Climate Change and the Clean Air Act

By LISA HEINZERLING*

Author's Note

AFTER I WROTE THIS ARTICLE, the Supreme Court decided *Massachusetts v. EPA*[1] by a vote of 5-4 in favor of Massachusetts and other petitioners.[2] The Court accepted both of the arguments made in this Article (which had themselves formed the centerpiece of the briefs I wrote on behalf of petitioners in that case): (1) that the Clean Air Act[3] ("Act" or "CAA") authorizes the Environmental Protection Agency ("EPA" or "the agency") to regulate greenhouse gases from motor vehicles and (2) that EPA erred in refusing to regulate these emissions based on policy concerns not reflected in the Act.

On the first issue, the Court held that greenhouse gases are "air pollutants" subject to regulation under the Act.[4] The Court focused on the statutory text and proclaimed it "unambiguous."[5] The Court found that legislation enacted after the relevant provisions of the Act were passed did not impinge upon EPA's pre-existing authority to regulate air pollutants and that nothing in the Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*[6] (invalidating the Food and Drug Administration's ("FDA") regulation of tobacco products) justified a narrow interpretation of the Act.[7] The Court also concluded that regulation under the Act was not inconsistent with the Department of Transportation's responsibility to set standards for fuel efficiency.[8] More generally, the Court observed that the Act's broad language de-

* Professor of Law, Georgetown University Law Center. This article draws heavily on petitioners' briefs in *Massachusetts v. EPA*. I was the primary author of those briefs. I am grateful to Justin Wade, Susannah Foster, Meghan Greenfield, and Jessica Galante for their fabulous research assistance on the briefs.

1. 127 S. Ct. 1438 (2007).
2. *Id.*
3. 42 U.S.C. §§ 7401–7671q (2000).
4. Massachusetts v. EPA, 127 S. Ct. at 1459.
5. *Id.* at 1460.
6. 529 U.S. 120 (2000).
7. 127 S. Ct. at 1461.
8. *Id.* at 1461–62.

fining "air pollutants" reflected "an intentional effort to confer the flexibility necessary to forestall . . . obsolescence" in the presence of "changing circumstances and scientific developments."[9]

On the issue of agency discretion, the Court rejected arguments that EPA's refusal to regulate greenhouse gases was unreviewable agency inaction.[10] Instead, the Court found that EPA erred by citing a "laundry list" of reasons why it preferred not to regulate, rather than grounding its decision in the statutory criterion of endangerment of public health and welfare.[11] Even if the agency found the science of climate change uncertain, the Court held, it could not refuse to regulate greenhouse gases unless the science was so profoundly uncertain that the agency could not even form a judgment as to whether greenhouse gases were endangering public health or welfare.[12] "The statutory question," the Court said, "is whether sufficient information exists to make an endangerment finding."[13]

Introduction

In *Massachusetts v. EPA*, petitioners—twelve states, three cities, an American territory, and numerous health and environmental groups—have asked the Supreme Court to hold that the Clean Air Act gives EPA the power to regulate greenhouse gas emissions from motor vehicles and that EPA may not decline to exercise this power based on statutorily irrelevant factors.[14] The problem petitioners ultimately seek to address—climate change—is unique in its scope and complexity. But the legal issues before the Court in *Massachusetts v. EPA* are neither particularly grand nor particularly complex. They are the kinds of statutory and administrative law issues courts address every day in this country without great trouble or fanfare. My aim in this Article is to show that a standard approach to the legal issues raised in *Massachusetts v. EPA* dictates a ruling in petitioners' favor.

Part I gives the background of the case before the Court. Part II argues that a straightforward reading of the relevant provisions of the Clean Air Act shows that EPA has the authority to regulate greenhouse gases. Part III explains why EPA does not have the power to

9. *Id.* at 1462.
10. *Id.* at 1459.
11. *Id.* at 1462.
12. *Id.* at 1463.
13. *Id.*
14. *Id.* at 1446.

decline to regulate based on statutorily irrelevant concerns. Part IV briefly concludes.[15]

I. Background

In 1999, the International Center for Technology Assessment and other parties petitioned EPA to set standards for four chemicals emitted by new motor vehicles: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.[16] The petition asserted that, due to effects on climate, motor vehicles emitting these chemicals cause or contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare" within the meaning of section 202(a)(1) of the Clean Air Act.[17]

In 2001, EPA requested public comment on the petition.[18] The agency received nearly 50,000 public comments.[19] In 2003, EPA denied the petition.[20] In explaining its decision, the agency announced, first, that the Clean Air Act "does not authorize regulation to address global climate change"[21] and that therefore, air pollutants associated with climate change "are not air pollutants under the [Act's] regulatory provisions."[22] EPA adopted the legal conclusions set forth in a memorandum written by Robert E. Fabricant, then EPA's General Counsel, reversing the legal conclusions reached by two previous General Counsels.[23]

15. I discuss only statutory questions in this Article. In addition to taking issue with petitioners' statutory arguments, respondents in the case have also argued that petitioners lack standing to challenge EPA's refusal to regulate greenhouse gases. *See, e.g.*, Brief for the Federal Respondent at 10–20, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3043970, at *10–20 [hereinafter U.S. Brief]. Regardless of how the Court ultimately rules on the question of standing, the statutory issues discussed in this Article will remain timely and important. A federal district judge in California, for example, has ruled that the statutory issues in *Massachusetts v. EPA* are closely intertwined with the question of whether California's own law regulating greenhouse gases from motor vehicles is preempted by federal law. Cent. Valley Chrysler-Jeep v. Witherspoon, No. 04-6663, slip op. at 3, 6, 2007 WL 135688 (E.D. Cal. Jan. 16, 2007).

16. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922–23 (Sept. 8, 2003).

17. 42 U.S.C. § 7521(a)(1) (2000) (section 202 is the bill section number; section 7521 is the U.S.C. section number).

18. Control of Emissions from New and In-Use Highway Vehicles and Engines, 66 Fed. Reg. 7486, 7486 (Jan. 23, 2001).

19. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,924.

20. *Id.* at 52,922.

21. *Id.* at 52,925.

22. *Id.* at 52,928.

23. *Id.* at 52,925.

In offering this interpretation of the term "air pollutant," EPA turned away from the language of the statutory provisions in question and instead relied on failed legislative proposals to address climate change, statutory provisions (in the Clean Air Act and elsewhere) addressing climate change in what the agency called a "nonregulatory" fashion, and an asserted tension between regulation of air pollutants associated with climate change and the regulatory structure of the Clean Air Act and the Energy Policy and Conservation Act.[24] Citing the "economic and political significance" of the issue of climate change, EPA stated that it was "urged on"[25] in its legal judgment by the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*

As a separate basis for its decision—discussed in a section entitled "Different Policy Approach"—EPA stated that it "disagrees with the regulatory approach urged by petitioners" and that it would not be "effective or appropriate for EPA to establish GHG [greenhouse gas] standards for motor vehicles at this time."[26] In place of the regulatory program created by section 202 of the Clean Air Act, EPA offered "near-term voluntary actions and incentives" and "programs aimed at reducing scientific uncertainties and encouraging technological development."[27]

EPA preferred a "different policy approach" for several reasons. First, noting that "[t]he science of climate change is extraordinarily complex and still evolving,"[28] the agency trotted through a list of scientific issues that remain inconclusively resolved.[29] EPA relied primarily on selective quotations from a 2001 report by the National Research Council,[30] disregarding, among many others, that report's important opening sentence: "Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise."[31]

Second, EPA concluded that regulation under section 202 was not warranted because it would "result in an inefficient, piecemeal

24. *Id.* at 52,925–29.

25. *Id.* at 52,928.

26. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929–30.

27. *Id.* at 52,930.

28. *Id.*

29. *Id.*

30. *Id.*

31. NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 1 (2001), *available at* http://www.nap.edu/catalog/10139.html.

approach to addressing the climate change issue," since motor vehicles are one of many sources of air pollutants associated with climate change.[32]

Third, EPA asserted that "[u]nilateral EPA regulation" on this matter could "weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies."[33] Regulation of air pollutants associated with climate change "raises important foreign policy issues," EPA observed, which it is "the President's prerogative" to address.[34]

Finally, EPA expressed uncertainty about the availability of technologies to address the emissions at issue.[35]

"In light of [these] considerations," EPA announced, the agency "would decline the petitioners' request to regulate motor vehicle GHG emissions even if it had authority to promulgate such regulations."[36]

Petitioners sought review of EPA's decision in the D.C. Circuit. The appeals court panel split three ways. Judge Randolph authored the court's lead opinion and announced its judgment.[37] Assuming without deciding that the EPA Administrator had authority to regulate air pollutants associated with climate change, Judge Randolph voted to uphold the agency's decision based on its "'policy' considerations."[38] Judge Randolph found that section 202(a)(1)'s reference to the Administrator's "judgment" gave the agency broad enough discretion to make a decision based on "the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area."[39] These considerations included, but were not limited to, the existence of scientific uncertainty.[40] "It is . . . not accurate to say . . . that the EPA Administrator's refusal to regulate rested entirely on scientific uncertainty . . . ."[41] Judge Randolph concluded that section 202(a)(1) "does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evi-

32. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Massachusetts v. EPA, 415 F.3d 50, 53 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

38. *Id.* at 58.

39. *Id.*

40. *Id.*

41. *Id.*

dence."[42] According to Judge Randolph, other "'policy' considerations"—concerns about piecemeal regulation, effects on international treaty negotiations, and technological feasibility, as well as a preference for alternative voluntary approaches—were all factors that the agency was entitled to consider in coming to a decision.[43]

Judge Sentelle dissented in part, but concurred in the judgment.[44] Because what he called the "phenomenon known as 'global warming'" was "harmful to humanity at large," Judge Sentelle thought it was "impossible" to establish standing to adjudicate petitioners' legal claims; the grievance was too generalized.[45] He nevertheless joined in Judge Randolph's judgment denying the petitions for review on the merits to ensure that a majority supported the denial of the petition.[46]

Judge Tatel dissented. The only panel member to reach the question of EPA's authority, Judge Tatel concluded that EPA plainly had statutory authority to regulate air pollutants associated with climate change and that its decision not to regulate these pollutants rested on policy considerations that fell outside the range of discretion delegated by Congress.[47]

The Supreme Court granted certiorari on the questions whether EPA had authority to regulate greenhouse gases under the Clean Air Act and whether it could decline to exercise that authority based on policy considerations not enumerated in the statute.[48] The Court did not answer the Solicitor General's request that it add the issue of standing to the list of questions presented.[49]

II. Authority

EPA's first legal error was to conclude that physical and chemical compounds associated with climate change and emitted into the ambient air by motor vehicles are not "air pollutants" within the meaning of the Clean Air Act, and thus EPA may not regulate them under section 202(a)(1) of the Act. As set forth below, none of the arguments of EPA or the industry respondents supporting EPA has merit.

