COMPLEX ENVIRONMENTAL CASES BEFORE THE SUPREME COURT: JUST HOW DO YOU EXPLAIN THE "SPAGHETTI-LIKE MATRIX"?

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Abstract:

Like a baseball double-header, this Term's Supreme Court docket contains two separate Clean Air Act ("Act") cases with dense details sure to challenge even the Justices. Both cases have certain common features: Both result from petitions for certiorari from the D.C. Circuit, both involve principally statutory interpretation questions arising under the Act, and both involve challenges to EPA regulation mounted both by states, industry, and other parties. Although grounded in statutory interpretation questions, both questions raise major questions of federalism, specifically the role of the states in implementing portions of the Act. In one critical fashion, both cases challenge the best of advocates to explain and articulate to the High Court why they should prevail amidst the complexity of both the law and its implementation in a specific instance. This paper examines the background of the two cases, the decisions in the lower court, and briefly addresses some of the key points in the merits briefs. It is intended as a background for the reader to better understand the plenary panel discussion, which will examine how skilled advocates use written briefs and verbal prestigation to explain in clear terms the nearly incomprehensible density that is the Clean Air Act.

I. EPA'S TRANSPORT RULE—A "COMPLEXITY" EXCEPTION TO STATUTORY INTERPRETATION? *EPA v. EME Homer City Generation, LP*, Nos. 12-1182 and 12-118 (Argued Dec. 10, 2013)

A. *The Statutory Framework and EPA's Transport Rule*

The first case involves the Court's review of a series of successful challenges in the D.C. Circuit by both industry and various states to an EPA rule sometimes known as the "Transport Rule," and also known by its ghostly acronym, the Cross-State Air Pollution Regulation or CSAPR. Under the Clean Air Act, EPA had the power to regulate air pollution in an upwind state that "significantly contributed" to pollution in a downwind state. But, EPA's efforts to issue implementing regulations to effectuate the statutory provision proved challenging at best and had resulted in two prior setbacks before the D.C. Circuit. *See* R. Lazarus, *Long Struggle for An Interstate Rule*, The Environmental Forum (ELI Nov/Dec 2012) (describing background of the "good neighbor" statutory provision and prior litigation in the D.C. Circuit).

EPA issued its third attempt, the Transport Rule in August of 2011. The rule imposed responsibilities on 28 upwind states to reduce emissions that impacted downwind states, principally by regulating sulfur dioxide and nitrogen oxides, two compounds regulated as chemicals under the "National Ambient Air Quality Standards" (NAAQS) program.

If a state fails to attain all NAAQS standards, then it is deemed in "non-attainment" and it falls to the specific state to issue a "State Implementation Plan" or SIP. If a state fails to issue a SIP within three years (or issues one deemed inadequate), then EPA has discretion to issue a Federal Implementation Plan (FIP) to implement a reduction of NAAQS within that state. One requirement for a SIP is that the state plan contain adequate provision to prevent "any source or other type of emissions activity within the State" emission which will "contribute significantly to nonattainment . . . by *any other State* with respect to any [achievement of a NAAQS]. This

provision, colloquially termed the "good neighbor provision" is found in one of the many subparts of subsections of the Act, 42 U.S.C. §7410(a)(2)(D)(i)(1).

1. A "Spaghetti-Like Matrix" or the "Red Pill"?

In a metaphor that captured the imagination of the Chief Justice, the authors of the Solicitor General's main brief described the complexity of regulating upwind and downwind state contributors whose emissions sometimes interact in both upwind and downwind areas as a "dense, spaghetti-like matrix of overlapping upwind/downwind linkages among many states." (Brief for the Federal Petitioners in Nos. 12-1182 and 12-1183 at 6; available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-1182-12-1183_pet-federal.authcheckdam.pdf). But, like the Hollywood version of *The Matrix*, EPA's Transport Rule often depends upon the perspective of the person caught up inside the matrix, a matrix which like the movie heavily depends upon computer modeling.

Judge Kavanaugh captured in short English sentences the origins of EPA's rule and its grounding on computer projections. First, EPA sought to determine by use of computerized air modeling what states had indeed "significantly impacted" downwind states. EPA established certain numeric "air quality thresholds" and then utilized computer modeling to show what upwind states exceeded those thresholds set for ozone and for daily and annual levels of "PM 2.5" or fine particulate matter. A number of states exceeded one or more of the numerical thresholds set by EPA, thereby leading the Agency to conclude that those states which exceeded those thresholds needed to reduce their sulphur dioxide and nitrogen oxide emissions.

