No. 05-1120

In the Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

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

REPLY

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A common theme runs throughout respondents' arguments on standing, statutory authority, and agency discretion: a judicially restrained approach to this case, respondents suggest, implies a ruling in their favor. This is not so. On standing, respondents ask this Court to make factual judgments by recasting them as legal determinations; these determinations would do violence to this Court's Article III jurisprudence. On statutory authority, respondents encourage the Court to focus not on the statutory text at issue here, 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. Last, on agency discretion, respondents ask for a new and lenient interpretive rule for cases involving agencies' refusals to issue rules. But nothing in the background principles of administrative law that respondents invoke allows an agency to turn its back on a statute that the agency does not, for its own policy reasons, want to follow.

I. Petitioners have standing.

In the court of appeals, petitioners submitted forty-three detailed affidavits establishing their standing. No party responded to, let alone refuted, those declarations. By a vote of 2-1, the court declined to dismiss the petition for review on grounds of standing. This Court declined to take up the issue in granting review. Nonetheless, respondents make standing a centerpiece of their briefs. Accepting their arguments would rework and distort the role of standing. Respondents' arguments should be rejected.

A. Petitioners have demonstrated injury in fact.

In their affidavits, petitioners described in detail how emissions of greenhouse gases have already caused and are causing States, cities, and individuals injuries that unquestionably satisfy the "injury in fact" requirement of Article III.[1] That is no doubt why EPA has not contested injury in fact in these proceedings.

Rising temperatures have injured petitioners in the following specific and concrete ways: coastal States have lost and are losing land to rising sea levels (D.C. Cir. Jt. App. 666; Stdg. App. 179, 194, 196, 208, 212, 216, 217, 234, 266, 304-305); ground-level ozone (smog) is exacerbated by rising temperatures, leading to adverse health effects and costly efforts on the part of States to address the problem (Stdg. App. 3-5, 68); glaciers are melting, causing distinct injuries to particular individuals (JA 190; Stdg. App. 182, 190, 212). These injuries span a broad range, from the Commonwealth of Massachusetts losing coastal land (Stdg. App. 196) to Frank Keim no longer being able to hike on the Alaskan glaciers he used to enjoy (Stdg. App. 190). The former injury, the loss of sovereign territory, has been a cognizable Article III injury since the founding of the republic (*see New York v. Connecticut*, 4 U.S. 1, 4 (1799)); the latter is exactly the kind of injury held sufficient to support federal jurisdiction in *Friends of the Earth v. Laidlaw Envtl. Services (TOC)*, 528 U.S. 167 (2000).

Petitioners' injuries are not "'some day'" injuries, as respondents contend (Utility Air Regulatory Group (UARG) Br. 13, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)); they are injuries in the here and now. Nor do petitioners' declarations describe mere "generalized grievances" (Alliance of Automobile Manufacturers (AAM)

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[1] Petitioners' declarations are collected in a "standing appendix" which has been lodged with the Court as part of the appeals court record ("Stdg. App."). For convenience, additional copies of this document have also been lodged with the Clerk.

Br. 12); they attest to harms being visited—right now—upon particular individuals and particular States. The fact that the interests asserted here "are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *see also FEC v. Akins*, 524 U.S. 11, 24-25 (1998).

Industry respondents assert that petitioners' case rests on the "central allegation" that substantial harm will not occur until the year 2100. AAM Br. 9-10; *see also* UARG Br. 12 & n.4. This characterization is incorrect; it ignores petitioners' detailed statements of current harm.

The record is also filled with evidence of continuing harm. *See, e.g.,* JA 229, 233-235; Stdg. App. 5-6, 43-48, 170-174, 175-180, 234-236. Each of the injuries described above is not only continuing, but will worsen with rising concentrations of greenhouse gases. Stdg. App. 182, 207-209, 211, 213-219, 234-236. Because each of these injuries is present today and will only become more grave, respondents' arguments that these injuries do not satisfy Article III are wrong.

Respondents ask this Court to hold that temporal distance alone warrants denial of standing. Respondent UARG suggests, based on *McConnell v. FEC*, 540 U.S. 93 (2003), that standing cannot exist where an injury will not occur for five years. UARG Br. 13. If this were true, no one would have standing to object to illegal exposure to carcinogens, as most cancers have latency periods far longer than the five-year interval involved in *McConnell*. Instead, *McConnell* stands only for the common-sense rule that temporal distance can vitiate standing where the passage of time aggravates, as opposed to reduces, uncertainty about injury; this is, indeed, the way the case was argued to the Court. Brief of Respondent FEC at 129-30, *McConnell v. FEC*, 540 U.S. 93 (No. 02-1676).

