

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

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.

7 MR. JONATHAN F. MITCHELL, ESQ., Solicitor General of
8 Texas, Austin, Texas; on behalf of State Petitioners.

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10 Department of Justice, Washington, D.C.; on behalf of
11 Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

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

7 Mr. Keisler.

8 ORAL ARGUMENT OF PETER KEISLER

9 ON BEHALF OF THE PRIVATE PARTY PETITIONERS

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

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

21 And second, EPA took that conclusion not as
22 a reason to reexamine its interpretation, but as a basis
23 for rewriting other provisions of the statutes that are
24 clear and unambiguous, the numerical permitting
25 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 costs 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 Solicitor --

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's right, Your Honor. And
22 that actually reflects a deeper problem, and I'd like to
23 address that, and then also explain why our position, we
24 think, is the correct and only correct interpretation of
25 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 PSD --

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

1 work.

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

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

24 CHIEF JUSTICE ROBERTS: Counsel, you began
25 that discussion by saying putting Massachusetts v. EPA

1 to one side. But I was in the dissent in that case, but
2 we still can't do that.

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

4 (Laughter.)

5 MR. KEISLER: That's -- that's right, Your
6 Honor. And I think --

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

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

1 a particular way, that doesn't mean that that same term
2 used elsewhere in the statute can't be construed
3 differently where context requires. And the Court
4 reversed the Fourth Circuit for holding that they had to
5 be the same.

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

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

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

25 MR. KEISLER: There are multiple places in

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

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

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

16 JUSTICE SOTOMAYOR: You are right, but --

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

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

24 MR. KEISLER: No, I don't think so, Your
25 Honor, because it was an act of interpretation in

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

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

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

20 This is about whether State and local
21 permitting authorities, the 90-plus State and local
22 permitting authorities, are supposed to regulate plant
23 by plant under this particular PSD program. And I
24 mention the NSPS program because the features of that
25 program highlight what's wrong here because the NSPS

1 program doesn't contain the elements of the PSD program
2 that require the PSD program to be rewritten in so many
3 particulars to make greenhouse gases fit.

4 NSPS doesn't have the 100- and 250-ton per
5 year thresholds. It lets EPA by notice and comment
6 rulemaking decide what categories of sources are most
7 contributing to the problem and most require regulation.
8 It doesn't require the area-specific local impact
9 analysis of subsection (e) of 7475, which EPA has told
10 State and local permitting authorities, even though it's
11 mandatory, don't conduct it because it can't be done for
12 greenhouse gases.

13 NSPS permits the EPA to look at reducing the
14 national footprint without regard to area-specific
15 impacts, and it permits the EPA to do this through a
16 national uniform emissions standard that the plants can
17 then determine how best to meet, rather than asking 90
18 State and local permitting authorities, which is what
19 PSD is about, to decide plant by plant what they think
20 each plant in their jurisdiction should do about global
21 warming.

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

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

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

4 MR. KEISLER: Yes, without --

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

7 MR. KEISLER: Well, they are doing it, Your
8 Honor.

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

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

1 and local permitting authorities addressing the
2 area-specific air quality impacts of plants that are
3 built in their States.

4 JUSTICE BREYER: It says, "such standards
5 with such modifications as he deems appropriate."
6 That's the language of 7411(b).

7 MR. KEISLER: Right.

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

14 MR. KEISLER: Because the statutory language
15 and structure of the PSD program does not, we think,
16 encompass these kinds of pollutants that have globally
17 dispersed results and not area-specific impacts. And
18 it's for the reasons that I've indicated. 7411, which
19 says -- sorry. 7471, which says that the prevention of
20 significant deterioration is focused on deterioration of
21 air quality in each region; the study required by
22 7475(e), which is of local conditions; and the fact that
23 this is assigned to 90 State and local permitting
24 authorities.

25 JUSTICE SCALIA: Is that your second point?

1 I've been keeping a list here of points you -- you have
2 not been permitted to get to.

3 (Laughter.)

4 JUSTICE SCALIA: One, you were going to
5 discuss not just the Massachusetts case, but the
6 follow-on case to Massachusetts.

7 MR. KEISLER: Oh, well, Connecticut.

8 JUSTICE SCALIA: You never did that, yes.

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

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

25 MR. KEISLER: There were really -- yes,

1 there were three features I mentioned of the PSD statute
2 which we think make the context clear.

3 JUSTICE SCALIA: You got the first, which
4 was the --

5 MR. KEISLER: Which was 7471, prevention of
6 significant deterioration.

7 JUSTICE SCALIA: Right.

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

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

23 MR. KEISLER: If the agency had tried to
24 establish a NAAQS for greenhouse gases, we think that
25 would be contrary to the statute because the National

1 Ambient Air Quality Standards are all about regional
2 concentrations. Is this area in or out of compliance?
3 If the gas goes up to the atmosphere and is mixed there,
4 either the whole country is going to be in attainment or
5 the whole country is going to be out of attainment. It
6 doesn't work at all with the NAAQS structure.

7 And if I could reserve the ---

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

17 MR. KEISLER: I think it does, Your Honor,
18 because while that might deal with the specific issue of
19 rewriting the thresholds, the fact that the PSD
20 provisions for the reasons I have indicated is limited
21 to area-specific air impacts would, we think, be
22 violated merely by applying Best Available Control
23 Technology to a globally dispersed substance like
24 greenhouse gases.

25 CHIEF JUSTICE ROBERTS: I understand. But

1 they would only be applying that with respect to sources
2 that are already required to operate under PSD permits.

3 MR. KEISLER: That's right, but they would
4 be applying it to a substance, greenhouse gases, which
5 the PSD program was not designed to address, which was
6 designed to be addressed by other programs. And I would
7 say, Your Honor, that while they have tried to separate
8 those issues out, that there's one issue about who has
9 to get a permit and the other issue about whether the
10 requirements of Best Available Control Technology apply,
11 the regulation that they have adopted to implement what
12 they call their tailoring rule applies equally to both.

13 What they've done is say that the words
14 "subject to regulation," which are the words in the BACT
15 provision, shall only apply to greenhouse gases, even
16 when they are regulated, if you're emitting them at
17 levels of 100,000 tons per year or more.

18 When they did that, they both rewrote the
19 provision that says who has to get a permit and they
20 rewrote the provision that says what Best Available
21 Control Technology applies. They did both at once even
22 though their brief treats it as separate.

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

25 CHIEF JUSTICE ROBERTS: You have three and a

1 half minutes left.

2 MR. KEISLER: Not including rebuttal?

3 CHIEF JUSTICE ROBERTS: No. You will get 5
4 minutes of rebuttal.

5 MR. KEISLER: Thank you, Your Honor.

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

17 JUSTICE KAGAN: Well, but that's not Judge
18 Kavanaugh's position. I thought Judge Kavanaugh's
19 position is any NAAQS pollutant, all NAAQS pollutants.

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

23 JUSTICE KAGAN: And it comes from a
24 different portion of the statutory language.

25 MR. KEISLER: That's right. We are focused

1 on the language in any area to which this part applies,
2 and that is because Part C, the PSD provision, applies
3 not to an area as a whole, but for some pollutants and
4 not for others in any particular area.

5 JUSTICE KAGAN: Can I ask, Mr. Kavanaugh,
6 why Judge Kavanaugh's argument has been left by the
7 wayside?

8 MR. KEISLER: It is very similar, Your
9 Honor, to the argument that we're making, but we get at
10 it in a different way and with a slightly different
11 result.

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

18 MR. KEISLER: This is the argument we made
19 below and it's the argument we've continued to make
20 here. And the point of the argument --

21 JUSTICE SOTOMAYOR: I don't think that
22 answers the question.

23 MR. KEISLER: Excuse me, Your Honor?

24 JUSTICE SOTOMAYOR: I said I don't think --
25 I don't think it answers the question, which is I know

1 that's the argument; are you saying you can't defend his
2 argument or are you saying that --

3 MR. KEISLER: No, it's just that it's been
4 hard enough to make two alternative arguments in this
5 forum, and to add a third to it would be more than I
6 think I could handle.