Then, EPA applied a cost-based standard to calculate how much on a per ton basis an upwind state could reduce its sulphur dioxide (for example) pollution if various stationary facilities in that state were assessed a charge of $500.00 per ton cost. EPA again turned to computer modeling to estimate the downwind air quality effects of imposing different cost-based per ton limits on upwind states.

EPA ended up with a unitary $500/ton standard for ozone-seasonal and annual nitrogen oxide emissions. But, the Agency imposed a two-tier per ton charge for upwind emitters of sulphur dioxides, imposed a $500/ton change for seven states in one group, and imposing a $2,300/ton charge for a second group of 16 upwind states. The latter category of states ("Group I states") were deemed to require more charges in order to reduce more significant upwind impacts on downwind states.

Finally, EPA not only set the standard, but chose to implement it directly by promulgating a series of FIPs. This imposition of direct federal control proved particularly nettlesome to a number of the so-called "red states," who literally saw "red" upon the issuance of EPA's Transport Rule. *See EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 15-18 (D.C. Cir. 2013) (Kavanaugh, J., with whom Griffith, J. joins) ("EME Homer"), *cert. granted sub nom., EPA v. EME Homer City Generation, L.P.*, Nos. 12-1182 and 12-1183.[1]

[1] The 15 states joining in briefing challenging EPA's Transport Rule in the D.C. Circuit are: Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, and Wisconsin. Nine states and the District of Columbia joined a separate brief supporting EPA's rule, including New York, Connecticut, Delaware, the District of Columbia, Illinois, Maryland, Massachusetts, North Carolina, Rhode Island and Vermont.

2. The D.C. Circuit's "Red Lines" that EPA's Transport Rule Exceeded

Shortly after EPA's promulgation of the Transport Rule at least four different groups challenged the rule as violating the statutory "good neighbor" provision. As Judge Kavanaugh described in his majority opinion for a split panel in the D.C. Circuit, "various states, local governments, industry groups and labor organizations" petitioned for review of the Transport Rule. *EME Homer, 69*6 F.3d *supra* at 11. Judge Kavanaugh, joined by Judge Griffith, found that EPA's Transport Rule exceeded its statutory authority under the "good neighbor" statutory provision in several respects.

The majority opinion by Judge Kavanaugh concluded that EPA's Transport Rule exceeded the Agency's statutory authority under the "good neighbor provision" of the Clean Air Act by violating what he termed several statutory "red lines" that cabin EPA's authority. First, the majority found that the text of the "good neighbor provision" required that EPA could only regulate "amounts which will contribute" to a downwind State's nonattainment area. This language, for the majority, required that EPA could not require a state to reduce its emissions below one of the "threshold levels" used to determine whether that state was a "significant contributor" to downwind pollution. Moreover, the majority opinion held that the statutory language precluded EPA from imposing a remedy that could cause a particular state to reduce its pollution by more than its proportional impact on a downwind state's pollution. Thus, there was a "proportionality" problem with EPA's rule. Finally, Judge Kavanaugh described his third "red line": "EPA must also ensure that the combined obligations of the various upwind States. . .do not produce more than necessary "over-control" in the downwind states." *EME Homer*, 696 F.3d at 19-22. That is, EPA could not require the upwind states to do more than the minimum required to allow affected downwind areas to meet the air quality standards.

The majority also faulted the Agency for imposing a FIP, rather than allowing the states to utilize the SIP process to implement their own standards. For the majority, the failure to give the states 'the initial opportunity' to implement the new Transport Rule constituted a "second, entirely independent reason" to reject EPA's regulation. *EME Homer*, 696 F.3d at 28-38.

For the majority in the D.C. Circuit, EPA's Transport Rule had crossed several statutory "red lines" and thus exceeded the Agency's authority to regulate. Judge Rogers dissented from the majority opinion, finding that many of the attacks made on the Transport Rule were barred by jurisdictional limits on collateral attacks as to issues not squarely raised within the rulemaking process and that in any event, EPA's regulation was within the permissible scope of the Clean Air Act. *EME Homer*, 696 F.3d at 38-44 (Rogers, J., dissenting).

