

ORAL ARGUMENT SCHEDULED FOR APRIL 8, 2005

**United States Court of Appeals
for the District of Columbia Circuit**

Nos. 03-1361

(CONSOLIDATED WITH NOS. 03-1362 THROUGH 03-1368)

COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

Petitioners

The following parties appear as petitioners in these consolidated cases (all of which were filed on October 23, 2003):

In cases no. 03-1361 and 1365, the Commonwealth of Massachusetts; the States of Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; American Samoa Government; District of Columbia; and the Commonwealth of the Northern Mariana Islands.

In cases no. 03-1362 and 03-1366, the State of California, by and through Arnold Schwarzenegger, Governor of the State of California, the California Air Resources Board, and Bill Lockyer, Attorney General of the State of California.

In cases no. 03-1363 and 03-1367, the International Center for Technology Assessment, Bluewater Network, Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and US Public Interest Research Group.

In cases no. 03-1364 and 03-1368, City of New York and Mayor and City Council of Baltimore.

Respondent

The United States Environmental Protection Agency is the respondent in these consolidated cases.

Intervenors

The following parties have intervened in support of the Respondent: the States of Michigan, Texas, Idaho, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, and Ohio; the Alliance of Automobile Manufacturers; National Automobile Dealers Association; Engine Manufacturers Association; Truck Manufacturers Association; CO₂ Litigation Group; and Utility Air Regulatory Group.

Amici

The following entities appear as amici in support of Petitioners: Indigenous Environmental Network, REDOIL, and Physicians for Social Responsibility.

The following entities appear as amici in support of Respondent: State of Indiana and Washington Legal Foundation.

B. Rulings Under Review

Petitioners seek review of two final actions by EPA:

1. A decision by EPA, published at 68 Fed. Reg. 52922 (September 8, 2003), denying a petition for rulemaking filed by Petitioner International Center for Technology Assessment and others.
2. A formal legal opinion set forth in a memorandum from Robert Fabricant, EPA General Counsel, to Marianne Horinko, EPA Acting Administrator, entitled *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act* (August 28, 2003). Notice of EPA's adopting this legal opinion was published at 68 Fed. Reg. 52922 (September 8, 2003), although the memorandum was not reprinted there.

C. Related Cases

The matter on review has not been previously heard in this or any other court. There are no related cases currently pending.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, Petitioners state as follows:

Petitioner Sierra Club is a nonprofit corporation with more than 700,000 members nationwide organized under California law, with no parent corporation and no publicly held company has a 10% or greater ownership interest in Sierra Club. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; and to educate and enlist humanity to protect and restore the quality of the natural and human environment.

Petitioner Bluewater Network is a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in Bluewater Network. Bluewater Network is dedicated to championing innovative solutions and inspiring individuals to protect the earth's finite and vulnerable ecosystems. Bluewater Network promotes critical policy changes in government and industry to reduce dependence on fossil fuels and eradicate other root causes of air and water pollution, global warming, and habitat destruction.

Petitioner Center for Biological Diversity is a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in the Center. The Center strives to secure a future for animals and plants on the brink of extinction, for the wilderness they need to survive, and by extension for the welfare of generations to come. The Center combines conservation biology with litigation, policy advocacy, and an innovative strategic vision.

Petitioner International Center for Technology Assessment (ICTA) is a nonprofit

corporation that was formed to address the environmental, economic, and ethical impacts in several areas including the development and commercialization of transportation technologies. There is no parent corporation or publicly held corporation that owns stock in the International Center for Technology Assessment.

Petitioner Center for Food Safety (CFS) is a national nonprofit membership organization that seeks to address the impacts of current industrial farming and food production systems on human health, animal welfare and the environment and to promote sustainable agricultural practices. There is no parent corporation or publicly held corporation that owns stock in the Center for Food Safety.

Petitioner Environmental Advocates of New York (EANY) is a non-profit membership organization that is the voice of New York State's environmental community and devoted to the protection of New York's wildlife, land and people. There is no parent corporation or publicly held corporation that owns stock in Environmental Advocates.

Petitioner Greenpeace is a nonprofit, nonviolent environmental membership organization. Its mission is to raise public awareness of environmental problems and promote changes that are essential to a green and peaceful future. There is no parent corporation or publicly held corporation that owns stock in Greenpeace.

Petitioner Conservation Law Foundation (CLF) is a Massachusetts not-for-profit 501(c)(3) corporation that works to solve the environmental problems that threaten the people, natural resources and communities of New England. CLF is a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in CLF.

Petitioner Environmental Defense is a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in Environmental Defense. Environmental Defense is a leading national organization representing more than 400,000 members and is dedicated to protecting the environmental rights of all people, including future generations. Among these rights are clean air and water, healthy and nourishing food, and a flourishing ecosystem.

Petitioner Friends of the Earth is a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in Friends of the Earth. Friends of the Earth is devoted to defending the environment and champions a healthy and just world.

Petitioner National Environmental Trust (NET) is a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in NET. The National Environmental Trust is a non-partisan membership group established in 1994 to inform citizens about environmental problems and how they affect our health and quality of life.

Petitioner Natural Resources Defense Council (NRDC) is a national nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in NRDC. NRDC is dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Petitioner Union of Concerned Scientists is a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in Union of Concerned Scientists. The Union facilitates a partnership of scientists and citizens combining rigorous scientific analysis, innovative policy development and effective citizen advocacy to

achieve practical environmental solutions.

Petitioner United States Public Interest Research Group (US PIRG), a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in US PIRG, is dedicated to delivering persistent, result-oriented public interest activism that protects our environment, encourages a fair, sustainable economy, and fosters responsive, democratic government.

TABLE OF CONTENTS

Certificate as to Parties, Rulings and Related Cases	i
Corporate Disclosure Statement	iv
Glossary of Acronyms and Abbreviations	xv
Jurisdictional Statement	1
Issues Presented	4
Statutes and Regulations	5
Statement of the Case	5
Statement of Facts	5
I. The Climate Change Problem	5
II. Statutory Background	11
III. Procedural History	12
Summary of Argument	13
Argument	14
I. The Clean Air Act Authorizes EPA to Regulate Greenhouse Gas Emissions from Motor Vehicles.	14
A. Section 202 of the Act Unambiguously Authorizes EPA to Regulate Greenhouse Gas Emissions from Motor Vehicles.	15
B. EPA’s Textual Arguments that §202(a)(1) Does Not Authorize Regulation of Greenhouse Gases Are Meritless.	17
C. EPA Has Provided No Valid Grounds for Rejecting the Plain Meaning of the Statutory Language.	20
1. EPA Has Not Shown That, As Matter of Historical Fact, Congress Intended to Preclude EPA from Regulating Greenhouse Gases.	21
a. EPA Has Produced No Legislative History to Support Its Position.	21
b. The Legislative History Supports the Conclusion that Congress Authorized EPA to Regulate Greenhouse Gases.	21
c. The 1990 Amendments Did Not Take Away EPA’s Existing Authority.	24
d. Other Climate Change Legislation Does Not Curtail EPA’s Authority.	27
e. Failed Legislation That Would Have Mandated	

	Greenhouse Gas Emission Standards Does Not Abrogate EPA’s Pre-Existing Regulatory Authority.	31
	2. EPA Has Not Shown That “As a Matter of Logic and Statutory Structure,” Congress “Almost Surely” Could Not Have Meant What It Said.	33
	3. <i>Brown & Williamson</i> Supports Petitioners’ Interpretation.	36
II.	The Energy Policy and Conservation Act Does Not Preclude EPA from Regulating Greenhouse Gas Emissions under the Clean Air Act.	38
	A. There Is No Conflict Between the Clean Air Act and EPCA.	39
	B. There is No Possible EPCA Conflict with Other Classes of Vehicles or Other Greenhouse Gases.	43
III.	EPA Acted Unlawfully and Arbitrarily in Refusing to Regulate Motor Vehicle Emissions of Greenhouse Gases.	44
	A. EPA Has Articulated No Discernible Decisionmaking Path Under §202(a)(1).	45
	B. EPA Unlawfully and Arbitrarily Transformed §202(a)(1) from a Mandatory to a Discretionary Provision.	47
	1. This Court’s <i>En Banc</i> Precedent, and the Statutory Language, Establish that §202(a)(1) is Mandatory.	47
	2. EPA’s Attempt to Overturn this Court’s <i>En Banc Ethyl</i> Decision, and to Disregard §202(a)(1)’s “Shall,” Must Be Rejected.	49
	C. EPA’s Decision Unlawfully and Arbitrarily Disregarded §202(a)(1)’s Express Provision for Protection of Public Health and Welfare in the Face of Uncertainty.	51
	D. EPA’s Contentions Concerning Control Technology, Multi-Source Pollution, and International Relations Misstate the Act and Are Otherwise Arbitrary.	54
	1. EPA’s Control Technology Concerns Offer No Lawful or Reasoned Basis for Refusing to Promulgate §202(a)(1) Standards.	54
	2. Section 202(a)(1) Provides for Regulation of Sources that “Contribute to” Harmful Air Pollution, Even if They Are Not the Sole Source of the Pollution.	56
	3. EPA’s Allegations Concerning International Relations Provide No Basis for Declining to Implement §202(a)(1).	58
	Conclusion	60

TABLE OF AUTHORITIES

Cases

<i>Alabama Power Co. v. Costle</i> , 636 F.2d 323 (D.C. Cir. 1979)	35, 56
<i>Ameren Services Co. v. FERC</i> , 330 F.3d 494 (D.C. Cir. 2003)	48
<i>American Forest & Paper Ass'n, Inc. v. EPA</i> , 294 F.3d 113 (D.C. Cir. 2002)	1
<i>American Horse Protection Assn. v. Lyng</i> , 812 F.2d 1 (D.C. Cir. 1987)	45, 48
<i>American Lung Association v. Browner</i> , 134 F.3d 388 (D.C. Cir. 1998)	46
<i>American Trucking Associations v. Whitman</i> , 531 U.S. 457 (2001)	34
<i>Animal Legal Defense Fund v. Glickman</i> , 154 F.3d 426 (D.C. Cir. 1998)	2
<i>Appalachian Power Co. v. EPA</i> , 208 F.3d 1015 (D.C. Cir. 2000)	2
<i>Appalachian Power Co. v. EPA</i> , 249 F.3d 1032 (D.C. Cir. 2001)	20
<i>Atkinson v. Inter-American Dev. Bank</i> , 156 F.3d 1335 (D.C. Cir. 1998)	32
<i>Bargmann v. Helms</i> , 715 F.2d 638 (D.C. Cir. 1983)	14
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	50
<i>Bluewater Network v. EPA</i> , ___ F.3d ___ (D.C. Cir. 2004)	47, 57
<i>Cajun Elec. Power Coop., Inc. v. FERC</i> , 924 F.2d 1132 (D.C. Cir. 1991)	14
<i>Calloway v. District of Columbia</i> , 216 F.3d 1 (D.C. Cir. 2000)	31
<i>Center for Auto Safety v. NHTSA</i> , 793 F.2d 1322 (D.C. Cir. 1986)	42
* <i>Chevron U.S.A. v. NRDC</i> , 467 U.S. 837 (1984)	14, 18
<i>Chicago v. Environmental Defense Fund</i> , 511 U.S. 328 (1994)	48
<i>Dept. of HUD v. Rucker</i> , 535 U.S. 125 (2002)	15
<i>Desert Palace, Inc. v. Costa</i> , 539 U.S. 90 (2003)	25
* <i>Engine Manufacturers Ass'n v. USEPA</i> , 88 F.3d 1075 (D.C. Cir. 1996)	20, 32-34, 49
* <i>Ethyl Corp. v. EPA</i> , 541 F.2d 1 (D.C. Cir. 1976)	47-49, 51-53, 57
* <i>FDA v. Brown & Williamson Tobacco, Corp.</i> , 529 U.S. 120 (2000)	36-38
<i>FTC v. Ken Roberts Co.</i> , 276 F.3d 583 (D.C. Cir. 2001)	39
<i>Harrison v. PPG Indus.</i> , 446 U.S. 578 (1980)	2, 21
<i>Her Majesty the Queen in Right of Ontario v. EPA</i> , 912 F.2d 1525 (D.C. Cir. 1990)	1, 2, 14, 47
<i>Hercules Inc. v. USEPA</i> , 938 F.2d 276 (D.C. Cir. 1991)	17
<i>Intl. Harvester Co. v. Ruckelshaus</i> , 478 F.2d 615 (D.C. Cir. 1973)	56
<i>J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.</i> , 534 U.S. 124 (2001)	16, 24
<i>Monongahela Power Co. v. Marsh</i> , 809 F.2d 41 (D.C. Cir. 1987)	40

<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	39
<i>Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	44, 45
<i>Mova Pharm. Corp. v. Shalala</i> , 140 F.3d 1060 (D.C. Cir. 1998)	35
<i>Nebraska v. EPA</i> , 331 F.3d 995 (D.C. Cir. 2003).	6, 9
<i>NPR v. FCC</i> , 254 F.3d 226 (D.C. Cir. 2001)	20
<i>NRDC v. Hodel</i> , 865 F.2d 288 (D.C. Cir. 1988)	24, 39
<i>NRDC v. USEPA</i> , 655 F.2d 318 (D.C. Cir. 1981)	33, 41, 55, 56
<i>PPG Industries v. U.S.</i> , 52 F.3d 363 (D.C. Cir. 1995)	45, 48
<i>PUD No. 1 v. Washington Dept. of Ecology</i> , 511 U.S. 700 (1994)	40
<i>Shook v. D.C. Fin. Responsibility and Management Assistance Auth.</i> , 132 F.3d 775 (D.C. Cir. 1998)	19
<i>Sierra Club v. EPA</i> , 129 F.3d 137 (D.C. Cir. 1997)	17, 20
<i>Sierra Club v. Thomas</i> , 828 F.2d 783 (D.C. Cir. 1987)	50
<i>Small Refiner Lead Phase-Down Task Force v. USEPA</i> , 705 F.2d 506 (D.C. Cir. 1983)	53, 54
<i>Telecom*USA, Inc. v. United States</i> , 192 F.3d 1068 (D.C. Cir. 1999)	32
<i>U.S. Air Tour Ass'n v. FAA</i> , 298 F.3d 997 (D.C. Cir. 2002)	2
<i>U.S. v. Craft</i> , 535 U.S. 274 (2002)	32
<i>U.S. v. Hansen</i> , 772 F.2d 940 (D.C. Cir. 1985)	43
<i>U.S. v. Monsanto</i> , 491 U.S. 600 (1989)	47
<i>West Virginia v. EPA</i> , 362 F.3d 861 (D.C. Cir. 2004)	34
 <u>Statutes, Regulations, and Other Agency Action</u>	
5 U.S.C. §706(2)(A)	44
42 U.S.C. §6201(5)	40
Byrd-Hagel Resolution, 105 S. Res. 98, Rep. No. 105-54	30
Clean Air Act	
§103(g), 42 U.S.C. §7403(g)	24, 25
§§108-110, 42 U.S.C. §§7408-7410	33
§108(f)(1)(A)(xvi), 42 U.S.C. §7408(f)(1)(A)(xvi)	29
§109(d)(1), 42 U.S.C. §7409(d)(1)	23
§112, 42 U.S.C. §7412	1
§115, 42 U.S.C. §7415	1

