Probing Environmental Discretion: An Argument for Regulating Greenhouse Gases from Motor Vehicles under the Clean Air Act[1]

*Omari Jackson**

1. This comment was written prior to the U.S. Supreme Court's decision in *Massachusetts v. EPA* and reflect the author's views of the case at the time the Court granted certiorari to review the case.

* J.D. 2007, Thurgood Marshall School of Law, Texas Southern University, B.A. 2003, Morehouse College. Law Clerk to the Honorable Phil Johnson, Supreme Court of Texas, 2007-2008 term. The author would like to thank his parents for their love and support during the preparation of this comment and the entire staff of the *UCLA Journal of Environmental Law & Policy* for their hard work.

I.
INTRODUCTION

On October 20, 1999, the International Center for Technology Assessment (ICTA) and a number of environmental groups petitioned the Environmental Protection Agency (EPA) to regulate certain greenhouse gas (GHG) emissions from new motor vehicles and engines.[2] The organizations argued that section 202(a)(1) of the Clean Air Act (CAA)[3] provided the EPA Administrator with mandatory discretion to regulate GHG emissions.[4] Petitioners contended that statements made on the EPA's website and other documents concluded that the emissions they sought to control may reasonably be anticipated to endanger the public welfare.[5] They also claimed that motor vehicle emissions from the GHGs could be significantly reduced by increasing the fuel economy of vehicles, eliminating tailpipe emissions altogether, or using other current and developing technologies. However, the EPA concluded that it did not possess the legal authority to regulate the GHG emissions and denied their petition.[6]

In *Massachusetts v. Environmental Protection Agency*,[7] the D.C. Circuit addressed the issue of whether the Clean Air Act authorized the EPA Administrator to control GHG emissions of

2. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Environmental Protection Agency Sept. 8, 2003) [hereinafter Control of Emissions] (to be codified at 40 C.F.R. pt. 2).

3. Section 202 requires the Administrator to regulate emissions of any "air pollutant" from motor vehicles where, in the Administrator's judgment, such emissions contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. *See* 42 U.S.C. § 7521(a)(1).

4. Control of Emissions, *supra* note 2, at 52,923. Petitioners specifically sought regulation of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O) and hydrofluorocarbon (HFCs) emissions. *Id.*

5. *Id.*

6. Control of Emissions, *supra* note 2, at 52,933. The EPA also held it should not regulate GHG emissions from U.S. motor vehicles under the CAA. *See id.* at 52,925.

7. 415 F.3d 50 (D.C. Cir. 2005).

new motor vehicles and engines. A three-judge panel voted 2-1 against reviewing the EPA's decision that it lacked authority under federal law to regulate GHGs.[8] The majority held that the Administrator "properly exercised his discretion under section 202(a)(1) in denying the petition for rulemaking."[9] In an en banc hearing, the D.C. Circuit rejected a petition for rehearing.[10] Late last term, the Supreme Court granted certiorari to hear arguments to resolve this controversy.[11]

This comment asserts that the CAA authorizes the EPA to regulate GHG emissions from new motor vehicles. The Supreme Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[12] held that if a statute is silent or ambiguous with respect to a specific issue, the question becomes whether the agency's action involves a permissible construction of the statute. Part II of this comment discusses the historical background of climate change policy regarding GHG emissions. Part III focuses on the various environmental law cases addressing the issue of Article III standing. Part IV analyzes the *Chevron* test and the three opinions by the *Massachusetts v. Environmental Protection Agency* judges. Part V advances the belief that section 202(a)(1) of the CAA provides mandatory authority and predicts that the Supreme Court will decide that the petitioners possess proper standing and that the EPA is mandated under section 202(a)(1) to regulate GHG emissions. This prediction is based on the Court's jurisprudence regarding Article III standing and the *Chevron* doctrine, respectively. Part VI concludes that failure to control the production of GHG emissions from new motor vehicles and engines limits the impact of the CAA to protect the public welfare from threats to the environment.

8. *Id.*

9. *Id.* at 58. In his majority opinion, Judge Randolph assumed *arguendo* that "the EPA possessed statutory authority to regulate greenhouse gases from new motor vehicles." *Id.* at 56.

10. Massachusetts v. Envtl. Prot. Agency, 433 F.3d 66 (D.C. Cir. 2005).

11. Massachusetts v. Envtl. Prot. Agency, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006).

12. 467 U.S. 837 (1984).

II.
HISTORY OF CLIMATE CHANGE

A. *The Evolution of Climate Change Policy*

In 1896, Swedish scientist Svante August Arrhenius calculated that carbon dioxide being emitted into the atmosphere by industrial smokestacks could eventually change the Earth's climate by intensifying the greenhouse effect.[13] Arrhenius estimated that, at then-current rates of emission, it would take thousands of years for higher carbon dioxide emissions to have a perceptible effect.[14] At the time, legal action directed at climate change was not a priority for policymakers and lawyers. However, the rapid industrialization of the twentieth century sent atmospheric levels of carbon dioxide and other GHGs soaring.[15]

Climate change research did not generate significant attention in the first half of the twentieth century.[16] This was largely due to scientists rejecting the concept of global warming as a developing concern that needed immediate attention.[17] However, during the 1970s, scientists began to notice a cooling trend in the earth's weather patterns that warned of a "drastic decline in food production – with serious political implications for just about every nation on Earth."[18] A report by the National Academy of Sciences (NAS) stated that a major shift in climate change "would force economic and social adjustments on a worldwide scale because the global patterns of food production and population that have evolved are implicitly dependent on the climate of the present century."[19] Although there was disagreement regarding the

13. Kristin Choo, *Feeling the Heat: The Growing Debate Over Climate Change Takes on Legal Overtones*, A.B.A. J., July 2006, at 31.

14. *Id.*

15. *Id.* Methane and nitrous oxide were other GHGs affected by the movement towards industrialization. *Id.*

16. *Survey: The Heat Is On*, THE ECONOMIST, Sept. 9, 2006, at 3 [hereinafter *Survey*].

