NO. 05-1120

In the
Supreme Court of the United States

THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* WILLIAM H. TAFT, IV IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

Amicus William H. Taft, IV, served as legal adviser to the Department of State from 2001 to 2005. From 1989 to 1992, Mr. Taft was the United States permanent representative to the North Atlantic Treaty Organization. From 1984 to 1989, Mr. Taft was the Deputy Secretary of Defense. From 1981 to 1984, Mr. Taft was the General Counsel of the Department of Defense. From 1976 to 1977, Mr. Taft was General Counsel of the Department of Health, Education and Welfare. Mr. Taft has extensive experience and expertise in foreign policy and international law as well as United States administrative law. Mr. Taft has a strong interest in the court's resolution of the legal issues in this case to the extent they bear on the conduct of foreign policy and its consideration in the interpretation of domestic regulatory statutes and the execution of domestic regulatory programs.

Mr. Taft is currently Of Counsel at Fried, Frank, Harris, Shriver & Jackson LLP, an international law firm. He serves on the Executive Council of the American Society of International Law and the Board of

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[1] All parties have consented to the filing of this brief. Pursuant to the Rule 37.6, counsel for *Amicus Curiae* states that this brief was not written in whole or in part by counsel for any party. A monetary contribution to the preparation and submission of this brief was made by non-party, the Automotive Trade Policy Council.

the American Bar Association's Center for Rule of Law Initiatives.

The purpose of this brief is to advise the Court that the Administrator of the Environmental Protection Agency may properly consider the foreign policy interests of the United States in exercising her responsibilities under the Clean Air Act.

SUMMARY OF ARGUMENT

Petitioners conclude that carbon dioxide is an "air pollutant" that, under section 202 of the Clean Air Act, is subject to regulation by the Environmental Protection Agency (EPA). Petitioners overlook the President's and Congress's repeated determinations that, as a matter of U.S. foreign policy, the issue of global climate change must be addressed through a comprehensive, multilateral strategy, not through unilateral, domestic regulation that could cause significant harm to the Nation's economy.

The petitioners and their *amici* have worked for years to enact legislation and to shape foreign policy to control carbon dioxide emissions, but they have repeatedly failed to achieve their goals. Because neither Congress nor the Administration has been willing to grant EPA authority to regulate greenhouse gas emissions, the petitioners now seek to use this Court to achieve their preferred policy objectives, even though their views have been consistently rejected through the democratic process.

In recognizing that, under the Clean Air Act, EPA enjoys no authority to regulate greenhouse gas emissions, the EPA Administrator appropriately considered United States' foreign policy and declined petitioners' request that she impose burdensome domestic regulations on carbon dioxide emissions from new motor vehicles. The decision was appropriate and should be upheld.

ARGUMENT

I. The United States Is Working Within An International Framework To Develop A Comprehensive, Multilateral Approach To Global Climate Change.

The President and Congress have insisted for more than a decade that the phenomenon of global climate change must be addressed through coordinated, multilateral strategies that do not inflict undue harms on the U.S. economy. EPA correctly determined that "climate change raises important foreign policy issues," and it appropriately recognized that imposing unilateral, mandatory restrictions on one sector of the economy could "weaken U.S. efforts to persuade key developing countries to reduce" their own greenhouse gas emissions.[2]

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[2] Pet. App. at A-86.

A. The Issue Of Global Climate Change Raises Important Foreign Policy Concerns.

Because carbon dioxide and other greenhouse gases disperse throughout the atmosphere, their effect on climate is a global issue that does not lend itself to unilateral, piecemeal approaches.[3] In the conduct of its foreign policy, the United States has rejected go-it-alone strategies and focused instead on promoting voluntary and coordinated multilateral commitments. As President Bush has emphasized, "[c]limate change, with its potential to impact every corner of the world, is an issue that must be addressed by the world."[4]

This country's foreign policy leaders have likewise recognized that mandatory restrictions on United States' greenhouse gas emissions would impose potentially enormous burdens on the nation's economy, as well as its citizens and businesses.[5]

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[3] *See* Thomas R. Karl & Kevin E. Trenberth, *Modern Global Climate Change*, 302 SCIENCE 1719 (Dec. 5, 2003) (greenhouse gases, once emitted, are "typically halfway around the world a week later, making climate change a truly global issue").

