No. 12-1272

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND AMERICAN FARM BUREAU FEDERATION

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REPLY BRIEF

This case presents questions of fundamental doctrinal importance for the administrative state and enormous practical importance for the economy. In the rulemakings below, EPA asserted a new regulatory jurisdiction over essentially every energy-consuming building and activity in the nation, all the way down to houses of worship, neighborhood bakeries, and private homes. Never before has an agency erected such a "burdensome, costly, far-reaching program," with such "massive real-world consequences." App. 133a (Kavanaugh, J., dissenting). What is more, EPA promulgated its far-reaching program based on a claimed authority to discard thresholds codified by statute and replace them with "regulatory" thresholds of the agency's choosing.

Rather than disputing this case's importance, the government attempts to defeat certiorari by arguing the merits. It contends above all that this case is controlled by *Massachusetts v. EPA*, 549 U.S. 497 (2007). But that simply is not true. This Court was plain in *Massachusetts* that EPA was not required to regulate GHGs, so long as it provided "reasons * * * ground[ed] * * * in the statute" for declining to do so. *Id.* at 535. In any event, surely this Court and not the D.C. Circuit is best positioned to determine the meaning and limits of its own decisions.

The government also attempts to pitch this case as a challenge to EPA's handling of the scientific record. But that too is unavailing. Petitioners' quarrel is not with EPA's scientific expertise or empirical assertions—it is with EPA's ill-founded statutory constructions and assumption of

unprecedented authority over the American public and economy.

Absent intervention by this Court, hundreds of billions and possibly trillions will be drained from the American economy based on novel legal theories marking "a significant shift of power from the Legislative Branch to the Executive Branch." App. 152a-153a (Kavanaugh, J., dissenting). Such extraordinary doctrinal innovations with such vast real-world consequences should not be given a "greenlight," *id.*, until this Court has an opportunity to fully consider the merits of the questions presented.

I. This Case Presents Urgent Questions of Exceptional Practical and Doctrinal Importance.

EPA's rulemakings below generated what quite likely are the costliest regulations ever promulgated based on EPA's belief that it can take a red pencil to plain statutory text. Every judge below recognized that this case is exceptionally important.

Nine petitions brought on behalf of over 80 petitioners have sought review of the decision below; ten amicus briefs have been filed in support; and three respondents have asked the Court to intervene. All of these petitions and supporting briefs emphasize the unprecedented scope and burdens of EPA's rulemakings, and a majority emphasize EPA's unprecedented assertion of authority to re-write statutory thresholds. Although the petitioners' perspectives vary, they represent a consensus in favor of review shared by 19 states, industry associations representing almost every sector of the economy, and numerous public policy groups.

Review now is especially needed in light of the expanding repercussions of the decision below. *See, e.g.*, *Texas* v. *EPA*, __ F.3d __, 2013 WL 3836226 (D.C. Cir. July 26, 2013) (requiring Texas and Wyoming to immediately adhere to EPA's GHG rules). For instance, on July 12, 2013, the D.C. Circuit held that EPA may not defer regulations governing "biogenic carbon dioxide" emissions—including, remarkably, "emissions" produced from the decomposition of dead trees—even if EPA were to conclude that such a rule could increase the amount of carbon dioxide in the atmosphere. *See Ctr. for Biological Diversity* v. *EPA*, __ F.3d __, 2013 WL 3481511 (D.C. Cir. July 12, 2013). Judge Kavanaugh reluctantly concurred on grounds that the circuit precedent established in the case below compels this counterintuitive result. Judge Kavanaugh noted that because EPA construed the CAA in an "admittedly absurd" way, the nation is left with "a statute that is a far cry from what Congress intended or enacted." *Id.* at *11 (Kavanaugh, J., concurring). He lamented that EPA is now required to "mak[e] it up as it goes along" and "[t]hat is not how the administrative process is supposed to work." *Id.*

If this Court is ever to have a timely, effective say in the foundational questions this petition presents—for the Clean Air Act, for administrative law, for the nation's economy—now is the time to take up those questions.

