

## Commentary

# Global Warming in the Supreme Court: What Does *Massachusetts v. EPA* Mean for You (and Planet Earth)?

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### INTRODUCTION

Planners can be proud of many things, but years hence, when you're explaining the significance of your career to your grandkids, be sure to tell them about the time the American Planning Association helped convince the highest court in the land to rouse the U.S. Environmental Protection Agency from its slumber on the issue of global warming.

Through its amicus curiae program, APA played a pivotal role in the U.S. Supreme Court's ruling in *Massachusetts v. EPA*, 127 S. Ct. 1438 (April 2, 2007). APA participated in two stages of the case, first filing an amicus brief asking the court to hear the case. The Supreme Court grants only a tiny fraction of the petitions for review (formally called petitions for certiorari) that it receives each year. Odds are even worse when the federal government opposes review, and when there is only one lower court ruling on the issue—both factors working against review of *Massachusetts v. EPA*. But Massachusetts and its allies, bolstered by APA and other amici, prevailed, and the Court agreed to hear the case.

APA filed its second amicus brief in August 2006, supporting arguments

made by Massachusetts and the other petitioners that EPA had misread the Clean Air Act in key respects when it decided not to regulate greenhouse gas emissions from new motor vehicles.

On each brief, APA joined with the U.S. Conference of Mayors, the National Association of Counties, and other municipal officials in emphasizing that local communities are the first responders to the catastrophic harm global warming will bring. They also stressed that while state and local officials are leading the way with innovative programs to reduce greenhouse emissions, they cannot do the job alone and need the federal government to set minimum reduction standards.

The federal position on emissions from new cars and trucks was especially exasperating for state and local officials. EPA contended it lacked authority to regulate vehicular greenhouse emissions, while the Department of Transportation argued that federal law prohibits states from doing so and prohibits DOT from considering global warming threats in setting fuel efficiency standards. According to the feds, no level of government could limit vehicular emissions to help pre-

vent global warming. How very convenient for industry!

APA's leadership in supporting Massachusetts and the other petitioners was critical. After all, 11 states, led by Michigan, were on the other side of the case, urging the Supreme Court to uphold EPA's refusal to regulate. APA was the first national organization to sign onto its amicus briefs, and its early support for Massachusetts in this controversial case steered the backbone of others to support Massachusetts as well. What follows is an analysis of what the ruling means, both legally and practically.

### THE 'PREDICTED CATAclySM'

During the oral argument before the Supreme Court, Justice Antonin Scalia, his voice tinged with sarcasm, derisively asked the lawyer for Massachusetts and the other petitioners: "When is the predicted cataclysm?"

Notwithstanding Scalia's skepticism, the worldwide scientific community has reached a near-unanimous consensus on three key points: Global warming is occurring, the primary cause is fossil fuel consumption, and if we do not act now to reduce greenhouse gas

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The intense hurricane season of 2005 demonstrated how a powerful storm can tear a city into pieces.

emissions, global warming will worsen significantly. Every major scientific organization in the country whose expertise bears on climate change agrees with this consensus, including the National Academy of Sciences, the American Meteorological Society, and the American Association for the Advancement of Science.

If carbon dioxide levels continue to rise to the point of doubling preindustrial levels (a plausible scenario given current trends), the latest estimates are that temperatures will climb between 3.6 and 8 degrees Fahrenheit by the end of the century, with the best estimate at about 4.4 degrees. Best estimates for other emission scenarios range from 3.2 degree to 7.2 degrees.

These seemingly small shifts in temperature could affect the built environment in the most concrete of ways (bad pun intended). Since local officials and planners are the ones who imagine, design, oversee, and rebuild the structures and infrastructure that make up our cities and towns, global warming is a pressing local issue.

Take, for example, the flooding that will likely result from global warming. Rising sea levels are one of the most certain aspects of climate change, and they affect coastal communities in several ways. First, low-lying areas may be permanently underwater as seas rise. In the New York area, for example, a 12-inch rise in sea level would erode or submerge 120 feet of beaches, or thousands of acres of beachfront land. Loss of land means loss of property, infrastructure, and revenue for local governments. On the other side of the country, erosion already threatens 10 percent of the property tax base in the city of Ocean Shores, Washington, as well as the city's wastewater treatment facility. A U.S. government review of climate change impacts on the Pacific Northwest noted that "[i]f climate change and erosion accelerate the erosion trends that have emerged recently along parts of the [Pacific Northwest] coast, this type of scenario could become more common."

