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

BRIEF FOR THE RESPONDENT STATES OF MICHIGAN, NORTH DAKOTA, UTAH, SOUTH DAKOTA, ALASKA, KANSAS, NEBRASKA, TEXAS, AND OHIO

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QUESTION PRESENTED

Does the United States Environmental Protection Agency ("EPA") lack the authority under the Clean Air Act to regulate the emission of carbon dioxide and other greenhouse gases to address global climate change?

PARTIES TO THE PROCEEDING

Petitioners, who were petitioners in the United States Court of Appeals for the District of Columbia Circuit, are the Commonwealth of Massachusetts, the States of California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the District of Columbia, American Samoa Government, New York City, Mayor and City Council of Baltimore, Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group.

Respondents are EPA (the respondent below); the Alliance of Automobile Manufacturers; National Automobile Dealers Association; Engine Manufacturers Association; Truck Manufacturers Association; CO_2 Litigation Group; Utility Air Regulatory Group; the State of Idaho; and the States of Michigan, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, Texas, and Ohio. The Respondent States other than Idaho are referred to herein as the "State Respondents." The State of Idaho has elected not to join in this Brief. All of the Respondents other than EPA were intervenors below.

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JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 2005. The Court of Appeals' order denying the petition for rehearing *en banc* was entered on December 2, 2005. The petition for a writ of certiorari was filed on March 2, 2006, and was granted on June 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in the case are Sections 109(a) and (b), 110(a), and 202(a)(1) of the Act.[1] The pertinent statutory text is set forth in the State Respondents' Appendix (State Resp. App. 1b-12b).

STATEMENT

Petitioners challenge EPA's denial of a petition for rulemaking that sought the regulation of carbon dioxide ("CO_2") and other greenhouse gas emissions from new motor vehicles and engines under Section 202(a)(1) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7521(a)(1).

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[1] 42 U.S.C. §§ 7409(a) and (b), 7410(a), 7521(a)(1).

EPA's denial of the petition was based on the agency's position that the CAA "does not authorize EPA to regulate for global climate change purposes[.]"[2] EPA therefore determined that CO_2 and other greenhouse gases cannot be considered "air pollutants" subject to the CAA's regulatory provisions for any contribution they may make to global climate change.[3] EPA also concluded that even if it did have such authority, it would not exercise it at this time because of uncertainties about the causes and effects of climate change and additional policy considerations.[4]

The U.S. Court of Appeals for the District of Columbia Circuit affirmed EPA's denial of the petition for rulemaking.

1. Statutory Framework

The Act, 42 U.S.C. §§ 7401-7671q, provides for the control of air pollutants from stationary and mobile sources within the United States to protect public health and welfare. The purpose of the Act is to successfully achieve air pollution goals that will protect public health and welfare by reducing U.S. emissions. The Act does not, however, authorize EPA to set emission standards that will not meaningfully address an air quality issue like global climate change, which is caused primarily by CO_2 and other greenhouse gas emissions from outside of the United States.[5]

The "centerpiece" of the Act is the requirement in Title I that EPA establish national ambient air quality standards

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[2] 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

[3] *Id.*

[4] *Id.*, at 52,929-33.

[5] *See* Declaration of Michael McCracken, ¶ 31 (Joint App. 238); *see also* Energy Information Administration, Table on World Carbon Dioxide Emissions from the Consumption and Flaring of Fossil Fuels, 1980-present at 4, 20 (identifying U.S. and world-wide CO_2 emissions in 2004), available at http://www.eia.doe.gov/pub/international/iealf/tableh1co2.xls.

("NAAQS").[6] The NAAQS "'define [the] levels of air quality that must be achieved to protect public health and welfare.'"[7] States have the primary responsibility for air pollution prevention and control, and they fulfill that responsibility by establishing emission limits for sources within their borders.[8] The States achieve the NAAQS mainly by regulating stationary sources, such as factories and power plants, through implementation plans that they submit to EPA for approval.[9]

The Act, however, does not contain any provision for States to reduce air pollution from sources outside of the United States. Therefore, if international sources of air pollution are contributing to a State's inability to meet a NAAQS, it would be impossible for that State to meet the national standard because of the lack of authority to limit such emissions.

EPA's setting of the NAAQS is "the engine that drives nearly all of Title I of the CAA."[10] For example, Title I contains detailed preconstruction requirements to allow for economic growth while assuring that air quality in areas that have attained the national standards does not degrade and that 'nonattainment' areas continue to improve. Under the prevention of significant deterioration provisions ("PSD"), no major air polluting facility may be constructed unless it can meet an emission limit that reflects the best available control

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[6] *Sierra Club v. Costle*, 657 F.2d 298, 315 (D.C. Cir. 1980).

