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Commonwealth of Massachusetts v. EPA: Passing the Buck on Regulation of Greenhouse Gas Emissions

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COMMONWEALTH OF MASSACHUSETTS v. EPA:
PASSING THE BUCK ON REGULATION OF
GREENHOUSE GAS EMISSIONS

I. INTRODUCTION

Most climate scientists believe that increases in atmospheric greenhouse gases mostly, from the burning of fossil fuels, especially carbon dioxide, have resulted in much of the Earth's current warming. Changes in the Earth's temperature closely relate to the amount of carbon dioxide in the Earth's atmosphere. The United States is responsible for much of the greenhouse gas emissions, namely carbon dioxide, resulting from the burning of fossil fuels. The global warming caused by increased greenhouse gas emissions

1. See Climate Change Science and Research: Hearing Before the Subcomm. on Global Climate Change and Impacts of the S. Comm. on Commerce, Science and Transportation, 109th Cong. (July 20, 2005) (statement of Ralph J. Cicerone, President, National Academy of Sciences), http://www7.nationalacademies.org/ocga/testimony/Grounds_Change_Policy_and_Budget_Review.asp (last visited Feb. 14, 2006) [hereinafter Climate Change Hearing] (noting increase of approximately 0.7°F (0.4°C) in global mean surface air temperature since early 1970s). The ocean, which represents the largest reservoir of heat in the climate system, has warmed by about 0.12°F (0.06°C) averaged over the layer extending from the surface down to 750 feet, since 1993. See id. Carbon dioxide in the Earth's atmosphere is currently at its highest level in 400,000 years and is still increasing. See id. Carbon dioxide, methane, nitrous oxide, water vapor, ozone and chlorofluorocarbons are the most important greenhouse gases in the Earth's atmosphere. See NATIONAL RESEARCH COUNCIL (NRC), CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS, 9 (2001). Furthermore, "[g]overnment studies and reports confirm that carbon dioxide and other greenhouse gases that accumulate in the atmosphere are causing global warming and other significant climatic changes." See Attorney General Reilly Leads Multi-State Challenge to Federal Court Ruling on Greenhouse Gases, U.S. STATE NEWS, Aug. 30, 2005, available at 2005 WLNR 13698915.

2. See Climate Change Hearing, supra note 1 (explaining, through laboratory measurements, that Earth's temperature correlates closely to levels of carbon dioxide in Earth's atmosphere). "Laboratory measurements of gases trapped in dated ice cores show that for hundreds of thousands of years, changes in temperature have closely tracked atmospheric carbon dioxide concentrations." See id.

will likely alter the Earth’s environment and affect its population.\(^4\) For these reasons, future global warming may be catastrophic.\(^5\) It is crucial that the United States and other countries take steps toward a significant and long-term reduction of greenhouse gas emissions.\(^6\)

Congress enacted the Clean Air Act (CAA)\(^7\) in 1970, with subsequent amendments in 1990.\(^8\) Title II of the CAA authorizes the Environmental Protection Agency (EPA) to regulate air pollutants from motor vehicles.\(^9\) It is unclear, however, whether greenhouse gases are “air pollutants” under the CAA.\(^10\)

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4. See Climate Change Hearing, supra note 1 (noting warming is consistent with geographically widespread evidence such as melting glaciers and ice caps, sea level rise, extended growing seasons and altered distributions of plant and animal species).

5. See id. (cautioning about future effects of global climate change). The National Academy of Sciences notes:

While future climate change and its impacts are inherently uncertain, they are far from unknown. The combined effects of ice melting and sea water expansion from ocean warming will likely cause the global average sea-level to rise by between 0.1 and 0.9 meters between 1990 and 2100. In colder climates, such warming could bring longer growing seasons and less severe winters. Those in coastal communities, many in developing nations, will experience increased flooding due to sea level rise and are likely to experience more severe storms and surges. In the Arctic regions, where temperatures have risen more than the global average, the landscape and ecosystems are being altered rapidly.

See id. Unchecked global warming could result in rising sea levels that flood coastal cities, damage equatorial countries' agriculture and increase the frequency of severe storms and floods. See Editorial, Stealing a March on the EPA, Bus. Wk., July 12, 2004, at 104.

6. See Climate Change Hearing, supra note 1 (advising action must be taken to reduce causes of climate change despite remaining unanswered questions). "[S]cientific understanding of climate change is now sufficiently clear to justify nations taking cost-effective steps that will contribute to substantial and long-term reduction in net global greenhouse gas emissions." See id. See also Kara Sissell, Court Hands EPA Victory in Global Warming Lawsuit, CHEM. Wk., July 20, 2005, at 35 (emphasizing global warming will not cease by ignoring it).


10. See Control of Emissions From New Highways and Engines, 68 Fed. Reg. at 52,924 (noting definition of "air pollutant" in CAA section 302(g) is very broad and CAA itself in section 103(g) refers to carbon dioxide as "air pollu-
In *Massachusetts v. United States Environmental Protection Agency (Massachusetts)*, the District of Columbia Circuit Court of Appeals addressed the EPA's regulation of greenhouse gas emissions. The *Massachusetts* court ruled that the EPA had correctly followed CAA section 202(a)(1) by denying a petition for the EPA to regulate greenhouse gas emissions from new motor vehicles.

This Note explores the D.C. Circuit's decision in *Massachusetts*, particularly the EPA's interpretation of CAA section 202(a)(1) and its denial of the petition to regulate greenhouse gas emissions from new motor vehicles. Section II of this Note briefly summarizes the facts of *Massachusetts*. Section III provides a background of the pertinent portions of the CAA and relevant case law interpreting the statute. Section IV discusses the *Massachusetts* court's analysis.
of relevant case law and CAA statutory language. Section V analyzes whether the court’s analysis of the EPA’s petition denial was consistent with statutory authority and relevant precedent. Finally, Section VI of this Note considers the impact of the Massachusetts court’s holding in regard to the EPA’s authority under CAA section 202(a)(1).

