Nothing in the law prevents the FDA from changing its policy for such reasons. By the mid-1990's, the evidence needed to prove objective intent — even without an express claim — had been found. The emerging scientific consensus about tobacco's adverse, chemically induced, health effects may have convinced the agency that it should spend its resources on this important regulatory effort. As for the change of administrations, I agree with then-Justice Rehnquist's statement in a different case, where he wrote:

> The agency's changed view . . . seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 59, (concurring in part and dissenting in part).

[O]ne might claim that courts, when interpreting statutes, should assume in close cases that a decision with "enormous social consequences," 1994 Hearings 69, should be made by democratically elected Members of Congress rather than by unelected agency administrators. If there is such a background cannon of interpretation, however, I do not believe it controls the outcome here.

Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken there, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable. Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude — one that is important, conspicuous, and controversial — can escape the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision. . . .

Consequently, I dissent.

Massachusetts v. EPA[11]

549 U.S. 497 (2007)

[In October 1999, a group of private organizations petitioned the Environmental Protection Agency (EPA) to regulate the emissions of four greenhouse gases (GHGs), including carbon dioxide, under §202(a)(1) of the Clean Air Act, 42 U.S.C. §7521(a)(1). That section provides that the

11. *Massachusetts v. EPA* is an extremely rich case that raises issues treated in many different sections of the casebook. We present most of the decision (in an edited version, of course) here, for the sake of coherence and completeness. However, several portions of the opinions are relevant only to later portions of the casebook. At this point, you should focus on the introductory material, Parts I and VI of the majority's opinion, and Part II of Justice Scalia's dissent. Other portions of the opinions will be referenced in Section E of this chapter (arbitrary and capricious review) and Section C.4.c of Chapter 7 (review of inaction), and the opinions dealing with standing are reproduced in Section D of Chapter 7.

administrator of the EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA administrator's] judgment causes, or contributes to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare." The act defines "air pollutant" to include "any air pollution agent . . . , including any physical, chemical . . . substance . . . emitted into . . . the ambient air." 42 U.S.C. §7602(g). The rulemaking petition argued that EPA's own statements indicated that the statutory standard had been met — that in the administrator's judgment GHG emissions from new motor vehicles did cause air pollution reasonably anticipated to endanger public health or welfare — and that therefore the administrator had a duty to promulgate standards limiting those emissions.

[In August 2003, after taking public comments, EPA denied the petition. Its reasons for doing so were numerous. One set of conclusions were legal in nature. First, EPA found that the Clean Air Act does not authorize it to issue mandatory regulations to address global climate change. EPA general counsels had taken conflicting positions on whether carbon dioxide was an "air pollutant" under the act; with the more recent opinion concluding that it did not. Although the actual definition of air pollutant was broad, numerous contextual clues suggested that Congress had not intended to give EPA authority to regulate CO_2: "(1) no CAA provision specifically authorizes global climate change regulation, (2) the only CAA provision specifically mentioning CO[$_2$] authorizes only 'nonregulatory' measures, (3) the codified CAA provisions related to global climate change expressly preclude the use of those provisions to authorize regulation, (4) a Senate committee proposal to include motor vehicle CO_2 standards in the 1990 CAA amendments failed, (5) Federal statutes expressly addressing global climate change do not authorize regulation, and (6) numerous congressional actions suggest that Congress has yet to decide that such regulation is warranted." The agency relied heavily on the Supreme Court's decision in *Brown & Williamson*. As in that case, there was a problem of "fit"; the regulatory approaches the Clean Air Act takes with regard to air pollutants would have been illogical and ineffective if adopted to control CO_2. And, as in that case, other legislation indicated that Congress did not understand the Clean Air Act as reaching CO_2. Noting that imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco, EPA concluded that climate change was so important and its regulation so significant that Congress would never have given it authority to regulate in this area without saying so explicitly.

[Second, EPA noted that the essential method for reducing GHG emissions from cars would have to be an improvement in fuel economy, but Congress had assigned the regulation of fuel economy (in the form of the Corporate Average Fuel Economy standards) to the Department of Transportation, implying that this was not a task Congress wanted EPA to take on.

