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CREATIVE STATUTORY INTERPRETATION: HOW THE EPA ESCAPED REGULATION OF MOTOR VEHICLE EMISSIONS UNDER THE CLEAN AIR ACT

*Massachusetts v. EPA*¹

I. INTRODUCTION

Global warming is a phenomenon that can be traced back to 1863.² Human contribution to global warming can be traced to 1938.³ The process of global warming begins when greenhouse gases, such as carbon dioxide, are emitted into the air by activities such as fossil fuel burning.⁴ Once emitted into the air, the gases trap heat radiated from the earth, which causes surface air temperatures to rise.⁵ Carbon dioxide (“CO₂”) is one of the major greenhouse gases, and the “fastest growing source of CO₂ emissions is vehicle exhaust.”⁶ The United States has “less than five percent of the global population but is responsible for twenty-five percent of global emissions of greenhouse gases.”⁷ As a result, many experts, states, and organizations believe the issue of greenhouse gas emissions, particularly motor vehicle emissions, must be addressed and regulated in an attempt to prevent further harm.⁸

Therefore, fifteen states and cities petitioned the Environmental Protection Agency (“EPA”) to regulate motor vehicle emissions.⁹ The EPA denied the petition because of “scientific uncertainty,” and the EPA argued that it had discretion whether to regulate motor vehicle emissions.¹⁰ The U.S. Court of Appeals for the District of Columbia held

¹ 415 F.3d 50 (D.C. Cir. 2005).

² Dominick J. Graziano, *Global Warming: An Introduction to the State of the Science and a Survey of Some Legal Responses*, 79-OCT Fla. B.J. 34, 34 (Oct. 2005).

³ *Id.*

⁴ *Massachusetts*, 415 F.3d at 62.

⁵ *Id.*

⁶ Steven Ferrey, *Law of Independent Power*, 1 L. of Indep. Power § 6:7 (2005). “CO₂ emissions account for 83 percent of U.S. greenhouse gas emissions” *Id.*

⁷ Eileen Claussen, *Climate Change: Present and Future*, 27 ECOLOGY L.Q. 1373, 1378 (2001).

⁸ *Id.* at 1375.

⁹ *Massachusetts*, 415 F.3d at 53.

¹⁰ *Id.* at 58.

that the EPA properly exercised its discretion in denying the petition.¹¹

II. FACTS AND HOLDING

In 1999, Massachusetts, along with fourteen other states and cities,¹² filed a rulemaking petition with the EPA, requesting that it regulate emissions from new motor vehicles of carbon dioxide and other types of greenhouse gases, including methane, nitrous oxide, and hydrofluorocarbons,¹³ under § 202(a)(1) of the Clean Air Act (“CAA”).¹⁴ Each of the states and cities claimed that the emission of greenhouse gases caused a climate change.¹⁵ Further, Petitioners claimed this climate change would cause injuries, such as loss of property, due to rising sea-levels and storm surge flooding, additional emergency response costs, damage to facilities along the coast, increased health problems and related costs, harm to state economies, and reduced water supply.¹⁶ Petitioners finally claimed EPA regulation of the emission of greenhouse gases would reduce and delay further injuries resulting from a change in the climate.¹⁷

The EPA received over 50,000 public comments regarding the petition for rulemaking by the end of the comment period in May 2001.¹⁸

¹¹ *Id.*

¹² *Id.* at 51. The eleven states joined in the suit are California, Connecticut, New Jersey, Oregon, Illinois, New Mexico, Rhode Island, Maine, New York, Vermont, and Washington. *Id.* The three cities that joined Massachusetts’ petition are the city of New York, the city of Baltimore, and Washington, D.C. *Id.* The following environmental groups also joined in the suit: Bluewater Network, Center for Biological Diversity, Center for Food Safety, Center for Technology Assessment, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, National Environmental Trust, Natural Resources Defense Council, Sierra Club, the Union of Concerned Scientists and U.S. Public Interest Research Group. Final Brief for Petitioners in Consolidated Cases at i-iii, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. Jan. 24, 2005) (No. 03-1361) (hereinafter “Final Brief for Petitioners”).

¹³ *Massachusetts*, 415 F.3d at 56.

¹⁴ *Id.*

¹⁵ Final Brief for Petitioners at 2.

¹⁶ *Id.* at 2-3. More specific problems likely to occur are “increased flash flood potential in the Appalachians, degraded water quality and reduced water supply in the Great Lakes, sea-ice melting and permafrost thawing in Alaska, reduced summer snow-pack runoff in the Rockies, extreme water resource fluctuations in Hawaii, and rising sea levels combined with higher storm surges along the coasts of Puerto Rico, the Virgin Islands, and some eastern states.” *Massachusetts*, 415 F.3d at 61.

¹⁷ Final Brief for the Petitioners at 4.

