No. 05-848

In The Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,

Petitioners,

v.

DUKE ENERGY CORP., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF LAW PROFESSORS JOHN E. BONINE, OLIVER A. HOUCK, RICHARD J. LAZARUS, EDWARD LLOYD, THOMAS O. MCGARITY, ROBERT V. PERCIVAL, ZYGMUNT J.B. PLATER, ARNOLD W. REITZE, JR., WILLIAM H. RODGERS, PETER M. SHANE, AND MARK SQUILLACE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici are professors of law who teach and write in the fields of environmental and administrative law. Amici have substantial expertise relevant to the questions of interpretation of the Clean Air Act law presented in this case, and strong professional interests in the development of legal rules that promote fidelity to the public policies established in the Clean Air Act.

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[1] The parties have consented to the filing of this brief. Letters of consent to the filing of this brief are being filed in conjunction with this brief. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

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STATEMENT

This case addresses the validity of the regulatory test adopted by the Environmental Protection Agency ("EPA") under the Clean Air Act for determining whether a change to a stationary source of air pollution constitutes a "modification" as that term is used in the Prevention of Significant Deterioration program ("PSD"), 42 U.S.C. §§ 7470-7492. The PSD program specifies standards for the "construction" of major pollution sources operating in attainment areas, that is, areas that comply with the Clean Air Act's national ambient air quality standards. 42 U.S.C. § 7475(a). The Act defines "construction" for the PSD program to include "modification" of existing sources, and defines "modification," in turn, by cross-reference to 42 U.S.C. § 7411. That provision, part of the New Source Performance Standards ("NSPS") program, defines "modification" as "any physical change in a stationary source which increases the amount of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4). EPA promulgated regulations implementing the PSD program by establishing

an actual annual emissions test for measuring whether a change "increases" the amount of air pollution emitted and thereby constitutes a "modification." The test compares "actual emissions" from a source, measured in "tons per year," with past actual annual emissions. *See* 40 C.F.R. § 51.166(b)(2), (3), (21) (1987).

In this enforcement action, the Fourth Circuit refused to give effect to the actual annual emissions test on the ground that EPA has adopted a different test for measuring emissions increases under the NSPS program. The NSPS test measures emissions "increases" on the basis of hourly emission *rates*, expressed in kilograms of pollutants that a source is capable of emitting per hour, rather than total actual annual emissions. 40 C.F.R. § 60.14 (1988). The Fourth Circuit ruled that the text of the Clean Air Act establishes an "effectively irrebuttable" presumption that EPA must establish identical regulatory tests for measuring emissions increases under both the PSD and NSPS programs: "When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently." *United States v. Duke Energy Corp.*, 411 F.3d 539, 546-547 (4th Cir. 2005).

Concluding that EPA must employ the same test for measuring emissions increases under both programs, the Fourth Circuit refused to apply the actual annual emissions test adopted under the PSD program because the NSPS test had been adopted first: "No one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification.' The EPA must, therefore, interpret its PSD

regulations defining 'modification' congruently." *Id*. (emphasis supplied by the court).

SUMMARY OF ARGUMENT

The court of appeals erred in effectively invalidating the actual annual emissions test. That test is fully supported, if not mandated, by the text of the "modification" definition. The actual annual emissions test measures whether there has been an "increase" in the "amount" of air pollutants "emitted," as the quoted words are used in 42 U.S.C. § 7411(a)(4), by comparing the total amount of pollution emitted per year to annual amounts emitted in past years. EPA reasonably concluded that pollution emissions can be said to increase if more pollution is emitted this year than in past years.

In ruling otherwise, the court of appeals did not follow basic principles of statutory construction. Although the court found that the text of the Clean Air Act does not allow the actual annual emissions test, the court did not examine the statutory text, history, or purposes of the Clean Air Act and the PSD provisions, and the court did not hold that the actual annual emissions test is in any way inconsistent with the Clean Air Act. The court likewise did not conclude that the "modification" definition unambiguously requires that "increases" be measured by the hourly rate test adopted under the NSPS program, making the actual annual emissions test in EPA's PSD regulations an impermissible agency interpretation under the framework of *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). Nor is it possible that the court could have reached such conclusions.