[Third, even if the administrator found that GHG emissions from motor vehicles threatened health or welfare, that would not *require* her to issue the standards sought by the petition. "An important issue before the Administrator is whether, given motor vehicles' relative contribution to a problem, it makes sense to regulate them. In the case of some types of air pollution, motor vehicles may be one of many contributors, and it may make sense to control other contributors instead of, or in tandem with, motor vehicles. The discretionary nature of the Administrator's section 202(a)(1) authority allows her to consider these important policy issues."

[EPA's second set of conclusions were more policy-based. "EPA disagrees with the regulatory approach urged by petitioners. . . . We do not believe . . . that it would be either effective or appropriate for EPA to establish GHG standards for motor vehicles at this time. . . . [T]he President has laid out a comprehensive approach to climate change that calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and

encouraging technological development so that the government may effectively and efficiently address the climate change issue over the long term." Much of the justification for this approach lay in continuing scientific uncertainty about the nature, scope, and causes of climate change. Furthermore, any EPA regulation of motor-vehicle emissions is a piecemeal approach to climate change that would conflict with the president's comprehensive approach involving additional support for technological innovation, the creation of nonregulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change, and might hamper the president's ability to persuade key developing nations to reduce emissions. It concluded:

> In all, the President's global climate change policy sets the U.S. on a path to slow the growth of GHG emissions and, as the science justifies, to stop and then reverse that growth. This policy supports vital global climate change research and lays the groundwork for future action by investing in science, technology, and institutions. In addition, the President's policy emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change. In taking prudent environmental action at home and abroad, the U.S. is advancing a realistic and effective long-term approach to the global climate change issue.

[The petitioners, now joined by intervenor Massachusetts and other state and local governments, sought review in the U.S. Court of Appeals for the D.C. Circuit. Although each of the three judges on the D.C. Circuit panel wrote separately, two of them agreed that the EPA administrator properly exercised his discretion in denying the rulemaking petition. Judge Randolph concluded that the administrator's exercise of "judgment" as to whether a pollutant could "reasonably be anticipated to endanger public health or welfare," §7521(a)(1), included a fair amount of policymaking discretion. "In requiring the EPA Administrator to make a threshold 'judgment' about whether to regulate, §202(a)(1) gives the Administrator considerable discretion. Congress does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence. . . . In addition to the scientific uncertainty about the causal effects of greenhouse gases on the future climate of the earth, the Administrator relied upon many 'policy' considerations that, in his judgment, warranted regulatory forbearance at this time." The denial of the petition was reasonable in light of a number of factors, including scientific uncertainty, the fact that automobile emissions account for only a small portion of GHG emissions, and the concern that unilateral U.S. regulation of motor-vehicle emissions could weaken efforts to reduce other countries' greenhouse gas emissions. Accordingly, the administrator had "properly exercised his discretion."

[Judge Sentelle wrote separately, concluding that the petitioners lacked standing to sue because they had not alleged a *particularized* injury. Global warming "is harmful to humanity at large. . . . The generalized public good that petitioners seek is the thing of legislatures and presidents, not of courts." Despite this conclusion, Judge Sentelle accepted the contrary view as the law of the case and joined with Judge Randolph to deny the petitions for review.

[Judge Tatel dissented. In an opinion that in many ways is echoed by Justice Stevens's opinion for the Supreme Court, Judge Tatel argued that at least the Commonwealth of Massachusetts among the petitioners had standing, that greenhouse gasses are "air pollutants" under the Clean Air Act, and that EPA's rationale for declining to regulate was inadequate because it relied on factors that were irrelevant under the statute without making the determinations the statute actually required.]

Justice STEVENS delivered the opinion of the Court.

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species — the most important species — of a "greenhouse gas."

Calling global warming "the most pressing environmental challenge of our time," a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of §202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute. . . .

I

Section 202(a)(1) of the Clean Air Act, 42 U.S.C. §7521(a)(1), provides:

> "The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. . . ."

The Act defines "air pollutant" to include "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." §7602(g). "Welfare" is also defined broadly: among other things, it includes "effects on . . . weather . . . and climate." §7602(h).

