Nos. 12-1146 and Consolidated Cases

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE STATES OF KANSAS, KENTUCKY, MONTANA, OHIO, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DEREK SCHMIDT
Attorney General
of the State of Kansas
JEFFREY A. CHANAY
Deputy Attorney General
120 S.W. 10th Street,
2nd Floor
Topeka, KS 66612
(785) 296-2215
jeff.chanay@ksag.org

C. BOYDEN GRAY
ADAM J. WHITE
Counsel of Record
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
(202) 955-0620
adam@boydengrayassociates.com

RONALD A. CASS
CENTER FOR THE RULE OF LAW
746 Walker Road, Suite 16
Great Falls, VA 22066
(703) 438-8832

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

ADDITIONAL COUNSEL

JACK CONWAY, Attorney General of Kentucky

TIMOTHY C. FOX, Attorney General of Montana

MICHAEL DEWINE, Attorney General of Ohio

PATRICK MORRISEY, Attorney General of West Virginia

PETER K. MICHAEL, Attorney General of Wyoming

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III. The "Absurd Results" Doctrine Does Not Allow EPA To Save Itself From Absurdities Of Its Own Making, Nor Does It Free EPA To Alleviate The "Absurdity" By Any Means That It Chooses

In re-interpreting the PSD and Title V statutes to include greenhouse gas emissions as "air pollutants," EPA recognized that its interpretation was incompatible with the statutory 100/250 tons per year thresholds triggering the statutes' permitting requirements. J.A. 447-502. But EPA's nominal effort to cabin and correct this absurdity, through the Tailoring Rule, fails to consider that these were absurd results of EPA's making, not Congress's. Cf. J.A. 454-55 ("It is not too much to say that applying PSD requirements literally to GHG sources at the present time . . . would result in a program that would have been unrecognizable to the Congress that designed PSD").

As explained below, an agency cannot invoke the "absurd results" doctrine to remedy absurdities of the agency's own making, any more than the patricidal defendant can invoke the court's mercy as an orphan. And in the rare cases where the doctrine's application actually is warranted, it requires a court to select the alternative statutory construction that does the *least* violence to Congress's enacted text. EPA's failure to heed both of these doctrinal limitations illustrates the fundamental constitutional problems inherent in allowing agencies a free hand to re-write statutes to solve problems that the agency itself created.

A. The "Absurd Results" Doctrine Does Not Apply When The "Absurdity" Results From The Agency's Untenable Interpretation Of The Statute

The "absurd results" doctrine is a narrow exception to the normal rules of statutory construction. Courts and agencies must "begin with the understanding that Congress says in a statute what it means and means in a statute what it says there[.]" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks omitted). Thus, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (quotation marks omitted).

The absurd results exception that the Court noted parenthetically is limited strictly. The Constitution commits the legislative power to Congress, not to agencies or courts. Thus, resort to the absurd results doctrine to "override the literal terms of a statute" is appropriate "only under rare and exceptional circumstances." *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930); see also *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 441 (2002) ("the Court rarely invokes such a test to override unambiguous legislation"). In those rare cases where Congress's intentions are embodied in generally stated laws that, if applied literally, would direct results plainly at odds with Congress's intent and understanding of the law, it falls to the courts to employ a limiting construction to avoid such results.

But in doing so, the courts must take care not to put the cart before the horse. The absurd results

doctrine applies only when the absurdity in question is the product of a statute's *unambiguous* direction. When an interpretation of ambiguous text produces absurd results, those results should signal that the statute's "proper scope" has been misconstrued to begin with. *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989).[8]

In this case, EPA's interpretation of the statute produces results so absurd that they would be "unrecognizable to the Congress that designed" the statute. J.A. 454-55. But EPA fails to take the next obvious step of asking whether these results cast doubt upon its interpretation of "air pollutant" for purposes of PSD and Title V. The fact that Congress could not possibly have intended the specific 100/250 tons per year threshold to apply to greenhouse gases proves that the agency misinterpreted the Act's general "any air pollutant" phrase, not that Congress