[7] *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 469 (2004) (quoting R. Belden, Clean Air Act 6 (2001)). EPA has established NAAQS for six air pollutants: particulate matter, sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone and lead. 40 C.F.R. §§ 50.4-12 (2004). In addition, oxides of nitrogen and volatile organic compounds combine in the presence of sunlight to form ozone, and they are regulated as precursors of ozone. *See e.g.*, 42 U.S.C. § 7511a(b)(requiring reductions in emissions of volatile organic compounds and oxides of nitrogen to attain the NAAQS for ozone).

[8] 42 U.S.C. § 7401(a)(3).

[9] *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1078-79 (D.C. Cir. 1996).

[10] *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

technology.[11] New sources in nonattainment areas must, under the provisions known as "Nonattainment New Source Review," obtain offsetting emission reductions and meet the "lowest achievable emission rate" through the use of the most protective pollution controls.[12] Each State's implementation plan to achieve the NAAQS is required to include permit provisions to administer both the PSD and Nonattainment New Source Review requirements.[13]

Section 111 helps States achieve the NAAQS through EPA's promulgation of "new source performance standards" ("NSPS") for industry categories. The NSPS are national, technology-based standards that establish a minimum level of emission limitations regardless of whether a source is located in an attainment or a nonattainment area.

Meeting the NAAQS is mandatory, and Title I requires that the implementation plans adopted by the States achieve them by specific dates.[14] Failure to achieve a NAAQS by those dates triggers sanctions under the Act that include the loss of federal highway funding.[15]

Other provisions in Title I similarly reflect that the Act is designed to prevent air pollution that endangers public health and the environment by reducing emissions from U.S. sources. Section 112 establishes a two-phase approach to limit the emission of hazardous air pollutants ("HAPs") for which EPA has not established a NAAQS.[16] The first phase is a

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[11] 42 U.S.C. § 7475(a); *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. at 470-73.

[12] 42 U.S.C. § 7503(a).

[13] 42 U.S.C. §§ 7471, 7512a. The PSD and Nonattainment New Source Review requirements are collectively referred to as "New Source Review." *New York v. EPA*, 413 F.3d 3, 12-13 (D.C. Cir. 2005).

[14] 42 U.S.C. § 7502(a)(2).

[15] 42 U.S.C. § 7509(b).

[16] 42 U.S.C. §§ 7412(d), (f).

technology-based program that requires the use of "maximum achievable control technology" ("MACT") for categories and subcategories of sources that emit HAPs.[17] In the second phase – which occurs within eight years after the MACT standards are promulgated – EPA is required to evaluate whether "residual risks" remain after implementation of the MACT standards that warrant more stringent requirements in order "to provide an ample margin of safety to protect public health . . . or to prevent . . . an adverse environmental effect."[18] The residual risk provisions illustrate a core premise underlying the NAAQS provisions and the Act in general: emissions reductions from U.S. sources are intended to achieve the goal of protecting public health and the environment.

Title II authorizes EPA to establish emission standards for mobile sources and complements the States' efforts to achieve the NAAQS pursuant to Title I. For example, Section 202 establishes motor vehicle emission standards for carbon monoxide and particulate matter (for which EPA has promulgated NAAQS), as well as hydrocarbons and nitrogen oxides (which are precursors of ozone, for which EPA has also promulgated a NAAQS).[19] The oxygenated fuels provision in Section 211(m) requires that gasoline sold in the winter months contain a minimum of 2.7 percent oxygen in areas that have not attained the NAAQS for carbon monoxide.[20] Section 246 requires clean-fuel vehicle programs for motor vehicle fleets in ozone and carbon monoxide nonattainment areas with populations of 250,000 or more.[21]

Again, the common theme running through all of these Title I and Title II provisions is that they are designed to

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[17] 42 U.S.C. § 7412(d). The MACT standards are based on the emission limitation achieved by the best performing sources in a category. *Id.*

[18] 42 U.S.C. § 7412(f)(2)(A).

[19] 42 U.S.C. § 7521(g).

[20] 42 U.S.C. § 7545(m).

[21] 42 U.S.C. § 7586.

successfully prevent and control air pollution by reducing emissions from sources (both stationary and mobile) in the United States. Nothing in the Act suggests that it is intended to require controls that cannot effectively address air quality problems in the United States that are caused primarily by emissions from sources outside of the country.

