

Petitioners argue in response that the enactment of a regulatory program to address one environmental problem does not take away from a “clearly expressed grant of pre-existing authority to address different environmental problems.” Pet. Br. at 27. EPA never suggested otherwise. However, as discussed above, there simply is no express authorization in the Act to regulate greenhouse gases to address global climate change, and in determining that the CAA's general regulatory provisions do not *implicitly* authorize such regulation, EPA appropriately reasoned that the Act’s stratospheric ozone provisions provide an example of the type of specific, tailored regulatory scheme Congress would have been likely to adopt if it intended EPA to regulate in the climate change context.

3. The NAAQS system is ill-suited to address the issue of global climate change.

In considering whether the CAA authorizes regulation of greenhouse gases for global climate change purposes, EPA also explored whether a key regulatory mechanism for controlling pervasive air pollutants under the CAA -- the NAAQS system -- could be used to address CO₂ emissions. See 42 U.S.C. §§ 7408-10; see also 68 Fed. Reg. at 52,927. The NAAQS provisions of the Act are tailored to deal with air pollution problems caused by emissions “the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.” See 42 U.S.C. § 7408(a)(1)(B). As explained above, CO₂ is emitted by exceedingly

numerous and diverse stationary and mobile sources. However, the NAAQS system is fundamentally ill-suited to regulate CO₂ for the purpose of addressing global climate change, further suggesting that Congress did not intend the CAA to address that issue through regulatory measures.

As EPA explained, the NAAQS regulatory regime has traditionally been directed at controlling pollutants at or near the surface of the earth. 68 Fed. Reg. at 52,927. Concentrations of these pollutants tend to vary from locality to locality, and the basic premise of the Act is that “actions taken by individual states and by EPA can generally bring all areas of the U.S. into attainment of a NAAQS.” Id. Congress expected that there would be material differences among the States in their efforts to meet the NAAQS, and therefore directed that EPA designate “attainment” or “nonattainment” areas for particular pollutants, with more stringent requirements generally applying to nonattainment areas. See 42 U.S.C. §§ 7407(d), 7501-15.

By contrast, CO₂ (the most pervasive anthropogenic greenhouse gas) is well-mixed globally throughout the atmosphere and persists there for roughly 50-200 years. 68 Fed. Reg. at 52,927. One significant result of these facts is that “the nature of the global pool would mean that any CO₂ standard that might be established would in effect be a worldwide ambient air quality standard, not a

national standard -- the entire world would either be in compliance or out of compliance.” Id. This quite obviously would render the Act's differentiation between attainment and nonattainment areas in particular locations in the United States nearly meaningless, as all areas in the country would simultaneously be either in or out of attainment. Similarly, were EPA to establish a NAAQS for CO₂ that called for a reduction from present concentrations, no state would be able to design an implementation plan to meet such a standard, using local controls, absent international agreements requiring concerted action to reduce worldwide CO₂ emissions. Id. These are the types of technical and policy determinations for which EPA should be afforded the highest deference. Baltimore Gas & Elec. Co., 462 U.S. at 103; Appalachian Power, 249 F.3d at 1051-52.

Petitioners incorrectly characterize EPA's discussion of the Act's NAAQS provisions as an attempt to overcome the “plain meaning” that Petitioners purport to find elsewhere in the Act. See Pet. Br. at 33-35. In fact, EPA’s point, which complements the point made with respect to Title VI (a set of provisions specifically *tailored* to a global problem of the same type), was simply that the CAA regulatory mechanism for dealing with substances emitted by ubiquitous sources does *not* appear to have been crafted by Congress with CO₂ and global

climate change regulation in mind, and so further suggests that Congress did not intend to use the CAA to regulate CO₂ for purposes of climate change.

4. The legislative history of the CAA does not reflect a congressional intent to provide EPA with authority to regulate CO₂ and other greenhouse gases for global climate change purposes.
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By recourse to legislative history, Petitioners argue that at least some members of Congress were aware of “the potential dangers of global climate change” when the Act was amended in 1965, 1970, and 1977. Pet. Br. at 22-24. Petitioners further posit that when Congress again amended the Act in 1990, it did not take away whatever existing regulatory authority EPA had under CAA sections 202(a)(1) and 302(g) and (h), 42 U.S.C. §§ 7521(a)(1), 7602(g)&(h). Pet. Br. at 24-27. However, the degree to which individual members of Congress were aware of climate issues does not answer the question of whether Congress, as a whole, intended to confer authority on EPA to regulate the ubiquitous sources of CO₂ and other greenhouse gas emissions for the purpose of addressing global climate change. Indeed, Congress' failure to provide EPA with such express authority is perhaps even *more* notable to the extent such inaction occurred against a backdrop of some congressional concern about global climate change. See Brown & Williamson, 529 U.S. at 155-56.

The reality is that while individual members of Congress have expressed concern about climate issues over the years, none of the Act's legislative history reflects the type of express delegation of regulatory authority that would be expected for “a policy decision of such economic or political magnitude.” *Id.* at 133.^{12/}

a. The 1965 amendments.

Petitioners begin their legislative history discussion with a suggestion, based on snippets of floor remarks by Congressman Henry Helstoski of New Jersey, that Congress had control of CO₂ emissions in mind when it enacted the Act's mobile source provisions in 1965. *See* Pet. Br. at 22.^{13/} In fact, Congressman Helstoski's *full* remarks suggest just the opposite, as they appear to *distinguish* CO₂ emissions from the types of air pollution problems to which the Act was addressed. More specifically, the Congressman observed that while “[t]he cure for the worst kinds of air pollution is to prevent noxious combustion products from entering the air[,] . . . the laws of physics make it virtually

^{12/} Pertinent excerpts from the legislative history discussed below have been included in the Joint Appendix for the Court's convenience. *See* JA at 134-556.

^{13/} The text of the pre-1970 version of the Act's mobile source provisions (National Emission Standards Act, §§ 201-212) is reprinted at 2 A Legislative History of the Clean Air Act Amendments of 1970, 93rd Cong., 2d Sess. (Comm. Print), at 1563-69 (“1970 Legis. Hist.”).

impossible to keep carbon dioxide, which is the principal product of combustion, out of the air.” 111 Cong. Reg. at 25,061 (Sept. 24, 1965).

Nor can the cited remarks plausibly be read to reflect any kind of congressional consensus in 1965 about the impacts and effects of CO₂ emissions. While Petitioners correctly note that Congressman Helstoski stated that “many believe” that such emissions may have a climate effect, Pet. Br. at 22, Petitioners overlook that the Congressman stated immediately thereafter that “nobody has been able to make a convincing guess about just what that effect will be.” 111 Cong. Reg. at 25,061.

b. The 1970 amendments.