When Congress enacted these provisions, the study of climate change was in its infancy. In 1959, shortly after the U.S. Weather Bureau began monitoring atmospheric carbon dioxide levels, an observatory in Mauna Loa, Hawaii, recorded a mean level of 316 parts per million. This was well above the highest carbon dioxide concentration — no more than 300 parts per million — revealed in the 420,000-year-old ice-core record. By the time Congress drafted §202(a)(1) in 1970, carbon dioxide levels had reached 325 parts per million.

In the late 1970's, the Federal Government began devoting serious attention to the possibility that carbon dioxide emissions associated with human activity could provoke climate change. In 1978, Congress enacted the National Climate Program Act, which required the President to establish a program to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications." President Carter, in turn, asked the National Research Council, the working arm of the National Academy of Sciences, to investigate the subject. The Council's response was unequivocal: "If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible. . . . A wait-and-see policy may mean waiting until it is too late."

Congress next addressed the issue in 1987, when it enacted the Global Climate Protection Act. Finding that "manmade pollution — the release of carbon dioxide, chlorofluorocarbons,

methane, and other trace gases into the atmosphere — may be producing a long-term and substantial increase in the average temperature on Earth," §1102(1), 101 Stat. 1408, Congress directed EPA to propose to Congress a "coordinated national policy on global climate change," §1103(b), and ordered the Secretary of State to work "through the channels of multilateral diplomacy" and coordinate diplomatic efforts to combat global warming, §1103(c). Congress emphasized that "ongoing pollution and deforestation may be contributing now to an irreversible process" and that "necessary actions must be identified and implemented in time to protect the climate." §1102(4).

[T]he United Nations convened the "Earth Summit" in 1992 in Rio de Janeiro. The first President Bush attended and signed the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of "preventing dangerous anthropogenic [i.e., human-induced] interference with the [Earth's] climate system." The Senate unanimously ratified the treaty.

Some five years later — after the IPCC issued a second comprehensive report in 1995 concluding that "the balance of evidence suggests there is a discernible human influence on global climate" — the UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol. President Clinton did not submit the protocol to the Senate for ratification. . . .

[In Part IV, Justice Stevens concluded that Massachusetts had standing to sue. Excerpts of that portion of the opinion are set out at pp. 840-41.]

V

The scope of our review of the merits of the statutory issues is narrow. As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. See *Chevron U.S.A. Inc. v. NRDC*. That discretion is at its height when the agency decides not to bring an enforcement action. Therefore, in *Heckler* v. *Chaney* we held that an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review. Some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking.

There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential."

EPA concluded in its denial of the petition for rulemaking that it lacked authority under 42 U.S.C. §7521(a)(1) to regulate new vehicle emissions because carbon dioxide is not an "air pollutant" as that term is defined in §7602. In the alternative, it concluded that even if it possessed authority, it would decline to do so because regulation would conflict with other administration priorities. As discussed earlier, the Clean Air Act expressly permits review of such an action.

§7607(b)(1). We therefore "may reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §7607(d)(9).

VI

On the merits, the first question is whether §202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a "judgment" that such emissions contribute to climate change. We have little trouble concluding that it does. In relevant part, §202(a)(1) provides that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7521(a)(1). Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an "air pollutant" within the meaning of the provision.

The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . . " §7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substances which [are] emitted into . . . the ambient air." The statute is unambiguous.

Rather than relying on statutory text, EPA invokes postenactment congressional actions and deliberations it views as tantamount to a congressional command to refrain from regulating greenhouse gas emissions. Even if such postenactment legislative history could shed light on the meaning of an otherwise-unambiguous statute, EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended §202(a)(1) in 1970 and 1977. And unlike EPA, we have no difficulty reconciling Congress' various efforts to promote interagency collaboration and research to better understand climate change with the agency's pre-existing mandate to regulate "any air pollutant" that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.

EPA's reliance on *Brown & Williamson Tobacco Corp.* is similarly misplaced. In holding that tobacco products are not "drugs" or "devices" subject to Food and Drug Administration (FDA) regulation pursuant to the Food, Drug and Cosmetic Act (FDCA), we found critical at least two considerations that have no counterpart in this case.

