

UTILITY AIR REGULATORY GROUP V. EPA: A SHOT ACROSS THE BOW OF THE ADMINISTRATIVE STATE

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INTRODUCTION

In *Utility Air Regulatory Group v. Environmental Protection Agency (UARG)*,¹ decided in June of this year, the Supreme Court reached a split decision on a pressing but arcane issue related to the scope of the Environmental Protection Agency's (EPA) authority to regulate greenhouse gases. From the bench, Justice Scalia described his opinion for a shifting majority of the Court as, in essence, a win for the agency: "EPA is getting almost everything it wanted in this case," he said.² "[The agency] sought to regulate sources it said were responsible for 86 percent of all the greenhouse gases emitted from stationary sources nationwide. Under our holdings, [it] will be able to regulate sources responsible for 83 percent of those emissions."³ Some in the press accepted Scalia's characterization, while others emphasized the partial nature of the victory. Sample headlines include *Justices Uphold Emission Limits on Big Industry*⁴ and *Supreme Court Upholds Rules Curbing Greenhouse Gases from Power Plants*,⁵ but also *Supreme Court Limits Greenhouse Gas Regulations*.⁶

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1. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) [hereinafter *UARG*].
2. Robert Barnes, *Supreme Court: EPA Can Regulate Greenhouse Gas Emissions, with Some Limits*, WASH. POST, June 24, 2014, at A1 (quoting Justice Scalia's bench statement).
3. *Id.*
4. Adam Liptak, N.Y. TIMES, June 24, 2014, at A1.
5. David G. Savage, L.A. TIMES, June 24, 2014, at A1.
6. Richard Wolf, USA TODAY, June 23, 2014, <http://www.usatoday.com/story/news/nation/2014/06/23/supreme-court-greenhouse-gas/8567453/>.

The first two headlines are more accurate than the third. The trajectory of the *UARG* case, and the opinion itself, preserve (even bolster) EPA’s authority to curb greenhouse gas emissions from the largest industrial sources. That outcome should be welcomed by anyone concerned about mitigating the serious environmental, public health, and national security risks of global climate change.

That said, other aspects of the *UARG* opinion should trouble anyone concerned about Supreme Court jurisprudence or judicial deference to agency authority. For one thing, the stakes in statutory interpretation cases such as *UARG* are quite high at present, because our deeply divided Congress seems less likely than past Congresses to “intervene[] to correct . . . wayward”⁷ Supreme Court interpretations.⁸ Yet part of the *UARG* decision plays fast-and-loose with the statutory text, throwing interpretive caution to the winds.

Another portion of the opinion creates a presumption against reading ambiguous statutory text to grant agencies authority that is either “too expansive” or “too expensive.”⁹ The problem? There is no objective way to measure whether a delegation conveys authority that is overly expansive or overly expensive. Moreover, no such anti-delegation presumption previously existed. Indeed, just last year in *City of Arlington v. FCC*, Justice Scalia himself invoked the opposite—and more commonly accepted—rule: “Congress knows to speak in *plain* terms when it wishes to *circumscribe*, and in *capacious* terms when it wishes to *enlarge*, agency discretion.”¹⁰

7. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2466 (2013) (Ginsburg, J., dissenting).

8. Indeed, the authors of two recent—and divergent—studies of congressional overrides apparently agree that since at least 1998, Congress’s participation in this important inter-branch dialogue has declined “dramatically.” Compare Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319 (2014), (arguing that the 1990s was “the golden age of overrides, with an unprecedented explosion of statutes resetting statutory policy in important ways,” but that after 1998, “overrides declined . . . dramatically”), with Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 217 (2013) (“[C]ongressional overruling of Supreme Court cases [has] slowed down dramatically since 1991”).

9. Justin Pidot, *Utility Air Regulatory Group v. EPA: Climate Litigation and Statutory Construction*, ACSBLOG (June 24, 2014), <https://www.acslaw.org/acsblog/utility-air-regulatory-group-v-epa-climate-litigation-and-statutory-construction>. Pidot’s observation relates to Justice Scalia’s assertion that the Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *UARG*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

10. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis added).

Worse, by inventing this previously nonexistent interpretive presumption, the *UARG* opinion not only risks misinterpreting Congress's intent, but undermines the separation of powers principle that: "Congress, when it [leaves] ambiguity in a statute' administered by an agency, 'underst[ands] that the ambiguity [will] be resolved, first and foremost, by the agency, and desire[s] the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"¹¹

The Court reminded readers of this very presumption in *EPA v. EME Homer City Generation*, issued just two months before *UARG*: "[u]nder Chevron, we read Congress' silence [on a contested matter] as a delegation of authority to EPA to select from among reasonable options."¹² Moreover, in *City of Arlington*, Justice Scalia confirmed that this principle applies with full force even when—as in *UARG*—the statutory ambiguity goes to the scope of the agency's own authority.¹³ Yet the *UARG* opinion neither defers to the agency's reading of the relevant statutory language nor remands the resulting mess to the agency to try again. Instead, the opinion imposes its own reading, thereby taking *judicial* "possess[ion of] whatever degree of discretion the ambiguity allows."

In several ways, the opinion also runs afoul of notions of judicial restraint. Most egregiously, although the Court limited its grant of certiorari to a single narrow question, the opinion resolves at least two other questions that the parties had posed but the Court had declined to review—and that the parties therefore had not briefed. Further, the opinion fails to give EPA adequate guidance about appropriate next steps. Portions of the challenged regulations are invalid, but it is not clear whether the remaining portions can be salvaged, or whether the agency must return to its rulemaking drawing board.

In short, the *UARG* opinion muddles previously well-understood principles of statutory interpretation and undermines agency authority, and it also reaches out to decide or comment on, issues that were not properly before the Court. The press may have had some difficulty identifying a clear winner in this case, but the clear losers are the Court and the administrative state.

11. *Id.* (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–741 (1996)).

12. *EPA v. EME Homer City Generation*, 134 S. Ct. 1584, 1604 (2014).

13. *See City of Arlington*, 133 S. Ct. at 1868 (parenthetical needed).

I. BACKGROUND

A. *Setting the Scene*

To understand the outcome of *UARG* and see the shortcomings of the Court's opinion, one must have some background on relevant portions of the Clean Air Act.¹⁴ As passed in 1970 and amended several times since then,¹⁵ the Act gives both EPA and the states a role in reducing air pollution. Specifically, EPA sets national air quality standards for a set of common pollutants (dubbed "criteria pollutants"):¹⁶ particulate matter, ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead.¹⁷ This list does not currently include the most common greenhouse gas, carbon dioxide.¹⁸ The Act then turns over much of the responsibility for achieving and maintaining these national standards to the states, which must develop implementation plans identifying the specific emissions control requirements on which each state plans to rely.¹⁹

Superimposed on that broad structure are several narrower programs to control emissions of a variety of air pollutants, including but not limited to the six criteria pollutants listed above. Three such programs are relevant here:²⁰

- *The Tailpipe Program*: A broad federal program to regulate the tailpipe emissions of any air pollutant that the EPA Administrator determines contributes to air pollution that "may reasonably be anticipated to endanger public health or welfare";²¹

14. 42 U.S.C.A. §§ 7401–7671 (West 2014).