¹⁸ *Massachusetts*, 415 F.3d at 56.

Most of those comments supported the petition.¹⁹ However, the EPA subsequently denied the rulemaking petition.²⁰ The EPA Administrator declared that the information provided by Petitioners and others was already in the public domain and available to the National Research Council (“NRC”) when it prepared a study on climate change.²¹ In that study, the NRC stated, “there is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases.”²² Based on this uncertainty regarding the effects of greenhouse gases and the perceived discretion granted to the EPA,²³ the EPA Administrator declined Petitioners’ request for rulemaking.²⁴

The U.S. Court of Appeals for the District of Columbia determined there was an overlap between deciding the merits of the case and whether Petitioners had standing to bring the suit; nonetheless, the court proceeded to decide the merits of the case.²⁵ In ruling on the merits, the court

¹⁹ *Id.* Most of the requests were also identical. *Id.*

²⁰ *Id.* at 57.

²¹ *Id.* The NRC is an agency of the National Academy of Sciences. *Id.* at 56-57. The NRC report, as a component of the National Academy of Sciences, was drafted at the request of the White House. *Id.* at 56.

²² *Id.* at 57. (quoting National Research Council, *Climate Change Science: An Analysis of Some of the Key Questions*, at 1 (2001) (hereinafter “NRC Report”).)

²³ *Massachusetts*, 415 F.3d at 57-58. In its denial, the EPA stated,

[T]he CAA provision authorizing regulation of motor vehicle emissions does not impose a mandatory duty on the Administrator to exercise her judgment. Instead, section 202(a)(1) provides the Administrator with discretionary authority to address emissions . . . While section 202(a)(1) uses the word ‘shall,’ it does not require the Administrator to act by a specified deadline and it conditions authority to act on a discretionary exercise of the Administrator’s judgment regarding whether motor vehicle emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

Id. at 74 (quoting 68 Fed.Reg. 52,922, 52,529 (Sept. 8, 2003)).

²⁴ *Massachusetts*, 415 F.3d at 57. The following states and groups intervened on behalf of the EPA: Michigan, Texas, Idaho, North Dakota, South Dakota, Utah, Alaska, Kansas, Nebraska, Ohio, Utility Air Regulatory Group, Vehicle Intervenor Coalition, CO2 Litigation Group, American Forest and Paper Association, American Petroleum Institute, National Association of Manufacturers, National Chamber Litigation Center, National Petrochemical and Refiners Association, Portland Cement Association, American Road and Transportation Builders Association, National Automobile Dealers Association, Alliance of Automobile Manufacturers, and Engine Manufacturers Association. Joint Brief of Industry Intervenor-Respondents, *Mass. v. EPA*, 415 F.3d 50 (D.C. Cir. Jan. 24, 2005) (No. 03-1361).

²⁵ *Massachusetts*, 415 F.3d at 55-56.

emphasized the rule that a reviewing court “will uphold agency conclusions based on policy judgments when an agency must resolve issues on the ‘frontiers of scientific knowledge.’”²⁶ The court held the EPA Administrator had the discretion to deny the petition for rulemaking, therefore dismissing and denying the petitions.²⁷

III. LEGAL BACKGROUND

A. *Clean Air Act*

Congress’ first legislative act to address the issue of air pollution was the passage of the Air Pollution Control Act of 1955.²⁸ The purpose of this legislation was to identify air pollution as a national problem and to establish research and other steps to be taken in an effort to resolve the problem.²⁹ Congress’ next step in air pollution legislation was to enact the Clean Air Act of 1963, which set emissions standards for stationary sources.³⁰ The primary goal of the CAA is “encourag[ing] or otherwise promot[ing] reasonable Federal, State, and local governmental actions . . . for pollution prevention.”³¹

²⁶ *Id.* at 58 (quoting *Envtl. Def. Fund v. EPA*, 598 F.2d 62, 82 (D.C.Cir.1978)).

²⁷ *Id.* at 58-59. The U.S. Court of Appeals for the District of Columbia has exclusive jurisdiction over final actions of agencies. 42 U.S.C. § 7607(b)(1) (2000). Therefore, the Court of Appeals is acting as the District Court.

²⁸ 42 U.S.C. § 7401 (2000).

²⁹ James R. Fleming & Bethany R. Knorr, *History of the Clean Air Act, A Guide to Clean Air Legislation Past and Present*, American Meteorological Society, available at <http://www.ametsoc.org/sloan/cleanair/index.html>. The purpose of the CAA is for the federal government:

- (1) to protect and enhance the quality of the [n]ation's air resources so as to promote the public health and welfare and the productive capacity of its population;
- (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
- (3) to provide technical and financial assistance to [s]tate and local governments in connection with the development and execution of their air pollution prevention and control programs; and
- (4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

42 U.S.C. § 7401(b)(1)-(4).

³⁰ Fleming & Knorr, *supra* note 30; see 42 U.S.C. § 7401.