Rather than undertaking any analysis that properly could be characterized as statutory construction, the Fourth Circuit invalidated the actual annual emissions test solely on the ground that EPA had adopted a different emissions test under the NSPS program. This Court's cases do not support that conclusion. This Court has stated that a presumption of consistent meanings arises when a term appears in more than one statutory provision, but this Court has long recognized that the presumption "is not rigid" and "readily yields" when application of ordinary principles of statutory construction reveals that the term should be construed differently in different statutory provisions. *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932).

The court of appeals mistakenly concluded that the presumption of consistency becomes "effectively irrebuttable" when a repeated term is defined in a single provision, but this Court has already unanimously rejected that argument. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court ruled that Congress's use of a single statutory definition for the term "employee" in Title VII does not mean that the term must be given an identical construction in every provision in which it appears. Even though Title VII includes a definition of "employee" applicable throughout the statute, this Court held that the term means past and present employees in some provisions but only present employees in other provisions. This Court's decision in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), upon which the Fourth Circuit relied in finding the presumption of consistency "effectively irrebuttable," does not support such a beefed-up presumption. *Rowan* holds that the term "wages" should be given a consistent meaning in different provisions of the tax code based on the

text, purposes, and legislative history of the provisions at issue. *Rowan* does not hold that the presence of a common statutory definition invariably mandates consistency.

Even if the Fourth Circuit were correct that EPA must employ identical tests for determining if there has been an emissions "increase" under both the NSPS and PSD programs, that conclusion would not mean that the actual annual emissions test is invalid. That EPA adopted different tests under the two programs does not suggest which test is right or wrong. The Fourth Circuit gave no reason for preferring the hourly rate test over the actual annual emissions test other than the fact that the hourly rate test was adopted first. If consistency is required, however, there is no reason to prefer an earlier test to a later test. Instead, the validity of either test should be determined using the ordinary methods of statutory construction, examining the statutory text, context, purposes, and history of the Clean Air Act, and giving proper deference to EPA for its resolution of any statutory ambiguities. Under that analysis, the actual annual emissions test is plainly valid.

ARGUMENT

I. THE PLAIN MEANING OF THE "MODIFICATION" DEFINITION AND THE UNMISTAKABLE PURPOSE OF THE PSD PROGRAM REQUIRE AN ACTUAL ANNUAL EMISSIONS TEST

In reviewing the court of appeals' refusal to give effect to EPA regulations, it is important to note what the court did not do: it did not undertake to construe the definition of "modification" as it appears in 42 U.S.C. § 7411(a)(4),

and it did not conclude that the actual annual emissions test adopted by EPA for the PSD program is inconsistent with that text, or with the structure, purposes, or history of the Clean Air Act.

Had the court bothered to consider the text of the "modification" definition, it could only have reached the conclusion that the actual annual emission test is not only a permissible construction of that text but is in fact required by it. Section 7411(a)(4) defines "modification" of stationary sources subject to the PSD program as "any physical change in * * * a stationary source which increases the amount of any air pollutant emitted by such source." The ordinary meaning of the operative words—"amount," "emitted," and "increases"—comport with the actual annual emission test. Under the actual annual emissions test, the "amount" of air pollutants "emitted" is said to "increase" when a stationary source "emitted" more tons of pollutants this year than it did in past years. That test perfectly tracks the everyday meanings of the statutory terms, as the "amount" of pollution "emitted" surely "increases" when more tons of pollution are released now than in the past. It would be difficult to find a more obvious example of the plain meaning of common words.[3]

The alternative test, the hourly rate test, which measures the maximum amount of pollution a source can emit per hour, does not so easily conform with the statutory

