

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UTILITY AIR REGULATORY GROUP, :

4 Petitioner : No. 12-1146

5 v. :

6 ENVIRONMENTAL PROTECTION AGENCY; :

7 - - - - - x

8 - - - - - x

9 AMERICAN CHEMISTRY :

10 COUNCIL, ET AL., :

11 Petitioners : No. 12-1248

12 v. :

13 ENVIRONMENTAL PROTECTION AGENCY, :

14 ET AL., :

15 - - - - - x

16 - - - - - x

17 ENERGY-INTENSIVE MANUFACTURERS :

18 WORKING GROUP ON GREENHOUSE GAS :

19 REGULATION, ET AL., :

20 Petitioners : No. 12-1254

21 v. :

22 ENVIRONMENTAL PROTECTION AGENCY, :

23 ET AL., :

24 - - - - - x

25 - - - - - x

1 SOUTHEASTERN LEGAL FOUNDATION, :

2 INC., ET AL., :

3 Petitioners : No. 12-1268

4 v. :

5 ENVIRONMENTAL PROTECTION AGENCY, :

6 ET AL., :

7 - - - - - x

8 - - - - - x

9 TEXAS, ET AL., :

10 Petitioners : No. 12-1269

11 v. :

12 ENVIRONMENTAL PROTECTION AGENCY, :

13 ET AL., :

14 - - - - - x

15 - - - - - x

16 CHAMBER OF COMMERCE OF :

17 THE UNITED STATES, ET AL., :

18 Petitioners : No. 12-1272

19 v. :

20 ENVIRONMENTAL PROTECTION AGENCY, :

21 ET AL., :

22 - - - - - x

23 Washington, D.C.

24 Monday, February 24, 2014

25

1 The above-entitled matter came on for oral
2 argument before the Supreme Court of the United States
3 at 10:05 a.m.

4 APPEARANCES:

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6 the Private Party Petitioners.

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11 Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 12-1146, Utility Air Regulatory Group v. The Environmental Protection Agency and the consolidated cases.

Mr. Keisler.

ORAL ARGUMENT OF PETER KEISLER
ON BEHALF OF THE PRIVATE PARTY PETITIONERS

MR. KEISLER: Mr. Chief Justice, and may it please the Court:

The situation presented by this case is, to our knowledge, unprecedented in at least two respects. First, EPA agrees that its interpretation of the PSD and Title V statutes is adopted, then applying other provisions of those same statutes would, according to their terms, would in EPA's words result in a program that would have been unrecognizable to the Congress that enacted it, and so contrary to Congress's intent that the Agency calls it absurd.

And second, EPA took that conclusion not as a reason to reexamine its interpretation, but as a basis for rewriting other provisions of the statutes that are clear and unambiguous, the numerical permitting thresholds that Congress enacted, because the Agency

1 wrongly believes that fixes the problem. And this is
2 not a single one-time act of statutory rewriting, as
3 problematic as that alone would be, because the Agency
4 has said it intends to continually adjust and readjust
5 thresholds into the indefinite future based on its
6 ongoing assessment of the cost and benefits of
7 regulation. So --

8 JUSTICE KAGAN: Mr. Keisler, I'm sorry. Can
9 I ask about your interpretation of the phrase "any air
10 pollutant?" Because there are a lot of different
11 interpretations that have gone on among the various
12 briefs and among the lower court opinions in this case.
13 So here are some choices, all right? And I want really
14 to ask you to pick what you're arguing for.

15 Your original position was that "any air
16 pollutant" meant any NAAQS pollutant for which the area
17 is in attainment; that was your original position.
18 Judge Kavanaugh's position is that it means any NAAQS
19 pollutant. There is another position that goes on in
20 the briefs that says no, it doesn't mean any NAAQS
21 pollutant; it means any local pollutant, whether or not
22 it's a NAAQS pollutant; and there is still another
23 position that says it's really any regulated pollutant
24 other than greenhouse gases.

25 So those are four different interpretations

1 that all of the folks on your side, and I realize there
2 are a lot of them, have presented. And I guess I'm
3 asking you which one you're arguing for.

4 MR. KEISLER: Yes. Your Honor, I'm here on
5 behalf of all the private party Petitioners, and we have
6 two arguments. Our principal argument and the one I
7 would like to focus on first is that while other
8 programs of the Clean Air Act give EPA authority to
9 regulate greenhouse gases from stationary sources, PSD
10 does not. And that is because -- and this is where I
11 would choose one of the options Your Honor gave me --
12 and that is because the PSD program is exclusively
13 focused on emissions that have area-specific air quality
14 impacts, and not on globally undifferentiated phenomena.
15 I wouldn't use the words --

16 JUSTICE SOTOMAYOR: May I ask --

17 JUSTICE KAGAN: When you say area-specific,
18 I mean, I take it that these sort of ozone pollutants
19 are not area-specific. Would your interpretation
20 exclude those as well?

21 MR. KEISLER: If the EPA couldn't make a
22 regulatory finding that they had an area-specific air
23 quality impact, yes. Now, the sources --

24 JUSTICE SOTOMAYOR: Could I ask you a
25 follow-up to Justice Kagan? Now that's a fifth

1 interpretation by your side. That to me is the
2 quintessential ambiguity in a statute where we give
3 deference to the Agency. So if your side can't even
4 come to one interpretation, why shouldn't we defer to
5 the Agency?

6 MR. KEISLER: Well, first of all, Your
7 Honor, the deference that an agency is afforded is
8 always going to be limited to reasonable
9 interpretations, and we would start out with the premise
10 that an interpretation that requires the Agency to
11 rewrite other provisions of the Act is not reasonable.

12 JUSTICE SOTOMAYOR: Well, it hasn't
13 rewritten them. All it has said, as I understand it,
14 and I don't understand -- other than your view that
15 there are too many people it's regulating, is that we
16 can't implement it immediately, because it would
17 overburden us administratively. It hasn't said that
18 over time, with streamlining and with other adjustments,
19 that it can't do this. It's just said we can't do it
20 right away.

21 MR. KEISLER: That is right, Your Honor.
22 And that actually reflects a deeper problem, and I'd
23 like to address that and then also explain our why our
24 position we think is the correct and only correct
25 interpretation of the statute on the broader question.

1 JUSTICE GINSBURG: Before you do that, can
2 you clarify whether or not you agree with the dissenting
3 judges on the D.C. Circuit? That is, if we limit it to
4 criteria pollutants, even so, BACT must be installed for
5 greenhouse gases. You seemed in your main brief to
6 agree with that. You have a footnote saying it's got a
7 heck of a lot of differences. It's 86 percent of the
8 emissions on the government's theory; 83 on yours. But
9 your reply brief seems to turn 180 degrees from that.

10 MR. KEISLER: And -- and let me sort that
11 out. And I recognize, Your Honor, that having six
12 opening briefs isn't the most effective or most helpful
13 way to the Court to present our position. So let me
14 express on behalf of all the private Petitioners, there
15 are two arguments.

16 Our principal argument, and the one I would
17 like to focus on the most, is that greenhouse gases are
18 not included within the PSD program at all. They can't
19 trigger its applicability and they wouldn't be subject
20 to the Best Available Control Technology determination.

21 JUSTICE KAGAN: But, again, that's because
22 they're not local.

23 MR. KEISLER: Because they don't have
24 area-specific air quality impacts, yes.

25 JUSTICE GINSBURG: Well, what do you make --

1 what do you make of the endangerment finding that
2 greenhouse gases have severe effects at the local level
3 that -- I think the endangerment finding is not before
4 us today. The endangerment finding is that they
5 exacerbate ground-level ozone and smog.

6 MR. KEISLER: Certainly, every effect that
7 any environmental phenomenon has on the planet and on
8 people will at some point be felt in some local area.
9 Our point is that that is not the kind of measurable
10 area-specific, regionally-defined air quality impact
11 that the PSD statute --

12 JUSTICE SCALIA: It's certainly not
13 measurable. The agency doesn't even assert that it's
14 measurable, right.

15 MR. KEISLER: That's right. And -- and
16 maybe it would help if I specifically identified. There
17 are three features of the --

18 CHIEF JUSTICE ROBERTS: I'm sorry. Before
19 you do that, we have an outstanding question from
20 Justice Sotomayor. Maybe --

21 MR. KEISLER: Thank you very much, Mr.
22 Chief Justice.

23 The problem is not simply that the agency
24 rewrote the thresholds and said that it will eventually
25 try, as it did say, to get down to the level of the

1 statutory thresholds, because the reason that Congress
2 wrote those thresholds was because it wanted to exempt
3 small entities from the costs and burdens of the
4 permitting process. And so when EPA says that it hopes
5 eventually to get down to the apartment buildings and
6 large high schools that would be covered if those
7 thresholds were applied by carbon dioxide, it is
8 contravening congressional intent in another way.

9 JUSTICE SCALIA: I didn't read them as
10 saying that anyway. I read them as saying they'll try
11 to do it, but make whatever exemptions are necessary.

12 MR. KEISLER: Well, and the problem is,
13 Justice Scalia, that those exemptions violate the
14 statute as well. The exemptions they're talking about
15 in order to deal with the small entities that Congress
16 meant to exclude would be to have general permits by
17 category. And the statute specifically says that these
18 determinations are to be case by case followed by an
19 individualized hearing. And so --

20 JUSTICE SCALIA: It -- it clearly is not a
21 matter of the EPA simply saying we can't do it right
22 away, but we're going to do it eventually.

23 MR. KEISLER: That's right.

24 JUSTICE SCALIA: It hasn't said that.

25 MR. KEISLER: It hasn't, and if they did say

1 that they would be violating the statute in worse ways.
2 They would be treating a command by Congress not to
3 regulate small entities into a command to regulate small
4 entities.

5 JUSTICE ALITO: Mr. Keisler, do you really
6 mean to say that the only difference between greenhouse
7 gases and the air pollutants that Congress clearly had
8 in mind when it enacted the Clean Air Act is that
9 greenhouse gases don't have a localized effect? Isn't
10 there also a big difference in that the quantity of
11 greenhouse gases that are emitted by sources are much
12 greater than the quantity of these other pollutants and
13 that's why there's this discrepancy between the
14 statutory threshold and the threshold that EPA has --

15 MR. KEISLER: That's right.

16 JUSTICE ALITO: -- substituted?

17 MR. KEISLER: That's right, Your Honor. And
18 I think there are really two parallel problems that
19 we're dealing with, each of which creates its own need
20 for the EPA to violate the statute in order to save it
21 for greenhouse gases.

22 One is the one that Your Honor and Justice
23 Sotomayor were referring to, which is this was a statute
24 designed for case-by-case permitting of a small number
25 of large sources that materially contribute to the

1 problem. And whether you rewrite the thresholds or
2 promise to regulate down to the infinitesimal level, you
3 are violating that aspect of the statute.

4 But the other aspect of the statute, which
5 is equally violated here, is the requirement that this
6 particular program, not the other programs in the Act,
7 but this particular program, be focused on these
8 area-specific air quality impacts. And there are three
9 features, the three central features of the PSD statute,
10 which we think show that.

11 The first is Section 7471, which is, I
12 think, on page 13A of the appendix to the government's
13 brief. And that is the provision that specifies what
14 the PSD program applies to and also explains what PSD,
15 "prevention of significant deterioration," refers to.
16 And 7471 says, "The program consists of emissions
17 limitations and other measures as may be necessary to
18 prevent significant deterioration of air quality in each
19 region that bears certain designations." And "air
20 quality in each region" is Clean Air Act language for
21 that subset of air pollution problems that have
22 regionally-defined effects on the air that people
23 breathe.

24 JUSTICE BREYER: How does the -- this
25 differ? I mean, there are many statutes, I believe,

1 particularly in the regulatory area, where Congress
2 passes a statute that tells the Agency, do A, B, C and
3 D. And then it turns out, since there's so many of the
4 regulated things, that it just doesn't make sense to
5 apply A, B and C and D to all of them. So often I would
6 think courts read in an exception where it makes no
7 sense.

8 For example, if there were a statute that
9 said you have to throw out all bubble gum that's been
10 around for more than a month. Well, what about bubble
11 gum used in a display case that nobody ever intends to
12 eat? You see. And so what we do all the time is we
13 say, well, it doesn't mean to apply to that. Now, why
14 can't we take the same approach or EPA takes the same
15 approach here? It says 250 tons or more and we apply
16 that all over the place, except it doesn't make sense
17 here, so we read an exception into it, unwritten, for
18 places where it makes no sense?

