

# SUPREME COURT REVIEWS

LISA HEINZERLING\*

## *Massachusetts v. EPA*

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On April 2, 2007, the United States Supreme Court issued its much-anticipated decision in *Massachusetts v. Environmental Protection Agency (E.P.A.)*.<sup>1</sup> By a vote of 5-4, the Court decided all of the issues presented in the case in favor of the states and other parties that had challenged the decision of the Environmental Protection Agency (EPA) refusing to regulate greenhouse gas emissions from motor vehicles.<sup>2</sup> The Court held that: the states and other petitioners met the constitutional requirements for pursuing their claims in federal court;<sup>3</sup> the federal Clean Air Act gives the EPA authority to regulate greenhouse

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\* Professor of Law, Georgetown University Law Center. I was the primary author of petitioners’ briefs in *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007). I am grateful to Sarah Nealen for research assistance on this essay.

<sup>1</sup> *Massachusetts*, 127 S. Ct. 1438.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1454-55.

gases;<sup>4</sup> and the EPA could not refuse to exercise this authority by citing policy considerations not enumerated in the statute<sup>5</sup> or by referring generally to the scientific uncertainty remaining with respect to climate change.<sup>6</sup> On each issue, the Court broke new legal ground. The implications of the Court's decision for other cases involving climate change are likely to be enormous.

## I

### BACKGROUND OF THE CASE

In 1999, the International Center for Technology Assessment and other parties petitioned the EPA to set standards for four chemicals emitted by new motor vehicles: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.<sup>7</sup> The petition asserted that, due to effects on climate, motor vehicles emitting those chemicals cause or contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare" within the meaning of the Clean Air Act.<sup>8</sup>

In 2003, the EPA denied the petition.<sup>9</sup> In explaining its decision, the agency announced, first, that the Clean Air Act "does not authorize regulation to address global climate change,"<sup>10</sup> and that, therefore, air pollutants associated with climate change "are not air pollutants under the [Act's] regulatory provisions."<sup>11</sup> In offering this interpretation of the term "air pollutant," the EPA relied on failed legislative proposals to address climate change;<sup>12</sup> statutory provisions (in the Clean Air Act and elsewhere) addressing climate change in what the agency called a "nonregulatory" fashion;<sup>13</sup> and an asserted tension between regulation of air pollutants associated with climate change and the regulatory structure of the Clean Air Act and Energy Policy and Conservation Act, which regulates vehicle fuel efficiency.<sup>14</sup> Citing the "economic and political significance" of the issue of climate change,

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<sup>4</sup> *Id.* at 1462.

<sup>5</sup> *Id.* at 1463.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1449.

<sup>8</sup> 42 U.S.C. § 7521(a)(1) (2006).

<sup>9</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

<sup>10</sup> *Id.* at 52,925.

<sup>11</sup> *Id.* at 52,928.

<sup>12</sup> *Id.* at 52,924.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 52,925.

the EPA stated that it was “urged on” in its legal judgment by the Supreme Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>15</sup> which had invalidated the Food and Drug Administration’s (FDA) regulation of tobacco products as “drugs” under the federal Food, Drug, and Cosmetic Act.<sup>16</sup>

As a separate basis for its decision—discussed in a section entitled “Different Policy Approach”—the EPA stated that it “disagrees with the regulatory approach urged by petitioners,” and that it would not be “effective or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time.”<sup>17</sup> In place of the regulatory program created by section 202 of the Clean Air Act, the EPA offered “near-term voluntary actions and incentives” and “programs aimed at reducing scientific uncertainties and encouraging technological development.”<sup>18</sup>

The EPA preferred a “different policy approach” for several reasons. First, noting that “[t]he science of climate change is extraordinarily complex and still evolving,” the agency ran through a list of scientific issues that remained inconclusively resolved.<sup>19</sup> The EPA relied primarily on selective quotations from a 2001 report by the National Research Council, disregarding, among many others, that report’s important opening sentence: “Greenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise.”<sup>20</sup> Second, the EPA concluded that regulation under section 202 was not warranted because it would “result in an inefficient, piecemeal approach to addressing the climate change issue,” since motor vehicles are one of many sources of air pollutants associated with climate change.<sup>21</sup> Third, the EPA asserted that “[u]nilateral EPA regulation” on this matter could “weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies.”<sup>22</sup> Regulation of air pollutants associated with cli-

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<sup>15</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>16</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,928.