[4] Remarks of the President George W. Bush on Global Climate Change, 2001 WL 637709, at 1 (June 11, 2001).

[5] *Id*. at 3 (complying with Kyoto's "mandates would have a negative economic impact, with layoffs of workers and price increases for consumers"); *see also* Department of Energy, Energy Information Administration, *What Does the Kyoto Protocol Mean to U.S. Energy Markets and the U.S. Economy?* (Oct. 1998) *available at* http://eia.doe.gov/oiaf/kyoto/kyotobtext.html. (projecting actual losses between $102 and $437 billion in 2010 in order to reduce

Because greenhouse gases mix in the atmosphere, however, such restrictions might have no meaningful effect on greenhouse gas concentrations in the atmosphere absent efforts by developing countries to undertake similar emissions reductions.[6]

In fact, any program seeking to control greenhouse gases that does not involve China, India, and other key developing nations is unlikely to succeed. Emissions from developing nations will exceed those from industrialized nations by the early 2020s. It is expected that, from 2003 to 2030, almost seventy-five percent of the increase in total carbon dioxide emissions will come from developing countries,[7] with most of the growth contributed by China and India. Two years ago, China became the world's second-largest petroleum consumer, and is projected to have 150 million private motor vehicles by 2015, a 150-fold increase over 2002 levels. China's economy is growing at twice the rate of the United States' economy, and its population is increasing by 10.4 million people a year. The increase

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greenhouse gas emissions to levels proposed by the Kyoto Protocol).

[6] Robert R. Nordhaus & Kyle W. Danish, Pew Center on Global Climate Change, *Designing a Mandatory Greenhouse Gas Reduction Program for the U.S.*, at 2 (2003) ("a ton of greenhouse gases emitted in the United States has the same impact as a ton emitted in Malaysia").

[7] Congressional Budget Office, Uncertainty in Analyzing Climate Changes: Policy Implications 1 (Jan. 2005).

in emissions from China alone will exceed the increase of emissions from all developed nations (OECD nations) and Russia combined.[8]

Petitioners have suggested, optimistically, that if the United States were to move aggressively to reduce greenhouse gas emissions from new motor vehicles, other countries might make similar emissions reductions.[9] But there are no assurances that this would occur. Although western European nations may well continue to work for controls, China, India, and other developing countries are unlikely to implement emissions reductions absent binding multilateral agreements. In any event, these issues require judgments that the political branches of the federal government and, particularly, the Executive Branch in the conduct of foreign policy have the responsibility to make.

B. The United States' Foreign Policy Favors Comprehensive, Multilateral Strategies For Addressing Global Climate Change.

Given the potential costs of controlling greenhouse gas emissions, the United States has sought to address

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[8] U.S. Dept. of Energy, Energy Information Administration, International Energy Outlook 92 (June 2006).

[9] *See* JA 239 (arguing that if "the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U.S. program").

the issue of climate change through comprehensive, multilateral strategies, while rejecting mandatory, unilateral controls that could cause undue harm to the U.S. economy.

1. The President and Congress Have Rejected Mandatory Emissions Reductions That Would Unduly Harm The United States' Economy.

Two decades ago, Congress enacted the Global Climate Protection Act of 1987, mandating an international approach to global climate change.[10] The Act designated the Department of State as the lead executive agency responsible for United States' foreign policy regarding climate change. At the same time, Congress tasked EPA with "developing and *proposing* to Congress a coordinated national policy on global climate change."[11] The responsibilities assigned to the two agencies are clearly related, and Congress understood that a "coordinated national policy on global climate change" would have domestic and international aspects.

Five years later, the United Nations Framework Convention on Climate Change (UNFCCC) became the first international agreement to address the issue of global climate change. Seeking to encourage a coordinated international response, the UNFCCC

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[10] Pub. L. No. 100-204, Part XI, § 1103, 101 Stat. 1331 (1987).