Baltimore, Maryland, is another of the many cities with infrastructure at risk

from rising sea levels. According to one city official, Baltimore's "entire public and private infrastructure is designed and built around the existing sea level."

Rising sea levels also mean higher storm surges, since the surge starts from a higher waterline. By the turn of the next century, New York City's 100-year floods could instead occur every 19 years, and overwhelm the city's airports, highways, subways, and tunnels. As a result of sea level increases, weaker, more frequent storms in the future probably will do more damage than powerful, extraordinary storms do today. If a Category Three hurricane hit New York City, "surge levels could rise 25 feet above mean sea level at JFK airport and 21 feet at the Lincoln tunnel," according to a U.S. government report.

The intense hurricane season of 2005 demonstrated how a powerful storm can tear a city into pieces. By 2010, 73 million people will live in the nation's most hurricane-prone counties. They, and all of the infrastructure it takes to sustain them, will be in the path of more destructive storms because climate change likely will increase the intensity, if not the frequency, of Atlantic hurricanes. Allstate Insurance no longer issues new policies to home owners in Florida, Louisiana, the New York City area, and the Texas Gulf Coast because of the high risk of hurricane destruction.

Global warming also places other demands on scarce public resources. Major cities are already devoting vast resources to combating heat waves, recognizing that these events demand the same response as hurricanes, floods, or terrorist attacks. The Intergovernmental Panel on Climate Change (IPCC)—the authoritative scientific body established in 1988 by the World Meteorological Organization and the United Nations Environment Programme to evaluate climate change science—notes that more heat waves are "very likely" (a 90 to 99 percent chance) to occur as a result of climate change. Increased temperatures present enormous challenges to local governments, and can have devastating effects on human health, particularly in urban areas.

During an excruciatingly hot period in the summer of 2006, the city of New York opened more than 350 cooling centers, relied on back-up generators to avoid power failures, and activated the city's Emergency Operations Center. All towns in Rhode Island had to open at least one public cooling facility. In Chicago, municipal officials evacuated more than 1,000 residents after a power failure in high-rise apartments and opened scores of cooling centers. The July 2006 heat wave in California was the likely cause of more than 160 deaths, making it more deadly than the Loma Prieta earthquake of 1989 and Northridge earthquake of 1994. In the state's hottest inland regions, county morgues were over their capacity. EPA estimates that, under one climate change scenario, "excess weather related mortality" in a single year would mean the death of 1,250 people in New York City, 600 in St. Louis, and between 200 and 300 each in Atlanta, Dallas, and Los Angeles.

Wildfires are yet another threat to human life and property that global warming will exacerbate. Scientists have documented a sudden, sharp upsurge in wildfires in the western U.S. since the mid-1980s, with more frequent large wildfires, longer-burning fires, and longer fire seasons. These wildfires require a massive municipal response, going well beyond fire and police departments. When the largest wildfires in California history swept through the San Diego region in late October 2003, the city of San Diego evacuated three neighborhoods and set up three evacuation centers. City staff assessed 400 damaged structures in 72 hours after the fire stopped. The city's transportation department removed damaged trees, distributed 14,000 sandbags, and placed screens on storm drains to keep fire debris out. While much of the cost of responding to the fire is covered by federal disaster aid, San Diego lost about \$2 million in waived fees associated with reconstruction, and was not reimbursed for other lost revenues or the replacement of trees, shrubs, and groundcover destroyed by the fire.

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Warmer weather also exacerbates pollution, particularly ground-level ozone or smog, which is already a major health concern in our nation's cities and counties. Ozone pollution is especially dangerous for asthmatics, the elderly, and children, but it can limit the lung capacity of even healthy adults and permanently damage the lungs of outdoor workers and others who are exposed to it for several months at a time. Currently, 462 counties, home to more than 158 million people, exceed federal standards for ozone. A warmer climate means more days on which ozone is likely to form, so global warming will make compliance with federal standards even more difficult. In addition to harm to public health, local governments suffer economically when the stringent pollution restrictions imposed on high ozone areas discourage industries from building or expanding facilities there.

