IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1425, consolidated with 11-1062, 11-1128, 11-1247, 11-1249, 11-1250

STATE OF TEXAS, *ET AL.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent

No. 11-1037, consolidated with 11-1038, 11-1039, 11-1040, 11-1041, 11-1059, 11-1060, 11-1063, 11-1075, 11-1076, 11-1077, 11-1078, 11-1287, 11-1288, 11-1289, 11-1290, 11-1291, 11-1292, 11-1293

UTILITY AIR REGULATORY GROUP, *ET AL.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent

Petitions for Review of Administrative Action
of The United States Environmental Protection Agency

EPA'S RESPONSE TO PETITIONS FOR REHEARING OR REHEARING *EN BANC*

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GLOSSARY

BACT	Best Available Control Technology
CAA	Clean Air Act
CO^2e	Carbon dioxide equivalent
EPA	U.S. Environmental Protection Agency
FIP	Federal Implementation Plan
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan
TPY	Tons per year

INTRODUCTION

Petitioners here challenged a series of regulations promulgated by Respondent Environmental Protection Agency ("EPA") that ensured that there were procedures available in each State to implement the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act ("CAA") with regard to a source's greenhouse gas emissions, which had become subject to PSD permitting requirements as a result of the regulation of greenhouse gas emissions from motor vehicles. As this Court explained, these regulations were necessary to allow stationary sources deemed to be a "major emitting facility" to obtain a PSD permit, which is required in order to initiate construction of a new or modified facility.

The Court found that the requirement for a major emitting facility to obtain a PSD permit that addresses greenhouse gas emissions emanated directly from the statutory provisions of the PSD program, not from the challenged regulations. The Court further found that the challenged regulations mitigated Petitioners' alleged injury by providing a regulatory structure for sources to obtain the permits necessary to initiate construction and for States (or EPA, if necessary) to issue such permits, and that vacatur of the rules would not redress Petitioners' alleged injury but rather would actually increase it. Accordingly, the Court dismissed the petitions for lack of standing. *Texas v. EPA*, 726 F.3d 180 (D.C. Cir. 2013).

Petitioners now seek rehearing and rehearing *en banc*, grounding their

petitions on mischaracterizations of the Supreme Court's recent decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG v. EPA*"), that "affirmed in part and reversed part" a judgment that the Panel here referenced in its decision, *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) ("*Coalition*"). But there is no need to entertain rehearing regarding the portion of *Coalition* that the Supreme Court reversed, because this Court did not rely on that portion of *Coalition* in issuing its decision here and because EPA already has taken steps to respond to the partial reversal. Similarly, Petitioners' arguments to the contrary, there is no basis to rehear issues from the portion of *Coalition* that the Supreme Court *affirmed*.

BACKGROUND

A. The PSD Permitting Program

As the Supreme Court explained in *UARG v. EPA*, the CAA's PSD program makes it unlawful to construct or modify a "major emitting facility" in any area to which PSD applies "without first obtaining a [PSD] permit." 134 S. Ct. at 2435, citing 42 U.S.C. §§ 7475(a)(1), 7479(2)(C). A "major emitting facility" is any stationary source that has the potential to emit over 250 tons per year ("tpy") (or 100 tpy for certain source categories) of "any air pollutant." *Id.* at 2435, citing 42 U.S.C. § 7479(1). As the Supreme Court further explained, these sections of the Act are the "triggering provisions," under which it is determined whether a

stationary source is a "major emitting facility" and is thereby subject to the substantive permitting requirements of PSD. *Id*. at 2439-42.

Any source that is, in fact, a major emitting facility and thus subject to the PSD program must, in order to obtain a PSD permit necessary to initiate construction, "comply with emissions limitations that reflect the 'best available control technology' (or BACT) for 'each pollutant subject to regulation under' the Act." *Id*. at 2435, quoting 42 U.S.C. § 7475(a)(4) (the "BACT provision"). As the Court explained, this requirement for sources already subject to PSD is clear under the statute because, *inter alia*, "[t]he text of the BACT provision is far less open-ended than the text of the PSD and Title V permitting triggers." *Id*. at 2448.

