No. 05-1120

IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENT UTILITY AIR REGULATORY GROUP IN OPPOSITION

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RULE 29.6 STATEMENT

The Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participate collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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STATEMENT OF THE CASE

This case involves review of the U.S. Environmental Protection Agency's ("EPA" or "Agency") 2003 denial of a petition for rulemaking asking the Agency to regulate greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7521(a)(1) (2000), to address global climate change. The Petitioners based their request on their argument that EPA had a "mandatory duty" under the Act to regulate those emissions. Control of Emissions from New Highway Vehicles and Engines, Notice of denial of petition for rulemaking, 68 Fed. Reg. 52922, 52923 (Sept. 8, 2003), A-59, A-60. After giving the public an opportunity to comment on the rulemaking petition and considering public comments, EPA denied the petition. *Id.* at 52922-33, A-59 to A-93. The Agency set forth three grounds for its denial of the petition.

First, based on the Act's language and legislative history, other statutes, congressional decisions, and statutory interpretation principles underlying *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), EPA determined it lacked authority under the CAA to regulate greenhouse gas emissions for the purpose of addressing global climate change. *Id.* at 52925-29, A-68 to A-79. The Agency said that "[i]n light of Congress' attention to the issue of global climate change, and the absence of any direct or even indirect indication that Congress intended to authorize regulation under the CAA to address global climate change, it is unreasonable to conclude that the CAA provides the Agency with such authority." 68 Fed. Reg. at 52928, A-78.

Second, EPA determined that even if the CAA authorized it to regulate greenhouse gas emissions to

address global climate change, granting the rulemaking petition would impermissibly conflict with title V of the Energy Policy and Conservation Act ("EPCA"), 49 U.S.C. §§ 32901-32919, which authorizes the U.S. Department of Transportation to establish fuel economy standards for motor vehicles. 68 Fed. Reg. at 52929, A-79 to A-80. EPA found that "[a]t present, the only practical way to reduce tailpipe emissions of [carbon dioxide ("CO_2"), the most prevalent greenhouse gas] is to improve fuel economy." *Id.*, A-79. EPA concluded that "any EPA effort to set CO_2 tailpipe standards under the CAA would either abrogate EPCA's regime (if the standards were effectively more stringent than the applicable [fuel economy] standard) or be meaningless (if they were effectively less stringent)." *Id.*, A-80

Third, EPA determined that, assuming *arguendo* that the CAA did provide EPA with authority to regulate greenhouse gas emissions to address global climate change, section 202(a) of the CAA -- the provision at issue in the rulemaking petition -- gives EPA's Administrator discretion to determine "in his judgment" whether, based on the facts before the Agency, the emissions in question "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). EPA observed that the Administrator had never made a determination under the CAA that greenhouse gas emissions endanger public health or welfare and that the timing of any such endangerment determination is within the Administrator's discretion. 68 Fed. Reg. at 58929, A-80 to A-81. EPA thus determined that, contrary to Petitioners' argument, it had no mandatory duty to undertake rulemaking. Moreover, EPA determined that the scientific evidence before it in reviewing the petition, including the National Research Council's report, *Climate Change Science: An Analysis of Some*

Key Questions (2001) ("NRC Report"), was "extraordinarily complex and still evolving" and reflected "'considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases.'" 68 Fed. Reg. at 52930, A-83 (quoting NRC Report). EPA also noted, for example, that, given the global nature of atmospheric concentrations of CO_2, it is "extremely difficult to evaluate" to what extent any "effects in the U.S. would be related to anthropogenic [CO_2] emissions in the U.S." *Id.* at 52927, A-73.

In light of the scientific uncertainty on these critical issues, EPA found no basis for making an endangerment determination and regulating motor vehicles' greenhouse gas emissions under section 202(a) of the CAA. *Id.* at 52931, A-86 (declining to regulate "[u]ntil more is understood about the causes, extent and significance of climate change"). EPA 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.*, A-85. Accordingly, EPA denied the rulemaking petition because it determined that, even if it had authority under the CAA to undertake rulemaking, it had neither an obligation nor a sound basis to do so.

