
**In the Morris Tyler Moot Court of
Appeals at Yale Law School**

MASSACHUSETTS ET AL.,
PETITIONERS,

V.

ENVIRONMENTAL PROTECTION AGENCY ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF OF RESPONDENT
ENVIRONMENTAL PROTECTION AGENCY

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QUESTIONS PRESENTED

1. Whether clean, safe, common, and life-sustaining gases such as CO₂ may be treated as “pollutants” under section 202(a) of the Clean Air Act because of global warming concerns?
2. Whether EPA’s decision not to initiate rulemaking is reviewable at all, and if it is, whether the agency in fact considered any factors unambiguously contrary to the intent of Congress?

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*ON WRIT OF CERTIORARI TO THE
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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-93a) is reported at 415 F.3d 50 (D.C. Cir. 2005). The opinions and dissenting statements on denial of rehearing en banc (Pet. App. 94a-98a) are reported at 433 F.3d 66 (D.C. Cir. 2005).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2005. The petition for a writ of certiorari was filed on March 2, 2006, and was granted on June 26, 2006. 126 S. Ct. 2960. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

The relevant statutory provisions appear in an appendix attached to this brief.

STATEMENT OF THE CASE

On October 20, 1999, several organizations petitioned the U.S. Environmental Protection Agency (“EPA”) seeking regulation of certain greenhouse gases (“GHGs”) — specifically, carbon dioxide (“CO₂”), methane (“CH₄”), nitrous oxide (“N₂O”), and hydrofluorocarbon

(“HFCs”).¹ The specific request was for the agency to prescribe emission standards for new motor vehicles and engines pursuant to section 202(a) of the Clean Air Act (“CAA” or “Act”). *See* Control of Emissions From New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003); Pet. App. 5-45.

Petitioners’ submissions suggested that the Earth’s temperature is increasing, and that this increase might be attributable to anthropogenic GHG emissions. They further submitted that, although U.S. auto emissions compose less than 5% of global greenhouse emissions,² regulation of motor vehicles under section 202(a) would serve in abating the possible threat to public health posed by potential changes in global climate patterns. Pet. App. 13-15. They contended that the specified GHGs are “air pollutants” under section 202(a), Pet. App. 16-20, and that, through their potential contribution to global warming, these “pollutants” threaten public health by increasing, *inter alia*, the prevalence of infectious diseases, heat stress, skin cancer, cataracts, and immune suppression. Pet. App. 21-28. They also argued that global warming threatens depletion of resources and disruption of weather patterns, along with a possible rise in sea levels, reduced water quality, and reduced air quality through increased levels of allergens. Pet. App. 28-35.

To remedy these potential ills, Petitioners asked the EPA to increase standards for corporate average fuel economy. They argued that a fuel economy regulation, not expressly within the authority of the EPA, would be a permissible indirect regulation of “emissions.” *See* 42 U.S.C. § 7521 (granting authority to create “standards applicable to” emissions). According to

¹ Although there are many GHGs, there is essentially only one that matters — CO₂. Given its clearly dominant prevalence *vis-à-vis* the other GHGs, any approach to GHG regulation would necessarily rise and fall with the success of CO₂ regulation strategies. For that reason, this brief will occasionally switch between discussing GHGs in general and CO₂ in its particulars, but in all mentions of CO₂ it should be understood that this particular GHG serves only as the most crucial representative of the broader class.

² The submissions indicated that U.S. transportation emissions constitute about 7% of global fossil fuel emissions, Pet. App. 238, and that about two-thirds of those emissions are attributable to automobiles. Pet. App. 18.

Petitioners, increased fuel economy standards would “create the rapid market introduction of hybrid-electric and zero emission vehicles.” Pet. App. 35-45; 68 Fed. Reg. at 52,923.

On January 23, 2001, the EPA requested public comment on all issues raised in the petition and received numerous responses. Control of Emissions From New and In-Use Highway Vehicles and Engines: Request for Comment, 66 Fed. Reg. 7486 (Jan. 23, 2001).³ The comments addressed a variety of scientific, technical, legal, and economic issues raised by the petition. *See generally* 68 Fed. Reg. at 52,924-25.

The EPA denied the petition on September 8, 2003, noting two independent reasons to decline regulation. First, EPA denied the petition because, in its view, it lacks authority to regulate CO₂ and other GHGs. 68 Fed. Reg. at 52,925. Although former EPA General Counsel had concluded that CO₂ qualifies as an air pollutant and is therefore regulable, the current General Counsel, and in turn the Administrator, found that CO₂ is not a pollutant, and is therefore beyond the authority of the EPA. The Administrator was persuaded that, given this Court’s recent ruling in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the EPA lacked authority to treat CO₂ as a pollutant because such treatment would be at odds with several congressional enactments including the structure of the CAA itself and the Transportation Department’s independent regulatory authority over fuel economy. 68 Fed. Reg. at 52,925-29.

The Administrator also declined to issue a regulation on the grounds that, even if the EPA had the requisite authority, such regulation was not called for at the time. The published decision relied substantially on the National Research Council’s CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001), which was seen as an “objective and independent assessment of the relevant science.” 68 Fed. Reg. at 52,930. EPA’s published decision crucially

³ EPA received nearly 50,000 comments in response, many of them nearly identical e-mails expressing support for the petition. 68 Fed. Reg. at 52,924.

noted that the Administrator had never made the endangerment finding that section 202(a) requires before regulation, *id.* at 52,929, and the Administrator also declined to make such a finding because there “continue to be important uncertainties in our understanding of . . . climate change” such that regulation “would require the EPA to make scientific and technical judgments without the benefit of the studies being developed.” *See id.* at 52,930, 52,931.

The Administrator also believed that he could decline to regulate GHG emissions even if he had made an endangerment finding. *Id.* at 52,929. The decision discussed concerns that unilateral EPA regulation could weaken U.S. efforts to persuade developing countries to reduce their GHG emissions in the future, and that U.S. emission reductions under a regulation might therefore be offset at best by increased emissions abroad. *Id.* at 52,931. The decision also noted the salutary impact of several nonregulatory programs for GHG reduction already in place. *Id.* at 52,931-33.

Dissatisfied with this lengthy decision denying their plea for rulemaking, several parties petitioned the D.C. Circuit Court of Appeals for review on October 23, 2003. Pet. App. 1. The cases were consolidated, and were heard on April 8, 2005. *Id.* The court of appeals did not produce a majority opinion. *See* 415 F.3d 50 (D.C. Cir. 2005). Judge Randolph ruled on the merits, holding that EPA’s decision was not arbitrary and capricious. He therefore denied the petition for review. *Id.* at 58-59. Judge Sentelle determined that none of the Petitioners had standing under Article III, and that he was therefore required to dismiss the petition for review. *Id.* at 60-61. Judge Tatel dissented, and would have remanded to the agency. *Id.* at 61.

SUMMARY OF ARGUMENT

There is no more appropriate occasion for deference to an administrative agency than when it reasonably and responsibly concludes that certain actions are beyond the powers granted to it by Congress. This posture is unusual for a reason — it is the rare agency that chooses careful scrutiny of its own statutory authority over broad and sweeping claims that great power has

already been vested in it through congressional delegation. Against the odds, however, the EPA has undertaken a careful examination of its authority and powers under the CAA and concluded that that the best reading of the statute and its available tools renders GHG regulation inappropriate. Heavy deference should thus extend to EPA's findings that its power over "pollutants" does not extend far enough to regulate GHGs and that, in any event, uncertain science and ineffectual statutory tools make CAA-based regulation of GHGs inappropriate at this time. Indeed, for this Court to rebuke the EPA's laudable unwillingness to arrogate power to itself as somehow unlawful is to suggest that it is better for an agency to run unchecked than for it to responsibly check itself. Such an anomalous result should be rejected in favor of the more ordinary assumption of our American system of checks and balances that conservatism in the construal of one's own powers is a rare virtue rather than a judicially remediable vice.

EPA's first argument is that the term "pollutant" in section 202(a) of the CAA excludes GHGs. This is not only an eminently reasonable interpretation, but is likely the best possible reading of the text, history, and structure of the Act. This is so for at least three main reasons: (1) the plain meaning of "pollutant" seems to exclude safe, clean, common, and life-sustaining substances such as CO₂; (2) treatment of GHGs as pollutants is broadly incongruous with the structure and function of the CAA; and (3) the legislative history clearly indicates that regulation of GHGs was affirmatively not anticipated by Congress and that, if anything, Congress intended to address GHGs through nonregulatory means. Moreover, although EPA has endeavored to give section 202(a) its best and most faithful reading, the bar that it must clear here is considerably lower than that. Under the familiar framework of *Chevron*, if the status of GHGs as pollutants is anything less than *unambiguous*, the courts must accept EPA's permissible—and *responsible*—view that its authority does not as yet extend so far.

