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CAN THE ENVIRONMENTAL PROTECTION AGENCY REGULATE CARBON DIOXIDE EMISSIONS FROM MOTOR VEHICLES UNDER THE CLEAN AIR ACT? – PENDING ISSUES BEFORE THE HIGH COURT[†]

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I. INTRODUCTION

Massachusetts v. EPA, the first landmark case related to global warming, came before the United States Supreme Court in 2006.¹ The case was appealed from the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”),² in which twelve states, two cities, American Samoa, the District of Columbia, and fourteen public interest organizations tried to challenge the Environmental Protection Agency’s (“EPA”) denial to regulate motor vehicle emission of Greenhouse Gases (GHGs).

Global warming is a hotly debated issue. Although uncertainties exist, the scientific community universally recognizes that gases such as water vapor, carbon dioxide (or “CO₂”), methane, nitrous oxide, ozone, and halogenated hydrocarbons can trap a part of the energy radiated from Earth to space and cause the atmospheric temperature to rise.³ These gases are collectively called GHGs because their heat-retaining capacity is similar to the glass panels of a

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† This Note was written before the United States Supreme Court deliberated on the landmark case and finally delivered its opinion on April 2, 2007. See *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

¹ *Massachusetts v. EPA*, 126 S. Ct. 2960 (2006) (granting certiorari).

² *Massachusetts v. EPA*, 415 F.3d 50, 51 (D.C. Cir. 2005).

³ See, e.g., <http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html> (last visited November

greenhouse.⁴ Carbon dioxide is one of the major GHGs, and the "fastest growing source of CO₂ emissions is vehicle exhaust."⁵ The United States "is responsible for twenty-five percent of global emissions of greenhouse gases."⁶ Because the majority of CO₂ is emitted from fossil fuel burning processes, in particular those of power plants and combustion engines of motor vehicles, regulation of CO₂ emission would have huge impact on the U.S. economy. As a result, although the United States signed and ratified the United Nations Framework Convention on Climate Change (UNFCCC) and under the Clinton Administration signed the Kyoto Protocol to the UNFCCC, the Bush Administration has since retreated from further participation in the global efforts addressing climate change emissions, including failure to ratify the Kyoto Protocol.⁷ This has occurred despite Bush and Cheney's promises to regulate carbon dioxide during the 2000 presidential campaign.⁸

The Bush Administration's retreat culminated on August 28, 2003, when the EPA promulgated a memorandum through its general counsel, Robert E. Fabricant, declaring that carbon dioxide is not an "air pollutant" within the meaning of the Clean Air Act ("CAA") and that the agency does not have the authority to regulate it.⁹ On the same day, the EPA also issued a Notice of Denial of Petition for Rulemaking, which was to take effect on September 8, 2003,¹⁰ in response to a rulemaking petition filed by the International Center for Technology Assessment (ICTA) and a number of other organizations in 1999 requesting that the EPA to regulate emissions of CO₂ and other types of GHGs from new motor vehicles under the CAA.¹¹

22, 2006).

⁴ *Id.*

⁵ Steven Ferrey, *Law of Independent Power*, 1 L. OF INDEP. POWER § 6:7 (2005).

⁶ Eileen Claussen, *Responding to the Global Warming Problem: Climate Change: Present and Future*, 27 ECOLOGY L.Q. 1373, 1378 (2001).

⁷ Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN. ST. ENVTL. L. REV. 15, 15 (2004).

⁸ Nicolle Winters, Note, *Carbon Dioxide: A Pollutant in the Air, But Is the EPA Correct That It Is Not an "Air Pollutant"?*, 104 COLUM. L. REV. 1996, 1998 (2004).

⁹ Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act* (Aug. 28, 2003) [hereinafter Fabricant Memo], available at <http://www.epa.gov/airlinks/co2petitiongcmemo8-28.pdf> (last visited Nov. 22, 2006).

¹⁰ Control of Emissions from New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922 (Sept. 8, 2003) [hereinafter Rulemaking Denial].

¹¹ *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C. Cir. 2005).

Following the EPA's announcements, Massachusetts and eleven other states, two cities, and fourteen organizations filed a total of eight petitions with the D.C. Circuit, challenging both the Fabricant Memo and the Rulemaking Denial.¹² The petitioners claimed that the GHG emissions caused climate change and the climate change would cause injuries to them, such as loss of property, damage to facilities, increased health problems and related costs, reduced water supply, and harm to economies.¹³ Petitioners also claimed that an EPA regulation of the GHG emissions would reduce or delay the injuries resulting from a climate change.¹⁴

Circuit Judge Randolph wrote the majority opinion, which denied and dismissed the petitions for review by holding that the EPA had properly exercised its discretion under section 202(a)(1) of the CAA in denying the petition for rulemaking.¹⁵ The case is now before the Supreme Court. This case poses various thorny issues in environmental law for the Court to resolve. They include: (1) whether the petitioners have established standing to challenge the agency's denial to regulate GHG emissions; (2) whether CAA has authorized the agency to regulate GHG emissions, in particular CO₂, from motor vehicles; and (3) if the agency does have the authority, whether it has the discretion to decline to issue emission standards for motor vehicles based on policy considerations. The majority opinion of the D.C. Circuit did not directly address the issue of standing but, by assuming "EPA has statutory authority to regulate GHGs from new motor vehicles," proceeded to address whether the EPA had "properly declined to exercise that authority."¹⁶ Although the Supreme Court has established abundant precedents on standing issues in environmental law, *Massachusetts* is yet another important case, because this is the first time the Court is going to address standing issues related to "global warming" plaintiffs.¹⁷ The decision likely will have far-reaching effects on later cases based on similar theories.

¹² *Id.* at 51; *see also* Petitions for Review, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (Nos. 03-1316 to 03-1368, consolidated under 03-1361) [hereinafter Consolidated Briefs for Petitioners].

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 4.

¹⁵ *Massachusetts*, 415 F.3d at 58-59.

¹⁶ *Id.* at 56.

¹⁷ Whether the petitioners have standing is one of the questions presented to the Court by the federal respondent. *See* Brief for Federal Respondent, *Massachusetts v. EPA*, 548 U.S. 903 (2006) (No. 05-1120), 2006 WL 1358432 (May 15, 2006).

Commentators are divided as to whether the EPA is authorized to regulate GHG emissions under the CAA. The majority of them agree that the CAA allows for regulation of carbon dioxide.¹⁸ Other commentators believe GHGs meet the statutory definition of air pollutants but that the scientific evidence to support the requisite finding of harm is debatable.¹⁹ A few authors think that the CAA does not authorize the regulation of GHGs.²⁰

This Note attempts to analyze the issues presented before the Supreme Court and to assess how the Court should or will likely rule on these issues. Part II evaluates whether the petitioners had established adequate standing to challenge EPA's Rulemaking Denial in court. Part III evaluates the EPA's authority to regulate CO₂ under the CAA while examining the reversal of the EPA's position as to whether carbon dioxide is an air pollutant under the CAA. Part IV analyzes whether the EPA has discretion to deny rulemaking petitions and what level of deference the Court should give to the agency's actions. Finally, Part V comments on the EPA's arguments. This Note argues that, the text of the CAA clearly directs the EPA to study potential detrimental effects of air pollutants, including CO₂, to the public health and welfare. The EPA's authority to regulate the CO₂ emission from motor vehicles is at least implied, if not expressly granted, in the statutory language. Moreover, the EPA's discretion to deny rulemaking is limited to situations where the Administrator determines that CO₂ emissions are unlikely to endanger the public health and welfare.

¹⁸ See, e.g., McKinstry, *supra* note 7, at 77-78; Rachel L. Chanin, Note, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 730, 733 (2003); Karen D. Bettencourt, *California's Attempt to Remain the Leader in Environmental Policy: Regulating Carbon Dioxide Emissions from Vehicles Sold in the Golden State*, 34 MCGEORGE L. REV. 465, 468 (2003); Michael T. Donnellan, *Transportation Control Plans Under the 1990 Clean Air Act as a Means for Reducing Carbon Dioxide Emissions*, 16 VT. L. REV. 711, 739 (1992); David Zachary Kaufman, Comment, *The Greenhouse Effect: Available and Needed Laws and Treaties*, 9 UCLA J. ENVTL. L. & POL'Y 219, 229 (1991); Jennifer Woodward, Comment, *Turning Down the Heat: What United States Laws Can Do to Help Ease Global Warming*, 39 AM. U. L. REV. 203, 229 (1989).

¹⁹ See Denee A. DiLuigi, Comment, *Kyoto's So-Called "Fatal Flaws": A Potential Springboard for Domestic Greenhouse Gas Regulation*, 32 GOLDEN GATE U. L. REV. 693, 714 & 724 (2002); Veronique Bugnion & David M. Reiner, *A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?*, 30 ENVTL. L. 491, 505-07 (2000).