It was against this backdrop of ongoing harm and threatened catastrophes that local officials and others began to urge EPA to regulate greenhouse gases under its existing statutory authority.

#### MASSACHUSETTS V. EPA: THE BEGINNINGS

The gears of justice grind slowly. *Massachusetts v. EPA* arose out of a petition for an administrative rulemaking filed with EPA way back in 1999.

The time seemed ripe for federal action. Scientists had concluded that 1998 was the warmest year on record (a record eclipsed several times since then). The 1998 increase continued a steady upward trend of warmer temperatures since the late 1970s. Just a few years earlier, the IPCC reiterated its conclusion that global warming is occurring, that human activity is contributing to it, and that we should act immediately to reverse the trend. In 1998, EPA's general counsel concluded that the federal Clean Air Act authorizes EPA to regulate greenhouse gas emissions from motor vehicles. In 1999, a second EPA general counsel reiterated this conclusion in testimony before Congress, reaffirming that the Clean Air Act's definition of "air pollutant" includes greenhouse gas emis-

sions and thus makes them subject to federal regulation.

Armed with the latest scientific studies, in October 1999 the International Center for Technology Assessment and some 20 other groups petitioned EPA to set limits on greenhouse gas emissions under § 202 of the Clean Air Act. Section 202 requires EPA to regulate air pollutants from new cars and trucks that, in its judgment, "may reasonably be anticipated to endanger public health or welfare." The petition relied heavily on the IPCC report, particularly its warning that these emissions could change the planet's climate to an extent unprecedented in human history and thereby pose grave risks to public health and welfare through infectious diseases, heat stress on the elderly and infirm, increased floods and storms, air pollution, and droughts. EPA received almost 50,000 comments from the public on the petition, strong evidence of the widespread public concern over global warming.

But a strange thing happened on the petition's way to the EPA administrator's office. A new EPA general counsel, working in a new presidential administration, concluded that his two predecessors were wrong in reading the Clean Air Act as authorizing EPA to regulate greenhouse gases. EPA used this new interpretation as the main basis for denying the petition. The agency also said that even if it had authority under the Act to regulate greenhouse gases, it still would decline to do so because global warming "cannot be unequivocally established." EPA also stated it preferred voluntary measures over mandatory controls, that it favored a more comprehensive approach to climate change, and that it was concerned that unilateral reductions might impair efforts to persuade other countries to reduce emissions.

But EPA skipped a critical step in making its decision not to regulate. It did not determine whether, in the words of the Clean Air Act, greenhouse emissions "may reasonably be anticipated to endanger public health or welfare." Perhaps the agency sensed that it faced a no-win situation: A finding of no endangerment would not pass the

straight-face test, but a finding of endangerment would require it to regulate greenhouse gases spewed by cars and trucks, a position the Bush administration wanted to avoid. So EPA punted.

#### LAWYERS AGAINST HOT AIR

Some people just complain about the weather, but lawyers have an additional option. They can sue. In the face of EPA's intransigence, 12 states, three cities, several major environmental groups, and others challenged EPA's refusal to act by filing a petition for review in what is often called the second highest court in the land, the U.S. Court of Appeals for the District of Columbia Circuit.

By 2005, when the D.C. Circuit heard *Massachusetts v. EPA*, there was near-unanimous consensus on the science of global warming. But the appellate court ruling, actually a trio of rulings spread over almost 60 pages, showed that there was very little consensus on the law of global warming, at least not where the Clean Air Act was concerned.

The case was heard by a three-judge panel that ended up hopelessly split. Judge Raymond Randolph concluded that EPA properly declined to regulate greenhouse emissions based on the policy grounds it cited. Judge David Sentelle determined that the petitioners lacked legal "standing" to bring their suit because their harm was not particularized, but merely representative of the global harm threatened by climate change.

