ORAL ARGUMENT SCHEDULED FOR APRIL 8, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 03-1361
(CONSOLIDATED WITH NOS. 03-1362 THROUGH 03-1368)

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

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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Dated: November 2, 2004

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, *et al.*,	)	
Petitioners,	)	
v.	)	Docket Nos. 03-1361 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

AMICUS CURIAE'S CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record for Amicus Curiae Washington Legal Foundation submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici: The parties and amici appearing before the Court have been listed in the Brief for the Petitioners.

B. Rulings Under Review: References to the rulings under review appear in the Brief for the Petitioners.

C. Related Cases: There are no pending related cases.

DATED: November 2, 2004

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COMMONWEALTH OF MASSACHUSETTS, *ET AL.*,	)	
Petitioners,	)	
v.	)	Docket Nos. 03-1361
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY	)	
Respondent.	)	

RULE 26.1 DISCLOSURE STATEMENT FOR WASHINGTON LEGAL FOUNDATION

Pursuant to FRAP 26.1, amicus curiae Washington Legal Foundation ('WLF") hereby represents that it is a non-stock, non-profit corporation organized under the laws of the District of Columbia and has no parent corporation. WLF is a national public interest law and policy center based in Washington, D.C.

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Glossary

CAA	Clean Air Act
CO_2	Carbon Dioxide
EIA	Energy Information Administration
EPA	Environmental Protection Agency
GHG	Greenhouse Gas
IPPC	Intergovernmental Panel on Climate Change
NRC	National Research Council
SO_2	Sulfur Dioxide
UNFCCC	United Nations Framework Convention on Climate Change
WLF	Washington Legal Foundation

ORAL ARGUMENT SCHEDULED FOR APRIL 8, 2005

STATEMENT OF INTEREST

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center based in Washington, D.C. WLF's supporters include consumers, businesses, and property owners affected by Environmental Protection Agency (EPA) regulation under various environmental statutes such as the Clean Air Act (CAA).[1] WLF's interest and authority to file this brief are described in WLF's December 22, 2003 motion for leave to file an amicus brief, which this Court granted.

WLF participated in comments filed with EPA on the rulemaking petition that is the subject of the present case.[2] WLF supports EPA's position that it does not have authority under the CAA to regulate greenhouse gas (GHG) emissions for climate change purposes.

SUMMARY OF ARGUMENT

In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, in determining whether Congress intended to regulate tobacco products under the Food, Drug and Cosmetic Act, the Supreme Court

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[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.

[2] Comments of the Working Group to Oppose Expanded EPA Authority, November 29, 1999, JA_____.

observed that "we must be guided by a degree of common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[3] The Court's reliance on common sense interpretation applies with particular force to potential regulation of carbon dioxide (CO_2) and other GHGs. Tobacco regulation pales as a matter of social and economic importance in comparison with regulation of GHGs because carbon-based fuels are at the heart of our economy and the way we live our lives. Indeed, potential global climate change and GHG regulation have become the seminal energy and environmental issue of recent years. It is extremely unlikely that Congress authorized regulation in an area of such importance without explicitly saying so and without creating a legislative record reflecting so momentous a step.

ARGUMENT

I. Potential Global Climate Change Has Been the Most Prominent Energy and Environmental Issue of Recent Years.

A. The Public Debate

The claim that human activity is changing the global climate has unquestionably become the most prominent issue at the intersection of American energy and environmental policy in recent years. No other issue

[3] *Food & Drug Admin. v. Brown and Williamson Tobacco Corp*, 529 U.S. 120, 133 (2000).

engenders such extreme predictions of global environmental damage as are made by those who advocate the necessity of GHG controls. At the same time, because substantial GHG reductions would require substantial reductions in the use of fossil fuels such as oil, coal and natural gas even as the economy continues to grow, no other issue creates economic and social challenges of such magnitude. For instance, EPA has observed both that (1) climate change is "perhaps the biggest environmental threat to the planet"[4] and (2) "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change."[5]

Petitioners' Brief illustrates the dramatic nature of claimed global climate change damages. Relying on out-of-context statements from various scientific reports, Petitioners warn of unprecedented temperature increases, polar ice cap melting, rising sea levels inundating coastal communities, killer storms combined with devastating drought, huge losses of species,

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[4] *Hearings Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong., 2d Sess. (April 14, 1994) (Testimony of Robert Sussman, EPA Deputy Administrator).