15. Clean Air Act §§ 101–618, 42 U.S.C.A. §§ 7401–7642 (West 2014), *amended by* 42 U.S.C.A. §§ 7402–7671g (West 2014).

16. 42 U.S.C.A. §§ 7408–7409 (West 2014).

17. ENV'T'L PROT. AGENCY, NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS), EPA.GOV, <http://www.epa.gov/air/criteria.html> (last updated Oct. 21, 2014).

18. The Center for Biological Diversity has, however, petitioned the agency to list carbon dioxide as a criteria pollutant. CTR. FOR BIOLOGICAL DIVERSITY, PETITION TO ESTABLISH NATIONAL POLLUTION LIMITS FOR GREENHOUSE GASES PURSUANT TO THE CLEAN AIR ACT (2009), *available at*, http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.

19. 42 U.S.C.A. § 7410 (West 2014).

20. To simplify the discussion, this Article ignores Petitioners' challenge to the Title V program, focusing instead on their challenge to the PSD permitting program. "Title V generally does not impose any substantive pollution-control requirements," instead serving primarily "to facilitate compliance and enforcement by consolidating into a single document all of a facility's obligations under the Act." *UARG*, 134 S. Ct. 2427, 2436 (2014). Moreover, the Court's analysis of the legal issues related to the Title V program largely parallels its analysis of the PSD Program.

21. 42 U.S.C.A. § 7521(a)(1) (West 2014).

- *The Prevention of Significant Deterioration (PSD)*²² Program: A permitting scheme for large *new* stationary (that is, non-mobile) sources that will emit specific amounts of “any air pollutant” already subject to regulation under the Act,²³ and for large *existing* stationary sources that are undertaking major modifications that will increase their emissions of “any air pollutant” that is already subject to regulation under the Act;²⁴ and
- *The NSPS Program*: A regulatory program to reduce emissions from whole categories of stationary sources that “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”²⁵

In creating these pollution control programs, Congress did not attempt to anticipate every air pollution problem that might confront the country as the economy grew and new industries developed. Rather, in both the tailpipe and NSPS programs, Congress granted EPA broad authority to respond to new and newly recognized air-pollution problems that the Administrator determines “may reasonably be anticipated to endanger public health or welfare.”²⁶ The agency terms this determination an “endangerment finding.”²⁷

22. The PSD Program is actually a sub-programs of the broader “new source review,” or NSR, permitting program. There is also another sub-program, the so-called nonattainment new source review, or NNSR, permitting program. 42 U.S.C.A. §§ 7502(b), 7503. Applicability of the PSD and NNSR programs depends on the air quality of the region in question. For purposes of this Paper, the only relevant sub-program is the PSD Program, which applies to (1) those criteria pollutants whose levels in the relevant area do not exceed the national air quality standards (or NAAQS), and (2) other pollutants for which there is no NAAQS. *See, e.g.*, ENVTL PROTECTION AGENCY, *Region 9 Air Permits*, EPA.GOV, <http://www.epa.gov/region9/air/permit/psd-public-part.html> (last visited Mar. 2, 2015) (describing the PSD Program); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,520 (June 3, 2010) (describing the PSD and NNSR programs and noting that “[t]here is no NAAQS for [carbon dioxide] or any of the other well-mixed [greenhouse gases], nor has EPA proposed any such NAAQS; therefore, unless and until we take further such action, we do not anticipate that the nonattainment NSR program will apply to [greenhouse gases]”). To simplify the discussion, the remainder of the Paper discusses only the PSD Program, ignoring other aspects of the NSR permitting regime.

23. 42 U.S.C.A. § 7475 (describing permitting program); § 7479(1) (defining “major emitting facility”).

24. *Id.* at § 7475 (describing permitting program); § 7479(1) (defining “major emitting facility”); § 7479(2)(C) (defining “construction”).

25. *Id.* at § 7411(b)(1)(A).

26. *Id.* at § 7521(a)(1) (motor vehicle emissions); § 7411(b)(1)(A) (stationary sources).

27. *See, e.g.*, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. 1) (making such a determination for greenhouse gases).

Further, these various emissions control programs do not operate in isolation. They are designed—somewhat clumsily—to work in tandem. The states and the federal government have the authority and the obligation to regulate major sources of any air pollutant that the EPA Administrator deems dangerous. In effect, a finding that a particular pollutant contributes to pollution that poses risks to human health or welfare triggers a regulatory cascade: EPA must regulate that pollutant under the Tailpipe and NSPS Programs, which in turn triggers the source-by-source permitting obligations of the PSD Program.²⁸

In two decisions that predate *UARG, Massachusetts v. EPA*²⁹ and *American Electric Power v. Connecticut (AEP)*,³⁰ the Supreme Court recognized that the protections of the Clean Air Act extend to the increasingly certain and serious risks of climate change. The timeline is somewhat complicated. In its 2007 decision in *Massachusetts*, the Court noted that the Act’s “sweeping definition of ‘air pollutant,’” clearly and unambiguously “embraces all airborne compounds of whatever stripe,” including greenhouse gases,³¹ provided only that the Administrator makes the required “endangerment finding.”³² In 2009, the agency responded to *Massachusetts* by making such a finding, and committing to regulate tailpipe emissions of greenhouse gases.³³ Shortly thereafter in 2010 and 2011, the agency followed through and released rules regulating the emissions of greenhouse gases from

28. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010) (describing EPA’s view that the phrase “pollutant subject to regulation” in the statutory language defining the scope of the PSD Program “means a pollutant subject to a provision in the [Clean Air Act] or a regulation issued by EPA under the Act that requires actual control of emissions of that pollutant,” and thus that the PSD Program is triggered whenever “(1) the EPA promulgate[s] regulations requiring control of a particular pollutants on the basis of considered judgment, taking into account the applicable criteria in the CAA, or (2) EPA promulgates regulations on the basis of Congressional mandate that EPA establish controls on emissions of a particular pollutant, or (3) Congress itself directly imposes actual controls on emissions of a particular pollutant”).

29. 549 U.S. 497 (2007).

30. 131 S. Ct. 2527 (2011).

