No. 05-1120

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

Fall 2006 Term

MASSACHUSETTS, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Colombia Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the EPA Administrator have the authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1)?

2. May the EPA Administrator decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1)?

PARTIES TO THE PROCEEDINGS

Petitioners:

The Commonwealth of Massachusetts
The State of California
The State of Connecticut
The State of Illinois
The State of Maine
The State of New Jersey
The State of New Mexico
The State of New York
The State of Oregon
The State of Rhode Island
The State of Vermont
The State of Washington
The District of Colombia
The Government of America Samoa
New York City
The Mayor and City Council of Baltimore, Maryland
Center for Biological Diversity
Center for Food Safety
Conservation Law Foundation
Environmental Advocates
Environmental Defense
Friends of the Earth
Greenpeace
International Center for Technology Assessment (ICTA)
National Environmental Trust
Natural Resources Defense Council (NRDC)
Sierra Club
Union of Concerned Scientists
U.S. Public Interest Research Group

Respondents:

Environmental Protection Agency
The Alliance of Automobile Manufacturers

National Automobile Dealers Association
Engine Manufacturers Association
Truck Manufacturers Association
CO2 Litigation Group
Utility Air Regulatory Group
The State of Alaska
The State of Idaho
The State of Kansas
The State of Michigan
The State of Nebraska
The State of North Dakota
The State of Ohio
The State of South Dakota
The State of Texas
The State of Utah

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The Notice of Denial of Petition for Rulemaking [hereinafter "Rulemaking Denial"] is reported at 68 Fed. Reg. 52,922 (September 8, 2003). The Court of Appeals of the D.C. Circuit subsequently dismissed and denied the petitions for review, reported at 415 F.3d 50 (2005).

JURISDICTION

Petition for certiorari was filed on March 2, 2006. Certiorari was granted on June 26, 2006. 126 S. Ct. 2960 (2006). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 202 of the Clean Air Act provides in relevant part:

> (a) Except as otherwise provided in subsection (b) of this section–
>
> > (1) The Administrator shall by regulation prescribe . . . 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.
> >
> > (2) Any regulation prescribed under paragraph (1) of this subsection . . . 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.

42 U.S.C. §§ 7521(a)(1-2).

Section 302 of the Clean Air Act provides in relevant part:

> (g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . 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. . . .
>
> (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 . . . whether caused by transformation, conversion, or combination with other air pollutants.

42 U.S.C. §§ 7602(g-h).

STATEMENT OF FACTS

I. The Effects of Greenhouse Gases and Global Climate Change

"Greenhouse gases [hereinafter "GHGs"] are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise." National Research Council, *Climate Change Science* (2001) [hereinafter "NRC Report"], J.A. at 151. Global average surface temperatures warmed between .4° C and .8° C in the 20th century, and most of the observed warming has been due to human-caused increases in GHG concentrations. *Id.* at 157. Scientists expect that temperatures will rise at an accelerated rate throughout the next century *Id.* The "mid-range" estimate of predicted warming by the end of this century is 3° C (5.4° F). *Id.* The human-produced GHGs most responsible for the warming are carbon dioxide ["CO2"], methane ["CH4"], and nitrous oxide ["N2O"], and *Id.* at 153. All of these pollutants are emitted from U.S. automobiles. *Id.* at 18-19.

Global warming is expected to have numerous deleterious consequences. Sea levels are expected to rise by as much as eighty-eight meters, *see* Intergovernmental Panel on Climate Change, *Climate Change 2001* at 9 [hereinafter "IPCC Report"]. Population displacement may occur as coastal regions—home to fifty-three percent of the American population, NRC Report, J.A. at 200—are inundated. *See* IPCC Report at 12. Global warming is also anticipated to increase the incidence of various infectious diseases, including malaria, dengue fever, and encephalitis, along with water-born diseases such as cholera, toxic algae, and cryptosporidiosis. *See* J.A. at 22-6. Higher temperatures are also expected to increase the likelihood of direct effects on human health, including heat stress, skin cancer, cataracts, and immune suppression. *Id.* at 26-8. In the United States, GHG emissions and resultant global warming are expected to have an

adverse impact on food production, nutritional health, weather patterns, sea levels, water quality and quantity, and respiratory health. *See id.* at 33-5; IPCC Report at 9.

Global warming is also expected to have environmental consequences, including severe harm to water resources, rangelands, forests, non-tidal wetlands, fisheries and birds. *See* J.A. at 29-32. Scientists expect increased rainfall in same areas and increased droughts in others. *Id.* at 157. Among the effects on water resources, the U.S. Environmental Protection Agency [hereinafter, "EPA"] predicts that "[l]ower river flows and lower lake levels could impair navigation, hydroelectric power generation, and water quality, and reduce the supplies of water available for agriculture, residential, and industrial uses." *Id. at* 29.

II. The EPA's Asserted Authority to Regulate GHGs under the Clean Air Act.

On several occasions, the EPA has claimed the authority to regulate GHG emissions under its existing authority under the Clean Air Act [hereinafter "CAA"]. On March 11, 1998, Carol Browner, then the EPA Administrator, testified before Congress that the EPA had the authority to regulate GHGs under the general provisions of the CAA, though the EPA had not decided at that time to regulate. *See* FY 1999 VA-HUD Appropriations: Hearing of the Veterans Affairs, Housing and Urban Development and Independent Agencies Subcomm. of the H. Appropriations Comm., 105th Cong. [hereinafter "Browner Testimony"]. Following the Browner Testimony, the General Counsel of the EPA, Jonathan Cannon responded to a request by Senator Tom Delay with a memorandum reinforcing the EPA's authority to regulate GHGs. *See* Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator (April 10, 1998) [hereinafter "Cannon Memo"]. The following year, Cannon's successor as General Counsel reiterated the EPA's stance that it had the authority to regulate GHGs under the CAA. *See* Joint Hearing of the H. 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, Comm. on Sci., 105th Cong. (Oct. 6, 1999) (Testimony of Gary S. Guzy, EPA General Counsel) [hereinafter "Guzy Testimony"].

However, shortly before the EPA released its Rulemaking Denial, the EPA General Counsel released a memorandum in which he reversed the EPA's previous position.. *See* Memorandum from Robert E Fabricant, EPA General Counsel, to Marianne L. Horinko, Acting EPA Administrator (August 28, 2003) [hereinafter "Fabricant Memo"].

III. Procedural History

On October 20, 1999, a group of scientific research and public advocacy groups filed a detailed petition for rulemaking, requesting that the EPA Administrator regulate vehicular GHG emissions pursuant to CAA § 202(a)(1). *See* JA at 6. After inviting public comments, the EPA denied the petition ["Rulemaking Denial"], 68 Fed. Reg. at 52,922. In response, twelve states, three cities, an American territory, and numerous environmental organizations brought this action requesting judicial review of the agency's decision.

SUMMARY OF ARGUMENT

The EPA Administrator ["the Administrator"] has impermissibly interpreted § 202(a)(1) so as to minimize his agency's regulatory authority and responsibility, despite explicit statutory language commanding the opposite conclusion. Since Congress has plainly entrusted the EPA Administrator with *both* the authority *and* the responsibility to regulate GHGs in defense of public health and welfare, this Court should vacate the Rulemaking Denial.

First, the unambiguous text of § 202(a) grants the EPA authority to regulate GHGs; the Rulemaking Denial subverts that plain meaning. Further, the Rulemaking Denial should not be afforded *Chevron* deference because it does not carry the "force of law" necessary for such

deference under this Court's holdings in *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). The EPA's denial also calls into question the propriety of granting deference to agency interpretations in jurisdictional disputes. Agencies can claim no special expertise in interpreting statutes confining their own jurisdiction, and granting them such power would indulge perverse incentives for agency aggrandizement or abrogation of statutory duties. Therefore, the Denial ought to be afforded only "respect" insofar as it has the "ability to persuade" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

However, even if the EPA interpretation is afforded *Chevron* deference, its interpretation is impermissible in that it ignores the CAA's unambiguous text. Since GHGs fit the statutory definition of a "pollutant," *see* 42 U.S.C. § 7602(g), the CAA plainly grants the EPA the authority to regulate GHG emissions. The EPA fails to show how this is a "rare case" where applying the text "will produce a result demonstrably at odds" with congressional intent *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). The statutory and legislative histories show that though Congress did not grant specific authority to regulate GHGs, it also never restricted the EPA's authority to do so under the CAA's general provisions. Nor would regulating GHGs conflict with Congress' subsequent global warming legislation, making *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), inapplicable. Finally, the EPA and Department of Transportation are both capable of regulating vehicular CO2 emissions, as both of their governing statutes contemplate regulatory overlap, and the EPA has a duty to press for the development of new technologies. *See* 42 U.S.C. § 7521(a)(2); S. Rep. No. 1196, at 24 (1970).

