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Massachusetts v. EPA: A New Chapter in Regulation under the Clean Air Act

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Holding that EPA has the statutory authority to regulate greenhouse gas emissions from motor vehicles and that the agency failed to provide a reasoned explanation for refusing to do so, in a split 5-4 decision the United States Supreme Court reversed the D.C. Circuit and remanded the case with instructions that EPA make a determination of whether sufficient information exists to make a finding that greenhouse gasses (“GHG”)¹ “‘cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.’”² The Court held that GHG are air pollutants that may be regulated under Section 202 of the Clean Air Act (“CAA” or the “Act”). The Court’s ruling not only establishes that EPA has the authority to regulate GHG emissions from new motor vehicles, but it also opens the door for the regulation of GHG emissions from stationary sources under other parts of the CAA

¹ Greenhouse gases include, among others, carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.
² See *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, 1462-63 (2006) (quoting 42 U.S.C. § 7521(a)(1)).

because the definition of “air pollutant” in Section 302(g) applies generally to the Act. Although the Court did not go so far as to order EPA to regulate GHG emissions from tailpipes, Justice Stevens, who was joined by Justices Breyer, Ginsburg, Kennedy, and Souter, made clear to EPA that Congress gave the agency a “pre-existing mandate to regulate ‘any air pollutant’ that may endanger the public welfare,”³ and “EPA can avoid promulgating regulations 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.”⁴

PROCEDURAL HISTORY

In a 1999 rulemaking petition, 19 private organizations asked EPA to regulate GHG emissions from new motor vehicles under Section 202 of the CAA arguing that these emissions contribute to global warming thereby endangering public health and welfare.⁵ Almost four years later, EPA issued a Notice of Denial of Petition for Rulemaking stating that “the CAA does not authorize regulation to address global climate change,” and that even if the agency had

³ *Id.* at 1461.
⁴ *Id.* at 1444.
⁵ 42 U.S.C. § 7521(a)(1) states that EPA “shall by regulation prescribe . . . standards, applicable to the emission of any air pollutant from any . . . new motor vehicles . . . which cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

such authority, it would “not [be] appropriate at this time.”⁶ EPA reasoned that because a comprehensive global climate change policy is presently in effect by the order of the president, and due to the implications of global climate change on foreign policy, which is directed by the president, it would be unwise for it to regulate GHG emissions from motor vehicles.⁷

As for lacking the authority to regulate GHG emissions, EPA argued that the CAA was designed by Congress to address local or regional air pollutants “near the surface of the earth” rather than substances that are “fairly consistent in concentration throughout the world’s atmosphere,” such as GHG.⁸ EPA was further persuaded that it lacked sufficient authority because it reasoned that imposing emission limitations on GHG would have profound economic and political repercussions.⁹ In support of this argument, EPA cited *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*¹⁰ wherein the Supreme Court invalidated the Food and Drug Administration’s (“FDA’s”) authority to regulate tobacco products under the Food, Drug and Cosmetic Act (“FDCA”) because the agency was “assert[ing] jurisdiction to regulate an industry constituting a significant portion of

⁶ 68 Fed. Reg. 52925.
⁷ See *id.*
⁸ 68 Fed. Reg. 52926-27.
⁹ 68 Fed. Reg. 52928.
¹⁰ 529 U.S. 120 (2000).



the American economy.”¹¹ EPA concluded that “[i]n light of Congress’ attention to the issue of global climate change, and the absence of any direct or even indirect indication that Congress intended to authorize regulation under the CAA to address global climate change, it is unreasonable to conclude that the CAA provides the Agency with such authority.”¹² Accordingly, “GHGs, as such, are not air pollutants under the CAA’s regulatory provisions,” including Section 202.¹³

Joined by various intervening states and local governments, the petitioners sought review in the D.C. Circuit.¹⁴ Writing separate opinions due to disagreement regarding standing but concurring in the judgment on the merits, two of the three judges concluded that it was reasonable for EPA to consider “policy judgments Congress makes when it decides whether to enact legislation regulating a particular area” when it exercised its discretion to not regulate GHG emissions from motor vehicles under Section 202.¹⁵ After denial of a petition for rehearing, twelve states, the District of Columbia, various local governments, and a number of environmental groups filed a petition for certiorari alleging that “EPA has abdicated its responsibility” under the CAA to regulate GHG,¹⁶ and in June of

last year the Supreme Court granted the petition.¹⁷

STANDING

In order to get to the merits of the case, the Court had to first determine whether any of the petitioners had standing to bring the suit in federal court.¹⁸ Applying a new relaxed standing test, the majority explained that because Massachusetts, to which Congress accorded a procedural right to protect the state’s concrete interests, successfully demonstrated that there is “some possibility that the requested relief will prompt” EPA to reconsider its decision that led to the state’s injury, standing was established.¹⁹ In applying this standard, the Court held that Massachusetts was “entitled to special solicitude” in the Court’s standing analysis. Justice Stevens stressed that “the special position and interest of Massachusetts” — a sovereign state — “is of considerable relevance,” and EPA has been mandated by Congress to protect Massachusetts by prescribing standards to control *any air pollutant* from new motor vehicle engines.²⁰ The significance of the liberalized standard adopted by the majority in *Massachusetts* is at this point uncertain. However, the potential exists that the Court’s new state standing doctrine will

give states the ability to establish standing where they would have otherwise been unable had the traditional standing doctrine been applied.