31. *Massachusetts*, 549 U.S. at 529, 532.

32. *Id.* at 532–33 (noting that the Clean Air Act expressly conditions EPA action on the agency’s “formation of a ‘judgment[.] . . . relate[d] to whether an air pollutant ‘cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare’” (quoting 42 U.S.C.A. § 7521(a)(1))).

33. See Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. 1) (finding that greenhouse gases do pose a risk to human health and welfare).

cars³⁴ and trucks.³⁵ Further, the agency pledged to take the next steps: regulating greenhouse gases from major stationary sources via the PSD permitting program³⁶ and the NSPS program.³⁷ Finally, also in 2011, the Supreme Court referenced the agency's various regulatory actions and commitments when it held in *AEP*³⁸ that some combination of the Clean Air Act itself and the EPA action authorized by the Act displaced the Respondents' "federal common law public nuisance claims against carbon-dioxide emitters."³⁹ In other words, the *AEP* Court identified EPA's statutory authority to regulate greenhouse gas emissions from stationary sources as grounds to prevent Respondents from pursuing their common law claims against those emitters.

In sum, the Court issued its *UARG* decision against a background understanding that the Clean Air Act grants EPA authority to regulate greenhouse gas emissions, not only from tailpipes, but also from stationary industrial sources via the PSD and NSPS programs.

B. The Lead-Up to UARG

The question in *UARG* concerned the shape and scope of the agency's effort to implement the PSD permitting program for greenhouse gases. Following its longstanding interpretation of the Clean Air Act,⁴⁰ EPA took the position that (1) the agency's

34. See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (regulating light duty vehicles).

35. Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (regulating medium and heavy duty vehicles); see also Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (regulating lighter trucks).

36. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010) (determining that PSD Program requirements apply to greenhouse gases emitted from stationary sources as of the effective date of the tailpipe regulations for greenhouse gas emission from light duty vehicles).

37. Notice of Proposed Settlement Agreement; Request for Public Comment, 75 Fed. Reg., 82,392, 82,392 (Dec. 30, 2010) (proposing to reach a settlement agreement in pending D.C. Circuit litigation, under which EPA would "sign by July 26, 2011 . . . a proposed rule under [Clean Air Act] section 111(b) that includes standards of performance for [greenhouse gases] for new and modified [electricity generating units]"); see also Clean Air Act § 111(d)(1), 42 U.S.C.A. § 7411(d)(1) (West 2014) (triggering a requirement that States set standards for existing sources "to which [an NSPS] standard of performance would apply if such existing sources were a new source").

38. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011).

39. *Id.*

40. Brief for the Federal Respondents at 9–10, *UARG*, 134 S. Ct. 2427 (2014) (No. 12-

regulation of the tailpipe emissions of greenhouse gases automatically triggered the PSD Permitting Program,⁴¹ and (2) the PSD Program, in turn, obligated both new and modified “major” stationary sources to obtain greenhouse gas emissions permits, and to comply with the associated—and fairly rigorous and expensive—emissions control requirements.⁴² The agency ran into a significant obstacle, however, when it confronted the Clean Air Act language defining which facilities are sufficiently “major” to be covered by the PSD Program. For greenhouse gases, the language is overbroad.

This overbreadth is not a drafting error. It is a consequence, rather, of the Clean Air Act’s age and the nature of climate pollution. When Congress wrote the Act, “the study of climate change was in its infancy.”⁴³ Congress had in mind more familiar pollutants—compounds such as sulfur dioxide, emitted as byproducts of combustion. Drafters targeted the largest industrial sources of those pollutants but let smaller sources continue to operate without a permit. Specifically, under the Act, the PSD Program extends only to “major” stationary sources that emit more than 250—or, for some sources, 100—tons per year of the regulated pollutant.⁴⁴

The 250 and 100 tons-per-year statutory thresholds generally work well for traditional pollutants. Only the most significant stationary sources, such as fossil-fuel-fired power plants, emit more than the threshold amount of criteria pollutants like sulfur dioxide, and thus find themselves subject to PSD permitting and pollution control requirements. But the most common greenhouse gas, carbon dioxide, is not a trace pollutant but the inevitable end product of almost all

1146) [hereinafter Brief for Federal Respondents] (“Since the earliest days of the PSD program, the EPA has concluded that, once a pollutant becomes regulated under the Act (as greenhouse gases now are under Title II), two related but distinct consequences follow automatically under the PSD program. First, going forward, the PSD program [applies to] any stationary source that emits large quantities of that newly regulated pollutant. . . [and s]econd, all proposed facilities to which the PSD program applies must take certain steps with respect to that newly regulated pollutant.”).

41. See *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010).

42. For example, permitted sources are required to install the “best available control technology” for all regulated pollutants. 42 U.S.C.A. § 7475(a)(4) (West 2014). The statute elsewhere defines “best available control technology” as “an emission limitation based on the maximum degree of reduction of each pollutants subject to regulation under this chapter . . . which the permitting authority, on a case-by-case basis . . . determines is achievable for such facility.” *Id.* at § 7479(3).

43. *Massachusetts v. EPA*, 549 U.S. 497, 507 (2007).

44. 42 U.S.C.A. § 7475 (requiring preconstruction permits for “major emitting facilities”); § 7479(1) (defining “major emitting facility”).

combustion. As a result, EPA projected that applying the PSD thresholds to stationary sources of greenhouse gases would bring tens of thousands of additional sources under the agency's PSD umbrella,⁴⁵ impose hundreds of millions of additional dollars in permitting costs,⁴⁶ and result in "a volume of permit applications that is so high that the [PSD Program] would become impossible for State and Federal authorities to administer. The PSD . . . permitting processes would become overwhelmed and essentially paralyzed."⁴⁷

As a temporary solution to this implementation conundrum, EPA promulgated something it dubiously nicknamed a "Tailoring Rule." This rule purported to elevate by several orders of magnitude the triggering threshold for application of the PSD Program to greenhouse gas sources, so as to continue to target only the largest and most egregious sources.⁴⁸ EPA emphasized that it did not intend this "tailoring" of the statutory thresholds to be a permanent solution but rather a short-term fix—a phase-in of the permitting requirements.⁴⁹ Indeed, EPA pledged to conduct future rulemakings to address greenhouse gas emissions from sources whose emissions fell between the statutory triggering thresholds and the Tailoring Rule's elevated thresholds.⁵⁰

This promise of a phase-in did not, however, insulate the Tailoring Rule (or the rest of EPA's greenhouse gas regulations) from judicial challenge. Questioning both the agency's legal interpretations and its fact-finding, various industry players and some States challenged every aspect of EPA's permitting program for greenhouse gas sources. Their claims covered everything from the original endangerment finding, to the Tailpipe Rule for cars and light trucks, to the theory

45. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,295 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, & 71) ("[T]o apply the statutory PSD and title V applicability thresholds to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD Program each year.").