<sup>17</sup> *Id.* at 52,929-30.

<sup>18</sup> *Id.* at 52,930.

<sup>19</sup> *Id.*

<sup>20</sup> NAT’L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 1 (2001).

<sup>21</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931.

<sup>22</sup> *Id.*

mate change “raises important foreign policy issues,” the EPA observed, which are “the President’s prerogative to address.”<sup>23</sup> “In light of [these] considerations,” the EPA announced, the agency “would decline the petitioners’ request to regulate motor vehicle [greenhouse gas] emissions even if it had authority to promulgate such regulations.”<sup>24</sup>

Petitioners sought review of the EPA’s decision in the D.C. Circuit. The appeals court panel split three different ways, with a majority ruling in favor of the EPA.<sup>25</sup> The Supreme Court agreed to review the questions of whether the EPA had authority to regulate greenhouse gases under the Clean Air Act and whether it could decline to exercise that authority based on policy considerations not enumerated in the statute.<sup>26</sup> In their legal brief opposing petitioners’ request that the Court review the case, the United States and other parties made clear that they also intended to argue that petitioners simply did not have the right to challenge the EPA’s decision in federal court—or, in legal jargon, they lacked “standing” to sue.<sup>27</sup> I will review the Court’s answers to each of these three questions, and their potential implications, in turn.

## II

### EPA’S AUTHORITY TO REGULATE GREENHOUSE GASES

#### A. *The Court’s Decision*

The question of the EPA’s authority to regulate greenhouse gases under the Clean Air Act was the marquee issue in the case, yet it was also the issue the Court appeared to find the most straightforward. The Court held that greenhouse gases are “air pollutants” subject to regulation under the Clean Air Act.<sup>28</sup> The Court focused on the statutory text and proclaimed it “unambig-

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *Massachusetts v. Env’tl. Prot. Agency*, 415 F.3d 50 (D.C. Cir. 2005), *rev’d*, 127 S. Ct. 1438 (2007).

<sup>26</sup> *Massachusetts v. Env’tl. Prot. Agency*, 126 S. Ct. 2960 (2006); see also *Petition for Writ of Certiorari, Massachusetts v. Env’tl. Prot. Agency*, 127 S. Ct. 1438 (2007) (No. 05-1120) (listing questions presented by the petitioner).

<sup>27</sup> Brief for the Federal Respondent in Opposition at 6, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120).

<sup>28</sup> *Massachusetts*, 127 S. Ct. at 1460.

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uous.”<sup>29</sup> The Court held that legislation enacted after the relevant provisions of the Clean Air Act did not impinge upon the EPA’s pre-existing authority to regulate air pollutants and that nothing in the Court’s decision in *Brown & Williamson* justified a narrow interpretation of the Act.<sup>30</sup> The Court also held that regulation under the Clean Air Act was not inconsistent with fuel efficiency standards.<sup>31</sup> More generally, the Court observed that the Clean Air Act’s broad language defining air pollutants reflected “an intentional effort to confer the flexibility necessary to forestall . . . obsolescence” in the presence of “changing circumstances and scientific developments.”<sup>32</sup>

### ***B. Implications***

First, and most obviously, the Court’s ruling means that the EPA may not decline to regulate greenhouse gas emissions from motor vehicles based on the argument that it has no authority to do so. The matter returns to the EPA for its decision whether greenhouse gases may—in the language of the statute—“reasonably be anticipated to endanger public health or welfare.”<sup>33</sup> The Clean Air Act does not set a deadline for the EPA’s decision.<sup>34</sup> Pragmatically speaking, the Court’s decision puts some pressure on the agency not to dilly-dally, but there is no fixed date by which the EPA must act.