In a long and fierce dissent, Judge David Tatel concluded that at least one petitioner, the state of Massachusetts, had standing to sue because it is losing, and will continue to lose, acres of its coastline as global warming causes the seas to rise. Tatel also found no support for EPA's contention that the agency could base a decision whether to regulate on policy grounds unrelated to public health and welfare. In fact, Judge Tatel found EPA's stated reasons for refusing to regulate to be so incoherent that it was "difficult even to grasp the basis for EPA's action."

Standing doctrine plays an important role in the separation of powers under the Constitution.

This fracturing of the D.C. Circuit was bad for Massachusetts and the other plaintiffs because it meant they lost their case. But it was even worse for the public at large because it gave no authoritative guidance as to how future challenges to global warming should proceed. By Judge Sentelle's reasoning, all courts would be closed to plaintiffs seeking to stop global warming because global warming harms everyone, and therefore no one especially. Judge Randolph would allow such challenges, but they would be lost before they began given the enormous discretion he granted the EPA to make policy judgments. And Judge Tatel would permit at least some suits and force the EPA to hew closely to the text of the Clean Air Act.

In sum, almost 50,000 people submitted comments to EPA on the original petition for rulemaking. EPA flip-flopped on the central legal issue regarding the scope of its regulatory authority, and then produced a rambling policy discourse denounced by one reviewing judge as utterly incoherent. Some 30 parties then sought review in the D.C. Circuit, including 12 states with a total population exceeding 100 million people. And the judiciary produced as badly fractured a decision as one could imagine, leaving the citizenry with no definitive answer to the key legal issue concerning EPA's authority under the Clean Air Act.

The case cried out for an authoritative ruling, which only the Supreme Court could supply.

#### ON TO THE SUPREMES

Led by Massachusetts, the same coalition that unsuccessfully appealed to the D.C. Circuit took their case to the highest court in the land. In March 2006 they petitioned for a writ of certiorari, asking the Supreme Court to accept the case and receive full briefing on the merits.

The petitioners lacked one typical indicia of "cert.-worthiness," namely a split among the lower courts on key legal issues. But they explained that because the D.C. Circuit has exclusive jurisdiction over most EPA rulemakings under the Clean Air Act, there was no

need to wait for the issue to percolate further in the lower courts. In its first amicus filing in the case, the APA joined with local officials to support the petition for certiorari by emphasizing the extraordinary importance of the issues to those on the front lines of responding to the storm surges, heat waves, and other threats posed by global warming.

In the summer of 2006, the Court agreed to hear the case. In their briefs, the parties and supporting amici addressed three issues: (1) Do Massachusetts and the other petitioners have legal standing to bring the lawsuit? (2) Are greenhouse gases "air pollutants" under § 202 of the federal Clean Air Act? and (3) In refusing to regulate greenhouse gases under § 202, may EPA consider factors other than public health and welfare?

#### Who Can Sue?

When Massachusetts Assistant Attorney General James Milkey stepped up to the lectern for the oral argument, he was immediately hit with a barrage of questions from the Justices about whether his clients had any business being in federal court at all. In fact, these questions consumed the vast bulk of his allotted 30 minutes of argument time.

The question of whether someone has legal "standing" to sue in federal court is rooted in Article III of the U.S. Constitution, which limits federal court jurisdiction to "cases" and "controversies." Standing doctrine plays an important role in the separation of powers under the Constitution. Unlike the executive and legislative branches, the federal judiciary is a relatively passive institution. It cannot reach out and offer its views on pressing issues willy-nilly, but instead must wait until injured parties bring cases to the courts in an effort to seek real relief.

The flip side is that if you believe a federal agency (or anyone else) has violated the law, you cannot sue the agency in federal court simply because you believe in the rule of law. Nor is it enough for you to say: "I pay taxes and I want my tax dollars spent in a way that complies with the law." According

to the courts, you can sue in federal court only if you can show that (1) you have been injured or will be injured imminently, (2) the challenged action or inaction caused the injury, and (3) victory in the lawsuit will help cure the injury. In recent decades, much ink has been spilled arguing over how to meet this three-part threshold showing for litigation in federal court.

Justice John Paul Stevens, writing for the majority in *Massachusetts v. EPA*, concluded that Massachusetts met its burden. Before analyzing the three-part standing test, however, Stevens made two important observations. First, he noted that Congress expressly authorized this kind of challenge to EPA, and that Congress has an appropriate role to play in defining the injuries and chains of causation that can give rise to a case appropriate for the federal courts under Article III.