B. *The Scope of the Grant of Certiorari*

The United States and another group lead by the American Lung Association petitioned for certiorari, which was granted on three issues:

1. Did the Court of Appeals lack jurisdiction to consider certain issues upon which it granted relief? [*This question echoes much of Judge Rogers' dissent below*];
2. Are the States excused from adopting state plans [SIPs] prohibiting emissions that "contribute significantly" to air pollution problems. . . until after the EPA has adopted a rule quantifying each State's interstate pollution obligations? [*This question goes to the core of the Court of Appeals' "second and independent" basis for striking the Transport Rule, i.e., that EPA immediately issued its own FIP rather than allowing the states more time to consider implementation through SIPs*]; and

3. Whether the EPA permissible interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

These were the three questions presented by the U.S. in its petition for certiorari, and the Court granted certiorari on the questions posed in EPA's case (No. 12-1182) and consolidated it for hearing with the separate petition filed by the American Lung Association (No. 12-1183). *See* T. Lorensen, "Legal Uncertainty continues as Supreme Court takes up invalidation of EPA's Transport Rule", 43 TRENDS 1 (Nov/Dec 2013) (discussing the Court's decision to grant certiorari and the possible implications for the uncertainty surrounding the Transport Rule) *available at*: http://www.americanbar.org/publications/trends/2013-14/november-december-2013/legal_uncertainty_continues_supreme_court_takes_invalidation_epas_transport_rule.html.

C. *The Merits Briefing*[2]

In its brief, the United States emphasized that EPA was "confronted [with] a problem of considerable technical complexity." According to the Solicitor General, EPA met this challenge by its multiple-step approach and computerized modeling to adopt a federal "budget" of permitted emissions for each state. (*Brief for the Federal Petitioners).* The State and local respondents brief focused on the claim that EPA could not "adopt a FIP-before-SIP" approach to regulation under the Act, and that the Court of Appeals had jurisdiction to consider this claim. *Brief for the State and Local Respondents*, Nos. 12-1182 and 12-1183, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-118212-1183_resp_sl.authcheckdam.pdf).

The industry and labor respondents brief, lead by Peter Keisler as counsel of record, emphasized the principal statutory "red lines" constructed by Judge Kavanaugh below, and particularly focused on EPA's switch from its first step involving computerized modeling of various specific air quality impacts to its second step, which focused on "cost" considerations. This switch, according to the industry and labor challengers, caused a disconnect between a particular state's emissions and EPA's imposition of reduced emissions for that state. It also led to a failure of EPA to consider "whether the mission reductions it directed were greater than necessary to achieve attainment."
Brief of Industry and Labor Respondents Nos. 12-1182 and 12-1183 at 7-8, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-1182_resp_il.authcheckdam.pdf.

A variety of amicus briefs were also submitted on all sides of this issue. Perhaps the most intriguing of the amicus briefing comes from the "Atmospheric Scientists and Air Quality Modeling Experts" filed in support of the petitioners (EPA and supporting parties). In their brief, the various scientists argue that although the "red lines" or statutory constraints devised by the majority in the Court of Appeal had a certain "intuitive appeal" that in fact:

[2] It is beyond the scope of this paper to discuss the many intricate arguments of the various briefs filed in this case. Instead, hyperlinks are provided for the main briefs which are contained at the American Bar Association's website for this case, http://www.americanbar.org/publications/preview_home/12-1182--12-1183.html.

> [T]he complexity of interstate air transport makes it difficult (if not impossible) to design a rule that meets these [Court of Appeal] constraints. Furthermore, emissions at the source are not directly proportional to pollutant concentrations downwind, which the lower court did not account for, and even if they were directly proportional, air pollution controls do not allow the precise emissions reductions that would be necessary to achieve the perfect allocation the lower court desires. Most pollution controls are blunt instruments that eliminate pollution in bulk, not scalpels capable of cutting out specific amounts. Power plants, also known as electric generating units (EGUs), cannot easily be controlled for specific amounts of SO_2 or NO_x that EPA or the states determine they can emit.
> *Brief of Amici Curiae Atmospheric Scientists and Air Quality Modeling Experts in Support of Petitioners*, Nos. 12-1182 and 12-1183, at 11-12 *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-1182-12-1183_pet_amcu_asaqme.authcheckdam.pdf).