First, we thought it unlikely that Congress meant to ban tobacco products, which the FDCA would have required had such products been classified as "drugs" or "devices." Here, in contrast, EPA jurisdiction would lead to no such extreme measures. EPA would only *regulate* emissions, and even then, it would have to delay any action "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance," §7521(a)(2). However much a ban on tobacco products clashed with the "common sense" intuition that Congress never meant to remove those products from circulation, *Brown & Williamson*, there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter.

Second, in *Brown & Williamson* we pointed to an unbroken series of congressional enactments that made sense only if adopted "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco." We can point to no such enactments here: EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles. Even if it had, Congress could not have acted against a regulatory "backdrop" of disclaimers of regulatory authority. Prior to the order that provoked this litigation, EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it *had* such authority. There is no reason, much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute. . . .

VII

The alternative basis for EPA's decision — that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time — rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. §7521(a)(1), that judgment must relate to whether an air pollutant "causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare," *ibid.* Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. For example, EPA said that a number of voluntary executive branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions, and that curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue."

Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment. In particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws. In the Global Climate Protection Act of 1987, Congress authorized the State Department — not EPA — to formulate United States foreign policy with reference to environmental matters relating to climate. EPA has made no showing that it issued the ruling in question here after consultation with the State Department. Congress did direct EPA to consult with other agencies in the formulation of its policies and rules, but the State Department is absent from that list.

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this

time. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty — which, contrary to Justice Scalia's apparent belief, is in fact all that it said, see 68 Fed. Reg. 52929 ("We do not believe . . . that it would be either effective or appropriate for EPA *to establish [greenhouse gas] standards for motor vehicles* at this time" (emphasis added)) — is irrelevant. The statutory question is whether sufficient information exists to make an endangerment finding.

In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore "arbitrary, capricious, . . . or otherwise not in accordance with law." 42 U.S.C. §7607(d)(9)(A). We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the statute. . . .

[A dissenting opinion by the Chief Justice, arguing that the petitioners lacked standing, is excerpted at pp. 841-43.]

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, dissenting.

I

A

I am willing to assume, for the sake of argument, that the Administrator's discretion in this regard is not entirely unbounded — that if he has no reasonable basis for deferring judgment he must grasp the nettle at once. The Court, however, with no basis in text or precedent, rejects all of EPA's stated "policy judgments" as not "amounting to a reasoned justification," effectively narrowing the universe of potential reasonable bases to a single one: Judgment can be delayed *only* if the Administrator concludes that "the scientific uncertainty is [too] profound." The Administrator is precluded from concluding *for other reasons* "that it would . . . be better not to regulate at this time." Such other reasons — perfectly valid reasons — were set forth in the agency's statement . . . . When the Administrator *makes* a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." But the statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment — the permissible reasons for deciding not to grapple with the issue at the present time. Thus, the various "policy" rationales that the Court criticizes are not "divorced from the statutory text," except in the sense that the statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion. The reasons the EPA gave are surely considerations executive agencies *regularly* take into account (and *ought* to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy. There is no basis in law for the Court's imposed limitation.

EPA's interpretation of the discretion conferred by the statutory reference to "its judgment" is not only reasonable, it is the most natural reading of the text. The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron*. As the Administrator acted within the law in declining to make a "judgment" for the policy reasons above set forth, I would uphold the decision to deny the rulemaking petition on that ground alone.

B

Even on the Court's own terms, however, the same conclusion follows. As mentioned above, the Court gives EPA the option of determining that the science is too uncertain to allow it to form a "judgment" as to whether greenhouse gases endanger public welfare. Attached to this option (on what basis is unclear) is an essay requirement: "If," the Court says, "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so." But EPA *has* said precisely that — and at great length, based on information contained in a 2001 report by the National Research Council (NRC). . . .

I simply cannot conceive of what else the Court would like EPA to say.

II

A

Even before reaching its discussion of the word "judgment," the Court makes another significant error when it concludes that "§202(a)(1) of the Clean Air Act *authorizes* EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change." For such authorization, the Court relies on what it calls "the Clean Air Act's capacious definition of 'air pollutant.'"

