BROWN, *Circuit Judge*, dissenting from the denial of rehearing en banc: In the summer of 1974, while waiting to start classes at UCLA, I was lucky enough to obtain a summer job house sitting in the pleasant, upscale neighborhood of Pasadena. Known mostly for its Rose Parade and Rose Bowl, Pasadena is one of the more scenic exurbs of Los Angeles. I inhabited a sparsely furnished, modest-but-pricey bungalow set among the lush landscape typical of southern California. This is a place where Birds of Paradise grow ten feet tall and the magenta blossoms of Bougainvillea fall like lavish draperies from redwood garden trellises. After staying in the house more than a month and spending a restless night listening to the agitated thrashings of the jacaranda trees in a fitful wind, I stumbled bleary-eyed into the kitchen, looked out the window, and stopped — utterly dumbfounded. There — looking like it was but a few feet beyond the back fence — stood a mountain. Not a foothill. Not an unobtrusive mesa. A mountain! Closer inspection revealed not a lone majestic peak, but a whole mountain range I later identified as the San Gabriels. In those days, the air in the Los Angeles basin was so thick with smog that a mountain, or even a nearby mountain range, could simply disappear.

Although the Los Angeles basin was among the most notorious examples of the phenomenon, it was by no means unique and certainly not the worst. It was this crisis of ambient air quality that precipitated the enactment of the Clean Air Act (CAA). But as the CAA's history, language, and structure make clear, Congress never intended the Act to serve as an environmental cure-all. It was targeted legislation designed to remedy a particular wrong: the harmful direct effects of poisoned air on human beings and their local environs. This is what Congress understood as "air pollution which may reasonably be anticipated to endanger public health" in the tailpipe emissions provision, 42 U.S.C. § 7521(a)(1). The Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), however, concluded otherwise. In dicta

too suggestive to ignore, the Court implicitly assumed that climate change could provide the basis for an endangerment finding in the tailpipe context. *See id.* at 532–33.

Bound as I am by *Massachusetts*, I reluctantly concur with the Panel's determination that EPA may regulate GHGs in tailpipe emissions. But I do not choose to go quietly. Because the most significant regulations of recent memory rest on the shakiest of foundations, Part I of this statement engages *Massachusetts*'s interpretive shortcomings in the hope that either Court or Congress will restore order to the CAA. Part II, by contrast, reflects my belief that *Massachusetts* does not compel the same result for Title V and the Prevention of Significant Deterioration of Air Quality (PSD) program. Although I agree with Judge Kavanaugh's dissent, *Coal. for Responsible Regulation v. EPA*, Nos. 09-1322, et al. (Kavanaugh, J., dissenting from denial of rehearing en banc), I approach the inflection point from a slightly different perspective. Part III concludes with a brief note on standing.

Because I would vote for the full court to consider the propriety of extending *Massachusetts* to Title V and the PSD program, I respectfully dissent from this denial of rehearing en banc.

I.

A.

The origins of the Clean Air Act are closely tied to fatal fogs and deadly air inversions that, for much of early post-industrial history, seemed to be the inevitable consequence of economic progress. *See* Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed;*

What Might Work, 21 ENVTL. L. 1549, 1575 (1991).[1] Initially regulated at the local and state level, air pollution became the focus of the federal government only after World War II. *See id.* at 1585–86. In October 1948, a severe temperature inversion in the industrial city of Donora, Pennsylvania increased air pollution to such an extent that traffic " 'was virtually stopped because of lack of visibility.' " The inversion killed 20 people, *id.*, and prompted the federal government to begin researching air pollution. *Id.* at 1586. By 1961, President Kennedy included a plea for "an effective air pollution program" in his Special Message on the Natural Resources. *Id.* Public pressures for legislation only increased when a "Killer Smog" engulfed London in December 1962, killing at least 340, and a similar inversion in New York City allegedly claimed the lives of 200. *Id.* Eventually, legislation recommended by President Kennedy in February 1963 led to the enactment of the CAA, which President Johnson signed into law on December 17, 1963. *Id.* at 1586–87. Seven years later, President Nixon signed The Clean Air Amendments of 1970. The 1970 Amendments authorized the EPA to prescribe national ambient air quality standards (NAAQS) and created the statutory framework that still exists today.

