

# TEXT IN CONTEXT: THE FATE OF EMERGENT CLIMATE REGULATION AFTER *UARG* AND *EME HOMER*

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## INTRODUCTION

The 2013 Term of the U.S. Supreme Court was obviously significant for the U.S. Environmental Protection Agency (“EPA”). EPA achieved a complete victory in one case, *EPA v. EME Homer City Generation, L.P.* (“*EME Homer*”),<sup>1</sup> and partial victory in another, *Utility Air Regulatory Group v. EPA* (“*UARG*”).<sup>2</sup> In *EME Homer*, the Court upheld EPA’s reading of the Clean Air Act’s (“CAA”) Good Neighbor Provision<sup>3</sup> to allow for an innovative interstate emission-reduction program.<sup>4</sup> In *UARG*, although the Court invalidated EPA’s interpretation applying two CAA permitting programs to greenhouse gas (“GHG”) emissions, it nonetheless upheld the majority of EPA’s permitting scheme.<sup>5</sup> *UARG* thus was, for all practical purposes, a substantive win for EPA. Yet the legality of EPA’s most ambitious rulemaking to date, the proposed Clean Power Plan for regulation of existing power-plant GHG emissions under CAA section 111(d),<sup>6</sup> remains uncertain, and judicial review is inevitable.<sup>7</sup>

*EME Homer* and *UARG* will play a starring role in determining the Clean Power Plan’s viability. So, too, of course, will the canonical *Chevron v. Natural Resources Defense Council*,<sup>8</sup> which governs judicial review of an administra-

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<sup>1</sup> 134 S. Ct. 1584 (2014).

<sup>2</sup> 134 S. Ct. 2427 (2014).

<sup>3</sup> 42 U.S.C. § 7410(a)(2)(D)(i) (2012).

<sup>4</sup> *EME Homer*, 134 S. Ct. at 1609–10.

<sup>5</sup> *UARG*, 134 S. Ct. at 2449.

<sup>6</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014) [hereinafter Clean Power Plan Proposed Rule].

<sup>7</sup> State and industry opponents have already filed lawsuits seeking to block the Clean Power Plan prior to finalization of the rulemaking. *See, e.g.*, Complaint, In re: Murray Energy Corp., No. 14-1112 (D.C. Cir. June 26, 2014); Complaint, West Virginia v. EPA, No. 14-1146 (D.C. Cir. Aug. 1, 2014).

<sup>8</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

tive agency's statutory interpretation. Under the familiar "*Chevron* Two-Step," a reviewing court must first employ the tools of statutory construction to determine whether Congress has spoken directly to the particular issue, and if so, "must give effect to the unambiguously expressed intent of Congress."<sup>9</sup> But if a statute is ambiguous, the court must defer to the agency's interpretation as long as it is reasonable.<sup>10</sup>

*EME Homer* and *UARG* relied on *Chevron* Step Two in ways that seem somewhat inconsistent with each other. Step Two is traditionally viewed as a relative safe harbor for agencies.<sup>11</sup> Indeed, where courts invalidate agency action, they typically do so at Step One.<sup>12</sup> *UARG* offers a rare example of the Court using Step Two to invalidate agency action, finding that a portion of EPA's permitting program was not a reasonable interpretation of statutory text that seemed, on its face, to require EPA to pursue its chosen regulatory path.<sup>13</sup> *EME Homer*, too, relied on Step Two, but to uphold an ambitious emission-control program even though a good case could be made that the program conflicted with the plain statutory language.<sup>14</sup>

Read together, the cases provide somewhat contradictory guidance about the application of *Chevron* to EPA's CAA interpretations. Yet we believe that *EME Homer* and *UARG* share an important lesson: in reviewing an agency's interpretation of statutory language, context matters significantly in deciding what a text allows. One could, indeed, go even further. Context matters even when the statutory text arguably points in another direction.<sup>15</sup> This lesson, we suggest, will be extremely important as courts consider whether the Clean Power Plan is a permissible implementation of section 111(d).

If a challenge to the Clean Power Plan reaches the Court, at least two different readings of the CAA statutory context, leading to opposite outcomes, seem possible. The first is similar to the context described by the Court in *EME Homer*. In upholding EPA's interpretation of the Good Neighbor Provision to allow a multi-state emission-trading program, the Court found the relevant statutory language, which seemed to focus on state-to-state cross-border pollution, to be ambiguous.<sup>16</sup> It then stressed that in interpreting the Good Neighbor Pro-

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<sup>9</sup> *Id.* at 842–43.

<sup>10</sup> *Id.* at 843.

<sup>11</sup> See, e.g., Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 768 (2008).