EPA's second argument is that, even assuming unambiguous authority to regulate GHGs as pollutants, there would still be three independent and high hurdles for Petitioners to clear before the EPA's decision to abstain from rulemaking could be assailed as unlawful. First, it is clear that agency *inaction* of this sort is simply unreviewable because the EPA's resource-allocation decisions are committed to its discretion by law and there are no judicially manageable standards by which a court can review such decisions. Second, even if the Court finds judicial review appropriate, the EPA did nothing more in this case than properly apply the statutory criteria, making it unnecessary to resolve the question Petitioners present about whether the agency may lawfully rely on unenumerated criteria. Finally, the answer to Petitioners' question is that the EPA may *of course* rely on unenumerated factors in deciding not to regulate *unless* Congress has plainly foreclosed particular criteria. No such barred criteria were considered here.

For these reasons, the Court should avoid the anomalous result of reprimanding the EPA for responsibly refusing to rush headlong into regulating a global phenomenon for which the CAA grants, at best, ambiguous authority and ineffectual tools. The Court should accordingly affirm the resolve of the agency to await clearer science and a clearer congressional mandate before embarking on such an historic and fraught regulatory undertaking.

ARGUMENT

I. BECAUSE CONGRESS HAS SHOWN NO INTENT TO GRANT THE EPA AUTHORITY OVER GREENHOUSE GASES, THE COURT MUST ACCEPT THE AGENCY'S VIEW THAT SUCH AUTHORITY IS LACKING.

A. The Plain Meaning of the Term "Pollutant" in § 202(a) of the Clean Air Act Excludes Greenhouse Gases.

"[W]e begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says,'" *Hartford Underwriters Insurance Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (quoting *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992)),

and the term “pollutant” in section 202(a) of the CAA simply does not mean CO₂ and other GHGs. The ordinary definition of “pollutant” is “an agent which fouls or contaminates the environment.” OXFORD ENGLISH DICTIONARY (5th ed. 2002). Similarly, “to pollute” means “to contaminate (an environment) esp. with man-made waste,” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003), or “to contaminate the soil, air, or water with noxious substances.” BLACK’S LAW DICTIONARY (7th ed. 1999). While the impact of GHGs upon global climate in the long term may be a matter of considerable dispute, it is beyond contention that CO₂ neither “fouls” nor “contaminates” an environment, and is certainly not a “noxious” substance.

One cannot claim that air or water saturated with CO₂ is polluted or contaminated. Billions of gallons of *intentionally* carbonated beverages are consumed each year in the United States, and it would be odd to claim that each such bottle of soda was either “contaminated” by CO₂ or “polluting” the air when it releases CO₂ as the cap is unscrewed. CO₂ in the air is neither toxic nor noxious, and because it is colorless, odorless, invisible, without effect upon humans or other animal organisms, and crucial for sustaining life on Earth, there can be no sense in which it “fouls” the environment. The plain meaning of the term pollutant thus stops short of CO₂.

Petitioners attempt to read the statutory definition of “air pollutant” as authorizing a broader reach, but their reading is inattentive to the words of the statute. Section 302(g) defines air pollutant as “any *air pollution agent* or combination of such agents, including any physical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” 42 U.S.C. § 7602(g) (emphasis added). This language is broad, but not broad enough to include all airborne matter. Notably, the statutory definition includes the term “pollution agent” within its description of “pollutants.” It therefore incorporates the plain

meaning of pollution, and does not eliminate the criterion of “fouling” or “contamination” from the term pollutant in section 202(a).

If, as Petitioners suggest, we were to read “air pollution agent” out of the statute, the ensuing definition of pollutant would be absurdly overbroad. Clearly, there is “physical . . . matter which . . . enters the ambient air” that is not a pollutant. Stripped of the “air pollution agent” limitation, everything from water vapor to rifle bullets and rice at weddings would qualify as an air pollutant. The EPA understandably declines to read its jurisdiction as extending so far.

Though undeniably broad and flexible, the terms “pollutant” and “air pollution agent” in section 202 (a) and its respective definition provide the sole limitation upon the reach of EPA authority under that section. In that context — and in light of the obvious intent of Congress to constrain EPA authority in other places throughout the statute — it would be reckless to construe “pollution” as mere surplusage that leaves the EPA’s regulatory reach untouched. *See Gonzales v. Oregon*, 126 S. Ct. 904, 918-19 (2006) (noting that “[i]t would be anomalous for Congress to have painstakingly described the [agency’s] authority” while simultaneously granting power under another section that “would be unrestrained”). The CAA scheme of regulation under section 202(a) is utterly unlimited if “pollutant” and “air pollution agent” are read without their plainly intended substance. Accordingly, the agency has responsibly acknowledged that there *is* substance to Congress’s use of the term “pollutant” in section 202(a), and — until Congress directs otherwise — has therefore declined to assert authority over gases such as CO₂ that are clean, common, and in no sense “foul” or “contaminate” the ambient air.

B. Congress Clearly Intended To Exclude Greenhouse Gases From the EPA’s Regulatory Authority.

Although the plain text of section 202(a) excludes GHGs from regulation because they are not contaminants, Congress’s intent to exclude GHGs is rendered all the more obvious by the

other ordinary indicia of statutory meaning. Given other provisions of the Act, the functional context of section 202(a) and other CAA provisions, and a strikingly relevant legislative history, Congress's view on the specific question presented here is clear: It neither specifically intended GHGs to be reached by section 202(a), nor did it understand section 202(a) to be susceptible of such a broad reading.

1. Congress Has Statutorily Expressed Its Intent That Greenhouse Gases Be Addressed Through *Non-Regulatory* Solutions.

The CAA mentions CO₂ with extreme infrequency, and when it does, it requires research into *nonregulatory* means of reducing emissions while conspicuously denying that the provisions grant any regulatory authority. The specificity with which Congress eschewed any intent to *regulate* — rather than investigate — CO₂ and other GHGs under the CAA indicates that Petitioners' suggested construction of the reach of section 202(a) does manifest violence to the statutorily enacted intentions of Congress.

Section 103(g) of the Act calls for “a basic engineering research and technology program to develop, evaluate, and demonstrate *nonregulatory* strategies and technologies for air pollution prevention.” 42 U.S.C. § 7403(g) (emphasis added). Among the research goals enumerated are “[i]mprovements in *nonregulatory* strategies and technologies for preventing or reducing . . . carbon dioxide.” 42 U.S.C. § 7403(g)(1) (emphasis added). The section goes on to use the term “nonregulatory” four additional times. It then states emphatically that it “shall not be construed to authorize the imposition on any person of air pollution control requirements.” 42 U.S.C. § 7403(g). In context, the import of Congress's six-fold repetition of the term “nonregulatory” and disavowal of any intent to alter regulatory authority is abundantly clear: Research into CO₂ is appropriate; direct regulation is not.

Section 103(g) was clearly intended not to authorize regulation, and clearly implies that no regulation of CO₂ was contemplated. The explicit exhortation not to construe the section as a grant of regulatory authority makes this plain. The legislative history is even stronger. It indicates that Congress's repetitive reference to "nonregulatory" research in section 103(g) was fully intentional. The research provisions of the CAA were drawn primarily from the House bill, but the limitation to *nonregulatory* research entered only as a compromise at the conference committee stage. *Compare* Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 901(c), 104 Stat. 2703, *with* S. 1630, 101st Cong. § 901(f) (as passed by House). Congress's call for nonregulatory research in section 103(g) should thus be understood as intentionally saying exactly what it appears to say — CO₂ should be considered solely as a candidate for *nonregulatory* approaches.