§202, 42 U.S.C. §7521	1, 5, 16, 21, 22, 25, 28, 31, 33-35, 38, 43
§202(a)(1), 42 U.S.C. §7521(a)(1)	4, 11-17, 19-21, 24-26, 29-32, 38, 40, 41, 44-51, 53-58
§202(a)(2), 42 U.S.C. §7521(a)(2)	33, 55
§202(b)(1)(C), 42 U.S.C. §7521(b)(1)(C)	43
§202(b)(3)(C), 42 U.S.C. §7521(b)(3)(C)	42
§211(c), 42 U.S.C. §7545(c)	48, 51, 57
§214, 42 U.S.C. §7548	29
§302, 42 U.S.C. §7602	5, 15, 21, 22
§302(g), 42 U.S.C. §7602(g)	11, 13, 16, 18-22, 24, 32
§302(h), 42 U.S.C. §7602(h)	11, 13, 15, 17, 19-22, 24, 32
§304(a)(2), 42 U.S.C. §7604(a)(2)	50
§307(b), 42 U.S.C. §7607(b)	2
§307(b)(1), 42 U.S.C. §7607(b)(1)	2, 50
§602(e), 42 U.S.C. §7671a(e)	26
Title IV, 42 U.S.C. §§ 7641-7661f	27, 32
§612(c), 42 U.S.C. §7671k	26
Title VI, 42 U.S.C. §§7671-7671q	27
Energy Policy & Conservation Act	
49 U.S.C. §§32901-32919	5, 38, 40-43
49 U.S.C. §32901(a)(3)(B)	44
49 U.S.C. §32902(f)	41-44
Energy Policy Act of 1992, Pub.L. 102-486, 106 Stat. 2776	29
Knollenberg Amendment, Pub. L. 105-276, III	30
Pub. L. 91-604, §15(a)(1), 84 Stat. 1710 (Dec. 31, 1970)	22
Pub. L. 94-163, §301, 89 Stat. 871, 904-05	42
Pub. L. 95-95, §§106(a), 403(a), 91 Stat. 690, 792 (Aug. 7, 1977)	23
Pub. L. 101-549, §821	26
40 C.F.R. 86.1811-04, 86.007-11	57
49 C.F.R. 1.50(f)	39
49 C.F.R. 523.3(b)	44

56 Fed. Reg. 24468, 24470 (May 30, 1991)	37
59 Fed. Reg. 13044, 13046 & 13049 (Mar. 18, 1994)	26
62 Fed. Reg. 48382, 48390 (September 15, 1997)	59
63 Fed. Reg. 25902, 25940 (May 11, 1998)	37
64 Fed. Reg. 28564 (May 26, 1999)	37
64 Fed. Reg. 53040-44 (September 30, 1999)	59
66 Fed. Reg. 15470 (March 19, 2001)	9
66 Fed. Reg. 57456 (Nov.15, 2001)	9
66 Fed. Reg. 86245 (April 6, 2001)	2
67 Fed. Reg. 44672, 44691 (July 3, 2002)	37
68 Fed. Reg. 52922 (September 8, 2003)	1, 2, 5, 12, 17, 18, 20, 21, 25-27, 29, 32, 34, 36, 38, 40, 44-47, 49, 54-56, 58, 60
Light Truck Average Fuel Economy Standards Model Years 2005-2007, 68 Fed. Reg. 16868, 16895-96 (April 7, 2003)	42
Memorandum from Robert Fabricant, EPA General Counsel, to Marianne Horinko, EPA Acting Administrator, entitled <i>EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act</i> (August 28, 2003)	1, 2, 5, 12, 19
 <u>Legislative History</u>	
111 Cong. Rec. 25,061 (1965)	22
116 Cong. Rec. 32,912, 32,914, 32,916	22
H.R. Rep. No. 89-899 (1965), reprinted at 1965 U.S.C.C.A.N. 3608	22
H.R. Rep. No. 94-340	40, 42
H.R. Rep. No. 95-294	23, 34, 43
S. Exec. Rep. No. 102-55, 102 nd Cong., 2d Sess. (1992)	6
S.1630, §206, reprinted in Sen. Comm. on Env. and Public Works, <i>5 A Legislative History of the Clean Air Act Amendments of 1990</i> at 8036-38 (S.Prt 103-38, Nov. 1993)	32
 <u>Miscellaneous</u>	
<i>IPCC Second Assessment Report</i> (1995)	6
<i>IPCC Third Assessment Report</i> (2001)	6-8

Kyoto Protocol to the UNFCCC, Dec. 10, 1997, U.N. Doc. FCC/CP/1997/L.Add.1, reprinted in 37 I.L.M. 22 (1998)	30
Letter from Gary S. Guzy, EPA General Counsel, to Rep. David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform (July 12, 2000)	34, 37
Memorandum of Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, <i>EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources</i> (April 10, 1998)	11, 16
Mercury Study Report to Congress (EPA December 1997), http://www.epa.gov/ttn/atw/112nmerc/volume3.pdf	59
National Research Council, <i>Climate Change Science: An Analysis of Some Key Questions</i> (2001)	8
Oxford English Dictionary (2d ed. 1989)	57
Testimony of Gary S. Guzy, EPA, General Counsel, Joint Hearing of the House Subcomm. on Nat'l. Econ. Growth, Natural Res. and Regulatory Affairs of the Comm. on Gov't Reform and the House Subcomm. on Energy and Env't of the Comm. on Sci. (Oct. 6, 1999)	12
U.S. Department of State, <i>U.S. Climate Action Report 2002</i> (2002)	6-9, 11, 44
United Nations Framework Convention on Climate Change, May 29, 1992, U.N. Doc. A:AC.237/18 (1992), reprinted in 31 I.L.M. 849 (1992)	8, 29, 35, 59
United States Global Change Research Program, <i>Climate Change Impacts on the United States</i> (2001)	9

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

CAA	Clean Air Act
CAFE standards	Corporate average fuel economy standards
CAR	U.S. Climate Action Report (2002)
CO ₂	Carbon dioxide
EPA	Environmental Protection Agency
EPCA	Energy Policy & Conservation Act
FDA	Food & Drug Administration
FDCA	Food, Drug & Cosmetic Act
GHGs	Greenhouse gases
IPCC	Intergovernmental Panel on Climate Change
NAAQS	National ambient air quality standards
NAS	National Academy of Sciences
NHTSA	National Highway Traffic Safety Administration
TAR	IPCC Third Assessment Report

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JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction to review any “nationally applicable regulations, or any final action taken” by EPA under §307 of the Clean Air Act (“the Act”).⁴ Petitioners challenge two related final actions that EPA took on August 28, 2003, both of which are applicable nationally. In the first action, EPA denied a petition for rulemaking seeking promulgation of regulations under §202 of the Act to control motor vehicle emissions of four chemicals that are greenhouse gases (“the 202 Petition”). 68 Fed. Reg. 52922 (September 8, 2003). In this final decision (“the 202 Denial”), EPA enunciated a definitive and controlling interpretation of the Act denying EPA’s authority to regulate greenhouse gases. Agency denials of rulemaking petitions are subject to review under §307 of the Act. *See, e.g., American Forest & Paper Ass’n, Inc. v. EPA*, 294 F.3d 113 (D.C. Cir. 2002) (denial of petition to delist methanol under §112 of the Act); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990)(denial of petition for action under §115 of the Act).

In the second action, EPA issued a formal legal opinion regarding the agency’s authority to regulate greenhouse gases. *See* Memorandum from Robert Fabricant, EPA General Counsel, to Marianne Horinko, EPA Acting Administrator, entitled *EPA’s Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act* (August 28, 2003)(“the Fabricant Opinion”). The 202 Denial adopted the Fabricant Opinion as “the position of the Agency for purposes of deciding this petition and for all other relevant purposes under the

⁴Citations herein are to sections of the Act; the Table of Authorities contains U.S. Code citations.

CAA.” 68 Fed. Reg. 52925/3[JA ____]. As a final agency interpretation, the Fabricant Opinion (and its adoption in the 202 Denial) fall within the provision in §307(b)(1) of the Act for review of “any” final action of the Administrator. *Harrison v. PPG Indus.*, 446 U.S. 578, 587 (1980)(letter); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000) (guidance document); *Her Majesty the Queen v. EPA*, 912 F.2d 1525 (letter partially rejecting rulemaking petition). *See also U.S. Air Tour Ass’n v. FAA*, 298 F.3d 997, 1013 (D.C. Cir. 2002) (opinion as to definition of statutory term, issued in conjunction with rulemaking, was reviewable).

Petitioners filed petitions for review of the two agency actions on October 23, 2003, within sixty days of September 6, 2003, when both actions were announced in the Federal Register. *See* §307(b) of the Act.

As set forth in declarations submitted with this brief, Petitioners have standing to challenge both the 202 Denial and the Fabricant Opinion.⁵ The twelve states and five other governmental entities have been, and will continue to be, injured in a variety of ways by the effects of climate change caused by greenhouse gas emissions.⁶ These demonstrated harms include loss of state-owned property to rising sea-levels, including permanent losses due to inundation and periodic losses due to storm surge flooding (Jacqz Decl. ¶¶10-11; Kirshen Decl.

⁵Petitioners’ Standing Appendix contains representative declarations demonstrating their Article III injuries. *See Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998)(*en banc*)(court need not consider whether all parties have standing if some do).

⁶EPA itself has recognized that “[s]tate governments will be affected by the environmental impacts of climate change.” 66 Fed. Reg. 18245 (April 6, 2001)(discussing threats to state infrastructure, damage to state natural resources, and increased number of ozone exceedences).

¶¶5-11; Woodward Decl. ¶6; Dickson Decl. ¶¶6-10; Conrad Decl. ¶¶10, 12; Joint Decl. ¶¶10-13), added regulatory costs of meeting ozone obligations under the Act (Kwetz Allan Decl. ¶¶17-19; Croes Decl. ¶¶14-16), added costs to deal with emergency response measures caused by more frequent intense storm surge flooding events (Tommaney Decl. ¶¶13-14; Roos Decl. ¶15), damage to state-owned historic, archeological, and natural resources including state forests (Morrison Decl. ¶¶9, 13-14, 17-20; Dickson Decl. ¶¶8-10; Carlson Decl. ¶¶5-12; Davies Decl. ¶¶7-16; Woodward Decl. ¶¶7-8; Conrad Decl. ¶¶12-13; Hooageboom Decl. ¶ 8), damage to state-owned facilities and infrastructure along the coast (Hooageboom Decl. ¶¶4-7; Morrison Decl. ¶¶15-16; Conrad Decl. ¶¶10-11; Belenz Decl. ¶¶7-8), increased health effects (Joint Decl. ¶¶14-15; Croes Decl. ¶13) and increased health care related costs (Belenz Decl. ¶¶7-8), harm to state economies or revenues (Morrison Decl. ¶¶10-12; Hooageboom Decl. ¶9; Conrad Decl. ¶11), reduced water supply due to reduced snowpack, increased saltwater intrusion, and other factors (Roos Decl. ¶¶11-14; Fawcett Decl. ¶6), and damage to state-owned property due to wildfires (Woodward Decl. ¶10).

The fourteen citizen groups have been, and will continue to be, injured by the effects of climate change in many ways, including recreational and aesthetic injuries caused by the retreat of glaciers (Keim Decl. ¶¶7-8); Smith Decl. ¶¶5-6; Siegel Decl. ¶¶8-9; Jensen Decl. ¶12), less snow for skiing and snowshoeing (Shelley Decl. ¶5; Siegel Decl. ¶¶10-11; Epstein Decl. ¶¶4-9), bleaching of coral reefs (Siegel Decl. ¶12), flooding of coastal nature preserves (Cox Decl. ¶¶9-10), and decline in New England fall foliage (Heyer Decl. ¶¶3-7); loss of oceanfront property caused by rising sea levels (Ferman Decl. ¶¶3-4; Bowers Decl. ¶4; Walker Decl. ¶¶6-12); property damage due to rising sea levels and more frequent and severe storms (Poss Decl. ¶¶3-5;

Mather-Thrift Decl. ¶¶2, 4-6); increased exposure to ground-level ozone and other pollutants (Gardner Decl. ¶4); and crop failures and other farming losses due to extreme weather events (Llewellyn Decl. ¶¶3-7; Kaye Decl. ¶¶4-9; Barbato Decl. ¶¶5-8).

Each of these injuries, as well as others described in these declarations, is a result of climate change caused by greenhouse gas emissions. MacCracken Decl. ¶¶20-28. *See also*, official governmental reports cited at 6-11, below (documenting such injuries and their cause).

Each of these injuries is redressable by a decision of this Court finding that EPA has authority under the Act to regulate greenhouse gas emissions that cause or contribute to climate change. The measures sought by petitioners (EPA regulation of greenhouse gas emissions from motor vehicles) would both reduce and delay further injuries from climate change. MacCracken Decl ¶¶29-32; Walsh Decl. ¶¶10-12.

ISSUES PRESENTED

1. Did EPA act unlawfully in concluding that it lacks authority to regulate substances that cause or contribute to climate change, where the Clean Air Act broadly authorizes the Environmental Protection Agency to regulate “any air pollutant” that may endanger public health or welfare, including, specifically, through effects on “climate”?
2. Is EPA precluded from exercising its Clean Air Act authority to protect public health and welfare by promulgating motor vehicle emission standards if these standards may also result in improved fuel economy, a subject addressed by a different statute?
3. Did EPA act unlawfully or arbitrarily in refusing to regulate greenhouse gas

emissions under §202(a)(1) of the Act where EPA disregarded governing legal standards, and violated standards of reasoned decisionmaking?

STATUTES AND REGULATIONS

The relevant provisions of the Clean Air Act are §§202 and 302. The relevant provisions of the Energy Policy & Conservation Act are 49 U.S.C. §§32901-32902. These provisions are contained in the Addendum.

STATEMENT OF THE CASE

On October 20, 1999, Petitioner International Center for Technology Assessment, joined by eighteen other organizations (including several who are also Petitioners here), filed the 202 Petition with EPA. EPA denied the 202 Petition on August 28, 2003, and issued the Fabricant Opinion that same day. Thirty-one parties challenged these final actions. In addition to the fourteen environmental groups described above at iv-vii, Petitioners include seventeen states and other governmental entities: California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, American Samoa, District of Columbia, Northern Mariana Islands, Mayor and City Council of Baltimore, and New York City.