17. *Id.* An example of this occurred in 1938 when Guy Callender, a British engineer, gave a speech to the Royal Meteorological Society in which he claimed to have established that the world was warming. The Society regarded Callender as an eccentric and eventually dismissed his assertions. *Id.*

18. Peter Gwynne, *The Cooling World*, Newsweek, Apr. 28, 1975, at 64. A survey by Dr. Murray Mitchell of the National Oceanic and Atmosphere Administration (NOAA) revealed a drop of half a degree in average ground temperatures in the Northern Hemisphere between 1945 and 1968. Another study by two NOAA scientists stated that the amount of sunshine that reached the ground in the U.S. declined by 1.3 percent between 1964 and 1972. *Id.*

19. *Id.*

cause and extent of the cooling trend, most agreed with the belief that the trend would create a reduction in agricultural productivity throughout the twentieth century.[20]

During the 1980s, scientific discussions about the possibility of global climate change led to public concern both in the United States and abroad.[21] By then, computer-generated climate models predicted a host of severe consequences if emissions of carbon dioxide and other GHGs were not brought under control within decades rather than centuries.[22] Such consequences included intense heat waves, melting glaciers, rising sea levels, floods, droughts, tropical storms and hurricanes.[23] In 1988, the United Nations Environment Programme and the World Meteorological Organization appointed an international group of scientists known as the Intergovernmental Panel on Climate Change (IPCC) to investigate climate change.[24] "The United States Senate recognized the IPCC as the preeminent international body established to provide objective scientific and technical assessments on climate change."[25]

In 1995, the IPCC's Second Assessment Report on climate change found that "the balance of evidence, from changes in global mean surface temperature and from changes in geographical, seasonal and vertical patterns of atmospheric temperature, suggests a discernible human influence on global climate."[26] After this report, additional data, improved analysis, and more rigorous evaluation provided the IPCC with a greater understanding of climate change.[27] In 2001, it concluded that most of the activities surrounding global warming in the last fifty years were attributable to human activities.[28] Furthermore, the report summarized regional changes in climate affecting a di-

---

20. *Id.*

21. Control of Emissions, *supra* note 2, at 52,926.

22. Choo, *supra* note 13, at 31.

23. *Id.*

24. Final Brief for Petitioners in Consolidated Cases at *6, Massachusetts v. Envtl. Prot. Agency, No. 03-1361, 2005 WL 257460 (D.C. Cir. Jan. 24, 2005).

25. *Id.*; *see also* S. Exec. Rep. No. 102-55, at 9 (1992) (stating that IPCC's work is "viewed throughout most of the international scientific and global diplomatic community as the definitive statement on the state-of-the-knowledge about global climate change").

26. IPCC Second Assessment Report, Synthesis Report 5 (1995).

27. IPCC Third Assessment Report, Summary for Policymakers Synthesis Report 2 (2001). The report also determined that the 1990s was the warmest decade since records were first kept in 1861. *Id.* at 4-5.

28. *Id.* at 5, 7-8.

verse set of physical and biological systems in many parts of the world.[29]

B. *The Domestic Agenda for Combating Climate Change*

In the 1980s, the United States joined other nations to develop the United Nations Framework Convention on Climate Change (UNFCC).[30] Following approval by the Senate, President George H. W. Bush signed the UNFCC in 1992.[31] The UNFCC constituted the international community's first major step toward addressing climate change on a global level.[32] The Convention sought to stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system regulate GHG concentrations. All UNFCC parties agreed on the need for further research to determine the point at which GHG concentrations should be stabilized, acknowledging that "there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof."[33]

Shortly before the UNFCC's adoption, Congress developed the 1990 CAA amendments.[34] In the amendments, Congress called on the EPA to develop information concerning global climate change and "nonregulatory" strategies for reducing carbon dioxide emissions.[35] A Senate committee included in its bill to amend the CAA a provision requiring the EPA to set CO^2 emission standards for motor vehicles.[36] However, the provision did not appear on the bill on which the full Senate voted, and the bill eventually enacted remained silent with regard to motor vehicle carbon dioxide emissions.[37] During the same period, other legis-

29. *Id.* at 3, 6-7.

30. Control of Emissions, *supra* note 2, at 52,926.

31. *Id.* The UNFCC went into effect in 1994. *Id.*

32. J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem*, 29 Colum. J. Envtl. L. 89, 94 (2004). The UNFCC is credited for the development of the Kyoto Protocol, which mandates that once developed nations, known as Annex I Parties, ratify the protocol, they must meet individual, legally-binding emissions targets. *Id.* at 94-95.

33. Control of Emissions, *supra* note 2, at 52,926.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

lative proposals sought to control GHG emissions but did not receive enough support from the majority of Congress.[38]

In 2001, at the request of the Bush Administration, the National Academy of Sciences (NAS) analyzed some of the key findings in the IPCC's Third Assessment Report.[39] The NAS report concluded that "a causal linkage" between GHG emissions and global warming "cannot be unequivocally established."[40] Although the report noted that the earth regularly experiences climate cycles of global cooling after periods of global warming, it stated that an increase in carbon dioxide levels is not always accompanied by a corresponding rise in global temperatures.[41] However, the NAS report further concluded that GHG atmospheric concentrations are increasing as a result of human activities.[42]

After the publication of the NAS report, the United States submitted the U.S. Climate Action Report 2002 (CAR)[43] to the Secretariat of the UNFCC.[44] The CAR recites at length the detrimental effects to public health and welfare caused by climate change.[45] Additionally, it provided "regional assessments determining that a wide variety of adverse effects to the public welfare are 'very likely' or 'likely' to occur in the United States as a result of climate change."[46] The CAR also recognized that GHG emissions from United States transportation activities account for a major part of the country's overall GHG emissions.[47]

---

38. *See, e.g.*, S. 324, 101st Cong. (1989); S. 1224, 101st Cong. (1989); H.R. 5966, 101st Cong. (1990).

39. National Research Council, Climate Change Science: An Analysis of Some Key Questions (2001). The Academy's principle operating agency for providing advice to the federal government on scientific and technical matters is the National Research Council (NRC). *Massachusetts*, 415 F.3d at 50, 56-57 (D.C. Cir. 2005).

40. National Research Council, *supra* note 39, at 17.

41. *Id.* at 7, 16. The NRC explained that although carbon dioxide levels increased steadily during the twentieth century, global temperatures decreased between 1946 and 1975. *Id.* at 16.

42. *Id.* at 9.

43. United States Climate Action Report [hereinafter Climate Report] (2002).

44. *See* Final Brief for Petitioners, *supra* note 24, at *8-9. The EPA served as the lead agency in the preparation of the Climate Action Report and coordinated the involvement of a dozen other federal agencies and the Executive Office of the President. *See* 66 Fed. Reg. 15470 (Environmental Protection Agency Mar. 19, 2001).

45. Final Brief for Petitioners, *supra* note 24, at 9 ("[H]eat waves are 'very likely' to increase in frequency and severity."); Climate Report, *supra* note 43, at 106.

46. Final Brief for Petitioners, *supra* note 24, at *9.

47. Climate Report, *supra* note 43, at 36. The report noted that nearly two-thirds of GHG emissions result from motor vehicles. *Id.* at 40.