B.

It was no happy accident that congressional draftsmen titled the legislation the "*Clean Air* Act." Ambient air quality was the point, purpose, and focus of the CAA. Congress had set its sights on the "dirty, visible 'smokestack' emissions," 136 CONG. REC. H2771-03 (1990) (statement of Rep. Roe),

[1] Inversions, sometimes known as "Londoners," occur "when a layer of hot air warmed by . . . water exists above cooler ground-level air and traps smoke and particulate matter under the warmer air." *Id.*

and smog caused by vehicle emissions. The CAA was the means by which Congress would grapple with urban air pollution and its attendant health effects, including impaired breathing, heart disease, lung damage and lung disease, and even death. If pollution was the problem, these ills were the specific harms Congress sought to combat. Even a cursory glance at the legislative history, with its numerous charts, graphics, and statistics detailing cancer and death rates, will bear this point out. *See, e.g.*, Hearings on Air Pollution — 1968 Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Pub. Works, 90th Cong. 2nd Sess., pt. 2, 608–20 (1968) (statement of Dr. Samuel S. Epstein, Children's Cancer Research Foundation.) ("Air Pollution — 1968").

With the enactment of the 1990 Amendments, Congress expanded the Act beyond its singular emphasis on urban air quality to address hazardous — *i.e.*, toxic — air pollutants, acid rain, and stratospheric ozone. In regulating hazardous pollutants, Congress reemphasized the need for a close and tangible nexus between pollutant and harm. The legislative record, for example, continued to conceive of dangers in terms of their direct effects on human health and well-being. *See, e.g.*, S. Rep. No. 101-228, at 3388 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385 ("Air pollution can silently damage our lungs and heart or act swiftly in the case of exposure to toxic air pollutants. Rigorous regulation of toxic air pollutants is needed to avoid risk of serious, irreversible damage to human health."). To the extent the regulation of stratospheric ozone and acid rain suggest a broader nexus between pollutant and harm to human health, the very particular way in which Congress handled these exceptions goes a long way toward proving the rule: Congress only expands the CAA through considered legislative acts.

In addressing these transnational phenomena, the legislature did not spin regulations out of whole cloth. With ozone concerns, for example, Congress developed solutions through international negotiations, the implementation of which led to the creation of a separate title of the CAA. *See NRDC v. EPA*, 464 F.3d 1, 3 (D.C. Cir. 2006). Likewise, years of contentious discussions with Canada helped bring about the acid rain provisions in the 1990 Amendments. *See generally* Dennis A. Leaf, *Intergovernmental Cooperation: Air Pollution from an U.S. Perspective*, 18 CAN.-U.S. L.J. 245 (1992). Simply put, when Congress became aware of new dangers, it acted judiciously in crafting workable remedies that, when they obtained the necessary political support, were worked into their own discrete provisions under the Act. Neither Congress nor the EPA attempted to force these distinct problems into existing, ill-suited regulatory schemes.

Congressman Waxman, one of the strongest proponents of stringent air pollution controls and a key force behind the 1990 Amendments, has stated that "in recent experience, no legislation has received more scrutiny during its consideration." The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1724 (1991). Hyperbole or not, the admission is telling. The history of the CAA is one of hard-fought incremental gains through which Congress remedied particular environmental wrongs with tailored remedies. Said the Congressman:

> Discrete and extensive new programs are included to grapple with high ambient pollution levels (urban and regional smog), hazardous air pollution, acid rain, and depletion of the stratospheric ozone layer. Each of these programs [was] tailored to the problem it [sought] to address, and each [was] quite different in its approach."

