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Massachusetts v. EPA: The D.C. Circuit's Failure to Extend the Clean Air Act to Greenhouse Gas Emissions

by Zachary Tyler

Editors' Summary: On July 15, 2005, the U.S. Court of Appeals for the D.C. Circuit upheld EPA's decision not to regulate carbon dioxide and other greenhouse gas (GHG) emissions from automobiles, thereby thwarting efforts to use the CAA to curb climate change. In this Article, Zachary Tyler analyzes the court's decision, arguing that the court should have reached the opposite conclusion. Tyler looks at the events that led to the dispute, including how the Clinton and Bush Administrations differed in their interpretation of the CAA with respect to GHGs. He also examines the majority, concurring, and dissenting opinions and their differing views on standing, the CAA, and policy considerations. He concludes that while the court left certain issues unresolved, their ruling is a clear setback in efforts to curb climate change.

I. Introduction

Long-standing efforts to use the Clean Air Act (CAA)[1] to curb climate change suffered a significant defeat in 2005 when the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit ruled that the U.S. Environmental Protection Agency (EPA) was not required to regulate carbon dioxide (CO_2) and other greenhouse gas (GHG) emissions from new motor vehicles. After the George W. Bush Administration's rebuke of the Kyoto Protocol,[2] the court's decision in *Massachusetts v. Environmental Protection Agency*[3] effectively drives the final nail through the coffin of attempts to coerce the federal government to seriously address global warming problems on domestic and international fronts. Stripped of nationally applicable laws, some states may now take matters into their own hands and create legal mechanisms to reduce GHG emissions on a regional basis.[4] These initiatives, however, will lack federal support, for in *Massachusetts*, the Bush Administration received legal vindication for its campaign to derail climate change legislation.

This Article analyzes the D.C. Circuit's ruling in *Massachusetts* that EPA properly denied petitions to regulate CO_2 and other GHG emissions from new motor vehicles under CAA §202(a)(1).[5] First, it provides an overview of the context in which the case developed, including the climate change debate, relevant provisions of the CAA, and the various twists and turns that EPA's position on the regulation of GHGs have undergone. Second, the Article summarizes the court's opinion. Specifically, it discusses the separate conclusions arrived at in the majority opinion, the concurring opinion, and the dissenting opinion. Third, the Article analyzes and critiques the court's rulings. In particular, this section argues that the D.C. Circuit erred in holding that EPA's denial of the rulemaking petition was legally proper. It argues that GHGs are "air pollutants" subject to regulation under §202(a)(1) pursuant to the plain meaning of the Act, and that the D.C. Circuit wrongly sidestepped this important threshold issue. In so doing, the court also applied the wrong standard for analyzing petitioners' standing claims. Of perhaps greater importance, the majority opinion misread the §202(a)(1) statutory standard. Section 202(a)(1) embodies a precautionary approach to regulation based on health- and science-based assessments of risk, and does not permit the Agency to engage in reviewing the wide range of policy considerations condoned by the court.

Zachary Tyler received his J.D. from Georgetown University Law Center in May 2006. He would like to thank Prof. Richard Lazarus for his help in the development of this Article.

1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

2. Kyoto Protocol to the United Nations (U.N.) Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/197/L.7/Add. 1, art. 3.1 & Annex B, *reprinted in* 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol].

3. 415 F.3d 50, 35 ELR 20148 (D.C. Cir. 2005), *petition for cert. filed* (U.S. Mar. 2, 2006) (No. 05-1120).

4. As of January 2006, seven northeastern states have committed to a regional plan to reduce power plant emissions of CO_2 by 10% by 2019. Anthony DePalma, *Seven States Agree on a Regional Program to Reduce Emissions From Power Plants*, N.Y. TIMES, Dec. 21, 2005, at B3. *See also* Laura H. Kosloff & Slayde Hawkins, *Fictional Credits or Progressive Action? Seattle Utility's Greenhouse Gas Offset Program Goes to Court*, 36 ELR 10370 (May 2006).

5. *Massachusetts*, 415 F.3d at 58.

II. Background

A. The Climate Change Debate

For the past several decades there has been increasing debate over whether human activities are causing climate change. The primary GHGs—CO_2, methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs)—act to hold energy within the atmosphere, providing the warming effect that governs the earth's climactic conditions and renders the planet habitable. Scientific evidence suggests that the levels of these GHGs are increasing, with the corresponding effect of raising temperatures across the planet.[6] The greatest driver of this change is CO_2.[7]

Beginning with the Industrial Revolution in the 19th century, this dramatic increase in GHG levels has been traced to the widespread use of carbon-based fuels such as coal and petroleum-derived products that have fueled economic development over the last two centuries. Prior to the Industrial Revolution, in 1750, CO_2 concentrations in the atmosphere were approximately 280 parts per million (ppm).[8] By 2000, the concentrations had risen to 360 ppm,[9] and projections estimate concentrations reaching 540 ppm by 2100.[10]

Corresponding to this increase in GHG emissions, scientists have documented a rise in global temperatures. Since the late 19th century, the average global temperature has increased by one degree Fahrenheit,[11] and temperatures have tended to increase more rapidly in polar regions. For example, the temperatures in northern latitudes increased by 1.4 degrees during this period.[12] Projections of increased temperatures due to rising GHG emissions estimate that by 2100, global temperatures may rise by as much as 2.5 to 10.4 degrees.[13] The negative effects of such temperature changes are many. Increased temperatures will cause the polar ice caps to melt, corresponding to a rise in sea levels. Evidence suggests that due to global warming, over the last 100 years sea levels rose between four to eight inches and are currently rising at the yearly rate of one-tenth of an inch.[14] A continued rise in sea levels would in turn cause severe flooding in coastal regions, where much of the world's population lives,[15] and threaten the sustainability of a number of island communities.[16] Global temperature increases also threaten to increase droughts, flooding, and erratic weather patterns, including the increased severity of hurricanes.[17] Additionally, temperature changes would likely shift ecological boundaries, with severe effects on habitat and ecosystems.[18]

The Intergovernmental Panel on Climate Change (IPCC) reported in 2001 that "there is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities."[19] This growing body of evidence has generated a tremendous policy debate over whether and how emissions of GHGs should be regulated. Nevertheless, while the majority of scientific evidence confirms the existence of climate change and suggests human influence on it, much uncertainty and debate about its causes still exists. In response to the calls for regulation of GHGs, reports and studies have been undertaken that refute the phenomenon of human-induced climate change.[20] The science of climate change, it is argued, is far from certain and it cannot be established that human activities have altered the climate or that the effects of any climate change would be as disastrous as proponents for regulation argue.[21] The result has been a policy and legislative deadlock.

In the United States, the issue has created tremendous controversy, with environmentalists, industry, scientists, and politicians disagreeing over the cause and the policy tools needed to address climate change. After participating in the negotiations leading up to the Kyoto Protocol to create a global framework for reductions of GHGs, the William J. Clinton Administration signed the treaty. But subsequent backlash to the Kyoto Protocol rendered the climate change treaty politically infeasible in the U.S. Senate, and the Clinton Administration never submitted it for ratification.[22] Following the transition from the Clinton to the Bush Administrations, the new president openly repudiated the treaty.[23] Despite these setbacks, during this period a groundswell of support in the United States endeavored to create additional and alternative means for preventing the adverse effects of climate change. One of the avenues openly explored was the regulation of GHGs, and particularly CO_2, under the existing provisions of the CAA.[24]

6. Intergovernmental Panel on Climate Change (IPCC) Working Group I, Climate Change 2001: The Scientific Basis 61 (2001).
7. *Id.* at 39.
8. *Id.* at 6.
9. *Id.*
10. *Id.* at 12.
11. *Id.* at 2-3.
12. *Id.*
13. *Id.* at 13.
14. *Id.* at 4. Projections indicate that if the ice mass on Greenland were to melt, that event alone would raise sea levels by 21 feet. Andrew C. Revkin, *Heading for Home*, N.Y. Times, May 21, 2004.
15. According to the World Bank, 50% of the world's population, approximately 3 billion people, live within 60 kilometers of the coast. World Bank, *Coastal and Marine Management*, July 8, 2005, *at* http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXCTMM/0,,menuPK:407932~pagePK:149018~piPK:149093~theSitePK:407926,00.html (last visited Jan. 3, 2006).
16. The most vulnerable communities are a series of small island nations, including Antigua, Cook Islands, the Federated States of Micronesia, Kiribati, the Maldives, Marshall Islands, Nevis, Tonga, and Tuvalu. IPCC Working Group II, Change, Climate Change 2001: Impacts, Adaptation, and Vulnerability 19.3.4.1 (2001).
17. IPCC Working Group I, *supra* note 6, at 15-17; Andrew C. Revkin, *Global Warming Is Expected to Increase Hurricane Intensity*, N.Y. Times, Sept. 30, 2004, at A20.
18. IPCC Working Group II, *supra* note 16, at 19.2.2.2.
19. IPCC Working Group I, *supra* note 6, at 10.
20. *See, e.g.*, Bjorn Lomborg, The Skeptical Environmentalist: Measuring the Real State of the World (2001); *"The Skeptical Environmentalist": The Litany and the Heretic*, Economist, Jan. 31, 2002.
21. *See, e.g.*, Angela Logomasini & David Riggs, The Environmental Source 67-85 (Competitive Enterprise Institute 2004), *available at* http://www.cei.org/gencon/026,01623.cfm (last visited Apr. 26, 2006).
22. John H. Cushman Jr., *Senate Urges U.S. to Pursue New Strategy on Emissions*, N.Y. Times, July 26, 1997, at 18.
23. Douglas Jehl & Andrew C. Revkin, *Bush, in Reversal, Won't Seek Cut in Emissions of Carbon Dioxide*, N.Y. Times, Mar. 14, 2001, at A1.
24. Natural Resources Defense Council, *Bush's Flawed Arguments Against Regulating Carbon Pollution* (Mar. 16, 2001), *at* http://www.nrdc.org/globalWarming/abushco2.asp (last visited Apr. 3, 2006); Testimony of David Hawkins, Director of Natural Resources Defense Council Air and Energy Program, Before Senate Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety Committee on Environment and Public Works, Mar. 21, 2001, *available at* http://www.nrdc.org/air/pollution/tdh0301.asp (last visited Apr. 3, 2006).

B. Relevant CAA Requirements

The CAA establishes a broad regime for regulating air pollution. Several provisions of the CAA are relevant to determining whether GHGs may be regulated under the statute. CAA §§202 through 250 govern the regulation of pollution emissions from motor vehicles and other mobile sources. Section 202(a)(1), the provision in dispute in *Massachusetts*, authorizes the EPA Administrator to create "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[25]

CAA §302(g) defines an "air pollutant" 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 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.[26]

Section 302(h) also clarifies the meaning ascribed to the term "welfare" as used in §202(a)(1) and elsewhere throughout the statute:

> 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 air pollutants.[27]

Based on a plain reading of this language, EPA during the Clinton Administration determined that the CAA created a statutory standard that was precautionary in nature, favoring regulation upon a finding of the threat of endangerment. EPA's retreat from this reading during the Bush Administration brought the matter before the D.C. Circuit.

C. EPA Interpretations of CAA Authority to Regulate GHGs

EPA has taken a number of positions concerning its authority to regulate GHGs under the CAA. Initially, during the Clinton Administration, EPA interpreted the CAA to confer authority to regulate GHGs if the Agency were to make the requisite endangerment finding under CAA §202(a)(1). Later, under the Bush Administration, EPA reversed its earlier interpretation and took the opposite view, stating that the Agency lacked the authority to regulate GHGs under the Act.