III.
CONFRONTING ARTICLE III STANDING

In *Massachusetts*, the D.C. Circuit addressed the issue of whether the petitioners suffered any harm or injury as a result of the EPA's decision not to regulate GHG emissions.[48] However, only Judge Sentelle and Judge Tatel's concurring and dissenting opinions, respectively, made any assertions regarding the chances of the petitioners being able to survive the issue of standing.[49] Although the court's opinion, written by Judge Randolph, appeared to focus mainly on the merits of the petitioner's claim,[50] the issue of Article III standing to establish jurisdiction in federal courts continues to arise in environmental law cases.[51] This section will explore the development of the Court's standing jurisprudence along with the current contrasting views on the requirements parties should meet to establish themselves as a proper party under Article III.

A. *Developing Standing Jurisprudence*

Early Supreme Court decisions indirectly established standing requirements by limiting suits to common law forms of action or the statutes at issue.[52] Since 1944, the Court has interpreted Article III of the U.S. Constitution's limitation of judicial decisions to cases and controversies by "implying that federal courts should require plaintiffs to meet certain standing criteria to ensure that the plaintiff has a genuine interest and stake in a case."[53] Although Article III establishes the parameters of the federal judicial branch, it does not contain explicit standing re-

48. *See infra* notes 104 to 109 and accompanying text.

49. *See infra* Parts IV.B.2-3; Judge Randolph decided to proceed to the merits with respect to EPA's alternative decision not to regulate GHG emissions from new motor vehicles. He cited the case of *Steel Co. aka Chicago Steel and Pickling Co. v. Citizens for a Better Environment*, 523 U.S. 83, 97 n.2 (1998), which explained that "the merits inquiry and the statutory standing inquiry often overlap" and "are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two." *Id.*

50. *See infra* Part IV.B.1.

51. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

52. Robert v. Percival, *"Greening" the Constitution—Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 827 (2002).

53. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 22 (2005).

quirements for suits in federal courts.[54] Some legal scholars argue that the Court's development of formal standing requirements derived from the rise of new administrative agencies during the 1930s and the need to clarify whether potential beneficiaries of regulation could challenge administrative decisions.[55]

In previous years, courts issued conflicting decisions about whether to grant standing to plaintiffs who file suits alleging general injuries to the public at large.[56] Courts often concluded that where cases involve generalized, abstract injuries affecting the public as a whole, such as misuse of taxpayer funds,[57] it is inappropriate to allow a plaintiff standing to pursue such a suit because the political branches are better suited than the judicial branch to resolve such controversies.[58] In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[59] the Supreme Court found adequate proof of injury when plaintiffs complained that a proposed nuclear power plant would expose them to radiation, and that the plant would not be constructed in the absence of a challenged limitation of liability in case of accident.[60] The Court stated that a court could deny standing if a suit would raise "general prudential concerns 'about the proper – and properly limited – role of the courts in a democratic society.'"[61]

---

54. *Id.* Article III indirectly places limits on the federal judicial power by stating that the "judicial Power shall extend to all Cases . . . [and] . . . Controversies," thus excluding advisory opinions. *See* U.S. Const. art. III, § 2, cl. 1.; Sunstein, *supra* note 53, at 170-75; Mank, *supra* note 53, at 22.

55. *See* Mank, *supra* note 53, at 22-23; Percival, *supra* note 52, at 827; Sunstein, *supra* note 49, at 179.

56. Such cases involve disputes in which every citizen possesses a small, yet common injury. Mank, *supra* note 53, at 21.

57. Flast v. Cohen, 392 U.S. 83, 88 (1968) (holding that a federal taxpayer did not have standing to challenge spending allegedly in violation of Constitution); Cantrell v. City of Long Beach, 241 F.3d 674, 683-84 (9th Cir. 2001) (stating that federal courts require a taxpayer seeking standing to demonstrate direct injury in a case alleging mishandling of municipal or state tax funds).

58. David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 40 n.217 (2003); Mank, *supra* note 53, at 21; Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 667 n.4 (D.C. Cir. 1996) ("The plaintiff must show that he is not simply injured as is everyone else, lest the injury be too general for court action.").

59. 438 U.S. 59 (1978).

60. *Id.* at 60; *see also* David P. Currie, Federal Jurisdiction in a Nutshell 22 (4th ed. 1999).

61. *Duke Power Co.*, 438 U.S. at 80 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

Other Supreme Court decisions on standing have implied that plaintiffs can establish standing even if they suffer an injury common to many people.[62] In *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP),[63] the Court declared 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."[64] Two years later, it held that a plaintiff may be able to satisfy Article III standing requirements "even if it is an injury shared by a large class of other possible litigants."[65] In *Warth v. Seldin*, the Court stated that a substantial likelihood of injury can be found after an examination of the pleadings.[66] Writing for the majority, Justice Powell, reasoned that the petitioners "failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention."[67] Thus, a federal court will not resolve a dispute between litigants unless the complaining party alleges facts that make him or her a proper party to seek judicial resolution.[68]

B. *The Effect of* Lujan

Standing exists only if the complainant suffers an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision.[69] In *Lujan v. Defenders of Wildlife*,[70] the Supreme Court broke new ground in construing the current standing doctrine.[71] In *Lujan*, the environmental group Defenders of Wildlife (Defenders) argued that the federal government provided partial funding for dam projects in Sri

62. Mank, *supra* note 53, at 22.

63. 412 U.S. 669 (1973) (permitting park users to challenge a rate decision of the Interstate Commerce Commission (ICC) on the basis of allegations that it would discourage transportation of recycled materials).

64. *Id.* at 688.

65. Warth v. Seldin, 422 U.S. 490, 501 (1975).

66. Currie, *supra* note 60, at 21.

67. *Warth*, 422 U.S. at 516. Justice Powell went on to say that "[T]he rules of standing, whether as aspects of the Article III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention." *Id.* at 517-18.

68. *Id.* at 518.

69. Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 54 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

70. 504 U.S. 555 (1992).

71. Brian Mayer, *Climate Change, Insurance, NEPA, and Article III: Does a Policy Holder Have Standing to Sue a Federal Agency for Failing to Address Climate Change under NEPA?*, 74 UMKC L. REV. 435, 442 (2005).

