In my recent CNN op-ed and in her previous post, Megan Herzog and I agree that the Supreme Court has properly interpreted the Clean Air Act (CAA) to apply to the emission of greenhouse gases. We just disagree about the correct manner in which to reach that conclusion.

Judges and scholars generally favor an originalist approach to statutory interpretation, but they view the precise interpretive question in two different ways. One approach is to ask what Congress intended by enacting a statute. That is the approach articulated by Megan and by White House press spokesman Josh Earnest in the aftermath of the recent Affordable Care Act decisions involving that law's provision for subsidies to those who are enrolled in "state" insurance exchanges. But the second approach insists that the goal of statutory interpretation is to understand the meaning of the words contained in the law that Congress enacted. As Justice Oliver Wendell Holmes put it, ""We do not inquire what the legislature meant; we ask only what the statute means." Or, in the words of Justice Sonia Sotomayor last year, "As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." The Court then follows the ordinary meaning of the statutory text unless that would yield an absurd result.

Using that approach, the Court correctly held in *Massachusetts v. EPA* held greenhouse gases qualify as "any substance emitted into the ambient air," the statutory phrase (minus extraneous ellipses) that the CAA employs to define "air pollutant." Most of the majority's discussion of that question emphasized that "sweeping definition." "On its face," Justice Stevens observed, "the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'" By contrast, EPA had eschewed the statutory text in favor a contextual argument that Congress did not intend to regulate greenhouse gases. The majority questioned whether "any such evidence could shed light on the meaning of an otherwise-ambiguous statute" and proceeded to explain how the context relied on by EPA could be read to be consistent with what the statute actually said. Then the majority concluded its analysis by remarking that "[t]he broad language" of the statute encompassed more than the pollutants that Congress actually had in mind at the time that it passed the law.

In other words, the CAA applies to greenhouse gases because the statutory text says so, even though it is unlikely that the Congress which enacted the CAA in 1970 really intended the CAA to empower EPA to regulate *anything* in the air. Consider

three examples. Dissenting in *Massachusetts v. EPA*, Justice Scalia derided the Court's plain meaning interpretation as encompassing "everything from Frisbees to flatulence." Sure enough, flatulence – thankfully the bovine variety, not human – contains methane and has become something of an issue in climate change regulation debates. EPA has disavowed an intent to regulate flatulence, but it has never questioned its authority to do so.

There are no Frisbee cases, but there is something far more deadly. The headline of a recent Onion story stated that "Environmental Study Finds Air In Chicago Now 75% Bullets." The story added, "Far exceeding the levels of carbon dioxide, nitrogen, and even oxygen, bullets now constitute three-fourths of Chicago's air supply," according to the Onion's fictional atmospheric scientist, "stressing that the dense and widespread deposits of jacketed lead and copper in the air pose severe and potentially fatal health risks to all Chicago residents." The satire would be funnier if it weren't so true. For bullets are "a substance emitted into the ambient air" that "endanger public health and welfare." They thus fit within the CAA's plain meaning.

Or consider the irony that water – completely pure, H2O – can be an air pollutant. After the Court decided *Massachusetts v. EPA*, several environmental groups petitioned EPA to regulate water vapor as a pollutant under the CAA. The petition focused on the "contrails" – condensation trails – of water vapor released by aircraft flying at high altitudes. Most of the 26-page petition recited the disproportionate greenhouse gas effect of water vapor occurring at high altitudes and the ways in which aircraft could be changed to reduce such emissions. It took only one paragraph to argue that water vapor is a pollutant for purposes of the CAA. That paragraph simply quoted the statutory definition of "air pollutant," the history of broad judicial readings of that definition, and the *Massachusetts v. EPA* Court's conclusion that greenhouse gas emissions are pollutants. Water itself, it seems, is a pollutant.

There is no indication in the legislative history that Congress intended the CAA to apply flatulence, bullets, or water. Yet Congress wrote a statute that plainly applies to such "pollutants," and the Court has rightly interpreted the statute according to that plain meaning. The only exception is that the courts decline to follow a statute's plain meaning when that would produce an "absurd result," which is what happened in the Court's recent *UARG* decision. Everyone involved in that case – including EPA, Justice Scalia (who wrote the majority opinion), Justice Breyer (who wrote the concurrence), and Justice Alito (who wrote the dissent) – agreed that the

application of the CAA's numerical pollution threshold to greenhouse gases would produce such an absurd result. In fact, the existence of such provisions confirms that Congress was contemplating different kinds of pollutants when it enacted the CAA. So does the impossibility of applying the CAA's signature National Ambient Air Quality Standards (NAAQS) to greenhouse gases that are uniformly distributed across the country, thus rendering all states out-of-attainment and precluding any individual state from achieving such attainment on its own.

The best reason for applying the CAA to greenhouse gases is the text of the CAA itself. That is the approach to statutory interpretation that the D.C. Circuit correctly employed in its recent Affordable Care Act case, and that the Fourth Circuit wrongly rejected. The text of the ACA is at least as clear as the CAA: subsidies are available to those who obtain health insurance from "state" exchanges. Yet the Fourth Circuit and its supporters quickly dismissed that interpretation. They insisted that Congress did not intend that result, even though the Supreme Court has repeatedly insisted that the statutory text provides the clearest indication of what Congress intended.

As others have observed, Congress may have wanted to limit subsidies to state exchanges in order to incentivize states to create such exchanges. Again, the CAA offers a helpful parallel. Congress encouraged states to regulate air pollution by developing state implementation plans (SIPs), and nearly every state has accepted that congressional invitation rather than deferring to federal regulation. With that experience in mind, the Congress that enacted the ACA could have reasonably expected that states would want to operate their own health care exchanges, and providing subsidies to those exchanges – and only those exchanges – was a useful incentive for them to do so. And it is at least as likely that Congress intended to limit subsidies to state exchanges as it is that Congress intended the CAA to empower EPA to regulate flatulence, bullets, and water.