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

FINAL REPLY BRIEF FOR THE PETITIONERS IN CONSOLIDATED CASES

THOMAS F. REILLY
Attorney General of Massachusetts
James R. Milkey
William L. Pardee
Carol Iancu
Assistant Attorneys General
1 Ashburton Place
Boston, Massachusetts 02108
617-727-2200

DAVID BOOKBINDER
Bluewater Network, Center for Biological Diversity, Conservation Law Foundation, Sierra Club, National Environmental Trust, Public Interest Research Group, Union of Concerned Scientists
408 C Street, NE
Washington, DC 20002
(202) 548-4598

BILL LOCKYER
Attorney General of California
Nicholas Stern
Marc N. Melnick
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
510-622-2133

JOSEPH MENDELSON III
International Center for Technology Assessment, Center for Food Safety, Greenpeace, Environmental Advocates
660 Pennsylvania Ave. SE
Washington, DC 20003
(202) 547-9359

HOWARD FOX
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036-2212
(202) 667-4500

DAVID DONIGER
Natural Resources Defense Council
1200 New York Avenue
Washington, DC 20005
(202) 289-2403

Additional counsel on inside cover

RICHARD BLUMENTHAL
Attorney General of Connecticut
Kimberly Massicotte
Matthew Levine
Assistant Attorneys General
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

LISA MADIGAN,
Attorney General of Illinois
GARY FEINERMAN,
Solicitor General
Gerald T. Karr
Matthew J. Dunn
Rosemarie Cazeau
Thomas E. Davis
Assistant Attorneys General
188 West Randolph Street
20th Floor
Chicago, IL 60601
(312) 814-3369

G. STEVEN ROWE
Attorney General of Maine
Gerald D. Reid
Assistant Attorney General
Department of the Attorney General
State House Station #6
Augusta, ME 04333-0006
(207) 626-8545

PETER C. HARVEY
Attorney General of New Jersey
Stefanie A. Brand
Lisa Morelli
John R. Renella
Deputy Attorneys General
Richard J. Hughes Justice Complex
25 Market St., P.O. Box 093
Trenton, NJ 08625-0093
(609) 633-8713

PATRICIA A. MADRID
Attorney General of New Mexico
Stuart M. Bluestone
Deputy Attorney General
Stephen R. Farris
Assistant Attorney General
P.O. Drawer 1508
Sante Fe, NM 87504-1508
(505) 827-6010

ELIOT SPITZER
Attorney General of New York
CAITLIN HALLIGAN
Solicitor General
Peter Lehner
J. Jared Snyder
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 474-8010

HARDY MYERS
Attorney General of Oregon
MARY WILLIAMS
Solicitor General
Shelley K. Mcintyre
Assistant Attorney General
Philip Schradle
Special Counsel to the Attorney General
Oregon Department of Justice
1162 Court Street, Suite 100
Salem, OR 97310
(503) 229-5725

PATRICK C. LYNCH
Attorney General of Rhode Island
Tricia K. Jedele
Special Assistant Attorney General
Department of Attorney General
150 South Main Street
Providence, RI
401-274-4400 ext. 2400

WILLIAM H. SORRELL
Attorney General of Vermont
Erick Titrud
Kevin O. Leske
Assistant Attorneys General
Office of the Attorney General
l09 State Street
Montpelier, VT 05609-1001
(802) 828-5518

ROB MCKENNA
Attorney General of Washington
David K. Mears
Leslie R. Seffern
Assistant Attorneys General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-4613

FITI A. SUNIA
Attorney General of American Samoa
Office of the Attorney General
Executive Offices Building
P.O. Box 7
Pago Pago, American Samoa
96799
011 (684) 633-4163

ROBERT J. SPAGNOLETTI
Attorney General of the District of Columbia
Edward E. Schwab
Deputy Attorney General
Appellate Division
Donna M. Murasky
Senior Litigation Counsel
Office of the Attorney General
for the District of Columbia
441 Fourth Street, N.W.
6th Floor South
Washington, D.C. 20001
(202) 724-5667/5665

MICHAEL CARDOZO
Corporation Counsel, City of New York
John Hogrogian
Assistant Corporation Counsel
City of New York
100 Church Street
New York, NY 10007
(212) 676-8517

RALPH S. TYLER III
City Solicitor of Baltimore
William Phelan, Jr.
Principal Counsel
City of Baltimore
Baltimore City Dept. of Law
100 Holliday Street
Baltimore, MD 21202
(410) 396-4094

JAY TUTCHTON, Attorney
Center for Biological Diversity
Environmental Law Clinic
University of Denver, College of Law
2255 E. Evans Ave.
Denver, CO 80208
(303) 871-6034

SETH KAPLAN, Attorney
Conservation Law Found.
62 Summer Street
Boston, MA 02110
(617) 350-0990

JAMES B. TRIPP, Attorney
Environmental Defense
257 Park Avenue South
17th Floor
New York, NY 10010
(212) 505-2100

JOHN M. STANTON, Attorney
Mark Wenzler, Attorney
National Environmental Trust
1200 18th Street, N.W.
Washington, DC 20036
(202) 887-8800

JULIE M. ANDERSON, Attorney
Union of Concerned Scientists
1707 H St., N.W. Suite 600
Washington, DC 20006
(202) 223-6133 x 109

KATHERINE MORRISON, Attorney
US PIRG
218 D Street, SE
Washington, DC 20003
(202) 546-9707 Ext. 318

LESLIE CAPLAN, Attorney
Bluewater Network
311 California St., Suite 510
San Francisco, CA 94104
(415) 544-0790 x 23

BRIAN S. DUNKIEL
Friends of the Earth
Shems Dunkiel Kassel &
Saunders PLLC
91 College Street
Burlington, Vermont 05401
802-860-1003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

---

* Authorities chiefly relied upon are marked with asterisks.

Miscellaneous

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
CO2	Carbon Dioxide
EPA	Environmental Protection Agency
EPCA	Energy Policy & Conservation Act
FDA	Food & Drug Administration
FDCA	Food, Drug & Cosmetic Act
IPCC	Intergovernmental Panel on Climate Change
NAAQS	National ambient air quality standards
NAS	National Academy of Sciences
NHTSA	National Highway Traffic Safety Administration

SUMMARY OF ARGUMENT

The Clean Air Act unambiguously authorizes EPA to regulate "air pollutants" that endanger public health or "welfare," a term that explicitly includes "climate." EPA dismisses the plain statutory language as "narrow, semantic" analysis, and offers only speculation about what Congress "would have said" or "would have been likely to adopt" if it had actually meant to confer such authority. EPA has failed to show a conflict between the text and the statutory context under *FDA v. Brown and Williamson,* 529 U.S. 120 (2000), and has failed to carry its burden under *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075 (D.C. Cir. 1996) to provide an "extraordinarily convincing justification" that Congress did not intend the plain meaning of the statutory words.

EPA no longer argues, as it had in the 202 Denial, that the Energy Policy and Conservation Act ("EPCA"), precludes EPA from regulating vehicle carbon dioxide emissions. Instead, EPA now points only to a claimed "inconsistency" with EPCA, and cites that as a basis to "infer" that Congress would not want EPA to so regulate. The alleged inconsistency is entirely absent: reducing CO2 emissions neither changes EPCA standards nor creates any compliance conflict for vehicle manufacturers.

EPA points to nothing in the 202 Denial that articulates a reasoned, lawful explanation for the agency's decision refusing to issue §202(a)(1) regulations, even if EPA had authority to do so. That is not surprising, given EPA's failure below to explain how its refusal squares with §202(a)(1)'s precautionary provision for redress of pollution that "may reasonably be anticipated to endanger" public health and welfare, and the agency's outright denial of the statute's mandatory requirement that EPA "shall" take regulatory action where the threshold endangerment criterion is met.

I. PETITIONERS HAVE STANDING.

EPA does not dispute that petitioners have been injured by climate change. Instead, the agency argues that petitioners have failed to allege that these injuries are caused by EPA's failure to regulate vehicle greenhouse gas emissions, or would be redressed by such regulation. EPA Br. 16. In so doing, EPA misreads petitioners' declarations as claiming that greenhouse gas reductions from U.S. vehicles would have a "meaningful impact" on climate change only "*in conjunction with similar reductions worldwide.*" *Id*.; emphasis in original.