Lanka and Egypt that would likely damage the habitat of endangered and threatened species in those countries.[72] Defenders sought standing based on the affidavits of two of its members who traveled to those countries in the past, were concerned about endangered species in those two countries, and sought to revisit the countries in the future but had no current travel plans.[73]

A divided Court concluded that the group lacked standing to challenge a Department of Interior rule that interpreted section 7 of the Endangered Species Act (ESA)[74] as not applying to extra-territorial actions.[75] Writing for the majority, Justice Scalia held that, to satisfy the injury-in-fact test, a plaintiff must demonstrate that he or she suffered a "concrete and particularized" and "actual and imminent" invasion of a legally protected interest.[76] Second, it stated that there must be a causal connection between the injury and the defendant's conduct.[77] Finally, the plaintiff must show, beyond mere speculation, that his or her injury will be "redressed by a favorable decision."[78]

The Court's insistence that injury is a constitutional requirement means that Congress cannot confer standing on a person with nothing to gain by suing.[79] If a plaintiff only possesses a general grievance and seeks relief that provides him no more benefit than the public at large, there is no injury in fact.[80] On the other hand, Congress can often create standing by conferring a cash bounty on the victorious plaintiff.[81] This would assure that the plaintiff's relief gives him or her tangible benefit not available to the public at large.[82]

---

72. *Lujan*, 504 U.S. at 563.

73. *Id.* at 563.

74. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000).

75. *Lujan*, 504 U.S. at 578.

76. *Id.* at 560; Mayer, *supra* note 71, at 442.

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

78. *Id.* at 561 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)); Mayer, *supra* note 70, at 442. The third standing prong requires that the plaintiffs' harms be redressable by favorable judicial decisions. Grossman, *supra* note 58, at 41.

79. Currie, *supra* note 60, at 22.

80. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12, at 93 (7th ed. 2004).

81. *Id.*

82. *Id.*

C. *Should the Political Branches Decide?*

Justice Scalia's opinion in *Lujan* was foreshadowed by a law review article he wrote while serving on the D.C. Circuit that took issue with the relaxed approach to standing adopted by the Supreme Court and many lower court decisions.[83] Scalia favored a narrower approach to standing because, in his view, standing doctrine created a "crucial and inseparable element" of separation-of-powers principles, and more restrictive standing rules would limit judicial interference with the popularly elected legislative and executive branches.[84] He argued that when "allegedly wrongful governmental action . . . affects 'all who breathe,' no one has standing to seek redress in court, and the political branches should resolve the issue instead."[85]

In the article, Scalia criticized judges who suggested that courts adopt a more lenient approach to standing in environmental cases. Scalia questioned "the judiciary's long love affair with environmental litigation."[86] This was in response to Judge Skelly Wright's pro-environmentalist opinion in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission.*[87] He articulated that "our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[88] Scalia suggested that judicial unenforcement of certain laws because of standing barriers could actually have positive social impacts.[89] He stated that judges who enforce environmental laws are "likely to be enforcing the political prejudices of their own class."[90] Furthermore, Scalia claimed that the ability to misdirect laws by denying standing where there is no particular harm to certain individuals can be said to be one of the prime engines of social change.[91]

---

83. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

84. *Id.* at 881.

85. *Id.* at 896 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973)).

86. *Id.* at 884.

87. 449 F.2d 1109 (D.C. Cir. 1971).

88. *Id.* at 1111.

89. Scalia, *supra* note 83, at 897.

90. *Id.* at 896.

91. *Id.* at 897.

In *Federal Election Commission v. Akins,*[92] the Court sought to address the issue of whether plaintiffs who suffer common injuries are entitled to standing. The *Akins* Court addressed why it permitted standing in some cases involving widespread injuries, but denied it in other disputes when "the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."[93] Justice Breyer's majority opinion reasoned that standing for widely shared, generalized injuries would not suffice if the harm is both pervasive and also of "an abstract and indefinite nature."[94] He maintained that courts should deny standing if the injury is too abstract, but allow standing even if many people have suffered the same harm as long as that harm is concrete.[95]

The *Akins* Court implied that Congress may grant standing to citizens concretely harmed by a particular injury even if every other citizen is similarly adversely affected.[96] However, Justice Breyer's majority opinion was fundamentally inconsistent with Justice Scalia's article and the *Lujan* decision[97] which held that "to permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" is to permit Congress to transfer to the judicial branch "the Chief Executive's most important constitutional duty."[98] Predictably, Justice Scalia's central argument in dissent was that the political branches, not the judiciary, should address broadly held grievances.[99]

---

92. 524 U.S. 11 (1998).

93. *Id.* at 23.

94. *Id.* at 24.

95. *Id.* at 24-25.

96. *Id.*

97. Mank, *supra* note 53, at 38.

98. *Id.* at 36 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992)); *see generally* Cass R. Sunstein, *Information Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 638-53 (1999) (discussing differences in standing philosophy between *Lujan* and *Akins*).

99. *Akins,* 524 U.S. at 37 (Scalia, J., joined by O'Connor & Thomas, JJ., dissenting); *see generally* Scalia, *supra* note 83. Justice Scalia argued that the statute should not be interpreted to allow a private party to bring an executive agency into court to compel its enforcement of the law against a third party, and second, that if the statute means that, it is unconstitutional because it transfers from the Executive to the courts the responsibility to "take Care that the Laws be faithfully executed." *Akins*, 524 U.S. at 37; Nowak & Rotunda, *supra* note 80, at 93 n.205.

IV.
EXAMINING THE CLEAN AIR ACT

A. *The* Chevron *Test*

In *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*,[100] the Supreme Court addressed whether the EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble"[101] was based on a reasonable construction of the "stationary source" of section 172(b)(6) of the CAA Amendments of 1977.[102] In this case the amendments required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. The EPA implemented this permit requirement by allowing a allow[ed] a State to adopt a plant-wide definition of the term "stationary source." Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant.[103]

Several environmental groups argued before the D.C. Circuit that the EPA's definition of "stationary source" contradicted the plain language of the CAA amendments, as well as the legislative intent behind the amendments.[104] The court noted that the relevant part of the amended CAA did not provide an explicit definition of what Congress envisioned as a stationary source to which the permit program should apply.[105] In light of its conclusion that the legislative history was contradictory at best, the court reasoned that "the purposes of the non-attainment program" should guide its decision.[106] It stated that the bubble concept[107] was "mandatory" in programs designed merely to maintain air quality, but held that it was improper in programs enacted to im-

100. 467 U.S. 837 (1984).

101. *See infra* note 110.

102. *See* 42 U.S.C. § 7502(b)(6) (2005); *Chevron*, 467 U.S. at 840.

103. *Id.* at 839.

104. *Id.* at 842 n.7.

105. Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev'd*, 467 U.S. 837 (1984). The court further stated that the precise issue was not "squarely addressed in the legislative history." *Id.*

106. *Id.* at 726 n.39.