[3] *See Webster's Third New International Dictionary* 1145 (2002) (defining "increase" as "to become greater in some respect (as in size, quantity, number, degree, value, intensity, power, authority, reputation, wealth): GROW, ADVANCE, WAX"); *id.* at 72 (defining "amount" as "the total number or quantity: AGGREGATE"); *id.* at 742 (defining "emit" as "to send out: DISCHARGE, RELEASE").

language. Nothing in the text of the "modification" definition suggests any concern for maximum emission *rates* unconnected to actual pollution emitted. The definition makes clear that Congress was concerned about the "amount" of pollution "emitted," which does not necessarily depend on a source's capacity for emissions. On the one hand, a change to a source may increase its capacity for emissions without increasing the amount of pollution emitted if the source operates below its capacity. On the other hand, a change that allows a source to operate for more hours may increase the amount of pollution actually emitted even though its hourly emissions capacity stays the same or even decreases. Accordingly, a test that focuses on hourly emission rates does not capture Congress's intent to focus on changes that "increase" the "amount" pollutants actually "emitted."[4]

Although the Fourth Circuit did not undertake any analysis of the language of the "modification" definition, the D.C. Circuit thoroughly examined the statutory text and held that the actual annual emissions test is required by the plain language of the modification definition, ruling that "the Clean Air Act unambiguously defines 'increases' in terms of actual emissions." *New York v. EPA*, 413 F.3d 3, 39 (D.C. Cir. 2005). The court found that the phrase "the amount of any air pollutant emitted" in the "modification" definition "plainly refers to actual emissions." *Id.* at 40. The

[4] The hourly rate test would not square with the statutory language even if it focused on the hourly rate of pollutants that a source actually emits, rather than its hourly emissions capacity. The "amount" of pollutants "emitted" from a source can "increase" if a source makes a change that allows it to operate more hours without increasing the hourly rate of emissions, but such a change would not be captured by any version of an hourly rate test.

court noted that other Clean Air Act provisions distinguish between actual, potential, and allowable emissions: "If Congress had intended for 'increases' in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to 'potential to emit' or 'emission limitations.' The absence of such a reference must be given effect." *Id.* Accordingly, the court found that the "plain language" of the modification definition mandates that EPA examine "actual emissions instead of potential or allowable emissions." *Id.* Unlike the Fourth Circuit, the D.C. Circuit has authority to determine the validity of EPA regulations, a fact that provides an independent basis for reversal. *See* 42 U.S.C. § 7607(b).

To the extent that the validity of the actual annual emissions test is not fully resolved by the plain language of the "modification" definition alone, other provisions of the PSD program make it clear that the "modification" definition refers to actual emissions. The program applies to "major emitting sources," expressly defined in terms of their total annual emissions. *See* 42 U.S.C. § 7479(1). It would be incongruous to define a "modification" of these major sources in terms of anything but increases in annual emissions. The compliance provisions likewise speak in terms of limits on actual emissions, *see*, *e.g.*, 42 U.S.C. § 7475(a)(1), (3), making it exceedingly unlikely that Congress could have intended a threshold test to allow actual emissions increases to go unregulated.

Moreover, the purpose of the PSD program supports the actual annual emissions test but not the hourly rate test. The PSD program seeks to prevent increases in the emission of pollutants in attainment areas, that is, areas in compliance with ambient air quality standards. *See* 42 U.S.C. § 7470; *Ala. Power v. Costle*, 636 F.2d 323, 346-351

(D.C. Cir 1979). It does so, as the Fourth Circuit correctly stated, by "fix[ing] on the actual emissions from a site." 411 F.3d at 543; *see also Alaska Dept. of Environmental Conservation v. EPA,* 540 U.S. 461, 470-471 (2004). Congress declared that the PSD program is intended "to assure that any decision to permit increased air pollution in [attainment areas] is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation." 42 U.S.C. § 7470(5). Congress's goal of preventing increased pollution emissions without "careful evaluation" and "public participation" would be thwarted by the hourly rate test because it allows increased emissions without any agency evaluation or public participation.[5]