Second, the court held that it is "of considerable relevance" to the standing issue that Massachusetts is a sovereign state, and not a private individual. The majority held that courts should show "special solicitude" to sovereign litigants in examining standing challenges because each state has an interest "in all the earth and air within its domain," and each "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." In addition, when states enter the Union, they surrender a portion of their sovereign police power to protect public welfare by subjecting their state laws to the possibility of being overridden by federal law. Therefore, according to the majority, courts should be more accommodating to states in examining their standing to sue the federal government. This portion of the ruling is especially controversial because it is based on a 1907 case—*Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)—that Massachusetts and its supporters had not discussed in their submissions, and whose relevance was hotly disputed by the dissent.

Turning to the three-part test for standing, the court ruled that Massachusetts identified actual (not merely imminent) injury by showing through uncontested affidavits that it

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has lost and will continue to lose coastal land owned by the state due to rising sea levels caused by global warming. And according to prior rulings on standing, it doesn't matter whether the injury is widely shared by others so long as it is concrete and personal, which is plainly the case with Massachusetts's loss of coastal property.

Although EPA did not dispute that greenhouse emissions contribute to this injury, it argued that its failure to regulate cars and trucks under § 202 of the Clean Air Act did not contribute significantly to the loss of coastal land. The court rejected this contention, ruling that the "argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." The court also observed that U.S. auto emissions constituted more than six percent of worldwide carbon emissions in 1999. If somehow all U.S. autos were transported to a separate nation, that auto-nation would by itself be the third-largest emitter of greenhouse gases in the world.

Finally, the court ruled that Massachusetts showed that victory in the case would help remedy its injuries. It is not necessary to show that regulation under § 202 would reverse global warming, the court held, so long as EPA action would help reduce it. Even though other countries, such as China and India, probably will increase greenhouse emissions in coming years, a reduction in U.S. emissions "would slow the pace of global emissions, no matter what happens elsewhere," the court wrote. The court also cited EPA's "ardent support" for various voluntary emission reduction programs, support that would make little sense if reductions will have no meaningful impact on global warming.

#### Court to EPA: Read the Statute!

Turning to the merits, the court ruled that the plain text of the Clean Air Act compels the conclusion that EPA has authority to regulate greenhouse gases under § 202. Calling the statute "unambiguous," the majority held that the "capacious definition" of the term "air

pollutant"—one that includes any substance emitted into the ambient air—embraces carbon dioxide and other pollutants that cause global warming. The court rejected EPA's argument that regulation under § 202 would conflict with other provisions in the Act that merely require monitoring and research of greenhouse gases. The court responded: "Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it."

It does not matter, said the court, that Congress might not have specifically considered whether EPA could use § 202 to address global warming. The broad language of the statute shows that Congress wanted regulatory flexibility and was giving the agency the ability to respond to changing circumstances as required to protect public health and welfare. As the court said in a prior ruling, the ability of a statute to "be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."

Finally, the court rejected EPA's argument that regulation under § 202 would conflict with the authority of federal transportation officials to regulate fuel efficiency. The majority viewed these programs as "wholly independent," concluding "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."

#### Read the Statute (Again)

After concluding that EPA has authority to regulate greenhouse gases under § 202, the court turned to EPA's assertion that it could decline to make an endangerment finding under that provision because it preferred voluntary measures over mandatory controls, and comprehensive strategies over piecemeal approaches. Once again, the court directed EPA to read the plain terms of the statute. Although § 202 commits the endangerment determination to EPA's "judgment," the court ruled that "the use of the word 'judgment' is not a roving license to ignore the statutory text." It ruled that "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute

to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." EPA's laundry list of excuses, however, will not suffice since they are unrelated to the statutory text.

On the issue of scientific uncertainty, in particular, the court said that EPA cannot sidestep its statutory duties with generalized references to uncertainty at the margins of the debate: "If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so." But a preference not to regulate may not be based on "residual uncertainty."

