Not Reported in F.3d, 2012 WL 6621785 (C.A.D.C.)
(Cite as: 2012 WL 6621785 (C.A.D.C.))

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United States Court of Appeals,
District of Columbia Circuit.
COALITION FOR RESPONSIBLE REGULATION, INC., et al., Petitioners
v.
ENVIRONMENTAL PROTECTION AGENCY, Respondent.

. . .

Before SENTELLE*, Chief Judge, and HENDERSON, ROGERS*, TATEL *, GARLAND, BROWN *, GRIFFITH, and KAVANAUGH *, Circuit Judges.

ORDER

On Petitions for Rehearing En Banc.

***1** The petition of the Chamber of Commerce of the United States of America, joined by the State of Alaska, Peabody Energy Company, Southeastern Legal Foundation, et al., State Petitioners and Intervenors for Petitioners, for rehearing en banc; and the petition of the National Association of Manufacturers, et al. for rehearing en banc in No. 10–1073, et al. and No. 10–1167, et al., and the responses to the petitions were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petitions. Upon consideration of the foregoing, it is

ORDERED that the petitions be denied.

* Circuit Judges Brown and Kavanaugh would grant the petitions for rehearing en banc.

* A statement by Chief Judge Sentelle and Circuit Judges Rogers and Tatel, concurring in the denials of rehearing en banc, is attached.

* A statement by Circuit Judge Brown, dissenting from the denials of rehearing en banc, is attached.

* A statement by Circuit Judge Kavanaugh, dissenting from the denials of rehearing en banc, is attached.

SENTELLE, Chief Judge, ROGERS, Circuit Judge, and TATEL, Circuit Judge, concurring in the denials of rehearing en banc:

In dissenting from the denials of rehearing en banc, Judge Brown primarily takes issue with EPA's Endangerment Finding. But as she candidly acknowledges, *see* Dissenting Op. at 2 (Brown, J.), her quarrel is with the Supreme Court. In *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), the Court expressly *held* that the Clean Air Act's "sweeping definition of 'air pollutant' " unambiguously includes greenhouse gases. *See id.* at 528–29. Moreover, in so holding, the Court expressly rejected many of the arguments her dissent now presses. In particular, it rebuffed EPA's attempt to use "postenactment congressional actions and deliberations" to obscure "the meaning of an otherwise-unambiguous statute," *id.* at 529, and found EPA's reliance on *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), "similarly misplaced," *Massachusetts v. EPA,* 549 U.S. at 530. . . .

***2** Judge Kavanaugh's dissent relates to the scope of the Prevention of Significant Deterioration ("PSD") program, an aspect of the panel opinion Judge Brown also rejects. Specifically, Judge Kavanaugh disagrees with EPA's longstanding interpretation of the term "any air pollutant," 42 U.S.C. § 7479(1), arguing that, in the context of the PSD program, "any air pollutant" refers not to all pollutants regulated under the Clean Air Act, but only to the six NAAQS pollutants. Because taking the statute at its word and interpreting "any air pollutant" to include greenhouse gases would lead to what he considers absurd results, Judge Kavanaugh insists that EPA and

this Court are obligated to read "any air pollutant" more narrowly. *See* Dissenting Op. at 3–10 (Kavanaugh, J.). This argument, however, hinges on the proposition that both readings are plausible interpretations of an ambiguous statutory provision. *See* Dissenting Op. at 2–3, 10 (Kavanaugh, J.). But as the panel opinion explains at length, the statute is clear. *See Coalition for Responsible Regulation,* 684 F.3d at 132–44. Congress did not say "certain 'air pollutants.' " Dissenting Op. at 2 (Kavanaugh, J.). It said "any air pollutant," and it meant it. *See Coalition for Responsible Regulation,* 684 F.3d at 136. Thus, unlike the unreasonable interpretation rejected in *Kloeckner v. Solis,* No. 11–184, slip op. at 7–13 (U.S.2012), the panel's interpretation of the statute is the only plausible one.

. . .