EPA first identified its authority to regulate GHGs in 1998, when EPA General Counsel Jonathan Cannon authored a memorandum (Cannon Memorandum)[28] explaining that CO_2 "is an air pollutant within the meaning of the Clean Air Act."[29] The Cannon Memorandum undertook its approach to the legal status of GHGs by first answering the question of whether CO_2 (the primary GHG that it discussed) is an "air pollutant" within the meaning of §302(g).[30] The Cannon Memorandum concluded that CO_2 facially satisfied §302(g)'s definition because it is a chemical substance emitted into the ambient air.[31] The fact that CO_2 exists naturally in the ambient air does not preclude regulation under the CAA because "many of the pollutants that EPA currently regulates are naturally present in the air in some quantity and are emitted from natural as well as anthropogenic sources."[32] Under the CAA's authority, the Cannon Memorandum explained, "EPA regulates a number of naturally occurring substances as air pollutants, however, because human activities have increased the quantities present in the air to levels that are harmful to public health, welfare, or the environment."[33]

The Cannon Memorandum next addressed whether CO_2 "meets the specific criteria for EPA action under a particular provision of the Act."[34] Noting that the broad statutory definitions conferring authority to regulate air pollutants such as CO_2 and GHGs were distinct from a particular statutory finding of endangerment, the Cannon Memorandum pointed out that a number of specific provisions shared common threshold requirements of a showing of "actual or potential harmful effects on public health, welfare or the environment."[35] These provisions included §202(a), the provision at issue in *Massachusetts.* The Cannon Memorandum emphasized that the U.S. Congress intended the precautionary standard to be incorporated in these threshold requirements. Congress desired a standard based on a "reasonable anticipation that a substance endangers public health or welfare" in order to "emphasize the preventative or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs; to emphasize the predominant value of protection of public health."[36] However, despite CO_2's status as an air pollutant under the scope of EPA's authority to regulate, the Cannon Memorandum concluded that "the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act."[37] Thus, while the memorandum did not explicitly state that an endangerment finding would be made under the precautionary standard in §202, it did state that CO_2 could be regulated.

The Cannon Memorandum's interpretation of the CAA was reiterated the following year by Gary Guzy, then-General Counsel to EPA, in testimony before Congress.[38] Gen-

25. CAA §202(a)(1); 42 U.S.C. §7521(a)(1).
26. *Id.* §302(g), 42 U.S.C. §7602(g).
27. *Id.* §302(h), 42 U.S.C. §7602(h).
28. Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator (Apr. 10, 1998) [hereinafter Cannon Memorandum].
29. *Id.* at 2-3.
30. *Id.* at 2.
31. *Id.* at 2-3.
32. *Id.* at 3.
33. *Id.* at 3.
34. *Id.*
35. *Id.* at 3-4.
36. *Id.* at 4 (quoting H.R. REP. NO. 95-294 (1977)).
37. *Id.* at 6.
38. Testimony of Gary S. Guzy, EPA General Counsel, Before a Joint Hearing of the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the Committee on Government Reform, and the House Subcommittee on Energy and Environment, Committee on Science (Oct. 6, 1999) [hereinafter Guzy Testimony].

eral Counsel Guzy stated that there was "no statutory ambiguity" that the CAA allows for regulation of CO_2.[39] Moreover, a number of different provisions provided an array of regulatory approaches to addressing CO_2 emissions.[40] As with the Cannon Memorandum, however, General Counsel Guzy testified that "[w]hile CO_2 as an air pollutant is within the scope of the regulatory authority provided by the Clean Air Act, this by itself does not lead to regulation."[41] CO_2 remained unregulated because "EPA has not made any of the Act's threshold findings that would lead to regulation of CO_2."[42] Shortly thereafter, on October 20, 1999, the International Center for Technology Assessment (ICTA) and other organizations petitioned EPA to regulate CO_2, CH_4, N_2O, and HFC emissions under CAA §202(a)(1).

The position taken by EPA during the Clinton Administration shifted radically with the Bush Administration. Prior to the denial of the petition for rulemaking that instigated the litigation at issue in *Massachusetts*,[43] the General Counsel of EPA, Robert Fabricant, issued a memorandum (Fabricant Memorandum) on August 29, 2003, repudiating EPA's earlier positions on its authority to regulate GHGs under the CAA and formally revoking the Cannon Memorandum and the congressional testimony by former General Counsel Guzy.[44]

The Fabricant Memorandum recognized the broad language of the CAA; however, it relied upon the U.S. Supreme Court's decision in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*[45] to "review the CAA's facially broad grants of authority in the context of the statute's purpose, structure and history and other relevant congressional actions to determine whether such grants reach the global climate change issue."[46] Reversing EPA's previous readings of the Act, the Fabricant Memorandum found that "EPA lacks CAA regulatory authority to address global climate change . . . . Thus, CO_2 and other [GHGs] are not agents of air pollution and do not satisfy the CAA section 302(g) definition of air pollutant."[47] The Fabricant Memorandum emphasized that in addressing stratospheric ozone depletion, Congress did not employ the general regulatory provisions of the CAA for this global problem.[48] According to the new position taken by EPA, only special provisions may be applied to deal with global problems such as climate change and the general regulatory scheme would not be suitable.[49] The Fabricant Memorandum also noted the infeasibility of implementing GHG emissions regulation under the national ambient air quality standards (NAAQS) system used for many of the air pollutants regulated under the Act.[50]

Shortly after the Fabricant Memorandum was issued, EPA formally denied the ICTA's petition for rulemaking under §202(a)(1).[51] The notice of denial adopted the Fabricant Memorandum as EPA's position regarding its refusal to regulate GHGs and the relevant sections of the CAA.[52] EPA stated in the denial that Congress did not intend to confer authority to the Agency to regulate CO_2 and other GHGs.[53] Following the analysis of the Fabricant Memorandum, EPA cited *Brown & Williamson* as cautioning "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."[54] In addition to asserting that it lacked authority to regulate GHGs, the Agency relied on a 2001 National Research Council report (NRC Report)[55] that it requested be prepared to address the climate change debate surrounding the petition. EPA claimed that the NRC Report found considerable uncertainties in the knowledge of the causes, extent, and significance of climate change, and, thus, it deemed regulation of GHGs inappropriate.[56] Therefore, the Agency would choose not to exercise its discretion to regulate GHGs even were it to possess the authority to do so.[57]

D. States Launch Lawsuit

In response to EPA's denial of the petition for rulemaking, the petitioners filed suit in the D.C. Circuit. In addition to the 12 states, 3 cities, 1 territory, and multiple environmental organizations challenging the Agency's action, 10 states and several trade associations joined in EPA's defense as intervenors. The D.C. Circuit issued its ruling on July 15, 2005.

III. The Court's Decision

A. Majority Opinion

Writing for the majority, Judge A. Raymond Randolph held that EPA properly exercised its discretion under CAA §202(a)(1) in denying the petition for rulemaking.[58] Although Judge David B. Sentelle joined Judge Randolph in ultimately agreeing that the petitions should be dismissed, Judge Sentelle concurred in the judgment only. The rationale of the majority opinion, therefore, only reflects the views of one judge of the panel of three.

1. Standing

Judge Randolph's opinion first confronted the issue of standing. EPA alleged that the petitioners lacked standing. Of the three-prong standing standard adopted in *Lujan v.*

39. *Id.* at 6.
40. *Id.* ("CO_2 is in the class of compounds that could be subject to several of the Clean Air Act's regulatory approaches.").
41. *Id.* at 5.
42. *Id.* at 6.
43. Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922 (Sept. 8, 2003).
44. Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator (Aug. 28, 2003), at 1 [hereinafter Fabricant Memorandum].
45. 529 U.S. 120 (2000).
46. Fabricant Memorandum, *supra* note 44, at 4.
47. *Id.* at 10.
48. *Id.* at 6.
49. *Id.*
50. *Id.* at 7.
51. *See* 68 Fed. Reg. at 52922.
52. *Id.* at 52925.
53. *Id.* at 52925-29.
54. *Id.* at 52925.
55. National Research Council, Climate Change Science: An Analysis of Some of the Key Questions (2001) [hereinafter NRC Report].
56. 68 Fed. Reg. at 52931.
57. *Id.* at 52929.
58. Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 58, 35 ELR 20148 (D.C. Cir. 2005).

Defenders of Wildlife,[59] namely that (1) the complainant has suffered an injury in fact, which is (2) fairly traceable to the challenged action, and (3) likely to be redressed by a favorable decision by the court,[60] the Agency claimed that petitioners failed to meet the second and third requirements. According to EPA, petitioners had not adequately demonstrated that their injuries were caused by the Agency's decision not to regulate GHG emissions from mobile sources.[61] Petitioners also allegedly failed to show that these injuries could be redressed by a favorable decision by the court.[62] In response to these contentions, petitioners cited declarations filed with the court by a climatologist and a mechanical engineer stating that any climate change policy adopted by the United States would have a significant global impact and that if the United States established emission standards for GHGs, it would propel a global policy to offset the adverse effects of climate change.[63]

In addressing the parties' standing contentions, the majority decision identified a unique problem posed to the court by the facts and posture of the case. *Lujan*, it explained, described the standing inquiry in much the same terms as the analysis adopted for resolving summary judgment motions, whereby a party must submit enough evidence to raise genuine issues of material fact to defeat the motion.[64] *Lujan* also required that at "the final stage" of the litigation, the evidence presented by the plaintiff during the summary judgment motion "(if controverted) must be 'supported adequately by the evidence adduced at trial.'"[65] This, Judge Randolph pointed out, created a particular problem for the court because, as an appellate court, it neither conducted evidentiary hearings nor made findings of fact.[66] Moreover, the court's prior decision in *Sierra Club v. EPA*[67] required a plaintiff's standing claims to be supported by affidavit or "other evidence." Here, the "other evidence" consisted of conflicting material in the administrative record that the petitioners challenged and upon which EPA based its decision to not regulate GHG emissions.

Judge Randolph stated that this scenario of first impression could be resolved in one of three ways. First, the court could refer the standing issues to a special master. Second, the court could remand the issue to EPA for a factual determination of causality and redressability. Third, the court could proceed to the merits of the petitioners' claims with respect to EPA's alternative decision not to regulate GHGs.[68] Rejecting the first two options as unnecessary and redundant, the majority decided to proceed to the merits of EPA's alternative argument that, even if it were deemed to have authority to regulate GHGs under the CAA, it would exercise its discretion not to do so because of the uncertainties surrounding climate change.[69] In reaching this decision, the court assumed, arguendo, that EPA had statutory authority to regulate GHGs from new motor vehicles.[70] The court, therefore, expressly declined to address EPA's contentions that, based primarily on *Brown & Williamson*, it lacked authority to regulate GHGs under §202(a)(1).[71]

2. EPA's Decision to Not Regulate GHGs

The majority opinion noted that EPA relied the NRC Report for its conclusions concerning climate change science. According to the court, the NRC Report concluded that "a causal linkage" between GHGs and climate change "cannot be unequivocally established."[72] EPA partially based its decision to not regulate GHGs due to the scientific uncertainties alluded to in the NRC Report.