²⁰ See Senator Frank H. Murkowski, *The Kyoto Protocol Is Not the Answer to Climate Change*, 37 HARV. J. ON LEGIS. 345, 364 (2000); Arnold W. Reitze, Jr., *Global Warming*, 31 ENVTL. L. REPORTER 10,253, 10,259 (2001).

II. PETITIONERS' STANDING TO SUE

To bring a suit in federal court, a plaintiff has to first establish standing.²¹ The standing issue “involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”²² On the one hand, Article III of the Constitution limits the jurisdiction of the federal courts to “cases” and “controversies”; on the other hand, the federal courts exercise their remedial powers only over certain “cases” and “controversies.”²³ As for whether to allow standing for plaintiffs who file suits alleging general injuries to the public at large, the courts’ decisions are not always consistent.²⁴ For example, in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP),²⁵ the Supreme Court stated that “to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread ... actions could be questioned by nobody.”²⁶ However, the Court has also “declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure.”²⁷

A. Requirements to Establish Standing

In the Administrative Procedure Act (APA) of 1946,²⁸ Congress explicitly granted standing to challenge adverse agency decisions to beneficiaries of a statute, including those who have suffered common law injuries and those who are denied statutory benefits by an agency.²⁹ But it was not until 1970 that the Supreme Court, in *Association of Data Processing Organizations v. Camp*,³⁰ interpreted the APA to require a plaintiff to have suffered an “injury in fact” to obtain standing to challenge a government action.³¹ *Data Processing* was also the first

²¹ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

²² *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

²³ *Id.*

²⁴ Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 21 (2005).

²⁵ 412 U.S. 669 (1973).

²⁶ *Id.* at 688.

²⁷ *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

²⁸ Administrative Procedure Act of June 11, 1946, ch. 324, 60 Stat. 237, *repealed, and provisions are contained in revised title*: 5 U.S.C. § 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000); *see also* Mank, *supra* note 24, at 23.

²⁹ *Robert v. Percival*, “*Greeting the Constitution – Harmonizing Environmental and Constitutional Values*,” 32 ENVTL. L. 809, 828 (2002); *see also* Mank, *supra* note 24, at 23.

³⁰ 397 U.S. 150 (1970).

³¹ *Id.* at 152-156; *see also* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,”*

Supreme Court decision requiring plaintiffs suing under the APA to demonstrate their suits fall “within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”³² In *Lujan v. Defenders of Wildlife*,³³ the Supreme Court summarized the previous case law and stated that the standing requirement contains three elements: (1) “injury in fact” that is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”; (2) “causal connection between the injury and the conduct complained of” (traceability); and (3) “likely” redressability of the injury by a favorable decision.³⁴ The Court reiterated these elements in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*³⁵

B. Petitioners’ Standing to Sue

In *Massachusetts*,³⁶ Circuit Judge Randolph discussed three options to handle the standing issue: (a) refer it to a special master, (b) remand to the EPA, or (c) proceed to the merits. The court decided to rule on the merits of the case.³⁷ Two other judges, Sentelle and Tatel, reached completely opposite conclusions. Judge Sentelle said he would dismiss the case because of the states’ failure to establish standing,³⁸ whereas judge Tatel, in dissent, argued that the petitioners, at least the Commonwealth of Massachusetts, had fulfilled all the requirements for standing to sue.³⁹

Since no questions arose as to whether the petitioners fall within the “zone of interest” protected by the CAA, this section will analyze the three elements enumerated in *Lujan*.

1. Injury In Fact

To establish the “injury in fact” element, first the petitioners must allege an injury that is both “concrete” and “particularized.”⁴⁰ In *Sierra Club v. Morton*,⁴¹ the Supreme Court

and Article III, 91 MICH. L. REV. 163, 169 (1992); Mank, *supra* note 24, at 23.

³² *Data Processing*, 397 U.S. at 153-154; *see also* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763, 778-779 (1997).

³³ 504 U.S. 555 (1992).

³⁴ *Id.* at 560-561.

³⁵ 528 U.S. 167, 180-181 (2000).

³⁶ 415 F.3d at 55-56.

³⁷ *Id.* at 56.

³⁸ *Id.* at 60 (Sentelle, J., dissenting in part and concurring in the judgment).

³⁹ *Id.* at 67 (Tatel, J., dissenting).

⁴⁰ *Lujan*, 504 U.S. at 560.

acknowledged that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life” and that “this type of harm may amount to an “injury in fact” sufficient to lay the basis for standing under § 10 of the APA.”⁴² The Court also stated, “the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”⁴³ Here, although global warming has the potential to impact a large segment of the human population, the petitioners have presented sufficient declarations that the projected rise of sea level due to global warming “would lead to serious loss of and damage to Massachusetts’s coastal property.”⁴⁴ As judge Tatel found, this is a claim particular to Massachusetts rather than a generalized claim,⁴⁵ which should satisfy the “concrete” and “particularized” requirements.

Second, the petitioners must allege an injury that is either “actual” or “imminent.”⁴⁶ Although there are some scientific uncertainties about global warming, the EPA itself recognized the certainty that “[g]lobal warming poses real risks.”⁴⁷ Although the exact time the petitioners’ injury will occur is neither certain nor imminent, the Court should not interpret the “imminent” requirement literally in light of the nature of the issue. When an injury is likely to occur, the Court should not delay to adjudicate a case until a real injury has occurred. In particular, in *Massachusetts* the petitioners’ alleged injury probably would be too late to be redressed after it has occurred. In such circumstances, when the scientific evidence has shown the likelihood of the injury to occur eventually, the Court should treat the case as ripe to adjudicate.

⁴¹ 405 U.S. 727 (1972).

⁴² *Id.* at 734.

⁴³ *Id.*

⁴⁴ *Massachusetts v. EPA*, 415 F.3d 50, 65 (D.C. Cir. 2005) (Tatel, J., dissenting).

⁴⁵ *Id.* at 65.

⁴⁶ *Lujan*, 504 U.S. at 564.

⁴⁷ See <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ClimateUncertainties.html> (last visited Nov. 22, 2006), which states in relevant part:

Scientists know for certain that human activities are changing the composition of Earth’s atmosphere Warming has occurred in both northern and southern hemispheres, and over the oceans. Confirmation of 20th-century global warming is further substantiated by melting glaciers, decreased snow cover in the northern hemisphere and even warming below ground.

2. Traceability – Causation

The “traceability” element requires a plaintiff to demonstrate “a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party before court.”⁴⁸ The standard to be applied by a court varies.⁴⁹ The D.C. Circuit applies a “substantial probability” standard by looking at “the chain of causation between the agency’s procedural omission or deficiency and the plaintiff’s injury.”⁵⁰ In *Massachusetts*, the EPA asserted that the petitioners’ alleged harm could not be traced to the GHG emissions from new vehicles rather than to the GHG emissions from other sources in the United States, or to the emissions from all kinds of sources in the world.⁵¹ Some commentators seem to agree.⁵² If the Supreme Court uses this narrow reading of “causation” for “traceability” element, the obstacle faced by the petitioners would be insurmountable. In contrast, the Ninth Circuit used a more relaxed standard, which only requires the plaintiffs to prove with a “reasonable probability” that the defendant’s procedural violation caused their injury.⁵³ Under this standard, the court may find causation while still recognizing other independent factors or parties that are necessary for the alleged injury to occur.⁵⁴

In *Massachusetts*, the Supreme Court may likely adopt the relaxed causation approach in light of the procedural nature of the petitioners’ alleged injury. Causation and redressability are usually less a concern in a case alleging “procedural injury” than in a case involving a “substantive injury.”⁵⁵ There is abundant credible evidence that GHG emissions would cause global warming, which in turn would cause sea levels to rise and damage the petitioners’

⁴⁸ *Lujan*, 504 U.S. at 560-61 (internal quotation marks omitted)(quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

⁴⁹ Blake R. Bertagna, Comment, “*Standing*” *Up for the Environment: The Ability of Plaintiffs To Establish Legal Standing To Redress Injuries Caused by Global Warming*, 2006 B.Y.U.L. REV. 415, 461 (2006).

⁵⁰ *Id.*

⁵¹ Brief for Federal Respondent at 12, *Massachusetts v. EPA*, 548 U.S. 903 (2006) (No. 05-1120), 2006 WL 1358432 (May 15, 2006).

⁵² Bertagna, *supra* note 49, at 462 (stating that the causal chain in the global warming cases is “too attenuated by the numerous alternative factors that may cause the injury for a court to grant standing”).