In the end, we agree that "the question here is: Who Decides?" Dissenting Op. at 18 (Kavanaugh, J.). We also agree that "Congress (with the President) sets the policy through statutes, agencies implement that policy within statutory limits, and courts in justiciable cases ensure that agencies stay within the statutory limits set by Congress." Dissenting Op. at 18 (Kavanaugh, J.). Here, Congress spoke clearly, EPA fulfilled its statutory responsibilities, and the panel, playing its limited role, gave effect to the statute's plain meaning. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

***3** To be sure, the stakes here are high. The underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance. The legal issues presented, however, are straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent. There is no cause for en banc review.

BROWN, Circuit Judge, dissenting from the denial of rehearing en banc:

In the summer of 1974, while waiting to start classes at UCLA, I was lucky enough to obtain a summer job house sitting in the pleasant, upscale neighborhood of Pasadena. Known mostly for its Rose Parade and Rose Bowl, Pasadena is one of the more scenic exurbs of Los Angeles. I inhabited a sparsely furnished, modest-but-pricey bungalow set among the lush landscape typical of southern California. This is a place where Birds of Paradise grow ten feet tall and the magenta blossoms of Bougainvillea fall like lavish draperies from redwood garden trellises. After staying in the house more than a month and spending a restless night listening to the agitated thrashings of the jacaranda trees in a fitful wind, I stumbled bleary-eyed into the kitchen, looked out the window, and stopped—utterly dumbfounded. There—looking like it was but a few feet beyond the back fence—stood a mountain. Not a foothill. Not an unobtrusive mesa. A mountain! Closer inspection revealed not a lone majestic peak, but a whole mountain range I later identified as the San Gabriels. In those days, the air in the Los Angeles basin was so thick with smog that a mountain, or even a nearby mountain range, could simply disappear.

Although the Los Angeles basin was among the most notorious examples of the phenomenon, it was by no means unique and certainly not the worst. It was this crisis of ambient air quality that precipitated the enactment of the Clean Air Act (CAA). But as the CAA's history, language, and structure make clear, Congress never intended the Act to serve as an environmental cure-all. It was targeted legislation designed to remedy a particular wrong: the harmful direct effects of poisoned air on human beings and their local environs. This is what Congress understood as "air pollution which may reasonably be anticipated to endanger public health" in the tailpipe emissions provision, 42 U.S.C. § 7521(a)(1). The Supreme Court in *Massachusetts v. EPA,* 549 U.S.

497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), however, concluded otherwise. In dicta too suggestive to ignore, the Court implicitly assumed that climate change could provide the basis for an endangerment finding in the tailpipe context. *See id.* at 532–33.

Bound as I am by *Massachusetts,* I reluctantly concur with the Panel's determination that EPA may regulate GHGs in tailpipe emissions. But I do not choose to go quietly. Because the most significant regulations of recent memory rest on the shakiest of foundations, Part I of this statement engages *Massachusetts's* interpretive shortcomings in the hope that either Court or Congress will restore order to the CAA. Part II, by contrast, reflects my belief that *Massachusetts* does not compel the same result for Title V and the Prevention of Significant Deterioration of Air Quality (PSD) program. Although I agree with Judge Kavanaugh's dissent, *Coal. for Responsible Regulation v. EPA,* Nos. 09–1322, et al. (Kavanaugh, J., dissenting from denial of rehearing en banc), I approach the inflection point from a slightly different perspective. Part III concludes with a brief note on standing.

***4** Because I would vote for the full court to consider the propriety of extending *Massachusetts* to Title V and the PSD program, I respectfully dissent from this denial of rehearing en banc.

. . .

II.

A.

But we need not follow *Massachusetts* off the proverbial cliff and apply its reasoning to the unique Title V and PSD provisions not considered in that case. The cascading layers of absurdity that flow from that interpretive exercise make clear that the plain language of the CAA compels no such result. As EPA's own rulemaking documents have so unabashedly explained:

> To apply the statutory PSD and title V applicability thresholds literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. These extraordinary increases in scope of the permitting programs would mean that the programs would become several hundred-fold larger than what Congress appeared to contemplate.

***9** PSD and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed.Reg. 31,514, 31,533 (Jun. 3, 2010) ("Final Tailoring Rule"). Completely oblivious to the irony, EPA added:

> For our authority to take this action, we rely in part on the "absurd results" doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs.