Although the 1970 CAA amendments extensively altered the Act's mobile source provisions, section 202(a) retained its prior reference to effects on health and welfare as a general basis for emission standards. See CAA § 202(a)(1), reprinted in 1970 Legis. Hist., Vol. 1, at 33; see also id., Vol. 2, at 1563 (prior version of section 202(a)). The Act's definition of “effects on welfare” was, however, amended in 1970 to include “effects on soils, water, crops, vegetation, man-made 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.” CAA § 302(h),
reprinted in 1970 Legis. Hist., Vol. 1, at 56.^{14/}

Petitioners argue that Congress' inclusion of “climate” as an “effect on welfare” in the 1970 amendments reflects a conscious decision to give EPA authority to regulate greenhouse gas emissions to address global climate change. Pet. Br. at 21-22. To support this argument, however, Petitioners point only to a 1970 report issued by the Council on Environmental Quality (“CEQ”), one chapter of which -- Chapter 4 -- was entered into the record by Senator J. Caleb Boggs of Delaware. See id. at 22; see also Environmental Quality: The First Annual Report of the Council on Environmental Quality (August 1970) (hereinafter “CEQ Report”) (Chapters 4 and 5 of the CEQ Report are reproduced at JA 600-642); 1970 Legis Hist., Vol. 1, at 243-57 (reprinting Chapter 4 of the CEQ Report). As an insertion into the record of a single legislator’s floor statement, this legislative history by itself carries little or no weight.^{15/} In any event, it does not even purport

^{14/} The prior version of the Act had defined “adverse effects on welfare” to “include but not be limited to injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to transportation.” Section 302(g), reprinted in 1970 Legis. Hist., Vol. 2, at 1571.

^{15/} When legislative history is to be consulted, this Court has recognized that conference reports are “the most persuasive evidence of congressional intent.” Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981). By contrast, “the remarks of a single legislator, even the sponsor,” are said to be the least

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to address the specific question of why Congress added “climate” to the CAA definition of welfare effects.

In fact, *none* of the legislative history of the 1970 CAA amendments directly explains why Congress added “climate” to the welfare effects definition, nor does any of the legislative history reflect any congressional consideration of the effect that such a change was intended to have on the scope of regulation of motor vehicle emissions, which was the specific topic raised by the ICTA Petition. See, e.g., Fourco Glass Co. v. Transmirra Prod's Corp., 353 U.S. 222, 227 (1957) (“it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed”).^{16/} “Climate” was added to the definition by the conference bill pursuant to a “technical amendment” that had no predecessor in either the House or Senate bills. See 1970 Legis. Hist., Vol. 1, at 56, 187. In their statements on the conference bill, House and Senate members of the conference committee made no comment

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persuasive. United States v. McGoff, 831 F.2d 1071, 1090-91 (D.C. Cir. 1987) (citations omitted).

^{16/} On this point, the Senate Report in fact stressed that even under the proposed amendments to the Act's mobile source provisions, “[t]he *regulatory authority* in section 202(a) would be essentially the *same* as existing law,” except for certain new procedural requirements. See S. Rep. No. 91-1196, at 22 (1970), reprinted in 1970 Legis. Hist., Vol. 1, at 424 (emphasis added).

on this “technical amendment.” See id. at 192-209, 123-137. Thus, there simply is *no* support in any conference reports, committee reports, or even floor debates on the final legislation for the proposition that Congress intended this unexplained change to give rise to a new and broad regulatory program to limit CO₂ and other greenhouse gas emissions to address potential climate change problems in the mobile and stationary source contexts. See Brown & Williamson, 529 U.S. at 160 (explaining that it is “highly unlikely” that Congress would “leave the determination of whether an industry will be entirely, or even substantially, [regulated]” to the agency's construction of a single term in a statute) (quoting MCI v. AT&T, 512 U.S. 218, 231 (1994)).

Nor is any such intent reflected in the more general history of the 1970 amendments. The term “climate” first appeared in several provisions of the Senate bill calling for expanded research, reporting and potential action on a long list of possible air pollution effects, including effects on climate and weather. See, e.g., sections 5 and 6 of S. 4358, reprinted in 1970 Legis. Hist., Vol. 1, at 535-36, 539-40. Although the final version of the 1970 amendments differed from the Senate bill in many significant ways, it is a reasonable inference that the textual reference to “climate” that ultimately emerged in the final legislation had its roots in these

portions of this earlier bill. However, it does not appear that the Senate intended this term to lead to regulation of CO₂ and other greenhouse gas emissions.

Both the Senate and CEQ Reports expressed an understanding that under the 1970 amendments, air quality standards would be issued for the five “major” pollutants -- sulfur oxides (SO_x), particulate matter (PM), carbon monoxide (CO), hydrocarbons (HC), and oxidants -- for which criteria documents had already been issued by EPA's predecessor, the National Air Pollution Control Administration (“NAPCA”). See S. Rep. No. 91-1196, reprinted in 1970 Legis. Hist., Vol. 1, at 401; CEQ Report at 62-66, 75. Although both the Senate and the CEQ expected that criteria documents would likely be developed for other substances as well, see 1970 Legis. Hist., Vol. I, at 409; CEQ Report at 75, there is absolutely no indication that either body expected such action to be taken with respect to the possible climate impacts of CO₂ or any other greenhouse gases.

NAPCA did not include CO₂ or any of the other greenhouse gases that were the subject of the ICTA Petition (methane (“CH₄”), nitrous oxide (“N₂O”), and hydrofluorocarbons (“HFCs”)) on the long list of air pollutants that it told Congress it was investigating for possible additional criteria documents. See 1970 Legis. Hist., Vol. 2, at 1054. Similarly, a NAPCA report entered into the record of a Senate hearing did not include CO₂ on a list of air pollutants resulting from the

combustion of fossil fuels. 1970 Legis. Hist., Vol. 2, at 1012-18. With regard to regulation of motor vehicle emissions in particular (the subject of the ICTA Petition), while nothing in the legislative history limited EPA's authority to regulate other substances that meet the applicable statutory criteria, the 1970 amendments only required that standards be set for emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen.^{17/}

To the extent any specific congressional concern on the climate issue can be inferred from the 1970 legislative history, it in fact appears related to the potential climatological *cooling* effects of *particulate matter* (a substance that would be subject to CAA regulation for other reasons), not to the potential warming effects of greenhouse gases. The only direct discussion of climate issues by any legislator in the 1970 legislative history occurs in a few brief, general remarks that were usually tied to the effects of the air pollutants for which NAPCA had already issued criteria documents -- SO_x, PM, CO, HC and oxidants.^{18/} Of these five

^{17/} See, e.g., 1970 Legis. Hist., Vol. 1, at 33-36 (text of 1970 legislation), at 134 (Senate consideration of H.R. Conf. Rep. No. 91-1783 (1970)), at 199 (House managers' statement), at 228, at 301-03 (Senate debate); id., Vol. 2, at 909 (additional remarks of Reps. Van Deerlin, Ottinger and Tiernan in H.R. Rep. No. 91-1146); id., at 1502 (President's message introducing proposed CAA amendments).

^{18/} For example, Senator Muskie stated his belief that control of the "200 million tons" of annual air pollution emissions in the United States would, among
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pollutants, NAPCA's 1969 criteria document for PM had examined, among other things, the potential of that pollutant to block incoming solar radiation and in so doing, to cool the atmosphere. See NAPCA, "Air Quality Criteria for Particulate Matter," Jan. 1969, Chapter 2 ("Effects of Atmospheric Particulate Matter on Solar Radiation and Climate Near the Ground") (JA 587-98).