46. *Id.* at 55,301 ("[T]he additional annual permitting burden for permitting authorities, on a national basis, is estimated to be 3.3 million hours at a cost of \$257 million to include all [greenhouse gas] emitters above the 250-[tons-per-year] threshold.").

47. *Id.* at 55,311.

48. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,517 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, & 71).

49. *Id.* at 31,516 ("EPA is establishing with this rulemaking a phase-in approach for [PSD] applicability, and is establishing the first two steps of the phase-in for the largest emitters of [greenhouse gases]. We also commit to certain follow-up actions regarding future steps beyond the first two.").

50. *Id.*

that the Tailpipe Rule triggered application of the PSD Program, and the details of the resulting Tailoring Rule. In all, challengers filed close to one hundred cases in the Court of Appeals for the District of Columbia Circuit.⁵¹

At first, the agency successfully fended off these challenges. The D.C. Circuit consolidated all of the cases and issued a per curiam ruling that was very favorable to the agency. Specifically, the court upheld both the endangerment finding and the Tailpipe Rule for cars and light trucks;⁵² agreed with EPA that its regulation of tailpipe emissions of greenhouse gases triggered PSD obligations for all major stationary sources of those emissions;⁵³ and concluded that no petitioner had standing to challenge the Tailoring Rule because its function was “actually [to] mitigate Petitioners’ purported injuries.”⁵⁴

That brings us, finally, to the Supreme Court case. Numerous challengers sought certiorari from the D.C. Circuit decision, proposing a broad range of possible “questions presented,” including six that are relevant to this discussion:

1. Whether the Court should reconsider its 2007 determination in *Massachusetts v. EPA* that the Clean Air Act extends to the regulation of greenhouse gases;⁵⁵
2. Whether EPA’s finding that greenhouse gases endanger human health and welfare was both procedurally and substantively sound;⁵⁶
3. Whether the agency correctly concluded that its regulation of tailpipe emissions automatically triggered PSD permitting requirements for stationary sources of greenhouse gases;⁵⁷
4. More generally, whether the agency correctly concluded that the PSD Program *applies* to major stationary sources of greenhouse

51. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *aff’d in part, rev’d in part sub nom. UARG*, 134 S. Ct. 2427 (2014) (consolidating cases).

52. *Id.* at 317.

53. *Id.* at 340.

54. *Id.* at 317, 350.

55. Petition for a Writ of Certiorari at i, *Texas v. EPA*, 134 S. Ct. 2427 (No. 12-1146) [hereinafter *Texas Certiorari Petition*]. The petitions for certiorari cited in footnotes 56–61 are petitions by separate parties in the individual cases consolidated by the Supreme Court to become the *UARG* opinion.

56. Petition for a Writ of Certiorari at i, *Virginia v. EPA*, 134 S. Ct. 2427 (2014) (No. 12-1152).

57. Petition for a Writ of Certiorari at i, *Chamber of Commerce of the U.S. v. EPA*, 134 S. Ct. 2427 (2014) (No. 12-1272).

gases, or whether the program should instead be limited only to sources of the six common criteria pollutants;⁵⁸

5. Whether the D.C. Circuit erred in holding that no petitioner had standing to challenge the Tailoring Rule;⁵⁹ and finally,
6. Whether the Tailoring Rule violated the Clean Air Act by rewriting the triggering standards of the PSD Program, and sharply narrowing its application to stationary sources of greenhouse gases.⁶⁰

Again, though, the agency fared reasonably well. Although the Supreme Court granted certiorari, it limited its grant to a single, quite narrow question presented, and its ultimate merits decision was reasonably favorable to the agency.⁶¹

II. THE *UARG* DECISION – THREE IMPORTANT VICTORIES FOR THE AGENCY

A. *Victory #1*

As noted, EPA's first victory in connection with the Supreme Court case came with the Court's grant of certiorari. Although the Agency opposed certiorari,⁶² the narrowness of the grant amounted to a significant win for EPA. Specifically, as relevant here, the Court declined to consider questions one through five above, instead focusing its attention on a single narrow issue, related but not identical to question six: "[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered [PSD] permitting requirements . . . for stationary sources that emit greenhouse gases."⁶³ In other words, the Court declined either to reconsider its determination, in *Massachusetts v. EPA*, that the Clean Air Act extends to greenhouse gases,⁶⁴ or to disturb the D.C. Circuit's twin holdings that EPA (1) reasonably concluded those gases

58. Petition for a Writ of Certiorari at i, *Am. Chem. Council v. EPA*, 134 S. Ct. 2427 (2014) (No. 12-1248).

59. Petition for a Writ of Certiorari at i, *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (No. 12-1146).

60. Texas Certiorari Petition, *supra* note 55, at i.

61. See *infra* at Part II.

62. See Brief for the Federal Respondents in Opposition at 18, *UARG*, 134 S. Ct. 2427 (2014) (No. 12-1146) [hereinafter Federal Opposition Brief].

63. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 418, 418 (2013) (order granting certiorari).

64. *Massachusetts v. E.P.A.*, 549 U.S. 497, 528–32 (2007).

contribute to air pollution that endangers human health and welfare;⁶⁵ and (2) followed required procedures and acted reasonably in regulating the tailpipe emissions of those gases.⁶⁶ As a result, the case posed only a narrow and well-cabined risk to EPA's authority to regulate greenhouse gas emissions and to the President's broader climate agenda.⁶⁷

B. Victory #2

The agency's second victory, too, related to the fate of *Massachusetts v. EPA*. Even though the Court declined to accept certiorari on the question of that case's continued validity, there remained a possibility that the four *Massachusetts* dissenters—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—would pen or join opinions expressing their continued skepticism that the Clean Air Act extends to greenhouse gas emissions. In the end, though, only Justices Thomas and Alito expressed that skepticism,⁶⁸ indicating that “seven of the Justices now view the issues decided in [*Massachusetts*] as settled.”⁶⁹

C. Victory #3

Explaining the third, more technical agency victory requires some background on the structure, analysis, and holdings of the Court's opinion in *UARG*. Justice Scalia wrote for the Court, though only two justices—Chief Justice Roberts and Justice Kennedy—agreed with both halves of the bifurcated decision.⁷⁰ Justices Thomas and Alito joined the first half of the opinion, to create a five-Justice majority (Majority A), while Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the second half to create a separate seven-Justice majority (Majority B).⁷¹

65. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 113, 116–26 (upholding the endangerment finding).