Id. at 1811. Political necessity has forced Congress to calibrate its amendments to the CAA with great specificity and care. Where our Representatives have acted with such caution, any suggestion that Congress has — through a single word — conferred upon EPA the authority to steamroll through Congressional gridlock, upend the Senate's rejection of the Kyoto Protocol, and regulate GHGs for the whole of American industry must necessarily fail. The legislature, recall, does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001).

But we needn't rely on interpretative canons alone to make this point. In drafting the 1990 Amendments, Congress considered — and *expressly rejected* — proposals authorizing EPA to regulate GHGs under the CAA. *See* S. Rep. No. 101-228, at 377 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3760. Even the Executive objected that an attempt to control Carbon Dioxide (CO_2) emissions — emissions not harmful to health — in order to prevent global warming was premature. *See* Administration's Amendments — Hearings Before the Subcomm. On Health and the Env't of the Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989) (includes Bush Administration Report on S. 1630). The Executive's critique noted that "unilateral action aimed at addressing a global problem" through a standard limiting tailpipe emissions would not be an effective means of safeguarding the global environment and would "necessarily punish national interests." *Id.* at 792, 813.

That Congress has never deviated from its decision to not regulate GHGs under the CAA was not for lack of opportunity. Congress has considered and rejected countless other bills in the years since the 1990 Amendments that would have authorized GHG regulation. By one estimate,

Congressmen have proposed over 400 bills concerning GHGs between 1990 and 2009. *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference As A Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 636–37 (2008) (tracking proposals). Congress's inability to break this nearly quarter-century long deadlock is incredibly suggestive: this is not an area of policymaking where the legislature has acted rashly or unthinkingly in delegating authority to agencies.

At bottom, Congress understood the dangers of "any air pollutant" in § 7521(a)(1) in terms of the ill-effects caused those who inhale the pollutants, not the broad, attenuated consequences of climate change. The CAA was drafted not to combat the threat of flooding or the menace of heat waves, *see* Endangerment and Cause of Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496, 66,526 (Dec. 15, 2009) ("EPA Endangerment Finding"), but the choking, stifling, and degenerative effect of airborne pollutants on human beings and their affected localities. Congress has long quantified this harm in terms of mortality rates, *see, e.g.*, Air Pollution — 1968, 564 (statement of Dr. Roger S. Mitchell, Director, Webb-Waring Institute for Medical Research), not acreage of "costal land" lost. *Massachusetts*, 549 U.S. at 522. To put matters pointedly: the injury sufficient to establish standing need not suffice to establish endangerment as well.

Congress was of course free to circumvent this close cause-health effect nexus by devising a separate provision for GHG regulation, much as it did for stratospheric ozone, but it did no such thing. And nothing in the legislative history suggests that Congress has deviated from this status quo.

The plain language of the CAA only underscores the Act's non-applicability to GHGs insofar as it requires the harm be of the sort "reasonably [] anticipated to endanger." 42 U.S.C. §7251(a)(1) — a term we know to have a discrete meaning.

C.

In the present case, this Court had "little trouble" disposing of the argument that the "PSD program is specifically focused solely on localized air pollution" because it is "*quite clear . . . the PSD program was intended to protect against precisely the types of harms caused by greenhouse gases*." *CRR* Slp. Op. 62–63 (emphasis added). *Massachusetts* notwithstanding, this statement is a curious thing in light of the uncontradicted legislative history just discussed.[2] So too is the court's reliance on the statutory text, particularly its finding that "the CAA expressly provides that effects on 'welfare' means 'effects on . . . weather . . . and climate.' " Slp. Op. 62-63 (citing 42 U.S.C. § 7602(h)).