II. FACTS

In October 1999, the International Center for Technology Assessment (ICTA) and several other organizations petitioned the EPA to regulate certain greenhouse gas emissions from new motor vehicles and engines. The petitioners contended the EPA was authorized to regulate air pollutants from motor vehicles under Title II of the CAA, particularly section 202(a)(1). Specifically, section 202(a)(1) authorizes that the EPA Administrator “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may

17. For a discussion of the District of Columbia Circuit Court of Appeal’s holding and reasoning in Massachusetts, see infra notes 68-104 and accompanying text.

18. For a critical analysis of the District of Columbia Circuit Court of Appeal’s decision that the EPA properly denied petition to regulate greenhouse gas emissions from new motor vehicles, see infra notes 105-125 and accompanying text.

19. For a discussion of the impact of the Massachusetts court’s decision, see infra notes 126-36 and accompanying text.


21. See 68 Fed. Reg. at 52,923 (asserting emissions of carbon dioxide, methane, nitrous oxide and hydrofluorocarbons meet CAA section 302(g) definition of air pollutant). According to the CAA:

The term “air pollutant” means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursors or precursors for the particular purpose for which the term “air pollutant” is used.

reasonably be anticipated to endanger public health or welfare.”\textsuperscript{22} The petitioners argued that because the EPA may reasonably anticipate emissions of four greenhouse gases from new motor vehicles to endanger public health and safety, and because these gases meet the CAA definition of air pollutants, the EPA therefore has a mandatory duty to regulate those four greenhouse gases from new motor vehicles and engines.\textsuperscript{23}

In 2003, the EPA denied the petition to regulate greenhouse gas emissions from new motor vehicles according to the discretion of the EPA Administrator under CAA section 202(a)(1).\textsuperscript{24} In denying the petition, the EPA Administrator considered both the scientific uncertainty about the causal effects of greenhouse gases on the Earth’s climate and many policy considerations that warranted regulatory forbearance.\textsuperscript{25} Petitioners appealed the EPA’s refusal by bringing action for review directly to the District of Columbia Circuit Court.\textsuperscript{26}

The D.C. Circuit held that the EPA Administrator properly denied the petition under CAA section 202(a)(1) in refusing to regulate greenhouse gas emissions.\textsuperscript{27} The court upheld the EPA’s conclusions and supported the EPA’s analysis based on scientific

\begin{itemize}
  \item \textsuperscript{22} See 42 U.S.C. § 7521(a)(1) (2000) (providing regulatory authority of EPA Administrator to prescribe emission standards for new motor vehicles or new motor vehicle engines).
  \item \textsuperscript{23} See Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,923 (contending carbon dioxide, methane, nitrous oxide and hydrofluorocarbons have met test for air pollutants in order to regulate motor vehicle emissions under CAA section 202(a)(1)).
  \item \textsuperscript{24} See id. at 52,933 (concluding that after considering ICTA petition, public comment, EPA’s legal authority and other relevant information, EPA denied petition requesting EPA to regulate certain greenhouse gas emissions from new motor vehicles and engines under CAA section 202(a)(1)).
  \item \textsuperscript{25} See Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005) (considering that new motor vehicles are only one of many sources of greenhouse gas emissions and federal regulation of greenhouse gas emissions results in inefficient, piecemeal approach to climate change issue); see also Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,930-31 (explaining ways to reduce uncertainties that exist in understanding of global climate change and describing President Bush’s policy considerations as options for addressing climate change).
  \item \textsuperscript{26} See Massachusetts, 415 F.3d at 53-54 (quoting 42 U.S.C. § 7607(b)(1) (2000)) (holding D.C. Circuit has “exclusive jurisdiction over nationally applicable regulations promulgated, or final action taken, by the Administrator,” under section 307(b)(1) of CAA); see also 42 U.S.C. § 7607(b)(1) (requiring petition for review of final action taken by EPA Administrator to be filed only in United States Court of Appeals for District of Columbia).
  \item \textsuperscript{27} See Massachusetts, 415 F.3d at 58 (stating section 202(a)(1) gives Administrator considerable discretion).
\end{itemize}
uncertainty about the causal effects of greenhouse gases on the Earth’s climate and its conclusions based on policy judgments.28

III. BACKGROUND

A. The Clean Air Act

The Clean Air Act’s latest amendments, promulgated in 1990, are designed to curb major threats to the nation’s environment and to the health of millions of Americans.29 These threats include acid rain, urban air pollution and toxic air emissions.30 Pursuant to CAA section 202(a)(1), the EPA Administrator has authority to regulate standards applicable to the emission of any air pollutant.31

The CAA’s emission standards provide the EPA Administrator with the authority to regulate “any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the EPA Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”32 What constitutes an air pollutant is defined under the 1970 CAA as “including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”33 It is unclear, however, whether Congress specifically authorized the EPA to regulate greenhouse gas emissions.34

28. See id. (citing Envtl. Def. Fund v. EPA, 598 F.2d 62, 82 (D.C. Cir. 1978)) (holding court will uphold government agency conclusions based on policy judgments when agency resolves issues on frontiers of scientific knowledge).


30. See id. (instructing that CAA Amendments of 1990 require federal government to reduce emissions from cars, trucks and buses).


32. See id. (describing when EPA Administrator shall regulate).

33. See 42 U.S.C. § 7602(g) (providing definitions of terms for air pollution and control regulations).

34. See Mank, supra note 3, at 67 (suggesting legislative history of CAA 1990 Amendments notes that Congress considered bills specifically including regulation of greenhouse gases but did not adopt language requiring EPA to regulate greenhouse gases). But see id. at 8, 65-66 (noting that during Clinton Administration, two EPA general counsel and EPA Administrator Carol Browner suggested CAA gives EPA authority to regulate carbon dioxide). See generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (instructing agency’s construction of statute that it administers is premised on theory that statute’s ambiguity constitutes implicit delegation from Congress to agency to fill in statutory gaps). See also Consumer Elecs. Ass’n v. FCC, 347 F.3d 291, 297 (D.C. Cir. 2003) (citing Chevron, 467 U.S. at 843) (stating when statute is silent or ambiguous on...
B. Precedent

