No.

IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), requires the Administrator of the Environmental Protection Agency ("EPA") to set emission standards for "any air pollutant" from motor vehicles or motor vehicle engines "which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." The questions presented are:

1. Whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1).

2. Whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1).

Parties to the Proceeding

Petitioners, who were petitioners in the appeals court, are the Commonwealth of Massachusetts, the states of California (acting by and through Governor Arnold Schwarzenegger, California Air Resources Board, and Attorney General Bill Lockyer), 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 the Environmental Protection Agency (a 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, and the States of Michigan, Texas, Idaho, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, and Ohio (all intervenors below).

Corporate Disclosure Statement

The non-governmental petitioners are all nonprofit corporations or organizations. None of them has a parent corporation, and no publicly-held company has a 10% or greater ownership interest in any of these entities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinions of the court of appeals (App. 1-58) are reported at 415 F.3d 50 (D.C. Cir. 2005). The following additional orders or statements of the court of appeals are reproduced in the appendix: the order denying petitioners' petition for rehearing (App. 98), the order denying petitioners' petition for rehearing *en banc* (App. 94-95), and the statement by Judge Tatel, joined by Judge Rogers, dissenting from the denial of rehearing *en banc* (App. 96-97)(the last two documents are reported at 433 F.3d 66 (D.C. Cir. 2005)).

Jurisdiction

The judgment of the court of appeals was entered on August 15, 2005 (App. 99-100). On December 2, 2005, the court denied petitioners' timely petition for rehearing, and the court denied, by a 4-3 vote, petitioners' timely petition for rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory and Regulatory Provisions

The relevant statutory provisions are sections 202(a)(1)- (a)(2), 302(g) and 302(h) of the Clean Air Act. 42 U.S.C.

§§ 7521(a)(1)-(a)(2), 7602(g), 7602(h). They are set forth *infra*, App. 101-02.

Statement

In 1999, several parties petitioned EPA to set regulatory standards for four air pollutants emitted by motor vehicles.[1] The petition asserted that, due to the effects on climate, the emission of these pollutants by motor vehicles "may reasonably be anticipated to endanger public health or welfare" within the meaning of section 202(a)(1) of the Clean Air Act. (App. 60-63.)

After public notice and comment, EPA decided not to set standards for the four air pollutants. 68 Fed.Reg. 52922 (September 8, 2003)(App. 59-93.) In explaining its decision, EPA never applied the statutory standard in section 202(a)(1); that is, the agency did *not* find that the scientific evidence regarding the pollutants' effects fell short of the "may reasonably be anticipated to endanger public health or welfare" standard. Rather, the agency simply ignored that standard and instead relied on various "policy" considerations not mentioned in section 202(a)(1). (App. 82-88.)

EPA also concluded that it had no authority to regulate air pollutants associated with climate change, regardless of the state of the scientific evidence. The agency concluded that the four substances covered by the petition are not "air pollutants" within the meaning of the Clean Air Act, even though it did not dispute that the

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[1] The four air pollutants are carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. (App. 60.)

plain language of the Act supported regulation. According to EPA, this "facially broad grant of authority" was not enough to justify regulation after this Court's decision in *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120 (2000). (App. 68-79.)

Thirty parties, including sixteen states and other governmental bodies, filed petitions for review pursuant to 42 U.S.C. § 7607(b), challenging EPA's denial of the rulemaking petition. The D.C. Circuit denied these petitions on the merits. (App. 99-100.)

Judge Randolph wrote the lead opinion for the panel, with Judge Sentelle joining in his judgment. Judge Randolph concluded that EPA acted lawfully in declining to regulate air pollutants under section 202(a)(1) of the Clean Air Act based on "'policy' considerations" nowhere mentioned there. (App. 14.) EPA was not, he thought, required to base its decision on the factors actually enumerated in section 202(a)(1), but was instead justified in giving expression to "the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area." (App. 13.)

Judge Tatel dissented. He explained that "the Clean Air Act gives the Administrator no discretion to withhold regulation" under section 202(a)(1) for reasons unrelated to danger to public health or welfare. (App. 42-58.) He also concluded that EPA has authority to regulate air pollutants associated with climate change. (App. 31-42.)

