

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

In the
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF OF SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT AND EMMETT CENTER
ON CLIMATE CHANGE AND THE ENVIRONMENT
AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENTS**

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*¹

Amicus Emmett Center on Climate Change and the Environment is a research and teaching center at UCLA School of Law dedicated to studying and advancing law and policy solutions to climate change, and to training the next generation of environmental leaders. Founded in 2008, the Emmett Center works across disciplines to develop and promote research and policy tools useful to local, state, federal, and international decisionmakers. The Center's faculty of environmental attorneys and scholars produces academic and policy research aimed at improving climate change regulation.

Amicus South Coast Air Quality Management District (SCAQMD) is the air pollution control agency for all of California's Orange County and the urban portions of Los Angeles, Riverside, and San Bernardino Counties. This area of 10,743 square miles is home to over 16.8 million people—about half the population of the State of California. It is the second most populated urban area in the United States. SCAQMD is committed to undertaking all necessary steps to protect public health and welfare from air pollution, with sensitivity to the impacts of its actions on communities and businesses. SCAQMD

¹ Pursuant to S. Ct. R. 37.6, counsel for *amici* state that they authored this brief in its entirety and that no party or counsel for any party, nor any other person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this *amici curiae* brief by blanket agreements filed with the clerk of this Court.

currently regulates approximately 27,000 permitted facilities with over 60,000 individual permits. Of these, approximately 275 facilities constitute major sources under the Clean Air Act. In 2012, SCAQMD processed 989 preconstruction permits.² SCAQMD has issued several permits regulating the greenhouse-gas emissions of new and repowered natural gas-fired electrical generating facilities. Additionally, SCAQMD has been a pioneer in developing and implementing a wide range of permit streamlining measures. In the early 1990s, SCAQMD developed several innovative measures to promote permit streamlining, some of which were incorporated into California state law. SCAQMD representatives co-chaired and contributed to EPA's Greenhouse-Gas Permit Streamlining Workgroup.

Petitioners' arguments in this case are grounded in part in a technical assessment of the feasibility of applying the Clean Air Act's permitting requirements to greenhouse-gas sources. *Amici* therefore believe that their combined expertise in air pollution control permitting, regulation of residential and commercial sources, greenhouse-gas mitigation, and the Clean Air Act is relevant to the Court's decision in this matter.

² Report to the Legislature and CARB on SCAQMD's Regulatory Activities for Calendar Year 2012 25 (2013), *available at* <https://www.aqmd.gov/hb/attachments/2011-2015/2013Jun/2013-Jun7-016.pdf>.

SUMMARY OF ARGUMENT

Petitioners ask this Court to invalidate EPA’s interpretation of the phrase “any air pollutant” as set forth in the Clean Air Act’s Prevention of Significant Deterioration (PSD) and Title V permitting programs because, in Petitioners’ view, EPA’s reading is “permanently unworkable” and “absurd” in the context of greenhouse gases. *See, e.g.*, Am. Chemistry Council Br. 25; Energy-Intensive Mfrs. Br. 30. Our experience and data show otherwise.

This brief provides information to aid the Court in understanding the practical implications of permitting greenhouse-gas sources. We show that PSD and Title V can be applied to a wide range of greenhouse-gas sources in a way that is consistent with Congress’ intent and manageable for permitting agencies. This conclusion is consistent with EPA’s determination that a phased greenhouse-gas regulatory program satisfies statutory requirements, and is grounded in commonsense agency findings regarding administrative capacity, environmental efficacy, and costs to regulated parties.

First, nothing in the PSD program is inherently incompatible with greenhouse-gas permitting. A review of the greenhouse-gas permitting process to date demonstrates that the PSD program has successfully reduced greenhouse-gas emissions from large sources without imposing undue burdens on regulated entities or permitting authorities, consistent with the goals of the program.

Second, Petitioners' argument that it would be unworkable to apply PSD and Title V to greenhouse-gas sources in accord with statutory thresholds is unfounded and speculative. In its Tailoring Rule, EPA concluded that immediately applying the permitting programs to small sources on January 2, 2011 would have been impracticable, and it committed to develop and implement a regulatory plan to phase in permitting requirements to greenhouse-gas sources "as close to the statutory thresholds as possible, and as quickly as possible" 75 Fed. Reg. 31,514, 31,548 (June 3, 2010) (J.A. 422). EPA is now developing and implementing regulatory streamlining techniques that could significantly shrink the number and types of greenhouse-gas sources subject to PSD and Title V permitting, and reduce burdens on permitting authorities and regulated parties. The record before this Court does not support Petitioners' request to discard EPA's long-standing interpretation of the law, based only on conjectures about how greenhouse-gas permitting will unfold.

