



Fall 2007

United States Supreme Court Rules EPA Must Take Action on Greenhouse Gas Emissions: Massachusetts v. EPA

Saillan de Charles

Recommended Citation

Saillan de Charles, *United States Supreme Court Rules EPA Must Take Action on Greenhouse Gas Emissions: Massachusetts v. EPA*, 47 NAT. RES. J. 793 (2007).

Available at: <https://digitalrepository.unm.edu/nrj/vol47/iss4/3>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

CHARLES DE SAILLAN*

United States Supreme Court Rules EPA Must Take Action on Greenhouse Gas Emissions: *Massachusetts v. EPA*

ABSTRACT

On April 2, 2007, the United States Supreme Court announced its decision in Massachusetts v. EPA, holding that the U.S. Environmental Protection Agency (EPA) had improperly denied a rulemaking petition requesting that the agency place limits on air emissions that contribute to global warming. The petitioners had asked EPA to regulate the emissions of certain greenhouse gases from new motor vehicles under the Clean Air Act. In ruling on the EPA's denial of the petition, the Supreme Court addressed three issues. First, the Court held that the lead petitioner, the Commonwealth of Massachusetts, had standing to sue for redress of injuries caused by global warming. The Court also ruled that a state acting to protect its quasi-sovereign interests was entitled to "special solicitude" in standing analysis. Second, the Court held that the EPA had the statutory authority to regulate greenhouse gases under the Clean Air Act. Finally, the Court held that the EPA had not adequately justified its denial of the petition in accordance with the statute. The decision sets significant precedent for pending and future litigation on global warming issues.

"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."¹ So states U.S. Supreme Court Justice John Paul Stevens, writing for the Court in *Commonwealth of Massachusetts v. Environmental Protection Agency*, decided on April 2, 2007. In what is likely to be a very important decision on the control of greenhouse gas emissions, the Court held by a 5-to-4 vote that the U.S. Environmental Protection Agency (EPA) has the authority to regulate greenhouse gases under the Clean Air Act and that the EPA's justification for not doing so was inadequate as a matter of law.

* Charles de Saillan is Assistant General Counsel in the New Mexico Environment Department, where he handles matters involving air quality, surface water and groundwater quality, hazardous wastes, and site remediation. The views expressed in this article are his own.

1. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446 (2007).

I. BACKGROUND

A. The Petition

This case began in October 1999 when 19 environmental, public interest, and trade organizations, as diverse as the International Center for Technology Assessment, Greenpeace USA, Public Citizen, and the New Mexico Solar Energy Association² filed a rulemaking petition with the EPA under the Clean Air Act.³ The petition also asserted a claim under section 553(e) of the Administrative Procedure Act, which requires each federal agency to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule."⁴ The petitioners asked the EPA to issue a rule regulating "greenhouse gas emissions," namely carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and hydrofluorocarbons (HFCs), from new motor vehicles under section 202(a)(1) of the Clean Air Act.⁵

Section 202(a)(1) of the Clean Air Act, which is the statutory basis of the petition, provides in relevant part:

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.⁶

The petitioners placed particular emphasis on two key terms in section 202(a)(1)—"air pollutant" and "welfare"—both of which are broadly defined in the Clean Air Act. Section 302(g) of the Act defines "air pollutant" as follows:

2. The 19 original petitioners were Alliance for Sustainable Communities; Applied Power Technologies, Inc.; Bio Fuels America; The California Solar Energy Industries Assn.; Clements Environmental Corp.; Environmental Advocates; Environmental and Energy Study Institute; Friends of the Earth; Full Circle Energy Project, Inc.; The Green Party of Rhode Island; Greenpeace USA; International Center for Technology Assessment; Network for Environmental and Economic Responsibility of the United Church of Christ; New Jersey Environmental Watch; New Mexico Solar Energy Assn.; Oregon Environmental Council; Public Citizen; Solar Energy Industries Assn.; and The SUN DAY Campaign. *Id.* at 1449 n.15.

3. 42 U.S.C. §§ 7401-7671q (2000).

4. 5 U.S.C. § 553(e) (2000). The petitioners also cited the First Amendment of the Constitution, which guarantees the right of the people "to petition the Government for a redress of grievances." U.S. CONST. amend. I.

5. Petition for Rulemaking and Collateral Relief Seeking Regulation of Greenhouse Gas Emissions from New Motor Vehicles under § 202 of the Clean Air Act, Int'l Ctr. for Tech. Assessment v. Browner, EPA Docket No. A-2000-04 (Oct. 20, 1999) (on file with Natural Resources Journal).

6. 42 U.S.C. § 7521(a)(1) (2000).

The term "air pollutant" means any 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 the formation of any air pollutant, to the extent the [EPA] Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.⁷

Notably, the term "welfare" includes such things as "weather" and "climate." Section 302(h) of the Act defines the term "welfare" as follows:

All language referring to effects on welfare includes, but is not limited to, 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 pollutants.⁸

Citing these provisions of the Clean Air Act, the petitioners maintained that greenhouse gases are "air pollutants" under the Act,⁹ and that the emission of greenhouse gases will endanger the public health and the public welfare.¹⁰ Therefore, according to the petitioners, the EPA has a mandatory duty to issue regulations under section 202(a)(1) prescribing standards for the emission of greenhouse gases from new motor vehicles.¹¹

The petitioners noted that two previous EPA General Counsels had concluded that the agency had the authority to regulate carbon dioxide under the Clean Air Act.¹² In a 1998 memorandum to the Administrator, EPA General Counsel Jonathan Z. Cannon concluded that "CO₂ emissions are within the scope of EPA's authority to regulate."¹³ The following year,

7. *Id.* § 7602(g).

8. *Id.* § 7602(h).

9. Petition for Rulemaking and Collateral Relief Seeking Regulation of Greenhouse Gas Emissions from New Motor Vehicles under § 202 of the Clean Air Act, *supra* note 5, at 10-14.

10. *Id.* at 14-28.

11. *Id.* at 33-34.