2. Proceedings before EPA

On October 20, 1999, Petitioner International Center for Technology Assessment and 18 other organizations filed a petition for rulemaking (the "ICTA Petition") asking EPA to regulate certain greenhouse gas emission for new motor vehicles and engines under Section 202(a)(1) of the CAA, 42 U.S.C. § 7521(a)(1). In particular, the petition sought the regulation of CO_2, methane, nitrous oxide and hydroflourocarbon emissions from new motor vehicles and engines. According to Petitioners, emissions from the entire U.S. transportation sector (not just new motor vehicles and engines) account for approximately 7% of global fossil fuel emissions.[22]

Section 202(a)(1) of the Act states that the EPA Administrator shall prescribe standards for emissions of air pollutants from new motor vehicles and engines that "in his judgment cause, or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[23] Petitioners claim that CO_2 and other greenhouse gases are air pollutants that contribute significantly to global climate change.[24]

On September 8, 2003, EPA denied the ICTA Petition. EPA concluded that the CAA "does not authorize EPA to regulate for global climate change purposes[.]"[25] The agency

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[22] Declaration of Michael McCracken, ¶ 31 (Joint App. 238).

[23] 42 U.S.C. § 7521(a)(1).

[24] 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003).

[25] *Id.*, at 52,925.

therefore determined that CO_2 and other greenhouse gases cannot be considered "air pollutants" subject to the Act's regulatory provisions for any contribution they may make to global climate change.[26]

In reaching its conclusion, EPA analyzed the text and history of the CAA as well as other congressional actions specifically addressing global climate change. Among other things, EPA emphasized that "the NAAQS system – a key CAA regulatory mechanism – . . . is fundamentally inadequate when it comes to a substance like CO_2, which is emitted globally and has relatively homogenous concentrations around the world."[27] EPA explained that "any CO_2 standard that might be established would in effect be a worldwide ambient air quality standard, not a national standard – the entire world would be either in compliance or out of compliance." This situation "is inconsistent with a basic underlying premise of the CAA regime for implementation of a NAAQS – that actions taken by individual States and by EPA can generally bring all areas of the U.S. into attainment of a NAAQS."[28] The inadequacy of one of the Act's central regulatory provisions (the NAAQS system) to address global climate change reinforced EPA's conclusion that the CAA as a whole, including Section 202, does not authorize the agency to regulate for global climate change purposes.

3. Proceedings before the U.S. Court of Appeals for the District of Columbia Circuit

The Court of Appeals dismissed the petitions for review. It did not, however, address the question of whether EPA has the authority under the Act to regulate greenhouse gas emissions to address global climate change. Instead, Judge Randolph, who authored the lead opinion, assumed *arguendo* that EPA had such authority. *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C.

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[26] *Id*., at 52,925, 52,928.
[27] *Id.*, at 52,927.
[28] *Id.*

Cir. 2005)(Pet. App. A1-A58). He determined that the agency correctly exercised its discretion in concluding that regulation of greenhouse gas emissions from motor vehicles was not warranted. According to Judge Randolph, the agency's judgment was properly based on, among other things, the "scientific uncertainty about the causal effects of greenhouse gases on the future climate of the earth" and policy considerations that supported EPA's judgment not to regulate. *Id*., at 58.

Judge Sentelle concurred in the judgment dismissing the petitions for review. He concluded that Petitioners lacked standing because their "claimed injury is common to all members of the public" and is "the sort of general harm" that is insufficient to present a justiciable controversy under Article III of the Constitution. *Id*., at 60. Judge Sentelle did not address the questions of whether EPA has the authority to regulate greenhouse gas emissions or whether EPA properly exercised its discretion in deciding not to regulate.

Judge Tatel dissented. He concluded that at least one Petitioner had standing, that EPA had the authority to regulate greenhouse gas emissions under Section 202 of the Act, and that EPA had not adequately explained its refusal to regulate. *Id.*, at 67, 73, 81.

The panel denied a petition for hearing. On December 2, 2005, the Court of Appeals denied a petition for rehearing *en banc*. (Pet. App. A94-A95).

SUMMARY OF ARGUMENT

The CAA is designed to successfully achieve air quality goals by limiting emissions from sources within the United States. This overarching theme runs through the entire Act. It is reflected in the NAAQS and other programs contained in Title I, in the mobile source provisions of Title II, in the acid rain program of Title IV, and in the stratospheric ozone depletion requirements of Title VI. The Act does not authorize

the reduction of emissions from U.S. sources that will not meaningfully address an international air quality issue like global climate change that is caused primarily by emissions from sources located outside of the United States. Nor is the intent of the Act to expend substantial resources on an air quality issue that is beyond the control of the United States and where such efforts will not effectively protect public health and welfare. Instead, the Act is designed to actually achieve air quality goals that will effectively protect public health and welfare through U.S. emission reductions.