Second, Congress entrusted the Administrator with a legal responsibility to apply a specified endangerment standard when making regulatory decisions under § 202(a)(1). This responsibility is plainly indicated by the statutory term "shall" and confirmed by legislative

history. Further, the Administrator's judgment is expressly confined to consideration of the mandatory standard, as indicated by both the statute's syntax and its relationship to an adjacent provision. While the Administrator's limited discretion does permits him to weigh conflicting or indeterminate evidence against the mandatory standard, the Administrator is not free to abandon the standard altogether. Nor is the Administrator free to replace the statute's mandatory regulatory criterion in favor of his own concerns or priorities. On the contrary, this Court's precedents uniformly require agencies to abide by Congress' express commands, even when those agencies have been assigned considerable discretion.

Unfortunately, the Administrator's decision not to regulate vehicular GHG emissions does not even purport to apply § 202(a)(1)'s emphatically precautionary standard. Instead, the Administrator invokes four policy considerations that fly in the face of Congress' express statutory directive and constitute clear errors of law. First, the Administrator harps on "uncertainties" that have no bearing on the statutory standard while ignoring abundant evidence that vehicular GHGs do in fact pose a serious threat to public health and welfare. Second, the Administrator repudiates Congress' determination that vehicle emissions should be regulated whenever they "contribute to" dangerous air pollution. Third, the Administrator falsely claims that he lacks the legal authority and technological capacity to regulate GHGs pursuant to § 202(a)(1). Finally, the Administrator argues that domestic regulation would foil international regulatory efforts—a consideration irrelevant to the mandatory statutory and well outside his expertise. In sum, § 202(a)(1) both authorizes the Administrator to regulate GHGs and requires him to apply the statutory endangerment standard

ARGUMENT

I. THE EPA HAS THE AUTHORITY TO REGULATE CARBON DIOXIDE & OTHER GREENHOUSE GASES UNDER § 202(A)(1) OF THE CAA.

Section 202(a)(1)'s unambiguous text clearly authorizes the EPA to regulate GHGs because they fit the statutory definition of an "air pollutant." The plain text, coupled with the EPA's inability to show that applying the CAA would subvert the statute's purpose, make the Rulemaking Denial an impermissible interpretation. A threshold question, however, is what level of deference the Denial ought to be afforded. Although the Court of Appeals for the D.C. Circuit never discussed the deferential standard it employed in evaluating the Rulemaking Denial, *see* 415 F.3d 50, it erred in not applying the standard of deference enunciated in this Court's holding of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

A. The Rulemaking Denial Is not Entitled to *Chevron* Deference.

In *Chevron v. NRDC*, the Court explained its framework for judicial deference: when considering agency interpretations carrying the "force of law," courts should defer to the interpretation unless the statute is clear (known as *Chevron* step one) or the interpretation is unreasonable (step two). 467 U.S. 837, 842-3 (1984); *see also Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). However, *Chevron* did nothing to eliminate the holding of *Skidmore*, which is applicable to agency interpretations lacking the "force of law." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). Since the Rulemaking Denial lacked the "force of law," it is only entitled to *Skidmore* deference.

1. The Rulemaking Denial lacks the "force of law" requisite for *Chevron* deference.

In *Christensen*, this Court held that agency "interpretations . . . which lack the force of law . . . do not warrant *Chevron*-style deference." 529 U.S. at 587. The *Christensen* Court considered an interpretation in an opinion letter, holding that such interpretations, "are 'entitled to respect' under our decision in *Skidmore*, but only to the extent that those interpretations have the 'power to persuade.'" *Id.* (citations omitted). The *Christensen* Court went on to clarify that

"[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation *contained in a regulation*." 529 U.S. 576, 587 (emphasis added). A year later, in *Mead*, the Court again held that not all constructions in informal agency adjudications are entitled to *Chevron* deference. 533 U.S. at 226-27 (2001). In particular, the Court held that "administrative implementation of a statutory provision" is entitled to *Chevron* deference "when it appears that Congress has delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* (emphasis added).

Thus, the "central message" of *Mead* is that "an agency is not entitled to *Chevron* deference unless Congress has conferred, and the agency has actually exercised, authority to take actions that 'carry the force of law.'" Ronald Levin, *Mead & the Prospective Exercise of Discretion*, 54 Admin. L. Rev. 771, 773 (2002). Therefore, "[a]ccording to *Mead*, if the agency did not actually use its authority to take binding action when it issued the document under review, *Chevron* is unavailable." *Id.* at 787; *see also id.* at 790 (discussing the difficulty in showing that a denial of a petition for rulemaking "had 'the force of law' in *Mead* terms."). The 2006 decision in *Gonzales v. Oregon* further bolsters this reading of *Mead*: "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, *the rule must be promulgated* pursuant to authority Congress has delegated to the official." 126 S. Ct. 904, 916 (emphasis added).

As a result of the *Christensen*/*Mead* refinement of *Chevron*, the Rulemaking Denial merits only *Skidmore* deference. There is no doubt that the EPA generally possesses the authority to make rules carrying the "force of law," *see, e.g.*, *Chevron*, 467 U.S. 837, but in the instant case, the Rulemaking Denial was not "promulgated in the exercise of [congressional] authority,"

Mead, 533 U.S. at 227, because the EPA denied any such authority. Similarly, the EPA's interpretation was not "contained in a regulation," *Christensen*, 529 U.S. at 587, or a "rule," *Gonzales*, 126 U.S. at 916, because the EPA *refused* to regulate. Therefore, since the Rulemaking Denial has no "force of law," *Christensen* and *Mead* compel the conclusion that it is not entitled to *Chevron*-style deference; instead, it is merely entitled to *Skidmore* deference.

2. The Court should not defer to agency interpretations in jurisdictional disputes.

The Rulemaking Denial also calls into the question the propriety of deferring to agency interpretations in jurisdictional disputes. This issue has been raised in this Court before, but never resolved. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 851 (2001). There are good reasons why courts should not defer to interpretations that modify agency jurisdiction, primary among them that "Congress would be unlikely to want agencies to have [that] authority," and deferring to agencies "would be to allow them to be judges in their own cause, in which they are of course susceptible to bias." Cass Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2099 (1990). This could lead to agency aggrandizement or abrogation of statutory duties "without any effective judicial check." Merill, 89 Geo. L.J. at 867; *see also Miss. Power v. Miss.*, 487 U.S. 354, 383 (1988) (Brennan, J., dissenting) (arguing against deferring to agency interpretations in jurisdictional disputes.).

3. The Rulemaking Denial ought to be entitled little deference under *Skidmore*.

In *Mead*, the Court emphasized that "*Chevron* did nothing to eliminate *Skidmore*'s holding." 533 U.S. at 234. Under *Skidmore*, deference granted to agency action varies on a case-to-case basis, with courts taking into consideration the "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements" *Skidmore*, 323 U.S. at 140. The *Mead* Court explained that agency opinions

and interpretations under *Skidmore* are not controlling, but come from a body of experience that deserves "respect" insofar as they have the "power to persuade." *Mead*, 529 U.S. at 587.

Under *Skidmore*, the EPA's claim that it lacks authority to regulate GHGs is entitled to little deference. As is discussed below, the "thoroughness evident in its consideration" and the "validity of its reasoning" are simply insufficient. *Skidmore*, 323 U.S. at 140. As for its "consistency with earlier and later pronouncements," the Rulemaking Denial is a direct reversal of the positions of the prior EPA Administrator and the two previous Generals Counsel. *See* Browner Testimony; Guzy Testimony; Cannon Memorandum. As the Court has said, "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991).

B. The Unambiguous Text of § 202(a)(1) Grants the EPA the Authority to Regulate Carbon Dioxide and Other Air Pollutants Associated with Climate Change.