ARGUMENT

Petitioners have urged this Court to reject EPA's approach to permitting greenhouse-gas sources on the grounds of absurdity. According to some Petitioners, the PSD program can effectively control only pollutants that produce exposure-related harms, concentrate locally, and are emitted in modest amounts. *See, e.g.*, Chamber of Commerce Br. 1, 15-20; S.E. Legal Found. Br. 10-13; Util. Air Regulatory Grp. Br. 25-32. Regardless, Petitioners suggest that applying the PSD and Title V permitting programs to small greenhouse-gas sources in accord with statutory

emissions thresholds would be “absurd” and “unworkable.”³ Chamber of Commerce even asserts that this case “appears to be the first in the Court’s history where no party disputes that an agency’s interpretation of a statute it administers produces absurd results.” Chamber of Commerce Br. 26.

As we demonstrate below, EPA’s statutory interpretation produces workable, not absurd, results. Although EPA concluded that it would have been infeasible to require PSD and Title V permitting in accord with statutory thresholds immediately, in 2011, prior to the implementation of regulatory measures appropriate to greenhouse-gas sources, EPA is now undertaking a phased approach that is working well. The manageability of the PSD permitting process for large sources to date demonstrates that permitting can reduce greenhouse-gas emissions without impos-

³ See, e.g., Am. Chemistry Council Br. 25 (“All parties agree that [EPA’s interpretation] . . . would render the PSD program permanently unworkable.”); Chamber of Commerce Br. 13 (declaring that “the Act’s PSD provisions, properly construed, cannot and do not work if extended to encompass GHGs”); Energy-Intensive Mfrs. Br. 30 (“PSD GHG regulation is thoroughly absurd, root and branch.”); S.E. Legal Found. Br. 14 (“[I]nterpreting the statute to require PSD and Title V permitting for GHGs would necessarily produce extreme and absurd consequences”); Texas Br. 4 (“The Clean Air Act cannot be interpreted to allow EPA to regulate greenhouse-gas emissions under either the PSD or Title V programs when the unambiguous statutory requirements would compel such preposterous consequences.”); Admin. Law Professors Br. 32 (asserting that EPA’s interpretation is “at war with the statutory text in a fashion that leads to absurd results and nullifies central statutory provisions”); Ctr. for Constitutional Jurisprudence Br. 14 (describing the statutory thresholds as “absurdly low”).

ing undue burdens on permitting authorities or regulated entities. As EPA continues to phase in the PSD and Title V permitting programs, EPA and state and local permitting authorities can implement numerous regulatory tools to reduce the number and types of greenhouse-gas sources subject to permitting, and ensure the permitting process continues to be manageable.

In sum, it would be unwarranted for the Court to accept Petitioners' claims that EPA's interpretation of the Clean Air Act is unworkable based on conjectural "absurd results" that permitting authorities have not yet experienced, and may not ever experience.

I. PSD Permitting Results in Reasonable Measures to Reduce Greenhouse-Gas Emissions Consistent with the Intent of the Clean Air Act.

Petitioners assert that individual PSD program permitting requirements "make no sense" as applied to greenhouse gases. *See, e.g.*, Chamber of Commerce Br. 17. In particular, Petitioners argue that various components of the best available control technology (BACT) review process are incompatible with greenhouse-gas permitting. *See, e.g.*, Chamber of Commerce Br. 18-19; Energy-Intensive Mfrs. Br. 23-25. The data simply do not support Petitioners' claims. State and local permitting authorities have thus far been able to manage the PSD permitting process for greenhouse-gas sources with relative ease, and without unduly burdening regulated parties.

None of the statutory requirements for the PSD program is inherently incompatible with greenhouse-gas permitting. To the extent Petitioners claim that specific statutory provisions are unworkable in the context of greenhouse gases (e.g., “production processes and available methods, systems, and techniques,” “energy,” “case-by-case basis,” “economic impacts and other costs”), Petitioners are critiquing only EPA’s interpretation and application of those provisions. *See* Energy-Intensive Mfrs. Br. 23-25 (referencing 42 U.S.C. § 7479(3)). Thus, even if Petitioners were correct, it would be unwarranted to conclude that the statutory language itself precludes application to greenhouse-gas sources. As we demonstrate below, however, the success of the PSD permitting process at the current regulatory thresholds demonstrates that Petitioners are incorrect as a factual matter. The BACT review process for greenhouse-gas sources has been working well. *Accord* States Br. 31-39.

The permit review process for greenhouse-gas sources is fundamentally similar to that of other PSD pollutants.⁴ The PSD program requires new and modified sources to implement BACT for each air pollutant emitted in significant amounts, including greenhouse gases. *Id.* § 7475(a)(4). The Clean Air Act largely delegates to states the authority to implement the PSD program. State and local permit-

⁴ *See, e.g.*, SCAQMD, Facility Permit to Operate for LA City, DWP Scattergood Generating Stn., Facility ID 800075, Revision No. 43 (Apr. 4, 2013), *available at* <http://tinyurl.com/scattergoodpermit>.

ting authorities issue PSD permits requiring a source to demonstrate that it will limit air-pollutant emissions to the level achievable with the implementation of BACT. The Tailoring Rule’s regulatory thresholds currently require high-emitting greenhouse-gas sources to undergo PSD review for greenhouse-gas emissions. 75 Fed. Reg. at 31,514 (June 3, 2010) (J.A. 268-682). As with the BACT process for all other pollutants, greenhouse-gas BACT must take the form of a numeric emissions limitation that reflects “the maximum degree of reduction . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [a] facility through application of production processes and available methods, systems, and techniques” 42 U.S.C. § 7479(3). *See also* 75 Fed. Reg. at 31,520 (J.A. 299-300).