The statutory provision at issue here cannot – as Petitioners claim – be interpreted in isolation, apart from the overall statutory scheme. When Section 202(a)(1) is understood in the context of the entire Act, its meaning is clear: Section 202 authorizes the EPA Administrator to set standards for the emission of air pollutants from new motor vehicles that "in his judgment cause, or contribute to, air pollution that may reasonably be anticipated to endanger public health or welfare,"[29] where U.S. emission reductions will measurably and meaningfully address such air pollution. Section 202 does not, however, allow EPA to set emission standards that would be an exercise in futility where the sources primarily generating the air pollution are outside the United States and where emission reductions from within the United States will have no meaningful effect on protecting public health and welfare.

ARGUMENT

Petitioners would have this Court ignore the basic principle of statutory construction that a statute is to be read as a whole. Petitioners' analysis of Section 202(a)(1) occurs in isolation, divorced from the rest of the Act. In fact, Petitioners would have this Court ignore the core provisions of the Act that contradict their proposed interpretation. Petitioners' use of tunnel vision prevents an accurate interpretation of Section

[29] 42 U.S.C. § 7521(a)(1).

202(a)(1); it must be understood in the context of the entire Act.

This case presents a straightforward question of statutory interpretation: Does the CAA provide EPA with the authority to regulate the emission of carbon dioxide and other greenhouse gases to address global climate change? The CAA, when viewed in its entirety, clearly does not authorize such regulation.

The specific statutory provision at issue in this case, Section 202(a)(1), directs that the EPA Administrator "shall by regulation prescribe . . . 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."[30] Petitioners assert that EPA's authority to regulate greenhouse gas emissions for purposes of global climate change is apparent from the plain language of Section 202(a)(1). Moreover, they emphasize that the Court should not review the Act's central provisions to understand the meaning of Section 202(a)(1) and that any analysis of the NAAQS provisions in Title I is "to utter a *non sequitor*."[31] But what Petitioners' characterize as a "debater's trick,"[32] this Court has described as a "cardinal rule" of statutory interpretation: "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."[33] Similarly, this Court has explained that in analyzing a statutory provision, "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[34]

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[30] *Id.*

[31] Petitioners' Brief, at 9.

[32] *Id.*, at 28.

[33] *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)(emphasis added)(citations omitted).

[34] *Kelley v. Robinson*, 479 U.S. 36, 43 (1986).

When read in the context of the entire Act, it is clear that Section 202(a)(1) authorizes EPA to prescribe standards for the emission of air pollutants from new motor vehicles that cause, or contribute to, air pollution that endangers public health and the environment and that is caused primarily by emissions from sources within the United States. As discussed below, the statutory provisions in Titles I, II, IV and VI all reflect and reinforce a fundamental theme of the Act: to successfully achieve air quality goals that will effectively protect public health and welfare by reducing emissions from sources of air pollution in the United States.[35]

A. Title I illustrates the Act's overall design and purpose

The statutory provisions in Title I demonstrate that the Act is designed to achieve air quality goals by limiting emissions from U.S. sources. The "engine that drives nearly all of Title I" is the provision for setting the NAAQS.[36] Section 109(b) directs that EPA promulgate the NAAQS to protect public health and welfare.[37] The States are then required to implement and attain the NAAQS by "deciding what emission reductions will be required from which sources."[38]

More specifically, Section 110 gives States the duty of developing, subject to EPA approval, implementation plans to

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[35] The Act's general provisions in Title III, 42 U.S.C. §§ 7601-27, and the operating permit program in Title V, 42 U.S.C. §§ 7661-7661f, do not, by themselves, limit emissions and are not discussed herein. *See e.g., Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006)("The Title V operating permit program generally does not impose new substantive air quality control requirements.").

[36] *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

[37] 42 U.S.C. § 7409(b).

