ORAL ARGUMENT SCHEDULED FOR APRIL 8, 2005

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1361
(and consolidated cases)

COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action of the U.S. Environmental Protection Agency

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Petitioners,	)	
v.	)	**No. 03-1361 and consolidated cases**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to Circuit Rule 28(a)(1) on behalf of Industry Intervenor-Respondents (the Vehicle Intervenor Coalition (consisting of the Alliance of Automobile Manufacturers, the Engine Manufacturers Association, the National Automobile Dealers Association, and the Truck Manufacturers Association), the CO_2 Litigation Group, and the Utility Air Regulatory Group).

A. Parties and Amici[1]

Except for the Commonwealth of the Northern Mariana Islands, which is no longer a petitioner in case Nos. 03-1361 and 03-1365 pursuant to the Court's September 17, 2004, order permitting that party's withdrawal, and except for amici

[1] Rule 26.1 disclosure statements for the Industry Intervenor-Respondents joining in this Brief appear following this certificate.

for petitioners Alaska Inter-Tribal Council, Arctic Village, Village of Venetie, and Ketchican Tribal Council, all parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners.

C. Related Cases

These cases were not previously before this Court or any other court. There are no related cases currently pending in this Court or in any other court of which undersigned counsel are aware.

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Dated: November 2, 2004

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief.

CAA	Clean Air Act
CAAA	Clean Air Act Amendments
CAFE	Corporate average fuel economy
CEQ	Council on Environmental Quality
CO_2	Carbon dioxide
DOT	United States Department of Transportation
EPA	United States Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
FDA	United States Food and Drug Administration
FDCA	Food, Drug, and Cosmetic Act
GHG	Greenhouse gas
JA	Joint Appendix
mpg	Miles-per-gallon
MY	Model year
NAAQS	National ambient air quality standards
NHTSA	National Highway Traffic Safety Administration
NMHC	Non-methane hydrocarbons

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JOINT BRIEF OF INDUSTRY INTERVENOR-RESPONDENTS

STATUTES AND REGULATIONS

Statutes and other legal authorities are in the EPA Brief's addendum.

SUMMARY OF ARGUMENT

Petitioners claim a few isolated words in the Clean Air Act ("CAA")[1] require a massive regulatory program for greenhouse gases ("GHGs") to address global climate change, a program that Congress never mentioned. Applying traditional tools of statutory construction, as required by *Chevron* "step 1," the CAA's language, context, and legislative history show that Congress never authorized such a program. Indeed, Congress declined to enact proposed legislation to authorize limitations on tailpipe emissions such as Petitioners seek. Moreover, Petitioners' statutory construction would conflict with Congress's existing automotive fuel economy program.

ARGUMENT

I. EPA's Determination that the CAA Does Not Authorize GHG Emission Regulation for Global Climate Change Purposes Should Be Upheld Under *Chevron* Step 1.

Under "step 1" of *Chevron v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984), this Court should affirm EPA's denial of the petition to regulate GHG emissions under CAA §202(a)(1) because "Congress has directly spoken to the precise

[1] 42 U.S.C. §§7401, *et seq.* Hereinafter, CAA citations are to the statute; the Table of Authorities contains parallel U.S. Code citations.

question at issue," and "that is the end of the matter." As EPA explained in its denial, 68 Fed. Reg. 52922 [JA__], Congress spoke to the precise issue here—whether the CAA authorizes GHG emission limits for global climate change purposes—by withholding that authority.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000), restates and applies *Chevron*'s directive to "employ[] traditional tools of statutory construction" to determine whether Congress has directly spoken to the question at issue. *See Brown v. Gardner*, 513 U.S. 115, 120 (1994). Those tools include a statute's text, its overall structure, and legislative history. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 466 (2001); *Train v. Colorado PIRG*, 426 U.S. 1, 10 (1976)("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.")(quotations omitted); *Office of Communication v. FCC*, 327 F.3d 1222, 1224 (D.C. Cir. 2003). Thus, when Petitioners criticize EPA for considering other provisions of the CAA, other statutes, and failure of proposed legislation, they ignore *Brown & Williamson* and *Chevron*. Pet. Br. 17.