As a textual matter, there is nothing "quite clear" about it. The Supreme Court has declared that GHGs like CO_2 are pollutants within the meaning of the Act. Under the CAA, however, EPA can regulate a pollutant only if the administrator finds that the GHG causes or contributes to "air pollution which *may reasonably be anticipated to endanger* public health or welfare." 42 U.S.C. §7251(a)(1) (emphasis added). But in locating the CAA's conception of "harm" in § 7602(h), the definition of "welfare," and not §7251(a)(1)

[2] As noted, the weather and climate issues targeted by the CAA involve direct, deleterious, localized effects caused by polluted air people breathe or suspended pollutants that may be deposited on land and crops by precipitation.

generally, this court effectively skirted the operative statutory language — "may reasonably be anticipated" — and rendered it nugatory. This was in error. Section 7602(h) defines only the potential *objects* of harm; the "reasonably be anticipated" language of §7251(a)(1) supplies the requisite *nexus* between the pollutant and the objects of its harm. The two provisions must be read together if the statute is to be interpreted faithfully. To put matters another way, the "may reasonably be anticipated" language must do some analytical work in the endangerment determination lest it be deemed surplusage. *See, e.g.*, *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 627 (D.C. Cir. 1983) ("[I]n construing a statute, we 'are obliged to give effect, if possible, to every word Congress used.' " (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))). And in view of the CAA's legislative history, the nature of that work is clear.

In order to reasonably anticipate that a pollutant will contribute to air pollution that endangers public health or welfare, the Agency would have to conclude that pollution created by CO_2 or another GHG is a reasonably direct cause of the damage to public health and welfare. To find that CO_2 may ultimately endanger public health and welfare because sea levels will rise tells us nothing about whether CO_2 concentrations in the ambient air directly harm public health and welfare. The ingredients of a Killer Smog are few and specific; the process through which an air inversion traps particulate matter close to the ground is well understood. With both there is a direct correlation between reducing the concentration of the pollutant and reducing the negative health effects. Questions of public health impacts from air pollution have consistently been based on the direct — that is, inhalational — effects of exposure to the pollutant. *See, e.g.*, Joint Opening Brief of Non-State Petitioners and Supporting Intervenors at 58, *Coal. for Responsible Regulation v. EPA*,

No. 09-1322 (May 20, 2011); *NRDC, Inc. v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (concluding that EPA may not consider the health effects of increased unemployment when setting new health-based NAAQS)

In contrast, any harm to human health and welfare flowing from climate change comes at the end of a long speculative chain. The dissent in *Massachusetts* pointed out that EPA had described in great detail the scientific uncertainty that precluded even forming a judgment as to whether greenhouse gases endanger public welfare. *See* 549 U.S. at 553–55 (Scalia, J., dissenting). In that earlier defense of its refusal to form a judgment, EPA explained how predicting climate change involved a "complex web of economic and physical factors," including:

> [o]ur ability to predict future global anthropogenic emissions of GHGs and aerosols; the fate of these emissions once they enter the atmosphere (*e.g.*, what percentage are absorbed by vegetation or are taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (*e.g.*, changes in cloud cover and ocean circulation); change in temperature characteristics (*e.g.*, average temperatures, shifts in daytime and evening temperatures); changes in other climatic parameters (*e.g.*, shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (*e.g.*, increases or decreases in agricultural productivity, human health impacts).

Id. If there can be this much logical daylight between the pollutant and the anticipated harm, there is nothing EPA is not authorized to do. If this finding is valid, in a world where six

degrees of separation is the compass of all humankind, the right endangerment finding would allow EPA to rule the world. But as this Court has noted before, EPA's authority to regulate is constrained, not enlarged, by the relationship of the term "will endanger" to other sections of the CAA. *See Ethyl v. EPA*, 541 F.2d 1, 29 (D.C. Cir. 1976) (en banc).