By a vote of 4-3, the court denied *en banc* review. (App. 94-

95.)

The ruling in this case is an extreme departure from this Court's precedents on statutory interpretation. EPA rewrote the Clean Air Act to justify its decision, and the lead opinion below approved the rewriting. To allow this decision to stand would be to sanction an enormous shift of power to administrative agencies, effectively letting them dismantle statutory regimes they simply do not like. The seriousness of the legal error here is compounded by the fact that it came out of the D.C. Circuit, the premier intermediate court for adjudicating issues of agency power and statutory interpretation, and the only court in the country – other than this Court – with the authority to review the EPA actions presented here. 42 U.S.C. § 7607(b).

Equally imperative is this Court's review of EPA's conclusion that it has no authority to regulate air pollutants associated with climate change. EPA's legal judgment rested on an obvious over-reading of this Court's decision in *FDA v. Brown & Williamson, supra*. *Brown & Williamson* is not a blank check to avoid regulating in politically controversial settings. The Court should grant certiorari to correct this misunderstanding of its decision.

Petitioners seek this Court's review in order to slip the case back into its proper legal joint, where an assessment of the scientific evidence of danger to public health and welfare – and not "'policy' considerations" nowhere mentioned in section 202(a)(1) – are the determining factor in deciding whether to regulate air pollutants associated with climate change.

A. Statutory Background

Section 202 of the Clean Air Act, 42 U.S.C. § 7521, creates, in broad terms, a two-step process for regulating air pollution from motor vehicles. Section 202(a)(1) creates the "trigger" for regulatory action, and the remainder of section 202(a) describes how EPA should set and implement the standards that have been triggered.

At the first step in the process, section 202(a)(1) directs the EPA Administrator's attention to the question whether "any air pollutant" from new motor vehicles or new motor vehicle engines "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." If "in his judgment" (42 U.S.C. § 7521(a)(1)), this so-called "endangerment standard" is met, then the obligation to regulate is triggered.

Before the 1977 Amendments to the Clean Air Act, section 202(a)(1) required the Administrator to regulate air pollution from motor vehicles that "endangers the public health or welfare." Pub. L. No. 91-604, § 6, 84 Stat. 1690 (1970). In 1976, the D.C. Circuit interpreted the "endangers" language as permitting "regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." *Ethyl Corp. v. EPA*, 541 F.2d 1, 15 (D.C. Cir. 1976)(*en banc*). In 1977, Congress amended section 202(a)(1) and the other standard-setting provisions in the Clean Air Act to require regulation where endangerment "may reasonably be anticipated." Pub. L. No. 95-

95, § 401, 91 Stat. 791 (1977). Congress expressly intended these additional words to underscore the obligation to assess risks and to take action even under conditions of uncertainty. H.R. Rep. No. 95-294, at 49-51.

The "air pollutant[s]" subject to regulation under section 202 are defined thus:

> any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air. . ..

Clean Air Act § 302(g), 42 U.S.C. § 7602(g). "Welfare," endangerment of which triggers the regulatory obligation under section 202(a)(1), is defined in this way:

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

Clean Air Act § 302(h), 42 U.S.C. § 7602(h)(emphasis added). Thus, a substance emitted into the air which endangers climate is, under the express terms of the relevant statutory provisions, subject to regulation under section 202.

The second step in regulating air pollution from motor vehicles involves deciding exactly what the regulatory standard for the pollutant(s) in question should be, and when the standard should be effective and for how long. The pertinent remainder of section 202(a) is concerned with these kinds of questions. At this stage of regulatory decisionmaking, factors beyond "endangerment" come into play. Section 202(a)(2) provides that standards set under section 202(a)(1) "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Section 202(a)(4)(A) further requires the Administrator to assure that there will not be "an unreasonable risk to public health, welfare, or safety" due to the "operation or function" of an emission control "device, system, or element of design." 42 U.S.C. § 7521(a)(4)(A).