Nor does *Whitmore v. Arkansas*, 495 U.S. 149 (1990), relied upon by the automobile manufacturers (AAM Br. 10-11), hold that temporal distance alone undoes standing. *Whitmore* held that the plaintiff had no standing to object to the execution of a fellow inmate, where the plaintiff's claim of injury assumed

that he would be granted habeas relief; that he would be retried, convicted, and sentenced to death; and that a comparison of his crime (which involved stabbing his victim 10 times, cutting her throat, and carving an "X" on the side of her face) to his fellow inmate's would show that his capital sentence was arbitrary given the comparative mildness of his crime. 495 U.S. at 156-157. To recall the facts of *Whitmore* is to refute respondents' extravagant reading of it; it was not temporal distance, but an implausible chain of causation, which led to the denial of standing there. That situation is precisely the opposite of what is present here, namely, one in which the magnitude and certainty of injury only *increase* as time passes.

Here, the continuing harms petitioners describe are the result of physics and chemistry, not the unpredictable workings of the electoral or criminal system. "The injury is of course probabilistic, but even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical . . . ." *Elk Grove Village v. Evans,* 997 F.2d 328, 329 (7th Cir. 1993) (Posner, J.). Nothing in the record refutes petitioners' claims of continuing harm. To say, as *amici* Robert H. Bork, *et al*. do, that Massachusetts' claim of injury based on the loss of its land to the rising seas is "entirely speculative" unless one knows more about economics (Bork Br. 12 & n. 9), is like saying that "a homeowner whose house is destroyed by arson has not been injured by the arsonist, if the house was adequately insured." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1367 (D.C. Cir. 2004) (Roberts, J.).

Respondents refer dismissively to petitioners' "reams of untested declarations," calling them "speculative." AAM Br. 8-9. While petitioners do bear the burden of proof on standing, the factual questions underlying standing are addressed in the same manner as other factual issues in litigation. *Lujan*, 504 U.S. at 561. Thus respondents were required to meet petitioners' proof with evidence, not adjectives. Nothing in the record refutes the conclusion, supported in petitioners'

affidavits, that emissions of greenhouse gases have harmed and will continue to harm petitioners.[2]

If there *were* evidence in the record creating a genuine factual controversy about petitioners' declarations of current and continuing harm, further factfinding would be necessary.[3] Respondents do not ask for this result. They apparently would have this Court rule, by judicial fiat, that climate change has not harmed, is not harming, and will not harm petitioners. Respondents' preferred disposition of the case is thick with irony: invoking a doctrine grounded in judicial restraint, respondents in effect are asking this Court to make the very scientific finding that they assert the accountable and expert agency charged with environmental protection need not, and indeed may not, make. Respondents' position stands standing on its head.

B. Petitioners have demonstrated that their injury is fairly traceable to EPA's decision.

U.S. motor vehicles are responsible for 23 percent of this country's carbon dioxide emissions and some 6 percent of the entire world's. Stdg. App. 232. U.S. motor vehicles and power plants together are responsible for more than 60 percent of U.S. emissions of carbon dioxide. Pet. Br. 39 n.28. EPA has

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[2] The 2001 report by the National Research Council entitled *Climate Change Science*, on which EPA relied in emphasizing the uncertainties surrounding climate change, confirms petitioners' claims of harm. *See* Brief of *Amici Curiae* Climate Scientists David Battisti *et al.*

[3] In a proceeding like this one, in which a petition for review is filed directly in the court of appeals, creating a procedure for resolving a factual dispute could be tricky, as Judge Tatel observed below. Pet. App. A30. Nevertheless, this Court has made clear that factual questions underlying standing are to be decided like other factual questions, even proceeding to trial if necessary. *See, e.g., Lujan*, 504 U.S. at 561, quoting *Gladstone, Realtors v. Vill. of Bellwood,* 441 U.S. 91, 115 n.31 (1979).

cited the conclusion it reached in this case in declining to regulate greenhouse gases from power plants.[4] *Ibid*. Despite these impressive percentages,[5] EPA argues that respondents have not shown that their injury is fairly traceable to EPA's decision because these emissions do not "materially affect the overall extent of global climate change." U.S. Br. 13-14. EPA is wrong on both the facts and the law.