Brown & Williamson held, under *Chevron* step 1, that the Food, Drug, and Cosmetic Act ("FDCA") did not authorize FDA to regulate tobacco products—even though they facially fell within the FDCA's definitions of "drugs" and

"devices." 529 U.S. at 132-61. Reviewing the FDCA's language, structure, and history and other federal legislation and congressional action regarding tobacco regulation, the Court held Congress had spoken directly to the issue by enacting several statutes addressing tobacco while aware of its health hazards and "persistently act[ing] to preclude a meaningful role for any…agency in making policy on the subject…." *Id.* at 155-56 (emphasis omitted). The Court also held that regulatory authority over tobacco under the FDCA would be incompatible with that statute's "overall regulatory scheme," *id.* at 126; "that Congress could not have intended to delegate a decision of such economic and political significance…in so cryptic a fashion," *id.* at 160; and that "no matter how important, conspicuous, and controversial the issue,…an…agency's power to regulate…must always be grounded in a valid grant of authority from Congress," *id.* at 161 (quotation omitted).

Here, guided by *Chevron* step 1 and *Brown & Williamson*, EPA used traditional tools to construe the CAA: its structure, legislative history, and congressional action (including decisions not to enact legislation). EPA also properly considered the economic, social, and foreign policy ramifications of any determination that the CAA authorized GHG emission regulation for global climate change purposes. Given "the absence of any direct or even indirect indication of congressional intent to provide such authority," EPA properly

concluded "the CAA cannot be interpreted to authorize such regulation." 68 Fed. Reg. 52928 [JA__].[2]

II. EPA's Conclusion Is Supported by the Structure of CAA Title II and Congress's Rejection of Global Climate Change Regulation in 1990.

Application of traditional tools of statutory construction to the CAA, including Title II's mobile source provisions, refutes Petitioners' interpretation. Petitioners here seek to add to the CAA what Congress chose not to enact in 1990—regulation of GHGs, including carbon dioxide ("CO_2") from motor vehicles under CAA Title II. *See* EPA Br. 5, 48-50. When it regulates an air pollutant under §202, Congress itself typically specifies the pollutant and often sets the required numeric standard or percentage reduction. *See, e.g.*, CAA §202(g)(1), (2)(standards for model year ("MY") 1994 and later light-duty vehicles). Little remains for EPA's discretion.

The 1990 Clean Air Act Amendments' ("CAAA") new §202(i) mandated a study and consideration of whether "further reductions in [non-methane hydrocarbons ("NMHC"),[3] nitrogen oxides, and carbon monoxide] emissions from

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[2] Many Industry Intervenor-Respondents filed comments on the rulemaking petition supporting the legal conclusions EPA ultimately reached. [JA__, __, __, __, __, __, __].

[3] Title II specifies emission standards for NMHCs. *See, e.g.*, CAA §202(g)(1). If Congress had meant EPA to include automotive methane emissions, as Petitioners suggest, it would not have excluded methane from "hydrocarbons."

[2004MY] light-duty vehicles and…trucks should be required." The study's primary focus was national ambient air quality standards ("NAAQS") attainment and technological availability. *Id.* §202(i)(2)(A). Presumptive emission limits for each targeted pollutant were set forth, *id.* §202(i)(1), and EPA was instructed to make findings as to need, technology and feasibility and to adopt (or not) either the presumptive standards or alternative ones, *id.* §202(i)(3). *See also id*. §202(j). The explicitness of §202(i), in contrast to the silence on CO_2, indicates that Congress did not intend EPA to regulate tailpipe CO_2 emissions.[4]

During debate on S.1630, the Environment and Public Works Committee's 1990 CAAA bill, the Senate dropped a provision that would have required automotive CO_2 emission limits. *See* S.1630, 101st Cong. §206 (1989) [JA___] (proposing a new CAA §216). That provision was deleted in a substitute amendment to S.1630. *See A Legis. Hist. of the CAAA of 1990*, S. Prt. No. 103-38, at 5178, 7248 (1993) [JA___]("1990 Legis. Hist.").