Thus section 202 creates two very different steps in the process of setting standards for air pollution from motor vehicles. The first step is almost pristine in its simplicity: the Administrator is required to regulate when, "in his judgment," motor vehicles 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 second step – setting technologically and economically feasible standards once endangerment is found – involves an assessment and balancing of an assortment of other factors.

This kind of two-step process is typical of regulation under the Clean Air Act. In setting the national ambient air quality standards

("NAAQS"), for example, EPA first assesses the harmfulness of an air pollutant to human health and welfare, without regard to economic costs or technological feasibility, and then implements the harm-based NAAQS while taking into account costs, feasibility, and other factors. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). Likewise, section 111 of the Act requires EPA to regulate emissions from various kinds of stationary sources by first listing a "category" of sources when "in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," and then establishing performance standards for that category after the agency has considered a variety of other relevant factors. 42 U.S.C. § 7411(b)(1).

B. EPA's Decision

In September 2003, EPA, after notice and comment, issued its decision refusing to set motor vehicle standards for substances associated with climate change. (App. 59-93.) EPA's decision rested on the two legal conclusions at issue here.

As one ground for its decision, EPA stated that it "disagree[d] with the regulatory approach urged by petitioners" (App. 82) and thus, in light of various "considerations" discussed by the agency, it would decline to use any authority it had under the statute to regulate the four substances. (App. 82-88.) In simple terms, EPA's legal position was that it could reject the regulatory approach embodied in section 202(a)(1) of the Clean Air Act – in light of "considerations" not found in that provision.

The "considerations" EPA thought sufficient to justify rejecting the regulatory approach of section 202(a)(1) of the Clean Air Act included a variety of factors. First, EPA cited the presence of various scientific uncertainties. (App. 83-85.) At no point, however, did EPA apply the statutory endangerment standard to determine whether the scientific evidence was strong enough to support regulation despite the presence of these uncertainties.

Second, EPA concluded that regulation under section 202(a)(1) was not warranted because it would "result in an inefficient, piecemeal approach to addressing the climate change issue," since motor vehicles are only one of many sources of air pollutants associated with climate change. (App. 85-86.)

Third, EPA asserted that "[u]nilateral EPA regulation" in this area could "weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies." (App. 86.) EPA concluded therefore that regulation of air pollutants associated with climate change "raises important foreign policy issues," which it was "the President's prerogative" to address. (App. 86.)

EPA rounded out its explanation of its decision with a boilerplate recitation of the administration's alternative approach to climate change, which relies on research, voluntary measures by industry, and public-private partnerships. (App. 88-92.)

As a separate ground for its decision, EPA asserted that it simply has no legal authority to regulate air pollutants associated with climate change. In so saying, EPA reversed its prior legal

position, provided to Congress on multiple occasions, that the Clean Air Act does provide that authority.[2] (App. 68-79.)

C. The Court of Appeals' Decision

Judge Randolph authored the Court's lead opinion, as well as its judgment. Without resolving whether EPA had statutory authority, Judge Randolph voted to uphold the agency's decision based on the agency's "'policy' considerations." (App. 13-15.) He noted that these considerations included, but were not limited to, the existence of uncertainty, saying "[i]t is . . . not accurate to say . . . that the EPA Administrator's refusal to regulate rested entirely on scientific uncertainty. . .." (App. 14-15.) Judge Randolph concluded that section 202(a)(1) "does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence." (App. 13.) He found that EPA's other policy considerations – concerns about piecemeal regulation, worries about effects on international treaty negotiations and technological feasibility, and a preference for alternative voluntary approaches – were all factors that the agency was entitled to consider in coming to a decision. (App. 13-15.) In fact, Judge

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[2] *See* Testimony of Gary S. Guzy, EPA, General Counsel, Joint Hearing of the House Subcomm. on Nat'l. Econ. Growth, Natural Res. and Regulatory Affairs of the Comm. on Gov't Reform and the House Subcomm. on Energy and Env't of the Comm. on Sci. (Oct. 6, 1999); Letter from Gary S. Guzy, EPA General Counsel, to Rep. David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform (July 12, 2000). *See also* App. 68-69 (rescinding EPA's earlier conclusions).