B. The Regulations at Issue in This Case

Petitioners here challenged five rules related to the implementation of PSD through State Implementation Plans ("SIPs") or through Federal Implementation Plans ("FIPs") that, as this Court noted, were "designed to ensure that a permitting authority existed to issue the required greenhouse gas permits." *Texas v. EPA*, 726 F.3d at 183. Because a number of States' SIPs did not yet address greenhouse gas emissions, and because a source could not obtain a PSD permit (and thus could not commence construction) unless it implemented BACT for "each pollutant subject to regulation under the [CAA]," which now includes greenhouse gases, 42 U.S.C.

§ 7475(a)(4), the challenged regulations allowed for a source deemed to be a major emitting facility to obtain the necessary PSD permit. 726. F.3d at 183, 198-99.

Petitioners in this case did *not* challenge the application of BACT to address the greenhouse gas emissions of facilities deemed "major emitting facilities," or whether sources can be deemed a major emitting facility -- and thereby be subject to PSD -- solely by virtue of their greenhouse gas emissions. As this Court stated, "petitioners do not dispute that States had to update their SIPs to incorporate greenhouse gases into their PSD programs. Instead, they challenge the method and timing by which EPA required SIP revisions, and contend that States could issue lawful PSD permits under CAA §165(a) in the interim." *Id*. at 186.

Specifically, Petitioners asserted that major emitting facilities did not need to obtain a PSD permit under 42 U.S.C. § 7475(a), but instead that "the PSD requirements apply only pursuant to an applicable SIP." *Texas v. EPA*, 726 F.3d at 193. Petitioners asserted that States had three years to amend their SIPs to address greenhouse gases and that until such amendments were promulgated, a source was free to initiate construction without a PSD permit that addresses greenhouse gases and without applying BACT for such emissions. Petitioners' argument centered on the assertion that a major emitting facility does not need to obtain a PSD permit until it is required in the State's SIP and that the challenged regulations cannot be used to prevent a source from obtaining the required PSD permit.

C. The Court's Decision in This Case

Based on a detailed review of the relevant provisions of the Clean Air Act and four of this Circuit's prior decisions that have consistently interpreted those provisions for over 30 years, this Court held that: (a) the application of the requirement that a "major emitting facility" obtain a PSD permit under 42 U.S.C. 7475(a)(1), and the BACT requirement applicable to each "major emitting facility" under 42 U.S.C. § 7475(a)(4), are self-executing; (b) it was not EPA's regulations that subjected stationary sources to the requirement to obtain a PSD permit addressing their emissions of greenhouse gases; and (c) a new or modified major emitting facility could not await the revision of a State's SIP before being subject to the BACT requirement for greenhouse gases. 726 F.3d at 187-94.

Accordingly, the Court here found that Petitioners lacked standing to challenge the regulations at issue because it was the statute, not EPA's regulations, that required BACT permitting requirements to be applied to greenhouse gas emissions and that the challenged regulations actually ameliorated the effects of that statutory requirement:

> The challenged rules operated to fill a permitting gap in several States and thereby ensure that a permitting authority existed to issue necessary PSD permits. [Citations omitted]. Vacating the challenged rules would mean neither those States nor EPA could issue greenhouse gas PSD permits, and construction of a major emitting facility could not proceed in those States. . . . [P]etitioners' purported injury was caused by automatic operation of the Act, not the challenged rules. The challenged rules mitigated the injury that

> otherwise would have occurred when industry petitioners could not obtain lawful PSD permits in those States.

726 F.3d at 198-99 (explaining that vacating the challenged regulations would deprive Petitioners of the ability to obtain or issue necessary PSD permits with greenhouse gas requirements).

The Court noted that in *Coalition* this Court found that both the triggering provisions (which apply to "any air pollutant") and the separate BACT provision (which applies to "each pollutant subject to regulation under the [CAA]") unambiguously cover emissions of greenhouse gases. *Coalition*, 684 F.3d at 134, 137. However, the Court here did not base its decision on the triggering issue decided in *Coalition* but instead considered only the issue whether, for those sources that are defined as a major emitting facility, the permitting and BACT requirements as they relate to greenhouse gas emissions are self-executing under the statute. *See, e.g.*, 726 F.3d at 188, quoting *Coalition*, 684 F.3d at 134 ("Because 'greenhouse gases are now a "pollutant subject to regulation" under the Act,' § 165(a) itself required that 'any *"major emitting facility" covered by the PSD program* must install BACT for greenhouse gases.'") (Emphasis added).