EPA is wrong. First, petitioners' expert climatologist unambiguously states that reductions from the U.S. vehicle fleet alone would have such a "meaningful impact": "Achievable reductions in emissions of CO2 and other greenhouse gases from U.S. motor vehicles would significantly reduce the build-up in atmospheric concentrations of those gases and delay and moderate many of the adverse impacts of global warming." MacCracken Decl. ¶5(e); App. 209. This statement -- which EPA completely ignores -- clearly alleges how petitioners' injuries would be redressed by a favorable decision from EPA on the 202 Petition, and establishes causation and redressability without relying on the actions of any "third party". This evidence also satisfies Judge D.H. Ginsburg's dissenting opinion in *City of Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990), which EPA cites for the proposition that petitioners must allege that the marginal impact of the increase in greenhouse gas emissions at issue contributes to their injury.[1]

[1] Petitioners need not show that EPA's action will completely redress their injuries; see *Tozzi v. Department of Health and Human Services*, 271 F.3d 301, 310 (D.C. Cir. 2001)(finding redressability because reversal of agency decision "would redress at least some" of plaintiff's injuries.)

As EPA notes, Dr. MacCracken's declaration subsequently states that if EPA were to reduce U.S. vehicle greenhouse gas emissions, other nations would be likely to do the same, and that such combined reductions would also reduce and delay the effects of climate change. MacCracken Decl. ¶32; App. 220. This conclusion logically follows from -- and does not in any way contradict -- Dr. MacCracken's earlier conclusion that U.S. reductions alone would help remedy petitioners' injuries.

Second, even if petitioners had alleged only that combined emissions reductions from the U.S. and other countries would redress their injuries, petitioners would still have established causation and redressability. Michael Walsh, former head of EPA's Office of Mobile Sources, states that foreign countries have repeatedly adopted the technology originally developed to meet U.S. vehicle emission standards and, based on this consistent pattern of behavior, that he has "no doubt" that the same would hold true for the technology developed to meet U.S. greenhouse gas standards. Walsh Decl. ¶¶8, 10, 12; App. 310-312. For example, automobile catalyst technology (originally developed to meet EPA's standards for carbon monoxide, NOx and hydrocarbons) is now used in approximately 90% of global car production. Walsh Decl. ¶7; App. 309-310.

EPA counters this expert testimony not with contrary evidence, but only by citing *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996)(en banc) for the proposition that such a redressability argument must fail because it relies on "speculation" as to the actions of third parties. *Florida Audubon* is completely inapposite.

First, *Florida Audubon* held that the tax credit at issue could only cause the alleged injuries if the credit led to increased production of ETBE, which in turn increased

production of ethanol, which caused increased production of corn or sugar, which caused more pollution than what had previously been grown on that land, and finally, that this pollution caused "a demonstrably increased risk of environmental harm to the wildlife areas enjoyed by appellants." *Id*. at 669-670. Contrasting sharply with this scenario is the simple two-step process of "if EPA regulates this pollutant, others will follow as they always have" situation established here.

Second, *Florida Audubon* rejected the "protracted chain of causation" in that case because "plaintiffs have put forward no parallel testimony supporting each step of their attenuated causal path." *Id*. at 671. Here, petitioners have submitted uncontested expert testimony on this issue.

Ultimately, EPA's standing argument rests on a glaring contradiction. On the one hand, EPA concedes that climate change is occurring, and in fact that the Administration's policy is to reduce greenhouse gas emissions:

> The President's goal is to lower the U.S. rate of greenhouse gas emissions from an estimated 183 metric tons per million dollars of gross domestic product (GDP) in 2002 to 151 metric tons per million dollars of GDP in 2012. Meeting this commitment will prevent greenhouse gas emissions of over 500 million metric tons of carbon equivalent (MMTCE) from entering the atmosphere over the next ten years, and is equivalent to taking 70 million (or one out of three) cars off the road. 68 Fed. Reg. 52932[JA 59].

Yet, at the same time that EPA espouses the benefits of actions equivalent to removing millions of cars from the road, it argues that there would be no discernible result from eliminating these exact same emissions via vehicle tailpipe standards. By way of comparison, if EPA were to do no more than follow California's proposed vehicle greenhouse gas standards, it would achieve annual reductions of more than 80 million

metric tons of carbon (MMTCE) per year,[2] far more than the 50 MMTCE per year touted above as the President's plan for combating climate change.

In sum, EPA's claim that Petitioners' injuries are not in part caused by EPA's failure to regulate vehicle greenhouse gas emissions and would not be redressed by the agency doing so relies on a misreading of petitioners' expert declarations, inapposite precedent and the odd notion that voluntary measures to eliminate such emissions will reduce and/or delay the impacts of global warming, but that regulatory ones -- with far greater reductions -- would not.

II. THE CLEAN AIR ACT GIVES EPA REGULATORY AUTHORITY OVER MOTOR VEHICLE GREENHOUSE GAS EMISSIONS.

A. The Act's Plain Language Grants This Authority.

The plain language of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles. Section 202(a)(1) authorizes EPA to issue emission standards for "any air pollutant" from new motor vehicles that endangers "public health or welfare." Section 302(g) defines "air pollutant" to "includ[e] any physical [or] chemical … substance or matter which is emitted into or otherwise enters the ambient air." Section 302(h) provides that "effects on welfare" includes effects on "weather" and "climate." Under these provisions carbon dioxide and other greenhouse gases emitted by motor vehicles plainly are "air pollutants." Impacts on "climate" expressly fall within the scope of effects on "welfare," and the many adverse effects of climate change plainly fall within the scope of danger to "public health" or "welfare." *See* Pet. Br. 15-16.

[2] This figure represents expected reductions from California's proposed greenhouse gas auto emission standards (9 MMTCE per year by 2020), extrapolated to the total U.S. vehicle market. http://www.arb.ca.gov/regact/grnhsgas/addendum.pdf p.17[JA730].

Neither EPA nor the industry intervenors can show any ambiguity in the statutory words. Ordinarily that would be the end of the matter under step one of *Chevron v. NRDC*, 467 U.S. 837 (1984). *See also Desert Palace v. Costa,* 539 U.S. 90, 98 (2003)("where … the words of the statute are unambiguous, the judicial inquiry is complete" [internal quotation and citation omitted]). EPA, however, dismisses the plain meaning of the statutory words as "narrow, semantic analyses" that are "simply irrelevant," suggesting instead "a more holistic analysis." EPA Br. 55 & 25. In belittling the statutory text, EPA claims to be following *FDA v. Brown and Williamson,* 529 U.S. 120 (2000), cited a heady 29 times in its brief. In an effort to construct a discordant "context" with which to overcome the plain text, EPA selectively assembles supposed "structural cues" and speculations about what Congress "would have said" or "would have been likely to adopt" if it had meant to confer such authority. EPA Br. 13 & n.4, 33. These efforts fail to demonstrate any conflict between the statutory text and context.

B. EPA Misconstrues and Misapplies *Brown and Williamson.*

In *Brown and Williamson,* the Supreme Court concluded that Congress had **"**directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products." 529 U.S. at 133. Considering both the statutory text and its context, the Court found the Food, Drug, and Cosmetic Act ("FDCA") unambiguous. The Court concluded FDA's position required "an extremely strained understanding of 'safety'" and "ignore[d] the plain implication of Congress' subsequent tobacco-specific legislation." *Id.* at 160. If tobacco products were subject to the FDCA, the Court concluded that the FDA would have had to ban them, a drastic result contradicted by numerous subsequent

enactments that set the terms for the continued sale of cigarettes and ratified FDA's decades-long prior position that it had no such statutory authority.

Applying *Brown and Williamson* principles to this case also yields the conclusion that Congress "has directly spoken to the issue," in this instance via plain statutory language authorizing EPA to regulate vehicle greenhouse gas emissions. First, in contrast to Petitioners' reliance on a completely natural reading of the plain text, EPA's reading – *e.g.*, that greenhouse gases are not "air pollutants," and effects on "climate" do not include climate change – is not even sufficiently plausible to be called "extremely strained." Second, while calling "cigarettes" a "drug delivery device" would have resulted in a complete ban on cigarettes, classifying greenhouse gases as air pollutants requires only that EPA set technologically and economically feasible standards[3] – something that EPA has done for decades for other tailpipe pollutants. Thus, this case simply does not pose the dire economic or political consequences that EPA suggests.[4] Third, there are no other enactments – subsequent or otherwise – that ratify EPA's recent "no-authority" position. Rather, each of the cited enactments is completely consistent with EPA's authority to regulate vehicle greenhouse gas emissions. *See* Pet. Br. 36-38; and pp. 16-17, *infra*.

EPA also misreads *Brown and Williamson* as changing the well-established rule that when the statutory text is plain, the agency has the burden to demonstrate that

[3] Section 202(a)(2) provides that such standards "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."

[4] EPA's "sky is falling" claims about the costs of an entirely different proposal, the Kyoto Protocol, EPA Br. 22, have no bearing on this case.