Petitioners thus do extreme violence to Congress's intentions when they maintain — along with the dissent below — that section 103(g) expresses Congress's unambiguous intent to subject CO₂ to regulation as a pollutant under section 202(a). They argue that because section 103(g) places CO₂ among a list of "pollutants" that should be researched for nonregulatory solutions and section 202(a) extends regulatory authority to any airborne "pollutant," a cross-referencing of the statutory text evinces an unambiguous congressional authorization to regulate CO₂ as a pollutant. It should be clear from the foregoing discussion and from any fair reading of section 103(g) in full and in context that Congress's unambiguous intent was the exact opposite. Yet even if this Court were to disagree that section 103(g) embodied an unambiguous intent to *exclude* CO₂ from regulation, Petitioners would still be miles from proving their contention that the list in section 103(g) constitutes an unambiguous *authorization* to regulate.⁴

⁴ As we clarify below, *see infra* Section I.C, Petitioners will ultimately bear the burden under *Chevron* of showing that Congress spoke unambiguously on the question of whether "pollution" as used in section 202(a) reaches GHGs.

Petitioners' argument turns on the assumption that the word "pollutant" in sections 202(a) and 103(g) may be treated as synonymous for the purpose of analyzing section 202(a)'s grant of authority, but that assumption is doubly erroneous. First, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). The context for these two invocations of the word "pollutant" is crucially different in at least three ways: (1) section 103(g) deals with "stationary sources" whereas section 202(a) deals with mobile sources; (2) section 103(g) deals with substances that are good candidates for research, whereas section 202(a) deals with substances that are candidates for regulation, and (3) section 103(g) expressly disavows any intent to grant regulatory authority, whereas section 202(a) does nothing but grant regulatory authority.

To treat the listing of CO₂ as a pollutant for the markedly different purposes of section 103(g) as an *unambiguous* statement that CO₂ is a pollutant for the purposes of section 202(a) is thus wholly inappropriate. It strains beyond the breaking point what is only a "presumption" that a word used in different parts of the same act is intended to have the same meaning. *See Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). For as this Court said in *Atlantic Cleaners* and recently reaffirmed in *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 595 (2004), "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."⁵

⁵ *See also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" has different meanings in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term "employee" has different meanings in different parts of Title VII). As this Court has more colorfully put it, "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against." *Cline*, 540 U.S. at 595-96 n.8 (citing multiple invocations of the passage).

There is another reason to eschew Petitioners’ logic — namely, that it requires so direct a contravention of a statutory provision as to appear *unlawful*. The command at the end of section 103(g) is explicit: “*Nothing* in this subsection shall be construed to authorize the imposition on *any* person of air pollution control requirements.” 42 U.S.C. § 7403(g) (emphasis added). Yet the logical path that petitioner asks the Court to tread does nothing but “construe” “this subsection” “to authorize the imposition” “of air pollution control requirements.” The prohibition here is exceedingly broad: It does not say that the subsection “does not authorize” the imposition of air pollution controls; it says that the section shall in no way be “*construed* to authorize” the imposition of air pollution controls. Incorporating section 103(g) into an analysis of section 202(a)’s grant of regulatory authority is thus not only a logically dubious form of statutory construction, but a direct refusal to obey the words of the law.

The facts quickly add up indicating that Congress statutorily enacted its intent not to authorize regulation of CO₂ and other GHGs through section 202(a). A different, purely informational provision of the CAA requires the EPA to publish the global warming potential of different substances, but meaningfully includes the same caveat as section 103(g): “The preceding sentence shall not be construed to be the basis of any additional regulation.” 42 U.S.C. § 7671a(e). Another research section in the House bill explicitly requiring research into reducing CO₂ emissions from mobile sources rather than the stationary sources currently referred to in section 103(g) was cut at the conference committee stage. *Compare* Pub. L. No. 101-549 sec. 901(c), 104 Stat. 2703 *with* S. 1630, 101st Cong. § 901(f) (as passed by House). Thus, the terms of the statute itself not only refute petitioner’s claim that the plain meaning unambiguously allows CO₂ regulation, but in fact unambiguously require exploration of nonregulatory techniques to the exclusion of direct GHG regulations.

2. Regulation of Greenhouse Gases As “Pollutants” Is Inconsistent With the Structure and Function of the Clean Air Act As A Whole.

Regulation of GHGs as “pollutants” under section 202(a) would render the CAA functionally incoherent and structurally inharmonious, and this Court should thus avoid any interpretation of section 202(a) authorizing such regulation. *See Brown & Williamson*, 529 U.S. at 133 (“A court must . . . interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an harmonious whole.’” (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385 (1959))).

Both in its function and its structure, the CAA confirms that section 202(a) was not contemplated as an authorization to regulate GHGs. First, regulation of CO₂ under section 202(a) necessarily implies that CO₂ would have to be listed as a “criteria pollutant” under section 108(a), *see* 42 U.S.C. § 7408(a), and the consequences of such a listing are both bizarre and unacceptable. Second, the CAA contains a special provision to deal with the sole *global* environmental phenomenon directly addressed by the 1990 CAA amendments — that is, stratospheric ozone depletion. *See* 42 U.S.C. §§ 7671 *et. seq.* That Congress felt the need to address this global phenomenon through special legislative provisions *despite* the fact that halons, chlorofluorocarbons (“CFCs”), and other ozone depleting chemicals are clearly “substance or matter which is emitted into or otherwise enters the ambient air,” 42 U.S.C. § 7602(g), shows clearly that section 202(a) and its above-cited definition were never understood by Congress to have the overbroad coverage that Petitioners seek to impart to it.

1. *Function.* First, there is no doubt that regulation of GHGs as pollutants under section 202(a) would in turn require: (1) listing them as “criteria pollutants” under section 108(a); (2) setting “national ambient air quality standards” (“NAAQS”) for those gases; and then (3) shifting the responsibility of meeting these NAAQS to the several states. Section 108(a) mandates the

listing of criteria pollutants if a standard *identical* to that of section 202(a) is satisfied. Once a pollutant is listed and criteria are published, the Administrator must set primary and secondary NAAQS. *See* 42 U.S.C. § 7409(a). Significant regulatory requirements of the Act are then triggered, including state-based implementation requirements with varying levels of stringency based on whether a particular state already exceeds the relevant NAAQS. *See* 42 U.S.C. § 7410 (requiring *state* implementation plans for reaching NAAQS).

The illogic of applying this framework to CO₂ and other GHGs is already apparent, because GHG concentration does not vary by state. Concentrations above Rhode Island are the same as they are above Montana — and they are both, in turn, the same as above empty expanses of the Atlantic. In short, the CAA is designed to bring individual state into NAAQS attainment through individual implementation plans, and this system makes less than no sense in the GHG context. A New York implementation plan for a hypothetical CO₂ standard would be extremely costly while having a negligible effect on both global and New York ambient air concentrations because the New York concentration *just is* the global concentration and is thus largely beyond New York’s power to control. Had Congress intended CO₂ to be regulable as a pollutant, it would not have provided such ineffectual tools for its regulation. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1988) (“[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation . . . or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”); *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 673 (1988) (concluding that “Congress did not intend to force [the agency] to impose . . . restrictions where such restrictions would not achieve the statutory goal they were intended to achieve”).

Indeed, the consequences of listing GHGs as criteria pollutants push beyond the illogical to the affirmatively destructive. First, the EPA would be put to the Hobson's choice of deciding whether to ineffectually put the entire country into attainment by setting the NAAQS above current levels, or whether to disastrously put the entire country into non-attainment by setting the NAAQS below current levels. Were the latter option chosen, every new or modified major stationary source of CO₂ (which includes all fossil-fuel-fired power or manufacturing plants of any kind) would only be allowed to operate if they complied with the "lowest achievable emission rate," *see* 42 U.S.C. § 7503(a)(2), although "no [CO₂ control] technology exists which fits the definition." *See* ARNOLD W. REITZE JR., AIR POLLUTION CONTROL LAW 417 (2001). As Professor Reitze makes clear, effective regulation of CO₂ is simply incongruous with the framework for regulation that Congress enacted in the CAA:

Because there is no cost-effective, commercially available control for stationary source CO₂ emissions, now or in the foreseeable future, neither new source performance standards (NSPS) or new source review (NSR) requirements can legally be applied to CO₂ sources. Any effort by the EPA to reduce CO₂ emissions or other GHG pollutants through controls on mobile sources also would certainly fail for similar reasons. If the CAA's statutory language is read with a focus on the goals it is intended to achieve, Congress cannot have intended to regulate global warming using a program completely unsuited to this purpose.⁶

Id. at 417 & nn.120-123. Thus, because treating GHGs as pollutants under section 202(a) is wholly incompatible with the proper functioning of the CAA — it is ineffectual at best and destructive at worst — we have powerful evidence that such treatment of GHGs was never intended. *See Public Citizen*, 491 U.S. at 454.