[5] *Control of Emissions from New Highway Vehicles and Engines,* 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

epidemic diseases, and the like.[6] Petitioners' assertions mirror similar statements often made by various other groups of like belief.[7]

Petitioners' claim of a scientific "consensus" of likely dire consequences of continued GHG emissions is vigorously contested by many in the scientific community. The Court is referred to the November 29, 1999 comments filed with EPA in this proceeding by the Working Group to Oppose Expanded EPA Authority ("Working Group") containing a detailed summary of the state of the science.[8] Additionally, EPA, in its denial of the underlying Petition for Rulemaking, concluded that the scientific consensus claimed by Petitioners does not exist. Citing the same National Research Council (NRC) Report as Petitioners, EPA said:

> As the NRC noted in its report, concentrations of GHGs are increasing in the atmosphere as a result of human activities (pp. 9-12). It also noted that "[a] diverse array of evidence points to a warming of global surface air temperatures" (p. 16). The report goes on to state, however, that "[b]ecause of the large and still uncertain level of natural variability inherent in the climate record and the uncertainties in the time histories of the various forcing agents (and particularly aerosols), a causal linkage between the buildup of greenhouse gases in the

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[6] Pet'rs Brief at 5-11.

[7] For instance, Petitioner NRDC's website warns of "dangerous consequences: drought, disease, floods, lost ecosystems . . . sweltering heat to rising seas . . [t]he polar ice cap is shrinking fast." http:///www.nrdc.org/globalWarming/default.asp.

[8] JA___.

atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.[9]

Noting "[t]he science of climate change is extraordinarily complex and still evolving," EPA listed the numerous areas of continuing uncertainty identified by NRC. According to EPA, "these uncertainties limit our ability to assess each of these factors and to separate out those changes resulting from natural variability from those that are directly the result of increases in anthropogenic GHGs."[10]

The economic side of the issue prompts equal controversy, because significantly reducing GHG emissions would be an extraordinary societal undertaking. CO_2, the principal human-produced GHG, is the unavoidable by-product of combusting fossil fuels. Fossil fuels are, by far, the largest source (70 percent) of energy in America.[11] As the Intergovernmental Panel on Climate Change (IPCC), a source on which Petitioners rely extensively in their brief, has noted, "[e]missions of GHGs are associated with an extraordinary array of human activities."[12] The United States Energy Information Administration (EIA) reached the same conclusion: "there are

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[9] 68 Fed. Reg. at 52,930.

[10] *Id.*

[11] *Id.* at 52,928.

[12] IPCC, *Climate Change 2001: Mitigation* ("IPCC 2001"), at 608, *available at* http://www.ipcc.ch/.

a vast number of entities that emit carbon – homes, factories, vehicles, commercial facilities, and other agricultural resources – unlike [for instance] the relatively few electricity generators covered by the SO_2 reduction program in the first phase."[13] According to EPA, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions."[14] Because significantly controlling carbon emissions would entail fundamental changes to our economy and the way we live, a variety of authorities have concluded that the cost of such controls would be massive.[15]

Global climate change also differs fundamentally from other energy and environmental issues the U.S. faces. According to the IPCC, "[t]he global nature of the problem ... implies that the full breadth of human social structures is encompassed."[16] The IPCC notes:

> A combination of several features lends the climate problem its uniqueness. They include public good issues arising from the

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[13] *Hearings Before the Senate Comm. on Energy and Natural Resources*, 106th Cong., 1st Sess. (March 25, 1999) (Testimony of EIA Administrator Jay Hakes).

[14] 68 Fed. Reg. at 52,928.

[15] *E.g.*, with respect to the cost of complying with the Kyoto Protocol, see "Global Warming: The High Cost of the Kyoto Protocol, National and State Impacts," Wharton Economic Forecasting Associates, Inc., 1998 (loss of 2.4 million jobs; annual loss of $300 billion in U.S. GDP. JA_____. A study by Stephen Brown, senior economist at the Federal Reserve Board, determined that in order to meet the emissions cuts of Kyoto, U.S. domestic consumption would be reduced by 25 percent, the equivalent of stopping all highway, rail, air and sea traffic permanently. JA_____.

[16] IPCC 2001, at 607.