It therefore seems reasonable to assume that the references to potential climate issues in the 1970 legislative history were mostly, if not entirely, prompted by this aspect of the 1969 NAPCA criteria document for PM. Perhaps more importantly, even if this assumption is incorrect in some respect, as explained above, there certainly is nothing in the legislative history reflecting any kind of specific, affirmative intent that EPA regulate CO₂ and other greenhouse gas emissions for climate reasons.^{19/}

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other things, help address a variety of impacts, including those to the climate and the atmosphere. 1970 Legis. Hist., Vol. 1, at 224; see also, e.g., id. at 349 (similar statement of Senator Scott). The "200 million tons" figure appears to have come directly from the NAPCA estimates of the annual emissions of the "five major pollutants" identified above. See CEQ Report at 62-63 & Table 1.

^{19/} This silence is particularly significant given the potentially breathtaking scope of regulating the many mobile and stationary sources of CO₂ emissions, and the extensive discussion in the 1970 legislative history of the feasibility and potential economic impacts of tightening automobile emission standards for carbon monoxide, hydrocarbons and NOx. See, e.g., 1970 Legis. Hist., Vol. 1, at 271-72 and 294-98 (Senator Dole); at 292-3 (Senator Gurney); at 299-308

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If anything, Senator Boggs' insertion of Chapter 4 of the CEQ Report into the legislative record reinforces the above conclusions. While Chapter 4 of the CEQ Report (which was entitled "Air Pollution") briefly mentioned the climate issue, see CEQ Report at 71, it was focused on emissions of carbon monoxide, particulate matter, sulfur oxides, hydrocarbons, nitrogen oxides, and oxidants -- not CO₂ or other greenhouse gases. Id. at 62-66.^{20/} It was Chapter 5 (entitled "Man's Inadvertent Modification of Weather and Climate") that examined the climate issue in depth, discussing, among other things, the possible cooling effects of PM and the potential warming effects of CO₂. See id. at 93-104. Chapter 5 explained that the processes and mechanisms of climate change were "largely unknown" and that it was unclear at the time whether global cooling or warming would in the long run prove to be the bigger problem. Id. at 93-94. The fact that Senator Boggs entered only Chapter 4 into the record, and not Chapter 5, suggests that he, too, differentiated between air pollution problems caused by emissions for which criteria documents had been or were expected to be developed (such as

^{19/}(...continued)
(Senator Griffin).

^{20/} In fact, Chapter 4 of the CEQ Report explained that more precise combustion of fuels would produce emissions of CO₂ rather than CO, a result that was considered *desirable* since CO₂ was "a natural constituent of the atmosphere." CEQ Report at 63.

particulate matter), and the then-poorly understood issue of climate change, for which Chapter 5 urged increased worldwide recognition, monitoring, and research, but not any domestic regulation. See CEQ Report at 104.^{21/}

In sum, when read together and in context, the few passages of 1970 legislative history that mention climate issues at all imply at most that Congress intended EPA to consider climate effects in making decisions about particulate matter (and perhaps other substances otherwise subject to regulation under the CAA). However, nothing in this legislative history reflects an intent to provide EPA with the sweeping authority to regulate CO₂ and other greenhouse gases to address climate change issues, the understanding of which was still in its infancy.

c. The 1977 Amendments.

Petitioners also emphasize an uncodified provision adopted as part of the 1977 CAA amendments that directed EPA to complete a study of the adverse health and welfare effects that may be caused by emissions of fine particulate matter. See Pet. Br. at 23; see also Pub. L. No. 95-95, § 403(a), reprinted in 3 A

^{21/} Senator Boggs' spoken remarks did not actually mention climate at all, but instead gave credit to President Nixon, whose proposals to amend the CAA were largely reflected in the Senate bill. See 1970 Legis. Hist., Vol. 1, at 240-43. To that end, Senator Boggs also inserted into the record the President's February 10, 1970 statement explaining his proposals. See id., Vol. 2, at 1498-1511. Notably, the President's proposals did not call for regulation to address any climate effects of air pollution.

Legislative History of the Clean Air Act Amendments of 1977, 95th Cong., 2d Sess. (Comm. Print 1978), at 496-97 (“1977 Legis. Hist.”); 1977 Legis. Hist., Vol. 3, at 564 (H.R. Conf. R. No. 95-564 (1977)). A House Committee report that accompanied an early version of this provision explained that the Committee “expects that special emphasis in this study will be placed on possible weather and climate modifications which may result from fine particulate emissions.” H.R. Rep. No. 95-294, at 339 (1977), reprinted in 1977 Legis. Hist., Vol. 4, at 2806; see also Pet. Br. at 23.

However, as discussed above with regard to the 1970 legislative history, there is an important difference between considering possible climate effects of a pollutant that is otherwise subject to regulation under the Act (such as particulate matter) and extending the Act to regulate CO₂ and other greenhouse gas emissions for a purpose focused entirely on climate change (the type of relief that was requested by the ICTA petitioners). There simply is no indication in *any* CAA legislative history that Congress intended EPA to take the latter course.

This conclusion is further reinforced by the 1977 legislative history to the Act's mobile source provisions (the specific subject of the ICTA Petition). In the 1977 amendments, like the 1970 amendments, CO₂ was not one of the specific substances for which such standards were required. Instead, the list still included

only carbon monoxide, hydrocarbons, and oxides of nitrogen, despite the fact that the 1977 amendments made revisions to the timing and stringency of these requirements. See 1977 Legis. Hist., Vol. 3, at 356-60, 545-46; 42 U.S.C. § 7521(b). Again, while this did not preclude the regulation of other substances determined to meet the statutory criteria, at the very least it further reinforces the point that Congress has not to date shown any express or direct intention for EPA to regulate CO₂ emissions from motor vehicles, and it certainly undercuts the more general notion that the Act's mobile source provisions were crafted with control of greenhouse gas emissions in mind.

d. The 1990 amendments.

Similar conclusions are reflected in the legislative history to the 1990 CAA amendments.

The Senate Environment and Public Works Committee originally reported out a bill, S. 1630, that would have expressly established CO₂ emission standards for mobile sources to help address global climate change. See 1990 Legis. Hist., Vol. 5, at 8438-8440 (S. Rep. No. 101-228 (1989)), 8036-38 (proposed text of new CAA section 216, entitled "Emissions of Carbon Dioxide from Passenger Cars"). That same bill also set forth an early version of what would eventually be enacted as the present Title VI of the Act, dealing with stratospheric ozone. Notably,

however, this part of the Senate bill was not limited to stratospheric ozone, but also expressly included various provisions addressed to global climate change; in fact, it was entitled “The Stratospheric Ozone and Climate Protection Act.” See 1990 Legis. Hist., Vol. 5, at 8717-43 (discussion in S. Rep. No. 101-228), 8291-8337 (proposed statutory text). Among other things, this bill would have provided EPA with express authority to require the phase-out of certain substances for purposes of addressing *either* global climate change *or* stratospheric ozone protection. See id. at 8299-8301, 8303-05 (text of proposed sections 504 and 506).