[38] *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. at 470. *See also* 42 U.S.C. §§ 7407(a), 7410 (giving States the duty of developing implementation plans).

achieve the NAAQS.[39] States determine and enforce the "specific, source-by-source emission limitations which are necessary if the national standards [EPA] has set are to be met. . . . *[S]o long as the ultimate effect of a States' choice of emission limitations is compliance with the national standards for ambient air,*" each State is free to select the "mix of emission limitations it deems best suited to its particular situation."[40]

The PSD and Nonattainment New Source Review programs in Title I help the States control emissions from new and modified sources. Both require new major sources of air pollutants to meet emission limits that reflect the state-of-the-art in air pollution control. New major sources in attainment and nonattainment areas are required to go through a detailed pre-construction permitting process and must meet emission standards based on the best available control technology and the lowest achievable emission rate, respectively.[41] New major sources in nonattainment areas must also obtain offsetting emission reductions from existing sources in the same area so that air quality can continue to improve and eventually achieve the NAAQS.[42]

The NSPS provisions in Section 111 also help the States meet the NAAQS. These provisions establish a minimum floor of emission limits for categories of industry sources and ensure that States with relatively clean air do not gain a competitive economic advantage to attract industry by setting less stringent emission limits.[43] The "purpose of the NSPS" is "part of the overall effort to advance the accomplishment of the

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[39] 42 U.S.C. § 7410.

[40] *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975)(emphasis added).

[41] 42 U.S.C. §§ 7475(a), 7503(a).

[42] 42 U.S.C. § 7503(a)(c).

[43] *Sierra Club v. Costle*, 657 F.2d 298, 315 (D.C. Cir. 1980).

NAAQS."[44] Indeed, many of the NSPS include requirements for those air pollutants for which EPA has promulgated a NAAQS.[45]

The Act also contains powerful incentives to ensure the States achieve the NAAQS. Eighteen months after EPA determines that a State has failed to implement an approved part of its implementation plan, the agency is required to impose one of two types of sanctions if the deficiency has not been corrected.[46] Sanctions include a loss of highway funding or a requirement that emission offsets for new sources in nonattainment areas shall be at least two to one. If the State fails to correct the deficiency within another six months, the emission offset sanction must be imposed.[47]

In addition to the NAAQS, Section 112's requirements to limit hazardous air pollutants further reinforce the overall statutory scheme. Under Section 112, EPA is directed to evaluate the remaining risk to public health and the environment within eight years after promulgating the technology-based MACT standards for major sources of hazardous air pollutants.[48] EPA is then required to establish and implement "residual risk" control standards to provide an ample margin of safety to protect public health or, if a more stringent standard is needed, to prevent an adverse

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[44] 1 Frank P. Grad, Treatise on Environmental Law § 2.03[14], at 2-356 (2005).

[45] *See e.g.*, Standards of Performance for Incinerators, 60 C.F.R. §§ 60.50-54 (2004)(containing standards for particulate matter); Standards of Performance for Petroleum Refineries, 60 C.F.R. §§ 60.100–109 (2004)(containing standards for particulate matter and carbon monoxide); Standards of Performance for Stationary Gas Turbines, 60 C.F.R. §§ 60.330-335 (2004)(containing standards for nitrogen oxides and sulfur dioxide).

[46] 42 U.S.C. § 7509(a).

[47] 42 U.S.C. § 7509(b).

[48] 42 U.S.C. § 7412(f).

environmental effect.[49] Section 112 thus reflects the underlying approach of both Title I itself and the Act as a whole: emission reductions from sources within the United States will ultimately achieve the goals of protecting public health and the environment.

In this case, there is no dispute that global climate change is caused by emissions from around the world. The emission reductions from new motor vehicles that Petitioners seek, however, are only a small fraction of global greenhouse gas emissions.[50] As Petitioners themselves note, reductions from other countries are needed to avoid "the most serious impacts" of global climate change.[51] While global climate change may be "the most significant public heath and environmental threat" facing the nation and the world,[52] the issue in this case is whether the Act provides EPA the authority to address international air quality issues that – like global climate change – are beyond the control of the United States itself and cannot be resolved by emission reductions from motor vehicles within this country. Title I and the rest of the Act demonstrate that EPA has no such authority.

1. The International Border Areas provision in Section 179B is not applicable to the issue of global climate change

Title I contains a provision that acknowledges that, in some instances, attainment of the NAAQS may not be possible because of emissions from sources outside the country. Section 179B, entitled "International Border Areas," provides that a State's implementation plan may be approved if the State "establishes to the satisfaction of EPA" that the State would attain the NAAQS "but for emissions emanating from outside

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[49] *Id.*

[50] Declaration of Michael McCracken, ¶ 31 (Joint App. 238).

[51] *Id.*, at ¶ 32.