<sup>12</sup> See generally *id.*

<sup>13</sup> Compare *UARG*, 134 S. Ct. 2427, 2439–42 (2014), with *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (stating that GHGs "fit well" within the CAA's "capacious definition of 'air pollutant'").

<sup>14</sup> Compare *EME Homer*, 134 S. Ct. 1584, 1603–04 (2014), with *id.* at 1610–13 (Scalia, J., dissenting) (finding that the text of the Good Neighbor Provision unambiguously prohibits the Transport Rule).

<sup>15</sup> We say "arguably" because in each case, the court of appeals below found that the statutory language at stake led to a conclusion opposite of the Supreme Court's conclusion. Compare *id.* at 1604 (majority opinion) (quoting *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 21 (D.C. Cir. 2012)), with *id.* at 1606; compare *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 134 (2012) (per curiam), with *UARG*, 134 S. Ct. at 2442.

<sup>16</sup> See *EME Homer*, 134 S. Ct. at 1604–06.

vision, EPA had exercised “sensibl[e]” judgment in attacking a “thorny” pollution problem by incorporating considerations of cost-effectiveness and historical state efforts into its program design.<sup>17</sup> The Court additionally emphasized that the Agency must have “leeway” to balance competing policy priorities “in fulfilling its statutory mandate.”<sup>18</sup>

By contrast, *UARG* struck down the Agency’s extension of permitting requirements to small, previously unregulated GHG sources, even though the statutory language of the permitting program seemingly covered such sources.<sup>19</sup> In the *UARG* Court’s view, EPA’s position that the statute unambiguously compelled the Agency to regulate small sources “radically transform[ed]” the Agency’s power.<sup>20</sup> Instead, the Court determined that application of the arguably clear text to GHGs, when considered in the context of the statute more generally, rendered the text ambiguous.<sup>21</sup> The Court then, in turn, found the Agency’s “enormous and transformative” interpretation unreasonable under *Chevron* Step Two.<sup>22</sup>

Which context, or story, will prevail as courts evaluate the Clean Power Plan? In designing its program for state-based control of GHG emissions from existing power plants, is EPA interpreting section 111(d) “sensibly” by issuing a rule that takes into account cost-effectiveness, historical state action to regulate GHG emissions, and the complexity of the problem, thus warranting the leeway that *EME Homer* accorded EPA? Or is the Agency engaged in an “enormous and transformative” power grab as in *UARG*, imposing on power plants and states a rule that extends far beyond the bounds of what the CAA intends? The story that succeeds in this battle of contexts will, in our view, determine the legality of the Clean Power Plan.

## I. TEXT AND CONTEXT IN *EME HOMER* AND *UARG*

The importance of context to statutory interpretation is not novel. The Court has repeatedly confirmed that *Chevron* Step Two requires reviewing courts to evaluate the agency’s interpretation of statutory text broadly in light of the overall statutory framework.<sup>23</sup> Yet given the likelihood of future challenges to the Clean Power Plan,<sup>24</sup> the Court’s contextual evaluation of innovative emission-control programs in *EME Homer* and *UARG* warrants close examination.

In *EME Homer*, the Court rejected industry opponents’ argument that EPA’s interpretation is inconsistent with the CAA’s Good Neighbor Provision.<sup>25</sup>

<sup>17</sup> *Id.* at 1604, 1607.

<sup>18</sup> *Id.* at 1607, 1609.

<sup>19</sup> See *UARG*, 134 S. Ct. at 2444.

<sup>20</sup> *Id.* at 2442.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2444.

<sup>23</sup> See, e.g., *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 485–86 (2001); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 696–708 (1995); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840, 866 (1984).

<sup>24</sup> See *supra* note 7.

<sup>25</sup> *EME Homer*, 134 S. Ct. 1584, 1603–07 (2014).

The CAA requires EPA to establish environmental- and health-based National Ambient Air Quality Standards (“NAAQS”) for six criteria pollutants and to designate “nonattainment” areas where concentration of a pollutant exceeds the NAAQS.<sup>26</sup> Each state must then develop and submit for EPA’s approval a State Implementation Plan (“SIP”) to achieve compliance with the NAAQS.<sup>27</sup> The Good Neighbor Provision additionally requires SIPs to prohibit any in-state source “from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interference with maintenance [of NAAQS] by, any other State . . . .”<sup>28</sup>

*EME Homer* addressed the practical challenges of regulating air pollution emitted in one state that contributes to nonattainment in other states. There are thousands of such pollution linkages between upwind and downwind states, rendering complex the determination of whether and which upwind states “contribute significantly” to downwind nonattainment.<sup>29</sup> EPA attempted to solve this puzzle through the Cross-State Air Pollution Rule (“Transport Rule”), which controls in twenty-seven states certain emissions that inhibit downwind states’ compliance with the NAAQS.<sup>30</sup> To determine which upwind states contribute significantly to downwind nonattainment, EPA modeled the allocation of cost-effective emission reductions among upwind states. EPA then translated its calculations into annual emission budgets representing the amount of emissions each upwind state would produce were it to implement all cost-effective controls.<sup>31</sup>