⁵³ *Bell v. Bonneville Power Admin.*, 340 F.3d 945, 951 (9th Cir. 2003); *see also* Bertagna, *supra* note 49, at 462-463.

⁵⁴ *See* *Pub. Citizen v. Dep’t of Transp.*, 316 F.3d 1002, 1017-18 (9th Cir. 2002).

⁵⁵ Bertagna, *supra* note 49, at 463.

coastline properties. The Court may find there is a “reasonable probability” that the EPA’s procedural violation would cause the petitioners’ injury.

3. Redressability of the Injury

The “redressability” element of standing requires a plaintiff to demonstrate that a favorable decision by a court would “likely” redress some of the problems causing the plaintiff’s injuries.⁵⁶ However, a plaintiff does not have to show that a favorable decision would “fully remedy” the problems.⁵⁷ In footnote seven of *Lujan*, Justice Scalia wrote, “One living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered.”⁵⁸ This footnote essentially removed the “redressability” requirement from the standing inquiry for a plaintiff claiming “procedural injuries.” Consequently, the federal courts have relaxed the redressability requirement in procedural injury cases.⁵⁹

In *Massachusetts*, the petitioners claimed that their harm could be redressed by a favorable decision from the Court because reductions in emissions would reduce the impact of global warming, and “by limiting emissions from U.S. motor vehicles, EPA would reduce the injury caused to petitioners by these emissions.”⁶⁰ Moreover, “[r]eversal of EPA’s legal position would also allow additional redress through regulation of other sources that emit greenhouse gases, such as power plants.”⁶¹ The fact that motor vehicles and power plants together represent sixty percent of U.S. CO₂ emissions and the U.S. accounted for about a quarter of the world emissions should help demonstrate to the Court that the redress would not be insignificant.

III. EPA’S AUTHORITY TO REGULATE CARBON DIOXIDE EMISSIONS

The EPA, through the Fabricant Memo and the Rulemaking Denial, asserts that carbon dioxide is not an air pollutant within the meaning of CAA and that the agency lacks authority to

⁵⁶ *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

⁵⁷ *See Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001).

⁵⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n.7 (1992).

⁵⁹ *See Colo. Env’tl. Coalition v. Wenker*, 353 F.3d 1221, 1240 (10th Cir. 2004); *see also Bertagna, supra* note 49, at 464.

⁶⁰ Reply Brief of Petitioners at 10, *Massachusetts v. EPA*, 548 U.S. 903 (2006) (No. 05-1120), 2006 WL 1491257 (May 24, 2006).

⁶¹ *Id.*

regulate the GHG emissions from motor vehicles. Moreover, the EPA declares that, even if the agency has the authority to regulate, it would not exercise it at this time. This section will discuss the EPA's authority to regulate the GHG emissions from motor vehicles within the legal framework surrounding the CAA and case law.

A. EPA's Legal Position

Upon receiving the rulemaking petitions from ICTA and others, the EPA requested public comments on the petition from January 23, 2001 to May 23, 2001.⁶² The EPA received over 50,000 public comments, most of which supported the petition.⁶³ However, the EPA denied the rulemaking petition "[i]n view of EPA's lack of CAA regulatory authority to address global climate change, DOT's [Department of Transportation] authority to regulate fuel economy, the president's policy, and the potential foreign policy implications."⁶⁴

Although the Fabricant Memo acknowledges that the CAA contains expansive language on the EPA's authority to regulate air pollutants, the Memo asserts that carbon dioxide is not an "air pollutant" within the meaning of the CAA. The Memo emphasizes that Congress did not use the general regulatory provisions of the CAA to deal with the global issue of stratospheric ozone depletion.⁶⁵ It therefore argues that Congress requires enactment of special provisions to deal with global problems, and that the general regulatory scheme offers inadequate authority to address climate change.⁶⁶ The Memo also emphasizes scientific uncertainties and the difficulties in regulating the GHG emissions.⁶⁷ For example, CO₂ is well mixed throughout the atmosphere. The scientific issues associated with unprecedented complexity in dealing with the CO₂ regulation would be "inconsistent with a basic underlying premise of the CAA regime for implementation of a national ambient air quality standards ("NAAQS").⁶⁸ Therefore, the Fabricant Memo concludes that the "EPA lacks CAA regulatory authority to address global

⁶² Rulemaking Denial, *supra* note 10, 68 Fed. Reg. 52,922, 52,923.

⁶³ *Id.* at 52,924.

⁶⁴ *Id.* at 52,925.

⁶⁵ Fabricant Memo, *supra* note 9, at 6.

⁶⁶ *Id.*

⁶⁷ *See id.* at 7-8.

⁶⁸ *Id.* at 7.

climate change. . . . Thus, CO₂ and other GHGs are not 'agents' of air pollution and do not satisfy the CAA section 302(g) definition of 'air pollutant.'"⁶⁹

Previously on two separate occasions, through its former General Counsels, Jonathan Z. Cannon and Gary S. Guzy, the EPA addressed the question of whether the CAA authorizes the regulation of GHG emissions.⁷⁰ In 1998, in response to a request from then-Congressman Tom DeLay, Cannon stated in a memorandum that carbon dioxide is an air pollutant and could be regulated under the CAA,⁷¹ on which then-Administrator Carol M. Browner agreed.⁷² The Cannon Memo reviewed the legislative history and noted that the CAA was meant to be "preventative or precautionary" and that "welfare" included effects on climate and weather. The memo explained that the necessary determinations had not been made by the EPA Administrator, so CO₂ remained unregulated.

In October 1999, in testimony before Congress, Cannon's successor Guzy confirmed the Cannon Memo's position that carbon dioxide is an air pollutant under the CAA and that it is within EPA's authority to regulate.⁷³ Guzy stressed that there is "no statutory ambiguity" on the matter at issue. He also emphasized that "while CO₂, 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."⁷⁴ Guzy nevertheless concluded, "CO₂ is in the class of compounds that could be subject to several of the Clean Air Act's regulatory approaches."⁷⁵

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 2-3.

⁷¹ Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, at 3 (Apr. 10, 1998) [hereinafter Cannon Memo], http://lawprofessors.typepad.com/environmental_law/files/EPACO2memo1.pdf (last visited Nov. 22, 2006).

⁷² Fabricant Memo, *supra* note 9, at 2.

⁷³ Testimony of Gary S. Guzy, EPA General Counsel, Before a Joint Hearing of the House Subcomm. on Nat'l Econ. Growth, Natural Res. and Regulatory Affairs of the Comm. on Gov't Reform, and the House Subcomm. on Energy and Env't Comm. on Sci., at 3-4 (Oct. 6, 1999) [hereinafter Guzy Testimony], http://epa.gov/ocir/hearings/testimony/106_1999_2000/100699gg.htm (last visited Nov. 22, 2006).

⁷⁴ *Id.* at 5.

⁷⁵ *Id.* at 6.

B. Legal Framework

1. The Clean Air Act (CAA)

The EPA has broad regulatory authority over air pollutants emitted from motor vehicles pursuant to section 202(a)(1) of the CAA, which provides:

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.⁷⁶

The plain meaning of the statutory language, in particular broad term “any air pollutant,” seems to grant EPA the authority to regulate emission of carbon dioxide from motor vehicles, if carbon dioxide is an “air pollutant” within the meaning of the CAA. The term “share” also suggests, if carbon dioxide is determined to be an “air pollutant” that “may reasonably be anticipated to endanger public health or welfare,” the EPA would have a duty to regulate its emissions. On the other hand, EPA’s discretion to deny rulemaking is only limited to a situation where, “in the Administrator’s judgment,” emission of carbon dioxide would not “reasonably be anticipated to endanger public health or welfare.”

In addition, “welfare” is broadly defined to include “effects on ... 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.”⁷⁷ The broad definition of “welfare” apparently should embrace the alleged harmful effects of climate change caused by GHGs such as carbon dioxide on the petitioners in *Massachusetts*.

2. Legislative History of the CAA

Upon recognizing air pollution as a national problem, Congress began to address the problem in 1955 by enacting the Air Pollution Control Act.⁷⁸ Congress enacted the Clean Air

⁷⁶ 42 U.S.C. § 7521(a)(1) (2006).

⁷⁷ 42 U.S.C. § 7602(h) (2006).

⁷⁸ 42 U.S.C. § 7401 (2006); see JAMES R. FLEMING & BETHANY R. KNORR, HISTORY OF THE CLEAN AIR ACT, A GUIDE TO CLEAN AIR LEGISLATION PAST AND PRESENT, <http://www.ametsoc.org/sloan/cleanair/index.html> (last visited Nov. 22, 2006).