D. The Supreme Court's Decision in *UARG v. EPA*

On June 23, 2014, the Supreme Court, reviewing this Court's decision in *Coalition*, issued its decision in *UARG v. EPA*, addressing EPA's regulation of greenhouse gases under the PSD program. The Court's decision is divided into

two distinct parts. *See* 134 S. Ct. at 2438 ("This litigation presents two distinct challenges to EPA's stand on greenhouse-gas permitting for stationary sources.").

The Court "first decide[d] whether EPA permissibly interpreted the statute to provide that a source may be required to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions." *Id.* at 2439. The Court found that requiring a source to obtain a PSD permit based solely on its emissions of greenhouse gases was neither required under the statute (under *Chevron* step one) nor a permissible interpretation of the statute (under *Chevron* step two). *Id.* at 2439-42 (*Chevron* step one analysis), 2442-46 (*Chevron* step two analysis). The Court summed up its holding on this issue as follows: "[T]he Agency may not treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' (or a 'modification' thereof) in the PSD context . . . ." *Id.* at 2449.

The Court then turned to the question of the application of BACT for greenhouse gases emitted from those sources subject to PSD requirements by virtue of their emission of pollutants other than greenhouse gases (termed "anyway sources"), and found that such application was indeed required under the statute. According to the Court, the question was whether 42 U.S.C. § 7475(a)(4) (the BACT provision) *requires* the application of BACT to anyway sources: "We now consider whether EPA reasonably interpreted *the Act* to *require* those [anyway]

sources to comply with 'best available control technology' emission standards for greenhouse gases." *Id.* at 2447 (emphasis added).

As the Court explained, in contrast to the phrase "any air pollutant" in the definition of "major emitting facility," there was nothing ambiguous about the language of the BACT requirement or Congress' intent:

> The text of the BACT provision [section 7475(a)(4)] is far less open-ended than the text of the PSD and Title V permitting triggers. It states that BACT is *required* "for each pollutant subject to regulation under this chapter" (i.e., the entire Act), § 7475(a)(4), a phrase that – as the D.C. Circuit wrote 35 years ago – "*would not seem readily susceptible [of] misinterpretation.*" *Alabama Power Co. v Costle*, 636 F.2d 323, 404 (1979). Whereas the dubious breadth of "any air pollutant" in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggests that the necessary judgment has *already been made by Congress*. The wider statutory context likewise does not suggest that the BACT provision *can bear a narrowing construction*: There is no indication that the Act elsewhere uses, or that EPA has interpreted, "each pollutant subject to regulation under this chapter" to mean anything other than what it says.

134 S. Ct. at 2448 (emphasis added). Accordingly, the Court *affirmed* this Court's holding in *Coalition* regarding the application of BACT to greenhouse gases, specifically finding that EPA may "*continue* to treat greenhouse gases as a 'pollutant subject to regulation under this chapter' for purposes of requiring BACT for 'anyway' sources." *Id.* at 2449 (emphasis added). Thus, while the Supreme Court's narrowing of the statutory definition of "major emitting facility" has the effect of reducing the number of sources required to obtain a PSD permit in the

first instance, it does not affect the requirements of PSD applicable to sources that are, in fact, subject to PSD.

E. EPA's Response to the Decision in *UARG v. EPA*

On July 24, 2014, EPA distributed a Memorandum describing its approach for implementing PSD permitting requirements in light of the Supreme Court's decision. Ex. A. EPA made it clear that until it is able to conduct the administrative process necessary to excise from relevant regulations the language that requires non-anyway sources to obtain a PSD permit, such requirements would not be enforced by EPA, either directly or through State SIPs:

> EPA will no longer apply or enforce federal regulatory provisions or the EPA approved PSD State Implementation Plan (SIP) provisions that require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)). Nor does EPA intend to continue applying regulations that would require that states include in their SIP a requirement that such sources obtain PSD permits.