107. Under the bubble concept, the EPA permitted States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." *Chevron*, 467 U.S. at 840.

prove air quality.[108] Arguing that the purpose of the permit program was to improve air quality, the court held that the bubble concept was inapplicable and set aside the regulations.[109]

The Supreme Court reversed the D.C. Circuit's decision, holding that the EPA regulations allowing states to treat all of the pollution-emitting devices within the same grouping were based on a reasonable construction of the "stationary source" term in section 172(b)(6).[110] Expressing the unanimous view of the six participating members of the Court, Justice Stevens argued that parsing of general terms in the text of the statute would not reveal the actual intent of Congress.[111] In reviewing the legislative history of section 172(b)(6), the Court found that Congress did not address the issue presented before them by the EPA's decision.[112] Thus, Justice Stevens reasoned that when a statute fails to provide a specific congressional intent regarding its application, an agency's reasonable construction may provide the best source for interpretation.[113]

In *Chevron*, the Court stated that an agency's interpretation of a statute provides "a reasonable accommodation" of "competing interests" in cases where Congress' intent cannot be inferred.[114] Justice Stevens asserted that the role of federal courts should be to reconcile such interests without relying on the judges' personal policy preferences.[115] Moreover, federal judges possess "a duty to respect legitimate policy choices made by" agency officials.[116] Thus, any challenge to a "fairly conceptualized" agency construction of a statutory provision that centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, must fail.[117]

108. *Gorsuch*, 685 F.2d at 726.
109. *Chevron*, 467 U.S. at 842.
110. *Id.* at 860-61.
111. *Id.*
112. *Id.* at 862.
113. *Id.* at 862-66.
114. *Id.* at 865.
115. *Id.*
116. *Id.* at 866.
117. *Id.*

B. *An Analysis of the D.C. Circuit's Opinions in* Massachusetts v. EPA

1. Judge Randolph's Majority Opinion

Writing the opinion for the court in *Massachusetts v. EPA*, Judge Arthur Raymond Randolph addressed whether the petitioners had standing under Article III of the Constitution.[118] He noted the two declarations cited as grounds to challenge the EPA's decision.[119] However, Judge Randolph failed to explicitly state whether the petitioners lacked standing to seek the EPA to enforce the regulation of GHGs from new motor vehicles.[120] Instead, he followed the statutory standing cases and assumed *arguendo* that the EPA possessed proper statutory authority under the CAA.[121]

Judge Randolph noted that section 202(a)(1) provides the EPA Administrator considerable discretion in regulating GHGs for new motor vehicles.[122] Moreover, he stated that the Administrator expressed concern that unilateral regulation of American motor vehicle emissions "could weaken efforts to persuade developing countries to reduce the intensity of greenhouse gases thrown off by their economies."[123] Judge Randolph also mentioned other scientific evidence the EPA took into consideration prior to issuing its decision.[124] Thus, he concluded that the EPA Administrator properly exercised his discretion in denying the petition for rulemaking.[125]

2. Judge Sentelle's Concurrence and Dissent

Judge Sentelle dissented from Judge Randolph's opinion.[126] Citing the D.C. Circuit's decision in *Florida Audubon Society v. Bentsen*,[127] he argued that the alleged harm did not provide a "specific" and "justiciable" claim for the court to resolve.[128]

---

118. Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 54.
119. *Id.* at 54-55.
120. *Id.* at 56.
121. *Id.*
122. *Id.* at 57-58.
123. *Id.* at 58.
124. *Id.*
125. *Id.* at 58-59.
126. *Id.* at 59 (Sentelle, J., concurring in part, dissenting in part).
127. 94 F.3d 658 (D.C. Cir. 1996).
128. Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 60 (Sentelle, J., concurring in part, dissenting in part and concurring in the judgment). Judge Sentelle noted that his opinion was not to suggest that the petitioners were without redress. *Id.*

Judge Sentelle reasoned that the claimed injury was so common to all members of the public that it should be recommended to the Executive Branch and Congress for resolution.[129] However, he also concurred with Judge Randolph's decision to deny the petitioners from final action of the EPA.[130]

3. Judge Tatel's Dissent

In his dissenting opinion, Judge David Tatel examined the National Research Council scientific research on GHGs to determine whether the petitioners established a controversy to meet the requirements of Article III standing.[131] In addressing the issue of standing, he asserted that only one petitioner needs to establish the elements of injury, causation and redressability before a court can reach the merits of the petitioners' claim.[132] Judge Tatel argued that the declarations submitted by petitioners clearly establish that the Commonwealth of Massachusetts satisfied each element under Article III.[133] Furthermore, he stated that the potential harm that the Commonwealth could suffer as a result of lack of regulation by the EPA is a "far cry from the kind of generalized harm that the Supreme Court has found inadequate to support Article III standing."[134] Judge Tatel concluded that the Commonwealth of Massachusetts sufficiently demonstrated its standing and that the court's jurisdiction was "plain."[135]

In addressing the merits, Judge Tatel analyzed the language of section 202(a)(1) to determine if the EPA has the authority to regulate GHG emissions.[136] He also discussed other sections of the CAA to examine the amount of discretion the EPA may ex-

129. *Id.*

130. *Id.* at 61 (Sentelle, J., concurring in part, dissenting in part).

131. *Id.* at 62-64 (Tatel, J., dissenting).

132. *Id.* at 64 (Tatel, J., dissenting) (citing Nuclear Energy Institute., Inc. v. Envtl. Prot. Agency, 373 F.3d 1251, 1266 (D.C. Cir. 2004)).

133. *Id.* at 64 (Tatel, J., dissenting) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Judge Tatel specifically examined the declarations of Professor Paul Kirshen of Tufts University, Michael MacCracken, senior scientist on global change at the Office of the U.S. Global Change Research Program, and Michael Walsh, a consultant on motor vehicle pollution technology and former director of EPA's motor vehicle pollution control efforts, to support his conclusion that Petitioners properly established standing under Article III. *Id.* at 64-66 (Tatel, J., dissenting).