[11] *Id*.

makes clear that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." Under the UNFCCC, participating nations agreed to work together to negotiate future binding commitments through which the international community might reduce worldwide greenhouse gas emissions.[12]

The Senate approved the UNFCCC in 1992,[13] and since that time, the United States has remained actively involved in the multilateral framework established by the UNFCCC.[14] Negotiations under the UNFCCC resulted in the Kyoto Protocol in late 1997. While the Administration was negotiating the Kyoto Protocol, however, the Senate unanimously adopted the Byrd-Hagel resolution, making clear that the Senate would not ratify any protocol that did not require substantive participation by developing countries or that would damage the United States economy. The

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[12] *See* United Nations Framework Convention on Climate Change, art. 4.1, 4.1(b) & (f), 4.2, 31 I.L.M. 849, 855-56 (May 9, 1992).

[13] U.N. Framework Convention on Climate Change: Hearing Before S. Comm. on Foreign Relations, 102nd Cong. 2d Sess. 93 (1992).

[14] Remarks by the President on Global Climate Change, 2001 WL 637709, at 1 (June 11, 2001) (committing 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").

later Knollenberg amendments to the FY 1999 and 2000 VA-HUD and Independent Agency Appropriations Acts likewise bar EPA from implementing the Kyoto Protocol.[15]

Given Congress's strong objections to the Kyoto Protocol, President Clinton did not submit it to the Senate for its advice and consent to ratification. Instead, he reassured Congress that, although the "industrial world must lead, … developing countries also must be engaged."[16] President Clinton made clear that, as a matter of policy, the United States would "not assume binding obligations unless key developing nations agree to participate meaningfully in the effort."[17]

The United States is now pursuing policies that encourage voluntary, multilateral efforts to reduce greenhouse gas emissions.[18] Against this foreign policy

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[15] Pub. L. No. 105-276, 232 (1998).

[16] Remarks of the President William J. Clinton at the National Geographic Society, 2 Pub. Papers 1408, 1410 (Oct. 22, 1997).

[17] *Id*.

[18] *See* M. Albright Brief at 15 n.14. An example of the existing U.S. approach is the Asia-Pacific Partnership on Clean Development and Climate, which on July 28, 2005, announced it would seek "to develop, deploy, and transfer cleaner, more efficient technologies and to meet national pollution reduction, energy security, and climate change concerns, consistent with the U.N. Framework Convention on Climate Change." Pamela Najor, *United States Joins*

backdrop, EPA correctly noted that, in light of "the large populations and growing economies of some developing countries, … [a]ny potential benefit of EPA regulation could be lost to the extent other nations … let their emissions significantly increase."[19]

2. A Multilateral Approach To Climate Change Is Consistent With The United States' Approach To Other Issues Affecting The Global Environment.

The United States' multilateral approach to the issue of global climate change is by no means unprecedented. For nearly a century this Nation has handled global energy and environmental problems as a matter of international diplomacy.

When dealing with trans-boundary disputes with our close neighbors to the North and South, for example, the United States has traditionally relied on treaties, compacts, and other bilateral arrangements. Such arrangements include the International Joint Commission (IJC) under the U.S.-Canada Boundary Waters Treaty of 1909, and the International Boundary and Water Commission (IBWC) operating under the U.S.-Mexico Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area. In 1991, Canada and the United States

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Five Other Nations In Effort To Cut Greenhouse Gas Emissions, 36 Env't Rep. (BNA) 1549 (July 29, 2005).

[19] Pet. App. at A-86.

entered into the Canada-United States Agreement on Air Quality.[20]

To the extent that these trans-boundary issues need to be addressed domestically, Congress has enacted specific legislation giving EPA authority to regulate. In 1990, for example, Congress acted to reduce the transport of sulfur and nitrogen oxides in subchapter IV-A of the Clean Air Act, after finding "the problem of acid desposition is of national and international significance."[21] This program is primarily aimed at improving domestic air quality, but it also reduces emissions to Canada.

Glossing over the United States' history of addressing global energy and environmental issues as a matter of foreign diplomacy, petitioners and their *amici* contend that the regulatory program for stratospheric ozone shows that international problems can be effectively handled with programs based, at least initially, on domestic law.[22] But petitioners fundamentally misunderstand how the stratospheric ozone program developed.

Stratospheric ozone depletion began to be recognized by the scientific community in the 1970s, after the Nobel Prize in Chemistry was awarded to three scientists who helped identify the threat that

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[20] Agreement on Air Quality, Can.-U.S., 30 I.L.M. 676 (1991).