STATEMENT OF FACTS

I. THE CLIMATE CHANGE PROBLEM

A build-up of heat-trapping gases in the atmosphere is causing a rise in global temperatures known as “global warming.” These gases - including carbon dioxide (CO₂),

methane (CH₄), nitrous oxide (N₂O) and hydroflourocarbons (HFCs) - are commonly called “greenhouse gases.” Emissions from U.S. motor vehicles, power plants, and other sources continue to increase the concentration of greenhouse gases in the atmosphere. *See* U.S. Department of State, *U.S. Climate Action Report 2002* (2002) 5[JA __]. As a result, changes in America’s climate due to global warming continue to increase in magnitude, and the severity and likelihood of adverse impacts will multiply. Indeed, climate change is already causing, and will continue to cause, a host of harmful effects to the public health and welfare of the United States.

Recognizing the problems posed by climate change, the United Nations Environment Programme and the World Meteorological Organization in 1988 appointed an international group of scientists called the Intergovernmental Panel on Climate Change (IPCC) to investigate climate change. The United States Senate has recognized the IPCC as the preeminent international body established to provide objective scientific and technical assessments on climate change. S. Exec. Rep. No. 102-55, 102nd Cong., 2d Sess. (1992), 9 (IPCC’s work is “viewed throughout most of the international scientific and global diplomatic community as the definitive statement on the state-of-the-knowledge about global climate change.”).

In 1995, the IPCC’s *Second Assessment Report* on climate change found that “the balance of evidence, from changes in global mean surface temperature and from changes in geographical, seasonal and vertical patterns of atmospheric temperature suggests a discernible human influence on global climate.” *IPCC Second Assessment Report, Synthesis Report* (1995), 5 (emphasis added);⁷ *see also, IPCC Third Assessment Report, Working Group I, Summary for*

⁷ The Court may take judicial notice of the IPCC’s *Second Assessment Report*, which is discussed in the *Third Assessment Report*, and is among the IPCC’s official publications available at <http://www.ipcc.ch/pub/reports.htm>. *See Nebraska v. EPA*, 331 F.3d 995, 999 n. 3

Policymakers (2001) at 10[JA___].

After the *Second Assessment Report*, additional data, improved analysis, and more rigorous evaluation have given the IPCC an even greater understanding of climate change. *Id.* 2[JA ___]. In 2001, the IPCC completed its *Third Assessment Report* (“*TAR*”) and concluded that “there is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities.” *TAR, Synthesis Report, Summary for Policymakers* (2001), 4[JA__](emphasis added). The *TAR* concluded that global warming will continue into the future, and that these further temperature increases will cause additional significant adverse effects on weather patterns, ecosystems, human health, and socio-economic systems. *Id.*, 7-8[JA ___].

The *TAR* found that the global average surface temperature has increased 0.6°C (1°F) over the 20th century. *TAR, Working Group I, Summary for Policymakers* (2001), 2[JA___]. “Although a 0.6°C (1°F) warming may not seem large compared to daily variations in temperature, it caused a decline of about two days per year in the number of days that minimum temperatures fell below freezing.” *U.S. Climate Action Report 2002*, 85[JA___]. The *TAR* also determined that the 1990s was the warmest decade since records were first kept in 1861. *TAR Working Group I, Summary for Policymakers* (2001), at 2[JA__]. As the *TAR* concluded:

Available observational evidence indicates that regional changes in climate, particularly increases in temperature, have already affected a diverse set of physical and biological systems in many parts of the world. Examples of observed changes include shrinkage in glaciers, thawing of permafrost, later freezing and earlier break up of ice on rivers and lakes, lengthening of mid- to high-latitude growing seasons, poleward and altitudinal shifts of

(D.C. Cir. 2003).

plant and animal ranges, declines in some plant and animal populations, and earlier flowering of trees, emergence of insects, and egg-laying birds.

TAR, Working Group II, Summary for Policymakers (2001), at 3[JA ____](emphasis added). The *TAR* also found increasing evidence that social and economic impacts are being felt through an escalation in the occurrence of floods and droughts. *Id.* 4[JA ____].

In 2001, at the request of the White House, the National Academy of Sciences (NAS) analyzed some of the key *TAR* findings. National Research Council, *Climate Change Science: An Analysis of Some Key Questions* (2001)[JA____]. The NAS ascertained: “The IPCC’s conclusion that most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas concentrations accurately reflects current thinking of the scientific community on this issue.” *Id.* 3[JA ____]. The NAS report concluded that “[d]espite uncertainties, there is general agreement that the observed warming is real and particularly strong within the past 20 years.” *Id.* More specifically, the NAS report emphasized that the effects of global warming are being experienced now:

The warming trend is spatially widespread and is consistent with the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting on rivers and lakes, the accelerated rate of rise of sea level during the 20th century relative to the past few thousand years, and the increase in upper-air water vapor rates and rainfall rates over most regions. A lengthening of growing season also has been documented in many areas, along with earlier plant flowering season and earlier arrival of migratory birds. Some species of plants, insects, birds, and fish have shifted toward higher latitudes and higher elevations.

Id. 16.

After publication of the NAS Report and pursuant to its obligations under the United Nations Framework Convention on Climate Change (“UNFCCC” or “Rio Treaty”), the United

States submitted the *U.S. Climate Action Report 2002* (“*CAR*”) to the Secretariat of the UNFCCC. EPA served as the lead agency in the preparation of the *CAR* and coordinated the involvement of a dozen other federal agencies and the Executive Office of the President. *See*, 66 Fed. Reg. 15470 (March 19, 2001)[JA__](EPA soliciting public comment on all aspects of the *CAR*); 66 Fed. Reg. 57456 (Nov.15, 2001)[JA__](EPA soliciting comment on draft *CAR*).

The *CAR* recites at length the detrimental effects to public health and welfare caused by climate change. For example, according to the *CAR*, heat waves are “very likely” to increase in frequency and severity.⁸ *CAR*, 106[JA __]. These changes in weather and climate are “likely” to affect air quality in several ways including higher concentrations of ground-level ozone. *Id.* 107[JA __].

Additionally, the *CAR* presented regional assessments from the United States National Assessment determining that a wide variety of adverse effects to public health or welfare are “very likely” or “likely” to occur in the U.S. as a result of climate change.⁹ For example:

- In the Northeast, Southeast, and Midwest, “[r]ising temperatures are likely to increase the heat index dramatically in summer”;
- In the Appalachians, “[w]armer and moister air is likely to lead to more intense rainfall events in mountainous areas, increasing the potential for

⁸ In the *CAR*, “the term *likely* is used to indicate that a suggested impact is more plausible than other outcomes, and the term *very likely* is used to indicate that an outcome is much more plausible than other outcomes.” *CAR*, 83[JA__].

⁹ The *CAR* uses a common probabilistic lexicon similar to one developed in the United States Global Change Research Program, *Climate Change Impacts on the United States* (2001)(“*National Assessment*”). *See* n.8, above. As used in the *National Assessment* the term “very likely” is assigned a 90-99% chance that the impact will occur and the term “likely” is assigned a 65-90% chance that the impact will occur. *See, National Assessment, 5, available at* <http://www.gcric.org/NationalAssessment/aIntro.pdf>; *Nebraska v. EPA*, 331 F.3d at 999 n.3 (judicial notice of EPA website).

flash floods”;

- In the Great Lakes, “[l]ake levels are likely to decline due to increased warm-season evaporation, leading to reduced water supply and degraded water quality;”
- In the Southeast Atlantic Coast, Puerto Rico, and the Virgin Islands, “[r]ising sea level and higher storm surges are likely to cause loss of many coastal ecosystems that now provide an important buffer for coastal development against the impacts of storms;”
- Coastal communities “are more likely to suffer damage from the increasing intensity of storms;”
- In the Great Plains, “[p]rairie potholes, which provide important habitat for ducks and other migratory waterfowl, are likely to become much drier in a warmer climate;”
- In the Southwest, “[w]ith an increase in precipitation, the desert ecosystems native to this region are likely to be replaced in many areas by grasslands and shrublands, increasing both fire and agricultural potential;”
- In the Mountain West, “[h]igher winter temperatures are very likely to reduce late winter snow-pack. This is likely to cause peak runoff to be lower, which is likely to reduce the potential for spring floods associated with snowmelt. As the peak flow shifts to earlier in the spring, summer runoff is likely to be reduced, which is likely to require modifications in water management to provide for flood control, power production, fish runs, cities, and irrigation”;
- In the Northwest, “[i]ncreasing river and stream temperatures are very likely to further stress migrating fish, complicating current restoration efforts”;
- In Alaska, “[s]harp winter and springtime temperature increases are very likely to cause continued melting of sea ice and thawing of permafrost, further disrupting ecosystems, infra-structure, and communities;” *and*
- In Hawaii and the island trust territories in the Pacific, “[m]ore intense El Niño and La Niña events are possible and would be likely to create extreme fluctuations in water resources for island citizens and the tourists who sustain local economies.”

Id. 110[JA__].

The *CAR* also recognized that greenhouse gas emissions from United States transportation activities account for a major part of the country's overall greenhouse gas emissions. *Id.*, 36[JA ___](26 percent of total annual U.S. emissions from 1990 to 1999). Nearly two-thirds of these emissions result from motor vehicles. *Id.*, 40[JA ___].

II. STATUTORY BACKGROUND

Under the Act, EPA's authority to implement motor vehicle emissions regulation is found in §202(a)(1). Section 202 requires the Administrator to regulate emissions of any "air pollutant" from motor vehicles where in the Administrator's judgment such emissions "contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." §202(a)(1) of the Act. The term "air pollutant" is broadly defined under the Act to include "[a]ny air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters ambient air." §302(g) of the Act. Under the Act, language referring to "effects on welfare" includes "effects on . . . weather . . . and climate." §302(h) of the Act.

On April 10, 1998, EPA General Counsel Jonathan Cannon issued a legal memorandum concluding that "EPA's regulatory authority extends to air pollutants, which . . . are defined broadly under the Act and include SO₂, NO_x, CO₂ and mercury emitted into the ambient air." Memorandum from Jonathan Cannon, General Counsel, to Carol Browner, Administrator, entitled *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998)("Cannon Memo")[JA___].

In subsequent testimony before Congress on October 6, 1999, Cannon's successor as General Counsel, Gary Guzy, reiterated and endorsed the Cannon Memo's conclusion that CO₂

is an air pollutant subject to regulation under the Act. Testimony of Gary S. Guzy, EPA, General Counsel, before a Joint House Subcomm. Hearing (Oct. 6, 1999)(“Guzy Testimony”), 6[JA__].

III. PROCEDURAL HISTORY

On October 20, 1999, petitioner International Center for Technology Assessment (ICTA), joined by 18 other organizations, petitioned the EPA to regulate the emissions of four greenhouse gases (carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons) from new motor vehicles under §202(a)(1) of the Act. *See*, 66 Fed. Reg. 7486 (Jan. 23, 2001)[JA__].

On August 28, 2003, EPA issued both the 202 Denial and the Fabricant Opinion upon which the 202 Denial relies. 68 Fed. Reg. 52922 (Sept. 8, 2003)[JA__]. These two final agency actions are challenged here.

In the Fabricant Opinion, EPA General Counsel Robert Fabricant formally withdrew the 1998 Cannon Memo and concluded that “the CAA does not authorize EPA to regulate for global climate change.” Fabricant Opinion, 1[JA__].

The 202 Denial provided three grounds for EPA’s refusal to regulate greenhouse gas emissions from automobiles: (1) based on the Fabricant Opinion, the Clean Air Act does not authorize any regulation or other agency action to address climate change regardless of the extent of harm greenhouse gas emissions pose to public health and welfare; (2) regulation of one of the four greenhouse gases, carbon dioxide, emitted from light duty vehicles would conflict with the federal regulation of fuel economy under the Energy Policy and Conservation Act; and (3) any such regulation is “not appropriate” in light of the President’s “comprehensive” climate change policies, and uncertainties in science, and hence would be bad policy.

SUMMARY OF ARGUMENT

EPA's conclusion that it lacks authority to set motor vehicle emission standards for greenhouse gases contravenes the Act's plain language. Section 202(a)(1) authorizes the agency to regulate "any air pollutant" that may adversely affect "public health or welfare," and the Act's definitions section (§302(h)) provides that effects on "welfare" include effects on "weather" and "climate." Likewise, the Act's broad definition of "air pollutant" (§302(g)) encompasses "[a]ny air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters ambient air." None of EPA's arguments come close to proving that – as a matter of historical fact or of logic and statutory structure – Congress could not have intended the plain meaning of its words. To the contrary, they support the conclusion that EPA has the authority it seeks to avoid, as the agency itself initially concluded.

EPA asserts that it cannot regulate automobile emissions of CO₂ pursuant to the Clean Air Act because such regulations would conflict with regulation of fuel economy under the Energy Policy and Conservation Act. However, there is no such conflict because Congress explicitly acknowledged that such statutory overlap would occur, and in this case compliance with any Clean Air Act emission standards would have no effect on automobile manufacturers' ability to comply with EPCA. In addition, EPCA is irrelevant to EPA regulation of other (non-CO₂) greenhouse gas emissions from automobiles and to any greenhouse gas emissions from all other vehicle classes (including heavy-duty trucks).

EPA also acted arbitrarily and unlawfully by announcing its refusal to regulate greenhouse gases from motor vehicles even if it had authority under the Act. EPA erred by

asserting that promulgation of §202(a)(1) regulations is discretionary, even where endangerment exists. On the contrary, this Court has held that §202(a)(1) is “mandatory” – understandably so, given the provision’s use of “shall.” In addition, while citing uncertainties in global warming science, the agency nowhere evaluated those uncertainties in light of the relevant statutory test – *i.e.*, whether in EPA’s judgment motor vehicle emissions “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” §202(a)(1). That test does not require scientific certainty, but expressly provides for regulatory action when health or welfare impacts “may reasonably be anticipated.”

ARGUMENT

I. THE CLEAN AIR ACT AUTHORIZES EPA TO REGULATE GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES.

The Clean Air Act authorizes EPA to regulate emissions of “any air pollutant” that endangers public health or welfare, and it expressly confers authority to regulate pollutants that affect “climate.” Because the relevant language is plain and unambiguous, this case is easily resolved under step one of *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). *Chevron* step one review is “*de novo*.” *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991). *See, also, Her Majesty the Queen*, 912 F.2d at 1532-34 (*Chevron* analysis applies to “purely legal question of statutory interpretation” raised by denial of rulemaking petition). Moreover, an agency’s claim that it lacks statutory authority to grant a rulemaking petition is “a rationale that is uniquely well-suited to judicial resolution.” *Bargmann v. Helms*, 715 F.2d 638, 640, 643 (D.C. Cir. 1983)(reversing and remanding denial of rulemaking petition based on erroneous agency disclaimer of authority).

A. Section 202 of the Act Unambiguously Authorizes EPA to Regulate Greenhouse Gas Emissions from Motor Vehicles.

Section 202(a)(1) of the Act authorizes the Administrator to promulgate motor vehicle emissions standards for “any air pollutant” that he determines “may reasonably be anticipated to endanger public health or welfare.” By using the word “any,” Congress demonstrated its intent to provide EPA expansive authority, not to limit the agency’s jurisdiction to only certain kinds of air pollutants. *See Dept. of HUD v. Rucker*, 535 U.S. 125, 131 (2002)(“the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind’”).