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[8] See also *Chem. Mfrs. Ass'n* v. *Natural Res. Def. Council*, 470 U.S. 116, 125-26 (1985) (because the "broadest sense" of a statutory phrase leads to a nonsensical result, that statutory phrase "has no plain meaning" for purposes of *Chevron*'s Step One); *Chapman* v. *United States*, 500 U.S. 453, 476 (1991) (Stevens, J., dissenting) ("There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result."); *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 144 (2004) (Stevens, J., dissenting) ("Before nullifying Congress' evident purpose in an effort to avoid hypothetical absurd results, I would first decide whether the statute can reasonably be read so as to avoid such absurdities, without casting aside congressional intent.").

intended EPA to have broader discretion to address the matter in spite of the statutes.

EPA should have relinquished its preferred interpretation and accepted an interpretation that makes sense of the *whole* statutory scheme. Here, as elsewhere, "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001). If EPA had interpreted "any air pollutant" in the PSD context as covering only regulated pollutants that deteriorate local air quality—which EPA itself recognizes was "the basic purpose" of the PSD and Title V statutes (J.A. 427)—then the results would not have been absurd.

B. The Absurd Results Doctrine Requires A Court To Select The Limiting Construction That Does The Least Violence To The Statute

Proceeding from the mistaken premise that the term "air pollutant," in the PSD and Title V context, necessarily includes greenhouse gas emissions, the agency attempts to redress the absurd consequences of its interpretation by effectively amending Congress's statute. And the court of appeals, proceeding from the mistaken premise that *Massachusetts* v. *EPA* controlled the interpretation of "air pollutant" in this context, agreed. In a profound understatement, the court acknowledged the strain that EPA's interpretation of "air pollutant" puts on the cohesiveness of the PSD and Title V programs as a whole: "That EPA adjusted the statutory thresholds to accommodate regulation of

greenhouse gases emitted by stationary sources may indicate that the [Clean Air Act] is a regulatory scheme less-than-perfectly tailored to dealing with greenhouse gases." J.A. 205.

Even if the court and EPA were correct that Congress's choice of terms, rather than EPA's interpretation of those terms, is what gave rise to the absurd results, the appropriate remedy would be to adopt the narrowing construction that "does *least* violence to the text." *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in the judgment).[9] This ensures the doctrine's core purpose of preserving legislative intent in the face of a result Congress could not possibly have intended. See *Pub. Citizen*, 491 U.S. at 471 (Kennedy, J., concurring); see also *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.").

In this case, if EPA had been correct that the absurd results were of Congress's making rather

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[9] See also *id.* at 533 (Blackmun, J., dissenting) (urging an interpretation that does least violence to the Congress's intent); *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (invalidating a rule that avoided absurd results but was "gravely inconsistent with the text and structure of the statute," rejecting the agency's "adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery").

than EPA's, then the best option would have been the simplest one: not to negate plainly stated numerical thresholds, but rather to adjust the construction of "any air pollutant" to cover only "pollutants" that actually deteriorate local air quality—which, EPA itself notes, was "the basic purpose" of Congress in enacting the statute. J.A. 427. Such construction "adds a qualification that the [phrase] does not contain but . . . does not give the [phrase] a meaning . . . it simply will not bear." *Bock Laundry*, 490 U.S. at 529 (Scalia, J., concurring in the judgment). As the lower court acknowledged, "nothing in the [Clean Air Act] requires regulation of a substance simply because it qualifies as an 'air pollutant' under this broad definition." J.A. 238. Moreover, the term "air pollutant" is, "in some contexts, capable of narrower interpretations." *Id.* at 251. Extending the narrower interpretation to the very same term in § 7479(1) requires the least statutory revision and is the most consistent Congress's decision to legislate one set of thresholds for all "air pollutants." It would avoid all of the unintended consequences that flow from EPA's interpretation of the Act.