[21] 42 U.S.C. § 7651 *et seq*.

[22] *See*, *e.g.*, M. Albright Brief at 11.

human activities posed to the ozone layer.[23] Three years later, in 1977, Congress took specific legislative action by creating a Part B-Ozone Protection program as part of the Clean Air Act's Subchapter I.[24] In enacting this new statutory scheme, Congress recognized the potential threat of ozone reductions in the stratosphere[25] and the need for "possible future regulatory action."[26] The law provided for studies, research and monitoring, and reports to Congress.[27] It also gave the President authority to undertake international agreements through the Secretary of State,[28] and delegated express authority for EPA to promulgate regulations controlling substances reasonably anticipated to affect ozone in the stratosphere.[29]

While EPA finalized regulations under the Toxics Substances Control Act (TSCA) that banned the use of chlorofluorocarbon (CFC) propellants in nonessential aerosol sprays in 1978, it took no comprehensive steps

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[23] *Stratospheric Sink for Cholorofluoromethanes: Chlorine Atom Catalyzed Destruction of Ozone*, 249 Nature 810 (1974).

[24] U.N. Environment Program, The Impact of Ozone-Layer Depletion 13 (1992).

[25] 42 U.S.C. § 7451 (pre-1990).

[26] 42 U.S.C. § 7451(a)(4) (pre-1990).

[27] 42 U.S.C. §§ 7453, 7454, & 7455 (pre-1990).

[28] 42 U.S.C. § 7456 (pre-1990).

[29] 42 U.S.C. § 7457 (pre-1990).

to address this global problem.[30] Around the same time, the United Nations formed a Coordinating Committee on the Ozone Layer.[31] But no meaningful actions occurred until 1984 when the United States began pushing for coordinated, global action.

One year later, the international community adopted the Vienna Convention For Protection of the Ozone Layer, which established a multilateral framework for addressing the issue of stratospheric ozone depletion.[32] Then, in September 1987, the United States and twenty-three other nations signed the Montreal Protocol on Substances that Deplete the Ozone Layer, agreeing to impose controls on emissions of ozone-depleting substances.[33] To comply with the Montreal Protocol, EPA promulgated regulations on December 14, 1987, and further regulations on August

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[30] Certain Fluorocarbons (Chlorofluorocarbons) in Food, Food Additives, Drug, Animal Food, Animal Drug, Cosmetic, and Medical Device Products as Propellants in Self-Pressurized Containers, 43 Fed. Reg. 11,301, Certain Fluorocarbons (Chlorofluorocarbons) in Food, Food Additives, Drug, Animal Food, Animal Drug, Cosmetic, and Medical Device Products as Propellants in Self-Pressurized Containers (Mar. 17, 1978).

[31] Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519 (1991).

[32] Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1529 (entered into force Sept. 22, 1988).

[33] S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 3, 26 I.L.M. 1550 (1987) (entered into force Jan. 1, 1989).

12, 1988.[34] On May 2, 1989, the First Meeting of the Parties to the Montreal Protocol was held in Helsinki,[35] which led to an agreement to phase out ozone depleting substances. By August 1990, sixty-three countries representing over ninety percent of the consumption of substances controlled by the Protocol had ratified the agreement. Finally, on November 15, 1990, the United States added subchapter VI to the Clean Air Act — Stratospheric Ozone Protection.[36] This subchapter regulated specified ozone-depleting substances in order to satisfy the United States' obligations under the Montreal Protocol.[37]

In short, contrary to the suggestions of petitioners and their *amici*,[38] the successful effort to limit the release of ozone-depleting substances started by building an international program that was then supplemented by granting EPA express authority in the 1990 Amendments to the Clean Air Act.

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[34] Protection of Stratospheric Ozone, 52 Fed. Reg. 47,489 (Dec. 14, 1987); Protection of Stratospheric Ozone, 53 Fed. Reg. 30,566 (Aug. 12, 1988).

[35] Helsinki Declaration on the Protection of the Ozone Layer, May 2, 1989, 28 I.L.M. 1335 (1989); *see also* London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, 30 I.L.M. 537 (1991) (multilateral agreement to accelerate the phase-out of ozone depleting substances).

[36] Pub. L. No. 101-549, Title VI, 104 Stat. 2399 (Nov. 15, 1990).