On review, the appellate court held that the Transport Rule violated the Good Neighbor Provision’s requirement that emission reductions be allocated among upwind states in proportion to impact.<sup>32</sup> The Supreme Court reversed.<sup>33</sup> Applying *Chevron* Step Two, the Court concluded that EPA chose “sensibly” from among the plausible options to target the most cost-effective reductions.<sup>34</sup> The Court emphasized the complexities of interstate air pollution control, particularly where states have different historical track records of attention to the pollution.<sup>35</sup> *EME Homer* is a sweeping victory for EPA, as well as a confirmation of courts’ obligation to defer to an agency’s reasonable judgment.<sup>36</sup>

A wry dissent by Justice Scalia starkly diverges from *EME Homer*’s deferential majority opinion. Neither the practical complexities of implementing the

<sup>26</sup> 42 U.S.C. §§ 7407–09 (2012).

<sup>27</sup> *Id.* § 7410(a)(1).

<sup>28</sup> *Id.* § 7410(a)(2)(D)(i).

<sup>29</sup> *EME Homer*, 134 S. Ct. at 1593–94 (internal quotation marks omitted).

<sup>30</sup> Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011).

<sup>31</sup> *Id.* at 48,236–37, 48,248–49. See *EME Homer*, 134 S. Ct. at 1596–97.

<sup>32</sup> See *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 22–28 (D.C. Cir. 2012).

<sup>33</sup> *EME Homer*, 134 S. Ct. at 1600–01.

<sup>34</sup> *Id.* at 1607 (“Eliminating those [pollution] amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address.”).

<sup>35</sup> *Id.* at 1605.

<sup>36</sup> See *id.* at 1607.

Good Neighbor Provision nor the sensibleness of EPA's solution could mollify Justice Scalia's concern that the Transport Rule reflects "remarkably expansive" authority.<sup>37</sup>

Similar concerns resurfaced in *UARG*, where Justice Scalia, writing for the majority, rejected EPA's interpretation of the triggers for application of the CAA's Prevention of Significant Deterioration ("PSD") and Title V permitting programs to stationary sources of GHGs.<sup>38</sup> The programs require permits for "major" emitters—defined as sources with the potential to emit 100 or 250 tons per year of "any air pollutant" in certain circumstances.<sup>39</sup> EPA argued (and the lower court agreed) that the provisions had to extend to sources with the potential to emit GHGs in those amounts even though the requirement would sweep potentially thousands of sources into EPA's regulatory ambit.<sup>40</sup> Applying *Chevron* Step One, the Supreme Court held that the statutory language did not compel EPA's interpretation, emphasizing that EPA need not regulate every air pollutant every time the term is included in the statute but instead should exercise its power "sensibly."<sup>41</sup>

The Court then moved on to Step Two. Justice Scalia's concern about EPA "seizing expansive power" helps to explain *UARG*'s rare invalidation of agency action here.<sup>42</sup> Referring to the absurd results that could flow from immediately applying the permitting programs to GHGs,<sup>43</sup> the *UARG* Court concluded "it beyond reasonable debate" that EPA's interpretation was "'incompatible' with 'the substance of Congress' regulatory scheme.'" <sup>44</sup> Under the Court's reading, permitting "cannot rationally be extended beyond a relative handful of large sources capable of shouldering heavy substantive and procedural burdens."<sup>45</sup> According to the Court, the potentially "disastrous[ ]" consequences of the interpretation—including tremendous costs, economic disruption, and excessive administrative burdens—were alone sufficient grounds to reject EPA's interpretation.<sup>46</sup> Moreover, the Court expressed unease about EPA stretching its permitting authority into a significant new regulatory area: small, nonindustrial sources. Justice Scalia invoked the major questions canon raised in *FDA v. Brown & Williamson Tobacco Corp.*:<sup>47</sup>

<sup>37</sup> *Id.* at 1617 (Scalia, J., dissenting).

<sup>38</sup> For a more detailed description of the case, see Cecilia Segal, *Climate Regulation Under the Clean Air Act in the Wake of Utility Air Regulatory Group v. EPA: Introduction*, 39 HARV. ENVTL. L. REV. 1, 5–6 (2015).

<sup>39</sup> See 42 U.S.C. §§ 7475, 7479(1)–(2), 7602(j), 7661 (2012).

<sup>40</sup> See *UARG*, 134 S. Ct. 2427, 2439 (2014); *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132–36 (2012).