Congress did not intend the plain meaning. Carrying this burden requires the agency to put forward "an extraordinarily convincing justification" that either "as a matter of historical fact," or "as a matter of logic and statutory structure," Congress did not intend the plain meaning of the statutory terms. *Appalachian Power Co, v. EPA,* 249 F.3d 1032, 1041 (D.C. Cir. 2001) (quoting *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1089 (D.C. Cir. 1996). EPA attempts to dismiss these cases by claiming that *Brown and Williamson* established a different rule of heightened legislative specificity for areas that supposedly have large economic and political significance. In those areas, EPA asserts, generally-applicable authorizing language is presumed not to apply and Congressional intent must be proved "indisputably." EPA Br. 22-23.

But *Brown and Williamson* does not establish any such new rule, nor does it change the agency's burden of justification when running against the plain text. *Brown and Williamson* actually cuts against the agency's position, saying that in "extraordinary cases" courts should hesitate to accept "strained" statutory interpretations advanced in hopes of reaching step two of *Chevron.* Here, EPA offers a reading of statutory language (*e.g.,* "climate" and "air pollutant") too implausible even to qualify as "strained." Moreover, even if there were such a rule as EPA conjures for issues of great economic or political significance, it is hard to see how it would help EPA here, where §202's feasibility limits prevent any dire economic consequences.

EPA also contends that *Engine Manufacturers* and *Appalachian Power* are relevant only to "far more discrete statutory questions." EPA Br. 24. But there is nothing in these cases suggesting that their test applies only to supposedly small-bore issues, and given the above-mentioned feasibility limits on EPA's standard-setting, there

is nothing qualitatively different between the issues presented here and the ones presented in those precedents. Ultimately, neither EPA nor industry carries their burden to demonstrate a conflict between the statutory text and context or to show that Congress did not intend the plain meaning of the statutory words.

C. Neither Context, Logic, Structure, Nor Historical Fact Overrides the Plain Meaning of the Statutory Terms.

EPA and industry make a variety of claims in the effort to overcome the authority provided on the face of the statute. In a far from "holistic" effort, they pick snippets from other parts of the Act, the legislative history, failed legislation, and other laws in an effort to rebut the plain text and reach a contrary conclusion. None of these claims show that context, logic, structure, or history compels a different result.

"Climate." Acknowledging that it cannot write the word "climate" out of the "welfare" definition, EPA does not dispute that it has authority to address the climate change impacts of some pollutants. The agency contends, however, that such authority is limited to pollutants that are "otherwise subject to regulation" for some other purpose. EPA Br. 46 ("at most that Congress intended EPA to consider climate effects in making decisions about particulate matter (and perhaps other substances otherwise subject to regulation under the CAA)"). *See also* Ind. Br. 13-14 (conceding that §302(h) "describes the kinds of effects to be considered when regulatory authority otherwise exists under the CAA's operative provisions"). Presumably, for example, EPA could take into account methane's contribution to global warming if EPA were already regulating it for another reason (*i.e.*, for toxicity).

Moreover, while acknowledging authority to control new air pollutants beyond those originally listed in the Act in 1970 as additional dangers become known (EPA Br.

42), the agency continues to insist that it cannot regulate a pollutant solely because of danger to the climate. EPA asserts that there is "an important difference" between addressing climate change impacts of an otherwise regulated pollutant and regulating solely for climate change purposes. *Id.* at 47. But EPA nowhere explains what this "important difference" might be.

EPA's statutory interpretation thus reduces to the nonsensical proposition that its authority to address global climate change impacts of a given substance depends on the fortuity of whether the substance also happens to have non-climate impacts as well. The agency advances no textual, contextual, or case law support whatsoever for this proposition, which contradicts the unrestricted character of the key statutory terms "air pollutant" and "climate."

EPA offers an equally strained reading of the legislative history in an effort to show that Congress did not have the possibility of global change in view when it enacted §302(h)'s reference to effects on "climate." EPA Br. 36-46. Even if EPA were correct – which it is not – the observation would be irrelevant: "The fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity . . . It demonstrates breadth." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001)(internal citation and quotation omitted).[5]

[5] *See Consumer Elecs. Ass'n v. FCC,* 347 F.3d 291, 298 (D.C. Cir. 2003)("[T]he Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application."); *Forman v. Small,* 271 F.3d 285, 296-97 (D.C. Cir. 2001)("Congress's failure to mention [a specific term] does not undermine its intended breadth of the provision."). *See also Diamond v. Chakrabarty,* 447 U.S. 303, 314-15 (1980)(rejecting argument that because genetic technology was unforeseen when broad patent statute language was enacted, micro-organisms could not be patented until

Moreover, even EPA acknowledges, as it must, that Members of Congress were aware that carbon dioxide could cause global warming as early as 1965, and certainly in 1970 when the present "welfare" definition was adopted. EPA also cites expressions of legislative concern in 1970 and 1977 over the climate impacts of particulate matter as though these narrowed the breadth of "climate" in the statutory text. But "the language of a statute – particularly language expressly granting an agency broad authority – is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice. It is not . . . a definitive interpretation of a statute's scope." *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990). Here, as in *Pension Benefit*, there is "no suggestion in the legislative history that Congress intended its list of examples to be exhaustive." *Id.* In fact, the legislative discussion of particulate matter only underscores Congressional awareness and concern about the potential impact of pollution on climate. *See* Pet. Br. 22-23.

Industry tries a different tack, arguing that "climate" "cannot reasonably be construed to encompass global climate phenomena" and must mean only climate "in a particular geographic area." Ind. Br. 14. But industry points to nothing in the statute or the legislative history limiting "climate" to only a local meaning. Moreover, as illustrated by the Climate Action Report[JA687], *see* Pet. Br. 9-10, and petitioners' standing declarations, global climate change manifests itself through concrete local climate impacts, *e.g.*, melting glaciers, beachfront property lost to rising sea levels, hotter heat waves, and many other effects within the dimensions of "public health" and

---

Congress expressly authorized it.)

"welfare." That these local impacts are widespread throughout the United States provides more reason for regulation under §202, not less.

"Air Pollutants." Industry revives an argument EPA made in the 202 Denial, but dropped from EPA's brief, that an "air pollutant" must also be an "air pollution agent." Ind. Br. 9. But both terms – "air pollutant" and "air pollution agent" – "includ[e]" any chemical or physical substance emitted into the ambient air. "Air pollution agent" cannot be given a meaning that excludes chemical or physical substances emitted into the ambient air – especially substances that produce impacts on "weather" and "climate" that fall within the express statutory definition of effects on "welfare." *See* Pet. Br. 18.

Industry also points to a dictionary definition of the verb "to pollute" as "to make physically impure or unclean," suggesting that the statutory definition of "air pollutant" independently incorporates notions of impurity. Ind. Br. 10. What they ignore is that the Clean Air Act separates the definition of an air pollutant from the decision whether it should be regulated. Section 302(g) defines an air pollutant as a chemical or physical substance emitted into the air. Not every air pollutant, however, is automatically regulated; motor vehicle air pollutants are regulated only if EPA also makes the endangerment judgment under §202(a)(1). That is where the statute provides for weighing how air pollutants endanger health or welfare, *i.e.*, how they make the air impure or unclean. There is no basis for Industry's assertion that the air pollutant definition requires a showing of "impurity" separate from the endangerment judgment made under §202(a)(1), or for the implication that substances which harm public health or welfare could nonetheless fall outside the Act's safeguards if they failed this separate impurity test.

EPA does not assert any such impurity test. Indeed, the agency agrees that: "An air pollutant is any substance in the air that can cause harm to humans or the environment. Pollutants may be natural or man-made and may take the form of solid particles, liquid droplets or gases." (http://www.epa.gov/ebtpages/airairpollutants.html (December 17, 2004)[JA735](emphasis added)). EPA also specifically states that "Mobile sources also produce several other important air pollutants, such as air toxics and greenhouse gases." (http://www.epa.gov/otaq/invntory/overview/pollutants/index.htm (December 17, 2004))[JA738].

Nor do Industry's examples help them. While it is true that oxygen is an "air pollutant" if emitted into the air from motor vehicles or other sources, *see* Ind. Br. 10, oxygen emissions could not be regulated without an endangerment judgment. And, contrary to industry's implication that "pervasive and essential" compounds cannot be pollutants, *id.*, there are many such examples: ozone (a form of oxygen) and sulfur dioxide, for instance, are naturally occurring and benign in nature, but they are also problematic pollutants as a result of industrial-age emissions, and they are regulated for this reason. And it is beyond strained for Industry to compare (*id.* at 10) the step from carbon monoxide to carbon dioxide with the leap from fine particles to baseballs.