That greenhouse-gas BACT review is fundamentally similar to BACT review for all other pollutants is underscored by EPA’s greenhouse-gas permitting guidance document, which advises permitting authorities to continue to use the five-step BACT review process that EPA has historically promoted for other pollutants for over twenty years.⁵ Importantly, this five-step process recognizes that “permitting au-

⁵ Office of Air Quality Planning & Standards, EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* 17, 19 (Mar. 2011), available at <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf> (hereinafter *Greenhouse Gas Guidance*) (“A determination of BACT for GHGs should be conducted in the same manner as it is done for any other PSD regulated pollutant.”).

thorities have a wide range of discretion in their consideration of the various direct and indirect economic, energy, and environmental impacts that might be informative to the top-down BACT analysis for GHG emissions” *Greenhouse Gas Guidance* 41, 44. In practice, BACT review for large sources is a collaborative process; as is the case for non-greenhouse-gas pollutants, the permitting authority and the individual facility work closely together to determine how the facility can reduce greenhouse-gas emissions, taking into account cost and technical feasibility.

Regulating greenhouse-gas sources in this manner has led, thus far, to incorporation of emission-reducing measures at reasonable cost. BACT for greenhouse gases has required, in most cases, the incorporation of moderately updated equipment and processes to improve combustion quality or fuel selection. *See* States Br. 37-39; *Greenhouse Gas Guidance* 29. Regulated entities typically can reduce greenhouse-gas emissions through relatively simple updates to existing operations.⁶ Some effective techniques for reducing greenhouse-gas emissions are as simple as inspecting, maintaining, and replacing

⁶ EPA, *Clean Air Act Permitting for Greenhouse Gases*, <http://www.epa.gov/nsr/ghgpermitting.html> (collecting white papers on available and emerging technologies to reduce greenhouse gas emissions from various industrial sectors); *Greenhouse Gas Guidance* 25. *Cf.* *Greenhouse Gas Guidance* 27 (confirming that EPA’s initial list of greenhouse-gas BACT alternatives does not include primary fuel switching or control options that otherwise would “fundamentally redefine the source”).

components to ensure maximum efficiency and lifespan.⁷

BACT review also can take into consideration technologies already used by existing facilities that will reduce greenhouse gases in new and modified sources.⁸ For example, potential greenhouse-gas reduction measures include widely implemented energy-efficient technologies and energy management systems.⁹ Many emission-reduction measures would allow existing facility operators to recoup implementation costs within a few months or years.¹⁰ Some greenhouse-gas reduction measures may even generate revenue for operators. For example, several greenhouse gas-reducing technologies for landfills could generate saleable electricity or fuel from landfill gas. EPA, Landfills White Paper 13-16 (2011).

⁷ See, e.g., EPA, Iron and Steel Industry White Paper 29 (2012); EPA, Cement White Paper 29 (2010); EPA, Large Industrial, Commercial, and Institutional Boilers White Paper 11-15 (2010); EPA, Pulp and Paper White Paper 14, 20, 30-32, 40-42 (2010); EPA, Refineries White Paper 20-21, 23-24 (2010).

⁸ See EPA, Cement White Paper 8-15 (2010); EPA, Refineries White Paper 11-16 (2010).

⁹ EPA, Iron and Steel Industry White Paper 5-8 (2012); EPA, Cement White Paper 16 (2010); EPA, Large Industrial, Commercial, and Institutional Boilers White Paper 23-26 (2010); EPA, Pulp and Paper White Paper 50-52 (2010); EPA, Refineries White Paper 17-19 (2010).

¹⁰ See, e.g., EPA, Iron and Steel Industry White Paper 10-11, tbl.1 (2012); EPA, Cement White Paper 19-20, 29-30 (2010); EPA, Pulp and Paper White Paper 12-15, 29-32, 34-42 (2010); EPA, Refineries White Paper 11-16 (2010).