Randolph concluded that under section 202(a)(1), EPA "could take into account "the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area." (App. 13.)

Judge Sentelle dissented because of his view that the Court lacked jurisdiction. He nevertheless joined in Judge Randolph's judgment denying the petitions for review on the merits. (App. 16-20.)

Judge Tatel would have granted the petition for review. In a dissenting opinion, Judge Tatel detailed how the Court's jurisdiction was not in doubt, how EPA plainly had statutory authority to regulate air pollutants associated with climage change, and how the agency's decision not to regulate these pollutants rested on policy considerations that fell outside the range of discretion delegated by Congress. (App. 21-58.)

D. The Court of Appeals' Denial of Rehearing and Rehearing *En Banc*.

By a 2-1 vote, the panel denied rehearing (App. 98), and by a 4-3 vote, the full Court denied *en banc* review. (App. 94-95.) Judge Tatel wrote an opinion, joined by Judge Rogers, dissenting from the denial of rehearing *en banc*. (App. 96-97.) Judge Tatel stated that he would have granted *en banc* review because:

> the case involves the threat of global warming and its attendant consequences for human health and the environment, and therefore presents an issue of exceptional importance. . . . Indeed, if global warming is not a matter

> of exceptional importance, then those words have no meaning.

(internal cite omitted)(App. 96).

Reasons for Granting the Petition

Like Melville's scrivener, Bartleby, EPA may as well have explained its resistance to fulfilling its statutory obligations under the Clean Air Act with the simple reply: "I would prefer not to." And, like Bartleby's flummoxed boss, the court below let this answer suffice.

This was a significant mistake. The provision under which EPA made its decision, section 202(a)(1) of the Clean Air Act, is crystalline: EPA is to decide whether to regulate an air pollutant emitted by motor vehicles on the basis of its judgment whether public health or welfare may reasonably be anticipated to be endangered by the pollution. Section 202(a)(1) says not a word about technological judgments, international treaty negotiations, private-public partnerships, or any other of the myriad factors EPA cited in deciding not to regulate here.

The unidimensional simplicity of section 202(a)(1) was no accident, as the neighboring provisions of section 202 make clear. These adjacent provisions detail the "policy" factors for EPA to consider when setting and implementing the standards triggered by section 202(a)(1). But these factors are nowhere to be found in the "endangerment" standard of section 202(a)(1). By allowing EPA to import into section 202(a)(1) policy factors not enumerated there, the appeals court has sanctioned a large-scale and

unwholesome shift of power from Congress (which, after all, wrote section 202(a)(1)) to the agency. The court's decision is seriously out of step with this Court's precedents counseling judicial modesty in the face of pellucid statutory language.

The other ground on which EPA rested its decision was that it lacked any statutory authority to regulate air pollutants associated with climate change. EPA's claim is contradicted by the plain language of the Clean Air Act. Because EPA's interpretation of the Act is based almost entirely on its reading of *Brown & Williamson*, 529 U.S. 120, the Court's review of this question is necessary to prevent the agency from continuing to claim that a decision of this Court prevents it from taking regulatory action to address climate change.

I. IN UPHOLDING EPA'S DECISION BASED ON FACTORS NOT MENTIONED IN THE RELEVANT STATUTORY PROVISION, THE LEAD OPINION BELOW DRAMATICALLY DEPARTED FROM THIS COURT'S PRECEDENTS.

This Court has made plain that the judicial role in statutory interpretation begins, and often ends, with the statute's language. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)(speaking for a unanimous Court, Justice Rehnquist observed: "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). In trying to discern a statute's meaning, the Court has often found it helpful to compare the language of the

statutory provision in question with language found elsewhere in the statute: "it is a general principle of statutory construction that when one statutory section includes particular language that is omitted in another section of the same Act, it is presumed that Congress acted intentionally and purposely." *Barnhardt v. Sigmund Coal*, 534 U.S. 438, 440-41 (2002), *citing Russello v. United States*, 464 U.S. 16, 23 (1983).