19 MR. KEISLER: I don't know that there
20 actually is a precedent of this Court which says the
21 agency can do precisely what it did here, which is take
22 an express command that identifies thresholds, that
23 didn't delegate to the agency the determination of the
24 thresholds but says --

25 JUSTICE SOTOMAYOR: But I'm -- but I'm a

1 little confused, because there have to be pollutants
2 who -- where it doesn't emit just 250, where it emits a
3 million. And the Best Available Control Technology
4 won't get it down to below 250. Yet the PSD program is
5 in effect when they get down below 250 on any pollutant
6 of the six criteria. So it can't be your view that this
7 statute was written only to -- to get to measurable
8 pollutants that -- that are at 250 or -- or can be
9 brought below 250.

10 MR. KEISLER: Well, that's right, Your
11 Honor. It's not our position that the purpose of Best
12 Available Control Technology is to bring facilities down
13 to below the 250 level. It's our position that the
14 statute sets that 250 ton per year level as the trigger,
15 that a facility which emits or has a potential to emit
16 that or more is subject --

17 JUSTICE SOTOMAYOR: That's a minimum, but
18 anything --

19 MR. KEISLER: That's right.

20 JUSTICE SOTOMAYOR: -- above it.

21 MR. KEISLER: That's right. Anything above
22 it.

23 JUSTICE SOTOMAYOR: All right. So --

24 MR. KEISLER: And then -- and then best
25 available --

1 JUSTICE SOTOMAYOR: And so GHG is something
2 that's above that and it's never going to be brought
3 down below it.

4 MR. KEISLER: That's right. But it's above
5 it for millions of entities that Congress intended to
6 exempt from the permitting process. And if I could just
7 continue --

8 JUSTICE SOTOMAYOR: Right. Well, let's
9 go --

10 JUSTICE KAGAN: Mr. Keisler, if I could
11 follow up, really, on Justice Breyer's question, because
12 the conundrum here, you keep saying: Look, EPA is
13 violating this specific statutory term. But the
14 conundrum that this cases raises is that everybody is
15 violating a statutory term. EPA is saying, no, we can't
16 do the 100 to 250 with respect to greenhouse gases, but
17 you are also violating a statutory term. You know, it
18 says any pollutant or it says in the other provision
19 each pollutant subject to regulation. Nobody would
20 think that the most natural, most reasonable readings of
21 those phrases are any pollutant if they have localized
22 effects, but not otherwise.

23 So I mean, what's happened here is that you
24 have this new kind of emission that basically makes
25 these two terms of the statute irreconcilable, and the

1 agency has essentially picked one. It said: Look,
2 we're not going to just exempt a broad class of
3 pollutants. Instead, we're going to fudge the numbers.
4 And why isn't that the more reasonable of the two things
5 to do?

6 MR. KEISLER: Because we don't agree, Your
7 Honor, that those two -- that those two horns of the
8 dilemma that Your Honor described are equally situated.
9 Certainly, 100 and 250 tons per year is a clear and
10 unambiguous congressional command. The question of how
11 to interpret the phrase "air pollutant" is -- that is an
12 issue that is subject to interpretation. And if I could
13 just then follow up --

14 JUSTICE KAGAN: Well, I think I don't really
15 understand. But I mean, it's true that one is a number.
16 But the other, each pollutant subject to regulation or
17 any air pollutant, what the EPA has done is for 30 years
18 across presidential administrations treated those
19 phrases as meaning a single thing, which I think if you
20 put aside the absurdity problem in this case, everybody
21 would agree is the most reasonable interpretation of
22 those phrases. And you're saying the EPA should junk
23 that most reasonable interpretation of those phrases
24 because there's a new kind of emitted -- emitted
25 chemical or whatever that makes the numbers not work.

1 MR. KEISLER: No. Let me -- it goes much
2 beyond the numbers, Justice Kagan. I think if anybody
3 were looking at the PSD statute in isolation, without
4 the benefit of Massachusetts v. EPA, assume that the
5 word "pollutant" was an undefined term and the question
6 was: What pollutants does this provision of the Clean
7 Act refer to, they would conclude that it refers to
8 pollutants only that have those area-specific air
9 quality impacts. And it's not only that the prevention
10 of significant deterioration referred to in the statute
11 is the deterioration of air quality in each region. It
12 is also two other features of that statute which we
13 think make that unambiguously clear.

14 The first is Section 7475(e), which can be
15 found on pages 27A to 29A, I think, of the government's
16 statutory appendix. And that mandates the one analysis
17 that has to be conducted in every permitting process and
18 the one analysis that Congress has required be available
19 for public hearing, and that is an analysis of the air
20 quality and local conditions at the site of the facility
21 and each area that is going to be affected by
22 the emissions.

23 CHIEF JUSTICE ROBERTS: Counsel, you began
24 that discussion by saying putting Massachusetts v. EPA
25 to one side. But I was in the dissent in that case, but

1 we still can't do that.

2 MR. KEISLER: No, that's --

3 (Laughter.)

4 MR. KEISLER: That's -- that's right, Your
5 Honor.

6 JUSTICE KENNEDY: And -- and my question is
7 along that exact same line. Let's assume, and it's the
8 case, that we're bound by both the result and the
9 reasoning of Massachusetts and EPA and the -- the
10 American Electric v. Connecticut case. Under your view,
11 what regulatory force, what regulatory significance, do
12 those cases have under, A, your approach and, B, the
13 approach by the Chamber of Commerce in the blue brief?
14 I -- I think that may be consistent with the subject the
15 Chief Justice just opened.

16 MR. KEISLER: Sure. Let me begin with
17 Massachusetts v. EPA and then I'll turn to AEP v.
18 Connecticut. Massachusetts v. EPA did not hold that the
19 interpretation of pollutant in that opinion had to be
20 applied every time the word "pollutant" appears in the
21 Clean Air Act. The same day that Massachusetts came
22 out, this Court decided Environmental Defense v. Duke,
23 in which it specifically said that, even when a defined
24 term in the statutory definition provision is construed
25 a particular way, that doesn't mean that that same term

1 used elsewhere in the statute can't be construed
2 differently where context requires. And the Court
3 reversed the Fourth Circuit for holding that they had to
4 be the same.

5 And that's why in Massachusetts, after
6 indeed holding that the definition of "pollutant"
7 unambiguously in its literal sense included greenhouse
8 gases, the Court didn't stop there. It went on to ask
9 whether applying that definition to the Title II
10 provisions on motor vehicles that were at issue in that
11 case would produce what the Court called "extreme
12 measures or counterintuitive results." And only after
13 finding that there'd be no extreme or counterintuitive
14 results did the Court direct the EPA to apply that
15 definition to those Title II provisions.

16 And I think what that reflected was that the
17 Court understood that the literal definition of
18 "pollutant" was sufficiently broad that it shouldn't be
19 mechanically applied, plugged in everywhere in the Act
20 that the word "pollutant" appears, without some
21 additional analysis of the context of those provisions.

22 JUSTICE GINSBURG: What else does it cover
23 other than Title II, other than mobile vehicles?

24 MR. KEISLER: There are multiple places in
25 which the word "pollutant" appears in the Act in which

1 the EPA has understood Mass v. EPA the way I just
2 described, in which they have interpreted the words "any
3 air pollutant" to mean only a subset of the pollutants
4 that -- that the definition literally could be held to
5 encompass.

6 JUSTICE SOTOMAYOR: That's generally because
7 the section that it's in gives a different definition
8 directly.

9 MR. KEISLER: No, that's -- with respect,
10 Your Honor, that's not correct. So, for example, in the
11 PSD in Title V provisions, it says "any air pollutant."
12 The EPA has interpreted that to mean any regulated air
13 pollutant, not because of any separate definition, but
14 because of context.

15 JUSTICE SOTOMAYOR: You are right, but --

16 MR. KEISLER: The context suggests
17 otherwise. The same thing with the provision on
18 visibility-impairing pollutants.

19 JUSTICE KENNEDY: But your -- your answer is
20 that they can be treated differently under different
21 parts of the Act. Doesn't that contradict your earlier
22 view that we can't change the statute?

23 MR. KEISLER: No, I don't think so, Your
24 Honor, because it was an act of interpretation in
25 Massachusetts v. EPA of a particular term, and the

1 question is, reading that decision as a whole, what
2 import did the Court give that interpretation. It would
3 not have needed to go on and say, let's look at
4 specifically the Title II provisions at issue here and
5 ask whether it will produce extreme or counterintuitive
6 measures if it weren't the case that that was an
7 additional part of the inquiry that was necessary.

8 JUSTICE GINSBURG: And what other programs
9 I asked earlier. So we have the mobile vehicles. What
10 else? You say it excludes PSD. What else does it --

11 MR. KEISLER: I think most critically, Your
12 Honor, it includes the new source performance standards
13 program of Section 111 that this Court discussed in
14 Connecticut v. AEP. And this is a very important point,
15 because this case is not about whether EPA can regulate
16 greenhouse gases from stationary sources. This Court
17 held that it could under this program in Section 11.

18 This is about whether State and local
19 permitting authorities, the 90-plus State and local
20 permitting authorities, are supposed to regulate plant
21 by plant under this particular PSD program. And I
22 mention the NSPS program because the features of that
23 program highlight what's wrong here because the NSPS
24 program doesn't contain the elements of the PSD program
25 that require the PSD program to be rewritten in so many

1 particulars to make greenhouse gases fit.

2 NSPS doesn't have the 100- and 250-ton per
3 year thresholds. It lets EPA by notice and comment
4 rulemaking decide what category of sources are most
5 contributing to the problem and most require regulation.
6 It doesn't require the area-specific local impact
7 analysis of subsection (e) of 7475, which EPA has told
8 State and local permitting authorities, even though it's
9 mandatory, don't conduct it because it can't be done for
10 greenhouse gases. NSPS permits the EPA to look at
11 reducing the national footprint without regard to
12 area-specific impacts and it permits the EPA to do this
13 through a national uniform emissions standard that the
14 plants can then determine how best to meet, rather than
15 asking 90 State and local permitting authorities, which
16 is what PSD is about, to decide plant by plant what they
17 think each plant in their jurisdiction should do about
18 global warming.

19 JUSTICE BREYER: So in your opinion -- is --
20 I'm not sure what the statutory cite is to the provision
21 you are talking about. Is it 7411?

22 MR. KEISLER: That's right, Your Honor.

23 JUSTICE BREYER: All right. So you're
24 saying they could use 7411(a) and (b) to get to just the
25 same place they are today.

1 MR. KEISLER: Yes, without --

2 JUSTICE BREYER: You don't see an objection.
3 There must be some reason they didn't do that.

4 MR. KEISLER: Well, they are doing it, Your
5 Honor.

6 JUSTICE BREYER: They are doing it? Well,
7 then I don't know what this case is about. I mean, it's
8 a question of whether they do exactly the same thing
9 under one provision or another provision. You agree
10 with them that they could do it under the other one and
11 we'd end up at exactly the same place.

12 MR. KEISLER: But it's not exactly the same
13 thing, Your Honor. And it is the difference between
14 having the EPA, through notice and comment rulemaking,
15 establish a national emissions standards and then the
16 plants can deal with that incentive system in the best
17 way they can and figure out how to meet it, versus this
18 command and control PSD mechanism, where 90-plus State
19 and local permitting authorities are each having to
20 decide on their own what controls they think each plant
21 in their area should engage in in order to deal with
22 global warming. It makes perfect sense to have 90 State
23 and local permitting authorities addressing the
24 area-specific air quality impacts of plants that are
25 built in their States.

1 JUSTICE BREYER: It says "such standards
2 with such modifications as he deems appropriate."
3 That's the language of 7411(b).

4 MR. KEISLER: Right.

5 JUSTICE BREYER: Okay. So if this is the
6 right program, why couldn't they copy it word for word
7 into the rules and just put a different section number
8 at the bottom? I know you'd have a preferred way to do
9 it, but if they disagreed with you and they think this
10 is the perfect program, why can't they do it?