[37] *See*, *e.g.*, 42 U.S.C. § 7671n.

[38] *See*, *e.g.*, Pet. Br. at 27; M. Albright Br. at 11.

Notwithstanding broad scientific consensus on the problems of ozone depletion, EPA did not assume that it already had authority to address the issue under the Clean Air Act. Congress ultimately granted the Agency such authority, but only after the United States had coordinated a global response to the problem of ozone depletion. Moreover, the specific authority and direction established in Title VI of the Clean Air Act was based on and crafted to comply with the obligations the United States had negotiated and undertaken in the Montreal Accord.

C. Congress Has Repeatedly Declined To Impose Mandatory Restrictions On Greenhouse Gas Emissions In The Absence Of An Acceptable International Regime.

Congress has never given EPA specific authority to regulate greenhouse gases. Because the President and Congress have sought to develop an international framework for addressing the issue of global climate change, Congress has consistently declined to adopt proposals requiring or even authorizing mandatory controls on greenhouse gas emissions. The large number of bills that Congress has considered and rejected, including bills that would have specifically delegated authority to EPA to regulate greenhouse gas emissions, provide strong evidence that EPA does not already have authority under the Clean Air Act to regulate greenhouse gas emissions for purposes of addressing global climate change.

In the 105th Congress (1997-1998) seven bills dealing with climate change were introduced; in the 106th Congress (1999-2000) twenty-five bills were introduced. In the 107th Congress (2001-2002) the number increased to eighty, and in the 108th Congress (2003-2004), the number reached nearly one hundred.[39] In the 109th Congress (2005-2006), as of August 2005, fifty-nine bills, resolutions, and amendments addressing global climate change and greenhouse gas emissions had been introduced.[40] Congress's failure to act on these many legislative proposals shows that, although Congress favors voluntary reductions in greenhouse gases and further research, it is not willing to adopt more comprehensive programs that impose mandatory, enforceable requirements, absent a coordinated international response.

For example, President George W. Bush announced his Clear Skies Initiative on February 14, 2002, which included a plan to reduce the greenhouse gases emitted per dollar of gross domestic product eighteen percent by 2012. The bill also proposed reductions in nitrogen oxides, sulfur, and mercury from most fossil-fueled electric power generators, but did not include

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[39] Legislation in the 108th Congress Related to Global Climate Change, available at http://www.pewclimate.org/what_s.being_done/in_the_congress//108th.cfm (last visited Oct. 18, 2006).

[40] *Id*. at 109th.

mandatory controls on carbon dioxide emissions.[41] The proposed legislation was never approved.[42] Similarly, in 2003, Senators Joseph Lieberman and John McCain introduced the well-publicized Climate Stewardship Act, which sought to reduce carbon dioxide emissions to 2000 levels by 2010 through a cap on emissions and an emissions credit trading program.[43] The bill was not approved, and on May 26, 2005, a modified version of the bill, known as the Climate Steward and Innovation Act, was introduced. The bill proposed giving EPA express authority to promulgate regulatory programs that would control greenhouse gas emissions from the

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[41] Remarks by President George W. Bush on Climate Change and Clean Air Act at National Oceanic and Atmospheric Administration, Feb. 14, 2002, Daily Env't Rep. (BNA), Feb. 15, 2002,, at E-1.

[42] *See* Steve Cook, *Bush Promotes Administration's Air Policies, Urges Congress to Approve Clean Skies Bill*, 34 Env't Rep. (BNA) 2062 (Sept. 19, 2003); *Senate GOP Signals Death of Clear Skies After Committee Deadlock*, XXII ENVTL POL'Y ALERT (Inside EPA) 6:10 (Mar. 16, 2005).