Id. at 31,541–42. And again:

> [I]n this case because a literal reading of the PSD and title V applicability provisions results in insurmountable administrative burdens. Those insurmountable administrative burdens—along with the undue costs to sources—must be considered "absurd results" that would undermine congressional purpose for the PSD and title V programs.

Id. at 31,547.

In precincts outside Washington, D.C., this litany might cause a regulator to pause and consider whether results so at odds with Congressional presuppositions could ever be justified as falling within the literal meaning of an enactment. EPA, however, proposes that the absurd result can be easily elimi-

nated by ramping up and gradually phasing in the requirements. Faced with the choice of reconsidering the legitimacy of an endangerment finding that sets in motion such a cluster of chaos or rewriting the statute, the agency has blithely done the latter. This is an abuse of the absurdity and administrative necessity doctrines as neither can be invoked to preempt legislative prerogatives. Permitting a statute "to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not express the 'unambiguously expressed intent of Congress,' " but it does not grant the agency "a license to rewrite the statute." *Mova Pharmaceuticals v. Shalala,* 140 F.3d 1060, 1068 (D.C.Cir.1998).

But that is not the worst of it. The real absurdity—apparently as invisible to the EPA as the San Gabriels once were to me—cannot be cured by phase in, no matter how subtly Byzantine. The real absurdity is that this unprecedented expansion of regulatory control, this epic overreach, may very well do more damage to the well-being of Americans than GHGs could ever do.[FN3]

FN3. *See, e.g.,* Joint Reply Br. of Non–State Petitioners and Supporting Intervenors at *1, No. 09–1322 (Nov. 14, 2011) ("Nor does [EPA] dispute that the new rules will impose massive burdens on a struggling economy, or that its program of vehicle standards will affect global mean temperatures by no more than *0.01 degree Celsius by 2100* ").

B.

A second, more elementary consideration counsels against the mechanical application of *Massachusetts's* tailpipe emissions determination to these distinct CAA provisions: deference to Congress.

As articulated in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), the Supreme Court's "major questions" canon gives form to the judicial intuition so strongly implicated here: Congress should not be presumed to have deferred to agencies on questions of great significance more properly resolved by the legislature. If there was ever a regulation in recent memory more befitting such a presumption than the present, I confess I do not know of it.

. . .

III.

***13** In rejecting State Petitioners' challenge to the Tailoring Rule for want of standing, the Panel invoked that famed preceptor of American civics, Schoolhouse Rock, to great effect. Slp. Op. at 79. ("As a generation of schoolchildren knows, 'by that time, it's very unlikely that [a bill will] become a law. It's not easy to become a law.' "). I certainly do not quarrel with such dispositive authority. Lawmaking is neither easy nor certain. In an ordinary case, the mere possibility of "corrective legislation" will not establish that redress is "likely, as opposed to merely speculative." *Lujan,* 504 U.S. at 561. But it bears repeating that this is not an ordinary case. Where the choice is between non-action or a confessedly "absurd" regulation poised to impress countless billions of dollars in costs on American industry, we have transcended the realm of the speculative. For once, the comparison with *Massachusetts* is apt. The Supreme Court found standing on the basis of an estimated rise in sea level of 20 to 70 centimeters by the year 2100, *see Massachusetts,* 549 U.S. at 542 (Roberts, C.J, dissenting)—a prediction based almost entirely on conjecture. Is it any more speculative to say that specific projections of billions of dollars in actual regulatory costs would not suffice to compel Congress to act?

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KAVANAUGH, Circuit Judge, dissenting from the denial of rehearing en banc:

***14** This case is plainly one of exceptional importance. A decision in either direction will have massive real-world consequences. The U.S. Chamber of Commerce describes the EPA regulations at issue here as "the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency." Petition for Rehearing En Banc at 1. On the other hand, EPA issued these regulations to help address global warming, a policy issue of major long-term significance to the United States. Put simply, the economic and environmental policy stakes are very high.

Of course, our role is not to make the policy choices or to strike the balance between economic and environmental interests. That job is for Congress and the President when considering and enacting legislation, and then as appropriate for the Executive Branch—here, EPA, under the ultimate supervision of the President—when exercising its authority within statutory constraints. Our job as a court is more limited: to ensure that EPA has acted within the authority granted to it by Congress. In this case, I conclude that EPA has exceeded its statutory authority. I respectfully disagree with the panel opinion's contrary conclusion, and given the overall importance of the case, I respectfully dissent from the denial of rehearing en banc.