11 MR. KEISLER: Because the statutory language
12 and structure of the PSD program does not, we think,
13 encompass these kinds of pollutants that have globally
14 dispersed results and not area-specific impacts. And
15 it's for the reasons that I've indicated. 7411, which
16 says -- sorry. 7471, which says that the prevention of
17 significant deterioration is focused on deterioration of
18 air quality in each region; the study required by
19 7475(e), which is of local conditions; and the fact that
20 this is assigned to 90 State and local permitting
21 authorities.

22 JUSTICE SCALIA: Is that your second point?
23 I've been keeping a list here of points you -- you have
24 not been permitted to get to.

25 (Laughter.)

1 JUSTICE SCALIA: One, you were going to
2 discuss not just the Massachusetts case, but the
3 follow-on case to Massachusetts.

4 MR. KEISLER: Oh, well, Connecticut.

5 JUSTICE SCALIA: You never did that, yes.

6 MR. KEISLER: Well, Connecticut v. AEP, and
7 the only point to make about that is that that was the
8 case which held that the commission -- that the EPA has
9 authority under Section 111, the NSPS provision, to
10 address greenhouse gases without having to rewrite
11 thresholds by designating the categories of sources like
12 it's trying to do here. But it has to do it by national
13 emissions standards through notice and comment
14 rulemaking. Connecticut v. AEP certainly did not
15 approve -- the PSD provisions here -- certainly did not
16 approve the regulations rewriting the statutory
17 thresholds that the EPA had to -- had to promulgate in
18 this case.

19 JUSTICE SCALIA: The other thing -- you were
20 going to give two points and you only got to -- what is
21 it -- 7411(e), but there was another point.

22 MR. KEISLER: There were really -- yes,
23 there were three features I mentioned of the PSD statute
24 which we think make the context clear.

25 JUSTICE SCALIA: You got the first, which

1 was the --

2 MR. KEISLER: Which was 7471, prevention of
3 significant deterioration.

4 JUSTICE SCALIA: Right.

5 MR. KEISLER: The second was that study, the
6 only required study is of local conditions and
7 area-specific impacts. And the third is just that this
8 is assigned to 90 State and local permitting
9 authorities, which is -- it is not plausible to think
10 that with respect, not to these area-specific impacts,
11 but to a global problem like global warming that what
12 Congress was doing was saying we think 90 State and
13 local permitting authorities should make those decisions
14 rather than, perhaps, EPA on a national basis.

15 JUSTICE SOTOMAYOR: You -- just to be clear,
16 your reading would say that the -- that the Agency was
17 not permitted, with notice and opportunity to be heard,
18 to say -- to make a criteria -- make this a criteria of
19 pollution in NAAQS.

20 MR. KEISLER: If the Agency had tried to
21 establish a NAAQS for greenhouse gases, we think that
22 would be contrary to the statute because the National
23 Ambient Air Quality Standards are all about regional
24 concentrations. Is this area in or out of compliance?
25 If the gas goes up to the atmosphere and is mixed there,

1 either the whole country is going to be in attainment or
2 the whole country is going to be out of attainment. It
3 doesn't work at all with the NAAQS structure.

4 And if I could reserve the ---

5 CHIEF JUSTICE ROBERTS: Well, why don't you
6 take an extra 5 minutes, and -- and you can begin by
7 answering the question: You know, the government
8 disaggregates the discussion, and their first point in
9 their brief is that greenhouse gases can be regulated
10 with respect to sources that are already covered by the
11 PSD program. That position does not implicate your
12 concern about the broad reach of EPA regulation, does
13 it?

14 MR. KEISLER: I think it does, Your Honor,
15 because while that might deal with the specific issue of
16 rewriting the thresholds, the fact that the PSD
17 provisions for the reasons I have indicated is limited
18 to area-specific air impacts would we think be violated
19 merely by applying best available control technology to
20 a globally disbursed substance like greenhouse gases.

21 CHIEF JUSTICE ROBERTS: I understand. But
22 they would only be applying that with respect to sources
23 that are already required to operate under PSD permits.

24 MR. KEISLER: That's right, but they would
25 be applying it to a substance, greenhouse gases, which

1 the PSD program was not designed to address, which was
2 designed to be addressed by other programs. And I would
3 say, Your Honor, that while they have tried to separate
4 those issues out, that there's one issue about who has
5 to get a permit and the other issue about whether the
6 requirements of best available control technology apply,
7 the regulation that they have adopted to implement what
8 they call their tailoring rule applies equally to both.
9 What they've done is say that the words "subject to
10 regulation," which are the words in the BACT provision,
11 shall only apply to greenhouse gases, even when they are
12 regulated, if you're emitting them at levels of 100,000
13 tons per year or more.

14 When they did that they both rewrote the
15 provision that says who has to get a permit and they
16 rewrote the provision that says what best available
17 control technology applies. They did both at once even
18 though their brief treats it as separate.

19 And if -- I'm not certain how much time I
20 have, Mr. Chief Justice. If I have --

21 CHIEF JUSTICE ROBERTS: You have three and a
22 half minutes left.

23 MR. KEISLER: Not including rebuttal?

24 CHIEF JUSTICE ROBERTS: No. You will get 5
25 minutes of rebuttal.

1 MR. KEISLER: Thank you, Your Honor.

2 If I could then turn briefly to the second
3 argument that I made reference to at the very beginning,
4 which is an argument that need not be addressed if the
5 Court is persuaded by what I've just said. But if not,
6 we have a second, narrower argument which is in the
7 American Chemistry Council brief, which addresses the
8 requirements for triggering the PSD statute, and our
9 position on that is very much like Judge Kavanaugh's
10 position below, which is that the statute is triggered
11 only by emissions of major amounts of a pollutant for
12 which the area is in attainment.

13 JUSTICE KAGAN: Well, but that's not Judge
14 Kavanaugh's position. I thought Judge Kavanaugh's
15 position is any NAAQS pollutant, all NAAQS pollutants.

16 MR. KEISLER: That's right, Your Honor, and
17 that is a distinction. Our position is similar but not
18 identical to his position.

19 JUSTICE KAGAN: And it comes from a
20 different portion of the statutory language.

21 MR. KEISLER: That's right. We are focused
22 on language in any area to which this part applies, and
23 that is because Part C, the PSD provision, applies not
24 to an area as a whole, but for some pollutants and not
25 for others in any particular area.

1 JUSTICE KAGAN: Can I ask, Mr. Kavanaugh,
2 why Judge Kavanaugh's argument has been left by the
3 wayside?

4 MR. KEISLER: It is very similar, Your
5 Honor, to the argument that we're making, but we get at
6 it in a different way and with a slightly different
7 result.

8 JUSTICE KAGAN: Well, it does -- it comes
9 from different statutory language. His arguments about
10 the structure of the statute don't apply to your
11 argument. So I think, notwithstanding that there is
12 some overlap between the arguments, the legal rationales
13 are entirely different, and I guess I'm just curious.

14 MR. KEISLER: This is the argument we made
15 below and it's the argument we've continued to make
16 here. And the point of the argument.

17 JUSTICE SOTOMAYOR: I don't think that
18 answers the question.

19 MR. KEISLER: Excuse me, Your Honor?

20 JUSTICE SOTOMAYOR: I said I don't think --
21 I don't think it answers the question, which is I know
22 that's the argument; are you saying you can't defend his
23 argument or are you saying that --

24 MR. KEISLER: No, it's just that it's been
25 hard enough to make two alternative arguments in this

1 forum and to add a third to it would be more than I
2 think I could handle.

3 (Laughter.)

4 JUSTICE GINSBURG: Can you clarify that? We
5 have the NAAQS criteria. EPA has added many others
6 across the years. For 30 years it's been adding things
7 for which there are no NAAQS. What about all of those?

8 MR. KEISLER: Your Honor, it is true that
9 ever since 1980 -- although it proposed our
10 interpretation as its original interpretation of the
11 statute, ever since EPA has said that any pollutant,
12 whether it's a NAAQS pollutant, whether it's a pollutant
13 for which the area is in attainment, any pollutant would
14 be sufficient to trigger PSD permit requirements. But
15 that has had virtually no practical effect because all
16 of those other pollutants, if they are emitted in
17 threshold quantities, invariably -- we've been able to
18 find about two or three exceptions over 30 years --
19 invariably the facility that is emitting them is also
20 emitting 250 tons per year of one of the criteria
21 pollutants.

22 So this was a difference which made no
23 difference until greenhouse gases came onto the scene.

24 And with the Court's permission, I will
25 reserve the remainder of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 General Mitchell.

3 ORAL ARGUMENT OF JONATHAN F. MITCHELL
4 ON BEHALF OF STATE PETITIONERS

5 MR. MITCHELL: Mr. Chief Justice, and may it
6 please the Court:

7 There of are at least two issues in this
8 case in which EPA and the Petitioners agree. The first
9 is that the term "air pollutant" cannot be given uniform
10 construction after the Clean Air Act even after this
11 Court's ruling in Massachusetts that "air pollutant"
12 includes all things airborne for purposes of Title 2.
13 The second point of agreement is that greenhouse gases
14 cannot be treated the same as other air pollutants for
15 purposes of the PSD and Title 5 programs, because the
16 unambiguous statutory requirements of those programs are
17 incompatible with sensible regulation of greenhouse
18 gases.

19 EPA thinks it can fix this problem by
20 imposing an atextual agency-created regime that applies
21 only to greenhouse gases. The proper response, however,
22 is for EPA to conclude that Congress never delegated
23 regulatory authority over greenhouse gases in the PSD
24 and Title 5 programs. Congress does not establish round
25 holes for square pegs, and Brown & Williamson holds in

1 these situations agency cannot make a round hole square
2 by rewriting unambiguous statutory language.

3 JUSTICE KAGAN: General, I take it that the
4 unambiguous statutory language that you are referring to
5 is the references to 100 and to 250. And it seems to me
6 that that's an odd kind of term to drive such an
7 important statutory interpretation question, because
8 what those numbers were all about is that they were
9 supposed to separate major emitters from minor emitters.
10 I mean, they were supposed to be about the size of the
11 facility. They were not supposed to have -- they were
12 not supposed to make any distinctions as to the type of
13 pollutant. So you're essentially using those numbers to
14 make distinctions as to the type of pollutant rather
15 than, it seems to me and more sensible approach would be
16 to say, look, the 100 and 250 numbers don't work for
17 this new kind of pollutant, we're going to up the
18 numbers, and that will be the rest of the statute and
19 all the purposes of Congress intact.

20 MR. MITCHELL: Justice Kagan, the reason we
21 don't think the approach that you describe is
22 permissible is because there are statutory provisions in
23 the Clean Air Act that specifically forbid EPA to do
24 what Your Honor is prescribing. 7661(a)(A) says that
25 EPA cannot under any circumstance exempt any major

1 source from the Title 5 requirements. And because that
2 provision is in the statute, EPA cannot be claiming to
3 seize discretion when Congress has specifically withheld
4 that type of discretion here. This is akin to a
5 dispensing power, for EPA to be coming in and rewriting
6 the Title 5 permitting thresholds in the way that they
7 are.

8 And the question to ask is whether the term
9 "air pollutant" is flexible enough to accommodate
10 different meanings in different statutory contexts. And
11 here even EPA agrees with us that "air pollutant" can
12 mean different things in different parts of the Act,
13 even Massachusetts.

14 Massachusetts held that "air pollutant"
15 unambiguously includes all things airborne, all airborne
16 compounds of whatever stripe for purposes of Title 2.
17 But EPA has refused to carry over that definition
18 throughout the Clean Air Act when the term "air
19 pollutant" appears in at least three different places.
20 One of them is section 7411(a)(4), which is part of the
21 NSPS program. In that provision the term "air
22 pollutant" appears as part of the definition of
23 modification.

24 EPA does not interpret that to mean all
25 things airborne. It doesn't even interpret it to mean

1 all regulated air pollutants. It interprets that to
2 mean air pollutants for which a standard of performance
3 has been established. In the PSD and Title 5 permitting
4 thresholds, EPA interprets the phrase "any air
5 pollutant" not to mean all things airborne, but to mean
6 any regulated air pollutant.

7 And then finally, in Section 7491 EPA
8 interprets the phrase "any pollutant" to mean any
9 visibility-impairing pollutant. So if Massachusetts's
10 all things airborne view of the phrase "air pollutant" is
11 forced to be applied to every provision of the Clean Air
12 Act where the word "air pollutant" appears, all of these
13 longstanding EPA interpretations would have to be
14 discarded.