It is uncontested that emissions of greenhouse gases contribute to the harms petitioners have described. Moreover, greenhouse gases, once emitted, become distributed throughout the earth's lower atmosphere. A ton of carbon dioxide emitted by an automobile has the same climate-changing effect as a ton of carbon dioxide emitted by any other source. If EPA regulated greenhouse gases, the carbon dioxide emitted by motor vehicles would be reduced.[6] The harms suffered by petitioners are thus "fairly . . . trace[able]" to EPA's decision not to regulate greenhouse gases from motor vehicles. *Lujan*, 504 U.S. at 560, quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (*EKWRO*). No intervening act of a third party separates the greenhouse gas

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[4] Conceding the link between its decision in this case and its refusal to regulate greenhouse gases from power plants, EPA joined the motion for a stay of a separate proceeding challenging its decision on power plants because the Court granted review here. CO_2 Litigation Group (CLG) Br. 30.

[5] EPA tries to minimize the effect of controlling emissions under section 202(a)(1) by noting that this provision applies only to *new* motor vehicles. U.S. Br. 13-14. Any rule applied to new vehicles would ultimately affect all vehicles: the U.S. automobile fleet turns over every 10-15 years. 60 Fed. Reg. 12459, 12472 (1995).

[6] Redressability is even clearer when one considers the linkage between EPA's decision on motor vehicles and its decision not to regulate greenhouse gas emissions from power plants (sources which together comprise over 60 percent of U.S. carbon dioxide emissions, Pet. Br. 39 n. 28)—a linkage the Solicitor General confirms in his brief to this Court. U.S. Br. 32.

emissions left unregulated by EPA's decision and the harm those emissions cause.

The Court's precedents make clear that its concern with ensuring that asserted injuries are fairly traceable to challenged actions is satisfied when the causal chain is as direct as it is here. In *Allen v. Wright*, 468 U.S. 737 (1984), the Court worried that recognizing standing where plaintiffs' injuries arose from "'the independent action of some third party not before the court'" would "pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations." *Id.* at 757 (quoting *EKWRO*, 426 U.S. at 42), 759; *see also DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1864 (2006). Here, in contrast, petitioners challenge a "specifically identifiable Government violation[] of law" that results directly in the emission of more greenhouse gases than would be emitted if EPA had not declined to regulate greenhouse gases.

Respondents seek to avoid the straightforward result dictated by the Court's decisions by asking this Court to adopt a new constitutional rule of causation: in the Solicitor General's formulation, judicial review of EPA's decision not to regulate greenhouse gases from motor vehicles would be available only if these emissions "materially affect the overall extent of global climate change." U.S. Br. 14. This standard has no basis in Article III and would undo the Clean Air Act's causal framework.

"[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents. 'Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*'" *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund,* 500 U.S. 72, 77 (1991), quoting, with emphasis added, *Allen*, 468 U.S. at 752; *see also Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the

judgment) ("Congress has the power to . . . articulate chains of causation that will give rise to a case or controversy . . .").

Section 202(a)(1) of the Clean Air Act directs the Administrator of the EPA to regulate air pollutants emitted by new motor vehicles when the Administrator determines that they "cause, *or contribute to*, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1) (emphasis added). The same causal relationship triggers regulation under other provisions of the Act. *See, e.g.*, 42 U.S.C. 7411(b)(1)(A); 7545(c)(1); 7547(a)(1). These provisions reflect Congress's insistence that regulation proceed where a source contributes to, and is not solely responsible for, endangerment of public health or welfare—which is overwhelmingly the norm in pollution cases.

EPA, too, has recognized that effective air pollution control requires regulation of sources that, standing alone, cause a portion of a large-scale harm. With respect to ozone pollution, for example, the agency has observed:

> Each source's contribution is a small percentage of the overall problem; indeed, it is rare for emissions from even the largest single sources to exceed one percent of the inventory of ozone precursors even for a single metropolitan area. . . . [A]ttainment requires controls on numerous sources across a broad area.