2. *Structure.* It is also clear from the structure of the CAA that section 202(a) was not contemplated as a license to regulate GHGs. Sections 108(a) and 202(a), which authorize regulation in identical terms, were clearly intended to apply — and only structured to effectively apply — to substances with a relatively localized contaminating effect on the air. It is for this

⁶ Reitze specifically concludes that mobile source regulation of CO₂ emissions is foreclosed by the similar structure of those provisions, as well as the legislative history discussed below. *See* REITZE at 419-21.

reason that CFCs and other ozone-depleting substances were treated in a separate subchapter of the CAA. *See* 42 U.S.C. §§ 7671 *et. seq.* Indeed, it is clear that although CFCs and halons constitute “matter which is emitted into or otherwise enters the ambient air” and therefore satisfy what Petitioner would have us believe is the standard for regulation as a pollutant, Congress thought special and targeted measures were necessary if the *global* phenomenon of ozone depletion was to be addressed under the CAA. The presence of such a detailed section on *global ozone depletion*, with scarcely a whisper on *global warming*, thus further evinces a lack of congressional intent to regulate the global GHG issue under the CAA’s generic provisions.

CFCs and GHGs are crucially similar, and the extent to which one calls for a unique regulatory approach under the CAA comments directly on the extent to which the other does as well. CFCs, like GHGs, are not actually pollutants: They were so prized by industry and so popular in everything from refrigerators to asthma inhalers because they were safe, clean, effective, and so stable as to react with almost nothing. CFCs are also, like GHGs, a global issue: They affect the stratosphere generally rather than the ambient air where they are released. To that end, CFCs were, like GHGs, subject to regulation through an international agreement: The Montreal Protocol regulated CFCs in much the way the Kyoto Protocol attempted to address GHGs. Indeed, the extent to which both CFCs and GHGs are harmful begins and ends with a climatic effect driven by a photochemical interaction with sunlight. The only distinction — one which is without a difference for regulatory purposes — lies in the precise physical and chemical details of those climatic effects.

The use of specific legislation to address CFCs thus strongly suggests that they were not to be considered “pollutants” under the general provisions of the CAA, and the crucial similarities between CFCs and GHGs in turn suggests that the same is true of them — if Congress intended

to make GHGs regulable, it would have done so in a specific and tailored fashion as well. In short, there was an obvious location to put a provision regulating GHGs *along with other* substances affecting the global stratosphere, and thus Congress's failure to include greenhouses gases in subchapter IV of the CAA is especially laden with meaning.⁷ That the CAA *has* stratospheric issue regulations that do not speak a word about regulating GHGs makes it all the more obvious that Congress intentionally declined to subject GHGs to regulation.

3. The Legislative History of the 1990 Clean Air Act Amendments Clearly Shows That Regulation of Greenhouse Gases Was Intentionally Excluded.

While use of legislative history to divine congressional intent is sometimes problematic, *see, e.g., Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2626 (2005) (noting that histories are often selective or based on untrustworthy sources), a brief review of the history of the 1990 CAA amendments is particularly appropriate, relevant, and conclusive in this instance.

Legislative history is especially relevant here for two reasons. First, as explained above, reading section 202(a)'s "pollutant" requirement to include GHGs would create disharmony with respect to mandatory regulation of GHGs under other sections of the statute. This Court has made clear that where "a statutory term would compel an odd result, we must search for other evidence of congressional intent . . . [including] the circumstances of the enactment of particular legislation." *Public Citizen*, 491 U.S. at 454 (internal quotations omitted).

Furthermore, given the enormous undertaking that would be effective regulation of the carbon cycle and other GHG processes, the statute is conspicuously silent on the authority for doing so. *See Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (famously noting the relevance of the congressional "dog that did not bark"); *see also Harrison v. PPG Industries, Inc.*, 446 U.S.

⁷ The legislative history cements this point. It shows that a section explicitly regulating greenhouse gases was considered *at this very location* by the Senate, but was removed by the House and not revived in conference committee. *See infra*, Section I.B.3.

578, 602 (1980) (Rehnquist, J. dissenting) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”). In light of this unlikely silence — unlikely, of course, only if one persists in believing that Congress intended to authorize GHG regulation — the legislative history is especially helpful in determining whether this silence can be explained, or whether it ultimately confirms that the sweeping authorization was in fact not within the intentions of Congress. *See Chisom*, 501 U.S. at 496 (rejecting a sweeping statutory construction because “if Congress had such an intent, Congress would have made it explicit in the statute, *or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history*”) (emphasis added).

And indeed, two particularly relevant and persuasive forms of legislative history confirm that no regulation of GHGs was contemplated under the general provisions of the CAA. First, it is clear from the legislative history that Congress expressly considered, and affirmatively *rejected*, granting the EPA regulatory authority over GHGs. Second, the statements of Senator Chaffee — floor manager of the 1990 amendments and the Senate’s strongest proponent of global warming regulation — make clear that *even he* believed the bill stopped short of granting authority over greenhouse emissions.

First and foremost, a provision expressly authorizing regulation of CO₂ emissions from motor vehicles was stripped from the original bill. When it was introduced in the Senate, section 206 of the bill contained tailpipe standards explicitly requiring limits on the emission of CO₂. *See* S. 1630, 101st Cong. § 206 (introduced in Senate). Yet by the time the bill exited the Senate, this authorization to regulate motor vehicle GHG emissions had disappeared, never to return. *See* 136

Cong. Rec. 6479 (1990); REITZE at 415. In other words, Congress considered the *very* power at issue here and declined to confer that power on the EPA.

Even more notably, the 101st Congress considered and rejected language that would have granted EPA wide-ranging authority over GHGs and global warming effects. Title VII of the 1990 CAA amendments left the Senate as the “Stratospheric Ozone and Climate Protection Act,” and would have required the Administrator to regulate not only CFCs and other ozone-depleting substances, but all manufactured substances “which are known or may reasonably be anticipated to cause or contribute significantly *to atmospheric or climatic modification.*” *See* S. 1630, 101st Cong. §§ 501-506 (passed by Senate) (emphasis added).⁸ Although the House bill did incorporate a subchapter on stratospheric ozone depletion, it utterly failed to enact the Senate’s regulatory approach to CO₂ and other greenhouse emissions. *See* 136 Cong. Rec. 11964-65 (1990). The conference committee sided with the House, and the final bill incorporated none of the Senate’s language authorizing regulation of GHGs.

That the full Congress knowingly abandoned the Senate’s regulatory provisions covering GHGs is a particularly damning fact for Petitioners’ position. As this Court explicitly recognized in the context of a different conference committee deletion, any such abandonment “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”

See Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974). That Congress felt it

⁸ The Senate’s proposed climate change legislation was based on legislation that Senator Chafee had long advocated. *See Report of the Senate Committee on Environment and Public Works on S. 1630*, S. REP. NO. 228 at 385, 101st Cong. (1989) (noting that Title VII was based on Senators Chafee’s S. 491, entitled the Stratospheric Ozone and Climate Protection Act of 1989, which in turn was based on a similar bill, S. 571, which Senator Chafee introduced in the previous Congress). Chafee’s language proclaimed the regulatory goal in the broadest of terms:

The objectives of this title are . . . to reduce the generation of greenhouse gases in order to protect the Earth’s ozone layer and to limit anthropogenically induced global climate change.

. . . .

In order to achieve the objectives of this title, it is the national goal to . . . reduce to the maximum extent possible emissions of other gases [other than CFCs and ozone depleting gases] caused by human activities that are likely to affect adversely the global climate.

necessary to regulate the global phenomenon of ozone depletion through a special provision already led us to suspect that its silence on CO₂ and other GHGs demonstrated an intent not to regulate those substances. The legislative history's clear evidence that Congress *affirmatively* declined to regulate GHGs transforms this reasonable suspicion about the meaning of statutory silence into an iron-clad fact of legislative intent. *See INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded." (quotation omitted)).⁹

Were this not enough, the legislative history also contains a well-recognized trump card against Petitioners' assertion that the Act regulated GHGs — namely, that Senator Chafee, the *floor manager* of the Senate bill and the *principal* advocate for GHG regulation, admitted that the CAA did not reach that far. Even extreme skeptics of legislative history concede that the constructions of floor managers can be persuasive indicia of general legislative intent. *See Babbitt v. Sweet Home Communities*, 515 U.S. 687, 727-29 (1995) (Scalia, J. dissenting). The instructive value of such floor manager statements grows exponentially greater when, as here, the statement is one against the individual proclivities of the manager himself. A statement by Chafee that the CAA as amended did not reach GHG regulation would be an exceptionally trustworthy form of floor statement, and its existence renders EPA's argument that GHGs are beyond its authority beyond serious reproach.