South Coast Air Quality Management District has issued no more than ten PSD permits regulating greenhouse-gas emissions since it adopted Rule 1714 in 2010 to govern PSD review for greenhouse gases.¹¹ All of these permits regulate the greenhouse-gas emissions of new and repowered natural gas-fired electrical generating facilities. The District conducted its greenhouse-gas BACT analyses in collaboration with regulated entities and according to the five-step process outlined in EPA's *Greenhouse Gas Guidance*.¹² Application of BACT for greenhouse gases did not present an unusual burden for these facilities. Notably, as a testament to the State of California's progressive greenhouse-gas mitigation policies, SCAQMD's BACT determination for each facility was equivalent to the California Energy Commission's greenhouse-gas emission performance standard for electric generating facilities. *See* 20 CAL. PUB. UTIL. CODE § 2902(a). All combined cycle and simple cycle natural gas turbines have been able to meet this requirement with relative ease.¹³ The District's experience thus supports the general conclusion that "states and local agencies are currently able to handle all new permitting requirements for

¹¹ SCAQMD R. 1714, *available at* <http://www.aqmd.gov/rules/reg/reg17/r1714.pdf>.

¹² *See, e.g.*, SCAQMD's Response to EPA Comments on the Proposed LADWP Scattergood Repower Project (2013), *available at* <http://tinyurl.com/scattergoodresponse>.

¹³ *See, e.g.*, SCAQMD, Facility Permit to Operate for LA City, DWP Scattergood Generating Stn., Facility ID 800075, Revision No. 43 (Apr. 4, 2013), *available at* <http://tinyurl.com/scattergoodpermit>.

GHG major sources at the current applicability levels”¹⁴

Overall, greenhouse-gas permitting for large sources to date does not support Petitioners’ request to omit greenhouse-gas sources entirely from the PSD program. The data suggests that there are no grounds for excluding the relatively small number of greenhouse-gas sources already subject to PSD on the basis of non-greenhouse-gas emissions (so-called “anyway” sources) from implementing BACT for greenhouse gases. *See* Federal Br. 33-34. At most, Petitioners could argue that the PSD program might prove unworkable if expanded to include a large number of smaller sources. As we demonstrate below, however, this argument is speculative and unfounded.

II. The Record Does Not Support Petitioners’ Claims that Regulating Greenhouse-Gas Sources at Statutory Thresholds Is Absurd.

Petitioners assert that implementation of the PSD and Title V programs at the statutory thresholds for regulation would lead to absurd results. *See* n.3 *supra*. Petitioners’ arguments about the unworkability of the statutory thresholds raise the

¹⁴ Clean Air Act Advisory Committee Report to EPA on Air Permitting Streamlining Techniques and Approaches for Greenhouse Gases 16 (Sept. 14, 2012), *available at* <http://www.epa.gov/nsr/ghgdocs/20120914CAAACPermitStreamlining.pdf> (hereinafter Streamlining Rpt.). *See also* States Br. 35, 37.

specter of permitting requirements for many, even “millions,” of relatively small greenhouse-gas sources by referencing EPA’s initial estimates about the potential scope of greenhouse-gas permitting. *See, e.g.*, Am. Chemistry Council Br. 3, 14; Chamber of Commerce Br. 3, 13, 18; Energy-Intensive Mfrs. Br. 7-8. As discussed below, Petitioners’ references to “millions” of small sources are misleading. EPA’s initial estimates projected the scope of Title V and PSD permitting requirements had those requirements gone into effect immediately in 2011, without EPA having time to develop streamlining measures appropriate to greenhouse-gas sources.

With EPA’s phased approach, the potential for administrative burden shrinks considerably. Many established regulatory tools are available to EPA that would greatly alleviate estimated administrative burdens associated with applying PSD and Title V permitting requirements at the statutory thresholds, and could lead to vastly lower numbers of covered sources than Petitioners claim. EPA is mid-stream in developing and deploying those tools. Thus, the record does not support Petitioners’ view that regulating sources at the statutory thresholds would be unworkable. Instead, it suggests that EPA’s phased regulatory program is appropriate and does not reveal any inherent absurdity in regulating greenhouse-gas sources.

A. EPA’s Initial Estimates of the Number of Sources Affected at Statutory Thresholds Were Preliminary, Conservative, and Relevant Only to Immediate Application of Regulatory Requirements in 2011.

Petitioners rely on estimates prepared in support of the Tailoring Rule to argue that the scope of greenhouse-gas permitting at statutory thresholds would be so great as to show EPA’s approach to be impossible. *See, e.g.*, Am. Chemistry Council Br. 3, 14; Chamber of Commerce Br. 3, 13, 18; Energy-Intensive Mfrs. Br. 7-8. Those estimates, however, were preliminary, conservative, and not reflective of the scope of the more streamlined regulatory program EPA is now developing.