66. *Id.*

67. See generally *Energy, Climate Change, and Our President*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/energy> (last visited Mar. 3, 2015).

68. *UARG*, 134 S. Ct. 2427, 2455 (2014) (Alito, J., dissenting) (“I believed *Massachusetts v. EPA* was wrongly decided at the time, and these cases further expose the flaws with that decision.”).

69. *Pidot*, *supra* note 9.

70. *UARG*, 134 S. Ct. at 2432.

71. *Id.*

The first half of the opinion (Parts I, II–A, and II–B–1) begins with some background on Clean Air Act stationary source permitting and the history of EPA’s greenhouse gas regulation. This half addresses two legal questions. First, in a discussion modeled on the traditional *Chevron* step one,⁷² the Court asked whether the Clean Air Act’s unambiguous language *compels* EPA to conclude that greenhouse-gas regulation under the Tailpipe Program automatically triggers the PSD Program with respect to major stationary sources of those gases—a linkage that the Court termed a “greenhouse-gas-inclusive interpretation.”⁷³ Second, the Court asked a question that more closely resembles the traditional *Chevron* step two⁷⁴: if the Act does not unambiguously compel a greenhouse-gas-inclusive interpretation, does the Act’s “ambiguous . . . text”⁷⁵ nevertheless leave interpretive room for the agency to adopt such an interpretation? Majority A answered both questions in the negative.

1. Part II-A-1

On the first question, Majority A concluded that although the Act requires PSD permits for “major emitters of ‘any *air pollutant*,’” and (under *Massachusetts*) the “general, Act-wide definition” of the term “‘*air pollutant*’ includes greenhouse gases,”⁷⁶ the statutory language is nevertheless sufficiently broad, and the various pollution control programs sufficiently varied, to permit the agency to adopt a narrower definition of “air pollutant” for some programs than for others.⁷⁷ As Justice Scalia explained, “the presumption of consistent usage [of a term in a statute] ‘readily yields’ to context, and a statutory term—even one defined in the statute—‘may take on distinct characters

72. See, e.g., *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 54, 52 (2011) (describing the first step of the traditional two-step analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as requiring the Court to “ask whether Congress has ‘directly addressed the precise question at issue’”).

73. *UARG*, 134 S. Ct. at 2439–42 (Part II-A-1).

74. See, e.g., *Mayo Found.*, 562 U.S. at 54 (describing the second step of the *Chevron* test as requiring the Court to leave in place “an agency rule unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute’”).

75. *UARG*, 134 S. Ct. at 2444.

76. *Id.* at 2439 (quoting 42 U.S.C.A. § 7479(1) (West 2014) (defining “major emitting facility”)).

77. *Id.* at 2442 (“In sum, there is no insuperable textual barrier to EPA’s interpreting ‘any air pollutant’ in the permitting triggers of PSD . . . to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.”)

from association with distinct statutory objects calling for different implementation strategies.”⁷⁸

Thus, in Majority A’s view, the Clean Air Act does not compel EPA to adopt a greenhouse gas-inclusive interpretation. Rather, the Act allows for the possibility that even after EPA regulates a particular kind of pollutant under the Tailpipe Program, major stationary sources of that pollutant may nevertheless escape regulation under the PSD program. Put more simply, Majority A decoupled the Tailpipe and PSD Programs for greenhouse gases. The fact that tailpipe emissions of greenhouse gases are regulated under the Tailpipe Program does *not* automatically obligate all major stationary sources of greenhouse gases to obtain PSD permits.

2. Part II-A-2

On the second question, Majority A went one step further and concluded that in fact, the language and structure of the Act not only do not require the EPA to adopt a fully greenhouse gas-inclusive interpretation, but do not *permit* EPA to adopt that interpretation. This portion of the opinion focused on the problem EPA had tried to resolve with its Tailoring Rule—the mismatch between the low PSD triggering thresholds and the high levels of many sources’ greenhouse gas emissions. Majority A noted the impossibility of extending the PSD permitting program to all “major” stationary sources whose greenhouse gas emissions exceed the statutory thresholds: such an extension would “place plainly excessive demands on limited governmental [permitting] resources” and “bring about an enormous and transformative expansion in EPA’s regulatory authority.”⁷⁹ And Majority A found no “clear congressional authorization” to adopt such a costly and “expansive” interpretation.⁸⁰

3. Part II-A-3

Finally—and somewhat surprisingly given the narrow grant of certiorari—Majority A turned its attention to the Tailoring Rule and conducted a third statutory-interpretation exercise. Specifically, Justice Scalia explained that the agency had no room to solve the problem of statutory fit by “tailoring” the PSD Program’s statutory thresholds. Those numerical thresholds are clear and unambiguous;

78. *Id.* at 2441 (quoting *Env’tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).

79. *Id.* at 2444.

80. *Id.*

“[w]hen EPA replaced [them] with others of its own choosing, it went well beyond the ‘bounds of its statutory authority.’”⁸¹

To summarize, three holdings emerge from the first half of the *UARG* opinion. First, the Clean Air Act does not *require* application of the PSD Program to all sources whose emissions of pollutants regulated under the Tailpipe Program exceed the PSD triggering thresholds. Second, the Act does not *permit* application of the full PSD Program to pollutants like greenhouse gases, which are commonly emitted at levels vastly exceeding the PSD triggering thresholds. Third, the Act expressly prohibits EPA from tailoring the PSD Program in the manner the agency had tried—by exempting less significant sources of such pollutants.

The only question remaining for resolution was whether, despite Majority A’s conclusions, EPA nevertheless had authority to tailor the PSD Program in some *other* way. That is, although the Clean Air Act does not permit EPA to rewrite the PSD Program’s quantitative triggering thresholds for major stationary sources, can the agency nevertheless apply the Program’s emissions-control requirements to some otherwise-defined subset of stationary sources of greenhouse gas?

4. Part II-A-3

In the second half of Justice Scalia’s opinion, Majority B accepted a line of argument from EPA’s merits brief⁸² and sided with the agency on this final question. Per Majority A, stationary sources need not obtain PSD permits merely because they emit greenhouse gases at levels above the PSD triggering thresholds; but those sources that must obtain PSD permits because of their threshold-exceeding emissions of other, conventional pollutants—so-called “anyway sources”⁸³—must also ensure that their greenhouse gas emissions satisfy the PSD Program’s strict emissions control requirements.⁸⁴ Thus, while EPA lacks authority to modify the PSD triggers, it has ample authority to require that sources already within the PSD Program because of their emissions of other pollutants take on the

81. *Id.* at 2445 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)).