Ex. A at 2. Indeed, last week EPA approved Texas' submission of a revised SIP governing the treatment of greenhouse gases, with EPA affirmatively declaring that it would not enforce greenhouse gas permitting requirements with regard to non-anyway sources. Exs. B, C at 5-7.[1]

[1] All but one of the 13 states with EPA-approved PSD programs that EPA found inadequate to cover greenhouse gases in SIP Calls have since amended their

In the July 24, 2014 Memorandum, EPA explained that the PSD BACT requirement, just as the Supreme Court stated, *continues* to apply to greenhouse gas emissions from any new or modified source that is otherwise subject to PSD requirements as a result of its emissions of another pollutant (*i.e.*, to "anyway" sources). *Id.* at 2. EPA further explained that it would continue to apply the BACT requirement for anyway sources only where the construction project to be completed would emit or increase greenhouse gases at or above a level of 75,000 tpy of carbon dioxide equivalent ("CO_2e"). *Id.* at 3. This continued application of BACT to greenhouse gas emissions of anyway sources is reflected in States' revised SIPs. *See, e.g.*, Texas SIP, Ex. C at 5-10. Finally, in conjunction with further administrative proceedings to amend relevant regulations, EPA stated that it would consider whether to promulgate a *de minimis* threshold below which BACT would not apply to greenhouse gas emissions from anyway sources. *Id.* at 4.

F. The Remand from the Supreme Court in *Coalition*

On October 21, 2014, the parties in *Coalition* submitted respective motions to govern further proceedings. EPA requested that the Court issue an order: (a) vacating the challenged regulations to the extent they require a stationary source to

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programs to cover greenhouse gases and obtained EPA's approval for such amendments, including Petitioners Wyoming and Texas. 78 Fed Reg. 69,998 (Nov. 22, 2013) (Wyoming); Exs. B, C (Texas).

obtain a PSD permit if greenhouse gases are the only pollutant that a source has the potential to emit over the statutory thresholds; (b) requiring EPA to take steps to expeditiously rescind or revise applicable regulations to reflect the regulatory changes in the PSD program; and (c) directing EPA to consider additional revisions to its regulations (e.g., making a *de minimis* determination) in light of the Court's opinion in *UARG v. EPA*. *Coalition*, Dkt. No. 1518233. Responses to the parties' respective motions to govern are due November 21, 2014.

ARGUMENT

I. THE SUPREME COURT DID NOT DISTURB ANY PREMISE THAT SUPPORTS THIS COURT'S CONCLUSION THAT PSD PERMITTING REQUIREMENTS ARE SELF-EXECUTING

In dismissing the Petitions for Review, this Court concluded that "the plain text of CAA § 165(a) and § 167 compel the interpretation that the PSD permitting requirements are self-executing and prohibit construction of a major emitting facility without … BACT technology for each pollutant subject to regulation under the Act, irrespective of applicable SIP provisions." 726 F.3d at 189-90. This conclusion -- which applies to any major source, i.e., any major emitting facility -- remains true today, after the Supreme Court's decision in *UARG v. EPA*.

After *UARG v. EPA*, a source that is deemed to be a major emitting facility under PSD still requires a PSD permit, which in turn requires implementation of BACT for greenhouse gases, pursuant to the self-executing terms of 42 U.S.C. §

7475(a). The portion of the statute that the Supreme Court found did not apply to greenhouse gases (and thus was implicitly not self-executing *as to greenhouse gases* only) was the definition in 42 U.S.C. § 7479(1) that determines which sources are subject to PSD requirements in the first instance, i.e., which sources are considered to be major emitting facilities. 134 S. Ct. at 2439-46. While the Court's reversal on *that* issue reduces the number of sources subject to PSD requirements, it does not alter the fact that sources that are undeniably subject to PSD – i.e., anyway sources that are subject to PSD due to their emissions of another pollutant – must implement BACT for greenhouse gas emissions in order to obtain a PSD permit and hence must have available a State SIP or an EPA-implemented FIP that covers the requirements for greenhouse gases.