42. *Id.*
43. *Id.*
44. *Id.* at 59 (Sentelle, J., dissenting in part and concurring in the judgment).
45. *Id.* at 60.
46. *Id.* at 60–61.
47. *Id.* at 61–82 (Tatel, J., dissenting).
48. Massachusetts v. EPA, 126 S. Ct. 2960 (2006).
49. Brief for the Federal Government in Opposition at (I), Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), *available at* www.usdoj.gov/osg/briefs/2005/0responses/2005-1120.resp.html.

A. The Statutory Text

The argument that EPA has authority to regulate greenhouse gases under the Clean Air Act rests on a straightforward interpretation of the statute's text. *Massachusetts v. EPA* involves the specific question of whether EPA has authority to regulate greenhouse gases emitted by motor vehicles.[50] Section 202(a)(1) of the Act directs EPA to regulate "air pollutant[s]" from motor vehicles when, in the Administrator's judgment, they "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[51] The Act defines "welfare" to include effects on "climate" and "weather."[52] Physical or chemical matter that is emitted into the ambient air is an "air pollutant" under the Act.[53] Greenhouse gases are physical and chemical matter emitted into the ambient air by motor vehicles. EPA thus has authority over these gases under section 202(a)(1) of the Act.

EPA took the long way around in coming to the opposite conclusion. In deciding that the Act "does not authorize regulation to address global climate change,"[54] EPA first decided what the statute meant and then bent the statutory language to fit the agency's predetermined meaning. Rather than beginning with the language of the statute, as the Supreme Court's precedents instruct,[55] the agency instead began by describing *other* alleged "indicia of congressional intent,"[56] including the "political significance" of the issue of climate change.[57] Only after the agency had persuaded itself—through means other than examination of the text of the relevant statutory provisions—that Congress could not have intended the statute to authorize regulation of air pollutants associated with climate change, did the agency turn to the language of the statute. This is not the way statutory interpretation is supposed to work.

In concluding that air pollutants associated with climate change are not "air pollutants" within the meaning of the Act, EPA managed both to ignore and to distort the plain text of the statute. Section

50. Massachusetts v. EPA, 127 S. Ct. 1438, 1446 (2007).

51. 42 U.S.C. § 7521(a)(1) (2000).

52. *Id.* § 7602(h).

53. *Id.* § 7602(g).

54. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

55. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999).

56. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926.

57. *Id.* at 52,928.

302(g) defines the critical term "air pollutant": "The term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air."[58]

Motor vehicles *emit* the *physical* and *chemical matter* carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons *into the ambient air.* No one involved in *Massachusetts v. EPA* has ever questioned these basic facts, which place these chemicals squarely within the ambit of the statutory definition of "air pollutants."

Closer parsing of the statutory text only bolsters this conclusion. The use of the word "any" in section 302(g)—not once, but twice: "any" air pollution agent, "any" physical or chemical substance or matter—bespeaks breadth. As the Supreme Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[59]

EPA's interpretation of the term "air pollutant" is at odds with section 302(g)'s use of the word "any." EPA asserted that "a substance does not meet the CAA definition of 'air pollutant' *simply because* it is a 'physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air.' It must also be an 'air pollution agent.'"[60] To accept EPA's view would be to rewrite the statutory language, changing it from "*any* physical, chemical, biological, radioactive . . . substance or matter" to the very different phrase "*some* physical, chemical, biological, radioactive . . . substance[s] or matter." But that is not what the statute says.

In addition, EPA's interpretation inverts the meaning of the word "including." Section 302(g) states, "The term 'air pollutant' means any air pollution agent or combination of such agents, *including* any physical, chemical, biological, radioactive . . . substance or matter."[61] In suggesting that some "physical, chemical, biological, radioactive * *

58. 42 U.S.C. § 7602(g).

59. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)); *see also, e.g.*, J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 130 (2001) ("In choosing such expansive terms . . . modified by the comprehensive 'any,' Congress plainly contemplated that the [statutory provision] would be given wide scope.") (quoting Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980)).

60. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929 n.3 (emphasis added).

61. 42 U.S.C. § 7602(g) (emphasis added).

* substance[s] or matter" are not "air pollution agent[s],"[62] EPA implied that the class of "air pollution agents" is smaller than the class of "physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." However, the use of the word "including" indicates that "air pollution agent" is, if anything, to be given a more spacious, not more cramped, meaning than the words that follow it. As the Court has recognized, "To 'include' is to 'contain' or 'comprise as part of a whole.'"[63] Thus, an "air pollution agent" is the "whole" of which "any physical, chemical, biological, radioactive . . . substance or matter" is a "part."

Petitioners' reading also gives meaning to the word "agent." Congress chose to include within the category of "air pollutants" not merely the "substance[s] or matter" that might comprise air pollution, but also other "agents" of air pollution.[64] These agents could include phenomena that, unlike "substance[s] or matter," have no mass (including, for example, heat and certain types of ionizing radiation, such as ultraviolet, gamma, and X-rays). Such phenomena could be "agents" of air pollution even though they are not "substance[s] or matter." Thus, far from having a constrictive effect on the phrase following the word "including," the use of the term "air pollution agent" indicates applications of the Act to phenomena not embraced by the "including" clause.

The text of the Act also makes clear that including air pollutants associated with climate change under the statutory rubric of "air pollutants" comports with Congress's legislative aims. The basic purpose of the Clean Air Act is to protect public health and welfare.[65] Adverse effects on public health and welfare are the key triggers for regulation under the Act.[66] Here is the Act's definition of "welfare":

62. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929 n.3.

63. Chickasaw Nation v. United States, 534 U.S. 84, 89 (2001) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 609 (rev. ed. 1985)); *see also* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (stating that "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants" held to mean that "discharge" was broader than the terms following "includes"); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 77 n.7 (1979) (defining "employee" to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations"; the word "including" was interpreted "to indicate that 'longshoring operations' are a part of the larger group of activities that make up 'maritime employment'").

64. 42 U.S.C. § 7602(g).

65. *Id.* § 7401(b)(1).

66. *See, e.g., id.* § 7411(b)(1)(A) (stationary sources); § 7521(a)(1) (motor vehicles); § 7545(c)(1)(A) (fuels and fuel additives).

> All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, *weather*, visibility, and *climate*, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.[67]

EPA's view that the Act "does not authorize regulation to address concerns about global climate change"[68] is completely at odds with the concern for effects on climate and weather explicit in this provision. It would be strange indeed for Congress to conclude, so pointedly, that climate and weather are important components of human welfare, yet to deprive EPA of authority to do anything about the pollutants that most affect these features of our environment.

Indeed, even absent the express references to "climate" and "weather" in the definition of the pivotal term "welfare," section 302(h) would nevertheless signal congressional concern with the kinds of harms posed by air pollutants associated with climate change. Climate change either triggers or exacerbates every one of the effects listed in section 302(h). EPA's narrow interpretation unjustifiably shrinks the agency's capacity to respond to effects that Congress has undeniably directed it to address.

What is more, EPA attempted to accomplish this shrinkage through a statutory phrase—"air pollutant"—that gives no hint of such a repercussion. Instead, the natural reading of this term is that it describes the large class of substances and phenomena that could potentially lead to regulation under the Act. While the Act defines "air pollutant" broadly, EPA may only regulate emissions of air pollutants when it concludes that they may reasonably be anticipated to endanger the public health or welfare.[69] Contrary to the claim of EPA's General Counsel, then, reading section 302(g)'s language as written would *not* lead to the regulation of "virtually anything entering the ambient air."[70]

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67. *Id.* § 7602(h) (emphasis added).

68. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

69. *See, e.g.*, 42 U.S.C. § 7411(b)(1)(A) (new stationary sources); § 7521(a)(1) (new motor vehicles).

70. Memorandum from Robert E. Fabricant, General Counsel, EPA, on EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act to Marianne L. Horinko, Acting Administrator, EPA 10 n.9 (Aug. 28, 2003), *available at* http://www.icta.org/doc/FabricantMemoAug282003.pdf.

EPA also erred in giving no weight to the Act's explicit inclusion of carbon dioxide within a list of "air pollutants." Section 103(g) directs EPA to conduct a research program concerning "[i]mprovements in nonregulatory strategies and technologies for preventing or reducing multiple *air pollutants*, including . . . *carbon dioxide*."[71] Trying to explain away this textual inclusion of the most important greenhouse gas, EPA asserted a dichotomy between "regulatory" and "nonregulatory" programs under the Act and claimed that the Act bars only "regulatory" activities with respect to air pollutants associated with climate change. EPA stated that "GHGs, as such, are not air pollutants under the CAA's *regulatory* provisions, including sections 108, 109, 111, 112 and 202," and that "the term 'air pollution' *as used in the regulatory provisions* cannot be interpreted to encompass global climate change."[72] On this theory, research on climate change conducted pursuant to section 103(g),[73] comports with EPA's interpretation because such activity is not "regulatory."[74] Yet research under section 103(g) relates to "air pollution," which EPA has said does not include climate change.[75]

Nothing in the language of the Act allows the phrase "air pollutants" to bear the double meaning EPA sought to give it. Section 302(g) does not, in defining "air pollutants," give any hint that the reach of this phrase depends on whether a statutory program is "regulatory" or not. As the Supreme Court put it in another case, "To give these same words a different meaning for each category would be to invent a statute rather than interpret one."[76]

Moreover, the Act does not even provide any basis for distinguishing actions that are "regulatory" in EPA's sense from ones that are not. EPA suggested that section 821 of the 1990 amendments to the Act ("1990 Amendments"), requiring utilities subject to the Act's acid rain control program to monitor and report their carbon dioxide emissions, is not a regulatory provision.[77] It is hard to understand what

71. 42 U.S.C. § 7403(g)(1) (emphasis added).

72. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928 (emphasis added).

73. 42 U.S.C. § 7403(g).

74. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926.

75. *Id.* at 52,928.

76. Clark v. Martinez, 543 U.S. 371, 378 (2005).

77. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926 (stating that section 821 does not "authorize[ ] the imposition of mandatory requirements"). Section 821 is uncodified; it appears as a note to section 412 of the Clean Air Act, 42 U.S.C. § 7651k.

EPA meant by "regulatory" or "mandatory" requirements if government-dictated monitoring and disclosure do not come within their terms.

In its argument in front of the Supreme Court in *Massachusetts v. EPA*, EPA tried to supply the textual analysis so sorely missing from its decision on the petition to regulate greenhouse gases. EPA's argument from text now amounts to this: "air pollution agents" must have "independent meaning" beyond the items listed in section 302(g)'s "including" clause, and that independent meaning constrains interpretation of the phrase "any chemical, physical . . . substance or matter."[78] Only those chemical or physical substances that are *also* "air pollution agents" are covered by the Act.[79] EPA has, however, provided no interpretation of the phrase "air pollution agent" beyond saying that this term does not include greenhouse gases under the Act's "regulatory provisions."[80] This circular reasoning lies behind the Solicitor General's otherwise mysterious reference to "cognizable 'pollution.'"[81] The government's position appears to be that although greenhouse gases may indeed constitute "pollution," they are not *cognizable* pollution under the Act. Nothing in the Act supports a distinction between "cognizable" and "non-cognizable" pollution.