The D.C. Circuit and the United States Supreme Court have not made a determination regarding the EPA Administrator’s regulatory authority under CAA section 202(a)(1).\(^{35}\) The applicable precedent relied on by the majority, concurrence and dissent in *Massachusetts* involved either the EPA analyses of other CAA provisions or other regulatory agencies’ approaches to statutory interpretation.\(^{36}\)

In *Ethyl Corp. v. EPA* (*Ethyl*),\(^{37}\) the primary issue facing the D.C. Circuit was the interpretation of the language in CAA section 211(c)(1)(A).\(^{38}\) This provision authorized the EPA Administrator to act under a “will endanger” the public health or welfare standard to regulate gasoline additives, specifically lead.\(^{39}\) The CAA provision, however, did not include specific language detailing a “findings requirement” standard to be used by the EPA Administrator when acting under the “will endanger” standard because Congress had previously deleted the findings requirement language from the statute.\(^{40}\) Petitioners, manufacturers of lead additives and refiners of gasoline, filed for review of an EPA order requiring annual reductions in the lead content of leaded gasoline.\(^{41}\) Petitioners argued that the EPA Administrator needed proof of actual harm rather than of a significant risk of harm.\(^{42}\) The EPA, however, asserted that CAA section 211(c)(1)(A) authorizes the EPA Adminis-
trator to regulate gasoline additives whose emission products "will endanger the public health or welfare . . . ."43

The D.C. Circuit agreed with the EPA and held that the EPA Administrator had properly regulated leaded gasoline according to CAA section 211(c)(1)(A).44 Examining the CAA's statutory language and legislative history relating to the deletion of the findings requirement language, the court held that the legislative intent clearly afforded the EPA Administrator the flexibility to make determinations of endangerment in order to protect the public health and welfare without proving actual harm.45 The D.C. Circuit reasoned that the EPA Administrator must have flexibility in determining endangerment to public health that favors protection of the health and welfare of people.46

The D.C. Circuit in Ethyl Corp. also found that anticipatory regulatory action to prevent harm is crucial for protecting public health and the environment.47 The court held that "statutes and common sense demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable."48 As a result, Congress amended CAA section 202(a)(1) in 1977 from "air pollution which endangers the public health" to "air pollution which may reasonably be anticipated to endanger public health."49 The Ethyl Corp. court, therefore, endorsed administrative

ministrator has no power to assess risks or make policy judgments in deciding to regulate lead additives. See id.

43. See id. at 5 (noting EPA Administrator determined that leaded gasoline automotive emissions presented "significant risk of harm" to public health, thereby endangering public within reaches of CAA provision).

44. See id. at 7 (noting EPA Administrator, acting as authorized in rule-making proceedings, determined that leaded gasoline automotive emissions posed "significant risk of harm" to public health, thereby endangering public health within scope of CAA section 211(c)(1)(A)).

45. See id. (instructing flexibility provided to regulators such as EPA Administrator that recognizes special judicial interest in favor of protection of health and welfare of people, even in areas where certainty does not exist).

46. See id. at 24 (reasoning environmental questions are particularly prone to uncertainty, yet statutes and common sense demand regulatory action to prevent harm, even if regulator is not certain that harm is otherwise inevitable).

47. See Ethyl Corp., 541 F.2d at 25 (observing that most often reasonable medical concerns and theory long precede certainty of findings of danger or harm).

48. See id. (emphasizing that environmental matters are particularly prone to uncertainty).

49. See Massachusetts v. EPA, 415 F.3d 50, 76-77 (D.C. Cir. 2005) (Tatel, J., dissenting) (noting Congress not only approved of Ethyl Corp. conclusion that statutes demand regulatory action to prevent harm, but wrote it into CAA); see also 42 U.S.C. § 7521(a)(1) (2000) (requiring regulation where, in EPA Administrator's judgment, emissions of any air pollutant from new motor vehicles cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare). Congress's purposes for amending the previous version of CAA
discretion and at the same time, required regulation to precede certainty.\textsuperscript{50}

In \textit{Environmental Defense Fund v. EPA},\textsuperscript{51} the D.C. Circuit determined whether the EPA properly enacted and followed statutory regulations prohibiting the discharge of polychlorinated biphenyls (PCBs) into the nation's waterways.\textsuperscript{52} The petitioners challenged the EPA's ban on discharges of PCBs in waterways, arguing that the EPA regulatory authority, as intended by Congress, did not allow the EPA to completely and immediately phase out PCB manufacturing and processing.\textsuperscript{53} Industry petitioners contended that the EPA lacked an adequate basis for regulation due to incomplete scientific knowledge about less chlorinated PCB mixtures.\textsuperscript{54} The D.C. Circuit applied the "substantial evidence" test and concluded that in statutory contexts, when an agency must resolve issues "on the frontiers of scientific knowledge," the court will uphold agency conclusions based on policy judgments instead of factual determinations.\textsuperscript{55}

In \textit{Food & Drug Admin. v. Brown & Williamson Tobacco Corp. (Brown & Williamson)},\textsuperscript{56} the issue facing the United States Supreme Court was whether the Food and Drug Administration (FDA) had asserted proper jurisdiction under the Food, Drug, and Cosmetic Act (FDCA) to regulate tobacco products.\textsuperscript{57} Respondents, a group of tobacco manufacturers, retailers and advertisers, brought action section 202(a)(1) included the following: "[t]o emphasize the preventive or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs; [and] to emphasize the predominant value of protection of public health." \textit{See H.R. REP. No. 95-294, at 49 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1127.}

50. \textit{See Ethyl Corp.}, 541 F.2d at 25 (advising that regulatory action is necessary to prevent harm, even if regulator is uncertain whether harm is inevitable); \textit{see also Massachusetts}, 415 F.3d at 76 (Tatel, J., dissenting) (noting CAA section 202(a)(1) statutory standard is precautionary).

51. 598 F.2d 62 (D.C. Cir. 1978).

52. \textit{See id.} at 65 (noting consolidated cases are challenge to EPA's first regulations prohibiting discharge of polychlorinated biphenyls (PCBs) into nation's waterways, under Federal Water Pollution Control Act).