Even if this Court were to apply *Chevron*, the EPA's decision would remain erroneous under step-one. *See Massachusetts v. EPA*, 415 U.S. 50, 67-8 (Tatel, J., dissenting). As the next section discusses, the CAA's plain text squarely contradicts the EPA's position. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

1. Carbon dioxide and other GHGs clearly fit the CAA's definition of a pollutant.

Section 202(a)(1) to the CAA "plainly authorizes regulation of (1) any air pollutants emitted from motor vehicles that (2) in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Mass. v. EPA*, 415 F.3d at 67 (Tatel, J., dissenting). The EPA claims it lacks the authority to regulate GHGs because they do not qualify as "air pollutants." *See* 68 Fed Reg. at 52,928. However, the

CAA itself contains the relevant definition of an "air pollutant": "the term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). This "[e]xceedingly broad language" clearly encompasses vehicular GHG emissions since "they are 'physical [and] chemical . . . substances or matter . . . emitted into . . . the ambient air.'" *Mass. v. EPA*, 415 F.3d at 67 (Tatel, J., dissenting).

Moreover, in 1990 Congress explicitly included CO2 in a partial list of air pollutants in § 103(g), 42 U.S.C. § 7403(g), along with numerous other pollutants that the EPA already regulates. *See* EPA, Six Common Air Pollutants, at http://www.epa.gov/air/urbanair/6poll.html (last visited Dec. 3, 2006). The EPA's conclusion that CO2 is not an "air pollutant" is thus directly contradicted by the unambiguous text of the CAA. As this Court has continually stated: "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc v. United States*, 541 U.S. 176, 183 (2004) (citation omitted).

2. The EPA ignored the plain words of the CAA in concluding that it did not have the authority to regulate CO2 & other GHGs.

As this Court has repeatedly said, "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors,* 458 U.S. 564, 571 (1982) (citation omitted). In issuing its Rulemaking Denial, the EPA ignored the plain words of the CAA. The D.C. Court of Appeals similarly erred in not applying the plain and unambiguous words of the statute, violating the "preeminent canon of statutory interpretation." *BedRoc,* 541 U.S. at 183.

C. The EPA Has not Shown an "Extraordinarily Convincing Justification" for Disregarding the Unambiguous Text of the Clean Air Act.

Despite the unambiguous text of § 202(a)(1), the EPA contends that a "more holistic analysis … [of] the text, structure, and history of the CAA as a whole, as well as the context provided by other legislation that is specific to climate change" demonstrate that it cannot regulate GHGs. *Mass. v. EPA*, 415 F.3d at 68. But to in order to overcome the plain words of the statute, the EPA needs "an extraordinarily convincing justification." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). The Court has explained that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (citation omitted). "We have reserved 'some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.'" *Oceanic Contractors*, 458 U.S. at 571 (citation omitted).

The EPA gives four reasons for its counter-textual position, all of which are insufficient to show that regulating GHGs "would thwart the obvious purpose of the statute." *Id.*

1. The Clean Air Act's broad wording clearly encompasses GHGs.

The EPA's first argument is that since the 1965, 1970, and 1977 Congresses were not specifically concerned with global warming, the Act cannot apply to GHGs. 68 Fed. Reg. at 52,925-26. Although it is true that Congress did not spend extensive time on global warming, there are nonetheless indications that Congress did have global climate issues in mind when enacting and amending the CAA. For example, when § 302(h) was added in 1970 (which includes harm to "climate" in the definition of "welfare"), Senator Boggs introduced a report into the record stating that "air pollution alters climate and may produce global changes in

temperature. . . . The addition of particulates and carbon dioxide in the atmosphere could have dramatic and long-term effects on world climate." 116 Cong. Rec. 32,917. In 1977, when amending the CAA, the House Report stated that particulate matter "could significantly modify the Earth's climate" and that the EPA should consider "weather and climate modifications" when revising NAAQS. H.R. Rep. No. 95-294, at 339. Thus, the EPA exaggerates when it claims that Congress did not have global climate issues in mind when it enacted and amended the CAA.

Further, arguments based on a lack of more specific Congressional attention to global warming during the 1960s and 1970s ignore the fact that "in those years the scientific understanding of the issue was nascent at best." *Mass. v. EPA*, 415 F.3d at 68 (Tatel, J., dissenting). In writing the language of § 202 broadly, Congress predicted that additional research would lead the EPA to regulate pollutants beyond those named in the Act. While amending the CAA in 1977, the House Report indicated that the EPA should be more active in regulating new pollutants: "There are numerous other air pollutants which to date have not been subject to regulations under the [CAA]. Despite mounting evidence that these pollutants are associated with serious health hazards . . . the Agency has failed to promulgate regulations to institute adequate control measures for these unregulated pollutants." H.R. Rep. No. 95-294, at 36.

The legislative history confirms what § 202's broadly-written wording indicates: when enacting and amending the Clean Air Act, Congress clearly contemplated that the EPA would regulate then-unregulated pollutants. *Id.*. And as this Court has held, the plain meaning of a statute is no less compelling simply because it can be applied to new situations as knowledge or circumstances change: "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) (citation omitted).

2. The EPA cannot avoid the Congressional intent clearly expressed in the statutory text by asserting that its preferred approach would be better policy.

The EPA's second argument for disregarding the plain text of the CAA, that "for practical and policy reasons global warming should be dealt with through specifically tailored statutes," similarly "fails to trump Congress' plain language." *Mass. v. EPA*, 415 F.3d at 69 (Tatel, J., dissenting). Though it may be true that "specifically-tailored statutes" could better address the threat of global warming, "an agency may not 'avoid the Congressional intent clearly expressed in the [statutory] text simply by asserting that its preferred approach would be better policy.'" *Id.* (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)

The EPA nonetheless asserts that since Congress added specific provisions to the CAA in 1977 and 1990 to address the global problem of ozone depletion, the court should infer that "the Act's general provisions do not cover such global problems." *Id.* However, the text of the statute and the legislative history show that when Congress added this provision, it did not limit the EPA's authority to merely non-global air pollution issues. Congress explicitly provided that "nothing in this [ozone-specific] part shall be construed to alter or affect the authority of the Administrator under . . . any other provision of this Act." Pub. L. No. 95-95, § 158 (1977). The accompanying House Report also noted that the EPA could already regulate emissions to protect stratospheric ozone under its existing CAA authority, but that the Committee merely wanted to "to focus special attention on the potential ozone depletion problem." H.R. Rep. No. 95-294, at 102-3. The language and history of the provisions addressing global ozone depletion therefore actually suggest the opposite of the EPA's claim: Congress delegated the EPA broad authority to regulate "any air pollutant," 42 U.S.C. § 7521(a)(1), even those with transnational effects.

The EPA further pursues this line of argument by claiming that the regulation of GHGs through § 202 would require regulations under other sections of the Act that would be, in the

EPA's opinion, unworkable. *Mass. v. EPA*, 415 F.3d at 69. The CAA requires the Administrator to maintain a list of air pollutants that "in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). For each pollutant on that list, the Act requires the Administrator to set national ambient air quality standards (NAAQS) levels that, in the judgment of the Administrator, "are requisite to protect the public health," or, in other sections of the Act, are "requisite to protect the public welfare." Id. § 7409(b); *see also id.* §§ 7407, 7410(a)(1). The Act then requires states to submit plans detailing how they will attain these NAAQS. *Id.* § 7410. The EPA argues that since "CO2 disperses relatively evenly throughout the lower atmosphere, states would have only minimal control over their atmospheric CO2 concentrations and thus over whether they meet the CO2 NAAQS." *Mass. v. EPA*, 415 F.3d at 69. Given the difficulties in regulating CO2 with NAAQS, the EPA attempts to conclude that no provision of the CAA, including § 202(a)(1), authorizes it to regulate any GHGs. *Id.* at 70.

"This unwieldy argument fails." *Id.* First, assuming *arguendo* that the NAAQS system would be wholly inappropriate for CO2, the "the absurd-results canon would justify at most an exception limited to the particular unworkable provision." *Mass. v. EPA*, 415 F.3d at 70 (Tatel, J., dissenting); *see also Holy Trinity Church v. United States*, 143 U.S. 457, 459-60 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."). As the EPA acknowledges, there are feasible ways to regulate CO2 emissions from automobiles, *see* 68 Fed. Reg. at 52,929, and given its authority under § 202(a)(1) to do so, there is no good reason to use the "unworkability" of one provision of the Act to justify not using a wholly separate, completely feasible provision found elsewhere in the Act.