Of course, nothing here should be taken to imply that a particular GHG does not contribute to climate change. I mean only to suggest that a pollutant might contribute to the nebulous mélange of potential drivers of climate change without having any direct, deleterious impact within the meaning of the CAA. I emphasize too that this is not a problem with science. This is a problem of statutory interpretation. Climate change, with its geologic timeframe and its many uncertainties and imponderables, is and will probably remain a subject of some controversy. EPA finds the science sufficiently convincing for its purposes and it is entitled to a certain amount of deference on questions related to its technical expertise. But it is not necessary to quibble with the science of climate change to conclude that the endangerment finding fails on textual and logical terms. There is simply a point at which a difference in degree becomes a difference in kind and we have passed this point many times over in the course of this tortured litigation. The Supreme Court, however, has refused to recognize as much for tailpipe emissions.

II.

A.

But we need not follow *Massachusetts* off the proverbial cliff and apply its reasoning to the unique Title V and PSD provisions not considered in that case. The cascading layers

of absurdity that flow from that interpretive exercise make clear that the plain language of the CAA compels no such result. As EPA's own rulemaking documents have so unabashedly explained:

> To apply the statutory PSD and title V applicability thresholds literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. These extraordinary increases in scope of the permitting programs would mean that the programs would become several hundred-fold larger than what Congress appeared to contemplate.

PSD and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31,514, 31,533 (Jun. 3, 2010) ("Final Tailoring Rule"). Completely oblivious to the irony, EPA added:

> For our authority to take this action, we rely in part on the "absurd results" doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs.

Id. at 31,541–42. And again:

> [I]n this case because a literal reading of the PSD and title V applicability provisions results in insurmountable administrative burdens. Those insurmountable administrative burdens — along with the undue costs to sources — must be considered "absurd results" that

> would undermine congressional purpose for the PSD and title V programs.

Id. at 31,547.

In precincts outside Washington, D.C., this litany might cause a regulator to pause and consider whether results so at odds with Congressional presuppositions could ever be justified as falling within the literal meaning of an enactment. EPA, however, proposes that the absurd result can be easily eliminated by ramping up and gradually phasing in the requirements. Faced with the choice of reconsidering the legitimacy of an endangerment finding that sets in motion such a cluster of chaos or rewriting the statute, the agency has blithely done the latter. This is an abuse of the absurdity and administrative necessity doctrines as neither can be invoked to preempt legislative prerogatives. Permitting a statute "to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not express the 'unambiguously expressed intent of Congress,' " but it does not grant the agency "a license to rewrite the statute." *Mova Pharmaceuticals v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

But that is not the worst of it. The real absurdity — apparently as invisible to the EPA as the San Gabriels once were to me — cannot be cured by phase in, no matter how subtly Byzantine. The real absurdity is that this unprecedented expansion of regulatory control, this epic overreach, may very well do more damage to the wellbeing of Americans than GHGs could ever do.[3]

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[3] *See, e.g.*, Joint Reply Br. of Non-State Petitioners and Supporting Intervenors at *1, No. 09-1322 (Nov. 14 2011) ("Nor does [EPA] dispute that the new rules will impose massive burdens on a struggling economy, or that its program of vehicle standards

B.

A second, more elementary consideration counsels against the mechanical application of *Massachusetts*'s tailpipe emissions determination to these distinct CAA provisions: deference to Congress.

As articulated in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court's "major questions" canon gives form to the judicial intuition so strongly implicated here: Congress should not be presumed to have deferred to agencies on questions of great significance more properly resolved by the legislature. If there was ever a regulation in recent memory more befitting such a presumption than the present, I confess I do not know of it.

On familiar facts, the Supreme Court in *Brown & Williamson* rebuffed the FDA's expansionist effort to bring tobacco products within its regulatory ambit. The agency's regulation rested on a strained interpretation of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, in which it defined nicotine as a "drug" and cigarettes and smokeless tobacco as "combination products" used to deliver nicotine to the body. *See Brown & Williamson*, 529 U.S. at 125–27. Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court first considered the statutory structure. "[I]f tobacco products were within the FDA's jurisdiction," the majority concluded, the normal operation of the "Act would require the FDA to remove them from the market entirely," and this would "contradict

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will affect global mean temperatures by no more than *0.01 degree Celsius by 2100*").