"Ambient Air." Noting that §302(g) requires "air pollutants" to be emitted into the "ambient air," industry advances a theory that greenhouse gases do not exert their ill effects on climate in the ambient air. Ind. Br. 11-12. First, they claim the "ambient air" is limited to the low, ground-level strip of the atmosphere in which the public breathes. *Id.* at 11. It is hard to see how this would help them even if true, since there can be no question that motor vehicles emit greenhouse gases into this very zone.

Second, there is no basis for Industry's cramped definition of "ambient air." They cite a regulatory definition of the "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." *Id.,* citing 40 C.F.R. 50.1(e). That definition has nothing to do with altitude; its only purpose is to exclude from certain compliance determinations air pollution readings taken on factory premises from which the public is excluded. *See* 48 Fed. Reg. 56219 (1983) ("As a matter of EPA policy, the only exemption is for air immediately above land owned and controlled by a source and to which public access is precluded.") Many regulated pollutants (*e.g.*, sulfur dioxide) are emitted into the air at altitudes well above the ground. Finally, as a matter of scientific fact, greenhouse gases contribute to global warming at all altitudes, from the ground upwards.[6]

Other Clean Air Act Provisions and Failed Amendments. Referring to three self-contained 1990-vintage provisions (§103(g), §602(e), and the uncodified §821), EPA concedes: "It is true, as Petitioners point out, that none of these provisions purports to rescind or repeal any more general regulatory authorities EPA may have under the Act." EPA Br. 29, referring to Pet. Br. 24-26. The agency then claims that this is "completely irrelevant," because it merely asserted that these 1990 provisions are "indicia" that "suggest" Congress did not authorize regulation of greenhouse gas emissions from motor vehicles back in 1970. *Id.* These vague claims fall far short of meeting the agency's

[6] Industry misunderstands the scientific reference they make to "radiative flux." Ind. Br. 12. As a matter of scientific fact, "[t]he longwave radiation that reaches the top of the atmosphere results from the absorption and emission of longwave radiation by gases throughout the atmosphere." J.T. Kiehl and Devin E. Trenberth. *Earth's Annual Global Mean Energy Budget*. Bulletin of the American Meteorological Society, Vol. 78, No.2, February 1997, p. 198 (emphasis added).

burden of "extraordinarily convincing justification" in order to override the plain meaning of §§202 and 302.

EPA next speculates that "common sense" would dictate that Congress address global warming only through a "specific, customized approach" dealing with all sources of global warming, and resembling the 1990 provisions for stratospheric ozone depletion. EPA Br. 30. The agency concedes, however, that "the enactment of a regulatory program to address one environmental program does not take away from a 'clearly expressed grant of pre-existing authority to address different environmental problems.' … EPA never suggested otherwise." EPA Br. 33, quoting Pet. Br. 27. Dating from 1970, §202(a) provides a specific and customized approach to motor vehicle emissions of greenhouse gases. It has been sufficiently specific and customized for other major motor vehicle problems, *see NRDC v. USEPA*, 655 F.2d 318 (D.C. Cir. 1981) (§202(a) standards for diesel emissions), and EPA has shown no reason why it is incomplete or inadequate for addressing vehicle greenhouse gas emissions.[7]

EPA continues to try to shift attention from §202 to the Act's provisions for national ambient air quality standards ("NAAQS"). EPA Br. 33-36. EPA has still done nothing to meet its burden under *Engine Manufacturers* and *Appalachian Power* to show how using the NAAQS system for these pollutants would necessarily be unworkable. And even if it had, the judicial power to refashion the statute to avoid absurd results

[7] EPA also points to 1990 draft versions of the stratospheric ozone provisions that would have empowered EPA to phase out a defined list of ozone-depleting chemicals (*e.g.*, chlorofluorocarbons) on the basis of their contribution to either ozone depletion or global warming. EPA Br. 49. The final amendments referred only to their ozone-depleting properties – an unsurprising result since that is the basis on which they were selected. That amendment never covered the four greenhouse gases from motor vehicles and had no relevance to EPA's powers under §202.

would be limited only to those provisions and would not extend to altering the plain meaning of other entirely workable provisions, such as §202, that deal with greenhouse gases without any difficulty. *See* Pet. Br. 35.

Finally, EPA and Industry still have not explained how the failure of a 1990 amendment to legislatively decree a specific tailpipe CO_2 standard proves the absence of pre-existing EPA authority to regulate vehicle greenhouse gases. EPA Br. 48-50; Ind. Br. 4-8.[8] They do not rebut the well-established rule that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft,* 535 U.S. 274, 287 (2002)(internal quotations omitted). *See* Pet. Br. 32. Indeed, EPA's primary authority – *Brown & Williamson* – expressly cautioned that "[w]e do not rely on Congress' failure to act -- its consideration and rejection of bills that would have given the FDA this authority." 529 U.S. at 155 (emphasis added). Industry's quotations from Senators Chafee, Gore, and Baucus all refer to the decision to drop the specific, legislatively-mandated standard. Neither the attempt to set a specific standard, nor the failure of that attempt, is inconsistent with pre-existing EPA authority.

Other Legislation. Neither EPA nor industry points to any other legislation, before or after EPA's enunciation of its current "no-authority" position, that ratified this newly-minted position or in any way undercuts the agency's authority to regulate greenhouse gases under §202. EPA repeats the claim that research statutes somehow demonstrate the lack of underlying authority. EPA Br. 50. There is nothing incompatible between researching a pollutant's impacts while at the same time regulating it. In fact,

[8] Industry tries to shift this burden, claiming that "[p]etitioners can cite no evidence" that the amendment failed because "Congress thought [it] superfluous." *Id.* at 8. Under *Engine Manufacturers,* the burden is theirs.

one of the statutes EPA cites, the 1990 Global Change Research Act, makes this point expressly:

> Nothing in this subchapter shall be construed, interpreted, or applied to preclude or delay the planning or implementation of any Federal action designed, in whole or in part, to address the threats of stratospheric ozone depletion or global climate change.

15 U.S.C. §2938(c).

In short, EPA and industry have not made any showing under *Brown and Williamson* that the statutory context disproves the plain meaning of the statutory text. Nor have they satisfied their burden under *Appalachian Power* and *Engine Manufacturers* to demonstrate through an "extraordinarily convincing justification" that, either "as a matter of historical fact," or "as a matter of logic and statutory structure," Congress did not intend that plain meaning.

III. EPCA IS NO OBSTACLE TO EPA ACTION UNDER THE CLEAN AIR ACT.

In the 202 Denial, EPA asserted that "Interference with Fuel Economy Standards" was an independent ground for concluding that it did not have authority to regulate motor vehicle CO_2 emissions. 68 Fed. Reg. 52929/1[JA56]. But EPA now concedes that the Energy Policy Conservation Act ("EPCA") itself does not "formally preclude[] or repeal[] any authority EPA may have to regulate mobile source emissions under the CAA." EPA Br. 74 (emphasis added).[9] Yet, EPA still asserts that CO2 emission standards would be inconsistent with EPCA, not because the regulations will impose

[9] In passing, industry asserts that EPCA was enacted later in time and is more specific than §202. Ind. Br. 15, 17. Because these statutes are not in conflict but instead address different topics (fuel economy and air pollution), neither overrides the other. *See, e.g., J.E.M. AG Supply*, *supra*, 534 U.S. at 141-44. Moreover, §202 was strengthened in 1977, after EPCA was enacted. *See* Pet. Br. 22-23, 53-54.

conflicting obligations, but instead because EPA claims any such emission standards would be met by "increasing fuel economy."[10]

EPA ignores that Congress expressly provided for the interaction of these two statutory schemes. The Clean Air Act explicitly allows automobile manufacturers a limited waiver of certain emission standards if it would enable greater fuel economy. §202(b)(3)(C). And EPCA requires that the minimum fuel economy standards set by the National Highway Traffic Safety Administration ("NHTSA") 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). Neither of these cross-references – or anything else in the Clean Air Act or EPCA – imposes a limit on EPA's broad §202 authority to set emission standards because of some effect on fuel economy.[11] To the contrary, EPCA's requirement that NHTSA take into account other government standards refutes any suggestion that EPCA displaces EPA's authority to adopt §202 emission standards that may affect fuel economy. If Congress had intended to prohibit other government standards from having effects on fuel economy, there would be no reason to require that NHTSA take such effects into account.