Petitioners invoke *United States v. Craft*, 535 U.S. 274 (2002), to argue proposed §216's removal means nothing, that "[o]ne can just as easily infer" that Congress believed EPA already had authority to regulate CO_2. Pet. Br. 31-32. *Craft* involved a rejected proposal that would have permitted tax liens on certain

[4] Also, had Congress intended to make regulation under §202(a) "nondiscretionary," as Petitioners claim, it would have said so there, as it did in §202(i)(3)(D).

property. In nevertheless upholding such a lien, the Court noted that failure of a measure could support several reasonable inferences, including that existing legislation already incorporated the offered change. *Craft*, 535 U.S. at 287. Petitioners here fail to mention that *Craft* actually examined legislative history showing that Congress rejected the failed tax measure as unnecessary. The House saw the measure as "nothing more than a 'clarification' of existing law," and the Senate viewed it as "'superfluous.'" *Id.* (citation omitted).

In contrast, far from suggesting that Congress viewed the proposed §216 as superfluous, Senator Chafee, the proposal's main sponsor, reported "a compromise" in which he "gave up" §216's CO_2 emission limits, 1990 Legis. Hist. 5189-90 [JA___], and co-sponsor Senator Lieberman rued "elimination" of the tailpipe CO_2 standard with no substitute measure, *id*. 5410 [JA___]. Other 1990 CAAA history also shows Congress's belief that EPA had no pre-existing authority to regulate automotive GHG emissions. Senators intimately involved with the legislation declared:

> <u>*Senator Gore*</u> (regarding his amendment, later rejected in conference, on CO_2 effects of transportation projects): "[T]o me it is unimaginable that this body would take up a Clean Air Act and revisit this question [of global warming] as extensively as we are doing without grappling at least in some way with the problem of CO_2 emissions." *Id.* 5488-89 [JA___].
>
> ....

"[L]et us begin in a small way to prepare the ground in this bill for a measure we hope will come later this year that will allow us to begin taking the steps necessary to deal with this problem of CO_2." *Id.* 5491 [JA___].

Senator Baucus (the CAAA bill's floor manager): "Any amendment" to require CO_2 standards for "tailpipe emissions…would be a deal-breaker," but the Gore transportation planning amendment would be "a good start" to address "global warming," and "[w]e must start somewhere, and this is a good beginning." *Id.* 5492 [JA___].

There would have been no need to "start somewhere" if EPA already had the power Petitioners assert.

Equally instructive is Senator Bryan's withdrawn 1990 proposal to increase automobile fuel efficiency standards, a *de facto* regulation of CO_2 emissions. *See id.* 5548-50 [JA___]. The proposal declared current fuel economy standards inadequate to address CO_2 emissions' effect on global warming. *Id.* 5548-49 [JA___]. During floor debate, Senator Lieberman lauded Senator Bryan's amendment as "a first step for the United States" to address "global climate change." *Id.* 5570 [JA___]. Senator Baucus added that CO_2 "is the most potent greenhouse gas that this country emits, and therefore we must begin to control it." *Id.* 5566 [JA___]. Senator Levin opposed the measure because "[t]he issue of [CO_2] emissions from automobiles is appropriately addressed in the context of a comprehensive global warming bill" where "all sources of [CO_2] emissions can be considered." *Id.* 5562 [JA___]. Senator Bryan withdrew his proposal with the leadership's assurance that a "comprehensive global warming bill" would be

presented later. *Id*. 5559, 5572 [JA__, __]. These statements regarding another dropped CO_2 control measure belie Petitioners' claim that Congress had already given EPA Title II CO_2 regulatory authority.

Petitioners can cite no evidence that Congress rejected the proposed limitations on CO_2 tailpipe emissions because it thought them superfluous. The legislative history above compels the opposite conclusion. *See Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 705-06 (D.C. Cir. 1971)(using rejected amendments to reveal legislative intent).

III. CAA Provisions that Define "Air Pollutant" and List "Effects on Welfare" Do Not Authorize GHG Emission Regulation for Global Climate Change Purposes.