> concentration of GHGs in the atmosphere that requires collective global action, the multiplicity of decision makers ranging from global down to the micro level of firms and individuals, and the heterogeneity of emissions and their consequences around the world. Moreover, the long-term nature of climate change originates from the fact that it is the concentration of GHGs that matters rather than their annual emission and this feature raises the thorny issues of intergenerational transfers of wealth and environmental goods and bads. Next, human activities associated with climate change are widespread, which makes narrowly defined technological solutions impossible, and the interactions of climate policy with broad socioeconomic policies are strong. Finally large uncertainties or in some areas even ignorance characterize many aspects of the problem and require a risk management approach to be adopted in all [decision-making frameworks] that deal with climate change.[17]

For these reasons, potential global climate change has become a prominent feature of public discourse and policy debate for many years. The matter assumed central importance with widely reported Congressional testimony by NASA scientist James Hansen in 1988 as to a potentially runaway greenhouse effect[18] and the formation that year of the IPCC. To date, global climate change has probably been the subject of more than two hundred hearings and briefings before various congressional committees. Regulatory and non-regulatory legislation on the subject has been introduced in Congress yearly since the late 1980s. It is a topic debated in the last three

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[17] *Id.* at 66.

[18] *Hearings Before the Senate Comm. on Energy and Natural Resources,* 100th Cong., 2d Sess. 39 (1988).

presidential elections, and was raised in the debates between President Bush and Senator Kerry.[19] Global climate change is now a widely discussed topic in books,[20] magazines,[21] the internet[22] and even the movies.[23]

B. Where the Issue Stands Today

The record of Congressional action on global climate change is detailed in EPA's brief.[24] The current Congressional status of the issue cannot be disputed. Congress has consistently rejected proposals to require or even authorize mandatory controls on GHG emissions, most recently in the current Congress.[25] Instead, Congress has enacted several statutes mandating scientific research and calling for negotiations to develop an international framework for addressing climate change globally.[26]

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[19] Commission on Presidential Debates, October 8, 2004 Debate Transcript.

[20] The term "global warming" yields 22,235 hits in a search of books on Amazon.com.

[21] Based on a Nexus search, just this year 1625 articles were published with the term "global warming" or "global climate change" in their titles.

[22] The term "global warming" yields 1,810,000 hits on Google.

[23] The 2004 film *The Day After Tomorrow* is the fifth highest box office film of 2004. Http://www.boxofficereport.com.

[24] EPA Brief at 50-55.

[25] 149 Cong. Rec. S13485 (daily ed. Oct. 29, 2003) (Climate Stewardship Act of 2003).

[26] *See* National Climate Program Act of 1978, 15 U.S.C. §§ 2901, et seq.; section 711 of Energy Security Act (Pub. L. No. 96-294); Global Climate Protection Act of 1987; Global Change Research Act of 1990, 15 U.S.C. §§ 2931-2938; Title XXIV of the Food and Agriculture Act, of 1990, Pub. L. No. 101-624, § 2401; Title XVI of the 1992 Energy Policy Act, Pub. L. No. 102-486.

International negotiations were first mandated by Congress approaching two decades ago in the Global Climate Protection Act of 1987.[27] Again, the current status of these ongoing negotiations cannot be contested. President George H. W. Bush signed, and the Senate approved, the United Nations Framework Convention on Climate Change (UNFCCC), which brought together a coalition of countries for a coordinated approach to climate change.[28] The UNFCCC did not mandate emission reductions on behalf of the U.S. or other country. Instead, the "shared understanding" of the Executive Branch and the Senate was that the UNFCCC did not impose "legally binding targets and timetables for reducing emissions of greenhouse gases."[29]

Nevertheless, the U.S. has been actively involved in international activities under the UNFCCC to address global climate change. Negotiations led to the Kyoto Protocol in December 1987, which called for mandatory GHG emissions reductions by developed nations.[30] In a resolution addressing the Protocol, the Senate formally expressed misgivings

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[27] Pub. L. No. 100-204, 101 Stat. 1331 (1987).

[28] *See* UNFCCC Homepage, *at* http://unfccc.int.

[29] Report of the Sen. Comm. on Foreign Relations, Exec Rep. 102-55, at 14 (Oct. 1, 1992).