The Court's reversal in *UARG v. EPA* extends only to the issue of which sources are subject to PSD in the first instance, which was not something this Court addressed *or* relied upon in this case. The decision at issue here focused on whether the prohibition in section 7475(a)(1) of the Act requiring a PSD permit and the BACT requirement in section 7475(a)(4) of the Act applies directly to "major emitting facilities," *however* they are defined. This Court found that because the permitting requirements for any source that is found to be a "major emitting facility" are self-executing under these provisions of PSD, EPA's action to ensure that sources in each State immediately have the ability to obtain permits

necessary to satisfy these requirements was both proper and caused Petitioners no harm. While the Court here referred to the decision in *Coalition* a number of times, the decision in this case was not in any way based on the definition of which sources are to be considered a "major emitting facility" and therefore subject to PSD, which is the only part of *Coalition* that was reversed by the Supreme Court. Accordingly, there is no issue to rehear in this case.

II. REHEARING IS UNNECESSARY BECAUSE THE CONCLUSION THAT SOURCES ARE NOT SUBJECT TO PSD BY VIRTUE SOLEY OF THEIR GREENHOUSE GAS EMISSIONS IS NOT IN DISPUTE AND IS BEING IMPLEMENTED

By mischaracterizing the nature of the Supreme Court's decision, Petitioners assert that this Court must rehear this case because its decision has been undermined by the Court's reversal of a portion of *Coalition*. But even if the "triggering issue" reversed in *UARG v. EPA* somehow formed an underpinning of this Court's decision, there would still be no issue to rehear in this case. In light of the decision in *UARG v. EPA*, everyone agrees that PSD does not cover non-anyway sources, and thus there is no issue for this Court to address on rehearing.

EPA has communicated that it will not be enforcing or applying regulatory provisions, including those applicable to SIPs, calling for application of PSD to non-anyway sources, and it has asked this Court in its motion to govern to vacate any such provisions in its order on remand in *Coalition*. Such an action would immediately make those provisions inapplicable and would be followed by EPA

instituting administrative proceedings to expunge the inapplicable provisions from the Code of Federal Regulations. In sum, non-anyway sources are not harmed by the regulations challenged in this case or this Court's decision because, in light of *UARG*, those sources are no longer subject to PSD requirements or, therefore, to the provisions of the SIPs at issue in this case, and EPA is not claiming otherwise.

There simply is no need for the Court to rehear this issue merely to issue a new ruling with fine-tuned language that reflects the Supreme Court's ruling, and Petitioners offer no reason why the Court would need to rehear an issue on which all parties agree. It occasionally occurs that a portion of a court's ruling is overruled or impacted by a subsequent decision of the Supreme Court in another case, but in such instances the lower court is not obliged to go back and revise its opinion. Westlaw, Lexis and Sheppards adequately explain when a portion of a decision has been questioned or effectively overturned.

Similarly, there is no issue for which Petitioners have standing because they can show no injury related to the sole issue on which the Supreme Court reversed. The only way there could be such an injury is if EPA continued to enforce PSD requirements for non-anyway sources notwithstanding *UARG v. EPA*. But to support standing an injury must be certain, and petitioners readily admit that such enforcement *will not happen*. SIP/FIP Group Pet. at 8, quoting EPA's Memorandum ("EPA has itself acknowledged that, in light of *UARG*, it 'will no

longer apply or enforce federal regulatory provisions *or* the EPA-approved PSD State Implementation Plan . . . provisions that require a stationary source to obtain a PSD permit [based on emissions of] greenhouse gases.'") (emphasis in original).

While no further action by this Court is either required or warranted, EPA has no objection should the Court deem it appropriate to issue an order clarifying the reach of its decision in light of *UARG v. EPA*. Such an order should, however, await the action of this Court on remand in *Coalition*, so that the order can consider the specific manner in which EPA's regulations are to be revised to implement the Supreme Court's decision narrowing the applicability of PSD to exclude non-anyway sources of greenhouse gases.[2]

III. REHEARING CANNOT BE BASED ON HOLDINGS THE SUPREME COURT DID NOT ISSUE

Texas, Wyoming, and certain industry Petitioners (collectively "Texas") echo the arguments made by the SIP/FIP Group but make a separate argument.

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[2] The SIP/FIP Group seeks rehearing *en banc* in addition to panel rehearing, basing their petition on notions of cooperative federalism. Rehearing *en banc* should be denied for the same reasons offered in response to the petition for panel rehearing, as States are not accorded special standing to challenge regulations that cause them no harm. Further, EPA's authority to ensure that the PSD program is administered by States in accordance with statutory requirements has long been recognized as well within EPA's authority – and duty – and does not impinge upon States' rights. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 490 (2004) (Congress "vested EPA with explicit and sweeping authority to enforce CAA 'requirements' relating to the construction and modification of sources under the PSD program."). And, as the Panel explained, invoking cooperative federalism in this case rings hollow. *Texas v. EPA*, 726 F.3d at 193.