[5] Moreover, if the court of appeals were correct that consistency requires that the hourly rate test be applied in identifying "modifications" in attainment areas under the PSD program, that would presumably mean that the same test must also be applied to "modifications" in non-attainment areas under the Non-Attainment New Source Review ("NNSR") program. As under the PSD provisions, the definition of "modification" for NNSR is incorporated by reference to the NSPS provision. *See* 42 U.S.C. § 7501(4). Application of the hourly rate test under NNSR would have disastrous consequences for air quality. The purpose of the NNSR program is to decrease the total amount of pollution emissions in non-attainment areas so that the national ambient air quality standards can be achieved, but that purpose would be thwarted if regulatory authorities must focus on hourly emission rates rather than actual annual emissions. Indeed, if EPA were stuck with the hourly rate test under the NNSR program, air pollution in non-attainment areas could get much worse and EPA could do little about it.

II. THE PRESUMPTION OF CONSISTENCY DOES NOT SUPPORT THE INVALIDATION OF THE ACTUAL ANNUAL EMISSIONS TEST

In refusing to apply the actual annual emissions test, the Fourth Circuit relied principally, if not entirely, on the presumption of consistency—the principle that a word appearing in different statutory provisions should be given a consistent meaning. This Court long ago warned, however, that "only mischief can result" if a term appearing in two statutory provisions must be "given one meaning regardless of the statutory context." *Lee v. Madigan*, 358 U.S. 228, 231 (1959). The Fourth Circuit's decision in this case reveals exactly the sort of mischief this Court meant. There is no basis in principles of statutory construction or in this Court's cases for concluding that EPA must employ the same test for emissions increases under the PSD and NSPS programs. Moreover, even if EPA must employ identical tests for both programs, that conclusion would in no way mean that the actual annual emissions test is invalid.

A. This Court Has Unanimously Rejected the Argument that a Term Must Be Construed Identically Whenever It Is Defined in a Single Statutory Provision

This Court has long recognized a presumption that a term be given a consistent meaning when it appears in different provisions of the same statute. *See, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); 2A Norman J. Singer, *Statutes and Statutory Construction* 357 (6th ed. 2000). The

presumption of consistency arises from the principle that "a phrase gathers meaning from the words around it." *General Dynamics Land Systems v. Cline*, 540 U.S. 585, 591 (2004). Thus, a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

The Fourth Circuit applied the presumption, however, in a manner at odds with this Court's cases and oft-repeated instructions. The Fourth Circuit held that the presumption rigidly requires identical regulatory tests in different programs that make use of the same statutory term whenever Congress has given the term a single statutory definition. As this Court has long recognized, however, the presumption of consistency "is not rigid" and "readily yields" when statutory context reveals that a term should be construed differently in different statutory provisions. *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932). This Court's cases are replete with instances in which the presumption of consistency was rejected.[6] In a passage that this Court has

[6] *See, e.g., Wachovia Bank v. Schmidt*, ___ U.S. ___, 126 S.Ct. 941 (2006) (holding that the word "located" as its appearances in the banking laws "is a chameleon word; its meaning depends on the context in and purpose for which it is used"); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004) (holding that the word "age" has different meanings in different provisions of the Age Discrimination in Employment Act); *United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200 (2001) (construing the phrase "wages paid" to have different meanings in different parts of the tax code); *Atlantic Cleaners & Dyers, Inc.* (holding that the word "trade" has a more encompassing meaning in Section 3 than in Section 1 of the Sherman Act).

described as a "staple of our decisions," this Court has declared that "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." *Cline*, 540 U.S. at 585 n.8 (quoting Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933)).

Notwithstanding this Court's repeated instruction that the presumption of consistency must "readily yield" when statutory context supports a different result, the Fourth Circuit asserted that the presumption of consistency is "effectively irrebuttable" under the Clean Air Act because Congress defined the term "modification" for both PSD and NSPS in a single provision. As the Fourth Circuit stated: "Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically in the two programs." 411 F.3d at 550.