Consistent with this, the legislative history of both statutes shows that Congress fully understood and accepted that the technologies required to meet some emission

---

[10] EPA admits that EPCA has no relevance as to heavy-duty trucks, motorcycles, methane, nitrous oxide, and hydrofluorocarbons. All EPA says is that regulating these emissions "would not make sense." EPA Br. 75. In doing so, EPA fails to apply §202's criteria: whether these sources and pollutants "contribute to" air pollution that may reasonably be anticipated to endanger public health or welfare. *See Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004) (the term "contribute" does not itself require a significant magnitude).

[11] Congress knew how to impose limitations on EPA's authority to adopt emission standards. *See, e.g.,* §202(a)(2), (a)(3)(A)(i), (b)(1), (g), (h).

standards could also significantly affect fuel economy, either positively or negatively. *See* Pet. Br. 42-43.[12] In 1977, Congress specifically endorsed emission standards that lead to increased fuel economy:

> The improved technology required to meet emissions standards may assist in improving fuel economy. . . . If future emissions standards require the introduction of more sophisticated fuel delivery systems (electronic fuel injection, for example), further gains in fuel economy should result. The development of new or improved engine technologies which simultaneously reduce emissions and fuel consumption can and should be pursued.

H.R. REP. NO. 95-294, at 247 [JA 316](quoting National Academy of Sciences report). There is simply no inconsistency between §202 standards and EPCA, especially when those standards result in improved fuel economy.

Technological improvements that would reduce emissions, as well as fuel use, are precisely what are at issue here. The 202 Denial describes technologies that reduce CO_2 emissions: "reduced vehicle mass, reduced aerodynamic drag, reduced tire rolling resistance, and reduced accessory loads . . . improved specific power and gasoline direct injection . . . 5- and 6-speed automatic transmissions, 5-speed motorized manual gearshifts, and continuously variable transmissions." 68 Fed. Reg. 52925/1[JA52]. In fact, the technology example referenced in the 1977 legislative history – improved fuel injection – is one of the technologies for reducing CO_2 emissions. *Id.* Adopting §202 standards that take advantage of these technologies would not change EPCA standards. And these technologies certainly would not create a compliance conflict for automobile

[12] EPA's citation to Senator Symms' 1990 comments provides no insight into Congress's pre-existing authority. *See* p. 16, *supra*.

manufacturers, for they would assist in meeting both standards – since both standards are minimum standards, which manufacturers can (and do) exceed.

With no statutory or practical conflict, EPA and others rely on the limitations that EPCA places on NHTSA's authority to change its fuel economy standards.[13] They also cite to various provisions, including the requirement that NHTSA-established standards be set at "a level that the Secretary decides is the maximum feasible average fuel economy level for that model year." 49 U.S.C. §32902(c)(1). *See also id.* §32902(a). But Congress imposed these particular obligations on NHTSA only, limiting in particular ways NHTSA's authority to set its own standards.

For example, the "maximum feasible" language simply prescribes a familiar technological and economic feasibility limitation on NHTSA's power to set standards. *Id.* §32902(f) ("When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability . . .").[14] Section 202 imposes a similar obligation on EPA in its setting of motor vehicle emission standards. *See* §202(a)(2) (emission standards "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."); *see also NRDC v. USEPA*, 655 F.2d at 322. What Congress did was set up two parallel regulatory systems that affect motor vehicles. EPCA is focused on fuel use, with its sole purpose being to increase fuel efficiency in

[13] Industry's argument about these statutes' state law preemption provisions (Ind. Br. 18) is irrelevant to this case, where federal agency authority is at issue.

[14] This section also mandates consideration of "the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy" but does not include mandate consideration of public health or the environment.

order to reduce dependence on oil. *See* EPCA, Pub. L. No. 94-163, § 2(5), 1975 U.S.C.C.A.N. (89 Stat.) 871, 874[JA107]. The Clean Air Act is focused on reducing air pollution. One sets fuel economy standards, the other emission standards. Because of these different focuses and purposes, the two statutes (not surprisingly) provide for different administrative processes and different criteria for setting standards. Each agency has its statutory authority to address problems within its expertise, and Congress provided for reconciliation of different standards that might affect fuel economy by having NHTSA take other agencies' standards into account in setting its own standards.

Nowhere does EPA provide any case law support for its theory of inconsistency. But as industry acknowledges, the governing precedent is that "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 J.E.M. AG Supply, supra,* 534 U.S. at 144 (finding two overlapping patent statutes "effective because of [their] different requirements and protections"). Here, the two statutes are fully compatible and each can be given full effect.

IV. EPA ACTED UNLAWFULLY AND ARBITRARILY IN REFUSING TO REGULATE MOTOR VEHICLE GREENHOUSE GAS EMISSIONS.

EPA's decision below announced the agency's refusal to regulate vehicle greenhouse gases emissions, even if the Act authorizes such regulation. That decision does not constitute reasoned decisionmaking, nor does it correctly apply the law. *See* Pet. Br. Part III. In particular, EPA's decision invoked uncertainties in climate change science, without acknowledging the governing statutory criterion (*i.e.*, whether in EPA's judgment these emissions cause or contribute to pollution that may endanger public

health or welfare), or applying that criterion to the facts presented by the record.[15] Moreover, EPA committed several other key errors of law, any of which is sufficient to warrant remand as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). *See, e.g., PPG Industries v. U.S.*, 52 F.3d 363, 365 (D.C. Cir. 1995).

A. EPA's Post Hoc Effort to Recharacterize the 202 Denial Is Unavailing.

Unable to defend the flawed rationale set forth in EPA's 202 Denial, the agency's attorneys offer two post hoc attempts to recharacterize what EPA decided. *See*, *e.g.*, *Florida Power & Light Co. v. FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996). First, the brief suggests that EPA never really took final action. Second, the brief suggests that EPA did take final action, but only on the issue of whether to make the threshold judgment that motor vehicle greenhouse gas emissions contribute to pollution that may endanger public health or welfare.

Final action. EPA's brief characterizes the 202 Denial as "deferring any endangerment finding" until after uncertainties are further investigated. EPA Br. 67 (emphasis added). Indeed, the agency's brief goes so far as to argue that this aspect of the 202 Denial does not represent final action. *Id.* 64 n.26. These arguments are meritless.

The 202 Denial did not defer decision on any aspect of the 202 Petition, but instead denied the Petition in its entirety. See p. 24, *infra* (quoting decision). That denial

15 EPA's brief relies heavily on language in the 202 Denial addressing whether EPA had previously found the statutory endangerment criterion satisfied. EPA Br. Part III.B. Nowhere did the 202 Denial itself apply the endangerment criterion to the facts in the administrative record.

ended EPA's deliberation on the Petition, and thus constitutes final agency action. *See* Pet. Br. 1 (citing cases).[16]

Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525,1530 (D.C. Cir. 1990), cited by EPA to support its finality argument, actually undermines it. There, EPA sent two letters to entities who had petitioned for rulemaking. Far from expressly denying the petitions, the letters were sent in response to petitioners' request for "a report on the status" of the petitions, and each letter cautioned that "it would be premature to rule on your petition at this time."[17] Nonetheless, this court held that these interim status reports functioned as partial denials of the petitions, and accepted review of those denials. *Id*. at 1531-32. That such letters could constitute final action strongly supports a finding of finality here, where EPA's decision was not a mere status report in a letter, but instead was a Federal Register notice, following a public comment period, in which EPA expressly denied the petition.

Endangerment finding. Inconsistently with its deferral argument, EPA also claims that the 202 Denial "reflects EPA's decision not to make any endangerment finding -- either affirmative or negative -- under section 202(a)(1)." EPA Br. 62-63 (emphasis in original). As the brief effectively concedes by using the hedge word "reflects," the 202 Denial nowhere says this.

Far from being limited to the threshold issue of whether or not to make an endangerment judgment, the 202 Denial -- tracking the scope of the petition -- stated

---

16 Even if there were a possibility that EPA might revisit the issue at some future time, that mere possibility would not derogate from finality. *See*, *e.g.*, *U.S. Air Tour Assn. v. FAA,* 298 F.3d 997, 1013 (D.C. Cir. 2002).

17 The letters are available at http://www.earthjustice.org/backgrounder/documents/letters115.pdf.

EPA's final decision not to regulate greenhouse gases under §202(a)(1). *See* 68 Fed. Reg. 52933/2 [JA 60] ("EPA hereby denies the ICTA petition requesting that EPA regulate certain GHG emissions") (emphasis added); 52922/3[JA 49] (noting that organizations had petitioned EPA "to regulate emissions" of CO2 and other greenhouse gases, and stating that "EPA is denying the petition"); 52931/2[JA 58] ("it is inappropriate to regulate GHG emissions from motor vehicles") (emphasis added).