63 Fed. Reg. 57356, 57375 (1998). EPA concluded that upwind States "contribute[d] significantly" to ozone nonattainment problems in downwind States within the meaning of section 110(a)(2)(D)(i)(I) of the Clean Air Act, even where their contributions to ozone pollution in the downwind States were on the order of one percent. *Id.* at 57391-93; *see also Michigan v. EPA*, 213 F.3d 663, 674 (D.C. Cir. 2000) (upholding EPA's approach).[7]

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[7] EPA also used a one-percent threshold in identifying significant contributions to nonattainment in its recent interstate air pollution trading rule. 70 Fed. Reg. 25162, 25175 (2005). Likewise, in

Respondents seek to quietly overturn Congress's decision to require control of sources that "contribute to" a pollution problem. Respondents argue that, as a matter of constitutional law, this Court cannot hear this case because regulation of U.S. motor vehicles—which, again, account for an impressive 23 percent of this country's carbon dioxide emissions and some 6 percent of the entire world's (Stdg. App. 232)—will not "materially affect the overall extent of global climate change." U.S. Br. 13-14; *see also* UARG Br. 14-15 (petitioners must show new motor vehicles "caused" global climate change). The Solicitor General does not define "materially affect." However, he must have in mind a standard stricter than the statutory "contributes to" standard; as noted, EPA has in the past found that sources "contribute *significantly* to"—not merely "contribute to"—a pollution problem when their contributions are on the order of one percent. By erecting a causal standard for standing that is stricter than the causal standard prescribed by the underlying statute, respondents would "raise the standing hurdle higher than the necessary showing for success on the merits . . . ." *Laidlaw*, 528 U.S. at 181. Yet "[t]he question of standing is different" from "the merits." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

The Solicitor General also cites no authority for the idea that a "material" effect is required for standing. There is none. In *Laidlaw*, for example, plaintiffs were not required to demonstrate that defendants' mercury discharges into the North Tyger River were responsible for some preordained percentage of plaintiffs' harm. *Laidlaw*, 528 U.S. at 182-184; *see also, e.g., Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (standing established if defendant "*contributes* to the pollution" that affects the plaintiff); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (defendant's

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regulating mercury emissions from U.S. power plants, EPA noted that these emissions accounted for approximately one percent of the total global pool of mercury emissions. 70 Fed. Reg. 15994, 16028 (2005).

contribution to pollution suffices for traceability). Multiple causation is pervasive in the law (*see, e.g., Olympic Airways v. Husain*, 540 U.S. 644, 653 (2004)), and different statutory and common-law frameworks deal with it in different ways. The Court should reject respondents' invitation to create a new constitutional rule for such cases.

In any event, petitioners' declarations satisfy any sensible construction of the Solicitor General's new standard. Seen in its most favorable light, the Solicitor General's standard might be viewed as an effort to avoid federal jurisdiction over decisions with truly *de minimis* effects. As noted, U.S. motor vehicles are responsible for approximately 23 percent of this country's carbon dioxide emissions and 6 percent of the entire world's. Stdg. App. 232. In 1999, the U.S. transportation sector emitted almost half a billion metric tons of carbon dioxide (Stdg. App. 219); the emissions from this sector come mainly from automobiles (Stdg. App. 220). Half a billion metric tons of carbon dioxide cannot plausibly be viewed as *de minimis*.

C. Petitioners have demonstrated redressability.

Reversal of EPA's decision declining to regulate greenhouse gases from motor vehicles would make possible significant controls on sources responsible for some 60 percent of this country's carbon dioxide emissions—23 percent from motor vehicles and the rest from the power plants left unregulated by the same legal conclusion EPA reached here. Pet. Br. 39 n.28. Lower greenhouse gas emissions mean reduced harms from climate change. Stdg. App. 232-236. Petitioners' injuries are thus redressable by judicial action.

Here, too, respondents provide no factual rebuttal to petitioners' claims;[8] instead, they offer a new constitutional

[8] EPA does briefly speculate about the possibility that other nations will "free ride" on any effort by the U.S. to reduce its greenhouse gas emissions (U.S. Br. 19), thus, presumably, somehow rendering U.S. regulatory efforts nugatory. But just as standing cannot be established based on speculation or conjecture, it also cannot be

test for redressability. Here, too, their argument should be rejected.

EPA asserts that petitioners' injury must be "materially alleviated" by a ruling in their favor. U.S. Br. 7; *see also* AAM Br. at 16 (lawsuit must lead to "significant reduction" in greenhouse gas concentrations). The government does not define what it means or cite any judicial precedent for its suggested standard. Congress has chosen to require regulation of mobile sources when they "contribute to" air pollution that endangers public health or welfare. As already discussed, the government's standard of materiality appears to be stricter than the Clean Air Act's causal standard. This Court should reject respondents' implicit invitation to smother the standard Congress chose with a stricter constitutional test.

In addition, there is no support in this Court's precedents for respondents' new constitutional test. On the contrary, this Court has held that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982) (emphasis in original).