The Act expressly confers authority to regulate air pollutants that affect climate. Section 202(a)(1) expressly authorizes regulation addressing harmful effects that air pollution may pose to “public health or welfare.” In turn, §302 defines various terms “[w]hen used in this chapter.” Specifically, §302(h) states:

All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(emphasis added). By including effects on “climate” within the “welfare” effects that define EPA’s §202(a)(1) regulatory authority, Congress has expressly conferred authority to regulate air pollutants that adversely affect “climate.” In addition to direct effects on climate, global warming-related welfare effects also include effects on “weather” (*e.g.*, increased storm activity and changes in rainfall or drought patterns), destruction of property, damage to crops, and many other effects within the enumerated dimensions of “welfare.” Greenhouse gas emissions also endanger “public health” by raising air temperature, which increases the severity of health-damaging smog episodes. *TAR, Working Group II Technical Survey*, 43[JA ____]. Dangers from

climate change thus fall squarely within the scope of “public health” and “welfare.” Because §202(a)(1) provides EPA with jurisdiction over “any air pollutant” that poses such dangers, a greenhouse gas is covered by that section if it qualifies as an “air pollutant.”

Neither the Court, nor EPA, need speculate about what Congress intended by “air pollutant,” because Congress itself expressly defined the term for all provisions of the Act, including §202. Specifically, §302(g) of the Act defines “air pollutant” as:

any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.

Congress coupled the all-inclusive word “any” – used this time not once but twice – with a list of expansive terms that are covered. “In choosing such expansive terms . . . , modified by the comprehensive ‘any,’ Congress plainly contemplated that the [statutory provision] would be given wide scope.” *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 130 (2001)(citation and internal quotation omitted)(construing the language: “any new and useful process, machine, manufacture, or composition of matter”).

Each of the four greenhouse gases emitted by motor vehicles is plainly covered by the definition of “air pollutant.” As the EPA General Counsel recognized in 1998, CO₂, the most prevalent greenhouse gas, is a “physical [and] chemical . . . substance which is emitted into . . . the ambient air.” Cannon Memo, 2[JA ____]. Nowhere in the current rulings does the agency attempt to challenge that basic truth.

B. EPA’s Textual Arguments that §202(a)(1) Does Not Authorize Regulation of Greenhouse Gases Are Meritless.

In the face of the overwhelming textual evidence, EPA largely ignores the actual words that Congress employed. Instead, EPA offers various policy-based contentions, as well as arguments addressing other provisions of the Act, other statutes, and even failure to enact legislation. *See* Part I.C., below (refuting these arguments). The few textual arguments EPA does offer concerning §202(a) and the accompanying definitions are unavailing.

Congressional silence about climate change. EPA’s primary argument is its claim that the Act is silent about the agency’s authority to address the effects of greenhouse gases. *See* 68 Fed. Reg. 52928/1[JA____](claiming an “absence of any direct or even indirect indication of congressional intent to provide such authority”). But in making this argument, EPA disregards §302(h)’s express affirmation of EPA’s authority over effects on “climate.”

The agency is left to suggest that Congress intended to draw a distinction between “global” climate change, and climate change of a less extensive geographical reach. *See* 68 Fed. Reg. 52924/2[JA____](asserting that “no CAA provision specifically authorizes global climate change regulations”)(emphasis added). But the statutory reference to “climate” is unqualified, and includes no language confining the term to a limited geographical scope. *See Hercules Inc. v. USEPA*, 938 F.2d 276, 280 (D.C. Cir. 1991)(“reject[ing] the EPA’s action because it reads into the statute a drastic limitation that nowhere appears in the words Congress chose and that, in fact, directly contradicts the unrestricted character of those words”). This Court “has consistently struck down administrative narrowing of clear statutory mandates.” *Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997), and it should likewise do so here.

“Air pollutant”/“air pollution.” Having concluded that it lacks authority to regulate

greenhouse gases, EPA then asserts that greenhouse gases therefore cannot be “air pollutants” and that their excess concentration in the air cannot be “air pollution”:

Because EPA lacks CAA regulatory authority to address global climate change, the term “air pollution” as used in the regulatory provisions cannot be interpreted to encompass global climate change. Thus, CO₂ and other GHGs are not “agents” of air pollution and do not satisfy the CAA section 302(g) definition of “air pollutant” for purposes of those provisions.

68 Fed. Reg. 52928/3[JA ____]. These conclusory assertions about what the text must mean are insupportable.

First, the agency violates the order of analysis prescribed by *Chevron*. Instead of following *Chevron*'s mandate to begin with the text of the statute to determine whether Congress's intent is clear, EPA starts with its conclusion that the Act does not provide authority and then asserts that the text “cannot be interpreted” otherwise.

Second, whether one focuses on “air pollutant” or “air pollution agent,” the result is the same. By the express terms of §302(g), both terms “includ[e] any physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.” Because greenhouse gases fall within the scope of the “including” clause, they are air pollutants, as well as air pollution agents.

EPA protests that reading §302(g)'s language as written would give EPA regulatory jurisdiction over “virtually anything entering the ambient air regardless of whether it pollutes the air.” Fabricant Opinion, 10 n.9[JA ____]. But while the Act defines “air pollutant” broadly, emissions of air pollutants are regulated only when the agency concludes that they may reasonably be anticipated to endanger the public health or welfare. Thus, the regulation of air emissions is driven by the degree of harm that they pose, not by the type of chemical being

emitted. This accords with both the purpose of §202(a)(1) and common sense.

Third, EPA's attempt to exclude climate from the scope of "air pollution" also founders on §§202(a) and 302(h). As discussed above, §202(a)(1) authorizes regulation where "air pollution" may endanger "public health or welfare," and, in turn, §302(h) defines welfare effects to include effects on "climate" and "weather." The notion that "air pollution" excludes airborne substances that produce effects expressly included in the Act's key phrase ("public health or welfare") is simply untenable.¹⁰

"Precursors." EPA also seeks support in a 1990 amendment to §302(g), which clarified that "precursors to the formation of any air pollutant" are themselves air pollutants. EPA argues that the amendment "would have been unnecessary had the definition already encompassed everything physical, chemical, biological or radioactive that enters the air." Fabricant Opinion, 11 n.9[JA___]. The 1990 Amendment, however, did not narrow the broad pre-existing language in the first sentence of §302(g). To the contrary, the 1990 Amendment emphasized the breadth of the phrase "air pollutant," by affirming EPA's authority to regulate substances that – while themselves benign – lead to the creation of harmful pollutants after they are emitted. *See, e.g., Shook v. D.C. Fin. Responsibility and Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) (Congress "sometimes drafts provisions that appear duplicative of others simply, in Macbeth's words, 'to make assurance double sure'").

¹⁰Greenhouse gases so obviously qualify as 'air pollutants' that the agency itself continues to refer to them in this manner. *See* <http://www.epa.gov/ebtpages/airairpollutioneffects.html> (last visited June 22, 2004)(EPA's current web page referring to climate change and global warming as "effects of pollution"); *see, also*, n.24, below (citing some of the many similar references in EPA rulemaking over the years).

C. EPA Has Provided No Valid Grounds for Rejecting the Plain Meaning of the Statutory Language.

EPA cannot “avoid the Congressional intent clearly expressed in the [statutory] text simply by asserting that its preferred approach would be better policy.” *Engine Manufacturers Ass’n v. USEPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). Instead, “for the EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.” *Id.* The court “will not . . . invoke this rule to ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification.” *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001) (emphasis added).¹¹

EPA offers various policy-based contentions, as well as arguments addressing other provisions of the Act, other statutes, and even failure to enact legislation. 68 Fed. Reg. 52925-26; 52928[JA __, __]. None of these materials either states or even suggests that the relevant provisions of §§202(a)(1), 302(g), and 302(h) should be read to mean anything other than what they say. Thus, EPA falls far short of the “extraordinarily convincing” justification required.

¹¹ See, also, *NPR v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (presumption that Congress meant what the plain language of the statute says is “[e]xtremely strong,” and agency’s burden in rebutting it is “onerous”); *Sierra Club v. USEPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (rejecting EPA’s attempt to diverge from literal meaning of the Act).

1. EPA Has Not Shown That, As Matter of Historical Fact, Congress Intended to Preclude EPA from Regulating Greenhouse Gases.

a. EPA Has Produced No Legislative History to Support Its Position.

EPA has produced nothing from the legislative history of the Act to prove that “as a matter of historical fact” Congress intended to exclude greenhouse gases from the agency’s plenary authority. In fact, EPA does not even discuss the legislative history of the 1965, 1970, and 1977 Amendments, which together fixed the relevant language of §§ 202 and 302 in its current form.¹² Instead, EPA stands on its sweeping allegation that there is an “absence of any direct or even indirect indication of congressional intent to provide such authority [to regulate greenhouse gases].” 68 Fed. Reg. 52928/1[JA____, ____].

Given that it is EPA’s burden to find an “extraordinarily convincing justification” for departing from the plain language of the statute, an absence of legislative history does not help the agency. *See Harrison v. PPG Industries*, 446 U.S. at 592 (“it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.”).

b. The Legislative History Supports the Conclusion that Congress Authorized EPA to Regulate Greenhouse Gases.

A closer examination of the historical record reveals that the legislative history is not in fact silent but instead supports the authority of EPA to regulate greenhouse gases.

¹² Congress first enacted §202 (authorizing EPA to regulate “any air pollutant” that may endanger “public health or welfare”) in 1965, and refined it in 1970 and 1977. The relevant definitions in §302(g) (defining “air pollutant” expansively) and in §302(h)(expressly including effects on “climate” within effects on “welfare”) were enacted in 1970 and refined in 1977. Since 1977, §202(a)(1) has not been amended at all, and §§302(g) and (h) have been amended only to emphasize their breadth. *See* p.19, above.

1965 Amendments. Express Congressional awareness of the potential dangers of global climate change stretches back nearly forty years to 1965, when Congress first enacted §202. During the debates on the 1965 Amendments, Congressman Helstoski stated that “[i]t has been predicted that by the year 2000, the amount of atmospheric carbon dioxide may have increased by about fifty percent; and many believe that this will have a considerable effect on the world’s climate.” 111 Cong. Rec. 25,061 (1965). And Congress was well aware at that time that cars were a major source of CO₂ emissions. *See, e.g.*, H.R. Rep. No. 89-899 (1965), reprinted at 1965 U.S.C.C.A.N. 3608, 3611.

1970 Amendments. In 1970, Congress added §302(h) to the definition section, including its express reference to effects on “climate.” *See* Pub.L. 91-604, §15(a)(1), 84 Stat. 1710 (Dec. 31, 1970), reprinted in 1970 U.S.C.C.A.N. 1954, 1997. During the debate on the 1970 Amendments, Senator Boggs introduced into the record a White House Report stating that: “Air pollution alters climate and may produce global changes in temperature. . . . [T]he addition of particulates and carbon dioxide in the atmosphere could have dramatic and long-term effects on world climate.” 116 Cong. Rec. 32,912, 32,914, 32,916. Far from silence, this legislative history evidences an affirmative awareness of the problem of global climate change at the time Congress added the word “climate” to §302(h).

1977 Amendments. Before the 1977 Amendments, §302 defined “air pollutant” simply as “an air pollution agent or combination of such agents.” EPA argued at the time – as it does today with respect to greenhouse gases – that this definition left it without authority to address some environmental threats, including some types of radioactive materials. Congress responded by enacting the expansive definition of “air pollutant” that currently exists in §302(g). As

explained in the House Committee Report:

the Clean Air Act is the comprehensive vehicle for protection of the Nation's health from air pollution. In the committee's view, it is not appropriate to exempt certain pollutants or certain sources from the comprehensive protections afforded by the Clean Air Act.

H.R. Rep. No. 95-294, at 42.

The 1977 Amendments further indicate that, as a matter of historical fact, Congress was aware of potentially serious air pollution hazards to “weather” and “climate” and intended EPA to address such hazards in the exercise of its regulatory authority. For example, Congress amended the Act to require EPA to complete a study of “the nature and degree of endangerment to public health or welfare” presented by particulate matter, and to revise the national ambient air quality standards (NAAQS) for this pollutant. Pub. L. 95-95, §§106(a), 403(a), 91 Stat. 690, 792 (Aug. 7, 1977).¹³ The House Report accompanying this amendment noted “the possibility that fine particulate emissions could significantly modify the earth's climate,” and that “precipitation rates and distribution and temperatures may be affected.” The Committee specifically directed EPA to address “possible weather and climate modifications” when revising the NAAQS since “there can be no higher mission for Government than assuring that man's activities will not threaten the life-sustaining conditions on which we all rely.” H.R. Rep. No. 95-294, at 339. *See also id.* at 105, 138 (commenting that new Prevention of Significant Deterioration provisions would help to avoid effects on climate of “unnecessary stratospheric and atmospheric modifications due to air pollution.”)

In sum, far from providing the “extraordinarily convincing” evidence essential to prove

¹³Pub.L. 95-95, §106(a), requiring periodic review and revision of the NAAQS, is codified at §109(d)(1) of the Act. Pub.L. 95-95, §403(a), requiring the study of particulate matter, is not codified.

that Congress did not intend the plain meaning of its words, the legislative history to the contrary demonstrates that Congress viewed the problem of global climate change as one within the ambit of the expansive authority that it gave to EPA.

c. The 1990 Amendments Did Not Take Away EPA’s Existing Authority.

The 1990 Amendments did not amend §202(a)(1) at all, and they amended §§ 302(g) and (h) only to affirm the breadth of their reach. *See* p.19, above. Nevertheless, EPA argues that four other provisions in the 1990 Amendments show that Congress intended to limit EPA’s regulatory authority over greenhouse gas emissions. EPA has not even tried to argue that any of these measures implicitly amended or repealed §§202(a)(1), 302(g), and 302(h). While this is hardly surprising given the burden EPA would have to overcome to demonstrate an implied amendment or repeal, it is not at all clear why EPA thinks these entirely separate provisions support its interpretation.¹⁴ Regardless, all of the cited provisions are fully compatible with EPA’s authority to regulate greenhouse gases under §202(a)(1).

Section 103(g) of the Act. Section 103(g) is part of a general provision regarding “nonregulatory strategies and technologies for air pollution prevention.” EPA notes that this section “expressly preclude[s its] use for regulatory purposes,” and it suggests that this implies that Congress did not intend EPA to regulate substances that are referenced there. 68 Fed. Reg. 52926/2[JA ____]. But §103(g) says only that “[n]othing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements.” (Emphasis added).

¹⁴ It is well settled that amendments and repeals by implication are strongly disfavored, and are not to be found absent a demonstration that the two statutory provisions at issue are incapable of co-existence. *See, NRDC v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988)(amendment by implication); *J.E.M. AG Supply*, 534 U.S. at 137, 141-42 (repeal by implication); *U.S. v. Vonn*, 535 U.S. 55, 66 (2002)(partial repeal by implication).