53. \textit{See id.} at 76 (arguing Toxic Substances Control Act was intended to preempt EPA's authority under Federal Water Pollution Control Act Amendments of 1972 ("Water Pollution Control Act"), and EPA should not achieve result of PCB phase out by use of authority under Water Pollution Control Act).

54. \textit{See id.} at 79 (stating petitioners insisted EPA must trace line of direct causation from each substance it regulates to danger requiring regulation).

55. \textit{See id.} at 82 (noting this approach has gained acceptance in many statutory contexts). The EPA interpretation of the complex statutes it administers is entitled to deference. \textit{See id.} at 80.


57. \textit{See id.} at 125 (noting Food and Drug Administration (FDA) concluded nicotine is "drug" within meaning of Food, Drug, and Cosmetic Act (FDCA)).
challenging FDA regulation of tobacco products. The FDA argued the FDCA grants it the authority to regulate “drugs” and “devices” and that the FDA had properly asserted its jurisdiction in concluding that nicotine is a “drug” and cigarettes and smokeless tobacco are “devices” that deliver nicotine to the body. The Court held that Congress had not given the FDA authority to regulate tobacco products according to the plain language of the FDCA. The Court reasoned that if the FDA had jurisdiction to regulate tobacco products, the FDCA would require the FDA to remove them from the market entirely, which would contradict Congress’s intent to keep tobacco products on the market.

C. Greenhouse Gases and Climate Change

Many scientists agree that motor vehicle emissions of greenhouse gases have contributed significantly to the Earth’s temperature increase. The “greenhouse effect” is a natural occurrence in which atmospheric greenhouse gases such as water vapor, carbon dioxide and other gases trap some of the Earth’s outgoing energy. The Earth’s temperature warming is most likely a result of increased atmospheric concentrations of carbon dioxide and other greenhouse gases resulting from the burning of fossil fuels.

58. See id. at 120 (noting respondents moved for summary judgment on ground that without claims of therapeutic benefits of tobacco products, FDA lacked jurisdiction to regulate these products).

59. See id. (stating reasons for FDA’s assertion of its jurisdiction to regulate tobacco products in 1996).

60. See id. at 142 (explaining Congress did not intend FDA to have jurisdiction). “Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction.”

61. See Brown & Williamson, 529 U.S. at 142-43 (highlighting correlation between FDCA, FDA and congressional intent). A fundamental precept of the FDCA is that any product regulated by FDA, but not banned, must be safe for its intended use. See id. Yet, tobacco products are unsafe and dangerous when used for their intended use of delivering certain pharmacological effects. See id. See generally Engine Mfrs. Ass’n v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 1996) (showing agencies’ obligation to follow congressional intent). Under Chevron, an agency may not “avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.”

62. See Climate Change Hearing, supra note 1 (noting nearly all climate scientists believe increases in amount of greenhouse gases in atmosphere have caused Earth’s current warming).

63. See Global Warming—Climate, supra note 3 (stating that without greenhouse effect, temperatures would be much lower and life as we know it would be impossible).

64. See id. (noting scientists generally believe that combustion of fossil fuels and other human activities are primary reason for increased concentration of carbon dioxide).
In 2001, the National Research Council (NRC), which provides advice to the federal government on scientific and technical matters, issued its review of climate change policy at the Bush Administration’s request. The NRC report concluded that “a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.” The NRC based its conclusion on considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases.

IV. NARRATIVE ANALYSIS

In Massachusetts v. EPA, the D.C. Circuit addressed whether the EPA Administrator’s denial of a petition asking the EPA to regulate greenhouse gas emissions under CAA section 202(a)(1) was proper. The Massachusetts court considered two key issues pertaining to the EPA Administrator’s discretion in the denial of the petition: first, the scientific uncertainty linking greenhouse gases with climate change; and second, the EPA Administrator’s judgment to rely on policy considerations.

A. Statutory Authority

Although the petitioners relied on Ethyl Corp. to show that the EPA Administrator’s denial was contrary to statutory standard, the court held that Ethyl Corp. supported the EPA instead of the peti-

65. See Massachusetts v. EPA, 415 F.3d 50, 56-57 (D.C. Cir. 2005) (explaining NRC is principal operating agency of National Academy of Sciences for providing technical and scientific advice).

66. NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS, 17 (2001) (noting lack of determinative link between greenhouse gases and climate change).

Because of the large and still uncertain level of natural variability inherent in the climate record and the uncertainties in the time histories of the various forcing agents (and particularly aerosols), a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established.

See id.

67. See id. at 1 (observing that changes over last several decades are likely result of human activities, though significant changes also due to natural variability).

68. See Massachusetts, 415 F.3d at 56-59 (looking to precedent, scientific research on linkage between greenhouse gas emissions and global warming and EPA Administrator’s discretion under CAA section 202(a)(1) to determine whether EPA’s denial of petition was proper).

69. See id. at 56-59 (addressing whether EPA Administrator properly exercised his discretion under section 202(a)(1) to regulate greenhouse gas emissions).
tioners. Based on *Ethyl Corp.*, the court reasoned that CAA section 202(a)(1) directed the EPA Administrator to "regulate emissions that 'in his judgment' may reasonably be anticipated to endanger public health or welfare." The court, accordingly, held that CAA section 202(a)(1) required the EPA Administrator to make a threshold judgment about whether to regulate, thus giving the EPA Administrator considerable discretion. The court declared the EPA Administrator's analysis in denying the petition entirely consistent with *Ethyl Corp.* because the petition's denial may be based on the EPA Administrator's judgment. The court, therefore, held that the EPA Administrator acted consistently with the statutory standard of CAA section 202(a)(1).

B. EPA Administrator's Judgment

In concluding that the EPA was within its statutory authority to deny the petition to regulate greenhouse gas emissions, the Massachusetts court addressed two key issues raised by the EPA Administrator's denial of the rulemaking petition: (1) whether the EPA could deny the petition based on scientific uncertainty regarding the effects of greenhouse gas emissions on climate change; and (2) whether the EPA Administrator could rely on several policy considerations in making a determination to deny the petition.