7 (Laughter.)

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 General Mitchell.

7 ORAL ARGUMENT OF JONATHAN F. MITCHELL

8 ON BEHALF OF STATE PETITIONERS

9 MR. MITCHELL: Mr. Chief Justice, and may it
10 please the Court:

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

23 EPA thinks it can fix this problem by
24 imposing an atextual agency-created regime that applies
25 only to greenhouse gases. The proper response, however,

1 is for EPA to conclude that Congress never delegated
2 regulatory authority over greenhouse gases in the PSD
3 and Title V programs. Congress does not establish round
4 holes for square pegs, and Brown & Williamson holds in
5 these situations, an agency cannot make a round hole
6 square by rewriting unambiguous statutory language.

7 JUSTICE KAGAN: General, I take it that the
8 unambiguous statutory language that you are referring to
9 is the references to 100 and to 250. And it seems to me
10 that that's an odd kind of term to drive such an
11 important statutory interpretation question, because
12 what those numbers were all about is that they were
13 supposed to separate major emitters from minor emitters.
14 I mean, they were supposed to be about the size of the
15 facility. They were not supposed to have -- they were
16 not supposed to make any distinctions as to the type of
17 pollutant.

18 So you're essentially using those numbers to
19 make distinctions as to the type of pollutant rather
20 than, it seems to me a more sensible approach would be
21 to say, look, the 100 and 250 numbers don't work for
22 this new kind of pollutant, we're going to up the
23 numbers, and that will leave the rest of the statute and
24 all the purposes of Congress intact.

25 MR. MITCHELL: Justice Kagan, the reason we

1 don't think the approach that you describe is
2 permissible is because there are statutory provisions in
3 the Clean Air Act that specifically forbid EPA to do
4 what Your Honor is describing. 7661(a)(A) says that EPA
5 cannot under any circumstance exempt any major source
6 from the Title V requirements. And because that
7 provision is in the statute, EPA cannot be claiming to
8 seize discretion when Congress has specifically withheld
9 that type of discretion here. This is akin to a
10 dispensing power, for EPA to be coming in and rewriting
11 the Title V permitting thresholds in the way that they
12 are.

13 And the question to ask is whether the term
14 "air pollutant" is flexible enough to accommodate
15 different meanings in different statutory contexts. And
16 here even EPA agrees with us that "air pollutant" can
17 mean different things in different parts of the Act,
18 even after Massachusetts.

19 Massachusetts held that "air pollutant"
20 unambiguously includes all things airborne, all airborne
21 compounds of whatever stripe for purposes of Title II.
22 But EPA has refused to carry over that definition
23 throughout the Clean Air Act when the term "air
24 pollutant" appears in at least three different places.
25 One of them is section 7411(a)(4), which is part of the

1 NSPS program. In that provision the term "air
2 pollutant" appears as part of the definition of
3 modification.

4 EPA does not interpret that to mean all
5 things airborne. It doesn't even interpret it to mean
6 all regulated air pollutants. It interprets that to
7 mean air pollutants for which a standard of performance
8 has been established. In the PSD and Title V permitting
9 thresholds, EPA interprets the phrase "any air
10 pollutant" not to mean all things airborne, but to mean
11 any regulated air pollutant.

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

20 JUSTICE KAGAN: But, General, if you think
21 about the question of what any pollutant means, and you
22 put aside this whole absurdity question that the numbers
23 get you to, you just say, what does any air pollutant
24 mean? Does it mean what EPA has said it has meant for
25 30 years, which is any pollutant that's regulated under

1 this Act, or does it mean something more along the lines
2 of what you're saying, which is anything other than
3 greenhouse gases, or anything other than pollutants that
4 have particular localized effects.

5 You would obviously choose EPA's version of
6 the thing. And the only reason that you're not choosing
7 that is because of these numbers that are in the
8 statute, which were designed only, only to distinguish
9 between major and minor emitters.

10 So if you can distinguish between major and
11 minor emitters while keeping the completely sensible
12 longstanding interpretation of any pollutant, why
13 wouldn't you do that?

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

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

1 the statute?

2 MR. MITCHELL: It's more than just that
3 there's ambiguity, Justice Sotomayor. We're asking the
4 Court to hold that a greenhouse gas inclusive
5 interpretation of air pollutant simply does not fit with
6 the unambiguous provisions of the PSD and Title V
7 programs, just as a tobacco inclusive or nicotine
8 inclusive interpretation of the word "drug" was not able
9 to fit with the unambiguous requirement --

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

15 MR. MITCHELL: The definition of?

16 JUSTICE BREYER: Of the major emitting
17 facility.

18 MR. MITCHELL: Right.

19 JUSTICE BREYER: Okay. Now, we look at
20 7475, and it says you have to have a permit and use Best
21 Available Control Technology. For what? And then we go
22 to the definition, and it says, among other things, "For
23 any source with the potential to emit 250 tons per year
24 or more of any pollutant."

25 Now, that doesn't -- my God, that maybe

1 means every 500 people, every school is applied here.
2 So you say we've got to do something about this statute
3 because they don't really mean to every football game
4 they're going to have a permit, or it doesn't mean every
5 500 people, like all of my relatives are together, they
6 have to have a permit. No, it can't mean that.

7 So we have two choices. Choice A, which is
8 what you would like, is it means any air pollutant, any
9 regulated air pollutant, but not greenhouse gases.
10 Okay. That's choice one.

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

14 Now, which does the less violence to the
15 statute?

16 MR. MITCHELL: Choice one. And the reason
17 choice one --

18 JUSTICE BREYER: I knew you would say that.
19 (Laughter.)

20 MR. MITCHELL: The reason choice one does
21 less violence is because the term "air pollutant" is
22 flexible and has been acknowledged to be by EPA for
23 decades. And I think even by this Court,
24 notwithstanding its holding in Massachusetts, it's
25 permissible for an agency to construe ambiguous

1 statutory language to avoid absurdity. In fact, it must
2 construe the ambiguous language to avoid absurdity
3 before taking choice two that Your Honor described,
4 where it rewrites unambiguous statutory language to
5 avoid absurdity.

6 If the simple choice were between construing
7 one unambiguous statutory provision to avoid the
8 anomalous results and construing another unambiguous
9 statutory provision to avoid that outcome, then EPA
10 would have a much stronger case for deference here.

11 The problem for EPA is they've insisted for
12 decades that air pollutant can mean different things in
13 different parts of --

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

22 Which do you think the Senate would have
23 chosen in enacting this bill from the evidence in the
24 language itself, in the evidence which I look at, the
25 history of the bill?

1 MR. MITCHELL: I think they did make a
2 choice, and it's in the language of the bill, that EPA
3 does not have the authority to exempt any major source
4 from Title V. They say that right there in Section
5 7061(a) (A) on page 44 of the statutory appendix in --

6 JUSTICE SOTOMAYOR: Title V is not the PSD
7 requirement. Title V is just the recordkeeping
8 provision.

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

10 JUSTICE SOTOMAYOR: And so why should we
11 exempt people from Title V? That's not what's causing
12 the burden that you're talking about. It's just a
13 recordkeeping provision.

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

24 So, again, to return to Justice Breyer's
25 question, which would Congress have chosen, the choice

1 was made in the statute to establish rigid numerical
2 permitting thresholds that were defined not only by 100
3 tons and 250 tons per year, but also defined by a
4 specific metric.