II. The Government's Merits Arguments Miss the Mark.

The government's opposition does not dispute the massive real-world consequences of EPA's regulatory program, or the fact that EPA took the extraordinary

leap of unilaterally rewriting the statute's emissions thresholds for stationary pollution sources. App. 137a. Rather than responding to the core reasons for granting review, the government argues the merits. According to the government, this case "represents an unexceptional application of settled" law. U.S.Opp. 18. Nothing could be further from the truth.

1. As the petition explains, EPA chose in the rulemakings below to discard its own proposal to "conduct a single rulemaking comprehensively addressing the propriety of regulating GHG" and to proceed instead "in piecemeal fashion." Pet. 8. EPA thus set the stage for its fundamental mistake of failing to consider section 202(a)(1) in the context of the Clean Air Act as a whole. *See* Pet. 20-21. This interpretive failure not only runs afoul of basic principles of statutory construction, it led to EPA rewriting plain statutory text and thus posing the profound separation of powers questions spotlighted in the dissents below. *See, e.g.*, App. 131a (Brown, J., dissenting).

Rarely if ever has the Court confronted so conspicuous a departure from its centuries-old jurisprudence admonishing that proper statutory construction involves reading language in context and considering statutes as a whole. It is a basic interpretive principle that one must "read[] the *whole* statutory text, considering the purpose and context of the statute." *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) (emphasis added). After all, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Savings Ass'n* v. *Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988); *see also United States* v. *Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850) ("In

expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). Accordingly, when an agency acts contrary to this canon, its decision fails at *Chevron* step one and is entitled to no deference. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *MCI Telecomms. Corp.* v. *Am. Tel. & Telegraph, Co.*, 512 U.S. 218, 231 (1994); *see generally Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 n.9 (1984) ("traditional tools of statutory construction" employed at step one).

2. The government contends that EPA's rulemaking decisions were "compelled by the statutory text and by this Court's decision in *Massachusetts*." U.S.Opp. 18. According to the government, there was after *Massachusetts* little interpretive work left for EPA; instead, all EPA needed to do was "form a scientific judgment based on the available evidence" about greenhouse gases. *Id.* at 19.

In fact, there was plenty of legal work left for the agency. Section 202(a)(1) authorizes EPA to establish "standards applicable to the emission of any air pollutant" from motor vehicles only upon finding that the pollutant can "reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). What causation standard this statutory language establishes is a pure legal question. *See, e.g.*, *Lombardi* v. *Sec'y of Health & Human Servs.*, 656 F.3d 1343, 1350 (Fed. Cir. 2011) ("the appropriate standard of causation is a legal determination"); *Otal Invs. Ltd.* v. *M.V. Clary*, 494 F.3d 40, 59 (2d Cir. 2007) (same); *Head* v. *Glacier Nw. Inc.*, 413 F.3d 1053, 1063 (9th Cir. 2005) (same).

This legal question was left unaddressed and unresolved both in the 2003 EPA final rule reviewed in *Massachusetts* and in *Massachusetts* itself. Indeed, in the *Massachusetts* briefing the Commonwealth assured the Court that a decision in its favor would not foreordain the outcome on remand. *See, e.g.*, Br. for Petitioner, at 3, 2006 WL 2563378 ("Petitioners ask this Court to correct EPA's legal errors and to remand the case to the agency with directions to apply the correct legal standard to this matter; that is all. A judgment in favor of petitioners will not mandate regulation of air pollutants associated with climate change."). The *Massachusetts* Court thus had reason to expect that its holding that GHGs are "air pollutants" under the Act would not produce "extreme measures." 549 U.S. at 531.

Unfortunately, the Court's expectation that EPA would refrain from "extreme measures" on remand was not fulfilled. Quite remarkably, EPA side-stepped the causation question and then embraced a construction that produced absurd and far-reaching results. Had EPA read the statute with more care and sought to avoid absurd results, it would have found that the agency's reliance on non-exposure-related health effects distant in time and proximity from the relevant emissions cannot be squared with the statutory text. It would also have found that its interpretation of the Act is at odds with the statute's structure and consistent application in past EPA rulemakings. *See* Pet. 21-28.