³¹ 42 U.S.C. § 7401(c).

Further amendments to the CAA were enacted in 1965, 1966, 1967, and 1969.³² These amendments expanded air pollution control programs and set air quality standards.³³ Congress later amended the CAA in 1970.³⁴ This Amendment “established new primary and secondary standards for ambient air quality, set new limits on emissions from stationary and mobile sources to be enforced by both state and federal governments, and increased funds for air pollution research.”³⁵ Congress again passed an amendment in 1977 extending the deadlines to meet motor vehicle emission and ambient air standards, in order to give the CAA more realistic goals.³⁶ The last major revision of the CAA was the Clean Air Act of 1990.³⁷ This latest amendment addressed five main areas: air-quality standards, motor vehicle emissions and alternative fuels, toxic air pollutants, acid rain, and stratospheric ozone depletion.³⁸

The CAA provides the EPA with authority to implement motor vehicle emission regulation.³⁹ The CAA requires the EPA to regulate motor vehicle emissions which, in the Administrator’s judgment, “contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”⁴⁰

³² Fleming & Knorr, *supra* note 30.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ 42 U.S.C. § 7521(a)(1) (2000).

The 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. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

Id.

⁴⁰ 42 U.S.C. § 7408(a)(1)(A) (2000). “Air pollutant” is defined as:

[A]ny air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to

B. Summary of Relevant Case Law

The U.S. Court of Appeals for the District of Columbia has exclusive jurisdiction over “nationally applicable regulations promulgated, or final action taken, by the Administrator” of the EPA.⁴¹ As a result, this court is well versed in cases regarding the EPA and its discretionary rulemaking authority.

In *Ethyl Corp. v. EPA*,⁴² the EPA decided it had the authority to regulate leaded gasoline under CAA § 211(c)(1)(A).⁴³ This section states that the EPA has the authority to regulate gasoline additives if emission products “will endanger the public health or welfare.”⁴⁴ The EPA concluded that gasoline emissions created a “significant risk of harm” to public health.⁴⁵ Petitioners argued the EPA needed to prove actual harm, not just a significant risk of harm.⁴⁶ However, the court held, “the Administrator’s interpretation of the standard is the correct one.”⁴⁷ Part of the court’s reasoning was that the statute provides the Administrator “flexibility to assess risks and make essentially legislative policy judgments.”⁴⁸ The court also held § 202(a)(1) is “*mandatory* in [its] terms,” providing that “the Administrator ‘shall’ regulate if ‘in his judgment’ the pollutants warrant regulation.”⁴⁹

*National Resources Defense Council, Inc. v. EPA*⁵⁰ focused on a

the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term “air pollutant” is used.

42 U.S.C. § 7602(g) (2000). “Welfare” includes “effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.” *Id.* § 7602(h).

⁴¹ 42 U.S.C. § 7607(b)(1).

⁴² 541 F.2d 1 (D.C. Cir. 1976) (en banc). This case dealt with whether the EPA “appropriately linked its policy analysis to the statutory standard.” *Massachusetts*, 415 F.3d at 75.

⁴³ *Ethyl Corp.*, 541 F.2d at 7.

⁴⁴ *Id.* (quoting 42 U.S.C. § 7545(c)(1) (2000)).

⁴⁵ *Ethyl Corp.*, 541 F.2d at 7.

⁴⁶ *Id.* at 12.

⁴⁷ *Id.*

⁴⁸ *Id.* at 26.

⁴⁹ *Id.* at 20, n.37 (emphasis added).

⁵⁰ 824 F.2d 1146 (D.C. Cir. 1987) (en banc). This case stated, “the Administrator may only exercise “judgment” in evaluating whether the statutory standard has been met.” *Massachusetts*,

CAA provision authorizing the Administrator to set emission standards “at the level which in his judgment provides an ample margin of safety to protect the public health.”⁵¹ In this case, the Administrator failed to base his determination of emission standards on statutory grounds.⁵² The court held that the Administrator’s determination needed to be based on the level that would provide an “ample margin of safety” under the statute and could not be based on cost and feasibility.⁵³

In *Her Majesty the Queen in Right of Ontario v. EPA*,⁵⁴ the petitioners alleged the Administrator failed to make an endangerment finding as to acid rain, believed to be caused by emissions from several states, entering Canadian air.⁵⁵ CAA § 115,⁵⁶ the basis of the claim, requires the Administrator to notify foreign countries if air pollutants emitted in the United States will endanger the welfare of the foreign country.⁵⁷ The EPA argued “because it [lacked] sufficient information to be able to trace pollutants affecting the Canadian health and welfare to specific sources in the United States, it [was] not obliged to make endangerment findings at [that] time.”⁵⁸ The court held that the Administrator reasonably declined to make an endangerment finding until there was enough evidence to show a correlation between the pollution and particular states.⁵⁹

Finally, in *Sierra Club v. EPA*,⁶⁰ the court discussed the two-step *Chevron*⁶¹ test used when an agency interprets a statute.⁶² In *Sierra Club*, the EPA Administrator permitted a twelve-month grace period for

415 F.3d at 75.

⁵¹ *Natural Resources Defense Council, Inc.*, 824 F.2d at 1147 (quoting 42 U.S.C. § 7412(b)(1)(B) (2000)).