12. *Id.* at 11-12.

13. Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, on EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources 5 (Apr. 10, 1998) (on file with Natural Resources Journal).

EPA General Counsel Gary S. Guzy reiterated this view in congressional testimony.¹⁴

On January 23, 2001, more than a year after the petition was filed, the EPA published a notice in the *Federal Register* requesting public comment on the petition.¹⁵ During the 120-day comment period, which ended May 23, 2001, the EPA received nearly 50,000 public comments, most of them supporting the petition.¹⁶

B. EPA Denial of the Petition

On September 8, 2003, nearly four years after the petition had been filed, the EPA denied the petition and published its denial in the *Federal Register*.¹⁷ The EPA gave several legal and policy reasons for denying the petition.

The first reason was EPA's conclusion that it did not have the legal authority to regulate greenhouse gases under the Clean Air Act. In support of this conclusion, the EPA recited an assortment of "indicia of congressional intent" suggesting that Congress had yet to decide whether regulation of greenhouse gases was warranted.¹⁸ The EPA noted that several bills were introduced in Congress that would have mandated such regulation, but none became law. Moreover, while Congress had enacted several pieces of legislation that specifically address global warming, none of that legislation authorized a regulatory program.¹⁹ The EPA also cited the Supreme Court decision in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,²⁰ holding that the Food and Drug Administration did not have the statutory authority to regulate tobacco. That decision, according to the EPA, "cautions agencies against using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues when Congress has specifically addressed those areas in other statutes."²¹ Having thus concluded that the Clean Air Act does not authorize regulation to address concerns about global climate change, the EPA went on to assert, in circular fashion, that "[i]t follows from

14. *Is CO₂ a Pollutant and Does EPA Have the Power to Regulate It?*: J. Hearing Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs of the H. Comm. on Government Reform and the Subcomm. on Energy and Environment of the H. Comm. on Science, 106th Cong., at 11-19 (Oct. 6, 1999) (statement of EPA Gen. Counsel Gary S. Guzy).

15. Notices Environmental Protection Agency, 66 Fed. Reg. 7486 (Jan. 23, 2001).

16. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,924 (Sept. 8, 2003).

17. *Id.* at 52,922.

18. *Id.* at 52,926.

19. *Id.* at 52,925-28.

20. 529 U.S. 120, 120 (2000).

21. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,925.

this conclusion, that [greenhouse gases], as such, are not air pollutants under the [Clean Air Act's] regulatory provisions."²²

In concluding that it lacked legal authority to regulate greenhouse gases, the EPA also relied on a new legal opinion from its General Counsel. On August 28, 2003, EPA General Counsel Robert E. Fabricant issued a memorandum concluding, contrary to his predecessors, that the Clean Air Act "does not authorize EPA to regulate for global climate change purposes."²³ The General Counsel's memorandum set forth several reasons for its conclusion, all of which were repeated by the EPA in denying the petition.²⁴ General Counsel Fabricant expressly repudiated the conclusion of his predecessors, stating that the memorandum "formally withdraws Mr. Cannon's April 10, 1998 memorandum as no longer representing the views of EPA's General Counsel."²⁵

The EPA's second reason for denying the petition was exercise of the agency's discretion under section 202(a)(1) of the Clean Air Act. According to the EPA, section 202(a)(1) "does not impose a mandatory duty on the Administrator to exercise her judgment"; rather, it "provides the Administrator with discretionary authority."²⁶ The EPA noted that the provision "does not require the Administrator to act by a specified deadline."²⁷ Further, the provision "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."²⁸

The EPA's third reason for denying the petition was that regulation of greenhouse gases from motor vehicles would interfere with the fuel efficiency standards set by the U.S. Department of Transportation (DOT). The EPA asserted that "the only practical way to reduce tailpipe emissions of CO₂ is to improve fuel economy."²⁹ It pointed out that "Congress has already created a detailed set of mandatory standards governing the fuel economy of cars and light duty trucks, and has authorized DOT—not

22. *Id.* at 52,928. EPA repeated, "Because EPA lacks [Clean Air Act] regulatory authority to address global climate change, the term 'air pollutant' as used in the regulatory provisions cannot be interpreted to encompass global climate change." *Id.*

23. Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator, on EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act 1 (Aug. 28, 2003).

24. *See id.* at 3–11.

25. *Id.* at 1 (citation omitted). General Counsel Fabricant further stated, "The Cannon memorandum and the statements by Mr. Guzy concerning this matter no longer represent the views of EPA's General Counsel." *Id.* at 12.

26. 68 Fed. Reg. at 52,929.

27. *Id.*

28. *Id.*

29. *Id.*

EPA — to implement those standards.”³⁰ The EPA concluded that its options were limited to setting more stringent fuel economy standards, which would abrogate the DOT standards, or setting less stringent standards, which would be meaningless.³¹

The EPA’s final reason for denial of the petition was a policy reason, that it would be neither “effective [n]or appropriate” for the EPA to establish greenhouse gas standards for motor vehicles “at this time.”³² The EPA emphasized the uncertainty in the science of climate change: “The science of climate change is extraordinarily complex and still evolving,” and “there continue to be uncertainties in our understanding of the factors that may effect future climate change and how it should be addressed.”³³ Further, according to the EPA, “the President has laid out a comprehensive approach to climate change.”³⁴ The approach “calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development so that government may effectively and efficiently address the climate change issue over the long term.”³⁵ The EPA asserted that to establish greenhouse gas “emission standards for U.S. motor vehicles at this time would require the EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies.”³⁶ The EPA also asserted that establishing such standards “would...result in an inefficient, piecemeal approach to addressing the climate change issue.”³⁷ The EPA further argued that such regulation “could also weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies.”³⁸ For these reasons, the EPA concluded that it “would decline the petitioners’ request to regulate motor vehicle [greenhouse gas] emissions even if it had authority to promulgate such regulations.”³⁹

30. *Id.*

31. *Id.* Somewhat contrary to EPA’s assertions, the petition listed other practical methods of reducing carbon dioxide emissions from motor vehicles that could be implemented independent of fuel economy standards, such as the increased use of hybrid vehicles and electric vehicles and the introduction of hydrogen-powered fuel cell vehicles. *See* Petition for Rulemaking and Collateral Relief Seeking Regulation of Greenhouse Gas Emissions from New Motor Vehicles under § 202 of the Clean Air Act, *supra* note 5, at 29–33.

32. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,930.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 52,931.

37. *Id.*

38. *Id.*

39. *Id.*

C. The D.C. Circuit Decision Affirming EPA

Following the EPA's denial of the petition, the petitioners appealed that action to the Court of Appeals for the District of Columbia Circuit under section 307(a)(1) of the Clean Air Act. That provision allows judicial review in the District of Columbia Circuit of any "final action of the Administrator...if such action is based on a determination of nationwide scope or effect."⁴⁰ Twelve states (including New Mexico), one territory, and three municipalities joined the petitioners as interveners.⁴¹ Ten states and several trade associations intervened on behalf of the EPA defending the denial.⁴²

On July 15, 2005, the court of appeals issued its decision, affirming the EPA's denial of the petition.⁴³ The court of appeals' 2-to-1 decision was oddly fractured, with three separate opinions, including a dissent. Writing for the court, Judge A. Raymond Randolph based the decision on agency discretion. He noted that "a reviewing court will uphold agency conclusions based on policy judgments when an agency must resolve issues on the frontiers of scientific knowledge."⁴⁴ Thus, the court held "that the EPA Administrator had properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking."⁴⁵ Judge David B. Sentelle wrote a separate opinion that concurred in the judgment but dissented in part. He opined that the petitioners lacked standing to sue in that they had not suffered a particularized injury in fact.⁴⁶ Judge David S. Tatel dissented. In his view, at least one of the interveners, the Commonwealth of Massachusetts, had established standing to sue.⁴⁷ He further stated his view

40. Clean Air Act, 42 U.S.C. § 7607(b)(1) (2000).

41. The interveners supporting the original petitioners in seeking to overturn EPA's denial of the petition were the states of California, Connecticut, Illinois, Maine, (the Commonwealth of) Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; the territory of American Samoa; the municipalities of Baltimore, the District of Columbia, and New York City; and the environmental organizations Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation of New England, Environmental Defense, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group.

42. The interveners supporting EPA in defending its denial of the petition were the states of Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah; and the trade organizations Alliance of Automobile Manufacturers, National Automobile Dealers Association, Engine Manufacturers Association, Truck Manufacturers Association, CO2 Litigation Group, and Utility Air Regulatory Group.

43. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 147 S. Ct. 1438 (2007).

44. *Id.* at 58 (internal quotations omitted) (citing *Env'tl. Def. Fund v. EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978)).

45. *Id.*

46. *Id.* at 59-60 (Sentelle, J., dissenting in part and concurring in the judgment).

47. *Id.* at 64-67 (Tatel, J., dissenting).

that the EPA has the authority to regulate greenhouse gas emissions⁴⁸ and that the EPA's reasons for not exercising this authority did not follow the statutory standard.⁴⁹

After the court of appeals denied a motion for rehearing en banc,⁵⁰ the petitioners, led by Massachusetts, sought review in the U.S. Supreme Court. The Court granted their petition for certiorari on June 26, 2006.⁵¹ The Court heard oral argument on the case on November 29, 2006.

II. SUPREME COURT DECISION

The Supreme Court issued its decision in *Massachusetts v. EPA* on April 2, 2007. It reversed the court of appeals and ruled that the EPA had improperly denied the rulemaking petition. The Court's opinion was authored by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Roberts filed a dissenting opinion on the standing issue that was joined by Justices Scalia, Thomas, and Alito. Justice Scalia filed a separate dissenting opinion on the merits that was joined by the Chief Justice and Justices Thomas and Alito. The Court addressed three issues in its decision.

A. Standing

The first issue that the Court addressed was whether the petitioners had standing to sue. As the Court explained, the basis of the standing requirement is Article III of the Constitution, which limits federal-court jurisdiction to "Cases" and "Controversies."⁵² The jurisdiction of the federal courts is limited "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."⁵³ To establish standing, a litigant must demonstrate "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress the injury."⁵⁴ In other words, the litigant must show injury, causation, and redressability.

48. *Id.* at 67-73 (Tatel, J., dissenting).

49. *Id.* at 73-82.

50. *Massachusetts v. EPA*, 433 F.3d 66 (D.C. Cir. 2005) (per curiam) (Tatel, J., dissenting).

51. *Massachusetts v. EPA*, 126 S. Ct. 2960 (2006) (mem.).

52. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1452 (2007). Article III of the U.S. Constitution provides that "[t]he judicial Power shall extend to" enumerated "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1.

53. *Massachusetts v. EPA*, 127 S. Ct. at 1452 (citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

54. *Id.* at 1453 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The Court noted that “[o]nly one of the petitioners needs to have standing” for the Court to consider the petition.⁵⁵ Focusing on the lead petitioner, the Commonwealth of Massachusetts, the Court concluded that the Commonwealth met the standing requirements. Interestingly, the Court ruled that a state, acting as *parens patriae* and protecting its quasi-sovereign interests, “is entitled to special solicitude in our standing analysis.”⁵⁶ In support of its ruling, the Court referenced *Georgia v. Tennessee Copper Co.*,⁵⁷ in which Justice Holmes wrote,

“This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”⁵⁸

The Court concluded that, “[j]ust as Georgia’s ‘independent interest...in all the earth and air within its domain’ supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”⁵⁹

The Court went on to find that Massachusetts had suffered injury due to global warming. Because global warming had caused sea levels to rise, Massachusetts had lost some of its coastal land, an injury that is expected to worsen over the course of the next century.⁶⁰ Moreover, the Commonwealth “owns a substantial portion of the state’s coastal property.”⁶¹ The Court found that the costs of remediation of damage resulting from inundation, storm surges, and floods “could run well into the hundreds of millions of dollars.”⁶²

The Court next found that greenhouse gas emissions from new motor vehicles cause or contribute to the Commonwealth’s injury. The Court was not persuaded by the EPA’s argument that emissions from new motor vehicles contribute “so insignificantly” to the injuries that they do not meet the causation requirement for standing.⁶³ The Court noted that the transportation sector of the United States “emits an enormous quantity of

55. *Id.* at 1453–54 (citing *Rumsfeld v. F. for Acad. & Inst’l Rights*, 547 U.S. 47, 52 n.2 (2006)).