<sup>41</sup> *UARG*, 134 S. Ct. at 2439–42.

<sup>42</sup> See *id.* at 2444.

<sup>43</sup> *Id.* at 2442. See also *id.* at 2436, 2437, 2443 (referencing EPA's admissions that extending permitting to smaller sources would be unprecedented, administratively burdensome, economically disruptive, and perhaps beyond congressional intent).

<sup>44</sup> *Id.* at 2443 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000)).

<sup>45</sup> *Id.* at 2443.

<sup>46</sup> *Id.* at 2443–44, 2448.

<sup>47</sup> 529 U.S. 120 (2000).

EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority. . . . We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."<sup>48</sup>

The Court did agree with EPA that the CAA's "best available control technology" ("BACT") provision, unlike the triggers, unambiguously applies to GHG emissions from "anyway sources" already subject to PSD permitting.<sup>49</sup> Even if the BACT provision were ambiguous, the Court declared, requiring GHG BACT for anyway sources is "not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority" as to be unreasonable.<sup>50</sup> In practical effect, upholding the GHG BACT requirement for anyway sources preserved permitting for roughly eighty-three percent of stationary-source GHG emissions.<sup>51</sup> Consequently, *UARG* is another broad victory for EPA.

In both *EME Homer* and *UARG*, EPA sought to resolve a complex emission-reduction problem, the details of which the statutory text did not precisely predict. Although the outcomes of the cases seem to provide conflicting guidance about the scope of EPA's interpretive authority, they are in harmony in emphasizing the importance of context in deciding what a statutory provision allows.

## II. LOOKING AHEAD: THE CLEAN POWER PLAN IN CONTEXT

Should challenges to the Clean Power Plan reach the Supreme Court, *EME Homer* and *UARG* suggest that the Court's view of how the rule relates to the CAA statutory context could be the key factor in determining the legality of the rule. Section 111(d) is brief, but its text appears to grant EPA wide administrative authority.<sup>52</sup> The provision directs EPA to establish by rule a procedure for states to submit SIP-like plans containing "standards of performance" for certain "existing source[s]" of "any air pollutant" that is neither controlled as a criteria pollutant nor regulated as a hazardous air pollutant.<sup>53</sup> Fossil fuel-fired power plants are among the categories of sources subject to section 111(d).<sup>54</sup>

<sup>48</sup> *UARG*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160).

<sup>49</sup> *Id.* at 2447–49; 42 U.S.C. § 7475(a)(4) (2012) (conditioning PSD permits on installation of BACT "for each pollutant subject to regulation under" the CAA).

<sup>50</sup> *UARG*, 134 S. Ct. at 2448.

<sup>51</sup> *See id.* at 2438–39.

<sup>52</sup> *See, e.g.*, 42 U.S.C. § 7411(d)(1) ("The Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit . . . a plan . . .").

<sup>53</sup> *Id.* § 7411(d). *But see, e.g.*, Brief of the States of West Virginia et al. as Amici Curiae in Support of the Petitioner, In re: Murray Energy Corp., No. 14-1112 (D.C. Cir. filed June 25, 2014) (arguing that any pollutant emitted from a source category regulated under CAA section 112 is exempt from section 111(d)).

<sup>54</sup> *See* 42 U.S.C. § 7411(d)(1)(A) (triggering section 111(d) where EPA has issued a New Source Performance Standard ("NSPS") for a source category); Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed.

Because GHGs are neither a criteria pollutant nor a hazardous air pollutant, EPA proposed the Clean Power Plan to guide state control of GHGs from existing power plants.<sup>55</sup> States must submit to EPA a plan that is “no less stringent” than the federal guideline.<sup>56</sup> The state plan must also include provisions for the implementation and enforcement of its “standards of performance.”<sup>57</sup> “Standard of performance” is in turn defined as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction [BSER] which (taking into account the cost . . . ) the [EPA] Administrator determines has been adequately demonstrated.”<sup>58</sup>

Historically, EPA has issued only thirteen section 111(d) rules for existing sources—most, though not all, in the form of traditional emission-intensity limits achievable through installation of a control technology.<sup>59</sup> Regulation of GHGs from existing power plants raises a difficult problem, however. Technologies to reduce the GHG emission-intensity of power plants are limited in effect or high in cost.<sup>60</sup> Instead, measures that are implemented not “inside the fence line” of individual facilities but within the electricity sector more generally can be both more cost-effective and more successful in achieving significant emission reductions.<sup>61</sup> Mitigation measures that have proven successful at the state level—such as end-use energy efficiency incentives, renewable portfolio standards, and cap-and-trade programs—do not resemble the end-of-stack control measures conventionally utilized in CAA regulation.<sup>62</sup> Moreover, a number of states have made significant investments in existing GHG mitigation programs while others have lagged behind.<sup>63</sup>

In the Clean Power Plan, EPA opted to propose state-specific GHG emission-reduction targets for 2030.<sup>64</sup> EPA developed the targets by calculating each state’s electricity-sector emission rate if the state were to implement a bundle of emission-reduction measures that EPA deems cost-effective, including measures that reduce emissions “outside the power plant fence line” such as demand-side energy efficiency and increased renewable energy generation.<sup>65</sup> The

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Reg. 1430 (Jan. 8, 2014) (proposing NSPS for GHG emissions from fossil fuel-fired electric generating units).