Moreover, it is not entirely clear that the NAAQS system would produce the absurdity that the EPA claims; the CAA provides a "safe harbor" for states that are unable to meet NAAQS due to emissions originating from outside the country. 42 U.S.C. § 7509a(a). Although the safe harbor in the context of CO2 regulation might make the NAAQS rather insignificant for the states, it would hardly render the regulation of CO2 under other provisions of the CAA unworkable. Further, the text of the CAA "in no way . . . . suggests that a pollutant should not be listed, or a standard not established, because compliance will require a significant period of time." Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems*, 12 Penn. St. Envtl. L. Rev. 15, 81 (2004). "Indeed, the United States has still not achieved compliance with many of the NAAQS established following the 1970 enactment of these requirements, thirty-three years later." *Id.* Though attaining NAAQS for CO2 would be challenging, that does not mean that the CAA does not authorize the regulation in the first place.

3. *FDA v. Brown* is inapposite because there would be no conflict between EPA regulation of CO2 and prior or subsequent global warming legislation.

The EPA's third argument, relying on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), is that Congressional legislation calling for the study of climate change, paired with Congress' failure to pass legislation specifically authorizing the regulation of GHGs, demonstrates that the CAA cannot be applied to GHGs. *See* 68 Fed. Reg. at 52,928. In *Brown & Williamson*, the Court held that the FDA did not have the authority to regulate tobacco products under the Food, Drug, and Cosmetic Act (FDCA) because "Congress ha[d] clearly precluded the FDA from asserting jurisdiction to regulate tobacco products." 529 U.S. at 126. For a number of reasons, the Court's holding in *Brown & Williamson* is inapplicable to EPA regulation of GHGs.

The *Brown & Williamson* Court relied heavily on a "direct, irreconcilable conflict between FDA jurisdiction over tobacco under the FDCA and later statutes expressly regulating

tobacco." *Mass. v. EPA*, 415 F.3d at 70 (Tatel, J., dissenting). FDA regulation of tobacco products would have compelled the FDA to ban them entirely because "it would be impossible to prove they were safe for their intended use." *Brown & Williamson*, 529 U.S. at 137. The Court found this consequence to be in direct conflict with legislation passed after the FDCA, which "reveal[ed Congress'] intent that tobacco products remain on the market." *Id.* at 139. The Court also found it significant that until 1995, the stated and "unconditional" position of the FDA was that "[r]egulation of cigarettes is to be the domain of Congress," and that "any such move by FDA would be inconsistent with the clear congressional intent." *Id.* at 158. "[W]hen Congress [subsequently] created a distinct regulatory scheme addressing the subject of tobacco and health," the Court said, "it understood that the FDA [was] without jurisdiction to regulate tobacco products and ratified that position." *Id.* at 157.

The situation in regards to EPA jurisdiction over GHGs is wholly different. First, the EPA's jurisdiction over GHGs would not rival FDA jurisdiction over tobacco. As Judge Tatel pointed out, "[a]cting under the CAA, EPA already extensively regulates the energy and transportation industries, whereas the FDA had no prior authority over the tobacco industry." 415 F.3d at 71. "Moreover, EPA jurisdiction would lead only to *regulation* of GHGs," *id.*, which, under § 202, would only take effect "after such period as the Administrator finds necessary" for technology development, "giving appropriate consideration to the cost of compliance." 42 U.S.C. § 7521(a)(2). "By contrast, FDA jurisdiction over tobacco would have triggered a total product ban." *Mass. v. EPA*, 415 F.3d at 71.

Additionally, and also in direct contrast to the situation in *Brown & Williamson*, there is no conflict between the EPA's authority under § 202(a)(1) to regulate GHGs and subsequent Congressional enactment of global warming legislation. *See id.* "Whereas an FDA ban on

tobacco would have directly conflicted with congressional intent that tobacco remain on the market, EPA regulation of GHGs would be fully compatible with statutes proposing additional research and other nonregulatory approaches to climate change." *Id.*

The EPA points to legislation passed after the enactment of the CAA as evidence "that Congress did not authorize regulation under the CAA to address global climate change." 68 Fed. Reg. at 52,927. However, a review of the provisions the EPA references reveals that none of them limit any grant of existing regulatory authority under the Act—including § 202. For example, § 103(g) calls for "nonregulatory strategies and technologies" for addressing a specified list of pollutants—which includes CO2. 42 U.S.C. § 7403(g). The section does say that "nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements," *id.*, which both the Fabricant Memo, at 6, and the Rulemaking Denial, 68 Fed. Reg. at 52,926, use to emphasize that "Congress did not provide [the EPA with] commensurate regulatory authority." However, § 103(g) "nowhere suggests that EPA lacks authority to regulate carbon dioxide." *Mass. v. EPA*, 415 F.3d at 71. In fact, the argument that § 103(g) somehow prohibits regulation of the pollutants it lists is completely untenable. Many of the pollutants listed by §103(g) are explicitly regulated through other provisions of the CAA, including sulfur dioxides, nitrogen oxides, PM-10 and carbon monoxide. *See* EPA, Six Common Air Pollutants. Both the Fabricant Memo, at 6, and the Rulemaking Denial, 68 Fed. Reg. at 52,926, try to get around this difficulty by subtly mischaracterizing § 103(g)'s list of pollutants, claiming that the section "called for improvements in such measures *for preventing CO2 as well as several specified air pollutants*." (emphasis added). Even a casual reading of § 103(g) demonstrates that Congress fully intended CO2 to be considered a "pollutant," just like every other listed substance, many of which were already regulated. *See* 42 U.S.C. § 7403(g). The most

plausible reading of § 103(g), then, is that while the provision does not authorize any additional regulation, it also does not limit any authority granted elsewhere in the Act.

The same is true in other provisions dealing with climate change. Section 602(e), for example, requires research into climate change, but does not abrogate any authority granted elsewhere in the Act. *See* 42 U.S.C. § 7671(a)(e). Another uncodified section requires sources regulated under Title V of the Act to monitor CO2 emissions, but "says nothing about regulation one way or another." *Mass. v. EPA*, 415 F.3d at 71. *See also* Pub. L. No. 101-549, § 821 (1990). It is readily apparent from a reading of these CO2- and climate-related provisions of the CAA that although Congress did not intend them to be used as sources for new regulation, it also did not restrict the EPA's authority to regulate GHGs under any other section of the Act.

The EPA also points to a failed legislative proposal that would have required GHG emissions reductions as proof that Congress has not authorized the EPA to regulate GHGs. *See* 68 Fed. Reg. at 52,926. The proposal, considered during the process to amend the CAA in 1989 and 1990, was ultimately not included in the amendments. *See* S. 1224, 101st Cong. (1989); H.R. 5966, 101st Cong. (1990). But putting such interpretive value in this failed proposal is completely unwarranted. Compromises are often made in the legislative process, and this Court has repeatedly "refused to rely on congressional inaction to alter the proper construction of a pre-existing statute." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting). "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. 'It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). Additionally, the Court has said that not only is "subsequent legislative history . . . a hazardous basis for inferring the intent of an

earlier Congress," *Pension Benefit Guar. Corp. v. LTV Corp*., 496 U.S. 633, 650 (1990) (citation omitted), but also 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).

The EPA also badly mischaracterizes the role congressional inaction played in the *Brown & Williamson* decision. Using identical language, both the Fabricant Memo, at 9, and the Denial, 68 Fed. Reg. at 52,928, claim that the Court "analyzed FDA's authority in light of . . . failed legislative attempts to confer authority of the type FDA was asserting." However, the *Brown & Williamson* decision explicitly stated, "We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching this conclusion. Indeed, this is not a case of simple inaction by Congress . . . ." 529 U.S. at 155.

What was significant for the Court in *Brown & Williamson* was not Congress' *inaction*, but rather their successful legislative actions that created a regulatory scheme for tobacco wholly apart from the FDCA. *See id.* at 157. There has been no such disavowal of EPA authority in regards to the CAA; in fact, the previous EPA Administrator and former Generals Counsel all maintained that EPA *had* the authority to regulate GHGs under the general provisions of the CAA. *See* Browner Testimony, Guzy Testimony, Cannon Memo. Furthermore, unlike in the case of tobacco, Congress has not constructed a separate regulatory apparatus for GHG emissions. The enacted legislation that deals with climate change only relate to research and do not grant any other agency regulatory authority over GHGs—unlike the case with tobacco.