As an initial matter, Petitioners inaccurately characterize the number of sources at issue. For instance, Chamber of Commerce argues that “BACT assessments are impossible to faithfully adapt . . . in the GHG context,” because, purportedly, “six million facilities, including 4.5 million residential facilities, would become subject to case-by-case PSD emission-control assessments” under the PSD statutory thresholds. Chamber of Commerce Br. 18. *See also id.* 13. But Chamber of Commerce mistakenly refers to EPA’s initial estimates of how many facilities would be subject to Title V permitting requirements—not PSD requirements—at statutory thresh-

olds and without the Tailoring Rule.¹⁵ In fact, EPA initially and conservatively estimated that 55,509 residential and commercial facilities would meet the PSD statutory threshold—a far cry from Petitioner’s claims about millions of small sources.¹⁶

Even as to the sources potentially subject to PSD, EPA’s Tailoring Rule estimates are not exact predictors of the program’s future scope, for two reasons. First, in developing the Tailoring Rule, EPA made conservative estimates of the number of sources that would meet the threshold for a permit,¹⁷ relying on “numerous assumptions and estimates.” 77 Fed. Reg. at 41,066. While EPA initially projected that applying the statutory thresholds would dramatically increase the number of sources requiring permits, 75 Fed. Reg. at 31,536, 31,540 (J.A. 367, 387), the agency explained that most of the newly included sources would be small residential and commercial sources for which EPA had little capacity utilization

¹⁵ See EPA, GHG Data for Final Tailoring Rule Development – CO_{2e} (Mar. 29, 2010), EPA-HQ-OAR-2009-0517-19158. See also *Env’tl. Orgs. Br.* 37-38 (arguing that, by failing to present any serious arguments for exempting greenhouse gases from Title V, Petitioners have waived any Title V claims).

¹⁶ Linda M. Chappell, Office of Air Quality Planning & Standards, EPA, *Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* Attach. C, at 33, tbl.4-1 (May 2010), available at <http://www.epa.gov/ttn/regdata/RIAs/riatailoring.pdf>.

¹⁷ EPA’s reasonable estimation methods were based on the best available information and fully vetted through the notice-and-comment process, 77 Fed. Reg. 41,051, 41,066 (July 12, 2012); however, even the best estimates necessarily fall short of perfect forecasts.

rate data. *See* 75 Fed. Reg. at 31,538 (J.A. 380). Future projections aided by better data are likely to be lower than EPA's initial projections.

Second, EPA's initial estimates did not account for the effect of regulatory streamlining actions it plans to take to shrink the number and types of small sources subject to permitting, and to reduce the burdens on sources that remain subject to permitting. Indeed, one of the central purposes of EPA's phased approach is to give the agency time to develop regulatory streamlining measures to reduce burdens on smaller sources and permitting agencies, including measures that would exclude certain low-emitting sources from PSD and Title V permitting requirements entirely. *See* 75 Fed. Reg. at 31,547, 31,588 (J.A. 418, 594-595). We discuss these regulatory actions and their potential effects below. The burden to small sources cannot fairly be judged without taking such measures into account.

B. EPA Is Engaged in Developing Sensible Regulatory Measures That Should Greatly Alleviate Administrative Burdens Associated with the Statutory Thresholds.

Petitioners' argument that EPA intends to apply PSD permitting to types of sources that Congress did not intend to regulate, namely small residential and commercial sources, is premature and speculative. *See, e.g.,* Util. Air Regulatory Grp. Br. 22. EPA is vetting and deploying regulatory streamlining techniques that should greatly alleviate administrative

burdens associated with the extension of PSD and Title V to additional greenhouse-gas sources, including techniques to reduce the number and types of sources subject to permitting. *See* 74 Fed. Reg. 55,292, 55,321 (Oct. 27, 2009). Because many of these streamlining techniques “require a longer process to develop, including significant data collection activities, notice and comment rulemaking to obtain specific authority and, in some cases, the development of necessary implementation tools,” EPA could not immediately deploy these measures in 2011, when greenhouse gases were first subject to regulation; but EPA is working assiduously to implement them. 77 Fed. Reg. at 41,056, 41,058. Implementing streamlining techniques over the next several years should ensure that the PSD and Title V programs for greenhouse gases are manageable.

EPA and state and local permitting authorities have a host of regulatory tools at their disposal to enhance the efficiency of permitting processes consistent with the Clean Air Act. States Br. 21-22. “Streamlining” describes an assortment of established regulatory tools that would render permitting unnecessary for certain sources and simplify permitting of other sources as EPA expands its regulatory program to cover smaller sources of greenhouse gases. 75 Fed. Reg. at 31,526 (J.A. 325). *See also* Streamlining Rpt. 15. Streamlining techniques for PSD and Title V permitting broadly fall into five categories: (1) tools to obviate PSD or Title V permitting for small sources; (2) procedures for permitting groups of sources; (3) simplifying the establishment of BACT; (4) improving the speed and ease of the

permitting process; and (5) simplifying or deferring permitting for sources subject only to general conditions or requirements. *See* 77 Fed. Reg. at 41,055; 75 Fed. Reg. at 31,526 (J.A. 325); Streamlining Rpt. 5, 25, 31. EPA is vetting all of the above streamlining techniques to enable lowering the applicability thresholds, while limiting both the number and types of sources subject to permitting, and the burden on those that remain subject. 75 Fed. Reg. at 31,526 (J.A. 325-326). *See also* 77 Fed. Reg. at 41,055.