5 And to withhold from the agency the
6 discretion to depart from those unambiguous
7 requirements. Instead, they provided looseness to the
8 extent they provided it in the definition of air
9 pollutant, which even though this Court held in
10 Massachusetts unambiguously includes all things
11 airborne, for purposes of Title II, EPA has narrowed
12 that construction in numerous other parts of the
13 statute.

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

23 MR. MITCHELL: I don't -- yeah, I don't
24 think it would be a permissible act of statutory
25 construction to say that carbon dioxide could be an air

1 pollutant and not an air pollutant at the same time.

2 JUSTICE SCALIA: Well, you -- you'd accept
3 his definition, wouldn't you? You'd be happy with a
4 definition that says air pollutant means any air
5 pollutant to the extent it can be sensibly controlled
6 under the statute. And you would say this one obviously
7 can't.

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

10 JUSTICE SCALIA: So that would be a
11 wonderful definition.

12 JUSTICE BREYER: It can, though. It can in
13 large quality -- quantities. I mean, you don't see
14 anything wrong with large quantities. It's just the
15 small quantities you have a problem with.

16 MR. MITCHELL: Well, we have a problem
17 with --

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

20 MR. MITCHELL: We're saying it doesn't make
21 sense to construe air pollutant in a greenhouse
22 gas-inclusive manner for purposes of the PSD program
23 because the unambiguous requirements require the EPA to
24 reach the small emitters. And if EPA wants to fix the
25 problem, they can't resort to this form of agency

1 self-help. They need to get --

2 JUSTICE KAGAN: General, one question is
3 what would Congress have wanted, given the obvious
4 purposes of the Act. And that's an important question.
5 Another question is: What did the agency decide here?
6 I mean, obviously, this is the apex of Chevron
7 deference. There's nothing that gets more deference
8 than this agency with respect to this complicated a
9 statute.

10 And given that this whole thing arises
11 because there's this new kind of emission, which --
12 which the numbers don't work for, but which essentially
13 makes these two terms in the statute irreconcilable, why
14 isn't that a classic case for deference to the agency,
15 that the agency gets to choose how to make the thing
16 work as best it can, when a changed circumstance makes
17 it work not entirely the way Congress had foretold?

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

1 JUSTICE SOTOMAYOR: To accept your -- your
2 argument, we have to reverse Massachusetts.

3 MR. MITCHELL: No, not at all, Justice
4 Sotomayor.

5 JUSTICE SOTOMAYOR: Well, you're saying
6 that the -- that Congress didn't intend to control this
7 pollutant. We said there that it did.

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

19 If the Court has no further questions, I
20 yield my time back to the Court.

21 CHIEF JUSTICE ROBERTS: Thank you, General
22 Mitchell.

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

24 ON BEHALF OF THE RESPONDENTS

25 GENERAL VERRILLI: Mr. Chief Justice, and

1 may it please the Court:

2 Greenhouse gases pose the same threat to
3 public health and welfare when they are emitted from a
4 power plant as when they are emitted from the tailpipe
5 of a car; and in American Electric Power this Court said
6 it was plain that EPA has the authority to prescribe
7 general rules limiting greenhouse gas emissions by
8 stationary sources like power plants. Yet Petitioners
9 say EPA lacks any authority to use the PSD permitting
10 program to regulate the same emissions, from the same
11 sources, causing the same harms.

12 That's not a reasonable reading of the
13 statutory text, and it rests on a fundamental
14 misunderstanding of the PSD program and the way it is
15 supposed to operate in conjunction with the --

16 JUSTICE SCALIA: Why? Why would it be
17 unreasonable to give -- give EPA authority to regulate
18 mobile sources and not authority to -- to regulate
19 stationary sources, given that stationary sources have
20 to be licensed in this fashion and it -- it produces all
21 sorts of other problems? That doesn't seem to me
22 irrational at all.

23 GENERAL VERRILLI: Well, the Court said, I
24 think, that it was plain that Congress gave EPA the
25 authority to regulate stationary sources in the American

1 Electric Power case under Section 7411, and that I think
2 gets to a fundamental premise where the Petitioners are
3 just wrong.

4 Section 7411 -- and this relates to a
5 question you asked, Justice Breyer -- Section 7411 and
6 the PSD program are not aimed at different problems.
7 They are aimed at the same problem, and you can see that
8 from the statutory text. For example, if one looks at
9 Section 7475(a) (3), which you can find at page 21A of
10 our appendix, you will see that in order to become
11 eligible for a PSD permit if you are a major emitting
12 facility, you've got to -- if you are looking at
13 subsection (3), under (3) (A) and (3) (B), you've got to
14 show that you can meet all of the local air quality
15 requirements of the NAAQS, those standards; and then (C)
16 says you've got to meet any other applicable emissions
17 standard or standard of performance under this chapter.

18 And that standard of performance language is
19 not an accident. In 7411 the standards that are set,
20 the nationwide standards that Mr. Keisler was discussing
21 for greenhouse gases or other air pollutants, are called
22 standards of performance. So it's specifically picking
23 up the Section 7411 standard.

24 Then if one turns to the definition of Best
25 Available Control Technology under the PSD program,

1 which you can find at page 34A of the appendix to our
2 brief, you will notice that Congress specifically linked
3 the operation of the Section 7411 standards and the Best
4 Available Control Technology under the PSD program. And
5 what this provision says, I won't belabor you by reading
6 the lengthy provision, but what it says is that once
7 Congress has set a standard under section 7411, a
8 nationwide standard, that becomes a floor for the
9 evaluation of Best Available Control Technology.

10 JUSTICE KENNEDY: Are you reading subsection
11 (3), the (A), (B) and (C), and you focus on (C), any
12 other applicable -- are you reading those in the
13 alternative? I read that they -- that all three have to
14 be complied with.

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

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

20 GENERAL VERRILLI: Well, I would be happy
21 to --

22 JUSTICE KENNEDY: And with the absurd result
23 that follows.

24 GENERAL VERRILLI: Well, I would be happy to
25 get to that. But if I could just finish off this point

1 about the connection between the operation of the two,
2 because I do think it's of critical importance here.
3 That what you are supposed to do under BACT is use Best
4 Available Control Technology to get above the floor,
5 that the NSPS program sets those standards on an every
6 8-year basis, and the point of BACT is to force best
7 practices to keep raising the bar during those 8-year
8 intervals.

9 And there is an additional point to be made
10 about the relationship between the two. This goes back
11 to Senator Muskie in 1977. The NSPS program was enacted
12 as part of the 1970 Act. The PSD program was added in
13 1977; and it was added in 1977 because of
14 dissatisfaction over both the pace and the
15 comprehensiveness of the -- of air pollution regulations
16 that were being enacted by EPA under the 7411 standard;
17 and it's because under 7411, EPA has got to go one
18 source category at a time. It has got to do power
19 plants; then it's got to do refineries; then it's got to
20 do the next thing, and the next thing, and the next
21 thing.

22 And so EPA hadn't gotten standards in place
23 for all the different sources, and the point of -- of
24 the PSD program is to put in place an additional
25 requirement. It's exactly what Congress was after. So

1 that when there is a standard under 7411 that becomes
2 the floor, and you -- and BACT says let's keep raising
3 the bar. But when there isn't a standard under 7411,
4 PSD is supposed to fill the breach, and it makes sense
5 because you want to get -- the PSD program, remember,
6 applies to -- excuse me -- it applies to new
7 construction or major modification. The idea behind it
8 is you want to get in there at the beginning when the
9 source is first being constructed, so that they don't
10 lock in old pollution -- pollution-causing technology.
11 They have got to meet Best Available Control Technology.

12 CHIEF JUSTICE ROBERTS: About the Best
13 Available Control Technology, I think I have an idea of
14 what that looks like with respect to sources already
15 regulated, because they're relating to the NAAQS. You
16 know, filters, scrubbers and all that; I'm sure it's
17 oversimplified. But what does Best Available Control
18 Technology look like with respect to greenhouse gases?