[30] *Available at* UNFCCC website, http://unfccc.int/resource/docs/convkp/kpeng.pdf.

over the prospect that the economic burdens of GHG reductions would be shouldered exclusively by developed nations, such as the U.S.[31] Although President Clinton signed the Protocol, he did not present it to the Senate for advice and consent to ratification. Thereafter, Congress enacted annual legislation affirmatively barring EPA from implementing the Protocol.[32]

At present, the global climate change issue remains highly controversial and a matter of intense public debate. Nevertheless, the fact that the U.S. has not ratified the Kyoto Protocol or enacted legislation mandating GHG emission controls means that, to date, the country has affirmatively elected not to require such controls.

II. Congress Cannot Be Understood to Have Authorized EPA to Regulate on a Subject of Such Overriding Societal Importance as Global Climate Change Without Having Clearly and Specifically Expressed Its Intention to Do So.

Given this history of the global climate change debate in the U.S., Petitioners' contention that there has been latent authority in the CAA since 1970 to adopt a massive greenhouses gas control program is not credible. In Petitioners' view, despite wide public discourse of the issue for many years,

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[31] S. Res. 98, 105th Cong. (1997) (resolving by vote of 95-0 to urge the President not to sign any agreement that would result in serious harm to the economy or that did not include commitments regarding GHG emissions of developing nations).

[32] *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1141, 1441A-41 (2000).

the regulatory authority GHG advocates have loudly but unsuccessfully called for, in fact, existed all along but lay dormant and unnoticed until discovered by EPA's lawyers in 1998.[33] Indeed, in Petitioners' view, this long-sought regulatory authority was hiding in plain sight in the CAA, a statute minutely dissected through the years by legislators and lawyers both in the comprehensive CAA amendments of 1977 and 1990 and in seemingly endless litigation in this and other courts. However, it is implausible in the extreme that GHG regulatory authority that Petitioners now maintain is "plain and unambiguous" on the face of the CAA[34] was overlooked by so many for so long. In fact, when asked by Congress for a complete list of policy options for addressing global climate change, EPA in 1990 produced a comprehensive report that nowhere mentioned pre-existing CAA authority to regulate GHG emissions for climate change purposes.[35]

Equally implausible is the legislative mechanism Petitioners claim as the source of this far-reaching, but until recently overlooked, authority. Petitioners claim that Congress in 1970 authorized EPA to restrict GHG emissions simply by redesigning the CAA §302(h) list of "welfare" effects

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[33] Pet'rs Brief at 11.

[34] *Id.*, at 14.

[35] EPA, *Policy Options for Stabilizing Global Climate Change, Final Report to Congress,* Office of Policy, Planning, and Evaluation, PM221 (1990).

to include effects on "climate."[36] Congress, however, when it added this language, did not evince any understanding that, by doing so, it was authorizing the massive regulatory program Petitioners now seek to mandate. There was no debate in Congress in 1970 surrounding the new wording; no GHG or climate program enacted into the CAA at the time or thereafter to accompany the new wording; and no explanation by Congress of its intent in amending the §302(h) language. Surely, to quote Justice Stevens in another context, "[i]f Congress had intended such a significant change . . ., some indication of this purpose would almost certainly have found its way into the legislative history."[37]

Indeed, as EPA's brief points out, nowhere in the mammoth text of the CAA, including CAA §202(a), is there any explicit grant of authority to regulate GHGs or CO_2. The term "carbon dioxide" is mentioned exactly one time in the entire codified version of the Act, in a non-regulatory provision mandating research and study.[38] The term "global warming" is likewise mentioned but once in the Act, in CAA §602(e), directing the Administrator

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[36] Pet'rs Brief at 15.

[37] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring).

[38] CAA §103(g)(1). *See also*, the reference to CO_2 in non-codified CAA §821 requiring "monitoring" rather than regulation.

to examine the global warming potential of certain listed substances that contribute to stratospheric ozone depletion. Such direction, however, is accompanied by the admonition that it "shall not be construed to be the basis of any additional regulation under the [CAA]." By contrast, at this point in time, more than thirty years into implementation of the modern CAA as enacted in 1970, *every* air pollutant that EPA regulates for mobile sources under CAA §202(a) is subject to a specific program tailored for the control of such pollutant under §§202(g)-(i). The statute also lists literally hundreds of other pollutants designated for control.[39]

As Justice Frankfurter observed, in interpreting a statute, "[o]ne must ... listen attentively to what it does not say."[40] What one hears when one listens to the CAA for an expression of Congressional intent to regulate on a matter of such significance as global climate change is nothing more than the silence of the "watchdog [that] did not bark in the night."[41]

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[39] *See* CAA Title I, Part D for specific regulatory requirements for six listed criteria pollutants; CAA §112, establishing a detailed regulatory scheme for 190 listed hazardous air pollutants; and CAA Title VI, providing a regulatory scheme for 53 ozone-depleting substances.