Act in 1963, which set emission standards for stationary sources.⁷⁹ The primary goal of the CAA is to "encourage or otherwise promote reasonable Federal, State, and local governmental actions ... for pollution prevention."⁸⁰ Amendments to the CAA in the 1960s authorized federal agencies to expand air pollution control programs and set air quality standards, including control of emissions from new motor vehicles.⁸¹

However, by the end of the decade, states had made little progress, so Congress enacted the Clean Air Amendments of 1970, which "sharply increased federal authority."⁸² In the same year, the EPA was created pursuant to an executive order of President Nixon by combining preexisting units from various federal departments.⁸³ The strengthened CAA placed responsibility to regulate air pollution within the newly created EPA and thus increased the role of the federal government.⁸⁴ The Administrator of the EPA would set emission standards for new automobiles, new stationary sources of pollution, and highly toxic substances, would identify "criteria" pollutants, and would prescribe NAAQS for those pollutants.⁸⁵ Each state would then create appropriate regulation to achieve the federally mandated standards through a State Implementation Plan (SIP), which would require EPA approval.⁸⁶ The 1970 amendments also contained the distinctive requirement that automobile emissions were to be regulated exclusively by the federal government.⁸⁷ Only the state of California was granted an exception to regulate automobile emissions, subject to approval by the EPA.⁸⁸

Section 109 of the 1970 Amendments directed the EPA Administrator to establish national ambient air quality standards (NAAQSs) for pollutants that may endanger public health or welfare.⁸⁹ Each pollutant is subject to two types of standards: (1) primary standards that,

⁷⁹ 42 U.S.C. § 7401 (2006); see FLEMING & KNORR, *supra* note 78.

⁸⁰ 42 U.S.C. § 7401(c) (2006).

⁸¹ FLEMING & KNORR, *supra* note 78; see also ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 80 (West, 2004).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See, e.g., Arnold W. Reitze, Jr., *Overview and Critique: A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1591 (1991); Woodward, *supra* note 18, at 220.

⁸⁵ Reitze, *supra* note 84, at 1591.

⁸⁶ *Id.*

⁸⁷ 42 U.S.C. § 7543(a) (2006).

⁸⁸ 42 U.S.C. § 7543(b) (2006).

⁸⁹ 42 U.S.C. § 7409(a)(1) (2006).

“allowing an adequate margin of safety, are requisite to protect the public health”; and (2) secondary standards “to protect the public welfare from any known or anticipated adverse effect.”⁹⁰ The Amendments also set new limits on emissions from stationary and mobile sources, which can be enforced by both state and federal governments.⁹¹

The CAA has undergone significant amendments since 1970. The last major revision of the CAA was made in 1990.⁹² The 1990 amendments addressed five main areas: air-quality standards, motor vehicle emissions and alternative fuels, toxic air pollutants, acid rain, and stratospheric ozone depletion.⁹³ The amendments further tightened vehicle emission standards, such as reducing 30% of hydrocarbon emissions and 60% of nitrogen oxide emissions by 1998.⁹⁴

3. Statutory Provisions Addressing Global Warming or Carbon Dioxide Emissions

The CAA contains three provisions that touch upon global warming or carbon dioxide emission issues. Section 821 requires measurement of CO₂ emissions from utilities;⁹⁵ section 103(g) calls for research into nonregulatory measures for prevention of multiple air pollutants, including CO₂;⁹⁶ and section 602 directs the EPA to determine the global warming potential of substances that deplete ozone.⁹⁷ Section 602(e) specifically mandates research into climate change and ensures that information regarding global warming will be gathered.⁹⁸ These provisions do not specifically limit any existing grants of the EPA’s regulatory authority under the Act.⁹⁹

4. Relevant Case Law

The U.S. Court of Appeals for the District of Columbia has exclusive jurisdiction over "nationally applicable regulations promulgated, or final action taken, by the Administrator" of the EPA.¹⁰⁰ The case law of the D.C. Circuit suggests that the CAA has given the EPA broad

⁹⁰ 42 U.S.C. § 7409(b)(2) (2006).

⁹¹ See FLEMING & KNORR, *supra* note 78.

⁹² See *id.*

⁹³ *Id.*

⁹⁴ FINDLEY & FARBER, *supra* note 81, at 82-83.

⁹⁵ 42 U.S.C. § 7651k (2006).

⁹⁶ 42 U.S.C. § 7403(g) (2006).

⁹⁷ 42 U.S.C. § 7671 (2006).

⁹⁸ See 42 U.S.C. § 7671a(e) (2006).

⁹⁹ See McKinstry, *supra* note 7, at 80.

¹⁰⁰ 42 U.S.C. § 7607(b)(1) (2006).

authority to regulate matters related to air pollution. For example, section 211(C)(1)(A) of the Clean Air Amendments of 1970 authorized the EPA Administrator to regulate gasoline additives whose emission products “will endanger the public health or welfare.”¹⁰¹ However, in *Ethyl Corp. v. EPA*,¹⁰² a seminal case in 1976 dealing with EPA’s regulation of the gasoline additives, the EPA interpreted section 211(c)(1)(A) as requiring only finding of a “significant risk of harm” to public health.¹⁰³ Although the petitioners challenged the EPA’s authority to regulate by arguing that the EPA was required to prove actual harm, not just a “significant risk of harm,” the court upheld the EPA’s interpretation of the statute.¹⁰⁴ The court also noted that section 202(a)(1) mandates the EPA’s regulation by using the language “the Administrator ‘shall’ regulate if ‘in his judgment’ the pollutants warrant regulation.”¹⁰⁵

On the other hand, historically the D.C. Circuit has also interpreted the “in his judgment” language in the CAA as giving the Administrator wide latitude in making endangerment findings, as was done by judge Randolph in *Massachusetts*. For example, in *Her Majesty the Queen in Right of Ontario v. EPA*, the petitioners alleged the Administrator had failed to make an endangerment finding as to acid rain emitted from several states entering the Canadian air,¹⁰⁶ pursuant to section 115 of the CAA.¹⁰⁷ The EPA argued that because it lacked sufficient information for tracing the pollutants affecting Canadian health and welfare to specific sources in the U.S., it was not obliged to make endangerment findings at that time.¹⁰⁸ The court agreed by holding that the Administrator reasonably declined to make an endangerment finding until there was enough evidence to show a correlation between the pollution and particular states.¹⁰⁹

These cases suggest that the EPA has both broad authority to regulate air pollutants and considerable discretion in making endangerment findings. However, as judge Tatel interpreted, if the EPA makes no endangerment findings, the determination must be based on statutory standards; and if the EPA wishes to postpone making endangerment findings, the decision must

¹⁰¹ 42 U.S.C. § 1857f-6c(c)(1)(A) (1970) (*transferred to* 42 U.S.C. §§ 7401 et seq.).

¹⁰² 541 F.2d 1 (D.C. Cir. 1976) (en banc), *cert denied*, 426 U.S. 941 (1976).

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.* at 12.

¹⁰⁵ *Id.* at 20, n.37.

¹⁰⁶ 912 F.2d 1525, 1529-30 (D.C. Cir. 1990).

¹⁰⁷ 42 U.S.C. § 7415(a) (2006).

¹⁰⁸ *Her Majesty*, 912 F.2d at 1528.

¹⁰⁹ *Id.* at 1533.

be because the EPA lacks necessary information for determining whether the statutory standard is met.¹¹⁰

C. Analysis of *Massachusetts v. EPA*

1. Is Carbon Dioxide an “Air Pollutant”?

A plain text review of the CAA demonstrates that carbon dioxide falls within the expansive definition of an air pollutant. Several provisions of the CAA expressly address the issue of whether carbon dioxide is an air pollutant. Most notably, section 302(g) of the CAA defines "air pollutant" as “[a]ny air pollution agent or combination of such agents, including any physical, chemical, . . . substance or matter which is emitted into or otherwise enters the ambient air.”¹¹¹ Furthermore, air pollutant “includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors.”¹¹² The D.C. Circuit interpreted section 302(g) as defining air pollutant "extremely broadly."¹¹³

In section 103(g),¹¹⁴ Congress calls for a research program in order to prevent or reduce “multiple air pollutants, including sulfur oxides . . . carbon monoxide, and *carbon dioxide*, from stationary sources.”¹¹⁵ The statutory language lists carbon dioxide as one of a number of “multiple air pollutants,” but the Fabricant Memo refers to the section as "listing several air pollutants and CO₂.”¹¹⁶ This misleading description is not a faithful, if not deliberately skewed, reading of the statute.

Furthermore, section 160 of the CAA has a stated purpose "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipated to occur.”¹¹⁷ These statements clearly suggest that Congress intended the EPA to regulate any air pollutant that may have an "actual or potential" adverse effect. If CO₂ can cause such adverse effect, there is no reason why Congress would intend to specifically exclude it from the agency’s regulation.