Acceptance of respondents' test would have far-reaching consequences. Incomplete redressability abounds in legal cases. Creditors often receive just pennies on the dollar in bankruptcy proceedings; plaintiffs in "pure" comparative fault regimes have received as little as one percent of their total damages; damage caps—such as the $75,000 cap of the Warsaw Convention—can limit plaintiffs' redress to a small fraction of their total harm. On respondents' theory, federal jurisdiction would not exist in these cases because the redress

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denied on this basis. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78 (1978) ("Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief.").

available is too small in proportion to the total harm.[9] And, on respondents' theory, even if Congress passed legislation saying, explicitly and precisely, that "EPA must regulate greenhouse gas emissions from motor vehicles," no one would have standing to challenge a failure by EPA to comply with this legislative directive.

Oddly—given their otherwise dire representations of the consequences of a ruling in favor of petitioners—respondents' arguments on redressability amount to a complaint that Congress *did not go far enough* in section 202 of the Clean Air Act. Congress's incremental, source-by-source approach to pollution control becomes, on respondents' theory, a basis for rejecting judicial review altogether. But this Court has "frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937), quoting *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 411 (1905). Respondents' theory of redressability is in tension with this fundamental principle of judicial deference to legislative choices.

II. The Clean Air Act authorizes regulation of greenhouse gases from motor vehicles.

Section 202(a)(1) of the Clean Air Act directs the EPA to regulate "air pollutant[s]" from motor vehicles when, in the

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[9] Another of respondents' arguments would unsettle much of administrative law. Industry respondents assert that petitioners cannot show redressability because EPA might decide, on remand, not to regulate greenhouse gases. UARG Br. 19-20; AAM Br. 16-17. Scores of administrative law cases concern agency decisions in which the agencies enjoy some discretion. This Court has made clear that an injury caused by an agency decision is redressable by a judicial remand to the agency, even if the complainant might lose on remand. *See, e.g., Akins*, 524 U.S. at 25.

Administrator's judgment, they "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). The Act defines "welfare" to include effects on "climate" and "weather." 42 U.S.C. 7602(h). Physical or chemical matter that is emitted into the ambient air is an "air pollutant" under the Act. 42 U.S.C. 7602(g). 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.

In concluding that it lacked authority to regulate greenhouse gases emitted by motor vehicles, EPA relied on unenacted legislation; legislation that was enacted subsequent to, and is fully compatible with, the provisions at issue here; and the supposed incompatibility of regulation of greenhouse gas emissions under section 202 with the Clean Air Act's programs addressing air quality standards and stratospheric ozone depletion and with the Energy Policy and Conservation Act's fuel efficiency program. Pet. App. A68-A80. Petitioners have rebutted each of these arguments. Pet. Br. 20-32. Respondents' submissions on these points add nothing to EPA's original arguments; we refer the Court to our opening brief on these issues.

Respondents also now attempt to bolster their extra-textual analysis of the relevant provisions of the Clean Air Act with arguments based on the language of these provisions; these arguments are unpersuasive. EPA's argument from text 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." Only those chemical or physical substances that are *also* "air pollution agents" are covered by the Act. U.S. Br. 34. 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."[10] Pet. App. A78. This circular reasoning lies behind the Solicitor General's otherwise mysterious reference to "*cognizable* 'pollution.'" U.S. Br. 33 (emphasis added). The government's position appears to be that although greenhouse gases may indeed constitute "pollution," they are not—for the extra-textual reasons noted above—*cognizable* pollution under the Act. Nothing in the Act supports a distinction between "cognizable" and "non-cognizable" pollution.

Contrary to the Solicitor General's suggestion, petitioners' interpretation gives independent meaning to the phrase "air pollution agent" (Pet. Br. 14), and thus does not render this term "superfluous." U.S. Br. 34; *see also* UARG Br. 45; AAM Br. 23; CLG Br. 7.

Moreover, although petitioners have focused on the text following the "including" clause of section 302(g) because it so clearly captures the emissions at issue in this case, it is also beyond dispute that these emissions fall within the phrase "air pollution agents," *even if one looks only at that language and ignores the language of the "including" clause*.[11] 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. 42 U.S.C. 7403(g). EPA asks the Court to ignore this

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[10] The government's inattention to the statutory text is pointedly illustrated by its invention of *hypothetical* statutory text as a reason why *this* statutory text—the relevant provisions of the Clean Air Act—should be read in a particular way. U.S. Br. 34.