82. Federal Opposition Brief, *supra* note 62 at 24–28, (arguing that “the PSD program’s substantive requirements . . . apply to greenhouse-gas emissions from stationary sources that are covered by the program, including sources that are subject to the program because of their non-greenhouse-gas . . . emissions”).

83. *UARG*, 134 S. Ct. at 2437 (defining “anyway sources”).

84. *Id.* at 2448–49 (outlining the holding with respect to “anyway sources”).

extra obligation of controlling their greenhouse gas emissions.⁸⁵

D. “EPA [got] almost everything it wanted”

The strange bifurcated nature of the *UARG* opinion accounts for Justice Scalia’s characterization of the decision from the bench: “EPA [got] almost everything it wanted.”⁸⁶ “[The agency] sought to regulate sources it said were responsible for 86 percent of all the greenhouse gases emitted from stationary sources nationwide”⁸⁷—namely, those sources whose greenhouse gas emissions exceed the Tailoring Rule’s modified triggering thresholds. Majority A stripped the agency of that authority by striking down the Tailoring Rule. But Majority B came to the agency’s rescue, upholding the agency’s authority “to regulate sources responsible for 83 percent of those emissions”⁸⁸—namely, those “anyway sources” whose emissions of more conventional pollutants already obligate them to comply with PSD permitting requirements.⁸⁹

A close reading of the agency’s Tailoring Rule suggests that it would have been more accurate for the Court to assert that EPA sought to regulate sources responsible for 86 percent of the greenhouse gas emissions from “*major*” stationary sources, while under the Court’s opinion, the agency remains able to regulate 83 percent of *those* emissions.⁹⁰ Even with that correction, however, it

85. *Id.*

86. Robert Barnes, *Supreme Court: EPA Can Regulate Greenhouse Gas Emissions, with Some Limits*, WASH. POST, June 23, 2014, http://www.washingtonpost.com/politics/supreme-court-limits-epas-ability-to-regulate-greenhouse-gas-emissions/2014/06/23/c56fc194-f1b1-11e3-914c-1fbd0614e2d4_story.html (quoting Justice Scalia’s bench statement).

87. *Id.*

88. *Id.*

89. The Court also mentions the 83 percent estimates in its opinion. *UARG*, 134 S. Ct. at 2438–39 (citing Transcript of Oral Argument at 52, *UARG*, 134 S. Ct. 2427 (2014) (No. 12-1146) (“The Solicitor General . . . informs us that ‘anyway’ sources account for roughly 83% of American stationary-source greenhouse-gas emissions, compared to just 3% for the additional, non-‘anyway’ sources EPA sought to regulate at Steps 2 and 3 of the Tailoring Rule.”)).

90. It is difficult to pin down the original source of the 86 percent and 83 percent figures, but they seem to derive from EPA’s Tailoring Rule, in which the agency asserted that “anyway sources” “account for approximately 65 percent of total national stationary source GHG emissions,” while sources covered by the adjusted triggering thresholds of the first two phases of the Tailoring Rule would “account for approximately 67 percent of total national stationary source GHG emissions.” 75 Fed. Reg. at 31,568, 31571. Sources covered by the *statutory* triggering thresholds account for 78 percent of total national stationary source GHG emissions. 75 Fed. Reg. at 31,600 (indicating that sources included under the statutory triggering thresholds but excluded under the adjusted thresholds of the first two phases of the rule “comprise only 11 percent of total stationary source GHG emissions”). That leaves fully 22 percent of stationary source GHG emissions unregulated under even the statutory triggering thresholds. Using these

remains true that EPA is now able to regulate almost⁹¹ “97% of the [greenhouse gas] emissions the [a]gency had proposed to control under the . . . Tailoring Rule.”⁹² This plainly amounts to a significant victory for an agency whose authority to regulate greenhouse gases from either mobile or stationary sources was in doubt as recently as 2007.⁹³

III. BUT A SIGNIFICANT LOSS FOR THE COURT AND A BLOW TO AGENCY DEFERENCE

It would be wrong, however, to view the opinion as a true “win” for EPA, because Majority A’s statutory analysis suggests that those five Justices have a cramped view of familiar deference doctrines. Moreover, the opinion is analytically muddled and takes several steps that run afoul of traditional notions of judicial restraint. Thus, while I welcome the *UARG* holding, the opinion itself is cause for concern rather than jubilation.

The following discussion identifies flaws in each section of the opinion, labeled to assist the reader in cross-referencing with the descriptions provided above.

A. *Part II-A-1*

The opinion brings further confusion to debates over techniques of statutory interpretation. As noted above, the central statutory issue in the case concerned the proper interpretation of the PSD triggering language in the Clean Air Act. After careful analysis of that language, the D.C. Circuit had concluded that the Act unambiguously extends PSD coverage to major emitters of greenhouse gases (or of any other pollutants already regulated under other Clean Air Act programs).⁹⁴ The lower court reached that interpretation in part because Congress used the word “any” in defining which stationary sources must obtain PSD permits: new or modified stationary sources “which emit, or have

figures, one can calculate that in the first two phases of the Tailoring Rule, EPA sought to regulate sources responsible for (67/78) or 86 percent of the national stationary source GHG emissions *that could potentially be covered under the PSD Program*, while under the Court’s opinion, the agency remains able to regulate (65/78) or 83 percent of *those* emissions.

91. That is, (0.83/0.86) or 96.5 percent.

92. Matthew R. Oakes, *Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA*, 124 *YALE L.J. F.* 56, 56–57 (2014), available at http://www.yalelawjournal.org/pdf/OakesForum_8i6dupxe.pdf.

93. That is, prior to the issuance of *Massachusetts v. EPA*, 549 U.S. 497 (2007).

94. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 134 (D.C. Cir. 2012).

the potential to emit” either 250 or 100 tons per year of “any air pollutant.”⁹⁵ “On its face,” the D.C. Circuit explained, “the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind,’ . . . Congress’s use of the broad, indiscriminate modifier ‘any’ thus strongly suggests that the phrase ‘any air pollutant’ encompasses greenhouse gases.”⁹⁶

Given that Justice Scalia regularly emphasizes the importance of focusing on statutory text,⁹⁷ and other members of Majority A are also committed textualists,⁹⁸ Majority A might have been expected likewise to wrestle with the meaning of the word “any” in the phrase “any air pollutant.” Instead, the first half of the *UARG* opinion focuses not on the PSD triggering language but on other indicia of statutory meaning. For example, Majority A observed that other portions of the Act use the term “‘air pollutant’ where what is meant is obviously narrower than the Act-wide definition,” and further, that EPA itself applies a narrowed definition of “any air pollutant” in administering some air pollution control programs.⁹⁹ From these few atextual indicia, the Court concluded that the statute does not unambiguously compel a greenhouse gas-inclusive interpretation.¹⁰⁰ That is, the Act allows for the possibility that EPA could employ some limiting principle—as yet undetermined¹⁰¹—to restrict the reach of the PSD Program to “pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds.”¹⁰²

95. 42 U.S.C.A. § 7479(1) (West 2014) (emphasis added).