In any event, EPA's attempted recharacterization -- even if it were accepted -- would not cure the central flaw in the agency's decision. If EPA's decision were read as a refusal to make any endangerment judgment, positive or negative, the question remains: why did the agency reach that outcome, and how is the outcome grounded in the applicable statutory standard? The agency's path to that purported outcome is no more discernible than its path to the outcome the 202 Denial expressly reached -- *i.e.*, refusal to issue §202(a)(1) regulations.

B. EPA's Decision Articulated No Discernible Decisionmaking Path, and Made Several Key Errors of Law.

EPA made a final decision not to issue §202(a)(1) regulations. Under this Court's precedent, that decision is reviewable to ensure that it is not arbitrary, and in particular that EPA applied the correct legal standard. Pet Br. 1, 44-45 (citing caselaw).

EPA argues it is entitled to an "exceptional" degree of deference. EPA Br. 56. The agency claims such exceptional deference flows from caselaw reviewing refusals to regulate (*Id*. 56, 64, 67) and from the discretion conferred by §202(a)(1)'s reference to the Administrator's "judgment." EPA's argument ignores the most basic principles of judicial review, which require the Court to determine whether an agency's decision -- even a discretionary one -- is "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." 5 U.S.C. §706(2)(A). This Court has previously emphasized -- in another Clean Air Act case involving refusal to regulate under a statutory provision implicating the Administrator's "judgment" -- that EPA has "the heaviest of obligations to explain and expose every step of its reasoning." *American Lung Assn. v. Browner*, 134 F.3d 388, 392 (D.C. Cir. 1998).

Moreover, in attempting to parlay the word "judgment" into immunity from meaningful judicial review, EPA ignores another key statutory word. Specifically, §202(a)(1) requires that EPA "shall" regulate where in the agency's judgment the statutory endangerment threshold is crossed. Thus, §202(a)(1) is a "mandatory" provision[18] requiring regulatory action to control emissions that may endanger public health or welfare, and entrusting to EPA's judgment only the threshold determination whether such endangerment is occurring. Careful judicial review is essential to make sure that EPA's judgment remains within the bounds prescribed by the statute. By contrast, the effectively limitless discretion and exceptionally deferential review EPA advocates would, if accepted, swallow §202(a)(1)'s mandatory "shall," rendering §202(a)(1) indistinguishable from other provisions (such as Clean Air Act §211(c)) that use "may" instead of "shall." *See* Pet. Br. 48.

(1) EPA's Allegations Concerning Uncertainty Disregard the Governing Legal Standard.

"With its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review can occur only when agencies explain their decisions with precision, for it will not do for a court to be compelled to guess at the theory underlying the agency's action." *ALA*, 134 F.3d at 392 (ellipsis and internal quotations omitted).

---

18 *Ethyl Corp. v. EPA*, 541 F.2d 1, 20 n.37 (D.C. Cir. 1976).

Agency decisions are also arbitrary where the agency applies the wrong legal standard. See Pet Br. 48 (citing caselaw). EPA's decision falls short when judged by these standards.

Central to §202(a)(1) is a precautionary approach requiring regulation of motor vehicle emissions which in EPA's judgment "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." (Emphasis added.) *See* Pet. Br. Part III.C. Tellingly, EPA's brief points to nowhere in the 202 Denial where the agency acknowledged this precautionary standard, or applied it to the record facts. Instead, the brief cites language describing petitioners' contentions concerning § 202(a)(1)'s precautionary approach. *See* 68 Fed. Reg. 52923[JA 50], *cited in* EPA Br. 67 n.27. EPA's decision neither responded to those contentions, nor acknowledged or applied the precautionary language of §202(a)(1) to the record facts.

Instead, the 202 Denial made free-floating assertions concerning uncertainty, which the agency never linked to the §202(a)(1) test. For example, EPA cites the 202 Denial's assertion that a causal link between greenhouse gas buildup and observed climate change cannot be "unequivocally" established. EPA Br. 65 (quoting 68 Fed. Reg. 52930/1[JA 57]). The precautionary approach required under § 202(a)(1), however, calls for the agency to take regulatory action to protect public health and welfare, even where harm cannot be unequivocally proven. *See* Pet. Br. Part III.C. *See also Ethyl*, 541 F.2d at 28 n.58 (rejecting industry argument that EPA can rely only on "evidence that reputable scientific techniques certify as certain;" "Such certainty has never characterized the judicial or the administrative process."). Similarly, while EPA claimed that its model projections are "tentative and subject to future adjustments" (EPA Br. 65, quoting 68 Fed.

Reg. 52930/2[JA 57]), this Court has recognized that "probative preliminary data not yet certifiable as 'fact'" are a proper basis for EPA regulatory decisions under the Act's precautionary approach. *Ethyl*, 541 F.2d at 28. The "may reasonably be anticipated to endanger" formulation was adopted expressly to direct EPA to employ this precautionary approach, and to act even in the presence of uncertainty.[19]

By proffering alleged uncertainties as a blanket excuse for inaction, without evaluating how those uncertainties stack up against §202(a)(1)'s precautionary decisional criterion, EPA disregarded the governing legal standard. Because EPA cannot leave the Court to guess at how the agency would have evaluated the facts under the proper standard, a remand is required.

(2) EPA Committed an Error of Law in Denying that §202(a)(1) is Mandatory.

EPA committed another key error of law in claiming 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. 52929/3[JA 56]. Section

---

19 Because this case addresses EPA's inadequate explanation of its decision, and application of the wrong legal standard, the merits of EPA's assertions concerning climate change science are not before the Court. In any event, EPA's quotes from the NRC report, upon which the agency "relied most heavily" (EPA Br. 63), are standard fare in scientific literature, and fully consistent with the international scientific consensus on the seriousness of climate change. Indeed, the Report expressly noted (at 1[JA 681]) that its authoring committee "generally agrees with" the IPCC Working Group I report's assessment. The IPCC in turn corroborates the impacts of climate change, and the role of human emissions in producing those impacts. TAR, Working Group I, Summary for Policymakers (2001), 5[JA 661]. It also bears emphasis that modeling the precise "magnitude" of future climate change (EPA Br. 65) is unnecessary to implementation of §202(a)(1). That provision focuses on application of feasible technologies, not—as in §115, the provision at issue in *Her Majesty*—on tracing pollution impacts back to individual states.

202(a)(1) provides that EPA "shall" regulate where in the agency's judgment the threshold criterion is met, and this Court has expressly ruled that § 202(a) is "mandatory." *Ethyl*, 541 F.2d at 20 n37.

In an effort to escape that clear error of law, EPA's brief attempts yet again to rewrite the decision below. According to the brief, EPA's decision merely stated that "a general endangerment finding" about the effects of greenhouse gas emissions would not trigger a duty to regulate "motor vehicle emissions." EPA Br. 59 (emphasis in original). To the contrary, the 202 Denial asserted that EPA can refuse regulation not only "if the Administrator were to find that GHGs, in general, may reasonably be anticipated to endanger public health or welfare," 68 Fed. Reg. 52929/3[JA 56], but also even if the Administrator concluded that motor vehicles contribute to that endangerment. *Id.* ("motor vehicles may be one of many contributors, and it may make sense to control other contributors instead of, or in tandem with, motor vehicles") (emphasis added).

Under the plain language of §202(a)(1), if in EPA's judgment motor vehicles cause or contribute to air pollution that may endanger public health or welfare, the agency "shall" issue regulations. EPA's contrary assertion is an error of law requiring remand.

EPA argues that the mandatory "shall" comes into play only upon a discretionary endangerment determination, and claims that the agency expressly declined to make such a determination. EPA Br. 56-60. That is not what the 202 Denial said. To the contrary, that decision could be read as indicating either that (1) EPA believes the statutory endangerment threshold has not been crossed, or that (2) EPA prefers not to regulate greenhouse gases under §202(a)(1), regardless of whether that threshold has been

crossed. Pet. Br. 46, 48-49. Because EPA's decisionmaking path cannot be discerned, a remand is required.

(3) EPA's Arguments Concerning Control Technology, Source Contribution, and International Relations Are Meritless.

EPA's 202 Denial advanced arguments concerning control technology, source contribution, and international relations. Those arguments are unavailing for reasons previously stated, Pet. Br. 54-60, and EPA's brief offers no reason to conclude otherwise.

Control technology. EPA's brief repeats alleged limitations in control technology as grounds for denial of the 202 Petition. EPA Br. 68-70. The argument is unavailing. As to CO2 -- the "most prevalent" greenhouse gas, EPA Br. 68 -- commenters pointed to numerous feasible control technologies. 68 Fed. Reg. 52925/1[JA 52].