⁵² *Natural Resources Defense Council, Inc.*, 824 F.2d at 1163-64.

⁵³ *Id.* at 1164-65.

⁵⁴ 912 F.2d 1525 (D.C. Cir. 1990). The court held “for [the] EPA to decline to make an endangerment finding, it must have a statutorily based reason for doing so.” *Massachusetts*, 415 F.3d at 76.

⁵⁵ *Her Majesty*, 912 F.2d at 1529-30.

⁵⁶ CAA § 115(a) (codified as 42 U.S.C. § 7415(a) (2000)).

⁵⁷ *Her Majesty*, 912 F.2d at 1528-29.

⁵⁸ *Id.* at 1528.

⁵⁹ *Id.* at 1533.

⁶⁰ 129 F.3d 137 (D.C. Cir. 1997).

⁶¹ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁶² *Sierra Club*, 129 F.3d at 139-40.

conformity with § 176(c) of the CAA.⁶³ The court, applying the *Chevron* test, held that the EPA misinterpreted the statute and the grace period was contrary to the CAA.⁶⁴ The first step of the *Chevron* test is to ask “whether Congress has directly spoken to the precise question at issue.”⁶⁵ The second step of the test, used only if the first part is not met, is whether the “agency’s construction of the statute . . . is reasonable.”⁶⁶ If the construction is reasonable, the court must defer to the agency’s interpretation.⁶⁷

These cases suggest that if the EPA makes no endangerment finding, the determination must be based on statutory standards. Further, if the EPA wishes to postpone the making of an endangerment finding, the decision to postpone must be because the EPA cannot determine whether the statutory standard was met until more information is received.⁶⁸ Finally, if Congress has spoken directly to the issue, the EPA is not at liberty to interpret the statute in any other manner.

IV. INSTANT DECISION

A. *Majority Opinion*

The short majority opinion⁶⁹ in *Massachusetts v. EPA* held that, “the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking.”⁷⁰ The first issue the

⁶³ *Id.* at 138.

⁶⁴ *Id.*

⁶⁵ *Id.* at 139 (quoting *Chevron*, 467 U.S. at 842-43). If Congress has spoken directly to the issue, the Congressional intent must be followed by the agency. *Id.*

⁶⁶ *Id.* at 140 (quoting *Chevron*, 467 U.S. at 843).

⁶⁷ *Id.*

⁶⁸ *Massachusetts*, 415 F.3d at 76.

⁶⁹ The majority opinion is approximately six pages, while the dissenting opinion is approximately twenty-two pages. Given the importance of the subject matter of this case, the majority seems to have concluded that global warming is not a topic warranting much discussion.

⁷⁰ *Id.* at 58. Circuit Judge Randolph wrote the majority opinion. *Id.* at 53. Circuit Judge Sentelle wrote an opinion dissenting in part and concurring in the judgment, which gave Circuit Judge Randolph the majority opinion. *Id.* at 59. Circuit Judge Sentelle concluded the petitioners did not have sufficient “injury necessary to establish standing under Article III.” *Id.* He further concluded the petitioners’ claims may be correct, however the claim is not justiciable at this time. *Id.* at 60. Circuit Judge Sentelle also stated this issue should be for legislatures and presidents to decide, not the courts. *Id.* Therefore, he concurred in the judgment of Circuit Judge Randolph’s opinion. *Id.*

court addressed was whether it had jurisdiction to hear the case.⁷¹ Exclusive jurisdiction rests in the U.S. Court of Appeals for the District of Columbia if there are “nationally applicable regulations promulgated, or final action taken, by the Administrator.”⁷² The EPA’s denial of the rulemaking petition was a final action because it was final and a denial.⁷³

The next jurisdictional issue was whether Petitioners had standing to bring the suit.⁷⁴ The majority declined to decide whether Petitioners in fact had standing and discussed three options to handle this issue: refer the standing issue to a special master, remand to the EPA, or proceed to the merits.⁷⁵ The majority chose to follow the third approach and proceeded to the merits.⁷⁶

⁷¹ *Id.* at 53.

⁷² *Id.*

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.

42 U.S.C. § 7607(b)(1). District courts have jurisdiction for suits involving nondiscretionary acts or duties of the EPA. *Massachusetts*, 415 F.3d at 53. “Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2) (2000).