[43] A companion bill was introduced in the House by Representatives Wayne Gilchrist (R-Md.) and John Oliver (D-Mass.). *See* Pamela Najor, *Bills Reintroduced in Senate, House to Cut U.S. Emissions of Greenhouse Gases by 2010*, 36 Env't Rep. (BNA) 321 (Feb. 18, 2005).

transportation, industrial, and commercial sectors.[44] It was voted down in a 60 to 38 vote.[45]

Rather than requiring mandatory emissions reductions, Congress has recognized the potential burdens that such mandates might impose on the United States' economy. On May 18, 2005, for example, the Senate Energy and Natural Resources Committee voted *against* increasing fuel-economy standards (which would have decreased carbon dioxide emissions) for SUVs and light trucks in an energy bill.[46] The recent Energy Policy Act of 2005 likewise did not include any provision directly regulating carbon emissions.[47] To the contrary, although the Act provides incentives to encourage the development of nuclear and renewable energy, it provides substantially more

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[44] Pamela Najor, *Incentives to Push Technology Added to Bill by McCain, Lieberman on Greenhouse Gases*, 36 Env't Rep. (BNA) 1118 (Jun 3, 2005).

[45] In the 108th Congress, bills providing for carbon dioxide controls were introduced by Senator Jeffords (S. 366), Senator Carper (S. 843), Congressman Waxman (H.R. 2042) and Congressman Bass (H.R. 3093). Congress took no action on any of these legislative proposals.

[46] Lynn Garner, *Senate Committee Defeats Efforts to Close SUV "Loophole," Boosts Clean Coal Funding*, 36 Env't Rep. (BNA) 1043 (May 20, 2005); *see also* Safe, Accountable, Flexible and Efficient Transportation Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005).

[47] Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005).

money to expand the use of carbon-based fuels, which are the major source of carbon dioxide emissions.

II. EPA's Administrator Appropriately Considered Foreign Policy Issues When Denying The Petition For Rulemaking.

Petitioners and their amici contend that foreign policy considerations should play no role in EPA's decision not to regulate greenhouse gases under the Clean Air Act. But this narrow view of EPA's regulatory prerogatives cannot be squared with the Clean Air Act or the history of regulation.

A. Congress Has Never Granted EPA Authority To Regulate Greenhouse Gases For Purposes Of Affecting The Global Climate.

Petitioners and their *amici* argue that EPA's Administrator should not have considered United States' foreign policy when denying the petition for rulemaking. They complain that EPA lacks the "expertise necessary to make foreign policy judgments" and that EPA's "judgment was not produced through consultation with expert foreign policy agencies."[48] But the Clean Air Act does not mandate that EPA regulate

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[48] M. Albright Brief at 3. There is no basis in the record for this statement. The Administrator of the EPA played a major role with the Department of State in developing our foreign policy on climate change. *See*, *e.g.*, U.S. Won't Follow Climate Treaty Provisions, Whitman Says, N.Y. TIMES, A19 (Mar. 28, 2001). Cited in M. Albright Br. at 14, fn. 12.

in a manner that requires it to be oblivious to world events. Nor can this head-in-the-sand approach be reconciled with settled administrative practice.[49]

As part of the unitary Executive, federal agencies are expected to take into account the President's foreign policy objectives. As commentators have recognized, the President's "wide-ranging powers to supervise and guide" the activities of administrative agencies, are intended to assure that those activities are coordinated within the Executive Branch and support national policies, including foreign policy.[50]

Perhaps recognizing that there is nothing inherently wrong with EPA's consideration of the President's foreign policy objectives, petitioners and their *amici* assert that EPA may not use foreign policy to ignore the mandates of the Clean Air Act.[51] But that is not what EPA has done. The EPA Administrator's reference to

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[49] *Cf.* 5 U.S.C. § 553(a)(1) (requiring agencies to engage in notice and comment rulemaking, "except to the extent that there is involved a military or foreign affairs function of the United States"); *see also International Brotherhood of Teamsters v. Pena*, 17 F.3d 1378 (D.C. Cir. 1994) (upholding U.S. Department of Transportation rule exempting Mexican Truckers from complying with U.S. motor vehicle laws under a Memorandum of Understanding with the Mexican government).

[50] Geoffrey P. Miller, *The Unitary Executive In a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 Cardozo L. Rev. 201, 201 (1993)

[51] *See* M. Albright Brief at 16-19 (arguing that EPA may not use "a foreign policy trump to avoid domestic regulation").

foreign policy concerns merely supports her "judgment" that EPA lacks authority to regulate domestic greenhouse gas emissions, and even if Congress had vested EPA with such authority, exercise of that authority would be inappropriate, and in the absence of any effective international regime would not address any dangers those emissions pose. The Administrator did not claim that foreign policy concerns allowed EPA to ignore the statutory directives of the Clean Air Act; instead, she cited those concerns, among others, in order to ascertain and fulfill those directives.