After explaining the special consideration afforded to states when they have a special procedural right granted by Congress, the Court found that “EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’ There is, moreover, a ‘substantial likelihood that the judicial relief requested’ will prompt EPA to take steps to reduce that risk.”²¹ Accordingly, Massachusetts satisfied the traditional standing test as set forth in *Lujan v. Defenders of Wildlife*,²² which requires that a litigant establish that (i) it has suffered a concrete and particularized injury that is either actual or imminent, (ii) the injury is fairly traceable to the defendant, and (iii) it is likely that a favorable decision will redress that injury.²³

Injury

The Court found persuasive testimony by witnesses for the petitioners that Massachusetts owns a significant amount of property along its coastline that will be inundated as a result of global warming caused by GHG emitted from motor vehicles. The Court cited findings contained in a 2001 National Research Council report, which concluded that as a result of anthropogenic activities, GHG are

¹¹ 68 Fed. Reg. 52928.

¹² *Id.*

¹³ *Id.*

¹⁴ 415 F.3d 50 (2005).

¹⁵ *See id.* at 58.

¹⁶ *See Massachusetts*, 127 S. Ct. at 1446.

¹⁷ *Massachusetts v. Environmental Protection Agency*, 126 S. Ct. 2960 (2006).

¹⁸ The Court explained that only one of the petitioners needed to establish standing in order for it to consider the petition for review. *See id.* at 1453.

¹⁹ *Massachusetts*, 127 S. Ct. at 1453.

²⁰ *Id.* at 1454.

²¹ *Id.* at 1455.

²² 504 U.S. 555 (1992).

²³ *See id.* at 560-61.



accumulating in the atmosphere causing, among other harms, a rise in sea levels across the globe. Contrary to EPA’s assertions, the Court explained “[t]hat these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.”²⁴ Because Massachusetts owns coastal territory that will be lost due to the continued rise in sea levels, “it has alleged a particularized injury in its capacity as a landowner.”²⁵ Responding to the Chief Justice’s dissent, Justice Stevens explained that it is not necessary that Massachusetts determine the precise metes and bounds of its soon-to-be-flooded sovereign territory as long as it can demonstrate that its coastline will generally recede as a result of global warming resulting from the emission of GHG from tailpipes.²⁶

Causation

According to the Court, because EPA in no way disputed the causal connection between man-made GHG emissions and global warming, at a minimum, “EPA’s refusal to regulate such emissions ‘contributes’ to Massachusetts’ injuries.”²⁷ The majority rejected EPA’s argument that because motor vehicle emissions in the United States contribute only a small fraction of carbon dioxide to the global pool, that contribution is far too tentative for the causation prong of the traditional standing test to be satisfied. The Court

²⁴ *Massachusetts*, 127 S. Ct. at 1456.
²⁵ *Id.*
²⁶ *See id.* n. 21.
²⁷ *Id.* at 1457.

concluded, “[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.”²⁸

Redressability

EPA argued that because predicted increases in GHG emissions from developing nations such as China and India will offset any decreases that would result from regulating carbon dioxide emissions from U.S. motor vehicles, the petitioners failed to demonstrate how a favorable decision by the Court would redress their alleged injuries. In other words, regulating carbon dioxide emissions will do little to reverse the trend. However, the majority was not persuaded, explaining that it is not necessary that a favorable decision relieve all of plaintiffs’ injuries, nor that the effects of the remedy be immediately felt.²⁹ According to the Court, EPA has a duty to take steps to slow or reduce global warming, and “[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.”³⁰

²⁸ *Id.* at 1457-58.
²⁹ *Id.* at 1458.
³⁰ *Id.* n. 24 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) (emphasis omitted)).