I

A

This case concerns EPA's implementation of the Prevention of Significant Deterioration provisions of the Clean Air Act. The Prevention of Significant Deterioration program—which is codified in Sections 7470 to 7479 of Title 42—is designed to maintain state and local compliance with the National Ambient Air Quality Standards, known as the NAAQS. The NAAQS are currently established for six air pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. As relevant here, the Prevention of Significant Deterioration statute requires stationary facilities that emit certain "air pollutants" to obtain permits before beginning new construction. *See* 42 U.S.C. §§ 7475(a)(1), 7479(1). To obtain a permit, the facility must undergo a lengthy, costly process to analyze the new construction's impact on air quality and to try to demonstrate its compliance with the relevant emissions limits.

A central question in this case is how to construe the term "air pollutant" for purposes of this statutory permitting requirement. In particular, the question is whether the term "air pollutant" here covers not just the NAAQS pollutants, which can cause breathing problems or other health issues, but also greenhouse gases such as carbon dioxide, which contribute to global warming. Under the broader interpretation of "air pollutant" that encompasses greenhouse gases, a far greater number of facilities would fall within the Prevention of Significant Deterioration program and have to obtain pre-construction permits. That in turn would impose significantly higher costs on businesses and individuals that are building new commercial or residential property.

***15** In considering a different Clean Air Act program targeted at motor vehicle emissions, the Supreme Court said that the term "air pollutant" meant "all airborne compounds of whatever stripe," which included greenhouse gases such as carbon dioxide. *Massachusetts v. EPA,* 549 U.S. 497, 529, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). But all parties here, including EPA, agree that the *Massachusetts v. EPA* interpretation of the term "air pollutant" cannot control in this case, for purposes of this very different Clean Air Act program for stationary facilities. Rather, as the parties agree, we must look to the text and context of the Prevention of Significant Deterioration statute to determine what "air pollutant" covers here.

Looking at the relevant statutory text and context, there would initially appear to be two plausible

interpretations of the term "air pollutant" for purposes of the Prevention of Significant Deterioration statute: (i) more broadly, an airborne compound that is deemed harmful and is regulated by EPA in any Clean Air Act program, which would include greenhouse gases such as carbon dioxide; or (ii) more narrowly, the six air pollutants that are regulated by EPA in setting and enforcing the NAAQS, which would cover carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide, but would not include greenhouse gases such as carbon dioxide.

EPA chose the broader interpretation of "air pollutant," thereby greatly expanding the reach of the Prevention of Significant Deterioration statute. But that broader interpretation has a glaring problem, as EPA itself recognized. In the context of the Prevention of Significant Deterioration statute, EPA's broader interpretation would not mesh with other provisions of the statute and would lead to absurd results. That's because the Prevention of Significant Deterioration statute requires pre-construction permits for facilities with the potential to emit more than 250 tons per year (or, for some facilities, 100 tons per year) of any covered pollutant. *See* 42 U.S.C. §§ 7475(a)(1), 7479(1). That would be a very low trigger for emissions of greenhouse gases because greenhouse gases are emitted in far greater quantities than the NAAQS pollutants. As a result, the low trigger would mean a dramatically higher number of facilities would fall within the program and have to obtain pre-construction permits.

In an unusual twist, EPA openly acknowledged the unreasonableness—indeed, the absurdity—caused by its interpretation of the statute. If the Prevention of Significant Deterioration program were interpreted to require pre-construction permits based on emissions of greenhouse gases, EPA candidly stated that the result would be "so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish with the PSD requirements—that it should be avoided under the 'absurd results' doctrine." 74 Fed.Reg. 55,292, 55,310 (Oct. 27, 2009).