In any event, the Clean Air Act contains no indication that Congress granted EPA authority to regulate greenhouse gas emissions, much less that Congress intended to cabin the agency's discretion by severely restricting the factors that EPA may consider in determining whether to regulate.[52] Congress's failure to grant EPA express authority in this area is telling because Congress has enacted specific legislation to mandate control of long-distance transport of sulfur and nitrogen compounds,[53] to

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[52] *See* M. Albright Brief at 14 n.11 (quoting Text of a Letter from President George W. Bush, Mar. 13, 2001, *available at* http://www.whitehouse.gov /news/releases/2001/03/20010314.html (recognizing that "carbon dioxide … is *not* a 'pollutant' under the Clean Air Act") (emphasis added).

[53] Clean Air Act, subchapter IV, 42 U.S.C. §§ 7401-7416.

protect visibility,[54] and to phase-out ozone depleting substances.[55] Each of these ecosystem protection programs has specific and detailed statutory authorization. In contrast to these express statutory authorizations, there is no provision that specifically grants EPA authority to regulate carbon dioxide for purposes of affecting the global climate. To the contrary, section 602(e) provides for the Administrator to determine the global warming potential of ozone depleting substances, but specifically states that the provision is not to be the basis for any additional regulation. Likewise, in section 103(g), Congress authorized basic research to develop non-regulatory strategies and technologies for a list of substances, including carbon dioxide, but took care to make clear that nothing in that subsection should be construed to authorize air pollution control requirements.

It appears, in short, that Congress has consistently supported the Executive Branch's efforts to pursue an international regime for the regulation of greenhouse gas emissions as a predicate to domestic regulation.[56]

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[54] Clean Air Act, 42 U.S.C. §§ 7491-7492.

[55] Clean Air Act, 42 U.S.C. §§ 7601-7617.

[56] *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate").

B. Because Carbon Dioxide Emissions Disperse Throughout The Earth's Atmosphere, They Are Materially Different From Most Pollutants Regulated Under The Clean Air Act.

Petitioners and their *amici* provide three examples of pollutants that over a thirty-year period have been incorporated into EPA's regulatory program under the Clean Air Act: lead, benzene, and particulates.[57] But the regulatory history of these compounds does not support the view that carbon dioxide should be regulated under section 202 of the Clean Air Act. All three substances are well known pollutants that directly injure health, have an extensive history of governmental regulation, and can be practically controlled at a local level, where most of the adverse effects occur, without the need for a coordinated international response. The success of efforts to regulate lead, benzene, and particulates in the United States does not depend on whether China, India, and other key developing countries also are regulating those substances.

Lead was known to be toxic since biblical times although it was only in the later part of the twentieth century that lead in the form of tetraethyl lead was shown to be associated with health risks. The U.S. government nonetheless did not regulate lead until 1973, when Congress determined that lead reduction in

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[57] *See* Former EPA Administrators' Brief at 8-19, 23-26.

fuel was needed to protect new emission control technologies that utilized catalytic converters.[58] EPA's regulation was based on section 211(c)(1)(B) of the Clean Air Act, which allows the Administrator to regulate a fuel or fuel additive that "will impair to a significant degree the performance of any emission control device or system ...." Additional, health-based regulations concerning lead were not promulgated until nearly a year later.[59]

Petitioners' *amici* likewise seek to compare carbon dioxide emissions to benzene, characterizing EPA's decision to regulate benzene as an example of EPA making an "endangerment-type finding based on the best available science" and then issuing "implementing regulations to control various benzene sources."[60] But, here again, benzene had been recognized as a dangerous substance since at least 1900.[61] Unlike carbon dioxide, which is non-toxic in the concentrations found in the atmosphere, benzene is a human carcinogen and hazardous to human health.[62] Benzene regulation thus does not have any relevance in trying to

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[58] *Regulation of Fuels and Fuel Additives*, 38 Fed. Reg. 1254 (Jan. 10, 1973).

[59] *Regulation of Fuel and Fuel Additives: Control of Lead Additives in Gasoline*, 38 Fed. Reg. 33,734 (Dec. 6, 1973).