Congress' clear intent as expressed in its more recent, tobacco-specific legislation." *Brown & Williamson*, 359 U.S. at 143. As the present case confirms, such absurdity is all but inevitable where an agency attempts to regulate that which "simply do[es] not fit" within its regulatory scheme. *Id.* The Court next considered Congress's 35 year history of tobacco-specific legislation, finding it "clear" that this "legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156.

The Court then closed its lengthy *Chevron* discussion with an appeal to first principles. The "inquiry into whether Congress has directly spoken to the precise question at issue," the Court explained, "is shaped, at least in some measure, by the nature of the question presented." *Id.* at 159. *Chevron* deference operates on the assumption "that a statute's ambiguity constitutes an implicit delegation," but this tenuous fiction need not hold true in every situation. *Id.* "In extraordinary cases," the Court went on, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* (referencing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration")).[4]

[4] *MCI Telecommunications Corporation v. AT&T Co.*, 512 U.S. 218 (1994), a case the *Brown & Williamson* Court found "instructive," *Brown & Williamson*, 529 U.S. at 160, had advanced a similar logic. In concluding Congress had spoken to the meaning of the term "modify" as it appears in § 203(b) of the Communications Act of 1934, the Court rejected FCC's far more expansive interpretation. The Court assumed in dicta that it was

Declaring *Brown & Williamson* "hardly [the] ordinary case," the Court reasoned:

> Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Brown & Williamson, 529 U.S. at 159-60.

In view of the language, structure, and history of the CAA, I am simply unable to distinguish this logic from the present case in any meaningful way. To the contrary, with

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"highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion — and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *MCI*, 512 U.S. at 231. Certainly the same might be said here as well.

only the slightest of modifications one could rework the above text to apply to GHG emissions.[5]

Although the *Massachusetts* Court distinguished *Brown & Williamson*, it did so only in the context of tailpipe emissions. Its reasoning does not extend to Title V and the PSD program.

In the Court's view, *Brown & Williamson* had "found critical at least two considerations that have no counterpart in [*Massachusetts*]." 549 U.S. at 531. First, whereas the regulation of tobacco under the FDCA would have necessarily led to a ban on tobacco products — an outcome that clashed with the "common sense" intuition that Congress never meant to remove those products from circulation — the expansion of EPA's "jurisdiction would lead to no such extreme measures

[5] Perhaps:

> Contrary to its representations in *Massachusetts v. EPA*, the EPA has now asserted jurisdiction to regulate industries constituting a significant portion of the American economy. In fact, the EPA contends that, because greenhouse gases can be regulated as tailpipe emissions, it is obligated to regulate all stationary sources at admittedly "absurd" levels. Owing to its ubiquitous place in the planet's life cycle, greenhouse gases have their own unique political history. Congress, for better or for worse, has declined to create a distinct regulatory scheme for greenhouse gases, squarely rejected proposals to give the EPA jurisdiction over greenhouse gases, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the EPA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the EPA this power.

[because] EPA would only *regulate* emissions" and "there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Id.* But the Court spoke too soon. In the present litigation, EPA argued — and a Panel of this Court readily agreed — that in regulating tailpipe emissions under 42 U.S.C. § 7521, it is obligated to regulate stationary sources under Title V and the PSD program as well. As a threshold matter, the *Massachusetts* Court never considered these far-reaching effects. It limited its brief discussion on the merits to the tailpipe emissions question squarely before it. In this way, the Court never considered the differing ways in which the CAA regulates tailpipes and stationary sources.