The one aspect in which GHG and tobacco regulation would be similar is that both would have an economic impact. *See Brown & Williamson*, 529 U.S. at 147; 68 Fed. Reg. at 52,928. The Court in *Brown & Williamson* said that "we must be guided to a degree by common sense as

to the manner in which Congress is likely to delegate a policy decision of such economic . . . magnitude to an administrative agency." 529 U.S. at 133.

Here, however, common sense indicates that Congress *did* intend to delegate the EPA authority to make regulations with wide-ranging economic impacts. In enacting the CAA, Congress made clear that it was doing so to "solve this gigantic air pollution menace," despite the economic costs of regulation. 116 Cong. Rec. 19,205, 19,200 (1970) (statement of Rep. Madden); *see also id*. at 32,901 ("The costs of air pollution can be counted in death, disease and disability . . . in the billions of dollars of property losses; it can be seen and felt in the discomfort of our lives. . . . Air pollution control will be cheap only in relation to the costs of lack of control."). This Court recognized the same principle in *Whitman v. American Trucking Ass'ns*, when it said that "[n]owhere are the costs of achieving [air pollution] standard[s] made part of that initial calculation [to regulate]." 531 U.S. 457, 464-65 (2001). Thus, Supreme Court precedent, legislative history, and "common sense" urge a conclusion opposite that of the EPA.

4. EPA regulation of CO2 and Department of Transportation authority over fuel economy standards could overlap, but would not be incompatible.

The EPA's final argument for disregarding the plain text of the CAA is that since EPA regulation of CO2 emissions from automobiles would overlap with Department of Transportation (DOT) authority over fuel economy standards under the 1975 Energy Policy and Conservation Act (EPCA), Congress could not have intended the definition of "air pollutant" to include CO2. *Mass. v. EPA*, 415. F.3d at 72. Like the previous three, this argument fails to overcome the plain meaning expressed in § 202(a)(1) of the CAA. The EPA argues that because the only presently practical way to reduce CO2 emissions from automobiles is to improve fuel economy, "any EPA effort to set CO2 tailpipe standards under the CAA would either abrogate

EPCA's regime (if the standards were effectively more stringent than the applicable [DOT] standard) or be meaningless (if they were effectively less stringent)." 68 Fed. Reg. at 52,929.

The EPA overstates the significance of DOT regulation of fuel economy standards. First, even if the two statutes overlap, they would not be incompatible; and when two "statutes are 'capable of co-existence,' it becomes the *duty* of [] court[s] 'to regard each as effective'—at least absent clear congressional intent to the contrary." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551(1974)).

Secondly, "Congress acknowledged, and indeed accepted, the possibility of regulatory overlap" between the CAA and other acts. *Mass. v. EPA*, 415 F.3d at 73. The House Report accompanying the 1977 amendments to the CAA made clear that the EPA has authority over *any* air pollutant, even those already regulated by another agency. *See* H.R. Rep. No. 95-294, at 42-43. "The Clean Air Act," the Report explained, "is the comprehensive vehicle for protection of the Nation's health from air pollution. . . . . [I]t is not appropriate to exempt certain pollutants or certain sources from the comprehensive protections afforded by the Clean Air Act." *Id.* The EPCA also recognizes the possibility of regulatory overlap in the setting of fuel economy standards: among the list of four "[c]onsiderations on decisions on maximum feasible average fuel economy," the EPCA provides that "the Secretary of Transportation shall consider . . . the effect of other motor vehicle standards of the Government on fuel economy." 49 U.S.C. § 32902(f). Thus, both the CAA and the EPCA clearly contemplate regulatory overlap.

Third, by the EPA's own admission, the two statutory schemes would not completely overlap, even when considering only presently-available technology. For example, the EPCA currently exempts heavy duty trucks and engines from its fuel economy standards, 68 Fed. Reg. at 52,929. The EPA argues that since heavy duty trucks "only" account for about sixteen percent

of the "U.S. motor vehicle GHG inventory," regulating them would be "ineffective and inefficient," *id.*, although it gives no basis—scientific or otherwise—for concluding that these emissions do not "*contribute* to [] air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (emphasis added).

Finally, the EPA's focus on only presently-available technology is unduly myopic. The EPA concedes that there are other possibilities for reducing automobile GHG emissions, but focuses only on that which is presently available—improving fuel economy—to argue that its regulation of GHGs would be inconsistent with that of the DOT. *See* 68 Fed. Reg. at 52,928. However, § 202(a)(2) clearly contemplates that the EPA should have a role in spurring pollution-reducing technology by permitting regulations prescribed under § 202(a)(1) to take affect only "*after* such period as the Administrator finds necessary to permit the development and application of the requisite technology." 42 U.S.C. § 7521(a)(2) (emphasis added); *see also* S. Rep. No. 1196, at 24 (1970) (explaining that EPA is "expected to press for development and application of improved technology rather than be limited by that which exists . . . today"). Presumably, the types of technology that could be developed to reduce automobile GHG emissions in the future would not overlap whatsoever with the regulatory authority of any other agency. *Cf.* 68 Fed. Reg. at 52,928.

II. THE EPA ADMINISTRATOR ABUSED HIS DISCRETION BY BASING HIS DECISION NOT TO REGULATE GREENHOUSE GASES ON UNENUMERATED POLICY CONSIDERATIONS.

The Administrator's fallback position is that, even if he has authority to regulate GHGs pursuant to § 202(a)(1), that provision also grants him the discretion not to do so. In particular, the Administrator argues that § 202(a)(1) "does not impose a mandatory duty on the Administrator to exercise her judgment," and, moreover, that "even were the Administrator to

make a formal finding regarding the potential health and welfare effects of GHGs . . . section 202(a)(1) would not require her to regulate GHG emissions from motor vehicles." 68 Fed. Reg. at 52,929. Yet the Administrator does have a statutory responsibility to base regulatory decisions on § 202(a)(1)'s explicit, non-discretionary endangerment standard. By failing to apply that standard—and, instead, considering factors inconsistent with Congress's regulatory scheme—the Administrator abused his discretion. The Rulemaking Denial should therefore be remanded for further consideration consistent with § 202(a)(1).

A. Section 202(a)(1) Plainly Requires the Administrator to Base Regulatory Decisions on the Mandatory Statutory Endangerment Standard.

The Rulemaking Denial claims that § 202(a)(1) provides a purely "discretionary authority." 68 Fed. Reg. at 52,929. Under *Chevron* analysis, the Administrator's interpretation merits deference only if "the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). Yet a contextual reading—the most elementary "device of judicial construction"—does yield a "clear sense of congressional intent" in § 202(a)(1). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 344 (1997) (holding that an ambiguous term "must be analyzed to determine whether the context gives the term a further meaning"). Further, this plain meaning is confirmed by other fundamental principles of construction, including the statute's legislative history and § 202(a)'s overall structure. In contrast, the Administrator's interpretation, which requires that the plain language term "judgment" be read in isolation from the very clause in which it appears, is not "consistent with the statute." *NLRB v. United Food & Commercial Workers' Union*, 484 U.S. 112, 123 (1987). Therefore, this is not one of "those rare instances where statutes are drawn in such broad terms that . . . there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 570 (1975) (finding law to

apply in a statute coupling a "shall" command with a "probable cause" standard). On the contrary, by using a "shall" command and providing a clear standard for agency decision-making, Congress has "provided meaningful standards for defining the limits" of agency discretion. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

1. Congress employed mandatory language requiring the administrator to consider the statutory endangerment standard.

Congress indicated the non-discretionary nature of the Administrator's statutory responsibility by employing "the mandatory term 'shall.'" *Miller v. French*, 530 U.S. 327, 337 (2000) (rejecting a statutory construction that "would subvert the plain meaning of the statute, making its mandatory language merely permissive"). Such mandatory language "must . . . be given effect unless there are clear expressions of legislative intent to the contrary." *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Here, the available legislative history confirms that the statute's mandatory language is deliberate. Many other CAA provisions employ permissive, discretionary predicates ("may"), *see*, *e.g.*, 42 U.S.C. § 7521(a)(1), and Congress left § 202(a)(1)'s "shall" undisturbed even as other components of 202(a) were amended. *See* Pub.L. 95-95, § 401(d)(2) (1977). Further, the statute's mandatory language is consistent with Congress's determination that the public health and welfare must be safeguarded, regardless of economic cost of technological limitations. As Senator Muskie, Chair of the Subcommittee on Air and Water Pollution and principal sponsor of the 1970 CAA amendments, explained: "[P]eople and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges *must be met*." 116 Cong. Rec. 32,901-02 (1970) (emphasis added). The statute's mandatory language thus reflects a legislative policy choice binding on the Administrator.