Petitioners sought review of EPA's denial by the U.S. Court of Appeals for the District of Columbia Circuit. Without reaching the issue whether the CAA provides EPA with authority to regulate for global climate change purposes, *Massachusetts v. EPA*, 415 F.3d 50, 56 & n.1 (D.C. Cir. 2005), A-10 & n.1, a panel of the D.C. Circuit held, in an opinion by Judge Randolph, that assuming *arguendo* that EPA has such authority, the Agency properly exercised its discretion in denying the rulemaking petition. *Id.* at 58, A-15; *see*

also id. at 61, A-20 (Sentelle, J., concurring in the judgment). Judge Tatel dissented, believing that EPA had "misinterpreted the scope of its statutory authority" and had provided a legally inadequate explanation for the petition denial. *Id.* at 82, A-58 (Tatel, J., dissenting).

Some of the Petitioners filed a petition for rehearing and rehearing en banc. Both the panel and the full court denied that petition. A-94 to A-95; A-98.

ARGUMENT

I. THE LEGAL ISSUES PRESENTED ARE UNREMARKABLE AND DO NOT WARRANT REVIEW BY THIS COURT.

The legal issues presented by this case do not merit this Court's review. This case involves EPA's denial of a petition for rulemaking under the CAA, a denial that the Court of Appeals properly found was a reasonable exercise of EPA's very broad discretion and that it therefore declined to disturb based on well-established principles of administrative law. Although the factual matters considered by EPA revolve around interesting public policy questions concerning global climate change, the legal doctrines governing this case are well-settled and were properly applied below.

Petitioners believe that global climate change is "the most pressing environmental problem of our time," Pet. Br. at 22, and that "[t]here can be no reasonable debate about the exceptional importance of [that] problem," *id.* at 23. Plainly, global climate change presents our nation's elected decision makers with important questions of public policy. *This case*, however, does not present those public policy questions. As the dissenting opinion below noted, although this case arose "in the context of a highly controversial question -- global warming -- it actually

presents a quite traditional legal issue: has the Environmental Protection Agency complied with the Clean Air Act?" *Massachusetts*, 415 F.3d at 82, A-58 (Tatel, J., dissenting).

For the reasons discussed below, the issues presented by this case and the Court of Appeals' resolution of those issues do not warrant review by this Court.

A. The Court of Appeals' Decision Is Fully Consistent with Established Principles of Administrative Law Governing Review of Denials of Rulemaking Petitions.

As Petitioners acknowledge, the D.C. Circuit is "the premier intermediate court" on administrative law matters. Pet. at 4. That court's case law consistently reflects the long-established administrative law principle that a federal agency's decision -- based on the facts and given the circumstances before it -- to decline a request to institute rulemaking proceedings is given a high degree of deference. Such a decision should be overturned "only in the rarest and most compelling of circumstances." *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981); *see also Timpinaro v. SEC*, 2 F.3d 453, 461 (D.C. Cir. 1993) (same); *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4-6 (D.C. Cir. 1987) (denials of rulemaking petitions entitled to "high end" of range of deference). Indeed, "an agency's refusal to initiate a rulemaking is evaluated with deference so broad as to make the process akin to non-reviewability." *Cellnet Communications, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992). In rejecting challenges to EPA's denial of the rulemaking petition here, the D.C. Circuit applied settled administrative law precedents.

In *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979),[1] the D.C. Circuit held that in cases such as the instant case, where an agency declines to grant a request to regulate, the scope of judicial review is -- and must be -- extremely limited for several reasons:

> An agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution -- *e.g.*, internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework. Further, even if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived. The area may be one of such rapid technological development that regulations would be outdated by the time they could become effective, or the scientific state of the art may be such that sufficient data are not yet available on which to premise adequate regulations. The circumstances in the regulated industry may be evolving in a way that could vitiate the need for regulation, or the agency may still be developing the expertise necessary for effective regulation.