56. *Id.* at 1454–55.

57. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

58. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007) (quoting *Tenn. Copper*, 206 U.S. 230, 237) (emphasis by Justice Holmes).

59. *Id.* (alteration in original).

60. *Id.* at 1455–56.

61. *Id.* at 1456.

62. *Id.*

63. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1457 (2007).

carbon dioxide into the atmosphere..., more than 1.7 billion metric tons in 1999 alone," according to one expert.⁶⁴ Further, considering only carbon dioxide emissions from the transportation sector, "the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China."⁶⁵ The Court thus concluded that emissions from motor vehicles in the United States "make a meaningful contribution to greenhouse gas concentrations and hence...to global warming."⁶⁶

Next, the Court found that Massachusetts' injury is redressable and that the remedy is regulation of greenhouse gas emissions from new motor vehicles.⁶⁷ While the Court recognized that the remedy would not by itself reverse global warming, it nevertheless found that the remedy would slow or reduce global warming.⁶⁸ The remedy would relieve a "discrete injury" to the Commonwealth, which is sufficient to support standing, even if it would not relieve every injury.⁶⁹ The Court also recognized that a delay in emission reductions would be unavoidable, as regulations are implemented and new regulated vehicles eventually replace older unregulated ones. Yet the Court found that, "[b]ecause of the enormity of the potential consequences associated with man-made climate change," the relatively short delay "is essentially irrelevant."⁷⁰

Dissenting from the Court's decision, Chief Justice Roberts, joined by three other Justices, would have found that Massachusetts lacked standing. Chief Justice Roberts began by criticizing the "special solicitude" the Court gave to Massachusetts: "Relaxing Article III standing requirements because asserted injuries are pressed by a State...has no basis in our jurisprudence...."⁷¹ Chief Justice Roberts went on to criticize the Court's finding that Massachusetts has standing. To establish standing, he stated, the petitioners must allege an injury that is "'concrete and particularized,'" and that affects them in a "'personal and individual way.'"⁷² Yet, "[t]he very concept of global warming seems inconsistent with this particularization requirement"⁷³ because it is "'harmful to humanity at

64. *Id.*

65. *Id.*

66. *Id.* at 1458.

67. *See id.*

68. *See id.*

69. *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 224 n.15 (1982)).

70. *Id.*

71. *Id.* at 1464 (Roberts, C.J., dissenting).

72. *Id.* at 1467 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992)).

73. *Id.*

large.”⁷⁴ Furthermore, in his view, the petitioners’ alleged injury is based on a “conclusory statement” and “pure conjecture”;⁷⁵ the connection between the alleged injury and the EPA’s inaction “is far too speculative to establish causation”;⁷⁶ and the likelihood that regulation of emissions from new motor vehicles will redress the alleged injury is “pure conjecture.”⁷⁷ Chief Justice Roberts concluded that “the Court’s self-professed relaxation of [the] Article III requirements has caused us to transgress ‘the proper – and properly limited – role of the courts in a democratic society.’”⁷⁸

B. EPA Authority

Having dispensed with the standing issue, the Court turned to the merits of the case, beginning with the question of the EPA’s authority under the Clean Air Act to regulate greenhouse gases. The Court had no trouble concluding that the EPA had such authority. It dismissed the EPA’s assertions that Congress did not intend the agency to regulate greenhouse gases, and therefore such gases do not fall within the Act’s definition of “air pollutant.”⁷⁹ Such a reading is foreclosed by the text of the statute, the Court ruled, quoting the Clean Air Act’s “sweeping definition of ‘air pollutant’” in section 302(g).⁸⁰ The Court derided the EPA’s indicia of congressional intent as “postenactment legislative history” having little bearing on Congress’s intent when it enacted section 202(a)(1).⁸¹ Nor was the Court persuaded by the EPA’s argument that regulation of global gas emissions from new motor vehicles would interfere with the DOT fuel economy standards. The EPA’s mandate to protect health and the environment is wholly independent of DOT’s mandate to promote energy efficiency, and there is no reason why the two agencies cannot implement the programs to “avoid inconsistency.”⁸² The Court concluded that “[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt”

74. *Id.* (quoting *Massachusetts v. EPA*, 415 F.3d 50, 60 (D.C. Cir. 2006) (Sentelle, J., dissenting in part and concurring in judgment)).

75. *Id.*

76. *Id.* at 1469.

77. *Id.* at 1470.

78. *Id.* at 1471 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

79. *See id.* at 1473.

80. *Id.* at 1460. The definition of “air pollutant” is set forth *supra* text accompanying note 7.

81. *Id.* at 1460. The Court referred to such post-enactment legislative history as “not only oxymoronic but inherently entitled to little weight.” *Id.* at 1460 n.27 (quoting *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005)).