2. The Administrator's discretionary "judgment" is expressly confined to consideration of the mandatory statutory endangerment standard.

Congress further specified the proper object of the Administrator's discretion, as the Administrator is directed to regulate those air pollutants that, "in his judgment, cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) The Administrator's "judgment" is therefore directed toward, and bounded by, the subsequently specified standard. Again, the text's plain meaning is confirmed by its legislative history. As the provision's drafting committee explained, "the committee language is intended to emphasize the necessarily judgmental element *in the task of predicting future health risks* of present action and to confer upon the Administrator the requisite authority to exercise *such judgment*." H.R. Rep. No. 95-294, at 57 (1977) (emphasis added). Thus, while § 202(a)(1) may be ambiguous in other respects, it is unambiguous "[w]ith respect to the question presented in this case," *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002), namely, the question of what it is that the Administrator must judge. Judicial review should therefore terminate, without affording the Administrator's interpretation any deference. *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

To be sure, the statutory phrase "in his judgment" does entrust the Administrator with the limited discretion to determine when § 202(a)(1)'s statutory standard has been satisfied. *See Nat'l Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2710 (2005) (holding that the FCC is "free" to act discretionarily "within the limits of reasoned interpretation" of its governing statute). Accordingly, the Administrator has discretion to make an endangerment finding in the face of "reasonably" conflicting points of view. 42 U.S.C. § 7521(a)(1); *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 26 (D.C. Cir. 1976) (holding that "a determination of endangerment to public health is necessarily . . . based on an assessment of risks"). Further, because the statute lacks a

deadline for agency action, the Administrator also possesses discretion to postpone an endangerment finding until he can ascertain whether the statutory standard is satisfied. *See Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (permitting the EPA to postpone an endangerment finding based on considerations that were "consistent with the statute"). Ultimately, however, the statute confines the Administrator's discretion to consideration of the non-discretionary statutory standard. As this Court explained in *Chevron*, while "an agency to which Congress has delegated policy-making responsibilities may . . . rely upon the incumbent administration's views of wise policy to inform its judgment," the agency may only do so "*within the limits of that delegation*." 467 U.S. at 864 (emphasis added).

3. Read as a whole, Section 202(a) plainly requires the Administrator to make an endangerment finding before considering policy factors.

Sections 202(a)(1) and (2) together reflect Congress's legislative decision that the Administrator must formally assess the demands of public health and welfare *before* engaging in broader policy judgments. As CAA architect Senator Muskie explained: "The first responsibility of Congress is not the making of technological or economic judgments. . . . Our responsibility is to establish what the public interest requires to protect the health of persons." 116 Cong. Rec. 32,901-02 (1970). This policy prioritization—public health and welfare first, other concerns second—requires the Administrator to abide by a two-part process. Initially, under § 202(a)(1), Congress directs that the Administrator "shall" regulate vehicle emissions that, in his judgment, contribute to potentially dangerous air pollution. 42 U.S.C. § 7521(a)(1). This provision requires the Administrator to begin any regulatory inquiry by formally establishing "what the public interest requires to protect the health of persons." 116 Cong. Rec. 32,901-02 (1970). Only *then* does Congress entrust the Administrator with a broader discretion under § 202(a)(2) to make those policy decisions—including technological feasibility and compliance costs—that are

appropriate for rulemaking, implementation, and enforcement. 42 U.S.C. § 7521(a)(2). Section 202(a) as a whole thus permits the Administrator discretion to consider policy factors in § 202(a)(2) only *after* making an endangerment finding pursuant to 202(a)(1). Because the Administrator's assertion of broad discretion under § 202(a)(1) violates "the cardinal rule that a statute is to be read as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), judicial review should terminate at *Chevron* step-one.

4. This Court has repeatedly held that mandatory statutory standards must guide otherwise discretionary agency decision-making.

Three recent cases demonstrate that agencies are required to abide by mandatory statutory standards even when engaging in otherwise discretionary judgments.

First, agencies cannot ignore mandatory statutory standards. In *AT&T Corp. v. Iowa Utils. Bd.*, the Court struck down an FCC regulation because the agency did not "adequately consider" two statutory factors despite mandatory language directing it to do so. 525 U.S. 366, 388 (1999). Though the provision invited agency discretion in determining whether the statutory standard had been satisfied, the FCC's inadequate consideration of that standard resulted in a "judgment" that was neither "rationally related to the goals of the Act" nor "consistent with the statute." *Id.* at 389-90. Similarly, the Administrator's regulatory judgments are "consistent with" § 202(a)(1) only if they address the mandatory standard specified by Congress. *Id.*

Second, mandatory standards bar agencies from relying on non-statutory factors. In *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457 (2001), the Court confronted a mandatory language statute requiring the Administrator to set national air quality standards (NAAQS) that "in [his] judgment . . . are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The Court held that this "absolute" language plainly "does not permit" discretionary consideration of factors, like cost, that are irrelevant to the statute's explicit "requisite to protect the public

health" standard. 531 U.S. at 465; *see also NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (holding that, where a statute authorizes the Administrator to set emission standards "at the level which in his judgment provides an ample margin of safety to protect the public health," "[*e*]*very action* by the Administrator in setting an emission standard is to be taken 'to protect the public health.'") (emphasis added). Analogously, § 202(a)(1)'s mandatory language, coupled with the specified statutory standard, bars the Administrator from contemplating non-statutory factors when making regulation determinations.

Finally, agencies may be compelled to regulate once a mandatory statutory standard is satisfied. In *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002), the Federal Energy Regulatory Commission (FERC) declined to assert jurisdiction over a particular electricity market pursuant to the Federal Power Act (FPA), which requires FERC to set "just and reasonable" prices upon a discretionary agency finding of undue price discrimination. *See* 16 U.S.C. § 824e(a). The Court found that FERC's non-regulation decision was "a statutorily permissible policy choice" because, in applying the mandatory statutory standard, the agency had not found price discrimination. 535 U.S. at 15. However, the Court was careful to note that FPA's mandatory language "would require" FERC to regulate if the relevant statutory standard had been satisfied. *Id.* at 27. Likewise, the Administrator's regulatory choices must be guided by the standard specified in § 202(a)(1), and when the Administrator finds that that standard has been satisfied, the statute's mandatory language requires regulatory action.

In sum, the Administrator is plainly subject to a non-discretionary duty to base his regulatory decisions on the dispositive statutory endangerment standard. The Administrator's assertion to the contrary defies the statute's plain meaning, and is therefore impermissible.

B. The Administrator's Rulemaking Denial is an Agency Action That Must Be Reviewed for Abuse of Discretion.

The Rulemaking Denial constitutes a "final action" under the Administrative Procedure Act (APA) and CAA. *See* 5 U.S.C. § 551(13) (defining "agency action" as "an agency rule . . . or denial thereof"); 42 U.S.C. § 7607(d)(1)(V) (rendering only the APA definitions listed at 5 U.S.C. §§ 553-557 & 706 inapplicable to the CAA). Therefore, the Denial is reviewable in federal Courts of Appeal. *See* 42 U.S.C. § 7607(b)(1); *Mass v. EPA*, 415 F.3d at 53. Moreover, the CAA prescribes judicial "reversal" for "any action of the Administrator"—including the Rulemaking Denial—that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9). This outcome is no fluke of draftsmanship. On the contrary, the drafters of the 1990 Amendments to the CAA deliberately provided judicial review for agency decisions *not* to regulate. As explained in the accompanying Senate Report, "[W]here the EPA inaction culminates in a formal decision *not to take action*, such a situation would constitute a 'denial' within the meaning of APA section 551(13) and would likewise be reviewable in the courts of appeal under section 307(b)(1)." S. Rep. No. 101-228, at 374 (emphasis added). The Report immediately continues:

> Where the Agency does not concede that it has a duty to take action, the citizen suit will test the plaintiff's claim that the failure to act is not in accordance with law (for example, that it violates an unqualified and specific "shall" command in the Act) or that it is arbitrary, capricious, or an abuse of discretion. Examples of the latter categories would include circumstances where the failure to act is not rationally based, ignores clear evidence, or where it frustrates the purposes and goals of the Act by failing to correct deficiencies in air pollution standards or regulations.