⁹ This straightforward use of stricken language to help determine what Congress did not mean to accomplish is routine in statutory interpretation. *See, e.g., Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Arizona v. California*, 373 U.S. 546, 580-81 (1963) (using stricken provisions as reliable evidence of congressional intent not to achieve outcome that those provisions would have reached). This interpretive tool is more trustworthy than some forms of legislative history which either selectively invoke floor statements or use reports and records which are subject to gaming after the fact by self-interested parties. *Cf. Allapattah Services*, 125 S. Ct. at 2626 (expressing dangers of legislative history).

Among Senator Chafee’s parting thoughts on the bill he labored so greatly to protect is a paean to the excised global warming regulations and a sober look to the questions left to the future. His account of what the bill did and did not achieve is plainly instructive:

We have not run out of challenges. We have cut disposal of waste, solid waste, and hazardous waste, particularly the toxics. We have the interstate problems with hazardous waste and solid waste. We have the wetlands. We have endangered species. *We have global warming problems that we are yet to face.*

136 Cong. Rec. S19633 (emphasis added). He continued with a notably restrained celebration of the way that the 1990 CAA amendments would “*start* trying to tackle the global warming problem.” *Id.* All he could say on this front, however, was that the stratospheric ozone chapter which he had originally tailored to authorize a broad regulatory approach to global warming would now have an indirect impact on the greenhouse effect because (serendipitously) the banned, ozone-depleting CFCs also happened to be GHGs themselves. *See id.* (citing *only* the otherwise-banned CFCs as having lowered emission rates under the CAA). The obvious implication of such statements from such an ardent advocate of GHG regulation was that there were still “global warming problems that [Congress was] yet to face” because the CAA left greenhouse gases insusceptible of direct regulation.

C. Even If Congress’s Intent To Exclude Greenhouse Gases From EPA Regulatory Authority Is Ambiguous, *Chevron* Requires That the Court Accept the Agency’s Construction of the Statutory Authorization.

Although EPA believes that, for all the foregoing reasons, it has given the term pollutant in section 202(a) its best and most faithful reading, it goes without saying that the bar is far lower than the “best” reading of the statutory text. Under the familiar framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the EPA need only show that Congress has not spoken directly to whether GHGs are pollutants under section 202(a), and if not, that EPA’s construction is permissible. That burden is easily carried where, as here, almost all the evidence suggests that Congress unambiguously understood the term pollutant to *exclude*

GHGs. In short, even if Petitioners' arguments persuade that this is a close case despite the clear text, structure, and legislative history on the EPA's side, *Chevron* nonetheless mandates acceptance of the agency's view in precisely that situation.

Recognizing the fatality of *Chevron* for their preferred interpretation of the statute, Petitioners struggle mightily but unpersuasively to suggest that the EPA's published decision in this case is not entitled to *Chevron* deference. It clearly is entitled to deference, however. As this Court made clear in *United States v. Mead*, 553 U.S. 218 (2001), an "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority 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.* at 226-27. It is indisputable that the EPA has rulemaking authority under the CAA; and clearly, a decision declining to make rules was "promulgated in the exercise of that authority." Moreover, *Barnhart v. Walton*, 535 U.S. 212 (2002), made clear that agency interpretations "through means less formal than 'notice and comment' rulemaking" nevertheless can be entitled to *Chevron* deference. *Id.* at 222. "If this Court's opinion in *Christensen v. Harris County*, 529 U.S. 576 (2000), suggested an absolute rule to the contrary, our later opinion in *Mead* denied the suggestion." *Walton*, 535 U.S. at 222. Petitioners' reliance on *Christensen* is therefore completely misplaced. The EPA is the paradigmatic example of an agency entitled to *Chevron* deference, and where, as here, it has delivered its well considered view of its own statute after notice and comment, there can be no question but that *Chevron* applies.¹⁰

¹⁰ Petitioners also desperately attempt to claim that *Chevron* does not apply to questions of agency jurisdiction. Suffice it to say that this confuses doctrine and dissent. See *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 357 (1988); *United States v. Riverside Bayview Homes*, 474 U.S. 1221 (1985). And even were this the Court's rule, it would be of questionable wisdom because a good lawyer can characterize most statutory construction disputes as jurisdictional disputes and courts would thus routinely encounter intractable characterization problems. See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 3.5, at 157-58 (2002).

The point need not be belabored. Suffice it to say that this Court’s iron-clad standard for analyzing agency constructions of their authorizing statutes only makes a straightforward case for the EPA’s construction of section 202(a) that much easier to accept.

II. THE EPA’S DECISION TO ABSTAIN FROM RULEMAKING ON EMISSIONS OF GREENHOUSE GASES, IF REVIEWABLE AT ALL, CLEARLY PASSES THIS COURT’S DEFERENTIAL “ARBITRARY OR CAPRICIOUS” STANDARD.

A. The Decision Denying The Rulemaking Petition Is Either Unreviewable, Or Subject To An Especially Deferential Standard Of Review.

1. EPA’s Decision To Deny The Petition For Rulemaking At Issue Here Is Not Subject To Judicial Review.

Both Petitioners and the court below proceeded on the faulty assumption that EPA’s decision not to initiate rulemaking on GHGs can be judicially reviewed under the Administrative Procedure Act (“APA”), 5 U.S.C. § 101 *et. seq.* This mistaken assumption should be corrected, and EPA’s cautious refusal to regulate should be upheld here as a policy determination that is within the unique expertise of the agency and beyond the proper compass of review in the courts.

Section 10 of the APA forbids any review of the Administrator’s decision to refrain from regulating GHGs because, under section 202(a), that decision is “committed to agency discretion by law.” 5 U.S.C. § 701(a). In *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court announced the now-familiar standard under which reviewability of agency decisions is judged. Construing the language “committed to agency discretion by law,” this Court held that judicial review was precluded whenever “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Id.* at 821. The general difficulty in finding such meaningful standards for judging *inaction* as opposed to action led this Court to conclude that claims of agency inaction should be treated as presumptively unreviewable. *Id.*

EPA’s decision not to regulate under section 202(a) is thus presumptively, and ultimately, unreviewable under *Chaney*. Section 202(a) entrusts the decision to regulate to the Administrator

in explicit terms — indeed, terms nearly identical to those used in *Chaney* to describe when review is precluded. *Compare* 42 U.S.C. § 7521(a) (permitting regulation of pollutants which “in his judgment” are dangerous) *with Chaney*, 470 U.S. at 821 (finding unreviewability where decision was entrusted to “the agency’s *judgment* absolutely” (emphasis added)). In section 202(a), Congress expressly told the Administrator that it was “in his judgment” to determine whether a pollutant may “reasonably” be anticipated to be dangerous. It would be hard for the law to commit a question to agency discretion in terms more direct than this doubly broad vesting of authority, and *Chaney* therefore requires upholding EPA’s decision as unreviewable.

Petitioners wrongly submit that *Chaney* is inapplicable because it concerned the narrow question of agency refusal to act in an enforcement proceeding, rather than an agency refusal to initiate rulemaking as presented here. The doctrine actively forecloses this argument, however, because it is clear that *Chaney*’s nonreviewability standard is not even limited to the context of agency *inaction*, let alone agency *enforcement* inaction. *See Webster v. Doe*, 486 U.S. 592 (1988) (holding a decision *to fire* unreviewable under *Chaney* where the statute “exudes deference”).

Indeed, *Doe* provides a clear and persuasive analogy to this case. The statute there provided that the Director of the CIA could, “in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States” 486 U.S. at 594 (quoting 50 U.S.C. § 403(c)). The Court found that the “standard fairly exudes deference to the Director, and appears to [the Court to] foreclose the application of any meaningful judicial standard of review” *Id.* at 600. Judicial review of the relevant claims was accordingly barred. *Id.* at 605. Yet the phrase “in his discretion,” found to “exude[] deference” in *Doe*, is essentially indistinguishable from the phrase “in his judgment” at issue here, even without the additional discretion supplied by section

202(a)'s reference to the Administrator's "reasonabl[e]" anticipations. If the affirmative act of firing someone in *Doe* is unreviewable under the "discretion" language of 50 U.S.C. § 403(c), so too is the EPA's decision not to make rules under similar language in CAA section 202(a).