¹¹⁰ *Massachusetts*, 415 F.3d at 76.

¹¹¹ 42 U.S.C. § 7602(g) (2006).

¹¹² *Id.*

¹¹³ *Ala. Power Co. v. Costle*, 636 F.2d 323, 352 n.60 (D.C. Cir. 1979).

¹¹⁴ 42 U.S.C. 7403(g)(1) (2006).

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ Fabricant Memo, *supra* note 9, at 5.

¹¹⁷ 42 U.S.C. § 7470(1) (2006).

2. Does EPA Have Authority to Regulate Carbon Dioxide Emissions?

If the Court agrees with the petitioners that carbon dioxide is an air pollutant within the meaning of the CAA under sections 302(g) and 103(g), the EPA would not be able to deny its authority to regulate carbon dioxide emissions under section 202(a)(1). The EPA can overcome the textual grant of authority only when it can show “either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.”¹¹⁸ Nothing seems to justify *Massachusetts* as such an extraordinary case. The EPA’s assertion that Congress did not provide “commensurate regulatory authority” with “research and development authority” in section 103(g) is unsound.¹¹⁹

Legislative history also showed “the willingness of Congress to address global issues within the existing CAA framework.”¹²⁰ For example, the broad definitions of “air pollutant” and “welfare” have never been restricted or amended by Congress.¹²¹ On the contrary, in 1977 Congress amended section 202(a)(1), changing “endangers” to “may reasonably be anticipated to endanger,”¹²² “in order to emphasize the precautionary or preventive purpose of the act.”¹²³ Though the EPA equates the regulation of CO₂ emissions from motor vehicles to the regulation of climate change, they are actually two distinct concepts. Under the CAA, any pollutant that “may be reasonably anticipated to endanger public health or welfare” calls for the agency’s regulation. The CAA defines air pollutant extremely broadly, encompassing numerous substances, but regulation is tied to a finding of harm. Therefore, the limitation within the statute on the EPA’s regulatory authority is not in the definition of air pollutant but in the endangerment finding language. However, the mechanisms by which the public would be harmed should not be part of the “regulatory authority” inquiry. The “EPA’s decision to adopt and set air quality standards need only be based on ‘reasonable extrapolations from some reliable evidence’” and does not require proof of causation.¹²⁴

¹¹⁸ *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

¹¹⁹ *See* Fabricant Memo, *supra* note 9, at 6.

¹²⁰ *Winters*, *supra* note 8, at 2013.

¹²¹ *Id.*

¹²² H.R. Rep. 95-294 at 49.

¹²³ *Id.* at 51.

¹²⁴ *See, e.g., Am. Trucking Ass’n v. Whitman*, 175 F.3d 1027, 1055-56 (D.C. Cir. 1999) (quoting *Natural Res. Def. Council, Inc. v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986)), *rev’d in part on other grounds*, 531 U.S. 457 (2001).

The EPA also based its rulemaking denial on the alleged scientific uncertainty. This argument is not persuasive. Although climate change due to the GHG emissions is not indisputably proven, it is generally recognized that anthropogenic activities, especially emissions of GHGs, contribute to the climate change.¹²⁵ While there may be uncertainty, there is overwhelming evidence highlighting the trend of global warming, the close correlation between the surface temperature and the ambient carbon dioxide level, and the potential harmful effects of climate change. The CAA is a precautionary statute, which does not require the agency to wait to act until it is certain that public will be harmed, as the *Ethyl* court stated:

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, ... [t]he Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as "fact," and the like.¹²⁶

In *Lead Industries Ass'n v. EPA*,¹²⁷ the D.C. Circuit further stated that "requiring EPA to wait until it can conclusively demonstrate that a particular effect is adverse to health before it acts is inconsistent with both the Act's precautionary and preventive orientation and the nature of the Administrator's statutory responsibilities."¹²⁸

3. Is EPA's Rulemaking Denial Mandated by the *Brown & Williamson* Decision?

In asserting lack of regulatory authority, the EPA relies heavily on the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*¹²⁹ The Fabricant Memo emphasizes that the Cannon Memo and Guzy's Testimony came before *Brown & Williamson*, suggesting that the

¹²⁵ See, e.g., Intergovernmental Panel on Climate Change ("IPCC"), *Climate Change 2001: Synthesis Report, A Contribution of Working Groups I, II, and III to the Third Assessment Report of the Intergovernmental Panel on Climate Change 2*, 10-15 (R.T. Watson et al. eds., 2001), available at <http://www.grida.no/climate/ipcctar/vol4/english/>; U.S. Dept. of State, *U.S. Climate Action Report - 2002*, at 3 (May 2002), available at <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsUSClimateActionReport.html>; Margot B. Peters, Comment, *An International Approach to the Greenhouse Effect: The Problem of Increased Atmospheric Carbon Dioxide Can Be Approached by an Innovative International Agreement*, 20 CAL. W. INT'L L.J. 67, 84 (1990).

¹²⁶ *Ethyl Corp.*, 541 F.2d at 28.

¹²⁷ 647 F.2d 1130 (D.C. Cir. 1980).

¹²⁸ *Id.* at 1155.

validity of the two former general counsels' statements have been undermined by *Brown & Williamson* decision.¹³⁰ The EPA thus asserts that *Brown & Williamson* decision mandates it to conduct "more thorough inquiry" about its authority to regulate because the debate involves "unusually significant policy questions."¹³¹ This subsection argues that the EPA's reversal of legal position is not mandated by the *Brown & Williamson* decision.

A threshold question is whether *Brown & Williamson* is applicable to *Massachusetts*. A careful comparison reveals that the two cases, though bearing some superficial resemblance, are distinguishable in many material aspects. In *Brown & Williamson*, the Food & Drug Administration's (FDA) asserted authority to regulate tobacco products under the Food, Drug & Cosmetic Act (FDCA) was challenged by a group of tobacco-based enterprises.¹³² The Fabricant Memo attempted to draw an analogy between the regulation of GHG emissions under the CAA to the regulation of tobacco products under the FDCA.¹³³ By claiming that the regulation of climate change is a case at least as extraordinary as the regulation of tobacco, the Memo concludes that the EPA should not act until Congress gives explicit directions.¹³⁴ In interpreting the Court's holding in *Brown & Williamson* that the FDA lacks authority to regulate tobacco, the EPA implicitly asserts that the Court's decision was based mostly on the analysis of the statutory "language, structure and history."¹³⁵ This interpretation has apparently downplayed the fact that the Court has repeatedly emphasized that Congress had essentially ratified the FDA's long-held position of lacking authority to regulate tobacco.¹³⁶ In fact, as one commentator put it, "the reversal in position of the FDA heavily influenced the Court's finding that there was no implied delegation of authority."¹³⁷

Probably the most significant similarity between the two cases is that both the proposed regulation of GHG emissions and that of tobacco products would have a huge impact on the U.S. economy. As the Fabricant Memo stated, "[t]he production and use of fossil fuel-based energy

¹²⁹ 529 U.S. 120 (2000).

¹³⁰ See Fabricant Memo, *supra* note 9, at 4.

¹³¹ *Id.*

¹³² 529 U.S. at 120.

¹³³ Fabricant Memo, *supra* note 9, at 9-10.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *Brown & Williamson*, 529 U.S. at 144.

¹³⁷ Winters, *supra* note 8, at 2015.

undergirds almost every aspect of the nation's economy," "approximately 75 percent of the electric power used in the U.S. is generated from fossil fuel, and the country's transportation sector is almost entirely dependent on oil."¹³⁸ Therefore, the EPA asserted that "an effort to impose controls on U.S. GHG emissions would have far greater economic and political implications than FDA's attempt to regulate tobacco."¹³⁹ However, whether the economic impact alone is enough to justify the agency's denial to regulate is debatable. The case law seems to have disapproved the EPA's consideration of economic factors in promulgating the national ambient air quality standards (NAAQS) under the CAA, starting from the D.C. Circuit's holding in *Lead Industries Ass'n v. EPA*.¹⁴⁰

In *Natural Res. Def. Council, Inc. v. EPA*,¹⁴¹ a case dealing with the EPA Administrator's authority to set emission standards under CAA, the court interpreted the statutory language "at the level which in his judgment provides an ample margin of safety to protect the public health" did not authorize the Administrator to base his judgment on cost and technological feasibility.¹⁴² Therefore, the Administrator's determination of emission standards based on "cost and technological feasibility," instead of an "ample margin of safety," was not an allowable policy consideration by the statutes.¹⁴³ Recently, the Supreme Court, in *American Trucking*,¹⁴⁴ reiterated that the CAA unambiguously disallows the EPA Administrator to consider costs in setting the NAAQS.