Moreover, greenhouse gases clearly fall within the phrase "air pollution agents," even if one looks only at that language and ignores the language of the "including" clause. This is true for several reasons.

First, focusing on carbon dioxide: carbon dioxide is specifically named as an "air pollutant" in section 103(g) of the Act.[82] EPA has asked the Supreme Court to ignore this unambiguous textual inclusion of carbon dioxide in a list of "air pollutants" based on its theory that the Act draws a bright line between "regulatory" and "nonregulatory" provisions.[83] However, as already discussed, EPA's rigid distinction between "regulatory" and "nonregulatory" provisions has no support in the text or structure of the Act.

In addition, EPA itself has acknowledged that greenhouse gases exacerbate ozone pollution by exacerbating the conditions that create

78. U.S. Brief, *supra* note 15, at 34.

79. *Id.*

80. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928.

81. U.S. Brief, *supra* note 15, at 33.

82. 42 U.S.C. § 7403(g).

83. U.S. Brief, *supra* note 15, at 34–35.

this pollution.[84] Thus, greenhouse gases are "agents" of ozone "air pollution." Greenhouse gases help to bring about air pollution in the form of ozone; this is precisely what an "agent"—of "air pollution"—does.

In sum, a straightforward reading of the language of the Clean Air Act shows that carbon dioxide and other air pollutants associated with climate change are "air pollutants" potentially subject to regulation under section 202(a)(1). Whatever the outer limits of the term "air pollution agents," they are not close to being reached by including carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons within the ambit of this term. Not only do these chemicals fit exactly within the "including" clause of the definition of "air pollution agents," they also easily qualify as "air pollution agents" even without consideration of that clause. Indeed, as explained in Part II.E below, EPA has recognized as much in other regulatory proceedings. Perhaps this is why EPA has made no effort to define "air pollution agents" except to say that this term does not include greenhouse gases when they are being regulated as greenhouse gases. And it has not so much as mentioned the other proceedings in which it has taken a different approach to these chemicals. But interpretation for the nonce is not interpretation at all; it is merely improvisation.

B. "Economic and Political Significance"

As we have just seen, the statutory text does not work for EPA. Thus, EPA has relied heavily on a recent case that rejected a literal reading of statutory text in part because of the "economic and political significance" of the matter at hand.[85]

In *FDA v. Brown & Williamson Tobacco Corp.*, the Court overturned FDA's regulation of tobacco products as "drugs" under the Food, Drug, and Cosmetic Act[86] ("FDCA").[87] Before turning to the statutory scheme before it, the Court cautioned that it "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 and political magnitude to an administrative agency."[88] Acknowledging its usual policy of

84. *See* Control of Emissions from New and In-Use Highway Vehicles and Engines, 66 Fed. Reg. 18,245, 18,246 (Jan. 23, 2001).

85. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928.

86. 21 U.S.C. §§ 301–397 (2000).

87. *Brown & Williamson*, 529 U.S. at 155–56.

88. *Id.* at 133.

deferring to agency interpretations of the statutes they administer unless Congress has "directly spoken to the precise question at issue,"[89] the Court found that the issue of tobacco regulation was too important to conclude that Congress had delegated interpretive authority to FDA on this issue:

> [O]ur inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. . . .
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> . . . Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.[90]

Other than "economic and political significance," however, EPA's decision on greenhouse gases bears no resemblance to FDA's decision on tobacco.

For decades prior to FDA's decision to regulate tobacco, the agency had disclaimed any authority to regulate tobacco under the FDCA.[91] Moreover, Congress had enacted numerous tobacco-specific laws explicitly relying on FDA's interpretation.[92] Thus a whole regulatory regime, created by Congress, had sprung up in response to FDA's disclaimers of regulatory authority. FDA's own regulatory framework for tobacco stood in sharp contrast to the framework Congress had developed over the years.[93]

In *Massachusetts v. EPA,* in contrast, EPA had not spent decades disclaiming authority to regulate greenhouse gases, and thus no legislation was enacted premised on such disclaimers. In fact, prior to the decision challenged in *Massachusetts v. EPA,* EPA had acknowledged that it did have authority to regulate greenhouse gases. In response to congressional inquiries, two EPA General Counsels stated that the Clean Air Act gives the agency the power to regulate carbon dioxide.[94]

89. Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

90. *Brown & Williamson,* 529 U.S. at 159–60 (citations omitted).

91. *Id.* at 157.

92. *Id.* at 154–57.

93. *Id.* at 148–56.

94. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,923, 52,924 (Sept. 8, 2003).

In *Brown & Williamson*, moreover, the Court thought that FDA's view on its regulatory authority could have but one regulatory consequence: a total ban on tobacco products.[95] Yet Congress's legislation on tobacco clearly assumed that tobacco products would remain legal.[96] In this way, too, the Court found that FDA's regulatory program was at odds with the program Congress itself had developed.[97]

Nothing so dramatic as a ban on automobiles would come from recognition of EPA authority to regulate greenhouse gases. Regulating greenhouse gases under the Clean Air Act would merely lead to EPA setting economically and technologically feasible emission standards—something the agency has done for decades for other pollutants emitted by motor vehicles.[98]

Massachusetts v. EPA is thus worlds away from *Brown & Williamson*. In relying on *Brown & Williamson*, EPA has encouraged the Court to focus not on the relevant statutory text, but instead on the political and economic consequences of a ruling in petitioners' favor. Making interpretive principles turn, not on statutory text but on the Court's own view of the political and economic ramifications of a case, is the very antithesis of judicial restraint.

C. "They Call It Pollution, We Call It Life"

In the spring of 2006, the Competitive Enterprise Institute ("CEI") ran television spots on carbon dioxide. The tag line: "They call it pollution. We call it life."[99] Amazingly, the basic message of these commercials has resurfaced in industry respondents' briefs in *Massachusetts v. EPA*.

First, the automobile and utility industry respondents have argued that carbon dioxide is not an "air pollution agent" because it does not make the air "dirty."[100] This is not a word used in the Act. It is hard to know what respondents mean by it. For example, carbon

95. 529 U.S. at 137.

96. *Id.* at 143–44.

97. *Id.* at 134–43.

98. Section 202 includes protections designed to prevent severe economic impacts. *See, e.g.*, 42 U.S.C. § 7521(a)(2) (2000).

99. Competitive Enterprise Institute, http://www.cei.org/pages/co2.cfm (last visited Aug. 11, 2007) (showing two sixty-second ads focusing on the alleged global warming crisis that aired in several United States cities in May 2006).

100. Brief for Respondent Utility Air Regulatory Group at 46, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3101955, at *46 [hereinafter UARG Brief]; Brief for Respondents Alliance of Automobile Manufacturers et al. at 20–21, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3023028, at *20–21 [hereinafter AAM Brief].

monoxide is not "dirty" in the usual sense of the term; it is colorless and odorless (this is why carbon monoxide detectors are needed).[101] Yet carbon monoxide has been regulated under section 202 of the Act for decades,[102] and no one involved in *Massachusetts v. EPA* has questioned the appropriateness of this regulation.

More closely echoing CEI's commercials, automobile industry respondents also assert that carbon dioxide is not an "air pollution agent" because it is "essential to life."[103] Yet chromium and selenium, for example, are essential nutrients,[104] and EPA nonetheless regulates chromium and selenium compounds as hazardous air pollutants under the Act.[105] EPA has, moreover, recently announced a proposed rule that would control the use of carbon dioxide as a substitute for ozone-depleting substances because carbon dioxide is deadly at certain concentrations.[106] Many substances have benign, or even beneficent, consequences at lower concentrations and malign consequences at higher concentrations.[107] Respondents' categorical treatment of carbon dioxide as "essential to life" ignores this basic scientific principle.

D. Other "Indicia of Legislative Intent"

EPA adopted its question-begging reading of the text of the Clean Air Act because it concluded, wrongly, that Congress had either deprived it of jurisdiction in more recent enactments, or had otherwise made clear to the agency that Congress, not EPA, should deal with climate change. None of the arguments the agency has made in support of this claim is sound.

First up is EPA's invocation of failed legislative proposals. In its decision concluding that it had no authority to regulate greenhouse gases, EPA noted that when Congress amended the Act in 1990, it did

101. Consumer Prod. Safety Comm'n, Carbon Monoxide Questions and Answers, CPSC Document #466, *available at* http://www.cpsc.gov/CPSCPUB/PUBS/466.html (last visited Aug. 3, 2007).

102. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690.

103. AAM Brief, *supra* note 100, at 20.

104. *See* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 401 tbl.60-2, 410 (Kasper et al. eds., 16th ed. 2005).

105. 42 U.S.C. § 7412(b)(1) (2000).

106. Protection of Stratospheric Ozone: Listing of Substitutes in the Motor Vehicle Air Conditioning Sector Under the Significant New Alternatives Policy (SNAP) Program, 71 Fed. Reg. 55,140, 55,143 (Sept. 21, 2006) (codified at 40 C.F.R. pt. 82 (2006)).

107. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 9 (1993) ("Drinking a bottle of pure iodine is deadly; placing a drop of diluted iodine on a cut is helpful.").

not enact the specific carbon dioxide emission limits then proposed.[108] EPA also cited several other legislative proposals that were not enacted.[109] EPA argued that because Congress was aware of the issue of climate change when it amended the Act in 1990, its failure to enact proposals to regulate carbon dioxide signaled that it was "awaiting further information before deciding *itself* whether regulation to address global climate change is warranted and, if so, what form it should take."[110]

The statutory language showing that EPA has authority to regulate carbon dioxide and other air pollutants associated with climate change was in place before the 1990 Amendments, and indeed, before any of the failed legislative proposals EPA cited were developed. By the plain terms of the statute, EPA *already* possessed the authority to regulate greenhouse gases at the time of these proposals. EPA appears to think that subsequent unenacted legislation can amend prior enacted legislation. The Supreme Court has repeatedly rejected such an approach.[111] Moreover, if failed legislative proposals were good evidence of prior legislative intent, then petitioners in *Massachusetts v. EPA* could cite such evidence on their side as well.[112]

EPA is also laboring under the misimpression that subsequently enacted legislation can silently undo previously granted authority and can do so even when the two pieces of legislation can happily coexist. EPA cited provisions from the 1990 Amendments to the Act and from other legislation in asserting that Congress meant for EPA to take a strictly "nonregulatory" approach to climate change.[113] Nothing in these provisions expressly or impliedly removes the authority granted by section 202(a)(1).[114]

108. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,926 (Sept. 8, 2003).

109. *Id.* at 52,928.

110. *Id.* at 52,927.

111. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169–70 (2001) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'") (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977) ("It is the intent of the Congress that enacted [the provision at issue], unmistakable in this case, that controls.").

112. H.R. 2221, 106th Cong. §§ 3(b), 2(a)(2) (1999) (failed proposal to strip EPA of authority to regulate emissions of carbon dioxide, citing EPA's position, at the time, that carbon dioxide was a "pollutant").

113. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926, 52,927 (citing sections 103, 602, and uncodified section 821 of the Act).

114. Section 103(g) says only that "[n]othing *in this subsection* shall be construed to authorize the imposition on any person of air pollution control requirements." 42 U.S.C.

In fact, as discussed above, one of the "nonregulatory" provisions EPA relied upon, section 103(g), reinforces the interpretation of the phrase "air pollutant" dictated by the plain text of section 302(g). By expressly including carbon dioxide in a list of enumerated "air pollutants," section 103(g) reaffirms that this greenhouse gas is an "air pollutant" under the Act.[115]

Apart from these provisions in the Clean Air Act, Congress has, since 1977, also enacted several statutes pertaining to global climate change.[116] Because such legislation principally called for further research and other "nonregulatory" measures, EPA thought that these enactments demonstrated that Congress meant to withhold from EPA regulatory authority to address climate change.[117] Once again, however, EPA did not—and, given the content of these statutes, could not—claim that these enactments erased its existing authority to regulate "air pollutants."[118] In trying to snuff meaning out of 1970s legislation based on legislation of the 1980s and 1990s, EPA is struggling uphill against the "cardinal rule . . . that repeals by implication are not favored."[119]

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§ 7403(g) (2000) (emphasis added). Likewise, section 602(e) directs EPA to "publish the global warming potential" of ozone-depleting substances designated for phase-out under the Act, and then states that "[t]he *preceding sentence* shall not be construed to be the basis of any additional regulation under this chapter." 42 U.S.C. § 7671a(e) (emphasis added). Neither of these provisions utters a peep about section 202(a)(1).

115. 42 U.S.C. § 7403(g).

116. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, 106 Stat. 2776 (calling for an assessment of the feasibility of reducing greenhouse gases and creating a national inventory and voluntary reporting of greenhouse gas emissions); Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, tit. XXIV, 104 Stat. 3359 (establishing a program to coordinate climate change research and policy within the Department of Agriculture); Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 (authorizing a comprehensive research effort); Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1331 (requiring the President to develop a national policy on climate change); National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 (establishing a program to assist the nation in understanding and responding to climate change).

117. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,927.

118. EPA's citation to congressional actions pertaining to climate treaty negotiations in the 1990s, Control of Emissions from New Highway Vehicles and Engines, is even further removed from the meaning of the Clean Air Act provisions enacted in the 1970s. These actions did not mention, let alone limit, existing domestic regulatory authority. *See* S. REP. No. 105-54 (1997); *see also* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-276, 112 Stat. 2461 (1998).

119. Cook County v. United States *ex rel.* Chandler, 538 U.S. 119, 132 (2003) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

EPA's aim in citing the above "indicia of congressional intent"—failed proposals and legislation enacted after the statutory text at issue here was in place—was to show that Congress intended to "learn more about the global climate change issue before specifically authorizing regulation to address it."[120] Apart from the problems already discussed, there are additional flaws in EPA's analysis.

First, numerous provisions of the Clean Air Act explicitly require EPA or other entities to "learn more about" an environmental issue and to report back to Congress with recommendations for legislation.[121] In addition, before the Motor Vehicle Air Pollution Control Act of 1965[122] created the first federal regulatory program for motor vehicle emissions, Congress had twice directed first the Surgeon General, and then the Secretary of Health and Human Welfare, to conduct research on the consequences of air pollution from motor vehicles and to report back to it with recommendations for legislation on the subject.[123] If, in section 202(a)(1) of the Clean Air Act, Congress had really wanted to create the kind of nonregulatory, report-and-wait program EPA envisions, it could easily have replicated the language of these other provisions and tailored it to the issue of climate change. It did not do this.

Second, EPA's argument implies that ongoing research only precedes, and cannot coexist with, regulation under the Act. Yet section 202 and other key sections of the Act call for EPA to take regulatory action against dangers to public health and welfare even when some scientific uncertainty remains. Research and regulation walk hand in hand under the Act, and thus calls by Congress for more research on a topic have naturally been paired with commands for regulation.[124]

120. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928.

121. *See, e.g.*, 42 U.S.C. § 7412(f)(1)–(2) (2000) (requiring report to Congress on program regulating hazardous air pollutants and contemplating further agency action only in the event Congress does not act on agency recommendations); § 7412(r)(6) (directing Chemical Safety Board to report to Congress on accidental hazardous releases and to make recommendations).

122. Act of Oct. 20, 1965, Pub. L. 89-272, 79 Stat. 992 (amending the Clean Air Act).

123. Act of June 8, 1960, Pub. L. No. 86-493, 74 Stat. 162; Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (current version at 42 U.S.C. §§ 7401–7671q (2000)).

124. *See, e.g.*, 42 U.S.C. § 7409(a), (d) (providing for establishment of National Ambient Air Quality Standards ("NAAQS") and continuing research on the scientific basis of the standards); § 7412(d), (f)(1) (providing for technology-based regulation of hazardous air pollutants and continuing research into adequacy of this regulation in protecting public health); §§ 7521(a), 7548 (calling for regulation of air pollution from motor vehicles and study of effects on public health and welfare of particulate matter emissions from motor vehicles).

Third, EPA states that Congress must "*specifically* authoriz[e]"[125] a regulatory program before EPA may act. This notion is at odds with the system created by the Act. What EPA seems to mean is that Congress must say the words "carbon dioxide" or "greenhouse gases" in specific regulatory provisions of the Act before a regulatory program addressing these matters may be developed. This is not the way the statute works.[126] On the contrary, the Act does not attempt, in advance, to identify all of the possible targets of regulatory activity. Even where Congress has painstakingly listed pollutants that it wishes to regulate, it has also recognized that further research may identify additional harmful pollutants that should be brought into the regulatory fold.[127] In many other cases, Congress has identified the targets of regulation in general terms, leaving the details for EPA to fill in.[128]

One famous example of this framework in operation is EPA's reduction of the lead content of gasoline. The 1970 version of section 211 of the Clean Air Act authorized the Administrator to "control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products of such fuel or fuel additive will endanger the public health or welfare."[129] This provision did not mention the fuel additive lead. Despite the Act's lack of an explicit reference to leaded gasoline, EPA in 1973 ordered a dramatic reduction in the lead content of gasoline.[130] The agency later ordered still steeper reductions.[131] EPA based its decisions to phase down lead in gasoline on broadly worded statutory language that did not specifically grant it authority to regulate lead in gasoline.[132] These

125. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928 (emphasis added).

126. Nor is it the way most statutes work. *See, e.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 475 (1989) (Kennedy, J., dissenting) (stating Congress "usually does not legislate by specifying examples, but by identifying broad and general principles that must be applied to particular factual instances").

127. *See, e.g.*, 42 U.S.C. § 7412(b)(1) (listing nearly 200 hazardous air pollutants to be regulated); § 7412(b)(2)–(3)(B) (making way for additions to the list).

128. *See, e.g.*, 42 U.S.C. § 7408(a) (criteria air pollutants); § 7411(b)(1)(A) (stationary sources subject to New Source Performance Standards); § 7545(c) (fuels and fuel additives).

129. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 211(c)(1), 84 Stat. 1676, 1698.

130. Control of Lead Additives in Gasoline, 38 Fed. Reg. 33,734, 33,734 (Dec. 6, 1973) (codified at 40 C.F.R. pt. 80 (1973)).

131. Regulation of Fuels and Fuel Additives; Gasoline Lead Content, 50 Fed. Reg. 9386, 9386 (Mar. 7, 1985) (codified at 40 C.F.R. pt. 80 (1985)).

132. 42 U.S.C. § 7545.

decisions were economically and politically momentous. The interpretive method EPA embraced in declining to regulate greenhouse gases would have doomed the lead phase-down from the get-go.

In disclaiming authority to regulate air pollutants associated with climate change, EPA also pointed to two important programs under the Act which the agency said would fit so uneasily with regulation of these pollutants that Congress could not have intended these pollutants to be regulated at all. These claims are meritless.

EPA asserted, first, that Congress's enactment in 1990 of Title VI of the Act,[133] which regulates chemicals that threaten the stratospheric ozone layer, "cautions against construing [the Act's] provisions to authorize regulation of emissions that may contribute to global climate change."[134] EPA stated that the enactment of Title VI "demonstrate[s] that Congress has understood the need for specially tailored solutions to global atmospheric issues."[135] Once again, EPA sought to use provisions enacted in 1990 to discern—and to limit—the meaning of provisions enacted in the 1970s. Moreover, as discussed below, EPA has used the very statutory program under discussion here—relating to stratospheric ozone depletion—as a basis for regulating air pollutants associated with climate change.

In any event, EPA cannot seriously maintain that "coordination with the international community" is a prerequisite for regulating pollutants that "are emitted around the world and are very long-lived," the consequences of which "occur on a global scale."[136] Congress directed EPA to regulate ozone-depleting substances themselves without awaiting such coordination.[137] In addition, EPA has recently issued a rule regulating mercury emissions.[138] Mercury is (to use EPA's words in describing greenhouse gases and ozone-depleting substances) a pollutant "emitted around the world" that is "very long-lived" and exerts effects "on a global scale."[139] Even so, the agency has not made

133. *Id.* §§ 7671–7671q.

134. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,926 (Sept. 8, 2003).

135. *Id.*

136. *Id.*

137. 42 U.S.C. § 7426; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 126, 91 Stat. 685, 724.

138. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,606 (May 18, 2005) (codified at 40 C.F.R. pts. 60, 72, 75 (2005)).

139. *See* Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 70 Fed. Reg. 15,994, 16,011, 16,012 (Mar. 29, 2005) (stating that mercury is "persistent," and there exists a "global

domestic regulation of mercury await "coordination with the international community."

EPA's claim based on the National Ambient Air Quality Standards ("NAAQS") program is equally unsound. EPA concluded that the NAAQS system, created by sections 108-110 of the Act,[140] is "fundamentally ill-suited to addressing [greenhouse] gases in relation to global climate change," and on this basis asserted that Congress did not intend EPA to regulate these pollutants under any part of the Act, including section 202.[141] EPA's move is a classic debater's trick: when you're losing the argument, change the subject.

The NAAQS program is an entirely separate program from the mobile source program at issue in *Massachusetts v. EPA*. Nothing in the Act suggests that regulation under the mobile source program must stand or fall with regulation under the NAAQS program. Congress created the federal program for controlling air pollution from motor vehicles in 1965, five years before the Act created the NAAQS program. Congress did not choose to merge the programs, and they retain significant independent status and effects.

Organizationally, Title II of the Act regulates mobile sources, which is separate from Title I, concerning the NAAQS.[142] Moreover, while the federal government sets the NAAQS, the states are primarily responsible for implementing them,[143] whereas the federal government sets the emission standards for mobile sources, and states have a more circumscribed role (with the exception that California may set its own standards, subject to certain constraints).[144] Furthermore, the two programs cover different pollutants. For example, benzene and formaldehyde must be regulated under the mobile source program,[145] but they are not regulated under the NAAQS program.