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

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

136. *Id.*

ercise.[137] Although Judge Tatel acknowledged that Congress did not provide much regulation on the issue of global warming, he noted that Congress instructed the EPA to "be on the lookout for climate-related problems in evaluating risks to 'welfare.'"[138] He went on to cite several CAA provisions addressing the regulation of air pollutants and establishing air quality standards.[139] Judge Tatel further distinguished the authority presented by the EPA to support its argument by stating that the EPA previously took, consistent with its present stance, the position that it possessed the authority to regulate GHG emissions under section 202(a)(1).[140] Accordingly, he concluded that GHGs fell within the EPA's authority to regulate under section 202(a)(1).[141]

Judge Tatel later discussed the EPA's grounds for refusing to regulate GHG emissions under the CAA. He argued that the Administrator is provided with discretion to weigh credible and non-credible evidence to make a determination as to whether there is an endangerment finding sufficient enough to support an argument for regulation.[142] Judge Tatel stated that the EPA failed to meet this requirement by simply refusing to conduct an endangerment finding as mandated under section 202(a)(1) and denying that it is bound by the statutory language in its brief before the D.C. Circuit.[143] This, he claimed, would allow the EPA to "duck Congress's express directive by declining to evaluate endangerment on the basis of policy reasons unrelated to the statutory standard."[144]

---

137. *Id.*

138. *Id.* at 68 (Tatel, J., dissenting).

139. *Id.* at 69-71 (Tatel, J., dissenting).

140. *Id.* at 72 (Tatel, J., dissenting).

141. *Id.* at 73 (Tatel, J., dissenting).

142. *Id.* at 75 (Tatel, J., dissenting). The EPA Administrator has no discretion either to base that judgment on reasons unrelated to this standard or to withhold judgment for such reasons. *Id.*

143. *Id.* at 73-75 (Tatel, J., dissenting).

144. *Id.* at 81 (Tatel, J., dissenting). Judge Tatel goes on to mention how the EPA seemed to abandon the argument that refusing to regulate GHG emissions following an endangerment finding would violate the CAA. He contends that it conceded during oral argument that "if the agency had made an endangerment finding, that then you would have to give some significance to the term 'shall' in section 202(a)." *Id.* at 81-82 (Tatel, J., dissenting) (citing Transcript of Oral Argument at 44, Massachusetts v. Envtl. Prot. Agency, 415 F.3d 50 (2005) (No. 03-1361).

V.
PROMOTING REGULATION THROUGH THE CLEAN AIR ACT

As Judge Tatel pointedly asserts in his dissent, the petitioners met the standing requirements under Article III and sufficiently construed the language of section 202(a)(1) to infer a specific congressional intent to require the EPA to act. This section will analyze the two main issues that the Supreme Court will address in *Massachusetts v. Environmental Protection Agency*. The first part of this section will examine how the petitioners do possess proper standing under Article III of the Constitution. The second part explores the language of section 202(a)(1) and concludes that Congress provided an intention to regulate GHG emissions after conducting an endangerment finding, which the EPA and Judge Randolph both ignored. The third part of this section predicts that the Supreme Court will decide that the petitioners' possess proper standing and that the EPA is mandated under section 202(a)(1) to regulate GHG emissions.

A. *Article III Standing*

1. The *Akins/Lujan* Standard

In his book entitled *Catastrophe: Risk and Response*, Judge Richard Posner observed that there is a scientific consensus that global warming is a serious problem that may be increased by dissent by scientists and policymakers.[145] While scientists continue to debate the uncertainty regarding the effects of global climate change, litigation relating to the regulation and effects of global warming is beginning to emerge.[146] Hence, the issue of whether plaintiffs have Article III standing continues to arise in many environmental cases addressing global warming.[147] This was the case in *Massachusetts* where the D.C. Circuit judges took three distinct approaches to the issue of standing.

Under the *Akins/Lujan* standard, the Commonwealth of Massachusetts presented sufficient evidence to support its position that the EPA's decision declining to regulate GHG emissions from new motor vehicles would create significant damage to the

145. RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 55-58 (2004).

146. Daniel A. Farber, *Idea: Uncertainty as a Basis for Standing*, 33 HOFSTRA L. REV. 1123, 1128 (2005).

147. *Id.*; *see also* Mank, *supra* note 53.

state's environmental policy.[148] It submitted proof of sea level increases as a result of global warming that would lead to permanent loss of coastal land within its sovereign boundaries.[149] It further argued that such damage differs from the damage accruing to other parties seeking the EPA's regulation of greenhouse gas emissions.[150] This infringement upon Massachusetts' ability to properly enforce its own policies due to lack of federal assistance in enforcing the CAA clearly rises to the level of a "concrete injury" as the Court's Article III jurisprudence established. Such an injury derives in connection with the lack of federal regulation as a result of the EPA's decision. Moreover, the potential harm would make it more difficult for the petitioners to fulfill their obligations under the CAA.[151] The petitioners' only manner of correcting such inaction would be through an action from the federal courts. Hence, the Commonwealth of Massachusetts presented ample evidence to meet the requisite elements of Article III standing.

2. Proposing New Standing Requirements for Global Warming Disputes

Professor Daniel Farber asserts that, "despite uncertainties, the risk of global warming is large enough to have real economic consequences."[152] He argues further that plaintiffs may still be able to establish standing even though the effects of global warming are speculative at best.[153] Farber contends, moreover, that "it is a mistake to think that standing in [global warming cases] de-

148. Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 64-66 (Tatel, J., dissenting).

149. *Id.* at 65 (Tatel, J., dissenting). Judge Tatel went on to distinguish this injury from those that would occur in Maine (loss of coastal land) and New Mexico (reduced water supply) to support the contention that the Commonwealth of Massachusetts has proper standing under *Lujan*. *Id.*

150. *Id.*

151. *See* Brief for the Petitioners, Massachusetts v. Envtl. Prot. Agency, 126 S. Ct. 2960 (2006) (No. 05-1120).

152. Farber, *supra* note 146, at 1129.

153. *Id.* Farber concludes his article by stating:

> It is a mistake to think that standing in cases like this depends on proof by the plaintiffs that harmful effects will in fact occur or at least be more likely than not. Sophisticated economic actors do not limit themselves to certainties or to high probability events. Instead, they recognize in the most tangible way possible—through concrete financial decisions—that uncertain and low-probability events can be just as important in rational decision making. If we are looking for a test to distinguish speculative risks from those that are real and pressing enough to form a basis of standing, economic responses to the risk may provide just the litmus paper we need. *Id.*

pends on proof by the plaintiffs that harmful effects will in fact occur or at least be more likely than not."[154] He cites economic actors' reliance on uncertain and low-probability events as relevant in making financial decisions in preparation for potential damage from global warming.[155]

Farber's arguments support a new approach to examining Article III standing with respect to global warming cases. As more scientific evidence regarding climate change develops, risks of potential damage from natural disasters will continue to increase throughout the world. Courts should consider the probability that such risks will occur in their decisions that fail to address claims for regulation by avoiding the merits presented. Such action will only postpone the necessary steps to alleviate any potential damage that is predicted to affect the environment.