That *Chaney* controls rulemaking cases such as this one no less than enforcement cases is clear from consideration of the policy rationales advanced in *Chaney* for its presumption of nonreviewability. The Court listed three reasons why agency decisions not to take enforcement action should be deemed unreviewable:

First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. . . . [Second,] when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. . . . Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict

Id. at 832. The reasoning the Court gave in the enforcement context is fully applicable to the rulemaking context, at least where, as here, a petition seeks a new rule in an area in which an agency has no existing regulatory program. Lower courts have found that the first and second factors quoted above apply wholeheartedly to rulemaking refusals. *See American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (noting that deciding when and whether to initiate rulemaking clearly requires considerable agency coordination and expertise in setting priorities, and that refusal to make rules also means declining to exercise coercive power). The third factor, which "recapitulates and underscores the prior points about resource allocation and non-coercion," *id.*, applies in this case as well. The agency's decision when and whether to initiate rulemaking mirrors the decision of Executive Branch officers to initiate prosecution because it is ultimately a discretionary act with few recognized standards whereby the agency must allocate scarce resources so as to maximize the public welfare.

The legislative history of the APA supports this result and makes clear that no judicial review should be available for denial of rulemaking petitions. The Attorney General's Manual,

which this Court “ha[s] repeatedly given great weight,” *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 218 (1988), expressly states this contemporaneous understanding: “Neither the denial of a petition under section 4(d), nor an agency’s refusal to hold public rule making proceedings thereon, is subject to judicial review.” TOM C. CLARK, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 39 (1947). The committee report in the Senate accompanying the APA also states this understanding:

The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings. The refusal of an agency to grant the petition or to hold rule making proceedings, therefore, would not per se be subject to judicial reversal.

S. REP. NO. 79-752, at 44 (1945), *as reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 201 (1946). The committee report implies elsewhere that an *existing* rule might be collaterally attacked (e.g., through a declaratory judgment proceeding) based on new information brought to an agency’s attention through a petition for rulemaking. But such a procedural posture is not presented today, as the EPA has no rules on GHGs, and indeed has *never* promulgated a rule under section 202(a). REITZE at 420. As to the situation presented here — i.e., a petition for a new rule inapplicable to any existing regulatory scheme — the report clearly indicates the Senate’s understanding that the APA would *bar* direct judicial review of an agency denial.

Compelling policy reasons also counsel in favor of applying the unreviewability doctrine of *Chaney* and *Doe* to the case at issue here. *See generally* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 762-69 (1990). A petition for rulemaking essentially demands that an agency devote substantial resources to a particular way of dealing with a particular problem. Agencies may have several reasons for refusing such requests, including that the agency can better address the problem through some other means, or that the problem is less important than other problems facing the agency.

Courts simply do not have enough information, even in the context of a well-fleshed-out record, to second guess agency decisions of this type. The reviewing court cannot monitor the resources available to the agency or whether the other problems the agency has decided to address are more or less important than the issues raised in the petition. In response to this petition, the EPA decided that its scientific understanding is currently so limited that rulemaking is not prudent, 68 Fed. Reg. at 52,930 (“[T]here continue to be important uncertainties in our understanding”), and that it can better address the problem through other means, *id.* at 52,931-33. There is limited record evidence about the EPA’s regulatory programs on other problems, but this Court can take judicial notice of the fact that the EPA’s existing regulatory burden is substantial, and that granting the Petitioners’ request will necessarily require the agency to divert resources from programs that the agency itself considers more important.

Even if the Court could somehow acquire all of the relevant information, there still would be no judicially manageable standard for reviewing the agency’s decision not to regulate. Resource-allocation decisions are quintessentially political, as demonstrated by the complicated machinations that regularly attend the appropriations process. Unless Congress sets a schedule of priorities, there is simply no objective test by which a court could hope to determine whether one agency program is more or less “important” than any other. Petitioners ask this Court to intervene in this political dispute on their behalf, despite the complete absence of judicially manageable standards for doing so. The Court should decline the invitation.

2. If the EPA’s decision is reviewable at all, it is subject to an extremely narrow and deferential standard of review.

Assuming for the sake of argument that there is judicial review of the Administrator’s decision in this case, such review must be exceedingly narrow and deferential. Those lower courts that find review permissible at all under such circumstances have routinely held that the

standard is extremely light. *See, e.g., Consumer Federation v. Consumer Product Safety Commission*, 990 F.2d 1298, 1305 (D.C. Cir. 1993) (finding that deference “while not ‘extreme,’ is ‘very substantial’”); *WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (D.C. Cir. 1981) (“[W]e believe that the decision to institute rulemaking is one that is largely committed to the discretion of the agency, and that the scope of review of such a determination must, of necessity, be very narrow.”). For the reasons discussed earlier for eliminating review entirely, it is clear that at the very least, the Court should use a carefully crafted, narrow, and deferential standard of review.

Some courts have suggested that review of an agency’s refusal to issue a rule is more searching where the agency engaged in rulemaking, received comments, but stopped short of adopting the proposed rule. *Compare Consumer Federation*, 990 F.2d at 1305 *with WWHT*, 656 F.2d at 818. To the extent that such a distinction is defensible, the EPA would clearly fall on the nonrulemaking side because it did not receive comments on a particular, concrete rulemaking proposal. *See Request for Comment, Control of Emissions from New and In-Use Highway Vehicles and Engines*, 66 Fed. Reg. 7486 (Jan. 23, 2001).

In any event, this Court should not adopt the proposed distinction, which is without support in this Court’s cases, or in the text or legislative history of the APA. It would also be bad policy, incentivizing agencies to deny petitions outright rather than seek comments that might change the agency’s mind about the petition. If they are to be reviewed in the courts, all refusals to promulgate rules should be afforded the same extremely narrow and deferential review.

B. The Administrator’s Decision To Abstain From Rulemaking On Greenhouse Gas Emissions Was Based On The Enumerated Statutory Criteria.

Should this Court decide that judicial review is appropriate, the petition for review still must be denied on the unexceptional observation that every reason cited by the EPA for declining to regulate is relevant to the broad statutory standards of section 202(a). In response to this petition,

the Administrator determined that the EPA had not previously made the endangerment finding required under law. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003) (“[N]o Administrator has made any finding that satisfies the criteria for setting CO₂ standards for motor vehicles or any other emission source.”). He further determined that it would have been inappropriate to make such a finding at that point in light of persisting scientific uncertainty over the GHG phenomenon. This most obvious reason for refusing to regulate goes directly to the heart of the statutory requirement under section 202(a) that the Administrator determine whether, “in his judgment,” a certain substance “may reasonably be anticipated to endanger public health or welfare.” Clearly, then, the Administrator’s consideration of the relevant science and its ambiguity is beyond reproach.

Neither can the Administrator’s construction of the science be challenged as arbitrary or capricious. His determination that the science of global climate change remains speculative was supported by ample evidence in the record, including a 2001 report that found that a “causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.” *Id.* at 52,930 (citing NATIONAL RESEARCH COUNCIL COMMITTEE ON THE SCIENCE OF CLIMATE CHANGE, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001)). The Administrator found that in light of the scientific uncertainty, the best plan was to continue “to conduct the research necessary to better understand the nature, extent and effects of any human-induced global climate change and to develop technologies that will help achieve GHG emission reductions to the extent they prove necessary.” *Id.* at 52,931. This decision was eminently reasonable and should be upheld.

1. The Agency Is Entitled To *Chevron* Deference On the Construction of the Statute’s Broad Standards.

Despite the fact that the Administrator’s determination can be defended on his review of the science alone, Petitioners assert that the EPA acted unlawfully by relying on policy considerations not enumerated in the statute. Judge Tatel, who made the same argument in dissent, identified a list of factors which, in his judgment, were unlawfully considered by the EPA in denying the petition for rulemaking. 415 F.3d at 77-81 (Tatel, J. dissenting). But fairly read,¹¹ the EPA’s decision considers only factors which are directly relevant to the concerns of the statutory text.

Because the Administrator followed a notice-and-comment procedure, *cf. Christensen v. Harris County*, 529 U.S. 576 (2000), and is “charged with administering” the CAA, *see Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996); *see also National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005); *Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 479 n.14 (1997), he is undoubtedly entitled to *Chevron* deference on interpretations of the CAA contained in the published order to the extent that the meanings of the terms he construes are ambiguous. *See Chevron*, 467 U.S. at 842.