THE MERITS

Having determined that the petitioners had standing to challenge EPA’s denial of their petition for rulemaking, Justice Stevens turned to the merits of the case and began with a recognition that although an agency’s decision not to promulgate rules is entitled to a high level of deference, such a refusal is, nevertheless, susceptible to judicial review. According to the Court, because 42 U.S.C. § 7601(b)(1) expressly permits judicial review of final EPA action under Section 202 of the Act, the Court may reverse such action if it determines that it is arbitrary, capricious, an abuse of discretion, or otherwise violates the law.³¹

Regarding the merits, the first issue addressed by the Court was whether Section 202 authorizes EPA to regulate carbon dioxide emissions from new motor vehicles if EPA forms a “judgment” that these emissions contribute to climate change. Rejecting EPA’s argument that carbon dioxide is not an air pollutant because Congress did not intend it to regulate GHG, the Court held that the Act’s definition of “air pollutant” is unambiguous in that it includes *any* physical or chemical substances that are emitted into the ambient air, which substances would include carbon dioxide and other GHG.³² Disagreeing with Justice Scalia, the majority stated that given this clear and “sweeping” definition that Congress designed

³¹ *See Massachusetts*, 127 S. Ct. at 1459.
³² *Id.* at 1460.



to catch all airborne compounds, EPA’s exclusion of GHG from the category of air pollution agents is not entitled to deference. According to the Court, the plain text of the statute simply does not support EPA’s interpretation that because GHG permeate the global pool instead of being limited to an area near the surface of the earth, they are not agents of air pollution.³³

The Court further explained that Congressional inaction to enact mandatory emissions limitations to address global warming tells us nothing about what it meant when it amended Section 202 in the 1970s. According to the Court, EPA’s reliance on *Brown & Williamson* is “misplaced” because unlike in that case where it was shown that a series of congressional enactments were entirely consistent with the FDA’s consistently stated position that it lacked authority under the FDCA to regulate tobacco as a drug, “EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles.”³⁴

Finally, the Court rejected EPA’s argument that it could not regulate carbon dioxide emissions from motor vehicles because the primary way to accomplish this would be to tighten mileage standards, and this is a job for the Department of Transportation (“DOT”). In a stinging admonition to EPA, Justice Stevens wrote “that DOT sets mileage standards in no way

licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s ‘health’ and ‘welfare,’ [which is] a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency.”³⁵ The Court explained that Section 202 is certainly broad and flexible enough to provide EPA with the necessary authority to promulgate regulations to protect human health and the environment from global warming caused by emissions of carbon dioxide from motor vehicles.³⁶

Having made this determination, the Court addressed EPA’s contention that even if it did have the authority to regulate the emission of carbon dioxide from new motor vehicles, it would be unwise to do so. Although acknowledging that EPA has the authority to exercise its judgment, the Court explained “that judgment must relate to whether an air pollutant ‘cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”³⁷ In other words, “the use of the word ‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.”³⁸ Accordingly, pursuant to the clear terms of the statute, if EPA makes a finding of endangerment to public health or welfare, it must regulate emissions of carbon dioxide from

new motor vehicles. According to the Court, EPA may avoid regulating such emissions only if it can show that GHG do not lead to climate change or it provides a reasonable explanation of why it will not or cannot regulate such emissions; and the agency’s reasons not to regulate are neither relevant nor justified.³⁹ The Court expounded, “[t]he statutory question is whether sufficient information exists to make an endangerment finding.”⁴⁰

JUSTICE ROBERTS’ STANDING DISSENT

Chief Justice Roberts, joined by Justices Alito, Scalia and Thomas, dissented stating that the petitioners’ challenges were “nonjusticiable” in that the Court’s standing jurisprudence recognizes that the redress of grievances of the type claimed by Massachusetts and the other petitioners is for Congress and the executive branch of government to deal with, not the courts.⁴¹ Suggesting that the majority manipulated the Article III standing requirements by failing to exercise judicial self-restraint, it was Chief Justice Roberts’ opinion that there is no basis in law between public and private litigants, and when the traditional three-part standing test is applied, Massachusetts and the other petitioners fail to satisfy the standards necessary for the case to be heard in federal court.

³³ *Id.* at 1460 n. 25.

³⁴ *Id.* at 1461.

³⁵ *Id.* at 1462.

³⁶ *Id.*

³⁷ *Id.* (quoting 42 U.S.C. § 7521(a)(1)).

³⁸ *Id.*

³⁹ *Id.* at 1462-63.

⁴⁰ *Id.* at 1463.

⁴¹ *See id.*



The Chief Justice argued that Massachusetts’ injury claim is neither concrete nor particularized. In fact, he explained the very concept of global warming is “inconsistent with” the particularization requirement in that it is a problem that is “harmful to humanity at large.”⁴²

Characterizing evidence provided by petitioners to establish loss of Massachusetts’ coastal lands as “pure conjecture,” he argued that such hypothetical evidence does not satisfy the injury prong of the standing analysis.⁴³ Furthermore, nothing about the injuries claimed by the petitioners is immediate or imminent: “Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be *certainly impending* to constitute injury in fact.”⁴⁴ As for causation, Chief Justice Roberts argued that the link between the injuries claimed by petitioners was far too tenuous and “speculative” to establish that carbon dioxide emissions from motor vehicles are responsible for the loss of portions of Massachusetts’ coastline.⁴⁵