Based on their view of CAA provisions that define "air pollutant" and list "effects on welfare," Petitioners argue that the CAA authorizes a sweeping global climate change regulatory program. Petitioners' claim fails when traditional tools of statutory construction are applied. As EPA recognized in its denial of the rulemaking petition, the provisions Petitioners cite may not be construed in isolation from the broader statutory context to create regulatory authority where, as here, the overall statutory scheme and legislative history show Congress did not intend to provide such authority. *See Whitman*, 531 U.S. at 468 (Congress does not "hide elephants in mouseholes").

A. EPA Correctly Determined GHG Emissions Are Not "Air Pollutants" for Global Climate Change Purposes.

CAA §302(g) states that "'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive…substance or matter which is emitted into or otherwise enters the ambient air." Petitioners would revise §302(g) by making *any* substance or matter that enters the ambient air an "air pollutant" that potentially is subject to CAA regulation, Pet. Br. 16-19, thereby writing the qualifying words "air pollution agent" out of the statute.

Statutes must, if possible, be construed to give every word effect. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). If, as Petitioners argue, Congress intended to include within §302(g)'s scope any substance or matter that enters the ambient air, it would not have retained, when amending §302(g) in 1977 and 1990, the limiting phrase "means…air pollution agent or combination of such agents," enacted in 1970, Pub. L. No. 91-604, §15(a)(1) [JA__]. That phrase provides that an air pollutant *must be* an agent of air pollution. *See Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979)("'[a] definition which declares what a term "means" [rather than what it "includes"]…excludes any meaning that is not stated.'")(citation omitted). Moreover, if anything that merely enters the ambient air were an "air pollutant," Congress would not have needed to provide in 1990 that "air pollutant" includes any precursors to the formation of an air pollutant.

CAA §302(g); Pub. L. No. 101-549, §108(j)(2) [JA__]; Fabricant Memorandum 10-11 n.9 [JA__]. Furthermore, Petitioners' expansive reading is contradicted by Congress's inclusion, in the 1990 amendment to §302(g), of the limitation that "precursors" are air pollutants only "to the extent [EPA] has identified [them]…*for the particular purpose* for which the term 'air pollutant' is used." CAA §302(g)(emphasis added).

Petitioners' reading also ignores both the dictionary definition of "pollute" ("to make physically impure or unclean," Webster's Seventh New Collegiate Dictionary (1969)) and common sense. For example, under Petitioners' interpretation, oxygen, a pervasive and essential element of the atmosphere that also can enter into the ambient air from anthropogenic sources (*e.g.*, tree farms), as well as objects such as baseballs, would be "air pollutants" because they "enter[] the ambient air" even though they do not make the air "impure or unclean" and thus cannot be regarded as "agent[s]"— *i.e.*, causes—of air pollution. Based on its determination that GHGs do not cause "air pollution," EPA properly determined they are not "air pollutants" for global climate change purposes. 68 Fed. Reg. 52928-29 & n.3 [JA__]; *see* Fabricant Memorandum 10-11 n.9 [JA__].[5]

[5] That Congress in 1990 included CO_2 in a list of "air pollutants" in CAA §103(g), a *nonregulatory* provision, does not support a conclusion that it is an "air pollutant" for CAA regulatory purposes. *See PDK Laboratories v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004). Nor does casually mentioning CO_2 in non-statutory (continued)

Most importantly, Petitioners ignore that the CAA is structured to address pollution in the ambient air, not global climatological phenomena. This structure is reflected both in §302(g) and in CAA operative regulatory provisions. Thus, §302(g) provides that an "air pollutant" is an air pollution agent that is emitted into or otherwise enters "the ambient air." Congress added "ambient air" to §302(g) in 1977, Pub. L. No. 95-95, §301(c) [JA__], after EPA and the Supreme Court had defined "ambient air" respectively as "that portion of the atmosphere, external to buildings, *to which the general public has access*," 40 C.F.R. §50.1(e)(promulgated at 36 Fed. Reg. 22384 (1971))(emphasis added), and "the statute's term for the outdoor air *used by the general public*," *Train v. NRDC*, 421 U.S. 60, 65 (1975)(emphasis added), as opposed to the entirety of Earth's atmosphere. By limiting "air pollutants" to air pollution agents that enter the "ambient" air, *i.e.*, air at or near ground level that people breathe, §302(g) provides no basis to regulate substances due to their presence in the upper atmosphere—a determinative fact in the global climate change context.