"Air pollutant" is defined by the Act as "any air pollution agent or combination of such agents, including any physical, chemical, . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. §7602(g). The Court is correct that "carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons," fit within the second half of that definition: They are "physical, chemical, . . . substances or matter which [are] emitted into or otherwise enter the ambient air." But the Court mistakenly believes this to be the end of the analysis. In order to be an "air pollutant" under the Act's definition, the "substance or matter [being] emitted into . . . the ambient air" must also meet the *first* half of the definition — namely, it must be an "air pollution agent or combination of such agents." The Court simply pretends this half of the definition does not exist.

The word "including" can indeed indicate that what follows will be an "illustrative" sampling of the general category that precedes the word. Often, however, the examples standing alone are broader than the general category, and must be viewed as limited in light of that category. The Government provides a helpful (and unanswered) example: "The phrase 'any American automobile, including any truck or minivan,' would not naturally be construed to encompass a foreign-manufactured [truck or] minivan." The general principle enunciated — that the speaker is talking about *American* automobiles — carries forward to the illustrative examples (trucks and minivans), and limits them accordingly, even though in isolation they are broader. . . . In short, the word "including" does not require the Court's (or the petitioners') result. It is perfectly reasonable to view the definition of "air pollutant" in its entirety: An air pollutant *can* be "any physical, chemical, . . . substance or matter which is emitted into or otherwise enters the ambient air," but only if it retains the general characteristic of being an "air pollution agent or combination of such agents." This is precisely the conclusion EPA reached: "[A] substance does not meet the CAA definition of 'air pollutant' simply because it is a 'physical, chemical, . . . substance or matter which is emitted into or otherwise enters the ambient air.' It must also be an 'air

pollution agent.'" Once again, in the face of textual ambiguity, the Court's application of *Chevron* deference to EPA's interpretation of the word "including" is nowhere to be found. Evidently, the Court defers only to those reasonable interpretations that it favors.

B

Unlike "air pollutants," the term "air pollution" is not itself defined by the CAA; thus, once again we must accept EPA's interpretation of that ambiguous term, provided its interpretation is a "permissible construction of the statute." *Chevron*. In this case, the petition for rulemaking asked EPA for "regulation of [greenhouse gas] emissions from motor vehicles to reduce the risk of global climate change." Thus, in deciding whether it had authority to regulate, EPA had to determine whether the concentration of greenhouse gases assertedly responsible for "global climate change" qualifies as "air pollution." EPA began with the commonsense observation that the "problems associated with atmospheric concentrations of CO_2," bear little resemblance to what would naturally be termed "air pollution":

"EPA's prior use of the CAA's general regulatory provisions provides an important context. Since the inception of the Act, EPA has used these provisions to address air pollution problems that occur primarily at ground level or near the surface of the earth. For example, national ambient air quality standards (NAAQS) established under CAA section 109 address concentrations of substances in the ambient air and the related public health and welfare problems. This has meant setting NAAQS for concentrations of ozone, carbon monoxide, particulate matter and other substances in the air near the surface of the earth, not higher in the atmosphere. . . . CO_2, by contrast, is fairly consistent in concentration throughout the world's atmosphere up to approximately the lower stratosphere."

In other words, regulating the buildup of CO_2 and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is *polluting* the *air*.

We need look no further than the dictionary for confirmation that this interpretation of "air pollution" is eminently reasonable. In the end, EPA concluded that since "CAA authorization to regulate is generally based on a finding that an air pollutant causes or contributes to air pollution" the concentrations of CO_2 and other greenhouse gases allegedly affecting the global climate are beyond the scope of CAA's authorization to regulate. "The term 'air pollution' as used in the regulatory provisions cannot be interpreted to encompass global climate change." Once again, the Court utterly fails to explain why this interpretation is incorrect, let alone so unreasonable as to be unworthy of *Chevron* deference.

* * *

The Court's alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.

Notes and Questions

1. In which, if any, of the foregoing cases had Congress, to quote the language from *Chevron*, "addressed the precise question at issue"?