Texas asserts that "[a]lthough 'EPA may . . . continue to treat greenhouse gases as a [PSD pollutant] . . . for purposes of requiring BACT for "anyway" sources' [134 S. Ct. at 2449], to do so, EPA must first amend the regulations in 40 C.F.R. Part 51 that govern PSD requirements. Until EPA has amended those rules and states have submitted SIPs consistent with those rules, GHGs are not subject to regulation in any form under the PSD program." Texas Pet. 3.

Search as one might, no such requirement can be found in the Supreme Court's opinion in *UARG v. EPA*. Instead, after citing at length to the *triggering* portion of the Supreme Court's opinion that says EPA may not classify a source as "major" solely on the basis of its greenhouse gas emissions, Texas states that the Court's holding with regard to EPA's continued authority to require BACT for greenhouse gas emissions from anyway sources was a determination made under *Chevron* step two and that "before EPA could implement such an interpretation and establish a requirement for SIP submittals addressing GHG BACT for anyway sources, EPA would have to promulgate new Part 51 rules." Texas Pet. 12. But these propositions are both irrelevant and incorrect.

First, the Supreme Court expressly held that EPA may "continue" to require BACT for anyway sources and affirmed the corresponding portion of this Court's opinion in *Coalition*. Moreover, the Supreme Court's affirmation that EPA may require BACT for greenhouse gas emissions for anyway sources was based on the

express language of the statute. As outlined *supra*, the Court expressly stated that "the more specific phrasing of the BACT provision suggests that the necessary judgment has already been made by Congress. The wider statutory context likewise does not suggest that the BACT provision can bear a narrowing construction. . . ." *UARG v. EPA*, 134 S. Ct. at 2448. Unlike the triggering provisions and the question of which sources are required to obtain a PSD permit in the first instance, where the Court turned to a *Chevron* step two analysis after determining that EPA's interpretation was not the unambiguous directive of Congress, 134 S. Ct. at 2442-46 (conducting *Chevron* step two analysis), the Court never stated that it applied a *Chevron* step two analysis with regard to the application of BACT to anyway sources. The Court never suggested that the BACT provision was ambiguous or referred to the deference accorded to EPA in a *Chevron* step two analysis. The Court resolved this issue at *Chevron* step one.

Texas contends that the BACT portion of the Court's opinion was a *Chevron* step two analysis by relying on the Court's single statement that it issued a "narrow ruling" that nothing in the statute "categorically prohibits" EPA from interpreting BACT to apply to greenhouse gases emitted from anyway sources. Texas Pet. 3, 12. But this statement was made in the context of the Court's warning that when BACT is applied on a case-by-case basis in the future, regulatory anomalies may arise in a "distinct context," which should be dealt with in those specific situations.

134 S. Ct. at 2449. Indeed, the Court made this statement in explaining that EPA's application of BACT for greenhouse gas emissions was a "judgment [that] has already been made by Congress" and that BACT for anyway sources would nevertheless still be proper "[e]ven if the [statutory] text were not clear." *Id.* As the quoted language suggests, the Court was, in the first instance, resting its BACT holding on the "clear" text of the statute, explaining that it would still have upheld EPA's approach as reasonable "even if" the inquiry were made under *Chevron's* second step rather than its first.

More importantly, even if the Supreme Court's decision with regard to the continued validity of the BACT requirement to greenhouse gas emissions was made under a *Chevron* step two analysis, it would be of no import. It does not matter if the statute is unambiguous or if the Court determined that EPA's interpretation that the statute requires the application of BACT for greenhouse gas emissions was reasonable under *Chevron* step two. In either case the Court determined that BACT for greenhouse gases *is required* by the statute – which was the question the Court posed in Part II of its opinion. 134 S. Ct. at 2447.