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), a case also arising from the Fourth Circuit, this Court unanimously rejected an argument identical to the one adopted by the court of appeals here, and ruled that Congress's use of a single statutory definition of a term does not mean that the term must be given an identical construction in every instance. *Robinson* addresses whether the term "employee" could include past and present employees in some provisions in Title VII but only present employees in other provisions. The Fourth Circuit had held that the term must be given identical meanings throughout the statute because Congress had given the word a single statutory definition. *See Robinson v. Shell*

Oil Co., 70 F.3d 325, 328-331 (4th Cir. 1995). As the court of appeals stated, "employee" could only mean one thing throughout Title VII because "Title VII defines 'employee' for purposes of all provisions of Title VII." *Id.* at 329-330. This Court unanimously reversed, holding that the statutory definition of "employee" did not resolve the question because the definition "is consistent with either current or past employment." *Robinson*, 519 U.S. at 542. Finding that the term "employee" is ambiguous as to whether it is limited to current employees, this Court held that the ambiguity could be resolved differently in the different statutory provisions in which the term appears.

Robinson dictates reversal. *Robinson* demonstrates that a statutory term can be given different meanings as used in different provisions notwithstanding the fact that Congress gave the term a single statutory definition. Just as the term "employee" appears in various provisions in Title VII and is defined in a single statutory provision, so the term "modification" appears in both the NSPS and PSD provisions and is defined in a single statutory provision. Just as the definition of "employee" in Title VII does not resolve whether it covers both past and present employees, the definition of "modification" in the Clean Air Act does not resolve complex questions of how "increases" in air pollution emissions should be measured.[7] Thus,

[7] Under the Fourth Circuit's conclusion that identical regulatory tests for "modification" are required, it would appear that EPA could not, for reasons of technological feasibility or administrative convenience, choose to measure emissions increases by volume in one program and by weight in the other. The presumption of consistency, however, addresses only whether a term should be construed to have a consistent interpretation across statutory provisions and does not speak to the particulars of the regulatory tests by which an agency's interpretation is put into action.

while the Fourth Circuit held that Congress's decision to employ a single definition of "modification" applicable to both the NSPS and PSD program requires that the term be "interpreted identically," 411 F.3d at 550, *Robinson* holds that Congress's use of a single definition of "employee" does not require that the term be interpreted identically in every provision.

One difference between Title VII and the Clean Air Act bears special emphasis. Title VII does not delegate regulatory and thus interpretive authority to an administrative agency, but the Clean Air Act unquestionably gives EPA authority to promulgate regulations establishing exactly how emissions "increases" should be measured. As the D.C. Circuit correctly ruled, judicial review of the validity of EPA regulations like those embodying the actual emissions test must "apply a highly deferential standard of review," under which the regulations can be set aside only if it "exceeds EPA's statutory jurisdiction, authority, or limitations or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *New York v. EPA*, 413 F.3d at 17 (quoting 42 U.S.C. § 7607(d)(9)). For the reasons discussed in Part I, *supra*, EPA's decision to employ an actual annual emissions test for the PSD program is eminently reasonable and is entitled to deference.

B. *Rowan* Does Not Support the Fourth Circuit's Decision

The Fourth Circuit placed particular reliance on this Court's decision in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), which it characterized as addressing "a situation strikingly similar to the one at hand," 411 F.3d at 547.

Rowan, however, supports neither the "effectively irrebuttable" presumption of consistency adopted by the court of appeals nor the court's rejection of the actual annual emission test.

Rowan addresses the validity of Treasury Department regulations construing the meaning of the word "wages" as it appears in the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the income tax withholding provisions of the tax code. The Treasury Department had adopted regulations requiring employers to include employer-provided meals and lodging in computing "wages" under FICA and FUTA but not in calculating "wages" for income tax withholding purposes. This Court held that the various tax code provisions were best construed to employ a single meaning of "wages." In holding that a consistent meaning of "wages" is required by the tax code, *Rowan* does not employ anything like the principle adopted by the Fourth Circuit—that the use of a single statutory definition establishes an "effectively irrebuttable" presumption that an agency must employ identical regulatory tests.