It is §202 that creates regulatory authority over motor vehicle emissions of greenhouse gases, and nothing in §103(g) expressly or impliedly removes that authority.

EPA’s reading of §103(g) proves too much. If the enumeration of a chemical substance in §103(g) barred regulation of that substance, EPA would lack authority not only over CO₂, but also over “sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), [and] carbon monoxide” – all of which are listed in §103(g). Yet EPA indisputably regulates each of these other pollutants under the Act, notwithstanding §103(g). Thus, EPA’s citation of §103(g) gains it no ground.

In fact, as EPA’s former General Counsel concluded, the enactment of §103(g) actually supports the conclusion that EPA has authority to regulate greenhouse gases under §202(a)(1). Cannon Memo 3 n.1[JA ____]. By expressly including CO₂ in a list of enumerated “air pollutants,” §103(g) further confirms that this greenhouse gas is an “air pollutant” under the Act.¹⁵ §103(g)(“multiple air pollutants, including sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), carbon monoxide, and carbon dioxide”). *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003)(the “normal rule of statutory construction” is that “identical words used in different parts of the same act are intended to have the same meaning”)(citations and internal quotations omitted).

¹⁵ EPA subtly mischaracterizes §103(g) to suggest a false distinction between “air pollutants” and carbon dioxide, claiming that the section “lists several air pollutants and CO₂.” 68 Fed. Reg. 52926/2[JA ____].

Section 602(e) of the Act. Section 602(e) directs EPA to determine the “global warming potential” of certain substances.¹⁶ EPA claims that this section “precludes” regulatory action. 68 Fed. Reg. 52926/2[JA ____]. Again, the precise language must be examined; §602(e) says: “[t]he preceding sentence shall not be construed to be the basis of any additional regulation under this chapter.” (Emphasis added). Nothing in §602(e) affects or diminishes EPA’s regulatory authority in §202(a)(1) over motor vehicle emissions of greenhouse gases.¹⁷

Section 821 of the 1990 Amendments. Section 821 of the Amendments requires electric power plants subject to the Act’s acid rain control program to report their emissions of carbon dioxide.¹⁸ EPA says this provision does not “authorize[] imposition of mandatory requirements.” 68 Fed. Reg. 52926/2[JA ____]. A provision requiring power plants to report CO₂ emissions, however, does nothing to diminish EPA’s authority to regulate greenhouse gas emissions from motor vehicles under §202(a)(1).

¹⁶ Global warming potential is a measure of how strongly a substance traps heat. Section 602(e) requires EPA to publish this measure of substances introduced as substitutes for ozone-depleting chemicals.

¹⁷ EPA has interpreted another provision, §612(c) of the Act, to authorize the agency to restrict use of greenhouse gases as replacements for ozone-depleting chemicals because of their adverse effect on the climate. Section 612(c) provides that “it shall be unlawful to replace any [ozone-depleting chemical] with any substitute substance which the Administrator determines may present adverse effects to human health or the environment, where the Administrator has identified an alternative to such replacement that . . . reduces the overall risk to human health and the environment.” EPA has ruled that “overall risk to . . . the environment” includes risks of global warming due to greenhouse gases. *See* 59 Fed. Reg. 13044, 13046 and 13049 (Mar. 18, 1994).

¹⁸Pub.L. 101-549, §821. This section was not codified, but is carried as a note to §412 of the Clean Air Act, 42 U.S.C. 7651k.

Title VI. As part of the 1990 Amendments, Congress enacted Title VI of the Act, which regulates chemicals that threaten the stratospheric ozone layer. 42 U.S.C. §7671. EPA argues that the enactment of Title VI “demonstrate[s] that Congress has understood the need for specially tailored solutions to global atmospheric issues” and “cautions against construing [the Act’s] provisions to authorize regulation of emissions that may contribute to global climate change.” 68 Fed. Reg. at 52926/3[JA ____]. But Congress’s enactment of a specific regulatory program for one environmental problem does not take away from its clearly expressed grant of pre-existing authority to address different environmental problems.

Indeed, even enactment of a special program addressing the same problem covered by pre-existing regulatory authority does not abrogate that authority. For example, the 1990 Amendments also enacted Title IV of the Act, which established an emissions trading program for sulfur dioxide. EPA could not credibly claim that this program abrogated the agency’s preexisting authority to regulate sulfur dioxide in other ways. Where the special enactment involves a different problem (stratospheric ozone depletion, not climate change), it is even more untenable to suggest preclusion of EPA’s pre-existing regulatory authority.

d. Other Climate Change Legislation Does Not Curtail EPA’s Authority.

Legislation calling for further research, planning or voluntary measures. Apart from the Clean Air Act, Congress has since 1977 enacted several statutes addressing global climate change.¹⁹ Because such legislation principally called for further research and other “non-

¹⁹See National Climate Program Act of 1978, as amended by the Global Climate Protection Act of 1987. Pub.L. 100-204, Title XI, §1102 (1987)(coordinating climate research); Global Change Research Act of 1990, 15 U.S.C. §2931, Pub.L. 101-606, 104 Stat. 3096 (calling for the President to establish a Committee on Earth and Environmental Sciences to coordinate a ten year research effort); Title XXIV of the Food, Agriculture, Conservation, and Trade Act of

regulatory” measures, EPA argues that these enactments demonstrate that Congress meant to withhold from EPA general regulatory authority over the problem and instead to adopt a “wait and see” approach:

With these statutes, Congress sought to develop a foundation for considering whether future legislative action on global climate change was warranted and, if so, what that action should be. From Federal agencies, it sought recommendations for national policy and further advances in scientific understanding and possible technological responses. It did not authorize any Federal agency to take any regulatory action in response to those recommendations and advances.

68 Fed. Reg. 52927/3[JA ____].

Once again, because EPA does not claim that these enactments limited its existing authority to regulate “any air pollutant” that adversely affects “climate,” it is not clear why EPA thinks such legislation provides support for its interpretation of the Act. In any event, far from supplying the “extraordinarily convincing” evidence needed to prove that Congress could not have meant what it so plainly said, the cited legislation suggests nothing about the scope of authority that Congress had previously delegated to EPA. Congress’s intent that EPA and other agencies conduct further studies of the problems posed by greenhouse gases is fully compatible with EPA having pre-existing authority to regulate them.

Indeed, EPA’s suggestion that investigation cannot coexist with regulation is a frontal assault on a core tenet of the Act. As is discussed more fully below in Part III, §202 (and other key sections of the Act) call for EPA to take regulatory action against dangers to public health and welfare even when a measure of scientific uncertainty remains. In light of this, simultaneous

1990, Pub.L. No. 101-624, 104 Stat. 3359 (establishing a Global Climate Change Program to research global climate agricultural issues and to provide liaison with foreign countries on such issues).

regulation and further study is not incompatible; rather, it is the norm that Congress established under the Act. *See, e.g.*, §214 of the Act (mandating study of motor vehicle emissions of particulate matter, which is indisputably subject to EPA's regulatory authority).

In a similar vein, EPA cites provisions in the Energy Policy Act of 1992 calling for study and assessment of greenhouse gases and for keeping track of voluntary emission reductions. Pub.L. 102-486, 106 Stat. 2776. 68 Fed. Reg. 52927/3[JA ____]. Nothing in this entirely separate law detracts in any way from EPA's pre-existing regulatory authority under §202(a)(1) of the Act. First, as shown above, investigation is compatible with regulation. Second, provisions encouraging voluntary action are likewise fully consistent with EPA's pre-existing authority to regulate. For example, Congress's express encouragement of "voluntary" measures to help control motor vehicle pollution, *see, e.g.*, §108(f)(1)(A)(xvi), cannot be read to repeal EPA's regulatory authority under §202.

Rio Treaty. In 1992, the United States signed and ratified the Rio Treaty. Noting that the treaty called for further study and did not include specific, enforceable emission reduction targets, EPA suggests that the Rio Treaty provides further support that Congress could not have intended the agency to regulate greenhouse gases. 68 Fed. Reg. 52926/1[JA ____]. The Rio Treaty does not support EPA's position. Neither a subsequent treaty's call for additional scientific study, nor its silence on specific enforceable emissions targets, could have any bearing on the scope of EPA's pre-existing authority under domestic law. *See* 27-29, above.

In addition, EPA ignores the heart of the Treaty. By joining the Rio Treaty, the United States made a commitment to "adopt national policies and take corresponding measures on the mitigation of climate change." UNFCCC, Art. 4.2(a). The treaty specifically states that such

policies and measures are to include “limiting its anthropogenic emissions of greenhouse gases.” *Id.* Finally, the Rio Treaty states that “[t]hese policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention.” *Id.* Thus, the Rio Treaty establishes a framework of international cooperation to address the problem, and it embodies the United States’ commitment to implement domestic policies to do so. Far from suggesting a lack of domestic authority to regulate greenhouse gases, the U.S. commitment under the Rio Treaty provides support for EPA to use that authority.

Byrd-Hagel Resolution & Knollenberg Amendments. Finally, EPA draws attention to two Congressional actions pertaining to subsequent climate treaty negotiations. In 1997, the Senate passed a non-binding resolution expressing certain views as to how the executive branch should conduct international negotiations on what became the Kyoto Protocol. 105 S. Res. 98, Rep. No. 105-54 (known as the Byrd-Hagel resolution). And in 1998 and 1999, Congress attached temporary budget riders known as the Knollenberg amendments to various appropriations bills, barring EPA and other agencies from using funds “to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol” without completion of the constitutional process for treaty ratification. *See, e.g.*, Pub. L. 105-276, 232.

By no stretch of the imagination does either action show any Congressional intention to restrict or deny EPA’s authority under §202(a)(1). The Byrd-Hagel resolution was entirely focused on the Senate’s views regarding a treaty then being negotiated and said nothing about domestic regulatory authority. Likewise, the now-expired Knollenberg funding rider – attached

to appropriations bills for a wide range of departments and agencies – did nothing more than prohibit any agency (including EPA) from implementing the Kyoto treaty without observance of the constitutional ratification procedure. Even during the temporary period when the budget rider was in effect, it only addressed implementation of the Kyoto treaty, and did not purport to restrict EPA from making non-treaty-related use of existing regulatory authority under the Act.

Implying such a restriction would amount to a finding of implicit amendment or repeal of §202(a). Disfavored even in the case of substantive legislation, an implied amendment or repeal is especially untenable in the case of an appropriations rider. This Court recently noted “the well settled principle that while appropriation acts are ‘Acts of Congress’ which can substantively change existing law, there is a very strong presumption that they do not [T]he established rule [is] that, when appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly. Such measures have the limited and specific purpose of providing funds for authorized programs.” *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000)(internal quotations and case citations omitted).

Finally, even if these fundamental principles were ignored and the Knollenberg Amendments were inappropriately read as having placed a temporary limit on EPA’s underlying regulatory authority, such a limit by itself would confirm that EPA possessed that authority.

e. Failed Legislation That Would Have Mandated Greenhouse Gas Emission Standards Does Not Abrogate EPA’s Pre-Existing Regulatory Authority.

In 1989 and 1990, Congress considered, but did not ultimately pass, a proposal that would have mandated specific numerical CO₂ standards for motor vehicles. EPA argues that this failed legislation shows that EPA lacks pre-existing authority to regulate greenhouse gases under

§202. 68 Fed. Reg. 52926/1[JA ____].²⁰ But “failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.” *US v. Craft*, 535 U.S. 274, 287 (2002)(internal quotations omitted). *See, also, Telecom*USA, Inc. v. United States*, 192 F.3d 1068, 1077 (D.C. Cir. 1999) (Congress’s failure to adopt amendment is hazardous basis for inferring intent); *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (“Congress does not express its intent by a failure to legislate”). The failure to pass legislation mandating a specific CO₂ standard provides no basis for concluding that EPA lacked pre-existing authority to regulate greenhouse gases. One can just as easily infer from the failure of this proposal that Congress believed that the general authority already provided by the Act was sufficient. *See US v. Craft*, 535 U.S. at 287.

Again, the enactment of the acid rain emissions trading program in Title IV provides useful illustration. Had the attempt to enact Title IV failed, this obviously would not have affected EPA’s pre-existing authority to regulate sulfur dioxide under other provisions.

In short, none of the Congressional actions or inaction EPA has put forward begins to meet the agency’s burden under *Engine Manufacturers* to show that – as a matter of historical fact – Congress could not have intended what the language of §§202(a)(1), 302(g), and 302(h) so plainly states.

²⁰*See* S.1630, §206, *reprinted in* Sen. Comm. on Env. and Public Works, *5 A Legislative History of the Clean Air Act Amendments of 1990* at 8036-38 (S.Prt 103-38, Nov. 1993). EPA also points in passing to several other pieces of failed energy legislation. 68 Fed. Reg. at 52926/1, 52927/3[JA __, __].

2. EPA Has Not Shown That “As a Matter of Logic and Statutory Structure,” Congress “Almost Surely” Could Not Have Meant What It Said.

Likewise, EPA fails to demonstrate under the second prong of *Engine Manufacturers* that “as a matter of logic and statutory structure,” Congress “almost surely” could not have intended the plain meaning of these statutory provisions. In short, the agency asserts that existing authorities are unworkable, a result that Congress could not have intended. These arguments are untenable.

It is telling that EPA’s broad claims ignore the pertinent provisions of §202, the section at issue in this proceeding. Section 202(a)(2) requires EPA to set technologically and economically feasible emission standards for new motor vehicles. Under §202, limits are set as performance standards that reflect the reductions achievable by technology that can be incorporated into new vehicles, taking into account lead-time needs and cost considerations. *Id.*²¹ Automakers have substantial flexibility to decide the specific mix of technologies and methods to use to meet the performance standard. *See, e.g., NRDC v. USEPA*, 655 F.2d 318, 332 n.25 (D.C. Cir. 1981). This is a feasible, practical approach, as well as one that protects against any undue economic impacts.

EPA’s “unworkability” argument seeks to shift focus to the system for setting and implementing national ambient air quality standards (NAAQS) under §§108-110 of the Act. EPA argues that the NAAQS system is “fundamentally ill-suited to address [greenhouse] gases in relation to global climate change,” and on this basis asserts that Congress did not intend EPA

²¹Other technology-based provisions of the Act operate in a similar manner. *See, e.g.,* §111 of the Act, governing new source performance standards for power plants and other stationary sources.

to regulate such greenhouse gases under any part of the Act, including §202. 68 Fed. Reg. 52927/1[JA ____]. The argument fails to demonstrate that “as a matter of logic and statutory structure,” Congress “almost surely” could not have intended the plain meaning of §202. *See Engine Manufacturers*, 88 F.3d. at 1089. Indeed, even as directed at the NAAQS system itself, EPA’s argument is not consistent with Congress’s 1977 directive that EPA should consider “possible weather and climate modifications” when revising the NAAQS for particulate matter. H. Rep. No. 294, 95th Cong., 1st Sess. (1977), *supra*, at 339.