One streamlining technique that could dramatically reduce the number and types of sources subject to PSD and Title V permitting consists of EPA altering its approach to calculating “potential to emit” (PTE) for certain categories of low-emitting sources. States Br. 22. The statutory thresholds are expressed in terms of PTE; for example, PSD applies to sources that emit 100 or 250 tons per year or more (depending on the type of source) of any air pollutant on a PTE basis. 42 U.S.C. § 7479(1). *See* 75 Fed. Reg. at 31,538. *See also* 42 U.S.C. § 7602(j) (requiring Title V permits for sources that emit 100 tons per year or more of any air pollutant on a PTE basis). PTE represents “the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.” 40 C.F.R. § 51.165(a)(1)(iii). EPA calculates a greenhouse-gas source’s annual PTE “based on operation at full equipment capacity, 24 hours per day, 365 days per year” EPA, *Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation* 5 (Mar. 29, 2010), EPA-HQ-OAR-2009-0517-19158. For example, although EPA estimates that the typical ferroalloy pro-

duction facility operates at 85.9 percent of its capacity, the PTE for a ferroalloy production facility represents the greenhouse-gas emissions of that facility were the facility to operate year-round up to 100 percent of its capacity. *Id.* at 27-28.

In comparison to large industrial sources, however, the furnaces, boilers, and appliances in small commercial and residential facilities typically operate far fewer hours per year, generating greenhouse-gas emissions at levels far below their theoretical maximum if operated year-round at full capacity. For example, EPA estimates that a typical residential single-family unit utilizes only 10 percent of its space-heating and appliance capacity annually. *Id.* at 66. As a result, under EPA's current methodology, the PTE for commercial and residential sources almost always dramatically exceeds those sources' actual emissions. 74 Fed. Reg. at 55,302 (stating that EPA's PTE calculation method "resulted in an upwards adjustment ranging from 85 to 90 percent in emissions from [the] actual emission values" of commercial and residential sources). Consequently, EPA initially estimated that many small commercial and residential sources would be subject to permitting requirements despite actual greenhouse-gas emissions well below the statutory thresholds. *See* 75 Fed. Reg. at 31,538 (J.A. 380). *See generally* EPA, *Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation* 5 (Mar. 29, 2010), EPA-HQ-OAR-2009-0517-19158.

EPA is evaluating ways to redefine low-emitting sources' PTE to more closely reflect those sources' realistic maximum greenhouse-gas emissions, which,

data suggests, would significantly reduce the number of sources subject to PSD as well as exclude millions of initially counted small sources from Title V. See EPA, GHG Data for Final Tailoring Rule Development – CO₂e (Mar. 29, 2010), EPA-HQ-OAR-2009-0517-19158 (estimating that, e.g., over 3.9 million single-family residential furnaces surpass the Title V statutory threshold based on the assumption of a 24 hours per day, 365 days per year capacity rate, while zero such sources would surpass the threshold on the basis of actual greenhouse-gas emissions); 74 Fed. Reg. at 55,321. “Defining potential emissions to be closer to actual emissions for various source categories” is among the streamlining measures that EPA is considering, in accordance with the statute, EPA’s regulations, and the agency’s past practice for some sources of non-greenhouse-gas emissions. See 77 Fed. Reg. at 41,055; States Br. 22; *Alabama Pwr. Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1980) (holding that EPA must take into account “the anticipated functioning” of a facility in assessing a facility’s “potential to emit”); EPA, Calculated PTE for Emergency Generators (1995), EPA-HQ-OAR-2007-0764-0001 (defining PTE for emergency generators, which operate only very occasionally, to be closer to those sources’ actual emissions); Streamlining Rpt. 27, 32-33.

Another streamlining technique that could significantly reduce the number and types of sources subject to permitting is exempting from Title V requirements sources that are defined as major on the basis of greenhouse-gas emissions only and not subject to pollution control requirements. See Streamlining

Rpt. 30-31. Unlike PSD permits, Title V operating permits do not impose independent emissions controls, but rather facilitate compliance, enforcement, and public participation by consolidating all of a source's requirements in one permit. *See generally* 40 C.F.R. § 70.6. Title V permits that contain only general conditions with no pollution control requirements are referred to as "empty permits." EPA has committed to "further assess . . . excluding empty permits from title V to relieve burden consistent with statutory requirements." 75 Fed. Reg. at 31,517 (J.A. 288); Streamlining Rpt. 30. The data suggest that exempting empty permits would relieve millions of initially counted small sources of Title V permitting requirements. *See* EPA, GHG Data for Final Tailoring Rule Development – CO₂e (Mar. 29, 2010), EPA-HQ-OAR-2009-0517-19158.

These types of regulatory approaches are well established. Streamlining has long been an integral component of PSD and Title V permitting for non-greenhouse-gas pollutants, and permitting authorities have already applied some measures to greenhouse-gas sources. In EPA's recent Tailoring Step 3 Rule, which EPA promulgated in 2012 as the next step in its phased regulatory approach, the agency expanded the availability of a streamlining technique commonly used for other pollutants to greenhouse gases: Plantwide Applicability Limitations¹⁸.