Notably, these principles have been decisive in shaping this Court's jurisprudence under the Clean Air Act. Where Congress has listed certain factors as relevant in one part of the Act, and not in another, this Court has consistently respected this legislative choice. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 464-71 (2001); *General Motors Corp. v. United States*, 496 U.S. 530, 538, 541 (1990); *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976).

In this case, the lead opinion in the D.C. Circuit failed to follow this well-worn path. Section 202(a)(1) includes only endangerment to public health or welfare as the criterion in deciding whether to regulate air pollution from motor vehicles. Once the threshold of endangerment has been crossed, other factors such as technological feasibility, cost, and lead-time concerns are relevant when establishing the standards under the other provisions of section 202. *See supra*, at 5. Nevertheless, the lead opinion allowed EPA's decision to stand based on reference to "'policy' considerations" not mentioned in section 202(a)(1).

The one factor mentioned by EPA that has anything to do with the endangerment standard of section 202(a)(1) is scientific

uncertainty. But even as to this factor, EPA failed to apply the statutory standard. Under this standard, the mere existence of uncertainty is not a bar to regulation or an excuse for inaction. Rather, the endangerment standard authorizes "regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." *Ethyl Corp. v. EPA*, 541 F.2d at 25. Indeed, in 1977, Congress amended section 202(a)(1) "to support the views expressed" in *Ethyl*. H.R. Rep. 95-294, at 49. Specifically, "[i]n order to emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator's duty to assess risks rather than wait for proof of actual harm), the committee not only retained the concept of endangerment to health; the committee also added the words 'may reasonably be anticipated.'" *Id.*, at 51.

Moreover, as the lead opinion expressly found, EPA did not rely solely on uncertainty in coming to its decision. (App. 14-15.) Instead, it relied on uncertainty in combination with the other factors clearly having no relevance to the endangerment finding of section 202(a)(1). (App. 82-88.) The consideration of statutorily excluded factors taints EPA's entire decision; we cannot know what EPA would have done if it had exercised its judgment in light of the only legally relevant consideration – endangerment of public health or welfare – and courts cannot supply an answer EPA itself did not give. *See, e.g., SEC v. Chenery, Corp.*, 318 U.S. 80, 93-95 (1943).

An administrative agency simply cannot rest its decisions on factors which Congress has not intended it to consider. *Motor*

Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). Section 202(a)(1) entrusts to the Administrator's "judgment" the threshold question of whether endangerment is occurring. But, as Judge Tatel observed, the statute provides the Administrator "no discretion either to base that judgment on reasons unrelated to this standard or to withhold judgment for such reasons." (App. 46.) By relying on these extra-statutory "policy considerations" in deciding not to regulate:

> In effect, EPA has transformed the limited discretion given to the Administrator under section 202 -- the discretion to determine whether or not an air pollutant causes or contributes to pollution which may reasonably be anticipated to endanger public health or welfare -- into the discretion to withhold regulation because it thinks such regulation bad policy. But Congress did not give EPA this broader authority, and the agency may not usurp it.

(App. 45)(Tatel, J. dissenting).

II. EPA MISREAD *FDA v. BROWN & WILLIAMSON TOBACCO CORP.* IN CONCLUDING THAT IT LACKS AUTHORITY TO REGULATE AIR POLLUTANTS ASSOCIATED WITH CLIMATE CHANGE.

EPA's contention that it lacks statutory authority to regulate air pollutants associated with climate change is belied by the plain language of the Clean Air Act.[3] The agency based its

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[3] Because the court of appeals upheld EPA on the merits by denying the (continued...)

misinterpretation on a misreading of this Court's decision in *Brown & Williamson*, 529 U.S. 120. Unless this Court accepts review, EPA will continue to justify its inaction based on its reading of the Court's precedent.