1. Scientific Uncertainty

The court recognized that scientific research on the effects of greenhouse gas emissions on climate change was the EPA's primary consideration in denying the petition. Although the EPA received nearly 50,000 submissions in response to its request for public comment, the EPA found that petitioners' and others'
comments rested on information already in the public domain and did not add to the knowledge available to the NRC in preparation of its 2001 report. 77 Therefore, the EPA decided to rely solely on the NRC’s report in making its determination. 78 The court noted that the NRC report explained that predicting climate change involves a complex web of economic and physical factors. 79

Further, the NRC reported that because the understanding of the relationships between climate and human health is in its infancy, the health consequences of climate change are not fully understood. 80 The NRC report concluded: “There is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases.” 81

2. Policy Considerations

The court held that the EPA Administrator may take policy considerations into account in addition to an assessment of scientific uncertainty in determining whether to regulate pursuant to the petition. 82 The court reasoned that the EPA Administrator’s reliance on policy considerations was entirely consistent with Ethyl Corp. because the EPA Administrator may consider policy judgments in making his determination whether to regulate in this mat-

77. See id. at 57 (clarifying EPA relied on NRC report because comments EPA received did not question NRC report).

78. See Massachusetts, 415 F.3d at 57 (stating EPA considered NRC’s report objective and independent assessment of relevant science).

79. See id. at 57 n.3 (noting economic and physical factors involved in predicting future climate change). These include: the ability to predict future global greenhouse gas emissions; the fate of greenhouse gas emissions once they enter the atmosphere; the impact of those emissions that remain in the atmosphere on the radiative properties of atmosphere; changes in temperature characteristics such as average temperatures and shifts in precipitation; and ultimately, changes on human health and welfare). See id.

80. See id. at 57 (stating that health outcomes in response to climate change is subject of intense debate).

81. See id. (quoting NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS) (concluding current estimates of magnitude of future warming should be regarded as tentative and subject to future adjustments).

82. See id. at 58 (citing Ethyl Corp., 541 F.2d at 20) (advising that Congress does not require EPA Administrator to exercise judgment based solely on assessment of scientific evidence); see also Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003) (concluding discretionary nature of EPA Administrator’s CAA section 202(a)(1) authority allows him to consider important policy issues and to regulate motor vehicle emissions as appropriate to air pollution problem).
The court noted that the EPA Administrator properly relied upon the following four policy considerations.

The first policy consideration the court addressed was that because new motor vehicles are but one of many sources of greenhouse gas emissions, regulation under CAA section 202(a)(1) would result in an inefficient, piecemeal approach to the climate change issue. The second policy consideration relied upon was concern that unilateral regulation of United States motor vehicle emissions could weaken efforts to persuade developing countries to reduce the intensity of their greenhouse gas emissions.

The third policy consideration that played a role in the EPA’s decision was ongoing scientific research attempting to resolve scientific uncertainties and the Bush Administration’s initiatives to address climate change. These initiatives include current efforts to promote fuel cell and hybrid vehicles and long-term efforts to develop hydrogen as a primary fuel for cars and trucks.

The fourth and final policy consideration that the EPA Administrator ad-

83. See Massachusetts, 415 F.3d at 58 (holding EPA Administrator may consider both scientific uncertainty about causal effects of greenhouse gases on future climate of earth, as well policy considerations that, in his judgment, warrant non-regulation on petition).

84. See id. (addressing policy considerations focused on by EPA Administrator).

85. See id. (listing policy considerations relied upon by EPA Administrator that, in his judgment, warranted regulatory forbearance at that time); see also Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931 (advising that sensible regulatory scheme would require that all significant sources and sinks of greenhouse gas emissions be considered in deciding how best to achieve any needed emission reductions).

86. See Massachusetts, 415 F.3d at 58 (addressing further policy considerations EPA Administrator relied upon that, in his judgment, warranted regulatory forbearance at this time); see also Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931 (cautioning that any potential benefit of EPA regulation could be lost if other nations decide to let their emissions significantly increase in view of U.S. emission reductions).

87. See Massachusetts, 415 F.3d at 58 (noting further policy considerations that address resolving scientific uncertainties and President Bush’s alternatives to EPA regulation); see also Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931 (noting President’s policy calls for public-private partnerships to develop break-through technologies that could dramatically reduce economy’s reliance on fossil fuels without slowing economic growth).

88. See Massachusetts, 415 F.3d at 58 (stating EPA Administrator highlighted new technologies and alternative initiatives to fossil fuels as policy considerations against regulating); see also Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931 (noting President has sought three billion dollars in tax credits over eleven years for consumers to purchase fuel cell and hybrid vehicles and that President has established new public-private partnership with U.S. automobile manufacturers to promote development of hydrogen as primary fuel for cars and trucks with goal of building commercially viable zero-emissions hydrogen-powered vehicles).
dressed were two remedies offered by petitioners to reduce carbon dioxide from new motor vehicles, which included reduction of gasoline consumption and improvement of tire performance.\textsuperscript{89}

C. Dissenting Opinion

In his lengthy dissent, Judge Tatel agreed with the petitioners that the CAA explicitly gives EPA authority to regulate greenhouse gas emissions.\textsuperscript{90} First, Judge Tatel stated that the threshold question in addressing the EPA's petition denial was whether the CAA authorizes the EPA to regulate emissions based on their effects on global climate.\textsuperscript{91} Judge Tatel argued that the court must interpret CAA section 202(a)(1) according to the plain language of the statute.\textsuperscript{92} He argued that the plain language of CAA section 202(a)(1) authorizes the EPA to regulate greenhouse gas emissions because they are covered by the language "any air pollutant."\textsuperscript{93} For the EPA to disregard the CAA's plain text, the EPA needs an extraordinarily convincing justification.\textsuperscript{94}

89. See Massachusetts, 415 F.3d at 58 (noting that Department of Transportation (DOT) is agency in charge of fuel efficiency standards). DOT has already addressed reduction of carbon dioxide with recently issued standards requiring greater fuel economy, which will eliminate millions of metric tons of carbon dioxide emission. See id. With regard to tire efficiency, the EPA's authority to regulate it as an "emission" of an air pollutant is unclear. See id.