The Court’s decision on the EPA’s authority also has several important legal consequences beyond this particular setting. First, sources other than motor vehicles, such as power plants, are governed by the same triggering language which applies to motor vehicles. Before the Court’s decision, the EPA had refused to regulate greenhouse gas emissions from power plants on the same ground on which it refused to regulate these emissions from motor vehicles: that it had no authority to do so.<sup>35</sup> That decision was appealed, and the litigation stayed pending the outcome of *Massachusetts v. E.P.A.* Given the Court’s decision, the

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1461.

<sup>31</sup> *Id.* at 1462.

<sup>32</sup> *Id.* (citing Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)).

<sup>33</sup> 42 U.S.C. § 7521(a)(1) (2006).

<sup>34</sup> *See* 42 U.S.C. § 7521.

<sup>35</sup> Standards of Performance for Steam Generating Units, 71 Fed. Reg. 9866, 9869 (Feb. 27, 2006).

EPA's explanation for its refusal to regulate greenhouse gases from power plants is not legally valid.

Another important consequence of the Court's holding regarding the EPA's legal authority is that the Court's previous decision in *Brown & Williamson* has now essentially been limited to its facts. The FDA's effort to regulate tobacco under the Food, Drug, and Cosmetic Act was invalidated, the Court explained in *Massachusetts v. E.P.A.*, because the FDA had long disclaimed any regulatory authority over tobacco and Congress had relied on those disclaimers in enacting a whole series of tobacco-specific laws.<sup>36</sup> Moreover, if the FDA had had authority to regulate tobacco as a drug, it would have been required to ban it as unsafe—something Congress clearly had not intended for the FDA to do.<sup>37</sup> Because the Court in *Brown & Williamson* had also cited the “economic and political” importance of tobacco in coming to its decisions,<sup>38</sup> many parties had seized upon the case in arguing that regulation with large political or economic consequences could not go forward without explicit direction from Congress.<sup>39</sup> That broad understanding of *Brown & Williamson*—which would spell doom for much regulation that might otherwise have been required under Congress' typically general mandates—was rejected in *Massachusetts v. E.P.A.*<sup>40</sup>

In addition, given the Court's holding on the EPA's authority, the automobile industry's pending challenge to California's own regulation of greenhouse gas emissions from automobiles is now on much shakier legal ground.<sup>41</sup> Before the Court's decision, the federal trial judge hearing the automobile industry's challenge to California's regulation had stayed the California litigation, finding that the two cases were so legally intertwined that it made sense to hold off the California case until the Supreme Court

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<sup>36</sup> *Massachusetts*, 127 S. Ct. at 1461.

<sup>37</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 140 (2000).

<sup>38</sup> *Id.* at 133.

<sup>39</sup> See Brief for Respondents Alliance of Automobile Manufacturers, Engine Manufacturers Association, National Automobile Dealers Association, Truck Manufacturers Association at 41, *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438 (2007) (No. 05-1120); Brief Amicus Curiae of Pacific Legal Foundation in Support of the Environmental Protection Agency at 11-12, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120).

<sup>40</sup> *Massachusetts*, 127 S. Ct. at 1461.

<sup>41</sup> See *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006).

made its decision.<sup>42</sup> One of the only claims left at that time was industry's claim that California's regulation had been supplanted by the Energy Policy and Conservation Act.<sup>43</sup> The Supreme Court's breezy, one-paragraph dismissal, in *Massachusetts v. E.P.A.*, of a similar argument<sup>44</sup> bodes ill for this aspect of the automobile manufacturers' lawsuit. Indeed, a district judge in Vermont recently rejected the auto manufacturers' similar challenge to Vermont's law adopting California's greenhouse gas standards for cars, partly on the strength of this aspect of *Massachusetts v. E.P.A.*<sup>45</sup>