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

1 CHIEF JUSTICE ROBERTS: Right. But am I --
2 am I right because the greenhouse gases do not affect
3 ambient air quality in a way that the current or the
4 NAAQS provisions do? I mean, you're dealing with
5 regulation of energy usage, right, as opposed to
6 emissions of lead, emissions of the other NAAQS
7 provisions?

8 GENERAL VERRILLI: Well, it's -- one
9 thing we're doing -- the main thing now is significant
10 energy efficiency, for example, different kinds of
11 turbines; different kinds of processes, that sort of --
12 that sort of thing. That's right.

13 CHIEF JUSTICE ROBERTS: The same sort of
14 thing as with -- for domestic uses, as the energy
15 efficient light bulbs.

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

18 CHIEF JUSTICE ROBERTS: No, but my point is
19 it relates to energy consumption as opposed to
20 particulate emission.

21 GENERAL VERRILLI: At the -- at the moment
22 that's largely true, not entirely true; there are some
23 other technologies described. But of course, the EPA is
24 considering and scientists are trying to develop
25 additional control technologies like carbon capture

1 technologies; and that's the whole point of Best
2 Available Control Technology, is as technology advances
3 and better options come on line, that allow for even
4 greater control of the pollutants, the statute requires
5 that they be incorporated. That's how it's supposed to
6 work.

7 CHIEF JUSTICE ROBERTS: If you -- if you
8 regulate -- I'm talking about your two distinct
9 arguments in your -- in your brief. If you prevail on
10 the first: In other words, greenhouse gases may be
11 regulated with respect to sources that are already
12 subject to permitting, my understanding, it gets you to
13 83 percent of the greenhouse gas emissions.

14 GENERAL VERRILLI: That's correct.

15 CHIEF JUSTICE ROBERTS: Prevailing on the
16 second argument gets you to 86 percent.

17 GENERAL VERRILLI: That's correct.

18 CHIEF JUSTICE ROBERTS: So this is a
19 fight -- putting aside your first argument -- about an
20 additional 3 percent, and yet according to the
21 Petitioners that brings in this huge regulatory problem,
22 of, you know, regulating the high school football game
23 and what-not.

24 GENERAL VERRILLI: Right. Just an aside on
25 the high school football game. Human beings are

1 actually net neutral on carbon emissions, and you will
2 need a chemist to explain that to you. But it doesn't
3 matter how many family members you have; you won't get
4 to the limit. But with respect to the -- with respect
5 to the question --

6 CHIEF JUSTICE ROBERTS: The lights at the
7 game.

8 GENERAL VERRILLI: The lights at the game I
9 don't think would be a problem, either. But anyway,
10 there obviously is -- and EPA has acknowledged that
11 there is a significant expansion of the permitting
12 obligation under EPA's present understanding of
13 permitting. But let me try to take this in two pieces,
14 if I could.

15 Let me first talk about why it's not just
16 about the 3 percent, and then let me try to get back to
17 Justice Kennedy's question to talk about the expansion
18 of the permitting obligation and what EPA is actually
19 thinking and doing about that.

20 The problem here is that the options -- one
21 of the problems, significant problem is that the options
22 that the -- the American Chemistry Council have advanced
23 and even that Judge Kavanaugh has advanced would require
24 an invalidation of or at least a significant, a
25 significant revision of EPA's 34-year understanding of

1 the meaning of the phrase "any air "pollutant" in
2 7479(1), which they have always interpreted to mean any
3 -- any air pollutant subject to regulation under the
4 Act. That -- you can't apply that 34-year-long agency
5 interpretation here and get to one of those results.
6 You've got to -- you've got to change it.

7 JUSTICE SCALIA: Yes, but the 34-year agency
8 interpretation is not a statute.

9 GENERAL VERRILLI: No, it's not, Justice
10 Scalia, of course.

11 JUSTICE SCALIA: And you are -- you know,
12 you are saying, oh, rather than alter our 34-year
13 interpretation, we're -- we're going to revise the
14 provisions of the statute. I don't think that's a --
15 that's a good trade.

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

1 JUSTICE ALITO: Can I ask you this question
2 about -- can I ask you this question about EPA's
3 position? Because this is something I don't understand.
4 On the one hand, EPA says that applying the statutory
5 thresholds to greenhouse gases would transform the PSD
6 program into something that would be unrecognizable to
7 the Congress that enacted the program; isn't that right?

8 GENERAL VERRILLI: Yes, they did say that.

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

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

16 What EPA's doing here is saying this is a
17 transition, it's not a rewrite. And the goal of the
18 transition is not to gradually expand the permitting
19 requirement until they've got all the Dunkin' Donuts in
20 America under it. That's not what's going on. In fact,
21 it's the opposite. What they're saying is, they're
22 taking a look at the standards they used to decide who's
23 eligible for a permit. They're looking to change those,
24 to the extent they can, consistent with their statutory
25 authority and appropriate Chevron deference, to

1 substantially narrow the numbers of people who will be
2 deemed eligible. And that's in particular --

3 JUSTICE ALITO: Well, then they're never
4 going to get to the statutory thresholds. I thought EPA
5 said, well, we're going to work toward that.

6 GENERAL VERRILLI: No, this is -- this is to
7 try to get to the statutory threshold. Well, let me
8 give you an example of the main -- one of the main ways
9 --

10 JUSTICE ALITO: Well, that's -- then I don't
11 understand the position. If -- if applying the
12 statutory thresholds makes the program unrecognizable,
13 and yet that's what they're going to aim to do down the
14 road, get to -- get to the statutory thresholds, will it
15 become more recognizable at that point?

16 GENERAL VERRILLI: Under the point -- the
17 nuance there, that I think answers Your Honor's
18 question, is that there -- the agency has discretion in
19 deciding what constitutes the potential to emit 250 tons
20 per year. What they have done historically is evaluate
21 that on the basis of an assumption that it's facilities
22 operating 24 hours a day --

23 JUSTICE BREYER: But then they'll -- then
24 they'll be back down to -- to 41,000 people fully within
25 this. And when you get to Number 5, Title V, 6.1

1 million, that sort of changes what -- I mean, if that's
2 the question, does, in fact, this provision give the EPA
3 the -- the obligation to impose permit requirements on
4 41,000 businesses of a size that really are --
5 constitute, at most, 10 or 15 percent of the problem,
6 well, that's -- that's pretty hard to accept.

7 GENERAL VERRILLI: Well --

8 JUSTICE BREYER: What I thought the question
9 was, was whether EPA had the authority to implement this
10 in a way that EPA itself thinks makes sense, which might
11 be, on their own reasoning, to not impose permitting
12 requirements on tens of thousands, perhaps millions of
13 small businesses. I thought that was what the question
14 was. That did seem to be the way they put it.

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

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

23 GENERAL VERRILLI: Right.

24 JUSTICE BREYER: The words they used in
25 their opinion implied to me when I read them that

1 they're never going to want to put tiny boilers under
2 this because it just doesn't do very much good and it's
3 expensive to administer. That's how I read it.

4 GENERAL VERRILLI: That's correct.

5 JUSTICE BREYER: All right. Then my
6 question is back, because you've been -- this has been
7 very helpful. I learned I'm not a net emitter of carbon
8 dioxide. Believe me, because that means I'm a part of
9 sustainable development. I thought --

10 (Laughter.)

11 JUSTICE BREYER: All right. So I learned
12 quite a lot from this, and I'd like to learn one more
13 thing, which is, look, 7411, remember what the Chief
14 Justice just said about the 83 percent and the 86
15 percent. And even if you lose, they still can regulate
16 83 percent, and if you win, you can regulate 86 percent.
17 And, my goodness, if 7411 is over there letting them do
18 precisely what they want, why do you need this, too?
19 That's the part that I haven't got a clear answer to in
20 my mind.