90. See Massachusetts, 415 F.3d at 61-62 (Tatel, J., dissenting) (holding EPA has authority under CAA to regulate any air pollutant defined elsewhere in statute).

91. See id. at 67 (Tatel, J., dissenting) (describing EPA claim that it lacks authority to regulate greenhouse gas emissions even if proven to contribute to substantial and harmful global warming). Petitioners, however, argue that Congress has provided clear statutory language giving the EPA the authority to regulate greenhouse gas emissions from new motor vehicles. See id. (Tatel, J., dissenting).

92. See id. (Tatel, J., dissenting) (reasoning that CAA section 202(a)(1) clearly authorizes regulation of any air pollutants emitted from motor vehicles that in EPA Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." See id. (Tatel, J., dissenting) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)). An inquiry begins with the plain language of the statute in question. See id. (Tatel, J., dissenting) (citing Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 297 (D.C. Cir. 2003)).

93. See id. (Tatel, J., dissenting) (concluding exceedingly broad language of CAA section 7602(g) clearly covers greenhouse gases emitted from motor vehicles). See 42 U.S.C. § 7602(g) (defining air pollutants).

94. See Massachusetts, 415 F.3d at 68 (Tatel, J., dissenting) (citing Appalachian Power Co. v. EPA, 249 F.3d 1032, 1041 (D.C. Cir. 2001)) (stating court will not ratify an interpretation of statute contrary to its seemingly clear meaning absent an extraordinarily convincing justification). For the EPA to avoid a literal interpretation of the statute, "it must 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 statu-
Second, Judge Tatel questioned the EPA’s reliance on scientific uncertainty as a reason for not regulating greenhouse gases associated with global warming.\(^{95}\) He noted that the statutory language of CAA section 202(a)(1) does not require proof or unequivocal evidence, but requires the EPA Administrator to determine whether greenhouse gases “contribute to air pollution which may reasonably be anticipated to endanger” welfare.\(^{96}\) He further noted that the EPA Administrator was silent in making this determination in its denial of the petition to regulate.\(^{97}\) In conclusion, Judge Tatel reasoned the extensive NRC report provided the EPA with adequate scientific research to determine whether global warming caused by greenhouse gases “may reasonably be anticipated to endanger welfare” as required by CAA section 202(a)(1).\(^{98}\)

Third, Judge Tatel attacked the EPA’s four policy reasons for not following the text of the CAA.\(^{99}\) He argued that despite Congresses’ past lack of concern over global warming, the CAA still instructs the EPA to implement measures to protect against air pollutants.\(^{100}\) He stated that the plain language of the statute trumped the EPA’s practical and policy reasons to have global warming addressed through specifically tailored statutes.\(^{101}\)

\(^{95}\) See Massachusetts, 415 F.3d at 77-78 (Tatel, J., dissenting) (noting NRC report demonstrated that global warming research is well within frontiers of scientific knowledge and projected consequences of global warming are serious).

\(^{96}\) See id. at 77 (Tatel, J., dissenting) (observing scientific uncertainty should not prevent EPA from determining whether greenhouse gases should be regulated according to CAA section 202(a)(1)).

\(^{97}\) See id. at 77 (Tatel, J., dissenting) (criticizing EPA has failed to explain its refusal to find endangerment according to statutory standard).

\(^{98}\) See id. at 80 (Tatel, J., dissenting) (questioning how EPA could fail to conclude that global warming does not meet statutory standard of CAA section 202(a)(1)).

\(^{99}\) See id. at 61-62 (Tatel, J., dissenting) (arguing none of EPA’s reasons provide convincing justification for EPA’s position).

\(^{100}\) See Massachusetts, 415 F.3d at 68-69 (Tatel, J., dissenting) (reasoning that CAA section 7602(g) definition of “air pollutants” is broad enough to allow CAA to be applied to new air pollution problems as well as existing ones). In addition, Congress expressly instructed the EPA to be cautious of climate-related problems in evaluating risks to “welfare.” See id. at 69 (citing 42 U.S.C. § 7602(h) (2000)) (explaining that “[a]ll language referring to effects on welfare includes, but is not limited to, effects on . . . weather, visibility, and climate.”). See H.R. REP. NO. 95-294, at 42 (stating CAA is comprehensive vehicle for protection of nation’s health from air pollution and that it is inappropriate to exempt certain air pollutants from comprehensive protections CAA affords). For further discussion on CAA, see supra notes 29-34 and accompanying text.

\(^{101}\) See Massachusetts, 415 F.3d at 69 (quoting Engine Mfrs. Ass’n v. EPA, 88 F.3d at 1089 (D.C. Cir. 1996)) (noting agency may not “avoid Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy”).
Judge Tatel also argued that the EPA’s reliance on the holding in *Brown & Williamson* and congressional inaction in addressing greenhouse gas emissions is misplaced. This is because under the CAA, the EPA already extensively regulates the energy and transportation industries, and the EPA’s regulation of greenhouse gas emissions would be fully compatible under CAA. Finally, he observed that the EPA’s claim that it lacks authority under the CAA to regulate carbon dioxide because it would overlap with the Department of Transportation’s (DOT) authority under the 1975 Energy Policy and Conservation Act (EPCA) provides no evidence that Congress exempted carbon dioxide from the meaning of “any air pollutant.”

V. CRITICAL ANALYSIS

In *Massachusetts v. EPA*, the D.C. Circuit erroneously held that the EPA properly declined authority to regulate greenhouse gas emissions from new motor vehicles based on the EPA Administrator’s judgment and consideration of policy issues. Further, the court improperly held that the EPA Administrator, according to CAA section 202(a)(1), may regulate emissions that, in his judgment, “may reasonably be anticipated to endanger public health or

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102. *See Massachusetts*, 415 F.3d at 71 (Tatel, J., dissenting) (stating FDA’s jurisdiction over tobacco would trigger total product ban, while EPA jurisdiction would lead only to regulation of greenhouse gases). The broad language of the FDCA suggested that FDA had authority to regulate tobacco products, but the court concluded FDA lacked such authority. *See Brown & Williamson*, 529 U.S. 120, 143 (2000). For a further discussion on the *Brown & Williamson* holding, see *supra* notes 56-61 and accompanying text.