82. *Id.* at 1462.

substances covered by the Clean Air Act's "capacious definition of 'air pollutant,'" and are subject to regulation under the Act.⁸³

Justice Scalia wrote a separate opinion dissenting on the merits that the Chief Justice and Justices Thomas and Alito joined. Justice Scalia took issue with the Court's conclusion that greenhouse gases fall within the definition of "air pollutant."⁸⁴ He observed that the term "air pollutant" as defined in the Act is "'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.'"⁸⁵ Thus, an air pollutant must be a "pollution agent." Justice Scalia then referred to the EPA's discussion of its regulatory program under section 109 of the Act,⁸⁶ which authorizes the EPA to set national ambient air quality standards (NAAQS) for conventional air pollutants.⁸⁷ In the notice denying the petition, the EPA explained – as an aside – that the NAAQS program was not well-suited to the regulation of carbon dioxide. The EPA stated that it used the NAAQS "'to address air pollution problems that occur primarily at ground level,'" but that carbon dioxide concentrations are fairly consistent "'up to approximately the lower stratosphere.'"⁸⁸ Justice Scalia quoted several passages from this discussion. He then concluded from these passages that the words "air pollution" naturally mean only that pollution occurring "'at ground level or near the surface of the earth.'"⁸⁹ He asserted that the EPA's "reasonable interpretation" was entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*.⁹⁰

C. EPA Discretion

Having concluded that the EPA has the authority to regulate greenhouse gas emissions, the Court next considered whether the EPA had properly exercised its discretion in declining to use that authority. The Court began by acknowledging that the agency "has broad discretion to choose how best to marshal its limited resources and personnel to carry out

83. *Id.* at 1460, 1462.

84. *Id.* at 1475–76.

85. *Id.* at 1475 (Scalia, J., dissenting). For the definition of "air pollutant," see *supra* text accompanying note 7.

86. 42 U.S.C. § 7409 (2000).

87. *Massachusetts v. EPA*, 127 S. Ct. at 1477 (Scalia, J., dissenting) (quoting 68 Fed. Reg. 52,922, 52,926–27 (Sept. 8, 2003)).

88. *Id.* (quoting 68 Fed. Reg. at 52,926–27).

89. *Id.*

90. *Id.* at 1476. In *Chevron*, the Court held that, if a provision of a statute is ambiguous, the reasonable interpretation of the administrative agency entrusted to implement and enforce the statute is entitled to deference. See 467 U.S. 837 (1984).

its delegated responsibilities.”⁹¹ That discretion, however, is circumscribed by statute. In responding to a petition for rulemaking, the agency’s “reasons for action or inaction must conform to the authorizing statute.”⁹² To deny the petition under section 202(a)(1), the Court held, the EPA must either find that the pollutants do not cause or contribute to global warming or provide some reasoned justification for not making a finding.⁹³ The court found that the EPA had failed to justify its decision not to regulate greenhouse gas emissions in conformance with section 202(a)(1). Although the EPA “offered a laundry list of reasons not to regulate,” these reasons “have nothing to do with whether greenhouse gas emissions contribute to climate change,” nor “do they amount to a reasoned justification for declining to form a scientific judgment.”⁹⁴ The Court was unimpressed by the EPA’s description of the scientific uncertainty surrounding the global warming issue as a reason not to regulate greenhouse gas emissions.⁹⁵ The Court stated, “If the scientific uncertainty is so profound that it precludes the EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.”⁹⁶ The Court concluded that the “EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change,” and its action was therefore “arbitrary, capricious,...or otherwise not in accordance with law.”⁹⁷

Justice Scalia, dissenting on the merits, again took issue with the Court’s reasoning, criticizing it on two grounds. First, he argued that the EPA had not made any determination whether greenhouse gases cause or contribute to global warming; the EPA had simply deferred making such a determination at this time. The statute does not require the EPA to make a determination whenever a petition is filed, according to Justice Scalia.⁹⁸ Moreover, “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.”⁹⁹ The EPA, in his view, had acted within its discretion in deferring a decision.¹⁰⁰ Second, Justice Scalia argued that, contrary to the Court’s holding, the EPA had

91. *Massachusetts v. EPA*, 127 S. Ct. at 1459 (majority opinion) (citing *Chevron*, 467 U.S. at 842–45).

92. *Id.* at 1462.

93. *Id.*

94. *Id.* at 1462–63.

95. *See supra* note 33 and accompanying text.

96. *Massachusetts v. EPA*, 127 S. Ct. at 1463.

97. *Id.* at 1463 (quoting Clean Air Act § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A)).

98. *Id.* at 1472 (Scalia, J., dissenting).

99. *Id.* at 1473.

100. *Id.* at 1473–74.

adequately justified its action. He recalled the Court's statement that "[i]f... 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."¹⁰¹ His retort to this statement was that the "EPA *has* said precisely that."¹⁰² Justice Scalia then quoted at length from the EPA's discussion of the scientific uncertainties surrounding global warming in the notice denying the petition.¹⁰³ He remarked that he did not know what more the EPA could say to satisfy the majority.¹⁰⁴

III. COMMENTARY

In reaching its decision in *Massachusetts v. EPA*, the Supreme Court had to grapple with some difficult issues. As suggested by the 5-to-4 split, the Court's decision was not inexorable. The toughest question was standing, and the Court made some new law in deciding the question in favor of Massachusetts. While the Court easily found that the EPA has the authority to regulate greenhouse gas emissions, the Court had to finely parse the EPA's denial of the rulemaking petition in order to reach its conclusion that the agency had not adequately explained its decision to abstain from exercising its authority.

A. A New Theory of Standing for States

On the question of standing, the Court clearly broke new ground in ruling that the Commonwealth of Massachusetts, given its "stake in protecting its quasi-sovereign interests,... is entitled to special solicitude in our standing analysis."¹⁰⁵ In dissent, Chief Justice Roberts rebuked the Court for "adopt[ing] a new theory of Article III standing for States...."¹⁰⁶ Indeed, the Court went back a full century to the *Tennessee Copper* case, which long predates modern standing jurisprudence, to find precedent to support its ruling.¹⁰⁷

Oddly, it is not entirely clear from the opinion how the Court applied the "special solicitude" afforded Massachusetts in protecting its quasi-sovereign interests. The Court seemed to analyze the standing

101. *Id.* at 1474 (quoting *id.* at 1463 (majority opinion)).

102. *Id.*

103. *Id.* at 1474-75 (quoting 68 Fed. Reg. 52,930 (Sept. 8, 2003)).

104. *Id.* at 1475.

105. *Id.* at 1454-55 (majority opinion).