With tailpipe emissions, the inclusion of greenhouse gasses within the term "air pollutant" does not directly expand or contract the universe of vehicles and engines subject to the new standards. Consequently, the regulation's impact will fall primarily on those manufacturers already complying with existing emission requirements. And even then, the Court explained, EPA "would have to delay any action 'to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance.' " *Massachusetts*, 549 U.S. at 531 (quoting § 7521(a)(2)). Not so with the regulation of stationary sources. Insofar as 42 U.S.C. § 7479(1) defines "major emitting facility" to include those facilities with the "potential to emit" either 100 or 250 "tons per year or more of *any* air pollutant," the statutory term is necessarily tied to CAA's jurisdictional scope. Inescapably, then, the regulation of greenhouse gasses as "air pollutants" will radically expand the universe of covered entities far beyond Congress's intentions. EPA's decidedly extra-textual Tailoring Rule only confirms the ludicrousness of this result. Nor can it be said that the statutory safeguards operate in the same way as §

7521(a)(2). Permitting authorities may well be able to determine on a case-by-case basis what constitutes the "best available control technology" for a particular emitting facility, 42 U.S.C. § 7479(3), but this is of little consolation for the small business owner who previously fell outside the CAA. At bottom, this outcome clashes with the "common sense" understanding that Congress would not have intended such a broad, unchecked expansion of the CAA to potentially millions of businesses from all walks of industry. The Supreme Court in *Massachusetts* simply did not have occasion to consider this absurd and "counterintuitive" outcome, but we do — and we must.

Second, the Court determined that the "unbroken series of congressional enactments" referenced in *Brown & Williamson* "made sense only if adopted 'against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.' " *Massachusetts*, 549 U.S. at 531.[6] By contrast, EPA had "not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles." *Id.* And even if it had, "Congress could not have acted against a regulatory 'backdrop' of disclaimers of regulatory authority" because "EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it *had* such authority." *Id*. When read in context, however, it is clear that the Court's reasoning was building toward a wholly unspectacular point: because EPA's legislative history failed to establish congressional intent with

[6] The suggestion here seems to be that Congress's decision to regulate tobacco products would not, by itself, evince its intent to proscribe agencies from doing the same. Doing so in light of FDA's statements, however, had the effect of implicitly codifying the agency's long-held view.

the same weight and precision as *Brown & Williamson*, it did not justify "read[ing] ambiguity into a clear statute." *Id.* That logic is inapplicable here. In the absence of lexical clarity — which the Court had found in in CAA's "sweeping definition of 'air pollutant,' " *id*. at 528 — we *need* legislative history and other indicia of congressional intent to inform our understanding of how GHGs are to be regulated under other CAA provisions.[7]

The *Massachusetts* Court's effort to distinguish *Brown & Williamson* is thus unavailing where we deal not with the definitional scope of "any pollutant" and tailpipe emissions, but the particular dangers Congress sought to combat in enacting Title V and the PSD program. When read in conjunction with the CAA's history, structure, and language, the intuitive logic of the "major questions" doctrine makes clear that the Panel erred in extending *Massachusetts.*

[7] Consider the role of NAAQS in this regulatory system. EPA in *Massachusetts* had observed that NAAQS were established to "address air pollution problems that occur primarily at ground level" as well as "concentrations of substances in the ambient air and the related public health and welfare problems." *Massachusetts*, 549 U.S. at 558–59 (Scalia, J., dissenting). EPA thus reasoned that the regulation of the buildup of CO_2 in the upper reaches of the atmosphere — the process alleged to cause global climate change — was not akin to regulating the concentration of a substance that is polluting the air and was "beyond the scope of CAA's authorization to regulate." *Id.* In other words, EPA maintained that had Congress intended the CAA to regulate greenhouse cases and global climate change, it would have provided some better tool than NAAQS. That defense — offered in response to a demand to regulate tailpipe emissions — applies with even greater potency to Title V and the PSD program. In fact, although EPA now claims it is authorized to regulate greenhouse gases and global climate change, the agency acknowledges that the regulatory framework is as ill-suited to the task as ever.