<sup>55</sup> See Clean Power Plan Proposed Rule, 79 Fed. Reg. at 34,830, 34,844.

<sup>56</sup> 40 C.F.R. § 60.24(c) (2014).

<sup>57</sup> 42 U.S.C. § 7411(d)(1)(A)–(B).

<sup>58</sup> *Id.* § 7411(a)(1).

<sup>59</sup> See Am. Coll. of Env’t Lawyers, Memorandum for ECOS Concerning Clean Air Act 111(d) Issues 5 (Feb. 22, 2014), <http://perma.cc/3QZP-TTEF>. For a discussion of the nontraditional section 111(d) guidelines, see *infra* text accompanying note 94.

<sup>60</sup> See Clean Power Plan Proposed Rule, 79 Fed. Reg. at 34,877–78.

<sup>61</sup> See *id.* at 34,832–33, 34,844–45.

<sup>62</sup> See *id.* at 34,835, 34,848–51; EPA, SURVEY OF EXISTING STATE POLICIES AND PROGRAMS THAT REDUCE POWER SECTOR CO<sub>2</sub> EMISSIONS 6 (2014), <http://perma.cc/R5R3-UPF8>.

<sup>63</sup> See Clean Power Plan Proposed Rule, 79 Fed. Reg. at 34,834, 34,838–51.

<sup>64</sup> *Id.* at 34,895 tbl.8.

<sup>65</sup> See *id.* at 34,855–92; EPA, OFFICE OF AIR AND RADIATION, DOCKET ID No. EPA-HQ-OAR-2013-0602, GOAL COMPUTATION TECHNICAL SUPPORT DOCUMENT 3–4 (2014), <http://perma.cc/3JQK-PSBS>.

proposal would not require states to adopt outside-the-fenceline measures but would instead allow states “significant flexibility to determine how to best achieve” the targets in their plans, acknowledging the differences in each state’s “emission reduction opportunities,” and “existing state programs and measures,” as well as “states’ commitments to a wide range of policy preferences.”<sup>66</sup>

State and industry opponents inevitably will challenge the final Clean Power Plan.<sup>67</sup> Should review reach the Supreme Court, we believe that, as with *UARG* and *EME Homer*, the Court would review the rule under *Chevron* Step Two. The statutory language the Court would be interpreting—phrases such as “standards of performance” and “best system of emission reduction”—does not have a clear meaning that commands EPA to regulate in only one direction. In evaluating the Clean Power Plan under Step Two, then, the key question is likely to be: which contextual story will prevail? Would Justice Scalia’s view that EPA is engaged in a power grab and causing extensive economic disruption in violation of the major questions canon succeed, as in *UARG*? Or would the Court read the Clean Power Plan contextual story more like *EME Homer*, as a reasonable attempt to achieve meaningful GHG emission reductions in a cost-effective manner by allowing for outside-the-fenceline reductions?

As we discuss below, we think a strong case can be made that the Clean Power Plan, like the emission-control program at issue in *EME Homer*, is a reasonable interpretation of section 111(d). We acknowledge, however, that the *UARG* story will have resonance for judges uncomfortable with innovative forms of regulation.<sup>68</sup>

#### A. *Story One: An “Enormous and Transformative Expansion” of Authority*

In the first of the Court’s possible readings of the Clean Power Plan, the Court may view the broad scope and effect of EPA’s proposed emission-control program, implementing the rarely utilized text of section 111(d), as a “remarkably expansive” power grab.<sup>69</sup> Under this reading, the Court could find that the language of section 111(d) reflects congressional intent to check sources’ emission intensity via modest, state-driven technology requirements imposed directly on power plants. The Court would reject the Clean Power Plan’s focus on an integrated system of electricity generation, transmission, and delivery rather than individual plants. Considering reductions achievable through measures that displace generation from regulated plants would be viewed as a dramatic expansion of EPA authority well beyond the scope of what the CAA envisions.

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<sup>66</sup> Clean Power Plan Proposed Rule, 79 Fed. Reg. at 34,900–01.