[52] Amicus Brief of Former EPA Administrators, at 1.

of the United States."[53] The provision has been used, for example, in the context of a Southern California county attempting to excuse nonattainment with a NAAQS for particulate matter due to transborder emissions from Mexico.[54]

Section 179B is not, however, applicable to the issue of global climate change. As EPA explained in its denial of the ICTA Petition, carbon dioxide is "by far the most pervasive of anthropogenic [greenhouse gases]" and stays in the atmosphere for approximately 50 to 200 years.[55] "This long lifetime along with atmospheric dynamics means that CO_2 is well mixed throughout the atmosphere, up to approximately the lower stratosphere." As EPA also noted, the NAAQS system "is fundamentally inadequate when it comes to a substance like CO_2, which is emitted globally and has relatively homogenous concentrations around the world." Unlike the other pollutants for which a NAAQS has been established, a NAAQS for CO_2 "could not be attained by an area of the U.S. until such a standard were attained by the entire world as a result of emission controls implemented in countries around the world." Therefore, the agency emphasized that this situation "would be inconsistent with a basic underlying premise of the CAA regime for implementation of a NAAQS – that actions taken by individual States and by EPA can generally bring all areas of the U.S. into attainment of a NAAQS."[56]

In other words, the NAAQS provisions are aimed at ultimately achieving the national standards through domestic emission reductions. Congress could not have envisioned the implausible scenario of a NAAQS for carbon dioxide that no State could meet, and where every State would seek to excuse its nonattainment under Section 179B because of international

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[53] 42 U.S.C. § 7509a(a)(2).

[54] *See Sierra Club v. Imperial County Air Pollution Control Dist.*, 346 F.3d 955 (9th Cir. 2003).

[55] 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003).

[56] *Id.*

emissions.[57] To excuse the nonattainment with a NAAQS for CO_2 by every State under Section 179B would, in effect, allow the exception to swallow the rule. As EPA noted, "[t]he limited flexibility provided in the Act to address the impacts of foreign pollution transported to the U.S. was not designed to address the challenges presented by long-lived global atmospheric pools such as exists for CO_2."[58]

2. The absurd results canon does not support Petitioners' argument

Judge Tatel, in his dissenting opinion in the Court of Appeals, stated that even if the States' "limited ability" to meet a NAAQS for carbon dioxide "renders the NAAQS provisions unworkable as to CO_2, the absurd-results canon would justify at most an exception limited to the particular unworkable provision, *i.e.*, the NAAQS provision."[59] The absurd results canon provides that if a literal construction of a statute produces an absurd result, it should be interpreted to avoid the absurdity.[60]

Judge Tatel's argument, however, incorrectly characterizes the NAAQS system as a mere exception to the Act. In fact, the NAAQS system is, as this Court has stated, the "engine that drives nearly all of Title I."[61] Moreover, it ignores the basic principle of statutory interpretation that the Act is to be read as a whole. The design of Title I and the entire Act demonstrates

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[57] *See Food and Drug Admin. v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 141 (2000)(rejecting statutory interpretation that would result in an implausible regulatory scheme).

[58] 68 Fed. Reg. at 52,927.

[59] *Massachusetts v. EPA*, 415 F.3d 50, 70 (D.C. Cir. 2005).

[60] *Holy Trinity Church v. United States*, 143 U.S. 457, 459-60 (1892). Any deviation from the literal reading of the statute should be no greater than is needed to protect congressional intent. *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

[61] *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

that Congress did not intend Section 202 to be used to address an international air quality issue like global climate change.

B. Title II complements Title I by advancing the goal of achieving the NAAQS

Petitioners assert that the mobile source requirements in Title II are "entirely separate" from the NAAQS provisions in Title I, and that the Court therefore should not consider the overall statutory scheme when analyzing whether Section 202 authorizes regulation for purposes of global climate change.[62] In fact, Title II's requirements are essential to achieving the NAAQS. Far from being "entirely separate," Title II complements Title I.

That complementary relationship is illustrated by the success in achieving the NAAQS for lead through emission reductions from mobile sources. In 1973, EPA promulgated regulations phasing out the use of lead as a gasoline additive under the statutory provision in Title II now codified at 42 U.S.C. § 7545(c)(1).[63] As a result of EPA's regulatory efforts, the levels of lead in the air decreased 94 percent between 1980 and 1999.[64] Today, all but two counties in the United States have attained the NAAQS for lead.[65]

Title II's emissions standards for automobiles and trucks also play a critical role in achieving the NAAQS for carbon monoxide, particulate matter, nitrogen dioxide, and ozone. The largest source of U.S. carbon monoxide emissions are motor vehicles.[66] In many urban areas, emissions of hydrocarbons

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[62] Petitioners' Brief at 28.

[63] 38 Fed. Reg. 33,733 (Dec. 6, 1973).

[64] EPA, EPA's Efforts to Reduce Lead, available at http://www.epa.gov/air/urbanair/lead/effrt.html.

[65] EPA, Nonattainment Areas for Lead, available at http://www.epa.gov/oar/oaqps/greenbk/lindex.html.