The court then turned to the petitioners' contentions that EPA's rationale for denying the petition violated the D.C. Circuit's decision in *Ethyl Corp. v. EPA*.[73] In *Ethyl Corp.*, the D.C. Circuit upheld EPA's decision to regulate lead in gasoline based on a statutory requirement that the Administrator may regulate it if the emissions products "will endanger the public health or welfare."[74] The central relevance of *Ethyl Corp.* involved EPA's reliance on a series of policy judgments in making its risk assessment of lead in gasoline. While the petitioners contended that *Ethyl Corp.* supported a mandatory duty to regulate when the statutory standard had been met and that the standard for §202(a)(1) was precautionary in nature,[75] the court read *Ethyl Corp.* as supporting EPA's position.[76] Citing a footnote in *Ethyl Corp.* that discussed §202(a)(1)'s language regarding the Administrator's discretion—"in his judgment"—the court emphasized the considerable latitude the provision gave the Administrator in reaching a decision to regulate or not.[77]

> Congress does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence . . . . What the *Ethyl* [*Corp.*] court called "policy judgments" also may be taken into account. By this the court meant the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area.[78]

According to the court, EPA's reasoning for deciding not to regulate GHGs was "entirely consistent" with the kinds of policy judgments condoned in *Ethyl Corp.*[79] In reaching its decision, and in addition to the arguments provided by EPA, the court cited concerns about scientific uncertainty and ongoing research on the science of climate change, concerns

59. 504 U.S. 555, 22 ELR 20913 (1992).
60. *Massachusetts*, 415 F.3d at 54; *Lujan*, 504 U.S. at 560.
61. *Massachusetts*, 415 F.3d at 54.
62. *Id.*
63. *Id.* at 54-55.
64. *Id.* at 55.
65. *Massachusetts*, 415 F.3d at 55; Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 22 ELR 20913 (1992).
66. *Massachusetts*, 415 F.3d at 55.
67. 292 F.3d 895, 32 ELR 20738 (D.C. Cir. 2002).
68. *Id.* at 55-56 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 28 ELR 20434 (1998), for the rule that federal courts must resolve Article III standing questions before proceeding to the merits of a case).
69. *Massachusetts*, 415 F.3d at 56.
70. *Id.*
71. *Id.* at 56 n.1.
72. *Id*. at 57; NRC Report, *supra* note 55, at 17.
73. 541 F.2d 1, 6 ELR 20267 (D.C. Cir. 1976).
74. CAA §211(c)(1)(A), 42 U.S.C. §1857f-6c(1)(A) (1976), *currently codified as amended at* 42 U.S.C. §7545(c)(1)(A); *Ethyl Corp.*, 541 F.2d at 12.
75. Final Brief for the Petitioners in Consolidated Cases at 50-52, Massachusetts v. EPA (D.C. Cir. Jan. 24, 2005) (No. 03-1361).
76. Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 57, 35 ELR 20148 (D.C. Cir. 2005).
77. *Id.* at 58.
78. *Id.* (emphasis in original).
79. *Id.*

that new motor vehicles were not the only emitters of GHGs, ongoing research on voluntary emissions reduction programs, and concerns that unilateral regulation of U.S. motor vehicle emissions could weaken efforts to persuade developing countries to reduce GHG emissions.[80] The court also pointed to the government's promotion of cleaner motor vehicles such as fuel cell and hybrid vehicles, the U.S. Department of Transportation's (DOT's) recent increases in fuel economy standards, and the fact that EPA doubted its authority to regulate tire performance, which impacts fuel economy.[81] In the eyes of the court, all of these reasons were valid policy considerations for EPA to make in deciding not to regulate GHG emissions under §202(a)(1). The court, therefore, held that EPA properly exercised its discretion under §202(a)(1) in denying the petition for rulemaking, and it denied the petitions for review.[82]

B. The Concurring Opinion

Although joining Judge Randolph in agreeing that EPA's decision to deny the petitions for rulemaking was proper, Judge Sentelle disagreed with his colleague's rationale and, therefore, wrote his own opinion dissenting in part but concurring in the judgment. In Judge Sentelle's view, the petitioners failed to meet the Article III standing requirements, and he would have dismissed the petitions on those grounds alone.[83]

First, Judge Sentelle argued that the petitioners failed to show that their harm was particularized, and, therefore, they could not establish the "injury in fact" prong of the Article III standing requirements.[84] The allegations that EPA's failure to regulate GHGs that contributed to global warming was, in Judge Sentelle's view, a generalized harm suffered by all of humanity and not particular to the petitioners.[85] Moreover, the concurrence doubted the justiciability of petitioners' claims when the widespread grievances that they sought to address were not suited for resolution by the courts. "The generalized public good that petitioners seek is the thing of legislatures and presidents, not of courts."[86] Without a particularized harm to assert but rather only a generalized grievance best left to the legislatures to decide, the petitioners had no place in court. Thus, Judge Sentelle's preferred outcome would be to dismiss petitioners for lack of standing. Although Judge Sentelle disagreed that the court had jurisdiction to review the petitions and would not reach the merits of the case, as did Judge Randolph, he joined Judge Randolph's judgment, thereby providing the second vote necessary to uphold EPA's decision.[87]

80. *Id.*

81. *Id.*

82. *Id.* at 58-59. The court also noted that the denial of the petition for rulemaking and not the Fabricant Memorandum was the "final action" under review by the court.

83. *Id.* at 59 (Sentelle, J., concurring).

84. *Id.* (Sentelle, J., concurring); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 22 ELR 20913 (1992).

85. *Massachusetts*, 415 F.3d at 60 (Sentelle, J., concurring).

86. *Id.*

87. *Id.* at 61 (Sentelle, J., concurring). The concurring opinion noted that choosing "the issuance of a judgment closest to that which [Judge Sentelle] would issue" followed the Supreme Court's approach in the plurality opinion adopted in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

C. The Dissenting Opinion

The third opinion generated in *Massachusetts* is a dissenting opinion issued by Judge David S. Tatel. Unlike the other two judges on the panel, Judge Tatel would have granted the petitions and ruled for the petitioners. Judge Tatel found that one of the petitioners satisfied the standing requirements, and not only did EPA possess statutory authority to regulate GHGs, but also it abused its discretion in deciding not to regulate. His analysis also took issue with Judge Randolph's reading of the NRC Report on climate change.[88]

1. Standing

Judge Tatel disagreed with Judge Sentelle's assertion that all of the petitioners lacked standing. Rather, Judge Tatel found that the commonwealth of Massachusetts satisfied the Article III standing requirements.[89]

First, Massachusetts sufficiently proved the "injury in fact" element. The declarations submitted by petitioners documented how rising sea levels due to global warming would cause serious loss of property along Massachusetts' coastal regions. In Judge Tatel's view, the loss of land and damage due to flooding were more than sufficient to prove that the harm was particularized. "This loss . . . undeniably harms the Commonwealth in a way that it harms no other state."[90] The dissent distinguished the similar harms that other states may face, for example, loss of coastal land and flooding in Maine, as not constituting the generalized grievances admonished by the Supreme Court. The generalized grievance standard spoke to harm encompassing "every citizen's interest in proper application of the Constitution and laws," and "relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large."[91] In this instance, although other states may suffer coastal erosion and flooding, Massachusetts' injuries would be concrete and unique to itself.

Second, the dissent asserted that Massachusetts established the causation element of standing. Again, the declarations provided by petitioners adequately established that global warming was the cause of these injuries, and U.S. auto emissions contributed significantly to global GHG emissions.[92] For Judge Tatel, these allegations were sufficient to connect the causal link with the United States.

Third, petitioners demonstrated that the injuries were redressable by the courts. Due to the considerable GHG emissions from motor vehicles in the United States and the causal connection between global warming and the damage caused from the corresponding rise in sea levels and flooding, Judge Tatel found the petitioners to have satisfactorily proven that U.S. regulation of these emissions would effect a global change.[93] This conclusion included claims contested by EPA that U.S. regulation would influence other countries to adopt similar regulatory regimes.[94]

88. *Massachusetts*, 415 F.3d at 61-62 (Tatel, J., dissenting).

89. *Id.* at 64 (Tatel, J., dissenting).

90. *Id.* at 65 (Tatel, J., dissenting).

91. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74, 22 ELR 20913 (1992) (Tatel, J., dissenting)).

92. *Massachusetts*, 415 F.3d at 65 (Tatel, J., dissenting).

93. *Id.* at 65-66 (Tatel, J., dissenting).

94. *Id.* at 66 (Tatel, J., dissenting).

Judge Tatel took issue with Judge Randolph's conundrum concerning the burden of production in determining standing. Following the analogy to summary judgment proceedings, he highlighted that EPA failed to further challenge petitioners' allegations by filing additional affidavits or producing other evidence.[95] Then, arguing that EPA neglected to challenge the NRC Report's statement that injurious global warming is occurring but instead focused only on the uncertainties, the dissent pointed out that the NRC Report also supports Massachusetts' claim to standing.[96] Instead of confusing the standing doctrine and going straight to the merits, Judge Tatel concluded that he would grant Massachusetts standing to bring its claim in the court.[97]

2. Whether EPA Lacked Statutory Authority to Regulate GHGs

Unlike Judge Randolph, who chose not to address the issue, Judge Tatel looked at whether EPA had authority to regulate GHGs. Relying on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[98] he found that the plain language of the CAA clearly allowed regulation of GHGs because the Act gives EPA authority to regulate "any air pollutant" that may endanger welfare.[99] This conclusion sharply differed from the official position taken by EPA that it lacked such regulatory authority.

Looking first to the plain language of the statute, Judge Tatel found that §202(a)(1) clearly authorizes "regulation of (1) any air pollutants emitted from motor vehicles that (2) in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[100] The determination of what constituted "air pollutants" under the Act was easily answered by §302(g)'s definition of the term. "This exceedingly broad language plainly covers green house gases emitted from motor vehicles: they are 'physical [and] chemical . . . substance[s] or matter . . . emitted into . . . the ambient air.'"[101] The dissent went on to point out that CO_2 was actually already included in a partial list of "air pollutants," namely, §103(g), which addresses research into nonregulatory strategies and technologies for dealing with certain "air pollutants."[102] Thus, under step one of *Chevron* analysis, Judge Tatel argued, GHGs were unambiguously subject to regulation by EPA through §202(a)(1).[103] For the Agency to depart from a step one finding, however, the dissent explained that it must provide "an extraordinarily convincing justification."[104] The dissent then proceeded to reject each of EPA's proffered justifications.

The first reason cited by EPA was that when Congress enacted and subsequently amended the CAA in 1965, 1970, and 1977, it was not concerned with global warming.[105] This reason failed, the dissent argued, due to the fact that simply because Congress did not specifically cite global warming pollutants for regulation does not mean that the CAA cannot regulate them when there exists a broad definition of "air pollutants" that would include GHGs. "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress . . . does not demonstrate ambiguity. It demonstrates breadth."[106] This is particularly so, Judge Tatel claimed, when Congress added §302(h) in 1970 for the purpose of considering climate in finding risks to welfare.[107]

The next reason supplied by EPA, namely that global pollution should be tackled through specific statutory provisions rather than general ones, failed in the face of plain statutory language to the contrary.[108] Judge Tatel further dismissed EPA's argument that legislation enacted in 1977 and 1990 on ozone depletion inferred that there must be specific provisions for global issues such as climate change.[109] EPA erred in these defenses, according to the dissent, because the addition of that language did not change any other part of the CAA's operation.[110] The dissent also rejected an unworkability argument that, according to EPA, illustrated that the NAAQS system could not work for a global problem like CO_2. The logic of this argument was faulty, the dissent pointed out, because although CO_2 regulation would at the most create an exception from the NAAQS framework, CO_2 emissions from motor vehicles were easily regulated.[111]

EPA's third reason was that congressional limitations and actions indicated that the regulation of global air pollutants was outside of the scope of the CAA.[112] This argument revolved around the Agency's interpretation of *Brown & Williamson*. In *Brown & Williamson*, the Supreme Court held that the Food and Drug Administration (FDA) did not possess the authority to regulate tobacco products.[113] Despite broad language in the Federal Food, Drug, and Cosmetic Act (FFDCA)[114] ostensibly conferring regulatory power, subsequent legislation expressly regulating tobacco trumped the FFDCA in the mind of the Court.[115] Moreover, the *Brown & Williamson* Court explained that despite statutory language, "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[116] According to EPA,