CO_2 "is fairly consistent in concentration throughout the *world's* atmosphere up to approximately the lower stratosphere," 68 Fed. Reg. 52927 [JA__] (emphasis in original), and it is CO_2's entry into and presence in the atmosphere, far above

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discussions of air pollution on EPA's website reflect any determination that CO_2 is an "air pollutant" for regulatory purposes.

the "ambient air," that is believed to affect global climate. *See* Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Scientific Assessment*, 49 (1990)("it is the change in the radiative flux at the [boundary between the troposphere and the stratosphere], and *not the surface*, that expresses the radiative forcing of [the] climate system")(emphasis added). Petitioners do not claim global climate change results from GHGs in the ambient air but, rather, from GHGs in the global atmosphere. Pet. Br. 5 ("build-up of heat-trapping gases *in the atmosphere* is causing…'global warming'")(emphasis added). Construing the CAA to authorize regulation of substances as "air pollutants" due to their presence in the general atmosphere is contrary to the CAA's repeated use of the qualifier "ambient air."

Operative provisions in the CAA addressing regulation of mobile and stationary source emissions reflect congressional intent to confine the scope of CAA regulatory authority to substances present in the "ambient air." The NAAQS program, the "heart" of the CAA, *Union Electric Co. v. EPA*, 427 U.S. 246, 249 (1976), applies only to air pollutants that are "present[]…*in the ambient air*"—not the global atmosphere generally—as a result of mobile or stationary sources. CAA §108(a)(1)(B); *see also* CAA §202(i)(2)(A)(directing EPA to examine the need for further motor vehicle emission reductions "to attain or maintain" NAAQS). The "criteria" on which NAAQS are based must identify "effects…from the presence

of [the] pollutant *in the ambient air*," *id.* §108(a)(2)(emphasis added); *see also id.* §109(b)(1), and secondary NAAQS must be "requisite to protect the public welfare from…adverse effects *associated with the presence of [the] air pollutant in the ambient air*"—not the atmosphere generally, *id.* §109(b)(2)(emphasis added). These provisions are incompatible with global climate change regulation under the CAA.[6] *See* EPA Br. 33-36.

Accordingly, when examined in the context of the CAA's language, structure, and history pursuant to *Chevron* step 1 and *Brown & Williamson*, §302(g) refutes Petitioners' arguments.

B. Listing "Climate" Among "Effects on Welfare" Does Not Undermine EPA's Determination.

Petitioners incorrectly argue that §302(h), which lists "climate" among "effects on welfare," creates authority to regulate "global climate" phenomena. Pet. Br. 15-16. Section 302(h), however, provides no regulatory authority; it merely describes the kinds of effects to be considered when regulatory authority

[6] In addition, other CAA provisions are incompatible with such regulation. For example, neither CAA §165(a)(7)(requiring new facilities to monitor their emissions' effects "on air quality in any area which may be affected by [those] emissions") nor CAA §123 (permitting emission limitations to vary with stack height, which affects ambient air concentrations, not global atmosphere) makes sense in the context of averting global climate effects. Here, EPA properly rejected Petitioners' interpretation, which would produce unreasonable results in conflict with such provisions. *Cf. American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *see also* EPA Br. 33-36.

otherwise exists under the CAA's operative provisions. Moreover, given §302(g)'s limitation of "air pollutant" to "air pollution agent[s]" in the "ambient air," as discussed above, the §302(h)'s listing of "climate" cannot reasonably be construed to encompass global climate phenomena associated with the presence of GHGs *outside* the ambient air.

In any event, "climate" implies nothing beyond the common definition—average weather in a particular geographic area—not "global climate" as Petitioners claim. "Climate" is "the average course or condition of the weather *at a place* over a period of years as exhibited by temperature, wind velocity, and precipitation." Webster's Seventh New Collegiate Dictionary (1969)(emphasis added). Congress presumably knew of this commonplace definition when it added "climate."