⁷³ *Massachusetts*, 415 F.3d at 53. Under § 551(13) of the Administrative Procedure Act, agency action is “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13) (2000). Accordingly, a denial by the EPA constitutes a final action. *Massachusetts*, 415 F.3d at 53-54. EPA General Counsel Robert Fabricant’s memorandum was not sufficient to constitute a final action even though the Administrator’s denial incorporated many of the passages. *Id.* at 54.

⁷⁴ *Id.* The elements of standing are “injury in fact, fairly traceable to the challenged action, and likely to be redressed by a favorable decision.” *Id.* See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In *Massachusetts*, the standing issues were whether petitioners’ injuries were caused by the EPA’s decision not to regulate and whether the injuries could be redressed. *Massachusetts*, 415 F.3d at 54.

⁷⁵ *Id.* at 55-56.

⁷⁶ *Id.* at 56. The majority stated that, “the merits inquiry and the statutory standing inquiry often overlap and are sometimes identical, so that it would be exceedingly artificial to draw a distinction

In deciding the merits, the majority looked to the language of § 202(a)(1) of the CAA.⁷⁷ This section states the Administrator may make a judgment as to whether or not they will regulate motor vehicle emissions.⁷⁸ According to the majority, this means the Administrator has considerable discretion.⁷⁹ The majority agreed with the EPA that scientific uncertainty and policy considerations were reasonable arguments against regulation at this time.⁸⁰ Based on these considerations, the majority held that the Administrator properly exercised discretion in denying the petition.⁸¹

B. Dissenting Opinion⁸²

While the majority declined to address the issue of standing, the dissent found that Massachusetts had standing.⁸³ The dissent also concluded that neither of the EPA's grounds for denying the rulemaking petition, lack of statutory authority to regulate emissions and no desire to exercise authority even if given, was sufficient for denying the petition.⁸⁴

between the two. *Id.* (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 97 n.2 (1998)). The majority declined to refer the issue to a special master because “[s]uch a proceeding would largely duplicate the proceedings on the rulemaking petition.” *Massachusetts*, 415 F.3d at 55. The majority declined to remand to the EPA because federal courts have the responsibility to make standing judgments and the EPA had already decided “the state of the evidence regarding global warming from greenhouse gases.” *Id.*

⁷⁷ *Id.* at 57-58.

⁷⁸ *Id.*

⁷⁹ *Id.* “In requiring the EPA Administrator to make a threshold judgment about whether to regulate, § 202(a)(1) gives the Administrator considerable discretion.” *Id.* (citing *Ethyl Corp.*, 541 F.2d at 20 n.37).

⁸⁰ *Massachusetts*, 415 F.3d at 58. As to the scientific uncertainties, the majority cited to the NRC Report which states, “the understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences of climate change are poorly understood.” *Id.* at 57 n.3 (quoting 68 Fed.Reg. at 52,930). The policy considerations are that “new motor vehicles are but one of many sources of greenhouse gas emissions” and “regulation of U.S. motor vehicle emissions could weaken efforts to persuade developing countries to reduce the intensity of greenhouse gases thrown off by their economies.” *Massachusetts*, 415 F.3d at 58.

⁸¹ *Id.*

⁸² In this case, Circuit Court Judge Randolph wrote the majority opinion, Judge Sentelle filed an opinion dissenting in part and concurring in the judgment, and Judge Tatel filed the dissenting opinion. *Id.* at 50. The “dissent” for purposes of this case note refers to the dissent written by Judge Tatel.

⁸³ *Massachusetts*, 415 F.3d at 61.

⁸⁴ *Id.* at 61-62.

As a result, the dissent would have remanded the petitions back to the EPA for further action.⁸⁵

Massachusetts' claimed injury is "loss of land within its sovereign boundaries" as a result of a projected rise in sea levels due to global warming.⁸⁶ The dissent found this to be a claim particular to Massachusetts,⁸⁷ rather than a generalized claim, because it "undeniably harms the Commonwealth in a way that it harms no other state."⁸⁸ Therefore, Massachusetts stated a sufficient claim of injury that warranted standing.⁸⁹ The dissent also found valid causation in that sea levels over the past century have risen as a result of ocean warming and melting glaciers.⁹⁰ Finally, the dissent concluded that the claim was redressable because reductions in emissions would reduce the impacts of global warming.⁹¹

The dissent also questioned the majority's decision to proceed to the merits without determining whether petitioners had standing.⁹² According to the dissent, since the EPA never challenged Petitioners' declarations, there was no reason for the majority to treat the issue as if they had challenged the declarations.⁹³ Therefore, there was no reason to give the merits of the case priority over the standing issue.⁹⁴

The dissent's discussion of the merits⁹⁵ begins with a discussion of

⁸⁵ *Id.* at 62.