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[1] *See WWHT*, 656 F.2d at 816 (identifying *NRDC v. SEC* as the D.C. Circuit's "most comprehensive statement . . . as to the availability and scope of review of an agency's decision to deny a petition for rulemaking").

Id. at 1046 (citations omitted) (emphasis in original); *see also WWHT*, 656 F.2d at 817 (quoting *NRDC*, 606 F.2d at 1046).

An agency's denial of a petition for rulemaking must be upheld "if it violates no law, is blessed with an articulated justification that makes a 'rational connection between the facts found and the choice made,' and follows upon a 'hard look' by the agency at the relevant issues." *Action for Children's Television v. FCC*, 564 F.2d 458, 479 (D.C. Cir. 1977). Because "[t]he agency's determination is essentially a legislative one, . . . the reviewing court should do no more than assure itself that the agency acted 'in a manner calculated to negate the dangers of arbitrariness and irrationality.'" *WWHT*, 656 F.2d at 817 (quoting *Action for Children's Television*, 564 F.2d at 472 n.24).

As the D.C. Circuit noted, "there are very few cases in which courts have forced agencies to institute rulemaking proceedings on a particular issue after it has declined to do so." *Id.* at 818. On rare occasions, courts do remand a denial of a rulemaking petition with instructions to provide a reasoned explanation of the denial. For example, in *American Horse Protection*, the Secretary of Agriculture denied a petition seeking rulemaking to reconsider regulations on the practice of "soring" horses in light of new evidence regarding the practice. 812 F.2d at 1-3. The support for the Secretary's denial of the petition consisted of two conclusory sentences and limited statistical information, *id.* at 5 -- "insufficient," the court held, "to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking," *id.* at 6.

In sharp contrast, EPA's denial of the rulemaking petition here was reasoned. The record before EPA and the D.C. Circuit enabled that court to "assure itself that the agency considered the relevant factors, that it explained the 'facts and policy concerns' relied on, and

that the facts have some basis in the record." *Id.* at 5. EPA provided a full explanation of its reasons for denying the petition in twelve pages of the *Federal Register*. 68 Fed. Reg. at 52922-33, A-59 to A-93; *cf.* 5 U.S.C. § 555(e) (2000) (Administrative Procedure Act requirement that an agency, in denying a petition for rulemaking, give "a brief statement of the grounds for denial") (quoted in *American Horse Protection*, 812 F.2d at 4). One of the principal grounds EPA gave for its denial was the continued existence of significant scientific uncertainty reflected in the record before it. *Id.* at 52930, A-82 to A-85; *see also NRDC*, 606 F.2d 1046 ("[E]ven if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived. . . . [T]he scientific state of the art may be such that sufficient data are not yet available on which to premise adequate regulations.") (citations omitted). EPA also discussed other policy concerns that would be raised by granting the petition, 68 Fed. Reg. at 52929-31, A-82 to A-87, and steps the President was taking to address global climate change issues, *id.* at 52931-33, A-87 to A-92.

Thus, nothing in the record before EPA or the court below presented those "rarest and most compelling of circumstances" necessary to overturn an agency denial of a rulemaking petition. *WWHT*, 656 F.2d at 818. Indeed, Petitioners do not show in their petition, and no basis exists for concluding, that EPA's decision was not "reasoned," that EPA failed to "explain[] the 'facts and policy concerns' [it] relied on," or that the facts lack "some basis in the record." *American Horse Protection*, 812 F.2d at 5 (citations omitted). In sum, applying familiar and settled principles of administrative law, the D.C. Circuit properly declined to overturn EPA's decision to deny the request for rulemaking.