15 JUSTICE KAGAN: But, General, if you think
16 about the question of what any pollutant means, and you
17 put aside this whole absurdity question that the numbers
18 get you to, you just say, what does any air pollutant
19 mean? Does it mean what EPA has said it has meant for
20 30 years, which is any pollutant that's regulated under
21 this Act, or does it mean something more along the lines
22 of what you're saying, which is anything other than
23 greenhouse gases or anything other than pollutants that
24 have particular localized effects.

25 You would obviously choose EPA's version of

1 the thing. And the only reason that you're not choosing
2 that is because of these numbers that are in the
3 statute, which were designed only, only to distinguish
4 between major and minor emitters.

5 So if you can distinguish between major and
6 minor emitters while keeping the completely sensible
7 longstanding interpretation of any pollutant, why
8 wouldn't you do that?

9 MR. MITCHELL: Because I don't think it can
10 be said, Justice Kagan, that the phrase "any air
11 pollutant" unambiguously means any regulated pollutant.
12 That is a possible interpretation of air pollutant, but
13 there are others, and EPA has adopted other definitions
14 depending on the surrounding statutory --

15 JUSTICE SOTOMAYOR: Let me ask you a
16 question. Assuming we agree with you, that neither
17 Massachusetts or Alabama -- there's no statutory command
18 to come to EPA's conclusion, what do we do? Do we just
19 reverse them, or do we vacate and remand and tell them,
20 no, you were wrong at step one; there is ambiguity in
21 the statute?

22 MR. MITCHELL: It's more than just that
23 there's ambiguity, Justice Sotomayor. We're asking the
24 Court to hold that a greenhouse gas inclusive
25 interpretation of air pollutant simply does not fit with

1 the unambiguous provisions of the PSD and Title V
2 programs, just as a tobacco inclusive or nicotine
3 inclusive interpretation of the word "drug" was not able
4 to fit with the unambiguous requirement --

5 JUSTICE BREYER: But that's a difficult -- I
6 think where Justice Kagan is going -- and I will if she
7 wasn't, but I think she was -- is put the definition
8 from 7479 in your mind. That means something to you,
9 right? You know what I'm talking about.

10 MR. MITCHELL: The definition of?

11 JUSTICE BREYER: Of the major emitting
12 facility.

13 MR. MITCHELL: Right.

14 JUSTICE BREYER: Okay. Now, we look at
15 7475, and it says you have to have a permit and use best
16 available control technology. For what? And then we go
17 to the definition, and it says, among other things, "For
18 any source with the potential to emit 250 tons per year
19 or more of any pollutant."

20 Now, that doesn't -- my God, that maybe
21 means every 500 people, every school is applied here.
22 So you say we've got to do something about this statute
23 because they don't really mean to every football game
24 they're going to have a permit, or it doesn't mean every
25 500 people, like all of my relatives are together, they

1 have to have a permit. No, it can't mean that.

2 So we have two choices. Choice A, which is
3 what you would like, is it means any air pollutant, any
4 regulated air pollutant, but not greenhouse gases.

5 Okay. That's choice one.

6 Choice two is it means any air pollutant
7 including greenhouse gases, but implicitly EPA has the
8 authority to exempt small emitters. You see?

9 Now, which does the less violence to the
10 statute?

11 MR. MITCHELL: Choice one. And the reason
12 choice one --

13 JUSTICE BREYER: I knew you would say that.

14 (Laughter.)

15 MR. MITCHELL: The reason choice one does
16 less violence is because the term "air pollutant" is
17 flexible and has been acknowledged to be by EPA for
18 decades, and I think even by this Court, notwithstanding
19 its holding in Massachusetts. It's permissible for an
20 agency to construe ambiguous statutory language to avoid
21 absurdity. In fact, it must construe the ambiguous
22 language to avoid absurdity before taking choice two
23 that Your Honor described, where it rewrites unambiguous
24 statutory language to avoid absurdity.

25 If the simple choice were between construing

1 one unambiguous statutory provision to avoid the
2 anomalous results and construing another unambiguous
3 statutory provision to avoid that outcome, then EPA
4 would have a much stronger case for deference here.

5 The problem for EPA is they've insisted for
6 decades that air pollutant can mean different things in
7 different parts of --

8 JUSTICE BREYER: All right. So let me
9 modify my question. I get that answer on the language
10 there. But if you had been sitting in Congress and the
11 Senate, Mr. Billings, I think, is the staff person,
12 Senator Muskie, and suppose that you had this choice put
13 to you with your language. We'd either like to have the
14 authority implicit here to exempt the football team, the
15 tiny emitters, or we'd like it not to cover it at all.

16 Which do you think the Senate would have
17 chosen in enacting this bill from the evidence in the
18 language itself, in the evidence which I look at, the
19 history of the bill?

20 MR. MITCHELL: I think they did make a
21 choice, and it's in the language of the bill, that EPA
22 does not have the authority to exempt any major source
23 from Title V. They say that right there in Section
24 7061(a)(a) on page 44 of the statutory appendix in --

25 JUSTICE SOTOMAYOR: Title V is not the PSD

1 requirement. Title V is just the recordkeeping
2 provision.

3 MR. MITCHELL: That's true, but EPA --

4 JUSTICE SOTOMAYOR: And so why shouldn't we
5 exempt people from Title V? That's not what's causing
6 the burden that you're talking about. It's just a
7 recordkeeping provision.

8 MR. MITCHELL: But it's a -- it's a very
9 burdensome recordkeeping provision as -- as EPA
10 acknowledges. That's why they're not willing to impose
11 it on every entity that emits more than 100 tons per
12 year of carbon dioxide. It costs, on average, \$20,000
13 to get a Title V permit and -- and hundreds of man
14 hours. And it's plausible to impose those burdens,
15 perhaps, on large industrial sources, but certainly not
16 to impose that on the corner deli or -- or the Chinese
17 restaurant of a high school building.

18 So, again, to return to Justice Breyer's
19 question, which would Congress have chosen, the choice
20 was made in the statute to establish rigid numerical
21 permitting thresholds that were defined not only by 100
22 tons and 250 tons per year, but also defined by a
23 specific metric.

24 And to withhold from the Agency the
25 discretion to depart from those unambiguous

1 requirements, instead, they provided looseness to the
2 extent they provided it in the definition of air
3 pollutant, which even though this Court held in
4 Massachusetts unambiguously includes all things
5 airborne, for purposes of Title II, EPA has narrowed
6 that construction in numerous other parts of the
7 statute.

8 JUSTICE BREYER: All right. If you can
9 narrow it, why not narrow that one? Any air pollutant,
10 including greenhouse gases, to the extent that they can
11 be sensibly controlled under this statute. Now I've
12 worked with the words "air pollutant." You see, I can
13 do it any way you want if I'm prepared to read in
14 exceptions. And, of course, we do have exceptions when
15 agencies enforce statutes. We do have exceptions from
16 general language all the time.

17 MR. MITCHELL: I don't -- yeah, I don't
18 think it would be a permissible act of statutory
19 construction to say that carbon dioxide could be an air
20 pollutant and not an air pollutant at the same time.

21 JUSTICE SCALIA: Well, you -- you'd accept
22 his definition, wouldn't you? You'd be happy with a
23 definition that says air pollutant means any air
24 pollutant to the extent it can be sensibly controlled
25 under the statute. And you would say this one obviously

1 can't.

2 MR. MITCHELL: Right, which means it can't
3 be regulated under the Title V --

4 JUSTICE SCALIA: So that would be a
5 wonderful definition.

6 JUSTICE BREYER: It can, though. It can in
7 large quantity -- quantities. I mean, you don't see
8 anything wrong with large quantities. It's just the
9 small quantities you have a problem with.

10 MR. MITCHELL: Well, we have a problem
11 with --

12 JUSTICE BREYER: I mean, are you saying it
13 doesn't make sense to control major emitters of CO2?

14 MR. MITCHELL: We're saying it doesn't make
15 sense to construe air pollutant in a greenhouse
16 gas-inclusive manner for purposes of the PSD program
17 because the unambiguous requirements require the EPA to
18 reach the small emitters. And if EPA wants to fix the
19 problem, they can't resort to this form of agency
20 self-help. They need to get --

21 JUSTICE KAGAN: General, one question is
22 what would Congress have wanted, given the obvious
23 purposes of the Act. And that's an important question.
24 Another question is: What did the agency decide here?
25 I mean, obviously, this is the apex of Chevron

1 deference. There's nothing that gets more deference
2 than this Agency with respect to this complicated a
3 statute.

4 And given that this whole thing arises
5 because there's this new kind of emission, which --
6 which the numbers don't work for, so which essentially
7 makes these two terms in the statute irreconcilable, why
8 isn't that a classic case for deference to the Agency,
9 that the Agency gets to choose how to make the thing
10 work as best it can, when a changed circumstance makes
11 it work not entirely the way Congress had foretold?

12 MR. MITCHELL: I think because the Court
13 rejected that very idea in *Brown & Williamson*, where
14 tobacco was trying to be regulated by FDA under a
15 statute where the word "drug" clearly included nicotine,
16 if you just looked at the definition of "drug" in
17 isolation, but this Court rejected FDA's assertion of
18 jurisdiction by saying that the unambiguous requirements
19 of the Food and Drug Act would be --

20 JUSTICE SOTOMAYOR: To accept your -- your
21 argument, we have to reverse *Massachusetts*.

22 MR. MITCHELL: No, not at all, Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Well, you're saying
25 that the -- that Congress didn't intend to control this

1 pollutant. We said there that it did.

2 MR. MITCHELL: No. The Court only needs to
3 revisit Massachusetts if it believes that air pollutant
4 must have a uniform, unambiguous construction everywhere
5 it appears in the Clean Air Act. And -- and not even
6 EPA is making that assertion to this Court. And we've
7 shown throughout how EPA has interpreted air pollutant
8 differently. So there is no need to visit Massachusetts
9 at all to conclude that at least in the context of the
10 PSD and Title V programs, it's not plausible for the
11 Agency to construe the phrase "air pollutant" to include
12 greenhouse gases.

13 If the Court has no further questions, I
14 yield my time back to the Court.

15 CHIEF JUSTICE ROBERTS: Thank you, General
16 Mitchell.

17 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.

18 ON BEHALF OF THE RESPONDENTS

19 GENERAL VERRILLI: Mr. Chief Justice, and
20 may it please the Court:

21 Greenhouse gases pose the same threat to
22 public health and welfare when they are emitted from a
23 power plant as when they are emitted from the tailpipe
24 of a car; and in American Electric Power this Court said
25 it was plain that EPA has the authority to prescribe

1 general rules limiting greenhouse gas emissions by
2 stationary sources like power plants. Yet Petitioners
3 say EPA lacks any authority to use the PSD permitting
4 program to regulate the same emissions, from the same
5 sources, causing the same harms.

6 That's not a reasonable reading of statutory
7 text, and it rests on a fundamental misunderstanding of
8 the PSD program and the way it is supposed to operate in
9 conjunction with the --

10 JUSTICE SCALIA: Why? Why would it be
11 unreasonable to give -- give EPA authority to regulate
12 mobile sources and not authority to -- to regulate
13 stationary sources, given that stationary sources have
14 to be licensed in this fashion and it -- it produces all
15 sorts of other problems? That doesn't seem to me
16 irrational at all.

17 GENERAL VERRILLI: Well, the Court said, I
18 think, that it was plain that Congress gave EPA the
19 authority to regulate stationary sources in the American
20 Electric Power case under Section 7411, and that I think
21 gets to a fundamental premise where the Petitioners are
22 just wrong.

23 Section 7411 -- and this relates to a
24 question you asked, Justice Breyer -- Section 7411 and
25 the PSD program are not aimed at different problems.

1 They are aimed at the same problem, and you can see that
2 from the statutory text. For example, if one looks at
3 section 7475(a)(3), which you can find at page 21A of
4 our appendix, you will see that in order to become
5 eligible for a PSD permit if you are a major emitting
6 facility, you've got to -- if you are looking at
7 subsection (3), under (3)(A) and (3)(B), you've got to
8 show that you can meet all of the local air quality
9 requirements of the NAAQS, those standards; and then (C)
10 says you've got to meet any other applicable emissions
11 standard or standard of performance under this chapter.
12 And that standard of performance language is not an
13 accident. In 7411 the standards that are set, the
14 nationwide standards that Mr. Keisler was discussing for
15 greenhouse gases or other air pollutants, are called
16 standards of performance. So it's specifically picking
17 up the Section 7411 standard.