⁸⁶ *Id.* at 64-65.

⁸⁷ Other states may have their own particularized claims of injury; however, it is sufficient that only one petitioner have a particularized injury to satisfy the Article III standing requirement. *Id.* at 65.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* The dissent cited to a declaration by Michael MacCracken from the Office of the U.S. Global Change Research Program which states that global warming causes rises in sea levels and "environmental impacts of projected global warming will include . . . an increase in sea level at an average rate of about .5 to 3.5 inches per decade." *Id.*

⁹¹ *Id.* The dissent again cited the declaration by Michael MacCracken, stating, "[a]chievable reductions in emissions of CO₂ and other [GHGs] from U.S. motor vehicles would . . . delay and moderate many of the adverse impacts of global warming. *Id.* Further, "[b]ecause the extent of damage to the Massachusetts coastline depends on the magnitude of the rise in sea level, a reduction in this projected adverse consequence of global warming would partially redress Massachusetts' injury." *Id.*

⁹² *Id.* at 66.

⁹³ *Id.* at 67.

⁹⁴ *Id.*

⁹⁵ "[T]he threshold question is . . . does the [CAA] authorize [the] EPA to regulate emissions based

the meaning of CAA § 202(a)(1).⁹⁶ The dissent first noted, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”⁹⁷ Accordingly, the EPA has the authority to regulate emissions if the emissions are “air pollutants” and if in the EPA’s judgment they “may reasonably be anticipated to endanger public health or welfare.”⁹⁸ The EPA claimed the emissions are not “air pollutants” because greenhouse gases are not “air pollutants.”⁹⁹ However, Congress specifically defined “air pollutants” to include carbon dioxide.¹⁰⁰ Further, CAA § 103(g) explicitly includes carbon dioxide as an air pollutant.¹⁰¹ The EPA claimed a “more holistic analysis” should be used, rather than a liberal interpretation of the statute.¹⁰² The dissent found none of the EPA’s reasons compelling, and reasoning under the language of the statute, Judge Tatel believed the EPA had authority to regulate motor vehicle emissions.¹⁰³

The dissent also discussed the use of the word “judgment” in the statute, which both the EPA and the majority argued provided discretion to the EPA.¹⁰⁴ The EPA claimed, “if the agency thinks regulating [greenhouse gases] is a bad idea, the Administrator has discretion to withhold making a ‘judgment,’ known as an ‘endangerment finding,’ that [greenhouse gas] emissions ‘cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.’”¹⁰⁵

on their effects on global climate?” *Id.* at 67.

⁹⁶ *Id.*

⁹⁷ *Id.* (quoting *Chevron*, 467 U.S. at 843 n. 9).

⁹⁸ *Massachusetts*, 415 F.3d at 67 (quoting 42 U.S.C. § 7521(a)(1)).

⁹⁹ *Massachusetts*, 415 F.3d at 67.

¹⁰⁰ *Id.* The term “air pollutant” is defined as “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.” 42 U.S.C. § 7602(g). Carbon dioxide is a physical or chemical substance or matter that is emitted into the air. *Massachusetts*, 415 F.3d at 67.

¹⁰¹ *Id.* (citing 42 U.S.C. § 7403(g)(1) (2000)).

¹⁰² *Massachusetts*, 415 F.3d at 68. The EPA cited four reasons for not adhering to the Act’s text: because earlier Congresses were not concerned with global warming, the Act does not apply to greenhouse gases; global pollution needs specific provisions rather than general; there are no specific provisions regarding regulation of greenhouse gases; and regulation would overlap with the Department of Transportation’s authority to regulate fuel economy standards. *Id.*

¹⁰³ *Id.* at 73.

¹⁰⁴ *Id.* at 75.

¹⁰⁵ *Id.* at 73; see 42 U.S.C. § 7521(a)(1).

Therefore, judgment exists only as to whether “the statutory standard for endangerment has been met.”¹⁰⁶ As a result, the EPA may not exercise judgment based on policy considerations, but rather only on statutory standards.¹⁰⁷ Finally, the dissent argued that the EPA “utterly failed to relate its policy reasons to section 202(a)(1)’s standard.”¹⁰⁸ The dissent would have granted the petitions for review on the basis that “[the] EPA has both misinterpreted the scope of its statutory authority and failed to provide a statutorily based justification for refusing to make an endangerment finding.”¹⁰⁹

V. COMMENT

Global warming is a major threat to this nation. It is estimated that in the 21st century average temperatures will rise between 1.4 and 5.8 Centigrade degrees.¹¹⁰ The EPA admits “[a]dverse impacts . . . include loss of land and structures, loss of wildlife habitat, accelerated coastal erosion, exacerbated flooding and increased vulnerability to storm damage, and increased salinity of rivers, bays, and aquifers, which would threaten supplies of fresh water.”¹¹¹ These problems of global warming occur as a result of the emission of greenhouse gases.