95. *Id.*
96. *Id.*
97. *Id.* at 66-67 (Tatel, J., dissenting).
98. 467 U.S. 837, 843 n.9, 14 ELR 20507 (1984).
99. *Massachusetts*, 415 F.3d at 67-68 (Tatel, J., dissenting).
100. *Id.* at 67 (Tatel, J., dissenting).
101. *Id.*
102. *Id.*
103. *Id.* at 67-68 (Tatel, J., dissenting).
104. *Id.* at 68 (quoting *Appalachian Power Co., v. Environmental Protection Agency*, 249 F.3d 1032, 1041, 31 ELR 20635 (D.C. Cir. 2001) (Tatel, J., dissenting)).
105. *Id.* at 69 (Tatel, J., dissenting); Brief of Respondent in Consolidated Cases at 36, Massachusetts v. EPA (D.C. Cir. Jan. 24, 2005) (No. 03-1361).
106. *Massachusetts*, 415 F.3d at 69 (quoting *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (Tatel, J., dissenting)).
107. *Massachusetts*, 415 F.3d at 69 (Tatel, J., dissenting).
108. *Id.*
109. *Id.*; Brief of Respondent in Consolidated Cases, *supra* note 105, at 29-32.
110. *Massachusetts*, 415 F.3d at 69 (Tatel, J., dissenting) (explaining that in 1977, Congress made clear that the new provision would not alter or affect any other authority under the CAA and 1990 Amendments because Congress enacted provisions for regional pollutants that EPA already had authority to regulate under general CAA provisions).
111. *Id.* at 70 (Tatel, J., dissenting).
112. Brief of Respondent in Consolidated Cases, *supra* note 105, at 18-26.
113. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).
114. 21 U.S.C. §§301-397.
115. *Brown & Williamson*, 529 U.S. at 139.
116. *Id.* at 159.

such an "extraordinary case" was before the court concerning GHG regulation. Congress' passage of legislation calling for the study of climate change along with Congress' failure to pass any provisions tailored solely to regulating GHGs demonstrated that the CAA cannot apply to them. Also like *Brown & Williamson*, the "extraordinary" political and economic significance of the regulation of GHGs casted doubt on the Agency's authority to undertake it.[117]

The dissent rejected EPA's reliance on *Brown & Williamson*. The Agency's analogy to FDA extending its jurisdiction over tobacco was not as strong when EPA already regulates the energy and transportation sectors, as opposed to FDA, which had never regulated tobacco.[118] Furthermore, the effects of regulation would be different. Regulation of GHGs would take place after "such period as the Administrator finds necessary" for development of technology "giving appropriate consideration to the cost of compliance,"[119] as opposed to the necessary total ban on tobacco that FDA would have been required to mandate.[120] Congress clearly established broad authority to regulate "air pollutants," including the delegation to EPA of the authority to regulate GHGs under §202(a)(1) if they meet the threshold. This, therefore, stripped the instant matter of the "extraordinary" nature required by *Brown & Williamson*. Additionally, Judge Tatel argued that, unlike the FFDCA and subsequent tobacco legislation, there was no conflict between EPA's regulation of GHGs and later global warming legislation.[121] Lastly, the fact that global warming legislation failed in Congress in later efforts is no proof of congressional intent when §202(a)(1) was passed.[122]

The final reason that EPA offered for lacking authority to regulate GHGs was that Congress could not have intended for the definition of "air pollutant" to cover CO_2 because that would cause EPA's regulatory authority to overlap with the DOT's regulation of fuel economy standards for motor vehicles under a separate statutory scheme. The dissent rejected this justification because although the two different regulatory regimes might overlap, they were not incompatible.[123] Judge Tatel cited the doctrine that when two statutes are capable of coexistence, courts must give effect to both absent clear congressional intent to the contrary.[124] He then argued that the clear language of §202(a)(1) combined with the Energy Policy Conservation Act's (EPCA's) recognition of the "effect of other motor vehicle standards of the Government on fuel economy"[125] and Congress' statement in the 1977 CAA Amendments that EPA's regulation should advance regardless of regulatory overlap with other agencies indicated that CAA GHG regulation could coexist with other statutes.[126]

The dissent then summarized its argument that, based on this reasoning and the unambiguous language of the statute, if in the judgment of the Administrator, GHGs caused or contributed to air pollution "which may reasonably be anticipated to endanger public health or welfare," EPA should regulate such "air pollutants" emitted from new motor vehicles.[127]

3. EPA's Decision to Not Regulate GHGs

The dissent next challenged EPA's alternative argument that even if it had authority to regulate GHGs as air pollutants, the Agency acted within its discretion to deny the petition for rulemaking. Reiterating that the standard of review for an Agency's refusal to institute rulemaking required assessing whether the decisionmaking was reasoned and not a plain error of law,[128] Judge Tatel argued that EPA failed to meet this deferential standard.[129]

EPA argued that §202(a)(1)'s threshold endangerment finding—whether in the judgment of the Administrator air pollutants "cause or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare"—empowers the Administrator with the discretion to decide whether or not to make such an endangerment finding in the first place.[130] The denial of the petition for rulemaking, in EPA's view, reflected its decision "not to make any endangerment finding—either affirmative or negative—under §202(a)(1)."[131] Instead, EPA's authority to make any finding is discretionary, and contrary to the petitioners' argument, the Agency is not required to regulate even if the statutory standard for an endangerment finding is met.[132] Additionally, EPA proffered a number of policy reasons for not regulating.

The dissent vigorously disputed EPA's assertion of such a broad grant of discretion in making a finding. Accusing the Agency of attempting to read the statute so as to allow it to withhold regulation simply if it disagrees with the policy, the dissent argued that the discretion in §202(a)(1) extends only to the determination of whether the air pollutant in question is linked to air pollution that may reasonably be anticipated to endanger public health or welfare.[133] Once the Administrator, using discretion, determines that endangerment does or does not exist, the discretion ceases and the Administrator must issue a finding.

Judge Tatel emphasized that §202(a)(1) places clear limits on EPA's discretion and that it only allows EPA the discretion "'to judg[e],' within the bounds of substantial evidence," whether the statutory standard of reasonable anticipation of endangerment to public health or welfare has been met.[134] For example, Judge Tatel pointed out that if conflicting evidence exists surrounding whether or not GHGs may reasonably be anticipated to endanger public health and welfare, then EPA possessed the discretion under

117. *Massachusetts*, 415 F.3d at 70 (Tatel, J., dissenting); Brief of Respondent in Consolidated Cases, *supra* note 105, at 21-22.

118. *Massachusetts*, 415 F.3d at 71 (Tatel, J., dissenting).

119. CAA §202(a)(2), 42 U.S.C. §7521(a)(2).

120. *Massachusetts*, 415 F.3d at 71 (Tatel, J., dissenting).

121. *Id.*

122. *Id.* at 72 (Tatel, J., dissenting); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990).

123. *Massachusetts*, 415 F.3d at 72-73 (Tatel, J., dissenting).

124. *Id.*; Federal Trade Comm'n v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001).

125. 49 U.S.C. §32902(f); *Massachusetts*, 415 F.3d at 73 (Tatel, J., dissenting).

126. *Massachusetts*, 415 F.3d at 73 (Tatel, J., dissenting); H.R. Rep. No. 95-294, at 42-43 (1977).

127. *Massachusetts*, 415 F.3d at 73 (Tatel, J., dissenting).

128. *Id.*

129. *Id.*

130. *Id.* at 74 (Tatel, J., dissenting).

131. Brief of Respondent in Consolidated Cases, *supra* note 105, at 62-63.

132. *Id.* at 57.

133. *Massachusetts*, 415 F.3d at 74 (Tatel, J., dissenting).

134. *Id.* at 75 (Tatel, J., dissenting).

§202(a)(1)'s grant of "judgment" to weigh that evidence. Thus, if the Agency were to conclude that further study were needed to resolve the question of endangerment, then the Administrator could postpone a finding pending such research.[135] Section 202(a)(1), however, does not allow for discretionary decisionmaking outside of the scope of the precautionary statutory standard.[136]

In arguing that EPA used its discretion in an unauthorized manner, Judge Tatel relied on circuit precedent. The dissent cited *Natural Resources Defense Council (NRDC) v. EPA*[137] for the rule that the Administrator may only exercise "his judgment" in determining whether or not an explicit statutory standard has been met.[138] Although *NRDC* involved another statutory provision of the CAA, the D.C. Circuit was clear that the Agency's judgment must be based on statutory standards.[139] Judge Tatel also relied on *Ethyl Corp.*, which, as stated above, was also cited by the majority in ruling that EPA could consider a wide range of policy judgments.[140] Disagreeing with Judge Randolph's reading of the case, the dissent argued that *Ethyl Corp.* establishes that the policy considerations EPA may rely upon must relate to whether the statutory standard for an endangerment finding has been met.[141] Unlike the grant of authority given by Judge Randolph, Judge Tatel claimed that EPA violated *Ethyl Corp.*'s terms by relying on a number of policy considerations that did not directly relate to whether GHGs were reasonably anticipated to endanger public health or welfare.[142] Instead, they involved considerations of the practicalities of regulating motor vehicle emissions, the international effects of unilateral U.S. efforts, and other logistical aspects of regulating under §202. Citing yet a third case for its argument that EPA violated its discretion, the dissent stated that in *Her Majesty the Queen in Right of Ontario v. EPA*,[143] the D.C. Circuit held that EPA acted reasonably in postponing an endangerment finding because the Agency gave a statutory basis for its decision.[144] *Her Majesty the Queen*, therefore, reinforces that agencies must stay within the bounds of the statutory standard when weighing a decision to regulate. These cases, Judge Tatel maintained, established that EPA could only withhold making an endangerment finding if it determined that more information was needed to make such a finding.[145]

The dissent also argued that the standard enshrined in §202(a)(1) was precautionary in nature and, therefore, regulation was required when endangerment could reasonably be anticipated, not when there was direct proof of harm.[146] In support of this reading, Judge Tatel pointed to Congress' reaction to the *Ethyl Corp.* decision. At the time *Ethyl Corp.* was decided, §202(a)(1) required regulation based on a finding of emissions "which endangers the public health or welfare."[147] After the D.C. Circuit's decision upholding a precautionary approach to regulating fuel under CAA §211, Congress amended §202(a)(1) in 1977 to incorporate the more precautionary standard of "may reasonably be anticipated to endanger public health or welfare."[148]

In light of these precautionary statutory standards, EPA's policy considerations failed to justify a refusal to make an endangerment finding.[149] EPA's claim that the phenomenon of global warming was laden with scientific uncertainties did not render regulation under §202(a)(1) infeasible. Rather, according to Judge Tatel, the precautionary standard of the provision mandated regulation.[150]

The dissent also differed sharply from both the majority opinion and EPA in its reading of the NRC Report. Whereas Judge Randolph and EPA both derived claims from the report that the science of climate change was so uncertain such that the extent and causes of it could not be unequivocally linked to GHG emissions and human activity, Judge Tatel argued that the report showed an indication of global warming and global warming trends and that the report's uncertainties about future warming relate chiefly to its scope.[151] Judge Tatel claimed that Judge Randolph read the report out of context and relied on isolated sections to support his claims.[152] More indicative of the bulk of the report's findings to the dissent was its first statement: "Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise."[153]

These differences notwithstanding, the dissent assailed EPA's second policy justification, namely that CO_2 emissions can only be regulated through fuel economy standards and that petitioners failed to put forth any regulatory approaches to CH_4, N_2O, and HFCs. Judge Tatel dismissed this contention for the same reason he did with regard to EPA's argument that its regulation of CO_2 emissions would overlap with DOT's regulation of fuel economy standards. Such overlap posed no problem when the two regulatory approaches did not conflict.[154]

Concerning EPA's claim that the lack of GHG emissions control technology prevented it from regulating the air pollutants, Judge Tatel stated that this assertion bore no relationship to the precautionary statutory standard for an endangerment finding.[155] Thus, it was irrelevant. Lastly, the Agency's argument that GHG regulation would be piecemeal and inefficient due to the global nature of the problem failed in the face of §202(a)(1)'s controlling language.[156]

135. *Id.*

136. *Id.*

137. 824 F.2d 1146, 17 ELR 21032 (D.C. Cir. 1987).

138. *Id.* at 1164-65.

139. *Id.* at 1163-64.

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

141. *Id.* at 76 (Tatel, J., dissenting).