103. *See Massachusetts*, 415 F.3d at 71 (Tatel, J., dissenting) (noting *Brown & Williamson* held that FDA had no prior authority over tobacco industry and FDA ban on tobacco would have directly conflicted with congressional intent that tobacco remain on market).

104. *See id.* at 72-73 (noting that Energy Policy and Conservation Act (EPCA) targets fuel conservation and CAA targets pollution prevention, which are overlapping, but not incompatible); *see also id.* (citing FTC v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001)) (holding that when statutes are capable of co-existence, it becomes duty of court to regard each as effective, absent contrary clear congressional intent); *see also H.R. Rep. No. 95-294*, at 42-43 (emphasizing EPA regulatory power under CAA should proceed even when it overlaps with other agencies’ responsibilities under different acts).

105. 415 F.3d 50 (D.C. Cir. 2005).

106. *See id.* at 58 (holding EPA’s decision not to regulate emissions was proper). For further discussion of the *Massachusetts* court’s holding regarding the EPA’s decision not to regulate greenhouse gas emissions from new motor vehicles under CAA section 202(a)(1) based on the EPA Administrator’s discretion and policy considerations, see *supra* notes 75-89 and accompanying text.
welfare." The court addressed neither the plain meaning of the statute nor policy considerations outside of the EPA Administrator's conclusion and, therefore, has improperly provided the EPA and other administrative agencies with increased deference in making regulatory determinations.

A. Statutory Authority

The D.C. Circuit did not directly address whether EPA had proper statutory authority under the CAA to regulate greenhouse gas emissions. The court assumed that the EPA had proper authority and decided to proceed on the merits of the EPA's decision not to regulate. Without a definitive ruling on statutory authority, the EPA may possibly regulate greenhouse gas emissions in the future if it chooses to do so. The Massachusetts court's ruling, however, did not answer the question of how much authority the EPA has to take action in regulating greenhouse gas emissions.

B. EPA Administrator's Judgment

The D.C. Circuit looked to the language of CAA section 202(a)(1) to determine that the EPA Administrator properly exercised discretion not to regulate greenhouse gas emissions in new vehicles.

107. See id. at 57 (providing basis for court's holding). For further discussion of the Massachusetts court's holding on the EPA Administrator's judgment based on statutory authority and precedent, see supra notes 70-74 and accompanying text.

108. See Massachusetts, 415 F.3d at 74 (Tatel, J., dissenting) (stating EPA's reasoning was wrong). The EPA Administrator has limited discretion under CAA section 202(a)(1) when determining whether an air pollutant causes or contributes to pollution which may reasonably be anticipated to endanger public health or welfare. See id. The EPA has transformed the EPA Administrator's limited discretion under CAA section 202(a)(1) into the decision-making power to withhold regulation of an air pollutant because the EPA Administrator thinks regulating greenhouse gas emissions is bad policy. See id.

109. See id. at 56 (holding court will assume arguendo that EPA has statutory authority to regulate greenhouse gases from new motor vehicles).

110. See id. at 55-56 (deciding court will proceed to merits with respect to EPA's decision not to regulate on grounds that effect of greenhouse gases on climate is unclear and models used to predict climate change might be inaccurate).

111. See DePalma, supra note 20 (noting environmental groups claim decision allows agency to regulate greenhouse gases in future).

112. See Massachusetts, 415 F.3d at 71 (Tatel, J., dissenting) (stating CAA section 202(a)(1) text makes clear Congress gave EPA broad authority to regulate all harmful pollutants). Congress intentionally gave the EPA authority to regulate all harmful pollutants, deeming it "not appropriate to exempt certain pollutants" from the Act's "comprehensive protections." See id. (quoting H.R. Rep. No. 95-294, at 42-43).
motor vehicles. The court's holding that the EPA Administrator has considerable discretion to decline to exercise regulatory authority based on scientific uncertainties and policy considerations appears to be inconsistent with statutory interpretation and precedent.

First, the plain reading of CAA section 202(a)(1) indicates that the EPA Administrator's discretion is limited when determining whether an air pollutant causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare. The statute limits the EPA Administrator's discretionary judgment only to the determination of whether the statutory standard of the danger of the air pollutant is met. The statute does not allow the EPA Administrator to base his or her judgment on reasons unrelated to the standard. Thus, it may have been more appropriate for the court to determine whether the EPA Administrator used his judgment to consider any harmful effects of greenhouse gas emissions, rather than base his determinations on scientific uncertainty and policy considerations.

Second, the D.C. Circuit's decision seems inconsistent with applicable precedent in holding that the EPA Administrator may cite scientific uncertainty and policy considerations in declining to exercise his regulatory authority of greenhouse gas emissions. The court relied on *Ethyl Corp.* to determine that the EPA Administrator had considerable discretion and may consider policy issues, but in

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113. See id. at 57-58 (holding section 202(a)(1) directs EPA Administrator to regulate emissions that "in his judgment may reasonably be anticipated to endanger public health or welfare.").

114. See id. at 75 (Tatel, J., dissenting) (criticizing EPA for ignoring CAA section 202(a)(1)'s language limiting EPA Administrator's discretion and for EPA's failure to make petition denial comply with D.C. Circuit's related precedent).

115. See id. (Tatel, J., dissenting) (concluding CAA section 202(a)(1) gives EPA Administrator discretion only to judge within bounds of substantial evidence whether pollutants cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare).

116. See id. (Tatel, J., dissenting) (observing CAA section 202(a)(1) plainly limits EPA Administrator's discretion to determine whether statutory standard for endangerment has been met).

117. See *Massachusetts*, 415 F.3d at 75 (Tatel, J., dissenting) (claiming EPA has ignored statute's language). The EPA Administrator does not have discretion to base judgment on reasons unrelated to the endangerment standard or to withhold judgment for such reasons. See id.

118. See id. at 58 (holding EPA Administrator relied upon many policy considerations in addition to scientific uncertainty about causal effects of greenhouse gases on future climate).