Congress established the EPA in 1970 to create cleaner water, air, and land.¹¹² The EPA’s mission is to “protect human health and the environment.”¹¹³ Petitioners sought to have the EPA regulate emissions from motor vehicles. Despite its mission statement, the EPA has refused to regulate a source of pollution which harms both human health and the environment. While the majority opinion agreed with the EPA, the dissenting opinion made the correct decision.

¹⁰⁶ *Massachusetts*, 415 F.3d at 75.

¹⁰⁷ *Id.* at 76.

¹⁰⁸ *Id.* at 81.

¹⁰⁹ *Id.* at 82.

¹¹⁰ David Wooley and Elizabeth Morss, *Clean Air Act Handbook*, § 6.20 (2005).

¹¹¹ U.S. Environmental Protection Agency, *Climate Change and Florida*, p. 3. (September 1997), available at <http://yosemite.epa.gov/oar/globalwarming.nsf> (follow “Impacts,” then “State Impacts,” then “Florida”).

¹¹² U.S. Environmental Protection Agency, *About EPA* (December 22, 2005), available at <http://www.epa.gov/epahome/aboutepa.htm#history>.

¹¹³ *Id.*

In deciding the merits of the case, both the majority and the dissent examined the language of § 202(a)(1) of the CAA in order to determine whether the EPA had the authority to regulate motor vehicle emissions. The majority focused on the word “judgment” and the discretion this granted the EPA.¹¹⁴ While the use of the word judgment does give the EPA discretion, focusing on the word alone reads the statute too narrowly. The majority determined that if the EPA could exercise discretion, it did not have to regulate motor vehicle emissions. However, the EPA’s judgment was incorrect.

The EPA concluded that in its judgment, “it did not have statutory authority to regulate greenhouse gas emissions from motor vehicles and that, even if it did, it would not exercise the authority at this time.”¹¹⁵ Although the EPA admitted motor vehicle emissions are contributing to global warming, the “EPA is also working to encourage voluntary GHG emission reductions from the transportation sector” and the “Administration’s global climate change policy includes promoting the development of fuel-efficient motor vehicles and trucks, researching options for producing cleaner fuels, and implementing programs to improve energy efficiency.”¹¹⁶ If the EPA did not believe it had the authority to regulate carbon dioxide emissions, why does it still wish to cooperate in the efforts to have emissions reduced?

Additionally, in 1998, EPA General Counsel Jonathon Cannon stated, “[the] EPA’s regulatory authority extends to air pollutants, which . . . are defined broadly under the Act and include SO₂, NO_x, CO₂ [carbon dioxide], and mercury emitted into the ambient air.”¹¹⁷ Cannon also stated carbon dioxide “is the most prevalent greenhouse gas . . . [and] is a physical and chemical substance which is emitted into . . . the ambient air.”¹¹⁸ Also in 1998, “EPA Administrator Carol Browner told Congress that [carbon dioxide] is a criteria pollutant that EPA has the authority to regulate.”¹¹⁹ Cannon’s statement was later reaffirmed in 1999 by Gary

¹¹⁴ *Massachusetts*, 415 F.3d at 57-58.

¹¹⁵ *Id.* at 53 (citing 68 Fed.Reg. at 52,922).

¹¹⁶ *Id.* at 66 (citing 68 Fed.Reg. at 52,932).

¹¹⁷ Final Brief for Petitioners at 11 (citing Memorandum from Jonathan Cannon, General Counsel, to Carol Browner, Administrator, entitled *EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998)).

¹¹⁸ *Id.* at 16.

¹¹⁹ Ferrey, *supra* note 6.

Guzy, the EPA General Counsel.¹²⁰ As such, the EPA clearly believed at one point it had the authority to regulate carbon dioxide. Given the evidence concerning greenhouse gases and global warming that has arisen since the statements were made in 1998 and 1999, the EPA has no basis for withdrawing those statements.

The EPA also argued that regulation was not warranted because of the existing scientific uncertainties regarding global warming.¹²¹ While there may be uncertainty, there is extensive evidence highlighting both the harmful effects of global warming and its causes, mainly greenhouse gases. In light of this, the EPA's argument is not persuasive, especially given that the CAA does not require proof or unequivocal evidence.¹²² Rather, the CAA only requires a reasonable belief that health and welfare may be endangered.¹²³ Therefore, the EPA cannot rationally base its denial on scientific uncertainties. If scientific uncertainty was a valid basis, regulations would likely never be enacted.