96. *Coal. for Responsible Regulation*, 684 F.3d at 134 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))).

97. See, e.g., *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in judgment) (observing that statutory text is “the *only* remnant of ‘history’ that bears the unanimous endorsement of the majority in each House”); see also Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 9–10 (2012) (discussing Justice Scalia’s view that judges must be tightly constrained by text or they will read their own values into congressional enactments).

98. See, e.g., Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1887 (2008) (“[I]t appears that several Justices—clearly Justices Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy . . . now consider themselves textualists.”); *id.* at 1887 n.14 (collecting cites to support this proposition).

99. *UARG*, 134 S. Ct. at 2440–41.

100. See *id.* at 2439.

101. *Id.* at 2442 n.6 (“During the course of this litigation, several possible limiting constructions for the PSD trigger have been proposed. . . . We do not foreclose EPA or the courts from considering those constructions in the future, but we need not do so today.”).

102. *Id.* at 2442.

The determination that the Clean Air Act language does not unambiguously require a fully greenhouse gas-inclusive interpretation may well be the soundest purposivist reading of the statutory language defining that Program. After all, as EPA itself acknowledges, applying the literal terms of the PSD triggering provisions to all greenhouse gas sources that meet the statutory definition of “major” would produce “a volume of permit applications” so high that the “permitting processes would become overwhelmed and essentially paralyzed.”¹⁰³ The Program must be limited in its application to greenhouse gases if it is to function at all. Yet it is striking that the committed textualists in Majority A reached this outcome in spite of, rather than because of, the statutory text. Indeed, Justice Scalia effectively acknowledged as much when he concluded his *Chevron* step one interpretation of the PSD triggering language by citing *FDA v. Brown & Williamson Tobacco Corporation*,¹⁰⁴ arguably the most atextual of the Court’s past opinions.¹⁰⁵

B. Part II-A-2

Majority A did offer a plausible explanation for its choice to abandon the Clean Air Act’s text: that text is “not conducive to clarity,” and is “far from a *chef d’oeuvre* of legislative draftsmanship.”¹⁰⁶ The opinion’s next analytic moves, however, are less readily explained.

Having concluded at *Chevron* step one that despite its express language, the Clean Air Act does not compel EPA to regulate “any” air pollutant under the PSD Program, Majority A then decided (at *Chevron* step two) that the Act also *precludes* application of the full PSD Program to all major stationary sources of greenhouse gases. This portion of the Court’s analysis is deeply flawed because the Court adopted a questionable interpretive presumption—in effect, almost a plain-statement rule—under which Congress must “speak clearly” if it intends to delegate expansive authority to an agency to

103. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

104. 529 U.S. 120, 133 (2000). *See also* *UARG*, 134 S. Ct. 2427, 2441 (2014).

105. *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 225–26 & n.24 (describing *Brown & Williamson* as “extraordinary,” and—if “viewed as a straightforward matter of statutory interpretation”—“puzzling,” “an idiosyncratic departure from the Court’s usual assumptions,” and “an aberrational abandonment of textualism”).

106. *UARG*, 134 S. Ct. at 2441 (emphasis in original).

issue expensive regulations:

EPA's [greenhouse gas-inclusive] interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," . . . we typically greet its announcement with a measure of skepticism. *We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."*¹⁰⁷

This newfound skepticism for broad delegations of power is quite troubling, as there is no objective measure whereby courts can identify overly expansive delegations. Numerous statutory programs require agencies to promulgate expansive and expensive regulations; are all such programs now suspect? Moreover, no such plain-statement rule previously existed. Indeed the presumption has always been the reverse: agency authority is at its apex when statutory language is *ambiguous*, not when it is plain. The *UARG* Court's alternative formulation means that *judicial* authority is at its apex when statutory language is ambiguous, because it is now up to the courts to decide, one statutory program at a time, whether a particular delegation to an agency is too expansive or too expensive, and in turn, whether Congress's delegation of the relevant authority is sufficiently clear to satisfy the *UARG* presumption.

The *Brown & Williamson* Court wrestled with similar concerns about overly expansive delegation, but in that opinion the Court was more careful to ensure that its holding would not swallow the background principle of deference to agency expertise. That case concerned the Food and Drug Administration's (FDA) effort to assert regulatory authority over tobacco products. The Court declined to defer to FDA's "expansive construction" of the Food, Drug, and Cosmetic Act, which would enable the agency to wield too much power over "an industry constituting a significant portion of the American economy."¹⁰⁸ Instead, the Court determined, "based on the [Act's] overall regulatory scheme and the subsequent tobacco legislation, that Congress ha[d] directly spoken to the question at issue and precluded the FDA from regulating" such products.¹⁰⁹ In

107. *Id.* at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159) (emphasis added).

108. *Brown & Williamson*, 529 U.S. at 159.

109. *Id.* at 160–61.

other words, the *Brown & Williamson* majority quite deliberately confined itself to a *Chevron* step one analysis. In its view, Congress's intent was clear: there was *no* delegation to the FDA to regulate tobacco products.

In contrast, in *UARG*, the Court undertook its expensive/expansive analysis at step *two* of *Chevron*, having already concluded at step one that the relevant Clean Air Act language is ambiguous. This distinction between *UARG* and *Brown & Williamson* may seem to be little more than a technicality, but in fact it is highly significant. A court's inquiry is meant to be *de novo* and searching at step one but highly deferential at step two. Majority A's willingness to import concerns about the expansiveness and expensiveness of Congress's delegation into the deferential step-two analysis suggests that Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito may no longer be satisfied by any reasonable agency reading of ambiguous statutory language. Instead, Majority A seems to indicate that even once a court has determined that congressional intent is ambiguous, the court should define for itself the plausible limits of Congress's delegation—presumably by consulting the judges' own views of the appropriate cost and scope of executive action. In this cramped view of *Chevron* deference, courts would defer to agencies' superior expertise only when (1) congressional intent is ambiguous, (2) the delegation does not offend the court's sense of the proper scope of agency authority, and (3) the agency's action is reasonable within that *judicially*—rather than legislatively—delimited scope.

C. Parts II-A-3 and II-B-2

Finally, the last two significant parts of the *UARG* opinion, striking down the Tailoring Rule and then upholding application of the PSD Program to “anyway” sources, raise their own set of concerns.