Instead, employing ordinary principles of statutory construction, *Rowan* holds that Congress intended the Treasury Department to employ a consistent interpretation of "wages." This Court carefully examined the text, purposes, legislative history, and regulatory history of the provisions at issue, and concluded that, read together, these sources demonstrate a congressional intent that the Treasury Department construe the term "wages" consistently. The Court supported its conclusion with the texts of the three statutes, which define "wages" in "substantially the same language." 452 U.S. at 255. The fact that Congress employed nearly identical definitions of wages in the

different statutes was not the end of this Court's analysis but rather only the beginning, as the similarity provided "strong evidence that Congress intended 'wages' to mean the same thing" in each statute. *Id*. Other sources relied upon in *Rowan* supported the conclusion that consistent meanings were intended. This Court thus relied on the legislative history and purposes of the tax code provisions at issue, finding that these sources "reveal a congressional concern for 'the interest of simplicity and ease of administration.'" 452 U.S. at 255 (quoting S.Rep. No. 1631, 77th Cong., 2d Sess., 165 (1942)). Congress's interest in simplicity and ease of administration would be jeopardized, this Court reasoned, if employers were required to calculate wages differently in different tax programs. *Id.* at 257.[8]

[8] *Rowan* suggests that the Treasury Department was entitled to diminished deference for regulations interpreting the term "wages" because those regulations amounted to interpretive regulations adopted pursuant to a general grant of rulemaking authority. *See Rowan*, 452 U.S. at 251 ("[W]e owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."). That aspect of *Rowan* may no longer be good law. As Justice Scalia has explained, the era in which this Court distinguished the degree of deference owed to agency statutory constructions based on whether the construction is embodied in "interpretive" rather than "legislative" regulations or whether the agency's rulemaking authority is general or specific "came to an end with our watershed decision in *Chevron*, which established the principle that 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'" *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring) (quoting *Chevron*, 467 U.S. at 844). If the term "modification" is ambiguous (and the D.C. Circuit concluded that it unambiguously refers to actual emissions), EPA is entitled to the full measure of deference under *Chevron* for its construction of the term and, correspondingly, it has authority to determine whether differences between the NSPS and PSD programs require different tests for measuring modifications.

Rowan does not lend any support to the creation of an "effectively irrebuttable" presumption of consistency whenever Congress enacts a single definition of a term appearing throughout a statute. On the contrary, *Rowan* is an unremarkable application of the presumption of consistency. In *Rowan*, this Court found that the text, purposes, and legislative history of the tax provisions established no basis for departing from consistency and, in fact, affirmatively demonstrated a congressional intent that the term be construed consistently.

The considerations supporting this Court's conclusion in *Rowan* are absent here. There is no basis in the statutory text, legislative history, or purposes of the PSD and NSPS programs to conclude that Congress intended the two programs to be governed by identical regulatory tests without regard to any differences in the programs. There is no reason to conclude that, in incorporating the NSPS definition of modification in the PSD program, Congress was concerned about simplicity and ease of administration as it was in enacting the provisions of the tax code at issue in *Rowan*. Of course, simplicity and ease of administration are salutary in any program, but in *Rowan* this Court identified a specific reason for finding a congressional intent that the tax code provisions be easily understood: the provisions were intended to be applied by practically every employer in the United States and therefore concerns for simplicity and ease of administration were paramount. The Clean Air Act's PSD program, in contrast, only applies to major sources of air pollution, which are quite capable of adjusting to different tests in different circumstances. *Cf. Chevron*, 467 U.S. at 848 (characterizing the Clean Air Act as "lengthy, detailed, technical, complex, and comprehensive").