The provisions of the Senate Committee bill dealing with CO₂ emissions from motor vehicles ultimately were not passed by the full Senate, but most of the other climate change provisions were. See 1990 Legis. Hist., Vol. 3, at 4747-55; see also 68 Fed. Reg. at 52,926. By contrast, the versions of the CAA amendments passed by the House did not address the climate change issue at all, and the Conference Committee mostly followed the House's lead on these issues, stripping out from the final legislation (Pub. L. No. 101-549) nearly all the climate change provisions the Senate had passed.

Of the Senate bill's specific climate change language, the Conference Committee retained only the provision calling for EPA to determine the global

warming potential of stratospheric ozone-depleting substances (the present CAA section 602(e)), and to that it added the proviso that global warming potential may not be used as the basis for regulation under the Act. See 42 U.S.C. § 7671a(e). In a similar vein, the Conference Committee revised the lone House provision referencing CO₂ (the present CAA section 103(g)) to make clear it authorized the development only of “non-regulatory” strategies. See 42 U.S.C. § 7403(g).

5. Other Legislation -- Both Enacted and Unenacted -- Clearly Indicates That Congress Did Not Expect EPA To Take Regulatory Action Under The CAA To Address Global Climate Change.
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The reasonableness of the Agency's reading of the statute is further underscored by the many pieces of legislation that Congress has enacted -- or not enacted -- since the late 1970s dealing specifically with climate change issues. See 68 Fed. Reg. at 52,927-28; see also Brown & Williamson, 529 U.S. at 143.

- a. Legislation up to 1990.

Congress emphasized *research* rather than *regulation* in 1978, when it enacted legislation creating a research program to study global climate change. See 15 U.S.C. §§ 2901-08 (National Climate Program Act of 1978). In the Global Climate Protection Act of 1987, Congress directed EPA to further study these issues, and directed the Department of State to coordinate United States negotiations with other countries on climate change. See Pub. L. No. 100-204 §§

1101-06 (Dec. 22, 1987); 22 U.S.C. § 2651 note. And in 1990 -- one day after the CAA Amendments of 1990 were signed into law -- Congress established a Committee on Earth and Environmental Sciences to coordinate a 10-year research program on climate change. 15 U.S.C. §§ 2931-38. Among other things, this legislation directed the Committee to make its findings available to EPA “for use in the formulation of a coordinated national policy on global climate change pursuant to section 1103 of the Global Climate Protection Act of 1987.” 15 U.S.C. § 2938(b)(1). Significantly, the cited portion of the Global Climate Protection Act says nothing about EPA utilizing existing authorities to develop regulations to address climate change, but instead simply states that the Agency shall “develop[] and propos[e] to Congress a coordinated national policy on global climate change.” Pub. L. No. 100-204, § 1103(b). Around the same time, Congress created a program to research global climate agricultural issues, see Pub. L. No. 101-624, § 2401, but as EPA pointed out, “Congress declined to adopt other legislative proposals . . . to require [greenhouse gas] emissions reductions from stationary and mobile sources.” 68 Fed. Reg. at 52,927 (citing, e.g., S. 1224, 101st Cong. (1989); H.R. 5966, 101st Cong. (1990)).

b. Legislative action since 1990.

As EPA explained, since the 1990 CAA Amendments, Congress has taken other actions consistent with the view that the Act does not authorize EPA to take regulatory action with respect to CO₂ and other greenhouse gases directed at global climate change. 68 Fed. Reg. at 52,927-28. For example, in 1992, Congress passed legislation directing the Secretary of Energy to study potential options for controlling greenhouse gas emissions, and establishing a registry for reporting voluntary reductions in those emissions. *Id.* at 52,927; see also Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992).

In addition, congressional actions in the mid to late 1990s “confirm that Congress did not authorize regulation under the CAA to address global climate change.” 68 Fed. Reg. at 52,927; see also *id.* at 52,928. More generally, in the years since the 1990 CAA Amendments, numerous bills have been proposed that would require control of greenhouse gas emissions, but none has passed. *Id.* at 52,928 (citing, e.g., H.R. 2663 [mistakenly says 2993 in original], 102d Cong., 1st Sess., 137 Cong. Rec. H4611 (daily ed. June 18, 1991) (proposing to amend the CAA to establish a permitting and regulatory program for sources of CO₂ emissions)). Indeed, as recently as October 2003, the Senate rejected a bill that would, among other things, have required EPA to establish a regulatory scheme to

control greenhouse gas emissions. See S. 139 (108th Cong.) (introduced January 9, 2003) (referred to Committee on Environment and Public Works following Senate vote on October 30, 2003).^{22/}

^{22/} See also, e.g., H.R. 4750 (102d Cong.) (introduced April 2, 1992) (requiring regulations to achieve stabilization of CO₂ emissions by January 1, 2000); S. 201 (102nd Cong.) (introduced Jan. 14, 1991) (amending the CAA to establish a permitting and regulatory program for sources of CO₂ emissions); S. 1323 (102nd Cong.) (introduced June 19, 1991) (amending the CAA to establish a permitting and credit offset program for sources of CO₂ emissions); S. 2668 (102nd Cong.) (introduced May 7, 1992) (requiring regulations to achieve stabilization of CO₂ emissions by January 1, 2000); S. 2617 (105th Cong.) (introduced Oct. 10, 1998) (amending CAA to authorize regulatory credits for voluntary reductions in greenhouse gas emissions); H.R. 2520 (106th Cong.) (introduced July 14, 1999) (authorizing regulatory credits for voluntary reductions in greenhouse gas emissions); H.R. 2900 (106th Cong.) (introduced Sept. 21, 1999) (amending the CAA to require EPA to issue regulations reducing emissions of CO₂ and other substances from powerplants); H.R. 4861 (106th Cong.) (introduced July 13, 2000) (requiring, inter alia, that EPA issue regulations to control interstate transport of CO₂ and establishing a program to issue, track, and monitor allowances for CO₂ and other emissions); S. 547 (106th Cong.) (introduced March 4, 1999) (authorizing regulatory credits for voluntary reductions in greenhouse gas emissions); S. 556 (107th Cong.) (introduced March 5, 2001; reported with amendment to Senate on Nov. 19, 2002) (requiring EPA, inter alia, to promulgate regulations requiring reductions in CO₂ emissions from powerplants); S. 3135 (107th Cong.) (introduced Oct. 17, 2002) (amending the CAA to regulate emissions of CO₂ and other substances by powerplants); H.R. 2042 (107th Cong.) (introduced May 8, 2003) (amending the CAA to regulate emissions of CO₂ and other substances by powerplants); H.R. 3093 (108th Cong.) (introduced Sept. 16, 2003) (amending the CAA to regulate emissions of CO₂ and other substances by powerplants); S. 366 (107th Cong.) (introduced Feb. 12, 2003) (amending the CAA to regulate emissions of CO₂ and other substances by powerplants); S. 843 (108th Cong.) (introduced April 9, 2003) (amending the CAA to regulate emissions of CO₂ and other substances by powerplants).

In contrast to the general regulatory provisions of the Act relied on by Petitioners, all of the cited legislation expressly addresses climate change issues and/or emissions of CO₂ and other greenhouse gases.^{23/} Notably, the legislation that was enacted is directed primarily to research and other non-regulatory actions, while proposals for regulation to address climate change issues have consistently been rejected, clearly suggesting that Congress continues to await further information about climate change before authorizing regulation to address it.