The NAAQS program and the mobile source program are also initiated by different regulatory triggers. Regulation of mobile sources is triggered under section 202(a)(1) by a determination that air pollu-

[mercury] cycle"); Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000) (estimating that roughly forty percent of the mercury deposited in the United States comes from sources in other countries).

140. 42 U.S.C. §§ 7408–7410.

141. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003).

142. *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("The NAAQS . . . are the engine that drives nearly all of *Title I* of the CAA . . . .") (emphasis added).

143. *See, e.g., id.* at 470.

144. 42 U.S.C. § 7543(a), (b).

145. *Id.* § 7521(1)(2).

tion from motor vehicles "may reasonably be anticipated to endanger public health or welfare."[146] Although an endangerment decision of this kind is also a prerequisite to regulation under the NAAQS program,[147] the NAAQS provision includes additional triggering language as well.[148]

In any event, whether or not the NAAQS program may appropriately be applied to greenhouse gases, there is no gainsaying that the mobile source program of section 202 may be so applied. Section 202 sets up a perfectly feasible framework for regulating emission of greenhouse gases from motor vehicles: the establishment of the same sort of technology-based limits that EPA has already set for other pollutants emitted by motor vehicles.

EPA also asserted that Congress has not authorized the agency to set standards for carbon dioxide emissions from motor vehicles to the extent that such standards would regulate fuel economy[149] because such regulation would be inconsistent with the Energy Policy and Conservation Act[150] ("EPCA"). EPCA, administered by the National Highway Traffic Safety Administration[151] ("NHTSA"), sets minimum corporate average fuel economy ("CAFE") standards for automobiles.[152] EPA claimed that the only practical way to reduce carbon dioxide emissions from vehicles is to improve fuel economy and that the care Congress exercised in creating a system for regulating fuel economy in EPCA demonstrated that EPCA was meant to be the only statutory vehicle for doing so.[153] Here, EPA fundamentally misread the Clean Air Act and EPCA and again violated sound principles of statutory interpretation.

The relevant provisions of EPCA and the Clean Air Act have fundamentally different purposes. EPCA's provisions were passed to promote energy efficiency;[154] the Clean Air Act's provisions were passed

146. *Id.* § 7521(a)(1).

147. *See id.* § 7408(a)(1)(A).

148. *See, e.g., id.* § 7408(a)(1) (requiring the Administrator to list new pollutants "for which he plans to issue air quality criteria").

149. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003).

150. 49 U.S.C. §§ 32,901–32,919 (2000).

151. The Secretary of Transportation has delegated his responsibilities under EPCA to NHTSA. 49 C.F.R. 1.50(f) (2006).

152. 49 U.S.C. 32,902.

153. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929.

154. 42 U.S.C. § 6201(5) (2000).

to protect public health and welfare.[155] The fact that in EPCA Congress created a system to strike a particular balance between energy conservation and other considerations has no bearing on the balance that Congress intended the EPA Administrator to strike if, in his judgment, he determined that carbon dioxide emissions from vehicles were endangering public health and welfare.

EPA's argument is premised on the assumption that the two provisions are inconsistent. They are not. The statutes may overlap but they are not irreconcilable, and manufacturers will be able to continue to comply with both statutes, as they have for decades. Regulatory overlap is common.[156] In cases of alleged conflict between two statutes, the Supreme Court has consistently held that both must be given effect wherever possible: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[157]

To be sure, many technologies employed to reduce carbon dioxide emissions may well result in consuming less fuel per mile of travel. These overlapping impacts are not inconsistent because the standards set pursuant to both statutes are minimum standards.[158] Because both statutes set minimum standards, an automobile manufacturer's compliance with one statute does not interfere with its compliance with the other.

Congress recognized these potentially overlapping effects. Indeed, the Clean Air Act and EPCA refer to each other. EPCA provides that when setting new fuel efficiency standards, NHTSA must take into account "the effect of other motor vehicle standards of the Government on fuel economy,"[159] which include emissions standards under the Clean Air Act. Similarly, the Clean Air Act allows automobile manufacturers a limited waiver of certain emission standards for oxides of nitrogen if this would, among other things, enable greater

155. *Id.* § 7521(a)(1).

156. FTC v. Ken Roberts, Co., 276 F.3d 583, 593 (D.C. Cir. 2001) ("[W]e live in 'an age of overlapping and concurring regulatory jurisdiction' . . . .") (quoting Thompson Med. Co. v. FTC, 791 F.2d 189, 192 (D.C. Cir. 1986)).

157. Morton v. Mancari, 417 U.S. 535, 551 (1974); *see also, e.g.*, J.E.M. AG Supply, Inc. v. Pioneer, 534 U.S. 124, 143–44 (2001).

158. *See* 42 U.S.C. § 7521(a)(1); 49 U.S.C. §§ 32,901(a)(6), 32,902 (2000).

159. 49 U.S.C. § 32,902(f).

fuel economy.[160] These statutes were thus written with respectful attention to each other. Congress expressly acknowledged that EPA is authorized under the Clean Air Act to set motor vehicle emission standards that could affect fuel economy, both positively and negatively. Nothing in EPCA limits the circumstances under which EPA may set motor vehicle emission standards for air pollutants that cause or contribute to endangerment of the public health or welfare, just as nothing in the Clean Air Act undoes NHTSA's authority to address fuel efficiency.

E. Arbitrariness and Caprice

Deference to EPA's interpretation is appropriate only if the statutory text is ambiguous, and the interpretation is reasonable.[161] As explained, the text is unambiguous. Even if it were not, however, EPA's interpretation deserves no deference because it is arbitrary and capricious.[162]

Making up one's mind first and then looking for reasons to support one's decision is the very soul of arbitrariness. Here, EPA backed into its conclusion that carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are not "air pollution agents" within the meaning of the Act by first reaching its substantive bottom line and then forcing that conclusion into the statutory text:

> We thus conclude that the CAA does not authorize regulation to address concerns about global climate change.
>
> *It follows from this conclusion,* that GHGs, as such, are not air pollutants under the CAA's regulatory provisions, including sections 108, 109, 111, 112 and 202. . . . *Because EPA lacks CAA regulatory authority to address global climate change, the term "air pollution" as used in the regulatory provisions cannot be interpreted to encompass global climate change.* Thus, CO_2 and other GHGs are not "agents" of air pollution and do not satisfy the CAA section 302(g) definition of "air pollutant" for purposes of those provisions.[163]

If this is the way statutory interpretation works, EPA could also have declared that automobiles emitting carbon dioxide and other air pollutants associated with climate change are not "motor vehicles" within the meaning of the Act when they are emitting those chemi-

160. *See* 42 U.S.C. § 7521(b)(3)(C). Congress inadvertently included two subsections denominated "(b)(3)" in section 202. *Id.* n.2. This provision is in the second of those. *Id.* § 7521(b)(3)(C).

161. Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984).

162. *Id.* at 844.

163. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003) (emphasis added).

cals. Once interpretation is unmoored from statutory language, as EPA has done, one can, like Humpty Dumpty, use words to mean whatever the user chooses them to mean.

EPA's decisionmaking regarding air pollutants associated with climate change is also capricious. EPA does not consistently apply the definition of "air pollutants" and "air pollution" it offered in *Massachusetts v. EPA*. Indeed, EPA has regulated—as "air pollutants"—most of the chemicals at issue in that case. For example, the agency is requiring the monitoring of carbon dioxide emissions from nonroad equipment pursuant to section 103(a),[164] which authorizes research into "air pollution."[165]

In addition, EPA considers the global warming potential of proposed substitutes for ozone-depleting substances in evaluating those substitutes under provisions of the Clean Air Act addressing stratospheric ozone depletion.[166] EPA has ruled that the use of two hydrofluorocarbons[167] (HFC-134a and HFC-152a) in self-chilling cans is an unacceptable substitute for ozone-depleting substances, based entirely on these chemicals' global warming potential.[168] Section 618 of the Act specifically provides that requirements concerning stratospheric ozone depletion are "requirements for the control and abatement of *air pollution*" within the meaning of sections 116 and 118 of the Act.[169] EPA's assertion that "the term 'air pollution' as used in the regulatory provisions cannot be interpreted to encompass global climate change,"[170] cannot be squared with its regulatory actions with respect to substitutes for ozone-depleting substances.

Furthermore, ten years ago, EPA added municipal solid waste landfills to the list of sources to be regulated under the Clean Air Act based on the Administrator's determination that these landfills met

164. 42 U.S.C. § 7403(a).

165. Agency Information Collection Activities, 69 Fed. Reg. 12,151, 12,151 (Mar. 15, 2004).

166. Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044, 13,049 (Mar. 18, 1994) (codified at 40 C.F.R. pts. 9, 82 (1994)).

167. Hydrofluorocarbons are among the chemicals petitioners asked EPA to regulate. *See supra* text accompanying note 16.

168. Protection of Stratospheric Ozone; Listing of Substitutes for Ozone-Depleting Substances, 64 Fed. Reg. 10,374, 10,375 (Mar. 3, 1999) (codified at 40 C.F.R. pt. 82 (1999)); *see also, e.g.*, Protection of Stratospheric Ozone; Listing of Substitutes for Ozone-Depleting Substances, 64 Fed. Reg. 22,982, 22,984 (Apr. 28, 1999) (codified at 40 C.F.R. pt. 82 (1999)) (listing another substitute as unacceptable based in part on global warming potential).

169. 42 U.S.C. § 7671q (emphasis added).

170. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

section 111's standard of endangerment.[171] EPA included methane within "the emissions of concern" emanating from landfills, explaining: "Methane emissions *contribute to global climate change* and can result in fires or explosions when they accumulate in structures on or off the landfill site."[172] Yet methane is one of the chemicals EPA has now said is not an "air pollutant" under the Act.

Thus, EPA regulates air pollutants associated with climate change as "air pollutants" under the Clean Air Act. It sometimes even does so *because* they are implicated in climate change. The agency was incorrect, therefore, when it stated that "GHGs are not 'agents' of air pollution and do not satisfy the CAA section 302(g) definition of 'air pollutant' for purposes of [the Act's regulatory] provisions."[173] What EPA should have said was that it will let us know when these chemicals are "air pollutants," and when they are not, based not upon the statutory text but upon the agency's own unpredictable amendments to the statutory text. Even if the statutory language were ambiguous, which it is not, the ad-libbed interpretation EPA has offered in *Massachusetts v. EPA* deserves no deference from the Court.

III. Discretion

EPA also erred in concluding that it could decline under section 202(a)(1) to regulate air pollutants associated with climate change on the basis of factors not enumerated in that provision. Even when an agency is declining to regulate, it may not depart from the unambiguous language of the statute in making its decision.[174]

In the section of its decision relevant here, entitled "Different Policy Approach," EPA gave the reasons why it would refuse to regu-

171. Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9905 (Mar. 12, 1996) (codified at 40 C.F.R. pt. 60 (1996)) (applying section 7411(b)(1)(A)).