18 Then if one turns to the definition of Best
19 Available Control Technology under the PSD program,
20 which you can find at page 34A of the appendix to our
21 brief, you will notice that Congress specifically linked
22 the operation of the Section 7411 standards and the Best
23 Available Control Technology under the PSD program. And
24 what this provision says, I won't belabor you by reading
25 the lengthy provision, but what it says is that once

1 Congress has set a standard under section 7411, a
2 nationwide standard, that becomes a floor for the
3 evaluation of Best Available Control Technology.

4 JUSTICE KENNEDY: Are you reading subsection
5 (3), the (A), (B) and (C), and you focus on (C), any
6 other applicable -- are you reading those in the
7 alternative? I read that they -- that all three have to
8 be complied with.

9 GENERAL VERRILLI: Yes, they all three have
10 have to be complied with, yes, Justice --

11 JUSTICE KENNEDY: But then that doesn't help
12 you, because you are right back to where you started.
13 You have the tonnage per year requirement.

14 GENERAL VERRILLI: Well, I would be happy
15 to --

16 JUSTICE KENNEDY: And with the absurd result
17 that follows.

18 GENERAL VERRILLI: Well, I would be happy to
19 get to that. But if I could just finish off this point
20 about the connection between the operation of the two,
21 because I do think it's of critical importance here.
22 That what you are supposed to do under BACT is use Best
23 Available Control Technology to get above the floor,
24 that the NSPS program sets those standards on an every
25 8-year basis, and the point of BACT is to force best

1 practices to keep raising the bar during those 8-year
2 intervals.

3 And there is an additional point to be made
4 about the relationship between the two. This goes back
5 to Senator Muskie in 1977. The NSPS program was enacted
6 as part of the 1970 Act. The PSD program was added in
7 1977; and it was added in 1977 because of
8 dissatisfaction over both the pace and the
9 comprehensiveness of the -- of air pollutant regulations
10 that were being enacted by EPA under the 7411 standard;
11 and it's because under 7411 EPA has got to go one source
12 category at a time. It has got to do power plants; then
13 it's got to do refineries; then it's got to do the next
14 thing and the next thing and the next thing. And so EPA
15 hadn't gotten standards in place for all the different
16 sources, and the point of -- of the PSD program is to
17 put in place an additional requirement. It's exactly
18 what Congress was after. So that when there is a
19 standard under 7411 that becomes the floor, and you --
20 and BACT says let's keep raising the bar. But when
21 there isn't a standard under 7411 PSD is supposed to
22 fill the breach, and it makes sense because you want to
23 get -- the PSD program, remember, applies to -- excuse
24 me -- it applies to new construction or major
25 modification. The idea behind it is you want to get in

1 there at the beginning when the source is first being
2 constructed, so that they don't lock in old pollutant --
3 pollution-causing technology. They have got to meet
4 Best Available Control Technology.

5 CHIEF JUSTICE ROBERTS: About the Best
6 Available Control Technology, I think I have an idea of
7 what that looks like with respect to sources already
8 regulated, because they're relating to the NAAQS. You
9 know, filters, scrubbers and all that; I'm sure it's
10 oversimplified. But what does Best Available Control
11 Technology look like with respect to greenhouse gases?

12 GENERAL VERRILLI: Well, it's an evolving
13 process, Your Honor, and there are now 140 or so permits
14 that have been issued applying BACT to greenhouse gas
15 emissions. There is some very helpful discussion of
16 this kind of specifics in two places: The State
17 Respondents' brief, pages 35 to 39, and the Calpine
18 amicus brief. Calpine is a major utility, regulated --

19 CHIEF JUSTICE ROBERTS: All right. But am I
20 -- am I right because the greenhouse gases do not affect
21 ambient air quality in a way that the current or the
22 NAAQS provisions do? I mean, you're dealing with
23 regulation of energy usage, right, as opposed to
24 emissions of lead, emissions of the other NAAQS
25 provisions?

1 GENERAL VERRILLI: Well it's -- one
2 thing we're doing -- the main thing now is significant
3 energy efficiency, for example, different kinds of
4 turbines; different kinds of processes, that sort of --
5 that sort of thing. That's right.

6 CHIEF JUSTICE ROBERTS: The same sort of
7 thing as with, for domestic uses, the energy efficient
8 light bulbs?

9 GENERAL VERRILLI: Well, I really don't
10 think this is about light bulbs, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: No, but my point is
12 it relates to energy consumption as opposed to
13 particulate emission.

14 GENERAL VERRILLI: At the -- at the moment
15 that's largely true, not entirely true; there are some
16 other technologies described. But of course the EPA is
17 considering and scientists are trying to develop
18 additional control technologies like carbon capture
19 technologies; and that's the whole point of Best
20 Available Control Technology, is as technology advances
21 and better options come on line, that allow for even
22 greater control of the pollutants, the statute requires
23 that they be incorporated. That's how it's supposed to
24 work.

25 CHIEF JUSTICE ROBERTS: If you -- if you

1 regulate -- I'm talking about your two distinct
2 arguments in your -- in your brief. If you prevail on
3 the first: In other words, greenhouse gases may be
4 regulated with respect to sources that are already
5 subject to permitting, my understanding, it gets you to
6 83 percent of the greenhouse gas emissions.

7 GENERAL VERRILLI: That's correct.

8 CHIEF JUSTICE ROBERTS: Prevailing on the
9 second argument gets you to 86 percent.

10 GENERAL VERRILLI: That's correct.

11 CHIEF JUSTICE ROBERTS: So this is a
12 fight -- putting aside your first argument -- about an
13 additional 3 percent, and yet according to the
14 Petitioners that brings in this huge regulatory problem,
15 of, you know, regulating the high school football game
16 and -- and what-not.

17 GENERAL VERRILLI: Right. Just an aside on
18 the high school football game. Human beings are
19 actually net neutral on carbon emissions, and you will
20 need a chemist to explain that to you. But it doesn't
21 matter how many families members you have; you won't get
22 to the limit. But with respect to the -- with respect
23 to the question --

24 CHIEF JUSTICE ROBERTS: The lights at the
25 game.

1 GENERAL VERRILLI: The lights at the game I
2 don't think would be a problem, either. But anyway
3 there obviously is -- and EPA has acknowledged that
4 there is -- a significant expansion of the permitting
5 obligation under EPA's present understanding of
6 permitting. But let me try to take this in two pieces
7 if I could.

8 Let me first talk about why it's not just
9 about the 3 percent, and then let me try to get back to
10 Justice Kennedy's question to talk about the expansion
11 of the permitting obligation and what EPA is actually
12 thinking and doing about that. The problem here is that
13 the options -- one of the problems, significant problem
14 is that the options that the -- the American Chemistry
15 Council have advanced and even that Judge Kavanaugh has
16 advanced would require an invalidation of or at least a
17 significant, a significant revision of EPA's 34-year
18 understanding of the meaning of the phrase "any air
19 "pollutant" in 7479(1), which they have always
20 interpreted to mean any -- any air pollutant subject to
21 regulation under the Act. That -- you can't apply that
22 34-year-long agency interpretation here and get to one
23 of those results. You've got to -- you've got to change
24 it.

25 JUSTICE SCALIA: Yes, but the 34-year agency

1 interpretation is not a statute.

2 GENERAL VERRILLI: No, it's not, Justice
3 Scalia, of course.

4 JUSTICE SCALIA: And you are -- you know,
5 you are saying oh, rather than alter our 34-year
6 interpretation, we're -- we're going to revise the
7 provisions of the statute. I don't think that's a --
8 that's a good trade.

9 GENERAL VERRILLI: Well, I -- with all due
10 respect, I don't think that's what the agency is doing
11 and if I may, just, let me if I could just sort of
12 finish off this. The problem is that if you take the --
13 if you draw the line either at NAAQS pollutants versus
14 all other previously regulated pollutants, or if you
15 draw the line at local pollutants but not global
16 pollutants, you are going to knock out some sources that
17 have been subjected to the permitting requirement
18 previously.

19 JUSTICE ALITO: Can I ask you this question
20 about -- can I ask you this question about EPA's
21 position? Because this is something I don't understand.
22 On the one hand, EPA says that applying the statutory
23 thresholds to greenhouse gases would transform the PSD
24 program into something that would be unrecognizable to
25 the Congress that enacted the program; isn't that right?

1 GENERAL VERRILLI: Yes, they did say that.

2 JUSTICE ALITO: On the other hand, EPA says,
3 but that's what we're going to aim to achieve at some
4 point down the road.

5 GENERAL VERRILLI: No, that's a fundamental
6 misconception, Justice Alito, and I would like to try to
7 clear it up and it goes to -- I'll try to answer Your
8 Honor's question as well, Justice Scalia.

9 What EPA's doing here is saying this is a
10 transition, it's not a rewrite. And the goal of the
11 transition is not to gradually expand the permitting
12 requirement until they've got all the Dunkin' Donuts in
13 America under it. That's not what's going on. In fact,
14 it's the opposite. What they're saying is, they're
15 taking a look at the standards they used to decide who's
16 eligible for a permit. They're looking to change those,
17 to the extent they can, consistent with their statutory
18 authority and appropriate Chevron deference, to
19 substantially narrow the numbers of people who will be
20 deemed eligible. And that's in particular --

21 JUSTICE ALITO: And then they're never going
22 to get to the statutory thresholds. I thought EPA said
23 well, we're going to work toward that.

24 GENERAL VERRILLI: No, this is -- this is to
25 try to get to the statutory threshold. Well, let me

1 give you an example of the main -- one of the main ways
2 --

3 JUSTICE ALITO: Well, that's -- then I don't
4 understand the position. If -- if applying the
5 statutory thresholds makes the program unrecognizable,
6 and yet that's what they're going to aim to do down the
7 road, get to -- get to the statutory thresholds, will it
8 become more recognizable at that point?

9 GENERAL VERRILLI: Under the point -- the
10 nuance there, that I think answers Your Honor's
11 question, is that there -- the Agency has discretion in
12 deciding what constitutes the potential to emit 250 tons
13 per year. What they have done historically is evaluate
14 that on the basis of an assumption that it's facilities
15 operating 24 hours a day --

16 JUSTICE BREYER: But then they'll -- then
17 they'll be back down to -- to 41,000 people fully within
18 this. And when you get to Number 5, Title V, 6.1
19 million, that sort of changes what -- I mean, if that's
20 the question, does, in fact, this provision give the EPA
21 the -- the obligation to impose permit requirements on
22 41,000 businesses of a size that really are --
23 constitute, at most, 10 or 15 percent of the problem,
24 well, that's -- that's pretty hard to accept.

25 GENERAL VERRILLI: Well --

1 JUSTICE BREYER: What I thought the question
2 was, was whether EPA had the authority to implement this
3 in a way that EPA itself thinks make sense, which might
4 be, on their own reasoning, to not impose permitting
5 requirements on tens of thousands, perhaps millions of
6 small businesses. I thought that was what the question
7 was. That did seem to be the way they put it.

8 GENERAL VERRILLI: It is. But I think the
9 two things converge, Justice Breyer. They're trying to
10 get to the point of saying that you won't have to apply
11 -- if you apply the standards EPA uses now, you sweep in
12 all these people, and EPA says, well --

13 JUSTICE BREYER: Are they going to get some
14 new standards? But are these -- but the words they used
15 in their opinion were streamlining.

16 GENERAL VERRILLI: Right.

17 JUSTICE BREYER: The words they used in
18 their opinion implied to me when I read them that
19 they're never going to want to put tiny boilers under
20 this because it just doesn't do very much good and it's
21 expensive to administer. That's how I read it.

22 GENERAL VERRILLI: That's correct.

23 JUSTICE BREYER: All right. Then my
24 question is back, because you've been -- this has been
25 very helpful. I learned I'm not a net emitter of carbon

1 dioxide. Believe me, because that means I'm a part of
2 sustainable development. I thought --

3 (Laughter.)

4 JUSTICE BREYER: All right. So I learned
5 quite a lot from this and I'd like to learn one more
6 thing, which is, look, 7411, remember what the Chief
7 Justice said about the 83 percent and the 86 percent.
8 And even if you lose, they still can regulate 83 percent
9 and if you win, you can regulate 86 percent. And, my
10 goodness, if 7411 is over there letting them do
11 precisely what they want, why do you need this, too?
12 That's the part that I haven't got a clear answer to in
13 my mind.