A final consequence of the Court's ruling on the EPA's authority also relates to the litigation against California's regulation. The court in California has decided that California must obtain permission—in the lingo, a “waiver”—from the EPA for its regulation of greenhouse gas emissions from automobiles.<sup>46</sup> California's request for such a waiver has been pending at the EPA for well over a year.<sup>47</sup> Before the decision in *Massachusetts v. E.P.A.*, there was considerable speculation that the EPA would deny the waiver on the ground that if the EPA had no authority to regulate greenhouse gases under the Clean Air Act, California had none either. That argument no longer has legal merit. Other reasons why the EPA could, under the law, deny a waiver—such as a lack of “compelling and extraordinary conditions” in California<sup>48</sup>—seem exceedingly ill-suited to regulations addressing the compelling and extraordinary problem of climate change. Although some argue that the Clean Air Act's reference to compelling and extraordinary conditions relates only to more traditional air pollution problems such as ground-level ozone,<sup>49</sup> nothing in the language of the Act suggests this limitation. Moreover, this argument reflects precisely the kind of climate-

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<sup>42</sup> *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. CV F 04-6663 AWI LJO, 2007 WL 135688, at \*1 (E.D. Cal. Jan. 16, 2007).

<sup>43</sup> *Id.* at \*5.

<sup>44</sup> *Massachusetts*, 127 S. Ct. at 1461-62.

<sup>45</sup> See *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, Nos. 2:05-CV-302, 2:05-CV-304, 2007 WL 2669444 (D. Vt. Sept. 12, 2007).

<sup>46</sup> *Cent. Valley*, 2007 WL 135688, at \*6.

<sup>47</sup> John M. Broder, *California Wants Strict Auto Emission Rules*, N.Y. TIMES, May 23, 2007, at A19.

<sup>48</sup> 42 U.S.C. § 7543(e)(2)(A)(ii) (2006).

<sup>49</sup> See Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 61, 67 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>.

change exceptionalism that the Supreme Court rejected in *Massachusetts v. E.P.A.*

### III

#### AGENCY DISCRETION

##### A. *The Court's Decision*

On the issue of agency discretion, the Court rejected arguments that the EPA's refusal to regulate greenhouse gases was unreviewable agency inaction. While the Supreme Court had previously held that an agency's decision not to take enforcement action against a particular party was presumptively unreviewable,<sup>50</sup> here it said that an agency's refusal to issue a rule was subject to judicial review for arbitrariness or legal error.<sup>51</sup> Although the Court initially described judicial review of an agency's refusal to issue a rule as "extremely limited" and "highly deferential,"<sup>52</sup> it went on to review the EPA's refusal to regulate greenhouse gases in a manner that was neither particularly limited nor particularly deferential. The Court found that the EPA erred by citing a "laundry list" of reasons why it preferred not to regulate, rather than grounding its decision in the statutory criterion of endangerment of public health and welfare.<sup>53</sup> In answering a petition for rulemaking, the Court said the agency's "reasons for action or inaction must conform to the authorizing statute."<sup>54</sup> Even if the agency found the science of climate change uncertain, the Court stated that the agency could not refuse to regulate greenhouse gases unless the science was so profoundly uncertain that the agency could not even form a judgment as to whether greenhouse gases were endangering public health or welfare.<sup>55</sup> "The statutory question," the Court said, "is whether sufficient information exists to make an endangerment finding."<sup>56</sup>

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<sup>50</sup> See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

<sup>51</sup> *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1459 (2007).

<sup>52</sup> *Id.* (citing *Nat'l Customs Brokers & Forwarders Ass'n of America, Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

<sup>53</sup> *Id.* at 1462-63.

<sup>54</sup> *Id.* at 1462.

<sup>55</sup> *Id.* at 1463.

<sup>56</sup> *Id.*



### ***B. Implications***

The Court's decision considerably narrows the EPA's options in deciding whether to regulate greenhouse gas emissions from motor vehicles. Given the scientific evidence on climate change and the agency's own public statements acknowledging the threats posed by climate change,<sup>57</sup> it is almost unthinkable that the agency could say that the science of climate change is too uncertain even to make a finding whether public health or welfare are endangered by greenhouse gases. For the same reasons, it is hard to believe that the agency could conclude that greenhouse gases may not reasonably be anticipated to endanger public health or welfare. The statutory standard is reasonable anticipation, not absolute certainty.<sup>58</sup> Furthermore, agencies' decisions must conform to the evidence before them and they must explain their decisions in light of that evidence.<sup>59</sup> These legal requirements, and the existing scientific record on climate change, make it exceedingly unlikely that the EPA could lawfully find that greenhouse gases do not pass the threshold of endangerment.