¹⁸ "A PAL establishes a [voluntary] site-specific plantwide emission level for a pollutant that allows the source to make changes at the facility without triggering the requirements of the PSD program, provided that emissions do not exceed the PAL

See 77 Fed. Reg. at 41,052-53, 41,056, 41,059; Streamlining Rpt. 32. At the state and local level, many permitting agencies already use streamlining tools in the context of non-greenhouse-gas emissions, Streamlining Rpt. 16-17, 33, and may extend these tools to greenhouse-gas sources as they deem appropriate and as is permissible under the Clean Air Act.¹⁹ For example, in 2010, SCAQMD expanded one such rule to exempt from Title V permitting certain sources with greenhouse-gas emissions below 50,000 tons per year. Streamlining Rpt. 27-28 (referencing SCAQMD R. 3008). For certain categories of small sources, permitting authorities can even apply emission standards at the manufacturing stage.²⁰ Where appropriate for small sources, the “permit” could be as simple as a form.²¹ Streamlining rules like these can significantly shrink the number and types of

level.” 77 Fed. Reg. at 41,052, 41,060. See also Streamlining Rpt. at 33.

¹⁹ See, e.g., 42 U.S.C. § 7661c(d) (explicitly authorizing permitting authorities to issue Title V general permits); SCAQMD R. 3008, available at <http://www.aqmd.gov/rules/reg/reg30/r3008.pdf> (exempting from Title V permitting requirements various low-emitting sources with actual air pollutant emissions below permitting thresholds, so long as sources comply with reasonable emission limitations or operational limits outlined in SCAQMD’s rules).

²⁰ See SCAQMD R. 1121, available at <http://www.aqmd.gov/rules/reg/reg11/r1121.pdf> (requiring manufacturers, rather than owners, of residential water heaters to control nitrogen oxide emissions).

²¹ See SCAQMD R. 222, available at <http://www.aqmd.gov/rules/reg/reg02/r222.pdf> (allowing certain categories of small uniform sources, such as residential boilers, to complete a simple registration process as an alternative to written permits).

sources subject to permitting, as well as reduce permitting burdens for both permitting authorities and regulated sources.

In sum, both the record and past experience suggest that EPA's ongoing process to analyze and improve the manageability of the application of PSD and Title V requirements to greenhouse-gas sources at the statutory thresholds is warranted. Neither Petitioners, nor EPA, nor this Court yet knows how many sources of what types ultimately will require permits, what permitting will entail, or how burdensome it will be—though initial evaluation suggests that EPA can and will develop streamlining techniques that produce workable, not absurd, results.

C. EPA's Phased Regulatory Program is Appropriate and Does Not Reveal Any Inherent Absurdity in Regulating Greenhouse-Gas Sources.

EPA's phased approach to regulating greenhouse-gas sources does not support a conclusion that application of the Clean Air Act to greenhouse gases is somehow inherently "absurd." The need for additional time to collect data, prepare streamlining techniques, develop new guidance, and build administrative capacity before fully applying PSD and Title V permitting to greenhouse-gas sources motivated EPA's decision to phase in its regulatory program, beginning with the largest sources with which EPA is most familiar. States Br. 21; 75 Fed. Reg. at 31,547 (J.A. 418) (finding that applying permitting requirements "at the specified levels of emissions

and at the present time—in advance of the development of streamlining methods and greater permitting authority expertise and resources—would create undue costs for sources and impossible administrative burdens for permitting authorities”). The agency’s decision to take additional time to implement a regulatory program for some sources does not support a conclusion that the program is, as a whole, so unmanageable as to upend longstanding interpretations of the Clean Air Act’s requirements.

Without the Tailoring Rule, PSD and Title V would have applied at statutory thresholds on January 2, 2011, “greatly increasing the number of required permits, imposing undue costs on small sources, overwhelming the resources of permitting authorities, and severely impairing the functioning of the programs.” 75 Fed. Reg. at 31,514 (J.A. 268). EPA “conclude[d] that under the ‘absurd results’ doctrine, Congress could not have intended that the PSD or title V applicability provisions . . . apply literally to GHG sources *as of that date*.” *Id.* 31,517 (J.A. 286) (emphasis added). EPA was clear to emphasize that the absurdity resulted from applying permitting programs “at the present time—in the absence of streamlining or increasing permitting authority resources and without tailoring” *Id.* 31,555 (J.A. 454). *See also* Federal Br. 15-16, 22, 48. Thus, the Tailoring Rule outlined a multi-step process for phasing in the applicability of PSD and Title V permitting to greenhouse gases over time, beginning in Steps 1 and 2 with the largest sources. 75 Fed. Reg. at 31,523-24 (J.A. 311-316). EPA made enforceable commitments in the Tailoring Rule to un-

dertake a Step 3 rulemaking by July 1, 2012, in which EPA explored streamlining opportunities and evaluated whether to lower thresholds, and to complete by April 30, 2015 a study of the greenhouse-gas permitting process, “including progress in developing streamlining techniques” *Id.* 31,516, 31,566 (J.A. 283, 309-310). EPA also has committed to developing a Step 4 and possibly Step 5 in 2015-2016 specifically “to address the permitting of small sources.” *Id.* 31,516, 31,525 (J.A. 283, 319).