14 GENERAL VERRILLI: So the -- it's the reason
15 I tried to suggest earlier, Justice Breyer, that the PSD
16 program is supposed to work as a complement together
17 with 7411. For example, if 7411 now is being used, at
18 least EPA's contemplating setting standards, greenhouse
19 gas emission standards for power plants. That's a very
20 significant contributor of greenhouse gases, but it's
21 not the only one. There are refineries, there are other
22 major sources --

23 JUSTICE BREYER: Well, put those all in.
24 Put those all in. Write -- write complicated standards.
25 Write standards that have certain enforcement capacities

1 and abilities. Write standards that require you to get
2 a PSD permit. I mean, what's wrong with all that?

3 GENERAL VERRILLI: They can do all of that,
4 but the -- but the problem is that that's going to take
5 a lot of time, and that was the very reason Congress put
6 the PSD program into existence in 1977 was because of
7 the dissatisfaction because of the time it took to go
8 source by source, pollutant by pollutant under the EPA's
9 7411 program.

10 JUSTICE SOTOMAYOR: I'm sorry. I just want
11 to make sure that I understood correctly.

12 Under 7411, you can require a PSD --

13 GENERAL VERRILLI: No, you can set a
14 national standard.

15 JUSTICE SOTOMAYOR: Right.

16 GENERAL VERRILLI: But part of the reason,
17 as I said, I think it's just wrong to think about the
18 PSD program as being -- addressing a different kind of
19 problem from the 7411 problem is that you've got to meet
20 the 7411 standard in your PSD application.

21 JUSTICE KAGAN: General -- general, if I
22 could actually get back to Justice Alito's question,
23 because I had a similar issue with what EPA did here.
24 It seems to me it would be completely responsible and
25 understandable if EPA had said, look, the 100 and 250

1 don't work with respect to this category of pollutant,
2 Congress didn't know that this kind of pollutant was out
3 there when it wrote those numbers, what it was trying to
4 do was to distinguish between major and minor emitters,
5 the new numbers are X and Y for that -- for this kind of
6 pollutant. But, you know, and I understand that EPA may
7 have felt like, oh, gosh, can we really do that? But
8 the solution that EPA came up with actually seems to
9 give it complete discretion to do whatever it wants,
10 whenever it wants to, and to not -- and to be much more
11 problematic than if EPA had just said, no, it's not 100
12 and 250. It's 10 times that.

13 GENERAL VERRILLI: I take that point, Your
14 Honor. I don't think actually think that's what EPA was
15 trying to do. I know it's been portrayed that way. I
16 think that they were trying to do the opposite. They
17 were trying to say, well, let's look at how we define
18 what it means to emit 250 tons per year and see if we
19 can make that a more realistic analysis by going from
20 the 24/7, 365-day-a-year hypothesis to figuring out how
21 much this source is actually likely to emit, and you
22 could drastically lower the number of sources who would
23 be found to emit 250 tons per year, and that would bring
24 -- it would try to bring the system into line with the
25 expectations that major emitters would be regulating.

1 That -- that's their objective here.

2 JUSTICE ALITO: Are greenhouse gases the
3 only air pollutant for which EPA has the authority to
4 change the statutory thresholds?

5 GENERAL VERRILLI: Well, I'd like to make a
6 point, if I could, about that. The real problem here is
7 CO2. Actually, of the other -- of the six greenhouse
8 gases, the other five you could use the statutory
9 thresholds on without difficulty. It's the CO2 alone
10 really that causes a difficulty.

11 JUSTICE ALITO: But could it do -- could it
12 do this for another pollutant, something other than any
13 of the greenhouse gases?

14 GENERAL VERRILLI: Well, I think, in
15 fairness, what EPA is saying here is that we've got an
16 obligation under the statute to regulate. We've got an
17 obligation to require a permit when there's more than
18 250 tons per year, and we've got an obligation to get
19 the permits out within a year. That's also a statutory
20 requirement. And that just given the reality of the CO2
21 emission, something's got to give. So I don't think
22 it's that they're asserting authority to rewrite the
23 statutory thresholds. They're dealing with a practical
24 problem that's arisen under the immediate circumstances.

25 JUSTICE GINSBURG: One of the things that

1 EPA said in -- in the explanation of this rule is that
2 EPA could say that PSD or Title V applies only to
3 certain GHG sources -- it's been suggested that that's
4 also the carbon dioxide -- applies only to certain GHG
5 sources and does not apply to the remaining GHG sources.
6 But there didn't seem to be any follow-up of that idea.
7 Well, the way to cure it is carbon dioxide doesn't work,
8 take it out.

9 GENERAL VERRILLI: But I think the reason,
10 Justice Ginsburg, is because that is not going to
11 make -- the carbon dioxide is also a huge part of the
12 problem, and so you're really not going to be getting to
13 the heart of the problem. And there really is an
14 urgency here, you know, that's part of what's driving
15 EPA in this situation, of course, is understanding that
16 this is an urgent environmental problem. It's the -- it
17 is the gravest environmental problem that we face now as
18 far as EPA and EPA's judgment, and it is one that gets
19 worse with the passage of time. The effects are
20 cumulative and they're delayed, and so every year we
21 wait, we make the hole deeper and we create an even
22 greater threat to future generations. And that really
23 goes to --

24 CHIEF JUSTICE ROBERTS: I'm sorry. I didn't
25 get an answer to -- hear an answer to Justice Alito's

1 question and I think it's an important one. There are
2 currently criteria pollutants under the -- under the
3 Act. Let's assume you find out that there's a
4 particular substance that does cause harm to ambient air
5 quality that is not already covered, and you publish a
6 NAAQS for that, can you decide that 100 and 250, you
7 want to regulate at a different threshold, just like you
8 have here. I mean, is this a particular assertion of
9 authority only with respect to greenhouse gases or does
10 it cover any pollutant under the Act?

11 GENERAL VERRILLI: Well, if you're -- if
12 you're going to use the NAAQS approach and designate it
13 as a NAAQ, as a NAAQS pollutant, then you would be under
14 the rules of NAAQS pollutant and pollutants, and that
15 would include this standard. But this is --

16 CHIEF JUSTICE ROBERTS: Can you public a
17 NAAQ for greenhouse gases?

18 GENERAL VERRILLI: I think it would be
19 within EPA's authority to do so, but there are really
20 significant problems with trying to regulate that way,
21 and that's why -- but -- and -- but it's important to
22 understand, Mr. Chief Justice, that the PSD program
23 applies to more than just NAAQS pollutants. It's --
24 it's any pollutant subject to regulation under the Act.

25 CHIEF JUSTICE ROBERTS: Okay. Let's pick --

1 there is a pollutant that isn't currently regulated, and
2 science advances to the point where you think it should
3 be regulated. Can you change the 100 and 250 thresholds
4 for that new covered pollutant?

5 GENERAL VERRILLI: I guess what I would say
6 about that is that if EPA found itself in exactly the
7 same circumstances it finds itself in with respect to
8 greenhouse gases, where it's -- it feels like the
9 statutory definition compels it to regulate, it kicks in
10 at 250, and you've got to issue a permit in a year, that
11 they could make a judgment comparable to the one they
12 made here. But it's -- that would require that
13 confluence of --

14 JUSTICE BREYER: But why? Why does it have
15 to do that? Statutes all the time have implicit
16 exceptions, and not every statute has such exceptions
17 written in words into it. I mean -- you know, it's
18 classic example, one after another. A statute that
19 requires animals to pay 50 percent on the train does not
20 apply to snakes. Okay. I mean that's the most common
21 thing in law.

22 So what's the big problem here that
23 everybody seems to have, except me? I mean, what's the
24 big problem with writing an implicit exception so that
25 you don't regulate tiny little things which no one

1 normally wants to have regulated?

2 GENERAL VERRILLI: If the Court were to do
3 that, that would certainly justify the EPA's judgement
4 --

5 JUSTICE BREYER: And now, my problem is I
6 will hear from many that what I would -- perhaps it
7 isn't a question of what I'd like to do. The question
8 is, what does the law permit? And therefore, it's
9 helpful if you can or others think of similar examples.

10 GENERAL VERRILLI: Well, EPA has committed
11 itself in this -- in the regulations, in the rulemaking
12 proceedings, to try to bring the 250 tons per year into
13 alignment with the expectation that only large sources
14 will be regulated. That's what EPA is committed to.
15 It's --

16 JUSTICE SCALIA: General Verrilli, really, I
17 don't have as expansive a notion of reading exceptions
18 into a statute that are not there as Justice Breyer
19 does. But assuming, just assuming that you can -- you
20 can read exceptions, that isn't the issue here. The
21 issue is whether you can read in exceptions
22 unnecessarily when the absurdity in question doesn't
23 flow inevitably from the statute, when the statute can
24 be interpreted another way that would not produce the
25 absurdity.

1 Aren't you compelled where there is
2 ambiguity to adopt the interpretation of the statute
3 that does not produce absurdity rather than adopting the
4 interpretation that produces absurdity and then going
5 around altering the provisions of the contract -- of the
6 statute? I mean, to take Justice Breyer's bubble gum
7 example, yes, I suppose it -- would you have to make an
8 exception for bubble gum in the display window if the
9 statute were subject to two interpretations, one of
10 which would include display windows, and the other one
11 of which wouldn't.

12 It seems to me of course you would have to
13 adopt the interpretation that didn't include display
14 windows. And that's what is going on here. There's --
15 there's -- yes, there's absurdity but the issue is how
16 is that absurdity to be taken account of? By simply
17 letting EPA rewrite the very clear numbers in the
18 statute, or else by adopting a permissible
19 interpretation of the statute that does not lead to that
20 absurdity. And I think that's quite a different
21 question from -- from what we've been discussing.

22 GENERAL VERRILLI: Two points about that, if
23 I could. First, that goes to the question of what
24 triggers the permit application. It's only the
25 expansion of the number of permit applicants that even

1 raises this question of the so-called absurdity. It
2 doesn't go to the -- to the argument -- the Petitioners
3 are making a far more substantial argument, that EPA
4 lacks any authority to consider greenhouse gas emission
5 under the BACT provision and other provisions, even for
6 sources that have a permit for their emissions of
7 non-greenhouse gases.

8 So it only goes to the question of the scope
9 of the triggering provision, not to EPA's authority to
10 use PSD to regulate great greenhouse gases for entities
11 that are already subject to the permit for other
12 reasons.

13 Now, with respect to the trigger, what I
14 would say about that, Justice Scalia, is that the
15 statutory language is "any air pollutant." Reading
16 Massachusetts v. EPA, the EPA came to the conclusion
17 that that language necessarily encompasses greenhouse
18 gas emissions. That conclusion is most consistent with
19 the EPA's statutory obligations here, because if the
20 choice -- and you can say the choice is between doing
21 something sensible and absurd results. But really, the
22 choice is between throwing up your hands with respect to
23 what EPA considers to be the most serious air pollution
24 problem we have or trying to deal with the
25 implementation problem that exists with respect to

1 the --

2 JUSTICE KAGAN: And --

3 GENERAL VERRILLI: -- about 15 percent of
4 the sources. That's really the choice here.

5 JUSTICE KAGAN: General, wouldn't it be
6 right to say that the rule that Justice Scalia is
7 referring to only applies if there are alternative
8 interpretations that are consistent with the legislative
9 purpose. There have to be plausible alternative
10 interpretations of the statute. And reading the phrase
11 "any pollutant" to mean any pollutant except for
12 greenhouse gases for reasons that have nothing to do
13 with the purposes of the statute is not a plausible
14 alternative interpretation. Wouldn't that be the
15 argument?

16 GENERAL VERRILLI: Yes, that's exactly the
17 argument, and I think that's exactly what EPA did when
18 it reads Massachusetts v. EPA and its understanding of
19 air pollutant and thought about that in the context of
20 the regulatory goals of this program.

21 JUSTICE SCALIA: In the -- you know, the
22 argument against that is, no, that the statute evidences
23 concern with ambient air quality and requires that to be
24 measured. And the agency acknowledges that you cannot
25 possibly measure the effect on ambient air quality of

1 greenhouse gases.