As the Fourth Circuit and other courts have recognized, there are fundamental differences between the PSD and NSPS programs. Thus, if the plain meaning of the modification definition does not require the actual annual emission test for both programs, differences between the PSD and NSPS programs could support different emissions tests. The NSPS program focuses on uniform technology-based performance standards, which apply to all new and modified sources in particular source categories regardless of where they are located. *See* 42 U.S.C. § 7411. The PSD program, in contrast, as the Fourth Circuit recognized, "fixes on the actual emissions from a site." 411 F.3d at 543; *see also N. Plains Res. Council v. EPA,* 645 F.2d 1349, 1356 (9th Cir. 1981) ("The NSPS program is * * * equipment oriented. On the other hand, the PSD program [is] site oriented.").

C. The Actual Annual Emissions Test Would Be Valid Even if EPA Were Required to Employ the Same Test for the NSPS and PSD Programs

Having mistakenly ruled that EPA is required to employ the same test for measuring emissions increases under both the PSD and NSPS programs, the Fourth Circuit compounded its mistake by ruling that inconsistency alone provides a ground for invalidating the actual annual emissions test. Even if the Fourth Circuit were correct that EPA must adopt identical emissions tests under the two programs, it would not mean that the actual annual emissions test is invalid. Consistency could be established in any of three ways: the actual annual emissions test could be required for both the PSD and NSPS programs, the hourly rate test could be required for both

programs, or some other test could be required for both programs. The conclusion that identical tests must be adopted for both the NSPS and PSD programs, even if it were correct, says nothing about what test is valid.

The presumption of consistency can require invalidation of a statutory interpretation only in circumstances not present here: when it is clear how a statutory term should be construed in one provision and an inconsistent construction of the term has been given to the term appearing in another provision. For instance, in *Cohen v. de la Cruz*, 523 U.S. 213 (1998), this Court examined the meaning of the phrase "debt for" as it appeared in Section 532(a)(2)(A) of the bankruptcy code. In *Cohen*, the Court first found that the term was used for identical purposes in various bankruptcy provisions, and the Court therefore concluded that the term should be given the same meaning in each provision. *Id.* at 220. Next, the Court found that the term had a clear meaning as it was used in one provision, Section 532(a)(9). *Id.* Finally, the Court reasoned that the clear meaning of the term as it appeared in Section 532(a)(9) should be imported into the provision at issue. *Id.* ("It is clear that 'debt for' in [Section 532(a)(9)] means 'debt arising from' or 'debt on account of,' and it follows that 'debt for' has the same meaning in § 523(a)(2)(A)."). To put this reasoning in generic terms, a court can invalidate an agency's statutory construction for violating the presumption of consistency if it finds that a term appearing in Provisions 1 and 2 must be construed consistently, finds that the term appearing in Provision 1 clearly has meaning X, and then finds that the term appearing in Provision 2 should also be given meaning X. But where there is no authoritative basis for determining what the term means in either Provision 1 or 2, inconsistent constructions

establish no basis for invalidating the agency's construction.

The Fourth Circuit did not adhere to this reasoning. It did not hold that Congress mandated an hourly rate test for either the NSPS or PSD program. The only reason it gave for preferring one test to the other is that the hourly rate test was adopted first: "No one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification.' The EPA must, therefore, interpret its PSD regulations defining 'modification' congruently." 411 F.3d at 550. As the D.C. Circuit held, however, there is no basis for finding that Congress intended to incorporate the regulatory hourly rate test in enacting the PSD provisions. *See New York v. EPA*, 413 F.3d at 19-20. Indeed, the Fourth Circuit appears to have recognized that the hourly rate test is not mandated by the text of the statute, as the court recognized EPA's authority to adopt a different test. 411 F.3d at 550. ("Of course, this does not mean that this regulatory interpretation must be retained indefinitely. The EPA retains its authority to amend and revise this and other regulations."). Thus, the only basis the court of appeals gave for finding that the PSD program must apply the hourly rate test rather than the actual annual emissions test is that the hourly rate test came first in time. That conclusion is unsupported by law or logic, and the court provided none.

CONCLUSION

For the foregoing reasons, as well those in the briefs filed by petitioners and their amici, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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