Even assuming that economic impact alone can justify the "extraordinariness" of a case, *Massachusetts* would still be readily distinguishable from *Brown & Williamson*. In the latter, if the FDA had regulatory authority over tobacco, it would likely require that all tobacco products be removed from the market due to their well-recognized detrimental effects to human health.¹⁴⁵ Apparently Congress did not want this to happen, so it had "foreclosed the removal of tobacco

¹³⁸ Fabricant Memo, *supra* note 9, at 10.

¹³⁹ Rulemaking Denial, *supra* note 10, 68 Fed. Reg. 52,928.

¹⁴⁰ 647 F.2d at 1148 (D.C. Cir. 1980) (stating that "the [CAA] and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards"); *see also Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *Natural Res. Def. Council, Inc. v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990).

¹⁴¹ 824 F.2d 1146 (D.C. Cir. 1987) (en banc).

¹⁴² *Id.* at 1164-65 (quoting 42 U.S.C. § 7412 (b) (1982)).

¹⁴³ 824 F.2d at 1163-64.

¹⁴⁴ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464-465 (2001).

¹⁴⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 136 (2000).

products from the market" by legislating to specifically address the issue.¹⁴⁶ "A ban of tobacco products by the FDA would therefore plainly contradict congressional policy."¹⁴⁷ In contrast, regulation of GHG emissions from motor vehicles would not be an "all or nothing" situation, and thus the economic impact would not be so drastic. Not only can the emissions be regulated by taking incremental steps, but the EPA also has the considerable discretion to decide the timeline for compliance, similar to setting the NAAQS. Moreover, the agency would still need to make the requisite endangerment findings under the Act before promulgating regulations.

The key to the *Brown & Williamson* decision is the Court's finding that Congress had spoken on the issue. The Court made this finding because Congress passed several statutes specifically addressing tobacco's health-related problems after the FDA had repeatedly denied having the authority to regulate tobacco.¹⁴⁸ Thus, the FDA's asserted authority to regulate tobacco is clearly foreclosed by the distinct regulatory scheme created by Congress for tobacco products.¹⁴⁹ In contrast, Congress has not created a separate regulatory scheme for GHG emissions as it did for tobacco regulation, but instead it passed the pieces of legislation regarding climate change in order to further research, develop a national policy, and gather information, without conferring regulatory authority on another agency.¹⁵⁰

In addition, similar to the FDA's assertion of authority to regulate tobacco,¹⁵¹ the EPA's disavowal of authority to regulate carbon dioxide is a reversal of its position represented by its two former general counsels. Though reversal of an agency's position is not a determining factor on the validity of its new position,¹⁵² it is arguable that the EPA's asserted authority has gained Congress' acquiescence.

In summary, because *Massachusetts* is distinguishable from *Brown & Williamson* in many material aspects, the Supreme Court's decision in the latter should not be mechanically applied to the former.

¹⁴⁶ *Id.* at 137.

¹⁴⁷ *Id.* at 139.

¹⁴⁸ *Id.* at 144.

¹⁴⁹ *Id.* at 159-60.

¹⁵⁰ See Fabricant Memo, *supra* note 9, at 8.

¹⁵¹ See *Brown & Williamson*, 529 U.S. at 144-46.

¹⁵² See *Natl. Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

IV. JUDICIAL DEFERENCE TO EPA'S RULEMAKING DENIAL

In its Rulemaking Denial, the EPA asserts that even if it has authority to regulate the GHG emissions, the CAA's provision does not impose a mandatory duty on the Administrator to exercise it, but instead, "section 202(a)(1) provides the Administrator with discretionary authority to address emissions."¹⁵³ Moreover, the Denial asserts, although section 202(a)(1) uses the word "shall," "it does not require the Administrator to act by a specified deadline and it conditions authority to act on a discretionary exercise of the Administrator's judgment."¹⁵⁴ While apparently these statements may be true, the agency may not depart from the unambiguous language of the statute in making its decision, and the judicial review of denial of rulemaking petition should be "guided by *Chevron* analysis."¹⁵⁵

A. The *Chevron* Doctrine

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁵⁶ the Supreme Court established the modern standard for what deference a court must give to an agency interpretation of a statute administered by the agency. Prior to *Chevron*, an agency's statutory interpretations would receive mandatory deference from the courts only in situations where Congress had expressly delegated the interpretative authority to the agency.¹⁵⁷ In the absence of such delegation, a court would analyze whether to give deference on case-by-case basis by looking at various factors established in *Skidmore v. Swift & Co.*¹⁵⁸

The *Chevron* deference applies "not only when Congress expressly delegates interpretive authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering."¹⁵⁹ The *Chevron* doctrine involves a two-step analysis.

¹⁵³ Rulemaking Denial, *supra* note 10, 68 Fed. Reg. 52,929.

¹⁵⁴ *Id.*

¹⁵⁵ *General Motors Corp. v. NHTSA*, 898 F.2d 165, 169-170 (D.C. Cir. 1990).

¹⁵⁶ 467 U.S. 837 (1984).

¹⁵⁷ *Winters*, *supra* note 8, at 2018.

¹⁵⁸ 323 U.S. 134, 139-140 (1944); *see also* *Winters*, *supra* note 8, at 2018-2019; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972-75 (1992)); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833 (2001); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 70 (2000).

¹⁵⁹ Merrill & Hickman, *supra* note 158, at 833; *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997); Jim Rossi,

The first step is determining "whether Congress has directly spoken to the precise question at issue."¹⁶⁰ If the answer is yes, then it is the end of inquiry and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁶¹ When the court determines that the statutory language is ambiguous and Congress has not clearly spoken on the issue, the second step analysis comes to play, that is, analyzing whether the agency's interpretation of the ambiguous language is "reasonable" and "based on a permissible construction of the statute."¹⁶² The standard of review in step two is a lowered "reasonableness." In *Brown & Williamson*, the Supreme Court applied the *Chevron* principle and found that "Congress ha[d] directly spoken to the precise question at issue," that is, having foreclosed the FDA's authority to regulate tobacco products.¹⁶³

B. Analysis of *Massachusetts* under the *Chevron* Doctrine

1. EPA's Assertion of Carbon Dioxide Not Being an "Air Pollutant"

Like in *Chevron* itself, the issue in *Massachusetts* also involves the EPA's interpretation of the CAA. In *Chevron*, the EPA interpreted the phrase "stationary source" to mean an entire plant in its notice-and-comment rulemaking.¹⁶⁴ The Court reviewed the CAA and found that Congress had not directly spoken to the precise issue as to whether the EPA's definition of the term was permissible,¹⁶⁵ so it analyzed the issue under step two and found the EPA's interpretation to be reasonable.¹⁶⁶ In *Massachusetts*, whether the EPA is authorized to regulate carbon dioxide emission largely depends on the interpretation of the phrase "air pollutant."

Given the broad definition of "air pollutant" in the CAA, *supra*,¹⁶⁷ the Court may find that Congress has directly spoken to the issue. Carbon dioxide is certainly a chemical substance emitted into the ambient air, and its pre-existence in the ambient air does not seem to be relevant. If Congress had intended to exclude carbon dioxide, or any other GHGs, from the definition due

Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron, 42 WM. & MARY L. REV. 1105, 1113-14 (2001).

¹⁶⁰ *Chevron*, 467 U.S. at 842.

¹⁶¹ *Id.* at 842-843.

¹⁶² *Id.* at 843.

¹⁶³ 529 U.S. at 133.

¹⁶⁴ *Chevron*, 467 U.S. at 840-41.

¹⁶⁵ *Id.* at 845.

¹⁶⁶ *Id.* at 866.

¹⁶⁷ *See* 42 U.S.C. § 7602(g) (2006).

to their pre-existence in the ambient air, Congress would most likely have expressly done so. As commented by others,¹⁶⁸ if there is ambiguity in the statute regarding whether carbon dioxide is an air pollutant, interpretation of the issue by the agency should not trigger *Chevron* deference. It can be argued that this ambiguity involves determining exactly what Congress has said, and in that type of situation, "*Chevron* deference is inappropriate notwithstanding ambiguity."¹⁶⁹ *Chevron* step-two analysis applies only when (1) "Congress has not spoken on the issue" and (2) "the agency is better equipped than the courts to fill the gap left by Congress."¹⁷⁰ A case purely involving statutory construction is one for the courts to decide.¹⁷¹ The language of the statute, legislative history, and CAA's stated purposes may convince the Court that Congress did not intend carbon dioxide to be excluded from the definition of "air pollutant" under the CAA."¹⁷²

Finally, even if the Court agrees with the EPA that it is ambiguous whether carbon dioxide falls within the definition of "air pollutant" and proceeds to the step two analysis, the Court may still find that the agency's interpretation is unreasonable in light of the broad language in the statute. In the absence of explicit exclusion in the statutory language, the Court should give the effect to the broad definition of "air pollutant" in the CAA, that is, "air pollutant" including the GHGs emitted into the ambient air from motor vehicles.