This particular amicus suggests that given the complexity of regulating interstate air dispersion and of particular pollutants that the D.C. Circuit's "intuitive" approach must be disregarded.

Will the High Court indeed implicitly recognize some type of "complexity" exception to the Court of Appeals' interpretation of the good neighbor statutory provision?

D. *Oral Argument—December 10, 2013*

The Court heard extended oral argument (1 ½ hours) by three advocates: Malcolm Stewart, Deputy Solicitor General for petitioner EPA; Jonathan Mitchell for Texas and other state and local respondents; and Peter Keisler on behalf of industry and labor respondents. The case was submitted at the end of oral argument, and no decision has been announced as of the writing of this article. A copy of the written transcript of the oral argument is available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1182_0pl1.pdf.One commentator's conclusion about the argument was that even the Justices agreed that regulating interstate pollution was a "hard problem." *See* A. Liptak, "Justices Hear Case on Cross-State Air Pollution", THE NEW YORK TIMES (Dec. 10, 2013), available at, http://www.nytimes.com/2013/12/11/us/justices-hear-arguments-on-cross-state-air-pollution-rules.html?_r=0.

Some of the panelists will discuss some of the issues raised in oral argument on these cases held on December 10, 2013 and the skillful battle between two masters of argument before the High Court. *See* R. Lazarus, "Leaders in Clean Air Act Litigation", THE ENVIRONMENTAL FORUM 12 (ELI January 2014) (describing oral argument between two advocates, Deputy Solicitor General Malcolm Stewart for the EPA and Peter Keisler for industry and labor respondents).

II. THE GREENHOUSE GAS CASES: CAN EPA PERMISSIBLY REGULATE UTILITY PLANTS "'BACT' TO THE FUTURE"?

A. The Statutory Framework and EPA's Regulation of Stationary Sources Under the Prevention of Significant Deterioration Program

The Clean Air Act regulates an "air pollutant," which is broadly defined as "any air pollution agent. . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. Section 7602(g). In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that greenhouse gases were covered within this broad definition. After remand, EPA first concluded that greenhouse gas pollutants constituted an "endangerment" to human health and public welfare. It then regulated such gases pursuant to Title II of the Act for mobile sources, specifically new motor vehicles. EPA's regulation for new motor vehicles, however, is not what is currently before the High Court.

Rather, EPA extended its regulation of greenhouse gases by imposing limits on emissions of greenhouse gases from *stationary* sources under Subpart C of the Act, the Prevention of Significant Deterioration (PSD) program contained at 42 U.S.C. Sections 7470-7479. EPA has the power under the PSD program to issue regulations for construction of certain stationary sources of pollution, termed a "major emitting facility," which is generally defined as any power plant or other facility that emits more than 250 tons per year of any "air pollutant." 42 U.S.C. Sections 7475 (permitting requirements for new construction); id. at 7479(1) (defining term "major emitting facility" for which permit requirements apply).

Although the PSD program is placed in a part of the regulations dealing with areas of the country that are in "attainment" with at least one major air quality standard (a NAAQS standard), EPA choose to interpret the term "air pollutant" to apply to *any* pollutant including greenhouse gases that are not regulated under NAAQS.

EPA also determined that the "Best Available Control Technology" program for new construction of major emitting sources was "triggered" because of the statutory provision which requires that any new construction facility: "is subject to the best available control technology for each pollutant *subject to regulation under this chapter* emitted from. . . such facility." 42 U.S.C. Section 7475(a)(4). The Agency reasoned that because greenhouse gases were already "subject to regulation" by virtue of EPA's imposition of the "Tailpipe Rule" applicable to mobile sources, they were therefore within the scope of BACT regulation which applied to stationary sources. *See* J. Freeman, "Symposium on Greenhouse Gases Case: Soft Landings and Strategic Choices" available at www.scotusblog.com/2014/02/symposium-soft-landings-and-strategic-choices (Feb. 5, 2014) (discussing EPA's strategic choice to interpret its regulatory authority to regulate greenhouse gases in the PSD program).