Finally, the Chief Justice addressed the redressability requirement of the *Lujan* standing test and explained that given the tenuous link between tailpipe emissions and the injuries alleged, combined with the fact that global sources of GHG will likely be offset by any domestic regulation of motor vehicle emissions under Section

202, it is extremely unlikely that the alleged injury of loss of land will be redressed by the regulatory action requested by the petitioners. He explained, “[t]he realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will *likely* prevent the loss of Massachusetts coastal land.”⁴⁶

JUSTICE SCALIA’S DISSENT ON THE MERITS

Dissenting on the merits and being joined by the Chief Justice and Justices Alito and Thomas, Justice Scalia argued that because nothing in the statutory text of the CAA *requires* EPA to come to a decision whenever a rulemaking petition is filed, the agency acted within its authority when it declined to make a “judgment” based on the various policy reasons it presented.⁴⁷ He would have accorded EPA the *Chevron* deference to which it was entitled. In accordance therewith, Justice Scalia explained that although the majority’s reading of the Act’s definition is plausible, because the statute is ambiguous and EPA’s interpretation is “perfectly reasonable,” the Court “has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.”⁴⁸

IMPLICATIONS OF THE COURT’S DECISION

Beyond the impact of the majority’s new liberalized standing doctrine for states, the

Massachusetts decision is likely to shape future EPA rulemaking. As for carbon dioxide emissions from new motor vehicles, EPA will have to reevaluate the petition on remand. Given the Bush Administration’s positions concerning the appropriateness of the United States embarking on carbon dioxide emissions reductions, it will be interesting to see whether in the near term EPA proposes standards in a rulemaking or uses its authority to not do so while attempting to justify its position within the constraints established by the Court.

In addition, because other portions of the CAA contain endangerment language, as a result of *Massachusetts*, EPA will likely be compelled to evaluate the Court’s decision in the context of a number of its other regulatory programs.

The Supreme Court’s decision has already resulted in EPA reopening California’s stalled petition for a waiver to regulate carbon dioxide emissions from motor vehicles, which is necessary for California to implement its 2002 law aimed at reducing carbon dioxide emissions from automobiles by 18 to 25 percent. Since California enacted the law, ten other states have adopted its standards. The state standards resulted in district court cases in California, Rhode Island, and Vermont, which have been stayed pending the Supreme Court’s decision in *Massachusetts*, but will now go forward. All three of these cases involve suits filed by automobile manufacturers and dealers challenging the involved states’ authority to regulate carbon

⁴² *Id.* at 1467.

⁴³ *Id.* at 1467.

⁴⁴ *Id.* at 1468 (emphasis in original).

⁴⁵ *Id.* at 1469.

⁴⁶ *Id.* at 1470 (emphasis in original).

⁴⁷ *Id.* at 1472.

⁴⁸ *Id.* at 1478.



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dioxide emissions from motor vehicles.

In addition to its impact on mobile sources, the decision in *Massachusetts* will likely have an effect on the regulation of GHG from stationary sources such as industrial boilers and power plants. In *Coke Oven Envtl. Taskforce v. EPA*, ten states, two local governments, and a number of environmental groups filed suit in the D.C. Circuit asking EPA to regulate GHG emissions from new stationary sources. The primary issue in *Coke Oven* is whether EPA has the authority to regulate such emissions. The case was stayed pending the Court's decision in *Massachusetts*. Now that EPA has been told that it indeed has such authority, *Coke Oven* can be expected to move forward.

Another case involving the regulation of GHG from stationary sources, *Connecticut v. American Elec. Power Co., Inc.*, is currently pending in the Second Circuit. The plaintiffs in that case — eight states, New York City, and various environmental groups — are claiming that global warming is a public nuisance and that power companies should be ordered to restrict their carbon dioxide emissions. Because industry defendants are arguing that *Massachusetts* supports their separation-of-powers arguments, the Supreme Court's decision can be expected to affect the outcome of that case. Immediately following the Court's decision, both sides in the litigation sent letters to the Second Circuit notifying it of the decision.

As the *American Elec. Power* defendants' post-*Massachusetts*

arguments make clear, although *Massachusetts* settled some issues involving the state regulation of GHG emissions, it by no means resolved them all. The Supreme Court's decision created a double-edged sword for those states seeking to regulate GHG emissions because although *Massachusetts* established that EPA has the authority to regulate GHG, it leaves open the door to preemption arguments by those opposing state regulation. One of the most important issues courts will be asked to consider is, now that it is certain EPA has the authority to regulate emissions of GHG, does the CAA preempt the field of GHG regulation, and, therefore, are the states necessarily precluded from adopting their own GHG emission standards? This is a question that will surely be answered as the story unfolds.

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