Finally, there is no legislative history supporting Petitioners' claim that Congress in 1970 added "climate" to §302(h) to authorize GHG regulation. Petitioners cite (Br. 22) a report of the Council on Environmental Quality ("CEQ"), part of which Senator Boggs inserted in the Senate debate record, as purported evidence of Congress's "awareness of…global climate change" when it added "climate." Nothing, however, connects Senator Boggs's September 1970 insertion of the CEQ report excerpt in the Senate debate with the unexplained addition of "climate" to §302(h) three months later. *See A Legislative History of*

the Clean Air Amendments of 1970, Sen. Comm. Prt. No. 93-18, at 187, 192-209 (1974) [JA__, __]. No reason exists to believe Congress had anything in mind other than the commonplace definition, and Petitioners cite no other legislative history to support their argument. *See* EPA Br. 39-41.

IV. Regulation of Vehicular CO_2 under the CAA Would Eviscerate EPCA.

EPA regulation of vehicular CO_2 emissions would conflict with Title V of the Energy Policy and Conservation Act ("EPCA"), *codified at* 49 U.S.C. §§32901-32919. The program Congress created for fuel economy regulation shows it never intended motor vehicle CO_2 emissions to be regulated under the CAA. *Cf. Brown & Williamson*, 529 U.S. at 133, 143-56 (relying on other statutes to discern legislative intent). Such regulation of vehicular CO_2 would irreconcilably conflict with the more recent, more specific prescriptions of EPCA. Traditional canons of statutory construction require EPCA to control.

Senator Chafee noted during the 1990 CAAA debate that the only way to reduce automobiles' CO_2 emissions "is to increase the miles that a car travels per gallon." 1990 Legis. Hist. 5493 [JA__]; *accord* 68 Fed. Reg. 52929 [JA__]. Any CO_2 tailpipe limit set by EPA would thus amount to a new fuel economy standard. But only Congress, and by delegation, NHTSA have authority to set corporate average fuel economy ("CAFE") standards under EPCA's distinct statutory formula. Enacted in 1975, EPCA balances fuel economy with myriad competing

interests: jobs, safety, consumer choice, and technological feasibility. *See* 49 U.S.C. §32902(f). The House Report cautioned:

> [T]he Committee recognizes that the automobile industry has a central role in our national economy and that any regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens on it or unduly limiting consumer choice as to capacity and performance of motor vehicles.

H.R. Rep. No. 94-340, at 87 (1975) [JA__]; *see Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 120-22 (D.C. Cir. 1990)(noting EPCA balance).

Congress intended to keep oversight of this balancing such that changes outside a narrow range might be congressionally reviewed. 49 U.S.C. §32902(c)(2).[7] Congress itself pegged the CAFE standard for passenger vehicles at 27.5 miles-per-gallon ("mpg"), *id.* §32902(b), and for several years prohibited NHTSA from tightening it, *see, e.g.,* Pub. L. No. 106-69, §321 (1999) [JA__].

The *only* regulatory role delegated to EPA in the CAFE program is prescribing test procedures. *See* 49 U.S.C. §32904(a), (c). Those test methods reflect the direct nexus between CO_2 emissions and CAFE standards: EPA's method measures tailpipe CO_2 and converts those readings to mpg to determine compliance with NHTSA's CAFE standards. *See* 40 C.F.R. §600.113-93(d),

[7] *INS v. Chadha*, 462 U.S. 919 (1983), overturned such a one-House review method.

(e)(2003). If EPA were to set CO_2 limits pursuant to the CAA, then limits that could be met with fuel economy less stringent than EPCA's standards would be nugatory; if EPA's CO_2 limits were more stringent, they would usurp the CAFE standards and NHTSA's EPCA authority.

Even if it were true that the 1970 CAA had authorized EPA to limit automotive CO_2 emissions, as Petitioners contend, that authority would be irreconcilable with EPCA and would have to yield to the later, more specific statute. Petitioners correctly note the Court's duty to strive to reconcile apparently conflicting statutes and give full effect to both. Pet. Br. 39; *e.g., Auction Co. of America v. FDIC*, 132 F.3d 746, 753 (D.C. Cir. 1997). In cases of "irreconcilable conflict," *e.g.*, *Donaldson v. United States*, 653 F.2d 414, 418 (9th Cir. 1981), or when both cannot have "full literal effect," *e.g.*, *Local 1814, Int'l Longshoremen's Ass'n v. New York Shipping Ass'n*, 965 F.2d 1224, 1237 (2d Cir. 1992), courts find implied repeal or give the "'more specific statute…precedence over a more general one,'" *see, e.g.*, *Telecommunications Research & Action Ctr. v. FCC*, 836 F.2d 1349, 1361 n.25 (D.C. Cir. 1988)(quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)). Irreconcilable conflict here is avoided only by concluding that §202(a) does not authorize tailpipe CO_2 limits for global climate change purposes.