21 GENERAL VERRILLI: So the -- it's the reason
22 I tried to suggest earlier, Justice Breyer, that the PSD
23 program is supposed to work as a complement together
24 with 7411. For example, if 7411 now is being used, at
25 least EPA's contemplating setting standards, greenhouse

1 gas emission standards for power plants. That's a very
2 significant contributor of greenhouse gases, but it's
3 not the only one. There are refineries, there are other
4 major sources --

5 JUSTICE BREYER: Well, put those all in.
6 Put those all in. Write -- write complicated standards.
7 Write standards that have certain enforcement capacities
8 and abilities. Write standards that require you to get
9 a PSD permit. I mean, what's wrong with all that?

10 GENERAL VERRILLI: They can do all of that,
11 but the -- but the problem is that that's going to take
12 a lot of time, and that was the very reason Congress put
13 the PSD program into existence in 1977 was because of
14 the dissatisfaction, because of the time it took to go
15 source by source, pollutant by pollutant under the EPA's
16 7411 program.

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

19 Under 7411, you can require a PSD --

20 GENERAL VERRILLI: No, you can set a
21 national standard.

22 JUSTICE SOTOMAYOR: Right.

23 GENERAL VERRILLI: But part of the reason,
24 as I said, I think it's just wrong to think about the
25 PSD program as being -- addressing a different kind of

1 problem from the 7411 problem is that you've got to meet
2 the 7411 standard in your PSD application.

3 JUSTICE KAGAN: General -- General, if I
4 could actually get back to Justice Alito's question,
5 because I had a similar issue with what EPA did here.
6 It seems to me it would be completely responsible and
7 understandable if EPA had said, look, the 100 and 250
8 don't work with respect to this category of pollutant,
9 Congress didn't know that this kind of pollutant was out
10 there when it wrote those numbers, what it was trying to
11 do was to distinguish between major and minor emitters.
12 The new numbers are X and Y for that -- for this kind of
13 pollutant.

14 But, you know, and I understand that EPA may
15 have felt like, oh, gosh, can we really do that? But
16 the solution that EPA came up with actually seems to
17 give it complete discretion to do whatever it wants,
18 whenever it wants to, and to not -- and to be much more
19 problematic than if EPA had just said, no, it's not 100
20 and 250. It's 10 times that.

21 GENERAL VERRILLI: I take that point, Your
22 Honor. I don't actually think that's what EPA was
23 trying to do. I know it's been portrayed that way. I
24 think that they were trying to do the opposite. They
25 were trying to say, well, let's look at how we define

1 what it means to emit 250 tons per year, and see if we
2 can make that a more realistic analysis by going from
3 the 24/7, 365-day-a-year hypothesis to figuring out how
4 much this source is actually likely to emit, and you
5 could drastically lower the number of sources who would
6 be found to emit 250 tons per year, and that would bring
7 -- it would try to bring the system into line with the
8 expectations that major emitters would be regulated.
9 That -- that's their objective here.

10 JUSTICE ALITO: Are greenhouse gases the
11 only air pollutant for which EPA has the authority to
12 change the statutory thresholds?

13 GENERAL VERRILLI: Well, I'd like to make a
14 point, if I could, about that. The real problem here is
15 CO2. Actually, of the other -- of the six greenhouse
16 gases, the other five you could use the statutory
17 thresholds on without difficulty. It's the CO2 alone
18 really that causes a difficulty.

19 JUSTICE ALITO: But could it do -- could it
20 do this for another pollutant, something other than any
21 of the greenhouse gases?

22 GENERAL VERRILLI: Well, I think, in
23 fairness, what EPA is saying here is that we've got an
24 obligation under the statute to regulate. We've got an
25 obligation to require a permit when there's more than

1 250 tons per year, and we've got an obligation to get
2 the permits out within a year. That's also a statutory
3 requirement. And that just given the reality of the CO2
4 emission, something's got to give. So I don't think
5 it's that they're asserting authority to rewrite the
6 statutory thresholds. They're dealing with a practical
7 problem that's arisen under the immediate circumstances.

8 JUSTICE GINSBURG: One of the things that
9 EPA said in -- in the explanation of this rule is that
10 EPA could say that PSD or Title V applies only to
11 certain GHG sources -- it's been suggested that that
12 source would be carbon dioxide -- applies only to
13 certain GHG sources and does not apply to the remaining
14 GHG sources. But there didn't seem to be any follow-up
15 on that idea. Well, the way to cure it is carbon
16 dioxide doesn't work, take it out.

17 GENERAL VERRILLI: But I think the reason,
18 Justice Ginsburg, is because that is not going to
19 make -- the carbon dioxide is also a huge part of the
20 problem, and so you're really not going to be getting to
21 the heart of the problem. And there really is an
22 urgency here, you know, that's part of what's driving
23 EPA in this situation, of course, is understanding that
24 this is an urgent environmental problem. It's the -- it
25 is the gravest environmental problem that we face now as

1 far as EPA and EPA's judgment, and it is one that gets
2 worse with the passage of time. The effects are
3 cumulative and they're delayed, and so every year we
4 wait, we make the hole deeper and we create an even
5 greater threat to future generations. And that really
6 goes to --

7 CHIEF JUSTICE ROBERTS: I'm sorry. I didn't
8 get an answer to -- hear an answer to Justice Alito's
9 question and I think it's an important one. There are
10 currently criteria pollutants under the -- under the
11 Act. Let's assume you find out that there's a
12 particular substance that does cause harm to ambient air
13 quality that is not already covered, and you publish a
14 NAAQ for that, can you decide that 100 and 250, you want
15 to regulate at a different threshold, just like you have
16 here. I mean, is this a particular assertion of
17 authority only with respect to greenhouse gases or does
18 it cover any pollutant under the Act?

19 GENERAL VERRILLI: Well, if you're -- if
20 you're going to use the NAAQS approach and designate it
21 as a NAAQ, as a NAAQS pollutant, then you would be under
22 the rules of NAAQS pollutant and -- pollutants, and that
23 would include this standard. But this is --

24 CHIEF JUSTICE ROBERTS: Can you publish a
25 NAAQ for greenhouse gases?

1 GENERAL VERRILLI: I think it would be
2 within EPA's authority to do so, but there are really
3 significant problems with trying to regulate that way,
4 and that's why -- but -- and -- but it's important to
5 understand, Mr. Chief Justice, that the PSD program
6 applies to more than just NAAQS pollutants. It's --
7 it's any pollutant subject to regulation under the Act.

8 CHIEF JUSTICE ROBERTS: Okay. Let's pick --
9 there is a pollutant that isn't currently regulated, and
10 science advances to the point where you think it should
11 be regulated. Can you change the 100 and 250 thresholds
12 for that new covered pollutant?

13 GENERAL VERRILLI: I guess what I would say
14 about that is that if EPA found itself in exactly the
15 same circumstances it finds itself in with respect to
16 greenhouse gases, where it's -- it feels like the
17 statutory definition compels it to regulate, it kicks in
18 at 250, and you've got to issue a permit in a year, that
19 they could make a judgment comparable to the one they
20 made here. But it's -- that would require that
21 confluence of circumstances to arise.

22 JUSTICE BREYER: But why? Why does it have
23 to do that? Statutes all the time have implicit
24 exceptions, and not every statute has such exceptions
25 written in words into it. I mean -- you know, it's a

1 classic example, one after another. A statute that
2 requires animals to pay 50 percent on the train does not
3 apply to snails. Okay. I mean, that's the most common
4 thing in law.

5 So what's the big problem here that
6 everybody seems to have, except me, just about. I mean,
7 what's the big problem with writing an implicit
8 exception so that you don't regulate tiny little things
9 which no one normally wants to have regulated?