[66] EPA, Automobiles and Carbon Monoxide, available at http://www.epa.gov/otaq/consumer/03-co.pdf.

and nitrogen oxides (the precursors of ozone) come primarily from motor vehicles and other mobile sources.[67] The standards established under Section 202(g) sharply reduce tailpipe emissions of carbon monoxide, particulate matter, oxides of nitrogen, and hydrocarbons, all of which assist in achieving attainment of the NAAQS.[68]

Other provisions in Title II further help States attain the national standards. Section 211(m) requires that gasoline sold during the winter months contain a minimum of 2.7 percent oxygen in areas that have not met the NAAQS for carbon monoxide.[69] Section 246 requires clean fuel vehicle programs for fleets of 10 or more motor vehicles owned and operated by a single person in ozone and carbon monoxide nonattainment areas with populations greater than 250,000.[70] Additionally, Section 202(j) imposes requirements for limiting carbon monoxide emissions in cold weather when emissions can be very high due to the reduced efficiency of both pollution control equipment and fuel combustion.[71]

Title I itself contains provisions that illustrate the connection between limiting emissions from mobile sources and attaining the NAAQS. For example, Section 182(b)(3) requires fuel-pump recovery systems (such as sheaths over pump nozzles) to prevent the evaporation of hydrocarbons during refueling.[72] States with nonattainment areas are required to implement vehicle inspection and maintenance programs that vary depending on the severity of the nonattainment status. In States with ozone or carbon monoxide nonattainment areas, the act requires motor vehicle inspection

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[67] EPA, Automobiles and Ozone, available at http://www.epa.gov/otaq/consumer/04-ozone.pdf.

[68] 42 U.S.C. § 7521(g).

[69] 42 U.S.C. § 7545(m).

[70] 42 U.S.C. § 7586.

[71] 42 U.S.C. § 7521(j).

[72] 42 U.S.C. § 7511a(b)(3).

and maintenance programs to identify malfunctioning vehicle emission controls and require that they be repaired as a prerequisite to vehicle registration.[73]

The transportation-related requirements in both Title II and Title I illustrate the fact that both portions of the Act are designed to work together. Although the focus of Title I is on stationary sources while Title II addresses mobile sources, the requirements in both Titles are complementary and reflect the overall purpose and design of the entire Act: to successfully achieve air quality goals that will effectively protect public health and welfare by reducing emissions from sources within the United States.

C. Title IV further illustrates the Act's purpose

The acid rain program, enacted as part of the Clean Air Act Amendments of 1990,[74] also reflects the fact that the Act is intended to achieve air quality goals through domestic, rather than international, emission reductions. The primary precursors of acid rain are sulfur dioxide and nitrogen oxides. The purpose of Title IV is to reduce the adverse effects of acid rain by reducing, from 1980 levels, annual sulfur dioxide emissions by 10 million tons and annual nitrogen oxide emissions by 2 million tons.[75]

Title IV prescribes limits for emissions of these air pollutants from specified electric utility plants in the contiguous 48 States.[76] The Act imposes a nation-wide cap of approximately 8.9 million tons of sulfur dioxide emissions per year on electric utilities, and they must reduce their emissions to meet the cap.[77] Utilities are allocated marketable emission

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[73] 42 U.S.C. §§ 7511a(c)(3), 7512(a)(6).
[74] Pub. L. No. 101-549, 104 Stat. 2399.
[75] 42 U.S.C. § 7651(b).
[76] 42 U.S.C. §§ 7651c, 7651d.
[77] 42 U.S.C. § 7651b(a)(1).

allowances.[78] Each allowance authorizes the emission of one ton of sulfur dioxide per year and may be bought, sold, traded or banked for future use or resale.[79]

Canada and the United States contribute to each other's acid rain problem. According to testimony by EPA before Congress in 1980, however, only 13 percent of the acid rain in New York and New Jersey is caused by pollution from Canada, while only 18 percent of the acid rain in the remaining northeastern United States is from air pollutants emitted from Canadian sources.[80] The acid rain program in Title IV, therefore, provides another example of a program that, like the provisions in Titles I and II, can actually solve an air quality problem because it is caused primarily by emissions from within the United States. By contrast, global climate change, which is caused mainly by emissions from outside the country and requires reducing emissions world-wide, is not the kind of air quality problem that the Act was intended to solve.[81]

D. Title VI shows how Congress explicitly tailored specific provisions in the Act to resolve international air quality problems

Title VI of the Act, which addresses stratospheric ozone depletion, demonstrates that Congress knows how to specifically craft statutory solutions to global air quality issues. As EPA noted in its denial of the ICTA Petition, the causes and effects of stratospheric ozone depletion are similar to global

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[78] 42 U.S.C. § 7651c.