EPA designed its stepwise approach to be “consistent with Congress’s expectations that the programs would not impose undue costs to sources or undue administrative burdens to permitting authorities.” *Id.* 31,517 (J.A. 288). In particular, EPA acknowledged Congress’ dual goals to protect public health and welfare while excluding small residential and commercial sources from undue permitting burdens. *Id.* 31,558-59 (J.A. 464-469). EPA’s continuing commitment to its stepwise regulatory process evidences the agency’s intent to remain faithful to the statute. *See id.* 31,548 (J.A. 421-422). EPA reconciled Congress’ dual goals by incorporating greenhouse gases into the PSD and Title V programs, but deferring applicability of the programs at the statutory thresholds until EPA could develop streamlining measures to reduce the number and types of small sources subject to permitting. *See id.* 31,555 (J.A. 454). For the past several years, EPA has been preparing streamlining techniques consistent with this intent. *See id.* 31,524 (J.A. 316); Streamlining Rpt. 11. In March 2012, EPA convened a greenhouse-gas permit streamlining workgroup comprised of indus-

trial, environmental, tribal, and state and local representatives, and co-chaired by Mohsen Nazemi, SCAQMD's Deputy Executive Officer for Engineering and Compliance. 77 Fed. Reg. at 41,055; Streamlining Rpt. 2, 5. In September 2012, the workgroup submitted a report to EPA exploring and recommending streamlining methods, which corroborates the potential for streamlining measures to alleviate burdens to small sources and permitting authorities. *See generally* Streamlining Rpt.

EPA's multiyear streamlining development process reflects the fact that most streamlining techniques require novel data collection and notice-and-comment rulemaking under 42 U.S.C. § 7607(d). Streamlining Rpt. 5; 75 Fed. Reg. at 31,516 (J.A. 282). Indeed, EPA expects that the most effective streamlining measures, including measures to shrink the number and types of sources subject to permitting, would take three to four years to develop and implement, followed by actions at the state and local level to adopt the measures, which could take up to two years. 75 Fed. Reg. at 31,526, 31,586, 31,587 (J.A. 325, 589, 591). "This time frame is necessary because EPA will first need to collect and analyze small source data that [it] do[es] not currently have—because these are sources that EPA has not traditionally regulated—in order to assess which techniques are viable or effective for such sources." *Id.* 31,586 (J.A. 589). Overall, EPA estimated in 2010 that a "sustained intensive effort by EPA and states to develop, adopt and implement streamlining

techniques” would take approximately six years²². *Id.* 31,588 (J.A. 594).

EPA’s authority to proceed by stages is well established. As the administrator of the Clean Air Act, EPA has broad authority to interpret the statute, evaluate on-the-ground administrative capacity and requirements, and “prescribe such regulations as are necessary to carry out [EPA’s] functions under [the Act].” 42 U.S.C. § 7601(a)(1). It is well within EPA’s discretion to phase in the greenhouse-gas permitting program over time as necessary and reasonable to account for the practical reality of insufficient administrative capacity. As this Court noted in *Massachusetts v. EPA*, “Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop” and instead may “refin[e] their preferred approach [over time] as circumstances change and as they develop a more nuanced understanding of how best to proceed.” 549 U.S. 497, 524 (2007). EPA’s choice here to refine its greenhouse-gas permitting program over time is not evidence of agency overreach or of any inherent absurdity in its approach; rather, it shows an agency taking the time it

²² That there is no inherent absurdity in applying PSD to greenhouse-gas sources is demonstrated by a simple hypothetical: Had EPA begun collecting data and developing streamlining techniques six years before making its Endangerment Finding, regulating greenhouse gas emissions from new motor vehicles, and thereby triggering PSD permitting requirements for stationary sources of greenhouse gases, it is possible that EPA potentially could have applied the PSD and Title V programs at statutory thresholds without need for the Tailoring Rule.

needs to develop workable policy consistent with Congress' intent. States Br. 22-24.

Fundamentally, Petitioners ask this Court to declare a regulatory program that is working well to be impossible. As demonstrated above, Petitioners' claims of absurdity are based on imperfect estimates rather than empirical data about greenhouse-gas permitting, and EPA is still in the process of developing its regulatory program, with an as-yet uncertain scope and effect. On this record, then, it would be unwarranted to conclude that EPA's implementation of the PSD and Title V programs is unworkable for greenhouse gases.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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