EPA conceded that available technologies offer a "practical way to reduce tailpipe emissions of CO2," 68 Fed. Reg. 52929/1[JA 56], but shifted from a technological argument to a statutory one. According to EPA, available approaches to controlling CO2 would affect fuel economy, thus placing them in the exclusive purview of the Department of Transportation. *See id.*; EPA Br. 68. However, as previously shown, EPA's authority to set §202(a)(1) standards is not diminished, simply because the actions taken to reduce emissions may also improve fuel economy. *See* Part III, *supra*; Pet. Br. Part II.

As to the three pollutants other than CO2, EPA questions whether there are "practical strategies" available to control them. EPA Br. 68. Section 202(a)(1), however, envisions standards based not only on those technologies that are currently available, but also on those that can be developed in the future. Pet. Br. 55-56. EPA's cursory treatment of this issue in the 202 Denial falls far short of a showing that a §202(a)(1) rulemaking would be "pointless" (EPA Br. 70) as to these other pollutants. *See* Pet. Br. 56 n.30.

"Contribute to." EPA argues in a footnote that "most" of petitioners' arguments "are based on the harms allegedly caused by greenhouse gas emissions in general, not emissions that are specific to mobile sources." EPA Br. 69 n.28. However, §202(a)(1) expressly encompasses emissions that "cause, or contribute to," endangerment. (Emphasis added.) EPA does not dispute that U.S. motor vehicles make a substantial contribution to greenhouse gas emissions. *See* Pet Br. 11. *See also Bluewater Network*, 370 F.3d at 13 (the statutory term "contribute" has no inherent connotation as to "magnitude or importance," and certainly does not incorporate any "'significance' requirement").

EPA speculates (EPA Br. 69 n.28) that control of mobile source emissions may not be "the most practical and effective means" of addressing global warming. This policy argument, like similar ones in the 202 Denial, overlooks the statute's mandatory requirement that EPA "shall" regulate where in the agency's judgment U.S. motor vehicle emissions "contribute to" harmful pollution. Indeed, the 202 Denial never even tries to explain how its assertions concerning multiple emission sources can be squared with that key statutory language.

International relations. EPA argues (EPA Br. 70) that regulation of motor vehicle greenhouse gases "could" have undesirable foreign policy implications by discouraging other countries from reducing their emissions. Once again, such policy arguments overlook §202(a)(1)'s mandatory requirement that EPA "shall" regulate where in the agency's judgment U.S. vehicle emissions "contribute to" harmful air pollution.

EPA's argument also disregards the Rio treaty, to which the United States is a party. That treaty expressly obligates each developed nation signatory, *inter alia,* to take

measures "limiting its anthropogenic emissions of greenhouse gases," including measures that "demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions." Pet. Br. 59 (quoting treaty) (emphasis added). A policy of holding back domestic action as a bargaining chip would run counter to this treaty obligation.

EPA objects that the Rio treaty is not a "comprehensive emission control treaty." EPA Br. 71 n.29. But the above-quoted Rio treaty provisions are binding on their own,[20] and their wording is not contingent on ratification of another, more detailed treaty. They decisively refute EPA's policy argument that greenhouse gas reductions may be withheld to gain leverage in negotiations with other nations.

CONCLUSION

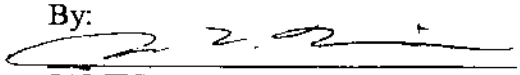
The Court should vacate both the Fabricant Opinion and the 202 Denial and remand them to EPA for further consideration in accordance with the Court's opinion.

Respectfully submitted:

20 *See Intl. Bank v. D.C.*, 171 F.3d 687, 690 (D.C. Cir. 1999) (treaties "are the 'supreme Law of the Land'") (citation omitted); *Kappus v. Commr. of Internal Revenue*, 337 F.3d 1053, 1057 (D.C. Cir. 2003) (treaty is "on the same footing" with statute, and "no superior efficacy is given to either over the other")(citation omitted).

FOR THE COMMONWEALTH OF MASSACHUSETTS

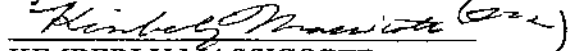
THOMAS F. REILLY
Attorney General
By:



JAMES R. MILKEY
WILLIAM L. PARDEE
CAROL IANCU
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, Rm 1813
Boston, Massachusetts 02108-1598
(617) 727-2200 Ext. 2419

FOR THE STATE OF CONNECTICUT

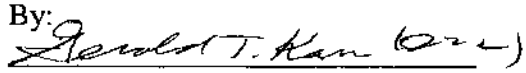
RICHARD BLUMENTHAL
Attorney General
By:



KIMBERLY MASSICOTTE
MATTHEW LEVINE
Assistant Attorneys General
P.O. Box 120, 55 Elm Street
Hartford, Connecticut 06141-0120
(860) 808-5250

FOR THE STATE OF ILLINOIS

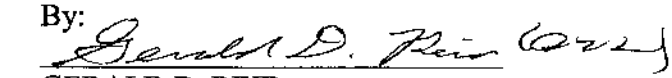
LISA MADIGAN,
Attorney General
GARY FEINERMAN,
Solicitor General
By:



GERALD T. KARR
MATTHEW J. DUNN
ROSEMARIE CAZEAU
THOMAS E. DAVIS
Assistant Attorneys General
188 West Randolph Street
20th Floor
Chicago, Illinois 60601
(312) 814-3369

FOR THE STATE OF MAINE

G. STEVEN ROWE
Attorney General
By:



GERALD D. REID
Assistant Attorney General
Department of the Attorney General
State House Station #6
Augusta, Maine 04333-0006
(207) 626-8545

FOR THE STATE OF NEW JERSEY

PETER C. HARVEY
Attorney General
By:

STEFANIE A. BRAND
LISA MORELLI
JOHN R. RENELLA
Deputy Attorneys General
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625-0093
(609) 633-8713

FOR THE STATE OF NEW MEXICO

PATRICIA A. MADRID
Attorney General
By:

STUART M. BLUESTONE
Deputy Attorney General
STEPHEN R. FARRIS
Assistant Attorney General
P.O. Drawer 1508
Sante Fe, New Mexico 87504-1508
(505) 827-6010

FOR THE STATE OF NEW YORK

ELIOT SPITZER
Attorney General
CAITLIN HALLIGAN
Solicitor General
By:
PETER LEHNER
J. JARED SNYDER
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 474-8010

FOR THE STATE OF OREGON

HARDY MYERS
Attorney General
MARY WILLIAMS
Solicitor General
By:
SHELLEY K. MCINTYRE
Assistant Attorney General
PHILIP SCHRADLE
Special Counsel to the Attorney General
Oregon Department of Justice
1162 Court Street, Suite 100
Salem, OR 97310
(503) 229-5725

FOR THE STATE OF RHODE ISLAND

PATRICK C. LYNCH
Attorney General
By:
TRICIA K. JEDELE
Special Assistant Attorney General
Department of Attorney General
150 South Main Street
Providence, Rhode Island
401-274-4400 ext. 2400

FOR THE STATE OF VERMONT

WILLIAM H. SORRELL
Attorney General
By:
ERICK TITRUD
KEVIN O. LESKE
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-5518

FOR THE STATE OF WASHINGTON

ROB MCKENNA
Attorney General
By:
DAVID K. MEARS
LESLIE R. SEFFERN
Assistant Attorneys General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-4613

FOR THE AMERICAN SAMOA GOVERNMENT

FITI A. SUNIA
Attorney General
Office of the Attorney General
Executive Offices Building
P.O. Box 7
Pago Pago, American Samoa 96799
011 (684) 633-4163

FOR THE DISTRICT OF COLUMBIA

ROBERT J. SPAGNOLETTI
Attorney General
EDWARD E. SCHWAB
Deputy Attorney General
Appellate Division
By:
DONNA M. MURASKY
Senior Litigation Counsel
Office of the Attorney General
for the District of Columbia
441 Fourth Street, N.W.
6th Floor South
Washington, D.C. 20001
(202) 724-5667/5665
KIMBERLY KATZENBARGER
Counsel to the Air Quality Division
Environmental Health Administration
51 N Street, N.E.
Washington, D.C. 20002
(202) 535-2608

FOR THE STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER
Governor
CALIFORNIA AIR RESOURCES
BOARD
BILL LOCKYER
Attorney General
By:
RICHARD M. FRANK
Chief Assistant Attorney General
MARY E. HACKENBRACHT
Senior Assistant Attorney General
NICHOLAS STERN, SBN 14308
MARC N. MELNICK, SBN 168187
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, California 94612
(510) 622-2133