106. *Id.* at 1466 (Roberts, C.J., dissenting). See also *id.* at 1471 (Roberts, C.J., dissenting) (The Court has "devise[d] a new doctrine of state standing to support its result.").

107. *Id.* at 1454 (majority opinion); see also *id.* at 1465 (Roberts, C.J., dissenting) ("The Court has to go back a full century in an attempt to justify its novel standing rule[s]....").

question based on the Commonwealth's ownership of coastal property within its borders.¹⁰⁸ That certainly was how the dissenters viewed the majority opinion.¹⁰⁹ And the dissenters point out that property ownership is not a quasi-sovereign interest; it is a non-sovereign interest.¹¹⁰ There are, however, strong indications that the Court intended a broader analysis, which included the Commonwealth's quasi-sovereign interests as well as its property ownership interests. For example, the Court expressly recognized "Massachusetts' well-founded desire to preserve its sovereign territory."¹¹¹ The Court also stated that the Commonwealth's ownership of "a great deal of the territory alleged to be affected *only reinforces* the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power,"¹¹² thus indicating that land ownership was not the primary basis for standing. Further, the Court stated that the "[p]etitioners maintain that the seas are rising and will continue to rise, and have alleged that such a rise will lead to the loss of Massachusetts' sovereign territory."¹¹³ Thus, the Court appears to have intended the Commonwealth's quasi-sovereign interests to be part of its standing analysis.

By recognizing an injury to the Commonwealth's quasi-sovereign interests as a basis for standing, the Court did not need to find that the petitioners suffered a "personal and individual" harm. The Court found it to be "of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan [v. Defenders of Wildlife]*, a private individual."¹¹⁴ In dissent, taking the opposite tack, the Chief Justice wrote that the petitioners must be "affected in a 'personal and individual way,'"¹¹⁵ and that they must "seek relief that 'directly and tangibly benefits [them]'" in a manner distinct from its impacts on "the public at large."¹¹⁶ Chief Justice Roberts complained that "the redress the petitioners seek is focused no more on them than on the public generally."¹¹⁷ But the Chief Justice derived these points of law from cases such as *Defenders of Wildlife*,

108. *Id.* at 1456 (majority opinion).

109. *Id.* at 1466 (Roberts, C.J., dissenting) (noting that the majority "applies our Article III standing test to the asserted injury of the State's loss of coastal property...*in its capacity as a landowner*") (citations and internal quotations omitted).

110. *Id.* at 1466 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

111. *Id.* at 1454 (majority opinion).

112. *Id.* (emphasis added) (internal quotation marks omitted).

113. *Id.* at 1456 n.21.

114. *Id.* at 1454 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

115. *Id.* at 1467 (Roberts, C.J., dissenting) (citing *Defenders of Wildlife*, 504 U.S. at 555, 560 n.1).

116. *Id.* (citing *Defenders of Wildlife*, 504 U.S. at 573-74).

117. *Id.*

analyzing the standing of individual plaintiffs, or of organizational plaintiffs bringing suit on behalf of their members,¹¹⁸ and these cases are not applicable.¹¹⁹ Where the state, acting as *parens patriae*, alleges injury to its quasi-sovereign interests, its interests are essentially identical to those of the public at large. Yet there is no reason why such an injury to a state's quasi-sovereign interest cannot be sufficiently "concrete and particularized" to support Article III standing, as the Court apparently found here.

The Court's holding that a state seeking to protect its quasi-sovereign interests is entitled to "special solicitude" in determining the state's standing to sue is important precedent. Besides *Massachusetts v. EPA*, states have filed several other lawsuits aimed at reducing greenhouse gas emissions.¹²⁰ The Court's holding will undoubtedly make it easier for states to establish standing in these and future actions to address global warming. Further, this "new theory of Article III standing for States"¹²¹ will likely have broader application, making it easier for states to establish standing in other actions to protect the health and environment of their citizens. Significantly, in a large number of the reported cases in which states have acted as *parens patriae* to protect quasi-sovereign interests, the state's claims involved environmental pollution or threats to natural resources.¹²²

B. EPA's Broad Authority Confirmed

On the question of the EPA's authority to regulate greenhouse gases, the Court had no difficulty finding that the greenhouse gases fall neatly within the Clean Air Act's "capacious definition of 'air pollutant.'"¹²³ That decision is intuitive and unremarkable. It is also consistent with lower court decisions that have tended to interpret environmental statutes

118. The Court has held that an organization has standing to sue on behalf of its members when its members would otherwise have standing to sue in their own right. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000).

119. See *Defenders of Wildlife*, 504 U.S. at 573-78, and cases discussed therein.

120. E.g., *New York v. EPA*, No. 06-1148 (D.C. Cir. filed Apr. 27, 2006) (state brought action to compel EPA to place limits on carbon dioxide emissions from new electric power plants); *California ex rel. Lockyer v. Gen. Motors Corp.*, No. 06-CV-05755 (N.D. Cal. filed Sept. 20, 2006) (state brought action seeking damages from automobile manufacturers for injuries resulting from greenhouse gas emissions).

121. *Massachusetts v. EPA*, 127 S. Ct. at 1466 (Roberts, C.J., dissenting).

122. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diversion of water); *Missouri v. Illinois*, 180 U.S. 208 (1901) (water pollution).

123. *Massachusetts v. EPA*, 127 S. Ct. at 1462.

liberally to effectuate their goals.¹²⁴ But the Court's decision sets useful precedent for future cases addressing greenhouse gases under the Clean Air Act.

What is remarkable is Justice Scalia's dissent. Justice Scalia, joined by three other Justices, concluded that the term "air pollutant" encompasses only substances in the air at or near ground level, not greenhouse gases that occur in the upper atmosphere.¹²⁵ In Justice Scalia's view, problems resulting from atmospheric concentrations of carbon dioxide "bear little resemblance to what would naturally be termed 'air pollution.'"¹²⁶ He reached this conclusion by patching together loosely related passages from the EPA's notice denying the petition, constructing an "EPA interpretation" that EPA itself had not made and then arguing that this "interpretation" should be afforded deference under *Chevron*.¹²⁷ His reasoning is badly flawed.