C. Petitioners' Remaining Statutory Arguments Are Inapposite.

Finally, Petitioners' statutory challenge is not assisted by their semantic argument that CO₂ and other greenhouse gases can constitute “air pollutants” as that term is defined in section 302(g) of the Act, 42 U.S.C. § 7602(g). See Pet. Br. at 16-18; 42 U.S.C. § 7602(g).

However, EPA's analysis of its statutory authority did not turn on the term “air pollutant” standing alone. Instead, EPA's conclusion about the limits of its CAA authority flowed from a broader analysis of the CAA and other climate

^{23/} Although Petitioners correctly note the Supreme Court's general caution against over-reliance on subsequent legislative activity to illuminate the meaning of previously-enacted statutes, see Pet. Br. at 32 (citing, *inter alia*, United States v. Craft, 535 U.S. 274, 287 (2002)), they overlook the Court's guidance -- clearly applicable here -- that subsequent, *more specific*, legislative action can appropriately be used to illuminate the limits of prior general statutes. Brown & Williamson, 529 U.S. at 143.

change-specific congressional action. Based on that analysis, EPA concluded that its regulatory authority did not extend to controlling greenhouse gas emissions for climate change purposes, and thus that greenhouse gases could not be considered “air pollutants” within the meaning of the Act for regulatory purposes. See 68 Fed. Reg. at 52,928. EPA expressly declined to decide whether greenhouse emissions would meet the other criteria of the statutory definition of “air pollutant” if, in fact, they were properly subject to regulation under the Act solely to address global climate change. Id. at 52,928-29 & n.3. Therefore, Petitioners’ argument on this point is simply irrelevant, since EPA did not premise its conclusion about the limits of its regulatory authority under the Act on the type of narrow, semantic analyses posited by Petitioners.^{24/} Instead, guided by Brown & Williamson, EPA based its conclusions regarding these terms on a comprehensive review of *all* the relevant indicia of congressional intent.

III. EVEN IF EPA HAD THE AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS FROM MOBILE SOURCES, THE PETITIONS FOR REVIEW NONETHELESS SHOULD BE DENIED

Even if it were assumed, arguendo, that EPA has the requisite authority under the CAA to regulate greenhouse gas emissions from motor vehicles to

^{24/} Even if such narrow concerns were at issue here, we note that Petitioners have not addressed all the textual implications of their argument. See, e.g., Fabricant Memo at 6-7 (discussing application of the CAA’s general regulatory provisions in the NAAQS context) (citing 40 C.F.R. § 50.1(e)) (JA 43-44).

address global climate change, the Agency's authority to make the threshold findings that are a prerequisite to such regulation are discretionary, and in this case EPA has not exercised its discretionary authority for the sound reasons it articulated in the ICTA Petition Denial. This aspect of the ICTA Petition Denial is entitled to an exceptional degree of deference. See, e.g., National Mining Ass'n, 70 F.3d at 1352; General Motors, 898 F.2d at 169; National Ass'n of Regulatory Util. Comm'rs v. DOE, 851 F.2d 1424, 1430 (D.C. Cir. 1988). As will be discussed below, EPA's decision here easily satisfies these standards, and Petitioners have utterly failed to show that this is “that rare and compelling case that would justify [the court] overturning the [agency’s] refusal to initiate rulemaking.” Timpinaro, 2 F.3d at 461 (internal quotations and citations omitted).

A. EPA's Authority to Make The Findings That Are A Prerequisite To Regulation Under CAA Section 202(a)(1) Is Discretionary.

It cannot seriously be debated that EPA has *discretionary* authority to make the determinations that are a prerequisite to the promulgation of regulations under section 202(a)(1) of the Act. The statute in fact is explicit on this point, as it premises any regulation on a “*judgment*” by the Administrator that motor vehicle emissions of the pollutant in question cause or contribute to “air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). As this Court and others have repeatedly recognized, provisions such

as this, which turn on judgments, findings, or determinations by the agency, necessarily grant discretion.^{25/} Until EPA makes this discretionary formal threshold finding, it has *no* duty or authority to initiate regulation.

Petitioners fail to recognize that the Agency's authority to make the threshold finding is discretionary, and instead insist that if the statutory test for making the finding "is met," EPA has no choice but to set standards. Pet. Br. at 47, 49. However, CAA section 202(a)(1) makes clear that any duty to regulate hinges on *EPA* making a judgment, not on whether a judgment *could* be made. Even the cases relied on by Petitioners are explicit in making the point that EPA has substantial discretion in making this threshold "judgment." For example, Petitioners cite an excerpt from this Court's decision in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc), noting that section 202(a)(1) provides that "the Administrator 'shall' regulate *if 'in his judgment'* the pollutants warrant regulation." Id. at 20, n.37 (emphasis added). Petitioners not only ignore the critical phrase "if in his judgment" from this quotation, but they also overlook that the very next sentence in the Ethyl decision unequivocally states that "[b]ecause of

^{25/} See, e.g., New York Public Interest Research Group v. Whitman, 321 F.3d 316, 330-31 (2d Cir. 2003); Her Majesty the Queen, 912 F.2d at 1533-34; NRDC v. Thomas, 885 F.2d 1067, 1073-75 (2d Cir. 1989); Environmental Def. Fund v. Thomas, 870 F.2d 892, 898 (2d Cir. 1989); Sierra Club v. Thomas, 828 F.2d 783, 788-90 (D.C. Cir. 1987).

the mandatory nature of the provisions, *express provision for administrative discretion via the 'judgment' phrase is necessary.*” Id. (emphasis added).

EPA's discretion in making these threshold determinations is also confirmed by Her Majesty the Queen, 912 F.2d at 1533, another case relied on by Petitioners. As Petitioners themselves acknowledge, see Pet. Br. at 47, that decision -- like Ethyl -- states that while statutes such as that involved here may require EPA to take regulatory action *after* it makes the requisite “endangerment” findings, the Agency has discretion in deciding whether and when to make the endangerment finding in the first instance. Her Majesty the Queen, 912 F.3d at 1533. EPA thus correctly characterized the discretionary nature of its CAA section 202(a)(1) authority when it observed in the ICTA Petition denial that “[w]hile section 202(a)(1) uses the word 'shall,' it does not require the Administrator to act by a specified deadline and it conditions authority to act on a discretionary exercise of the Administrator's judgment regarding whether motor vehicle emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.” 68 Fed. Reg. at 52,929.

Petitioners suggest that EPA's duties in this case nonetheless should be deemed mandatory because they believe the Agency has already conceded that the “endangerment” criterion -- at least in general terms -- has been met. See Pet. Br.

at 47. More specifically, Petitioners mischaracterize the ICTA Petition Denial as premised almost entirely on an assumption that “even if greenhouse gas emissions from U.S. motor vehicles *do* contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, § 202(a)(1) 'would not require [EPA] to regulate [greenhouse gas] emissions from motor vehicles.’” Pet. Br. at 47 (quoting in part 68 Fed. Reg. 52,929). Then, having set up this straw man, Petitioners argue that once a *general* endangerment finding has been made, EPA has no choice but to initiate the regulatory process for motor vehicles. Pet. Br. at 47-50.