Nor is *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527 (2011), contrary to petitioners' interpretation. Petitioners do not contest that greenhouse gases fall within section 302(g)'s broad definition of "air pollutant" and so can

potentially be regulated under the Act. *American Electric Power* thus correctly held that federal common law claims are displaced. *See id.* at 2537. What petitioners do vigorously contest is whether EPA has lawfully interpreted the applicable causation standard under a single Clean Air Act provision; namely, section 202(a)(1). That question was not at issue in *American Electric Power*.

The opposition contends in response that "EPA's interpretation of the undefined term 'reasonably * * * anticipated to endanger,' is controlling unless it is contrary to Congress's clearly expressed intent or otherwise unreasonable." U.S.Opp. 23. But EPA's rulemakings below never articulated an affirmative standard of causation in their discussion of "reasonably * * * anticipated to endanger." Despite the petition's heavy emphasis on this issue, *see* Pet. 21-28, the opposition fails to point out any such interpretation of the Act by the agency. *See* U.S.Opp. 23 (citing final rule sections that do not articulate an affirmative causation standard). Undoubtedly, this Court often affords deference to agency interpretations of statutes. But deference is not appropriate where, as here, "the agency itself" has failed to articulate a "position on the question." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

3. The opposition next suggests that this Court's *Massachusetts* remand "would have been a pointless exercise if the causal links between greenhouse gas emissions, climate change, and harm to the public health or welfare were as a matter of law too indirect to support and endangerment finding." U.S.Opp. 23. But surely there is nothing "pointless" in asking lower courts or administrative agencies (here, EPA)

to make new determinations in remand proceedings. Under *Massachusetts*, EPA was obliged to interpret, for the first time in the context of GHG emissions, "reasonably * * * anticipated to endanger"; and then to apply that interpretation to "the causal links between greenhouse gas emissions, climate change, and harm to the public health or welfare"; and then to explain its ultimate decision to regulate or not based on "reasons grounded in the statute." 549 U.S. at 535. Nonetheless, EPA's remand inexplicably failed to address any of these critical questions.

4. The opposition suggests, lastly and in a footnote, its puzzlement with the petition's emphasis on discrepancies between the statutory definition of welfare effects and EPA's analysis of harms to public welfare. *See* U.S.Opp. 23 n.9. But there is nothing puzzling or opaque in this argument. As the petition explains, rather than pursuing an inquiry "framed by the CAA, EPA chose to organize its endangerment analysis for welfare around an invented six-part scheme lacking a discernible relation to principles drawn from the Act." Pet. 26.

In short, petitioners' quarrel is not with EPA's scientific expertise or fact-finding, much less with *Massachusetts*. If *Massachusetts* makes anything clear it is that EPA should have hewed closely to the text of the Clean Air Act instead of veering from the statute in a quest for a preferred policy outcome. Even apart from the enormous practical importance of the rulemakings below, EPA's omission of an attentive reading of the Act, coupled with its embrace of a construction producing absurd results, warrants the Court's review.

III. This Petition Offers An Excellent Vehicle For Resolving The Questions Presented.

This petition is brought by our nation's largest business association, by its largest organization of farmers, and by the state (Alaska) that contains the nation's largest oil field and is most acutely attuned to potential climate change impacts on arctic regions. The petition has drawn specific support from a diverse coalition of *amici*, including prominent professors of administrative law and Nobel Prize-winning economists. Although all of the petitions challenging EPA's rulemakings make important points, this one uniquely focuses on key arguments for why EPA's Clean Air Act interpretation is flawed; namely, that EPA improperly interpreted the statute's "reasonably anticipated to endanger" language and that EPA and the D.C. Circuit misunderstood and misapplied *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), and *FDA* v. *Brown & Williamson*, 529 U.S. 120 (2000). Moreover, this petition focuses on the Endangerment Rule and not solely on EPA's downstream rulemakings. This petition is accordingly one of a handful that does not necessarily require the Court to grapple with standing issues.