[79] 42 U.S.C. §§ 7651a(3), 7651b(b).

[80] *Environmental Effects of the Increased Use of Coal; Hearings Before the Senate Subcomm. on Envt'l Pollution of the Senate Comm. on Env't and Pub. Works*, at 19 (March 19, 1980)(testimony of Douglas M. Costle, EPA Administrator).

[81] *See* Declaration of Michael McCracken ¶ 32 (Joint App. 239)(emission reductions from motor vehicles in the U.S. and other countries, along with limiting other emissions, make it "much more likely that the extent of climate change could ultimately be limited to levels that would avoid the most serious impacts of global warming.").

climate change: man-made substances "that deplete stratospheric ozone are emitted around the world and are very long-lived," and their effects "occur on a global scale."[82] To address this global problem, Title VI requires that the production and consumption of ozone–depleting substances be phased-out pursuant to a specific schedule.[83]

Title VI stands in stark contrast to the rest of the Act. It was enacted as part of the 1990 Clean Air Act Amendments to implement an international treaty signed by the United States and other governments in 1985 — the Vienna Convention for the Protection for the Ozone Layer — and, more precisely, the Montreal Protocol on Substances that Deplete the Ozone Layer that the signatories to the Vienna Convention adopted in 1987.[84] Unlike the other provisions of the Act, Title VI specifically requires U.S. emission reductions to address an international air quality issue caused by emissions from around the world. EPA should only endeavor to address the international air quality issue of greenhouse gas emissions and global climate change under the authority of a similar, specific provision, which Section 202 is not.

E. The structure and purpose of the entire Act – as reflected in Titles I, II, IV and VI – demonstrate that Section 202(a)(1) does not authorize regulation to address global climate change.

The portions of the CAA discussed previously highlight its central theme: to successfully achieve the air quality goal of effectively protecting public health and welfare by limiting emissions from sources within the United States. The provisions in Titles I, II, IV and VI all underscore and reinforce this fundamental premise of the entire Act.

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[82] 68 Fed. Reg. 52,922, 52,926 (Sept. 8, 2003).

[83] 42 U.S.C. §§ 7671c, § 7671d.

[84] 6 Frank P. Grad, Treatise on Environmental Law § 13.03[4][g][iii], [v], at 13-149, 13-162 (2005).

The basic flaw in Petitioners' argument is that Petitioners fail to ascertain the meaning of Section 202(a)(1) in the context of the Act as a whole. Instead, they claim that this Court should put on its blinders and attempt to understand the meaning of that statutory provision in isolation. That approach is fundamentally wrong and must be rejected.

When the design of the overall statutory scheme is applied to this case, the meaning of Section 202(a)(1) is clear. It authorizes the EPA Administrator to set standards for the emission of air pollutants from new motor vehicles that "in his judgment cause, or contribute to, air pollution that may reasonably be anticipated to endanger public health or welfare,"[85] where U.S. emission reductions will meaningfully address such air pollution. It does not, however, authorize EPA to set standards that will not effectively address an air quality problem.

In this case, Petitioners acknowledge that the emission reductions they seek make up only a small percentage of global greenhouse gas emissions.[86] Moreover, Petitioners state that emission reductions "from vehicles in the U.S. and other countries" (which Petitioners speculate will occur), "would substantially and measurably mitigate the impacts of global warming."[87] They further state that limiting the extent of global climate change "to levels that would avoid the most serious impacts of global warming" is "much more likely to occur" if other countries reduce motor vehicle emissions, and, in addition, there is "progress in limiting other emissions."[88]

In other words, effectively addressing an international issue like global climate change requires world-wide reductions, not

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[85] 42 U.S.C. § 7521(a)(1).

[86] *See* Declaration of Michael McCracken, ¶ 31 (Joint App. 238).

[87] Declaration of Michael Walsh, ¶ 12 (Joint App. 245).

[88] Declaration of Michael McCracken, ¶ 31 (Joint App. 238).

simply reductions from U.S. sources alone. The Act, however, authorizes reductions from U.S. sources that will meaningfully and effectively protect public health and welfare. The Act does not, therefore, authorize regulation to address global climate change.

CONCLUSION

Section 202(a)(1) does not give EPA the authority to limit emissions from new motor vehicles and engines in the United States to address global climate change, which is caused by emissions from around the world. Instead, the Clean Air Act is designed to actually achieve air quality goals that will successfully protect public health and welfare by reducing the emission of air pollutants from sources within the United States.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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