Id. at 374-75; *see also Am. Horse Protection Ass'n. v. Lyng*, 812 F.2d 1, 5, 13 (D.C. Cir. 1987) (holding that rejections of rulemaking petitions should be reviewed to determine "whether the agency's decisionmaking was reasoned," including whether the agency made "plain errors of law" and "considered the relevant factors") (internal citations omitted).

By deliberately adopting the APA's broad definition of "action," Congress provided for judicial review of the Administrator's decisions to deny rulemaking petitions. *See* S. Rep. No. 101-228, at 374. Indeed, the Administrator's statutory duty to explain the basis for denying rulemaking petitions, *see* 5 U.S.C. § 555(e), makes such agency actions especially appropriate for judicial review. *See Am. Lung Ass'n. v. EPA*, 134 F.3d 388 (D.C. Cir. 1998) (requiring the EPA to provide a more detailed explanation of a rulemaking petition denial in order to facilitate review).[1] Thus, the CAA and APA together provide a cause of action safeguarding citizens' "right," not only "to petition" the Administrator, *id*., but to receive a lawfully reasoned "statement of the grounds for denial," *id.* § 555(e).

C. The Administrator's Rulemaking Denial Is an Abuse of Discretion Because It Rests On Impermissible Considerations, Not the Mandatory Statutory Standard.

The Rulemaking Denial provides every basis for judicial reversal conceived of by the drafters of the 1990 Amendments. It violates an "unqualified and specific 'shall' command," "ignores clear evidence," and "frustrates the purposes and goals" of the CAA. S. Rep. No. 101-228, at 374-75; *see also Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that the "arbitrary and capricious" standard is met when an agency "relied on factors which Congress has not intended it to consider"). The Denial's core deficiency is that it does not even purport to apply the mandatory statutory endangerment standard set out in § 202(a)(1). Indeed, as though in defiance of the non-discretionary responsibility to base regulatory decisions on § 202(a)(1)'s precautionary standard, the Denial ignores the ample evidence in the record indicating that GHGs do satisfy that standard. Further, the Administrator flouts Congress's legislative decisions by applying standards that Congress consciously rejected and

[1] In contrast, other agency actions do not necessitate a formal (or any) justification. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding that employment decisions made by the CIA Director in the interest of national security are "committed to agency discretion by law" in part because, "[s]hort of permitting cross-examination of the Director concerning his views of the Nation's security," there is no way to review his reasoning).

considering factors that Congress deemed irrelevant. Importantly, the Administrator's Decision "cannot be upheld merely because findings *might have been made* and considerations disclosed which *would justify* its order as an appropriate safeguard for the interest protected by the Act." *SEC. v. Chenery*, 318 U.S. 80, 94 (1943) (emphasis added). On the contrary, the Administrator's "ample power . . . carries with it the correlative responsibility . . . to explain the rationale and factual basis for [his] decision." *Bowen v. American Hosp.*, 476 U.S. 610, 627 (1986). Unfortunately, the Rulemaking Denial's four policy arguments fail to fulfill this responsibility.

1. The Administrator must apply the statute's emphatically precautionary endangerment standard when evaluating the danger posed by GHGs.

The Administrator does not claim that there is uncertainty as to whether GHGs meet § 202(a)(1)'s "precautionary" endangerment standard. *See Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980) (discussing the "precautionary" nature of § 7408(a)(1)'s identical standard). Nor does he address the issue of whether GHGs pose a substantial risk to public health and welfare. Instead, the Administrator selectively draws passages from the NRC Report's "objective and independent assessment of the relevant science." 68 Fed. Reg. at 52,930. In particular, the Administrator cites passages indicating that a causal link between GHGs and global warming "cannot be unequivocally established" and that "climate change models indicating such a linkage "could be deficient" and so do not "constitute proof." *Id*. But on its face, § 202(a)(1) does not require "proof." *Id.* Nor does it require that GHGs' harmfulness must be "unequivocally established." *Id.* Instead, the statute requires the Administrator to regulate if he determines that GHGs "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). By expressly applying far more demanding standard of proof, the Administrator effectively overrules the precautionary regulatory policy mandated by Congress.

Indeed, Congress employed no fewer than three terms to emphasize that the Administrator should apply a precautionary standard when "judg[ing]" whether to regulate pollution emissions. 42 U.S.C. § 7521(a)(1). Drawing on plain meanings, *endanger* means to create a "risk of being injured," *anticipate* implies that the Administrator must "foresee" those risks "in advance," and *may reasonably* permits regulation based on perceptions of future risk so long as those perceptions are "not extreme." *See Merriam Webster Collegiate Dictionary* 54, 411, 920, 1037 (11th ed. 2003). Thus, far from requiring definite proof of extant harm, the statutory standard can be satisfied even if there is no present injury, no certainty of future injury, and no consensus as to whether (or with what likelihood) there will be any injury at all. This precautionary emphasis is the result of legislative fine-tuning, as Congress specifically amended § 202(a)(1) in order to introduce the "may reasonably be anticipated" language where simple endangerment ("will endanger") was previously required. *See* Pub.L. 95-95, § 401(d)(2) (1977). Identical or nearly identical language was deliberately adopted throughout the 1977 amendments so as "to emphasize the preventative or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs, to emphasize the predominant value of protection of public health." H.R. Rep. No. 95-294, at 49.

Moreover, the Administrator ignores ample evidence in the NRC Report indicating that GHGs do in fact satisfy the statutory standard. For example, the Report's first sentence asserts that "Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise." J.A. at 151. The Report's Summary further notes that "the mid-range model estimate of human induced global warming" yields a "predicted warming of 3° Celsius by the end of the 21st century." *Id.* Referring to this figure, the NRC later explains that "[i]f globally averaged temperature increases

approach 3° Celsius . . . they are likely to have substantial impacts on human endeavors and on natural ecosystems." *Id.* at 204. Elsewhere, the Report observes that "[g]lobal warming could well have serious adverse societal and ecological impacts by the end of this century." *Id.* at 161. Finally, the Report concludes that "U.S. society is *likely* to be able to adapt to *most* of the climate change impacts on human systems, but these adaptations may come with substantial costs." *Id.* at 198-99 (emphasis added).

The NRC Report thus anticipates that global warming will endanger the entire catalogue of interests that Congress intended to safeguard. See 42 U.S.C. § 7602(h) (defining "welfare" within the CAA to include "effects on economic values and on personal comfort and well-being," as well as "effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, *and climate*") (emphasis added). The Report's predictions therefore directly support an endangerment finding under § 202(a)(1)'s precautionary standard. Indeed, insofar as the Administrator accepts that the NRC Report is itself "reasonabl[e]," the dire prognosis contained in that document demonstrates that GHGs *are in fact* "reasonably anticipated to endanger public health and welfare." 42 U.S.C. § 7521(a)(1).

2. The Administrator must regulate mobile source emissions that "contribute to" potentially dangerous air pollution.

The Administrator next argues that, because GHGs are emitted from many sources around the world, any regulation pursuant to § 202(a)(1) would yield, not a "sensible regulatory scheme," but "an inefficient, piecemeal approach." 68 Fed. Reg. at 52,931. Yet it is not for the Administrator to evaluate whether or not the CAA—a lengthy statute defined by innumerable policy tradeoffs—constitutes a sufficiently comprehensive regulatory strategy. *See Rodriguez v. United States,* 480 U.S. 522, 525-526 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular

objective is the very essence of legislative choice."). The Administrator is instead required to fulfill his statutory responsibilities within the regulatory scheme that Congress has designed, and so may not dismiss his statutory responsibilities on the grounds that Congress should have approached the problem in a different fashion. *See also* Subsection I.C.2, *supra*.

Here, Congress explicitly required the Administrator to regulate mobile sources that "cause, *or contribute to*, air pollution," 42 U.S.C. § 7521(a)(1) (emphasis added). This language reflects Congress's decision that potentially dangerous mobile source emissions should be regulated, regardless of whether additional pollution sources also exist. This focus on contributory pollution sources is central to the statute's precautionary goal because "merely" contributory pollution sources can pose serious health risks. *See* EPA Office of Air Quality Planning and Standards, *National Air Quality and Emissions Trends Report, 1999*, 26 (2001) (describing N20's severe health effects and noting that nearly half of U.S. ambient N2O emissions result from non-mobile sources). Further, some pollutants, including lead, pose substantial health risks *only* in combination with other pollution sources, and yet are regulated under a provision containing the same "cause and contribute to" standard of § 202(a)(1). *See Ethyl Corp*, 541 F.2d at 31 (upholding regulation of lead emissions because the "absorption of lead automobile emissions" poses risks "when added to all other human exposure to lead").