Finally, EPA itself recognized that the statutory provision for regulation above 250 tons for a "major emitter" did not make sense in the context of regulation of greenhouse gases. It therefore issued what it termed the "Tailoring Rule," which limited the scope of regulated entities to those that emitted 100,000 tons of carbon dioxide equivalents, or some three orders of magnitude greater than the 100 or 250 tons per year emission standard provided for in the statutory definition of a major emitting facility. To borrow from a wine metaphor, it was as if EPA had discovered that the old [statutory] decanter lacked a filter for sediments coming from the bottom of the new wines, and added such a [regulatory] filter. For EPA, this was a "phased approach" to regulation that avoided a massive number of new applications under the Act that would overwhelm its permitting division.

For some, EPA's regulatory interpretations were a logical application of new issues (regulation of greenhouse gases) to an old statute. Some reasoned that given congressional lassitude in avoiding any recent amendments to the Act, EPA had little choice but to act. *See* R. Lazarus, "As Congress Stalls, the Courts Step In", ELI The Environmental Forum 12 (ELI May/June 2013)(discussing implications of congressional failure to amend act for the last 23 years). Others argued that although the "Tailoring Rule" was dubiously named, it was the best solution to a problem created by greenhouse gas regulation and one within the Agency's discretion to implement the Act. *See* A. Leiter, "Symposium: The Greenhouse Gas Cases and the Importance of Deference", available at www.scotusblog.com/2014/02/symposium-the greenhouse-gas-cases-and-the-importance-of-deference.

But, for others, this extension of EPA's regulatory grasp to stationary sources was like the Allies disastrous overreach into Europe, a "bridge too far", drawing opposition from many state and industry stakeholders. EPA's decision led to the second consolidated set of cases on the Act to be heard this term, *Utility Air Regulatory Group v. EPA*, Nos. 12-1146, 12-1148, 12-1254, 12-1268, 12-1269, and 12-1272.

B. The D.C. Circuit Affirms EPA and its Tailoring Rule for New Construction

In the D.C. Circuit a number of states and industrial parties launched a three-part challenge: They attacked EPA's endangerment finding as to greenhouse gases; its "Tailpipe Rule" regulating greenhouse gas emissions from mobile sources; and also contested EPA's effort to phase in regulation of stationary source emissions of greenhouse gases through its Timing and Tailoring Rules.

As the D.C. Circuit explained in its *per curiam* opinion, EPA actually issued two rules regulating the emissions of greenhouse gases at stationary sources. First, EPA determining that once it regulated this type of air pollutant under another section of the Act, then the PSD requirements immediately applied as well to stationary sources. The Agency termed this its "Timing Rule." 75 Fed. Reg. 17,004 (Apr. 2, 2010). Second, EPA then promulgated its "Tailoring Rule" to adjust the threshold for a major emitter to either 75,000 or 100,000 tons per year of carbon dioxide equivalents. 75 Fed. Reg. 31,540 (June 3, 2010). *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) *per curiam ("Coalition for Responsible Regulation").* While this might seem a self-imposed regulatory limit, EPA estimated that its Tailoring Rule could captured 86% of greenhouse gas emissions if these plants modified their facilities. 75 Fed. Reg. at 31,571.

The panel, consisting of Chief Judge Sentelle and Judges Rogers and Tatel, issued a *per curiam* opinion holding that EPA's endangerment finding and Tailpipe Rule were neither arbitrary nor capricious, and therefore were valid regulations. Turning to EPA's Tailoring Rule, the panel held that although the industrial challengers had timely challenged EPA's regulatory interpretation of the Act to stationary sources, they lost on the merits of the argument. For the Court of Appeals, EPA's long-standing interpretation that regulation under one part of the Act triggered automatic regulation under the PSD program was compelled by a statutory syllogism:

> Premise: The Act in the PSD section provides that a new construction permit is required for any stationary source emitting major amounts of "*any* air pollutant." [Citing 42 U.S.C. §7479 (1) (definition of "major emitting facility")];

Middle Term: Greenhouse gases are an "air pollutant." [Citing *Massachusetts v. EPA*, 549 U.S. at 528-29];

Conclusion: Greenhouse gases can be regulated by EPA as an "air pollutant" for major emitting facilities under the PSD program.

Coalition for Responsible Regulation, 684 F.3d at 133-134.