But faced with those absurd consequences from the broader interpretation of the statute, EPA surprisingly did not choose the seemingly obvious option of adopting the narrower and more sensible interpretation of the term "air pollutant" for the Prevention of Significant Deterioration statute—the interpretation limited to NAAQS air pollutants. Instead, EPA plowed ahead with the broader interpretation. And then, to try to deal with the absurd repercussions of that interpretation for the Prevention of Significant Deterioration statute, EPA re-wrote the very specific 250–ton trigger in the permitting requirement of the statute, unilaterally raising that trigger for greenhouse gas emissions from 250 tons to 100,000 tons—a 400–fold increase. *See* 75 Fed.Reg. 31,514 (June 3, 2010). EPA believed that re-writing the statute's permitting-triggers provision in this way would reduce the number of facilities that would require pre-construction permits and thereby "tailor" the absurdity—that is, alleviate some of the absurdity caused by interpreting "air pollutant" to cover greenhouse gases.[FN1]

> FN1. At the same time, EPA reserved the right to ratchet the trigger all the way back down to 250 tons, thereby bringing more and more facilities under the program at EPA's unilateral discretion. EPA's assertion of such extraordinary discretionary power both exacerbates the separation of powers concerns in this case and underscores the implausibility of EPA's statutory interpretation. Put simply, the statute cannot be read to grant discretion to EPA to raise or lower the permitting triggers as EPA sees fit.

***16** This is a very strange way to interpret a statute. When an agency is faced with two initially plausible readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware

of no precedent that suggests the agency can still choose the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out. And just recently, the Supreme Court reminded the Executive Branch and the lower courts that this is not the proper way to interpret a statute: Instead of "reading new words into the statute" to avoid absurd results, as the Government had urged in that case, the Court said that the statute should be interpreted so that "no absurdity arises in the first place." *Kloeckner v. Solis,* No. 11–184, slip op. at 13 (U.S.2012).

Even limited to this case alone, the practical implications of accepting EPA's approach are obviously major. And if this case stands as a precedent that influences other agency decisionmaking, the future consequences likewise could be significant: Agencies presumably could adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness. Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process. I would not go down that road.

B

In my view, the statutory issue here is reasonably straightforward. The Prevention of Significant Deterioration statute's definition of "major emitting facility" subjects a facility to the permitting requirement based on the facility's emissions of "air pollutants." *See* 42 U.S.C. §§ 7475(a)(1), 7479(1). In the context of the Prevention of Significant Deterioration program as a whole, it seems evident that the term "air pollutant" refers to the NAAQS air pollutants.

To begin with, as explained above, interpreting "air pollutant" in this context to refer to the NAAQS air pollutants would avoid the absurd consequences that EPA's broader interpretation creates—namely, the exponential increase in the number of facilities that would be required to obtain pre-construction permits. That single point alone provides dispositive support for the narrower, NAAQS-specific interpretation. *See, e.g., Taniguchi v. Kan Pacific Saipan, Ltd.,* —— U.S. ——, —— – ——, 132 S.Ct. 1997, 2004–05, 182 L.Ed.2d 903 (2012) (statutory context supports narrower rather than broader reading of statutory term).

Moreover, other provisions in the Prevention of Significant Deterioration statute likewise plainly use the term "air pollutant" to refer to the NAAQS air pollutants. The Prevention of Significant Deterioration program is codified in Sections 7470 to 7479 of Title 42. Of relevance here, Section 7473 sets guidelines for areas designated as in attainment of the NAAQS and requires that the "concentration of any air pollutant" in those areas not exceed certain concentrations permitted by the NAAQS. 42 U.S.C. § 7473(b)(4). The term "air pollutant" in Section 7473(b)(4) necessarily refers to the NAAQS air pollutants. In addition, several other provisions in the Prevention of Significant Deterioration statute similarly refer to Section 7473(b)(4)'s maximum concentrations for NAAQS pollutants. Each of those references thus also necessarily employs a NAAQS-specific use of the term "air pollutant." *See, e.g.,* 42 U.S.C. § 7473(c)(1) (listing exclusions from "the maximum allowable increases in ambient concentrations of an air pollutant"); § 7474(a)(B) (redesignations cannot cause "concentrations of any air pollutant" to exceed the maximum); *see also* § 7475(a)(3)(A) (facility may not cause air pollution in excess of "maximum allowable concentration for any pollutant").

***17** So it's clear that a variety of provisions in the Prevention of Significant Deterioration statute use "air pollutant" to refer to a NAAQS air pollutant. And we presume that, unless otherwise indicated, the term "air pollutant" is used the same way throughout the Prevention of Significant Deterioration statute—

and here, we have no reason to conclude otherwise. *See IBP, Inc. v. Alvarez,* 546 U.S. 21, 34, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) ("identical words used in different parts of the same statute are generally presumed to have the same meaning").