As we will discuss in the next section, however, it is clear from the record that EPA has never made *any* formal endangerment finding regarding the effects of greenhouse gas emissions on climate change, much less an endangerment finding specific to motor vehicle greenhouse gas emissions. Nor was the ICTA Petition Denial premised on the type of concession or assumption posited by Petitioners. Instead, the portion of the ICTA Petition Denial cited by Petitioners merely observed -- completely consistent with this Court's precedent -- that even a *general* endangerment finding about the effects of greenhouse gas emissions (had one ever been made) would not be sufficient, in and of itself, to trigger any duty to regulate *motor vehicle* emissions under section 202(a)(1). This observation was

merely a facet of the Agency's explanation that it had made no endangerment finding at all, and Petitioners' attempt to ascribe a wholly unwarranted meaning to it must be rejected. See, e.g., NRDC v. EPA, 822 F.2d 104, 111 (D.C. Cir. 1987) (“A 'presumption of regularity' extends to agency rulemakings.”) (citation omitted).

B. EPA Has Not Made Any “Endangerment” Finding Under Section 202(a)(1) Of The Act, And Therefore No Duty To Regulate Under That Provision Has Been Triggered.

This Court's precedent makes clear that an endangerment finding that is sufficient to trigger any duty to regulate under section 202(a)(1) must be made formally and specifically. See Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986). Thomas involved a dispute under section 115 of the CAA, a provision that, similarly to section 202(a)(1), makes action by EPA (in that case issuance of requests to revise state implementation plans) contingent on a threshold finding by the Agency that emissions from certain States “may reasonably be anticipated to endanger public health or welfare in a foreign country.” 42 U.S.C. § 7415(a)&(b). In Thomas, the Court (in an opinion by then-Judge Scalia) held that letters from the EPA Administrator did not constitute a formal “endangerment” finding sufficient to trigger EPA's consequent regulatory duties under section 115, even though the letters informally stated the Administrator's view that the endangerment

criteria essentially had been met. See Thomas, 802 F.2d at 1446-48. Instead, the Court ruled that any endangerment finding that would have such an effect could only be promulgated through express notice-and-comment rulemaking. Id. at 1447-48.

In this case, it is indisputable that EPA has never made any formal endangerment finding regarding greenhouse gas emissions of the sort required by Thomas, let alone one that is specific to regulation under section 202(a)(1) of the Act. EPA expressly rejected arguments that statements by two of EPA's General Counsels during the Clinton Administration, combined with a smattering of reports, statements, and testimony by other government officials and agencies, had in essence constructively made all of the determinations that Section 202(a)(1) of the Act requires the *Administrator* to make as a prerequisite to regulation. See 68 Fed. Reg. at 52,929. Indeed, as EPA pointed out, while it is true that former EPA General Counsels Cannon and Guzy opined that CO₂ could be considered an “air pollutant” under the Act, both of these officials also stressed that the Agency had *not* made any of the findings that would be a prerequisite to regulation of CO₂ emissions under any CAA programs. See 68 Fed. Reg. at 52,925, 52,929; see also Fabricant Memo at 2-3 (JA 39-40).

Petitioners in the instant case review some of these same general reports and testimony for purposes of background, see Pet. Br. at 5-12, and acknowledge in a footnote EPA's rejection in the ICTA Petition Denial of the notion that such materials could constructively constitute the threshold "endangerment" finding required by CAA section 202(a)(1). See Pet. Br. at 46, n.27. Petitioners have not challenged this determination, nor could they, since Thomas makes clear that such endangerment findings must be made specifically, expressly, and by rulemaking -- and not through the types of implications or assumptions on which Petitioners' argument rests.

C. EPA Articulated Sound And Appropriate Policy Grounds For Denying The ICTA Petition and Declining to Make An Endangerment Finding Under Section 202(a)(1) of the Act.

In what is in many ways the heart of their argument, Petitioners challenge as arbitrary and capricious what they mistakenly construe as an EPA finding of no endangerment under section 202(a)(1). See Pet. Br. at 44-60. Petitioners accordingly characterize EPA's supposed determination as one that insufficiently analyzed the health and welfare endangerment criteria of that section. See Pet. Br. at 45-46. As explained above, EPA made no such determination. Therefore, Petitioners' argument that the Agency failed to apply the section 202(a)(1) endangerment criteria is inapposite. Instead, the ICTA Petition Denial reflects

EPA's decision not to make *any* endangerment finding -- either affirmative or negative -- under section 202(a)(1).

The Agency advanced numerous specific grounds for this decision beyond the questions of statutory authority discussed above. See 68 Fed. Reg. at 52,929-33. Arguably, the most significant was the Agency's conclusion that any effort to regulate greenhouse gas emissions should wait “[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it.” Id. at 52,931. As the Agency explained, “establishing [greenhouse gas] emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies. It would also result in an inefficient, piecemeal approach to addressing the climate change issue.” Id.

This aspect of the ICTA Petition Denial is almost identical to the EPA determination reviewed by the Court in Her Majesty the Queen (a follow-up case to Thomas v. New York, which was discussed in the previous section). In Her Majesty the Queen, Canadian authorities brought suit against EPA after the Agency declined to take action on rulemaking petitions submitted pursuant to CAA section 115 and the guidance provided by the Court in Thomas. In that case, as in this one, EPA had not made the requisite “endangerment” finding due to

significant questions of scientific and technical uncertainty. See Her Majesty the Queen, 912 F.2d at 1530, 1534. The Court not only deferred to EPA's technical judgment, but further found that the posture of the case (*i.e.*, that the Agency in essence had decided only that more study was needed before *any* endangerment finding could be made) rendered this aspect of EPA's position with respect to the petitions not "final" and hence not reviewable under section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1). Her Majesty the Queen, 912 F.2d at 1534-35.^{26f}

In this case, as we will discuss in detail below, even if it is assumed that the Court has jurisdiction to entertain this aspect of the petition for review, the many sound policy reasons advanced by EPA more than satisfy the extremely deferential standard of review applicable to agency denials of rulemaking petitions. See id.; see also National Mining Ass'n, 70 F.3d at 1352; Timpinaro, 2 F.3d at 461; General Motors, 898 F.2d at 169; NARUC v. DOE, 851 F.2d at 1430.

^{26f} For this reason, there is also a threshold question in this case whether the comparable aspect of the ICTA Petition Denial, *i.e.*, the portion that declined to make an endangerment finding in light of scientific uncertainty, is even reviewable at all. Although the discussion in the text proceeds on the assumption that all aspects of EPA's decision are "final" and reviewable, we note that Petitioners have not addressed this aspect of Her Majesty the Queen, much less explained why it would not be applicable here. Petitioners, of course, bear the burden of proving jurisdiction. See, *e.g.*, Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

1. EPA reasonably concluded that any decision to regulate greenhouse gas emissions should await further scientific research into the causes and effects of global climate change.