Section 202(a)(1) of the Act requires the EPA Administrator to promulgate motor vehicle emissions standards for "any air pollutant" that he determines "may reasonably be anticipated to endanger public health or welfare." By using the word "any," Congress demonstrated its intent to provide EPA expansive authority, not to limit the agency's jurisdiction to only certain kinds of air pollutants. *See Dept. of HUD v. Rucker*, 535 U.S. 125, 131 (2002)("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'")(internal quotation omitted). As noted above (*supra* at 6), section 302(g) of the Act defines "air pollutant" comprehensively, and each of the four pollutants associated with climate change and emitted by motor vehicles is plainly covered by this definition. As the EPA General Counsel recognized in 1998, carbon dioxide, the most prevalent of these pollutants, is a "physical [and] chemical . . . substance which is emitted into . . . the ambient air."[4] Nowhere in its denial of the

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[3] (...continued)
petition for review, this Court may address the scope of EPA's authority even though this question – fully briefed below – was not actually reached by the court. *Cf. Pollard v. United States*, 352 U.S. 354, 359 (1957)(reaching the merits even of arguments not briefed below).

[4] Memorandum of Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, *EPA's Authority to Regulate Pollutants Emitted by* (continued...)

rulemaking petition did the agency attempt to challenge that self-evident conclusion.

EPA nevertheless maintains that there is something special about the nature of the harm that these substances cause that negates the agency's jurisdiction over them. (App. 71-73.) But in fact they cause the kinds of harm that are expressly set forth in section 302(h), which states that effects on "welfare" include effects on "climate." By including effects on "climate" within the "welfare" effects that the agency is charged with preventing, Congress has expressly conferred authority to regulate air pollutants that adversely affect "climate."[5]

The language of section 202(a)(1) is so plain that in the court of appeals EPA made not a single argument that the statutory text supported its position (or even that the words were ambiguous). Instead, the agency belittled the very idea of textual analysis, referring to plain language arguments as "narrow semantic analyses." EPA brief below at 55.

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[4] (...continued)
Electric Power Generation Sources (April 10, 1998), p. 2.

[5] In addition to direct effects on "climate," climate change endangers "welfare" through many of the other effects enumerated in section 302(h) [42 U.S.C. § 7602(h)], including effects on "weather" (*e.g.*, increased storm activity and changes in rainfall or drought patterns), "damage to and deterioration of property," and "effects on crops." Further, emissions that cause climate change endanger "public health" in several ways, *e.g.*, by raising air temperature so as to increase the severity of health-damaging smog episodes. Intergovernmental Panel on Climate Change, *Third Assessment Report* (2001), Working Group II Technical Survey, at 43.

In lieu of examining the words that Congress chose, EPA argued that interpreting the Act as providing regulatory authority would have such sweeping impacts that Congress could not have intended this result absent lock tight evidence of specific intent. (App. 75-79) EPA based this argument almost entirely on a single case, *Brown & Williamson*, 529 U.S. 120. But as Judge Tatel concluded, "EPA's reliance on *Brown & Williamson* is misplaced." (App. 38.) In fact, the legal principles of that case undercut, rather than support, EPA's claim that it lacks authority.

Brown & Williamson concluded that the Food, Drug and Cosmetic Act (FDCA) was unambiguous and that Congress had "directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products." 529 U.S. at 133. Central to the Court's analysis was the fact that the FDA had for more than sixty years held the position that it had no authority to regulate tobacco products under the FDCA and that, over this period, Congress had repeatedly enacted tobacco-specific legislation that ratified the FDA's longstanding interpretation. The Court concluded that if tobacco products were subject to the FDCA, then the FDA would have no other option than to ban them, a drastic result that was contradicted by the tobacco-specific enactments that were all premised on tobacco's remaining legally for sale. The Court thus held that the FDA's reinterpretation of its authority could not stand in the face of these enactments. *See* 529 U.S. at 154-57.

The *Brown & Williamson* analogy that EPA attempts to draw breaks down under even a cursory examination. Before the

decision here under review, EPA had previously maintained that it possessed authority to regulate air pollutants associated with climate change. EPA took the opposite view for the first time in this decision. Further, Congress has never – before or after this decision – enacted any legislation premised on EPA's "no authority" interpretation. Moreover, in sharp contrast to the complete ban on tobacco products that would have resulted from regulating cigarettes, regulating air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act would result only in EPA's setting technologically and economically feasible standards – something the agency has done for decades for other tailpipe pollutants.[6]

While attempting to clothe itself in *Brown & Williamson*, EPA has simply not shown that its having authority to regulate air pollutants associated with climate change would "contradict" other Congressional enactments. While the agency has cited various enactments that call for "non-regulatory responses" to global warming such as further studies,[7] each of these statutes is fully

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[6] Section 202 includes protections designed to prevent severe economic impacts from occurring. *See* 42 U.S.C. § 7521(a)(2)(new emission standards are to "take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.").