At its core, EPA’s “unworkability” argument is not a logical or structural argument under *Engine Manufacturers*, but a factual one.²² Whether the NAAQS system proves workable depends upon a variety of undetermined factors, including the level at which the NAAQS is set.²³ Under *Engine Manufacturers*, though, it is not enough to imagine circumstances in which some section of the statute may prove unworkable. *See* 88 F.3d at 1090 (if it is “conceivable” that

²²EPA tries unsuccessfully to elevate facts into interpretative principles when it argues, for example, that criteria pollutants generally represent local problems that can be solved through local controls, or that the NAAQS system can be used only where doing so will fully address the pollution problem at issue. *See, e.g., West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004) (upholding regional cap and trade program for ozone); §179B of the Act (recognizing that there will be situations where a NAAQS cannot be attained due to emissions that emanate from foreign sources).

²³EPA’s contentions regarding the assumed cost of regulating greenhouse gases through a NAAQS are particularly misdirected given that EPA has not yet considered what level of greenhouse gas concentrations in the air would be necessary and appropriate. *See* Letter from Gary S. Guzy, EPA General Counsel, to Rep. David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform (July 12, 2000)(“2000 Guzy Letter”)(“At this stage, it is not possible to determine whether the magnitude of the consequences from regulating CO₂ would be greater or less than those related to the regulation of other pollutants over which EPA’s authority is unquestioned”), attachment at 6[JA ____]; *see also, American Trucking Associations v. Whitman*, 531 U.S. 457, 466 (2001)(Congress was willing to impose significant economic impacts under the NAAQS program to protect the public health and welfare).

Congress meant what it said, EPA is not free to adopt interpretation at variance with words). For instance, EPA is not entitled to assume in advance that emissions elsewhere in the world will necessarily prevent attainment of a NAAQS for CO₂ in the United States. *See, e.g.*, UNFCCC Art. 2 (setting objective of stabilizing greenhouse gas concentrations at safe level). Still less may EPA assume that the particular characteristics of greenhouse gases will necessarily defeat implementation of the flexible provisions of the NAAQS system. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 359-60 (D.C. Cir. 1979)(EPA’s burden to justify statutory exemptions is “especially heavy” when the agency “seeks approval of a prospective exemption of certain categories from a statutory command based upon the agency’s prediction of the difficulties of undertaking regulation,” without having undertaken a “good faith effort”)(emphasis added). EPA has not yet made any effort to resolve the issues it raises regarding NAAQS implementation, let alone a “good faith one.”

Because this case is about §202, the court need not consider how the NAAQS system might work in regulating greenhouse gases. Those issues will be ripe if and when EPA actually seeks to use the NAAQS system to address greenhouse gases. In any event they could not excuse the failure to adopt emissions standards under §202, because §202 does provide a perfectly feasible mechanism for regulating greenhouse gas emissions from motor vehicles. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (“The rule that statutes are to be read to avoid absurd results . . . [is not] a license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.”).

3. *Brown & Williamson* Supports Petitioners' Interpretation.

Much of EPA's claim that it lacks authority to regulate greenhouse gases rests on the import it draws from a single case, *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120 (2000). EPA cites the case for the proposition that "in extraordinary cases," facially broad grants of authority must undergo more rigorous scrutiny to see if Congress really meant what it said. EPA asserts that just as the Supreme Court found Congress did not intend the Food and Drug Administration ("FDA") to regulate tobacco as a "drug" under the Food, Drug and Cosmetic Act ("FDCA"), so Congress did not intend EPA to regulate greenhouse gases as "air pollutants" under the CAA. 68 Fed. Reg. at 52928/1-2[JA ___]. EPA suggests that this case is even more "extraordinary" than *Brown & Williamson*, asserting that regulation of greenhouse gases "would have greater economic and political implications than FDA's attempt to regulate tobacco." *Id.* But the circumstances of *Brown & Williamson* are fundamentally different from those involved here, and indeed the legal principles of that case compel the opposite conclusion.

First, the *Brown & Williamson* Court found it determinative that for more than sixty years the FDA had held the position that it had no authority to regulate tobacco under the FDCA, and that Congress had repeatedly enacted tobacco-specific legislation that was explicitly based on and ratified the FDA's longstanding interpretation. FDA's more recent assertion of authority over tobacco under the FDCA could not stand in the face of Congressional enactments over this long period that were expressly premised on FDA's earlier no-authority position. *See* 529 U.S. at 154-57. In contrast, before the decision here under review, EPA had never articulated the view that it lacked authority to regulate greenhouse gases as air pollutants, and Congress has never enacted legislation premised on the no-authority view. In reality, EPA took the opposite position. In response to Congressional questions, one EPA Administrator and two prior EPA

general counsels opined to Congress that the Clean Air Act does provide authority to regulate greenhouse gases. *See* Cannon Memo, 5[JA ___]; Guzy Testimony, 6[JA ___].²⁴ Moreover, shortly after *Brown & Williamson* was decided, EPA’s general counsel emphatically noted that it posed no obstacle to regulation of greenhouse gases:

This set of circumstances is simply not repeated regarding the regulation of CO₂. EPA has never asserted that it lacks authority to regulate emissions of greenhouse gases, much less repeatedly disavowed such authority over a thirty year period. Congress has not established any broad-based requirements specifically to address climate change, much less created a distinct alternative regulatory scheme for emissions of CO₂. Nor has Congress acted to preclude administrative agencies from making policy on the topic of climate change.

2000 Guzy Letter, *supra* n. 23, attachment at 4[JA ___].

Second, *Brown & Williamson* stressed that if the FDCA applied to tobacco, it would allow only one result: a total ban on the product. 529 U.S. at 142-44. The Court noted that such a result would be inconsistent with the half-dozen other tobacco-specific enactments that are all premised on tobacco’s remaining legally for sale. *Id.*, at 143. In other words, because Congress had enacted legislation that was completely at odds with subjecting tobacco to FDCA jurisdiction, the Court declined to conclude that cigarettes were “drug delivery devices” under that statute. It was in this “extraordinary” context that the Court stated that “we are confident

²⁴EPA’s conclusion that greenhouse gases are “air pollutants” actually predates such Congressional inquiries. For example, EPA referred to methane as an “air pollutant” in rulemaking at least as early as 1991. *See* 56 Fed. Reg. 24468, 24470 (May 30, 1991)(proposed rule) (“[m]unicipal solid waste landfill emissions, also commonly referred to as ‘landfill gas,’ is a collection of air pollutants including methane and NMOC’s, some of which are toxic”(emphasis added). Similar references can be found in numerous other rulemakings, including recent ones. *See, e.g.*, 63 Fed. Reg. 25902, 25940 (May 11, 1998)(rulemaking notice stating “[a]s an additional benefit, decreases in fuel usage would reduce emissions of other pollutants such as SO₂, mercury, and carbon dioxide (CO₂).”(emphasis added); 64 Fed. Reg. 28564 (May 26, 1999) (final rule revisions to ensure that “sulfur dioxide (SO₂), nitrogen oxides (NO_x) and carbon dioxide (CO₂) air pollution emissions” are accurately monitored and reported)(emphasis added); 67 Fed. Reg. 44672, 44691 (July 3, 2002)(referring to “air pollution emissions, principally carbon dioxide” in discussing secondary impacts from the operation of air pollution equipment aimed at mercury)(emphasis added).

that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Id.* at 160. In contrast, as set forth above, regulating greenhouse gases under §202 would not ban the use of motor vehicles, but would result instead in EPA’s setting economically and technologically feasible emission standards for them. EPA’s exaggerated parade of horrors, and the comparison to *Brown & Williamson*, are inapposite.

In short, setting emission standards for greenhouse gases from motor vehicles under §202 presents circumstances fundamentally different from those described by *Brown & Williamson* as “extraordinary.” In the absence of those extraordinary circumstances, *Brown* calls for the same result as ordinary *Chevron* step one analysis: that greenhouse gases emitted from motor vehicles are “air pollutants” subject to regulation under §202(a)(1).

II. THE ENERGY POLICY AND CONSERVATION ACT DOES NOT PRECLUDE EPA FROM REGULATING GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT.

EPA also asserts that the Energy Policy and Conservation Act (“EPCA”)(42 U.S.C. §§6201-6422 (2003)) precludes it from regulating one of the greenhouse gases (carbon dioxide) from one class of vehicles (automobiles). 68 Fed. Reg. 52929/1-2[JA ____]. EPCA, administered by the National Highway Traffic Safety Administration (“NHTSA”),²⁵ sets minimum corporate average fuel economy standards (“CAFE standards”) for automobiles. *See* 49 U.S.C. §§32901-19. EPA argues erroneously that the statutes conflict and that EPCA displaces EPA’s authority to regulate emissions which endanger public health and welfare. EPA fundamentally misreads both the Clean Air Act and EPCA.

²⁵ The Secretary of Transportation has delegated his responsibilities under EPCA to NHTSA. 49 C.F.R. 1.50(f).

A. There Is No Conflict Between the Clean Air Act and EPCA.

EPA's argument fails because motor vehicle emission standards under the Clean Air Act are entirely compatible with EPCA. The two statutes regulate different subjects (air pollutant emissions and fuel economy) and have different purposes (protecting public health and welfare from air pollution and reducing energy consumption). While automobile manufacturers' responses to regulations under the two statutes may overlap to some extent, this overlap is not a conflict, and manufacturers will be able to continue to comply with both statutes, as they have for decades. Thus, both statutes can and must be given effect. In addition, Congress understood that emission standards would sometimes affect fuel economy, yet Congress still intended for the two statutes to co-exist.

In cases of alleged conflict between two statutes, the courts have consistently held that both must be given effect wherever possible: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also NRDC v. Hodel*, 865 F.2d 288, 317-18 (D.C. Cir. 1988)("regardless of any functional 'enmeshment' of the two statutes, it is well-settled that amendments by implication (like repeals by implication) are disfavored"); *see n.14, above*. As this Court has stated, "Because we live in 'an age of overlapping and concurring regulatory jurisdiction,' a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001)(citations omitted).

In *Ken Roberts*, the Court considered the Investment Advisors Act and the Federal Trade Commission Act, which regulate the same subject matter: antifraud standards for investment advisors. Nevertheless, the Court found that "it hardly follows that they therefore impose

conflicting or incompatible obligations.” *Id.* (citation omitted). Indeed, “[i]t is well established that when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect.” *Id.* (citation and internal quotations omitted). As a result, this Court held that the Federal Trade Commission was not “deprive[d] . . . of its . . . authority to investigate possibly deceptive advertising and marketing practices.” *Id.* Hence, even where the subject matters are the same, which is not the case here, both statutes must still be effectuated to the extent possible and the regulating agencies with overlapping jurisdiction each retain their authority under the relevant statutes. *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 722-23 (1994)(Federal Power Act does not oust portion of Clean Water Act); *see also, Monongahela Power Co. v. Marsh*, 809 F.2d 41, 50, 53 (D.C. Cir. 1987).

EPA asserts that it lacks authority to regulate CO₂ under the Clean Air Act because its regulations would overlap with NHTSA’s regulation of fuel economy under EPCA. 68 Fed. Reg. 52929/2[JA ____]. Specifically, it claims that “any EPA effort to set CO₂ tailpipe standards under the [Clean Air Act] would either abrogate EPCA’s regime (if the standards were effectively more stringent than the applicable CAFE standards) or be meaningless (if they were effectively less stringent).” *Id.* EPA’s argument is contradicted by *Ken Roberts* and other cases cited above. EPA’s conclusion that it cannot regulate CO₂ because of EPCA is no more true than if NHTSA had asserted that it could not regulate fuel economy because of the Clean Air Act.

Harmonizing the Clean Air Act and EPCA is even easier than harmonizing the statutes in *Ken Roberts*, since these statutes have subject matters and purposes distinct from one another. Under the Clean Air Act, EPA must set standards applicable to emissions of any air pollutant so as to protect the public health and welfare. §202(a)(1). By contrast, under EPCA, NHTSA sets average fuel economy standards for automobiles so as “to provide for improved energy efficiency of motor vehicles” 42 U.S.C. §6201(5); *see also* H.R. REP. NO. 94-340, 1, 86-94.

Thus, unlike in *Ken Roberts* where the subject matters and purposes overlapped, here the Clean Air Act and EPCA regulate distinct subject matters and have distinct purposes.

Instead, here the only potential overlap relates to the statutes' impacts, since steps taken to meet CO₂ emissions standards might also result in consuming less fuel per mile of travel. These overlapping impacts are easy to reconcile since the standards set pursuant to both the Clean Air Act and EPCA are minimum standards. Under the Clean Air Act, EPA sets minimum performance standards for emissions of air pollutants, and automakers are of course permitted to exceed these standards by selling vehicles with even lower emissions. §202(a)(1); *NRDC v. USEPA*, 655 F.2d at 332 n.25 (“[a]n EPA emission standard under the Clean Air Act dictates only the level of emissions permitted, not the technology required for achieving that level”). Likewise, under EPCA, the “average fuel economy standard” that NHTSA sets is defined as “a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year.” 49 U.S.C. §§32901(a)(6), 32902. Since both statutes set minimum standards, an automobile manufacturer’s compliance with one statute does not interfere with its compliance with the other.

Because of this type of potentially overlapping impacts, the Clean Air Act and EPCA do reference each other, but none of these cross-references limit EPA’s authority. EPCA provides that when setting new CAFE standards, NHTSA must take into account “the effect of other motor vehicle standards of the Government on fuel economy” – including emission standards set under the Clean Air Act. 49 U.S.C. §32902(f); *see, e.g.*, Light Truck Average Fuel Economy Standards Model Years 2005-2007, 68 Fed. Reg. 16868, 16895-96 (April 7, 2003)(NHTSA discussion taking into account the effects of federal and California emission standards in setting EPCA standards).

In fact, an earlier version of EPCA allowed automobile manufacturers to apply for a less stringent federal average fuel economy standard if they could show that emission standards resulted in lower fuel economy. EPCA, Pub. L. 94-163, §301, 89 Stat. 871, 904-05 (enacting EPCA §502(d)); *see Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1325 n.12 (D.C. Cir. 1986); H.R. REP. NO. 94-340, at 90-91 (1975). Similarly, the Clean Air Act allows automobile manufacturers a limited waiver of certain emission standards for oxides of nitrogen if it would enable greater fuel economy. *See* §202(b)(3)(C) of the Act.²⁶ While the two statutes each recognize the goals and authority of the other, nothing in these statutory provisions limits the circumstances under which EPA may set motor vehicle emission standards for additional air pollutants that cause or contribute to harm to public health or welfare, including climate. This is especially clear when, as here, the standards could have the impact of increasing, rather than decreasing, fuel economy.

The legislative history of both statutes confirms that Congress understood the relationship between fuel economy and motor vehicle emission regulations. When enacting EPCA in 1975, Congress attributed the prior year's 13.8% increase in fuel economy to the installation of catalytic converters as a result of federal emission standards. *See* H.R. REP. NO. 94-340, at 86-87, 89-91. At the same time, Congress was aware that California's more stringent emission standards decreased fuel economy. *Id.* 87. This is why Congress enacted the provisions, discussed above, allowing NHTSA to take emission standards (including those issued by EPA and by California) into account in setting fuel economy standards. *See* 49 U.S.C. 32902(f); EPCA, Pub. L. No. 94-163, §301, 89 Stat. 871, 904-05 (enacting EPCA §502(d)).