B. The Court of Appeals' Decision Is Fully Consistent with the Clean Air Act and Case Law Construing That Act.

The D.C. Circuit's decision is also fully consistent with the plain language of the CAA and with case law construing the Act. That court did not need to -- and expressly did not -- address the merits of EPA's first and second bases for denying the rulemaking petition (namely, that it lacked authority under the Act to regulate greenhouse gas emissions to address global climate change and that any regulation of such emissions from new motor vehicles would conflict impermissibly with EPCA). *Massachusetts*, 415 F.3d at 56 & n.1, A-10 & n.1 The Court of Appeals did not need to address those two reasons because, as the court found, the CAA's plain language supports the third reason EPA gave for denying the rulemaking petition: that section 202 of the Act provides EPA with discretion in making the expert "judgment" whether motor vehicle emissions "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Given the facts in the record before the Agency when it made its decision on the petition, nothing compelled EPA to exercise its judgment by determining that the statutory endangerment criterion was satisfied.

The D.C. Circuit properly found no basis to disturb EPA's denial of the petition because the court owed deference to the Agency's expert conclusion that a sound basis for making an endangerment determination did not exist in light of substantial scientific uncertainty in the record. *Massachusetts*, 415 F.3d at 57, A-11 to A-13; *Ethyl Corp. v. EPA*, 541 F.2d 1, 20 n.37 (D.C. Cir. 1976) (en banc) (Section 202(a)(1)'s "judgment" language is an "express provision for administrative discretion."). As the court

noted, an endangerment determination under the Act "'is necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact.'" *Massachusetts*, 415 F.3d at 58, A-15 (quoting *Ethyl*, 541 F.2d at 24). Petitioners correctly observe that the mere existence of some degree of scientific uncertainty need not paralyze regulators under all circumstances; whatever authority EPA might have to regulate is not necessarily eliminated by the presence of any degree of uncertainty in the science. Pet. Br. at 15 (citing *Ethyl*, 541 F.2d at 25). That does not mean, however, that EPA *must* exercise any such authority even in the presence of substantial scientific uncertainty.

The D.C. Circuit's en banc decision in *Ethyl* supports EPA's denial of the rulemaking petition at issue here, as the court pointed out below. *Massachusetts*, 415 F.3d at 57, A-13 to A-14. *Ethyl* did not involve the denial of a petition for rulemaking in the face of scientific uncertainty -- the kind of agency decision that, as discussed above, is subject to an extraordinarily high degree of judicial deference. Instead, *Ethyl* involved an industry challenge to an EPA decision *to* regulate where there was "less than certainty" about endangerment. *Ethyl*, 541 F.2d at 25. In rejecting that challenge, the D.C. Circuit held that although "certainty is the scientific ideal[,] to the extent that even science can be certain of its truth[,] . . . [a]waiting certainty will often allow for only reactive, not preventive, regulation." *Id.* Thus, as *Ethyl* makes clear, an agency is not always obligated to wait for complete scientific certainty before undertaking regulation. *Ethyl* plainly does not stand for the converse proposition Petitioners urge here: that EPA has a duty to grant a petition to regulate despite

substantial scientific uncertainty that the Agency is working to resolve.

In fact, Petitioners concede, as they must, that under the statute, EPA properly considers "scientific uncertainty" in exercising judgment to determine whether the endangerment criterion is met in light of the record before it. Pet. Br. at 14-15. Despite Judge Tatel's view in dissent that he "doubt[s] EPA could credibly conclude that it needs more research to determine whether [greenhouse gas]-caused global warming 'may reasonably be anticipated to endanger' welfare," *Massachusetts*, 415 F.3d at 77, A-50 to A-51 (Tatel, J., dissenting), the passage from the NRC Report that Judge Tatel quotes at length -- the same report on which EPA relied -- is replete with statements reflecting considerable scientific uncertainty regarding global climate change and its possible effects on both public welfare and public health. For example:

- "'Changes in storm frequency and intensity are one of the *more uncertain elements* of future climate change prediction.'" *Id.* at 79, A-53 (Tatel, J., dissenting) (quoting NRC Report) (emphasis added).
- "'[T]he response of insects and plant diseases to warming is *poorly understood*. On the regional scale and in the longer term, there is *much more uncertainty*.'" *Id.* at 78, A-52 (quoting NRC Report) (emphasis added).
- "'Health outcomes in response to climate change are the *subject of intense debate*. . . . Climate change is just one of the factors that influence the frequency and transmission of infectious disease, and hence the assessments view such changes as *highly uncertain*.'" *Id.*, A-52 (quoting NRC Report) (emphasis added).