172. *Id.* at 9905 (emphasis added); *see also* Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Landfills Point Source Category, 63 Fed. Reg. 6426, 6454 (Feb. 6, 1998) (codified at 40 C.F.R. pt. 445 (1998)) ("The primary source of air pollution from landfills is due to the microbial breakdown of organic wastes from within the landfill. Landfills are known to be major sources of greenhouse gas emissions such as methane and CARBON DIOXIDE. These emissions are now regulated under the CLEAN AIR ACT as a result of the landfill New Source Performance Standards and Emissions Guidelines, promulgated by EPA on March 12, 1996.").

173. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928.

174. *See, e.g.*, Gen. Motors Corp. v. NHTSA, 898 F.2d 165, 169–70 (D.C. Cir. 1990) (holding that judicial review of denial of rulemaking petition is "guided by *Chevron* analysis").

late greenhouse gases from motor vehicles even if it had the authority to do so: it thought regulation under section 202(a)(1) was "piecemeal and inefficient"; it gestured toward the potential foreign policy implications of pursuing regulation under the Clean Air Act; it stated that technology might not be available to reduce all of the greenhouse gas emissions the petition covered; and it outlined uncertainties remaining in our understanding of climate change.[175]

Nowhere did EPA assert that it was declining to regulate due to resource constraints, competing priorities, or an inability to determine whether the statutory standard of endangerment was met—factors that might counsel chariness in judicial review. Nevertheless, EPA and other respondents have asked the Supreme Court for an especially forgiving standard of review. In doing so, they have ignored the actual structure of EPA's decision. That decision must be reversed if it is inconsistent with the Act. It is.

A. Standard of Review

A court reviewing an agency decision "shall . . . compel agency action unlawfully withheld."[176] EPA's decision not to regulate greenhouse gases from motor vehicles should be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[177] Under this standard, petitioners in *Massachusetts v. EPA* should win. It is understandable, therefore, that respondents have worked very hard to convince the Court to apply a different standard of review.

Indeed, respondents' briefs brim with hints that EPA's decision declining to regulate greenhouse gases from motor vehicles might not be reviewable at all.[178] Automobile industry respondents have argued that agency refusals to issue rules are fundamentally different from agency decisions to issue rules and that this difference makes the former "effectively nonreviewable."[179] They stopped short, however, of actually saying that EPA's decision is unreviewable, settling instead for a "more deferential standard" than the one that would be applied to agency rules or revocations of rules.[180]

175. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929–31.

176. 5 U.S.C. § 706(1) (2000).

177. *Id.* § 706(2)(A).

178. U.S. Brief, *supra* note 15, at 38 & n.15, 45 & n.21; AAM Brief, *supra* note 100, at 43, 44.

179. AAM Brief, *supra* note 100, at 43.

180. U.S. Brief, *supra* note 15, at 39.

As support for a different standard of review for EPA's decision refusing to regulate greenhouse gases, the Solicitor General cites the Court's decisions in *Heckler v. Chaney*[181] and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[182] In *Heckler*, of course, as the Solicitor General notes, the Court did not even address rulemaking proceedings.[183] Moreover, the Court based its decision as much on an analogy to prosecutorial decisions not to indict and their historical immunity from review as on the concerns the Solicitor General identifies.[184] Agency decisions not to promulgate rules do not implicate the prosecutorial discretion protected in *Chaney*.[185] As for *State Farm*, the Court's only reference to the actual standard of review that might be applicable to refusals to promulgate rules was the Court's mention of what the *petitioners* in that case thought that standard would be.[186] The case does not hold that a different standard of review applies to refusals to promulgate rules or, more particularly, that an agency that refuses to issue a rule has more leeway in interpreting a statute than an agency that issues a rule.

The Court's practice in reviewing agency decisions confirms that there is no special rule of interpretation reserved for agency refusals to promulgate rules. In *Young v. Community Nutrition Institute*,[187] for example, the Court reviewed the refusal of FDA to promulgate a rule limiting aflatoxin in food.[188] FDA's decision was challenged as a misinterpretation of its governing statute.[189] Using ordinary tools of statutory interpretation, the Court investigated whether FDA had legally erred in refusing to promulgate the rule.[190] The Court upheld FDA's decision, but it did so by applying an ordinary standard of review to the case.[191]

In *Japan Whaling Ass'n v. American Cetacean Society*,[192] moreover, in a context strikingly similar to the one presented in *Massachusetts v.*

181. 470 U.S. 821 (1985).
182. 463 U.S. 29 (1983).
183. U.S. Brief, *supra* note 15, at 38 n.15; 470 U.S. at 825 n.2.
184. 470 U.S. at 832.
185. *See* Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987).
186. 463 U.S. at 42.
187. 476 U.S. 974 (1986).
188. *Id.* at 977–78.
189. *Id.* at 980.
190. *Id.* at 979–84.
191. To similar effect are *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 465–66, 469–74 (1984) (reviewing denial of rulemaking petition based on ordinary principles of statutory construction), and *NAACP v. Federal Power Commission*, 425 U.S. 662, 664, 666–71 (1976) (same).
192. 478 U.S. 221 (1986).

EPA, the Court scrutinized the Secretary of Commerce's refusal to certify that Japan's whaling practices "diminish[ed] the effectiveness" of the International Convention for the Regulation of Whaling, using ordinary tools of statutory construction.[193] There, the Court made clear that an agency may not refuse to make a finding contemplated by a statute "for any reason not connected with the aims and . . . goals" of the relevant law.[194]

Likewise, the D.C. Circuit—contrary to respondents' suggestions in *Massachusetts v. EPA*[195]—reviews refusals to promulgate rules under the same standard it uses for informal agency rulemaking. This is not surprising, since section 706(1) of the Administrative Procedure Act ("APA") does not draw the distinction respondents cite. For this reason, the very cases cited by respondents clearly hold that agency refusals to promulgate rules are to be overturned if the agency commits a "plain error of law."[196] The D.C. Circuit has, in fact, explicitly rejected the analogy to *Chaney* on which the government relied in *Massachusetts v. EPA*[197] and has overturned agencies' denials of rulemaking petitions where the denials were grounded in an error of law.[198] To be sure, the D.C. Circuit has been hesitant to overturn agency refusals to regulate where those refusals are grounded in "factors not inherently susceptible to judicial resolution," such as competing agency priorities,[199] but those factors are not present in *Massachusetts v. EPA*, where petitioners' claim is that EPA's decision rested on a misinterpretation of the statute on which the decision was based.

Creating a more deferential interpretive standard in the context of agency refusals to take action would not only be inconsistent with existing precedent and the APA, it would have far-reaching (and bad) effects. A substantial number of regulatory regimes prohibit certain conduct or commercial activity in the absence of an agency decision allowing it; food additives,[200] new drugs,[201] and certain medical de-

193. *Id.* at 228.

194. *Id.* at 233.

195. U.S. Brief, *supra* note 15, at 36–37; UARG Brief, *supra* note 100, at 26–29; AAM Brief, *supra* note 100, at 44.

196. Midwest Indep. Transmission Sys. Oper., Inc. v. FERC, 388 F.3d 903, 911 (D.C. Cir. 2004); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987); *see also* Gen. Motors Corp. v. NHTSA, 898 F.2d 165, 169–70 (D.C. Cir. 1990) (agency refusal to institute rulemaking guided by ordinary principles of statutory construction).

197. *Am. Horse Prot. Ass'n*, 812 F.2d at 4.

198. *See, e.g., id.* at 7 (overturning agency refusal to institute rulemaking where agency head had proved "blind to the nature of his mandate from Congress").

199. *See* Natural Res. Def. Council v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

200. 21 U.S.C. § 348(a)(2) (2000).

vices,[202] to name just a few examples, may not be marketed without agency approval. If agency decisions "to institute proceedings or to promulgate rules"[203] were subject to the more forgiving standard of review respondents seek in *Massachusetts v. EPA*, then agency actions that decline to free up—rather than constrain—market behavior would be subject to the same forgiving standard.

In declining to regulate greenhouse gases, EPA explained its refusal to act by noting that it preferred to take a different route from the one laid out in section 202(a)(1) of the Clean Air Act. Nothing in the "background principles of administrative law" EPA invokes[204] grants the agency the power to ignore statutes it does not like.

B. Endangerment

The regulatory mandate of section 202 is triggered by a conclusion that motor vehicles cause or contribute to air pollution which "may reasonably be anticipated to endanger public health or welfare."[205] Endangerment is the only factor mentioned in section 202(a)(1). Other provisions of section 202, which set forth the criteria for the content of the regulations triggered by a determination of endangerment, specify additional factors for the agency to consider at that stage.[206] Much of the Clean Air Act, in fact, takes the same basic form: regulation is initially triggered by a finding of endangerment to public health or welfare, and the content of regulation is shaped by reference to numerous other factors. EPA was wrong to insert factors beyond endangerment into the carefully circumscribed framework of section 202(a)(1).

The basic aim of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[207] Thus, the trigger for much of the regulatory action that occurs under the Act is the endangerment of public health or welfare. For example, regulation of stationary sources such as factories and power plants[208] and fuels and fuel additives[209] is triggered by a conclusion that air pollution from

201. *Id.* § 355(a).
202. *Id.* § 360e(a).
203. U.S. Brief, *supra* note 15, at 36.
204. *Id.* at 39.
205. 42 U.S.C. § 7521(a)(1) (2000).
206. *Id.* § 7521(a)(2), (3)(A).
207. *Id.* § 7401(b).
208. *Id.* § 7411(b)(1)(A).
209. *Id.* § 7545(c)(1).

these sources "may reasonably be anticipated to endanger public health or welfare." Under the Act's regulatory programs, myriad other factors (such as economic and technological feasibility) come into play in implementation,[210] but the initial stimulus for regulatory action is health- and welfare-based.

Section 202 of the Act has the same structure. Section 202(a)(1) creates the "trigger" for regulatory action on pollution from motor vehicles. Section 202(a)(1) directs the Administrator's attention to the question whether, "in his judgment," new motor vehicles or new motor vehicle engines "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[211] The statute states that the Administrator "shall" regulate air pollutants satisfying this criterion.[212]

The other step in regulating air pollution from motor vehicles involves deciding exactly what the regulatory standard for the pollutant(s) in question should be and when the standard should become effective. The bulk of section 202 is concerned with these kinds of questions. At that stage of regulatory decisionmaking, a range of factors beyond "endangerment" are relevant, including: the time needed "to permit the development and application of the requisite technology"; taking compliance costs into account;[213] and the existence of "an unreasonable risk to public health, welfare, or safety" due to the "operation or function" of an emission control "device, system, or element of design."[214]

If any doubt remained as to whether Congress's singular focus on endangerment in section 202(a)(1) was intentional, perusal of other provisions in the Clean Air Act confirms that Congress carefully specified which factors are relevant, and which are not, to various agency decisions under the Act.[215] In some cases, Congress explicitly allowed the agency to range beyond specifically enumerated factors, by winding up a list of statutorily relevant factors with open-ended language

210. *See, e.g., id.* § 7411(a)(1).