EPA explained that despite the progress that has been made in understanding climate change, there remain many significant and relevant areas of scientific uncertainty, all of which counsel against taking regulatory action to control greenhouse gas emissions from motor vehicles at this time. See 68 Fed. Reg. at 52,930-31. In reaching this conclusion, EPA took note of the numerous technical comments it had received, and ultimately relied most heavily on the 2001 report of the National Academy of Sciences' National Research Council (“NRC Report”) discussed above. Id. at 52,930; see NRC Report (JA 679). As EPA explained, the NRC advised that “[b]ecause of the large and still uncertain level of natural variability inherent in the climate record and the uncertainties in the time histories of the various forcing agents . . . , a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.” 68 Fed. Reg. at 52,930 (quoting NRC Report at 17 (SJA 1)).

As a result of these and other uncertainties, the NRC concluded that any current model projections regarding the magnitude of future climate change “should be regarded as tentative and subject to future adjustments (either upward

or downward).” 68 Fed. Reg. at 52,930 (quoting NRC Report at 1 (JA 681)). The NRC advised that these predictions could not be made more precise until there are “major advances” in understanding and modeling the factors that determine atmospheric concentrations of greenhouse gases and aerosols, as well as the feedbacks that determine the sensitivity of the climate system to increases in greenhouse gas concentrations. *Id.* Perhaps of particular significance here, the NRC also cautioned that “[t]he understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences of climate change are poorly understood.” *Id.* (quoting NRC Report at 20 (SJA 2)).

After taking note of these findings, EPA explained how the United States and other countries were conducting research that will enable scientists to address some of these critical uncertainties. *See* 68 Fed. Reg. at 52,930. In particular, EPA cited the federal government's Climate Change Research Initiative (“CCRI”), which was announced in June 2001, and which in the 2003 budget earmarked \$1.7 billion for scientific research on climate change issues. *Id.* at 52,930, 52,932. At the time of the ICTA Petition Denial, EPA noted that the CCRI had just issued its strategic plan, which is designed to target research efforts in such a way that “the key scientific uncertainties identified are addressed in a timely and effective

manner for decision makers.” Id. at 52,931-32. EPA also identified numerous initiatives that are now underway to help develop more advanced and commercially viable motor vehicle and stationary source technology that would help reduce greenhouse gas emissions. Id. at 52,931-33.

In light of all the foregoing, EPA reasonably concluded that “establishing [greenhouse gas] emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies.” Id. at 52,931. Contrary to Petitioners' suggestion, see Pet. Br. at 51-54, EPA's assessment that deferring any endangerment finding until after such uncertainties are further investigated represents an entirely appropriate exercise of the Agency's judgment that is entitled to the highest level of deference from this Court. See Her Majesty the Queen, 912 F.2d at 1534; see also e.g., Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1222 & n.19 (D.C. Cir. 1983).^{27/}

^{27/} It is undoubtedly true, as Petitioners point out, that the statute and this Court's case law also affirm EPA's discretion to *make* an endangerment finding where the Agency believes that such action is warranted, notwithstanding some uncertainty. Pet. Br. at 52-53. EPA in fact acknowledged this point in the ICTA Petition Denial. See 68 Fed. Reg. at 52,923. This point, however, in no way contravenes EPA's decision here, where the Agency reasonably determined that it was *not* appropriate to make such a finding given the present scientific record. The bottom line is that EPA has discretion to make reasonable determinations in the first instance *whether or not* to proceed in the face of scientific uncertainty,

(continued...)

2. Aside from effectively tightening fuel economy requirements, the practical options for reducing CO₂ emissions from motor vehicles are quite limited.

As EPA explained, the principal technological option for reducing motor vehicle emissions of CO₂, the most prevalent greenhouse gas, is making motor vehicles more fuel efficient. See 68 Fed. Reg. at 52,929. However, Congress delegated authority to regulate motor vehicle fuel economy to the Department of Transportation, not EPA. Id.; see also infra, Argument IV. Other options for requiring reductions in CO₂ emissions from motor vehicles are currently impractical or unavailable. See 68 Fed. Reg. at 52,931.

In fact, as EPA pointed out, the ICTA Petition identified almost no significant approaches other than requiring more fuel efficient vehicles that EPA could take to reduce CO₂ emissions from motor vehicles, and *no* practical strategies that could be employed to reduce emissions of the other greenhouse gases (CH₄, N₂O, and HFCs) that were the subject of the Petition. Id.; see also ICTA Petition at 31-33 (JA 31-33).^{27/} Even as to CO₂ emissions, however, the

^{27/}(...continued)

and the Agency's decision not to make an endangerment finding here was more than amply explained and supported by the record. The Agency obviously does not, as Petitioners suggest, have some sort of nondiscretionary duty to *make* an endangerment finding, and hence trigger regulation, in the face of uncertainty.

^{28/} In a somewhat related vein, the Agency also noted that even if it is assumed,
(continued...)

recommendations in the ICTA Petition were not feasible. Other than recommending that EPA require more fuel efficient vehicles (including hybrid gas/electric vehicles), the ICTA Petitioners' only significant recommendation was that EPA adopt requirements that would promote the commercial introduction of so-called zero-emission vehicles, such as fully electric vehicles and fuel cell-powered vehicles. *Id.* However, as EPA explained, these technologies simply are not far enough along in development to be “a practical choice for most consumers.” 68 Fed. Reg. at 52,931.

In their brief to this Court, Petitioners have not contested any of EPA's factual conclusions regarding the availability of control technologies, nor have they identified any aspect of the administrative record pertaining to these issues that they believe EPA overlooked. Instead they argue that the availability of appropriate control technology is simply irrelevant to the question of whether

^{28/}(...continued)

arguendo, that anthropogenic emissions of greenhouse gases in the United States cause adverse health and welfare effects that are sufficient to warrant a regulatory response, this does not necessarily mean that emissions controls on *mobile sources* are the most practical and effective means of addressing this problem. 68 Fed. Reg. at 52,931. Instead, “[a] sensible regulatory scheme would require that all significant sources and sinks of [greenhouse gas] emissions be considered in deciding how best to achieve any needed emission reductions.” *Id.* In this regard, while Petitioners purport to be limiting their challenges in this case to the mobile source context, we note that most of their policy arguments are based on the harms allegedly caused by greenhouse gas emissions in general, not emissions that are specific to mobile sources. See, e.g., Pet. Br. at 2-4, 5-11.

endangerment exists, and that consideration of such factors is not lawful in deciding whether to make an endangerment finding. See Pet. Br. at 54-56. To the contrary, as this Court has recognized, statutory provisions like CAA section 202(a)(1) “create[] a specific linkage between the endangerment finding and the remedial procedures.” Her Majesty the Queen, 912 F.2d at 1533. For this reason, the Court has recognized that “if there is insufficient information to enable the Administrator to implement those remedies, the promulgation of an endangerment finding alone would largely be pointless.” Id.

3. The actions sought by Petitioners could give rise to counterproductive foreign policy implications.

EPA also explained that the approach sought in the ICTA Petition could have undesirable implications for the conduct of United States foreign policy, in that it might actually reduce the incentives for other nations -- particularly in the developing world -- to reduce their emissions of greenhouse gases. See 68 Fed. Reg. at 52,931. To illustrate its concern, the Agency cited the history of American efforts to address stratospheric ozone depletion, where the initial controls adopted unilaterally by the United States were not matched by other countries, resulting in United States emission reductions being more than offset by increased emissions abroad. Id., n.5. Just as effective control of the stratospheric ozone problem depended on adoption of the Montreal Protocol, effective efforts to address global

climate change through mandatory emission reductions similarly must be founded on equitable and comprehensive international agreements.^{29/} Although the Petitioners may not agree with these judgments in all respects, as EPA aptly noted, it is normally the prerogative of the Executive Branch to address such important foreign policy issues in the first instance. Id. at 52,931.