- "'The 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*. The costs, benefits, and availability of resources for adaptation *are also uncertain.*'" *Id.* at 79, A-53 (quoting NRC Report) (emphasis added).

The passage from the NRC Report that Judge Tatel quotes also contains several other statements that illustrate the existence of substantial uncertainty about whether any basis existed for EPA to make an endangerment judgment. For example:

- "'A key conclusion from the National Assessment [of Climate Change Impacts] is that *U.S. society is likely to be able to adapt to most of the climate change impacts on human systems*, but these adaptations may come with substantial cost.'" *Id.* at 78, A-51 (Tatel, J., dissenting) (quoting NRC Report) (emphasis added).
- "'In the near term, agriculture and forestry are *likely to benefit* from CO_2 fertilization effects and the increased water efficiency of many plants at higher atmospheric CO_2 concentrations.'" *Id.*, A-51 (quoting NRC Report) (emphasis added).
- "'[T]he combination of the geographic and climatic breadth of the United States, possibly augmented by advances in genetics, increases the nation's robustness to climate change.'" *Id.*, A-52 (quoting NRC Report).
- "'[M]uch of the United States *appears to be protected* against many different adverse health outcomes related to climate change by a strong public health system, relatively high levels of public awareness, and a high standard of living.'"

Id. at 79, A-53 (quoting NRC Report) (emphasis added).

- "'At a national level, the direct economic impacts [of global climate change] are *likely to be modest* [while] on a regional basis the level and extent of *both beneficial and harmful impacts* will grow.'" *Id.*, A-54 (quoting NRC Report) (emphasis added).

In short, given the evidence of scientific uncertainty described in the NRC Report before the Agency, EPA was well justified in denying the petition for rulemaking.

EPA noted, in addition to uncertainty in the scientific evidence, other policy reasons that provided further support for its decision to deny the rulemaking petition. 68 Fed. Reg. 52929-33, A-82 to A-92. Petitioners claim that EPA may not consider policy reasons under section 202 of the CAA at all and that EPA's consideration of these reasons in this case impermissibly tainted the Agency's decision. Pet. Br. at 14-15. Again, applying settled principles, the D.C. Circuit properly rejected Petitioners' objection, holding that "Congress does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence." *Massachusetts*, 415 F.3d at 58, A-13 (citing *Ethyl*, 541 F.2d at 20); *see id.*, A-15 ("as we have held, a reviewing court 'will uphold agency conclusions based on policy judgments' 'when an agency must resolve issues "on the frontiers of scientific knowledge"'") (quoting *Environmental Defense Fund v. EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978)); *Ethyl*, 541 F.2d at 26 ("the statute accords the regulator flexibility to assess risks and make essentially legislative policy judgments"); *WWHT*, 656 F.2d at 818 ("The agency's determination is essentially a legislative one, and the reviewing court should do no more than assure itself that the agency acted 'in a

manner calculated to negate the dangers of arbitrariness and irrationality.'") (quoting *Action for Children's Television*, 564 F.2d at 472 n.24); *NRDC*, 606 F.2d at 1046 ("An agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution. . . .") (emphasis in original).

In sum, the legal issues in this case do not remotely present an important federal question that merits this Court's review. EPA's denial of the rulemaking petition, and the Court of Appeals' decision declining to overturn that denial, are supported by well-settled principles of administrative law. Moreover, the CAA's plain language and case law interpreting that language support EPA's decision, as the Court of Appeals correctly held.

II. CONGRESS AND THE PRESIDENT HAVE ACTED TO ADDRESS GLOBAL CLIMATE CHANGE.

Petitioners' melodramatic claim that failure to grant certiorari here "would likely drastically limit our ability to address the growing crisis" they say is posed by global climate change, Pet. Br. at 26, is wholly unfounded. As EPA explained in denying the rulemaking petition, Congress and the President have acted to address global climate change. Indeed, Congress and the President have continued to act to address the problem since EPA denied the petition for rulemaking.