The Court did not order EPA to regulate, but instead directed the agency to reconsider its position. It would be a mistake, however, to read the majority opinion as neutral on the subject. The opinion strongly suggests the court will not tolerate an ostrich-like, status-quo response from the agency once it rethinks its position.

#### The Chief Justice's Dissent

Chief Justice John Roberts authored a strongly worded dissent focusing exclusively on the issue of standing. Joined by Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, Roberts took issue with virtually every aspect of the court's standing analysis.

First, he accused the court of changing the rules for standing by ruling that states are entitled to special solicitude for purposes of standing analysis. According to Roberts, the ruling in the 1907 case cited by the majority to support its view, *Tennessee Copper*, had nothing to do with Article III standing, but was instead a case about another legal question entirely.

Turning to the three-part standing test, Roberts concluded that Massachusetts and the other petitioners failed to show particularized injury because the loss of coastal land and other injuries will be widespread: "The very concept of global warming seems inconsistent with this particularization requirement" since the harm is so widespread. The dissenters seem to be

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saying that no one, ever, would have standing to challenge any agency action relating to global warming, no matter how clear the governing statute, because global warming is harmful to the entire planet.

There is nary a word in the dissent about a 1998 case cited by the majority (*FEC v. Akins*, 524 U.S. 11 (1998)) that holds that concrete harm, though widely shared, is sufficient to support standing. The *Akins* ruling makes intuitive sense. The alternative is to say that if you injure enough people, you get off scot-free, since none of the victims can seek redress in federal court. It cannot be the case that the greater the injury inflicted, the less chance a particular victim can have a day in court. So the Chief Justice left readers completely in the dark as to how he would distinguish that seemingly on-point ruling.

In addition, Roberts determined that Massachusetts's affidavits attesting to actual loss of coastal lands were based on "a single conclusory statement" and "pure conjecture." It is difficult to know what would have satisfied the dissenters on this score, given that Massachusetts offered uncontested testimony from an expert whose life's work is to measure loss of coastal land to the sea in that state. Roberts also viewed the assertions about future property loss as premised on sea level rises throughout the next century, a time horizon too long to satisfy the requirement that alleged future harm be imminent.

The dissent further concluded that Massachusetts failed to show that EPA's inaction caused its alleged injuries because the small fraction of greenhouse emissions attributable to motor vehicles is one of many contributing factors, and that Massachusetts could not "trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards." This demanding standard leaves one wondering how anyone could challenge any agency action relating to air pollution in view of the impossibility of directly linking any particular emission to any specific injury.

With respect to the third standing factor, redressability, the dissent contended that Massachusetts failed to show that victory in this case could help redress its injuries because any limits imposed by EPA could be overwhelmed by increased emissions in developing countries such as China and India.

The Chief Justice ended his dissent by impugning the petitioners' motives, suggesting that their "true goal" was to secure the courts "as a convenient forum for policy debates." It's an allegation that makes one question whether he read their briefs, which contained virtually no policy discussion and focused exclusively on the legal issues before the court. Roberts then accused the majority of turning the standing inquiry into a "lawyer's game" that undermines the separation of powers set forth in the Constitution and allows courts to transgress the proper role of the federal judiciary in a democratic society.

#### WHAT IS 'AIR POLLUTION'?

After explaining how the Republic is threatened when courts issue opinions in cases that they shouldn't hear in the first place, the same four dissenting justices then joined a second dissent that essentially constitutes, by their terms, just such an opinion.

The second dissent, written by Justice Scalia, disagreed with the majority on both major statutory issues before the court. On the question of whether carbon dioxide and other greenhouse gases fall within the statutory definition of "air pollutants," the dissenters ridiculed the majority's reading as broad enough to include "everything airborne, from Frisbees to flatulence." (Subsequent research confirmed this is the first time the term "flatulence" has made it into a U.S. Supreme Court opinion.)

The dissent then concluded that greenhouse gas emissions are not air pollutants because they do not pollute the air. Citing a 1949 dictionary, Justice Scalia asserted that "pollute" means to "render impure or unclear" and "air" is the portion of the atmosphere "near the earth." Greenhouse gases are not ground-level impurities but invisible,

odorless gases that extended to the upper atmosphere.