FOR CENTER FOR TECHNOLOGY
ASSESSMENT

JOSEPH MENDELSON
Attorney
660 Pennsylvania Avenue, SE
Washington, DC 20003
(202) 547-9359

FOR BLUEWATER NETWORK

LESLIE CAPLAN
Attorney
311 California Street, Suite 510
San Francisco, CA 94104
(415) 544-0790 x 23

FOR CENTER FOR BIOLOGICAL
DIVERSITY

JAY TUTCHTON
Attorney
Environmental Law Clinic
University of Denver, College of Law
2255 E. Evans Ave.
Denver, CO 80208
(303) 871-6034

FOR CENTER FOR FOOD SAFETY

JOSEPH MENDELSON
Attorney
Center for Technology Assessment
660 Pennsylvania Avenue, SE
Washington, DC 20003
(202) 547-9359

FOR CONSERVATION LAW FOUNDATION

SETH KAPLAN
Attorney

62 Summer Street
Boston, MA 02110
(617) 350-0990

FOR ENVIRONMENTAL ADVOCATES

JOSEPH MENDELSON
Attorney

Center for Technology Assessment
660 Pennsylvania Avenue, SE
Washington, DC 20003
(202) 547-9359

FOR ENVIRONMENTAL DEFENSE

JAMES B. TRIPP
Attorney

257 Park Avenue South
17th Floor
New York, NY 10010
(212) 505-2100

FOR FRIENDS OF THE EARTH

BRIAN DUNKIEL
Attorney

Shems, Dunkiel and Kassel PLLC
87 College Street
Burlington, Vermont 05401
(802) 860-1003

FOR GREENPEACE

JOSEPH MENDELSON
Attorney

Center for Technology Assessment
660 Pennsylvania Avenue, SE
Washington, DC 20003
(202) 547-9359

FOR NATIONAL ENVIRONMENTAL TRUST

JOHN M. STANTON
MARK WENZLER
Attorneys

1200 18th Street, N.W.
Washington, DC 20036
(202) 887-8800

FOR NATURAL RESOURCES DEFENSE COUNCIL

DAVID DONIGER
Attorney

1200 New York Avenue
Washington, DC 20005
(202) 289-2403

FOR SIERRA CLUB

DAVID BOOKBINDER
(DC Bar No. 455525)
Attorney

Sierra Club
408 C Street, NE
Washington, DC 20002
(202) 548-4598

HOWARD FOX
(DC Bar No. 322198)
Attorney
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036-2212
(202) 667-4500

FOR UNION OF CONCERNED SCIENTISTS

JULIE M. ANDERSON
Attorney
1707 H St., N.W. Suite 600
Washington, DC 20006
(202) 223-6133 x 109

FOR U.S. PUBLIC INTEREST RESEARCH GROUP

KATHERINE MORRISON
Attorney
218 D Street, SE
Washington, DC 20003
(202) 546-9707 Ext. 318

FOR THE CITY OF NEW YORK
MICHAEL CARDOZO

Corporation Counsel
By:
JOHN HOGROGIAN
Assistant Corporation Counsel
100 Church Street
New York, New York 10007
(212) 676-8517

FOR THE MAYOR AND CITY COUNCIL OF BALTIMORE

RALPH S. TYLER III
City Solicitor

By:
William Phelan, Jr.
Principal Counsel
Baltimore City Department of Law
100 Holiday Street
Baltimore, MD 21201
(410) 396-4094

Date: January 19, 2005

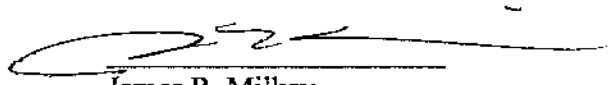
Certificate of Compliance with Rule 32(a) (7) (c) of the Federal Rules of Appellate Procedure

I hereby certify pursuant to Fed. R. App. P. 32 (a) (7) (c) that the foregoing brief contains 8,998 words, according to the count of MS Word.

James R. Milkey

Certificate of Service
D.C. Cir. Nos. 03-1361 through 03-1368

I hereby certify that by January 25, 2005, I will cause to be served on each of the following parties or counsel two true and accurate copies of the Final Brief for the Petitioners in Consolidated Cases and the Final Reply Brief for the Petitioners in Consolidated Cases, by first class mail, postage prepaid, and will cause a courtesy copy of each to also be sent by electronic mail in accordance with the parties' December 11, 2003, Electronic Service Agreement and Fed. R. App. P. 25(c)(1)(D).



James R. Milkey

Jon M. Lipshultz
U.S. Department of Justice
Environmental Defense Section
PO Box 23986
Washington, DC 20026-3986
Jon.Lipshultz@usdoj.gov

Counsel for Respondent U.S. Environmental Protection Agency

Nancy Ketcham-Colwill
Air and Radiation Law Office (2344A)
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
ketcham-colwill.nancy@epamail.epa.gov

Counsel for Respondent U.S. Environmental Protection Agency

Alan F. Hoffman
Neil D. Gordon
Assistant Attorneys General
Environment, Natural Resources
and Agriculture Division
P.O. Box 30217
Lansing, MI 48909
hoffmanaf@michigan.gov
gordonnd@michigan.gov

Counsel for Intervenor for Respondent State of Michigan

Jane E. Atwood
Assistant Attorney General
Natural Resources Division
P.O. Box 12548
Austin, TX 78711-2548
jane.atwood@oag.state.tx.us

Counsel for Intervenor for Respondent State of Texas

Lawrence G. Wasden
Attorney General
1410 North Hilton
Boise, ID 83706
dconde@deq.state.id.us

Counsel for Intervenor for Respondent State of Idaho

Fred Nelson
Assistant Attorney General
160 East 300th South, 5th Floor
Post Office Box 140873
Salt Lake City, UT 84114-0873
fnelson@utah.gov

Counsel for Intervenor for Respondent State of Utah

Steve Mulder
Alaska Department of Law
1031 W. 4th Avenue; Suite 200
Anchorage, AK 99501
steve_mulder@law.state.ak.us

Counsel for Intervenor for Respondent State of Alaska

David D. Cookson
Natalee J. Skillman
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68508
dcookson@notes.state.ne.us
nskillma@notes.state.ne.us
tmatas@notes.state.ne.us
annette.kovar@ndeq.state.ne.us

Counsel for Intervenor for Respondent State of Nebraska

Charles M. Carvell
500 North 9th Street
Bismarck, ND 58501
lwitham@state.nd.us

Counsel for Intervenor for Respondent State of North Dakota

Roxanne Giedd
Assistant Attorney General
500 East Capitol
Pierre, SD 57501
Roxanne.giedd@state.sd.us

Counsel for Intervenor for Respondent State of South Dakota

David W. Davies
129 SW Tenth Avenue, 2nd Floor
Topeka, KS 66612-1597
daviesd@ksag.org

Counsel for Intervenor for Respondent State of Kansas

Dale T. Vitale
Senior Deputy Attorney General
Environmental Enforcement Section
Office of the Attorney General of Ohio
30 E. Broad Street
Columbus, OH 43215
dvitale@ag.state.oh.us
jkmcmanus@ag.state.oh.us

Counsel for Intervenor for Respondent State of Ohio

William A. Anderson, II
Winston & Strawn LLP
1400 L Street, N.W.
Washington, DC 20005
WAnderso@winston.com
JBecker@autoalliance.org
TFrench@ngelaw.com
greenhaus@nada.org

Counsel for Intervenor for Respondent Vehicle Intervenor Coalition

Russell S. Frye
John L. Wittenborn
Collier Shannon Scott, PLLC
3050 K Street, N.W.
Washington, DC 20007-5108
RFrye@colliershannon.com
colleIir@api.org

Counsel for Intervenor for Respondent CO_2 Litigation Group

Howard M. Crystal
Meyer & Glitzenstein
1601 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20009

Counsel for Amicus Curiae for Petitioners Physicians for Social Responsibility

updated 1/19/05

Norman W. Fichthorn
Lucinda Minton Langworthy
Allison D. Wood
Hunton & Williams, LLP
1900 K Street, N.W.
Washington, D.C. 20006
nfichthorn@hunton.com

Counsel for Intervenor for Respondent Utility Air Regulatory Group

Thomas M. Fisher
Steven D. Griffin
Raeanna S. Moore
Attorney General's Office of the
State of Indiana
302 West Washington Street
Indiana Government Center South
Indianapolis, IN 46204-2770

Counsel for Amicus Curiae for Respondent State of Indiana

Daniel J. Popeo
Paul Douglas Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, DC 20036
PKamenar@wlf.org

Counsel for Amicus Curiae for Respondent Washington Legal Foundation