<sup>67</sup> See *supra* note 7.

<sup>68</sup> See, e.g., *EME Homer*, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting) (joined by Justice Thomas); *UARG*, 134 S. Ct. 2427, pt. II-B-1(2014) (joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito).

<sup>69</sup> *EME Homer*, 134 S. Ct. at 1617 (Scalia, J., dissenting).



Without doubt, *UARG* provides some indications that five Justices may view the Clean Power Plan as an unlawful extension of federal authority much like EPA's GHG-permitting program. For instance, *UARG* suggests that unconventional emission-control methods, similar to the measures included in the Clean Power Plan, sit uneasily within the CAA. In a portion of the *UARG* opinion joined by Justices Scalia, Kennedy, Alito, Thomas and Chief Justice Roberts, the Court equated "compulsory improvements in energy efficiency" (as opposed to "traditional end-of-stack controls") with "'unbounded' regulatory authority."<sup>70</sup> The Court ultimately concluded that certain features of the BACT analysis appropriately constrained EPA authority, but the Court made certain to clarify that its "decision should not be taken as an endorsement of all aspects of EPA's current approach."<sup>71</sup> In the context of the Clean Power Plan, these five Justices may view EPA's consideration of outside-the-fenceline emission-reduction measures as beyond the bounds of its CAA authority.

Furthermore, notwithstanding that section 111(d) grants EPA broad authority, *UARG* noted that courts respond skeptically where "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'"<sup>72</sup> In response to EPA's claim of authority over previously unregulated small sources, the *UARG* Court invoked the major questions canon,<sup>73</sup> which prohibits courts from extending deference to agency decisions of vast "economic and political significance."<sup>74</sup> In addition, two Justices, Scalia and Thomas, dissented in *EME Homer* on grounds quite similar to those of *UARG* and also invoked the major questions canon.<sup>75</sup> Justice Alito did not participate in *EME Homer*, but expressed a comparably critical opinion in *UARG*.<sup>76</sup>

The Court could invoke reasoning similar to the *UARG* majority and *EME Homer* dissent in reviewing the Clean Power Plan. While no bright line exists between "major questions" and the policy choices that rightfully fall within agency discretion, *UARG* suggests that an extension of EPA authority into new regulatory terrain raises red flags,<sup>77</sup> and confirmed that courts "expect Congress to speak clearly" in such circumstances.<sup>78</sup> Although EPA has long used section 111(d) to regulate emissions, the provision is slim and rarely triggered. On the few occasions when EPA has developed guidelines in the past, it has typically—though not always—required each and every regulated source to reduce its emission intensity.<sup>79</sup> By contrast, the Clean Power Plan, like the Transport Rule in *EME Homer*, relies on emission budgeting and averaging and outside-

<sup>70</sup> *UARG*, 134 S. Ct. at 2447–48 (quoting petitioners' briefs).

<sup>71</sup> *Id.* at 2449.

<sup>72</sup> *Id.* at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

<sup>73</sup> *Id.* at 2444.

<sup>74</sup> *Brown & Williamson*, 529 U.S. at 160.

<sup>75</sup> *EME Homer*, 134 S. Ct. 1584, 1612 (2014) (Scalia, J., dissenting).

<sup>76</sup> *UARG*, 134 S. Ct. at 2455–58 (Alito, J., concurring in part and dissenting in part).

<sup>77</sup> *See id.* at 2444, 2448 (majority opinion).

<sup>78</sup> *Id.* at 2444.

<sup>79</sup> *See supra* note 59.

the-fenceline emission reductions as important design tools.<sup>80</sup> Outside-the-fenceline measures may have effects beyond the regulated sector, interacting with policy areas thought to be within “traditional state authority.”<sup>81</sup> Given the integrated nature of the electricity sector and its essential role in the U.S. economy, states’ section 111(d) compliance plans may have particularly wide-ranging impacts. Given that GHG regulation is relatively new under the CAA, and that four members of the Court in *Massachusetts v. EPA*<sup>82</sup> argued that the CAA term “air pollutant” does not even encompass GHGs, a majority could view the ambitious nature of the Clean Power Plan and its outside-the-fenceline scope as an unsupportable power grab.<sup>83</sup>

We think, however, that the Court could well favor an alternate contextual story.

### B. *Story Two: An “Efficient” and “Workable” Policy Choice*

In the second of the Court’s possible readings of the Clean Power Plan, the Court could acknowledge the particular characteristics of successful GHG emission-reduction measures, and find that EPA’s chosen program “sensibly” takes into account cost-effectiveness and historical state action in tackling a complex pollution-control problem. In this contextual reading of section 111(d), Congress intended to grant EPA broad “leeway” to balance competing policy priorities in designing a cooperative regulatory program that achieves the CAA’s fundamental goal of meaningful, yet cost-effective emission reduction.<sup>84</sup> The Court could respond with approval to EPA’s efforts to allow states flexibility, and determine that the Agency’s reasonable interpretation warrants deference.