10 GENERAL VERRILLI: Well, if the Court were
11 to do that, that would certainly justify the
12 EPA's judgement --

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

18 GENERAL VERRILLI: Well, EPA has committed
19 itself in this -- in the regulations, in the rulemaking
20 proceedings, to try to bring the 250 tons per year into
21 alignment with the expectation that only large sources
22 will be regulated. That's what EPA is committed to.
23 It's --

24 JUSTICE SCALIA: General Verrilli, you know,
25 I don't have as expansive a notion of reading exceptions

1 into a statute that are not there as Justice Breyer
2 does. But assuming, just assuming that you can -- you
3 can read exceptions, that isn't the issue here. The
4 issue is whether you can read in exceptions
5 unnecessarily when the absurdity in question doesn't
6 flow inevitably from the statute, when the statute can
7 be interpreted another way that would not produce the
8 absurdity.

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

20 It seems to me, of course, you would have to
21 adopt the interpretation that didn't include display
22 windows. And that's what is going on here. There's --
23 there's -- yes, there's absurdity but the issue is how
24 is that absurdity to be taken account of? By simply
25 letting EPA rewrite the very clear numbers in the

1 statute, or else by adopting a permissible
2 interpretation of the statute that does not lead to that
3 absurdity. And I think that's quite a different
4 question from -- from what we've been discussing.

5 GENERAL VERRILLI: Two points about that, if
6 I could. First, that goes to the question of what
7 triggers the permit application. It's only the
8 expansion of the number of permit applicants that even
9 raises this question of the so-called absurdity. It
10 doesn't go to the -- to the argument -- the Petitioners
11 are making a far more substantial argument, that EPA
12 lacks any authority to consider greenhouse gas emission
13 under the BACT provision and other provisions, even for
14 sources that have a permit for their emissions of
15 non-greenhouse gases.

16 So it only goes to the question of the scope
17 of the triggering provision, not to EPA's authority to
18 use PSD to regulate greenhouse gases for entities that
19 are already subject to the permit for other reasons.

20 Now, with respect to the trigger, what I
21 would say about that, Justice Scalia, is that the
22 statutory language is "any air pollutant." Reading
23 Massachusetts against EPA, the EPA came to the
24 conclusion that that language necessarily encompasses
25 greenhouse gas emissions. That conclusion is most

1 consistent with the EPA's statutory obligations here,
2 because if the choice -- and you can say the choice is
3 between doing something sensible and absurd results.

4 But really, the choice is between throwing
5 up your hands with respect to what EPA considers to be
6 the most serious air pollution problem we have or trying
7 to deal with the implementation problem that exists with
8 respect to the --

9 JUSTICE KAGAN: And --

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

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

23 GENERAL VERRILLI: Yes, that's exactly the
24 argument, and I think that's exactly what EPA did when
25 it read Massachusetts against EPA and its understanding

1 of air pollutant and thought about that in the context
2 of the regulatory goals of this program.

3 JUSTICE SCALIA: In the -- you know, the
4 argument against that is, no, that the statute evidences
5 concern with ambient air quality and requires that to be
6 measured. And the agency acknowledges that you cannot
7 possibly measure the effect on ambient air quality of
8 greenhouse gases.

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

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

22 So either we have to do the one or the
23 other. Either we have to interpret the trigger
24 provision with flexibility so that there are written
25 exceptions -- unwritten exceptions in it, one way or the

1 other, or we have to say you can't do that, and
2 therefore they don't apply to all. Which is worse? Is
3 that a -- have I got it right?

4 GENERAL VERRILLI: I think that states it
5 fairly. I think that states it fairly.

6 JUSTICE SCALIA: I don't think so. I mean,
7 it depends on what you mean by "unthinkable," General
8 Verrilli. Is it --

9 GENERAL VERRILLI: I think that was Justice
10 Breyer who said "unthinkable."

11 (Laughter.)

12 JUSTICE SCALIA: But what is supposed to be
13 unthinkable, that greenhouse gases should not be
14 regulated? Maybe that is unthinkable. But the issue
15 is, is it unthinkable that Congress did not intend to
16 regulate greenhouse gases when it enacted the current
17 provisions of the statute?

18 JUSTICE KAGAN: But isn't that the argument?
19 Justice's Scalia's alternative plausible interpretation
20 of the statutes might have been an alternative plausible
21 interpretation of the statute pre-Massachusetts. But it
22 no longer is; isn't that right?

23 GENERAL VERRILLI: That's certainly true,
24 but it wasn't -- but it -- also, even before
25 Massachusetts, it had -- there's significant problems

1 with it.

2 JUSTICE ALITO: Here we have a statutory
3 provision that has very specific numbers, and the agency
4 has said these numbers are absurd. We're going to
5 multiple them by 400. Now, in the entire history of
6 Federal regulation what is the best example you can give
7 us of an agency's doing something like that, where it
8 has taken a statute with numbers and has crossed them
9 out and written in the numbers that it likes?

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

20 JUSTICE KENNEDY: What was that case?

21 GENERAL VERRILLI: Morton against Ruiz. And
22 -- and if I gave you a hypothetical on that -- if
23 Congress enacted a statute that said that the -- the
24 Customs authorities, border authorities have an
25 obligation to search every cargo container that comes

1 into a port in the United States for radioactive
2 materials, but no container shall be delayed more than 3
3 days, if a -- if an agency were faced with those kinds
4 of obligations, and it didn't have the resources to get
5 every container searched within 3 days, and it said,
6 well, what we're going to do is search the containers
7 that come from places where we think the risk is most
8 likely, I think everyone would think that that's a
9 reasonable interpretation of the -- of the agency's
10 charge under the statute; and that's essentially what
11 the EPA has done here.

12 JUSTICE KENNEDY: Just to be clear, you're
13 not saying -- or are you saying -- that if you're denied
14 the authority you seek here, there can be no significant
15 regulation of greenhouse gases under the Act? You are
16 not saying that?

17 GENERAL VERRILLI: No. I think -- I want to
18 provide some more specificity, though, in my answer, if
19 I could. The Court has held in American Electric Power
20 that the EPA has the authority to prescribe general
21 national standards. Now, with respect to the PSD
22 program, I want to -- I do want to emphasize that there
23 is a distinction between the question of what triggers
24 your obligation to get a PSD permit and whether your
25 emissions of greenhouse gases count as any air pollutant

1 that triggers it, versus a situation in which if you are
2 already subject to a PSD permit because you are
3 emitting, say, a NAAQS pollutant or another one of the
4 regulated pollutants, whether under Section 7574(a)(4),
5 you have to meet the Best Available Control Technology
6 requirement, which is phrased in terms of a requirement
7 for each pollutant subject to regulation under the Act.

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

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

19 For one thing, EPA has been regulating since
20 1988 under the PSD program something called
21 ozone-depleting substances. We talked about this a
22 little bit in our brief. Those are substances that have
23 no local effects; they -- they are substances that are
24 released; they go up into the stratosphere; and they eat
25 up the ozone and that then creates additional

1 ultraviolet rays which cause cancer and cataracts.

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

5 GENERAL VERRILLI: Well, that -- well, if
6 those local effects count, then certainly, greenhouse
7 gases have those kinds of local effects, because they
8 raise the sea levels, which cause flooding in certain
9 places and they cause droughts in other places. And so,
10 to the extent you're talking about local effects, the
11 greenhouse gases really aren't local --

12 JUSTICE SCALIA: Where have the sea levels
13 risen other than Massachusetts?

14 (Laughter.)

15 GENERAL VERRILLI: Well, certainly
16 Massachusetts, but -- but with respect -- but EPA has
17 been regulating ozone-depleting substances since 1988.