1. In an effort to limit this Court's ability to reach the central interpretive questions presented, the environmental respondents (but not the government) contend that petitioners "forfeited" arguments going to the meaning of "reasonably * * * anticipated to endanger." E.R.Opp. 15-16. In fact, petitioners raised the central question of what "reasonably * * * anticipated to endanger" means, both before the agency and in the D.C. Circuit, expressly claiming that EPA's rules must be vacated

for failing to satisfy the statute's requirement that health effects be directly and distinctly tied to the motor vehicle emissions to be regulated. *See* Final Joint Opening Br. at 57-58 (09-1322, D.C. Cir. Nov. 14, 2011) (explaining that the "health-related findings in the Endangerment Rule, addressing asserted future public health risks from climate change, run afoul of the Act" because endangerment to the public health requires "direct" effects); Final Joint Reply Brief at 32 (09-1322, D.C. Cir. Nov. 14, 2011) (rebutting EPA's argument that "climate change will create future public health effects and that such effects need not be direct to qualify"); App. 322a ("Several commenters argue that EPA may only consider the health effects from direct exposure to pollutants in determining whether a pollutant endangers public health.") These arguments are more than sufficient to preserve petitioners' right to advance the arguments and authorities adduced in the petition. *See, e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) ("Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'") (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)).

Similarly, the environmental respondents mischaracterize our argument regarding "reasonably anticipated" endangerment of public health. They suggest, incorrectly, that we contend "only 'inhalational' effects," and not other types of emissions exposures set forth in the petition, can give rise to endangerment of public health. *Compare* E.R.Opp. 16 ("only 'inhalational' effects") *with* Pet. 24 (referring to "inhalational *or other exposures* to a

pollutant") (emphasis added). In fact, our argument holds that motor vehicle "emissions" can be "reasonably anticipated" to "endanger public health" under section 202(a)(1) in those instances where people's exposures to the emissions can be "reasonably anticipated" to cause health problems. The petition thus emphasizes that "EPA could lawfully find endangerment of health" by identifying "exposure-related effects of pollutants" involving not just "inhalation" but also "skin exposures, ingestion, and the like." Pet. 25.

2. This petition affords an exceptionally good vehicle for review. While focusing on EPA's failure to articulate a standard of causation and establish that the standard was satisfied, it also argues that the term "air pollutant" need not have the same meaning across the Clean Air Act, *see* Pet. 28-29, and challenges EPA's decision to ignore *Brown & Williamson*'s admonition that in an "'extraordinary case'" an agency must "'hesitate before concluding that Congress'" intended an "'implicit delegation'" of a novel and potent regulatory authority. Pet. 30 (quoting 529 U.S. at 143, 159). When EPA realized that its regulations created absurd results imposing unprecedented impacts on the United States economy, it should have stayed its hand, as *Brown & Williamson* requires.

3. Finally, as noted above, nothing in *Massachusetts* compelled EPA's decision on remand. If, however, *Massachusetts* does indeed require a nullification of statutory text to avoid absurd results, then it is the offending portions of *Massachusetts*, not the plain terms of the Clean Air Act, that should be revisited. *See* Pet. 30-31.

* * *

Agencies' authority to interpret and then apply statutes entrusted to their care has always been understood as limited by plain statutory text, read in light of applicable construction canons. In the endangerment rulemaking below and with the D.C. Circuit's blessing, however, EPA effectively eviscerated this crucial limitation. EPA declined to read section 202(a)(1)'s "reasonably * * * anticipated to endanger" language in light of its plain meaning and past agency practice. It declined to read the Clean Air Act as a whole. It declined to revisit its preferred statutory construction on finding that it produced what the agency itself recognized were absurd results. Ultimately, EPA discarded and rewrote plain statutory text. Contrary to the government's assurances, practically nothing is "unexceptional" about these far-reaching EPA rulemakings. If the Court is to have a say in the foundational separation-of-powers issues and pivotal interpretive questions posed by the rulemakings, review in this case should be granted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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