This Court already addressed at length Petitioners' argument that States do not have to apply BACT or other PSD requirements until applicable regulations are generated and that they may take three years thereafter to amend their SIPs to address greenhouse gases. The Court rejected all of these arguments, explaining

that the requirement to implement BACT is self-executing under 42 U.S.C. § 7475(a)(4) and is not imposed by EPA's revision of the SIP regulations. 726 F.3d at 191-95. Nothing about the Supreme Court's opinion resurrects those arguments with regard to the application of BACT to anyway sources.

Alternatively, Texas argues that the Supreme Court held that EPA may not continue to require anyway sources to implement BACT as a condition for obtaining a PSD permit unless it promulgates a *de minimis* determination and, until it does so, EPA is prohibited from implementing its existing regulations for applying the BACT requirement for greenhouse gas emissions even to sources already subject to PSD, i.e., to anyway sources. Texas Pet. 13, 15. The Supreme Court established no such requirement nor did it disturb EPA's regulations that limit application of BACT to anyway sources that emit greenhouse gases in the amount of 75,000 tpy CO2e or more.

To the contrary, the Supreme Court expressly held that although EPA may no longer require a source to obtain a PSD permit based solely on its greenhouse gas emissions, "EPA may, however, *continue* to treat greenhouse gas emissions as a 'pollutant subject to regulation under this chapter [the CAA]' for purposes of requiring BACT for 'anyway sources.'" 134 S. Ct. at 2449 (emphasis added). The Court further explained that BACT already was being applied to anyway sources without significant problems. *Id.* at 2447 (noting the experience of Calpine in

applying BACT for greenhouse gases). EPA clearly cannot *continue* to apply BACT to anyway sources as it has been doing (and as the Supreme Court expressly stated it could) and simultaneously be *prohibited from* applying BACT to anyway sources until it conducts a rulemaking to determine whether a *de minimis* level of emissions for greenhouse gases is appropriate and, if so, at what level.

Petitioners misconstrue a single sentence in the Supreme Court decision that merely recognizes, based on D.C. Circuit precedent, EPA's authority to avoid applying the BACT requirement to *de minimis* levels of greenhouse gas emissions. Texas Pet. 14-15; 134 S. Ct. at 134. ("However, EPA may require an 'anyway' source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases."). Petitioners misread the "only if" in this sentence as modifying the verb "may require." The object of the sentence is the following phrase: "an 'anyway' source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases." The term "only if" is simply part of the description of what EPA "may require." This sentence merely points out that EPA *may* determine that there are amounts of greenhouse gases that could be deemed *de minimis* as applied to the application of BACT.

This off-hand comment by the Court about what EPA *may* do, cannot be twisted into a statutorily-based prerequisite for the application of BACT. If, as the

Supreme Court has said, Congress does not hide elephants in mouseholes, *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001), then its stands to reason that the Supreme Court does not do so either. The Supreme Court noted no prerequisite to the application of the unambiguous Congressional declaration that a major emitting facility must apply BACT to "each pollutant subject to regulation under this chapter." 42 U.S.C. 7475(a)(4).

Indeed, the question of whether, or at what level, EPA should establish a *de minimis* level for greenhouse gas emissions for the purpose of applying PSD BACT requirements was not even before the Supreme Court. The *only* issue on which *certiorari* was granted was described by the Supreme Court as "whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases." *UARG*, 134 S. Ct. at 2434. Nothing about whether or at what level *de minimis* thresholds should be established for the BACT requirement was briefed to the Court. Indeed, neither the level at which greenhouse gases may be considered *de minimis* nor the issue of whether the 75,000 tpy threshold for applying BACT is appropriate was an issue addressed in *Coalition*.

The Supreme Court is a court of "final review, not of first view." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (citation omitted). On the

BACT issue, all the Supreme Court had before it was an EPA reading of the Clean Air Act as requiring BACT for anyway sources, and regulations implementing that reading that this Court had upheld, and the Supreme Court "affirmed" that part of this Court's decision. To suppose that the Supreme Court nonetheless intended to bar or suspend operation of this aspect of the statute and EPA's implementing regulations *sub silentio*, on the basis of murky theories not previously presented to this Court, is wholly unjustified based on the record of these proceedings and inconsistent with the normal principles of appellate review.