The EPA argued that the definition of air pollutants did not include carbon dioxide.¹²⁴ However, the definition of air pollutants does not list specific sources, but rather outlines the properties which make something an air pollutant.¹²⁵ Thus, the definition is broad enough to encompass new pollutants as they are discovered. Further, § 103(g)(1) of the CAA specifically lists carbon dioxide as an air pollutant.¹²⁶ The normal rule for

¹²⁰ Final Brief for Petitioners at 11. "Cannon's successor as General Counsel, Gary Guzy, reiterated and endorsed the Cannon Memo's conclusion that CO₂ is an air pollutant subject to regulation under the Act." *Id.* These statements were withdrawn in 2003 by General Counsel Robert Fabricant based on "his belief that the Act 'does not authorize regulation to address global climate change.'" *Massachusetts*, 415 F.3d at 54. This memo became one of the grounds for the EPA's denial. *Id.*

¹²¹ *Id.* at 77.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 67.

¹²⁵ See 42 U.S.C. § 7602(g).

¹²⁶ Section 103(g)(1) states:

Improvements in non-regulatory strategies and technologies for preventing or reducing multiple air pollutants, including sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), carbon monoxide, and carbon dioxide, from stationary sources, including fossil fuel power plants. Such strategies and technologies shall include improvements in the relative cost effectiveness and long-range implications of various air pollutant reduction and non-regulatory control strategies such as energy conservation, including end-use efficiency, and fuel-switching to cleaner fuels. Such strategies and technologies shall be

statutory construction when two sections of a statute use the same language is “identical words used in different parts of the same act are intended to have the same meaning.”¹²⁷ Therefore, if both § 103(g)(1) and § 202(a)(1) use the term “air pollutant” and § 103(g)(1) defined the term and included carbon dioxide, §202(a)(1) should also include carbon dioxide within its meaning of “air pollutant.” Thus, the EPA cannot evade its authority to regulate motor vehicle emissions on the basis that the CAA does not specifically mention it in § 202(a)(1).

The majority seems to question whether any of the petitioners actually had standing to sue. Rather than finding no standing, the majority declined to decide the issue so it could proceed to the merits. It would appear as if the majority was trying to find a loophole around standing so that it could rule on the merits. If this was not such a hotly contested topic, the majority probably would have decided the petitioners lacked standing and would therefore not have ruled on the merits.

Part of the basis for questioning petitioners’ standing was that their evidence to support each element of standing was not enough in the eyes of the majority. As the majority stated, “[petitioners] must support each element of [their] claim to standing.”¹²⁸ The majority, following its own adopted rule, had no basis to require more from the petitioners than that required of them under statutory or case law. If the court had dismissed the case without prejudice for lack of standing, Massachusetts could have refiled the suit after proving more concrete evidence of standing. If that happened, the dissenting opinion would likely be the majority decision, since Circuit Judge Sentelle signed on to the majority opinion for a lack of standing. If the standing issue were resolved, the dissent would likely become the majority, and the EPA would be required to regulate motor vehicle emissions.

Redressability was one of the elements of standing challenged by the EPA and discussed by the majority. As the dissenting opinion pointed out, quoting the NRC Report, the EPA relied on “reductions in the atmospheric concentrations of these gases following possible lowered

considered for existing and new facilities.

42 U.S.C. § 7403(g)(1).

¹²⁷ *Sullivan v. Stoop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986)).

¹²⁸ *Massachusetts*, 415 F.3d at 55.

emissions rates in the future will stretch out over decades for methane, and centuries and longer for carbon dioxide and nitrous oxide.”¹²⁹ The dissenting opinion also questioned the majority’s reliance on a portion of the NRC Report stating, “a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.”¹³⁰ While this statement does support the EPA’s position, the statement cannot stand alone and must be read with the rest of the report. The NRC Report noted “[the] fact that the magnitude of the observed warming is large compared to natural variability as simulated in climate models is suggestive of such a linkage,” though not “proof.”¹³¹

Public policy also plays a critical role in this case. If nothing is done, the global climate will gradually deteriorate. The earlier that measures are taken to address the emission of greenhouse gases, the earlier that the climate can begin to stabilize and recover. Decisions made today, whether to regulate emissions or not to regulate, will continue to affect the climate as well as the environment and human population.

VI. CONCLUSION

Global warming is a controversial issue in today’s political climate. One way to reduce the effects of global warming is to regulate pollutants that cause global warming. Petitioners in this case sought to have the EPA do so by requesting the EPA to regulate motor vehicle emissions. However, the EPA decided it did not have the authority to regulate motor vehicle emissions, and the majority opinion agreed. Unfortunately, this will only serve to further the problems affecting the global climate. Until motor vehicle emissions become regulated, greenhouse gases will continue to pour into the air and global temperatures will continue to rise.

ERIN C. BARTLEY

¹²⁹ *Id.* at 62 (quoting NRC Report at 10).

¹³⁰ *Id.* at 63 (quoting NRC Report at 17).

¹³¹ *Id.* at 64 (quoting the NRC Report at 17).