A finding of endangerment is the triggering event for much regulation under the Clean Air Act.<sup>60</sup> Thus the Court's decision trims the EPA's discretion to refuse to regulate under other parts of the Act as well. Beyond the Clean Air Act, the Court's decision recognizes that agencies have as much obligation to refrain from unlawfully *failing* to regulate as they do to refrain from unlawfully regulating.<sup>61</sup> Although legal scholars since the New Deal have recognized that as much harm can come from an inert government as from an active government, courts often have not seen it that way.<sup>62</sup> *Massachusetts v. E.P.A.* plants a flag on the side of those who think government can err (and injure) in not doing enough.

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<sup>57</sup> See generally U.S. Env'tl. Prot. Agency, Climate Change, <http://www.epa.gov/climatechange/index.html> (2007) (offering comprehensive information on climate change impacts, science, and policy).

<sup>58</sup> 42 U.S.C. § 7521(a)(1) (2006).

<sup>59</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

<sup>60</sup> See 42 U.S.C. § 7521(a)(1).

<sup>61</sup> See *Massachusetts*, 127 S. Ct. at 1459.

<sup>62</sup> See *Heckler v. Chaney*, 470 U.S. 821, 851 (1985) (Marshall, J., concurring).

#### IV

##### STANDING TO SUE

###### A. *The Court's Decision*

Parties seeking to invoke the jurisdiction of the federal courts must meet three requirements: they must have what the Court deems an injury in fact, which may not be speculative or conjectural; that injury must be causally linked to the legal violation they are asserting; and the judicial relief they seek must redress their injury.<sup>63</sup> Focusing on Massachusetts' involvement in the case, the Court prefaced its entire discussion of standing by emphasizing that "the party seeking review here is a sovereign State" and that it was "entitled to special solicitude in our standing analysis."<sup>64</sup> The Court then found that Massachusetts already had experienced injury from rising sea levels and that "the severity of that injury will only increase over the course of the next century."<sup>65</sup> On causation, the Court concluded that, "[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming."<sup>66</sup> Last, the Court found redressability because the risk of "catastrophic harm" from climate change would be reduced "to some extent" by the relief petitioners sought.<sup>67</sup>

###### B. *Implications*

After this decision, it is improbable that any state will be denied standing to bring a claim related to climate change. All states are suffering current effects from climate change, although some more than others. It is possible, of course, that a state could fail to describe its injury from climate change with sufficient specificity or accuracy; but this would be a lawyer's mistake, not a legal barrier to suing. It is also possible that some claims will involve pollution sources that contribute a smaller portion of greenhouse gases to the atmosphere than United States motor vehicles do. It may become necessary, at some point, to further define the meaning of the Court's generous "to some extent"

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<sup>63</sup> *Massachusetts*, 127 S. Ct. at 1453 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

<sup>64</sup> *Id.* at 1454, 1455.

<sup>65</sup> *Id.* at 1456.

<sup>66</sup> *Id.* at 1457-58.

<sup>67</sup> *Id.* at 1458.

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test.<sup>68</sup> But there is no doubt that the Court's ruling opens the courthouse door wide to states pursuing legal claims related to climate change.

It is a closer question whether private litigants will be able to take advantage of the Court's broad ruling on standing. The Court's prefatory remarks on the special status of state claims suggest that private litigants might find it harder than states to meet the requirements for standing.<sup>69</sup> Yet the Court also thought it "clear that petitioners' submissions as they pertain to Massachusetts have satisfied *the most demanding standards of the adversarial process*"<sup>70</sup>—signaling, perhaps, that petitioners would have standing even without being shown any "special solicitude." Moreover, the Court's analysis of each of those requirements in this case had, ultimately, nothing to do with the presence of states in the case; it was, instead, a perfectly conventional rendering of injury in fact, causation, and redressability. As often happens in law, the Court's decision in *Massachusetts v. E.P.A.* answered several questions while raising several others.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1454-55.

<sup>70</sup> *Id.* at 1455 (emphasis added).