While it is always difficult to guess how the Court would resolve any particular issue, this contextual story seems, on balance, more suitable to the Clean Power Plan. Viewing the power system as an “interconnected and integrated” whole<sup>85</sup> rather than a series of atomized, individual power plants, and therefore basing state goals on measures that reduce emissions outside the power plant fenceline, is a reasonable interpretation of the language of section 111(d). That language, as explained above, does not use technology-based terms, as in other parts of the CAA, nor does it limit regulation to reducing the

<sup>80</sup> See, e.g., Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,252, 48,280 (Aug. 8, 2011).

<sup>81</sup> *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) (finding EPA’s interpretation unreasonable because it would extend EPA’s authority into land use regulation).

<sup>82</sup> *Massachusetts v. EPA*, 549 U.S. 497, 535–49 (2007) (Roberts, C.J., dissenting).

<sup>83</sup> Cf. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 71–78 (2007) (noting that GHG regulation raises precisely the type of questions that could trigger the major questions canon).

<sup>84</sup> *EME Homer*, 134 S. Ct. 1584, 1607, 1609 (2014). See also 42 U.S.C. § 7401(c) (2012) (stating that “reasonable . . . pollution prevention” is the primary goal of the CAA).

<sup>85</sup> Clean Power Plan Proposed Rule, 79 Fed. Reg. at 34,836.

emission rate of individual sources.<sup>86</sup> Moreover, recognizing that the power system is integrated is hardly radical—indeed it has been called “the most complex machine ever built.”<sup>87</sup> On days of high electricity demand, for example, utilities routinely implement measures to reduce demand or power up alternative generation, demonstrating the interconnected nature of the grid. More broadly, under the Clean Power Plan, states retain significant flexibility to meet their targets, thus distinguishing Clean Power Plan measures from the mandatory BACT measures that troubled the Court in *UARG*.<sup>88</sup>

In terms of the major questions canon, the Clean Power Plan may be more analogous to the Transport Rule than to EPA’s permitting program in *UARG*. The Transport Rule did not trigger the canon because the Court viewed the task of choosing the best method for allocating emission reductions among upwind states as inherent in EPA’s statutory mandate.<sup>89</sup> Section 111(d) contains broad grants of authority that mirror the provisions under review in *EME Homer*.<sup>90</sup> Thus, as in *EME Homer*, the Court may find that EPA, when faced with the particular challenges of controlling power-plant GHGs, selected the Clean Power Plan as a rational and efficient means to achieve section 111(d)’s broad goals.<sup>91</sup>

Moreover, adding a layer of regulation to the power sector is far from a significant expansion of regulatory authority into a previously unregulated sector of the economy, as was at issue in *UARG* with EPA’s regulation of small sources. Power plants have been subjects of CAA regulation since the CAA’s inception. Furthermore, outside-the-fenceline emission-reduction measures are contemplated in the SIP section of the CAA, which section 111(d) references as a model.<sup>92</sup> *EME Homer* itself upholds a power-plant emission-trading program that authorizes outside-the-fenceline measures and allows compliance flexibility. Indeed, a power plant subject to the Transport Rule might well use precisely the sorts of outside-the-fenceline emission-reduction measures that form the basis of the Clean Power Plan’s state targets.

Recent judicial decisions affirming EPA’s duty to regulate GHGs under the CAA support the conclusion that section 111(d) is an appropriate vehicle for

<sup>86</sup> *Accord* Final Brief of Respondent EPA, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097), 2007 WL 3231264, at \*125 (arguing that a cap-and-trade program constitutes BSER, and noting that Congress affirmatively removed “technology” from the section 111 definition of “standard of performance” via the 1990 CAA Amendments).

<sup>87</sup> See William Boyd, *Public Utility and the Low Carbon Future*, 61 *UCLA L. REV.* 1614, 1622 (2014) (describing the interconnected nature of the power grid); MIT, *THE FUTURE OF THE ELECTRIC GRID 1* (2011), <http://perma.cc/FJ6C-7DWY>.

<sup>88</sup> See *UARG*, 134 S. Ct. 2427, 2447–48 (2014).

<sup>89</sup> See *EME Homer*, 134 S. Ct. at 1603–04, 1609.

<sup>90</sup> Compare 42 U.S.C. § 7411(d) (2012), with *id.* § 7410. See also *id.* § 7411(d)(1) (granting EPA broad rulemaking authority).