142. *Id.* at 74 (Tatel, J., dissenting).

143. 912 F.2d 1525, 20 ELR 21354 (D.C. Cir. 1990).

144. *Massachusetts*, 415 F.3d at 76 (Tatel, J., dissenting); *Her Majesty the Queen*, 912 F.2d at 1533. In *Her Majesty the Queen*, the court held that EPA's refusal to initiate CAA §115 abatement proceedings was reasonable despite a delay of over nine years. However, the court stressed that once an endangerment finding is made, regulation is mandatory.

145. *Massachusetts*, 415 F.3d at 76 (Tatel, J., dissenting).

146. *Id.* at 76-77 (Tatel, J., dissenting).

147. CAA §202(a)(1), 42 U.S.C. §1857f-1(a)(1) (1976), *currently codified as amended at* 42 U.S.C. §7521(a)(1) (2000).

148. *Massachusetts*, 415 F.3d at 77 (Tatel, J., dissenting); Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 25, 6 ELR 20267 (D.C. Cir. 1976); H.R. Rep. No. 95-294, at 50-51 (1977).

149. *Massachusetts*, 415 F.3d at 77 (Tatel, J., dissenting).

150. *Id.*

151. *Id.* at 62-65 (Tatel, J., dissenting).

152. *Id.* at 63 (Tatel, J., dissenting).

153. IPCC Working Group I, *supra* note 6, at 1.

154. *Massachusetts*, 415 F.3d at 80, 72-73 (Tatel, J., dissenting).

155. *Id.* at 80 (Tatel, J., dissenting).

156. *Id.* at 80-81 (Tatel, J., dissenting).

In sum, the dissent concluded that EPA had clearly failed to follow the requirements of §202(a)(1). EPA misinterpreted the scope of its statutory authority, and it failed to provide a statutorily based justification for refusing to make an endangerment finding. Judge Tatel, therefore, would have granted the petitions for review.[157]

IV. Analysis

A. Standing

The standing issue poses a unique and complex question in *Massachusetts.* How should standing be analyzed when parties allege localized harms requiring national remedies for an ultimately global dilemma? In the context of global climate change, standing analysis must delve into an exploration of how courts should treat scientific uncertainty as well as thorny questions of causation and redressability. These challenges, however, did not prevent the D.C. Circuit from engaging with the issue. Unfortunately, as with the other major issues in the case, the court failed to adopt a unified theory. Instead, the three separate approaches to standing raise their own set of problems.

1. The Evidentiary/Factual Dilemma

The majority opinion authored by Judge Randolph failed to address standing. This is alarming because not only is there a constitutional requirement that this threshold issue be resolved before moving to the merits of a case,[158] but also because existing circuit precedent provided a clear avenue for addressing standing exactly in the context of a petition to review an agency decision.

The majority's first flaw is that it incorrectly read the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment*[159] in deciding to bypass resolution of the standing inquiry. *Steel Co.* mandates to do exactly what Judge Randolph chose not to do: resolve Article III standing before proceeding to the merits of a case.[160] In *Steel Co.*, the Court expressly rejected the view taken by several courts of appeals, as well as some of the Justices, that it was permissible to proceed to the merits before addressing jurisdictional questions.[161] The Court stated that such an approach took "the courts beyond the bounds of authorized judicial action" and was impermissible.[162] Instead, the requirement that the court's jurisdiction be settled first was "inflexible and without exception."[163] The majority in *Massachusetts* violates this constitutional tenet. Courts may not proceed to the merits without first addressing whether it has jurisdiction.[164]

Moreover, Judge Randolph incorrectly cited *Steel Co.* for endorsing his position.[165] While the *Steel Co.* Court indeed noted that the statutory standing inquiry and the merits inquiry often overlap,[166] that assertion is not relevant to a determination of Article III standing. The language that Judge Randolph cited for support actually stands for the rule that the Article III standing inquiry is separate from statutory standing. In the same footnote Judge Randolph cited, the *Steel Co.* Court explained that

> the question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two. The same cannot be said of the Article III requirement[.][167]

Steel Co. does not permit a court to proceed to the merits when there is an overlap between the merits inquiry and the statutory standing inquiry because it would leave the Article III standing requirement unresolved. As the *Steel Co.* Court stated, statutory standing "has nothing to with whether there is a case or controversy under Article III."[168] Judge Randolph's legal support for proceeding to the merits clearly does not exist.[169]

The majority's second major flaw is that it failed to follow *Sierra Club*, the governing precedent in the D.C. Circuit. *Sierra Club* involved a petition for review of an EPA rule addressing wastewater treatment sludge under the Resource Conservation and Recovery Act (RCRA).[170] The D.C. Circuit held that both petitioners—an environmental organization and a trade organization—failed to satisfy the standing requirements.[171] In its decision, the court discussed at length how to resolve standing issues in petitions to review agency action.

The *Sierra Club* court explained:

> [A] petitioner seeking review in the court of appeals does not ask the court merely to assess the sufficiency of its legal theory. Rather, like a plaintiff moving the district court for summary judgment, the petitioner is asking the court of appeals for a final judgment on the merits, based upon the application of its legal theory to facts established by evidence in the record. Consistent with *Defenders of Wildlife*, therefore, the petitioner must either identify in that record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional

157. *Id.* at 82 (Tatel, J., dissenting).

158. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2, 28 ELR 20434 (1998).

159. 523 U.S. 83, 28 ELR 20434 (1998).

160. *Id.* at 97 n.2.

161. *Id.* at 93-94.

162. *Id.* at 94.

163. *Id.* (quoting *Mansfield v. Sawn*, 111 U.S. 379, 382 (1884)).

164. *Steel Co.*, 523 U.S. at 97 n.2.

165. Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 56, 35 ELR 20148 (D.C. Cir. 2005).

166. *Id.*; *Steel Co.*, 523 U.S. at 97 n.2.

167. *Steel Co.*, 523 U.S. at 97 n.2 (emphasis in original).

168. *Id.*, 523 U.S. at 97.

169. To the extent that Judge Randolph rationalized his decision on the belief that the statutory question of whether the CAA permitted regulation of GHGs overlapped with the redressability prong of Article III standing, the *Steel Co.* Court also dispelled that notion as a justification for proceeding to the merits. The Court relied on its own precedent in *Bell v. Hood*, 327 U.S. 678 (1946), to explain that the determination of whether there is a statutory cause of action is not the same as the redressability prong. "Thus, the uncertainty about 'whether the plaintiff's injuries can be redressed' . . . is simply the uncertainty about whether a cause of action existed—which is precisely what *Bell* holds *not* to be an Article III 'redressability' question." *Steel Co.*, 523 U.S. at 96. The Supreme Court has thus definitively closed the door on substituting statutory standing analysis for any of the prongs of Article III standing analysis.

170. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011; Sierra Club v. Environmental Protection Agency, 292 F.3d 895,896, 32 ELR 20738 (D.C. Cir. 2002).

171. *Sierra Club*, 292 F.3d at 896.

> evidence to the court of appeals. . . . The petitioner's burden of production in the court of appeals is accordingly the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing "by affidavit or other evidence." . . . Its burden of proof is to show a "substantial probability" . . . .[172]

The court then stated that if standing was not self-evident because the petitioner was not one of the direct parties implicated in the adjudication or rulemaking, then the petitioner would need to submit additional evidence establishing standing.[173] To further remove any doubt about what the new law of the circuit was, the court restated the rule: "[h]enceforth . . . the petitioner may carry its burden of production by citing any record evidence relevant to its claim of standing and, if necessary, appending to its filing additional affidavits or other evidence sufficient to support its claim."[174] As the court explained earlier, the burden of production is "substantial probability."[175]

Such clear and unambiguous language speaks to the exact scenario present in *Massachusetts.* Petitioners seek review of an EPA decision, and in such settings, the D.C. Circuit meant for *Sierra Club* to apply. The court should have followed its own precedent. Instead, the majority chose not to be bound by this unequivocal mandate and in so doing failed to even determine whether petitioners satisfied the constitutional requirement at all.

The evidence produced by petitioners attesting to causation and redressability comports with the D.C. Circuit's requirement of a "substantial probability." The standard does not require proof. Contrary to Judge Randolph's concerns about the conflicting evidence in the administrative record, the petitioners' declarations about the likely flooding and coastal damage resulting from a decision not to regulate GHGs and the influence of a decision to regulate GHGs satisfy this lower standard. The fact that EPA disputes petitioners' claims, while perhaps ultimately dispositive under the deferential standard of judicial review when addressing the merits, does not influence whether petitioners have demonstrated the "substantial probability" required for the standing inquiry. The *Sierra Club* court foresaw Judge Randolph's purported problem concerning the overlap of the standing and merits issues and resolved it in advance.

> The organization need not prove the merits of its case—"*i.e.*, that localized harm has in fact resulted from a federal rulemaking"—in order to establish its standing, but it "must demonstrate that there is a 'substantial probability' that local conditions will be adversely affected" and thereby injure a member of the organization.[176]

Thus, D.C. Circuit law does not require proof. In order to clear the standing hurdle, petitioners must only meet the lower burden of substantial probability.

As to each element of standing, petitioners submitted detailed and relevant declarations supporting their claims. These declarations are more than "mere allegations."[177] They constitute "specific facts." More importantly, as the Supreme Court has noted, these "specific facts" "for purposes of the summary judgment motion will be taken to be true."[178] Therefore, contrary to Judge Randolph's perceived confusion, both the Supreme Court and the D.C. Circuit have spoken specifically to the issue before the court in *Massachusetts.*

As an appellate court with exclusive jurisdiction over CAA disputes involving national regulation,[179] Judge Randolph was correct to highlight that the court did not enjoy the luxury of relying upon evidence adduced at trial that, upon reaching the "final stage" of litigation, would support the evidence presented at the summary judgment stage.[180] However, where the Supreme Court failed to articulate standards for all scenarios, the *Sierra Club* court filled in the gaps and specifically provided for the submission of additional affidavits and evidence.[181] Petitioners, correctly reading D.C. Circuit law, submitted detailed declarations pursuant to the requirements laid out in *Sierra Club.* Their submissions are sufficient to support their claims because they show the requisite "substantial probability." The majority opinion committed a grave error in failing to correctly read its own law and not address the standing requirements.[182]

Furthermore, in addition to abandoning circuit precedent, Judge Randolph's conclusions suffer from several logical inconsistencies. The fact that the "other evidence" is information that both supports and contradicts the petitioners' standing claims and underlies EPA's decision not to regulate GHGs does not pose the problem Judge Randolph thinks it does. First, judicial review of an agency decision not based on petitioner's evidence does not render it invalid.[183] While

172. *Id.* at 899 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 22 ELR 20913 (1992)).

173. *Sierra Club*, 292 F.3d at 900.

174. *Id.* at 900-01.

175. *Id.* at 899.

176. *Id.* at 898 (quoting *Louisiana Envtl. Action Network v. EPA*, 172 F.3d 65, 71, 29 ELR 21038 (D.C. Cir. 1999)).

177. *Lujan*, 504 U.S. at 561; FED. R. CIV. P. 56(e).

178. *Sierra Club*, 292 F.3d at 898.

179. CAA §307(b)(1), 42 U.S.C. §7607(b)(1).

180. *Lujan*, 504 U.S. at 561; Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 55, 35 ELR 20148 (D.C. Cir. 2005).

181. This rule has since been followed in numerous cases, and with full knowledge of the governing rule in the circuit, petitioners submitted detailed and substantial declarations establishing their standing. *See* Rainbow/Push Coalition v. Federal Communications Comm'n (FCC), 330 F.3d 539, 543-45 (D.C. Cir. 2003) (following the *Sierra Club* rule in finding that petitioners lacked standing to request that the FCC deny certain license applications); City of Waukesha v. EPA, 320 F.3d 228, 236-38, 33 ELR 20160 (D.C. Cir. 2003) (following *Sierra Club* in finding that certain petitioner advocacy groups possessed standing while others lacked it); Fund for Animals, Inc. v. Norton, 322 F.3d 728, 733-34, 34 ELR 20010 (D.C. Cir. 2003) (applying *Sierra Club* to find that an intervenor's standing was self-evident due to the fact that the disposition of its property was the subject of an agency's regulation); American Library Ass'n v. FCC, 401 F.3d 489, 496 (D.C. Cir. 2005) (applying *Sierra Club* to require further submission of evidence to establish standing).