211. *Id.* § 7521(a)(1).

212. *Id.*

213. *Id.* § 7521(a)(2).

214. *Id.* § 7521(a)(4)(A).

215. *See, e.g., id.* § 7545(c)(2)(B) (stating the Administrator may not regulate fuel additive on account of its harm to vehicle emission control systems unless it first does cost-benefit analysis of such regulation); *id.* § 7411(a)(1), (b)(1) (stating that for certain categories of new sources, the Administrator must set "standards of performance," which take into account cost and "any nonair quality health and environmental impact and energy requirements").

such as "among other factors"[216] or "and other relevant factors."[217] Congress included no such unstructured authority in section 202(a)(1).

The Supreme Court has made plain that the courts' role in statutory interpretation begins, and often ends, with the statute's language.[218] In trying to discern a statute's meaning, the Court has found it helpful—often decisive—to compare the language of the statutory provision in question with language found elsewhere in the statute: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[219]

These principles are a hallmark of the Supreme Court's jurisprudence under the Clean Air Act. Where Congress has listed certain factors as relevant in one part of the Act and not in another, the Court has consistently respected this choice. For example, in *Whitman v. American Trucking Ass'ns*,[220] the Court held that the absence of any reference to costs in the provision specifying the criteria for NAAQS,[221] and the numerous references to costs in other provisions of the Act, plainly precluded consideration of costs in setting the NAAQS.[222] In so ruling, the Court relied on *Union Electric Co. v. EPA*[223] where the Court had similarly held that where Congress identifies the factors an agency must consider in decisionmaking, the agency is not free to stray and consider additional factors of its choosing.[224]

216. *See, e.g., id.* § 7411(d)(2)(B), (j)(1)(A)(iv).

217. *See, e.g., id.* § 7412(a)(1), (f)(2)(A).

218. *See, e.g.*, Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Speaking for a unanimous Court, Justice Rehnquist observed: "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*

219. Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

220. 531 U.S. 457 (2001).

221. 42 U.S.C. § 7409(b)(1).

222. *Whitman*, 531 U.S. at 465–68.

223. 427 U.S. 246 (1976).

224. *Id.* at 256–66 (stating that EPA may not consider economic and technological infeasibility in deciding whether to approve States' plans for implementing the NAAQS); *see also* Gen. Motors Corp. v. United States, 496 U.S. 530, 538 (1990) (holding that the four-month time limit for EPA review of an original state implementation plan did not apply to plan revisions). In *General Motors Corp.*, the Court observed, "Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline" in the provision at issue. *Id.*

In declining to regulate greenhouse gases, EPA strayed from this well-marked path. The agency thought that it could decline to regulate emissions from new motor vehicles under section 202(a)(1) by invoking a mélange of factors not mentioned in that provision. But an administrative agency cannot rest its decisions "on factors which Congress has not intended it to consider."[225] The provision under which EPA made its decision, section 202(a)(1) of the Act, is crystalline: EPA is to decide whether to regulate an air pollutant emitted by motor vehicles on the basis of its judgment as to whether public health or welfare may reasonably be anticipated to be endangered by the pollution, not the hodgepodge of considerations EPA invoked in declining to regulate greenhouse gases.

C. "Different Policy Approach"

Even if section 202(a)(1) did not so plainly rule out consideration of factors other than endangerment in the initial decision whether to regulate emissions from motor vehicles, the text and structure of the Clean Air Act make clear that three of the specific factors EPA did consider are irrelevant under this provision. EPA could appropriately consider a fourth factor, scientific uncertainty, but the agency failed to relate that factor to the statutory standard of endangerment.

EPA expressed concern that regulation under section 202(a)(1) would "result in an inefficient, piecemeal approach to addressing the climate change issue."[226] Section 202(a)(1) itself, however, embraces the very kind of approach EPA criticizes. It directs EPA to regulate motor vehicle emissions that "cause, or *contribute to*" air pollution that passes the endangerment threshold.[227] Congress used the same phrasing in directing EPA to set other standards under the Act.[228] Clearly, the Act endorses incremental responses to air pollution problems, rather than necessarily requiring all-encompassing solutions. EPA is free to propose a comprehensive solution to the problem of climate

225. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

226. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003).

227. 42 U.S.C. § 7521(a)(1) (2000) (emphasis added).

228. *See, e.g., id.* § 7411(b)(1)(A) (stationary sources); § 7545(c)(1) (fuels and fuel additives).

change if it wishes to do so, but it is not free to reject the approach Congress explicitly set forth in section 202(a)(1).[229]

The same observation applies to EPA's suggestion that reduction of air pollutants associated with climate change in this country might be offset by increases of such air pollutants in other countries, and thus, "climate change raises important foreign policy issues" which "it is the President's prerogative to address."[230] In enacting section 202(a)(1), Congress was clearly aware that emissions from mobile sources might not be the sole cause of an air pollution problem, yet it directed EPA to regulate even when they "contribute to" such a problem.[231] In other provisions of the Act, moreover, Congress specifically directed EPA to consider "emissions emanating from outside of the United States" in making regulatory decisions.[232] Congress gave no such direction to EPA in section 202(a)(1).

EPA also expressed concern that technologies might not be available to control air pollutants associated with climate change emitted by motor vehicles.[233] This is, however, plainly not relevant to deciding whether the endangerment standard of section 202(a)(1) is met. As detailed in the previous section, the remainder of section 202 does direct EPA's attention to the availability of technology, but only once the agency has found endangerment.

The one factor mentioned by EPA that has anything to do with the endangerment standard of section 202(a)(1) is scientific uncertainty. However, as the lead opinion below expressly found, EPA did

229. In addition, as a factual matter, it is hard to credit EPA's characterization of the approach it opposes as "piecemeal." Repeating the legal conclusion first announced in the decision at issue here, EPA has also refused to regulate carbon dioxide emissions from power plants and other stationary sources. Standards of Performance for Electric Utility Steam Generating Units and Industrial-Commercial Steam Generating Units, 71 Fed. Reg. 9866, 9869 (Feb. 27, 2006) (codified at 40 C.F.R. pt. 60 (2006)). Together, mobile sources and power plants are responsible for more than sixty percent of the carbon dioxide emissions inventory in this country. *See* ENERGY INFORMATION ADMINISTRATION, EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2004, at 24 (2005), *available at* http://www.eia.doe.gov/oiaf/1605/ggrpt/pdf/chapter2.pdf (describing carbon dioxide emissions of transportation and electric power sectors).

230. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931.

231. Tellingly, EPA has regulated mercury, a global pollutant, under the Act, despite the possibility that domestic reductions will be offset by increased emissions elsewhere. *See* Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) (codified at 40 C.F.R. pts. 60, 72, 75 (2005)).

232. *See* 42 U.S.C. § 7509a; *see also* § 7513(e).

233. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931.

not rely solely on uncertainty in coming to its decision.[234] Instead, it relied on uncertainty in combination with the other factors clearly having no relevance to the endangerment decision under section 202(a)(1).[235] The consideration of statutorily excluded factors taints EPA's entire decision; we cannot know what EPA would have done if it had exercised its judgment in light of the only legally relevant consideration—endangerment of public health or welfare—and the Court cannot supply an answer EPA itself did not give.[236]

Moreover, EPA failed to relate its discussion of scientific uncertainty to the statutory standard of endangerment. The existence of uncertainty is not a bar to regulation or an excuse for inaction. An agency cannot defer action "while it awaits the Godot of scientific certainty."[237] Congress underscored this point in 1977 by amending section 202(a)(1) (and other key regulatory provisions of the Act) to require the Administrator to regulate emissions from motor vehicles which "in his judgment cause, or contribute to, air pollution which *may reasonably be anticipated* to endanger public health or welfare."[238] Previously, the Act had set regulation in motion based on the Administrator's judgment that any air pollutant from motor vehicles "causes or contributes to, or is likely to cause or contribute to, air pollution which endangers the public health or welfare."[239] The textual change, from "endangers" to "may reasonably be anticipated to endanger," plainly signals that regulation of new motor vehicles is not to be eschewed merely because the relevant science is uncertain.[240]

234. Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

235. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929–31.

236. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 93–95 (1943).

237. Pub. Citizen Health Research Group v. Chao, 314 F.3d 143, 156 (3d Cir. 2002) (quoting United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1266 (D.C. Cir. 1980)).

238. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 401, 91 Stat. 685, 791 (emphasis added); *see also* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 514 n.12 (D.C. Cir. 1983) (discussing 42 U.S.C. § 7545(c)(1) (2000)).

239. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690.

240. In *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1976) (en banc), the court held that the earlier endangerment standard authorized "regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." In 1977, Congress amended section 202(a)(1) "to support the views expressed" in *Ethyl*. H.R. REP. No. 95-294, at 49 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1127. Specifically, "[i]n order to emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator's duty to assess risks rather than wait for proof of actual harm), the committee not only retained the concept of endangerment to health; the committee also added the words 'may reasonably be anticipated.'" *Id.* at 51.

EPA did not come close to applying this standard correctly in declining to regulate greenhouse gases. EPA did not seriously engage with the scientific evidence indicating that the pollutants at issue here are changing the earth's climate, causing destructive present effects and laying the groundwork for even worse future ones. Instead, EPA made do with a staccato listing of remaining uncertainties with respect to climate change.[241] The centerpiece of its discussion was the 2001 National Research Council Report on climate change (issued after the comment period closed),[242] from which EPA plucked the choicest concessions to scientific uncertainty. Yet nowhere did EPA address the overall thrust of the Report, which confirmed the scientific community's "current thinking"[243] that "most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas concentrations,"[244] that the accumulation of greenhouse gases is due to "human activities,"[245] and that "[*d*]*espite the uncertainties*, there is general agreement that the observed warming is real and particularly strong within the past 20 years."[246]

Even with respect to the one factor relevant to determinations under section 202(a)(1), therefore, EPA blundered. Mere incantation of the words "scientific uncertainty," paired with terse and selective references to the state of the science, is not a substitute for the mature scientific inquiry plainly contemplated by section 202(a)(1).[247] Whether air pollutants associated with climate change may be reasonably anticipated to endanger public health or welfare "is a matter for the agency to decide, but it must bring its expertise to bear on the

241. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930 (Sept. 8, 2003).

242. NAT'L RESEARCH COUNCIL, *supra* note 32, at 1.

243. *Id.* at 3.

244. *Id.*

245. *Id.* at 1.

246. *Id.* at 3.

247. Of course, as Judge Tatel recognized, if scientific uncertainty was sufficient to prevent the Administrator from making a credible finding either of endangerment or nonendangerment, EPA could lawfully decline to regulate. Massachusetts v. EPA, 415 F.3d 50, 75–76 (D.C. Cir. 2005) (Tatel, J., dissenting) ("If the Administrator concludes based on substantial evidence that more research is needed before he can judge whether GHGs may reasonably be anticipated to endanger welfare, then he has discretion to hold off making a finding. . . . In short, EPA may withhold an endangerment finding only if it needs more information to determine whether the statutory standard has been met."), *rev'd*, 127 S. Ct. 1438 (2007). Here, however, the agency declined to regulate based on policy reasons; it never claimed that scientific uncertainty prevented it from determining whether the endangerment threshold had been crossed. *Id.* at 77 ("EPA never suggests that the uncertainties identified by the NRC Report prevent it from determining that GHGs 'may reasonably be anticipated to endanger' welfare.").

question."[248] EPA's mistaken legal judgment about the requirements of section 202(a)(1) led it far afield from this basic principle.