Congress has enacted several statutes addressing global climate change and greenhouse gas emissions. It has focused much of its legislative efforts with regard to global climate change on establishing programs of research to reduce the scientific uncertainty surrounding global climate change issues. *See, e.g.*, Food and Agriculture Act, Pub. L. No. 101-624, tit.

XXIV, § 2401, 104 Stat. 4058 (1990) (creating a research program for global climate change agricultural issues); Global Change Research Act, Pub. L. No. 101-606, tit. I, §§ 102, 103, 106, 104 Stat. 3097-98, 3101 (1990) (establishing research programs and providing for scientific assessments every four years of the "current trends in global change"); Energy Security Act, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75 (1980) (calling for a study of the "projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuel activities"); National Climate Program Act of 1978, 15 U.S.C. §§ 2901, 2904 (directing the President to establish a "national climate program," including "appropriate . . . recommendations for action"); *see also* 68 Fed. Reg. at 52927, A-74; S. Rep. No. 95-740, at 13, 14 (1978), 1978 U.S.C.C.A.N. 1398, 1399 (legislative history of National Climate Program Act of 1978) (research programs assist the nation in "respond[ing] more effectively to climate-induced problems").[2]

In 1992, Congress directed the Secretary of Energy to conduct several assessments related to greenhouse gases and report to Congress. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002; *see also* 68 Fed. Reg. at 52927, A-75.

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[2] Congress also addressed global climate change in the CAA when it last enacted substantial amendments to the Act in 1990. *See* 68 Fed. Reg. at 52926, A-70 to A-72. In those amendments, Congress directed EPA "to develop, evaluate, and demonstrate nonregulatory strategies and technologies for air pollution prevention" that would address several substances, including CO_2. 42 U.S.C. § 7403(g). In an uncodified provision of the public law that includes the 1990 Amendments to the CAA, Congress required electric utilities to monitor and report annually their CO_2 emissions. Pub. L. No. 101-549, § 821(a), 104 Stat. 2399, 2699 (1990).

That statute directed the Executive Branch to develop a National Energy Policy Plan "to achieve to the maximum extent practicable and at least-cost to the Nation . . . the stabilization and eventual reduction in the generation of greenhouse gases." 42 U.S.C. § 13382(a), (g). Under the Act, the Department of Energy must assess "alternative policy mechanisms for reducing the generation of greenhouse gases." *Id.* § 13384. In enacting this statute, Congress sought analysis of "the important technical and policy issues that will enable us to make wiser decisions on more dramatic and possibly higher cost actions which should be undertaken only in the context of concerted international action." H.R. Rep. No. 102-474, pt. 1, at 152 (1992), 1992 U.S.C.C.A.N. 1953, 1975.[3]

Most recently, in the Energy Policy Act of 2005, Congress established additional specific federal policies to address global climate change, including coordination of technology development strategies and deployment of greenhouse gas reducing technologies in the United States and in developing countries. Pub. L. No. 109-58, tit. XVI, §§ 1610(b)(1), (c)(1), 1611, 119 Stat. 595, 1109.[4]

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[3] The Energy Policy Act of 1992 also provided for voluntary reporting of greenhouse gas emissions and reductions pursuant to Department of Energy guidelines. Pub. L. No. 102-486, § 1605(b), 106 Stat. 3002; *see also* Guidelines for Voluntary Greenhouse Gas Reporting, 71 Fed. Reg. 20784 (Apr. 21, 2006).

[4] During debate on the Energy Policy Act of 2005, Congress considered and rejected for a second time a legislative proposal to impose binding limits on CO_2 emissions. Senators McCain and Lieberman offered Amendment No. 826, known as the "Climate Stewardship and Innovation Act," which would have imposed mandatory limits on greenhouse gas emissions. 151 Cong. Rec. S6892, 6894 (daily ed. June 21, 2005). The Senate rejected this amendment by a vote of 38-60. Vote No. 148, June 22, 2005. The Senate in 2003 rejected a similar amendment by a vote of 43-55. Vote No. 420, 149 Cong. Rec. S13598 (daily ed. Oct. 30, 2003).