2. EPA's Assertion of Lacking Authority to Regulate

The EPA argues that Congress' intent for the EPA to regulate climate change is lacking because "the CAA is conspicuously missing a functional regulatory regime for addressing global climate change such as exists for addressing another global atmospheric issue, stratospheric ozone depletion."¹⁷³ Congress addressed the ozone depletion problem, like that of acid rain, by creating special programs in the CAA.¹⁷⁴ The fact provides some support to the EPA's statement that "it would be anomalous to conclude that Congress intended EPA to address global climate

¹⁶⁸ Winters, *supra* note 8, at 2025.

¹⁶⁹ Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 207 (1992).

¹⁷⁰ See *Chevron*, 467 U.S. at 843-44.

¹⁷¹ Michael Herz, *supra* note 169, at 224.

¹⁷² Winters, *supra* note 8, at 2026.

¹⁷³ Fabricant Memo, *supra* note 9, at 4.

¹⁷⁴ 42 U.S.C. §§ 7651, 7671 (2006).

change under the CAA's general regulatory provisions."¹⁷⁵ This line of argument may enable the agency to meet the low standard of the step-two analysis under *Chevron*, because the Court may find the EPA's interpretation to be "a permissible construction of the statute."¹⁷⁶ If the Court determines that Congress is silent about the global warming issue within the scheme of the CAA, the Court may defer to the EPA's decision to wait for a specific directive from Congress before regulating the GHG emissions. However, it is also possible that the Court will find the EPA's interpretation "unreasonable" in light of broad statutory language in the definition of the "air pollutant" and the agency's broad authority over regulation of other air pollutants.¹⁷⁷ For example, in *Whitman v. American Trucking Ass'ns*, the Court reviewed the EPA's revision of NAAQS for ozone and particulate matters.¹⁷⁸ Though the Court found the statute ambiguous, it held the EPA's interpretation "goes beyond the limits of what is ambiguous and contradicts what in [the Court's] view is quite clear."¹⁷⁹

Since *Chevron*, the Supreme Court has refined the doctrine by putting various limitations on judicial deference to agency interpretation of statutes.¹⁸⁰ For example, in *United States v. Mead Corp.*,¹⁸¹ the Court determined that a tariff classification ruling by the United States Customs Service is not entitled to *Chevron* deference, because the agency's ruling was not promulgated in the exercise of its authority delegated by Congress and did not "carry the force of law."¹⁸² *Mead* significantly limits applicability of the *Chevron* doctrine.¹⁸³ Under *Mead*, it is arguable that neither the Fabricant Memo nor the Rulemaking Denial is entitled to *Chevron* deference because both do not "carry the force of law."¹⁸⁴

¹⁷⁵ Fabricant Memo, *supra* note 9, at 6.

¹⁷⁶ See *Chevron*, 467 U.S. at 843.

¹⁷⁷ See *Verizon Communs. Inc. v. FCC*, 535 U.S. 467, 534-35 (2002).

¹⁷⁸ 531 U.S. 457 (2001).

¹⁷⁹ *Id.* at 481.

¹⁸⁰ See, e.g., *Christensen v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead Corp.*, 533 U.S. 218 (2001); see also Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1327-28 (1992); Robert A. Anthony, *Keeping Chevron Pure*, 5 GREEN BAG 2d 371, 374 (2002); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 17 (1996); Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313, 1315 (2001).

¹⁸¹ 533 U.S. at 221.

¹⁸² *Id.* at 221, 226-227.

¹⁸³ *Id.* at 239 (Scalia, J., dissenting).

¹⁸⁴ See Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 790

However, *Chevron* deference came back strongly in the Supreme Court’s most recent decision in *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*¹⁸⁵ *National Cable* was appealed from the Court of Appeals for the Ninth Circuit, in which the Ninth Circuit declined to apply *Chevron* because it thought the Federal Communications Commission’s (FCC) interpretation of the Communications Act foreclosed by the conflicting construction of the Act the court adopted previously.¹⁸⁶ The Supreme Court reversed and held that “[i]f a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to adopt the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”¹⁸⁷ In light of *National Cable*, the petitioners’ challenge to the EPA’s decision is decidedly an uphill battle.

On another aspect, *Massachusetts* involves the EPA’s attempt to limit its power. Although the case is contrary to *Brown & Williamson*, in which the FDA tried to expand its regulatory authority, both cases involved an agency’s interpretation of its jurisdiction. What level of deference an agency is entitled to in interpreting its own jurisdiction is a complex, unsettled area of law.¹⁸⁸ In general, an agency is entitled to judicial deference because of (1) its authority delegated by Congress and (2) its expertise in exercising that authority. It is arguable that jurisdictional interpretation is beyond the agency’s expertise, if not also beyond its authority delegated by Congress.¹⁸⁹ If jurisdictional interpretation can reasonably be characterized as construction of statutes, the job is arguably more appropriate for the judiciary. Given both the jurisdictional nature of the EPA’s interpretation and the fact that its Rulemaking Denial does not carry the force of law, the agency’s interpretation that it lacks of regulatory authority should not be given *Chevron* deference.

(2002) (noting that it could be difficult to show that denial of a petition for rulemaking has the force of law).

¹⁸⁵ 545 U.S. 967 (2005).

¹⁸⁶ *Id.* at 982.

¹⁸⁷ *Id.* at 980.

¹⁸⁸ Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2099 (1990); see also Winters, *supra* note 8, at 2022-23.

¹⁸⁹ An agency’s interpretation of the scope of its own jurisdiction may also implicate a “separation of

3. EPA's Assertion of Its Discretion to Decline the Rulemaking Petition

The EPA asserts that, pursuant to the statutory language “in his judgment,” the Administrator has discretion to decline to exercise his authority to regulate even if the authority exists.¹⁹⁰ However, it is arguable that the Administrator’s discretion must be interpreted within the statutory scheme, and the statute clearly directs the EPA to make endangerment findings. Therefore, the agency’s blanket denial of its regulatory authority is not a proper exercise of its discretion. Furthermore, all states, except for California, have been preempted to regulate in this area, and they have no choice but to rely on the federal agency in controlling the GHG emissions. Under these circumstances, the agency’s firm denial to act despite the broad statutory languages can hardly be characterized as a proper exercise of its discretion. Finally, the EPA denied the rulemaking petition by heavily relying on its foreign policy argument. Because foreign policy considerations are outside of both the statutory scheme of the CAA and the expertise of the agency, the agency’s interpretation of its discretion is not entitled to the *Chevron* deference.

Since the EPA’s actions do not deserve *Chevron* deference, they should be reviewed under the *Skidmore* doctrine, like what the Court did in *Mead*.¹⁹¹ The *Skidmore* Court declared that opinions, interpretations, and rulings by an agency are not controlling on courts but, nonetheless, come from a body of experience and warrant respect.¹⁹² Under *Skidmore*, a court should consider factors such as the “thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements” in determining whether to give deference to an agency’s decision.¹⁹³ Even under this line of analysis, the EPA’s drastic reversal of its previous position seems to undercut the judicial deference it would otherwise deserve.

powers” issue, discussion of which is beyond the scope of this Note.

¹⁹⁰ Fabricant Memo, *supra* note 9.

¹⁹¹ 533 U.S. at 234; *see also* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 822-823 (2001).

¹⁹² *Skidmore*, 323 U.S. at 140.

¹⁹³ *Id.*

V. ADDITIONAL COMMENTS

“Greenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise.”¹⁹⁴ It is estimated that by the end of the twenty-first century the average global surface temperature will rise between 1.4 and 5.8 °C (2.5 to 10.4 °F) relative to that in 1990.¹⁹⁵ The consequences of increased climate change could include, as the EPA admits, “loss of land and structures, loss of wildlife habitat, accelerated coastal erosion, exacerbated flooding and increased vulnerability to storm damage, and increased salinity of rivers, bays, and aquifers, which would threaten supplies of fresh water.”¹⁹⁶ Although health-related outcomes due to climate change are in debate, many adverse impacts like those mentioned above are almost certain to occur, if they are not already occurring.¹⁹⁷ However, the EPA goes a long way to assert that GHGs are not “air pollutants” and that it lacks authority under the CAA to regulate emissions of the GHGs from motor vehicles – the main sources of the GHG emissions due to human activities.