4. EPA and other federal agencies are pursuing appropriate actions to address the issue of global climate change.

As EPA explained in the Petition Denial, it and other federal agencies are undertaking a variety of efforts to address the issue of global climate change. See 68 Fed. Reg. at 52,931-33. In the end, Petitioners at most have articulated an argument for a somewhat different policy choice than that made here by EPA. However, this falls far short of the extraordinary showing that Petitioners would have to make in order to overcome the tremendous deference due EPA in making legal and policy decisions of this sort in the context of a well-explained and well-supported denial of a rulemaking petition.

^{29/} Any suggestion that the early 1990s United Nations Framework Convention on Climate Change (“UNFCCC,” or “Rio Treaty”) constitutes such a comprehensive emission control treaty, see Pet. Br. at 29-30, clearly is incorrect. As EPA explained, Congressional action before and after adoption of the UNFCCC was focused on voluntary, nonregulatory approaches to control of greenhouse gas emissions. See 68 Fed. Reg. at 52,926.

IV. THE ICTA PETITION DENIAL IS FURTHER SUPPORTED BY THE FACT THAT THE RELIEF SOUGHT BY PETITIONERS WOULD EFFECTIVELY REGULATE MOTOR VEHICLE FUEL ECONOMY, AN ACTION THAT CONGRESS SPECIFICALLY DELEGATED TO THE DEPARTMENT OF TRANSPORTATION, NOT EPA

Further reinforcing both the legal and policy rationales for the ICTA Petition Denial is the fact that at present, the only practical way of making a meaningful reduction in motor vehicle emissions of CO₂ (the most significant greenhouse gas) is by increasing fuel economy. See 68 Fed. Reg. at 52,929.^{30/} Consequently, even if EPA possessed CAA authority to regulate CO₂ for climate change purposes, any motor vehicle standard EPA might set under the Act that required meaningful reductions in CO₂ emissions would effectively require a corresponding increase in fuel economy. However, in the Energy Policy and Conservation Act (“EPCA”), 49 U.S.C. §§ 32901-18, Congress established a detailed program for regulating the fuel economy of passenger cars and light trucks -- the bulk of the motor vehicle fleet -- and it authorized DOT, not EPA, to implement that program. EPA thus reasonably concluded that it would be inconsistent with EPCA for EPA to set CO₂ emission standards under the CAA that would effectively require significant increases in the fuel economy of vehicles subject to EPCA. 68 Fed. Reg. at 52,929.

^{30/} EPA explained, and Petitioners do not dispute, that “[n]o technology currently exists or is under development that can capture and destroy or reduce emissions of CO₂, unlike other emissions from motor vehicle tailpipes.” 68 Fed. Reg. at 52,929.

In arguing that EPCA does not expressly abrogate EPA's authority under the CAA, see Pet. Br. at 38-43, Petitioners ignore those EPCA provisions that clearly signal Congress' intent that regulation of motor vehicle fuel economy be governed by EPCA alone. For example, Congress itself set the corporate average fuel economy ("CAFE") standard for "passenger automobiles" (which actually includes a variety of vehicles carrying up to 10 passengers). 49 U.S.C. §§ 32901(a)(16), 32902(b). Congress also provided that any DOT action increasing (or significantly decreasing) the stringency of the standard be subject to congressional review and potential disapproval. Id. § 32902(c). Moreover, Congress designed EPCA to allow automobile manufacturers substantial flexibility in meeting CAFE standards through credit banking and borrowing provisions. Id. § 32903.

In the face of EPCA's carefully calibrated scheme for regulating fuel economy and the close relationship between fuel economy and CO₂ emissions, EPA reasonably concluded that it would be inconsistent with Congress' intent, as reflected in EPCA, for EPA to set CO₂ emissions standards under the CAA that effectively regulated passenger automobile fuel economy. 68 Fed. Reg. at 52,929. As the Agency explained, Congress would not have taken such care in specifying a detailed process for setting, revising and meeting fuel economy standards if it

expected that EPA could, in effect, significantly tighten such standards simply by enacting CO₂ emission standards pursuant to the CAA. Id.

Petitioners create yet another straw man when they claim that EPA believes that EPCA completely “precludes [EPA] from regulating one of the greenhouse gases (carbon dioxide) from one class of vehicles (automobiles).” Pet. Br. at 38; see also id. at 38-44. However, EPA never stated that it believed EPCA, in and of itself, formally precluded or repealed any authority EPA may have to regulate mobile source emissions under the CAA. Instead, EPA said that since the only practical means of reducing CO₂ emissions from vehicles is by increasing fuel economy, and since Congress had in EPCA established a specific program under which increases in fuel economy could be required, it is reasonable to infer that Congress did not intend EPA to use its CAA authority to adopt CO₂ emission standards that would effectively require significant fuel economy increases, separate and apart from any proceeding under EPCA.

EPA's conclusion on this point in fact has direct support in the legislative history to the 1990 CAA amendments. As discussed above, the Senate Environment and Public Works Committee had originally reported out a bill that would have established CO₂ tailpipe emission standards under the CAA to help address climate change issues, but this bill was later rejected by the full Senate.

See supra at 48-50. One of the Senate opponents of this provision, Senator Symms, submitted minority views that specifically criticized this aspect of the bill for, among other things, having the effect of making the current fuel economy standards reflected in EPCA “a 'deadwood' artifact of law with no consequence” and of improperly elevating environmental concerns over all other policy issues related to the setting of fuel economy standards (e.g., “matters of engineering design, safety, national energy policy, international competitiveness and trade”). 1990 Legis. Hist., Vol. 5, at 8781.

In another effort to discredit a position EPA did not take, Petitioners claim that EPA also relied on EPCA in deciding against setting standards for vehicles not subject to EPCA and for the other three, non-CO₂ greenhouse gases. Pet. Br. at 43-44. In fact, EPA made clear that its EPCA concerns extended only to passenger automobiles and CO₂ emissions. See 68 Fed. Reg. at 52,929. EPA's point was simply that if the Agency could not regulate the primary greenhouse gas from the bulk of the motor vehicle fleet, it would not make sense to regulate greenhouse gases from the remaining portion of the fleet in the absence of a comprehensive program to regulate greenhouse gases from the many types of sources that emit them. Id. Moreover, EPA properly took note of the deficiencies of the showings

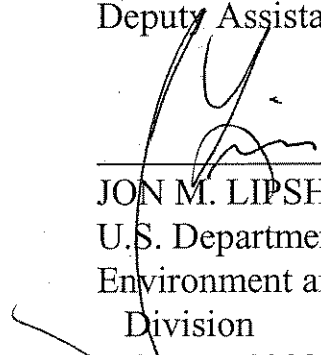
made in the ICTA Petition with regard to potential regulation of emissions of the three greenhouse gases other than CO₂. See 68 Fed. Reg. at 52,923, 52,931.

CONCLUSION

For all the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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