Under the current method of evaluating standing in environmental cases, plaintiffs would have to prove that a particular event was a direct result of global warming.[156] Such a standard applies even if a court is willing to accept scientific data presented to it.[157] While many federal courts continue to stand by this method of establishing standing, others are beginning to grant standing to plaintiffs on "global warming grounds."[158] For instance, in *Friends of the Earth, Inc. v. Watson,*[159] a federal judge granted standing to plaintiffs challenging the actions of two federal agencies that contribute to climate change by providing loan guarantees and insurance to overseas projects resulting in increased GHG emissions.[160] Judge White reasoned that to require the plaintiffs to investigate and prove the particular effects of an agency action was circuitous, forcing plaintiffs to perform

154. *Id.*

155. *Id.* Farber refers to *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as an example of how "the independent action of market actors" can provide "objective evidence of the economic consequences of uncertainty." *Id.* He continues by asserting that although *Duke Power* held that the evidence presented did not provide sufficient grounds for judicial resolution, it suggests that reliance on uncertainty provides a better indicator for courts and policymakers in determining "how 'real' a risk should be considered." *Id.* at 1126 (citing *Duke Power*, 438 U.S. at 76).

156. Choo, *supra* note 13, at 34.

157. *Id.*

158. Mayer, *supra* note 71, at 445 (citing City of Los Angeles v. Nat'l Highway Traffic Safety Admin, 912 F.2d 778, 483 (D.C. Cir. 1990)).

159. No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

160. *Id.* The plaintiffs initiated this action pursuant to the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4335.

the same environmental analysis they sought the action to conduct.[161]

Within the past several years, natural disasters have inflicted catastrophic damage upon many regions throughout the Earth. The most notable examples of such events include the tragedies of Hurricanes Katrina and Rita. Some claim that as the level of greenhouse gas in the atmosphere continues to increase, the disparity between standards applied by federal courts for establishing whether the petitioners possess standing will likely decrease.[162] However, this will only occur once the courts decide to consider new standards that address the more recent controversies surrounding global warming. As damage from climate change-related weather events continue to rise, courts that continue to adopt the *Akins/Lujan* standard will likely recognize the "substantial probability" that an agency's failure to consider the environmental consequences of increased greenhouse gas emissions creates a "demonstrable" risk of injury.

The standards that many courts apply to address Article III standing do not properly apply to cases involving global warming disputes that deal with ongoing injuries that might take years to develop into a serious catastrophe. Since many appellate courts are not willing to reevaluate *Lujan*, Congress should implement a new approach to determine whether a plaintiff suffers a concrete injury as a result of an agency's refusal to regulate environmental hazards. Such a standard should, in future environmental disputes, permit courts to accord greater weight to scientific evidence that bears on the plaintiff's position that government regulation by the EPA is necessary to prevent severe damage to the environment. Furthermore, it would further assist the efforts of state governments to prevent such damage within their respective jurisdictions. Although scientific evidence may not be sufficient to permit a plaintiff to prevail on the merits, it may be enough to establish a prima facie claim that is ripe for resolution through court action. Courts should employ a broad analysis in

161. *Id.* at *2.

162. Mayer, *supra* note 71, at 446-47. Under the standard applied by the Ninth Circuit, a claimant only needs to establish that the harm he or she complains of derives "in part" from the defendant's action. *See Friends of the Earth*, 2005 WL 2035596 at *4-*5 (citing Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000)). In contrast, the D.C. Circuit stated that a plaintiff must prove, with "substantial probability," that there is a "demonstrable risk of injury" to a "particularized interest" to establish an injury to satisfy Article III standing. *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 668-69 (D.C. Cir. 1996).

evaluating the scope of a "concrete injury" giving added weight to evidence of potential damage owing to an agency's failure to implement environmental laws. Such an inquiry becomes necessary when considering the complex nature of determining potential consequences in regulating global warming.

B. *Interpreting the Clean Air Act Provisions*

The language of section 202(a)(1) is sufficiently drafted to infer that Congress mandated that the EPA conduct an endangerment finding regarding the effects of GHG emissions and, if such a finding shows that the they contribute to the problem of global warming, to react with the required regulations. However, if there is any ambiguity with respect to section 202(a)(1), the EPA's decision to forgo an endangerment finding was not a proper interpretation of the statute and should not be afforded deference under the *Chevron* doctrine. The first part of this section examines the language of section 202(a)(1) and draws the conclusion that it expressly presents a congressional intent for mandatory regulation of GHG emissions. The second part centers on the interpretations of the statute by the EPA and Judge Randolph to assert that both misread the language of the statute in arriving at their conclusions.

1. Examining Congressional Intent

The term "shall" has been defined as expressing "determination, compulsion, obligation, *or* necessity."[163] The CAA clearly states that the EPA Administrator "shall by regulation prescribe . . . standards" to govern the emissions of air pollutants from motor vehicles.[164] Such language sufficiently establishes Congress' intent to mandate the EPA to exercise the requirements stipulated within section 202(a)(1). In making policy decisions regarding GHG emissions, the Administrator must determine whether U.S. motor vehicles "cause, or contribute to, air pollution."[165] Furthermore, while Congress provided discretion in evaluating whether global warming "may reasonably be anticipated to endanger" welfare, this same discretion does not apply to setting policies outside of the scope of the CAA.[166]

163. WEBSTER'S DICTIONARY NEW WORLD COLLEGE DICTIONARY 1232 (3d ed. 1996).

164. 42 U.S.C. § 7521(a)(1).

165. *Id.*

166. *See* Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 29 (D.C. Cir. 1976).

The EPA concedes that motor vehicles emit GHGs in significant quantities that can negatively impact the environment and public welfare.[167] This admission furthers Judge Tatel's assertion that the Administrator's refusal to regulate GHG emissions is in violation of the CAA.[168] The *Massachusetts* petitioners' scientific evidence reasonably concludes that U.S. motor vehicles pose a significant threat to global warming. Moreover, the EPA approved the National Academy of Sciences' independent assessment of relevant scientific research on potential hazards from the effects of climate change.[169] Several studies have pointed out the impact GHG emissions and climate change continues to have throughout the world.[170] Such evidence draws the conclusion that greenhouse gas emissions can be "reasonably anticipated to endanger the public health and welfare"[171] by contributing to the effects of global climate change.[172] At this juncture, the EPA's discretionary authority under the CAA would end and the Administrator would be required to regulate GHG emissions from new motor vehicles.