D. "In His Judgment"

Section 202(a)(1)'s reference to the "judgment" of the Administrator does two simple things: it specifies who is to make the determination regarding endangerment, and it makes clear that the Administrator is expected to exercise his expertise on the issues of environmental science and public health and welfare on which the provision turns. From the statutory text, it is plain that the "judgment" Congress called upon relates only to the Administrator's determination whether a given pollutant causes or contributes to pollution that endangers the public health or welfare. What the word "judgment" does not do is allow EPA to smuggle into this provision factors otherwise left out of it. To decide that allowance for "judgment" on the part of the Administrator—a feature present throughout the Clean Air Act, as well as in untold numbers of provisions in the United States Code—gives the Administrator unfettered discretion to regulate or not, as he sees fit and without regard to statutory text, would be to effect a radical transfer of authority from Congress to the executive branch.

Section 202(a)(1) provides:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[249]

In its brief treatment of this statutory language, EPA concedes that this language means that once the agency has made a finding that emissions from new motor vehicles contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, EPA must regulate those emissions.[250] But section 202(a)(1) places, in EPA's view, absolutely no constraint on the agency's decision whether to make such a determination in the first place.[251]

248. Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 54 (1983).

249. 42 U.S.C. § 7521(a)(1) (2000).

250. U.S. Brief, *supra* note 15, at 41–42.

251. *Id.* at 40–41.

EPA believes that the phrase "in his judgment" justifies the latter conclusion:

> Nothing in Section 202(a)(1) . . . requires EPA to make [an endangerment] determination at any particular time. To the contrary, the provision emphasizes the Administrator's ability to exercise his "judgment," which presumably includes the judgment that this issue is not yet ripe for determination. Thus, absent a formal judgment by the Administrator that greenhouse gas emissions from new motor vehicles can be expected to cause endangerment, the agency retained its traditional flexibility to base its denial of the rulemaking petition on a broad range of discretionary factors.[252]

EPA's interpretation and its presumption about the scope of the Administrator's discretion are wrong for several reasons.

"[I]n his judgment" modifies only the phrase "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." It does not modify the word "shall" or grant wholesale discretion over the question whether to regulate emissions from motor vehicles. But that is how EPA reads the phrase. In EPA's view, "in his judgment" smuggles even a blatant disagreement with the policy of section 202(a)(1) into section 202(a)(1) itself, as a "discretionary factor" the agency is entitled to consider. Only thus could EPA argue that its characterization of section 202(a)(1) as an "inefficient, piecemeal" answer to the question before it helped to justify its refusal to regulate under that provision.[253] An agency cannot, however, defend a decision based on its own preference for a policy approach different from the one Congress chose.[254]

Moreover, EPA's interpretation ascribes a very strange intent to Congress. According to EPA, Congress thought that emissions that contribute to air pollution which may reasonably be anticipated to endanger public health or welfare are such a big problem that EPA must regulate them. But, at the same time, Congress gave EPA absolute discretion as to whether to make the determination on which regulation could be based. On EPA's theory, the agency could have right in front of its eyes conclusive evidence that climate change (for example) is causing and will, for the indefinite future, continue to cause an environmental catastrophe, and so long as it did not take a close look at that evidence, it would have absolutely no obligation to do anything to mitigate the threat. EPA's interpretation does violence not only to the

252. *Id.* at 41.

253. *Id.* at 48.

254. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (stating that an agency may not rely "on factors which Congress has not intended it to consider").

text of section 202(a)(1) and to its basic sense, but also to an animating theme of the Clean Air Act itself—that as scientific knowledge advances, it should be pressed into service in protecting the public from threats to its health and welfare.

Acceptance of EPA's position would also pay insufficient respect to Congress's choice, in section 202, of technology-based standards over the health-based standards found elsewhere in the Act.[255] Technology-based standards demand much less intensive examination of the precise health and environmental consequences of pollution than health-based standards do. Requiring highly specific areas of scientific uncertainty to be resolved before regulating, as EPA has done, misapprehends the nature of the regulatory instrument Congress chose in enacting section 202.

Finally, EPA's interpretation gets the standard of scientific proof embodied in section 202(a)(1) just backwards. EPA interprets the phrase "in his judgment" to give the Administrator complete control over the determination of when the issue of endangerment "is . . . ripe for determination."[256] Congress, however, included the phrase "may reasonably be anticipated" precisely in order to make clear that EPA need not, and should not, wait for all scientific uncertainties to be resolved before taking action against an environmental threat.

Citing *Ethyl Corp. v. EPA*,[257] the Solicitor General has argued to the Court that "[t]he fact that EPA *may* regulate in the face of uncertainty . . . does not preclude the agency from deferring regulation pending the acquisition of additional information."[258] This argument badly misconceives the decision in *Ethyl*, which Congress ratified in amending the endangerment standard of section 202(a)(1) in 1977.[259] The court in *Ethyl* concluded that the agency's discretion was not only enlarged by the endangerment standard then in existence (because the standard permitted regulation in the face of uncertainty), but was constrained by it as well:

255. *See, e.g.*, 42 U.S.C. § 7412(f)(2)(A) (2000).

256. U.S. Brief, *supra* note 15, at 41; *see also id.* at 44 ("EPA may properly defer making an endangerment determination while it waits for additional scientific and technical studies to be completed."); *id.* at 45 (referring to "the agency's view that any decision whether to regulate in this area would be better made after further research was conducted into critical areas of current scientific uncertainty").

257. 541 F.2d 1 (D.C. Cir. 1976).

258. U.S. Brief, *supra* note 15, at 47 n.23.

259. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 401(d)(1), 91 Stat. 685, 791; H.R. REP. No. 95-294, at 49 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1127.

> A statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. Regulatory action may be taken before the threatened harm occurs; indeed, the very existence of such precautionary legislation would seem to *demand* that regulatory action precede, and, optimally, prevent, the perceived threat. . . . We believe the precautionary language of the Act indicates quite plainly Congress' intent that regulation should precede any threatened, albeit unprecedented, disaster. . . . [T]he statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that the harm is otherwise inevitable.[260]

Under section 202(a)(1), as amended to embody the *Ethyl* decision, the Administrator may not, as happened here, just wave a hand in the direction of scientific uncertainty in explaining a failure to act against a large-scale risk. There is always uncertainty in environmental matters, and, especially given the Clean Air Act's promotion of scientific research, there will always be "additional scientific and technical studies"[261] awaiting completion. Acceptance of EPA's claim of the scope of its own discretion under section 202(a)(1) would render the precautionary aspect of that provision a nullity.

The conclusion that the phrase "in his judgment" does not give the agency freewheeling discretion is bolstered by consulting the many other provisions in the Clean Air Act that use this same phrase. In numerous instances, the Act includes the phrase "in his judgment" (or "in the Administrator's judgment") when it directs the Administrator to make a scientific determination that is a condition precedent to regulation or other administrative action.[262] Congress's use of the phrase "in his judgment" in so many critical provisions of the Act shows the danger in the radical interpretation of that term endorsed by the lead opinion in the D.C. Circuit. If mere reference to the "judgment" of the Administrator gives the agency license not to regulate—or to regulate—based on the Administrator's undisciplined sense of whether it "makes sense to regulate,"[263] then many of the Act's most important provisions become blank canvases for the Administrator to

260. 541 F.2d at 13, 13 & n.18, 25.

261. U.S. Brief, *supra* note 15, at 44.

262. *See, e.g.*, 42 U.S.C. § 7408(a)(1)(A) (2000) (listing criteria pollutants), § 7409(b)(1)–(2) (setting primary and secondary NAAQS); § 7411(b)(1)(A) (listing stationary sources subject to New Source Performance Standards ("NSPS")); § 7411(h)(1) (setting NSPS); § 7412(h)(1) (setting standards for hazardous air pollutants); § 7545(c)(1) (regulating fuels and fuel additives); § 7547(a)(3)–(4) (setting standards for non-road engines and vehicles); § 7671n (regulating ozone-depleting substances).

263. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003).

paint as the Administrator wishes. This is not what the statute says, and it is not consistent with the Court's continued admonitions that statutes must give some direction to agencies about how they are to implement the statutes they are charged with administering.[264]

IV. Conclusion

The statutory framework governing *Massachusetts v. EPA* is straightforward. Physical or chemical matter that is emitted into the ambient air is an "air pollutant" under the Clean Air Act.[265] The Administrator of the EPA "shall" set standards for air pollutants emitted by new motor vehicles when, in the Administrator's judgment, they "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[266] "Climate" and "weather" are components of "welfare."[267]

Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are physical and chemical matter. They are emitted into the ambient air by motor vehicles. A prodigious amount of scientific evidence indicates that they are changing our climate. Several parties asked EPA to regulate these chemicals under section 202(a)(1) of the Act because they are "air pollutants" that "may reasonably be anticipated to endanger public health and welfare."

EPA's denial of the petition rested on two fundamental errors of law. First, EPA concluded that it had no authority under section 202(a)(1) to regulate air pollutants associated with climate change and that therefore the chemicals at issue here are not "air pollutants" within the meaning of the Act. Second, the agency decided that even if it had such authority, it would not exercise it, on account of various ad hoc policy considerations not enumerated in section 202(a)(1). The same mistake dooms both legal conclusions—EPA distorted two statutory terms ("air pollutant" and "judgment") and ignored a third ("welfare") in order to inject its own policy preferences into a statute that does not embody them.

EPA's misguided legal conclusions diverted it from the serious scientific inquiry at the heart of section 202(a)(1). Section 202(a)(1) requires the Administrator to set standards for air pollutants emitted by new motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public

264. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).
265. 42 U.S.C. § 7602(g).
266. *Id.* § 7521(a)(1).
267. *Id.* § 7602(h).

health or welfare."[268] EPA did not apply that standard, and it denied the petition without deciding whether carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons may, due to their effects on climate, reasonably be anticipated to endanger public health or welfare. To the extent the agency mentioned the science of climate change at all, it provided little more than a bullet-point list of scientific issues that remain incompletely resolved.

Petitioners in *Massachusetts v. EPA* are asking the Supreme Court to correct EPA's legal errors and to remand the case to the agency with directions to apply the correct legal standard to that matter; that is all. A judgment in favor of petitioners will not mandate regulation of air pollutants associated with climate change, nor will it dictate a particular answer to the question whether such pollutants are endangering public health or welfare. It will, however, ensure that the question whether to regulate these pollutants is evaluated according to the legal standard set forth in the Clean Air Act.

268. *Id.* § 7521(a)(1).