Congress simply did not intend for EPA to convert the "Clean Air Act" to the "Warm Air Act" writ large. But that is exactly what the federal courts have done.

As the Chief Justice observed in his *Massachusetts* dissent, impatience is not a juridical principle that can be sustained under our constitutional framework. *See Massachusetts*, 549 U.S. at 535–36 (Roberts, C.J., dissenting). It certainly fares no better as a default measure of institutional choice under *Chevron*. As *Massachusetts* recognized, an agency can only exercise the authority Congress has delegated to it. *See* 549 U.S. at 534–35 (noting that EPA must "ground its reasons for action or inaction in the statute" and "exercise its discretion within defined statutory limits."). Absurdity can never figure as an adequate substitute for authority in this threshold assessment. Nor can absurdity cure the agency's failure to establish that the statute unambiguously compels its interpretation or that its interpretation, though discretionary, is actually consistent with statutory text, structure, and purposes. The agency seeks to avoid these pesky constraints here by invoking *Massachusetts*, but Article III judges cannot be a legitimate source of legislative authority. By deferring to the distorted claim of delegation advanced here, this Court has transformed *Chevron* from a useful, albeit accidental, touchstone into an idol to which we surrender our constitutional faith.

III.

In rejecting State Petitioners' challenge to the Tailoring Rule for want of standing, the Panel invoked that famed preceptor of American civics, Schoolhouse Rock, to great effect. Slp. Op. at 79. ("As a generation of schoolchildren knows, 'by that time, it's very unlikely that [a bill will] become a law. It's not easy to become a law.' "). I certainly

do not quarrel with such dispositive authority. Lawmaking is neither easy nor certain. In an ordinary case, the mere possibility of "corrective legislation" will not establish that redress is "likely, as opposed to merely speculative." *Lujan*, 504 U.S. at 561. But it bears repeating that this is not an ordinary case. Where the choice is between non-action or a confessedly "absurd" regulation poised to impress countless billions of dollars in costs on American industry, we have transcended the realm of the speculative. For once, the comparison with *Massachusetts* is apt. The Supreme Court found standing on the basis of an estimated rise in sea level of 20 to 70 centimeters by the year 2100, *see Massachusetts*, 549 U.S. at 542 (Roberts, C.J, dissenting) — a prediction based almost entirely on conjecture. Is it any more speculative to say that specific projections of billions of dollars in actual regulatory costs would not suffice to compel Congress to act?

The Panel's alternative contention fares better: because Congress could remedy the issue in countless ways, not all of which inure to State Petitioners' benefit, the inquiry is "inherently speculative." *See* Op. at 79. This argument benefits from the genuine uncertainty in Congress over what, if any, role EPA should play in GHG regulation. But therein lies a frighteningly obtuse logic. If EPA actions are *ultra vires* precisely because disagreement on the Hill prevented Congress from altering the status quo and authorizing such regulation, how then can the very same deadlock be used to *defeat* Petitioners' standing to challenge the Rule through which EPA effectuates its absurdist scheme? The Court cannot have it both ways.

At bottom, bad decisions make bad law. In denying rehearing en banc, this Court has read *Massachusetts* to its illogical ends and it is American industry that will have to pay. That this Court did so is unsurprising, but certainly not

fated. *Massachusetts* does not compel this outcome for the PSD and Title V provisions. Had this Court interrogated its own assumptions and yielded not to *Massachusetts*'s telos but sound constitutional principles, it would have found that the matter properly belongs before Congress, not courts or agencies. As Schoolhouse Rock long ago explained:

> Ring one, Executive,
> Two is Legislative, that's Congress.
> Ring three, Judiciary.
> See it's kind of like my circus, circus.[8]

And what a circus it is.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

[8] "Three Ring Government," Schoolhouse Rocks, *available at* http://www.schoolhouserock.tv/ThreeRing.html.