18 JUSTICE ALITO: Is it your argument Congress
19 has acquiesced in that?

20 GENERAL VERRILLI: Yes. In fact, we think
21 in 1990, that they ratified it. Because in 1990,
22 Congress undertook a very substantial amendment of the
23 Clean Air Act. One thing they did was specifically
24 address ozone-depleting substances. They created a new
25 Title VI for ozone-depleting substances, so they were

1 clearly focused on it. And they did not pull
2 ozone-depleting substances out of the PSD program at
3 that time. They left them in. And that's significant
4 because they did pull out hazardous air pollution -- air
5 pollutants, which was another new category they created
6 in 1990 for the PSD program.

7 JUSTICE ALITO: I thought there was a very
8 short time lag between EPA's assertion of the authority
9 to regulate the ozone-depleting substances under the PSD
10 program and the enactment of --

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

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

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

21 JUSTICE SOTOMAYOR: What's the -- I know
22 litigants hate this question. If you were going to
23 lose, what's the best way for you to lose?

24 GENERAL VERRILLI: I knew you were going to
25 ask me that question.

1 (Laughter.)

2 GENERAL VERRILLI: So I actually think, you
3 know, there's the Judge Kavanaugh approach, there's the
4 ACC approach, you know, we -- obviously, we're not
5 endorsing this, but --

6 JUSTICE GINSBURG: There's a difference
7 between them.

8 GENERAL VERRILLI: There is a significant
9 difference between them. But --

10 JUSTICE GINSBURG: So which one? Either one
11 of them?

12 GENERAL VERRILLI: Well, I've got another
13 thought on that subject --

14 (Laughter.)

15 GENERAL VERRILLI: -- which is, as I said to
16 Justice Alito earlier, the whole problem in terms of
17 expanding the permitting requirement is CO2. And so
18 that if the Court were to say that "any air pollutant"
19 can't be interpreted in the way that EPA has interpreted
20 it at the trigger level, to mean what we think it says,
21 and what Massachusetts against EPA compelled, but if the
22 Court disagrees with that, it seems to me the -- the
23 answer that is least problematic from EPA's point of
24 view does the -- is the least dissonant and the least --
25 causes the least risk of collateral consequences with

1 respect to established regulatory programs, which go
2 beyond NAAQS pollutants under PSD, would be to say that
3 you can't read any air pollutant to include CO2, because
4 the inclusion of CO2 generates a permitting obligation
5 that is out of accord with what Congress would have
6 expected. I think -- I'm not endorsing that, but I
7 think that's --

8 JUSTICE GINSBURG: Well, what -- what about
9 BACT for CO2, then?

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

18 CHIEF JUSTICE ROBERTS: You've got to
19 follow -- you've got to follow the plain text of the
20 statute there.

21 GENERAL VERRILLI: Well, if the command of
22 the statute is that BACT applies for each pollutant
23 subject to regulation --

24 CHIEF JUSTICE ROBERTS: Yeah, but the plan
25 of the statute is 250 tons per year, too; and you've

1 changed that to 100,000 tons per year.

2 GENERAL VERRILLI: Right, but I think --

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

5 GENERAL VERRILLI: Well, 7475(3)(c) also
6 does say that if -- if EPA does set a greenhouse gas
7 standard for a particular stationary source like power
8 plants, then that becomes a condition of the permit.
9 That's what (c)(3) says. And so between (c)(3) and
10 BACT, greenhouse gas -- assuming that EPA acts under
11 7411, those, it seems to me, have to be in.

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

16 JUSTICE SOTOMAYOR: I just want to be clear.
17 Your reading or -- or your suggested out would mean
18 that -- that only the major facilities as defined now
19 essentially would -- would --

20 GENERAL VERRILLI: If you took CO2 out of
21 the equation, I don't think this -- the expanded scope
22 of the permitting obligation is going to happen, because
23 it's the CO2 emissions that expand the scope. And so
24 that's why -- you know, I'm not endorsing this. I'm
25 just saying --

1 JUSTICE SOTOMAYOR: Well, Justice Breyer
2 said the difference between 83 percent and 86 percent,
3 that 3 percent difference of who you're covering is
4 thousands and thousands of people.

5 GENERAL VERRILLI: That's correct.

6 JUSTICE SOTOMAYOR: Or entities, I should
7 say, not people, of institutions. Is that going to be
8 the same under the reading that you are proposing?

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

21 JUSTICE GINSBURG: Well, wouldn't the proper
22 answer be if we are rejecting your entire position to
23 say there are these other options? We're not going to
24 say take out CO2. We're not going to say adopt the
25 Kavanaugh approach. We're going to say those are

1 choices for EPA to make.

2 GENERAL VERRILLI: Yes, certainly that's
3 right. Certainly, that's right. But I think the -- the
4 argument that, as I -- as I read Judge Kavanaugh's
5 opinion and as I understood my friend's argument on
6 behalf of the ACC, was that the statute essentially
7 compelled the conclusion that you had to pick one or the
8 other of those alternative readings in order to avoid
9 expanding the permitting obligation.

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

19 JUSTICE KENNEDY: I have to say in reading
20 the brief for the States and reading your brief, I -- I
21 couldn't find a single precedent that strongly supports
22 your position. Brown & Williamson I think is
23 distinguishable for the reasons set forth in the reply
24 brief. And what are the cases you want me to cite if I
25 write the opinion to sustain your position?

1 GENERAL VERRILLI: So at the -- at the --
2 sustaining the argument that the trigger applies here, I
3 do think there aren't -- there aren't a lot of cases.
4 You're right. This is not a -- a situation that arises
5 very often. I think Morton against Ruiz comes the
6 closest.

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

9 GENERAL VERRILLI: No, it's not, Mr. Chief
10 Justice. That's true. It was cited and relied upon by
11 the EPA in the rulemaking proceedings and rulemaking
12 opinions.

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

16 JUSTICE ALITO: General, I don't want to
17 interrupt your summation, but on the -- let me just ask
18 this quick question. On the issue of what happens with
19 a facility that is subject to the PSD program because of
20 the emission of other pollutants, the Petitioners argue
21 that the permitting process would be entirely different
22 for greenhouse gases because it would make no sense to
23 require monitoring of local air conditions and -- air
24 conditions. It would make no sense to try to assess the
25 effect of the emission of the greenhouse gases on the

1 area in the region. Could you just give a quick
2 response to that?

3 GENERAL VERRILLI: You know, I'm glad you
4 raised that, Justice Alito. That's actually quite
5 important. That's just not right. I mean, if you think
6 about it in multiple ways, there are multiple pollutants
7 that are currently regulated under the PSD program.
8 Some of them have National Ambient Air Quality
9 Standards, and the local testing makes sense for those.
10 Others don't have National Air Quality -- Ambient Air
11 Quality Standards, like sulfuric acid mists, for
12 example, and others. There aren't standards for those.

13 And the way EPA has handled that is they
14 look at the regulations. The regulation says in terms
15 of the monitoring that the statute requires, there's a
16 specific exemption for substances that are otherwise
17 regulated but for which there is no NAAQS or related
18 standard. So they're just exempt from the monitoring
19 requirement.

20 There's also an analysis requirement. And
21 what EPA has said and what the States do in their
22 permitting processes with respect to the analysis
23 requirement for the non-NAAQS substances, for example,
24 sulfuric acid mists, is to apply a very simple idea.
25 You're not trying in that situation to make sure that

1 the particular emissions aren't having -- are consistent
2 with the overall ambient air quality level. It's a very
3 simple calculus. More is worse; less is better.

4 And so with respect to things like sulfuric
5 acid mist, with respect to things like ozone-depleting
6 substances, that is how it has always worked at the
7 State level under the PSD program. You just -- you look
8 at what the BACT emissions levels are. You try to get
9 them down.

10 And so you're not treating greenhouse gases
11 any differently than sulfuric acid mist or
12 ozone-depleting substances or the others that don't have
13 those requirements.