<sup>91</sup> See, e.g., S. REP. NO. 91-1196, at 17 (1970) (describing the intent of the section 111 program to incentivize “industries to work toward constant improvement in techniques for preventing and controlling emissions”).

<sup>92</sup> See 42 U.S.C. § 7410(a)(2); *id.* § 7411(d)(1) (EPA “shall prescribe regulations which shall establish a procedure similar to that provided by section [110] . . .”); *id.* § 7411(d)(2)(B). See also *Incorporating Energy Efficiency/Renewable Energy in State and Tribal Implementation Plans*, EPA, <http://perma.cc/J5HJ-ALY8>.

GHG emission-reduction despite its relative dormancy.<sup>93</sup> And significantly, EPA has used non-traditional forms of regulation in past section 111(d) guidelines, allowing emission-trading programs for nitrous-oxide emissions from municipal waste combustors and mercury emissions from power plants.<sup>94</sup>

The Court may also appreciate that EPA's state-specific emission-reduction targets recognize states' historical emission-control efforts.<sup>95</sup> *EME Homer* stressed that Congress intended the Good Neighbor Provision to prevent upwind states from "reap[ing] the benefits of the economic activity causing the pollution without bearing all the costs."<sup>96</sup> Accordingly, the Court noted approvingly that EPA's cost-based emission-allocation method "subject[ed] to stricter regulation those States that have done relatively less in the past to control their pollution."<sup>97</sup> In this regard, the Court may respond with equal favor to the Clean Power Plan, which incorporates similar considerations.

In short, then, the Court may well view the Clean Power Plan as a reasonable, cost-effective means to implement an ambiguous statutory provision that tasks EPA with producing a sensible plan to reduce electricity-sector GHG emissions.

#### CONCLUSION

*UARG* is arguably an extraordinary case of mismatch between text and context, compelling extraordinary administrative and judicial responses.<sup>98</sup> Thus, the best reading of *UARG's* *Chevron* Step Two invalidation may be that it is limited to the specific CAA programs at issue, or to excessive administrative burdens unlikely to arise in the context of other climate programs. Alternatively, *UARG* may signal the Court's inclination to dabble in climate change policy debates,<sup>99</sup> or a developing trend in the Court's application of *Chevron*.<sup>100</sup> Specifically, *UARG* may indicate that the Court will interpret the major questions canon broadly when it comes to climate rules, requiring Congress to speak directly to the question of whether the CAA allows EPA to consider

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<sup>93</sup> See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (finding that section 111 authorizes EPA to regulate GHGs); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (finding that GHGs are an "air pollutant" subject to regulation under the CAA, and Congress intended for flexible and broad CAA programs to extend to pollution challenges like climate change).

<sup>94</sup> See 40 C.F.R. § 60.33b(d)(2) (2014); Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) (Clean Air Mercury Rule), *vacated on other grounds by* *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

<sup>95</sup> See Clean Power Plan Proposed Rule, 79 Fed. Reg. at 34,900.

<sup>96</sup> *EME Homer*, 134 S. Ct. 1584, 1593 (2014).

<sup>97</sup> *Id.* at 1607.

<sup>98</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516–18 (June 3, 2010).

<sup>99</sup> Cf. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHIC. L. REV. 823 (2006) (demonstrating that Justices' political convictions influence the Court's *Chevron* analyses).

<sup>100</sup> Cf. Freeman & Vermeule, *supra* note 83.

outside-the-fenceline measures in setting power-plant emission-reduction targets. In any case, the rarity of the Court's Step Two invalidation combined with the case's uncommon subject matter—federal climate regulation—leaves open the question of whether the Clean Power Plan will withstand judicial review.

We suggest that the *UARG* Court's invalidation of EPA's interpretation cannot be considered separately from the Court's deferential *EME Homer* opinion. Although the opinions are seemingly contradictory, when read together, they demonstrate that context may be dispositive in determining the validity of the Clean Power Plan. As discussed above, this lesson could be extraordinarily important should review reach the high Court. If the Court views the rule in context as a bold attempt by EPA to seize new regulatory authority and irrationally burden the economy, as the Court viewed the permitting programs in *UARG*, the Court is likely to invalidate EPA's interpretation as unreasonable. Alternatively, if the Court views the rule in the broader context of the CAA as a sensible and equitable policy solution to complex emission-control challenges, as the Court viewed the Transport Rule in *EME Homer*, the Court is likely to defer to EPA's interpretation.

While it is impossible to foretell which context would prevail, we believe the latter story better suits EPA's section 111(d) program. Justice Scalia's opinion in *UARG* and dissent in *EME Homer* suggest, however, that the former story will have traction with certain Justices—perhaps even five. Whatever the outcome, a battle of contextual stories is sure to be at the heart of judicial review of EPA's emergent climate regulation.