First, although its interpretation of the PSD triggering language effectively released the agency from the statutory bind that made the Tailoring Rule necessary, Majority A nevertheless went ahead with its review (and rejection) of that Rule. EPA explained at length in the Tailoring Rule preamble that the agency chose to adopt modified triggering thresholds because “the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD [Program] at the statutory levels” would lead to “absurd

results.”¹¹⁰ The agency concluded that Congress “could not have intended that the PSD . . . threshold levels . . . apply literally” to stationary sources of greenhouse gases,¹¹¹ and the agency “[t]herefore” temporarily “tailored” those thresholds.

The Court’s determination that the Clean Air Act does *not* compel application of the PSD Program to all major stationary sources of greenhouse gases effectively rendered the Tailoring Rule unnecessary and opened up the possibility that EPA could identify some other, less legally-vulnerable principle to limit the Program’s reach.¹¹² Separation of powers principles would suggest that the proper outcome at that point was a remand from the inexperienced and unaccountable court to the more detail-oriented, expert, and democratically-accountable agency:¹¹³ “EPA, your awkward approach in the Tailoring Rule is no longer necessary; go back to the drawing boards and identify a more defensible limiting principle to improve the function of the PSD Program.”

Yet the Court declined to take that more cautious—and more respectful—approach. Instead, in Part II-A-3, Majority A reviewed the (now unnecessary) Tailoring Rule¹¹⁴ and struck it down; and in Part II-B-2, Majority B proceeded to assess—and, indeed, enshrine as *mandated* by the Clean Air Act¹¹⁵—the alternative approach,

110. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,517 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, and 71).

111. *Id.*

112. The Court effectively acknowledged that point when it reassured the agency that its opinion does not “foreclose EPA . . . from considering . . . possible limiting constructions for the PSD trigger . . . in the future.” *UARG*, 134 S. Ct. at 2442 n.6.

113. For Example:

Compared with judicial lawmaking, agency lawmaking has much to recommend it. First, it can make the rule of law more predictable: agencies can flesh out statutory standards with detailed rulemaking, and their rules have immediate national application, unlike the slower process of circuit-by-circuit adjudication by federal courts. Second, agencies have access to experts and deep experience in applying the statutes they are charged with enforcing. Hence, they often make better policy choices than either judges or legislators. For me, agencies are particularly attractive, because they can update statutes more rapidly and often more effectively than judges can. Third, agencies are typically more democratically accountable than judges. Their dynamic applications of statutes are subject to congressional oversight and budget pressures and are thus more likely to reflect current legislative preferences than judicial dynamism.

William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2057 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)).

114. *See UARG*, 134 S. Ct. at 2444–46.

115. *See id.* at 2448 (describing the pollution control language of the PSD Program as “clear” and not “readily susceptible [of] misinterpretation,” and concluding that nothing in the Act “suggest[s] that the BACT provision can bear a narrowing construction”).

suggested not in any agency rule but in the agency’s merits brief,¹¹⁶ of requiring that “anyway sources” already in the PSD Program undertake measures to control not just their emissions of conventional pollutants but also their greenhouse gas emissions.¹¹⁷ In short, rather than simply assisting EPA out of its legislative bind and then leaving the agency to conduct a rulemaking and devise an appropriate PSD limiting principle, the Court first struck down the Tailoring Rule and then began the process of devising a *judicial* alternative.

Worse, in reviewing and striking down the Tailoring Rule, Majority A squarely answered a question on which the Court had *denied* certiorari: whether the Tailoring Rule was lawful.¹¹⁸ Several parties had pressed the Court to entertain that question,¹¹⁹ but the Court declined, instead fashioning its own, far narrower Question Presented. Relying on that narrow grant of certiorari, the Respondents’ brief did not address the lawfulness of the Tailoring Rule.¹²⁰ Yet the Court took on the issue—and resolved it in favor of Petitioners—without the benefit of Respondents’ arguments.

116. Federal Opposition Brief, *supra* note 62, at 24–28 (arguing that “the PSD program’s substantive requirements . . . apply to greenhouse-gas emissions from stationary sources that are covered by the program, including sources that are subject to the program because of their non-greenhouse-gas . . . emissions”).

117. See *UARG*, 134 S. Ct. at 2448–49.

118. In fact, answering this question also forced the Court to resolve, if not satisfactorily address, a second question on which it had denied certiorari: Whether the Petitioners had standing to challenge the Tailoring Rule in the first place. See *generally, e.g.*, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88–89 (1998) (Scalia, J.) (noting that standing is “normally . . . considered a threshold question” that implicates the Court’s “jurisdiction to entertain” the suit and therefore “must be resolved in respondent’s favor before proceeding to the merits”).

In *UARG*, the Court did not bother with a true standing analysis, instead reasoning its way as follows: “Since the Court of Appeals thought the statute unambiguously made greenhouse gases capable of triggering PSD and Title V, it held that petitioners lacked Article III standing to challenge the Tailoring Rule because that rule did not injure petitioners but merely relaxed the pre-existing statutory requirements. Because we, however, hold that EPA’s greenhouse-gas-inclusive interpretation of the triggers was not compelled, and because EPA has essentially admitted that its interpretation would be unreasonable without ‘tailoring,’ we consider the validity of the Tailoring Rule.” *UARG*, 134 S. Ct. at 2445.

119. See *supra* note 60 and accompanying text.

120. Federal Opposition Brief at 17 *supra* note 62, at 1, 7& nn.4, 9 (mentioning the Tailoring Rule only three times, in the background section of the brief). The brief also bypassed Petitioners’ standing to challenge that Rule. *Id.* at 20 (mentioning standing only once, in a description of the D.C. Circuit’s opinion).

CONCLUSION

Complicated statutory and regulatory tangles like the one in *UARG* pose a real challenge for courts. They must work to understand Congress's purposes, the agency's role, and the facts on the ground; to predict the consequences of any judicial or administrative intervention in the status quo; to pay adequate heed to interpretive rules and deference doctrines; and to draft an opinion that satisfies a majority of the judges hearing the case. These myriad challenges go a long way toward explaining the *UARG* Court's evident confusion and frustration, and the somewhat tortured nature of the resulting opinion.

The right solution in the face of such statutory and regulatory complexity, however, is not for the Court to muddle through, leaving confusion and jurisprudential detritus in their wake, but to hew closely to traditional deference principles. Here, having solved EPA's statutory conundrum by decoupling the Tailpipe and PSD Programs, the Court should have remanded for EPA to sort out the resulting mess and adopt a workable solution. Even if EPA had adopted the same approach that Majority B identified—regulation of greenhouse emissions from “anyway” sources—that approach would have had greater substantive, procedural, and democratic legitimacy had it been developed in the first instance in a public rulemaking.