applications for PSD permit were expected to rise from approximately 800 to about 82,000 each year;³⁵² administrative costs of the PSD program would have risen from \$12 million to over \$1.5 billion,³⁵³ and "decade-long delays" in the issuance of permits could have resulted.³⁵⁴ Similarly, the Title V program would have faced an overwhelming wave of permit applications: over 6 million sources (up from about 15,000 sources) would need permits; administrative costs would have leaped from \$62 million to \$21 billion annually,³⁵⁵ and the permitting costs for the new source were estimated to cost a total of \$147 billion.³⁵⁶ The decision therefore eliminates these burdens.

*D. THE COURT WILL BE SKEPTICAL OF AGENCY ACTION THAT
SIGNIFICANTLY EXPANDS AN AGENCY'S REGULATORY AUTHORITY*

Following the *UARG* decision, the Court will scrutinize future attempts by agencies, such as EPA, to expand their regulatory authority beyond their historic limits. One reason for rejecting EPA's interpretation concerning the PSD and Title V triggers was because it "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."³⁵⁷ And the Court indicated that this skepticism will be especially high when an agency's interpretation impacts "a significant portion of the American

³⁵² *Id.* at 17(citing Tailoring Rule 31557).

³⁵³ *UARG v. EPA*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272 at 17 (citing Tailoring Rule 31557).

³⁵⁴ *Id.* at 17 (citing Tailoring Rule 31557).

³⁵⁵ *Id.* at 17 (citing Tailoring Rule at 31562-31563).

³⁵⁶ *Id.* at 17 (citing Tailoring Rule at 31562-31563).

³⁵⁷ *Id.* at 19.

economy.”³⁵⁸ Thus, future actions will likely be assessed under this benchmark.³⁵⁹

E. THE COURT REINFORCED THE ADMINISTRATIVE LAW PRINCIPLE THAT AGENCIES CANNOT RE-WRITE STATUTORY LANGUAGE.

Finally, the Court’s decision will certainly be used in future cases where agencies, like EPA, are interpreting statutory provisions. Although recognizing that judicial review was deferential, the Court faulted EPA for re-writing statutory language.³⁶⁰ In making its holding, the Court thus “reaffirm[ed] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”³⁶¹ The Court stressed that “[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always “give effect to the unambiguously

³⁵⁸ *Id.* at 19 (quoting *Brown & Williamson*, 529 U. S., at 159). See also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U. S. 607, 645–646 (1980) (plurality opinion).

³⁵⁹ Although it is beyond the scope of this article, it is also possible that the Court’s decision could impact EPA’s forthcoming Clean Power Plan (CPP) rule. The potential impact is sheer speculation at this point since EPA has not released its final rule. Nonetheless, several early observations may be made. The draft rule, called the Clean Power Plan rule, proposes to regulate GHG emissions from power plants by establishing New Source Performance Standards (NSPS) for power plants Under CAA section 111.

As discussed above, there is no question that EPA can, as a threshold matter, move forward with the rule under its authority to regulate GHGs as pollutants subject to regulation under the CAA. But it remains to be seen whether the language used by the Court in the UARG decision suggests that the Court will invalidate the specific methods by which EPA currently plans to effectuate its CPP. The pivotal inquiry will be whether these GHG NSPS constitute a “transformative expansion” EPA’s regulatory authority. See Seth D. Jaffe, GHG regulations: A Cautionary Tale, <http://www.fierceneenergy.com/story/ghg-regulations-cautionary-tale/2014-07-22> (last visited October 15, 2014).

³⁶⁰ *UARG v. EPA*, Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272 at 21 (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665 (2007) (quoting *Chevron*, 467 U. S., at 843)).

³⁶¹ *Id.* at 20 (quoting *Arlington*, 569 U. S., at ____ (slip op., at 5) (internal quotations deleted)).

expressed intent of Congress.”³⁶² Therefore the Court found that “[a]n agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”³⁶³

CONCLUSION

The Court’s decision in *UARG v. EPA* represents an important step in developing comprehensive GHG regulation. Although EPA could not claim a complete victory, there is no question that EPA can now reach a significant amount of industrial GHG emissions. Moreover, the reaffirmation of core principles in *Massachusetts v. EPA* is significant. Even though the Court did cabin EPA’s authority with respect to “non-anyway sources,” as well as possibly limit the selection of BACT for GHGs, the stage remains clear for EPA to regulate GHGs from motor-vehicles, to move ahead with GHG regulation for “anyway sources,” and to promulgate a final rule regulating GHG emissions from power plants.

³⁶² *Id.* at 21 (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665 (2007) (quoting *Chevron*, 467 U. S., at 843)).

³⁶³ *Id.* at 21 (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665 (2007) (quoting *Chevron*, 467 U. S., at 843)).