Congress's delicate CAFE balance would be nullified by EPA CO_2 limits under §202(a). First, EPA could force manufacturers to comply with stringent

CO_2/fuel economy standards, without considering safety, consumer choice, employment issues, or the effect of other vehicle standards. *Cf. Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992)(remanding CAFE standard because NHTSA did not explain how it balanced safety). Second, Congress completely preempted state regulation in EPCA. *See* 49 U.S.C. §32919; *Central Valley Chrysler-Plymouth v. California Air Resources Bd.*, No. CV-F-02-5017 REC/SMS, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal. June 11, 2002)(enjoining California zero-emission-vehicle rule). In contrast, CAA preemption is not absolute; the CAA allows California to seek a waiver for separate vehicle emission standards that other states can copy. *See* CAA §§209(b), 177. It is inconceivable that Congress would have tolerated even the possibility that California and other states might use the CAA to circumvent express preemption of fuel economy and override EPCA's preemptive CAFE standards.

Petitioners try to obscure the CAA-EPCA conflict inherent in their interpretation. They claim that CAA regulation of CO_2 tailpipe emissions comports with EPCA standards because both set minima that manufacturers would be free to exceed. Pet. Br. 41. But EPCA's plain language directs NHTSA to adopt the "*maximum feasible* average fuel economy level," balancing the factors discussed above, 49 U.S.C. §32902(a), (c), (f)(emphasis added). Thus, any EPA

CO_2 limit more demanding than CAFE would exceed EPCA's "maximum feasible…level."

Petitioners also summon inapt 1977 CAAA legislative history to explain away the conflict. Since Congress was aware that emissions limits it set in 1977 could affect fuel economy and did nothing to limit CO_2 authority it had purportedly given EPA in 1970, Petitioners bootstrap the argument that such authority was unaffected. However, even the passages they cite show Congress's concern that the 1977 CAAA's tighter non-GHG emission standards would impair fuel efficiency and, thus, the 1978MY fleet's ability to meet the initial CAFE standards. *See* H.R. Rep. No. 95-294, at 244-51 (1976) [JA__]. Senator Muskie noted that the 1977 Senate bill "represents a modest extension of time for the auto industry to bring emission control technology into conformity with fuel economy," not the other way around. *A Legislative History of the CAAA of 1977*, Sen. Comm. Prt. No. 95-16, at 741 (1978) [JA__]. Thus, the only relationship between CAFE standards and emission limits that Congress perceived in 1977 was that strict tailpipe standards could reduce fuel efficiency. Nothing suggests Congress considered, much less resolved, the irreconcilable CAA-EPCA conflict that would arise from §202(a) CO_2 tailpipe emission limits. It did not need to do so because no such CAA authority existed.

Congress would be stymied and its fuel economy program nullified if EPA and California could set tailpipe CO_2 limits under CAA §202(a). EPCA gave NHTSA exclusive authority to adjust fuel economy standards. Petitioners grasp at general CAA provisions that are silent on CO_2 limits. That silence contrasts starkly with EPCA's specific requirements. If there were a conflict, rules of statutory construction would dictate that EPCA, as the more recent and specific statute, be given its "full literal effect."

CONCLUSION

The Court should uphold EPA's denial of the rulemaking petition.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(a)(3)(C), that the foregoing Joint Brief of Industry Intervenor-Respondents contains 4,366 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 4,375-word limit set by the Court.

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I hereby certify that on this 2nd day of November, 2004, two copies of the foregoing Joint Brief of Industry Intervenor-Respondents was served by first-class mail, postage prepaid, on each of the following counsel. I further certify that additional copies were served electronically, pursuant to the agreement among the parties.

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