119. See id. at 76 (Tatel, J., dissenting) (stating that for EPA to find no endangerment of harmfulness of pollutants, EPA must base conclusion in statutory standard and may not rely on unrelated policy considerations).
Ethyl Corp., the policy issues related to whether the statutory standard of endangerment was met. In Massachusetts, however, the court did not fully address the factual difference that the EPA Administrator's policy considerations did not relate to the harmful effects of greenhouse gas emissions. Rather, the EPA Administrator gave weight to policy considerations to justify his refusal to regulate greenhouse gas emissions.

The court noted that Environmental Defense Fund instructs a reviewing court to uphold agency conclusions based on policy judgments when an agency must resolve issues "on the frontiers of scientific knowledge." While there may be scientific uncertainty concerning the relationship between greenhouse gas emissions and the Earth's temperature increase, global warming is not a new issue and its effects are well documented. The court's holding, therefore, may have avoided determining whether the EPA made a proper endangerment finding as to the harmful effects of greenhouse gas emissions.

VI. IMPACT

Considering the importance and the long-term effects of greenhouse gas emissions, the Massachusetts court's decision may significantly influence future regulation of greenhouse gas emis-

120. See id. (Tatel, J., dissenting) (holding Ethyl Corp. makes quite clear that EPA Administrator's policy-based discretion is limited to terms of statute).
121. See id. at 58 (acknowledging EPA Administrator's analysis relied on scientific uncertainty about causal effects of greenhouse gases on future climate change and policy considerations that warranted regulatory forbearance).
122. See Massachusetts, 415 F.3d at 76 (Tatel, J., dissenting) (holding EPA ruling that greenhouse gas emissions do not endanger public health or welfare must be grounded in statutory standard and may not rely on unrelated policy considerations). For a further discussion of the Massachusetts court's holding regarding the EPA Administrator's policy considerations, see supra notes 82-89 and accompanying text.
123. See id. at 77-78 (Tatel, J., dissenting) (noting EPA could not credibly conclude that it needs more research to determine whether greenhouse gas-caused global warming may reasonably be anticipated to endanger welfare). Although the NRC report may not offer certainty, it demonstrates that greenhouse gas emissions effects on global warming are well within "frontiers of scientific knowledge." See id. at 77 (Tatel, J., dissenting).
124. See id. at 77 (Tatel, J., dissenting) (reminding CAA does not require proof or unequivocal evidence of link between greenhouse gas emission increases and global warming).
125. See id. at 80 (Tatel, J., dissenting) (criticizing EPA for treating NRC report as "objective and independent assessment of the relative science," but still failing to conclude that global warming "may reasonably be anticipated to endanger public health or welfare").
The holding reinforces efforts to reduce greenhouse gas emissions voluntarily rather than by federal mandate. This outcome is significant to industries other than automobile manufacturers, such as catalyst companies, chemical producers and the electric power industry, which favor voluntary, rather than mandatory, reduction of greenhouse gas emissions. In addition, the decision reinforces the rights of states to determine their own emissions regulations and the option to implement their own stringent standards. The decision, however, addresses neither the seriousness of the potential future harm of global warming nor the EPA’s statutory authority to consider harmful effects in making its determination to regulate greenhouse gas emissions.

By avoiding the issue of statutory authority, the court has created a lingering ambiguity. The petitioners filed a petition for rehearing en banc, asking the full D.C. Circuit to reverse the Massachusetts ruling, but the court denied the petition. Nevertheless, the United States Supreme Court has granted certiorari to decide the issue.

This holding appears to be an important victory for the EPA because it allows the agency to make judgments by relying on scientific data. However, it also leaves open the question of how much authority the EPA has to take action on emissions.

126. See Mank, supra note 3, at 65 (noting Massachusetts decision addresses important question of whether EPA has duty pursuant to CAA to regulate greenhouse gas emissions); see also Attorney General Reilly Leads Multi-State Challenge to Federal Court Ruling on Greenhouse Gases, supra note 1 (emphasizing only circuit with authority to resolve issues of national import under CAA is D.C. Circuit).

127. See DePalma, supra note 20 (stating EPA believes voluntary programs are better way to reduce carbon dioxide and greenhouse gases rather than mandatory regulations and litigation that do not promote economic growth).

128. See Sissell, supra note 6 (noting ruling has been closely watched by catalyst companies and chemical producers because it settles at least discretionary element of debate over EPA’s decision to deny regulation of greenhouse gas emissions).

129. See DePalma, supra note 20 (observing ruling appears to leave unchecked authority of some states, such as California and New York, to continue their programs to regulate greenhouse gas emissions from motor vehicles or power plants).

130. See Editorial, Stealing a March on the EPA, supra note 5 (suggesting that instead of fighting in court, White House should make global warming high priority).

131. See DePalma, supra note 20 (stating holding was not showdown over global warming as expected). The holding did not settle the question about how much authority the EPA has to take action on emissions. See id.


tific research and public policy considerations in determining their regulatory authority under the CAA.\textsuperscript{134} The EPA, or any other federal administrative agency, may therefore determine regulatory authority based on policy grounds even when the agency may lack statutory authority.\textsuperscript{135} By not determining whether the EPA is legally required to regulate greenhouse gases, this holding provides broad discretion for future EPA Administrators to refuse to regulate greenhouse gas emissions, and provides little guidance for subsequent court interpretations of the EPA's regulatory authority under the CAA.\textsuperscript{136}

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\textsuperscript{134} See \textit{Massachusetts v. EPA}, 415 F.3d 50, 57-58 (D.C. Cir. 2005) (holding EPA Administrator has considerable discretion under CAA section 202(a)(1) and may take policy judgments into account).

\textsuperscript{135} See \textit{Attorney General Reilly Leads Multi-State Challenge to Federal Court Ruling on Greenhouse Gases}, supra note 1 (criticizing that because D.C. Circuit was split on whether EPA is legally required to regulate greenhouse gases, court allowed EPA to continue on path of inaction).

\textsuperscript{136} See id. (commenting nation needs decision that clarifies whether federal government is responsible for greenhouse gas regulation).