2 So it is not clearly compatible with the
3 statute to bring greenhouse gases into regulation.

4 JUSTICE BREYER: All right. And the other
5 is -- I mean, this is quite -- I see -- I've got it
6 focused now. It seems to me in my mind that we have two
7 questions, and I think they were well stated by Justice
8 Scalia actually. The first is, what is the alternative
9 interpretation that doesn't apply it here? And that
10 would be an interpretation that doesn't put greenhouse
11 gases within this PSD provision at all. And that might
12 be really unthinkable -- no, not unthinkable, but have
13 worse consequences than worrying about the
14 interpretation of this trigger provision.

15 So either we have to do the one or the
16 other. Either we have to interpret the trigger
17 provision with flexibility so that there are written
18 exceptions -- unwritten exceptions in it, one way or the
19 other, or we have to say you can't do that, and
20 therefore they don't apply to all. Which is worse? Is
21 that a -- have I got it right?

22 GENERAL VERRILLI: I think that states it
23 fairly. I think that states it fairly.

24 JUSTICE SCALIA: I don't think so. I mean,
25 it depends on what you mean by "unthinkable," General

1 Verrilli. Is it --

2 GENERAL VERRILLI: I think that was Justice
3 Breyer who said "unthinkable."

4 (Laughter.)

5 JUSTICE SCALIA: But what is supposed to be
6 unthinkable, that greenhouse gases should not be
7 regulated? Maybe that is unthinkable. But the issue
8 is, is it unthinkable that Congress did not intend to
9 regulate greenhouse gases when it enacted the current
10 provisions of the statute?

11 JUSTICE KAGAN: But isn't that the argument?
12 Justice's Scalia's alternative plausible interpretation
13 of the statutes might have been an alternative plausible
14 interpretation of the statute pre-Massachusetts. But it
15 no longer is; isn't that right?

16 GENERAL VERRILLI: That's certainly true,
17 but it wasn't -- but it -- also, even before
18 Massachusetts, it had -- there's significant problems
19 with it.

20 JUSTICE ALITO: Here we have a statutory
21 provision that has very specific numbers, and the agency
22 has said these numbers are absurd. We're going to
23 multiple them by 400. Now, in the entire history of
24 Federal regulation what is the best example you can give
25 us of an agency's doing something like that, where it

1 has taken a statute with numbers and has crossed them
2 out and written in the numbers that it likes?

3 GENERAL VERRILLI: Obviously, I wouldn't
4 characterize it quite that way. I don't have a case
5 that's exactly on point. I think Morton v. Ruiz is a
6 case that's like this in the sense that the agency had
7 an obligation to provide something to a certain
8 population, and it didn't have the funds that made it
9 available to provide it to the whole population that was
10 statutorily entitled, and it made the judgments it made
11 to try to get the program to work. And I mean, if I
12 could give you a hypothetical --

13 JUSTICE KENNEDY: What was that case?

14 GENERAL VERRILLI: Morton v. Ruiz. And --
15 and if I gave you a hypothetical on that -- if Congress
16 enacted a statute that said that the -- the Customs
17 authorities, border authorities have an obligation to
18 search every cargo container that comes into a port in
19 the United States for radioactive materials, but no
20 container shall be delayed more than 3 days, if a-- if
21 an agency were faced with those kinds of obligations,
22 and it didn't have the resources to get every container
23 searched within 3 days, and it said well, what we're
24 going to do is search the containers that come from
25 places where we think the risk is most likely, I think

1 everyone would think that that's a reasonable
2 interpretation of the -- of the agency's charge under
3 the statute; and that's essentially what the EPA has
4 done here.

5 JUSTICE KENNEDY: Just to be clear, you're
6 not saying -- or are you saying -- that if you're denied
7 the authority you seek here, there can be no significant
8 regulation of greenhouse gases under the Act? You are
9 not saying that?

10 GENERAL VERRILLI: No. I think -- I want to
11 provide some more specificity, though, in my answer if I
12 could. The Court has held in American Electric Power
13 that the EPA has the authority to prescribe general
14 national standards. Now, with respect to the PSD
15 program, I want to -- I do want to emphasize that there
16 is a distinction between the question of what triggers
17 your obligation to get a PSD permit and whether your
18 emissions of greenhouse gases count as any air pollutant
19 that triggers it, versus a situation in which if you are
20 already subject to a PSD permit because you are
21 emitting, say, a NAAQS pollutant or another one of the
22 regulated pollutants, whether under Section 7574(a)(4),
23 you have to meet the Best Available Control Technology
24 requirement, which is phrased in terms of a requirement
25 for each pollutant subject to regulation under the Act.

1 CHIEF JUSTICE ROBERTS: That's the 80 --
2 that's the 8386 question, right?

3 GENERAL VERRILLI: That's correct, Your
4 Honor. That's correct. And so I think those things are
5 different. And so there really are three points.
6 There's 7411, there's triggering, and then there's if --
7 if you're already subject to the permit. And the
8 questions about whether the PSD program is limited
9 entirely to pollutants that affect local ambient air
10 quality, I just don't think that adds up at the end of
11 the day.

12 For one thing, EPA has been regulating since
13 1998 under the PDS program something called
14 ozone-depleting substances. We talked about this a
15 little bit in our brief. Those are substances that have
16 no local effects; they -- they are substances that are
17 released; they go up into the stratosphere; and they eat
18 up the ozone and that then creates additional
19 ultraviolet rays which cause cancer and cataracts.

20 CHIEF JUSTICE ROBERTS: Well, that has local
21 effects. I mean, everybody knows there's smog in Los
22 Angeles versus Montana, right?

23 GENERAL VERRILLI: Well, that -- well, if
24 those local effects count, then certainly, greenhouse
25 gases have those kinds of local effects, because they

1 raise the sea levels, which cause flooding in certain
2 places and they cause droughts in other places. And so,
3 to the extent you're talking about local effects, the
4 greenhouse gases really aren't local.

5 JUSTICE SCALIA: Where have the sea levels
6 risen other than Massachusetts?

7 (Laughter.)

8 GENERAL VERRILLI: Well, certainly
9 Massachusetts, but -- but with respect -- but EPA has
10 been regulating ozone-depleting substances since 1988.

11 JUSTICE ALITO: Isn't your argument Congress
12 has acquiesced in that?

13 GENERAL VERRILLI: Yes. In fact, we think
14 in 1990, that they ratified it. Because in 1990,
15 Congress undertook a very substantial amendment of the
16 Clean Air Act. One thing they did was specifically
17 address ozone-depleting substances. They created a new
18 Title VI for ozone-depleting substances, so they were
19 clearly focused on it. And they did not pull
20 ozone-depleting substances out of the PSD program at
21 that time. They left them in. And that's significant
22 because they did pull out hazardous air pollution -- air
23 pollutants, which was another new category they created
24 in 1990 for the PSD program.

25 JUSTICE ALITO: I thought there was a very

1 short time lag between EPA's assertion of the authority
2 to regulate the ozone-depleting substances under the PSD
3 program and the enactment of --

4 GENERAL VERRILLI: 2 years. It was 2 years.

5 JUSTICE ALITO: So was it a full 2 years?

6 GENERAL VERRILLI: I don't know if it was a
7 full 2 years, but -- but the Congress focused
8 specifically on exactly how ozone-depleting substances
9 were going to be regulated under the Clean Air Act, and
10 they created a new -- they were -- it's not an accident.
11 They were focused exactly on how they were going to be
12 regulated. So I do think -- so I do think it's quite a
13 strong ratification argument. And --

14 JUSTICE SOTOMAYOR: What's the -- I know
15 litigants hate this question. If you were going to
16 lose --

17 GENERAL VERRILLI: I knew you were going to
18 ask me that question.

19 (Laughter.)

20 GENERAL VERRILLI: So I actually think, you
21 know, as Judge Kavanaugh approaches the ACC approach,
22 you know, we -- obviously, we're not endorsing this,
23 but --

24 JUSTICE GINSBURG: There's a difference
25 between them.

1 GENERAL VERRILLI: There is a significant
2 difference between them. But --

3 JUSTICE GINSBURG: So which one? Either one
4 of them?

5 GENERAL VERRILLI: Well, I've got another
6 thought on that subject --

7 (Laughter.)

8 GENERAL VERRILLI: -- which is, as I said to
9 Justice Alito earlier, the whole problem in terms of
10 expanding the permitting requirement is CO2. And so
11 that if the Court were to say that "any air pollutant"
12 can't be interpreted in the way that EPA has interpreted
13 it at the trigger level, to mean what we think it says,
14 and what Massachusetts v. EPA compelled, but if the
15 Court disagrees with that, it seems to me the -- the
16 answer that is least problematic from EPA's point of
17 view does the -- is the least dissonant and the least --
18 causes the least risk of collateral consequences with
19 respect to established regulatory programs, which go
20 beyond NAAQS pollutants under PSD, would be to say that
21 you can't read any air pollutant to include CO2, because
22 the inclusion of CO2 generates a permitting obligation
23 that is out of accord with what Congress would have
24 expected. I think -- I'm not enforcing that, but I
25 think that's --

1 JUSTICE GINSBURG: Well, what -- what about
2 BACT for CO2, then?

3 GENERAL VERRILLI: Well, no. BACT would be
4 -- that's just at the trigger, Justice Ginsburg. Just
5 at the trigger. We think that the -- I just don't see,
6 given that BACT says in unambiguous terms in Section
7 7475(a)(4) that anybody who's subject to a permit has
8 got to meet BACT for each pollutant subject to
9 regulation under the chapter, meaning the Act. I just
10 don't see how you can get out from under that --

11 CHIEF JUSTICE ROBERTS: You've got to
12 follow -- you've got to follow the plain text of the
13 statute there.

14 GENERAL VERRILLI: Well, if the command of
15 the statute is that BACT applies for each pollutant
16 subject to regulation --

17 CHIEF JUSTICE ROBERTS: Yeah, but the plan
18 of the statute is 250 tons per year, too; and you've
19 changed that to 100,000 tons per year.

20 GENERAL VERRILLI: Right, but I think --

21 JUSTICE KENNEDY: And you were going to get
22 to 7475(3),(a),(b),(c) on that point.

23 GENERAL VERRILLI: Well, 7475(3)(c) also
24 does say that if -- if EPA does set a greenhouse gas
25 standard for a particular stationary source like power

1 plants, then that becomes a condition of the permit.
2 That's what (c)(3) says. And so between (c)(3) and
3 BACT, greenhouse gas -- assuming that EPA acts under
4 7411, those, it seems to me, have to be in.

5 This is a question about the definition of
6 the trigger. Now, we don't agree with it. But -- but
7 in trying to faithfully answer Your Honor's question,
8 that's what I think. That that's --

9 JUSTICE SOTOMAYOR: I just want to be clear.
10 Your reading or -- or your suggested out would mean
11 that -- that only the major facilities as defined now
12 essentially would -- would --

13 GENERAL VERRILLI: If you took CO2 out of
14 the equation, I don't think this -- the expanded scope
15 of the permitting obligation is going to happen, because
16 it's the CO2 emissions that expand the scope. And so
17 that's why -- you know, I'm not endorsing this. I'm
18 just saying --

19 JUSTICE SOTOMAYOR: Well, Justice Breyer
20 said the difference between 83 percent and 86 percent,
21 that 3 percent difference of who you're covering is
22 thousands and thousands of people.

23 GENERAL VERRILLI: That's correct.

24 JUSTICE SOTOMAYOR: Or entities, I should
25 say, not people, of institutions. Is that going to be

1 the same under the reading that you are proposing?

2 GENERAL VERRILLI: Pretty close. But I
3 think -- but I think the reason that we would -- the
4 reason that the exclusion of CO2 seems to me to be the
5 least problematic is that EPA does have an established
6 regulatory framework here that applies not just to NAAQS
7 pollutants, but to the other non-NAAQS pollutants,
8 sulfuric acid mist and the other things that EPA
9 regulates under the PSD program. And you wouldn't be
10 redefining the trigger to exclude those things which
11 have previously been included. That's, I think, the --
12 the rifle shot solution, to the extent that the Court
13 thinks it's a problem.

14 JUSTICE GINSBURG: Well, wouldn't the proper
15 answer be if we are rejecting your entire position to
16 say there are these other options? We're not going to
17 say take out CO2. We're not going to say adopt the
18 Kavanaugh approach. We're going to say those are
19 choices for EPA to make.