Congress certainly has not “directly spoken to the precise question” of how strong the evidence must be to make an endangerment finding “reasonabl[e],” or of what kinds of evidence the Administrator should consider. *Chevron*, 467 U.S. at 842. Congress has not, for example, required particular scientific tests, although it could have done so if it wished to constrain the agency’s discretion. *Cf. Federal Food, Drug, and Cosmetic Act (“FFDCA”) § 505*, 21 U.S.C. § 355(d) (requiring the Food and Drug Administration to review “adequate and well-controlled

¹¹ It is important to note that this Court has held that it “will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974) *see also Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 497 (2004). Under this standard, the Court clearly should not go out of its way to read potentially impermissible rationales into an agency’s decision, even if that decision is not as articulate as it could have been.

investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved”). Indeed, the language of reasonableness, when coupled with the language directly entrusting the question to the Administrator’s judgment, shows that the delegation of interpretive authority to the Administrator was wholly calculated and intentional.

Congress similarly has not given any textual guidance as to the meaning of “cause or contribute,” and there is thus significant ambiguity as to the nature of the required causal link between the pollutant and the likelihood of dangerous air pollution. *Cf.* Federal Hazardous Substances Act § 2, 15 U.S.C. § 1261(f)(1)(A) (defining “hazardous substance” as a substance that “may cause substantial personal injury or substantial illness during or as a *proximate result* of any customary or reasonably foreseeable handling or use”) (emphasis added). Oxygen in the ambient air is absolutely a “but for” cause of the toxic criteria pollutant ozone, but clearly, the consequences of this observation are ambiguous to say the least. The ambiguities in the causation language thus cry out for administrative construction and resolution.

Finally, Congress has not unambiguously specified what kinds of injuries to health or welfare constitute “endanger[ment].” Congress did not provide a specific test for what can constitute an impermissible injury, as it has in other contexts. *Cf.* FFDCFA § 409(c)(3)(a), 21 U.S.C. § 348(c)(3)(a) (“[N]o additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal”). Congress has provided a broad definition of the public welfare, *see* 42 U.S.C. § 7602(h), but this broad definition does nothing to resolve obvious ambiguities such as whether endangerment implies a threatened or an actual harm, and what level of threat might constitute a “danger.” Once again, the ambiguity suggests the propriety of administrative constructions to fill in the gaps that Congress has left. *See Chevron*, 467 U.S. 843.

Instead of resolving these ambiguities itself, Congress has clearly committed these line-drawing determinations to the Administrator's sound "judgment." The Administrator thus had significant leeway to construe the various standards in section 202(a). Therefore, so long as any factor considered by the Administrator in denying the rulemaking petition can be incorporated into a permissible interpretation of section 202(a)'s inherently broad standards, the Administrator has not in fact considered any of Petitioners' so-called "non-statutory" factors at all.

2. Because The Factors Considered by EPA Are Relevant To Whether Greenhouse Gases "May Reasonably Be Anticipated To Endanger Public Health or Welfare," Their Consideration Was Proper.

The first factor identified by the dissenting opinion as potentially unlawful — the agency's consideration of the considerable scientific uncertainty about what effect human activity actually has on the climate, *see* 415 F.3d at 77 (Tatel, J. dissenting) — clearly falls well within the range of evidence relevant to the statutory text. This argument seems odd; one would think that review of the science is unambiguously *required*, and that it would be error for the agency to *fail* to consider this factor. The plain text of the statute tells the Administrator to determine whether an air pollutant "may *reasonably* be anticipated" to endanger the public. The Administrator must determine whether the likelihood of endangerment is sufficiently large as to merit regulation; when the likelihood is unreasonably small in the Administrator's judgment, the Administrator should not regulate. Thus, scientific uncertainty goes to the heart of the Administrator's statutory responsibility, and could not have been *unambiguously* foreclosed by the statute.

Moreover, the EPA did not ignore the precautionary purpose of the CAA by making a judgment that the scientific evidence currently available is not enough to reasonably establish the potential danger. First, this Court has made clear that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). The question upon

which an unambiguous congressional statement is needed is not whether the CAA has a precautionary purpose — of course it does — but *how far* that purpose extends. There are presumably levels of uncertainty in the scientific evidence that would not favor regulation, the precautionary purpose of the CAA notwithstanding. Without any specific criteria for determining those levels, it falls to the EPA to determine whether the evidence is sufficiently strong or whether it is prudent to await additional research.¹² The EPA in this case decided that the better course was to wait and see, and because the magnitude of the precaution required by the Act is a matter clearly left to the agency’s sound judgment, that determination was clearly permissible.

The next two “unenumerated” considerations cited by Petitioners — that the U.S. Department of Transportation already regulates fuel economy, and that further fuel economy standards would result in an inefficient, piecemeal approach, *see, e.g.*, 415 F.3d at 80 (Tatel, J., dissenting) — are both factors that the EPA would be required to consider at the rulemaking stage pursuant to the Regulatory Flexibility Act § 3(a), 5 U.S.C. § 603(b)(5) (requiring “identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule” and requiring discussion of “the clarification, consolidation, or simplification of compliance and reporting requirements”). Although there is no record evidence of how this rule would affect “small entities” in particular, the Administrator would flagrantly contravene the congressional intent behind the Regulatory Flexibility Act if he refused to consider the dangers of piecemeal regulation and new regulatory regimes duplicating the Department of Transportation’s work when that Act specifically commands him to consider such dangers. Whether or not these factors are enumerated under the CAA, they *are* enumerated under the Regulatory Flexibility Act and therefore can — indeed, must — be considered.

¹² The reasonableness of awaiting further information is conceded even by those sympathetic to the Petitioners’ claim. *See* 415 F.3d at 76 (Tatel, J., dissenting) (“EPA may withhold an endangerment finding only if it needs more information to determine whether the statutory standard has been met.”).

Similarly, the concern that unilateral U.S. regulation could result in offsetting emissions elsewhere and might weaken our ability to bargain with other countries to achieve reductions, *see* 415 F.3d at 80-81 (Tatel, J., dissenting), is well within section 202(a)'s command that the EPA consider reasonably anticipated effects on health and welfare. The EPA's concern was that regulating GHGs in the United States without a global scheme might reasonably be anticipated to make the GHG problem *worse* from a human health and welfare perspective by complicating efforts to convince other countries to reduce emissions. 68 Fed. Reg. at 52,931. It is absurd to suggest that Congress intended to prohibit the agency from considering whether regulation would in fact harm the very public health and welfare that the agency is charged with protecting.

In addition, extraterritorial causes and effects are relevant to the section's enumerated causation language. Since Congress did not express any intent that the CAA have extraterritorial application, *cf. E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (citing *Foley Brothers, Inc. v. Filardo*, 366 U.S. 281, 285 (1949)), the statute refers only to GHG emissions *in the United States* and their intranational effects. The fact that "increases in GHG emissions [in developing countries] could quickly overwhelm the effects of GHG reduction measures in [the United States]," 68 Fed. Reg. at 52,931, implies that U.S. emissions, standing alone, are neither a "but for" nor a proximate cause of deleterious health effects. Since emissions in other countries are an intervening cause of global warming in this country and since even a complete elimination of emissions from U.S. automobiles would reduce worldwide emissions by a negligible amount, *see* Pet. App. 238, the emissions here are not a proximate or "but for" cause of any injury to the public health or welfare. That fact is undoubtedly relevant in deciding whether GHGs "cause or contribute" to global warming under the statute.

Finally, it is incorrect to suggest, as the Petitioners and the dissenting opinion have, *see* 415 F.3d at 81, that the EPA based its decision on a preference for nonregulatory approaches. The EPA expressed no such preference in its decision. Rather, it discussed alternative programs that already address potential problems arising from global warming. It is unclear whether these were actually part of the decision or whether the EPA was merely cataloging its programs for the benefit of the public. It does not matter, however, since the Administrator clearly was discussing those programs as evidence that other governmental activity is reducing the risk that global warming might otherwise pose at this time. That fact about the world is plainly relevant to whether and how much GHGs might “reasonably be anticipated to endanger” public welfare. The EPA and other agencies are undertaking significant research into — and encouraging voluntary reduction of — GHG emissions. This approach, in the Administrator’s judgment, does enough so that GHGs are not, at this time, “reasonably . . . anticipated to endanger public health or welfare.” Thus, in considering both this fact and the other reasons cited in the published decision not to regulate GHGs, the Administrator was not at all wandering beyond the boundaries set by the broad terms of the applicable statutory provision.