[7] *See* National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601; Global Climate Protection Act of 1987, Pub. L. No. 100-204, §§ 1101-1106, 101

(continued...)

compatible with EPA having underlying authority to regulate air pollutants associated with climate change. In fact, one of the statutes that EPA cites makes this point expressly:

> Nothing in this subchapter shall be construed, interpreted, or applied to preclude or delay the planning or implementation of any Federal action designed, in whole or in part, to address the threats of stratospheric ozone depletion or global climate change.

Global Climate Change Research Act of 1990, 15 U.S.C. § 2938(c).

Nor does the Energy Policy and Conservation Act ("EPCA"), 49 U.S.C. §§ 32901-32919, the statute authorizing the Secretary of Transportation to set automobile fuel economy standards, provide EPA any help for disclaiming its authority under the Clean Air Act. Not only is there nothing in EPCA that limits EPA's authority to set motor vehicle emission standards for air pollutants associated with climate change, but EPCA in fact expressly recognizes that motor vehicle standards set by other agencies may affect fuel economy. 49 U.S.C. § 32902(f). Congress has simply not erected any bar to the agency's making use of the authority that the plain and unambiguous language of § 202(a)(1) provides.

The real import of *Brown & Williamson* to this case is quite

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[7] (...continued)
Stat. 1331, 1407-09; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

different from the one EPA has attempted to draw. Fundamentally, *Brown & Williamson* stands for the proposition that an agency cannot stretch its authority to usurp power that a statute does not give it, no matter how compelling the agency feels is the need to respond to a social or economic problem. By the same token, an agency cannot shrink its authority and deny power that a statute plainly does give it. That is Congress's decision alone.[8]

III. THE ISSUES RAISED BY THIS CASE MERIT THIS COURT'S REVIEW BECAUSE THEY GO TO THE HEART OF EPA'S STATUTORY RESPONSIBILITIES TO ADDRESS THE MOST PRESSING ENVIRONMENTAL CHALLENGE OF OUR TIME.

The statutory questions presented by this case are themselves important federal questions that have not been, but should be, settled by this Court. This Court's review is warranted because the

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[8] EPA's argument that there cannot be regulatory authority without specific intent is curious for two reasons beyond its misreading of *Brown & Williamson*. First, Congress has in fact been quite specific in demonstrating its intent that effects on "climate" fall within the scope of the Act. Second, even if this were not the case, this Court has consistently held that an agency can regulate a new subject matter in the absence of proof of specific congressional intent directed at the particular problem. *See, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 314-15 (1980) (rejecting argument that because genetic technology was unforseen when broad patent statute was enacted, micro-organisms could not be patented until Congress expressly authorized it). As this Court observed in 2001, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity . . .. It demonstrates breadth." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001)(internal citation and quotation omitted).

answers to these questions offered by the court of appeals (and EPA) flout the Court's guidance on statutory interpretation and administrative law. But the Court's review is also merited by the important real world context in which the questions arise. Simply put, this case goes to the heart of EPA's statutory responsibilities to deal with the most pressing environmental problem of our time.

There can be no reasonable debate about the exceptional importance of the problem of climate change. In fact, EPA conceded the need to address the problem in the proceedings below: "We agree with the President that 'we must address the issue of global climate change' (February 14, 2002)." (App. 82)(*quoting* President George W. Bush). *See also* March 3, 2001 Statement of then-EPA Administrator Christine Todd Whitman ("If we fail to take the steps necessary to address the very real concern of global climate change, we put our people, our economies, and our way of life at risk.").[9] Indeed, the very National Academy of Sciences report on which EPA claimed to rely opens with the statement: "Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise." National Research Council, *Climate Change Science: An Analysis of*

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[9] Remarks delivered at the G8 Environmental Ministerial Meeting Working Session on Climate Change, Trieste, Italy (March 3, 2001), available at: http://yosemite1.epa.gov/administrator/speeches.nsf/b1ab9f485b098972852562e7004dc686/36bca0e3a69a0d8b85256a41005d2e63?OpenDocument.