Indeed, the Supreme Court's limited references to the potential promulgation of a *de minimis* level of emissions only supports the view that it was not deemed by the Court to be a prerequisite to applying BACT requirements to anyway sources. In describing the *de minimis* doctrine, the Supreme Court explained that it is EPA's option as to whether to create a *de minimis* threshold for BACT. 134 S. Ct. at 2449 ("EPA *may* establish an appropriate *de minimis* threshold below which BACT is not required for a source's greenhouse gas emissions.") (Emphasis added). Never did the Court state that EPA *must* establish a de minimis threshold for BACT. The Supreme Court further explained that it was *not* holding that the 75,000 tpy threshold for applying the BACT requirement to anyway sources was invalid because it exceeds a true *de minimis* level, or otherwise questioning the regulation establishing that threshold, but only that if EPA *were* to establish a *de*

minimis exemption, it would need to justify both the establishment of the exemption and the selection of the *de minimis* level on proper grounds. *Id.*

Most importantly, nowhere did the Court hold that until EPA performs *de minimis* determination, it is prohibited from requiring anyway sources to implement BACT as part of their permitting requirements. To the contrary, in acknowledging EPA's authority to create a *de minimis* threshold, if appropriate, the Supreme Court cited and relied upon this Court's decision in *Alabama Power v. Costle*, 636 F.2d 323, 360-61, 400, 405 (D.C. Cir. 1979). *UARG v. EPA*, 134 S. Ct. at 2435 n.1, 2448-49. In *Alabama Power*, the Court rejected a blanket exemption from PSD BACT requirements for sources emitting criteria pollutants below certain levels. Just like the Supreme Court in *UARG v. EPA*, the Court in *Alabama Power* explained that EPA could, on a proper record, establish a *de minimis* threshold below which sources would not have to implement BACT. The Court found that until such a record was established, the BACT requirement applied as set forth under the statute. 636 F.2d at 403-05. Texas argues for the opposite result; that until EPA performs a *de minimis* determination, the BACT requirement may *not* be applied. But this is not the law of this circuit (*Alabama Power*), which was favorably cited by the Supreme Court in *UARG* as the basis for the *de minimis* doctrine.

Indeed, EPA's existing regulations that Petitioners contend EPA must supplement, already operate in exactly this manner. EPA's regulations provide that BACT applies to each pollutant emitted or increased in significant amounts. 40 C.F.R. § 52.21(j)(2)-(3). These significance levels for individual pollutants are established at 40 C.F.R. §§ 51.166(b)(23)(i) and 52.21(b)(23)(i). For pollutants not listed in this provision, *any* amount or increase in emissions is considered significant under sections 51.166(b)(23)(ii) and 52.21(b)(23)(ii). Thus, consistent with the case law on *de minimis* exceptions, the BACT requirement applies to the pollutant at any level of emissions unless and until EPA promulgates the significance level that Petitioners contend EPA must now create. And again, none of these provisions was challenged by Petitioners in *Coalition* or in this case.

Just as Petitioners lacked standing to challenge the regulations at issue in this case, they most assuredly lack standing to challenge the lack of a *de minimis* determination for the application of BACT for anyway sources. At present, an anyway source does not need to implement BACT unless it has the potential to emit 75,000 tpy of greenhouse gases. As the Supreme Court acknowledged, any *de minimis* determination could set the threshold at a level substantially below 75,000 tpy. 134 S. Ct. at 2438 n.3. More importantly, as outlined above, under both the precedent of this Court and EPA's regulations, if sections 51.166(b)(48)(iv) and 52.21(b)(49)(iv) (which establish the 75,000 ton threshold

for "anyway" sources) were to be vacated, then *any* amount or increase in greenhouse gas emissions would be subject to the BACT requirement until such time as EPA promulgates a significance level. 40 C.F.R. §§ 51.166(b)(23)(ii); 52.21(b)(23)(ii); 51.166(j)(2)-(3); 52.21(j)(2)-(3). Accordingly, the decision in *UARG v. EPA* does not alter any of the facts about how the PSD program operates on which this Court based its conclusion that Petitioners lack standing. Thus, the Supreme Court's decision provides no basis to conclude that rehearing or rehearing *en banc* is warranted.

CONCLUSION

For the foregoing reasons, the Petitions for Rehearing or Rehearing *En Banc* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing EPA's Response to Petitions for Rehearing and Rehearing *En Banc*, was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Dated: November 4, 2014

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