The D.C. Circuit panel considered but explicitly rejected an industry coalition argument that the PSD regulation of "air pollutants" can only make sense in the overall context of regulating just the NAAQS pollutants. To the contrary, the panel found that the PSD program's regulation, located in Part C, subpart 1 of the Act, could not be limited to just NAAQS pollutants, specifically citing to the language found in 42 U.S.C. Sec. 7475(a)(4) requiring that each facility can be permitted only if it is "subject to the best available control technology for *each pollutant subject to regulation under this chapter*. . ." *Coalition for Responsible Regulation*, 684 F.3d at 141-142.

Finally, as to more specific challenges by states and industry to the Tailoring Rule, the Court of Appeals held that neither group had standing to challenge a regulation that mitigating rather than increased the petitioner's claimed injuries. Thus, petitioners lacked Article III standing to sue for the alleged "injury" allegedly inflicted by EPA's promulgation of the Tailoring rule. 684 F.3d at 144-148.

The net result was a resounding victory for EPA and its efforts to regulate greenhouse gases. *See* M. Gerrard, *D.C. Circuit clears path for GHG rules, but Politics Remain*, 44 TRENDS 2 (Nov/Dec 2012) *available at* http://www.americanbar.org/publications/trends/2012_13/november_december/dc_circuit_clears_path_ghg_rules_politics_remain.html.

A petition for rehearing was denied over the separate dissents of Judges Kavanaugh and Janice Brown Rogers in December 2012. Thereafter, petitions for certiorari were filed by various challengers.

C. The Petitions for Certiorari raise Many Questions, but the Court Selects Just One For Review

The challengers, both several industry coalitions and various states[3], filed nine separate petitions for certiorari before the Supreme Court seeking reversal in whole or in part of the Court of Appeals decision. Various petitioners sought to challenge the basis for EPA's initial Endangerment Finding as to greenhouse gases. *See, e.g., Pacific Legal Foundation v. EPA*, No. 12-1153 (framing issue as: "Whether the EPA's regulation determining that carbon dioxide and related substances pose a danger to human health and welfare must be set aside because the EPA

[3] The line-up of states seeking review (and reversal) of the Tailoring Rule compared with those states supporting and urging that the High Court affirm that rule is similar to the list supporting or opposing EPA's Transport Rule. 12 states are challenging the rule: Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and Texas, with Texas again taking the lead in briefing and argument. 14 states supporting the rule are California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, with New York taking the lead in briefing on behalf of the respondent states.

violated the congressional mandate to submit the proposed endangerment finding to the Science Advisory Board for peer review, as required by 42 U.S.C. § 4365(c)(1)."); *Virginia v. EPA*, No. 12-1152 (framing issue as to alleged procedural improprieties in EPA's Endangerment Finding). At least one other party, the Coalition for Responsible Regulation, sought to reopen EPA's regulation of any greenhouse gases by asking the Court to consider: Whether the Clean Air Act and this Court's decision in *Massachusetts v. EPA* prohibit the Environmental Protection Agency from considering whether regulations addressing greenhouse gases under Section 202 of the Act would meaningfully mitigate the risks identified as the basis for their adoption.

The High Court, however, rejected these broader challenges and accepted just one question which the Court itself drafted:

> Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

D. The Merits Briefing—One Issue Presented, But Many Suggested Answers

The United States, in its brief, suggests that the Court's framed question "subsumes" three disputed issues:

> (1) Did the EPA permissibly conclude that, when a particular source is subject to the PSD program based on its emissions of non-greenhouse gas pollutants, the program's substantive requirement (e.g., the BACT requirement) apply to the source's greenhouse-gas emissions?
> (2) Did the EPA permissibly conclude that a particular source's greenhouse-gas emissions standing along can subject that source to the PSD program? And
> (3) Did the EPA permissibly conclude that the Title V program applies to some sources solely because of their greenhouse-gas emissions?
>
> For the EPA, the answer to each of these subsumed issues is "yes."