. . .

***18** A separate canon of interpretation further demonstrates that EPA's broad reading of the term "air pollutant" is at odds with Congress's design. By requiring a vastly increased number of facilities to obtain pre-construction permits, EPA's interpretation will impose enormous costs on tens of thousands of American businesses, with corresponding effects on American jobs and workers; on many American homeowners who move into new homes or plan other home construction projects; and on the U.S. economy more generally. Yet there is literally no indication in the text or legislative record that Members of Congress ever contemplated—much less intended—such a dramatic expansion of the permitting requirement of the Prevention of Significant Deterioration statute. Courts do not lightly conclude that Congress intended such major consequences absent some indication that Congress meant to do so. *See FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159–61, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Here, as elsewhere, we should not presume that Congress hid an elephant in a mousehole.

For all of those reasons—the statutory text, the absurdity principle, the statutory context as demonstrated by related statutory provisions, the overarching objectives of the statute, the major unintended consequences of a broader interpretation—the Prevention of Significant Deterioration statute as a whole overwhelmingly indicates that the permitting requirement is based on emissions of the NAAQS air pollutants.

And just to reiterate, the simple and absolutely dispositive point in this case is the following: The broader interpretation of "air pollutant" adopted by EPA produces what even EPA itself admits are absurd consequences. When an agency is faced with two plausible readings of a statutory term, but one reading would cause absurd results, the agency cannot choose the absurd reading. Here, therefore, EPA was required to adopt the narrower and more sensible interpretation of "air pollutant," the interpretation limited to the NAAQS pollutants. As the Supreme Court has said, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982). Such an "alternative interpretation[ ] consistent with the legislative purpose" is readily available here.

II

If that were the end of the analysis, I would not hesitate to conclude that EPA had adopted an impermissibly broad reading of the term "air pollutant" for purposes of the permitting provision of the Prevention of Significant Deterioration statute. But before reaching that conclusion definitively, we need to consider whether EPA's approach was mandated by the Supreme Court's decision in *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). In that case, the Supreme Court considered the general statutory term "air pollutant" as applied to a different aspect of the Clean Air Act—the motor vehicle emissions program. The Court there interpreted "air pollutant" very broadly to mean "all airborne compounds of whatever stripe," including greenhouse gases. *Id.* at 529.

***19** Does *Massachusetts v. EPA* dictate EPA's broader interpretation of "air pollutant" in the different context of the Prevention of Significant Deterioration statute? The panel opinion seemed to think so; its conclusion appears to have been heavily if not dispositively influenced by *Massachusetts v. EPA.*

See, e.g., Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 134, 136 (D.C.Cir.2012). In my view, however, the holding in *Massachusetts v. EPA* does not control the result in this case. Indeed, as explained more fully below, even EPA has concluded that *Massachusetts v. EPA* does not control here. The decision in *Massachusetts v. EPA* concerned the motor vehicle emissions program, a point the Supreme Court expressly noted many times in its opinion. The case did not purport to say that every other use of the term "air pollutant" throughout the sprawling and multifaceted Clean Air Act necessarily includes greenhouse gases. Each individual Clean Air Act program must be considered in context.[FN3]

FN3. As an analogy, take the familiar example of "no vehicles in the park." Assume that a court has decided that the term "vehicles" generally includes bicycles, and that no bicycles are allowed in the park. Next assume that another park regulation states that "all park service vehicles must have reinforced gas tanks." In that latter regulation, context tells us that the term "vehicles" obviously does not include bicycles. Bicycles are still vehicles in the abstract, but the gas-tank regulation logically applies only to a specific subset of vehicles (namely, motor vehicles).

So it is with "air pollutant" as used in different parts of the Clean Air Act. *Massachusetts v. EPA* held that the term "air pollutant" generally includes greenhouse gases. But that does not mean that the term "air pollutant" can never be used in a narrower sense. Greenhouse gases may qualify as "air pollutants" in the abstract, but context tells us that the Prevention of Significant Deterioration program uses the term "air pollutant" to refer only to a subset of all air pollutants (namely, the NAAQS pollutants).