²⁶Congress inadvertently included two subsections (b)(3) in §202. This provision is in the second of those, as set forth in §202(b).

Similarly, in 1977, when Congress substantially strengthened the Clean Air Act motor vehicle emission standards, the House Report explained at length why those standards would not interfere with manufacturers' ability to meet the CAFE fuel economy standard. H.R. Rep. No. 95-294, at 244-51. The committee wanted to ensure that emissions decreased while fuel economy continued to increase. *Id.* 244. The committee relied on a National Academy of Sciences report that noted approvingly that some emission standards could assist in improving fuel economy and that "engine technologies which simultaneously reduce emissions and fuel consumption can and should be pursued." *Id.* 247. The 1977 amendments did not include any fuel economy related limit on EPA's authority to set motor vehicle emission standards. *See* §202 of the Act.

In short, Congress expressly acknowledged that EPA (and California) are authorized under the Clean Air Act to set motor vehicle emission standards that could affect fuel economy, both positively and negatively. Congress did not limit EPA's authority to set emission standards because of those effects. *See, e.g.*, §202(b)(1)(C) of the Act. To the contrary, Congress required NHTSA to take emission standards into account when it set fuel economy standards. *See* 49 U.S.C. §32902(f). Therefore, there is no basis at all – let alone a "clear and manifest" intention – for EPA's argument that Congress intended EPCA to displace EPA's ability to set emission standards that are necessary to protect the public health and welfare. *See U.S. v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985)(explaining why "repeals by implication are not favored" and why a "clear and manifest" intent must be found to do so). Rather, Congress gave EPA broad authority to regulate any air pollutant.

B. There is No Possible EPCA Conflict with Other Classes of Vehicles or Other Greenhouse Gases.

On its face, EPA's claimed EPCA argument applies to only one class of vehicles (automobiles) and to only one of the greenhouse gases emitted by vehicles (CO₂). Thus, it is

arbitrary for EPA to rely on its EPCA claim to justify refusing to regulate the three non-CO₂ greenhouse gases emitted by automobiles and the emissions of all four greenhouse gases emitted by vehicles not covered by EPCA at all.

First, EPA admits that EPCA’s fuel economy standards do not apply to other vehicles, including heavy-duty trucks and motorcycles. 68 Fed. Reg. 52929/1 n.4[JA ___]; *see also* 49 U.S.C. §32901(a)(3)(B), 32902(a), (b); 49 C.F.R. 523.3(b). EPA further admits that heavy-duty vehicles constitute 16% – or one-sixth – of the U.S. motor vehicle greenhouse gas emission inventory. 68 Fed. Reg. 52929/1 n.4[JA ___]. Section 202 requires EPA to act when emissions “contribute to” air pollution that may reasonably be anticipated to endanger public health or welfare. §202(a)(1) of the Act. The agency gives no rational explanation of why heavy-duty vehicle emissions do not meet the Act’s “contribute to” threshold.

Second, EPA does not even argue that EPCA affects the agency’s authority regarding the three non-CO₂ greenhouse gases emitted from motor vehicles – methane, nitrous oxide, and hydrofluorocarbons. Each of these gases is a more damaging greenhouse gas, pound for pound, than CO₂. *CAR*, 37, Table 3-5[JA ___].

Thus, EPA’s EPCA argument cannot supply any reasoned basis for the agency’s refusal to regulate other greenhouse gases and other vehicles. *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-50 (1983)(and cases cited therein).

III. EPA ACTED UNLAWFULLY AND ARBITRARILY IN REFUSING TO REGULATE MOTOR VEHICLE EMISSIONS OF GREENHOUSE GASES.

EPA’s decision also announced the agency’s refusal to regulate greenhouse gases from motor vehicles, even in the event that the Act does confer authority to promulgate such regulations. 68 Fed. Reg. 52929-31[JA ___]. That decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. §706(2)(A), because it does not

constitute “reasoned” agency decisionmaking, *see American Horse Protection Assn. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987)(reviewing agency’s denial of rulemaking petition), and does not correctly apply the law. *See, e.g., PPG Industries v. U.S.*, 52 F.3d 363, 365 (D.C. Cir. 1995)(“when a court reviewing agency action determines that an agency made an error of law, the court’s inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards”).

A. EPA Has Articulated No Discernible Decisionmaking Path Under §202(a)(1).

At the heart of EPA’s refusal to issue §202(a)(1) regulations was the assertion that it would be “inappropriate” to proceed with regulation, even if EPA has authority to do so, “[u]ntil more is understood about the causes, extent and significance of climate change.” 68 Fed. Reg. 52931/2 [JA____]. While not denying that much is already known about climate change and its effects, EPA stated that “there continue to be important uncertainties.” *Id.* 52930/2[JA____]. This rationale articulates no discernible decisionmaking path under the governing statute. *See MVMA*, 463 U.S. at 43 (court can uphold agency decision only “if the agency’s path may reasonably be discerned”)(citation omitted).

Section 202(a)(1) provides that EPA “shall” prescribe standards “applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” §202(a)(1). EPA’s open-ended invocation of uncertainty as justification for refusal to regulate neither acknowledged the governing statutory criterion for rulemaking (*i.e.*, whether in EPA’s judgment motor vehicle

emissions cause or contribute to pollution that may endanger health or welfare), nor applied that criterion to the facts presented.²⁷

EPA's failure to acknowledge and apply the governing statutory criterion makes it impossible to parse the agency's decision under §202(a)(1). We do not know – because the decision did not state – whether EPA refused to regulate greenhouse gas emissions from motor vehicles (1) because the agency preferred not to do so, regardless of whether those emissions cause or contribute to endangerment of health or welfare within the meaning of §202(a)(1), or (2) because the agency contended that those emissions do not, in fact, cause or contribute to any such endangerment.

This will not do. As this Court held in remanding another EPA refusal to regulate under the Act:

Where, as here, Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning.

American Lung Association v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998). By proffering a rationale that articulates no discernible decisionmaking path under the applicable statute, EPA has fallen far short of this “heaviest of obligations.”

²⁷ The decision discussed only whether previous EPA statements had found the statutory endangerment criterion satisfied, and asserted that they had not. *See* 68 Fed. Reg. 52929/2-3[JA____]. Nowhere did the September 2003 decision itself apply the endangerment criterion to the facts contained in the administrative record.

B. EPA Unlawfully and Arbitrarily Transformed §202(a)(1) from a Mandatory to a Discretionary Provision.

EPA committed an error of law by asserting that, even when the “may reasonably be anticipated to endanger” standard is met, promulgation of standards remains entirely discretionary. In particular, the agency claimed that, even if greenhouse gas emissions from U.S. motor vehicles do contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, §202(a)(1) “would not require [EPA] to regulate GHG emissions from motor vehicles.” 68 Fed. Reg. 52929[JA__]. That position conflicts with this Court’s precedent and the Act, and is an error of law requiring reversal and remand.

1. This Court’s *En Banc* Precedent, and the Statutory Language, Establish that §202(a)(1) is Mandatory.

This Court has expressly ruled that §202(a)(1) is “mandatory in [its] terms,” providing that “the Administrator ‘shall’ regulate if ‘in his judgment’ the pollutants warrant regulation.” *Ethyl Corp. v. EPA*, 541 F.2d 1, 20 n.37 (D.C. Cir. 1976)(emphasis added). *Accord, Her Majesty the Queen*, 912 F.2d at 1533 (construing another Clean Air Act section providing that EPA “shall” take action when certain triggering circumstances exist, Court held: “The words ‘whenever’ the Administrator ‘has reason to believe’ imply a degree of discretion underlying the endangerment finding. Once that finding is made, however, the remedial action that follows is both specific and mandatory – the Administrator ‘shall’ notify the Governor of the specific State emitting the pollution and require it to revise its SIP.”); *Bluewater Network v. EPA*, ___ F.3d ___, ___ (D.C. Cir. 2004)(under another Clean Air Act section providing that EPA “shall” issue mobile source regulations when certain triggering circumstances exist, Court held that where EPA makes a threshold finding, it “must adopt standards”). *See also United States v. Monsanto*,

491 U.S. 600, 607 (1989)(discussing mandatory nature of “shall”); *Ameren Services Co. v. FERC*, 330 F.3d 494, 501 n.12 (D.C. Cir. 2003)(same).

Other provisions of the Act confirm that Congress knew full well how to confer discretion not to promulgate standards. For example, §211(c) – the Act’s motor vehicle fuel provision – tracks §202(a) in several respects, providing for promulgation of regulations where there is endangerment of public health or welfare. However, in contrast to §202(a)(1)’s “shall,” §211(c)(1) provides that EPA “may” promulgate regulations. *See Ethyl*, 541 F.2d at 20 n.37 (while §202 is “mandatory,” §211 is “permissive”). EPA has unlawfully erased the careful distinctions Congress made between “shall” and “may.” *See, e.g., Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994).

In short, where §202(a)(1)’s predicate has been met (*i.e.*, where in EPA’s judgment vehicle emissions contribute to pollution that may endanger health or welfare), Congress did not allow EPA discretion to refuse corrective action. On the contrary, §202(a)(1) provides that EPA “shall” prescribe §202(a)(1) standards. This fundamental misapprehension of the governing statutory standard renders EPA’s decision arbitrary and unlawful. *See PPG*, 52 F.3d at 365 (error of law requires remand); *American Horse*, 812 F.2d at 7, 8 (where agency head’s erroneous statutory interpretation “strongly suggest[ed] that he has been blind to the nature of his mandate from Congress,” Court remanded denial of rulemaking petition).

Moreover, EPA’s legal error makes the agency’s failure to articulate a path under §202(a)(1) all the more glaring. The agency’s express position is that §202(a)(1) regulations are discretionary, even when endangerment is occurring. *See p.47, above* (quoting EPA). Given this position, EPA’s decision may well reflect a refusal on policy grounds to promulgate §202(a)(1)

regulations, even if motor vehicle emissions of greenhouse gases are contributing to endangerment of public health or welfare. Indeed, EPA’s decision indicated that the agency believes some reductions of greenhouse gas emissions are warranted,²⁸ but “disagrees” that §202(a)(1) standards are an appropriate means of pursuing such reductions, and prefers a “different policy approach.” 68 Fed. Reg. 52929/3[JA_____] (capitalization omitted). However, EPA cannot “avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.” *Engine Mfrs.*, 88 F.3d at 1089. The agency’s contrary belief renders its decision arbitrary and capricious, and requires remand for the making of a new decision under the proper legal standard.

2. EPA’s Attempt to Overturn this Court’s *En Banc Ethyl* Decision, and to Disregard §202(a)(1)’s “Shall,” Must Be Rejected.

In an attempt to deny §202(a)(1)’s mandatory nature, EPA noted that §202(a)(1) “does not require the Administrator to act by a specified deadline.” 68 Fed. Reg. 52929/2[JA__]. But EPA misses the point. This is not a case where EPA has decided to move forward with §202(a)(1) standards, and the issue is whether the agency is moving fast enough. Instead, EPA has issued a final decision refusing to promulgate § 202(a)(1) standards for greenhouse gases, asserting that such promulgation is discretionary even where the statutory endangerment criterion is met. As this Court has already held in *Ethyl*, however, promulgation of §202(a)(1) regulations is “mandatory” once EPA makes the endangerment judgment. Section 202(a)(1)’s

²⁸ 68 Fed. Reg. 52931/1[JA_____] (approvingly quoting the President’s acknowledgment that “while scientific uncertainties remain, we can begin now to address the factors that contribute to climate change”), 52932/1-2[JA_____] (EPA “is . . . pursuing a number of nonregulatory approaches to reducing GHG emissions,” and in particular “is . . . working to encourage voluntary GHG emission reductions from the transportation sector”).

mandatory “shall” – and this Court’s *Ethyl* decision – preclude EPA from simply refusing to regulate where the prerequisites for regulation have been met. This Court should reject EPA’s invitation to ignore the Court’s *en banc* precedent.

EPA’s deadline argument confuses district court actions under §304(a)(2) with court of appeals review under §307(b)(1). EPA apparently refers to caselaw suggesting that a “date-certain” statutory deadline may be necessary in a kind of Clean Air Act lawsuit not at issue here – specifically, a district court action under §304(a)(2) to compel performance of a duty which is “not discretionary” with the Administrator. *See Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)(Court’s reference to the need for a “date-certain” deadline under §304(a)(2) rested on the conclusion that “Congress provided for district court enforcement under section 304 in order to permit citizen enforcement of clear-cut violations by polluters or defaults by the Administrator”)(emphasis added; footnote and internal quotations omitted).²⁹ In contrast to a §304(a)(2) suit to compel action, this §307(b)(1) suit challenges final agency action – specifically, EPA’s final decision not to promulgate §202(a)(1) regulations addressing greenhouse gases. In adjudicating that decision, this Court can and should address EPA’s proffered rationales – including the erroneous assertion that §202(a)(1) is not mandatory.

²⁹ Even as to §304(a)(2), the continuing validity of this aspect of *Sierra Club v. Thomas* is questionable. *See Bennett v. Spear*, 520 U.S. 154, 171-72 (1997)(upholding nondiscretionary duty suit jurisdiction under the Endangered Species Act, without inquiring whether there was a date-certain deadline or even suggesting that a deadline was a prerequisite).

C. EPA’s Decision Unlawfully and Arbitrarily Disregarded §202(a)(1)’s Express Provision for Protection of Public Health and Welfare in the Face of Uncertainty.

EPA’s open-ended invocation of scientific uncertainty to justify refusing to regulate, *see* p.45, above (quoting EPA), reflects an additional error of law. By simply listing alleged uncertainties in the science, then jumping directly to the conclusion that regulation is inappropriate, EPA ignored a key aspect of §202(a)(1). Under that provision, EPA “shall” prescribe motor vehicle standards applicable to the emissions of any air pollutant “which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare” (emphasis added). This highly precautionary standard reflects Congress’ intent that EPA proceed with regulation when there is evidence of significant danger to public health or welfare, notwithstanding the existence of some scientific uncertainty.

The precautionary “endangerment” test was first articulated in this Court’s *en banc Ethyl* decision, and then adopted and extended by Congress in the 1977 CAA amendments. Specifically, Congress adopted *Ethyl*’s approach by enacting into the statute a new action-triggering phrase – “may reasonably be anticipated to endanger public health or welfare” – and applied it uniformly to the Act’s regulatory sections, including §202(a)(1).