Brief for the Federal Respondents No. 12-1146, et. al., at 24, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-1146-12-148-12-1254-12-1268-12-1269-12-1272_fed-resp.authcheckdam.pdf

For the United States, the language of the Act, coupled with EPA's long-standing (since 1980) interpretation of the PSD provisions, clearly triggered regulation of stationary sources under the Act.. The suggestion by some (particularly the Petitioner States) that the Court reconsider *Massachusetts v. EPA*, 549 U.S. 497 (2007) was inconsistent with both *stare decisis* and the limited nature of the grant of certiorari. *Brief for the Federal Respondents* No. 12-1146, et. al., at 21-22.

In contrast, the industrial coalition in No. 12-1248, the American Chemistry Council, *et.al.*, reframed the key question as:

> Whether, as EPA urges, once an area is in attainment for *any* NAAQS pollutant, Part C [the PSD statutory provisions] then "applies" to that area with respect to *all* pollutants . . . or whether it instead "applies" as petitioners contend. . . to an attainment area only with respect to those particular NAAQS pollutants for which the area is attaining.

Brief of Petitioners American Chemistry Council, et. al., No. 12-1248 at 2.

True to form, Peter Keisler and co-counsel for the Petitioners in No. 12-1248, eschewed a broad all-out attack of EPA's regulations, focusing rather on the argument that the PSD program was designed to deal with areas where there was attainment of at least one NAAQS, and by implication, the term "air pollutants" in that program must be limited to other NAAQS (which had not yet been attained). *Brief of Petitioners American Chemistry Council, et. al.*, No. 12-1248 at 2-3. The Petitioners suggest that EPA's effort to "phase" implementation of greenhouse gas regulation to just larger sources initially with 100,000 tons or more of greenhouse gas emissions constitutes a whole sale rewriting of the statute, and that: "Nothing in the Clean Air Act or this Court's precedent supports this remarkable assertion of authority to rewrite the statute." *Id.* at 14. In distinguishing the brief filed for American Chemistry Council from all other petitioners, Mr. Keisler wrote in the second paragraph of the brief's introduction: "[T]his brief focuses instead on the interpretation of the triggering provision for the PSD permitting program."

In contrast to this narrow focus, the State of Texas and other states opposing the Tailoring Rule, argued some much broader propositions, such as the suggestion that *Massachusetts v. EPA* should be "reconsidered or overruled" to the extent that it is read (as the D.C. Circuit did) to compel EPA to regulate greenhouse gases under not just mobile source provisions of the Act, but also under the PSD program. *Brief for the State Petitioners*, No. 12-1146 and consolidated cases at 24-29. Indeed, the State Petitioners closed with the suggestion that EPA's actions in promulgating the Tailoring Rule "contradicts the Constitution's most fundamental principles of limited government and separation of powers", citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952)(Douglas, J., concurring). *Id.* at 29. The reader will note the irony contained in the petitioning states citation to a concurring opinion authored by the great liberal icon, Justice William O. Douglas.

Not so fast, argue the State of New York and 14 other states supporting regulation greenhouse gases under the PSD program. They rejoin that one must pay attention to the broad stationary language contained in the Part C (PSD) definitional section, 42 U.S.C. Sec. 7479(1), which uses the term "any air pollutant." That words "air pollutant" were defined in *Massachusetts v. EPA* to include greenhouse gases, a conclusion that the supporting states argue was applied to include greenhouse gases in the context of stationary sources in *AEP v. Connecticut*, 131 S. Ct. 2527 (2009), citing the Court's conclusion that Congress in the Act had displaced any federal common-law nuisance claims by "delegate[ing] to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." *Id.* at 2538. *Brief of Respondents the States of New York, et. al.* at 10-11. The supporting states brief even cites an *amicus* brief filed by the American Chemistry Council citing the PSD program as an example of the "comprehensive framework" for regulating greenhouse gases that displaced the federal common law of nuisance. *Id.* at 12, n.3.

E. *Oral Argument Held on February 24, 2014*

The Court set oral argument expanded to 1½ hours for February 24, 2014. The Court has granted divided argument, with industry petitioners allotted 30 minutes, the state petitioners given 15 minutes, and the federal respondents allowed 45 minutes for their argument.

Once again, most observers anticipate a skillful argument among two top-flight masters of practice before the Court, Peter Keisler on behalf of the industry coalition, and Solicitor General Donald Verrilli on behalf of the federal respondents.

A hyperlink to the written transcript of oral argument in the Greenhouse Gases Cases is available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1146_nk5h.pdf.