182. The court also could have avoided defying circuit precedent and the constitutional requirement to address standing before the merits by asking for more submissions or more affidavits, as *Sierra Club* suggests. *See Sierra Club*, 292 F.3d at 900.

183. In the context of judicial review of agency decisionmaking, the existence of conflicting evidence in the administrative record should not worry a court employing the extremely deferential standard of review applied to agencies. *See Massachusetts*, 415 F.3d at 73. In addressing the merits, a court may ultimately side with an agency's decision based on evidence in the administrative record that differs from evidence produced by a petitioner. However, that should not destroy petitioner's standing claims. In such cases, the merits claims involve the reasonableness of the agency's decision, and under an "arbitrary and capricious" standard of review, an agency's decision to base its decision on certain facts in the administrative record it deems appropriate does not mean that the petitioner's factual claims

these factual differences of opinion cut to the core of the policy dispute being played out in *Massachusetts*, they do not mean that they cannot be the basis for determining whether petitioners have standing to proceed. As the court noted, *Lujan* requires that a plaintiff must set forth "specific facts," either by affidavit or other evidence, when defending standing in summary judgment proceedings and that they must later be supported by evidence determined at trial.[184] In *Massachusetts*, both EPA and petitioners set forth "specific facts," albeit conflicting facts, that support their claims. In light of the perceived uncertainties surrounding both sides of the climate change debate, this information should suffice for a court to make the constitutionally required standing decision.[185] Judge Randolph's concerns about the conflicting evidence and uncertainty are unnecessary when, as here, the standard dictates that the "specific facts" "will be taken to be true."[186] The D.C. Circuit spoke to this very issue in *Sierra Club*, and in not adhering to this standard, the majority opinion contravenes its own precedent. Thus, while the majority was correct to ultimately proceed to the merits (although on the wrong theory), it did not need to grapple with this "highly unusual circumstance,"[187] which was actually no different from a garden-variety case where the parties disagree as to the underlying facts.

Moreover, in making its decision to resolve this purported problem by proceeding to the merits, the court skips over the central merits question of the case: whether EPA possessed authority under the CAA to regulate GHG emissions. Regardless of whether or not the court was correct in its analysis of the factual dilemmas in resolving standing, a decision to proceed to the merits should not forego consideration of one of the central claims in dispute. In so proceeding, the court committed a grave error. While Judge Randolph was wise to avoid reenacting the factual dispute by sending the matter to a special master for resolution or remanding it to EPA, he provides no reason for why the combination of *Lujan*, *Steel Co.*, and the factual overlap suggests that the court should not consider EPA's claim that it categorically lacks authority under the CAA to regulate GHG emissions. This decision neither appears grounded in precedent nor does it appear to flow logically from a decision to proceed to the merits. By taking the court in the direction it did without addressing a central contention, the majority substantially weakens the strength of its ruling. Not only does it avoid addressing the heavily litigated interpretation of *Brown & Williamson*, but it completely sidesteps the greater legal debate that had been brewing for years through the Clinton and Bush Administrations about the CAA's applicability to the regulation of GHG emissions.

were not "supported adequately by the evidence" for standing purposes. *Lujan*, 504 U.S. at 561. A ruling under this deferential standard does not disprove a petitioner's conflicting evidence; rather, it simply holds that the agency's decision was reasonable. This does not fall outside of *Lujan*'s requirement for evidence to be adequately supported because the agency is only choosing to base its decision on other evidence, and such a decision does not render petitioner's contrary evidence invalid.

184. *Lujan*, 504 U.S. at 61.

185. *See* Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 77-84 (2005); *see* Covington v. Jefferson County, 358 F.3d 626, 650-55, 34 ELR 20015 (9th Cir. 2004) (Gould, J., dissenting) (arguing that standing should be recognized for injuries due to global phenomena such as ozone depletion).

186. *Lujan*, 504 U.S. at 561.

187. *Massachusetts*, 415 F.3d at 56.

2. Petitioners Satisfy Standing Requirements

Despite Judge Randolph's aversion to resolving the threshold standing issue, the two other judges on the panel made their own conclusions as to the petitioners' standing. As explained earlier, Judge Sentelle would have dismissed all the petitioners for lack of standing, whereas Judge Tatel found Massachusetts to have satisfied the standing requirements.

The concurring opinion by Judge Sentelle erred in finding that the petitioners lacked standing. Specifically, his claim that petitioners' harm is not particularized enough fails to recognize that widespread harm can incur localized harms that are unique and concrete. By definition, the effects of global climate change will be widespread. That does not mean, however, that petitioners will not suffer concrete and particularized harms that are actual and imminent.[188] As laid out in petitioners' declarations, their coastal regions will be eroded and their lands will be flooded.[189] Their loss of property, though perhaps not the only property loss suffered as a result of climate change, is not "common to all members of the public" but particular to them.

In asserting that the petitioners allege no more than a general harm,[190] the concurrence fails to grasp the meaning ascribed to "generalized grievance" by the Supreme Court. A generalized grievance is "where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'"[191] Moreover, the Supreme Court has explicitly recognized that "where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"[192] In *Federal Election Commission v. Akins*,[193] the Supreme Court explained that it had allowed standing in the past where the harm was concrete even if the harm was suffered by many people.[194] This is the same situation the court faced in *Massachusetts*: a widespread phenomenon causing injury to many, including loss of coastal regions and flooding damage to the petitioners. Such events are by no means of an "abstract and indefinite nature." Contrary to Judge Sentelle's conclusions, the law clearly establishes that these facts constitute "injury in fact." This position was recently adopted by the U.S. Court of Appeals for the Ninth Circuit.[195]

188. *Lujan*, 504 U.S. at 560.

189. Kirshen Decl. at 7-8, 10; Jacqz Decl. at 8-11.

190. *Massachusetts*, 415 F.3d at 60 (Sentelle, J., concurring).

191. Federal Election Comm'n v. Akins, 524 U.S. 11, 23 (1998).

192. *Id.* at 24; Common Cause v. Department of Energy, 702 F.2d 245, 251 (D.C. Cir. 1983) ("[T]he widespread character of an alleged injury does not demean the standing of those who are in fact injured.").

193. 524 U.S. 11 (1998).

194. *Id*. at 24-25 ("an injury . . . widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'").

195. In *Covington v. Jefferson County*, 358 F.3d 626, 34 ELR 20015 (9th Cir. 2004), the Ninth Circuit held that property owners living across the street from a landfill satisfied the standing requirements and could bring suit under the CAA and RCRA for local injuries allegedly caused by county and district health departments arising from the improper disposal of chlorofluorocarbons (CFCs). *Id*. at 641. Concurring in the result, one judge reached the opposite conclusion of Judge Sentelle regarding standing and global air pollution impacts. The concurring opinion found that plaintiffs had standing to sue based on the global impacts of stratospheric ozone that allegedly resulted from the mishandling of CFCs by defendants. The concurring judge found that the plaintiffs had standing to sue because of the

Additionally, Judge Sentelle fails to grasp the rule laid down in *Akins* that a plaintiff suffering a concrete and actual injury may meet the "injury in fact" prong regardless of whether the injury is widely shared.[196] Petitioners do not disclaim the widespread injuries, and by linking their grievances to particularized harms to them, they fall within exactly the class of claimants who *Akins* recognized may satisfy "injury in fact" where the harms are widespread. As the *Akins* court stated, "[t]his conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law."[197] Such is the case of petitioners in *Massachusetts*, whose injuries are not unlike the mass tort analogy made by the *Akins* court.[198]

The concurring opinion also fails to grasp the Supreme Court's statement in *Friends of the Earth v. Laidlaw*[199] that the standing inquiry is not whether there is harm to the environment but whether there is harm to the plaintiff.[200] Judge Sentelle's argument focuses too narrowly on the global nature of climate change at the cost of not realizing that it inflicts discrete and particularized injuries on individual parties.[201]

Lastly, the assertion that the legislature and not the courts is the proper venue to redress this problem fails to recognize that the legislature already has provided an avenue for remedying this problem: CAA §202(a)(1).[202] Judge Sentelle reasoned that "[t]he generalized public good that petitioners seek is the thing of legislatures and presidents, not of courts."[203] This general statement does not apply to the petitioners. First, as was demonstrated above, their harm is not generalized, but rather unique to them. Second, in terms of providing for the public good, the legislature did exactly that in enacting §202(a)(1) in order to protect the public health and welfare from air pollutants that may reasonably be anticipated to endanger them. To the extent that petitioners' claims seek to benefit the public good, Congress has already provided them the means to redress their injuries.

The proper view of petitioners' standing is most closely adopted by the dissent. In finding that petitioner Massachusetts satisfied the standing requirements, Judge Tatel correctly identified the "injury in fact" to the state: flooding and land loss that "undeniably harms the Commonwealth in a way that it harms no other state."[204] This view identified the reasonable causal link to global warming alleged by Massachusetts, which was indeed redressable by U.S. regulation.[205] However, Judge Tatel's analysis fell short of establishing standing for the other petitioners. While the declarations filed by those petitioners may not have been as specific and concrete in addressing the alleged harms suffered, to the extent that those petitioners were similarly situated, they should also satisfy the standing requirements.

B. EPA's Authority to Regulate GHGs Under the CAA

Because the majority assumed, arguendo, that EPA possesses the authority to regulate GHGs under CAA §202(a)(1) instead of determining the matter outright, this issue remains open for resolution. The only judge to address the issue, Judge Tatel, was in the dissent and accordingly not the voice of the court. Thus, notwithstanding the outcome of *Massachusetts*, it is technically still unknown whether the CAA legally confers authority to EPA to regulate GHGs. It is this Article's view, however, that EPA's conclusion that it lacks authority to set motor vehicle emission standards for GHGs contravenes the Act's plain language.

The plain language of §202(a)(1) authorizes EPA to regulate "any air pollutant" that in the judgment of the Administration "may reasonably be anticipated to endanger public health or welfare." An "air pollutant" is, under §302(g) "[a]ny air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters ambient air." Section 302(h) then provides that effects on "welfare" include effects on "weather" and "climate." Applying these statutory provisions to the GHGs petitioners seek EPA to regulate, it is clear that EPA possesses the authority to regulate them under §202(a)(1). Carbon dioxide, CH_4, N_2O, and HFCs are each an "air pollution agent" composed of "physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters ambient air." Accordingly, they qualify as "air pollutants" under §302(g). As GHGs, these air pollutants cause an effect on both "weather" and "climate," particularly when emitted in large quantities as has been occurring since the Industrial Revolution, and, thus, they cause an effect on "welfare" as used in §202(a)(1). GHGs, therefore, are "air pollutants" that may be regulated by EPA under §202(a)(1) upon a finding by the Administrator that they "may reasonably be anticipated to endanger public health or welfare."

Judge Tatel, the only judge to address the issue in *Massachusetts*, correctly found that step one of the *Chevron* doctrine resolved the matter. *Chevron* teaches that when interpreting a statute, if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Con-

global ozone damage caused by the mishandling of the CFCs. The concurrence stated that the Supreme Court's standing cases, including *Akins*, allowed plaintiffs to satisfy standing involving general injuries as long as the injury alleged by the plaintiff was sufficiently concrete. The concurring judge found that the risks of skin cancer, cataracts, and suppressed immune systems were sufficiently concrete to justify Article III standing even though the defendant's alleged negligence only constituted a small contribution to the global problem. *Id.* at 650-55 (Gould, J., concurring).