[11] Respondents' brusque treatment of the "including" clause, which helps define what the term "air pollution agents" means, ignores the teaching of this Court's decision in *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Oregon*, 515 U.S. 687, 697 n.10 (1995) ("Congress explicitly defined the operative term" (there, "take"; here, "air pollution agent"), "thereby obviating the need for us to probe its meaning as we must probe the meaning of the undefined subsidiary term" (there, "harm"; here, "any physical, chemical . . . substance or matter")).

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. U.S. Br. 34-35. EPA's rigid distinction between "regulatory" and "nonregulatory" provisions has no support in the text or structure of the Act. Pet. Br. 16-17.

In addition, EPA itself has acknowledged that carbon dioxide exacerbates ozone pollution by exacerbating the conditions that create this pollution. *See* 66 Fed. Reg. 18245, 18246 (2001). Thus carbon dioxide is an "agent" of ozone "air pollution." Carbon dioxide helps to bring about air pollution in the form of ozone; this is precisely what an "agent"—of "air pollution"—does.

As for the other substances at issue here (methane, nitrous oxide, and hydrofluorocarbons), to the extent respondents address them at all, they appear to agree that these substances are "air pollution agents" insofar as they cause effects other than climate change. CLG Br. 3 n.2 (acknowledging that methane is an air pollutant with respect to some of its effects); UARG Br. 45 n.18 (appearing to concede that EPA could regulate methane due to its "explosive characteristics" and other features). EPA agrees as well. 61 Fed. Reg. 9905, 9906 (1996) (methane contributes to landfill gas pollution). Yet nothing in the language of the Act supports treating a chemical substance as a pollutant for one purpose, but not for another, depending on the exact effects being targeted. Respondents' approach would, moreover, forbid EPA from regulating pollutants based on effects specifically singled out by Congress as among the important components of human welfare.[12] 42 U.S.C. 7602(h) (defining "welfare" to include

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[12] During debate on the 1970 Amendments, which added the terms "climate" and "weather" to the definition of "welfare," Senator Boggs introduced into the record a White House Report stating that: "Air pollution alters climate and may produce global changes in temperature. . . . [T]he addition of particulates and carbon dioxide in the atmosphere could have dramatic and long-term effects on world

"weather" and "climate"); Pet. Br. 15-16. There is no sense in respondents' approach.

Industry respondents, focusing solely on carbon dioxide, argue that this chemical is not an "air pollution agent" for several different reasons. They say that the Clean Air Act only applies to substances that make the air "dirty." UARG Br. 46; AAM Br. 23. This is not a word used in the Act. It is also hard to know what respondents mean by "dirty." For example, carbon *monoxide* is colorless and odorless (this is why carbon monoxide detectors are needed);[13] it is not "dirty" in the usual sense of the term. Yet carbon monoxide has been regulated under section 202 of the Act for decades, *see* Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690 (1970), and respondents do not question the appropriateness of this regulation.

Respondents also assert that carbon dioxide is not an "air pollution agent" because it is "essential to life." AAM Br. 20. Yet chromium and selenium, for example, are essential nutrients, *see* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 401 (Table 60-2), 410 (Kasper *et al.*, eds., 16th ed. 2005), and chromium and selenium compounds are nonetheless regulated as hazardous air pollutants under the Act. 42 U.S.C. 7412(b)(1). EPA has, moreover, just 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*. 71 Fed. Reg. 55140, 55143 (2006). Many substances have benign, or even beneficent, consequences at lower concentrations and malign consequences at higher concentrations. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 9 (1993) ("Drinking a bottle of pure iodine is

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climate." 116 Cong. Rec. 32907, 32914, 32917. This evidences an affirmative awareness of the problem of global climate change at the time Congress added the words "climate" and "weather" to the definition of "welfare."

[13] Consumer Product Safety Commission, Carbon Monoxide Questions and Answers, CPSC Document #466, available at http://www.cpsc.gov/CPSCPUB/PUBS/466.html.

deadly; placing a drop of diluted iodine on a cut is helpful."). Respondents' categorical treatment of carbon dioxide as "essential to life" ignores this basic scientific principle.

Respondents also argue that greenhouse gases do not belong in the category of "air pollution agents" because they exert their effects through their presence in the upper atmosphere, rather than in the "ambient air" as EPA has defined it. CLG Br. 10-11; UARG Br. 47-48. This is not a line drawn by Congress; it is one of respondents' invention. Section 302(g) requires only that, to be an air pollutant, substance or matter be "emitted into or otherwise enter[] the ambient air." 42 U.S.C. 7602(g).[14] There is no question that motor vehicles emit greenhouse gases into the very zone described by respondents. And, as a matter of scientific fact, greenhouse gases contribute to climate change at all altitudes, from the ground upwards.