But instead of choosing the narrowest alternative construction of "any air pollutant," EPA insisted on the *broadest* possible construction of that term, despite the cascade of absurdities that result and the more drastic regulatory fixes necessary to remedy them. To shoehorn its interpretation of "any air pollutant" into this context, EPA substituted its own greenhouse-gas-specific emissions limit for

Congress's clear thresholds, completely negating the thresholds that Congress had carefully devised.[10]

Moreover, in insisting upon its interpretation of the Act's more general term ("air pollutant") and adjusting the Act's specific numerical thresholds, EPA ignored this Court's caution that the absurd results doctrine allows only for slight adjustment to a statute's "[g]eneral terms," *United States* v. *Kirby*, 74 U.S. 482, 486 (1868), not wholesale revisions of its *specific* terms. This limitation, too, is intended to preserve the supremacy of congressional intent, by limiting the potential for courts and agencies to encroach on legislative intent. See *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892).[11]

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[10] See also D. Wiley Barker, *The Absurd Results Doctrine, Chevron, and Climate Change*, 26 BYU J. Pub. L. 73, 97 (2012) (concluding that EPA's approach in this case "does the most violence to the statutory language by changing the clear numbers of the statute"); Katherine Kirklin O'Brien, *Beyond Absurdity: Climate Regulation and the Case for Restricting the Absurd Results Doctrine*, 86 Wash. L. Rev. 635, 653 (2011) ("EPA's Tailoring Rule may represent the broadest interpretation of the absurd results doctrine to date, as it revises unambiguous, numerical statutory standards").

[11] As the Court explained in *Holy Trinity Church*:

> This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the

In this case, by contrast, EPA has substituted its own will for that of Congress in the most egregious way—by construing a general statutory term so as to force an alteration of Congress's specific numerical standard—an alteration that "satisf[ies] the policy preferences of the [agency]," but that presumes to decide unilaterally "battles that should be fought among the political branches and the industry." *Barnhart*, 534 U.S. at 462 (2002).

EPA cannot say that all of this was done in the interests of preserving Congress's literal words, "any air pollutant." For even after rewriting the emissions threshold, EPA's position still relies upon construing "any air pollutant" to mean any "*regulated* pollutant," in order to avoid bringing facilities within the purview of PSD based solely on their emissions of harmless chemicals. J.A. 237-38.[12]

In sum, EPA surveyed the plausible alternative constructions of the statute, and chose the one that does the most violence to the Act—and that maximizes EPA's own power and discretion at the

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> words, makes it unreasonable to believe that the legislator intended to include the particular act.

Holy Trinity Church, 143 U.S. at 459.

[12] That construction of "air pollutant" also results in the Act requiring the "useless" exercise of collecting "continuous [GHG] air quality monitoring data" for every designated area, even though GHGs dissipate into the global atmosphere and do not measurably alter ambient air quality. See Brief of Util. Air Regulatory Group at 27.

expense of the States. If the Act itself gives rise to absurd results, all of those unintended consequences can and must be avoided by a limiting construction of "any air pollutant" to refer only to pollutants that actually deteriorate local air quality.

* * *

This case demonstrates the risk inherent in expanding the absurd results doctrine to allow agencies to revise congressional statutes as EPA did here. An agency motivated to regulate in a manner inconsistent with the express intent of Congress has a clear incentive to identify "plain meanings" and "absurd results" in the legislative text where the text may in fact be ambiguous and the alleged absurdities illusory. As Publius noted, executive departments exercise not "merely judgment," but "force," The Federalist No. 78 (Alexander Hamilton). For that very reason, courts must take care to "keep agencies tethered to Congress and to our representative system of government." David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 7 (2010). EPA has "programs it is eager to execute. But those programs will be legitimate—and will be sustained in court—only if their implementation conforms to the rule of law." *Id.* at 8.

When EPA nullifies Congress's plainly stated volumetric thresholds and replaces them with new thresholds of the agency's own making, EPA becomes the author of the laws it administers. This "violate[s] a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013)

(Scalia, J. concurring in part and dissenting in part) (citing Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Deputy Attorney General
120 S.W. 10th Street, 2nd Floor
Topeka, KS 66612
(785) 296-2215
jeff.chanay@ksag.org

C. BOYDEN GRAY
ADAM J. WHITE
Counsel of Record
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
(202) 955-0620
adam@boydengrayassociates.com

RONALD A. CASS
CENTER FOR THE RULE OF LAW
746 Walker Road, Suite 16
Great Falls, VA 22066
(703) 438-8832

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