Congress and the President also have acted to address global climate change in the international arena. In 1987, in the Global Climate Protection Act, Congress directed the Secretary of State to coordinate U.S. negotiations concerning global climate change. *See* 15 U.S.C. § 2901 note; H.R. Rep. No. 102-474, pt. 1, at 152 (1992), 1992 U.S.C.C.A.N. at 1975 (mandatory measures to reduce greenhouse gas emissions should be undertaken "only in the context of concerted international action"); *see also* 68 Fed. Reg. at 52927, A-74. This Act also demonstrates the emphasis Congress has placed on research programs, stating that research "is crucial to the development of an effective United States response" to global climate change and declaring that U.S. policy is to "identify technologies and activities to limit mankind's adverse effect on the global climate . . . and . . . work toward multilateral agreements." Pub. L. No. 100-204, tit. XI, §§ 1102(3), 1103(a), 101 Stat. 1407, 1408 (1987) (codified at 15 U.S.C. § 2901 note).

Consistent with this directive, President George H. W. Bush signed, and the Senate ratified, the United Nations Framework Convention on Climate Change ("UNFCCC"), which established mechanisms for international approaches to address global climate change.[5] *See* UNFCCC Homepage, http://unfccc.int

[5] The United States is not a party to the UNFCCC's Kyoto Protocol because Congress and the President want developing nations to participate in any international programs requiring reductions in greenhouse gas emissions on the same basis as developed nations (something the Kyoto Protocol does not require) and because participation in the Protocol "would have a negative economic impact" on the United States. Transcript, *President Bush Discusses Global Climate Change* (June 11, 2001), http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html (visited May 5, 2006); S. Res. 98, 105th Cong. (1997) (Senate resolution, approved by a vote of 95-0, urging the President not to sign any international agreement to reduce

(last visited May 5, 2006). President George W. Bush has committed the United States "to work within the United Nations framework and elsewhere to develop with our friends and allies and nations throughout the world an effective and science-based response to the issue of global warming." Transcript, *President Bush Discusses Global Climate Change*; *see also* 68 Fed. Reg. at 52931, A-86 ("Unavoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them.").

To that end, in July 2005, President Bush reached an agreement with leaders of the other "G8" nations to "speed the development and deployment of clean energy technologies to . . . address[] climate change." White House Fact Sheet, Action on Climate Change, Energy and Sustainable Development (July 8, 2005), http://www.whitehouse.gov/news/releases/2005/07/20050708-2.html (last visited May 5, 2006). Later that month, the President announced that the United States was joining with two other developed nations (Japan and Australia) and three developing nations (China, India, and South Korea) in the Asia-Pacific Partnership on Clean Development and Climate to "achieve practical results" through programs "addressing the long-term challenge of climate change."[6] White House Fact Sheet, President Bush and the Asia-Pacific Partnership on Clean Development (July 27, 2005),

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greenhouse gas emissions that does not include developing nations); *see also* 68 Fed. Reg. at 52927, A-75.

[6] The Asia-Pacific Partnership, which is consistent with UNFCCC principles, "serve[s] as a framework for supporting . . . international cooperation among the Partners to meet [their] development, energy, environment, and climate change objectives." Charter for the Asia-Pacific Partnership on Clean Development and Climate (Jan. 2006), http://www.dfat.gov.au/environment/climate/ap6/charter.html (last visited May 5, 2006).

http://www.whitehouse.gov/news/releases/2005/07/print/20050727-11.html (last visited May 5, 2006).

Thus, no basis exists for Petitioners' suggestion that, absent this Court's grant of certiorari in this case, global climate change concerns will be unaddressed. The nation's elected decision makers have acted, and continue to act, in response to those concerns. Notwithstanding Petitioners' claims, this Court's review of the decision below is unnecessary and unwarranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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