Justice Scalia began with the EPA's conclusion that the definition of "air pollutant" does not cover greenhouse gases, a conclusion with which he agreed.¹²⁸ In support of this conclusion, he relied almost entirely on the EPA's discussion of the NAAQS regulatory program in its notice denying the petition.¹²⁹ In that discussion, the EPA had explained why, in its view, it would be inappropriate to regulate greenhouse gases under the NAAQS program.¹³⁰ The EPA had pointed out, correctly, that the NAAQS primarily address concentrations of pollutants that occur at ground level.¹³¹ But the EPA also correctly noted that long-range transport of pollutants "may also contribute to local concentrations in some cases."¹³² Nowhere did the EPA state that it interprets the term "air pollutant" (or "air pollution") to apply only to ground-level pollution.¹³³ To the contrary, the EPA expressly

124. E.g., *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996) (The Comprehensive Environmental Response, Compensation, and Liability Act "should be construed liberally to carry out its purpose."); *United States v. Boldt*, 929 F.2d 35, 41 (1st Cir. 1989) ("federal water pollution laws...are construed in a broad, rather than a narrow fashion"); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (The Resource Conservation and Recovery Act "should be liberally construed.").

125. *Massachusetts v. EPA*, 127 S. Ct. at 1477 (Scalia, J., dissenting).

126. *Id.*

127. *See id.*

128. *Id.* at 1476.

129. *Id.* at 1476-77.

130. *Id.* at 1477 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,926-27 (Sept. 8, 2003)).

131. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926. *See supra* note 87 and accompanying text.

132. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,927.

133. Nor did EPA advance such an interpretation in the brief it filed with the Court. *See* Brief for the Federal Respondent at 20-35, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

"reserve[d] judgment on whether [greenhouse gases] would meet the [Clean Air Act] definition of 'air pollutant' for regulatory purposes were they subject to regulation under the [Clean Air Act] for global climate change purposes."¹³⁴ Nor did the EPA anywhere state that its discussion of the NAAQS program formed a part of the basis for its conclusion that greenhouse gases do not fall within the definition of "air pollutant." The basis for that conclusion was the "indicia of congressional intent" that the EPA recited in its notice.¹³⁵ Furthermore, the EPA's discussion of the NAAQS regulations was largely beside the point; it had almost nothing to do with the petition before the EPA, and the EPA had used it only by way of example or "context."¹³⁶ Justice Scalia nevertheless adopted portions of this discussion as "EPA's interpretation" of the words "air pollution" in the definition of "air pollutant."¹³⁷ He faulted the Court for not deferring to the "EPA's reasonable interpretation" under *Chevron*.¹³⁸

Putting aside the fact that the interpretation articulated by the EPA was quite different from Justice Scalia's view of the "EPA interpretation," his *Chevron* argument is wrong for at least two reasons. First, under *Chevron*'s two-step analysis, the courts look to the agency interpretation of a statute only if that statute is ambiguous on its face; otherwise the courts apply the statute's plain meaning.¹³⁹ Despite Justice Scalia's effort to find ambiguity in the Act's definition of "air pollutant," it is not there. The definition of "air pollutant" is very broad. There is nothing on the face of the statute to suggest that either the term "air pollutant" or the words "air pollution agent" should be limited to harmful substances in the air only at ground level and should exclude such substances higher in the atmosphere. Second, the Court has repeatedly held that an agency interpretation of an ambiguous statute is entitled to heightened deference only if that

134. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928-29.

135. *Id.* at 52,926-28; see discussion *supra* text accompanying note 19.

136. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926.

137. *Massachusetts v. EPA*, 127 S. Ct. at 1477 (Scalia, J., dissenting).

138. *Id.* at 1476-77.

139. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984). Under *Chevron*, judicial review of administrative actions that involve an agency's statutory interpretation requires a two-step analysis. First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, "that is the end of the matter," for the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Further, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer...." *Id.* at 844.

interpretation has been consistent over time.¹⁴⁰ Here, the EPA's interpretation has been markedly *inconsistent* over time. As we have seen, in 2003 General Counsel Fabricant repudiated the interpretation advanced by General Counsel Cannon in 1998 and General Counsel Guzy in 1999 "as no longer representing the views of EPA's General Counsel" and adopted the contrary view.¹⁴¹

Furthermore, Justice Scalia fails to account for the fact that the Clean Air Act regulates other substances that occur high in the atmosphere. For example, it regulates sulfur dioxide and oxides of nitrogen, which form aerosols in the upper atmosphere and cause acid precipitation.¹⁴² It also regulates chlorofluorocarbons, which destroy the ozone layer in the upper atmosphere.¹⁴³ Certainly, these substances "would naturally be termed 'air pollution.'"¹⁴⁴ Justice Scalia's conclusion that the term "air pollutant" applies only to ground-level pollutants is nothing short of absurd.

C. EPA's Discretion Curtailed

On the question of the EPA's discretion to regulate greenhouse gas emissions, the Court had more difficulty in concluding that the EPA did not adequately justify its denial of the petition. According to the Court, the EPA's stated reasons for not regulating greenhouse gas emissions did not relate to the statutory standard—whether those emissions cause or contribute to global warming.¹⁴⁵ In dissent, Justice Scalia leveled two criticisms at the Court's analysis. First, he said that the EPA did not decide whether or not to regulate greenhouse gas emissions; it merely decided not to make such a decision at this time.¹⁴⁶ According to Justice Scalia, there are no statutory standards for deferring a decision. The Court effectively responded to this criticism by holding that the "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."¹⁴⁷ The Court found that such a reasonable explanation was lacking in the

140. E.g., *Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of Interior*, 526 U.S. 86, 108 (1999) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.").