Respondents' suggestion, moreover, that pollution control can and does focus only on cleaning the air to make it breathable (AAM Br. 21) ignores the fact that the Act's core provisions all protect welfare as well as human health. Pet. Br. 15. "[E]ffects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation," 42 U.S.C. 7602(h) (defining "welfare"), all go well beyond concerns with breathable air. And citation to a 1968 law review article on the nature of the air pollution problem (AAM Br. 23-25) hardly helps this Court to understand the nature of today's most challenging air pollution problems, quite apart from climate change. One of the reasons why ozone, example, has posed such a difficult problem is that it *does* cross airshed boundaries (*cf.* AAM Br. 25), yet no one in this proceeding is suggesting that ozone

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[14] *Cf.* 42 U.S.C. 7408(a)(2) (for purposes of air quality standards program, underlying scientific documents must describe effects on public health or welfare due to "the presence of such pollutant *in the ambient air*").

pollution is thus not the kind of "air pollution" the Clean Air Act aims to address.

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, EPA has recognized as much in other regulatory proceedings. Pet. Br. 33-34. Perhaps this is why EPA makes no effort to define "air pollution agents" in this case except to say that this term does not include greenhouse gases when they are being regulated as greenhouse gases. And it does not so much as mention the other proceedings in which it has taken a different approach to these chemicals. Interpretation for the nonce is not interpretation at all; it is merely improvisation.

III. EPA may not decline to issue emission standards for motor vehicles based on policy considerations not reflected within section 202(a)(1) of the Clean Air Act.

Four years after receiving a petition to regulate greenhouse gases from motor vehicles, and in settlement of a lawsuit charging EPA with unreasonably delay in answering the petition, EPA issued a final decision declining to regulate greenhouse gases. In the section of its decision relevant here, entitled "Different Policy Approach," EPA gave the reasons why it would refuse to regulate 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. Pet. Br. 4-5, 39-44.

Nowhere did EPA assert that 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. In arguing that EPA's decision should be reviewed under an especially forgiving standard of review, respondents ignore the actual structure of EPA's decision. That decision must be reversed if it is inconsistent with the Clean Air Act. It is.

A. EPA's decision must be reversed if it reflects a misinterpretation of the Clean Air Act.

A court reviewing an agency decision "shall . . . compel agency action unlawfully withheld . . . ." 5 U.S.C. 706(1). 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." 5 U.S.C. 706(2)(A). Under this standard, as explained in Part III.B below, petitioners win. It is understandable, therefore, that respondents work very hard to convince this Court to apply a different standard of review here.

Indeed, respondents' briefs brim with hints that EPA's decision declining to regulate greenhouse gases from motor vehicles might not be reviewable at all. U.S. Br. 38 & n.15, 45 & n.21; AAM Br. 43, 44. Respondents argue that agency refusals to issue rules are fundamentally different from agency decisions to issue rules, and that this difference makes the former "effectively nonreviewable." AAM Br. 43. Respondents stop 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. U.S. Br. 39.

As support for a different standard of review for this case, the Solicitor General cites this Court's decisions in *Heckler v.*

Chaney, 470 U.S. 821 (1985), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). In *Heckler*, of course, as the Solicitor General notes, the Court did not even address rulemaking proceedings. U.S. Br. 38 n.15; 470 U.S. at 825 n.2. 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. 470 U.S. at 832. Agency decisions not to promulgate rules do not implicate the prosecutorial discretion protected in *Chaney*. *See Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). 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. 463 U.S. at 42. 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*, 476 U.S. 974 (1986), for example, the Court reviewed the refusal of the Food and Drug Administration (FDA) to promulgate a rule limiting aflatoxin in food. FDA's decision was challenged as a misinterpretation of its governing statute. Using ordinary tools of statutory interpretation, the Court investigated whether FDA had legally erred in refusing to promulgate the rule. *Id.* at 979-984. The Court upheld FDA's decision, but it did so by applying an ordinary standard of review to the case. To similar effect are *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 465-466, 469-474 (1984) (reviewing denial of rulemaking petition based on ordinary principles of statutory construction), and *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 664, 666-671 (1976) (same).

In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), moreover, in a context strikingly similar to the one presented here, 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. 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. *Id.* at 233.