Judge Tatel argues that the EPA is free to petition Congress to amend the CAA to provide them with discretionary authority to regulate GHG emissions after the agency makes an endangerment finding.[173] While such an action is permissible, the EPA must obey the provisions of the CAA as they currently stand.[174] The refusal to regulate GHG emissions on the basis of policy reasons beyond the statutory standard of section 202(a)(1) only stretches the EPA's lawful discretion. Furthermore, such actions avoid Congress' "express directive" as provided under the CAA.[175] Accordingly, the EPA failed to properly interpret section 202(a)(1) with respect to regulating GHG emissions from new motor vehicles.

---

167. Climate Report, *supra* note 43, at 40.

168. Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 50, 81 (D.C. Cir. 2005).

169. Control of Emissions, *supra* note 2, at 52, 930.

170. *See Survey*, *supra* note 16, at 3-5.

171. 42 U.S.C. § 7521(a)(1).

172. Recent Case, Massachusetts v. Envtl. Prot. Agency, 415 F.3d 50 (D.C. Cir. 2005), 119 HARV. L. REV. 2620, 2620 (2006).

173. *See* Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 81 (Tatel, J., dissenting).

174. *Id.*

175. *Id.*

2. The D.C. Circuit's Mischaracterization of the Clean Air Act

Because federal agencies are held accountable to the public through the Executive Branch, they should not be allowed to reach its or the Executive's preferred outcome in a way that bypasses political repercussions.[176] Such actions only serve to insulate the Executive Branch while diminishing public accountability for implementing its policies.[177] In *Massachusetts*, Judge Randolph never explicitly stated that he interpreted the EPA's petition denial as a finding of no endangerment.[178] Rather, he refers to its decision by using terms such as "refusal to regulate," "decision to forego rulemaking," and "regulatory forbearance."[179] However, section 202(a)(1) permits the EPA Administrator to make such a decision only after it has found that GHG emissions from new motor vehicles do not create a significant hazard that would require federal regulation. Given that Judge Randolph ruled in favor of the EPA based on the merits presented, these statements would presume that the EPA conducted a thorough study on the effects of U.S. motor vehicles with respect to climate change when, in fact, such actions did not occur.

If the EPA determined that GHGs met the statutory standard of section 202(a)(1), one would expect that Judge Randolph would be obliged to require the EPA to regulate them.[180] But because he proceeded to find for the EPA, his approach was to treat the agency as making the requisite finding of no endangerment.[181] To reach this conclusion would be to mischaracterize the CAA with respect to its mandatory authority delegated under section 202(a)(1). Additionally, this reasoning would allow agencies to ignore credible scientific findings and escape public accountability in their decision to enforce policies established by the political branches.

Judge Randolph's majority opinion portends to establish a finding that the EPA did not present before the court.[182] This

176. Recent Case, *supra* note 173, at 2627.

177. *Id.*

178. *Id.*; Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 57-58.

179. *See* Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 57-58. *Id.*.

180. Recent Case, *supra* note 173, at 2625-26.

181. *Id.*; Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 57.

182. *See* Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 75-78 (Tatel, J., dissenting).

ruling serves to extend the Administrator's discretionary authority under the CAA as provided by Congress. Furthermore, Judge Randolph's decision considers policies unrelated to the statutory standard applicable under the CAA.[183] Moreover, it grants the EPA the authority to circumvent any mandatory provisions within the CAA any time it thinks the statute's approach unwise.[184] Such judicial interpretation could severely restrict the ability of Congress to effectively establish laws for the Executive Branch to enforce.

The D.C. Circuit's opinion stands to weaken the CAA and its ability to effectively protect the public welfare from environmental hazards. The decision presented an opportunity to hold the EPA accountable to the public by making a threshold judgment on the impact of GHG emissions from new motor vehicles. Instead, it established a policy for the EPA to avoid the CAA's mandatory regulation duties while preserving its discretionary authority. If federal courts continue to refrain from interpreting federal statutes to hold the Executive Branch accountable when applicable, several policies established by Congress will be deemed inefficient in their respective implementation.

C. *The Likely Outcome of* Massachusetts v. EPA

There are some signs that the White House and Capitol Hill may be starting to pay greater attention to the implications of climate change.[185] For instance, the Senate adopted a nonbinding resolution calling for a national mandatory program to "slow, stop and reverse" emissions of GHGs.[186] In addition, the Bush administration is pushing for more voluntary energy conservation and reliance on alternative fuels.[187] Such actions could possibly prompt the Court to move in the direction of GHG regulation under the CAA.

Since its decision in *Lujan*, the Court has established a broader test for determining whether a plaintiff possesses proper standing under Article III.[188] In *Akins*, Justice Breyer implied that Congress may grant standing to all citizens concretely harmed by a particular injury even if every other citizen is similarly adversely

183. Recent Case, *supra* note 173, at 2627.
184. *Id.*
185. Choo, *supra* note 13, at 35.
186. *Id.*
187. *Id.*
188. Fed. Election Commissions v. Akins, 524 U.S. 11 (1998).

affected.[189] Such reasoning shifted the Court's Article III jurisprudence away from Justice Scalia's philosophy as articulated in *Lujan*. In addition, federal courts seem inclined to set a trend of establishing standing with respect to the CAA and other statutes in similar environmental cases.[190] Given these recent developments, the Court should find that the petitioners claim meets the three requirements regarding Article III standing.

Due to the significance placed upon policies addressing global warming, those supporting wide agency discretion contend that reliance on scientific data is insufficient to impact the EPA's policy surrounding regulating GHG emissions. However, if the Court conducts the proper test, the EPA should be required to enforce GHG policies as mandated under the CAA. Recent scientific discoveries support the impact that GHG regulations have towards assisting state governments in enforcing their respective policies within their domains. Moreover, there is nothing in the CAA that permits the EPA to exercise discretion once evidence of an endangerment finding is presented. Such evidence and growing public concern with respect to environmental hazards shows that agency discretion should not be used to limit the ability to enforce statutes as Congress intended.

VI.
CONCLUSION

The history of climate change policy evidences the contention that global warming cases present different controversies that do not appear in most Article III cases. Because of this, the Supreme Court should examine global warming cases by applying a broader test to determine if the petitioners lack standing under Article III. In the case of *Massachusetts v. Environmental Protection Agency*, the Court should not overlook such factors when confronting climate change policy.

States and their citizens depend on the Executive Branch to carry out the policies established by Congress for the benefit of the public. Yet, to permit federal agencies to exercise discretion in areas where Congress did not provide them with the power to act only hinders the ability to enforce federal statutes. The Supreme Court can prevent such actions by upholding the mandatory authority granted to the EPA under section 202(a)(1)

189. *Id.* at 24-25.

190. *See generally* Covington v. Jefferson County, 358 F.3d 626 (9th Cir. 2004).

of the CAA. Such a move will serve to establish a new direction in the development of global warming policy for the benefit of the public.