Importantly, in *Massachusetts v. EPA,* the Supreme Court explicitly relied on the fact that the Clean Air Act's "capacious definition of 'air pollutant,' " did not appear "counterintuitive" or produce "extreme" consequences in the context of motor vehicle emissions. 549 U.S. at 531–32. But, as explained above, EPA's capacious definition of "air pollutant" *is* counterintuitive and *does* produce extreme consequences in the context of the Prevention of Significant Deterioration statute, as EPA itself acknowledges. Moreover, in this case, an alternative and sensible interpretation of the term "air pollutant" is readily discernible from the text, context, and structure of the Prevention of Significant Deterioration statute as a whole—namely, the NAAQS-specific interpretation.

To be sure, as noted earlier, the same words used in different parts of an Act are often construed to have the same meaning. *See IBP, Inc. v. Alvarez,* 546 U.S. 21, 34, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). If that were an inflexible command, the *Massachusetts v. EPA* interpretation of "air pollutant" would certainly control here and throughout the entire Clean Air Act. But as the Supreme Court recently reminded us—*in the context of interpreting the Clean Air Act*—"the natural presumption that identical words used in different parts of the same act are intended to have the same meaning is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Environmental Defense v. Duke Energy Corp.,* 549 U.S. 561, 574, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007) (internal quotation marks and ellipsis omitted). As instructed by the Supreme Court, we must interpret statutory terms based on their context and in light of the statute as a whole, even if that approach on some occasions means that the same term applies differently in different parts of a statute. *See, e.g., General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 596–97, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) (term "age"

has different meanings within Age Discrimination in Employment Act); *United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 212–13, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (term "wages paid" has different meanings within Social Security Act Amendments of 1939); *Robinson v. Shell Oil Co.,* 519 U.S. 337, 343–44, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (term "employee" has different meanings within Title VII).

. . .

If *Massachusetts v. EPA* does not control here—and even EPA admits that it does not—then we are back where we started. EPA was faced with two initially plausible interpretations of "air pollutant" for purposes of the permitting requirement of the Prevention of Significant Deterioration statute. One interpretation created patent absurdities and made little sense given the other statutory provisions. The other interpretation fit comfortably and sensibly within the statutory text and context. EPA nonetheless chose the first option. In my view, EPA's reading of the statute was impermissible. An agency cannot adopt an admittedly absurd interpretation and discard an eminently sensible one.

Given all of this, the case seems reasonably straightforward. So how did the panel opinion reach the opposite conclusion? I respectfully have three main points of disagreement. . . . Third, the panel gave insufficient weight to the most critical point in this case, the absurd consequences of EPA's broad interpretation. This was a mistake because the ultimate clincher in this case is one simple point: EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text. An agency cannot do that.

III

***22** In finding EPA's statutory interpretation legally impermissible, I do not in any way want to diminish EPA's vital policy objectives. EPA's regulations for the Prevention of Significant Deterioration statute may well be a good idea as a matter of policy. The task of dealing with global warming is urgent and important. But as in so many cases, the question here is: Who Decides? The short answer is that Congress (with the President) sets the policy through statutes, agencies implement that policy within statutory limits, and courts in justiciable cases ensure that agencies stay within the statutory limits set by Congress. A court's assessment of an agency's compliance with statutory limits does not depend on whether the agency's policy is good or whether the agency's intentions are laudatory. Even when that is true, we must enforce the statutory limits. *See Hamdan v. United States,* 696 F.3d 1238 (D.C.Cir.2012) (ruling that Executive Branch exceeded statutory authority in wartime prosecution of al Qaeda member).

. . . .

As a court, it is not our job to make the policy choices and set the statutory boundaries, but it is emphatically our job to carefully but firmly enforce the statutory boundaries. That bedrock separation of powers principle accounts for my concern about this case. Here, as I see it, EPA went well beyond what Congress authorized for the Prevention of Significant Deterioration statute. I respectfully disagree with the panel's resolution of this issue, and given the overall importance of the case, I respectfully dissent from the denial of rehearing en banc.

C.A.D.C.,2012.
Coalition for Responsible Regulation, Inc. v. E.P.A.
Not Reported in F.3d, 2012 WL 6621785 (C.A.D.C.)

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