First, the EPA’s argument that it lacks authority to regulate because of scientific uncertainty is not persuasive. The EPA focused on the statement in the Climate Change Science Report that “causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.”¹⁹⁸ However, the EPA ignored the two “pivotal conclusions” of the report, as stated by the Amici Brief filed by the climate scientists, among whom many were the authors of the report the report on which the EPA relied.¹⁹⁹ First, “the NAS report unambiguously links already observed climate warming, and related impacts, damages, and risks, to human emissions of greenhouse gases.”²⁰⁰ Second, the report cautions that “national policy decisions made now, and in the longer-term future will influence the extent of any damage suffered by vulnerable human

¹⁹⁴ NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (PREPUBLICATION COPY) 1 (National Academy Press, 2001) [hereinafter CLIMATE CHANGE SCIENCE], <http://www.gcrio.org/OnLnDoc/pdf/ClimateChangeScience.pdf> (last visited Nov. 22, 2006).

¹⁹⁵ *Id.* at 4.

¹⁹⁶ U.S. Environmental Protection Agency, *Climate Change and Florida*, at 3 (Sept. 1997), <http://yosemite.epa.gov/oar/globalwarming.nsf> (last visited Nov. 22, 2006).

¹⁹⁷ CLIMATE CHANGE SCIENCE, *supra* note 194, at 19-20.

¹⁹⁸ Brief for Climate Scientists David Battisti et al. as Amici Curiae in Support of Petitioners at 19, *Massachusetts v. EPA*, 548 U.S. 903 (2006) (No. 05-1120), 2006 WL 2563377 (Aug. 30, 2006).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

populations and ecosystems later in this century.”²⁰¹ The agency should base its decision on sound scientific judgment. Science, by nature, is always evolving, not to mention that the complexity and scale of the climate science makes it almost impossible to completely prove and validate in any research labs. EPA should not wait for a full validation of the theory or a complete consensus among the scientific community before taking action. Undeniable facts are that with increasing emissions from motor vehicles, the temperature of the globe and the sea level are rising, and the petitioner states, such as *Massachusetts*, are losing coastline sovereignty and properties to the ocean. Acknowledging inherent scientific uncertainty, Congress used the phrase “may reasonably be anticipated to endanger public health or welfare,”²⁰² which grants the EPA the authority to list a pollutant even if there is scientific uncertainty about its precise harmful effects.

In addition, nowhere does the CAA require proof or unequivocal evidence before the agency can act.²⁰³ The scientific uncertainty argument does not support a “lack of authority” conclusion. The CAA directs the EPA Administrator to inquire about the potential detrimental effects of “any air pollutants” to the “public health or welfare.” If she finds such detrimental effects are likely or possible, she would be obligated to prescribe standards for emission of such “air pollutants.” Even if an express regulatory authority on the part of EPA is arguably lacking in the statutory language, it can be argued that the authority is implied by these strong Congressional directives. The EPA’s many initiatives for voluntary reduction of GHG emissions, while highly commendable, also support existence of the Congress’ acquiescence with the agency’s authority to regulate.

Second, the EPA’s denial of its regulatory authority is not only a sharp reversal of its legal position but also a drastic step backward in fulfilling its mission to “protect human health and the environment.”²⁰⁴ Since the creation of the EPA thirty-six years ago, it has played an indispensable role in securing a safe and healthy environment for American people. As four former EPA Administrators stated in their Amici Brief, three “guiding principles” are essential in administering the CAA:

²⁰¹ *Id.* (quoting CLIMATE CHANGE SCIENCE, *supra* note 194, at 1).

²⁰² 42 U.S.C. 7408(a)(1)(A) (2006).

²⁰³ *Massachusetts*, 415 F.3d at 77 (Tatel, J., dissenting).

²⁰⁴ *About EPA*, Dec. 22, 2005, <http://www.epa.gov/epahome/aboutepa.htm#history> (last visited Nov. 22,

(1) The Act confers broad authority on EPA to regulate pollutants and pollutant sources not specifically enumerated in the statute; (2) EPA's decision whether to regulate specific pollutants and pollutant sources must be based on the best available scientific evidence concerning the likely impact on human health and welfare; and (3) Given the unacceptably high health and environmental costs of waiting for perfect formulation, absolute scientific certainty concerning all aspects of a pollutant's impacts is not a necessary prerequisite to regulation.²⁰⁵

Using these principles, the EPA has successfully promulgated four prominent regulations previously under the CAA. They are (1) phasing out lead additives in gasoline; (2) listing benzene as a hazardous air pollutant; (3) accelerating the phase-out of certain ozone-depleting substances; and (4) revising the NAAQS for particulate matter.²⁰⁶ These regulations under the CAA were all promulgated in the absence of specific statutory language addressing the pollutants at issue and despite the varying levels of scientific uncertainty. Yet, the significance of these regulations is far-reaching, and their impact on protecting human health and welfare cannot be overstated. Now, global warming is a major public concern and poses real risk to public health and welfare. It is high time for the EPA to face the challenge and fulfill its mission again.

Moreover, the EPA's rulemaking denial heavily relies on a foreign policy argument. The EPA asserts that domestic regulation of GHGs could "weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies" and, therefore, suggests that climate change must be left to the foreign policy prerogative of the President without agency action.²⁰⁷ However, nowhere does the CAA refer to foreign policies. "Congress has made the irrelevance of foreign policy to the EPA's domestic judgments under § 202(a)(1) doubly clear by designating the Department of State, not the EPA, as the executive agency responsible for United States foreign policy regarding climate change."²⁰⁸ Even if foreign policy considerations were relevant to the EPA's judgment, the particular foreign policy rationale the EPA offers for withholding domestic regulation is not entitled to deference under any applicable standard of

2006).

²⁰⁵ Brief of Former EPA Administrators Carol M. Browner et al. as Amici Curiae in Support of Petitioners at 7, *Massachusetts v. EPA*, 548 U.S. 903 (2006) (No. 05-1120), 2006 WL 2569575 (Aug. 31, 2006).

²⁰⁶ *Id.* at 7-26.

²⁰⁷ Brief for Former Secretary of State Madeleine K. Albright as Amicus Curiae in Support of Petitioners at 2, *Massachusetts v. EPA*, 548 U.S. 903 (2006) (No. 05-1120), 2006 WL 2570988 (Aug. 31, 2006).

review, either *Chevron* or *Skidmore*,²⁰⁹ because it is outside of the statutory delegation and the agency's expertise.

VI. CONCLUSION

The environmental law community is waiting for a landmark decision from the Supreme Court. Ruling one way or another by the Court would have far-reaching effects on the litigation of environmental cases in the area of global warming.

First, given the credible evidence on the correlation between the ambient carbon dioxide level and the global surface temperature, control of GHG emissions is a legitimate concern for the petitioning states. Though the agency's action would not fully remedy the petitioners' injury, any reduction of the GHG emissions would reduce the potential future harm. Especially given the procedural nature of the petitioners' injury, the petitioners should readily satisfy the "traceability" and "redressability" elements of standing. The main obstacle in the present case is probably proof of injury in fact. Because the petitioners cannot claim "actual harm," they need to establish the "imminent harm" element. Due to the nature and time scale of the global warming issue, the Court should relax the "imminent harm" standard to include the harm that would likely to occur or likely to be aggravated in the absence of the agency's action.

Second, the broad statutory language suggests that carbon dioxide is an air pollutant within the meaning of the CAA, and the EPA has adequate authority to regulate its emissions from motor vehicles. The broad statutory language clearly directs the EPA to make requisite endangerment findings about the GHG emissions, which implicitly authorizes the agency to regulate the emissions if the harmful effects can be reasonably anticipated.

Third, the EPA's disavowal of its authority to regulate GHG emissions is a sharp reversal of its previous legal position. Although the EPA heavily relies on the *Brown & Williamson* decision, the two cases are readily distinguishable. Its new interpretation of the CAA that carbon dioxide is not an air pollutant and that the statute does not authorize its regulation is an agency interpretation of congressional intent. This type of agency action is not entitled to *Chevron* deference. The court is the appropriate forum for the interpretation of congressional intent. The Supreme Court should perform a de novo review of *Massachusetts* using traditional tools of

²⁰⁸ *Id.* at 7.

²⁰⁹ *Id.* at 9.

statutory interpretation and consider various factors by applying *Skidmore* doctrine. It is also arguable that the agency's inconsistency in its legal position should undercut the *Skidmore* deference to which the agency would otherwise be entitled.

Finally, the EPA's foreign policy argument is not entitled to either *Chevron* or *Skidmore* deference, because it is clearly outside of the statutory mandate and the agency's expertise.