Though the Administrator never addresses the issue, the record is replete with evidence that U.S. vehicles do contribute to GHG pollution. Approximately twenty percent of all U.S. CO2 emissions are from automobiles, not including trucks. JA at 14. Further, the total CO2 emissions from cars and light trucks combined are greater than the *nationwide* CO2 emissions from all but three other countries—China, Russia, and Japan. *Id.* at 18. It should therefore be no surprise that "the President's global climate change policy" aspires to "slow the growth of GHG

emissions" by "increasing automobile fuel economy." 68 Fed. Reg. at 52,933. Indeed, by holding up the President's plan as an alternative to agency regulation, *id.* at 52,931-33, the Administrator himself appears to accept both that vehicular GHG emissions contribute to global warming and that reducing those emissions would have beneficial consequences for public health and welfare.

3. The Administrator is authorized to regulate CO2, and technological constraints do not bar an endangerment finding with respect to N2O, CH4, and HFC.

The Administrator's third argument is that he need not address the statutory standard because he lacks the authority to regulate CO2 emissions and the technological capacity to regulate the other GHGs cited by petitioners. 68 Fed. Reg. at 52,931. In fact, however, § 202(a) both provides the Administrator with authority to regulate CO2 emissions and precludes consideration of technological feasibility. 42 U.S.C. § 7521(a).

First, while the Administrator is within his discretion to conclude that "improv[ing] fuel economy" constitutes the only "practical way to reduce tailpipe emissions of CO2," he is simply incorrect in his belief that "only the DOT is authorized to set fuel economy standards." 68 Fed. Reg. at 52,931. On the contrary, the EPA and the DOT have statutory authority to impose fuel economy standards pursuant to § 202(a)(1) and the 1975 Energy Policy and Conservation Act (EPCA), respectively. *See* 49 U.S.C. § 32902(f). Because these two regulatory regimes would serve different purposes—pollution control and fuel economy—their standards may differ. While some vehicles may be subject to both regulatory regimes, others may not, and the controlling regulatory regime may vary from vehicle to vehicle. *See supra,* Subsection I.E.4 (explaining that heavy trucks are exempt from DOT fuel economy standards but contribute significantly to U.S. GHG emissions). Even if the two regimes were perfectly overlapping, both should nonetheless be given legal effect. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen 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.").

Second, the Administrator argues that he has no responsibility to make an endangerment finding with regard to N2O, CH4, and HFC because there is presently no technology available to curb emissions of those chemicals. 68 Fed. Reg. at 52,931. This conclusion betrays an incomplete reading of the relevant provision. Section 202(a)(2) explains that regulations pursuant to § 202(a)(1) "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." 42 U.S.C. § 7521(a)(2). Just as the Court has "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere . . . been expressly granted," *Am. Trucking*, 531 U.S. at 467, here the Court should refuse to find an authorization to consider technological feasibility in one provision that is expressly granted in the statute's very next subsection. The statute thus directs that the Administrator consider issues of technological capability (and compliance costs) *after* making an endangerment finding pursuant to § 202(a)(1). This approach is confirmed by legislative history. As the Senate Report explained, the EPA "is expected to press for the development and application of improved technology rather than be limited by that which exists." S. Rep. No. 1196, at 24 (1970). The Administrator therefore lacks the discretion to withhold an endangerment finding for lack of presently-available technology.

4. The Administrator's inexpert foreign policy speculations are irrelevant to the statutory endangerment standard.

The Administrator's final reason for rejecting the petitioner's rulemaking petition is that regulating GHGs might "weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies." 68 Fed. Reg. at 52,931. This argument comes no closer to

addressing the mandatory statutory standard than those that preceded it: so long as domestic vehicular GHG emissions "contribute to" potentially dangerous air pollution, as they plainly do, *see supra*, Subsection II.B.2, then those emissions must be regulated pursuant to § 202(a)(1), regardless of the regulatory policies adopted by foreign countries. The Administrator marshals two arguments in the hope of avoiding this obvious conclusion.

First, the Administrator suggests that he should consider the public health and welfare effects of GHG *regulation* as opposed to the effects of GHGs themselves. *See* Fed. Reg. at 52,931 ("Any potential benefit of EPA regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions."). This argument resembles the failed FDA position in *FDA. v. Brown & Williamson*, 529 U.S. 120 (2000). There, the FDA predicted that a tobacco ban would generate "a black market offering cigarettes even more dangerous than those currently sold legally." *Id* at 139. In reviewing the agency's reasoning, the Court conceded that such factors might have to be "considered when developing a regulatory scheme that achieves the best public health result." *Id.* at 140. Nonetheless, the Court rejected the agency's reasoning because, on a "straightforward reading," the relevant statute required the agency to consider those "benefit[s] to health" resulting from the tobacco product itself, and not the potential avoidance of a tobacco black market. *Id.* at 141.

An analogous result is even more appropriate in the present case. Whereas the Food, Drug, and Cosmetic Act (FDCA) explicitly granted the FDA broad discretion to "weigh[] *any probable benefit* to health from the use of" tobacco products, 21 U.S.C. § 360c(a)(2) (emphasis added), the provision at issue here, § 202(a)(1), requires the Administrator to regulate according to a specified statutory standard. *See supra*, Section II.A. Therefore, on a "straightforward reading," *Brown & Williamson*, 529 U.S. at 141, § 202(a)(1) requires the Administrator to make

judgments regarding the direct effects of "air pollution" on "public health and welfare"—and not the diplomatic consequences of the regulation itself. 42 U.S.C. § 7521(a)(1). Further, the Administrator offers only terse and inexpert speculations on international diplomacy, even though Congress typically expects agency discretion to be "based on the expert knowledge of the agency," *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978); *see also Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137,147 (2002) (rejecting the NLRB's "chosen remedy" because it was based on policy arguments "outside the Board's competence"). Therefore, here, just as in *Brown & Williamson*, the Administrator's inexpert "judgment . . . is no substitute for the specific safety determinations required by the" governing statute. 529 U.S. at 140.

Finally, the Administrator asserts that international solutions to "important foreign policy issues," like global warming, are necessarily within "the President's prerogative." 68 Fed. Reg. at 52,931. Yet the Administrator is not the President. Far from possessing the full panoply of discretionary executive powers, whatever those might entail, the Administrator instead wields only those powers entrusted to him by Congress. That delegation entails both discretionary powers and non-discretionary responsibilities. *See Heckler*, 470 U.S. at 832 ("Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers"). Indeed, "[i]t is axiomatic that an agency must act in accordance with applicable statutes and its regulations." *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998). Here, the choice to require precautionary domestic regulation in the absence of international coordination, like the decision to regulate vehicular emissions as opposed to other pollution sources, *see supra* Subsection I.B.3, ultimately rests with Congress. Should that policy choice prove counterproductive, Congress—and not the Administrator—has the power to revise the law accordingly. *See, e.g.*, Pub. L. No. 101-549 (1990) (amending the CAA in response to

judicial decisions holding that § 112's plain meaning required that regulation initially be based only on health considerations, not technological constraints). In the meantime, the Administrator has no special discretion to ignore domestic laws bearing on issues of international significance. On the contrary, the Administrator, like all other agency administrators, is bound to observe mandatory Congressional directives, including the one set out in § 202(a)(1).

In sum, the Rulemaking Denial ignores abundant evidence indicating that GHGs do satisfy § 202(a)(1)'s unambiguously precautionary standard. Further, the Administrator applies standards that Congress consciously rejected, considers factors that Congress deemed irrelevant, and bases his decision on plain errors of law. Thus, instead of fulfilling his solemn statutory responsibility, the Administrator has acted in a manner that is "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9). Congress did not provide the Administrator with unlimited discretion, "and the Administrator may not usurp it." *Mass. v. EPA*, 415 F.3d at 74 (Tatel, J., dissenting).

CONCLUSION

The judgment of the Court of Appeals of the D.C. Circuit should be reversed and remanded for proceedings consistent with the foregoing reasons.

Respectfully submitted,

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