[60] *See* Former EPA Administrators' Brief at 18.

[61] *Id*. at 16.

[62] *Id*. at 15-17.

determine whether EPA has authority to regulate carbon dioxide under the Clean Air Act.

Finally, petitioners' *amici* attempt to compare carbon dioxide emissions to EPA's regulation of particulate matter,[63] but their analysis is again flawed and irrelevant. Particulate matter has been regulated as a well-recognized "air pollutant" in many large cities in the eastern United States since the 1880s.[64] When the federal government entered the air pollution control field, the Air Quality Act of 1967 required States to set ambient air quality standards based on federal criteria,[65] and particulates were among the criteria pollutants to be regulated.[66] The regulation of particulates by the federal government thus predates the creation of EPA in 1970. In 1970, the Clean Air Act as amended gave the Administrator authority to promulgate air quality standards that had previously been exercised by the States.[67] Air quality standards controlling particulate matter were first promulgated by EPA in 1971, and further revisions to EPA's

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[63] *Id*. at 23.

[64] Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 HOUSTON L. REV. 679, 684 (1999).

[65] *Id*. at 700; *see also* Pub. L. No. 90-148, 81 Stat. 485 (1967).

[66] The author of this brief personally participated in the setting of these standards.

[67] Pub. L. No. 91-604 § 109, 84 Stat. 1679 (Dec. 31, 1970).

regulations were made in 1987 and in 1997.[68] Unlike carbon dioxide, particulate matter has thus been regulated for as long as the federal government has participated in the air pollution control effort.

Since the Clean Air Act amendments of 1970, there has been one program that has successfully addressed a threat to the global ecosystem. The release of ozone-depleting substances threatened the integrity of the earth's protective ozone layer, but the approach used by the legal system to address ozone-layer depletion differs significantly from the treatment of carbon dioxide advocated by petitioners.

The ozone depletion control program resulted in a comprehensive legislative effort dealing with all significant ozone depleting substances including chlorofluorocarbons, halons, carbon tetrachloride, methyl chloroform, and methyl bromide.[69] The program also regulates nearly all significant producers of ozone depleting gases. In contrast, the petitioners seek to regulate only motor vehicles sold in the United States, focusing on carbon dioxide.

Another component of a successful program is the availability of an appropriate technological solution.

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[68] Revisions to the National Ambient Air Quality Standards For Particulate Matter, 52 Fed. Reg. 24,663 (July 1, 1987); National Ambient Air Quality Standards For Particulate Matter, 62 Fed. Reg. 38,711 (July 18, 1997).

[69] Clean Air Act §§ 602 (b), 604(h), 42 U.S.C. §§ 7671a(b), 7671C(e)

The ozone-depletion program was enacted after a technology was developed that could substantially reduce the severity of the problem. In contrast, there is no effective technology for preventing carbon dioxide from being released from combustion. It is not possible with existing technology, or any technology expected to be developed, to achieve carbon dioxide reductions from motor vehicles without increases in fuel economy and/or controls on vehicle miles traveled. Neither of these types of controls are suitable for development or enforcement using the Clean Air Act.

Finally, the success of the ozone depletion program was due to the international cooperative efforts to phase out ozone depleting substances in contrast to the unilateral approach advocated by petitioners for the control of carbon dioxide. The threat to the global ecosystem from greenhouse gases cannot be, and was not intended by Congress to be, addressed with a piecemeal solution implemented by EPA alone. Instead, Congress and the Executive Branch have chosen to address the employment, economic competitiveness, foreign policy, and other important factors involved and to develop a "coordinated national policy."

* * * *

For nearly twenty years, the United States has engaged in extensive diplomatic efforts focused on developing a comprehensive, multilateral strategy for addressing the issue of global climate change. Those efforts as a matter of foreign policy have consistently

rejected mandatory, unilateral, domestic controls that would unduly burden the United States' economy and potentially interfere with attempts to achieve a coordinated international solution to an issue of global concern. Against this backdrop, EPA sensibly determined that Congress had not granted it never-before-recognized authority under the Clean Air Act to regulate greenhouse gases. The Agency appropriately recognized that such regulation could well interfere with the United States' broader foreign policy objectives. Its decision should not be disturbed.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted,

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