Even apart from his invocation of a decades-old dictionary, there are several problems with Justice Scalia's analysis. The word "air" is not normally understood as limited to ground-level portions of the atmosphere. Indeed, one lengthy subchapter of the Clean Air Act is designed to preserve the stratospheric ozone layer from pollutants that degrade that protective shield. What's it doing in the Clean Air Act if it has nothing to do with air? Moreover, greenhouse gas emissions generally collect at equal concentrations throughout the atmosphere, including at ground level.

As for "pollution," the Clean Air Act requires regulation of many pollutants, such as carbon monoxide, that are odorless and colorless but nonetheless cause great harm to public health and welfare. The Act also requires the regulation of pollutants such as sulfur dioxide, which cause harm not by fouling the breathable air but by leading to acid rain that spoils our lakes. Recall, too, that § 202 of the Act requires EPA to regulate vehicular pollutants that endanger public health and *welfare*; nowhere does Justice Scalia acknowledge that the Act defines the term "welfare" to include effects on both weather and climate. Nor does he mention that another provision of the Act, § 103, expressly refers to carbon dioxide as an "air pollutant"!

On the issue of whether EPA improperly considered factors other than public health and welfare under § 202, the dissent argued that § 202 never requires EPA to do anything, ever, unless it makes a finding of endangerment. On this view, there could be dead bodies in the streets caused by toxic auto emissions and EPA would have no obligation to do anything at all, unless and until it made an endangerment finding. Perhaps sensing the radical nature of this position, the dissent assumed for the sake of argument that EPA's discretion under the Act is not unbounded. But it then concluded that it would be perfectly appropriate for EPA to decline to make the endangerment finding based on factors unrelated to § 202's

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health and welfare standard, and it explicitly endorsed the factors invoked by EPA in this case. According to the dissent, EPA may lawfully decline to respond to serious threats to public health and welfare by stating a preference for voluntary measures or a more comprehensive approach.

The dissent also concluded that EPA properly invoked scientific uncertainty as a reason for failing to make the endangerment finding. As the majority notes, however, EPA stated that the causal connection between greenhouse gases and global warming “cannot be unequivocally established” and that the climate models do “not constitute proof” of such linkage. Section 202 does not require *proof* as a predicate for regulation, but only a finding that the emissions “may reasonably be anticipated to endanger public health or welfare.” This language is plainly designed to err on the side of protection, not to require certainty and proof.

Notwithstanding the dissent’s biting reference to Frisbees and flatulence, the majority’s reading of § 202 reflects a common-sense approach. The Act casts a broad net that potentially embraces every mobile source emission into the air but requires regulation only where the emission endangers human health or welfare, leaving the nature and scope of that regulation to EPA’s discretion. In other words, it does not categorically exclude any particular emission up front, but it does not compel regulation unless it is prudent to regulate. And it gives EPA broad discretion in deciding how best to regulate in view of economic costs and technological feasibility.

#### THE RULING’S PRACTICAL IMPACT

Some have suggested the ruling in *Massachusetts v. EPA* is largely symbolic and lacking in practical impact because the ruling simply requires that EPA reconsider its decision not to enact limits on greenhouse gases, without telling EPA (explicitly, anyway) that it must enact those limits. But don’t be fooled. It is a momentous decision.

The decision will have several significant on-the-ground consequences.

First, and most obviously, the ruling that greenhouse gases are “air pollutants” under § 202 of the Clean Air Act enables this or any future administration to regulate these emissions from motor vehicles without additional congressional action.

Although the court left open the theoretical possibility that EPA might decline to regulate on remand, this discussion is best read as a simple acknowledgment that § 202 vests discretion in EPA to decide whether the emissions “may reasonably be anticipated to endanger public health or welfare.” The court also wanted to make clear that it was not overruling prior precedent regarding an agency’s discretion over its resources and enforcement priorities.

As noted above, however, there are strong signals in the majority opinion that the court would view with suspicion any finding that these emissions do not endanger public health or welfare, or any conclusion that EPA has better things to do with its resources. The majority opinion reflects a solid grasp of the near-unanimous scientific consensus that greenhouse gases threaten public health and welfare and are causing significant harm now.