[40] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 536 (1947), quoted in *Germain*, 503 U.S. at 255 (Stevens, J., concurring).

[41] *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting), quoted in *Chisom v. Roemer*, 501 U.S. 380, 396n. 23 (1991).

Under basic principles of administrative law, the 1970 legislative language on which Petitioners rely is too thin a reed to support a GHG regulatory program. Legislative delegations of authority to administrative agencies into new subject areas must be made clearly, and the more important the issue, the clearer the delegation should be.[42] As the Supreme Court said of a legislative delegation in an area of considerably less national and international import than global climate change, had Congress intended to legislate in an important public policy area, "it would have done so in clear and unequivocal terms," as it had in other provisions of the legislation.[43] Similarly, as this Court has said, in cases involving assertions of agency power into new arenas, "courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue."[44]

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[42] *MCI Telecommunications. Corp. v. AT&T Co.*, 512 U.S. 218, 231-232 (1994). *See also* Ernst Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1008 (1999) ("The more significant the question and the greater the impact the expansion of the agency's jurisdiction is likely to have, the greater the likelihood that Congress did not intend implicitly to delegate that determination to an agency").

[43] *Arizona v. California*, 373 U.S. 546, 581 (1962). *See also Adams Fruit Co., Inc., v. Barrett*, 494 U.S. 638, 644 (1990) ("[h]ad Congress intended to limit further the availability of AWPA relief based on the adequacy of state workers' compensation remedies, it would have made that purpose clear . . . ."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring).

[44] *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

The reason courts demand clear legislative authorizations for the extension of agency authority into new arenas derives from the proper role of administrative agencies in our system of government. As Justice Rehnquist remarked in a similar context, Congress, not an agency, is "the governmental body best suited and most obligated to make the choice confronting us in this litigation."[45] Justice Brennan likewise concluded that "Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should have been presented and considered."[46] According to Justice Brennan, "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate . . . 'without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them.'"[47] An Agency that seeks to regulate in a new arena of social or economic activity without a plain and explicit statutory

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[45] *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in the judgment).

[46] *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in the result).

[47] *Id.* at 276.

authorization to do so usurps the constitutional role of Congress to promulgate policy in the first instance.[48]

These principles have special application to the potentially significant restrictions on how this country uses energy that are involved with the global climate change issue. If, as the IPPC says, measures addressing global climate change must encompass the "full breadth of human social structures"[49] it must be Congress, not EPA, that decides the matter.

In this case, the actions by Congress, after long debate, to address potential global climate change through scientific research and international negotiations, and to resist calls for mandatory regulation of GHG emissions, reflect a political and policy decision not to regulate which carefully balances economic interests, scientific uncertainties, and energy/environmental concerns. For better or worse, depending on one's view of the issue, where Congress has so far chosen to stand marks the place where "opposing social and political forces have come to rest."[50] EPA acted

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[48] John J. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 276-77 (2000) ("If Congress has addressed a subject, but has done so in a limited way, this fact itself may suggest that Congress has gone as far as the enacting coalition wished to, on the subject in question. If the Court permitted ... [an agency] to go further under ... [the Act's] general authority, such action might disturb the more precise policies adopted by Congress through bicameralism and presentment," footnotes omitted).

[49] IPCC 2001, at 607.

[50] *Chrysler v. Brown*, 441 U.S. 281, 313 (1979).

properly in this case in not asserting power it does not have to upset Congress' decision.

III. CONCLUSION

For the reasons stated above, the Petition should be denied.

Dated: November 2, 2004

Respectfully submitted,

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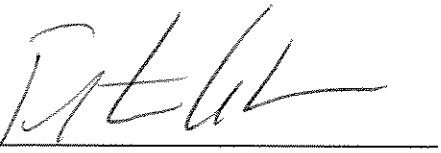

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CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that the foregoing Amicus Curiae Brief of the Washington Legal Foundation contains 3737 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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