196. *Akins*, 524 U.S. at 23.

197. *Id.* at 24.

198. *See* Pye v. United States, 269 F.3d 459, 469, 32 ELR 20280 (4th Cir. 2001) (adopting *Akins*, and explaining the *Akins* decision to hold that "so long as the plaintiff . . . has a concrete and particularized injury, it does not matter that legions of other persons have the same injury").

199. 528 U.S. 167, 30 ELR 20246 (2000).

200. *Id.* at 181.

201. This failure to properly read the petitioners' claims also brings the concurring opinion into conflict with other recent circuit precedent. In *Village of Bensenville v. Federal Aviation Admin.*, 376 F.3d 1114, 1119, 34 ELR 20061 (D.C. Cir. 2004), the D.C. Circuit held that a substantial group of air travelers had standing. The court specifically noted that the fact that their environmental interests were shared by many did not lessen the legal protections that should be afforded to them. *Id.*

202. Judge Sentelle also failed to adequately address the true redressability issue of §202(a)(1) authority.

203. Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 60, 35 ELR 20148 (D.C. Cir. 2005).

204. *Id.* at 65 (Tatel, J., dissenting).

205. *Id.*

gress."[206] The dissent correctly identified the controlling language provided by Congress and argued that the court's inquiry should end by ruling that the CAA clearly conferred authority to EPA to regulate GHGs.[207] Regardless of whether the GHGs in question contribute to a problem with global dimensions, there is nothing in §202(a)(1) that prohibits EPA from regulating air pollutants the effects of which are felt both inside and outside of the United States' borders.

Moreover, the dissent correctly identified the faults in EPA's justifications for circumventing such clear statutory language. The purported "extraordinarily convincing justification[s]" cannot trump such clear and precise statutory provisions. EPA's argument that Congress did not intend to regulate GHGs under the CAA because Congress was not initially aware of the global climate change problem and that specific statutory provisions are preferable to general ones in addressing the issue simply cannot withstand §202(a)(1)'s unequivocal command.[208] A lack of awareness on the part of Congress about global warming cannot preclude the CAA from addressing it when the statute is given a broad mandate to address a wide variety of effects on the public health and welfare from multiple sources. Although Congress may not have specifically envisioned air pollution leading to flooding and loss of coastal land, it did empower EPA with broad tools to regulate "air pollution which may reasonably be anticipated to endanger public health or welfare."[209] That a statute may carry such powers is not unique, but rather regularly condoned by the courts.[210] Likewise, clear statutory language cannot be trumped by a desire for more specific provisions that are not present in the statute.[211]

The argument that CO_2 regulation was unfeasible under NAAQS fails for two simple reasons. First, the language of §202(a)(1) dictates that regulation be adopted upon an endangerment finding. Simply because the NAAQS model is not the best fit for CO_2 does not mean that EPA cannot craft other regulatory approaches. Second, a perfectly feasible avenue for regulation exists by controlling CO_2 through fuel economy standards.[212]

EPA's reliance on *Brown & Williamson* fails primarily because EPA already has a long history of regulating the energy and transportation sectors, unlike the FDA that had no prior experience in regulating tobacco. Furthermore, in regulating GHGs, EPA would not undergo the reversal of a longtime position as the FDA did. Rather, EPA is working quite the opposite effect: for years prior to the 2003 denial of the petitions, EPA's official position was that it enjoyed the authority to regulate GHGs under the CAA.[213] Regulation of GHGs also would not conflict with any other regulatory framework. EPA cited the EPCA and the DOT's regulation of fuel economy standards. However, Congress explicitly acknowledged that such statutory overlap would occur,[214] and in this case compliance with any CAA emission standards would have no effect on the ability of automobile manufacturers to comply with the EPCA.[215] In addition, the EPCA is irrelevant to EPA regulation of other non-CO_2 GHGs from automobiles and to any GHGs from all other vehicle classes.[216] The *Brown & Williamson* analogy also fails, as Judge Tatel illustrated, because unlike the FDA's duty to ban tobacco, EPA's regulation of GHGs would neither ban motor vehicles nor completely prohibit GHG emissions. Thus, *Brown & Williamson* does not serve EPA's cause.[217] Instead, as the dissent rightly established, the CAA's provisions for motor vehicle emissions in §202(a)(1) clearly confer authority on EPA to regulate GHGs. The Agency's assertions to the contrary are wrong.

Ethyl Corp. supports §202(a)(1) being used to regulate CO_2 and other GHGs. The *Ethyl Corp.* court discussed at length the meaning of §202(a)(1)'s standard. It found that the provision allowed for regulation of otherwise innocuous air pollutants if they were determined to be likely to contribute to endangerment:

> Rather, we think that to regulate under §202 the Administrator must find that emission of the air pollutant is likely to cause or contribute to dangerous air pollution. This addition is important, for not all air pollutants contribute to dangerous air pollution and, more importantly, not all dangerous air pollution is caused by air pollutants that are, themselves, dangerous. Thus hydrocarbons, whose emission is regulated by §202, are not themselves always dangerous, but are properly regulated because they react in sunlight to form smog, which is dangerous…Thus, far from stating a tautology, §202 allows for the regulation of such apparently innocent pollutants, which indirectly cause dangerous pollution.[218]

Like hydrocarbons, CO_2 is a natural substance that occurs naturally and is necessary for our survival; without it, the earth would lack the protective blanket creating the greenhouse effect that renders the planet habitable. However, as with hydrocarbons, CO_2 can also pose dangerous threats, such as when sufficient quantities of it are emitted and unnaturally warm the atmosphere. CO_2 and other GHGs are therefore perfect candidates for regulation under §202(a)(1).

206. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 14 ELR 20507 (1984).

207. *Massachusetts*, 415 F.3d at 67 (Tatel, J., dissenting).

208. *Chevron*, 467 U.S. at 842-43.

209. CAA §202(a)(1), 42 U.S.C. §7521(a)(1).

210. PGA Tour v. Martin, 532 U.S. 661, 689 (2001); Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998).

211. Engine Mfrs. Ass'n v. Environmental Protection Agency, 88 F.3d 1075, 1088-89, 26 ELR 21477 (D.C. Cir. 1996):

> [T]he court cannot ignore the text by assuming that if the statute seems off to us, i.e., the statute is not as we would have predicted beforehand that Congress would write it, it could be the product only of oversight, imprecision, or drafting error. Put otherwise, the court's role is not to "correct" the text so that it better serves the statute's purposes, for it is the function of the political branches not only to define the goals but also to choose the means for reaching them.

212. 68 Fed. Reg. at 52929.

213. *See* Cannon Memorandum, *supra* note 28; Guzy Testimony, *supra* note 38.

214. H.R. Rep. No. 95-294, at 42-43 (1977).

215. Final Brief for the Petitioners in Consolidated Cases, *supra* note 75, at 39-44.

216. *Id.*

217. The weakness of the *Brown & Williamson* argument may have been recognized by the rest of the panel, for both Judges Randolph and Sentelle crafted opinions that sidestepped the case.

218. Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 16, 6 ELR 20267 (D.C. Cir. 1976) (emphasis omitted).

C. EPA's Decision to Not Regulate GHGs Is Wrong and an Abuse of Discretion

The majority opinion failed to apply the correct statutory standard for §202(a)(1) in holding that EPA properly exercised its discretion to deny the petitions. Section 202(a)(1) embodies a precautionary approach to regulation based on health- and science-based assessments of risk and does not permit the Agency to engage in reviewing the wide range of policy considerations condoned by the majority. The central failure of the Agency, and of the majority ruling, was to allow policy considerations that did not relate to the statute. Additionally, contrary to the majority's ruling, the record possessed sufficient evidence to conclude that the §202(a)(1) standard was indeed satisfied.

The standard of review for an agency's decision to not institute rulemaking proceedings is extremely deferential.[219] Under this standard, a court "will grant the petition for review only in the rarest and most compelling of circumstances."[220] The D.C. Circuit has explained that compelling circumstances "primarily involve plain errors of law, suggesting that the agency has been blind to the source of its delegated power."[221] Even under this lessened scrutiny, EPA's alternative argument to not regulate GHGs fails. The Agency relied on policy considerations outside of the statutory realm permitted and drew conclusions from the NRC Report (which it requested) that cannot be supported under a plain reading of the document.

In the majority opinion, Judge Randolph interpreted *Ethyl Corp.* as supportive of the Agency's position. *Ethyl Corp.*, the majority stated, allowed a wide range of policy considerations to be explored by the Agency in deciding whether to exercise it rulemaking authority under §202(a)(1).[222] These policy judgments were not unlike what Congress could look to in deliberating on legislation.[223]

This reading of *Ethyl Corp.* is incorrect. *Ethyl Corp.* does not permit agencies to entertain policy considerations outside of the statutory standard for making an endangerment finding. Rather, *Ethyl Corp.*'s discussion of policy considerations extends only to those areas within the limits that the specific statutory provision permits, which in this case would pertain to health- and science-based assessments of risk. Judge Randolph partially relied on a passage in footnote 37 of *Ethyl Corp.* concerning policy judgments to be made in making a §211 finding for the regulation of fuels.[224] That discussion involved the difference between the discretion inherent in §§108's and 202's requirements that regulation "shall" be undertaken if the Administrator exercises his judgment in making the necessary threshold finding versus §211's more permissive "may" regulate standard. The language in the footnote does not address the wide scope of permissible policy considerations that Judge Randolph reads into §202, but rather whether or not discretion exists in the standard.[225] Judge Randolph thus incorrectly extends *Ethyl Corp.* in a direction that the case does not support.

Although the *Ethyl Corp.* court was discussing policy judgments that could be made, nowhere did it state that the Agency could venture outside of the statutory requirement. Judge Randolph, on the other hand, would allow EPA tremendous latitude in looking to any number of policy considerations that, as the majority approved of, bear no relationship to whether air pollutants "may reasonably be anticipated to endanger public health or welfare." Such a conclusion cannot be derived from *Ethyl Corp.*, for it would fly in the face of considerable circuit precedent. *NRDC* establishes that the Administrator's judgment refers only to the statutory standard,[226] and as Judge Tatel correctly argued, EPA's policy judgments concerning, for example, technology and fuel economy, do not relate to the statutory health- and welfare-based standard.

Importantly, §202(a)(1) sets forth a precautionary approach to protecting the public health and welfare. The *Ethyl Corp.* court held that the §211(c)(1)(A) requirement of a finding that a fuel or fuel additive "will endanger the public health or welfare" made the provision precautionary in nature.[227] Key to the court was the use of the word "endanger." "Case law and dictionary definitions agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur."[228] At the time *Ethyl Corp.* was decided, §202(a)(1) also followed the "will endanger" standard. However, subsequent to *Ethyl Corp.*, Congress amended both sections to "emphasize the precautionary or preventative purpose of the act (and, therefore, the Administrator's duty to assess risks rather than wait for proof of actual harm)."[229] Judge Tatel recognized this approach—an approach embraced both by the D.C. Circuit en banc in 1976 and one year later by Congress, but not by the majority in *Massachusetts.*

The parallels between the matching language in §§211(c)(1)(a) and 202(a)(1) and Congress' subsequent emphasis on their precautionary nature are too great to avoid. In weighing policy considerations that may influence EPA's decision to regulate GHG emissions from new motor vehicles, both *Ethyl Corp.* and the 1977 amendments establish that under §202(a)(1), those considerations cannot go beyond the scope of the precautionary standard incorporated in Congress' directive to the Agency. That standard dictates that the Administrator may exercise his judgment—and look at policy considerations—to determine whether air pollutants may reasonably be anticipated to endanger public welfare or health. However, policy considerations such as a

219. Timpinaro v. Securities Exchange Comm'n, 2 F.3d 453, 461 (D.C. Cir. 1993).

220. *Id.*

221. *Id.*

222. Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 58, 35 ELR 20148 (D.C. Cir. 2005).