Likewise, the D.C. Circuit—contrary to respondents' suggestions (U.S. Br. 36-37; UARG Br. 26-29; AAM Br. 44)—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." *Midwest Indep. Transmission Sys. Oper., Inc. v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004); *Am. Horse Prot. Ass'n*, 812 F.2d at 5; *see also General Motors Corp. v. NHTSA*, 898 F.2d 165, 169-170 (D.C. Cir. 1990) (agency refusal to institute rulemaking guided by ordinary principles of statutory construction). The D.C. Circuit has, in fact, explicitly rejected the analogy to *Chaney* on which the government relies, *Am. Horse Prot. Ass'n*, 812 F.2d at 4, and has overturned agencies' denials of rulemaking petitions where the denials were grounded in an error of law. *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"). 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, *see Natural Res. Def. Council v. SEC,* 606 F.2d 1031, 1046 (D.C. Cir. 1979), but those factors are not present in this case, 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 (21 U.S.C. 348(a)(2)), new drugs (21 U.S.C. 355(a)), and certain medical devices (21 U.S.C. 360e(a)), to name just a few examples, may not be marketed without agency approval. If agency decisions "to institute proceedings or to promulgate rules" (U.S. Br. 36) were subject to the more forgiving standard of review respondents seek, then agency actions that decline to free up—rather than constrain—market behavior would be subject to the same forgiving standard.

In this case, the agency 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 (U.S. Br. 39) grants the agency the power to ignore statutes it does not like.[15]

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[15] The Solicitor General's emphasis (U.S. Br. 39-43) on the lack of a deadline for enacting standards, or for responding to petitions to enact standards, under section 202(a)(1) is misplaced. If there *were* a deadline for enacting standards under section 202(a)(1), perhaps petitioners would not have had to wait four years for an answer from EPA on the rulemaking petition. But once EPA answered that petition, the lack of an initial deadline for an answer became irrelevant. EPA answered the petition, and its answer may not violate the Clean Air Act. Were the law otherwise, the many cases recognizing that agencies may be held to account for "unreasonable delay" in their decisionmaking, *see, e.g., In re United Steelworkers of America v. Rubber Manufacturers Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (per curiam); *Oil, Chemical and Atomic Workers International Union v. Zegeer*, 768 F.2d 1480, 1487-1488 (D.C. Cir. 1985) (Ginsburg, J.), would amount to empty gestures. On respondents' theory, an

B. EPA committed a plain legal error in declining to issue emission standards for motor vehicles based on policy considerations not reflected within section 202(a)(1) of the Clean Air Act.

Bad journalists bury the lede; bad interpreters bury the text. The latter, unfortunately, is exactly what EPA did in declining to regulate greenhouse gases and what it continues to do in trying to justify that decision to this Court.[16]

For the Court's convenience, here is the pertinent text of section 202(a)(1):

> The Administrator shall by regulation prescribe (and from time to time revise) 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.

42 U.S.C. 7521(a)(1). 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. U.S. Br. 41-42. 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. U.S. Br. 40-41.

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

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agency could simply respond to any judicial directive to come to a timely decision by saying that it disagreed with the policy approach of the statute under which it operated.

[16] Petitioners' opening brief describes how EPA's decision concerning the scope of its discretion collides with section 202(a)(1). Pet. Br. 35-48.

> 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.

U.S. Br. 41. EPA's interpretation and its presumption about the scope of the Administrator's discretion should be rejected for several reasons.

"In his judgment" modifies only the phrase "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). 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 can 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. U.S. Br. 48. An agency cannot, however, defend a decision based on its own preference for a policy approach different from the one Congress chose. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. at 43 (agency may not rely "on factors which Congress has not intended it to consider").

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 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. *See* Amicus Brief of Former EPA Administrators Carol M. Browner *et al.*

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. *See, e.g.*, 42 U.S.C. 7412(f)(2)(A). Technology-based standards demand much less intensive examination of the precise health and environmental consequences of pollution than health-based standards do. *See, e.g.*, Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 94-97, 106. 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." U.S. Br. 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 "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"). 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. Pet. Br. 41-43.

Citing *Ethyl Corporation v. EPA,* 541 F.2d 1 (D.C. Cir. 1976), the Solicitor General argues 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." U.S. Br. 47 n.23 (emphasis in original). This argument badly misconceives the decision in *Ethyl*, which Congress ratified in amending the endangerment standard of section 202(a)(1) in 1977. Pet. Br. 42 n.32. 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:

> 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.

541 F.2d at 13 & n.18, 25. 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" (U.S. Br. 44) 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.

CONCLUSION

The judgment of the court of appeals should be reversed, with directions to remand the case to EPA for a statutorily-based, non-arbitrary decision on the petition for rulemaking.

Respectfully submitted,

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