Some Key Questions (2001), at 1.[10]

Given that the D.C. Circuit has exclusive jurisdiction to review EPA's national regulatory decisions, there is no good reason to put off review in order to let the issues presented percolate through the lower courts. At the same time, there are important reasons for this Court to accept review now. The court of appeals' ruling effectively puts motor vehicle sources, which account for over a quarter of U.S. greenhouse gas emissions, beyond EPA's regulatory reach for the indefinite future. And without this Court's review, EPA will continue to disclaim its statutory role in evaluating the dangers posed by such pollutants from any source. In fact, EPA only recently refused to even consider greenhouse gas emissions

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[10] The scientific basis for concern is well documented in the administrative record, including through various official governmental reports. A prime example is the 2002 report that the United States submitted pursuant to its reporting obligations under the 1992 climate change treaty signed by President George H.W. Bush and ratified by the Senate. *U.S. Climate Action Report 2002* (CAR). The report was produced by several federal agencies with EPA taking the lead. In a portion of the report drafted by EPA, the report specifically identified numerous adverse effects that the accumulation of greenhouse gas emissions is likely or very likely to cause. These include: in the Northeast, Southeast, and Midwest, "[r]ising temperatures are likely to increase the heat index dramatically in the summer;" in the Appalachians, "[w]armer and moister air is likely to lead to more intense rainfall events in mountainous areas, increasing the potential for flash floods;" in the Great Lakes, "[l]ake levels are likely to decline due to increased warm-season evaporation, leading to reduced water supply and degraded water quality;" and coastal communities "are more likely to suffer damage from the increasing intensity of storms." CAR at 110.

limits on new power plants, stating that it "does not presently have the authority to set [New Source Performance Standards] to regulate CO_2 or other greenhouse gases that contribute to global climate change." 71 Fed. Reg. 9869/3 (February 27, 2006). This Court's review is warranted to give the issues raised by this case the careful hearing they deserve.

Meanwhile, delay has serious potential consequences. Given that air pollutants associated with climate change are accumulating in the atmosphere at an alarming rate, the window of opportunity in which we can mitigate the dangers posed by climate change is rapidly closing. *See, e.g.*, Intergovernmental Panel on Climate Change, *Third Assessment Report* (2001), Synthesis Report, Summary for Policymakers, at 19, 21 (explaining how significant reductions in greenhouse gas emissions are needed in the short term to stabilize atmospheric concentrations, and how a delay in implementing emission reductions will result in increased extent and magnitude of adverse impacts). As the heads of the national academies of science of eleven different countries, including the United States, recently stated: "Failure to implement significant reductions in net greenhouse gas emissions now, will make the job much harder in the future." Joint Science Academies' Statement: Global Response to Climate Change (July 2005)(footnotes omitted). Available at: http://nationalacademies.org/onpi/06072005.pdf.

Seven years have already passed since EPA received the petition for rulemaking that spawned this litigation. In reliance on incorrect legal analyses and *ultra vires* policy rationales, EPA has

squandered nearly a decade. This delay, itself, has the effect of compounding the problem by narrowing our ability to mitigate it. As the EPA Administrator who served under Presidents Nixon and Ford recently stated: "[t]o sit back and push this away and deal with it sometime down the road is dishonest and self-destructive." Statement of Russell E. Train. *The New York Times*, "6 Ex-Chiefs of EPA Urge Action on Greenhouse Gases" (January 19, 2006), at 19. If this Court declines to resolve the issues presented now, we will see the cycle of delay repeat itself. Waiting for the issues to arise in other contexts would likely drastically limit our ability to address the growing crisis.

Thus, there are critically important reasons not only for this Court to resolve the questions presented, but also to reach them in the current case.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2, 2006