The *Ethyl* decision. In *Ethyl*, the Court construed analogous language in the Act’s motor vehicle fuels provision (§211), which – like §202(a)(1) – provides for regulation to address endangerment of public health or welfare. The Court observed that “[t]echnological man has altered his world in ways never before experienced or anticipated,” and “[t]he health effects of such alterations are often unknown, sometimes unknowable.” 541 F.2d at 24 (emphasis added). Noting the newness of many human alterations of the environment, the Court found:

Sometimes, of course, relatively certain proof of danger or harm from such modifications can be readily found. But, more commonly, “reasonable medical concerns” and theory long precede certainty. Yet the statutes – and common sense – demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.

Id. 25 (emphasis added).

Thus, *Ethyl* repeatedly recognized EPA’s authority to regulate in the face of uncertainty.

Id. 28 (the Administrator “must take account of available facts, of course, but his inquiry does not end there. The Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as ‘fact,’ and the like.”); 37-38 (EPA’s decision “may be fully supportable if it is based, as it is, on the inconclusive but suggestive results of numerous studies”); 44 (“[a] supportable and reasonable hypothesis may well form the basis for regulations”).

The Court rejected industry’s argument that harm must be “probable” to justify regulation: “Danger . . . is not set by a fixed probability of harm, but rather is composed of reciprocal elements of risk and harm, or probability and severity. That is to say, the public health may properly be found endangered both by a lesser risk of a greater harm and by a greater risk of a lesser harm.” *Id.* 18 (footnote and citations omitted). Indeed, the Court stressed Congress’s intent to prevent large and unprecedented harms:

The massive diffusion of airborne lead is a gross environmental modification never before experienced. Of course, there are no past disasters of the kind anticipated by the Administrator on which the community’s experience may be based. This, however, is inherent in such a threat and does not imply that no danger is posed by it. We believe the precautionary language of the Act indicates quite plainly Congress’ intent that regulation should precede any threatened, albeit unprecedented, disaster. *Ethyl* is correct that we have not had the opportunity to learn from the consequences of an environmental overdose of lead

emissions; Congress, however, sought to spare us that communal experience by enacting §211(c)(1)(A).

Id. 13 (emphasis added). Because climate change is a hazard to public health and welfare of even greater magnitude than the lead contamination at issue in *Ethyl*, open-ended invocation of scientific uncertainty is an even less tenable excuse for inaction here.

The 1977 Amendments. In 1977 Congress amended the Act to make §202(a)(1) (and several other provisions) even more precautionary than the pre-existing statutory language. The 1977 amendments replaced the pre-1977 reference to pollution which “endangers” public health or welfare with language requiring regulation of air pollution which “may reasonably be anticipated to endanger” public health or welfare. §202(a)(1)(emphasis added). The drafters of this provision noted their intent “to support the views expressed” in *Ethyl*. H.R. REP. NO. 95-294, at 49. “In order to emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator’s duty to assess risks rather than wait for proof of actual harm), the committee not only retained the concept of endangerment to health; the committee also added the words ‘may reasonably be anticipated.’” *Id.* 51 (emphasis added). *See Small Refiner Lead Phase-Down Task Force v. USEPA*, 705 F.2d 506, 514 n.12 (D.C. Cir. 1983).

Congress retained the statutory reference to the Administrator’s “judgment,” emphasizing that the language was designed to “to affirm th[e] view” of court decisions that “have held that a substantial element of judgment, including making comparative assessment of risks, projections of future possibilities, establishing margins of safety and margins of error, extrapolating from limited data, etc., are necessary and permissible under the act.” *Id.* 50-51 (emphasis added). The committee noted that it had “expressly rejected an amendment which would have deleted the[]

words [“in his judgment”] and required a finding by the Administrator instead.” *Id.* 51 (emphasis added). See *Small Refiner*, 705 F.2d at 515 n.15.

Implications for EPA’s Greenhouse Gas Decision. In light of the foregoing, EPA’s open-ended invocation of uncertainties in the climate change science did not constitute reasoned agency decisionmaking. Nowhere in its decision did EPA so much as acknowledge the governing legal standard: specifically, Congress’s intent that EPA undertake precautionary regulation to protect public health and welfare, even in the face of uncertainty. Nowhere did EPA measure climate change science against that standard, or evaluate its claims regarding scientific uncertainty in light of that standard. In short, EPA never offered a reasoned explanation, applying the correct legal standard, for its conclusions.

D. EPA’s Contentions Concerning Control Technology, Multi-Source Pollution, and International Relations Misstate the Act and Are Otherwise Arbitrary.

In addition to the core rationales discussed above, EPA offered several other reasons for declining to regulate greenhouse gases under §202(a). In each instance, the proffered reasons misconceive the Act and fall short of reasoned decisionmaking.

1. EPA’s Control Technology Concerns Offer No Lawful or Reasoned Basis for Refusing to Promulgate §202(a)(1) Standards.

EPA cited uncertainties about control technology, indicating that setting §202(a)(1) standards would require EPA to make scientific and technical judgments “without the benefit of the studies being developed to reduce uncertainties and advance technologies.” 68 Fed. Reg. 52931/1 (emphasis added)[JA___]. *Accord, id.* 52931/2 (it would not be “appropriate” to regulate greenhouse gas emissions until more is known about “the potential options for addressing” climate change). This rationale too is unlawful and arbitrary.

As EPA elsewhere conceded, the threshold for §202(a)(1) regulation is the Administrator’s judgment about endangerment of public health or welfare, not his judgment concerning the technology for abating that endangerment. *See, e.g., id.*, 52929/2[JA___] (§202(a)(1) “conditions authority to act on a discretionary exercise of the Administrator’s judgment regarding whether motor vehicle emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare”)(emphasis added). If the health or welfare endangerment threshold is crossed, EPA “shall” prescribe regulations. §202(a)(1). No exemption is made for situations where EPA would prefer to await for further development of technologies.

Indeed, Congress structured §202(a) to accommodate technological concerns. Standards under §202(a)(1) and (2) “are ‘technology-based’ – the levels chosen must be premised on a finding of technological feasibility.” *NRDC v. USEPA*, 655 F.2d at 322. *See* p. 33, above. Thus, EPA’s technological concerns offer no lawful or reasoned basis for refusing to undertake a rulemaking under these statutory provisions.

EPA’s technology argument is especially untenable, given that the agency itself has conceded that present technology does offer a “practical way to reduce tailpipe emissions of CO₂.” 68 Fed. Reg. 52929/1[JA___]. The agency’s professed desire to await further technological development does not constitute a reasoned explanation for refusing to require application of current technologies.

Moreover, §202(a) does not limit emission standards to existing technologies, but rather encompasses “the development and application of the requisite technology.” §202(a)(2) (emphasis added). Construing §202, this Court has held: “The legislative history of both the

1970 and the 1977 amendments demonstrates that Congress intended the agency to project future advances in pollution control capability. It was expected to press for the development and application of improved technology rather than be limited by that which exists today.’’ *NRDC v. USEPA*, 655 F.2d at 328 (internal quotations and citations omitted). And in another §202 decision, the Court noted that “Congress expected the Clean Air Amendments to force the industry to broaden the scope of its research – to study new types of engines and new control systems.” *Intl. Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 635 (D.C. Cir. 1973)(footnote omitted). Thus, EPA’s stated goal of “encouraging technological development” (68 Fed. Reg. 52930/1[JA__]) is a reason to set §202(a)(1) standards, not to refuse to do so.³⁰

In short, EPA’s statements on control technology unlawfully and arbitrarily disregard the governing statutory standard, and do not constitute a reasoned explanation for refusing to prescribe §202(a)(1) standards.

2. Section 202(a)(1) Provides for Regulation of Sources that “Contribute to” Harmful Air Pollution, Even if They Are Not the Sole Source of the Pollution.

EPA also argued that, because “[t]he U.S. motor vehicle fleet is one of many sources of GHG emissions,” section 202(a)(1) regulations would “result in an inefficient, piecemeal approach to addressing the climate change issue.” 68 Fed. Reg. 52931/1[JA__] (emphasis

³⁰ While EPA seems to question the availability of technology to control greenhouse gases other than CO₂, 68 Fed. Reg. 52931/3[JA____], the agency has refused to undertake the § 202(a) rulemaking process designed to identify such technologies. Thus, “[t]his is not a circumstance of an agency seeking relief from a charge which, after a good faith effort, it has found it cannot perform.” *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979)(emphasis added). Instead, “EPA seeks approval of a prospective exemption of certain categories from a statutory command based upon the agency’s prediction of the difficulties of undertaking regulation. The agency’s burden of justification in such a case is especially heavy.” *Id.* (emphasis added; footnote omitted).

added). *Accord, id.* 52929/3[JA ____] (“[a]n important issue before the Administrator is whether, given motor vehicles’ relative contribution to a problem, it makes sense to regulate them”). Once again, EPA’s rationale disregards the governing statutory standard. Section 202(a)(1) expressly provides that EPA “shall” regulate emissions that “cause, or contribute to,” harmful air pollution (emphasis added). *See, e.g., Bluewater Network*, ____ F.3d at ____ (construing another CAA mobile source provision that used the phrase “contribute to,” this Court held: “As used in this context, ‘contribute’ means simply ‘to have a share in any act or effect,’ Webster’s Third New International Dictionary 496 (1993), or ‘to have a part or share in producing,’ 3 Oxford English Dictionary 849 (2d ed. 1989). Standing alone, the term has no inherent connotation as to the magnitude or importance of the relevant ‘share’ in the effect; certainly it does not incorporate any ‘significance’ requirement.”).

EPA’s approach would write the phrase “or contribute to” out of the statute. Moreover, such an approach would contravene the agency’s own past practice in regulating motor vehicle emissions of pollutants such as nitrogen oxides, hydrocarbons and particulates even though they are emitted by many sources other than motor vehicles. *See, e.g.,* 40 C.F.R. 86.1811-04, 86.007-11.

Indeed, EPA moved forward with a §211 motor vehicle fuel regulation addressing lead, even though motor vehicles were only one of several sources of that pollutant. Industry argued that regulation is proper only where motor vehicle lead “in and of itself” caused harm, but this Court rejected that argument as “tunnel-like reasoning.” *Ethyl*, 541 F.2d at 30. “Congress understood that the body lead burden is caused by multiple sources. It understood that determining the effect of lead automobile emissions, by themselves, on human health is of no

more practical value than finding the incremental effect on health of the fifteenth sleeping pill swallowed by a would-be suicide.” *Id.* 30-31 (footnote omitted).

The drafters of the 1977 Amendments confirmed Congress’s intent that EPA regulate multi-source pollutants: “By its use of the words ‘cause or contribute to air pollution’, the committee intends to require the Administrator to consider all sources of the contaminant which contribute to air pollution and to consider all sources of exposure to the contaminant – food, water, air, etc. – in determining health risk.” H.R. REP. 95-294, at 51 (emphasis added). *Accord, id.* 49-50 ¶ C.

EPA’s adoption of the “tunnel-like reasoning” that this Court, Congress, and EPA itself all previously rejected is unlawful and arbitrary.³¹

3. EPA’s Allegations Concerning International Relations Provide No Basis for Declining to Implement §202(a)(1).

EPA also claimed that “[u]nilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies,” and increases in developing countries’ GHG emissions “could quickly overwhelm the effects of GHG reduction measures in developed countries.” 68 Fed. Reg. 52931/1[JA___]. Once again, EPA ignores the express terms of §202, which does not grant the agency discretion concerning whether to regulate when public health and welfare are endangered, but instead requires that the Administrator “shall” prescribe standards when motor vehicle emissions cause “or contribute to” harmful air pollution.

³¹ EPA also argued that §202(a) regulation would be unwarranted where motor vehicles contribute “not at all” to endangering public health or welfare. 68 Fed. Reg. 52929/3[JA___]. Because EPA did not contend that greenhouse gases make no contribution to endangerment of public health or welfare, the agency’s speculation about such a scenario is unavailing.

Moreover, the notion that unilateral U.S. emission reductions would weaken our negotiations with other nations is refuted by the Rio Treaty, to which the U.S. has been a party since 1992. That treaty provides that each developed nation signatory “shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs,” and that “[t]hese policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions.” UNFCCC Art. 4 §2(a)(footnote omitted). *Accord*, Signing Statement by President Bush (October 13, 1992)(“All parties must inventory all sources and sinks of greenhouse gases and establish national climate change programs. Industrialized countries must go further, outlining in detail the programs and measures they will undertake to limit greenhouse emissions and adapt to climate change and quantifying expected results.”). Thus, far from holding back domestic reductions as a bargaining chip, the Rio Treaty envisions and requires that the United States will actively pursue such reductions as a means of setting an example for developing nations.

Second, EPA has actively pursued Clean Air Act reductions of other pollutants that are emitted by sources in many countries. For example, mercury is emitted in numerous countries, and travels long distances across international boundaries.³² Nonetheless, EPA has issued regulations limiting mercury emissions. *See, e.g.*, 62 Fed. Reg. 48382, 48390 (September 15, 1997); 64 Fed. Reg. 53040-44 (September 30, 1999). EPA does not claim that domestic regulation of mercury should be withheld to gain negotiating leverage with other countries.

³² *See* Mercury Study Report to Congress (EPA December 1997), 2-7 to 2-8 (<http://www.epa.gov/ttn/atw/112nmerc/volume3.pdf>).

Third, even as to greenhouse gases themselves, EPA indicates that it is working to encourage domestic reductions through voluntary means. 68 Fed. Reg. 52932[JA___]. The agency offers no reasoned basis for its view that U.S. reductions achieved through regulatory means will discourage other countries from limiting their emissions, but that reductions achieved through voluntary means will have no such effect.

Finally, EPA offers the generic claim that “climate change raises important foreign policy issues, and it is the President’s prerogative to address them.” 68 Fed. Reg. 52931/2[JA___]. The present case, however, invokes a United States statute to abate United States emissions that are contributing to endangerment of the health and welfare of United States citizens located within the United States. That this endangerment may also be caused in part by emissions from foreign nations in no way deprives United States citizens of their right to seek redress of its domestic component.

CONCLUSION

Petitioners respectfully request that the Court vacate the two agency actions challenged herein (the 202 Denial and the Fabricant Opinion), and remand them to EPA for further consideration in accordance with the Court’s opinion.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 28(d)(1), I hereby certify that the foregoing brief contains 17,986 words as computed in accordance with the Rule by Wordperfect 9.0.

James R. Milkey

June 22, 2004

STATUTORY APPENDIX

Clean Air Act Sections 202(a)(1) and (2)	1
Clean Air Act Sections 302(g) and (h)	2
Energy Policy and Conservation Act Section 32901(a)(6)	3
Energy Policy and Conservation Act Section 32902(f)	3

CLEAN AIR ACT: Sections 202(a)(1) and (2)

42 U.S.C. § 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section -

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

CLEAN AIR ACT: Sections 302(g) and (h)

42 U.S.C. 7602. Definitions

When used in this chapter -

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

ENERGY CONSERVATION AND POLICY ACT (EPCA)

49 U.S.C. § 32901(a)(6): Definitions.

[In this chapter] - "average fuel economy standard" means a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year.

49 U.S.C. § 32902(f): Considerations on Decisions on Maximum Feasible Average Fuel Economy.

When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.