223. *Id.*

224. *Id.* at 57-58.

225. Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 20 n.37, 6 ELR 20267 (D.C. Cir. 1976). Additionally, the assertion made by respondents regarding the amount of discretion *Ethyl Corp.* allows misses the mark because the court never permitted the discretion to go beyond what the statute permits. *See* Brief of Respondent in Consolidated Cases, *supra* note 105, at 56.

226. Natural Resources Defense Council v. Environmental Protection Agency, 824 F.2d 1155, 17 ELR 21032 (D.C. Cir. 1987). Unlike the §112 provisions at stake in *NRDC v. EPA*, where the statutory threshold was "to protect public health" and thereby allowing for some consideration of costs, the language of §202(a)(1) is a clear public health standard—"endanger public health or welfare." *See* Her Majesty the Queen in Right of Ontario v. Environmental Protection Agency, 912 F.2d 1525, 1533, 20 ELR 21354 (D.C. Cir. 1990).

227. *Ethyl Corp*., 541 F.2d at 13.

228. *Id.*

229. H.R. Rep. No. 95-294, at 51 (1977).

lack of technologies to reduce GHGs or the specter of piecemeal legislation bear no rational relationship to a finding that the public health and welfare is endangered. Moreover, even EPA's strongest reason—the uncertainty of climate change science—does not necessarily hold up in the face of a precautionary standard that required no actual proof of harm.[230]

A further incorrect assertion made by the government, and unfortunately also sidestepped by the majority, was that EPA's denial constituted a decision not to make *any* endangerment finding under §202(a)(1).[231] Barring only certain factual scenarios, EPA is not allowed to deny issuing an opinion, neither an affirmative nor a negative endangerment finding.[232] Section 202(a)(1) is not discretionary; rather, it requires EPA to determine whether, in its judgment, motor vehicle emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[233] EPA failed to evaluate GHGs under this statutory test. The petitions for review triggered EPA's duty to determine whether the threshold endangerment finding had been met. In declining to issue any finding at all, and then citing policy reasons outside of the parameters of §202(a)(1)'s scope, EPA's denial should have been reversed for committing a "plain error[ ] of law."[234]

As Judge Tatel pointed out in his dissent, if conflicting evidence exists, then EPA has the discretion under §202(a)(1) to weigh the evidence.[235] If, based on its assessment, EPA concludes that there needs to be more study, then it can hold off on making a finding.[236] Under the circumstances of the case, however, it is doubtful whether EPA's assertion of uncertainties drawn from the NRC Report can withstand judicial scrutiny.

The NRC Report, the primary document used to support EPA's position, and specifically requested by the Agency for purposes of evaluating the petitions, suggests an alternative conclusion to the one derived by the Agency concerning the uncertainties of climate change. Given the precautionary standard of §202(a)(1) and the court's duty to "consider whether the agency's decisionmaking was reasoned" or commits "plain errors of law,"[237] a proper judicial review would find EPA's reliance on and conclusions about the NRC Report faulty.

The NRC Report stands more for the proposition that manmade emissions of GHGs are causing global climate change than for the uncertainties and lack of knowledge on the topic that EPA and the court derived from the report. Tellingly (and as noted by Judge Tatel), the report opens with the statement: "Green house gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise."[238] An unequivocal statement like this in a scientific report specifically requested to answer an underlying factual dispute in this case cannot allow for the Agency to come to the opposite conclusion.

The NRC Report agrees with the "assessment of human-caused climate change presented in the IPCC Working Group I (WGI) scientific report."[239] While stating that the report sought to clarify its views on those assessments and critique them, it unequivocally stated that the increase in CO_2 is due to human activity.[240] As to the question of whether GHGs were causing climate change, the NRC Report offered this view:

> The IPCC's conclusion that most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas concentrations accurately reflects the current thinking of the scientific community on this issue. The stated degree of confidence in the IPCC assessment is higher today than it was 10, or even 5 years ago, but uncertainty remains because of (1) the level of natural variability inherent in the climate system on time scales of decades to centuries, (2) the questionable ability of models to accurately simulate natural variability on those long time scales, and (3) the degree of confidence that can be placed on reconstructions of global mean temperature over the past millennium based on proxy evidence. *Despite the uncertainties, there is general agreement that the observed warming is real and particularly strong within the past 20 years*.[241]

That EPA could take a scientific body's combined statements that (1) the increase in CO_2 is due to human activity and (2) the scientific community was in agreement that the observed warming is "real and particularly strong within the past 20 years" and conclude that there were too many uncertainties to find that GHGs may reasonably anticipated to endanger public health or welfare borders on absurdity. More specifically, such a conclusion rises to the level of such unreasonable decisionmaking as to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[242] Under the admittedly highly deferential standard of review, taking a diametrically opposed view from that reflected in the administrative record should not withstand judicial scrutiny and should be reversed as arbitrary and capricious.[243]

Despite the considerable deference afforded to EPA, its denial of the petition fails under the judicial review standard.[244] Notwithstanding the faults in its reliance on policy considerations outside the statutory parameters, EPA's factual conclusions are not sufficiently grounded in the administrative record. The NRC Report does not, contrary to EPA's assertions and the majority's findings, support the Agency taking the position that global climate change is so

230. Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 77, 35 ELR 20148 (D.C. Cir. 2005) (Tatel, J., dissenting); H.R. Rep. No. 95-294, at 49, 51 (1977).

231. *See* 68 Fed. Reg. at 52922; Brief of Respondent in Consolidated Cases, *supra* note 105, at 61.

232. *See infra* Part V.

233. CAA §202(a)(1), 42 U.S.C. §7521(a)(1).

234. American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987).

235. *Massachusetts*, 415 F.3d at 75 (Tatel, J., dissenting).

236. *See infra* Part V.

237. *American Horse*, 812 F.2d at 5.

238. NRC Report, *supra* note 55, at 1; *Massachusetts*, 415 F.3d at 62 (Tatel, J., dissenting).

239. NRC Report, *supra* note 55, at 1.

240. *Id.* at 2.

241. *Id.* at 3 (emphasis added).

242. Administrative Procedure Act §706, 5 U.S.C. §706; *American Horse*, 812 F.2d at 4.

243. A court could also conceivably side with the agency. The strength of deference to agencies coupled with a strong counterargument that the NRC Report has sufficient ambiguity to support an alternate reading may persuade some courts.

244. Timpinaro v. Securities Exchange Comm'n, 2 F.3d 453, 461 (D.C. Cir. 1993).

uncertain as to not merit regulation under §202(a)(1)'s precautionary standards. The thrust of the NRC Report is that climate change is real and due to human-induced emissions of GHGs. Such a conclusion satisfies the precautionary standard in §202(a)(1), and once that standard is met, EPA must regulate GHG emissions. The statutory standard requires a finding when there is sufficient information on the record, as there is in this case. While EPA has not made the requisite endangerment finding, a court should not allow it to use the NRC Report to find that the threshold has not been met. The substance of the report points to a situation of endangerment, and under these facts, EPA should make an endangerment finding. The D.C. Circuit, therefore, should have granted the petitions due to the Agency's abuse of its discretion.

V. Alternative Rulings

One of the clear alternative outcomes in the case would have been for the court to determine whether or not the petitioners satisfied the Article III standing requirements. In determining Article III standing, the court would have to determine whether petitioners' suit fell within the zone of interests protected under the CAA.[245] This prudential limitation could pose a severe stumbling block for petitioners, because if the court found that the CAA did not confer authority to regulate GHGs, then petitioners' claims could be dismissed for not falling within the CAA's zone of interests. Under such a scenario, petitioners would not be able to employ CAA citizen suit provisions.[246] This would also preclude a suit under the Administrative Procedure Act.[247] While Judge Randolph appears to have conflated the prudential inquiry with the constitutional one, his mistake would not necessarily reverse the ultimate outcome for petitioners. It would, however, resolve another major flaw in the majority's opinion. Such an inquiry would have addressed the major issue of whether EPA possessed authority under the CAA to regulate GHGs.

But what if the court determined that petitioners did have standing and ruled that EPA abused its discretion in declining to make any endangerment finding? The court then would have sent the case back to the Agency to make a determination of whether there was a reasoned basis within the statutory standard for refusing to grant the petition. Under this alternative, despite obtaining an initial success, the petitioners' cause may still have ultimately failed as EPA would be justified in making a negative endangerment finding—that it could not be reasonably anticipated to endanger public health or welfare.

The Agency could find the need for more research. Although the Agency did in fact assert this,[248] such a claim is dubious given that the NRC Report it relied upon was requested specifically to address this question. However, given the extreme level of deference to agency decisions, it is reasonable to estimate that such a reading by EPA could be upheld in court.

The petitioners argued that EPA's decision to hold off and do more research because of the scientific uncertainties did not articulate a discernible decisionmaking path under the CAA.[249] In their view, the use of scientific uncertainty to justify refusing to regulate constituted an error of law.[250] By citing alleged uncertainties in the science and then concluding that regulation was inappropriate at the time, petitioners maintained that EPA ignored the precautionary requirement of §202(a)(1). It is probable, though, that the Agency's finding would survive judicial scrutiny. In utilizing discretion to weigh evidence, EPA could easily argue that in its judgment, regulation is not possible due to scientific uncertainties. Although a more exacting court, under a broad reading of the arbitrary and capricious standard, could find that if the NRC Report is the standard, then combined with the §202(a)(1) precautionary mandate, the reasonable agency finding would be a determination of endangerment. However, it is far from certain that a court would adopt this approach because, in light of *Massachusetts*, it is uncertain whether §202(a)(1) actually reflects a precautionary approach anymore. In allowing for such wide discretion in policy considerations, the *Massachusetts* court reduced the effectiveness of the precautionary approach.

Therefore, had the D.C. Circuit ruled against the Agency, EPA still would have been in a strong position. An adverse ruling for the Agency in *Massachusetts*, therefore, would most likely have turned out to be only a temporary victory for the petitioners.

VI. Conclusion

Massachusetts is a disappointing culmination of years of skirmishing over the regulation of GHG emissions. The ruling is a clear setback for the environmental community because it signals an end to efforts for climate change legislation at the federal level (at least under the current Administration). The subsequent petition for rehearing en banc was denied by the D.C. Circuit,[251] and at the time this Article was going to press, the Supreme Court had yet to decide whether it would hear the case.[252] For now, therefore, *Massachusetts* will remain the law of the land for some time to come. Unfortunately, the case leaves the law unresolved because the court chose to avoid addressing the most important issue: whether GHGs may be regulated at all under §202(a)(1). Additionally, the court wrongly sidestepped the standing inquiry, which not only amounts to a constitutional violation, but a failure to take advantage of the important question of the relationship between standing and greater environmental harms such as global warming. Lastly, the case carries dangerous implications for agency decisionmaking because the majority's ruling on permissible policy judgments allows considerations beyond what many agencies' statutory

245. Bennett v. Spear, 520 U.S. 154, 162-63, 27 ELR 20824 (1997); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153-54 (1970) (mandating that a plaintiff seeking standing under the Administrative Procedure Act demonstrate that a suit is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

246. 42 U.S.C. §7604(a)(2) (allowing citizen suits "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").

247. *Data Processing*, 397 U.S. at 153-54; Mank, *supra* note 185, at 79.

248. 68 Fed. Reg. at 52930-31.

249. Final Brief for the Petitioners in Consolidated Cases, *supra* note 75, at 45-46.

250. *Id.*

251. On Petition for Rehearing En Banc, Massachusetts v. EPA, No. 03-1361 (D.C. Cir. Dec. 2, 2005).

252. Massachusetts v. Environmental Protection Agency, *petition for cert. filed* (U.S. Mar. 2, 2006) (No. 05-1120).

requirements would permit. Unfortunately, the precautionary nature of §202(a)(1) must be left to another day to protect the health of Americans and our environment. Sadly, *Massachusetts* stands as a missed opportunity to confront the problem of growing GHG emissions in the United States.