It seems wildly optimistic for anyone to assume the court would be comfortable with a business-as-usual status quo response from EPA on remand. To be sure, EPA retains broad discretion in deciding *how* to regulate. But after years of federal neglect, state and local officials welcome the ruling that EPA has authority under § 202 to regulate, as well as the cues suggesting the court would be skeptical of any decision on remand not to regulate.

Second, the ruling will be helpful in other cases now being litigated involving other provisions of the Clean Air Act that use the term “air pollutant”—most notably, provisions that govern emissions from power plants and other stationary sources. In view of the Court’s reading of “air pollutant” in § 202 to include greenhouse gases, industry will be hard pressed to argue for a narrower reading of the term as used elsewhere in the Act.

Third, the ruling will affect pending cases in which the auto industry argues that federal fuel efficiency standards preempt state limits on tailpipe greenhouse gas emissions. The court concluded that EPA’s duties under the Clean Air Act are “wholly independent” from the Department of Transportation’s responsibility to regulate fuel efficiency, and “there’s no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.” This language undercuts the auto industry’s argument that the federal fuel efficiency program preempts limits on greenhouse gas emissions from cars and trucks imposed by California and adopted by other states.

Fourth, the ruling might well prompt the U.S. Congress to act more quickly and more aggressively on comprehensive global warming legislation. The auto industry reacted to the ruling by immediately urging Congress to ensure that all industrial sectors—not just their own—are called on to address the global warming crisis. Several key members of Congress issued statements hailing the ruling and vowing to redouble their efforts to enact tough new legislation that supplements EPA’s existing authorities. The ruling adds to the momentum for additional federal controls.

Unfortunately, on June 5 the *San Francisco Chronicle* reported that Rep. Rick Boucher (D-Va.), working with Rep. John Dingell (D-Mich.), has drafted provisions in the House energy bill that would undo the results of *Massachusetts v. EPA* and prohibit EPA from regulating greenhouse gas pollution under the Clean Air Act. In a severe affront to principles of federalism, the proposal also would preempt California and other states from adopting California’s landmark controls on tailpipe emissions of carbon dioxide. The provisions appear in a working draft of the bill circulating within a subcommittee of the House Committee on Energy and Commerce, which is chaired by Dingell, a longstanding ally of the auto industry. California Gov. Arnold Schwarzenegger and many others have de-

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# GELPI's Annual Takings Conference

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**September 20–21**

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- ◆ Balancing Private and Public Rights in the Coastal Zone in the Era of Climate Change: The Fifteenth Anniversary of *Lucas v. South Carolina Coastal Council*
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- ◆ Conference participants will include the major players in the *Lucas* case, other prominent takings scholars and practitioners, and leading policy makers, scientists, and academics who are addressing the challenge of coastal management in the era of climate change.

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nounced the proposal, and some observers expect House Speaker Nancy Pelosi to eliminate these provisions before the legislation reaches the House floor. Although the Boucher energy bill is just a discussion draft, these disturbing developments warrant careful monitoring.

Fifth, the case will help future litigants withstand standing challenges. Although Massachusetts's status as a sovereign state plays a prominent role in the opinion, the majority stated that Massachusetts passed even "the most demanding standards," which presumably is a reference to the standing requirements that apply to everyone, including non-state litigants. The court determined that Massachusetts suffered adequate injury to sue based on its loss of land, a non-sovereign interest shared by many others. And at no point during its analysis of the three-part standing test did the court rely on the state's sovereign status to support its analysis, which leaves the impression that a similar analysis would pertain for non-sovereign landowners who bring legal challenges involving global warming.

#### CONCLUSION

Global warming naysayers like to point out that any single source of greenhouse gases, whether from a particular industry such as the auto industry, or a particular nation, such as the United States, only accounts for a small percentage of global warming emissions. The implicit (or sometimes explicit) suggestion is: Why bother to act, if this action will only result in a five (or three or one-half) percent reduction?

But that logic is backwards. It is because the sources of greenhouse gases are so diffuse and dispersed that curbing global warming requires emission reductions from every one of these sources. It makes sense for local and state officials to work on strategies to solve a global problem. But they also need the federal government to engage. *Massachusetts v. EPA* translated state and local insistence on action into change at the federal level.