20 GENERAL VERRILLI: Yes, certainly that's
21 right. Certainly, that's right. But I think the -- the
22 argument that, as I -- as I read Judge Kavanaugh's
23 opinion and as I understood my friend's argument on
24 behalf of the ACC, was that the statute essentially
25 compelled the conclusion that you had to pick one or the

1 other of those alternative readings in order to avoid
2 expanding the permitting obligation.

3 And the problem with that way of thinking
4 about it is that there are many other pollutants,
5 non-NAAQS pollutants that EPA has regulated for years
6 and used as a trigger for years to require PSD permits,
7 which you would be at risk of excluding from the program
8 if you were to adopt the ACC or the Judge Kavanaugh
9 reading as triggers, and that's a problem that, it seems
10 to me, the Court ought to be thinking about trying to
11 avoid.

12 JUSTICE KENNEDY: I have to say in reading
13 the brief for the States and reading your brief, I -- I
14 couldn't find a single precedent that strongly supports
15 your position. Brown & Williamson I think is
16 distinguishable for the reasons set forth in the reply
17 brief. And what are the cases you want me to cite if I
18 write the opinion to sustain your position?

19 GENERAL VERRILLI: So at the -- at the --
20 sustaining the argument that the trigger applies here, I
21 do think there aren't -- there's aren't a lot of cases.
22 You're right. This is not a -- a situation that arises
23 very often. I think Morton v. Ruiz comes the closest.

24 CHIEF JUSTICE ROBERTS: But that's not cited
25 in your brief, is it?

1 GENERAL VERRILLI: No, it's not, Mr. Chief
2 Justice. That's true. It was cited and relied upon by
3 the EPA in the rulemaking proceedings and rulemaking
4 opinions.

5 So if I could just sum up here. The EPA did
6 what it did because the problem it's confronting is a
7 problem that EPA considers to be urgent.

8 JUSTICE ALITO: General, I don't want to
9 interrupt your summation, but on the -- let me just ask
10 this quick question. On the issue of what happens with
11 a facility that is subject to the PSD program because of
12 the emission of other pollutants, the Petitioners argue
13 that the permitting process would be entirely different
14 for greenhouse gases because it would make no sense to
15 require monitoring of local air conditions and -- air
16 conditions. It would make no sense to try to assess the
17 effect of the emission of the greenhouse gases on the
18 area in the region. Could you just give a quick
19 response to that?

20 GENERAL VERRILLI: You know, I'm glad you
21 raised that, Justice Alito. That's actually quite
22 important. That's just not right. I mean, if you think
23 about it in multiple ways, there are multiple pollutants
24 that are currently regulated under the PSD program.
25 Some of them have National Ambient Air Quality

1 Standards, and the local testing makes sense for those.
2 Others don't have National Air Quality -- Ambient Air
3 Quality Standards, like sulfuric acid mists, for
4 example, and others. There aren't standards for those.

5 And the way EPA has handled that is they
6 look at the regulations. The regulation says in terms
7 of the monitoring that the statute requires, there's a
8 specific exemption for substances that are otherwise
9 regulated but for which there is no NAAQS or related
10 standard. So they're just exempt from the monitoring
11 requirement.

12 There's also an analysis requirement. And
13 what EPA has said and what the States do in their
14 permitting processes with respect to the analysis
15 requirement for the non-NAAQS substances, for example,
16 sulfuric acid mists, is to apply a very simple idea.
17 You're not trying in that situation to make sure that
18 the particular emissions aren't having -- are consistent
19 with the overall ambient air quality level. It's a very
20 simple calculus. More is worse; less is better.

21 And so with respect to things like sulfuric
22 acid mist, with respect to things like ozone-depleting
23 substances, that is how it has always worked at the
24 State level under the PSD program. You just -- you look
25 at what the BACT emissions levels. You try to get them

1 down.

2 And so you're not treating greenhouse gases
3 any differently than sulfuric acid mists or
4 ozone-depleting substances or the others that don't have
5 those requirements.

6 And then in terms of localized effects
7 versus wider effects, I mean, I would just remind the
8 Court about the EMC-Homer City case from just a few
9 months ago -- it's not at all unusual that the EPA would
10 be regulating emissions in one place because they --
11 they impose effects hundreds or even thousands of miles
12 away.

13 The pollutants emitted in Ohio or Kentucky
14 contribute to the air pollution levels in New Haven or
15 Bangor, Maine. That's what that case was all about.
16 And so -- and you regulate those pollutants also through
17 the PSD program. And so don't -- you aren't in that
18 situation looking just to see what happens in the local
19 area. It's just never been the nature of this program.
20 It's not -- it just doesn't work that way.

21 And if I could just remind the Court, in
22 conclusion, why EPA did what it did, it is because this
23 is an urgent problem. Every year that passes, this
24 problem gets worse, and the threat to future generations
25 get worse. And I think, faced with the obligations that

1 EPA had, it made the most reasonable choice available to
2 it. Thank you.

3 CHIEF JUSTICE ROBERTS: Well, you've got
4 five extra minutes, to be -- to be fair.

5 And one thing --

6 GENERAL VERRILLI: You should have told me
7 that before my summation.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: You had already
10 gotten going. I didn't want to disturb -- you don't
11 think that greenhouse gases should be regulated at the
12 250-tons-per-year level, right? You said Congress did
13 not intend that, and it would be absurd.

14 GENERAL VERRILLI: Yes. Certainly --

15 CHIEF JUSTICE ROBERTS: So what level do you
16 think they should be regulated at? In other words, what
17 intelligible principle are you taking from the statute
18 to say we're going to -- we're at 100 now. We're going
19 to aim for 50 or -- in other words, if you had all the
20 resources you need, what level would you pick as the
21 proper one --

22 GENERAL VERRILLI: Well, I think --

23 CHIEF JUSTICE ROBERTS: -- other than --
24 since it's not 250?

25 GENERAL VERRILLI: You would want to look at

1 the definition of what it means to emit 250 tons per
2 year, and then you'd want to think about the underlying
3 notion that what Congress is trying to do is to impose
4 these obligations on facilities that are capable of
5 responding to them, that are going to tend to be
6 facilities that are major in quality. And then those
7 are the things that are going to guide you in trying to
8 figure out what the number is. And I think that is what
9 EPA is trying to do.

10 JUSTICE KAGAN: Could I -- sorry. Trying to
11 understand that. Would you pick the number that leads
12 to the same class of emitters? Is that the number you
13 would pick?

14 GENERAL VERRILLI: I'm sorry, Justice Kagan.
15 The same class of emitters as?

16 JUSTICE KAGAN: As in the more typical
17 emissions context. So 100 --

18 GENERAL VERRILLI: It might -- I don't think
19 it would --

20 JUSTICE KAGAN: -- captures a certain set of
21 emitters. Are you essentially looking for the number
22 that captures the same class of emitters?

23 GENERAL VERRILLI: I think -- I don't know
24 that it will be the same, but I think it'll be -- but I
25 think the -- the class will be a lot smaller than the

1 class under EPA's current understanding of what it means
2 to emit 250 tons per year.

3 JUSTICE GINSBURG: Well, how did the EPA
4 come at -- settle on the number?

5 GENERAL VERRILLI: Yeah, they tried to
6 explain that in -- in one of the rulemaking orders, and
7 I think what they did is to try to figure out the right
8 balance point where they were accomplishing very
9 significant emissions limitations while not sweeping in
10 sources that were -- that very large number of small
11 sources that were going to only make the incremental --
12 an incremental difference.

13 And what EPA did was say, essentially, we
14 can get to 85 percent of the emissions we're trying to
15 get to by setting the standards where we've set them.

16 JUSTICE BREYER: Why -- two things. One is,
17 you haven't said anything about the Title V problem,
18 which they said was at 6.1 million persons or
19 individuals or, you know, businesses coming into it. So
20 how do you get them out of that one?

21 GENERAL VERRILLI: Well, I think the
22 streamlining. Same idea, I mean --

23 JUSTICE BREYER: It's the same basic point.
24 Okay. Why -- there would be a good reason for this, but
25 the bell that it rang is that agencies have tremendous

1 authority about how they distribute their enforcement
2 resources. They don't have to enforce everything
3 against everything. And that is a basic principle.
4 They have to put their money where it will do the most
5 good. And so why wasn't that -- no one's really argued
6 it --

7 GENERAL VERRILLI: Well, I --

8 JUSTICE BREYER: I just wondered. It's sort
9 of like the missing --

10 GENERAL VERRILLI: There would be a helpful
11 point for us, but for this, and then I'll tell you
12 why -- explain why we didn't, because there is a citizen
13 suit provision in the -- in the law. And so the --
14 that's what they'll tell you on rebuttal.

15 JUSTICE BREYER: Yes.

16 GENERAL VERRILLI: And so, I think that's
17 the reason why because it's subject to a citizen suit,
18 whether we exercise our --

19 JUSTICE BREYER: In other words, you would
20 be out of it totally, and any citizen could go bring a
21 suit and say where is your permit?

22 GENERAL VERRILLI: Right.

23 JUSTICE BREYER: I see.

24 GENERAL VERRILLI: No further questions?

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, General.
2 Mr. Keisler, 5 minutes.

3 REBUTTAL ARGUMENT OF PETER KEISLER
4 ON BEHALF OF PRIVATE PARTY PETITIONERS

5 MR. KEISLER: Thank you, Mr. Chief Justice.
6 You had asked the Solicitor General what
7 would BACT involve in this kind of situation. And I
8 think Your Honor gave a perhaps absurd hypothetical
9 about light bulbs. Your Honor should know that EPA's
10 instruction to the State and local permitting
11 authorities does address light bulbs in the cafeteria.
12 What it says is that State and local permitting
13 authorities likely -- likely do not need to look at
14 whether more efficient light bulbs should be used in a
15 plant's cafeteria because that would be worth the burden
16 in terms of the payoff.

17 But the fact that they are talking about it
18 in that level of detail brings it into sharp relief when
19 applied to which GS which is not about adding technology
20 to control the stuff that comes out of smoke stacks is
21 pervasive of an industrial plant's operation and asking
22 the 90 State and local permits authorities to decide
23 what needs to be done and that's what is so different
24 between this and the NSPS program which functions by
25 setting emissions standards.

1 JUSTICE SOTOMAYOR: So what do I do with the
2 examples in the brief of the 144 permits that have
3 already been given, people who have managed to come into
4 compliance under that?

5 MR. KEISLER: It's certainly not our
6 submission that every single determination by every one
7 of these authorities is going to be unreasonable or
8 outrageous or is going to reach into the cafeterias.
9 But it is the scope of this is so different in nature
10 and kind than the NSPS program, which would set
11 efficient standards that people would be able to meet.

12 And the second point I would like to make,
13 Your Honor, is there is a selectivity what the agency
14 considers ambiguous and unambiguous. It unambiguously
15 is required to apply Massachusetts' definition of
16 "pollutant," but "any air pollutant" is ambiguous enough
17 to accommodate any regulated air pollutant.

18 But 100 and 250 tons per year, that's really
19 ambiguous because it can mean 100,000. And I mention
20 that because the selectiveness with which EPA has turned
21 the ambiguity on and off so that in combination it
22 maximizes the agency's discretion shows that when we
23 talk about what is -- what does the least violence to
24 the statute, we have to think about it, among other
25 things, along the parameter of separation of powers and

1 whether the way in which the agency has perceived it
2 here has arrogated an exceptional and troubling degree
3 of discretion to design its own climate change program.
4 And finally with respect to the different definitions of
5 pollutant, we have proceeded here as if we are defining
6 that particular word in the statute but here is another
7 way to think about the interpretative exercise here and
8 that is Brown & Williamson. Brown & Williamson started
9 with the assumption that the encompassed nicotine and
10 cigarettes but then it went on to say that giving the
11 FDA jurisdiction under those programs under tobacco
12 would be inconsistent with the regulatory structure.
13 When it did that it didn't go back to those definition
14 and say we have to figure out which word in that
15 definition means something different than what we
16 originally assumed. It says that the interruption as a
17 whole conflicted with the statute as a whole and that
18 was sufficient. We think the same is true here.

19 If the Court has no further questions, I
20 thank the Court.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel,
22 counsel. The case is submitted.

23 (Whereupon, at 11:42 a.m., the case in the
24 above-titled matter was submitted.)

25

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