141. See discussion *supra* text accompanying notes 13, 14, 23–25.

142. Clean Air Act §§ 401–416; 42 U.S.C. §§ 7651–7651o (2000).

143. Clean Air Act §§ 601–618; 42 U.S.C. §§ 7671–7671q (2000).

144. *Massachusetts v. EPA*, 127 S. Ct. at 1477 (Scalia, J., dissenting).

145. *Id.* at 1462 (majority opinion).

146. *Id.* at 1472 (Scalia, J., dissenting); see *supra* text accompanying notes 97–99.

147. *Id.* at 1462 (majority opinion) (emphasis added).

EPA's denial. Second, Justice Scalia said that, contrary to the Court's conclusion, the EPA *had* provided a justification for not setting standards,¹⁴⁸ and that justification was based on the statute. The justification, according to Justice Scalia, was that scientific uncertainty precludes the EPA from determining whether or not greenhouse gas emissions cause or contribute to global warming, and he quoted at length from the EPA's discussion of those uncertainties in its denial of the petition.¹⁴⁹ He concluded, with some sarcasm, "I simply cannot conceive of what else the Court would like EPA to say."¹⁵⁰ Justice Scalia makes a valid point here, but the Court is technically correct. The EPA nowhere expressly stated that this scientific uncertainty was the reason it did not make a determination, or the basis for its exercise of discretion. The EPA, in effect, did not connect the dots.

It is curious that the EPA was not more methodical and thorough in arguing that it had the discretion not to regulate greenhouse gas emissions when it denied the petition. The agency devoted four pages in the *Federal Register* to arguing that it did not have the authority to regulate greenhouse gases¹⁵¹ — a strained argument at best; but it then spent less than one-half page arguing that it had the discretion not to regulate¹⁵² — a much more plausible argument. The denial of the petition was poorly written, and its reasoning difficult to follow.¹⁵³ Perhaps it was the product of internal dissention within the agency over how to justify its decision not to regulate — a decision that was likely based on politics as much as policy.

The Court nevertheless suggested that the EPA would have another chance to justify its decision not to regulate: "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."¹⁵⁴

148. *Id.* at 1474 (Scalia, J., dissenting).

149. *Id.* at 1474–75 (quoting 68 Fed. Reg. 52,922, 52,930 (Sept. 8, 2003)).

150. *Id.* at 1475.

151. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,925–29.

152. *Id.* at 52,929.

153. See, e.g., *Massachusetts v. EPA*, 415 F.3d 50, 73 (D.C. Cir. 2006) (Tatel, J., dissenting) ("Indeed, reading the relevant sections of EPA's petition denial — one titled 'No Mandatory Duty,' another 'Different Policy Approach,' and a third 'Administration Global Climate Change Policy,' — I find it difficult even to grasp the basis for EPA's action.") (citation omitted).

154. *Massachusetts v. EPA*, 127 S. Ct. at 1463.

IV. CONCLUSION

The Supreme Court decision in *Massachusetts v. EPA* is highly significant, both with respect to the case before the Court and with respect to pending and future litigation over issues related to global warming. Of course, it remains to be seen whether the EPA will take significant steps to regulate greenhouse gas emissions in response to the Court's decision. It also remains to be seen how the lower courts will interpret and apply the decision. But it is clear that the decision will provide support to those who are advocating regulatory action to address global warming. As Massachusetts Attorney General Martha Coakley said, perhaps a little too optimistically, the "EPA can no longer hide behind the fiction that it lacks any regulatory authority to address the problem of global warming."¹⁵⁵

The Court's decision keeps alive the proceeding on the rulemaking petition, which was remanded back to the EPA for further action. Although the Court ruled for the petitioners, it also left the door open for the EPA to revise its justification for not taking action. On remand, the EPA could restate its reasons for not taking action on standards for greenhouse gas emissions, or articulate new reasons for not taking action, and link those reasons back to the requirements of section 202(a)(1) of the statute. But as a legal matter, this approach would be difficult and risky. The EPA would need to convince first its own lawyers and then the reviewing court that its justification comports with the Court's ruling in *Massachusetts v. EPA*. This approach would also be difficult politically. Public opinion has shifted markedly over the past year on the issue of global warming. Opinion polls show that a majority of Americans now recognize global warming as a threat that government needs to address.¹⁵⁶ "[R]ight timing," the Greek poet Hesiod said, "is in all things the most important factor."¹⁵⁷ The EPA may have run out of time.

The Court's decision also set important precedent for pending and future cases on greenhouse gas emissions. The decision established precedent on each of the three issues the Court addressed. First, the Court made new law in ruling that Massachusetts, when protecting its quasi-sovereign interests, is "entitled to special solicitude" in standing analysis. This holding will undoubtedly make it easier for states to establish standing in future actions to address global warming, or otherwise to protect the health and environment of their citizens. Second, the Court's finding that

155. Beth Daley, *High Court Tells EPA to Rethink Policy on Emissions*, BOSTON GLOBE, Apr. 3, 2007, at A1.

156. See John M. Broder & Marjorie Connolly, *Public Says Warming Is a Problem, but Remains Split on Response*, N.Y. TIMES, Apr. 27, 2007, at A20.

157. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 56 (Justin Kaplan ed., 17th ed. 2002) (quoting HESIOD, WORKS AND DAYS, line 694).

greenhouse gases fall within the Clean Air Act's definition of "air pollutant," though in itself unremarkable, also sets useful precedent for future cases addressing greenhouse gases under the Act. The ruling leaves no doubt that the regulatory authority of the Clean Air Act can be applied to greenhouse gas emissions from mobile and stationary sources in the United States. Third, the Court's decision that the EPA had not stated adequate reasons for denying the petition will make it more difficult for the EPA to avoid addressing the global warming issue in the future.

Quoting the petition for certiorari, Justice Stevens referred to global warming as "the most pressing environmental challenge of our time."¹⁵⁸ A century from now, assuming we as a society successfully meet that challenge, scholars may look back on *Massachusetts v. EPA* as Justice Stevens' most important opinion.

158. *Massachusetts v. EPA*, 127 S. Ct. at 1446.