14 And then in terms of localized effects
15 versus wider effects, I mean, I would just remind the
16 Court about the EMC-Homer City case from just a few
17 months ago, it's not at all unusual that the EPA would
18 be regulating emissions in one place because they --
19 they impose effects hundreds or even thousands of miles
20 away.

21 The pollutants emitted in Ohio or Kentucky
22 contribute to the air pollution levels in New Haven or
23 Bangor, Maine. That's what that case was all about.
24 And so -- and you regulate those pollutants also through
25 the PSD program. And so you don't -- you aren't in that

1 situation looking just to see what happens in the local
2 area. It's just never been the nature of this program.
3 It's not -- it just doesn't work that way.

4 And if I could just remind the Court, in
5 conclusion, why EPA did what it did, it is because this
6 is an urgent problem. Every year that passes, this
7 problem gets worse, and the threat to future generations
8 get worse. And I think, faced with the obligations that
9 EPA had, it made the most reasonable choice available to
10 it. Thank you.

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

13 And one thing --

14 GENERAL VERRILLI: You should have told me
15 that before my summation.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: You had already
18 gotten going, I didn't want to disturb -- you don't
19 think that greenhouse gases should be regulated at the
20 250-tons-per-year level, right? You said Congress did
21 not intend that, and it would be absurd.

22 GENERAL VERRILLI: Yes. Certainly --

23 CHIEF JUSTICE ROBERTS: So what level do you
24 think they should be regulated at? In other words, what
25 intelligible principle are you taking from the statute

1 to say we're going to -- we're at 100 now. We're going
2 to aim for 50 or -- in other words, if you had all the
3 resources you need, what level would you pick as the
4 proper one --

5 GENERAL VERRILLI: Well, I think --

6 CHIEF JUSTICE ROBERTS: -- other than --
7 since it's not 250?

8 GENERAL VERRILLI: You would want to look at
9 the definition of what it means to emit 250 tons per
10 year, and then you'd want to think about the underlying
11 notion that what Congress is trying to do is to impose
12 these obligations on facilities that are capable of
13 responding to them, that are going to tend to be
14 facilities that are major in quality. And then those
15 are the things that are going to guide you in trying to
16 figure out what the number is. And I think that is what
17 EPA is trying to do.

18 JUSTICE KAGAN: Could I make sure I
19 understand that? Would you pick the number that leads
20 to the same class of emitters? Is that the number you
21 would pick?

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

24 JUSTICE KAGAN: As in the more typical
25 emissions context, right? So 100 and 250 --

1 GENERAL VERRILLI: It might -- I don't think
2 it would --

3 JUSTICE KAGAN: -- captures a certain set of
4 emitters. Are you essentially looking for the number
5 that captures the same class of emitters?

6 GENERAL VERRILLI: I think -- I don't know
7 that it will be the same, but I think it'll be -- but I
8 think the -- the class will be a lot smaller than the
9 class under EPA's current understanding of what it means
10 to emit 250 tons per year.

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

13 GENERAL VERRILLI: Yeah, they tried to
14 explain that in -- in one of the rulemaking orders, and
15 I think what they did was to try to figure out the right
16 balance point where they were accomplishing very
17 significant emissions limitations while not sweeping in
18 sources that were -- these very large number of small
19 sources that were only making the incremental -- an
20 incremental difference.

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

24 JUSTICE BREYER: Why -- two things. One is,
25 you haven't said anything about the Title V problem,

1 which they said was at 6.1 million persons or
2 individuals or, you know, businesses coming into it. So
3 how do you get them out of that one?

4 GENERAL VERRILLI: Well, I think the
5 streamlining. Same idea, I mean --

6 JUSTICE BREYER: It's the same basic point.
7 Okay. Why -- and there would be a good reason for this,
8 but the bell that it rang is that agencies have
9 tremendous authority about how they distribute their
10 enforcement resources. They don't have to enforce
11 everything against everything. And that is a basic
12 principle. They have to put their money where it will
13 do the most good. And so why wasn't that -- no one's
14 really argued it --

15 GENERAL VERRILLI: Well, I --

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

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

23 JUSTICE BREYER: Yes.

24 GENERAL VERRILLI: And so, I think that's
25 the reason why, because it's subject to a citizen suit,

1 whether we exercise our --

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

5 GENERAL VERRILLI: Right.

6 JUSTICE BREYER: I see.

7 GENERAL VERRILLI: That's the problem with
8 that. If there are no further questions, thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, General.
10 Mr. Keisler, 5 minutes.

11 REBUTTAL ARGUMENT OF PETER KEISLER

12 ON BEHALF OF PRIVATE PARTY PETITIONERS

13 MR. KEISLER: Thank you, Mr. Chief Justice.

14 You had asked the Solicitor General what
15 would BACT involve in this kind of situation. And I
16 think Your Honor gave a perhaps absurd hypothetical
17 about light bulbs. Your Honor should know that EPA's
18 instruction to the State and local permitting
19 authorities does address light bulbs in the cafeteria.
20 What it says is that State and local permitting
21 authorities likely -- likely do not need to look at
22 whether more efficient light bulbs should be used in a
23 plant's cafeteria because that would probably be not
24 worth the burden in terms of the payoff.

25 But the fact that they are talking about it

1 at that level of detail just brings into sharp relief
2 that this PSD process when applied to greenhouse gases,
3 which is about energy efficiency, not about adding
4 technology to control the stuff that comes out of smoke
5 stacks, is pervasive in potentially affecting every
6 aspect of an industrial plant's operation and asking the
7 90 State and local permitting authorities to decide what
8 needs to be done. And that's what is so different
9 between this and the NSPS program which functions by
10 setting emissions standards that each plant can then
11 decide how best --

12 JUSTICE SOTOMAYOR: So what do I do with the
13 examples in the brief of the 144 permits that have
14 already been given, people who have managed to come into
15 compliance under BACT?

16 MR. KEISLER: It's certainly not our
17 submission that every single determination by every one
18 of these authorities is going to be unreasonable or
19 outrageous or is going to reach into the cafeterias.
20 But it is the scope of this is so different in nature
21 and kind than the NSPS program, which would set
22 efficient standards that people would be able to meet.

23 And the second point I would like to make,
24 Your Honor, is there is a selectivity about what the
25 agency considers ambiguous and unambiguous. It

1 unambiguously is required to apply Massachusetts'
2 definition of "pollutant," but "any air pollutant" is
3 ambiguous enough to accommodate any regulated air
4 pollutant.

5 But 100 and 250 tons per year, that's really
6 ambiguous because it can mean 100,000. And I mention
7 this because the selectiveness with which EPA has turned
8 the ambiguity on and off, so that in combination it
9 maximizes the agency's discretion shows that when we
10 talk about what is -- what does the least violence to
11 the statute, we have to think about it, among other
12 things, along the parameter of separation of powers and
13 whether the way in which the agency has perceived it
14 here has arrogated an exceptional and troubling degree
15 of discretion to design its own climate change program.

16 And finally, with respect to the different
17 definitions of pollutant, we have certainly proceeded
18 here as if we are defining that particular word in the
19 statute, but here is another way to think about the
20 interpretative exercise here and that is Brown &
21 Williamson. Brown & Williamson started with the
22 assumption that the definitions in the statute of drug
23 and device encompassed nicotine and cigarettes, but then
24 it went on to say that giving the FDA jurisdiction under
25 those programs over tobacco would be inconsistent with

1 the regulatory structure that Congress enacted.

2 And when it did that, it didn't go back to
3 those definitions and say, we have to now figure out
4 which word in that definition means something different
5 than what we originally assumed. It said that the
6 interpretation as a whole conflicted with the statute as
7 a whole and that was sufficient. We think the same is
8 true here.

9 If the Court has no further questions, I
10 thank the Court.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel,
12 counsel. The case is submitted.

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

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