C. Even If the Administrator Considered Unenumerated Criteria In Deciding to Abstain From Rulemaking, That Decision Still Would Not Be Arbitrary or Capricious.

Even assuming that *some* factors considered by the EPA in its published decision *might* be deemed beyond the unambiguous boundaries of the section 202(a),¹³ this still would not be a basis for granting the petition for review. This is because the EPA may lawfully rely on unenumerated criteria, at least in the absence of any clear congressional intent to foreclose consideration of the specific unenumerated factors considered.

¹³ EPA emphatically does not concede that any of the factors considered were beyond the boundaries of the statute or a permissible interpretation thereof. The Court only needs to reach our argument in this section if it determines, contrary to our position, that unenumerated factors were, in fact, considered.

1. *State Farm* Does Not Bar An Agency From Considering Unenumerated Criteria Unless Congress Has Directly Foreclosed Those Particular Criteria.

Petitioners argue that reliance upon criteria that are not enumerated in the statute is arbitrary and capricious *per se*, but this argument mischaracterizes the precedent. It relies heavily on the following dictum: “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.” *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 43 (1983). Petitioners incorrectly contend that this dictum prohibits an agency from considering a factor unless Congress specifically instructed the agency to consider that factor, but in fact the rule is far more narrow: Only decision criteria specifically barred by Congress from consideration ordinarily render an otherwise lawful regulation arbitrary and capricious.

The D.C. Circuit has persuasively rejected Petitioners’ interpretation in favor of this more narrow view. It has held, for instance, that the EPA’s consideration of factors other than air quality in setting rules for gasoline imports was not impermissible. *See George E. Warren Corp. v. EPA*, 159 F.3d 616, 624 (1998) (noting the “usual reluctance to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute”). Absent “anything in the text or structure of the statute to indicate that the Congress intended to preclude the EPA from considering” the disputed issues, *id.* at 623, the EPA is not barred from doing so. Indeed, the D.C. Circuit has consistently allowed agencies to consider factors as long as Congress did not expressly tell the agency to ignore a factor. *E.g.*, *Allied Local & Regional Manufacturers Caucus v. EPA*, 215 F.3d 61, 78 (D.C. Cir. 2000) (holding that list of five factors did not preclude consideration of other, unlisted factors); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (holding EPA can consider costs in determining interstate effect of emissions and holding that agency may consider cost unless the statute directs the agency not to).

This Court’s decision in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), which held that the EPA cannot consider implementation costs in setting NAAQS, is wholly in accord with the persuasive reasoning of the D.C. Circuit. The section of the CAA at issue in that case contained provisions that convinced both the D.C. Circuit and this Court that Congress clearly intended to foreclose consideration of implementation costs. “[T]he statute and its legislative history ma[d]e clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109.” *Lead Industries Association, Inc. v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980). This Court agreed with the D.C. Circuit, finding the language of the statute ““absolute.”” *American Trucking*, 531 U.S. at 465 (quoting D. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS 4-15 (1981)). *American Trucking* was thus based *not* on the fact that implementation cost was an unenumerated criterion, but instead on the fact that Congress had in essence “enumerated” cost as an affirmatively impermissible decision criterion. It thus lends no support to the broad rule that Petitioners urge upon this Court.

American Trucking left unresolved the question of whether the EPA in general might consider unenumerated factors, but the best reading suggests that it would not endorse such a broad prohibition. This may be ascertained from considering the *American Trucking* rule in the context of *Chevron* doctrine. Any claim that a factor considered by an agency ran afoul of *American Trucking* because it was not enumerated in the operative statute would have to be considered under *Chevron*, with deference due to the agency’s claims about the reach of the statutory terms so long as they were ambiguous. Thus, for there to be a plausible *American Trucking* problem, it would have to be the case that the criterion considered by the agency was not just “unenumerated” but affirmatively at odds with evident congressional intent — otherwise, *Chevron* deference would control. *American Trucking* is thus a relatively narrow rule;

it goes no further than to prohibit consideration of those criteria unambiguously at odds with congressional intent. To go any further in excluding unenumerated criteria would begin to erode *Chevron*'s core purpose of preserving agency flexibility in interpreting and administering the standards of its own authorizing statutes.

2. Barring Consideration of Unenumerated Criteria Would In Fact Undermine The Congressional Policy Considerations Underlying the Clean Air Act.

Addressing the open question of *American Trucking* now for the first time, the Court should thus reject the broad rule proposed by Petitioners. Several commentators have argued that courts should not adopt such a rule because it would be destructive of agency coordination and efficient use of resources. *See* 1 *Richard J. Pierce, Jr., Administrative Law Treatise* § 7.4, at 453 (citing JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* ch. 10 (1990)). Congress essentially always intends to accomplish a broad variety of societal goals when it legislates — not just the handful of goals that Congress explicitly identifies in each agency's organic statute. *Id.* Thus, limiting agencies to enumerated factors would often frustrate the overarching congressional interest in coordinated and rationalized administrative agency action. The doctrine would provide only pyrrhic victories for congressional intent, because broad regulatory goals would routinely be the casualties of limiting agency consideration to narrow statutory criteria.

For example, if prohibited from considering unenumerated factors, agencies usually could not consider the efficacy of regulation to accomplish a statute's overall objectives. The EPA could not consider whether regulation would even improve the public health and welfare: The mere fact that GHGs might "reasonably be anticipated to endanger public health or welfare" would be enough, as a matter of law, to require the EPA to issue *some* regulation, even if every conceivable regulation it might issue would be counterproductive. Congress could require the

agency to engage in regulation that seems counterproductive if it wished to, but courts should not read such requirements into the statute when they are not clearly present. Surely, Congress should not be assumed to have imposed such requirements by way of statutory silence.

Petitioners' rule would also prohibit agencies from considering whether rulemaking in a particular area is the best use of the agency's limited resources. Deciding which rulemakings to undertake, like deciding which prosecutions to undertake, is necessarily a selective enterprise. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (noting that an agency decision not to enforce involves factors peculiarly within the agency's expertise, including the allocation of the agency's resources). The EPA does not suggest that global warming is trivial. But seriously negative effects may not appear for some time, if at all; there is some chance that future scientific discoveries will provide an easy way of solving the problem. In such circumstances, the EPA can quite reasonably decide to await the results of ongoing research and focus on more here-and-now problems. To hold otherwise could hold agencies hostage to whatever special interest group might file a rulemaking petition, no matter how relatively unimportant the group's concern.

Moreover, Petitioners' proposal would not allow agencies to consider whether a particular approach is an efficient way of addressing the problem. The EPA was concerned that piecemeal regulation could ultimately require more agency resources to address global warming than would otherwise be necessary. *See* 68 Fed. Reg. at 52,931 (noting that "establishing GHG emission standards for U.S. motor vehicles at this time would . . . result in an *inefficient*, piecemeal approach to addressing the climate change issue" (emphasis added)). By forcing the agency to address the problem now, even though the agency can conserve resources by dealing with that problem later in a more comprehensive fashion, this Court would seriously undermine EPA's ability to effectively deploy the limited resources Congress has given it. The Court should not

presume an intent to force a seemingly inefficient approach upon the EPA absent more specific instructions from Congress such as a statutory deadline.

Instead of accepting the rule urged by the Petitioners, this Court should take the same approach it did in *American Trucking* and look at each statute to determine whether it indicates a specific congressional intent to forbid consideration of a particular factor.¹⁴ The agency's determination of what factors it may consider will be entitled to *Chevron* deference if Congress has not "directly spoken to the precise question at issue," 467 U.S. at 842, rendering review under *American Trucking* meaningful where Congress had a clear intent to bar certain factors, but not overly intrusive where it did not.

In looking at the precise statute at issue here, there clearly is no evidence of a congressional intent to preclude consideration of the factors upon which the agency relied. Petitioners utterly fail to point to any evidence of such an intent in either the text, structure, or legislative history of the statute. Consequently, since there is no contention that the factors discussed by the EPA are arbitrary and capricious on their face, the EPA's decision must be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the court of appeals.

Respectfully submitted.

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DECEMBER 4, 2006

¹⁴ This would not allow the agency to consider completely arbitrary and capricious factors. APA § 10(e)(B)(1), 5 U.S.C. § 706(2)(A), is an explicit congressional command that agencies cannot consider factors that are arbitrary and capricious. An agency that denied a petition on the ground that it was received on Friday the 13th would be subject to reversal directly under § 706(2)(A). In other words, agencies are still required to act rationally in all cases.